Decision **2011-119**

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

Disposition of Carbon Assets

March 29, 2011

The Alberta Utilities Commission
Decision 2011-119: ATCO Gas and Pipelines Ltd., CU Inc. and Canadian Utilities Limited
Disposition of Carbon Assets
Application No. 1606815
Proceeding ID No. 966

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Published by
The Alberta Utilities Commission
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Calgary, Alberta

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1 Introduction

1. ATCO Gas and Pipelines Ltd. (AGPL), CU Inc. (CUI) and Canadian Utilities Limited (CU) (collectively ATCO)[1] filed an application (application) on December 1, 2010 with the Alberta Utilities Commission (the AUC or the Commission).[2] ATCO sought approval from the Commission for the disposition (the Carbon Transaction) of the Carbon natural gas storage facility assets and associated properties (the Carbon assets) owned by AGPL. The requested approval was made pursuant to Section 26(2)(d) of the *Gas Utilities Act*, R.S.A. 2000, c. G-5 and Section 2(c) of the *Gas Utilities Designation Regulation* A/R 257/2007.

2. The purpose of the Carbon Transaction is to transfer the Carbon assets from AGPL to ATCO Midstream Ltd. (AML or Midstream).[3] The Carbon assets are considered by ATCO to be non-utility assets and their transfer to AML would remove them from indirect ownership by CUI, which is intended to be a holding company for utility assets only. The proposed Carbon Transaction is to be achieved by means of a tax effective corporate reorganization under Section 85 of the *Income Tax Act, R.S.C. 1985 (5th Supp) c. 1 as amended*. Procedures involved are illustrated as follows:

1) AGPL sells the Carbon assets to AML in exchange for $20,000,000 cash and preferred shares of AML.
2) AML redeems the AML preferred shares issued to AGPL in step 1 for $17,000,000 cash and an AML promissory note for $193,000,000.
3) AGPL distributes the AML promissory note to CUI as a dividend.
4) CUI distributes the AML promissory note to CU as a dividend.
5) CU uses the AML promissory note to acquire Class A non-voting and Class B common shares of AML, resulting in the cancellation of the AML promissory note.[4]

3. The Commission received a statement of intent to participate (SIP) by the deadline of December 16, 2010, from BP Canada Energy Company (BP) and the Office of the Utilities Consumer Advocate (UCA). BP raised no issues and the UCA considered that a written process, with provision for the submission of information requests, would be adequate to deal with the application.

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[1] AGPL is a wholly-owned owned subsidiary of CUI, which is a wholly-owned subsidiary of CU.
[2] AUC refers to the Alberta Utilities Commission as an organizational entity; Commission refers to the AUC Commission members as a collective body or a panel.
[3] AML is a wholly-owned non-regulated subsidiary of CU.
[4] Based on the referenced transaction, the value of the Carbon assets appears to be $230 million based on the redemption of the preferred shares and $20 million in cash

4. Given the submissions, the Commission established the following process schedule.

Process	Due date
Information Requests to AGPL	January 13, 2011
Information Responses from AGPL	January 27, 2011
Argument	February 10, 2011
Reply Argument	February 24, 2011

5. For purposes of the application, the Commission considers that the record closed on February 24, 2011.

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

2 Background

7. In Decision 2005-063[5] the Alberta Energy and Utilities Board (Board) addressed certain Preliminary Questions related to its continuing jurisdiction over the Carbon assets. In that Decision the Board determined that these questions could best be addressed through an examination of whether or not the Carbon assets were used or required to be used to provide service to the public and therefore should remain in rate base, which was the test set out in Section 37(1) of the *Gas Utilities Act* for the inclusion of assets in rate base. The Board determined that there were two "uses" for the Carbon assets relevant to its examination: 1) revenue generation and 2) distribution system load balancing.[6]

8. The Board addressed the use of load balancing in Decision 2006-098,[7] dated October 10, 2006. The Board concluded that the Carbon assets were not used or required to be used to provide service to the public, nor should they otherwise remain in the rate base of ATCO Gas South[8] in connection with the load balancing of ATCO Gas South's distribution system.[9]

9. Determining whether or not the Carbon assets were necessary to provide revenue generation was addressed in Decision 2007-005.[10] The Board concluded that revenue generation

[5] Decision 2005-063: ATCO Gas South 2005/2006 Carbon Storage Plan – Preliminary Questions, Application No. 1357130, June 15, 2005.

