ATCO Gas
(A Division of ATCO Gas and Pipelines Ltd.)

Decision on Request for Review and Variance of AUC Decision 2011-450 2011-2012 General Rate Application Phase I

June 08, 2012

The Alberta Utilities Commission
Decision 2012-156: ATCO Gas (a Division of ATCO Gas and Pipelines Ltd.)
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Application No. 1608121
Proceeding ID No.1698

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1 Introduction and background

1. On February 3, 2012, pursuant to Section 10 of the *Alberta Utilities Commission Act* and Alberta Utilities Commission (AUC or Commission) Rule 016: *Review and Variance of Commission Decisions* (Rule 016), ATCO Gas (AG), a division of ATCO Gas and Pipelines Ltd. (AGPL), filed a review and variance application (R&V application) regarding AUC Decision 2011-450.[1]

2. ATCO Gas submitted that the AUC committed errors of fact, law and/or jurisdiction in relation to various issues in Decision 2011-450 which raise substantial doubt as to the correctness of Decision 2011-450 pursuant to Section 12(a)(i) of Rule 016. AG also submitted that there are new facts, changes in circumstances and/or facts not previously placed in evidence for various issues that could reasonably lead the AUC to materially vary or rescind Decision 2011-450 pursuant to Section 12(a)(ii) of Rule 016.

3. In this decision, the Commission panel that provided its findings in Decision 2011-450 regarding AG's 2011-2012 general rate application is referred to as the "hearing panel" and the Commission panel that considered the R&V application is referred to as the "review panel".

4. The review panel established a process schedule requiring interested parties to submit comments on the R&V application by February 22, 2012 and for AG to reply to those submissions by March 7, 2012. On February 7, 2012, AG requested that the Commission extend the deadline for filings by both interested parties and AG by one week. On February 14, 2012, the review panel granted AG's request and established February 29, 2012 as the date for interested parties to response to the R&V application and March 14, 2012 as the date for AG to reply to those submissions.

5. Submissions were received from AltaGas Utilities Inc. (AltaGas), the Consumers' Coalition of Alberta (CCA), the City of Calgary (Calgary), and the Office of the Utilities Consumer Advocate (UCA).

6. The review panel considers the close of the record of the proceeding to be March 14, 2012.

[1] 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.

7. To summarize, AG submitted that the hearing panel committed errors of fact and errors of law and/or jurisdiction in relation to the following issues in Decision 2011-450, which raise a substantial doubt as to the correctness of Decision 2011-450:

- with respect to AG's Demand Side Management (DSM) projects and AG's Edmonton Blue Flame Kitchen (Edmonton BFK), the hearing panel failed to provide reasonable notice to reduce costs for previously approved service and service levels;

- with respect to AG's Customer Information System (CIS) Enhancements, head office advertising costs and Oracle Human Resource Management System (HRX or HRMS), the hearing panel disallowed these costs in a manner inconsistent with approvals of identical programs in closely related regulatory decisions issued to AG, as well as other utilities, such as ATCO Electric Ltd. (ATCO Electric or AE);

- with respect to the integration of NOVA Gas Transmission Ltd. (NGTL) and ATCO Pipelines (AP), the hearing panel denied forecast costs for participation in National Energy Board (NEB) NGTL hearings without providing notice of any concerns it may have regarding the forecast costs. There are also new facts that have arisen since the close of the record for the proceeding for Decision 2011-450 which reinforce AG's position that it should participate in these hearings and therefore warrant a detailed review of this decision. As well, the hearing panel denied AG's request to establish a deferral account which is inconsistent with regulatory decisions issued to AP;

- the hearing panel denied AG the ability to recover the settlement amount for the late payment penalty (LPP). The hearing panel's decision is fraught with errors of fact and AG had no notice and no opportunity to respond to the basis for the hearing panel's disallowance, which was not based on the evidence;

- with no factual basis the hearing panel denied AG's request for a deferral account for its Calgary office lease. As well, Decision 2011-450 set the lease rate at $14.50 based on what AG was paying in 2009 which was incorrect as AG was paying $16.00 in 2009; and

- the hearing panel denied recovery of prudently incurred production abandonment costs associated with assets that were fully consumed in the provision of utility service (commencing January 1, 2011) and as a result, these costs are now stranded.

2 Test for review application

8. The Commission's authority to review a decision is found in Section 10 of the *Alberta Utilities Commission Act*. Rule 016 establishes the procedures and tests to be applied on a review application. Section 11 of Rule 016 requires the Commission to consider whether the impugned decision shall be reviewed as requested.

9. Section 12(i) of Rule 016 provides that in the case where the applicant has alleged an error of law or jurisdiction or an error of fact, the Commission shall grant an application for review if the Commission determines that in its opinion the applicant has raised a substantial doubt as to the correctness of the decision.

10. In accordance with Section 12(a)(ii) of Rule 016, the Commission shall grant an application for review:

> [I]f the Commission determines that, in the case where the applicant has alleged new facts, a change in circumstances or facts not previous place in evidence, in the Commission's opinion, the applicant has raised a reasonable possibility that new facts, a change in circumstances or facts not previously placed in evidence as the evidence was not known, as the case may be, could lead the Commission to materially vary or rescind the decision.

11. Pursuant to Section 13 of Rule 016, if this threshold or preliminary test for granting the application for review is met, the Commission is to hold a new hearing or other proceeding in accordance with its rules of practice.

12. In reaching the determinations contained within this decision, the review panel 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 review panel's reasoning relating to a particular matter and should not be taken as an indication that it did not consider all relevant portions of the record with respect to that matter.

3 Failure to provide reasonable notice of termination of existing approved services and service levels

13. In its R&V application, AG submitted that with respect to its existing DSM programs and the Edmonton BFK, the costs of providing these services have consistently been approved for inclusion in AG's rates up until Decision 2011-450. However, in Decision 2011-450, the hearing panel decided that AG could not recover any of the costs incurred for its existing DSM programs and the Edmonton BFK retroactive to January 1, 2011. AG argued that the hearing panel did not provide any notice to allow AG a reasonable opportunity to adjust and respond to the significant change in approved services levels, the hearing panel denied AG the ability to recover the prudent costs of approved services contrary to Section 4(3) of the *Roles, Relationships and Responsibilities Regulation*, and denied AG a reasonable opportunity to earn its allowed return contrary to Section 37 of the *Gas Utilities Act*. By failing to provide AG with notice of its intention to reduce approved service levels, the hearing panel breached rules of procedural fairness and natural justice, as well as Section 4 of the *Administrative Procedures and Jurisdiction Act* and Section 9(2) of the *Alberta Utilities Commission Act*.[2]

14. AG stated that it is reasonable for a utility to continue to fund existing services at existing service levels given that those costs were previously approved by the regulator. It is unreasonable for the regulator to change the rules half way through the test period without providing sufficient notice to the utility when the utility has already incurred the costs and provided the services.[3] AG submitted that fairness requires the Commission to provide it with a reasonable period of time to terminate services or to reduce its service levels and mitigate its costs.[4]

[2] R&V Application at paragraphs 4-7.
[3] Exhibit 10, ATCO Gas Reply at paragraphs 11and 13.
[4] Exhibit 10, ATCO Gas Reply at paragraph 33.

