AUC
Alberta Utilities Commission

ATCO Pipelines
ATCO Gas and Pipelines Ltd.
CU Inc.
Canadian Utilities Limited

Disposition of Surplus Salt Cavern Assets in the Fort Saskatchewan Area

March 16, 2012

The Alberta Utilities Commission
Decision 2012-068: ATCO Pipelines, ATCO Gas and Pipelines Ltd., CU Inc., Canadian Utilities Limited
Disposition of Surplus Salt Cavern Assets in the Fort Saskatchewan Area
Application No. 1607245
Proceeding ID No. 1196

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1 Introduction

1. On April 27, 2011 ATCO Pipelines (AP), a division of ATCO Gas and Pipelines Ltd. (AGPL), filed a joint application on behalf of AP, AGPL, CU Inc. (CUI) and Canadian Utilities Limited (CUL) with the Alberta Utilities Commission (the AUC or the Commission) with respect to the disposition of certain salt cavern assets in the Fort Saskatchewan area (Surplus Assets) outside of the ordinary course of business pursuant to Section 26(2)(d) of the *Gas Utilities Act*, RSA 2000, c. G-5. AP indicated that the Surplus Assets were neither used nor required to be used for utility service and sought AUC approval to transfer the Surplus Assets from AGPL, a regulated entity owned 100 per cent by CUI, to ATCO Energy Solutions Ltd. (AES), a subsidiary of CUL (this transfer hereinafter referred to as the "Surplus Assets Transaction"). The Surplus Assets were briefly described as follows:

(1) Surplus land located in the S½ 34-55-21-W4M (specifically the SW 34-55-21-W4M quarter section) and a disposal well located on such land.

(2) A water system transporting water from the North Saskatchewan River.

2. The applicants also requested the Commission to approve an adjustment to the AP revenue requirement to be recovered after the Surplus Assets were removed from regulation.

3. AP indicated that following the Surplus Assets Transaction, the Surplus Assets would be owned by AES. This would further the objective of the ATCO group of companies to retain only utility assets in the CUI holding company.

4. AGPL, CUI, and CUL noted that the commercial agreements relating to the proposed Surplus Assets Transaction would not proceed unless all regulatory approvals in a form satisfactory to the respective counterparties were received. Denial of any requested approval or a material variation in any of them may result in the transaction not proceeding as described in the application or at all.

5. AP submitted that the effective date of the removal of the Surplus Assets from rate base should be within 30 days following a positive decision on this application (regardless of the closing date of the Surplus Assets Transaction).

6. The applicants further submitted that the proposed Surplus Assets Transaction would not adversely affect any member of the public of Alberta who was currently receiving or would receive regulated service from AP. AP noted that effective October 1, 2011, all AP customers

would become customers of NOVA Gas Transmission Ltd. (NGTL) following system integration between AP and NGTL, which was approved by the Commission in Decision 2010-228.[1]

7. On April 29, 2011, the Commission issued a notice of application which required interested parties to submit a statement of intent to participate (SIP) by May 13, 2011. In their SIPs, parties were asked to provide comments setting out the reasons respecting their support for or objection to, the application.

8. The Commission received SIPs from NGTL, the Canadian Association of Petroleum Producers (CAPP), ATCO Gas (a division of AGPL), and the Office of the Utilities Consumer Advocate (UCA). Both NGTL and CAPP indicated that they did not oppose the application but sought intervener status. ATCO Gas made no comment on the application in its SIP. The UCA requested the opportunity to submit information requests to gain a better understanding of the facts underlying the application and to assist in determining its position.

9. The Commission established a written process to deal with the application by letter dated May 31, 2011.

10. On June 7, 2011, the AUC issued information requests (IRs) with responses due by June 16, 2011.

11. A second round of IRs was issued by the Commission on June 23, 2011, and answered by AP on July 7, 2011.

12. By letters dated July 21, 2011 and July 27, 2011, the Commission issued a revised schedule and a third and fourth round of IRs to AP. The IR responses from rounds three and four were due to be submitted by August 18, 2011.

13. By letter dated August 19, 2011, the Commission indicated that AP had submitted responses to information requests in accordance with the process schedule. However, AP indicated it would require additional time to complete the research and analysis before submitting the responses to AUC-AP-33(a), AUC-AP-33(b) and AUC-AP-36(a). AP submitted that it would respond to the outstanding IRs by September 1, 2011. The Commission granted an extension of time and revised the process schedule.

14. On September 8, 2011, the UCA advised the Commission that it would not be filing evidence. No other party filed a submission with respect to intervener evidence. In response, the Commission established September 28, 2011 and October 12, 2011 as the dates for argument and reply argument, respectively. The UCA and AP each filed both argument and reply argument.

15. Following initial review of the proceeding record, including argument and reply argument, the Commission, by letter dated December 12, 2011, requested parties to submit supplemental argument and reply argument in respect of the effective date for removal of the

[1] Decision 2010-228**:** ATCO Pipelines, 2010-2012 Revenue Requirement Settlement and Alberta System Integration, Application No. 1605226, Proceeding ID. 223, May 27, 2010.

assets from rate base. The supplemental argument and reply argument were submitted on January 10, 2012 and January 31, 2012, respectively.

16. The division of the Commission assigned to this proceeding was Vice-Chair Carolyn Dahl Rees, and Commission members Moin A. Yahya and Kay Holgate. The Commission considered that the record closed for this proceeding on January 31, 2012, with the submission of supplemental reply argument.

17. In reaching the determinations contained within this decision, the Commission has considered all relevant materials comprising the record of this proceeding, including the evidence and argument provided by each party. Accordingly, references in this decision to specific parts of the record are intended to assist the reader in understanding the Commission's reasoning relating to a particular matter and should not be taken as an indication that the Commission did not consider all relevant portions of the record with respect to that matter.

2 Background

18. In the early 1980s, land was acquired by AP for the development of salt caverns to store natural gas to meet winter peak demand requirements. Five storage caverns were developed and commissioned between 1984 and 1987. The balance of the land was retained for future cavern development. A sixth cavern was developed and brought in-service in 1994. No additional caverns have been developed since 1994.

19. On October 1, 2007, AP filed its 2008-2009 General Rate Application (GRA), Application No. 1527976, with the Alberta Energy and Utilities Board (EUB or board). In that application AP excluded certain Salt Cavern assets (Identified Salt Cavern Assets) from its rate base effective December 31, 2007. The Identified Salt Cavern Assets were larger in size and scope than the Surplus Assets identified in the present application. In the present application AP is proposing to remove about 50 per cent of the land at the storage site and one disposal well rather than 75 per cent of the land and two disposal wells included in the Identified Salt Cavern Assets.

20. In its October 1, 2007 GRA, AP made the following statement describing the Identified Salt Cavern Assets, their net book values and the reasons for removing these assets from utility rate base:

> … AP has concluded after an evaluation of supply options, that approximately 75% of the salt cavern lands presently owned by AP have no foreseeable regulated gas transmission use. AP correspondingly concluded that the water pipeline and associated assets used in the development of salt caverns has no foreseeable regulated gas transmission use. The net book values for the lands and for the water pipeline related assets are $2,896,000 and $1,006,000 respectively, and are removed from utility rate base effective December 31, 2007.[2]

[2] AUC-AP-1(a), page 7 of 255 (2008-2009 GRA Application No. 1527976, Proceeding ID No. 13, Section 1.1, page 2 of 7, lines 24-30).

21. The Commission will consider the change in scope of the salt cavern assets which AP has requested approval to dispose of in Section 4.2 of this decision.

22. On November 6, 2007, the EUB ruled that unilateral removal of the Identified Salt Cavern Assets was a disposition out of the ordinary course of business according to Section 26(2)(d) of the *Gas Utilities Act* which required the prior consent of the EUB. AP was directed by the EUB to re-file its 2008-2009 GRA to include the Identified Salt Cavern Assets, and to file a separate application for the removal of the Identified Salt Cavern Assets from its rate base.

23. On February 1, 2008, AP submitted Application No. 1558743 (First Salt Cavern Disposition application) to the Commission requesting approval under Section 26(2)(d) of the *Gas Utilities Act* for the transfer of the Identified Salt Cavern Assets to a non-utility affiliate.

24. On April 2, 2008, the Commission issued notice regarding its Utility Asset Disposition Rate Review proceeding (Asset Disposition proceeding).[3] In the notice, the Commission indicated that further consideration of the First Salt Cavern Disposition application would be deferred until a decision was rendered in the Asset Disposition proceeding.

25. On April 8, 2008, concurrent with the Commission's notice in the Asset Disposition proceeding, AP requested that the Commission proceed with the First Salt Cavern Disposition application.

26. On May 9, 2008, the Commission confirmed its suspension of the First Salt Cavern Disposition application pending the conclusion of the Asset Disposition proceeding.

27. On July 21, 2008, AP wrote to the Commission citing two changed circumstances: (i) the May 27, 2008 decision of Alberta Court of Appeal in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2008 ABCA 200[4] (Carbon decision) and (ii) AP's decision not to sell or transfer the Identified Salt Cavern Assets for the time being. AP suggested that the Carbon decision confirmed a utility's right to utilize utility assets for its own account where the property is not required for utility service. In light of these changed circumstances, AP advised that it had decided to withdraw the Identified Salt Cavern Assets from service effective immediately and that AP would re-file the relevant GRA schedules in its Phase I compliance filing to reflect this decision. With respect to the first changed circumstance AP made the following statement:

> AP understands from the Courts that it is obliged to put forward a rate base that consists, at the relevant date, of assets that are used and useful for regulated service. Accordingly, effective immediately, AP has decided to remove the Surplus Assets from regulated service and to remove all costs related to these assets from the forecast revenue requirement in the present GRA, thereby providing a financial benefit to customers in the form of lower rates than would otherwise be the case.[5]

[3] Application No. 1566373, Proceeding ID No. 20.
[4] Leave to Supreme Court of Canada dismissed [2008] S.C.C.A. No. 347 (S.C.C.).
[5] AUC-AP-1(a), page 160 of 255 (Application No.1527976, Proceeding ID No. 13, Exhibit 144).

28. AP made the following statement in respect of the second changed circumstance:

> As AP no longer intends to dispose of the Surplus Assets but rather will maintain its ownership and re-develop those assets for non-utility use, it is not necessary to await the outcome of the Asset Disposition Proceeding. As such, AP is withdrawing the Salt Cavern Application.
>
> To be clear, AP owns those assets now and will continue to own them after they are withdrawn from service.[6]

29. On July 30, 2008, the Commission replied to AP's July 21, 2008 letter, restating the position that an application under Section 26(2)(d) of the *Gas Utilities Act* was required to "… allow the Commission and interested parties to adequately examine the merits of the application and assess whether or not the Identified Salt Cavern Assets are used and useful or required to be used to provide service to the public within Alberta."

30. The Commission directed AP not to re-file the relevant GRA schedules in its Phase I compliance filing to reflect the withdrawal of the Identified Salt Cavern Assets without first obtaining Commission consent. On August 28, 2008, AP sought leave from the Alberta Court of Appeal to appeal the Commission's July 30, 2008 letter direction and the ruling and direction of the EUB dated November 6, 2007. Leave was subsequently granted by the court.

31. On March 18, 2009, the Commission issued Decision 2009-033[7] approving a settlement of the 2008-2009 revenue requirements.

32. In Decision 2009-051[8] (April 29, 2009), the Commission granted the application by AP to negotiate its 2010-2012 revenue requirements. This approval was subject to a restriction which did not allow discussion or negotiation regarding the exclusion from rate base and utility service of salt cavern assets.

33. On June 30, 2009, the Alberta Court of Appeal issued its decision with respect to the AP appeal of the Salt Caverns letter decisions. In *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2009 ABCA 246 (Salt Caverns decision) the Court ruled that ceasing to use an asset for utility purposes involves the traditional criteria for what is in the rate base, and does not involve or require a Section 26 application. The Court answered the following question in the negative:

> If a utility company owns an asset whose price or value in previous rate hearings has been included in the rate base calculation, and the company now alleges that the asset is no longer used, nor useful, nor needed for its regulated utility business, or alleges that it will soon become none of those things, does s. 26 of the *Gas Utilities Act* apply, and does the company need leave under that section?[9]

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6 Ibid.
7 Decision 2009-033: ATCO Pipelines - 2008-2009 General Rate Application Phase I – Settlement Agreement, Application No. 1527976; Proceeding ID. 13, March 18, 2009.
8 Decision 2009-051: ATCO Pipelines, Request to Negotiate 2010-2012 General Rate Application Phase I, Application No. 1604425, Proceeding ID. 160, April 29, 2009.
9 Salt Caverns decision, paragraphs 40 and 69.

