Gas – Miscellaneous
Order U2005-133

MADE at the City of Calgary, in the Province of Alberta, on 23rd day of March, 2005.	 ALBERTA ENERGY AND UTILITIES BOARD

ATCO Gas South 2005/2006 Carbon Storage Plan Interim Order	Application No. 1357130

1 INTRODUCTION

The Alberta Energy and Utilities Board (Board) received correspondence from ATCO Gas South (AGS), dated March 8, 2005, which purports to withdraw "all plans, proposals or options previously filed by it in this proceeding pursuant to the Board's orders, including Direction #5 in Decision 2004-022." The letter also confirms at page 5 statements made by AGS in its submissions on the Board's Preliminary Questions dated January 24, 2005 and February 7, 2005 referring to "management's decision not to include any Carbon-related costs or revenues in connection with the 2005/2006 storage operation in its jurisdictional rates for distribution service, effective April 1, 2005." At page 6 "…AGS provides notice that all related riders (Riders G, H, I) will be discontinued effective April 1, 2005."

By letter dated March 11, 2005, The City of Calgary (Calgary) and the Consumer Group (CG) which included the Utilities Consumer Advocate, jointly provided a submission (Calgary/CG Letter) with respect to the Withdrawal Letter. AGS provided its reply on March 21, 2005.

2 BOARD FINDINGS

For the reasons expressed in the Board's correspondence of even date, which is attached hereto as Appendix A, the Board finds that an Interim Order preserving the positions of the various parties is appropriate. This Interim Order will be effective immediately and shall direct AGS to maintain Carbon and all related assets in rate base, authorize a lease of the entire storage capacity to ATCO Midstream at a placeholder rate equal to the existing storage rate of $0.45 per gigajoule and direct AGS to maintain the Rate Riders G, H and I. This Interim Order shall remain in place until such time as the Board determines that there has been a final disposition of:

(a) the matters presently before the Court of Appeal;
(b) the matters being considered by the Board relating to Carbon;
(c) any additional matters relating to Carbon that the Board may be required to decide as a result of subsequent filings of AGS or an intervener; and
(d) any additional matters resulting from any direction from the Court of Appeal.

Accordingly, this Interim Order shall remain in place until such time as it is terminated or otherwise modified by the Board.

3 ORDER

THEREFORE, IT IS ORDERED THAT:

(1) The Carbon Storage facility and the Carbon producing properties and all associated property and assets in the AGS 2004 rate base, adjusted in the ordinary course as required, shall continue in AGS' rate base until such time as the Board may otherwise determine.

(2) AGS shall continue to include in revenue requirement all operating expenses, working capital, depreciation, taxes, return, and other related costs and shall continue to account for applicable revenue credits, in respect of the Carbon related assets in the same manner as it does presently, with any necessary adjustments, until such time as the Board may otherwise determine.

(3) AGS may apply for new capital additions to rate base in respect of the Carbon related assets in the ordinary course during the time period that this Interim Order is in effect.

(4) AGS is given approval to lease the entire storage capacity of the Carbon storage to ATCO Midstream for the 2005/2006 storage year and for each subsequent storage year until such time as the Board may otherwise determine.

(5) On November 22, 2004, the Board issued direction with respect to a placeholder of $0.45/gigajoule to be used commencing April 1, 2005 in respect of the fee to be paid by ATCO Midstream in the 2005/2006 storage year in respect of a storage year lease of the entire storage capacity of the Carbon facility. The Board continues to consider that the use of such a placeholder is appropriate and amends the previous order by directing AGS to reflect such placeholder in its 2005 revenue requirement and in the revenue requirement of each subsequent year until such time as the Board may otherwise determine.

(6) The Riders G, H and I will continue in effect and the current process to establish their value on a monthly basis will continue until such time as the Board may otherwise determine.

(7) This Interim Order is effective as of the date hereof and shall remain in effect until such time as it is terminated or otherwise modified by the Board.