15. AG submitted that as part of their duty to ensure fair process tribunals must provide notice of their intention to do something which might affect the applicant. In support of this proposition, AG cited *Flamborough (Town) v. Canada (National Energy Board)*.[5] According to *Flamborough*, the applicant is entitled to know the case it must meet and this requirement is also incorporated in the legislation under Section 4(b) of the *Administrative Procedures and Jurisdiction Act*. AG argued that given both the case law and the legislative framework:

> There is a clear duty of fairness imposed on the Commission to ensure that applicants know the case to be met and have an opportunity to respond. In order to satisfy this duty, the intervenors and the AUC must provide notice of its intention. The *Flamborough* case has direct application. [...] [T]he case stands for the proposition that there is a positive duty of fairness on the regulator to provide applicants with its intention (so that the applicant has an ability to know the case and respond). An Applicant cannot discharge its burden of proof if it does not know the case it must meet.[6]

16. AG submitted that the duty of fairness requires parties to have an opportunity to test evidence, lead rebuttal evidence and so forth to address submissions that are adverse to their positions. AG was unaware until the argument phase of the proceeding that interveners had an issue with the costs of its existing DSM costs and the Edmonton BFK. Therefore there was no opportunity for AG to address in evidence and through cross-examination the existing DSM costs and the Edmonton BFK.[7]

3.1 Views of the Parties regarding Demand Side Management Projects (DSM) and Edmonton Blue Flame Kitchen (BFK)

17. In its response, Calgary submitted that interveners provided AG with full and adequate notice, particularly during the course of cross examination and argument, that there were concerns about whether AG's DSM programs constituted services under Section 4(3) of the *Roles, Relationships and Responsibilities Regulation*. Calgary also submitted that "for any capital investment made in a non test-year, the recovery of costs are at risk in future periods for all costs (capital and operating) from any associated activities and services connected with the investment, should those expenditures and the investment be subsequently disapproved or reduced on the basis of the Commission's findings of imprudence."[8]

18. The UCA stated that the issue of DSM and AG's role pursuant to the *Roles, Relationships and Responsibilities Regulation* was argued in detail during the proceeding for Decision 2011-450. In Decision 2011-450, the Commission found that DSM did not fall under the costs considered in sections 4(1) and 4(3) of the *Roles, Relationships and Responsibilities Regulation*. As well, the Commission found that AG's DSM programs are neither used nor required to be used to provide service and therefore the capital costs associated with DSM programs did not belong in rate base. AG is consequently not entitled to recover the costs associated with DSM pursuant to Section 4(3) of the *Roles, Relationships and Responsibilities Regulation* nor is it

[5] [1987] FCJ No. 460 (*Flamborough*)
[6] Exhibit 10, ATCO Gas Reply at paragraph 21.
[7] Exhibit 10, ATCO Gas Reply at paragraph 27.
[8] Exhibit 7.01, City of Calgary Response Submission at pages 4-5.

entitled to earn a return on costs associated with DSM pursuant to Section 37 of the *Gas Utilities Act;* therefore there is no reviewable error.[9]

19. The UCA also submitted that the Commission is not bound to provide any notice of its intention with respect to a particular finding. AG had ample opportunity to submit relevant evidence with respect to its DSM programs, unlike in *Flamborough* whereby the applicant was given no opportunity to provide evidence or input. As the applicant, AG bears the burden of satisfying the Commission that its forecast expenditures for the test period are prudent and required for the provision of utility service. Further, irrespective of the position taken by interveners during a proceeding, determinations as to what properly belongs in rate base and as part of a utility's revenue requirement remains to be determined by the Commission.[10]

20. In its response to the Edmonton BFK costs, the UCA relied on its comments with respect to DSM and stated that the same apply to the Edmonton BFK. Specifically, in a general rate application, the utility has the obligation to satisfy the Commission that its expenditures were prudent and required for the provision of utility service. No specific notice that costs may be scrutinized or disallowed is required and it is inaccurate for AG to argue that it had no notice that these costs may be denied given that the UCA submitted evidence and argument on the Edmonton BFK and its interpretation of the *Roles, Relationships and Responsibilities Regulation*.[11]

3.2 Decision 2011-450 regarding DSM and Edmonton BFK

21. With respect to DSM costs, in Decision 2011-450 the hearing panel stated:

> The evidence on the record with respect to DSM focused on whether the proposed programs fell within the legislative scope of a gas distributor and issues of general public policy and societal considerations including energy conservation, climate change, renewable energy, the development of government policy, customer preferences, the coordination of DSM efforts, the efficient delivery of DSM programs, practices in other jurisdictions, and the availability of certain services in the competitive market.
>
> The Commission must first determine if the requested DSM projects fall within the scope of the Commission's jurisdiction under the relevant legislation. If the Commission determines these projects are within the scope of its jurisdiction to approve, it will proceed to assess the reasonableness of the forecast DSM costs for the purposes of determining just and reasonable rates.
>
> [...]
>
> [...] The consequence of the interpretation placed on the definitions of the statute and Section 4(1) of the *Roles, Relationships and Responsibilities Regulation* by the Commission is that the costs associated with AG's DSM programs, both existing and proposed are not properly included within the regulated rates of a gas distributor and should be removed entirely from rate base, revenue requirement and rates. The

[9] Exhibit 5.02, UCA Response Submission at paragraphs 12, 14 and 15.
[10] Exhibit 5.02 at paragraphs 17-19.
[11] Exhibit 05.02, UCA Response Submission at paragraphs 27-28.

Commission finds the consequences of the interpretation placed on the wording of the above provisions to be reasonable.

The Commission has also considered the arguments of AG with respect to prior decisions of the EUB and the Commission and is not persuaded by these submissions. If the legislative scheme does not provide for DSM activities to be carried out by a gas distributor, that is sufficient to conclude that DSM activities would not result in just and reasonable rates and should be denied.

The Commission denies AG's request to include in revenue requirement for the test years all costs associated with current and proposed DSM activities. The Commission directs that all DSM related costs, both capital and operating, be removed from rate base and revenue requirement for the test years. The Commission further directs that the DSM capital expenditures incurred during the period 2008 to 2010 are to be excluded from opening rate base.[12]

22. With respect to Edmonton BFK costs, in Decision 2011-450 the hearing panel stated:

AG primarily supports the inclusion of BFK costs as one method of communicating with customers to deliver safety and energy efficiency messages. Another justification for the BFK is the ability to communicate with customers regarding DSM.

The Commission has considered the responsibilities of gas distributors as set out in the *Roles, Relationships and Responsibilities Regulation*. The role of a gas distributor in providing services relating to energy efficiency and DSM will be examined relative to Section 4(1)(b) of the *Roles, Relationships, and Responsibilities Regulation* in the following section on DSM.

With respect to the distribution of safety information, Section 4(1)(k) provides that a gas distributor must distribute public safety information. The BFK distributes safety information and provides education with respect to the gas distribution system. In order to determine if the costs associated with the public safety and gas distribution information aspects of the BFK are reasonable and should be included in customer rates, the Commission will consider the applied for costs and the alternatives available to perform these functions.

Although the Commission notes the AG data and statistics on the use of the BFK in Calgary and Edmonton, the Commission is not persuaded that the operation of the BFK program is a cost effective means to communicate distribution service information or natural gas safety information.

AG explained that it spends $50,000 per year on "cross-promotion of safety messages" through the BFK while the forecast for the test period for the BFK is $2 million per year. The Commission considers that BFK provides a disproportionate amount of costs for the safety and gas distribution service communication benefits received. Further, AG is the only Canadian distribution utility that has a facility like the BFK Calgary Learning Centre. The Commission is not persuaded that the Edmonton BFK is required in light of the limited benefit that customers receive

[12] Decision 2011-450 at paragraphs 662-663 and 684-686.

> through safety and gas distribution communication through the BFK. The Commission finds that the BFK is not a cost effective means of proving public safety communication. Further, AG has other options to meet its responsibility to distribute public safety information. For the preceding reasons, AG is directed to remove all Edmonton BFK costs from 2011 opening rate base and from revenue requirement for the test years, including both capital and O&M related costs. For the same reasons the request to include in revenue requirement costs associated with the Calgary BFK is denied.
>
> The Commission does, however, continue to support the expenditure of $50,000 per year on safety messaging that the BFK has provided in the past. AG may add this expenditure to its Customer Relations and Communications forecast for the test years. AG is directed to advise the Commission in the compliance filing to this decision as to the mechanism it will use to promote natural gas safety matters and gas distribution education information to customers.[13]

3.3 Commission findings

23. AG did not seek a review of the hearing panel's analysis as it related to proposed DSM and BFK costs, but rather took issue with the treatment of what it termed as "existing approved services and service levels." In its response to parties' submissions, AG confirmed that it only sought to review and vary the hearing panel's findings in regard to the existing DSM programs, not the expanded/new DSM programs that were proposed in the context of its application. Similarly, AG confirmed that it was only seeking to review and vary the hearing panel's findings in regard to the Edmonton Blue Flame Kitchen, not the Calgary Blue Flame Kitchen.[14]

24. AG argued that the hearing panel did not provide any notice to allow AG a reasonable opportunity to adjust and respond to the significant change in approved services levels, and that it is unreasonable for the regulator to change the rules half way through the test period without providing sufficient notice to the utility when the utility has already incurred the costs and provided the services. The review panel's understanding of AG's submissions is that AG did not dispute the Commission's authority to set AG's revenue requirement for the applied-for test period, but rather questioned the fairness of disallowing costs with respect to existing DSM programs and Edmonton Blue Flame Kitchen.