34. The Court considered that "Ceasing to use an asset for utilities purposes involves the traditional criteria for what is in the rate base … and does not involve or require a s. 26 application at all."[10]

35. The Alberta Court of Appeal further stated:

> … It is common ground that as part of a normal rate hearing, the Commission can and must decide what items (property) are to be considered part of the rate base and given a value on which the utility company is entitled to recover a return on investment: s. 37 of the *Gas Utilities Act*. (See Part F. above.)
>
> Indeed, counsel for the appellant stressed to us what the Commission could do when hearing a rate application if it found want of due prudence in starting or stopping the use of some asset in the regulated utility. It could make some adjustment of values in the rate base or in the expenses or return on investment, so that rates approved would not make the consumers pay rates based on that type of imprudence.[11]

36. In light of the Salt Caverns decision in a letter to the Commission dated July 17, 2009, AP requested confirmation from the Commission that the restrictions imposed on its negotiated settlement process regarding the Identified Salt Cavern Assets could be removed so that AP's 2010, 2011 and 2012 revenue requirement negotiations could reflect the removal of the salt caverns assets from rate base.

37. In Decision 2009-111[12] (July 24, 2009), the Commission removed the restriction imposed by Decision 2009-051 with respect to the negotiation of issues related to the Identified Salt Cavern Assets in AP's 2010-2012 revenue requirement negotiations. The Commission identified a number of requirements should the parties agree to withdraw the Identified Salt Cavern Assets from rate base stating:

> In the event that the Identified Salt Cavern Assets and associated costs are not included in any resulting 2010-2012 revenue requirement settlement agreement, the settlement agreement or the accompanying application for approval of the settlement must provide the following information to enable the Commission to assess the prudence of the removal of the Identified Salt Cavern Assets from rate base and the associated costs from revenue requirement, and the public interest impacts of the settlement agreement:
>
> - a narrative description of how the Identified Salt Cavern Assets have been dealt with in the settlement and in the proposed revenue requirement;
> - confirmation that the Identified Salt Cavern Assets are not being sold, leased or otherwise disposed of;
> - the rationale for exclusion of the Identified Salt Cavern Assets as well as an assessment of the impacts to present and future utility service as a result of the removal of the assets from utility service;

[10] Salt Caverns decision, paragraph 56.
[11] Salt Caverns decision, paragraphs 52 and 53.
[12] Decision 2009-111: ATCO Pipelines, Request to Remove Restriction Related To Identified Salt Cavern Assets Decision 2009-051, Approval to Negotiate 2010-2012 Revenue Requirements, Application No. 1605226, Proceeding ID. 223, July 24, 2009.

- a business case analysis with respect to how future transmission capacity requirements that might have been accommodated through the development of additional salt caverns using the land and mineral interests included within the Identified Salt Cavern Assets are anticipated to be addressed in the absence of these assets. The business case will include an assessment of the comparative costs of providing the needed capacity through the development of additional salt caverns using the Identified Salt Cavern Assets versus the construction of new pipelines or compression;
- a detailed listing of all assets, their gross and net values and vintages which are recorded in accounts 451 through 459, Underground Storage Plant, remaining after the removal of the Identified Salt Cavern Assets;
- an explanation of how servicing and maintaining the integrity of the salt caverns which will remain in regulated service will be accomplished without the use of the water pipeline and related facilities included within the Identified Salt Cavern Assets;
- an accounting of the revenue requirement and rate base adjustments as a result of the removal of the Identified Salt Cavern Assets from rate base and utility service; and
- confirmation that no costs associated with any of the Identified Salt Cavern Assets, including costs of decommissioning, salvage, reclamation or any similar expense relating to any of these assets will remain in AP's revenue requirement.[13]

38. On November 12, 2009, AP applied for Commission approval of its negotiated settlement for its 2010-2012 revenue requirements (Negotiated Settlement). Application No. 1605226, Proceeding ID No. 223 (Negotiated Settlement Application proceeding) dealt with the Negotiated Settlement application. The parties to the negotiation were not able reach agreement on the issues related to the salt cavern assets, therefore the Identified Salt Cavern Assets remained in AP's rate base as a placeholder pending resolution of the issue with any required adjustment to revenue requirement to be dealt with by way of a deferral account.[14]

39. In AUC-AP-4(a) dated December 21, 2009 filed in the Negotiated Settlement Application proceeding AP referred to Decision 2009-253[15] and stated:

> In summary, consistent with Decision 2009-253, AP requests that the Commission now confirm that the Surplus Assets are not used or required to be used for utility service and are removed from rate base effective January 1, 2010.
>
> While the issue of any required prudence review with respect to the Surplus Assets remains, AP submits that such a review can be conducted in the course of the present proceeding. To that end, AP proposes that:
>
> (i) the Commission conduct any required prudence review related to the Surplus Assets in the context of the present Settlement approval process, with input from interested parties as appropriate;

[13] Decision 2009-111, paragraph 5.
[14] Clause 1 of the Negotiated Settlement attached as Appendix 2 to Decision 2010-228.
[15] Decision 2009-253: ATCO Gas South Review and Variance Proceeding of Decision 2009-004 and Decision 2009-067 (Removal of Carbon Related Assets from Utility Service), Application No. 1605365, Proceeding ID. 281, December 16, 2009.

40. Subsequently, in a letter dated January 18, 2010, filed in Negotiated Settlement Application proceeding, AP indicated that it was withdrawing its proposal to address the salt cavern assets issue in the context of that proceeding. AP stated:

> AP and all the other parties to the Settlement (except City of Calgary, which has not yet responded to AP) are in agreement that the Integration process should not be delayed and that the Surplus Assets should, indeed, be dealt with in a separate proceeding. As such, AP withdraws its proposal to address the Surplus Assets in the context of the present proceeding….
>
> AP would like to clarify that dealing with the Surplus Assets in this proceeding or in a subsequent proceeding is entirely compatible with the Settlement (i.e. no amendment of the Settlement is required), as parties had contemplated there would be a further resolution required with respect to this issue and, as such, had deliberately assigned "placeholder" status to this issue. The result is that should the further process relating to the Surplus Assets determine such assets should not be included in the rate base calculation during the Settlement Period, AP would adjust that calculation, and deal with the adjustment (or, as the Settlement calls it "…approved costs that are different from the costs in this Settlement…") by placing the adjustment into a deferral account and clearing the deferred amount in its revenue requirement for the following year. AP's revenue requirement under the Settlement is subject to annual adjustments.

41. On January 22, 2010, the Commission approved AP's request that the salt cavern assets be dealt with in a separate proceeding stating: "The Commission is prepared to grant AP's request and deal with the Surplus Assets in a separate, subsequent proceeding." The Commission also indicated that since the removal of these assets would constitute a change in revenue requirement, the separate proceeding would be a rate-setting proceeding.[16]

42. In Decision 2010-228 the Commission approved certain aspects of integration of AP and NGTL and the Negotiated Settlement dealing with AP's 2010-2012 revenue requirements noting that:

> All issues were resolved, other than the issue related to the Identified Salt Cavern Assets and those issues specifically identified in the Settlement, which are being addressed in other proceedings.[17]

43. As a result of the above actions, the amounts included in the 2010-2012 AP revenue requirements in respect of the salt cavern assets were considered by the Commission and parties as a placeholder pending resolution of the continued inclusion of certain portions of the salt cavern assets in revenue requirement and rate base. This issue is now before the Commission for consideration in the present decision.

[16] AUC-AP-1(a), page 225 of 255 (Application No. 1605226, Proceeding ID. 223, AUC letter, paragraph 5).
[17] Decision 2010-228, paragraph 56.

3 Detailed description of Surplus Assets

44. In the application AP provided the following description of the assets it proposed to remove from rate base and transfer to AES:

> AP, a division of AGPL, owns two quarter sections of land in the Fort Saskatchewan area of Alberta and a mineral lease for the Lotsberg salt formation underlying the same two quarter sections. The legal description for the land is S½ 34-55-21-W4M. Salt caverns which store natural gas to meet the peaking natural gas demand requirements on AP's North integrated pipeline system have been developed on the land in the SE 34-55-21-W4M quarter section. The SW 34-55-21-W4M quarter section contains no salt caverns. Attachment 1 details the land area proposed to be removed from rate base and the land area to be retained by AP.
>
> The water system consists of a river intake structure, an adjacent pump station, associated land for siting and access to the river intake and pump station facilities, and approximately 6.3 km of 610mm high density polyethylene pipeline and approximately 3.9 km of 323mm steel pipeline (pipeline AUC license number 20021) which runs from the North Saskatchewan River to a 5,000 bbl water tank and structure located within AP's salt cavern peaking facility located at SE-34-55-21-W4M. Attachments 1 to 3 detail the water system assets.
>
> A disposal well and brine pipeline residing on the surplus land would also be removed from rate base and sold.
>
> The water diversion license and the respective portion of the mineral lease agreement related to the surplus land in SW 34-55-21-W4M do not have any rate base value and will be assigned to AES upon disposition of the Surplus Assets along with any required rights of way (ROW). To accommodate AP assets on AES land and AES assets on AP land, appropriate surface lease agreements will be entered into to allow use and access. Also, to the extent that there are common ROWs and road access requirements, the parties will enter into appropriate joint use and access agreements. Attachment 4 details the area of the mineral lease, surface leases, ROWs and joint use roads/access.[18]

4 Issues

45. In the following sections the Commission will examine the various issues raised by the application. AP has requested Commission approval for the sale of the Surplus Assets pursuant to Section 26(2)(d) of the *Gas Utilities Act* to AES. AP indicated that the Surplus Assets are neither used nor are they required to be used to provide utility service and should be removed from rate base and customer rates. Accordingly, the sale will not harm ratepayers. AP requested the effective date of the removal of the Surplus Assets from rate base to be within 30 days following a positive decision on this application.

[18] Application, Section 2, paragraphs 5, 6, 7 and 8. Attachments 1 through 4 to the application are attached in Appendix 3 of this decision.

46. The Commission must consider whether AP has satisfied the "no harm test" traditionally applied by the Commission to an application for approval of a sale of assets outside of the ordinary course of business pursuant to Section 26(2)(d) of the *Gas Utilities Act.*

47. Section 26(2)(d) of the *Gas Utilities Act* provides:

> **(2)** No owner of a gas utility designated under subsection (1) shall
>
> (d) without the approval of the Commission,
>
> (i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of it or them, or
>
> (ii) merge or consolidate its property, franchises, privileges or rights, or any part of it or them,
>
> and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a gas utility designated under subsection (1) in the ordinary course of the owner's business.

48. No party disputed that Section 26(2)(d) of the *Gas Utilities Act* applied to the contemplated disposition of the Surplus Assets. No party disputed that the proposed disposition was outside of the ordinary course of business requiring the prior consent of the Commission.

49. The Commission and its predecessor the EUB have traditionally applied a "no harm test" in assessing an application for the disposition of utility property under Section 26(2)(d) of the *Gas Utilities Act* or the comparable section of the *Public Utilities Act*, Section 102(2)(d). The no harm test considers the proposed transaction in the context of both potential financial impacts and service level impacts to customers. The no harm test has been reviewed in several EUB and Commission decisions. The test was summarized in Decision 2000-41[19] when the EUB stated:

> The Supreme Court of Canada has stated that the Board's jurisdiction to "safeguard the public interest in the nature and quality of the service provided to the community by public utilities" is "of the widest proportions."[15] The Board has also noted that its governing legislation provides no explicit guidance for the exercise of the Board's discretion in approving an asset disposition by a designated owner of a public utility.[16]
>
> The Board has held that its discretion under essentially similar provisions of the GU Act must be exercised according to a "no harm" standard. More specifically, the Board has held that it must be satisfied that customers of the utility will experience no adverse impact as a result of the reviewable transaction.[17]…

[19] Decision 2000-41: TransAlta Utilities Corporation, Sale of Distribution Assets, Application No. 2000051, File No. 6404-3, July 5, 2000.

> The Board believes that its duty to ensure the provision of safe and reliable service at just and reasonable rates informs its authority to approve an asset disposition by a public utility pursuant to Section 91.1(2) of the PUB Act. Therefore, the Board is of the view that, subject to those issues which can be dealt with in future regulatory proceedings …, it must consider whether the disposition will adversely impact the rates customers would otherwise pay and whether it will disrupt safe and reliable service to customers. As already noted, the Board also accepts that it must assess potential impacts on customers in light of the policy reflected in the EU Act, namely the unbundling of the generation, transmission and distribution components of electric utility service and the development of competitive markets and customer choice. As a result, rather than simply asking whether customers will be adversely impacted by some aspect of the transactions, the Board concludes that it should weigh the potential positive and negative impacts of the transactions to determine whether the balance favours customers or at least leaves them no worse off, having regard to all of the circumstances of the case. If so, then the Board considers that the transactions should be approved.[20]

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[15] *ATCO Ltd. v. Calgary Power Ltd.* [1982] 2 S.C.R. 557, at 576 (per Estey J.)
[16] Decision U99102, p.7
[17] See Decision U98084, *NOVA Corporation, et al., Application for Regulatory Approvals in Connection with a Proposed Merger of NOVA Corporation and TransCanada Pipelines Limited* (May 19,1998), p. 6; Decision U98097, *Westcoast Energy Inc. et al., Sale of Shares in Centra Gas Alberta Inc. from Westcoast Energy Inc. to AltaGas Services Inc.* (June 29, 1998), p.3; Decision U99102, *supra*, p.8

50. The no harm test used by the Commission was referred to by the Supreme Court of Canada in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, (Stores Block decision).