[6] Ibid, page 21.

[7] Decision 2006-098: ATCO Gas Retailer Service and Gas Utilities Act Compliance, Phase 2, Part B, Application No. 1411635, October 10, 2006, Decision 2006-098 Errata, November 7, 2006.

[8] ATCO Gas is a division of AGPL. The Carbon assets were more particularly included in the rate base of ATCO Gas South, a sub-division which operates in ATCO Gas' south service territory (south of the City of Red Deer).

[9] Ibid, page 51.

[10] Decision 2007-005: ATCO Gas South Carbon Facilities - Part 1 Module – Jurisdiction (2005/2006 Carbon Storage Plan), Application No. 1357130, February 5, 2007.

was a proper utility use for the Carbon assets given their unique factual and historical circumstances.

10. On May 27, 2008 the Alberta Court of Appeal issued a Decision (Carbon Appeal Decision)[11] which allowed AGPL's appeal of Order U2005-133[12] and Decisions 2005-063 and 2007-005. Specifically, the court determined that the Board erred when it included Carbon in rate base as an asset used or required to be used to provide service to the public when the only function of the Carbon assets was to generate revenue.

11. On June 20, 2008, the Commission issued Order U2008-213[13] which suspended the following rate riders and charges related to the Carbon assets from the rate schedules of ATCO Gas South, effective July 1, 2008, until such time as the Commission might provide further direction:

- Company Owned Production Rate Rider (COPRR) – Rider "G"
- Company Owned Storage Rate Riders (COSRRs) – Rider "H" and Rider "I" (Irrigation), and
- Carbon Production and Storage Charge (P&SC)

12. On July 11, 2008, ATCO Gas filed an application (Carbon Compliance Application)[14] with the Commission requesting the Commission to set aside Order U2005-133 and Decisions 2005-063 and 2007-005 and to grant a new order implementing the finding of the Alberta Court of Appeal in the Carbon Appeal Decision.

13. On November 13, 2008, the Commission issued Decision 2008-113[15] in respect of ATCO Gas's 2008-2009 General Rate Application (GRA). In accordance with Decision 2008-113, ATCO Gas submitted a 2008-2009 GRA compliance application in which it removed the revenues, costs, assets and liabilities related to the Carbon assets from the 2008/2009 revenue requirement forecasts. The amended revenue requirement was approved in Decisions 2009-109[16] and 2010-025.[17]

14. On November 28, 2008 the Alberta Court of Appeal released two decisions granting AGPL leave to appeal the Harvest Hills[18] and the Salt Caverns Letters[19] decisions of the Board and the Commission.

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[11] *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)* 2008 ABCA 200.

[12] Order U2005-133: ATCO Gas South 2005/2006 Carbon Storage Plan Interim Order, Application No. 1357130, March 23, 2005.

[13] Order U2008-213: ATCO Gas Suspension of Riders and Rate, Application No. 1574733, Proceeding ID. 61, June 20, 2008.

[14] Application No. 1579086, Proceeding ID. 87, Removal of Carbon Related Assets from Utility Service.

[15] Decision 2008-113: ATCO Gas 2008-2009 General Rate Application Phase I, Application No. 1553052, Proceeding ID. 11, Released: November 13, 2008.

[16] Decision 2009-109: ATCO Gas 2008-2009 General Rate Application Phase I Compliance Filing, Application No. 1603068, Proceeding ID. 154, July 28, 2009.

[17] Decision 2010-025: ATCO Gas 2008-2009 General Rate Application Phase I Second Compliance Filing, Application No. 1605412, Proceeding ID. 294, January 13, 2010.