25. As noted above, AG submitted that "there is a clear duty of fairness imposed on the Commission to ensure that the applicants know the case to be met and have an opportunity to respond." AG cited Section 4 from the *Administrative Procedures and Jurisdiction Act* and Section 9(2) from the *Alberta Utilities Commission Act* in support of its position. As well, AG cited the decision in *Flamborough*, dealing with circumstances in which a tribunal imposed conditions (which were not applied for) upon an applicant, without having allowed the applicant to comment on those conditions during the course of the proceeding.

26. Section 4 of the *Administrative Procedures and Jurisdiction Act* states:

[13] Decision 2011-450 at paragraphs 606- 611.
[14] Exhibit 10, ATCO Gas Reply at paragraph 9.

Evidence and representations

4 Before an authority, in the exercise of a statutory power, refuses the application of or makes a decision or order adversely affecting the rights of a party, the authority

(a) shall give the party a reasonable opportunity of furnishing relevant evidence to the authority,

(b) shall inform the party of the facts in its possession or the allegations made to it contrary to the interests of the party in sufficient detail

(i) to permit the party to understand the facts or allegations, and

(ii) to afford the party a reasonable opportunity to furnish relevant evidence to contradict or explain the facts or allegations,

and

(c) shall give the party an adequate opportunity of making representations by way of argument to the authority.

27. Section 9(2) of the *Alberta Utilities Commission Act* states:

9(2) If it appears to the Commission that its decision or order on an application may directly and adversely affect the rights of a person, the Commission shall

(a) give notice of the application in accordance with the Commission rules,

(b) give the person a reasonable opportunity of learning the facts bearing on the application as presented to the Commission by the applicant and other parties to the application, and

(c) hold a hearing.

28. With regard to knowing the "case to be met", in the case of a general rate application, the review panel considers that the applicant itself establishes the case to be met based on the relief sought. This is in keeping with the statutory onus placed on the gas utility to show that the costs applied for or relief requested result in just and reasonable rates. The applicant is in possession of all the relevant information required to support its case and chooses what to file as evidence in support of its general rate application, as well as when to file it.

29. The review panel considers that this is AG's statutory obligation and the provisions of the *Administrative Procedures and Jurisdiction Act* and the *Alberta Utilities Commission Act* and the common law rules of procedural fairness do not serve to shift that burden. In particular, the review panel considers that none of the *Administrative Procedures and Jurisdiction Act*, the *Alberta Utilities Commission Act* nor the common law rules of procedural fairness require the Commission to advise a party that it will be making a finding adverse to that party's interest, where the party has put the matter at issue by filing an application and requesting the Commission's approval, and has had an opportunity to furnish evidence and argument in relation to that matter. The review panel notes that AG raised this concept (that the Commission must provide reasonable notice of its intentions) throughout its R&V Application. Rather than reiterate its views on this assertion throughout this decision, the review panel confirms that these comments apply in each instance where it has been raised by AG.

30. Regarding existing DSM costs, the review panel has examined the record of the proceeding leading to Decision 2011-450. The review panel considers that the examination that took place during the oral hearing by the Commission and other parties which questioned the legislative basis for AG's DSM program provided fair notice to all parties of what was at stake. The content of the questions asked, particularly by Commission counsel, was a clear indication that the statutory foundation for all of AG's DSM costs was at issue; for example, at transcript volume 43, page 427, at lines 16-18, Commission counsel asked AG's panel: "[w]hat do you draw from the fact that the legislature saw fit to specifically require a gas distributor to disseminate safety information but did not deal with energy conservation or climate change?"

31. The review panel has also examined the record as it relates to Edmonton BFK costs. In an interrogatory directed to AG on the topic of "Blue Flame Kitchen",[15] the Commission posed the following questions in AUC-AG-81:

> (…)
> (d) Is ATCO Gas aware of any other gas distribution utility that uses similar programs? If yes, please provide details.
> (e) Please provide quantifiable benefits to ratepayers that have resulted from the Blue Flame Kitchen.
> (f) Please explain how the Blue Flame Kitchen is an asset required by AG to provide utility service (distribution) to customers. Please identify all labour resources and positions that go towards operating the Blue Flame Kitchen (emphasis added)

AG responded in some detail to AUC-AG-81, and in response to (f), stated:

> A key component of utility service (distribution) to customers is providing the service safely. The Blue Flame Kitchen is a key element of an integrated strategy to promote awareness of ATCO Gas and natural gas safety issues. This is discussed fully on pages 4.2-20 to 4.2-30.
>
> The establishment of a physical presence in the south service territory with the development of the Calgary Learning Centre was required to increase the profile of the BFK in the south. The goal of the Learning Centre is increasing the distribution of energy safety and conservation messaging by connecting directly with actively engaged audiences through programming for the public, education (Schools Programs) and community outreach activities.[16] (…)

32. The review panel considers that the Commission's information request put at issue the matter of how existing and proposed BFK costs were supported. Further, although the UCA first put forth its position in argument that Edmonton BFK should be denied (citing Commission Counsel's questioning of Ms. Radway and the reasons outlined in respect of why ATCO Gas' other DSM programs should be disallowed),[17] AG had the opportunity to respond to the UCA in reply argument. AG focused its reply argument on the fact that the UCA had filed no evidence that customers are prepared to accept a reduction in service levels (in BFK) and that the UCA's

[15] Exhibit 0078.01.AUC-969, AUC-AG-81
[16] Exhibit 0084.01.ATCO UTL-969, AG response to AUC-AG-81, pages 7-8.
[17] Exhibit 0200.UCA-969, UCA Argument, paragraph 239.

argument was inconsistent with its evidence and should be given no weight, but AG did not address the reasoning set out in the UCA's argument.[18]

33. In *Flamborough*, the NEB imposed conditions (which were not applied for) upon an applicant, without allowing the applicant to comment on those conditions during the course of the proceeding. That situation is distinguishable from the present case where AG filed its application seeking approval of costs associated with DSM and BFK and the Commission's authority to award those costs was put at issue during the proceeding.

34. Further, in the R&V application, AG did not expressly contest the hearing panel's findings that the costs associated with AG's DSM programs and BFK (other than costs related to the provision of safety-related communication in Edmonton BFK) are not properly included within the regulated rates of a gas distributor.

35. For these reasons, the review panel finds that there was neither an error of law or jurisdiction nor an error of fact with respect to the findings in Decision 2011-450 regarding the existing DSM costs and the Edmonton BFK costs, and denies AG's request for a review and variance in relation to the hearing panel's findings on the existing DSM costs and the Edmonton BFK costs.

4 Denial of costs previously approved in related decisions

36. AG submitted that it had a legitimate expectation that AUC approval of similar or identical program costs shared with other utilities would be similarly approved for AG, barring a compelling reason. AG referred specifically to the costs disallowed for Customer Information System enhancements, head office advertising costs and the Oracle Human Resource Management System.

37. AG stated:

> The doctrine of "legitimate expectation" is an aspect of procedural fairness, and establishes an entitlement to a fair process. No such compelling reason was identified or brought forward in the proceeding. Nor was AG provided with any indication or notice that it could not rely on approval of similar or identical program costs for other utilities, so that AG could meaningfully respond. By failing to provide notice that its prior approval of the similar or identical costs could not be relied upon, as before, the AUC deprived AG of procedural fairness.[19]

38. AG went on to say that in Decision 2011-450, the hearing panel arrived at numerous conclusions that are entirely inconsistent with previous regulatory decisions issued to AG, and inconsistent with recent regulatory decisions respecting similar or identical programs issued for other related utilities, such as, ATCO Electric. In Decision 2011-450, AG argued, the hearing panel did not provide any rationale as to why similar or identical costs were not approved for AG although they have recently been approved for sister utilities. The hearing panel committed an

[18] Exhibit 0218.01.ATCO UTL-969, AG Reply Argument, paragraphs 184-186.
[19] R&V Application at paragraph 9.

error of law or jurisdiction via its failure to consider past decisions, thereby rendering an arbitrary and patently unreasonable decision.[20]

39. The UCA responded to this ground, stating that the doctrine of legitimate expectation does not create a substantive right outside of the procedural domain; the doctrine does not extend to guaranteeing a particular result to AG simply because another utility was given a similar result in a different proceeding.[21] The UCA cited the Court of Appeal's decision in *Kelly v. Alberta (Energy Resources Conservation Board*)[22], wherein the Court stated "[t]he existence of apparently conflicting decisions by the tribunal on a particular subject does not itself warrant judicial intervention, unless the particular decision under review is unreasonable."