51. In the present case an application of the no harm test requires the Commission to consider whether service quality, service reliability or customer rates will be adversely affected by a sale of the Surplus Assets. In assessing this issue, the Commission will consider Section 37 of the *Gas Utilities Act* and whether a portion of the salt cavern assets should be removed from rate base and revenue requirement because that portion of the assets is not presently used or required to be used to provide utility service. This will necessarily require the Commission to consider whether the removal of these assets from utility service is prudent in the circumstances.

52. If the removal of a portion of the salt cavern assets from rate base and revenue requirement satisfies the no harm test, the Commission must next consider if the scope of the Surplus Assets proposed for disposition is reflective of the subset of salt cavern assets that are no longer used or required to be used to provide utility service.

53. Finally, assuming that the no harm test is satisfied, and that the Commission has identified the scope of the assets to be withdrawn from rate base and revenue requirement, the Commission must determine the effective date upon which the identified assets should be considered to be removed from rate base and revenue requirement. The Commission will deal with each of the above issues in turn.

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[20] Decision 2000-41, pages 7-8.

4.1 Used or required to be used

54. AP indicated in the application that the Surplus Assets were no longer used or required to be used to provide utility service stating:

> AP addressed the exclusion of the Surplus Assets from rate base in Information Response AUC-AP-4(a), as part of AP's 2010-2012 Revenue Requirement Settlement and Alberta Integration Application.
>
> > AP confirms that the Identified Salt Cavern Assets ("Surplus Assets") that were discussed in Decision 2009-111, are not in, and are not expected to be in, utility service and as such do not meet the test of being "used or required to be used to provide service to the public within Alberta" as required by the Gas Utilities Act.
> >
> > This has been AP's consistent position since it filed its 2008-2009 General Rate Application (GRA) on October 1, 2007… [21]

55. AP further indicated that the Surplus Assets had no foreseeable utility use stating:

> With regard to future utility use, AP will not be developing additional salt caverns to store natural gas for the North integrated pipeline system. If additional peaking gas supply is required to support growth in demand requirements, AP has determined that other alternatives, such as pipeline and compression facilities, can be constructed and operated at a lower cost than developing and operating additional salt caverns. AP has correspondingly determined that the water pipeline and associated assets used in the development of the salt caverns have no foreseeable regulated transmission use.[22]

56. AP included a report dated March 2008 titled "Fort Saskatchewan Salt Caverns Current And Forecast Utilization," as Attachment 5 to the application (Report). The Report discussed the current and forecast utilization of the salt cavern storage facility. In the report AP concluded it could meet its future gas delivery requirements without expanding salt cavern storage by installing additional pipeline and/or compression capacity when required. The installation of additional pipelines and/or compression was determined to be more cost effective than the development of additional salt caverns.

4.1.1 Views of the parties

AP

57. AP determined that it would not be developing additional salt caverns to store natural gas for the north integrated pipeline system. If additional peaking gas supply was required to support growth in demand requirements, AP had determined that other alternatives, such as pipeline and compression facilities could be constructed and operated at a lower cost than developing and operating additional salt caverns.[23] AP had correspondingly determined that the water pipeline and associated assets used in the development of the salt caverns had no foreseeable regulated

[21] Application, paragraph 31.
[22] Application, paragraph 33.
[23] UCA-AP-5(b).

transmission use.[24] AP argued that these decisions were the responsibility of the company's management.

58. In the Report AP stated the following:

> Several of the reasons originally used to justify construction of the salt caverns facility are no longer applicable. AP no longer purchases gas for peaking supply and no longer has its own natural gas production. Instead natural gas consumers (or their agents) contract for supply with natural gas producers (or their agents). AP is the shipper but is not involved in gas supply transactions. As a result, the opportunity to decrease gas purchased from third parties, reduce exposure to "take or pay" contracts, and reduce penalties on "peaking gas" purchases no longer exist.[25]

59. AP submitted that to meet its future transmission capacity requirements, AP would choose to utilize the lower cost alternative of additional pipe and/or compression over further development of its salt cavern assets. In the Report AP stated the following in the executive summary:

> As was the case in the 1980's, there are two types of system improvements available to AP for provision of incremental supply. These are construction of additional salt caverns or pipeline/compressor based improvements. The two types of projects can now be compared on the basis of capital cost, cost of service, and load factor impacts.
>
> Given that AP anticipates significant incremental demand in the coming years, the two types of system improvements were compared to determine whether construction of additional salt caverns is a preferred course of action. To do this, hydraulic models incorporating anticipated demand growth were developed for the current winter (2007-2008) and for the winter of 2012-2013. Various incremental supply projects, or combinations thereof, were tested on a hydraulic basis. The capital, fuel, and operations and maintenance (O&M) costs of each alternative were assessed at a high level. Using the estimated costs, the alternative projects were compared on a Cumulative Present Value of Annual Cost of Service (CPVCOS) basis. Construction of additional salt caverns was found to be significantly more expensive than equivalent pipeline/compression based improvements.[26]

60. In respect of the existing caverns AP made the following comment in the same Report:

> Edmonton and region has, and will continue to have, a significant peaking gas requirement during periods of cold weather. The existing salt caverns facility assists AP in its ability to supply this peaking gas requirement. In addition, the existing salt caverns provide insurance against short duration operational problems such as the loss of a major interconnect supply point.[27]

[24] Application, paragraph 33.
[25] Application, Attachment 5, page 4.
[26] Application, Attachment 5, pages 4 and 5 of 47 (Fort Saskatchewan Salt Caverns Current and Forecast Utilization).
[27] Ibid., page 4 of 47.

61. In response to AUC-AP-3 AP described the action it had taken to meet the growing demand without the expansion of the salt cavern storage facility. In part (c) of the response AP noted that the Redwater Extension Phase 1 and Phase 2 were planned to be in operation as the next increase in capacity to meet growing demand.

62. AP further stated "The AP/NGTL Integration will not impact this assessment."[28]

63. AP submitted that the Surplus Assets had no foreseeable use in utility operations. AP noted that this had been AP's consistent position since it filed its 2008-2009 GRA on October, 1, 2007. AP argued that despite AP's determination in that regard, its numerous attempts to remove the Surplus Assets from rate base were suspended or denied by the Commission. AP submitted that, as a consequence, the Surplus Assets had continued in rate base and regulation at the explicit direction of the Commission despite AP management's determination that the assets were no longer used or required to be used for utility service.

64. AP noted that the essence of the "no harm" test employed by the Commission was to consider whether or not the disposal of the asset would impact the safe and reliable operation of the utility and secondly, whether or not the rates paid by existing customers, in this case those on AP's North system, would be adversely impacted.

65. AP argued that disposal of the Surplus Assets would not affect AP's ability to provide safe and reliable transmission service to its customers. Nor would it negatively impact customer rates. AP submitted that disposal of these assets would reduce the return, depreciation and taxes included in utility revenue requirement paid by AP's North system customers without impairing service quality or reliability.[29]

66. AP argued that the evidence on the record showed the Surplus Assets served no operational purpose. They were not used or required to be used for operational purposes to provide service to the public within Alberta as required by the *Gas Utilities Act*. AP referred to the Carbon decision in support of this position.[30] The assets were considered surplus to utility needs, and AP indicated that they had remained in rate base and regulation pursuant to specific Commission directions.

67. At paragraph 5 of Decision 2009-111 referred to in paragraph 37 above, the Commission established a number of requirements to be addressed so that the Commission could, "… assess the prudence of the removal of the Identified Salt Cavern Assets from rate base …" AP stated it had identified these criteria in Section 5 of the application; Section 6 of the application addressed each of these requirements and further clarification of the asset values was provided in responses to AUC-AP-33 and AUC-AP-36.

68. With respect to the water related assets forming part of the Surplus Assets, AP explained that re-mining the caverns using water for maintenance purposes in the past had not been successful for several reasons. Also, filling the caverns to inspect or maintain the storage well infrastructure was no longer necessary because a preferred alternative was now available that did

[28] Application, page 8, paragraph 36 and argument, page 6, paragraph 19.
[29] AP argument, paragraph 13.
[30] Carbon Decision at paragraphs 23, 25.

not require a water supply.[31] However, notwithstanding AP's position that the water assets forming part of the Surplus Assets had no foreseeable utility use, in response to AUC-AP-37 AP indicated that "Although AP does not anticipate a need for water supply for the reasons noted above, AP may negotiate for a future option for interruptible water service in the final transfer agreement with its affiliate."

UCA

69. The UCA expressed no views on this issue.

4.1.2 Commission findings

70. Section 37 of the *Gas Utilities Act* requires the Commission in fixing just and reasonable rates to "determine a rate base for the property of the owner of the gas utility used or required to be used to provide service to the public within Alberta." The Commission has recently considered Section 37 and the inclusion of property within utility rate base in the context of the 2011-2012 ATCO Gas general rate application. In Decision 2011-450[32] the Commission stated:

> 311. …the Alberta Court of Appeal in the Carbon decision made it clear that assets previously included in rate base that are not presently used or required to be used to provide utility service as required by Section 37 of the *Gas Utilities Act* should not remain in rate base.
>
> 312. The words "used or required to be used" are intended to identify assets that are presently used, are reasonably used, and are likely to be used in the future to provide services. Specifically, the past or historical use of assets will not permit their inclusion in the rate base unless they continue to be used in the system.[237]
>
> 313. The court in the Carbon decision also stated:
>
> > Thirdly, the only reasonable reading of s. 37 is that the assets that are "used or required to be used" to provide service are only those used in an operational sense.[238] [33]

[237] Carbon decision, paragraph 23.
[238] Carbon decision, paragraph 25.

71. The Commission in Decision 2011-450 went on to conclude:

> 315. The Commission considers that assets that are not properly in rate base because they are no longer used or required to be used to provide utility service should not be reflected in rates in any fashion.[34]

72. The Commission has reviewed the AP evidence supporting the position that the Surplus Assets are not presently used or required to be used, nor will they be used or required to be used in the foreseeable future to provide utility service. AP concludes that these assets should be

[31] Application, pages 10-11, paragraph 45.
[32] Decision 2011-450: ATCO Gas (a Division of ATCO Gas and Pipelines Ltd.), 2011-2012 General Rate Application Phase I, Application No. 1606822, Proceeding ID No. 969, December 5, 2011.
[33] Decision 2011-450, paragraphs 311-313.
[34] Decision 2011-450, paragraph 315.

removed from revenue requirement and rates because there are more cost effective alternatives to meet a growing demand in AP's north service area than the expansion of salt cavern storage. To that end, the Commission notes that an expansion of pipeline in the Redwater area (Redwater Extension) is proposed as the next new facility to increase capacity in the area.

73. The Commission also notes that in the application AP provided a review of the need for a water supply to maintain the caverns and concluded that the water supply would not be necessary for either the maintenance or inspection of the existing salt caverns.

74. The Commission relies on AP's submission, based on the present view of the system's future requirements, that the most cost effective alternatives will be construction of new pipelines and/or compression. The Commission also relies on AP's submission that the water assets included within the Surplus Assets are not required for the future maintenance and inspection of the existing salt caverns.

75. Accordingly, the Commission agrees with AP that the portion of the land and mineral lease not presently required for the existing salt caverns and the facilities presently in rate base previously used to mine caverns or to maintain the existing caverns do not have an operational purpose within the utility, are not presently used or required to be used for utility purposes nor will they be used or required to be used to provide utility service in the foreseeable future. Further, the Commission agrees with AP that the removal of these assets will not adversely affect rates or services. Rates will decrease as a result of the removal of the capital and operating costs, return and taxes associated with these assets. Accordingly, the disposition of the assets satisfies the no harm test and that portion of the salt cavern assets that are no longer used or required to be used to provide utility service should be removed from rate base and revenue requirement. This conclusion, however, does not imply that the Commission agrees with AP as to the scope of the salt cavern assets to be withdrawn from rate base and revenue requirement or with respect to the timing of the removal. These issues are considered below.

76. Although the Commission has relied on AP's submission that the water supply and access to it is not required for the foreseeable future in making its determinations herein, AP has offered to contractually arrange for AP to have access to a water supply, if required, and the Commission considers this to be a prudent precaution. The Commission directs AP to include such an arrangement for access to an interruptible water supply in the Surplus Assets Transaction and to ensure the arrangement survives any future sale by the affiliate. Any such arrangement should be provided on a cost of service basis.

77. The Commission directs AP to file when and if executed, a copy of all common right-of-way and road access and joint use agreements and a copy of all water supply and access agreements entered into with AES.

4.2 Scope of salt cavern assets to be removed from rate base

78. The Surplus Assets were briefly described above as:

(1) Surplus land located in the S½ 34-55-21-W4M (specifically the SW 34-55-21-W4M quarter section) and a disposal well located on such land.

(2) A water system transporting water from the North Saskatchewan River.

79. In addition, AP proposed to enter into surface leases and rights-of-way with AES to accommodate the various transfers and continued operations of the existing salt caverns.

4.2.1 Views of the parties

80. The UCA agreed with AP that certain salt cavern assets were no longer used or required to be used to provide utility service and should be removed from rate base. The UCA, however, did not agree with how AP had defined the scope of the salt cavern assets that should be removed.