[18] Harvest Hills refers to Decision 2007-101, (ATCO Gas Disposition of Land in the Harvest Hills Area, Application No. 1512932, December 11, 2007) considered the application by ATCO Gas for approval pursuant to section 26(2)(d) of the *Gas Utilities Act* to sell a four acre vacant parcel of land in the Harvest Hills area of

15. In order to facilitate and potentially expedite the Carbon Compliance Application, the Commission held an oral pre-hearing conference on December 16, 2008. Following the conference, the Commission issued Decision 2009-004.[20] This Decision included the Final Issues List and made a determination that a unilateral removal of assets, like the Carbon assets, from rate base by a utility was a "disposition" requiring approval of the Commission under Section 26(2) of the *Gas Utilities Act* (the Disposition Issue).

16. On June 26, 2009, the Commission issued Decision 2009-067,[21] in respect of three Preliminary Questions. The Commission decided:

1) October 10, 2006 would be the date (Adjustment Date) to reflect all necessary rate adjustments for the removal of the Carbon assets from rate base.
2) Amounts included in approved revenue requirements prior to the Adjustment Date in respect of depreciation or net negative salvage on the Carbon assets should not be refunded to customers.
3) As costs for Carbon were prepared on a forecast basis and storage revenues from Carbon were collected and credited to customers on an actual basis, the Commission determined that the amount to be collected from customers to reflect the Adjustment Date should be calculated using the same methods.

17. On August 6, 2009, the Commission issued a letter advising parties that the Commission was initiating a review and variance proceeding, Proceeding ID. No. 281, in light of the full appeal decision by the Court of Appeal relating to the ATCO Pipelines' salt caverns assets.[22] This decision determined that a utility may unilaterally withdraw an asset from rate base without prior approval by the Commission. The review and variance proceeding was initiated with respect to the Disposition Issue decided in Decision 2009-004 and with respect to the Adjustment Date decided in Decision 2009-067.

18. The review and variance proceeding resulted in Decision 2009-253.[23] In this decision, the Commission varied its finding in Decision 2009-004 that the consent of the Commission was required before a utility could remove an asset from rate base. It also varied the Adjustment Date determined in Decision 2009-067 from October 10, 2006 to April 1, 2005, being the date on

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Calgary purchased as part of a larger 5.35 acre lot in 1993 for construction of a regulating station. Leave to Appeal was granted on November 12, 2008 in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2008 ABCA 381.

[19] The Salt Cavern Letters refers two letters issued in the proceeding related to ATCO Pipelines' 2008-2009 General Rate Application, Application No. 1527976, Proceeding ID No. 13. ATCO Pipelines is a division of AGPL. The first letter was issued by the Board on November 6, 2007 and the second was issued by the Commission on July 30, 2008. Both letters restricted the proposed removal from rate base of certain salt cavern assets owned by ATCO Pipelines which were indicated to be surplus to the needs of the utility. Leave to Appeal was granted on November 12, 2008 in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2008 ABCA 382.

[20] Decision 2009-004: ATCO Gas South, Removal of Carbon Related Assets from Utility Service Pre-hearing Conference Scoping Decision, Application No. 1579086, Proceeding ID. 87, January 9, 2009.

[21] Decision 2009-067: ATCO Gas South, Removal of Carbon Related Assets from Utility Service, Preliminary Questions, (Application No. 1579086, Proceeding ID. 87, June 26, 2009.

[22] *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2009 ABCA 246, Docket: 0701-0325-AC and 0801-0244-AC (Salt Caverns Appeal Decision).

[23] Decision 2009-253: ATCO Gas South Review and Variance Proceeding Of Decision 2009-004 and Decision 2009-067 (Removal of Carbon Related Assets from Utility Service), Application No. 1605365, Proceeding ID. 281, December 16, 2009.

which ATCO Gas determined that the Carbon assets were no longer used or required to be used to provide utility service.