40. Calgary also responded generally to this ground stating that the doctrine of legitimate expectation applies to process and procedure only, and not a substantive right to an outcome on the merits. Calgary also stated that AG's argument regarding the doctrine of legitimate expectation places a reverse burden on parties to provide compelling evidence why a previously approved cost for one utility should not be approved on the same basis for another utility, which is contrary to Section 44(3) of the *Gas Utilities Act*.[23]

4.1 Customer Information System enhancements

4.1.1 Views of the parties

41. With respect to Customer Information System enhancements, AG submitted that the hearing panel denied all costs on the basis that there was a lack of support filed in the application. AG asserted that it filed an additional IR response on the Customer Information System enhancements (AUC-AG-43(b)) which was the same information that had been filed in previous proceedings where approval was granted. As well, ATCO Electric provided similar information for Customer Information System enhancements in its GRA and these costs were approved.

4.1.2 Decision 2011-450 regarding Customer Information System enhancements

42. In Decision 2011-450, the hearing panel stated:

> Decision 2001-96 requires that all major capital projects should include a detailed justification including demand, energy and supply information, a breakdown of project costs, the options considered and their economics, and a discussion of the need for the project. The Commission continues to consider that these requirements are still in effect for the analysis of utility business cases.
>
> […]
>
> AG has forecast costs for the general CIS enhancement program of $1 million in 2011 and $0.6 million in 2012. This program and the related benefits are not clearly described. The Commission finds the explanation in paragraph 129 of the application

[20] Exhibit 10.01, AG Reply Submission at paragraphs 56-57.
[21] Exhibit 5.02, UCA Response Submission at paragraphs 30-31.
[22] 2012 ABCA 19
[23] Exhibit 7.01 at page 6.

> does not justify the requested capital expenditure for this project. Therefore, the Commission denies this proposed enhancement and directs that related costs be removed from the revenue requirement in the compliance filing to this decision.[24]

4.1.3 Commission findings

43. AG indicated in its response to intervener submissions that it saw the doctrine of legitimate expectation as an aspect of procedural fairness and an entitlement to fair process.[25] AG stated that "the utility must know the case it must meet in order to discharge it"[26] and that it was not provided with "notice that it could not rely on approval of similar or identical program costs for other utilities."[27]

44. The review panel concurs with the parties' submissions that the doctrine of legitimate expectation as interpreted in Canadian law affords procedural rights in cases where past *procedural* practice was clear, unambiguous and unequivocal. In *Moreau-Bérubé v. New Brunswick (Judicial Council)*, the Supreme Court of Canada stated the following regarding the doctrine of legitimate expectation:

> The doctrine can give rise to a right to make representations, a right to be consulted or perhaps, if circumstances require, more extensive procedural rights. But it does not fetter the discretion of a statutory decision-maker in order to mandate any particular result (…).[28]

45. In this instance, although it does not make the argument explicitly, AG appears to be arguing that it should have been afforded more extensive procedural rights - such as notice that it could not rely on other approvals - because other utilities have received Commission approval of similar costs.

46. The review panel does not agree that the circumstances of AG's application warrant such an extension of procedural rights. AG is a highly sophisticated party and aware that the concept of *stare decisis* does not apply to the Commission's decisions and that different outcomes are possible because every panel bases its decision on the record before it.

47. AG is also aware that it has the burden of proof under the provisions of the *Gas Utilities Act* to show that any requested relief is just and reasonable. AG has full control over what evidence it chooses to provide throughout the process to support its application and its burden of proof. The review panel notes that AG raised this concept of legitimate expectation throughout its R&V Application. Rather than reiterate this finding throughout this decision, the Commission confirms that this finding applies in each instance where AG has raised this issue.

48. Notwithstanding its finding on AG's submissions regarding the doctrine of legitimate expectation, with respect to Customer Information System enhancements, the review panel considers it is unclear whether the hearing panel considered AG's response to AUC-AG-43(b) in

[24] Decision 2011-450 at paragraphs 434 and 443.
[25] Exhibit 10.01, AG Reply Submission, paragraph 43.
[26] Ibid.
[27] Exhibit 10.01, AG Reply Submission, paragraph 44.
[28] *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249 (available on QL), at para 78.

coming to its conclusion that "paragraph 129 of the application does not justify the requested capital expenditure for this project." Given that AG's response to AUC-AG-43(b) could be relevant to the matter at issue, the review panel considers that this raises an error of law and a substantial doubt has been raised as to the correctness of the decision. Therefore, the review panel grants a review of the decision to deny AG's Customer Information System enhancement forecast costs.

4.2 Head Office Advertising Costs

4.2.1 Views of the parties

49. With respect to head office advertising costs, AG submitted that in Decision 2011-134, ATCO Electric received approval for all of its head office costs. AG's forecasts were based on the identical total head office cost forecast for ATCO Electric, however, in Decision 2011-450, the hearing panel denied AG its head office advertising costs without any explanation of the different circumstances between AG and ATCO Electric.

4.2.2 Decision 2011-450 regarding Head Office Advertising Costs

50. In Decision 2011-450 the hearing panel stated:

> The Commission relies on the approval of the corporate cost allocation methodology in Decision 2010-447 for 2011. The Commission has reviewed the corporate costs in Table 42, Administrative expense and notes that actual costs for 2008, 2009 and 2010 exceeded forecasts. However, for 2008 an explanation of the variance is provided. The Commission accepts AG's explanation and considers that the increase, which was with respect to HRX, would be a recurring cost. A comparison of actual 2008 costs to forecast 2011 costs is an increase of 10.5 per cent over a three-year period. The Commission considers an increase of approximately 3.5 per cent per year to be reasonable. However, the Commission agrees that the $73,000 for 2011 and $75,000 for 2012 of allocated corporate advertising, as noted above by the UCA, should not have been included in the corporate costs and directs that this amount should be removed.
>
> The Commission is satisfied that except as noted above for advertising, AG's forecast corporate office costs for 2011 are reasonable. The Commission notes that the same costs formed part of the 2011 revenue requirement for ATCO Electric in Decision 2011-134.[29]

4.2.3 Commission findings

51. As noted above, AG argued that ATCO Electric received approval for all of its head office costs in Decision 2011-134 and that it was unreasonable for the hearing panel to deny AG its head office costs for advertising in Decision 2011-450 without any explanation of the different circumstances of AG or at all. As discussed above in Section 4.1.3, the review panel is not persuaded by AG's argument that because similar costs were approved in an ATCO Electric proceeding they should be approved for AG.

[29] Decision 2011-450 at paragraphs 780 and 781.

52. The review panel has reviewed the proceeding for Decision 2011-134 and notes that the issue of head office advertising costs was not raised by any party in that proceeding. In the proceeding leading to Decision 2011-450, the UCA specifically raised this issue, arguing that advertising costs should not be included in the head office costs because ratepayers should not be responsible for these costs. Specifically, the UCA stated the following in its general evidence with respect to head office advertising costs:

> There is no explanation of how customers benefit from any of the advertising conducted by ATCO or CU. Advertising in utilities is usually for safety or customer education. There is no evidence that the advertising costs allocated from ATCO are only for safety or customer education. As such, the advertising costs should not be collected from customers.[30]

53. AG had the opportunity to respond to the UCA but took the position that in light of the Commission's approval for the very same head office costs for ATCO Electric, and the immateriality of the increases in these costs in 2011, the costs should be approved as forecast.

54. AG did not respond to the UCA's submission that head office advertising costs should not be collected from customers, but rather focused on the fact that ATCO Electric received approval for the very same head office costs. In its rebuttal evidence, AG stated:

> ATCO Gas notes that these services and their related costs are not new and relate to services that have been included and previously tested and approved in the quantum of Corporate Office costs, most recently in Decisions 2011-134 as discussed above. Second, ATCO Gas notes that it has excluded amounts from its Corporate Office cost forecast related to amounts that the Commission has previously determined are not to be included in those costs, consistent with what ATCO Electric did in its recent 2011/2012 GTA proceeding. Finally, ATCO Gas notes that these matters will also be addressed in the 2012 ATCO Utilities Corporate Cost Allocation Methodology proceeding that has been established by the Commission.[31]

55. In argument, AG confirmed that it had nothing further to add to this issue as it was addressed in AG's rebuttal evidence and no cross-examination occurred on this matter.[32]

56. The hearing panel agreed with the UCA and denied these costs. The review panel considers that the reasoning by which the hearing panel determined that head office advertising costs should be denied was warranted based on that panel's assessment of the UCA's evidence; specifically, that customers should not pay for advertising that includes items such as Calgary Flames, North of 60, and Spruce Meadows.[33] AG did not dispute this reasoning during the course of the proceeding that led to Decision 2011-450 or in its R&V Application.