END OF DOCUMENT

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ELECTRONIC NOTIFICATION

March 23, 2005

TO INTERESTED PARTIES

ATCO GAS SOUTH (AGS)
2005/2006 CARBON STORAGE PLAN – APPLICATION NO. 1357130

DIRECTIONS AND INTERIM ORDER

On March 8, 2005 AGS filed correspondence (Withdrawal Letter) with the Board, which purports to withdraw "…all plans, proposals or options previously filed by it in this proceeding pursuant to the Board's orders, including Direction #5 in Decision 2004-022." The Withdrawal Letter also confirms at page 5 statements made by AGS in its submissions on the Board's Preliminary Questions dated January 24, 2005 and February 7, 2005 referring to "…management's decision not to include any Carbon-related costs or revenues in connection with the 2005/2006 storage operation in its jurisdictional rates for distribution service, effective April 1, 2005." At page 6 "…AGS provides notice that all related riders (Riders G, H, I) will be discontinued effective April 1, 2005."

By letter dated March 11, 2005, The City of Calgary (Calgary) and the Consumer Group (CG), which included the Utilities Consumer Advocate (UCA), jointly provided a submission (Calgary/CG Letter) with respect to the Withdrawal Letter. AGS provided its reply on March 21, 2005 (AGS Reply).

The writer has been requested to convey the Board's directions set out herein.

The Board considers that the Withdrawal Letter and related submissions[1] raise several new procedural matters in this proceeding, which require the Board to make certain determinations not previously within the scope of this proceeding.

Withdrawal of Application

Rule 20 of the Board's Rules of Practice requires an applicant to file a notice of withdrawal of an application and stipulates that the Board may, with or without a hearing, grant an application for

[1] AGS submissions dated January 24, 2005 and February 7, 2005 filed with respect to the Board's Preliminary Questions provided in the Board's letter dated December 23, 2004.

withdrawal on any terms that it considers appropriate. Although ATCO has at certain times characterized its August 16, 2004 document, as amended by a letter dated August 23, 2004, relating to the 2005/2006 storage plan as a "response", a "discussion", a "submission" or as a "filing" containing various "plans, proposals or options" made without prejudice to AGS's position in respect of jurisdiction over Carbon and pursuant to Board orders, including Direction #5 in Decision 2004-022, the Board considers the August 16, 2004 document, as amended, as an "application" in respect of the 2005/2006 Storage Plan (the Application) for the purposes of the Board's Rules of Practice. Accordingly, the Board considers the Withdrawal Letter as an application to withdraw AGS' Application.

AGS states at page 1 of the Withdrawal Letter:

> This filing is necessitated by suggestions that AGS' compliance with the Board's directions, under compulsion of Board orders, has been interpreted as attornment or acquiescence in the Board's purported jurisdiction to direct such a plan. While AGS believes that the filings made on a 'without prejudice' basis are procedurally appropriate, the only manner in which to place the issue beyond doubt is to formally withdraw any and all plans, proposals or options previously filed in this proceeding under what AGS assumed but the Board has not confirmed was compulsion of the Board's orders including direction #5 in Decision 2004-022.

The above quote appears to raise two matters as a basis for the withdrawal of the Application: (i) the suggestion that AGS may have attorned or acquiesced in the Board's jurisdiction, and (ii) the fact that the Board has not provided certain confirmations sought by AGS.

With respect to the first ground for withdrawal, the Board's procedures provide an opportunity for the utility and interveners to make submissions on various issues, which arise during the course of a proceeding. However, no party is necessarily bound by submissions of any other party. The Board is also not bound by the submission of any party. The Board is aware of AGS' jurisdictional objection to the Board directing the inclusion of Carbon as part of its utility service and, in the circumstances, does not consider AGS' participation in the present process or the "without prejudice" filing of the Application as evidence of attornment or acquiescence. Accordingly, the Board does not consider the suggestions referenced in the Withdrawal Letter, that AGS may have attorned or acquiesced to the Board's jurisdiction, as sufficient reason to permit the Application to be withdrawn.

AGS also references certain confirmations that it has sought from the Board and that the Board has not responded to as a reason supporting the withdrawal of the Application. The Board will render its determinations on relevant matters in issue in accordance with the procedures that it establishes to achieve efficiency and fairness to all affected parties. The Board does not view AGS' demands for certain confirmations from the Board that have not been forthcoming in the timeframe chosen by AGS as sufficient reason to permit the Application to be withdrawn.

Accordingly, the Board denies AGS' request to withdraw the Application, including, all plans, proposals or options previously filed by it in this proceeding with respect to the 2005/2006 storage year.