81. The UCA was concerned that there may be unutilized salt cavern assets left in rate base if the AUC approved the transaction as proposed by AP. The UCA argued that if no more salt caverns were to be developed and that the water pipeline was no longer necessary to maintain the existing caverns, then the eastern half of the SE 34-55-21-W4M quarter section and the well located on the land should also be removed from rate base. These additional assets (Additional Assets), had originally been included in the Identified Salt Cavern Assets which AP had removed from rate base on the basis that such assets were no longer used or required to be used to provide utility service when it filed its 2008-2009 GRA, Application No. 1527976 on October 1, 2007.[35] The UCA stated:

> The UCA submits in addition that the law is now clear that customers are not entitled to either revenues earned from assets after utility management determines them to be "surplus assets" (having no valid operational purpose), nor to share in any gain on the sale of such surplus assets. Equally, customers should not be forced to pay for assets after AP has determined them to be surplus.[36] (footnotes omitted)

82. The UCA submitted that should the disposition of the Additional Assets require subdivision approval, the cost associated with such approval should be for the account of the AP shareholder. The UCA stated:

> These assets, which provided no utility service, should be removed from rate base. Any costs associated with them or any revenues or proceeds that can be realized from them should be unregulated. As such, it is entirely appropriate for the shareholders of AP to bear the entire cost of any transaction or application required to facilitate their disposal.[37]

83. The UCA further submitted that if AP chose not to dispose of the Additional Assets because of the cost to subdivide the southeast quarter of Section 34, customers should not be burdened with the cost of these assets in rates. The UCA argued that the test should be whether or not the Additional Assets were used and useful for the provision of utility service.

84. In reply argument AP submitted that the Additional Assets "… could not be considered surplus and removed from rate base."[38] AP stated:

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35 AUC-AP-1, page 7 of 255 (Application No. 1527976, Proceeding ID No. 13, page 2 of 7, lines 23-28).
36 UCA argument, paragraph 14.
37 UCA argument, paragraph 8.
38 AP reply argument, paragraph 4.

> There is no suggestion that the asset was imprudently acquired. The asset is a quarter section (SE 34-55-21-W4M) which contains rate base facilities and forms part of the existing Salt Cavern Peaking Facility. This asset is not surplus and any cost to subdivide the land would be appropriately recovered in utility rates.[39]

85. AP provided the following response when asked why the disposal well included within the Additional Assets had not been included within the definition of Surplus Assets to be disposed of in the present application:

> As noted in the response to AUC-AP-17(f), the disposal well being retained is located on the SE 34-55-21 W4M quarter section, which quarter section is not being transferred.[40]

86. AP submitted that the relevant asset to be discussed in the context of the property remaining in rate base was the entire southeast quarter section of Section 34 and that an asset comprising the Additional Assets does not separately exist.[41] Such an asset would only exist if the Additional Assets were subdivided from the balance of the southeast quarter section of Section 34.

87. AP also submitted that an order requiring it to undertake the cost of subdivision without the ability to recover the associated costs from customers would result in the regulator compelling the utility to incur a loss. AP submitted that the cost of subdivision would be a cost the utility incurred in the course of complying with a specific regulatory directive. AP believed that such costs must be recoverable in rates from customers. AP would not voluntarily take such action because it would not be a prudent expenditure.[42] Given that subdivision of the land was not required for the provision of utility service, the Commission should also not require the utility to behave in an economically imprudent manner.

88. AP further argued that there was no rational economic case for creating a new asset by incurring the cost of subdivision. AP had indicated in AUC-AP-17, that the new development levy on the subdivision of land by Strathcona County was based on the entire parcel of land to be subdivided. The change in the development levy made subdivision uneconomic. AP noted that levy on subdivision was not in place at the time of the First Salt Cavern Disposition application filed on February 1, 2008. In light of changed circumstances, incurring the cost of subdivision is not prudent.[43] AP estimated the cost to subdivide a 160 acre parcel of land into two parcels with a development levy charge of $7,500 per acre would result in a total cost of $1,200,000.[44]

89. In its reply argument, AP submitted that regulators expect utilities to act prudently and AP had done so. It would be contradictory and inconsistent with the scheme of the legislation to use regulatory powers to require a utility to incur costs to modify or change existing assets and then to also deny the utility recovery of those costs.[45]

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39 AP reply argument, paragraph 4.
40 AUC-AP-35.
41 AP reply argument, paragraph 14.
42 AP reply argument, paragraph 10.
43 AP reply argument, paragraph 9.
44 AP reply argument, paragraph 9.
45 AP reply argument, paragraph 12.

90. AP also submitted that it would not be proper for the Commission to "… disallow a portion of the prudently incurred costs of an asset now in rate base without properly acknowledging the related costs of altering that existing asset to create a new one."[46]

4.2.2 Commission findings

91. The Commission is satisfied that the Surplus Assets as defined by AP are no longer used or required to be used to provide utility service for the reasons noted in the previous section of this decision. The Commission is concerned, however, with the distinction being made between the Surplus Assets named in the present application and the broader scope of assets unilaterally withdrawn from rate base by AP in the original 2008-2009 GRA application. The assets withdrawn from rate base in the 2008-2009 GRA application included both the Surplus Assets and the Additional Assets, being the east half of SE 34-55-21-W4M and the disposal well located on the land. Both the Surplus Assets and the Additional Assets were also included by AP in the lands to be disposed of in the First Salt Cavern Disposition application.

92. AP now submits that the relevant asset with respect to the assets to remain in rate base is the entire southeast quarter of Section 34. The separation of the Additional Assets from the balance of the southeast quarter of Section 34 would require a legal subdivision of the property, which, if directed by the Commission, should be a cost recoverable from ratepayers as the utility would not voluntarily incur such costs.

93. The Additional Assets were intended by AP to be excluded from rate base and revenue requirement in both the 2008-2009 GRA and in the First Salt Cavern Disposition application. At that time the Additional Assets along with the Surplus Assets were not considered by AP to be used or required to be used to provide utility service. There is no indication by AP in the present application that the need for, or use of, the Additional Assets has changed since the filing of the First Salt Cavern Disposition application such that the Additional Assets are now required in the provision of utility service. Rather, the concern is that the separation and disposition of these assets would require subdivision of the southeast quarter section and that the cost of such a subdivision, which was not an issue at the time of the First Salt Cavern Disposition application, now makes subdivision uneconomic.

94. AP confirmed in the application that there is no need to develop additional salt caverns through the use of its water diversion assets. As quoted above AP stated:

> With regard to future utility use, AP will not be developing additional salt caverns to store natural gas for the North integrated pipeline system. If additional peaking gas supply is required to support growth in demand requirements, AP has determined that other alternatives, such as pipeline and compression facilities, can be constructed and operated at a lower cost than developing and operating additional salt caverns. AP has correspondingly determined that the water pipeline and associated assets used in the development of the salt caverns have no foreseeable regulated transmission use.[47]

[46] AP reply argument, paragraph 16.
[47] Application, paragraph 33.

95. AP also confirmed in the application that the water pipeline and associated assets were not needed in connection with the maintenance, remining or inspection of the existing salt caverns.[48]

96. If there is no need to develop additional salt caverns and the water pipeline and associated assets are not required in connection with the maintenance, remining or inspection of the existing caverns, it is clear that the Additional Assets, being excess land and a water disposal well, are not used or required to be used to provide utility service and should be removed from rate base and revenue requirement. The Carbon decision makes it clear that "… the only reasonable reading of s. 37 [*Gas Utilities Act*] is that the assets that are 'used or required to be used' to provide service are only those used in an operational sense."[49] Given that the Additional Assets are not used or required to be used in an operational sense, the Commission considers that the Additional Assets must be removed from rate base and revenue requirement.

97. As noted above, in Decision 2011-450 the Commission commented on the requirement of ATCO Gas to remove assets which no longer had an operational purpose from rate base and revenue requirement as follows:

> 315. The Commission considers that assets that are not properly in rate base because they are no longer used or required to be used to provide utility service should not be reflected in rates in any fashion.[50]

98. The Commission also notes certain other assets not included in either the Surplus Assets or the Additional Assets which relate to the water pipeline and brine system infrastructure, which AP does not propose to remove from rate base but which do not appear to be used or required to be used to provide utility service. In response to an information request in Application No. 1605226[51] AP referred to the following assets (Related Assets):

> (f) The following assets handle water or other fluids and are connected to the Identified Salt Cavern Assets.
>
> Water Infrastructure
> Pump station, injection pumps, flow control valves, meters and distribution pipelines to the caverns at plant site. These assets were used for the original solution mining of each existing salt cavern.
>
> Brine Disposal Infrastructure
> Brine recovery pipelines from the individual caverns to the two brine disposal wells. The brine recovery pipelines were used for the original mining of each existing salt cavern.
>
> Control Fluid Infrastructure
> Control fluid pumps, pipelines from the control fluid building to the individual caverns. The control fluid infrastructure was used during the original development of each existing salt cavern.

[48] Application, pages 10-11, paragraph 45.
[49] Carbon decision, paragraph 25.
[50] Decision 2011-450, paragraph 315.
[51] AUC-AP-1, pages 215-216 of 255 (2010-2012 Revenue Requirement Settlement and Alberta System Integration Application, June 26, 2009; response to AUC-AP-4(f)).

The above noted infrastructure was used during the development of each existing salt cavern, which salt caverns remain used and useful.

99. Similar to the Additional Assets, the Related Assets also appear no longer to be used or required to be used to provide utility service because of AP's decision not to develop additional salt caverns and because it no longer intends to maintain, remine or inspect the existing caverns using its water and brine infrastructure. Accordingly, the Commission considers that the Related Assets should also be removed from rate base and revenue requirement.

100. In the Commission's view, a subdivision of the property is not required to remove the rate base value, return and operating costs associated with the Additional Assets and Related Assets from rate base and revenue requirement. A proportional amount of the book value of the land included in rate base and the book value of the non-depreciable assets can be removed from rate base and revenue requirement. AP is free then to make whatever use of the Additional Assets and Related Assets it may wish to for its own purposes. Given that it is not necessary to subdivide the property to remove the value of the Additional Assets and the Related Assets from rate base and revenue requirement, the cost of any subdivision of the property which AP may wish to pursue for its own purposes or to dispose of the property should be for the account of AP's shareholders.

101. The Commission understands that the disposal wells, water infrastructure, brine disposal infrastructure and control fluid infrastructure would include, most if not all, the assets in Account 459 (including both disposal wells) and related assets in Account 452. AP is directed to revise the rate base calculation to exclude the Surplus Assets, the Additional Assets and the Related Assets as well as all other assets in rate base that were used either for the development of the salt caverns or their maintenance or inspection using the water pipeline and brine infrastructure and which no longer have an operational purpose in a compliance application indicating the revised values of the assets to be removed from rate base and the assets remaining in rate base.

102. The Commission recognizes that should AP wish to proceed with a subdivision of the SE 34-55-21-W4M in order to dispose of the Additional Assets and the Related Assets at its shareholder's cost to AES or to another party, that the consent of the Commission would be required under Section 26(2)(d) of the *Gas Utilities Act*. The Commission hereby grants its consent to such a disposition. Accordingly, given the consent of the Commission to a disposition of the Surplus Assets, the Additional Assets and the Related Assets and the Commission's directions to remove such assets from rate base and revenue requirement, AP may elect:

- to proceed with the Surplus Asset Transaction and dispose of the Surplus Assets to AES but retain ownership of the Additional Assets and/or the Related Assets

- to dispose of the Additional Assets and/or the Related Assets in addition to the Surplus Assets, provided that the costs of any subdivision are for the account of the AP shareholder or

- elect not to proceed with a disposition of any of the Surplus Assets, the Additional Assets or the Related Assets

103. Whichever election AP may decide upon, the net book value, return and operating costs associated with each of the Surplus Assets, the Additional Assets and the Related Assets (collectively referred to as the Salt Cavern Excess Assets) shall be removed from rate base and revenue requirement in accordance with the directions of the Commission provided in Section 4.3.

4.3 Effective date of removal

104. AP submitted that the effective date of the removal of the Surplus Assets from rate base should be within 30 days following a positive decision on this application (regardless of the closing date of the Surplus Assets Transaction). To address the impact on the revenue requirement of the exclusion of the Surplus Assets, AP proposed that a deferral account be established.[52] This deferral account would be cleared by AP in accordance with the terms of the existing Negotiated Settlement, which provides for deferral accounts to be cleared annually.[53]

105. AP submitted that its proposed timing for the removal of the Surplus Assets from rate base and revenue requirement was appropriate and an earlier effective date would not be appropriate in the circumstances as it would effectively penalize AP for complying with an express direction of the Commission.[54] AP provided the following rationale for the proposed effective date:

> 41. The effective date of removal of an asset from rate base was also addressed in Decision 2009-253. The Commission determined that the proper date for removing Carbon (the facilities at issue in that decision) was the date management had decided the facilities were no longer used or required to be used, in an operational sense, to provide regulated utility services.
>
> 42. However, in this respect there is a substantial difference between Carbon and the Surplus Assets. Pursuant to Interim Order U2005-133, ATCO Gas was permitted to use Carbon for a non-utility purpose pending a further Board determination. As noted in Decision 2009-253:
>
> > 58. Carbon was not being used to provide utility services as of April 1, 2005 with the knowledge and consent of the Board as reflected by Order U2005-133 dated March 23, 2005. As reflected in paragraph 10 above, Order U2005-133 [initially an interim order] authorized the lease of the entire Carbon storage capacity to ATCO Midstream "…for the 2005/2006 storage year and for each subsequent storage year until such time as the Board may otherwise determine." [AUC Decision 2009-253, at p. 14]
>
> 43. Unlike Carbon, as noted above, AP's Surplus Assets have been and continue to be effectively "frozen" in rate base, pending further direction from the Commission. On numerous occasions, both the Commission and AP's customers prevented AP from removing the Surplus Assets from rate base, as noted in Section 3. Under specific

[52] See Attachment 7 to the application for 2011 impact.
[53] Application, paragraph 38.
[54] AP argument, paragraph 27.