[30] Proceeding ID 969, Ex. 110.07, UCA General Evidence at page 89.
[31] Proceeding ID 969, Ex. 163.01, AG Rebuttal Evidence at paragraph 264.
[32] Proceeding ID 969, Ex. 203.01, AG Argument at paragraph 199.
[33] Decision 2011-450 at paragraph 778.

57. Furthermore, on June 4, 2011, ATCO Utilities[34] filed its 2012 Corporate Cost Allocation Methodology Application. The review panel agrees with AG that, with respect to 2012, these matters will also be addressed in that proceeding.

58. On this basis, the review panel finds that there was neither an error of law or jurisdiction nor an error of fact in the findings in Decision 2011-450 on this matter and denies AG's request for a review of the related findings.

4.3 Oracle Human Resource Management System

4.3.1 Views of the parties

59. With respect to Oracle Human Resource Management System, AG submitted that the hearing panel reduced AG's costs even though ATCO Electric's GTA decision approved similar costs in full. Further, ATCO Electric's Oracle Human Resource Management System business case was filed late in the GRA process, on June 2, 2011, in response to Calgary's questioning. Due to this timing, AG was not provided any opportunity to place the business case into context. AG submitted that it was unaware that the Commission intended to rely on the business case.

4.3.2 Decision 2011-450 regarding Oracle Human Resource Management System

60. In Decision 2011-450 the hearing panel stated:

> AG's evidence indicated that its existing HR related systems were in excess of 20 years old and they were built on aging technology which would require significant upgrades to meet ongoing business needs. The Commission accepts that AG's HR legacy systems did not have the capability to accommodate its ongoing business requirements. The Commission also accepts that Oracle HRX is an appropriate replacement program as noted by AG in its business case. The increased functionality and business benefits have been sufficiently supported by the HRX business case. The Commission also accepts that the Oracle HRX system is an enterprise system that AG uses to interface with a number of other programs.
>
> […]
>
> Calgary submitted based on the report of its IT consultant that as the TMS [Town Management System] program was four times more expensive than the IT consultant recommended, that the HRX program cost was likely four times more expensive and should be reduced to $3.8 million.
>
> The Commission has replicated Calgary's forecast of HRX based on the business case provided in the ATCO Electric proceeding adjusted for staff counts and estimates a forecast project cost of $9.6 million. The Commission notes AG's comment that the AE business case was four years old but finds that the business case was dated May 2008, the year in which the project commenced. The Commission considers the AE business case is the best information on the record regarding the forecast cost of HRX.

[34] ATCO Utilities is comprised of ATCO Gas and ATCO Pipelines (divisions of ATCO Gas and Pipelines Ltd.) and ATCO Electric Ltd.

> The Commission finds the actual cost of $15.1 million to be in excess of these three cost estimates. The Commission also recognizes that the estimates undertaken are imprecise and accordingly relies on them as directional guidance. The Commission has reviewed the business cases of ATCO Electric and AG and other evidence on the record and determines that a 10 per cent cost reduction in the actual costs of HRX is warranted. The Commission directs AG in its compliance filing to reduce the actual cost of HRX in its opening rate base by 10 per cent.[35]

4.3.3 Commission findings

61. As noted above, AG argued that it had not been provided any opportunity to place the AE business case into context.[36] Further, in its response to intervener submissions, AG argued that the hearing panel did not provide adequate reasons for its decision to reduce Oracle Human Resource Management System costs by 10 per cent, and that the hearing panel had not provided any rationale as to why it was denying costs that AE had been allowed. AG submitted that the hearing panel's decision was therefore arbitrary and patently unreasonable.[37]

62. As discussed above in Section 4.1.3, the review panel is not persuaded by AG's argument that it relied on the fact that similar costs were approved in an AE proceeding and so apparently chose not to more fully support its request. AG's onus is not affected by what happens in another application and decision of the Commission.

63. The review panel has reviewed the transcript from the proceeding that led to Decision 2011-450 and notes that AG placed the AE business case on the record of the proceeding in response to cross examination by counsel for Calgary:

> MR. SMITH: Mr. Chairman, members, I was asked by counsel for the City of Calgary to file as document arising from Exhibit 196. What had happened was Mr. Schmidt had been asked to take subject to check a number, a cost number, for the ATCO Electric 2007/2008 GTA HRX business case, and when he went back and checked he identified it, I think an updated business case, and the number was different than what had been put to him so he corrected that.
>
> What Mr. -- or, sorry, counsel for the City of Calgary has requested is that we put the updated business case on the record. That's fine, we would do that. So we would ask to reserve an exhibit number. And he has indicated that they have no intention of seeking to cross-examine on this. They just need it for completeness of the record.
>
> If that's acceptable, sir.
>
> THE CHAIR: So the updated business case will be marked when filed as Exhibit 197?
>
> MR. SMITH: Correct.[38]

[35] Decision 2011-450 at paragraphs 381 and 384-386.
[36] Exhibit 10.01, AG Reply Submission, paragraph 56.
[37] Exhibit 10.01, AG Reply Submission, paragraphs 52-53.
[38] Transcript, Vol. 8 at page 01749.

64. In particular, it appears that the AE business case was filed because counsel for Calgary questioned the AG witness panel regarding costs associated with the ATCO Electric's Oracle Human Resource Management System business case in its 2007-2008 general tariff application and AG's witness had responded, but subject to check.[39] The business case was filed by AG to correct that evidence.

65. The review panel notes that the AE business case was filed after cross-examination of the AG panel was completed and that Calgary explicitly indicated that it did not intend to cross examine on the AE business case. In addition, although the business case was not central to Calgary's argument, the Commission relied on it to make its determination. The review panel considers these facts suggest that AG did not have a reason or the opportunity to place the business case into context (for example, by addressing its relevance or weight in argument or reply argument) and raises a substantial doubt as to the correctness of the decision. Therefore, the review panel grants a review of the hearing panel's determination on AG's Oracle Human Resource Management System costs.

5 NGTL/AP Integration Matters

5.1 Views of the parties

66. AG submitted that the hearing panel's determination in Decision 2011-450 to deny AG's ability to recover $300,000 in forecast costs for participation in NEB NGTL hearings on the basis that AG provided no supporting rationale should be reviewed. The statement "no supporting rationale" is an error of fact given that in information response AUC-AG-83, AG provided detailed information as to the complexities of NGTL rate design and the reason why AG should participate in NGTL proceedings after integration.[40]

67. AG submitted that the hearing panel provided no advance notice of any concerns it may have and acted contrary to the rules of procedural fairness and natural justice and contravened sections 4, 5 and 7 of the *Administrative Procedures and Jurisdiction Act* and Section 9(2) of the *Alberta Utilities Commission Act.* As well, new facts have arisen at the NEB RH-003-2011 proceeding that reinforces AG's rationale about the adverse impacts on AG customers.[41]

68. AG also submitted that the hearing panel's denial to establish a deferral account for NGTL/AP integration related costs should be reviewed. Because the AUC established a deferral account for the benefits and costs associated with the entire integration process which concludes with the asset swap transaction, the hearing panel did not provide any rationale on why the approval of AP's deferral account should not apply to AG since both utilities are directly affected by that process. The hearing panel did, however, approve for inclusion in revenue requirement only those integration-related costs that it has incurred to date in the Compliance Filing, but not for future costs relating to the balance of the integration process. This finding in Decision 2011-450 is contrary to Section 7 of the *Administrative Procedures and Jurisdiction Act*, Section 9(2) of the *Alberta Utilities Commission Act* and contrary to the rules of procedural

[39] Transcript Vol. 4 at pages 658-659.
[40] R&V Application at paragraphs 12-13.
[41] R&V Application at paragraph 14.

fairness since AG had no advance notice of any concerns or objections to which it might respond.[42]

69. Additionally, there have been further delays in the completion of the asset swap until the end of 2013 which were not known at the time of the GRA hearing. This new fact renders the time limitation placed on AG's ability to recover integration related costs unreasonable.[43]

70. In its response submission, Calgary stated that prior approval to another utility of an item does not discharge AG's statutory onus to prove that rates are just and reasonable in a current proceeding. As well, further delays in the completion of the asset swap is no reason why the Commission could not have made a reasoned assessment, based upon the record before it, to limit recovery of integration-related costs to a prescribed date. Therefore, Calgary submitted that AG has not raised a substantial doubt as to the correctness of Decision 2011-450 in this regard.