19. On April 20, 2010, the Commission issued Decision 2010-167[24] which approved Rate Riders "H", and "I", for the period May 1, 2010 to December 31, 2010, to partially collect amounts that would be due to ATCO Gas as a result of adjusting revenue requirement and related riders to reflect the removal of the Carbon assets from utility rate base and rates as of the Adjustment Date. The rate riders applied for were approved on an interim and refundable basis given that the final determination of the amounts to be recovered from ratepayers was left to be completed in Carbon Compliance Application proceeding, ID No. 87.

20. On May 12, 2010, the Court of Appeal dismissed the application for Leave to Appeal filed by Calgary and the UCA in respect of Decision 2009-253 in *Calgary (City) v. Alberta (Utilities Commission)*, 2010 ABCA 158 (Carbon R&V Appeal Decision).

21. On October 19, 2010, the Commission issued Decision 2010-496[25] in the Carbon Compliance Application proceeding which determined that the Carbon related accounts and capital related expenditures and the calculation of the amounts, including interest, to be collected from each rate class in ATCO Gas South's service territory over a defined period were reasonable and complied with Alberta Regulation 546/63.[26] Further, no other approvals under Section 26(2) of the *Gas Utilities Act* were required with respect to the lease of the Carbon storage facility to AML for the period from the Adjustment Date to the end of the current one-year term. However, any new disposition of the Carbon assets beyond the current one-year term of the lease required a new approval pursuant to Section 26(2) of the *Gas Utilities Act*. Further, Section 26 is applicable to any sale related to the assets of the Carbon assets, whether in rate base or not, and would include the sale of the unproduced natural gas reserves used as base gas or any portion thereof.

22. Decision 2010-496 also terminated, effective October 31, 2010, the interim rate riders approved in Decision 2010-167 and replaced them with final rate Rider "H" and Rider "I", applicable to the period from November 1, 2010 to December 31, 2011. ATCO Gas was also directed to file an application no later than three months after December 31, 2011, in which it must provide details of the actual amounts recovered through Riders "H" and "I" and a reconciliation mechanism for any over/under collection.

3 Particulars of the application

AGPL

23. Pursuant to Section 2(c) of the *Gas Utilities Designation Regulation*, AGPL is a designated owner of a gas utility for the purpose of Section 26 of the *Gas Utilities Act.* In accordance with Section 26(2)(d)(i) of the *Gas Utilities Act,* AGPL sought approval from the Commission for the disposition of the Carbon assets to AML.

[24] Decision 2010-167: ATCO Gas South, Approval to Implement Carbon Recovery Riders, Application No. 1605873, Proceeding ID. 479, April 20, 2010.

[25] Decision 2010-496: ATCO Gas South, Removal of Carbon Related Assets from Utility Service, Application No. 1579086, Proceeding ID. 87, October 19, 2010.

[26] The *General Instructions to the Canadian Gas Association Uniform Classification of Accounts for Natural Gas under the Jurisdiction of the Public Utilities Board of the Province of Alberta*.

CUI

24. Pursuant to Section 2(e) of the *Gas Utilities Designation Regulation* and Section 1(1)(j) of the *Public Utilities Designation Regulation,* NR 194/2006*,* CUI is a designated owner of a gas utility for the purpose of Section 26 of the *Gas Utilities Act* and a designated owner of a public utility for the purpose of Section 101 of the *Public Utilities Act,* R.S.A. 2000, c. P-45 respectively. In accordance with Section 26(2)(d)(i) of the *Gas Utilities Act* and Section 101(2)(d)(i) of the *Public Utilities Act*, CUI may be required to seek approval from the Commission in respect of certain steps of the Carbon Transaction.

25. CUI is exempt (subject to undertakings) from the approval requirements contained in Section 26(2) of the *Gas Utilities Act* and Section 101(2) of the *Public Utilities Act* pursuant to Order U99115.[27] Order U99115 was subsequently clarified and amended via Order U99118.[28] Orders U99115 and U99118 have not been varied or rescinded as of the date hereof.

