



AUC

Alberta Utilities Commission

AltaGas Utilities Inc.

**Decision on Preliminary Question
Review and Variance of AUC Decision 2010-266
AltaGas Utilities Inc.
Application to Issue 2009 Debentures**

March 8, 2011

The Alberta Utilities Commission

Decision 2011-084: AltaGas Utilities Inc.

Decision on Preliminary Question

Review and Variance of AUC Decision 2010-266

AltaGas Utilities Inc. Application to Issue 2009 Debentures

Application No. 1606441

Proceeding ID No. 769

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1 Introduction

1. On June 9, 2010, the Alberta Utilities Commission (the AUC or the Commission) issued Decision [2010-266](#),¹ AltaGas Utilities Inc. (AUI) Application to Issue 2009 Debentures, Proceeding ID No. 418 (Decision 2010-266).
2. On August 6, 2010, the Commission received a request for a review and variance of Decision 2010-266 (review request) from AUI.
3. On August 10, 2010, the Commission issued a process letter establishing a schedule for comments from interested parties to be filed with the Commission by August 24, 2010, and reply comments from AUI, if any, by September 8, 2010. The Commission issued a further request for comments from parties on November 26, 2010, with a submission deadline of December 3, 2010. This deadline was extended at AUI's request to December 8, 2010. The Commission considers the record of this proceeding to have closed on December 8, 2010.

2 Decision 2010-266

4. On December 4, 2009, AUI filed an application requesting the Commission's approval and authorization to issue:
 - a 7.42 per cent debenture issued to AUI's parent company AltaGas Utility Holdings Inc. (AUHI) in the principal amount of \$40,000,000, dated October 8, 2009, and maturing on April 29, 2014; and
 - a 6.94 per cent debenture issued to AUHI in the principal amount of \$20,000,000, dated October 8, 2009, and maturing on June 29, 2016, (collectively referred to as the debentures)
5. AUI sought approval to issue the debentures pursuant to Section 26(2)(a)(ii) of the *Gas Utilities Act*, R.S.A. 2000, c. G-5 which states:

26(2) No owner of a gas utility designated under subsection (1) shall:

- (a) issue any

¹ Decision 2010-266: AltaGas Utilities Inc., Application to Issue 2009 Debentures: 7.42 Percent in the Principal Amount of \$40,000,000 and, 6.94 Percent in the Principal Amount of \$20,000,000, Application No. 1605686, Proceeding ID. 418, issued June 9, 2010.

...

(ii) bonds or other evidences of indebtedness, payable in more than one year from the date of them,

unless it has first satisfied the Commission that the proposed issue is to be made in accordance with law and has obtained the approval of the Commission for the purposes of the issue and an order of the Commission authorizing the issue[.]²

6. In Decision 2010-266, the Commission issued its findings with respect to AUI's application. The Commission found that the issuance of the debentures would be made in accordance with law and for a proper purpose.³ However at paragraph 47 of the decision, the Commission stated:

47. In the absence of an exemption from the provision, the Commission expects to receive an application under section 26 of the *Gas Utilities Act* far enough in advance to enable the application to be reviewed and a decision rendered in advance of the proposed date of issuance. That was not the case in this instance. The Commission has therefore assessed the issuance of the New Debentures, for the purposes of section 26(2)(a) of the *Gas Utilities Act* approvals, with an effective date that corresponds to the date of the Commission's approval.

3 AUI review request

7. In its review request AUI stated that paragraph 47 of Decision 2010-266 may be interpreted as modifying AUI's applied-for effective date of the debentures of October 8, 2009, so as to coincide with the date of Decision 2010-266 (June 9, 2010). It is this statement, AUI submitted, that it sought to have reviewed and varied or otherwise clarified through the review request. AUI noted that it had sought clarification from the Commission by letter dated June 17, 2010, which the Commission declined to provide.

8. In the review request, AUI submitted that the Commission made errors of law and/or jurisdiction raising a substantial doubt as to the correctness of Decision 2010-266 based on the following grounds:

- a) By erring in its interpretation of Section 26(2)(a)(ii) of the *Gas Utilities Act* with respect to the debentures;
- b) By erring in principle by arbitrarily ordering that the debentures should be assessed with an effective date corresponding with the date of Decision 2010-266 of June 9, 2010, and not an effective date of October 8, 2009, contrary to established AUC precedent and principles and the *Alberta Utilities Commission Act*;

² A virtually identical provision (Section 101(2)(a)(ii)) also exists in the *Public Utilities Act*, R.S.A. 2000, Ch. P-45, which applies to owners of public utilities as designated by regulation.

³ Decision 2010-266, paragraphs 45 and 49.

- c) By erring in principle by ordering the debentures should be assessed with an effective date corresponding with the date of Decision 2010-266 of June 9, 2010, despite the AUC having found the debentures were issued in accordance with law as of October 8, 2009; and
- d) By unjustly depriving [AUI] of the opportunity of earning a fair return on [AUI's] debt component of rate base contrary to section 37 of the *Gas Utilities Act*.

9. AUI requested that the Commission vary Decision 2010-266 by modifying the effective date of the authorized debentures to reflect an issuance date of October 8, 2009, or clarify Decision 2010-266 if this was the original intention.⁴

3.1 First ground: The AUC erred in its interpretation of Section 26(2)(a)(ii) of the Gas Utilities Act

10. AUI submitted that Section 26(2)(a)(ii) of the *Gas Utilities Act* sets out two requirements a utility must fulfill prior to the Commission authorizing a debenture issuance: (1) the debentures must be issued in accordance with the law; and (2) the Commission must approve the purposes for which the debentures are to be issued. AUI noted that in Decision 2010-266 the Commission expressly stated that it was satisfied that those two criteria had been met,⁵ and cited paragraph 35 of Decision 2010-035⁶ as authority that that should have ended the inquiry by the Commission. AUI stated that further inquiry into whether the date of the debentures aligned with the date of the application was outside of the Commission's common practice, as well as an arbitrary and irrelevant consideration on a Section 26(2)(a)(ii) application.

11. By arbitrarily imposing an effective date on the debentures corresponding to the date of Decision 2010-266, AUI submitted that regulatory lag became the sole factor determining the effective date of the debentures.

3.2 Second ground: The effective date in Decision 2010-266 is contrary to law & established AUC precedent

12. AUI submitted that in numerous instances the AUC has approved utilities' applications to issue debentures with an effective date prior to the utility's application to the Commission and, consequently, prior to the Commission's decision. AUI cited five examples of previous Commission decisions supporting the review request:

Decision 2001-31:⁷ The ATCO Group, Application for Approval to Issue Debentures (Issued April 24, 2001)

⁴ Review request, paragraph 32.