In addition, as noted in the Calgary/CG Letter, the present proceeding also results from the filing made by the UCA/CG on June 10, 2004 (June 2004 CG Letter) requesting the Board to address the jurisdictional issues related to the Carbon facility. The Board agrees with Calgary/CG when it states at page 2 of the Calgary/CG Letter: "…regardless of the Board's conclusions regarding AGS' purported withdrawal of its application, the jurisdictional issues being examined arise out of a separate application by the UCA/CG and cannot be withdrawn by, or otherwise affected by, the actions of AGS." Accordingly, even if the Board were to permit the withdrawal of the AGS Application, it would not result in a withdrawal of the jurisdictional matters raised in the June 2004 CG Letter from the present proceeding.

AGS Termination of Rate Riders

At page one of the Withdrawal Letter AGS states: "…AGS hereby withdraws all plans, proposals or options previously filed by it in this proceeding pursuant to the Board's orders, including Direction #5 in Decision 2004-022. It will be unnecessary, therefore, to continue Riders G, H and I for the purposes of the 2005/2006 storage year beginning April 1, 2005." At page 6 of the Withdrawal Letter AGS states: "Accordingly, AGS provides notice that all related riders (Riders G, H, I) will be discontinued effective April 1, 2005."

The above statements raise the issue of whether a utility regulated by the Board has the unilateral ability to discontinue Rate Riders, thereby impacting rates previously approved by the Board.

The Board notes the submission of Calgary/CG that such a unilateral action would be contrary to section 44(1) of the *Gas Utilities Act* (GUA). The Board agrees. It is the Board, not the utility acting unilaterally and without prior Board approval, that may approve a change to existing rates, tolls or charges, or schedules to them. The Board finds the AGS' notice that Rate Riders G, H and I will be discontinued effective April 1, 2005 to be inappropriate and the discontinuance of Rate Riders G, H and I will not be permitted at this time.

Interim Order

The Board is aware of the expectation of Madame Justice McFadyen of the Alberta Court of Appeal for the Board to continue to deal with the broad set of jurisdictional and rate base questions established by the Board relating to the Carbon facility. In her February 18, 2005 ruling granting AGS' request to lift the adjournment of the hearing of the appeal of Decision 2004-022, Madame Justice McFadyen stated:

> Because of procedural applications by ATCO and other interested parties, the Board hearings have been delayed and it may well be that the 2005/2006 hearings will not be concluded this year. Further, the uses which ATCO proposes for the Carbon facility for 2005/2006 have changed. While the jurisdictional issue will be dealt with by the Board, the questions will be much broader than contemplated last fall. In any event, as pointed out by ATCO, this appeal will have to be decided on the record before the Board for 2004/2005.

The Board will continue to consider the matters before it in accordance with the December 23, 2004 process letter, which is consistent with the expectations of the Court of Appeal. However,

the Board is sensitive to bona fide claims by parties of potential prejudice arising from the present proceeding and does not intend that its processes should directly or indirectly result in undue harm or prejudice to any party. In this regard, the Board notes the significant amount of time that has elapsed since July 23, 2004, when the Board first combined the June 2004 CG Letter and the 2005/2006 storage plan process into the current proceeding. Numerous motions and procedural delays have significantly extended the original schedule published by the Board in its September 29, 2004 letter, which contemplated the possibility of a hearing taking place in December 2004. The passage of time could add to the potential prejudice of parties. Accordingly, in light of:

(a) the expectation of the Court of Appeal that the Board shall be dealing with the jurisdictional and rate base issues relating to Carbon;

(b) AGS's assertions in the Withdrawal Letter of potential prejudice to its position should its 2005/2006 storage application remain before the Board and should Carbon-related costs and revenues remain in regulated rates; and

(c) the potential for prejudice to the position of interveners, if Carbon-related costs and revenues were permitted to be removed from regulated rates at this time;

the Board considers that it is appropriate in the circumstances to issue an interim order to maintain the respective positions of the parties with respect to the Carbon facility.

With respect to the issuance of an order as a tool to preserve the respective position of parties in light of changing circumstances, the Board notes the submission of AGS in this proceeding contained in its Motion to Stay Proceedings dated September 20, 2004, wherein it requested:

> …an order or direction staying the within proceeding until the leave application and any appeal from which leave may be granted has been decided by a final determination of the Court of Appeal or otherwise concluded. The within proceeding should only be continued, if at all, it is submitted for the limited purpose, as the Board considers necessary, to protect the status quo until such time as the Court proceedings are at an end.[2]

The intentions of AGS with respect to what was meant by the "status quo" were further elaborated in its correspondence dated September 22, 2004. In that correspondence AGS stated:

> AGS intended the status quo relative to the 2005/2006 Carbon Storage Plan to mean that ATCO Midstream would use the entire storage capacity pursuant to the existing Uncontracted Capacity Agreement at the existing storage rate of $0.45 per GJ [gigajoule].
>
> We trust this confirms AGS' identification of an option which poses the least risk to AGS and best preserves, to the extent possible, a fair balance of utility and ratepayer interests until the jurisdictional issue is resolved - regardless of the outcome.