26. The relevant exemptions granted to CUI pursuant to Orders U99115 and U99118 and the relevant condition appear as follows:

> The Alberta Energy and Utilities Board pursuant to section 71(1)(c)(ii) of the PUB Act [*Public Utilities Board Act*], section 3(1)(c)(ii) of the GU Act*[Gas Utilities Act],* and section 10(3)(d) of the *Alberta Energy and Utilities Board Act* hereby orders as follows:
>
> 1. Sections 80(a), 80(c), 80(d), 80(e), 91.1(2) [which is now 101(2)] and 93 of the PUB Act do not apply to CU Inc.;
>
> 2. Sections 25.l(2) [which is now 26(2)], 27(a), 27(c), 27(d), 27(e) and 36 of the GU Act *[Gas Utilities Act]* do not apply to CU Inc.;
>
> 3. The Applicant will accept and satisfy the terms of the amended undertaking attached as Appendix A.

27. The undertaking attached as Appendix A to Orders U99115 and U99118 requires, *inter alia,* that a written statement signed by a responsible officer of CUI setting out the particulars and purpose of the proposed transaction in summary form, be provided prior to closing of the transaction. Consistent with this undertaking, CUI indicated that the application, being signed by an officer of CUI, constitutes the written summary setting forth the particulars and purpose of the Carbon Transaction.

CU

28. Pursuant to Section 2(d) of the *Gas Utilities Designation Regulation* and Section 1(1)(g) of the *Public Utilities Designation Regulation*, CU is a designated owner of a gas utility for the purpose of Section 26 of the *Gas Utilities Act* and a designated owner of a public utility for the purpose of Section 101 of the *Public Utilities Act*, respectively. In accordance with Section 26(2)(d)(i) of the *Gas Utilities Act* and Section 101(2)(d)(i) of the *Public Utilities Act,*

[27] Order U99115: CU Inc., Application Regarding Exemption from Certain Sections of the Public Utilities Board Act and the Gas Utilities Act, Application No. 990182, File 6640-179, November 23, 1999.

[28] Order U99118: CU Inc. Variance of the Order Approved as Part of Decision U99115, Application No. 990182, File 6640-179, December 21, 1999.

CU may be required to seek approval from the Commission for the steps outlined in the Carbon Transaction.

29. CU is exempt (subject to undertakings, described below) from the approval requirements contained in Section 26(2) of the *Gas Utilities Act* and Section 101(2) of the *Public Utilities Act* pursuant to Order No. E81010.[29] Order No. E81010 was subsequently incorporated by reference via Decision No. E81085.[30] CU understands that Order No. U81010 and Decision No. E81085 have not been varied or rescinded as of the date hereof. The relevant exemptions granted to CU pursuant to Order No. E81010 and the relevant condition appear as follows:

> 1. The Board does hereby declare that, effective as of the date of this Order, the provisions of Sections 87(1)(e), 87(1)(f.1), 87(1)(g), 80(a), 80(c), 80(d), 80(e) and 89 of The Public Utilities Board Act and the provisions of Sections 24(1)(e), 24( )(f.l), 24(1)(g), 26(a), 26(c), 26(d), 26(e) and 35 of The Gas Utilities Act do not apply to CUL unless and until this Order is varied or rescinded by the Board.
>
> ....
>
> 3. This Order is subject to the condition that CUL [CU] comply with the Undertaking attached to this Order.[31]

30. The undertaking attached as Appendix A to Order No. E81010 requires, *inter alia,* that a written statement signed by a responsible officer of CU setting out the particulars and purpose of the proposed transaction in summary form, be provided prior to closing of the transaction. The undertaking also requires CU to file with the Commission, prior to closing, "all information" which CU intends "to provide to Securities Commissions or Stock Exchanges in Canada."

31. Consistent with the undertaking, CU indicated that the application, being signed by an officer of CU, constitutes a written summary setting forth the particulars and purpose of the Carbon Transaction. CU also included the news release that it has filed on SEDAR[32] with regard to the Carbon Transaction.