> direction of the Commission, AP has been unable to remove the costs of the Surplus Assets from rate base and from the revenue requirement and has been unable to use the Surplus Assets for non-utility purposes. As such, AP submits that the effective date for the exclusion of the Surplus Assets from rate base should be within 30 days following a positive decision on this Application.[55]

106. AP submitted that since the approval of AP's 2010-2012 Revenue Requirement Settlement and Alberta System Integration Application (Decision 2010-228) on May 28, 2010, AP had been working on many aspects of the current application. The issues included changes to the development regulations for lands in the municipality of Fort Saskatchewan and the changes to Salt Cavern well set-back requirements.[56]

107. AP confirmed that no costs associated with any of the Surplus Assets would remain in AP's revenue requirement once those assets were removed from AP's rate base.

4.3.1 Views of the parties

108. The UCA expressed concern with respect to the effective date of removal of the Surplus Assets from rate base proposed by AP and asked the following information request:

> **UCA-AP-1**
> **Request**
> (a) Please confirm that AP's Management had decided the Salt Cavern Assets were not required for utility service some time earlier than October 1, 2007, the date of the 2008/09 GRA Application. If confirmed, please provide the date that AP Management decided the Salt Cavern assets were not required for utility service. If not confirmed, please fully explain.
>
> **Response**
> (a) Confirmed. AP determined that the Salt Cavern Assets were not required for utility service during the summer of 2007, during which AP's staff and consultants were preparing the Fort Saskatchewan Salt Caverns Current and Forecast Utilization Report (Attachment 5 of the Application).[57]

109. The UCA submitted that the law required that assets that serve no utility purpose should be removed from rate base at least as soon as the utility management makes the determination that no operational purpose was being served. The UCA referred to Decision 2009-253 where at paragraph 56 the Commission stated in relation to the Carbon assets:

> 56. In order to apply the guidance of the Court of Appeal to the facts of the present proceeding the Commission must consider the date when ATCO management clearly indicated that Carbon no longer had an operational purpose, was no longer used or required to be used in providing utility service and should be withdrawn from rate base and utility service. It is that date that should be the Adjustment Date for removing Carbon from regulated service and making the necessary rate adjustments.

[55] Application, paragraphs 41-43.
[56] AP argument, paragraph 25.
[57] Exhibit 15.01, UCA-AP-1(a).

110. The UCA submitted that since AP had determined that the Surplus Assets were no longer used or required to be used to provide utility service in the summer of 2007 the appropriate date for removal of the assets from rate base was September 1, 2007.

111. The UCA submitted that the law provided that customers were not entitled to either revenues earned from assets after utility management determined them to be "surplus assets" (having no valid operational purpose),[58] nor to share in any gain on the sale of such surplus assets.[59] Equally, customers should not be forced to pay for assets after AP had determined them to be surplus.

112. In reply argument, the UCA submitted that the date selected for removal of the Surplus Assets should not depend on whether the assets were earning revenue, as in the case of Carbon, or incurring costs, as appears to be the case with the salt cavern assets. If the proper date for removal was the date when ATCO management clearly indicated that the assets had no operational purpose, then that was the proper date regardless of the financial consequences. The UCA submitted that the fact that parties were not able to negotiate the disposition of the Surplus Assets in late 2009[60] as part of the Negotiated Settlement should not result in any delay in the effective date of removal.

113. The UCA further submitted that "If there is any concern regarding retroactive rate making the latest date the Surplus Salt Cavern Assets should be removed from rate base is January 1, 2010."[61] [62] The UCA submitted that there has been no ruling regarding the costs of the salt cavern assets from January 1, 2010 forward.[63]

114. The UCA argued that any costs charged to customers since the effective date determined by the Commission should be calculated and refunded to customers through the use of a rate rider.

115. AP responded to the UCA submissions by stating in reply argument:

> 20. In light of the fact that AP has repeatedly requested that the assets be removed (dating back to October 2007) but has been specifically precluded from doing so, it would be neither just nor reasonable for the Commission to adopt either of the UCA's recommended effective dates.
>
> 21. … As noted in Argument, the circumstances of the Surplus Salt Cavern Assets are markedly different from the ATCO Gas Carbon assets. In respect of Carbon, the jurisdictional review was conducted under the auspices of an Interim Order (U2005-133) with an effective date of April 2005 (although management had actually determined that

[58] *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2008 ABCA 200, at paragraph 26.
[59] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, at paragraph 69.
[60] Exhibit 25.01, AP argument, paragraph 24.
[61] Exhibit 27.02, UCA reply argument, paragraph 8.
[62] See Application No. 1605226, Proceeding ID No. 223. In response to AUC-AP-4, December 21, 2009, AP stated: "In summary, consistent with Decision 2009-253, AP requests that the Commission now confirm that the Surplus Assets are not used or required to be used for utility service and are removed from rate base effective January 1, 2010."
[63] UCA reply argument, paragraph 8. The UCA references the Commission's letter decision dated January 22, 2010 in Application No. 1605226, Proceeding ID No. 223.

> the Carbon assets served no utility purpose years prior). All subsequent rate adjustments, therefore, were made in accordance with a Commission interim rate order. Retroactivity was debated and dismissed because of the interim order. As a matter of law, no retroactivity can be said to exist where an interim order is in use. In the case of Carbon, the utility was compensated for the use of its assets by either rate base/rate of return treatment or by the retention of the revenues generated throughout the period that the utility was directed to retain the assets in utility service. Any reliance on the case law relating to Carbon must take account of the specific facts and circumstances at issue here.
>
> 22. In contrast, in the case of the Surplus Salt Cavern Assets, if the UCA's position is to prevail, then AP will neither have had the use of the assets during the time in question, nor been allowed to earn a return on them. That is contrary to just and reasonable ratemaking. It would be outright confiscation of the owner's use and enjoyment of its own property. For the reasons outlined above, it would not be an outcome dictated by the Carbon case law.
>
> 23. It is respectfully submitted that the correct approach is that for any period during which the assets were required by the Commission to remain in rate base and could not be used for any alternative purpose, AP should receive the fair return related to these assets—this is the level of compensation which is supposed to be awarded for the use of utility assets.[64]

116. AP noted that in its February 1, 2008 application, AP had sought approval to transfer the surplus assets.[65] When the Commission issued its Notice of Proceeding to review utility asset dispositions in a generic proceeding (Proceeding ID No. 20), AP sought by letter dated April 8, 2008,[66] to ensure that the proposed transfer of surplus salt cavern assets would not be unduly delayed by the complex issues being addressed in Proceeding ID No. 20. AP had noted that it had a business opportunity related to the surplus assets that might not survive a significant delay in receiving Commission approval to transfer the assets. AP submitted that as it was unable to garner any higher or better use for its assets while the assets remained regulated.

117. AP considered that its proposed removal of the assets within 30 days of a positive decision provided a reasonable window in which to complete the transaction.

4.3.2 Supplemental argument and reply argument

118. In a letter dated December 12, 2011, the Commission requested parties to submit supplemental argument and reply argument on the following matters:

> Consideration of the proper effective date for removal of the surplus Salt Cavern assets from rate base necessarily raises issues with respect to the interpretation of the case law and the jurisdiction of the Commission (EUB) in directing AP to retain the surplus Salt Cavern assets in rate base and revenue requirement after AP notified the regulator of management's decision that these assets were no longer used or required to be used in providing utility service. If the Commission and the EUB directions were *ultra vires*, as the Alberta Court of Appeal held in *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission),* 2009 ABCA 246 (Salt Caverns decision), then the impact of such a determination on the effective date for removing the identified Salt Cavern assets from

[64] AP reply argument, paragraphs 21-23.
[65] AUC-AP-1(a), Document B-1. pages 167-174 of 255.
[66] AUC-AP-1(a), Document B-2. pages 175-176 of 255.

> rate base and revenue requirement must also be considered. This possibly involves issues of the Court of Appeal's decision rendering the Commission and EUB's directions a nullity, retro-active rate making and/or compensation to the utility or to ratepayers.

119. AP confirmed in its supplemental argument its position that the effective date for removal of certain salt cavern assets should be 30 days following a positive decision on the present application. Any day prior to that time without adequate compensation for the inclusion of the salt cavern assets in rate base would "… yield an artificial, perverse result and be patently unreasonable."[67] In the alternative, AP submitted that the Commission should set rates " … that include compensation to AP for the confiscation of the use of the Surplus Assets …"[68] equal to the amounts received from ratepayers in excess of any revenues related to the assets.

120. AP submitted that "While the Commission may have been operating under a mistaken interpretation of the law in issuing its past directions to AP, it does not follow that those directions are of no legal effect"[69] and that AP "… was not at liberty to ignore the directions"[70] of the Commission.

121. AP referred to the principle of relativity with respect to the impact of void actions set out in the *Administrative Law* text by Wade and Forsyth which states:

> The order may be 'a nullity' and 'void' but these terms have no absolute sense: their meaning is relative, depending upon the court's willingness to grant relief in any particular situation.[71]

122. AP submitted that the Salt Caverns decision did not mandate going back in time to adjust rates, "Rather, it should dictate a forward looking approach."[72]

123. AP submitted that selecting an effective date as a date other than the one proposed by AP will violate the statutory requirement for the Commission to set just and reasonable rates for the period after the effective date.

124. AP further submitted that the common law principle of *quantum meruit* supported its position to retain the revenues received from customers until its proposed effective date for removal of assets from rate base. AP referred to Decision 2011-474[73] where the Commission referred to the decision of the Supreme Court of Canada in *City of Edmonton et al. v. Northwestern Utilities Ltd*[74] *(Northwestern 1961 decision).* The Supreme Court stated:

> The right of the consumers to require the respondent to supply them with gas, conferred by the statute, would, in my opinion, even in the absence of any statutory provision, impose upon them an obligation at common law to pay for the service on the basis of

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67 AP supplemental argument, paragraph 12.
68 AP supplemental argument, paragraph 40.
69 AP supplemental argument, paragraph 15.
70 AP supplemental argument, paragraph 16.
71 Sir William Wade & Christopher Forsyth, *Administrative Law*, 10th ed. (Oxford: University Press, 2009) at 253.
72 AP supplemental argument, paragraph 19.
73 Decision 2011-474: 2011 Generic Cost of Capital, Application No. 1606549, Proceeding ID. 833, December 8, 2011.
74 *City of Edmonton et al. v. Northwestern Utilities Ltd.*, [1961] S.C.R. 392.

> quantum meruit. In such circumstances, I consider that the position of the utility would be similar to that of a common carrier upon whom is imposed, as a matter of law, the duty of transporting goods tendered to him for carriage at fair and reasonable rates. (Great Western R. Co. v. Sutton (1869), L.R. 4 H.L. 226 at 237).[75]

125. In Decision 2011-474 the Commission in discussing the applicability of the common law principle of *quantum meruit* in a regulatory context stated:

> 467. As noted above, the Utilities cited the Supreme Court of Canada's decision in *Northwestern 1961* in support of their *quantum meruit* argument. In that case, the Supreme Court of Canada found that the Commission's predecessor had jurisdiction to fix just and reasonable rates, which included fixing rates to allow for transitional losses between the date of application and the date of decision. The Court concluded that, even in the absence of any statutory provision, there is an obligation at common law for ratepayers to pay for utility service on the basis of *quantum meruit* as part of the jurisdiction to ensure that tolls are at all times just and reasonable.

126. AP also submitted that to require the removal of the Surplus Assets from rate base and revenue requirement at any date earlier than the date proposed by AP without compensation would be patently unreasonable.[76] Further, the Commission should be estopped from directing AP to refund revenues it received associated with the salt cavern assets given that AP acted upon (to its detriment should a refund be directed) the directions of the Commission and retained the assets in rate base.[77]

127. AP also referred to an article[78] by the Honourable Barry L. Strayer, QC and submitted that a potential tort liability arose against a decision maker should inconsistent decision making result in a predictable harm.[79]

128. The UCA confirmed its earlier submissions that the effective date should be September 1, 2007 to reflect the timing for when AP management determined that a portion of the salt cavern assets were no longer used or required to be used to provide utility service. The UCA submitted that the direction of the EUB, dated November 6, 2007, and the direction of the Commission, dated July 30, 2008, requiring AP to retain the salt cavern assets in rate base and revenue requirement were determined to be *ultra vires* in the Salt Caverns decision. The UCA referred to the *Principles of Administrative Law* text by Jones and de Villars in submitting that the effect of the *ultra vires* determination by the Alberta Court of Appeal was to render the regulatory directions void, not voidable.[80] Accordingly, "The effective date of the removal of the Salt

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75 *Northwestern* 1961 decision at page 401.
76 AP supplemental argument, paragraph 28.
77 AP supplemental argument, paragraph 36.
78 The Honourable Barry L. Strayer, QC, *Promissory Estoppel in Public Law: Towards Consistency in Governmental Decision-Making*, Administrative Law Conference – 2005, The Continuing Education Society of British Columbia.
79 AP supplemental argument, paragraphs 37-39.
80 David Phillip Jones, Q.C. and Anne S. de Villars, Q.C., *Principles of Administrative Law*, 5th ed. (Edmonton: Carswell, 2009).