[2] Motion of ATCO Gas (South) to Stay Proceedings dated September 20, 2004, p. 2.

Although the AGS Motion was denied by the Board at the time for the reasons set out in the Board's correspondence of September 29, 2004, the Board considers that an order or direction preserving the status quo and the positions of AGS and the interveners would be useful in the present circumstances.

The Board has decided to issue an Interim Order concurrently with this letter. The Interim Order will be effective immediately and shall direct AGS to maintain Carbon and all related assets in rate base, authorize a lease of the entire storage capacity to ATCO Midstream at a placeholder rate equal to the existing storage rate of $0.45 per GJ and direct AGS to maintain Rate Riders G, H and I. The Interim Order shall remain in place until such time as the Board determines that there has been a final disposition of:

(a) the matters presently before the Court of Appeal;
(b) the matters being considered by the Board relating to Carbon;
(c) any additional matters relating to Carbon that the Board may be required to decide as a result of subsequent filings of AGS or an intervener; and
(d) any additional matters resulting from any direction from the Court of Appeal.

Accordingly, the Interim Order shall remain in place until such time as it is terminated or otherwise modified by the Board. AGS shall continue to include in revenue requirement all operating expenses, working capital, depreciation, taxes, return, and other related costs and shall continue to account for applicable revenue credits, in respect of the Carbon related assets in the same manner as it does presently, with any necessary adjustments, until such time as the Board may otherwise determine. AGS may apply for new capital additions to rate base in the ordinary course during the time period that the Interim Order is in effect. It is contemplated that at the time that the Interim Order is terminated, the Board will address any required adjustments between AGS and ratepayers to reflect the Board's jurisdictional and rate base findings.

Further Process

The Board has indicated above that it will continue to consider the matters before it in accordance with the December 23, 2004 process letter. In this regard, the Board notes AGS' submissions of January 24, 2005 and February 7, 2005, the Withdrawal Letter and the AGS Reply, which indicate that AGS management has determined: "…the prudent operation of the AGS distribution system does not require the use of the Carbon storage operation and all related facilities."[3] AGS also states at page 5 of the Withdrawal Letter: "AGS' management believes that AGS is entitled to the exclusive benefit of its assets and operations not required to provide distribution service to its customers."

The above statements highlight the central issues of the present proceeding, namely the resolution of the jurisdictional question with respect to the Carbon facility and the consequences thereof. The Board's December 23, 2004 letter established a process that will address whether or not the Carbon facility is used or required to be used to provide service to the public within Alberta or should otherwise remain in rate base. The Board's process will consider the applicable

[3] Withdrawal Letter page 5

facts, legislation, case law, Board decisions and legal arguments, including the above submissions of AGS.

Presently, the Board is considering the Preliminary Questions set out in its December 23, 2004 letter and will be issuing a decision in due course. The decision on the Preliminary Questions will guide the Board in its consideration of whether the Carbon facility is used or required to be used to provide service to the public or should otherwise remain in rate base (Part 1 of the Issues List). A finding by the Board that the Carbon facility is not used or required to be used to provide service to the public and should not otherwise remain in rate base will restrict the Board's further consideration to the appropriate basis upon which the asset should be removed from regulated service and rate base (Part 3 of the Issues List). A finding that the asset is used or required to be used to provide service to the public or should otherwise remain in rate base will lead to a different consideration, namely the appropriate fee to be paid by ATCO Midstream for the lease of the storage capacity (Part 2 of the Issues List).

Costs

Given the length of time that has passed since the filing of the Application, and the modular nature of this proceeding, the Board believes it appropriate for parties to submit costs claims reflecting costs incurred to the date hereof. The Board will then issue a Cost Order dealing with these costs on a final basis.

Yours truly,

(original signed B. C. McNulty)

Brian C. McNulty
Senior Counsel