4 Issues

Harm to customers

32. ATCO submitted that as a designated owner of a gas utility, AGPL requires approval from the Commission for the disposition of the Carbon assets to AML pursuant to Section 26(2)(d)(i) of the *Gas Utilities Act*. ATCO submitted that ratepayers would not be harmed by the Carbon Transaction and that the application should be approved because the Carbon assets were non-utility in nature and had already been removed from rate base, stating:

[29] Order No. E81010: Canadian Utilities Limited, File E3.504.70.1, dated January 14, 1981.
[30] Decision No. E81085: Canadian Utilities Limited, File E3.504.70.1, dated May 14, 1981.
[31] Order No. E81010, at pages 4 and 5.
[32] System for Electronic Document Analysis and Retrieval, where investors can access copies of documents filed by Canadian public companies.

> In short, there can be no impact to ratepayers resulting from the Carbon Transaction since the Carbon natural gas storage facility assets and associated producing properties are non-utility assets and none of the costs of the Carbon assets are in rate base.[33]

33. ATCO considered that, in the case of the disposition of non-utility assets such as the Carbon assets, the Commission has recognized that the approval serves but one purpose, which was described by the Supreme Court of Canada (Supreme Court) in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)* 2006 SCC 4 (Stores Block) (paragraph 44):

> In fact, s. 26(2) can only have limited, if any, application to non-utility assets not related to utility function (especially when the sale has passed the "no-harm" test). The provision can only be meant to ensure that the asset in question is indeed non-utility, so that its loss does not impair the utility function or quality. [Emphasis added by ATCO.]

34. ATCO cited subsequent decisions in which it considered that the Commission has recognized the above finding of the Supreme Court in Stores Block.[34]

35. ATCO also submitted that the Carbon assets have been confirmed by the Commission to be no longer used or required for operational utility purposes (i.e., non-utility assets and that no harm to customers would result from their removal from rate base and regulation). In its support, ATCO referenced the following Commission findings in Decision 2009-004 and Decision 2009-067:

> Given the cumulative result of the Stores Block Decision and the proceedings before the Board and the Court of Appeal that Carbon has no operational purpose and that revenue generation is an improper reason to maintain Carbon in rate base, no harm to customers can result from the removal of Carbon from rate base provided it is accounted for properly and revenue requirement is adjusted accordingly.[35] [Emphasis added by ATCO.]

> … in the case of Carbon, both of these issues have already been determined. Carbon does not have an operational use for providing utility service and its removal will not harm customers.[36] [Emphasis added, footnote omitted by ATCO.]

36. ATCO argued that the Alberta Court of Appeal has upheld the non-utility status of the Carbon assets in its findings that:

> [20] While the parties raised a number of issues in their submissions regarding leave, the primary question remains whether the proposed appeal raises a serious arguable question of law or jurisdiction. In my view, the applicants have not met that test, and I deny leave to appeal. As quoted above, the Commission has found as a matter of fact that as of April 1, 2005, the Carbon storage facility was not being used to provide utility service. It made no error of law in doing so, but rather correctly applied the law set out in two decisions of this court. As clearly stated by this court, in both the *Carbon Decision* and in *Salt*

[33] Exhibit 14.01, ATCO argument, paragraph 3.
[34] Reference: Decision 2010-025, paragraph 30, and Decision 2010-496, paragraph 149.
[35] Decision 2009-004: ATCO Gas South, Removal of Carbon Related Assets from Utility Service, Pre-hearing Conference Scoping Decision, Application No. 1579086, Proceeding ID. 87, pages 12-13
[36] Decision 2009-067: ATCO Gas South, Removal of Carbon Related Assets from Utility Service, Preliminary Questions, Application No. 1579086, Proceeding ID. 87, paragraph 33, page 8.