Cavern assets should be the date that the assets would have been removed from rate base if not for the *ultra vires* decisions of the Commission."[81]

129. The UCA submitted that an effective date of September 1, 2007 would not offend the principle against retroactive ratemaking because the principle "… may not be used to defeat the implementation of clear direction from the Court of Appeal."[82]

130. The UCA further submitted that the principle against retroactive ratemaking could not be offended in this case because the parties and the Commission were well aware that the salt cavern assets were in dispute as of October 1, 2007. Further, the parties to the settlement agreement for the 2008-2009 period approved in Decision 2009-033 were specifically precluded by the Commission from addressing the salt cavern issue in the settlement. Also, the 2010-2012 Negotiated Settlement approved in Decision 2010-228 established a placeholder in respect of the salt cavern assets.

131. Alternatively, the UCA suggested that the effective date for removal of the salt cavern assets should be January 1, 2010, the date that AP identified as the date for removal in an information request response filed in Application No. 1605226, Proceeding ID No. 223, the 2010-2012 Revenue Requirement Settlement and Alberta Integration application.[83]

132. In supplemental reply argument, AP addressed why the two proposed dates advocated by the UCA for removal of the Surplus Assets were not correct. AP also confirmed that compensation should be awarded to AP should the Commission choose either of the two dates proposed by the UCA or any date in advance of the decision date. With respect to the September 7, 2007 removal date, AP noted that it never applied for the Surplus Assets to be removed from rate base prior to January 1, 2008, the start of the test period for which tolls were being applied for in AP's original application filed in 2007.

133. In response to the UCA's conclusion that the November 6, 2007 letter issued by the EUB and the July 30, 2008 letter issued by the Commission were void, AP stated that the letters were still valid because they had not been specifically set aside in the Salt Caverns decision and therefore they were not void, merely voidable. No party had applied to the court to have these directions declared to be invalid.[84] AP submitted that the theory of relativity set out in the *Administrative Law* text by Wade and Forsyth, referred to above, holds that illegal decisions are treated as valid unless and until they are quashed or set aside by a court of competent jurisdiction. AP stated:

> … without the impugned directions having been specifically quashed or set aside by court order, they remain valid and binding on AP.[85]

134. AP submitted that in the period following the Carbon and Salt Caverns decisions "… the Commission's prior directions not to dispose of the Surplus Assets remained valid and binding

[81] UCA supplemental argument, paragraph 8.
[82] UCA supplemental argument, paragraph 11.
[83] Exhibit 12.02, C-2, AUC-AP-4(a).
[84] AP supplemental reply argument, paragraphs 23 and 24.
[85] AP supplemental reply argument, paragraph 15.

on AP"[86] and "… the Surplus Assets cannot be removed from rate base until such time as the Commission reaches a positive decision with respect to their removal in the present Application."[87] Accordingly, there is no basis upon which to order the removal of assets from rate base effective as of any date prior to the date of the Commission's decision in this proceeding.

135. AP also referred to the Commission's letter of January 22, 2010 which granted AP's request to deal with the salt cavern assets by way of a proceeding separate and apart from the 2010-2012 revenue requirement settlement and Alberta system integration proceeding. This letter directed AP to file a separate application to deal with the salt cavern assets. AP suggested that this direction demonstrated that the Commission "… was not prepared to accept that the Surplus Assets had no potential utility use based on the Court Decisions themselves."[88]

136. AP reemphasized that should the Commission determine the Surplus Assets not to be part of AP's rate base prior to the date of this decision, then AP must be compensated for the period of time AP did not have use of the assets in order to ensure just and reasonable rates. Further, such compensation would be consistent with the common law principle of *quantum meruit.*

137. In supplemental reply argument, the UCA submitted that the effect of the Salt Caverns and Carbon decisions was to make it clear that the EUB and the Commission did not have the authority to issue the letters dated November 6, 2007 and June 30, 2008 directing AP not to remove any of the salt cavern assets from rate base without first receiving regulatory approval. The UCA stated:

> The Surplus Assets, as assets no longer used to operate the utility, were no longer part of rate base and any decision to the contrary is, by virtue of the Court of Appeal's above-cited decisions, a nullity.[89]

138. The UCA submitted that once the Court of Appeal issued the Salt Caverns decision:

> … AP knew that it did not require the AUC's approval to remove the Surplus Assets from rate base. AP was free, indeed obligated, to withdraw the Surplus Assets from rate base as it had contemplated in its correspondence to the Commission dated July 21, 2008 as the assets no longer served any operational utility purpose.[90]

139. With respect to AP's submission that it was entitled to retain amounts collected from ratepayers on the basis of *quantum meruit*, UCA stated that the principle is inapplicable to the present circumstances. The UCA referred to the following definition of *quantum meruit*:

> 1. The reasonable value of services; damages awarded in an amount considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship. 2. A claim or right of action for the reasonable value of services rendered ...

[86] AP supplemental reply argument, paragraph 21 (emphasis in original).
[87] AP supplemental reply argument, paragraph 24.
[88] AP supplemental reply argument, paragraph 18.
[89] UCA supplemental reply argument, paragraph 6.
[90] UCA supplemental reply argument, paragraph 7.

> Quantum meruit is still used today as an equitable remedy to provide restitution for unjust enrichment ...[91]

140. The UCA submitted that there was no suggestion that consumers received any service or benefit from the Surplus Assets because the Surplus Assets served no operational utility purpose while in rate base. No utility service was provided by the Surplus Assets. Therefore, consumers can not be said to have been unjustly enriched and AP was not entitled to any restitution on that basis. The principle of *quantum meruit* did not apply.

141. The UCA further submitted that even if there was some basis to allow AP to retain amounts paid in respect of the Surplus Assets prior to the Salt Caverns decision, there was no basis for that position after the decision was issued. The UCA stated:

> AP then states that it "was denied every option presented to remove the Surplus Assets from utility service". Even if this could justify allowing AP to recover the costs associated with, and earn a fair return on, the Surplus Assets after those assets were no longer used for operational service, this reasoning cannot extend to allowing AP to recover costs and earn a return on these assets after the release of the Court of Appeal's decision in *Salt Caverns*. Once this decision was released, and as discussed above, AP knew that it was free to remove the Surplus Assets from rate base and that it did not require AUC approval to do so. To maintain the Surplus Assets in rate base at this juncture was indeed imprudent and contrary to the Court's reasoning in both *Salt Caverns* and *Carbon*.[92] (footnote omitted)

142. The UCA submitted that AP's "patently unreasonable" argument was of no assistance to the Commission in determining the issue before them. "Patently unreasonable" had been abandoned as a standard of review per the Supreme Court of Canada's decision in *Dunsmuir* v. *New Brunwick.*[93] The UCA also disagreed with AP's reference to the doctrine of promissory estoppel. The UCA stated that this was not a case where the Commission would be reversing itself. Rather the Commission was responding to the guidance provided by the Court of Appeal in the Carbon and Salt Caverns decisions.

143. The UCA viewed AP's comments that it should be entitled to tort damages if the effective date for the removal of the assets was one other than as proposed by AP, as contrary to the Section 69 of the *Alberta Utilities Commission Act* which states that no action lies against the Commission for anything done, or purported to be done, in good faith.

4.3.3 Commission findings

Ultra vires - nullity

144. The Commission considers that that July 1, 2009 should be the effective date for the removal of the Salt Cavern Excess Assets from rate base and revenue requirement. In reaching this conclusion the Commission considered the submissions of the parties, the guidance provided

[91] Black's Law Dictionary, 9th ed., s.v. "quantum meruit."
[92] UCA supplemental reply argument, paragraph 13.
[93] 2008 SCC 9. See also David Phillip Jones, Q.C. and Anne S. de Villars, Q.C., *Principles of Administrative Law*, 5th ed. (Edmonton: Carswell, 2009), at page 507.

by the Alberta Court of Appeal in the Carbon and Salt Caverns decisions and the circumstances pertaining to each of the 2008-2009 test period and the 2010-2012 test period.

145. The Alberta Court of Appeal made it clear in the Carbon decision and the Salt Caverns decision that the Commission has no jurisdiction to include in rate base assets that are not used or required to be used to provide utility service in an operational context. In the Salt Caverns decision the court stated:

> In any event, to the extent to which the answers to the legal issues raised in the first and second questions on which leave was granted are not premature, they are largely resolved by this Court's recent decision in "***Carbon***" where the Court held that the Board had no jurisdiction to include in rate base, assets which were not being used or required to be used in providing service to the public, in an operational context.[94]

146. In the Salt Caverns decision, the court ruled that ceasing to use an asset for utility purposes involves the traditional criteria for what is in the rate base, and does not require a Section 26 *Gas Utilities Act* application. The Salt Caverns decision clarified that the regulators' actions were *ultra vires* in issuing the November 6, 2007 and the June 30, 2008 directions which required AP to retain all salt cavern assets in rate base until the Commission approved a Section 26 *Gas Utilities Act* application. Although the court did not expressly declare the regulators' directions to be invalid, the clear holding of the court was to overturn them. The court found that, in the absence of a disposition, a utility did not have to obtain the consent of the Commission under Section 26 of the *Gas Utilities Act* prior to removing an asset from utility service if the utility's management had determined that the asset is no longer used, nor useful, nor needed for its regulated utility business. Accordingly, as of June 30, 2009, the date of the Salt Caverns decision, AP was entitled to unilaterally withdraw the portion of the salt cavern assets from utility service which management had previously determined was no longer used or required to be used to provide utility service.

147. When the findings of the Court of Appeal in the Carbon and Salt Caverns decisions are considered together it is apparent that the Salt Cavern Excess Assets did not belong in rate base subsequent to AP's determination that the assets were no longer used or required to be used to provide utility service and that AP had the ability to unilaterally remove the Salt Cavern Excess Assets from utility service as of July 1, 2009. The Commission considers that it was incumbent upon AP to have acted immediately upon the issuance of the Salt Caverns decision to unilaterally remove from utility service the portion of the salt cavern assets that were not used or required to be used to provide utility service and to notify the Commission that it would apply for approval to make the required adjustments to rate base, revenue requirement and rates effective as of July 1, 2009. Before the Commission can consider the implications of this finding, however, it must first review the nature of the rate approvals in effect at the time of and granted after the date of the Salt Caverns decision.

148. The 2008 and 2009 revenue requirements were approved by the Commission in Decision 2009-033 issued March 18, 2009. Decision 2009-033 approved AP rates for the 2008-2009 test period. A placeholder was not established in respect of the salt cavern assets and there was no interim aspect of the decision, which distinguishes the facts from those before the

[94] Salt Caverns decision, paragraph 14.

court in the Carbon decision. As a result, any order of the Commission requiring an adjustment to amounts collected from ratepayers prior to the end of 2009 in light of the above finding raises questions with respect to whether Decision 2009-033 was *ultra vires* insofar as it related to the salt cavern assets and whether a rate adjustment would offend the rule against retroactive ratemaking.

149. With respect to the 2010-2012 test period, the portion of revenue requirement relating to the salt cavern assets was established as a placeholder pursuant to the Negotiated Settlement approved in Decision 2010-228. Pursuant to the Negotiated Settlement, the Identified Salt Cavern Assets would remain in AP's rate base as a placeholder pending resolution of the issue with any required adjustment to revenue requirement to be dealt with by way of a deferral account.[95] Accordingly, Decision 2010-228 cannot be challenged on the basis that it is *ultra vires* as it may relate to the salt cavern assets and no issues arise with respect to retroactive ratemaking.