⁵ Decision 2010-266, paragraphs 45 and 49.

⁶ Decision 2010-035: ENMAX Power Corporation, Application to Issue Debt – Remaining Debt Issuance, issued January 15, 2010, paragraph 35:

35. Although a number issues were raised by Maxim during this proceeding, the Commission considers that the focus of this Application is, and should be, to determine (a) whether the proposed issue is to be made in accordance with law and (b) whether the Commission approves the purposes of the issue.

⁷ The ATCO Group, Application for Approval to Issue, Debentures, Errata to Decision 2001-31, Northwestern Utilities Limited Application No. 2000331 and 2000332, File No. 6503-23 and 6503-24, ATCO Gas and Pipelines Limited Application No. 2000338 and 2000339, File No. 6508-1 and 6508-2.

Order [U2005-102](#):⁸ AltaGas Utilities Inc., Debentures Application (Issued March 7, 2005)
Decision [2006-049](#):⁹ AltaGas Utilities Inc., Request for Approval of Debenture Issue (Issued May 24, 2006)
Decision [2009-114](#):¹⁰ ATCO Electric Ltd., Issuance of Debentures and Preferred Shares (Issued August 14, 2009)
Decision [2009-115](#):¹¹ ATCO Gas and Pipelines Ltd., Issuance of Debentures and Preferred Shares (Issued August 14, 2009)

13. In each of these five of examples, AUI stated that the applications to the Commission were made subsequent to the date of the proposed debentures and the Commission did not object to this aspect of the application. Rather, AUI submitted, the Commission approved the applications with the debentures taking effect as of their stated effective date.

14. AUI cited Sections 8(2) and (6) of the *Alberta Utilities Commission Act* as authority for the Commission's ability to designate an effective date for a decision as a date other than the date of the decision. Sections 8(2) and (6) of the *Alberta Utilities Commission Act* read:

8 (2) The Commission, in the exercise of its powers and the performance of its duties and functions under this Act or any other enactment, may act on its own initiative or motion and do all things that are necessary for or incidental to the exercise of its powers and the performance of its duties and functions.

...

(6) An order of the Commission takes effect at the time provided for by the order or, if no time is provided for, on the date of the order. [Emphasis added by AUI]

15. AUI stated that to the extent the Commission may have determined it lacked the power or authority to approve the debentures with an effective date of October 8, 2009, or any date prior to Decision 2010-266, it erred in law. In particular, AUI submitted that the approval of a debenture issuance prior to an application and prior to the Commission's decision does not amount to retroactive or retrospective ratemaking. AUI stated at paragraph 17 of the review request:

...Retroactive rate making is an attempt to modify rates previously approved by the Commission. [*Calgary (City) v. Alberta (Energy and Utilities Board)* (2010) 477 A.R. 1 at para. 47 (C.A)] On the other hand, retrospective ratemaking attempts to impose on the utility's current consumers shortfalls (or surpluses) incurred by previous generations of consumers. [*Ibid*, para. 48] ...

⁸ Order U2005-102, AltaGas Utilities Inc., Miscellaneous Rates Non-Routine, Debentures Application, Application No. 1376589, issued March 7, 2005.

⁹ Decision 2006-049: AltaGas Utilities Inc., Request for Approval of Debenture Issue, Application No. 1426643, issued May 24, 2006.

¹⁰ Decision 2009-114: ATCO Electric Ltd., Issuance of Debentures and Preferred Shares, Application Nos. 1605215, 1605217 and 1605218, Proceeding ID. 221, issued August 14, 2009.

¹¹ Decision 2009-115: ATCO Gas and Pipelines Ltd., Issuance of Debentures and Preferred Shares, Application Nos. 1605229, 1605230 and 1605231, Proceeding ID. 224, issued August 14, 2009.

3.3 Third ground: The effective date is contrary to other AUC findings in Decision 2010-266

16. AUI submitted that the Commission relied on the legal opinion provided in support of the application to conclude that the debentures were to be issued in accordance with law. Given that both the debentures and the AUI board of directors' resolution contained an issuance date of October 8, 2009, AUI submitted that there was no legal requirement or need to alter the effective date of the debentures.

17. AUI stated that it should be entitled to recover interest costs starting in 2010 based on the debentures being in AUI's capital structure since 2009.¹² AUI acknowledged that pursuant to Decision 2010-266 and prior Commission decisions, the appropriateness of the rate and term of the debentures included in future revenue requirements would be addressed in future Phase I General Rate Applications. AUI submitted that because Decision 2010-266 creates an ambiguity as to whether the debentures are part of AUI's debt as at December 31, 2009, the Commission erred in fact and law and failed to set just and reasonable rates for AUI.

18. AUI noted that it was directed to provide a comprehensive analysis of debt financing alternatives available to AUI at the time of the AUI board of directors' resolution, namely December 3, 2009, even though Decision 2010-266 indicated the effective date of the Commission approval to be June 9, 2010. AUI submitted that the consideration of rates applicable in December 2009 was inconsistent with the Commission's determination of June 9, 2010, as an effective date for the debentures.

3.4 Fourth ground: Decision 2010-266 deprives AUI of the opportunity to earn a fair return

19. The fourth ground in AUI's review request was that the Commission, in approving the issuance of the debentures with an effective date of June 9, 2010, violated AUI's statutory right to earn a fair return on its rate base under Section 37(1) of the *Gas Utilities Act*, which states:

37(1) In fixing just and reasonable rates, tolls and charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility, the Commission shall determine a rate base for the property of the owner of the gas utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base.

20. AUI cited the Supreme Court of Canada in *Northwestern Utilities Ltd. v. Edmonton (City)*, [1929] S.C.R. 186 at 193, where that Court set out what constitutes a "fair return". AUI also cited *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, where Bastarache J. stated: "Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors." [Emphasis added by AUI]

21. AUI noted that the approval of a debenture issuance by the Commission (under Section 26(2)(a)(ii) of the *Gas Utilities Act*) does not imply the utility can recover interest costs over the full period of the debenture. At paragraph 29 of the review request AUI indicated that:

¹² Review request, paragraph 20.

...For example, the period from October 8, 2009, through to December 31, 2009, was previously the subject of Decision 2009-176,¹³ AltaGas Utilities Inc., 2008-2009, General Rate Application Phase I. The debt costs approved in that decision applied to all of the 2009 test year. In this Review Application, AUI does not seek to reopen the 2009 test year to allow for recovery of the interest costs reflected in the Debentures over the period October 8, 2009, to December 31, 2009. Rather, it seeks to have the issuance of the Debentures in 2009 recognized for purposes of establishing AUI's revenue requirement in future years.