5.2 Decision 2011-450 regarding NGTL/AP Integration Matters

71. In Decision 2011-450, the hearing panel made the following findings regarding AG's forecast costs of $150,000 in 2011 and 2012 relating to the potential requirement for AG to participate in NGTL proceedings with the NEB:

> The Commission has not been persuaded that the $150,000 forecast costs in each of the test years for potential involvement in hearings before the NEB relating to integration are justified because no supporting rationale was provided. The Commission is satisfied that the balance of AG's forecast costs for its audit, legal and consulting fees is reasonable based on AG's explanation that it is an average of its previous three-year costs. AG's forecast with regard to legal and consulting expenses is approved, subject to the above reduction. [44]

72. Regarding AG's request for a short term deferral account to capture the potential impacts related to the integration of AP and NGTL, the hearing panel stated the following at paragraph 1040:

> The Commission does not consider that the proposed deferral account satisfies the materiality factor criterion for the establishment of a new deferral account and accordingly denies AG's request. However, the Commission is sensitive to the concerns raised by AG with respect to possible unknown costs of integration and the difficulty of forecasting these costs prior to integration occurring. Contract integration between ATCO Pipelines and NGTL occurred October 1, 2011. While the Commission denies the requested deferral account, the Commission will permit AG in the compliance filing to this decision to identify any additional specific costs that AG has incurred due to integration and to include a request for approval of such costs in revenue requirement.

[42] R&V Application at paragraphs 16-17.
[43] R&V Application at paragraph 18.
[44] Decision 2011-450 at paragraph 813.

5.3 Commission findings

73. The review panel considers that it is unclear whether AG's response to AUC-AG-83 was considered by the hearing panel when it came to its conclusion that "no rationale was provided" in support of AG's request to recover $300,000 in forecast costs for participation in NEB/NGTL hearings. In Paragraph 811, immediately prior to the findings in paragraph 813, the hearing panel cited Exhibit 83.01 (AG's response to UCA-AG-85(a)) which specifically refers the reader to AUC-AG-83.

74. However, the hearing panel's subsequent finding that "no rationale was provided" does not address any of the items raised in AG's response to AUC-AG-83, namely, the complexities of NGTL rate design, AG's lack of familiarity with NGTL rate design, and the "additional cost risks associated with the export deliveries and costs on the TransCanada Mainline that may have an effect on costs incurred by Alberta customers". Because AG's response to AUC-AG-83 may be relevant to the matter at issue, the review panel considers that this raises an error of law and a substantial doubt has been raised as to the correctness of the decision. The review panel grants a review of the decision to deny AG's request to recover $300,000 in forecast costs for participation in NEB NGTL hearings.

75. As noted above, in Decision 2011-450 the hearing panel denied AG's request for a deferral account to capture the potential impacts related to the integration of ATCO Pipelines and NGTL. The hearing panel found that the requested deferral account did not meet the materiality threshold criterion for the establishment of a new deferral account. AG was provided the opportunity to "identify any additional specific costs that AG has incurred due to integration and to include a request for approval of such costs in revenue requirement" in its compliance filing.

76. In the R&V application AG did not dispute the hearing panel's assessment that the proposed deferral account did not satisfy the materiality factor criterion for new deferral accounts but took issue with the fact that a deferral account was approved for AP but not for AG. AG also argued that it had no advance notice of any concerns or objections by the Commission.

77. Further to the discussion above in Section 4.1.3, the review panel considers that the fact that a deferral account was approved for AP, in a different proceeding and based on the evidence heard therein, has no bearing on the validity or reasonability of the hearing panel's finding based on the record before it. This is particularly the case because AP's deferral account was approved in the context of the Commission's assessment of AP's negotiated settlement, and not a litigated general rate application such as AG's.

78. The review panel has previously discussed above (Section 3.3) its views on AG's argument that notice should be given to a party before the Commission makes its finding on a matter that the party has explicitly put at issue by seeking an approval for it.

79. AG submitted that there have been further delays in the completion of the asset swap until the end of 2013 which were not known at the time of the GRA hearing and that this new fact renders the time limitation placed on AG's ability to recover integration related costs unreasonable. The review panel notes that AG's application covered the test period of 2011-2012 and so costs outside of that test period (specifically 2013) should have no bearing on the validity of the hearing panel's decision. Further, in the R&V application, AG has made no submission

suggesting that the new fact of the delay means that AG might now meet the materiality threshold. Therefore the review panel cannot determine that AG has raised a reasonable possibility that this new fact could lead the review panel to materially vary or rescind the hearing panel's decision.

80. On the basis of these findings, the review panel finds that there was neither an error of law or jurisdiction nor an error of fact in the findings in Decision 2011-450 on this matter and denies AG's request for a review of this issue.

6 Late Payment Penalty

6.1 Views of the parties

81. AG submitted that the hearing panel's decision to deny AG the ability to recover the settlement amount for the LPP on the basis that AG has acted imprudently in failing to monitor and react to the issue contains errors of fact and is not based on the evidence.[45]

82. First, AG submitted there was no basis for the hearing panel to find imprudence. Based on a review of the relevant case law, specifically, *Garland v. Consumers' Gas Co.*[46] (Garland No. 2 decision), it is clear that April 22, 2004 was the first time there was the prospect that a class action in relation to the LPP issue might succeed. Because AG's settlement related to a period from November 1, 1998 to May 1, 2004, AG submitted it is unreasonable to suggest that AG acted imprudently and should be denied recovery for the LPP settlement.[47]

83. Second, the hearing panel's finding that AG did nothing to address this matter after the first Garland decision, *Garland v. Consumers' Gas Co*.[48] (Garland No. 1 decision), is incorrect. On February 19, 1999, AG addressed the matter with the Alberta Energy and Utilities Board (EUB) and in Decision 2000-16, the EUB acknowledged the sufficiency of AG's actions in response to the Garland No. 1 decision. AG did not provide this information at the time of the hearing because the hearing panel did not provide notice of its position and the facts it planned to rely on in reaching its determinations. These facts are evidence that AG acted prudently. The hearing panel's decision was contrary to Section 4 of the *Administrative Procedures and Jurisdiction Act*, Section 9(2) of the *Alberta Utilities Commission Act*, procedural fairness and natural justice.[49]

84. Third, the hearing panel's findings assess and assign culpability to AG rather than assess the prudence of the incurred costs. AG submitted that this constitutes a jurisdictional error.[50]

85. In its response submission, the CCA submitted that any prior approval by the regulator dealing with the late payment penalty issue is distinct from this matter which is the legal determination of the revenue requirement treatment of the costs stemming from the settlement of litigation. Further, any prior regulatory decisions on related issues (LPP versus LPP litigation

[45] R&V Application at paragraph 20.
[46] [2004] 1 S.C.R. 629.
[47] R&V Application at paragraph 21.
[48] [1998] 3 S.C.R. 112.
[49] R&V Application at paragraph 23 and Exhibit 10.01 at paragraph 67.
[50] R&V Application at paragraph 25.

settlement costs) do not enshrine prudence in perpetuity, especially when the final recovery of the cost is requested. At all times, the onus to establish prudence remains with the utility. The CCA submitted that AG has not raised a substantial doubt as to the correctness of the decision and the R&V Application on this issue should be denied.[51]

6.2 Decision 2011-450 regarding Late Payment Penalty

86. In Decision 2011-450, the hearing panel stated:

> [T]he Commission considers that AG and its predecessors' inaction after the issuance of the Garland No. 1 decision in requesting a change to the late payment penalty charge on the basis of a possible infringement of Section 347 of the Criminal Code, amounted to a "gamble." AG and its predecessor organizations gambled that it would not be sued on the same basis as the Garland No. 1 decision and AG further gambled that if it were sued, that the Commission would allow recovery of any resulting award or settlement amount to be recovered from ratepayers. AG's inaction is even more noticeable given the passage of time between the issuance of the Garland No. 1 decision in October 1998 and the commencement of the lawsuit against AG's predecessor in February 2001.
>
> Given that the settlement relates to a period (November 1, 1998 to May 1, 2004) subsequent to the issuance of the Garland No. 1 decision, the Commission considers that the entire amount paid under the settlement and the applicable legal costs is at issue. AG should have been aware of the issues associated with Section 347 of the Criminal Code at least from the October 30, 1998 issue date of the Garland No. 1 decision and it is AG's responsibility to ensure that its terms and conditions of service comply with all applicable law. There is no evidence on the record to indicate that AG requested a change from the regulator to the late payment penalty rate in its terms and conditions of service on the basis of the criminal rate of interest provisions of the Criminal Code during the period November 1, 1998 to May 1, 2004. In these circumstances, the Commission considers that AG is not entitled to rely on approvals of the late payment penalty rate by the predecessors to the Commission to include the settlement in the RID account.
>
> […]
>
> AG's request for a recovery of $1.8 million related to the settlement and associated legal expenses is denied. The Commission therefore directs AG to remove the settlement and associated legal expenses from AG's forecast for reserve for injuries and damages and revenue requirement in its compliance filing. The $300,000 balance of the proposed $2.1 million recovery in order to maintain a reserve balance of $600,000 is approved.[52]

6.3 Commission findings

87. The review panel has reviewed the record for the proceeding that led to Decision 2011-450 and notes that no party provided evidence to demonstrate that AG addressed the matter of its

[51] Exhibit 9.01, CCA Response Submission, paragraphs 5, 8 and 9.
[52] Decision 2011-450 at paragraphs 838-839, 842.

late payment penalty with the EUB in 1999 nor was Decision 2000-16 raised during the proceeding.