150. The Commission has reviewed the submissions of the parties with respect to the effect of an *ultra vires* administrative order and retroactive ratemaking. While it is clear that the actions of the EUB and the Commission in issuing the directions of November 6, 2007 and July 30, 2008 were *ultra vires*, the Commission must determine if the findings of the Alberta Court of Appeal in the Carbon decision and the Salt Caverns decision would by implication, require the Commission to retroactively overturn rates that had been approved on a final basis in a decision that was not specifically before the court for consideration. The Court did not provide any express direction in this regard. This is perhaps due to the court's mistaken belief that the salt cavern assets had been withdrawn from rate base as part of a negotiated settlement with customers.[96]

151. The Commission has considered the authorities referred to by the parties and related authorities for further guidance on this issue. In *Anisminic Ltd v Foreign Compensation Commission*, [1969] 2 AC 147 (Anisminic decision) Lord Reid stated:

> But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account.[97]

152. The Anisminic decision would suggest that a tribunal's decision based on a matter which it had no right to take into account is a nullity. It also appears that the distinction between

[95] Clause 1 of the Negotiated Settlement attached as Appendix 2 to Decision 2010-228.
[96] Salt Caverns decision, paragraph 9.
[97] Anisminic decision, page 171.

decisions that are void and decisions that are merely voidable no longer applies.[98] Jones and de Villars comment in *Principles of Administrative Law* that:

> In principle, all *ultra vires* administrative actions are void, not voidable, and there are not degrees of invalidity.[99]

153. After a review of the parties' submissions and relevant authorities, it is clear that the actions taken by the board and by the Commission in directing AP to maintain the salt cavern assets in rate base were *ultra vires* as determined in the Salt Caverns decision and therefore a nullity. As the inclusion of the Identified Salt Cavern Assets in rate base for the 2008 and 2009 test years was a direct result of these *ultra vires* directions, the Commission did not have the jurisdiction to include the Identified Salt Cavern Assets in the 2008 and 2009 rate base. Therefore, Decision 2009-033 must also be considered as *ultra vires* and a nullity to the extent that it included the unused salt cavern assets in rate base and revenue requirement because of and pursuant to, the *ultra vires* directions of the regulator. The rule against retroactive ratemaking can not apply when the order which finalized the rates was premised on directions given by the Commission that were subsequently determined to be *ultra vires* and therefore a nullity. Accordingly, the Commission must direct an accounting for the revenue requirement attributable to the salt cavern assets improperly included in rate base and revenue requirement for the 2008 and 2009 test years unless there is a compelling principle to the contrary.

Quantum meruit

154. AP argues that establishing the effective date as any date prior to 30 days after this decision will deny it the opportunity to have received either the benefit of the use of the assets for its own purposes or compensation for the use of the assets as a regulated asset. AP suggests that the common law principle of *quantum meruit* should apply to provide AP with compensation equal to the amounts collected from ratepayers in excess of any revenues related to the assets.

155. The UCA submitted that *quantum meruit* can not apply to the Surplus Assets because ratepayers can not be said to have received a benefit or any form of service from assets that were included in rate base and revenue requirement but which had no operational purpose.

156. As noted in the Northwestern 1961 decision, even in the absence of any statutory provision, there is an obligation at common law for ratepayers to pay for utility service on the basis of *quantum meruit* which the Commission can determine as part of its jurisdiction to ensure that tolls are at all times just and reasonable.

157. AP submitted that: "AP had no choice but to comply with a binding order of its regulator."[100] AP, however, did have the ability to unilaterally withdraw unused salt cavern assets from utility service after the release of the Salt Caverns decision. The Commission agrees with the UCA when it stated with respect to the Salt Caverns decision: "Once this decision was

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98 *London & Clydeside Estates Limited v Aberdeen DC*, [1980] 1 WLR 182 and *Boddington v. British Transport Police*, [1999] 2 AC 143, [1998] 2 All ER 203.

99 David Phillip Jones, Q.C. and Anne S. de Villars, Q.C., *Principles of Administrative Law*, 5th ed. (Edmonton: Carswell, 2009) at page 149.

100 AP supplemental argument, paragraph 22.

released, … AP knew that it was free to remove the Surplus Assets from rate base and that it did not require AUC approval to do so."[101]

158. While it is clear that AP was of the view that Identified Salt Cavern Assets served no utility operational purpose and that no utility service was actually provided by these assets, it is also clear that these assets were included in rate base and revenue requirement for the 2008 and 2009 test years only because of the explicit directions from the EUB and the Commission over the objection of AP. Until the release of the Salt Caverns decision on June 30, 2009, AP did not have the ability to unilaterally remove any of the salt cavern assets from regulated service. The Commission also notes that customers participating in the relevant proceedings did not support a unilateral withdrawal by AP of the Identified Salt Cavern assets. Accordingly, customers must have perceived there to be a benefit of retaining the assets in rate base rather than supporting a unilateral withdrawal by AP.[102]

159. The fact that AP chose not to exercise its right to unilaterally withdrawn the unused salt cavern assets from regulated utility service after the release of the Salt Caverns decision on June 30, 2009 and instead proceeded to enter into settlement negotiations with ratepayers with respect to the 2010-2012 revenue requirements with Commission approval should not result in ratepayers having to pay the costs associated with assets that are not used or required to be used to provide utility service. Further, the lack of benefit or compensation for the assets after June 30, 2009 either from private use or from customer rates is irrelevant given that AP had previously determined that there was no need for the assets to be in utility service but elected not to immediately withdraw the assets from regulated service as they were entitled to do following the release of the Salt Caverns decision.

160. In light of the above circumstances, the Commission considers that the principle of *quantum meruit* should apply with respect to the period January 1, 2008 to June 30, 2009. Given that AP had the ability to unilaterally remove the Salt Cavern assets from regulated utility service after June 30, 2009, a claim for *quantum meruit* after that date must fail.

161. For the above reasons the Commission considers that Salt Cavern Excess Assets should have been excluded from utility service, rate base, revenue requirement and rates from and after July 1, 2009 and directs AP to refund to customers all amounts collected through rates associated with the Salt Cavern Excess Assets from and after July 1, 2009. The amount of the refund and mechanics of the refund shall be addressed in a compliance filing to this decision. The Commission further directs that the 2010-2012 revenue requirement placeholders relating to the salt cavern assets shall be finalized through a compliance filing to this decision by excluding all amounts associated with the Salt Cavern Excess Assets.

[101] UCA supplemental reply argument, paragraph 13.
[102] See for example the January 21, 2010 correspondence of the City of Calgary referenced at paragraph 19 of AP's supplemental reply argument. The Commission also notes the failure of parties to the negotiated settlement approved in Decision 2010-228 to agree on the terms for removal of the Identified Salt Cavern Assets.

5 Order

162. It is hereby ordered that:

(1) ATCO Pipelines is directed to submit a compliance filing in accordance with paragraph 161 of this decision on or before April 20, 2012.

Dated on March 16, 2012.

The Alberta Utilities Commission

(original signed by)

Carolyn Dahl Rees
Vice-Chair

(original signed by)

Moin A. Yahya
Commission Member

(original signed by)

Kay Holgate
Commission Member

Appendix 1 – Proceeding participants

Name of organization (abbreviation) counsel or representative
ATCO Pipelines (AP) ATCO Gas and Pipelines Ltd. (AGPL) CU Inc. (CUI) Canadian Utilities Limited (CUL) N. Gretener J. Burnett S. Mah E. Jansen D. Dunlop B. Jones A. Jukov
ATCO Gas M. Bayley V. Porter
Canadian Association of Petroleum Producers (CAPP) L. Stevenson
NOVA Gas Transmission Ltd. (NGTL) C. Shaw
Office of the Utilities Consumer Advocate (UCA) T. Marriott R. Daw R. Bell

The Alberta Utilities Commission Commission Panel C. Dahl Rees, Vice-Chair M. A. Yahya, Commission Member K. Holgate, Commission Member Commission Staff B. McNulty (Commission counsel) R. Armstrong, P.Eng. M. McJannet A. Laroiya

Appendix 2 – Summary of Commission directions

This section is provided for the convenience of readers. In the event of any difference between the directions in this section and those in the main body of the decision, the wording in the main body of the decision shall prevail.

1. Although the Commission has relied on AP's submission that the water supply and access to it is not required for the foreseeable future in making its determinations herein, AP has offered to contractually arrange for AP to have access to a water supply, if required, and the Commission considers this to be a prudent precaution. The Commission directs AP to include such an arrangement for access to an interruptible water supply in the Surplus Assets Transaction and to ensure the arrangement survives any future sale by the affiliate. Any such arrangement should be provided on a cost of service basis. ..... Paragraph 76
2. The Commission directs AP to file when and if executed, a copy of all common right-of-way and road access and joint use agreements and a copy of all water supply and access agreements entered into with AES. ..... Paragraph 77
3. The Commission understands that the disposal wells, water infrastructure, brine disposal infrastructure and control fluid infrastructure would include, most if not all, the assets in Account 459 (including both disposal wells) and related assets in Account 452. AP is directed to revise the rate base calculation to exclude the Surplus Assets, the Additional Assets and the Related Assets as well as all other assets in rate base that were used either for the development of the salt caverns or their maintenance or inspection using the water pipeline and brine infrastructure and which no longer have an operational purpose in a compliance application indicating the revised values of the assets to be removed from rate base and the assets remaining in rate base. ..... Paragraph 101
4. Whichever election AP may decide upon, the net book value, return and operating costs associated with each of the Surplus Assets, the Additional Assets and the Related Assets (collectively referred to as the Salt Cavern Excess Assets) shall be removed from rate base and revenue requirement in accordance with the directions of the Commission provided in Section 4.3. ..... Paragraph 103
5. For the above reasons the Commission considers that Salt Cavern Excess Assets should have been excluded from utility service, rate base, revenue requirement and rates from and after July 1, 2009 and directs AP to refund to customers all amounts collected through rates associated with the Salt Cavern Excess Assets from and after July 1, 2009. The amount of the refund and mechanics of the refund shall be addressed in a compliance filing to this decision. The Commission further directs that the 2010-2012 revenue requirement placeholders relating to the salt cavern assets shall be finalized through a compliance filing to this decision by excluding all amounts associated with the Salt Cavern Excess Assets. ..... Paragraph 161

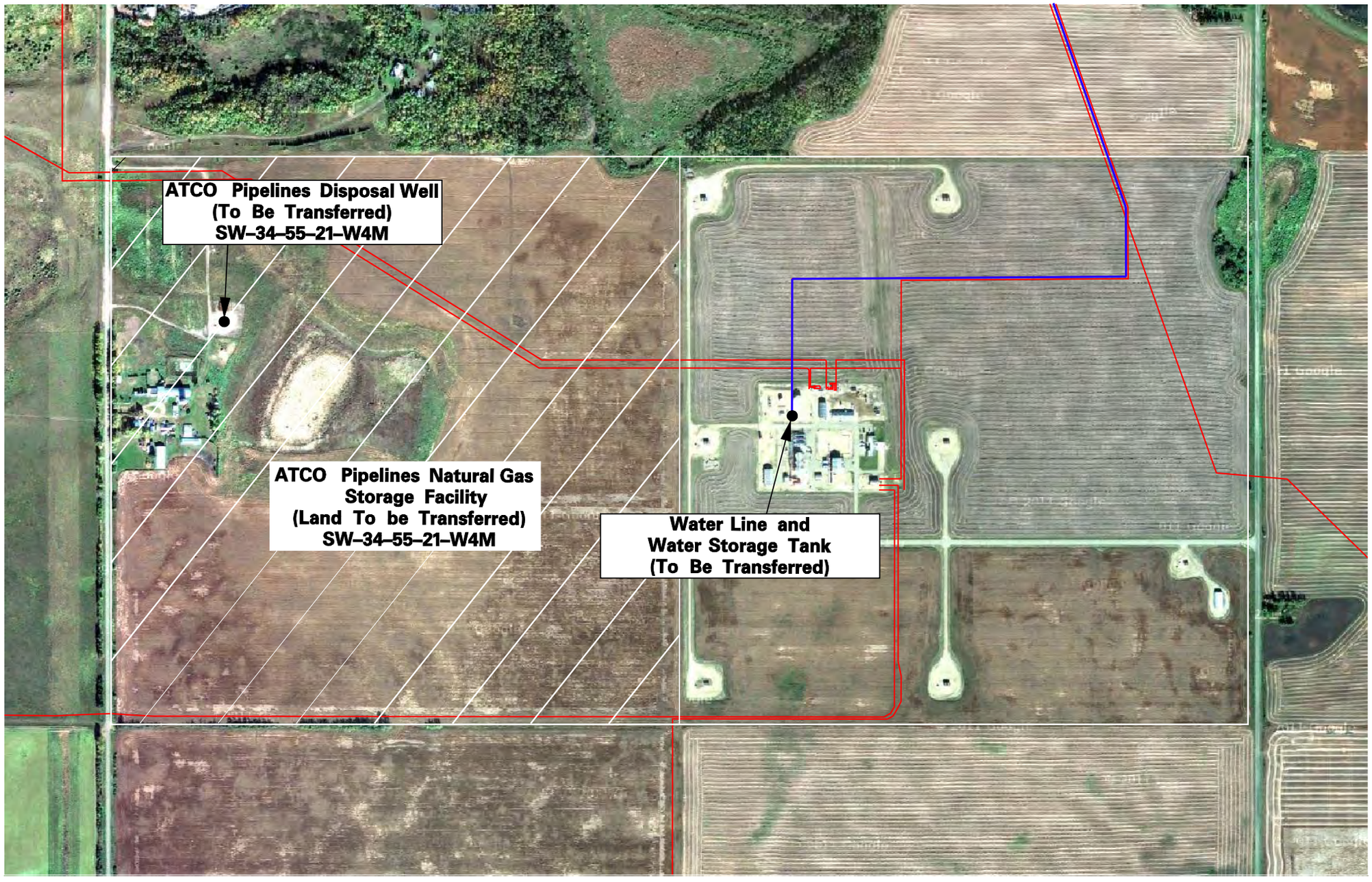
Appendix 3 – Application, Attachments 1 to 4