22. AUI submitted that by setting an effective date of June 9, 2010, Decision 2010-266 created ambiguity as to whether AUI is able to treat the debentures as part of its debt portfolio at the end of 2009 for the purposes of calculating 2010 and future revenue requirements. As an effective date of June 9, 2010, suggests the interest costs of the debentures may not be recoverable during the period January 1, 2010, to June 8, 2010, AUI submitted that Decision 2010-266 violates AUI's ability to earn a fair return as it "effectively denies AUI the opportunity to recover a substantial portion of its costs related to its debt financing in 2010".¹⁴

4 Submission by the Office of the Utilities Consumer Advocate

23. The Office of the Utilities Consumer Advocate (UCA) was an intervener in the proceeding leading to Decision 2010-266 and filed its comments regarding AUI's review request. The UCA's position was that AUI had not raised a substantial doubt as to the correctness of Decision 2010-266 and that AUI's application for review should not be granted.

24. The UCA submitted that, despite the other issues raised in AUI's review request, the review request was focused on the Commission's determination of the "effective date" for implementation of increased borrowing rates on the new debentures issued by AUI to its parent company, AUHI. The UCA cited AUI's statement that:

To the extent the Commission based the Decision on the principle a debenture application must precede the effective date of issuance; it erred in law and misconstrued or misapplied its previous decisions.¹⁵

25. The UCA stated that although AUI discussed regulatory lag, retroactive and retrospective ratemaking and the fact that the debentures were issued "in accordance with law",¹⁶ the foundation of the review request was based on an incorrect interpretation of Section 26(2) of the *Gas Utilities Act*, which reads (with emphasis added by the UCA):

No owner of a gas utility designated under subsection (1) shall

(a) issue any

...

¹³ Decision 2009-176: AltaGas Utilities Inc., 2008-2009 General Rate Application Phase I, Application No. 1579247, Proceeding ID. 88, issued October 29, 2009.

¹⁴ Review request, paragraph 30.

¹⁵ UCA submission, paragraph 3 citing review request, paragraph 13.

¹⁶ UCA submission, paragraph 5 citing review request, paragraph 19.

- (ii) bond or other evidences of indebtedness, payable in more than one year from the date of them, unless it has first satisfied the Commission that the proposed issue is to be made in accordance with law and has obtained the approval of the Commission for the purposes of the issue and an order of the Commission authorizing the issue.

26. The UCA submitted that it seems clear that the wording of Section 26 requires prior approval by the Commission to the issuance of these debentures and there is no provision for a retroactive approval. In other words, the “evidences of indebtedness” must be approved by the Commission prior to issuance.

27. Having taken this position, the UCA stated that the review request must comply with Commission Rule 016, Section 12(a)(i). The UCA noted that this section provides that the Commission will grant an application for review if it is of the opinion that “... the applicant has raised substantial doubt as to the correctness of the decision ...” The UCA submitted that AUI’s only response in this regard is its submission that the Commission made “... an arbitrary and irrelevant consideration”¹⁷ and “... the date of the decision is an irrelevant consideration with respect to the effective date of the debentures.”¹⁸

28. The UCA stated that AUI did not attempt to reconcile this position with any explanation or interpretation of the wording of Section 26 and rather, attempted to support its position based on previous decisions of the Alberta Energy and Utilities Board (board)/Commission. As the Commission is not bound by its previous decisions or those of its predecessor, the UCA stated that it did not review or comment on the previous board/Commission decisions cited by AUI.

29. The Commission’s enabling legislation is clear, the UCA submitted, that the Commission’s approval must be obtained before the “issue” is made, and the legislation does not address or contemplate an after-the-fact approval. The UCA submitted that, although the Commission is well aware that its authority is derived from its enabling legislation, the UCA cited the following judicial comments as being relevant.

30. In concluding that previous practices of the board exceeded its legislated mandate, the Supreme Court of Canada stated:

More importantly, in exercising this discretion [the regulatory agency policy process], statutory bodies must respect the confines of their jurisdiction: they cannot trespass in areas where the legislature has not assigned them authority.¹⁹

31. In that decision, the UCA noted that the Supreme Court of Canada also stated:

Administrative tribunals or agencies are statutory creations: they cannot exceed the powers that were granted to them by their enabling statute; they must ‘adhere to the confines of their statutory authority’ or ‘jurisdiction’ [; and t]hey cannot trespass in areas where the legislature has not assigned them authority’.²⁰

¹⁷ UCA submission, paragraph 7 citing review request, paragraph 9.

¹⁸ UCA submission, paragraph 7 citing review request, paragraph 10.

¹⁹ *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, paragraph 2.

²⁰ *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, paragraph 35.

32. The UCA also cited the Bell Canada case, in which the Supreme Court of Canada stated:

The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose.²¹

33. The UCA submitted that neither Section 26 of the *Gas Utilities Act* nor any of the other sections of the Commission's enabling legislation authorizes the Commission to in effect, retroactively approve the debentures in question. Similarly, the UCA submitted, AUI has not provided any evidence or argument that such power exists "by necessary implication".

34. The UCA noted that AUI cited paragraph 47 of Decision 2010-266 "... as modifying the effective date of the debentures of October 8, 2009, so as to coincide with the date of the decision of June 9, 2010."²² The UCA stated that it agreed with this interpretation and did not see the need for the clarification previously sought by AUI and submitted that the date of the decision is the earliest date on which the debenture could be effective having regard to the wording of Section 26.

35. Notwithstanding AUI's comments regarding regulatory lag, the UCA submitted that although the debentures are dated October 8, 2009, AUI did not apply for approval until December 4, 2009, some two months later. The UCA stated that although it has not taken this position, it could be argued that AUI's application was simply out of time and of no effect.

36. With respect to AUI's submission that Sections 8(2) and (6) of the *Alberta Utilities Commission Act* authorize the Commission to "... to designate an effective date for a decision as a date other than the date of the decision,"²³ the UCA submitted that AUI was "inviting the Commission to exceed its authority and, for no identifiable reason, establish an effective date which precedes the approval date."²⁴

37. The UCA cited AUI's statement at paragraph 30 of the review request that:

By fixing an effective date of June 9, 2010, the Decision creates ambiguity as to whether AUI is able to treat the Debentures as part of its debt portfolio at the end of 2009 for purposes of calculating 2010 and future revenue requirements. An effective date of June 9, 2010, suggests the interest costs of the Debentures may not be recoverable during the period January 1, 2010, to June 8, 2010. Therefore, the Decision violates AUI's ability to earn a fair return as it effectively denies AUI the opportunity to recover a substantial portion of its costs related to its debt financing in 2010 and constitutes an error of law, unless clarified or varied by the Commission, as required.