> *Caverns*, the Commission had no jurisdiction to include the Carbon storage facility in the rate base once the asset was no longer being used or required to be used in the operation of the regulated utility.
> …
>
> [25] ... While the Commission initially selected the date that it determined that the Carbon facility no longer served any operational function, it varied its opinion following this Court's decision in *Salt Caverns.* It concluded, as a matter of fact, that as of April 1, 2005, the Carbon facility was no longer being used or required to be used in the operational sense. The Commission's decision as to the date on which the asset was no longer used or required to be used in providing the service is entirely one of fact and in any event was correctly decided.[37] [Emphasis added by ATCO]

37. ATCO further argued that no evidence on the record contradicted the non-utility status of the Carbon assets. Further, no evidence was put forward to suggest that the removal of the Carbon assets from the rate base of ATCO Gas, effective April 1, 2005, would result in harm to customers. ATCO asserted that the removal of the Carbon assets from regulatory oversight does not impair ATCO Gas' utility function or quality of service and confirmed that ATCO Gas has properly accounted for their removal from regulation and adjusted its revenue requirement accordingly.[38]

38. No party to the proceeding took issue with the ATCO submissions.

Carbon assets as an entirety

39. ATCO emphasized that, for purposes of Section 26(2) of the *Gas Utilities Act*, there is no basis for any differentiation amongst properties referred to as the Carbon assets, which includes the Carbon natural gas storage facility, the unproduced base gas (also known as cushion gas), all wells, compressors, pipes, buildings, vehicles, and buffer lands. More particularly, ATCO submitted that the base gas is necessary for the continued operation of the Carbon storage business and cannot be separated because it is required to maintain operating pressure for the storage facility. ATCO submitted that all of the Carbon assets are integral to the continued operation of the Carbon storage business.

40. ATCO argued that the proposed Carbon Transaction of the entirety of the Carbon assets will not adversely affect any member of the public who is currently receiving service or who will receive service from ATCO Gas.

41. No party to the proceeding took issue with the ATCO submissions.

Particulars of the Carbon Transaction

42. The UCA noted that Section 6.4 of the Asset Conveyance Agreement between AGPL and AML concerning the Carbon Transaction provided that the purchaser will be liable for and indemnify the vendor for all environmental costs. Given that ATCO Gas has not confirmed that the final form of the final agreement will be identical to the draft agreement filed with the application, the UCA was concerned that the final agreement could change such that ATCO Gas

[37] *Calgary (City) v. Alberta (Utilities Commission),* 2010 ABCA 158,
[38] Exhibit 13.01, response to UCA-AG-2(a).

South may at some time in the future be subject to environmental or reclamation liabilities or costs. The UCA wanted to ensure that customers would not be at risk for any future costs related to the Carbon assets. Consequently, the UCA requested clarification and direction from the Commission that, regardless of the final Asset Conveyance Agreement, any future costs related in any manner to the Carbon assets will not be recovered from customers.

43. ATCO disputed the two issues raised by the UCA concerning the Asset Conveyance Agreement between AGPL and AML on the basis that the issues have no bearing on the application. ATCO argued that the *Gas Utilities Act* does not require approval for the form of such agreements and they would not provide information that would assist the Commission in reaching a decision. Notwithstanding, ATCO confirmed that the Carbon assets have been effectively removed from rate base effective April 1, 2005, and are to be treated as unregulated assets from that date forward, consequently no costs arising from liability pertaining to the Carbon Transaction or to the Carbon assets will be recovered from customers, with the exception of regulatory costs for this proceeding.[39]

4.1 Views of the Commission

44. The Commission acknowledges that no party objected to the disposition of the Carbon assets by AGPL to AML by means of the Carbon transaction.

45. The issue of whether or not the Commission would grant an application to remove the Carbon assets from rate base was already been dealt with by the Commission in Decision 2010-496:[40]

> Further in Decision 2009-004 the Commission considered the question of harm to customers and the need for a subsection 26(2) approval for the removal of Carbon from rate base. The Commission found no harm to customers and accordingly would have granted a subsection 26(2) approval for the removal of Carbon from rate base had it been requested to do so. In Decision 2009-004 the Commission stated:
>
> > With respect to Carbon, the Commission determined above that an increase in rates resulting from the permanent removal of Carbon from rate base is not a valid financial harm to customers and, accordingly, the removal of Carbon will not harm customers. Customers are not legitimately harmed by the removal of Carbon because Carbon has been previously determined by the Commission to have no valid operational purpose and because revenue generation has been determined by the Court of Appeal to be an invalid reason to maintain Carbon in utility service. Therefore, had the Commission been requested in the Application to consider the removal of Carbon from rate base under section 26(2) of the GUA and section 101(2) of the PUA, it would have provided its approval, subject to the appropriate adjustments to revenue requirement and the resolution of the other matters on the Final Issues List approved in this Decision.[41]

[39] Exhibit 13.01, response to UCA-AG-2(b), (c).
[40] Decision 2010-496, page 31-32, paragraph 146.
[41] Decision 2009-004, page 18.