88. As discussed in Section 3.3 of this decision, the review panel finds that it is not required to give a party prior notice of its determination on a matter that the party has expressly put at issue by including it in an application. As such, the review panel is not persuaded by AG's argument that it would have provided this information at the time of the hearing had the hearing panel provided notice of its position and the facts it planned to rely on in reaching its determinations. As AG is a sophisticated party, the review panel expects that AG will file all relevant and necessary material in order to discharge its onus in a general rate application.

89. However, the review panel finds that this information constitutes a new fact that was not previously placed in evidence in accordance with Section 12(a)(ii) of Rule 016. Specifically, it is AG's submission that the findings in Decision 2011-450 regarding AG's inaction after the issuance of the Garland No. 1 decision were incorrect in light of the information regarding the EUB and Decision 2000-16. Given that this information may be relevant to the matter at issue, the review panel considers that this raises an error of law and a substantial doubt has been raised as to the correctness of the decision. Therefore, the review panel grants a review of the decision to deny AG's request to recover the settlement amount for the late payment penalty.

90. AG also submitted that the hearing panel incorrectly assessed the prudence of these costs. Because the review panel has granted a second stage review and variance of this matter, the review panel finds that it would be premature to address this issue. The review panel considers that this discussion can happen at the second stage review and variance when parties have furnished all the evidence and material that is necessary to support their position.

7 Calgary Office Lease

7.1 Views of the parties

91. AG submitted that there is no basis for the hearing panel's finding that office lease rates should be negotiated one to two years prior to expiry. As well, the hearing panel made an error of fact when it found that AG was paying $14.50 per square foot as its lease rate for the Calgary office lease when in fact AG's prior lease rate was $16.00 per square foot; $14.50 was the amount that AG was allowed to include in rates in PUB Decision C85250.[53]

92. As well, AG submitted that it had a legitimate expectation that the Commission would follow the same process for the Calgary office lease as it did for the ATCO Edmonton lease renewal. AG expected that the hearing panel would at least provide prior notice if a different process were to be applied in this case. The Commission breached rules of procedural fairness and natural justice by depriving AG the opportunity to know and adequately present its case, contrary to Section 4 of the *Administrative Procedures and Justice Act*.[54]

93. The hearing panel denied the use of a deferral account and therefore denied AG the ability to update its placeholder. Following the close of the GRA proceeding, the new lease rate

[53] R&V Application at paragraphs 27-28.
[54] R&V Application at paragraph 29.

was established to be $20 per square foot in 2011 and 2012. This constitutes a new fact because section 12(a)(ii) of Rule 016 does not, in any way, restrict the scope of matters that constitute new facts that could lead the Commission to materially vary or rescind its decision.[55]

94. Calgary submitted that the error regarding the Calgary office lease rate is not material with respect to the hearing panel's finding of prudence. As well, because AG is subject to a prospective rate-making regime it must bear the burden to demonstrate the reasonableness of its forecasts. Calgary also submitted:

> [...] Section 12(a)(ii) of [AUC] Rule 016 does not contemplate new facts that have arisen to justify the position of the party in the previous proceeding leading to the decision in question. Instead, as stated in the Section, the new facts are those which have affected the Commission's decision on the original question before it, so as to materially vary or rescind it. In this case, the Commission denied ATCO the original question as to the use of a deferral account for Calgary office lease costs on the basis that a deferral account was not appropriate in the circumstances. A higher negotiated lease rate (after the fact) does not constitute new facts for the purpose of the Rule.[56]

7.2 Decision 2011-450 regarding Calgary Office Lease

95. In Decision 2011-450, the hearing panel stated:

> The Commission considers that a lease or lease extension should have been negotiated well before the expiry of the lease term. The record indicates that leases are typically negotiated one to two years in advance of expiry. Failure to do this limits AG's options and hence impacts its ability to negotiate leasing arrangements. In these circumstances, the Commission does not consider that a deferral account is warranted. Further the Commission does not consider that the actual rate should be accepted as the basis for the revenue requirement.
>
> [...]
>
> AG indicated that the ATCO Centre is a Class A building while Calgary indicates that the ATCO Centre is a Class B building. The Commission notes that AG's rental rate during 2009 was $14.50 per square foot which is mid-range for Class B buildings for that year. The Commission also notes that the Barclay Street publication repoed [sic] a downward pressure on rents at that time and that the range of rents for all classes of building space had decreased. However, the Commission agrees with AG that there would be significant costs both out of pocket and from operational disruptions which should be considered if AG were to move to other premises.
>
> Weighing all the above factors the Commission considers that the existing rental rate should be used for the revenue requirement in 2011 with a three per cent escalation for inflation in 2012.

[55] R&V Application at paragraphs 31-32; AG Reply Submission at paragraph 86.
[56] Calgary Response Submission at page 7.

> AG is directed in the compliance filing to this decision to include in its revenue requirement a rental rate for 2011 of $14.50. For 2012, rent should be forecast based on $14.50 per square foot increased by a three per cent inflation factor.[57]

7.3 Commission findings

96. In summary, AG argued that it had a legitimate expectation that the hearing panel would follow the same procedure for the Calgary office lease as it would for the Edmonton office lease renewal. Specifically, the hearing panel understands AG's argument to be that it had a legitimate expectation that it would receive a deferral account for this matter, or, in the alternative, if the Commission was not going to approve a deferral account, AG should have been afforded additional process to update its forecast costs.

97. The review panel has reviewed the record for the proceeding leading to Decision 2011-450 and notes that AG used $14.50 per square foot for its forecast lease costs in the test years for the Calgary office lease.

98. Notwithstanding, the review panel notes the following finding from Decision 2011-450 that the:

> Existing rental rate should be used for the revenue requirement in 2011 with a three per cent escalation for inflation in 2012. AG is directed in the compliance filing to this decision to include in its revenue requirement a rental rate for 2011 of $14.50. For 2012, rent should be forecast based on $14.50 per square foot increased by a three per cent inflation factor.[58]

99. The review panel considers that it is unclear whether the hearing panel was aware that AG's existing rental rate was $16.00 per square foot in reaching the determination that the existing lease rate should be used. Because this may be relevant to the matter at issue, the review panel finds that this raises an error of fact and a substantial doubt has been raised as to the correctness of the decision. Therefore, the review panel grants a review of the hearing panel's determinations on the Calgary office lease.

8 Production Abandonment

8.1 Views of the parties

100. AG submitted that the hearing panel committed errors of fact, law and/or jurisdiction when it denied the recovery of prudently incurred production abandonment costs associated with assets that were fully consumed in the provision of utility service (commencing January 1, 2011). As a result of the hearing panel's determinations in Decision 2011-450, these assets are now stranded and the hearing panel's findings are contrary to Section 4(3) of the *Roles, Relationships and Responsibilities Regulation* and deny AG a reasonable opportunity to earn its fair return contrary to the Fair Return Standard.[59]

[57] Decision 2011-450 at paragraphs 766-769.
[58] Decision 2011-450 at paragraphs 768 and 769.
[59] R&V Application at paragraphs 34 and 36.