²¹ *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722 at 1756.

²² UCA submission, paragraph 11 citing review request, paragraphs 5 and 6.

²³ UCA submission paragraph 13 citing review request, paragraph 16.

²⁴ UCA submission, paragraph 13.

38. The UCA submitted that this was incorrect since AUI's revenue requirement for 2008 and 2009 was determined in Decision 2009-176²⁵ and the resulting rates will continue until AUI makes further application to the Commission. The UCA stated that the Commission has already indicated that issues relating to "the appropriateness of the interest rate, the term of the debt and issue costs" will be "better reviewed in the broader context of AUI's next GRA".²⁶ In addition, the UCA submitted, AUI has the authority to apply for interim rates to recover any shortfall in revenue requirement.

39. In summarizing its submissions, the UCA submitted that the Commission's decision, as to the effective date of the debentures is correct and in accordance with its legislated authority, and as a result, the question of "whether" the Commission should review Decision 2010-266 should be answered in the negative.

5 AUI reply submission

40. In its reply submission, AUI noted the UCA's comment that, because the debentures had an effective date of October 8, 2009, but the AUI board of directors' resolution approving them is dated December 3, 2009, the debentures "were backdated to October 8, 2009". AUI submitted that the UCA's concern with the date of the December 3, 2009, directors' resolution is misplaced.

41. AUI cited paragraph 15 of the affidavit filed in support of the application to issue the debentures that explained that the parties had agreed to the substance of the transactions as of October 8, 2009, and that the AUI board of directors' resolution date of December 3, 2009, simply reflects a delay in AUI documenting the transaction which the parties effectively completed October 8, 2009. AUI submitted that this intention was plain from the actions of the AltaGas Group of Companies and that there was no "backdating" of the debentures. A delay in documenting the transaction was reasonable, AUI submitted, given the Share Transfer and Amalgamation application (whereby the AltaGas Income Trust (AIT) became an indirect parent of AUI) was approved on October 1, 2009.²⁷

42. AUI noted the UCA's submission that AUI provided no evidence of market interest rates as of October 8, 2009. In reply, AUI submitted that it sought approval to mirror down debt obtained by AIT from April and June of 2009.²⁸ AIT did not issue debt to markets from October

²⁵ Decision 2009-176, AltaGas Utilities Inc., 2008-2009 General Rate Application Phase I (issued: October 29, 2009).

²⁶ Decision 2010-266, paragraph 50.

²⁷ Decision 2009-152: AltaGas Utility Group Inc. Share Transfer and Amalgamation (issued: October 1, 2009)

²⁸ The form of the transaction was described in Decision 2010-266, paragraphs 3-5 as follows:

3. On April 29, 2009, AIT [AltaGas Income Trust] completed the sale of medium term notes in the principal amount of \$200,000,000 at a coupon rate of interest of 7.42 per cent with a maturity date of April 29, 2014, through agents to the public (AIT Five-Year Notes).

4. On June 29, 2009, AIT completed the sale of medium term notes in the principal amount of \$100,000,000 at a coupon rate of interest of 6.94 per cent with a maturity date of June 29, 2016, through agents to the public (AIT Seven-Year Notes).

5. AUI stated that the indirect acquisition of AU Group Inc. by AIT created the first recent opportunity for AUI to access long-term inter-company financing. It also noted that the AIT Five-Year Notes and the AIT Seven-Year Notes were the public issuances of debt by AIT that most immediately preceded AIT's indirect acquisition of AU Group Inc. It was proposed that the financing particulars, including term and coupon rate of the AIT Five-Year

2009 to December 2009. AUI stated that “[s]ince AUI’s assessment of its financing alternatives concluded financing through the most recently issued AIT Medium Term Notes was the preferred alternative, AUI did not consider market information related to a period when AIT was not issuing debt to be relevant to the application.”²⁹

43. AUI submitted that, because of the size of AUI in relation to its ultimate corporate parent, AUI cannot dictate the timing of when its parent accesses public debt markets. If AUI is to obtain debt mirrored from its parent, AUI submitted that a lag in timing from when AUI’s ultimate corporate parent issues the underlying debt to markets and when AUI accesses debt through its own issuance will exist. AUI cited its application filed in early September 2010, to issue a new \$30,000,000 debenture where AltaGas Ltd., AUI’s ultimate parent, obtained the underlying debt in March 2010, at a coupon rate of 5.49 per cent.

44. AUI described the remainder of the UCA’s submission as arguing that the Commission must issue an order approving a debenture prior to a utility issuing debt under Section 26(2)(a)(ii) of the *Gas Utilities Act*. AUI submitted however, that it did not seek an “after-the-fact” approval, as suggested by the UCA and that there is no question the debentures required Commission approval prior to issuance. Rather, AUI stated that it expressly acknowledged the requirement of Section 26(2)(a)(ii) in the debentures application and referred to the AUI board of directors’ resolution which indicated that the debenture issuance is, “[s]ubject to obtaining an order of the Alberta Utilities Commission approving the issue and the terms and conditions thereof.”³⁰

45. AUI submitted that in law, an agreement or debenture may be effective as of a certain date, but only come into force upon the happening of a condition precedent. AUI noted that the final sentence of Section 1.9 of the debentures indicates:

For greater certainty, upon receipt by the Corporation of the Order, all rights and obligations of each of the Corporation and the Holder hereunder, and this debenture, shall be deemed to have been in force and effect as of the Issue Date. [Emphasis added by AUI]

46. AUI submitted that given Section 1.9 of the debentures, once the Commission issued its approval, Section 1.9 deemed the debentures to be in force and effective as of the issue date, October 8, 2009.

47. AUI submitted that Section 26(2)(a)(ii) of the *Gas Utilities Act* does not require a debenture to be dated effective as of, or after, the Commission’s approval. Rather, a debenture may be dated prior to the date of the Commission’s approval. Consequently, AUI submitted, it is perfectly legal for the Commission to approve the debentures dated effective October 8, 2009, by Order dated June 9, 2010.

48. With reference to the UCA’s submission that the Commission need not follow its previous decisions, AUI noted that the UCA has not raised an objection to the approval of

Notes and the Seven-Year Notes be mirrored down to AU Group Inc., which in turn be mirrored down to AU Holdings Inc. and subsequently mirrored down to AUI.

²⁹ AUI reply submission, paragraph 4.

³⁰ AUI reply submission, paragraph 7.

debentures with effective dates prior to the filing of the application or approval in this, or any other application noted by AUI in its review request.