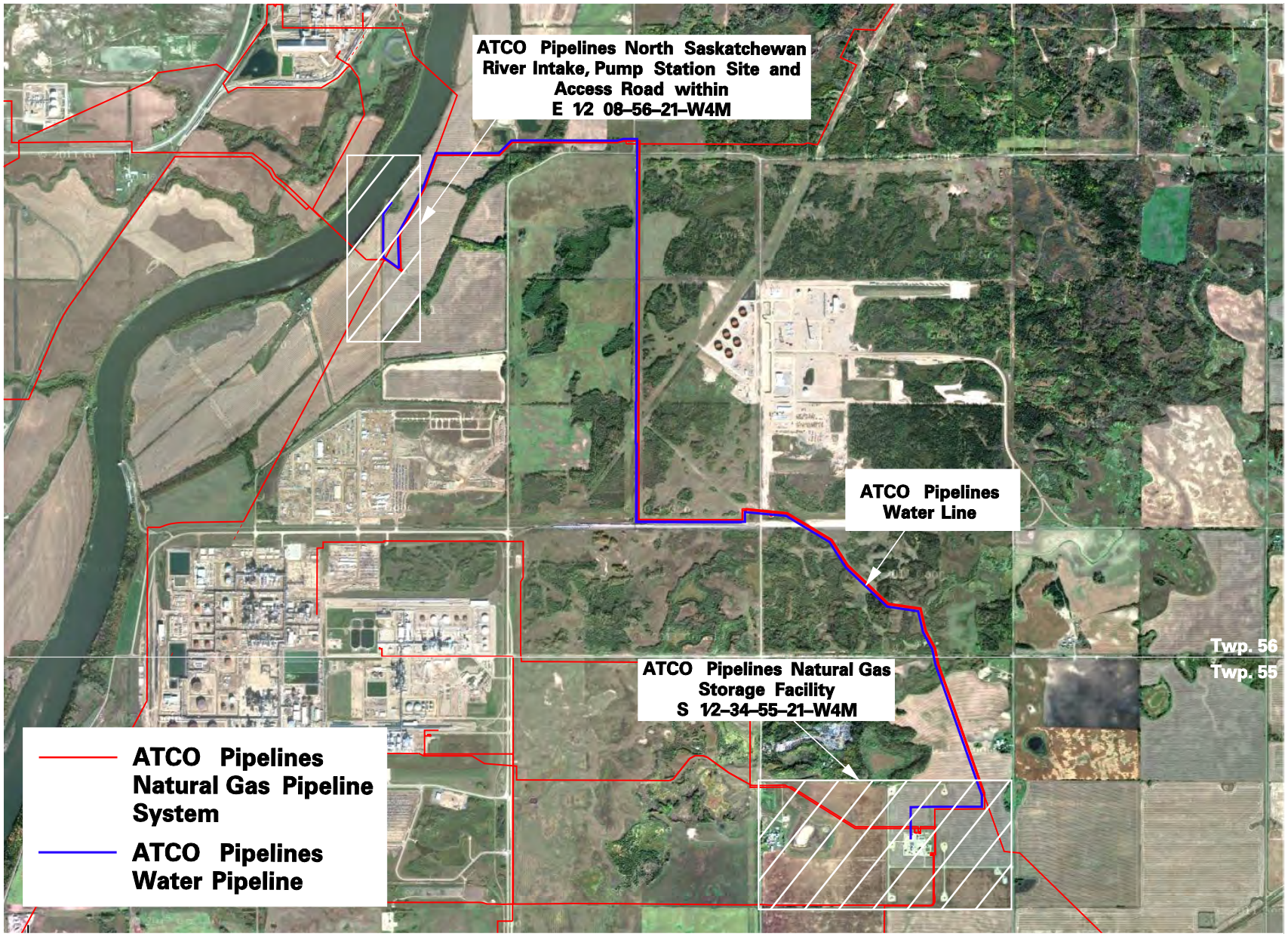
(return to text)

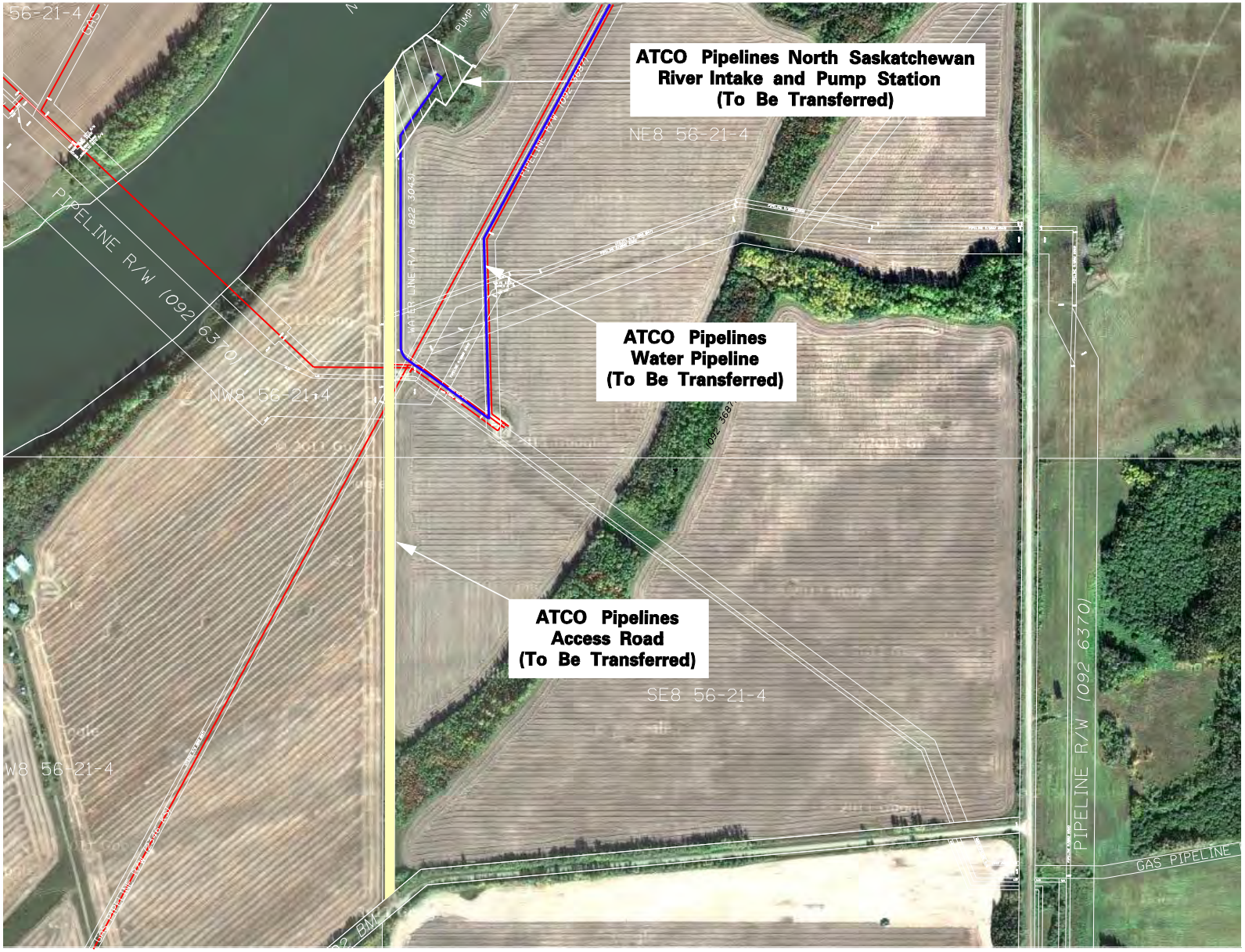
Appendix 3 -
Application Attachmer

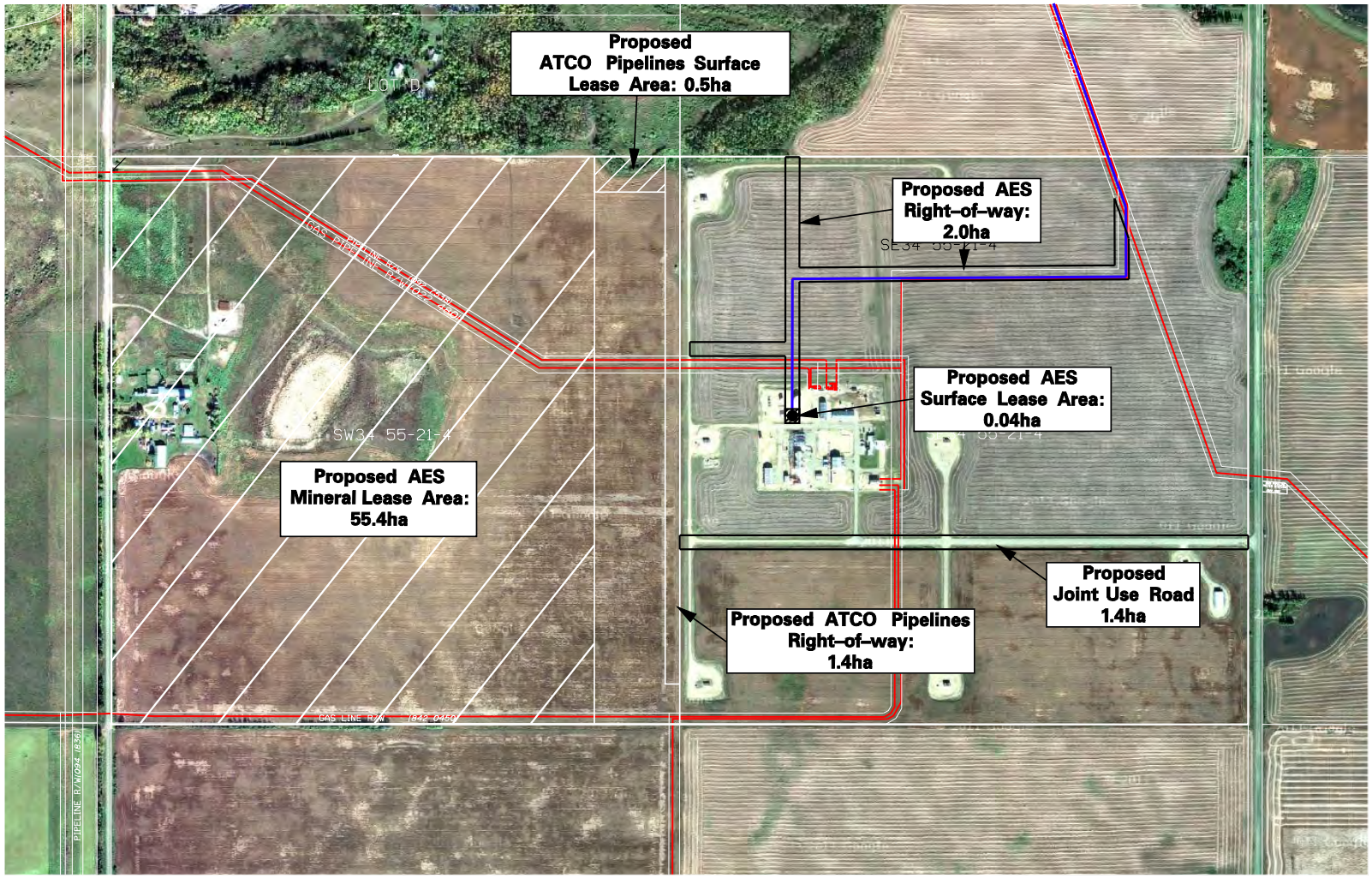
(consists of 4 pages)

Joint Application of AP, CUI and CUL
To Dispose of Fort Saskatchewan Surplus Assets
Attachment 1 – Salt Cavern Lands
Page 1 of 1




ATCO Pipelines North Saskatchewan River Intake, Pump Station Site and Access Road within E 1/2 08–56–21–W4M
ATCO Pipelines Water Line
ATCO Pipelines Natural Gas Storage Facility S 1/2–34–55–21–W4M
Twp. 56
Twp. 55
ATCO Pipelines Natural Gas Pipeline System
ATCO Pipelines Water Pipeline


ATCO Pipelines North Saskatchewan River Intake and Pump Station (To Be Transferred)
ATCO Pipelines Water Pipeline (To Be Transferred)
ATCO Pipelines Access Road (To Be Transferred)
NE8 56-21-4
NW8 56-21-4
SE8 56-21-4
W8 56-21-4
PIPELINE R/W (092 6370)
GAS PIPELINE


Proposed
ATCO Pipelines Surface
Lease Area: 0.5ha
Proposed AES
Right-of-way:
2.0ha
Proposed AES
Surface Lease Area:
0.04ha
Proposed AES
Mineral Lease Area:
55.4ha
Proposed
Joint Use Road
1.4ha
Proposed ATCO Pipelines
Right-of-way:
1.4ha
LOT D
SW34 55-21-4
SE34 55-21-4
GAS LINE R/W