101. AG submitted that the hearing panel erred in its interpretation of the *Gas Utilities Act* and the *Stores Block*[60] line of cases and these cases do not constrain the Commission in providing for recovery of depreciation expense or prudent abandonment costs in fixing just and reasonable rates. As well, the hearing panel failed to consider sections 36 and 37 of the *Gas Utilities Act* in reaching its determinations. Abandonment costs are related to depreciation expense and have always been dealt with in general rate applications as operating expense not return on rate base.[61]

102. AG also stated that the hearing panel's reasoning that prior decisions approving recovery of abandonment costs, including those approving settlements, were not relevant because they pre-date the *Stores Block* decision and the *Carbon*[62] decision. AG also argued that the hearing panel's reasoning fails to honour prior regulatory approval of settlements which resulted in payments to ratepayers in excess of $400 million in return for payment of ongoing production abandonment costs. The hearing panel's failure to consider the substance of the settlements, in any detail or at all, amounts to a reviewable error.[63] AG indicated that a review phase was required to adequately consider the nature and extent of the impact of the hearing panel's finding upon the settlement and AG's entitlement to recover from customers' prudent abandonment costs.[64] Specifically, AG stated that the negotiated settlement approved in Decision 2001-104 did not place a limit on the properties for which customers would be responsible for future abandonment or removal costs and that "there is no question that the North production abandonment costs disallowed in Decision 2011-450 are those covered by prior settlements."[65]

103. AG submitted that given the review and variance applications filed by itself and all other Alberta utilities regarding the issue of stranded assets in Decision 2011-474[66], the review of this issue should be consolidated with any Decision 2011-474 review and variance process that may be granted.

104. In its response submission, AltaGas echoed many of the concerns raised by AG stating that the findings in Decision 2011-450 regarding production abandonment costs should be reviewed.

105. Calgary supported the hearing panel's findings in Decision 2011-450 stating that the abandoned properties were no longer used or required to be used for public utility service and therefore the hearing panel correctly determined that the shareholder should absorb losses and gains, and increases and decreases in the value of assets.[67]

106. The UCA submitted that the hearing panel's analysis of the *Stores Block* line of cases was correct and that customers do not have an ownership interest in utility assets and shareholders bear, not only the benefit of utility assets, but also the risks associated with those assets. As well, any settlements and prior decisions cited by AG pre-date the *Stores Block* line of

[60] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board),* 2006 SCC 4 (*Stores Block*).
[61] AG Reply Submission at paragraphs 97 and 99.
[62] *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board),* 2008 ABCA 200 (*Carbon*).
[63] R&V Application at paragraph 39.
[64] Ex. 10.01 at paragraph 119.
[65] Ex. 10.01 at paragraph 120 and 121.
[66] Decision 2011-474: Alberta Utilities Commission, 2011 Generic Cost of Capital, Application No. 1606549, Proceeding ID No. 833, December 8, 2011.
[67] Calgary Response Submission at page 8.

cases.[68] The UCA submitted that the proceedings leading to Decision 2011-450 and 2011-474 were unrelated and therefore should a review be granted on both issues, they should not be heard together.[69]

8.2 Decision 2011-450 regarding Production Abandonment

107. In Decision 2011-450, the hearing panel stated:

> [A]ssets which no longer have an operational purpose are no longer used or required to be used to provide utility service as required by Section 37 of the *Gas Utilities Act* should be retired and removed from rate base. Further if the asset is not disposed of at the time of retirement, it should be moved to a non-utility account whether or not the asset had been fully consumed in providing utility service or whether it had residual value at the time it was retired. Accordingly, all ongoing costs of any nature, including operational and remediation costs (except to the extent that remediation costs are notionally offset by the net salvage component of depreciation expense previously included in rates and collected from ratepayers) associated with the asset after it ceases to have an operational purpose should be removed from revenue requirement and be for the account of the utility shareholder.
>
> AG confirmed that the "production abandonment costs relate to ATCO Gas' obligation to abandon production properties which were previously used to provide utility service." It is not disputed by the parties that the assets to which these costs relate are no longer "used in an operational sense" as required by the *Carbon* decision. It is also not disputed that the assets are no longer used or required to be used to provide utility service as required by Section 37 of the *Gas Utilities Act* and accordingly would not qualify for rate base consideration.
>
> [...]
>
> AG referred to several EUB decisions which approved the inclusion of production abandonment costs in rates in the past. Among these decisions were several which approved settlement agreements reached with customers. These decisions pre-date the *Stores Block* decision and the *Carbon* decision and accordingly the Commission has not considered them to be relevant to a consideration to the costs to be allowed in revenue requirement during the current test period.
>
> Given the above determination, all production abandonment costs applied for during the test period are disallowed and shall be removed from forecast revenue requirement in the compliance filing to this decision. Similarly, the deferral account in respect of these costs will be discontinued as of January 1, 2011. The closing deferral account balances in the north and south for 2010 are $0.76 million and $0.24 million respectively. Given that these balances relate to prior periods and the decisions that relate to those periods, AG will be permitted to include a one time recovery of those balances in 2011 revenue requirement.
>
> The Commission directs AG to remove the 2011 and 2012 production abandonment costs of $2.18 and $1.5 million respectively from revenue requirement.[70]

[68] UCA Response Submission at paragraphs 36 and 45.
[69] UCA Response Submission at paragraphs 47-48.

8.3 Commission findings

108. In Decision 2011-450, the hearing panel determined that previous decisions that approved settlements agreements pre-date the *Stores Block* and *Carbon* decisions and are therefore irrelevant to a consideration of the costs that should be approved in revenue requirement for the current test period.

109. In response to intervener submissions AG stated "there is no question that the North production abandonment costs disallowed in Decision 2011-450 are those covered by prior settlements."[71] The record for the proceeding leading to Decision 2011-450 shows that the issue of these settlements was not canvassed in the proceeding; therefore the review panel finds that there may be an error of law or jurisdiction and therefore a substantial doubt has been raised as to the correctness of the decision. For these reasons, the review panel grants a review of the hearing panel's determinations on production abandonment costs.

110. With respect to the submissions of AG and interveners regarding the correct interpretation of the legislation and case law regarding production abandonment, the review panel notes that in Decision 2012-154[72], the Commission stated that it would either re-initiate the Utility Asset Disposition Rate Review Proceeding (Proceeding ID No. 20) or establish a generic proceeding to address asset disposition and stranded assets after the issuance of a Commission decision on the Rate Regulation Initiative (Proceeding ID No. 566). For the purposes of regulatory efficiency, the review panel considers that the discussion regarding production abandonment and the *Stores Block* line of cases should form part of either Proceeding ID No. 20 or the generic proceeding. To the extent that the issue of previous settlement agreements impacts AG's production abandonment costs, this issue can be addressed either in Proceeding ID No. 20 or the generic proceeding. In the interim, the Commission directs AG to maintain a placeholder of zero with respect to these costs, to be adjusted upon completion of either Proceeding ID No. 20 or the generic proceeding.

9 Decision

111. For all of the foregoing reasons, the review panel finds that AG has not demonstrated a substantial doubt as to the correctness of Decision 2011-450 regarding Demand Side Management, Edmonton BFK, head office advertising costs or a deferral account for NGTL/AP Integration and therefore a second stage review and variance of Decision 2011-450 is denied on these issues.

112. However, the review panel finds that ATCO Gas has demonstrated a substantial doubt as to the correctness of Decision 2011-450 in respect of the hearing panel's findings regarding Customer Information System enhancements, Oracle Human Resource Management System, legal costs associated with the NGTL NEB hearing, the Calgary office lease, and late payment penalty and therefore a second stage review and variance of these issues is granted. A notice of second stage review and variance will be issued contemporaneously with this decision.

[70] Decision 2011-450 at paragraphs 1000-1005.
[71] Ex. 10.01 at paragraph 120 and 121.
[72] Decision 2012-154: Decision on Request for Review and Variance of AUC Decision 2011-474 2011 Generic Cost of Capital, June 4, 2012.

113. With respect to production abandonment costs, the review panel finds that ATCO Gas has raised a substantial doubt as to the correctness of the decision on this issue. The review panel finds this matter would be better suited for the Utility Asset Disposition Rate Review Proceeding (Proceeding ID No. 20) or the generic proceeding on asset disposition and stranded assets. To the extent that the issue of the previous settlement agreements impact AG's production abandonment, this issue can be addressed either in Proceeding ID No. 20 or the generic proceeding.

Dated on June 08, 2012.

The Alberta Utilities Commission

(original signed by)

Willie Grieve, QC
Chair

(original signed by)

Tudor Beattie, QC
Commission Member

(original signed by)

Anne Michaud
Commission Member