49. AUI noted again the five decisions set out in its review request where applications to the Commission were made subsequent to the effective date of the proposed debentures. AUI submitted that the Commission provided a clear regulatory signal to AUI, based on previous decisions involving AUI and the ATCO Group of Companies, that the effective date in the debentures application was appropriate. For the Commission to now change its approach without notice, AUI submitted, amounts to a “regulatory ambush” of AUI and results in inequitable treatment of utilities regulated by the Commission. To change such an established regulatory precedent, AUI submitted, the Commission should have issued a new rule, regulatory guidance document or, at a minimum, included a direction in a previous AUI debenture decision. AUI submitted that the recognition of an effective date on a debenture prior to the date of the Commission’s approval and prior to the date of the application causes no harm to customers whatsoever and is in the public interest.

50. In response to the UCA’s reference to the Supreme Court of Canada decision (*ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] S.C.J. No. 4), AUI submitted that the Supreme Court’s decision actually supported the position of AUI. In particular, AUI stated that in that decision, the Supreme Court found the EUB exceeded its jurisdiction by apportioning the gain on sale of certain utility property to customers because Section 26(2)(d)(i) was silent as to that power of apportionment. Similarly, AUI submitted, Section 26(2)(a)(ii) “does not contemplate the Commission altering the effective date of a debenture found by the Commission to have been issued in accordance with law.”³¹

51. AUI stated that the UCA had argued that approval of a debenture dated prior to the date of the Commission’s decision amounts to retroactive rate making. AUI responded that the relief requested by AUI would not amount to retroactive rate making as no rates will be made by the requested variation, since the Commission deferred all rate related issues to AUI’s next general rate application.

52. AUI submitted that the approval of a debenture with an effective date prior to the date of the application or approval is no more retroactive ratemaking than approving a capital expenditure for inclusion in rate base. Even though a capital expenditure may not be included in rate base for purposes of establishing a utility’s revenue requirement until approved by the AUC, once approved, it is included in the calculation of rate base, return and depreciation as and from the date it was put into service (even if prior to approval in a general rate application). Similarly, a debenture, once approved as meeting the requirements of Section 26(2)(a)(ii), should be included as and from its effective date.

53. In response to the UCA’s position that the Commission’s enabling legislation does not support the approval of a debenture with an effective date prior to the Commission’s decision, AUI reiterated its submission that Section 8(6) of the Alberta Utilities Commission Act indicates that, “[a]n order of the Commission takes effect at the time provided for by the order or, if no time is provided for, on the date of the order.” This provision in conjunction with Section 8(2), which provides the Commission all powers necessary or incidental to the exercise of its powers, provides the Commission the authority to approve a debenture dated prior to the date of the

³¹ AUI reply submission, paragraph 15.

Commission's decision. In fact, AUI suggested, the provision likely provides the Commission the power to backdate its own order in certain circumstances, however AUI stated that it was not requesting this of the Commission.

54. AUI submitted that if the Commission lacked the power to approve the debentures contained in the precedents cited by AUI, as suggested by the UCA, then the debt of AUI and ATCO approved by the board and Commission would be unauthorized from 2001 through to 2009 inclusive. AUI stated that this narrow interpretation by the UCA of the Commission's powers lacks any legal support, would have far reaching consequences, not only for AUI but other utilities, and would result in significant uncertainty. The argument effectively represents a collateral attack on previous decisions of the Commission by the UCA. The Commission clearly has the power to approve a debenture and all of its terms, including a term (Section 1.9) setting out an effective date prior to the Commission's decision.

55. In response to the UCA's submission that AUI's application was out of time and possibly of no effect, AUI submitted that the UCA quoted no case law or legal principles for its argument on this point.

56. Toward the end of its reply submission, at paragraphs 24 and 25, AUI concluded:

...the UCA refers to subsection 26(2)(a)(ii) of the [*Gas Utilities Act*] and argues the Commission cannot, "...designate an effective date for a decision as a date other than the date of the decision". The UCA argues the Commission would exceed its authority in doing so. AUI is not requesting that the Commission re-date Decision 2010-266. AUI is requesting that the Commission simply approve the AUI 2009 Debentures with an effective date that corresponds to their stated effective date of October 8, 2009. No more is required of the Commission to rectify or clarify Decision 2010-266. [Emphasis added by AUI]

...the UCA argues AUI will not be harmed if the effective date of the AUI 2009 Debentures is June 9, 2010, because AUI's existing rates will continue in effect. In reply, AUI submits if the AUI 2009 Debentures have an effective date of June 9, 2010, rather than October 8, 2009, AUI will not be able to apply for interest costs related to the AUI 2009 Debentures from January 1, 2010 to June 9, 2010. No application for interim rates or a deficiency rider will address this issue.

6 Commission supplemental request for comment

57. On November 26, 2010, the Commission sought further comments from parties regarding the effect of Decision 2010-266. In particular, the Commission sought further submissions regarding the harm that AUI alleged in paragraph 25 of its reply submission:

At paragraph 14, the UCA argues AUI will not be harmed if the effective date of the AUI 2009 Debentures is June 9, 2010, because AUI's existing rates will continue in effect. In reply, AUI submits if the AUI 2009 Debentures have an effective date of June 9, 2010, rather than October 8, 2009, AUI will not be able to apply for interest costs related to the AUI 2009 Debentures from January 1, 2010 to June 9, 2010. No application for interim rates or a deficiency rider will address this issue. [emphasis added by the Commission]

58. The Commission noted that Decision 2010-266 did not preclude AUI from arranging for some form of interim or bridge financing to cover the period from the applied-for issuance date of the 2009 debentures (October 8, 2009) to the date of the decision (June 9, 2010), the date the 2009 debentures could be issued, nor did Decision 2010-266 suggest that reasonable interest costs associated with any such interim debt solution would not be recoverable.

59. The Commission also noted that AUI has the opportunity to recover its reasonable debt costs for all of 2010, including the period January 2010 – June 2010, in AUI’s next general rate application.³² The Commission specifically indicated in Decision 2010-266 that “[i]t is more thorough to conduct a complete review of AUI’s cost of debt as part of the GRA” and, specified, at paragraph 54, that:

(...)As such, the Commission directs AUI to include a full and comprehensive review of AUI’s debt financing as part of its next GRA. Specifically, the Commission directs AUI to fully explore and provide a comprehensive analysis of debt financing alternatives that were available to AUI at the time of AUI’s Board of Directors resolution, December 3, 2009. The analysis should include the reasons for selecting a preferred option and the reasons for rejecting the others.

60. AUI filed its response to the Commission’s request for comment on December 8, 2010. The UCA did not file any comments.