46. As noted above, on November 13, 2008, the Commission issued Decision 2008-113 in respect of ATCO Gas' 2008-2009 GRA. In accordance with Decision 2008-113, ATCO Gas submitted a 2008-2009 GRA compliance application in which it removed the revenues, costs, assets and liabilities related to the Carbon assets from the 2008/2009 revenue requirement forecasts.[42] The amended revenue requirement was approved in Decisions 2009-109[43] and 2010-025.[44]

47. The UCA requested clarification and direction from the Commission that, regardless of the final Asset Conveyance Agreement which is currently only in draft form, any future costs related in any manner to the Carbon assets will not be recovered from customers. Based on ATCO's confirmation referred to in paragraph 43, the Commission is satisfied that customers will not be responsible for any costs or liabilities related to Carbon assets subsequent to the Adjustment Date, nor will they be liable with respect to costs or liabilities arising from the Carbon Transaction with the exception of regulatory costs for this proceeding.

48. The Commission also accepts ATCO's assertion that the removal of the Carbon assets from ATCO Gas' rate base has been properly accounted for subject to the provisions of Decision 2010-496 wherein ATCO Gas was directed to file an application no later than three months after December 31, 2011, in which it must provide details of the actual amounts recovered through Riders "H" and "I" and a reconciliation mechanism for any over/under collection.

49. For the above reasons, the Commission considers that approving the proposed Carbon Transaction will not be contrary to the public interest.

50. Based on the record of this proceeding the Commission is satisfied that AGPL, CUI and CU, separately, have met the requirements under the *Gas Utilities Act* and with respect to exemptions granted to CUI and CU as designated utilities under the *Gas Utilities Act* and the *Public Utilities Act*. Accordingly, the Commission approves the sale of the Carbon assets.

51. The Commission therefore approves the application as filed.

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[42] Application No. 1603068, Proceeding ID. 154, 2008-2009 GRA Compliance Filing, page 1 of 2.

[43] Decision 2009-109: ATCO Gas 2008-2009 General Rate Application Phase I Compliance Filing, Application No. 1603068, Proceeding ID. 154, July 28, 2009.

[44] Decision 2010-025: ATCO Gas 2008-2009 General Rate Application Phase I Second Compliance Filing, Application No. 1605412, Proceeding ID. 294, January 13, 2010.

5 Order

52. It is hereby ordered that pursuant to Section 26(2)(d)(i) of the *Gas Utilities Act,* ATCO Gas and Pipelines Ltd.'s disposition of the Carbon assets to ATCO Midstream Limited is approved.

Dated on March 29, 2011.

The Alberta Utilities Commission

(original signed by)

Willie Grieve
Chair

(original signed by)

Moin A. Yahya
Commission Member

(original signed by)

Tudor Beattie, QC
Commission Member

Appendix 1 – Proceeding participants

Name of organization (abbreviation) **counsel or representative**
ATCO Gas and Pipelines Ltd. (AGPL), CU Inc. (CUI) and Canadian Utilities Limited (CU) (collectively ATCO) V. Porter
BP Canada Energy Company (BP) C. Worthy G. Boone
The Office of the Utilities Consumers Advocate (UCA) T. Marriott R. Daw R. Bell

The Alberta Utilities Commission Commission Panel W. Grieve, Chair M. A. Yahya, Commission Member T. Beattie, QC, Commission Member Commission Staff B. McNulty (Commission counsel) M. McJannet B. Leung D. R. Weir B. Whyte