61. AUI stated that if the effective date of the debentures is held to be June 9, 2010, AUI will be deprived of the opportunity to earn a fair return in at least the following two ways:³³

- i. Interest rates for short term debt financing are generally lower than interest rates for long term debt financing. Applying deemed short term interest rates to actual long term debt for the period January 1, 2010, to June 8, 2010, will create a significant difference between AUI’s actual 2010 cost of debt and the costs AUI will recover in rates. This difference will materially erode AUI’s earnings, depriving AUI of the opportunity to earn a fair return in 2010.
- ii. Interest rates fluctuate over time. If the interest rates ultimately approved for the AUI Debentures are those considered appropriate for debt deemed to have been placed well after third party debt was actually incurred by AUI’s ultimate parent at rates mirrored down to AUI, AUI is exposed to the risk that the deemed interest rates will be lower than the actual interest rates on its issued debt. Those deemed interest rates will continue to be reflected in AUI’s revenue requirements until the Debentures mature. If the deemed rates are lower than the rates actually paid by AUI, AUI will be deprived of the opportunity to earn a fair return for the period 2010-2016.

62. AUI stated that any ability it might have to recover interest costs associated with interim financing, in the manner contemplated in the Commission letter of November 26, 2010, does not

³² AUI filed such an application with the Commission on October 22, 2010 and that application includes recovery for forecast debt costs in 2010: AltaGas Utilities Inc. 2010-2012 General Rate Application Phase I, Application No. 1606694, Proceeding ID No. 904.

³³ AUI supplemental submission, paragraph 8.

lessen, mitigate or reduce the impact of the harm to AUI cited in the fourth ground of the review. AUI stated that it was essential to the avoidance of harm to AUI that the debentures be approved as effective October 8, 2009, or at some other date in 2009, so they are reflected in the 2009 closing balance of AUI's 2010 debt financing accounts, and that if June 9, 2010, stands as the effective date of the debentures, and the debentures are, consequently, not reflected in AUI's 2009 debt financing closing balances, the financial harm to AUI in 2010 will be substantial.

63. As an example, AUI estimated the potential harm to AUI in 2010 assuming that its 2009 Commission-approved short term interest rate of 3.0 per cent would continue to be the approved rate until June 8, 2010. As illustrated in Table 1 of its submission, AUI stated that would not be able to include in its 2010 revenue requirement approximately \$1.1 million of interest expense to which it would otherwise be entitled. AUI stated that the inability to recover these costs would reduce AUI's 2010 return on equity from the forecast allowed 9.0 per cent to 7.2 per cent.

64. AUI noted the possibility that a deemed interest rate lower than the actual interest rate associated with the debentures may be applied to the debentures from June 9, 2010, to their maturity (i.e. if a rate other than that which was requested by AUI is approved by the Commission in AUI's 2010 general rate application). To estimate the potential harm from 2010-2016, AUI stated that it had determined for every 100 basis points by which a deemed interest rate is lower than the actual interest rate paid by AUI from June 9, 2010, to the maturity of the 2009 debentures, AUI will not recover approximately \$2.8 million of actual interest costs.³⁴

65. Consequently, AUI stated that the combined effect of: a) deeming AUI's debt from October 8, 2009, to June 8, 2010, to be short term interim financing; and b) an assumed 100 basis point reduction in allowed interest costs from June 9, 2010, to the maturity of the debentures as compared to the actual interest costs associated with the debentures, could reduce AUI's earnings by approximately \$3.9 million (\$1.1 million + \$2.8 million) over the period.

66. AUI further submitted that if the deemed interest rates effective June 9, 2010 are higher than the actual interest rates associated with the debentures, AUI's customers are harmed by being required to pay rates that reflect AUI debt costs higher than those actually incurred. AUI stated that as it is unlikely interest rates deemed to be effective June 2010 would be identical to those in place in October 2009, so that if the effective date of June 9, 2010, stands for purposes of determining AUI's approved interest rates, either AUI will be harmed or AUI's customers will be harmed.

67. AUI noted that in Decision 2010-266, the Commission determined, at paragraph 50:

...the appropriateness of the interest rate, the term of the debt and issue costs....would be better reviewed in the broader context of AUI's next GRA.

68. AUI stated that by setting both the effective date and the maturity date of the debentures in Decision 2010-266, the Commission has deprived AUI of the opportunity to present evidence and argument in support of its position that October 8, 2009, and not some other date, is the appropriate effective date for the debentures.

³⁴ AUI supplemental submission, Table 2.

69. AUI noted that no intervener in the proceeding leading to Decision 2010-266 argued that the effective date of the debentures should be the date of the AUC decision or some other date beyond December 3, 2009. AUI submitted that the harm that will be done to AUI as a result of the impacts of Decision 2010-266, as described in this submission, would be mitigated if the Commission:

- i. stipulates June 9, 2010, will not be the effective date of the Debentures for purposes of determining AUI's debt costs; and
- ii. directs, for purposes of determining AUI's debt costs, the effective date of the Debentures will be decided in AUI's 2010-2012 General Rate Application as either October 8, 2009, as proposed by AUI, or December 3, 2009, as proposed by the parties who intervened in the Debentures proceeding.³⁵

7 Authority to review

70. AUI requests a review and variance of Decision 2010-266 pursuant to Section 10(1) of the *Alberta Utilities Commission Act* and Section 3(1) of the Commission's rule on review and variance applications, [Rule 016](#):³⁶ *Review and Variance of Commission Decisions* (Rule 016).

71. The Commission's authority to review its own decisions is found in Section 10 of the *Alberta Utilities Commission Act*, which reads in part as follows:

10(1) The Commission may in accordance with the rules made under subsection (2) review any decision or order made by it under this Act or any other enactment and after the review may confirm, rescind or vary the decision or order.

72. Rule 016 addresses applications for review and variance. Section 3 reads in part as follows:

3(1) Subject to these rules, the Commission may review a decision on an application for review filed, within 60 days of the issuance of the decision, by a party to the decision, in a case where the applicant alleges that the decision contains an error of fact or law or jurisdiction.

73. Rule 016 establishes a two-part process for the consideration of applications for review and variance. First, Section 11 requires the Commission to answer the preliminary question of whether the decision should be reviewed. Section 12 describes the circumstances where the Commission shall grant a review, and reads in part as follows:

- 12** The Commission shall grant an application for review,
- (a) with respect to a review of a decision, other than a review under section 4(1), if the Commission determines that;
 - (i) in the case where the applicant has alleged an error of law or jurisdiction or an error of fact, in the Commission's opinion, the

³⁵ AUI supplemental submission, paragraph 28.

³⁶ AUC Rule 016, Review and Variance of Commission Decisions, approved on January 2, 2008.

applicant has raised a substantial doubt as to the correctness of the decision, or,

- (ii) in the case where the applicant has alleged new facts, a change in circumstances or facts not previously placed 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,

...

74. If the Commission decides to grant the review, it then proceeds to the second step of considering, in a new hearing or proceeding, whether the decision should be upheld, varied or rescinded.

75. In this decision the Commission must therefore determine the preliminary question of whether it should review Decision 2010-266 based on the grounds put forward by AUI.

76. In reaching its determinations set out within this decision, the Commission has considered all relevant materials comprising the record of this proceeding and the record of the proceeding resulting in Decision 2010-266. Accordingly, references in this decision to specific parts of the record are intended to assist the reader in understanding the Commission's reasoning relating to a particular matter and should not be taken as an indication that the Commission did not consider all relevant portions of the record with respect to that matter.

8 Commission findings

8.1 First ground: The AUC erred in its interpretation of Section 26(2)(a)(ii) of the Gas Utilities Act

77. The Commission considers that the review request is centered on the Commission's interpretation of Section 26(2)(a)(ii) of the *Gas Utilities Act*.

78. AUI argued that Section 26(2)(a)(ii) sets out two requirements a utility must fulfill prior to the Commission authorizing a debenture issuance: (1) the debentures must be issued in accordance with the law; and (2) the Commission must approve the purposes for which the debentures are to be issued. As noted above, AUI cited Decision 2010-035 as authority for the position that those are the only two criteria the Commission should properly consider. The Commission notes that in Decision 2010-035, the timing of that utility's debt issuance was not at issue: that utility sought approval of its debt issuance prior to the date of issuance and received that approval dated effective the date of the Commission decision.

79. AUI's position ignores the timing issue inherent in the words of Section 26(2)(a)(ii) which states that: "No owner of a gas utility designated under subsection (1) shall... issue any... bonds or other evidences of indebtedness, payable in more than one year from the date of them... unless it has first satisfied the Commission that the proposed issue is...".

80. The Commission considers that its findings in paragraph 47 of Decision 2010-266 are clear: “In the absence of an exemption from the provision, the Commission expects to receive an application under Section 26 of the *Gas Utilities Act* far enough in advance to enable the application to be reviewed and a decision rendered in advance of the proposed date of issuance.”

81. AUI submitted that Section 26(2)(a)(ii) of the *Gas Utilities Act* does not require a debenture to be dated effective as of, or after, the Commission’s approval, and that a debenture may be dated prior to the date of the Commission’s approval. The prospective nature of the Commission’s authority to set rates is subject to specific statutory exceptions.³⁷ AUI has referenced no wording in the *Gas Utilities Act* in support of its position that it is perfectly legal for the Commission to approve the debentures dated effective October 8, 2009 by Order dated June 9, 2010.

82. Further, the Commission is not satisfied that Section 8(2) and (6) of the *Alberta Utilities Commission Act* provide the authority that AUI suggests in its submissions. In particular, regarding Section 8(2), AUI did not address how the ability to approve the debentures dated effective October 8, 2009, by order dated June 9, 2010 was “necessary for or incidental to” the Commission’s authority in approving debt applications under Section 26 of the *Gas Utilities Act*. The Commission considers that Section 8(6), which states that “[a]n order of the Commission takes effect at the time provided for by the order or, if no time is provided for, on the date of the order,” must be read in the context of the particular legislation which gives rise to the Commission’s authority to grant the order, which in this case is the *Gas Utilities Act*. In the face of requirements of Section 26(2)(a)(ii), the Commission was not prepared to backdate the effective date of the order approving the debentures. The Commission considers that AUI has not raised a substantial doubt as to the correctness of the Commission’s decision on this ground.

8.2 Second ground: The effective date in Decision 2010-266 is contrary to law and established AUC precedent

83. As noted above in paragraph 15, AUI stated that the approach of approving a debenture issuance prior to an application and prior to the Commission’s decision does not amount to retroactive or retrospective ratemaking, and to the extent the Commission determined that was the case it erred in law.

84. In making its finding in paragraph 47 of Decision 2010-266, the Commission assessed the statutory authority within which it may act in approving debt applications under Section 26(2)(a)(ii) of the *Gas Utilities Act* and found that, in the absence of an exemption from the provision, the Commission expects to receive an application under Section 26 of the *Gas Utilities Act* far enough in advance to enable the application to be reviewed and a decision rendered in advance of the proposed date of issuance. This ensures that an order made by the Commission regarding such applications will take effect in the future, on a prospective and not retroactive basis.

85. While the Commission concurs with the UCA’s submission that the principle of *stare decisis* does not apply to the Commission’s decisions, it is also cognizant of the practical

³⁷ For example, Section 40(a)(ii) of the *Gas Utilities Act* allows the Commission to consider revenues and costs from a subsequent fiscal year in setting rates “to be imposed, observed and followed afterwards by an owner of a gas utility”.

concerns that inconsistent decisions can give rise to, for both applicants and interveners. For this reason, the Commission has provided brief comments on the five decisions cited by AUI and the factual circumstances cited by the board or Commission in each case.

8.2.1 AUI debenture decisions (Order U2005-102; and Decision 2006-049); and ATCO debenture decisions (Decision 2001-31; Decision 2009-114; and Decision 2009-115)

86. Both Order U2005-102 and Decision 2006-049 involved debt issues by AUI that had been considered in previous board decisions and were later finalized in more specific detail. In Order U2005-102, the board noted that it had previously approved a negotiated settlement which contemplated that AUI would issue \$30 million in debt effective January 1, 2003.³⁸ Order U2005-102 focused on an assessment of the specific terms (such as stamping fees and issue costs) of what had previously been approved as part of the negotiated settlement.

87. Similarly, in the application leading to Decision 2006-049, AUI requested approval of a \$30 million debenture to be effective October 28, 2005. As noted in Decision 2006-049, “[t]he board approved, in Decision 2005-127,³⁹ a deemed debenture placeholder amount of 6.7 per cent for the \$30 million principal to be refinanced in 2005”.⁴⁰ The focus of Decision 2006-049 was an assessment of the interest rate that should be used to replace that placeholder amount. The issuance of the debentures in question had already been considered by the board.

88. The ATCO debenture decisions cited by AUI reflect a recurring set of facts in which the Commission’s predecessor and the Commission have approved of the issuance of debentures with an earlier effective date. The ATCO issuances cited by AUI all involve a “mirroring down” of debt to the regulated utilities from its parent, CU Inc., that goes to financial markets for the express purpose of obtaining debt for those regulated entities. Because CU Inc. is also a designated utility, it requested and received an exemption from Section 26(2)(a)(ii) and its equivalent in the *Public Utilities Act* so that it does not have to request prior approval of the Commission before going to the financial markets on behalf of its regulated utilities. One of the conditions of this exemption⁴¹ is that CU Inc. must file documentation with the Commission which sets out the particulars of the transaction prior to completing any financing arrangement.

89. The most recent instance of this form of application was approved in Decision 2011-057,⁴² in which the Commission found that the particular circumstances in which CU Inc.’s debt was mirrored down⁴³ along with the terms of its exemption, provided the Commission with adequate opportunity to exercise its regulatory oversight.

90. The Commission considers that the five decisions cited by AUI are examples of exceptions to its standard practice. In most other applications under Section 26(2)(a)(ii) of the

³⁸ Order U2005-102, page 2.

³⁹ Decision 2005-127: AltaGas Utilities Inc., 2005/2006 General Rate Application – Phase I, Application No. 1378000, issued November 29, 2005.

⁴⁰ Decision 2006-049, page 1.

⁴¹ Order U99115, CU Inc. Application regarding Exemption from Certain Sections of the Public Utilities Board Act and the Gas Utilities Act, issued November 23, 1999.

⁴² Decision 2011-057: ATCO Electric Ltd., Application to Issue Debentures to CU Inc., 4.947 Per cent in the Principal Amount of \$125,000,000, Application No. 1606855, Proceeding ID No. 1006, issued February 17, 2011.

⁴³ Decision 2011-057, paragraphs 20-23.

Gas Utilities Act or Section 101(2)(a)(ii) of the *Public Utilities Act*, parties apply in advance for approval to issue debt and receive an order dated coincident with the date of the Commission's decision. While there may be some similarities between the decisions cited by AUI and the circumstances leading to Decision 2010-266 (for example, the “mirroring down” of debt obtained by a parent company), there are also factual differences (for example, the timing of the issuances and the absence of an exemption requiring information to be filed with the Commission).

91. In coming to its determination in Decision 2010-266 the Commission considered the facts on the record of that proceeding and found that it was not prepared to backdate the effective date of the order approving the debentures given the requirements of Section 26(2)(a)(ii). The fact that the board or the Commission has found cause to do so in other circumstances does not affect the correctness of the Commission's decision in this regard and accordingly, the Commission considers that AUI has not raised a substantial doubt as to the correctness of the Commission's decision on this ground.

8.3 Third ground: The effective date is contrary to other AUC findings in Decision 2010-266

92. The Commission determined in Decision 2010-266, in reliance on the legal opinion provided for that purpose, that the issuance would be made in accordance with law. AUI's submission suggested that reliance on that opinion meant that there was no reason to adjust the effective date since the debentures and AUI board of directors' resolution both contained an effective date of October 8, 2009. This position seems to ignore the Commission's obligation under the statutory language of Section 26(2)(a)(ii) as was discussed in the first ground. The Commission also notes its finding that the debentures “...will be issued in accordance with law”; that is, when issued in accordance with the effective date of the Commission order (i.e. June 9, 2010 or later).

93. AUI also pointed to the Commission's direction to AUI to provide an analysis of debt financing alternatives available to AUI at the time of its directors resolution (December 3, 2009) as being inconsistent with the effective date approved by the Commission. The Commission considers that the direction has a clear purpose: to ascertain, at AUI's next general rate application, what other options were available to or considered by AUI's board of directors on December 3, 2009, when they choose to execute the resolution approving the debentures effective October 8, 2009. The fact that there is a lag between when the directors resolved to take action and when the order approving the debentures was granted is not inconsistent with the direction given; it is simply a function of the regulatory lag inherent in Section 26(2)(a)(ii) approvals. The Commission therefore considers that AUI has not raised a substantial doubt as to the correctness of the Commission's decision on this ground.

8.4 Fourth ground: Decision 2010-266 deprives AUI of the opportunity to earn a fair return

94. AUI initially submitted that the Commission, in approving the issuance of the debentures with an effective date of June 9, 2010, violated AUI's statutory right to earn a fair return on its rate base under Section 37(1) of the *Gas Utilities Act*. In its reply submission, AUI addressed the harm more specifically by indicating that if Decision 2010-266 was not varied the Commission

will have prevented AUI from earning a fair return on its debt component of rate base from the period January 1, 2010, to June 9, 2010.

95. In response to the Commission's supplemental request for comment on the harm referred to in paragraph 25 of AUI's reply submission – namely, that "... AUI will not be able to apply for interest costs related to the AUI 2009 debentures from January 1, 2010 to June 9, 2010" – AUI stated that it would be deprived of the opportunity to earn a fair return in at least two ways: the first being that interest rates for short term debt financing are generally lower than interest rates for long term debt financing, so that applying deemed short term interest rates to actual long term debt for the period January 1, 2010, to June 8, 2010, will create a significant difference between AUI's actual 2010 cost of debt and the costs AUI will recover in rates. The second way AUI indicated it would be deprived of the opportunity to earn a fair return was that AUI is then exposed to the risk that the deemed interest rates will be lower than the actual interest rates on its issued debt; and if the deemed rates are lower than the rates actually paid by AUI, AUI will be deprived of the opportunity to earn a fair return for the period 2010-2016 (i.e., the term of the debentures).

96. The Commission finds it premature to characterize either of these situations as depriving the utility of the opportunity to earn a fair return since AUI's 2010 revenue requirement (which includes the determination of AUI's "return on debt component of rate base") is currently being assessed by the Commission in AUI's 2010-2012 general rate application.⁴⁴ That proceeding is the proper venue to ascertain the costs of AUI's debt for 2010: both the short term interest rate for the period of January through June 2010 and the deemed interest rate that the Commission will determine for the debentures for the test period. To argue that harm will occur or that a fair return will be denied to AUI here does not take into account that it is precisely these matters that will be assessed in AUI's general rate application. The Commission considers that AUI has not raised a substantial doubt as to the correctness of the Commission's decision on this ground.

9 Decision

97. For the above reasons, the Commission is of the opinion that AUI's review request fails to raise a substantial doubt as to the correctness of Decision 2010-266 as required by Section 12(a)(i) of Rule 016. The Commission denies the review request.

Dated on March 8, 2011.

The Alberta Utilities Commission

(original signed by)

Moin A. Yahya
Commission Member

⁴⁴ AltaGas Utilities Inc. 2010-2012 General Rate Application Phase I, Application No. 1606694, Proceeding ID No. 904.

Appendix 1 – Proceeding participants

Name of Organization (Abbreviation) Counsel or Representative
AltaGas Utilities Inc. (AUI) N. J. McKenzie R. Koizumi C. Martin S. Alexander J. Coleman C. Fieger

Alberta Utilities Commission
Commission Panel M. Yahya, Commission member
Commission Staff V. Slawinski (Commission counsel)