



ATCO Gas South, a division of ATCO Gas and Pipelines Ltd.

Reconsideration of
Application No. 1347852 and Decision 2005-036 and
Application No. 1524763 and Decision 2008-001
Pursuant to the Judgment of the Court of Appeal of
Alberta dated April 23, 2010

October 15, 2010

ALBERTA UTILITIES COMMISSION

Decision 2010-494: ATCO Gas South, a division of ATCO Gas and Pipelines Ltd.
Reconsideration of Application No. 1347852 and Decision 2005-036 and
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Appeal of Alberta dated April 23, 2010
Application No. 1606175
Proceeding ID. 623

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ALBERTA UTILITIES COMMISSION

Calgary Alberta

**ATCO GAS SOUTH, A DIVISION OF ATCO GAS AND PIPELINES LTD.
RECONSIDERATION OF APPLICATION NO. 1347852 AND
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1 INTRODUCTION

1. On April 23, 2010, the Alberta Court of Appeal released its reasons for judgment in *Calgary (City) v. Alberta (Energy and Utilities Board)*, 2010 ABCA 132, 477 A.R. 1 (DGA Appeal Decision). In that decision the Court of Appeal found that the Alberta Energy and Utilities Board (EUB or Board) had the authority to use deferral accounts, and that its authority to make adjustments to those accounts was not limited by section 40 of the *Gas Utilities Act*. The Court found, however, that the Board exercised its authority in an unreasonable manner based on the facts of the case before it. The Court directed that the orders under appeal be vacated, and the matter returned to the Board (now the Alberta Utilities Commission (AUC or Commission)) for consideration in accordance with the Court's reasons for judgment.

2. On June 3, 2010, the Commission issued notice of a Commission initiated process in which the original Board decisions subject to appeal in the DGA Appeal Decision would be reconsidered. The notice was sent to parties to the original Board proceedings and also sent to parties on the Commission's electronic distribution list. Pursuant to the notice, interested parties had until June 14, 2010 to indicate whether they intended to participate in the Commission's process and until July 5, 2010 to comment on how the Commission should implement the Court's judgment. Reply to other parties' comments had to be filed by July 19, 2010.

3. ATCO Gas (ATCO), a division of ATCO Gas and Pipelines Ltd., Direct Energy Regulated Services (DERS), a business unit of Direct Energy Marketing Limited, The City of Calgary (Calgary), the Consumers' Coalition of Alberta and the Office of the Utilities Consumer Advocate (UCA) each submitted a statement of intent to participate in this proceeding. ATCO, Calgary and the UCA submitted argument and reply argument in accordance with the Commission's process schedule. The Commission did not receive any other submissions.

4. Dr. Moin Yahya (Panel Chair), and Mr. Bill Lyttle were the Commissioners assigned to hear this matter. The Commission considers that the record for this proceeding closed on July 19, 2010.

5. In reaching the determinations contained within this Decision, the Commission has considered all relevant materials comprising the record of this proceeding, including the arguments provided by each party. References in this Decision 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

6. The Board's decisions subject to the DGA Appeal Decision, Decision [2005-036](#)¹ and Decision [2008-001](#),² dealt with ATCO's deferred gas account (DGA) for its southern distribution service territory. In the following subsections the Commission provides a brief background on the DGA and the relevant and somewhat lengthy procedural history of DGA issues.

2.1 The Deferred Gas Account

7. The DGA was first approved on a temporary basis by the Public Utilities Board, Alberta in 1987³ and was approved on a permanent basis in 1988.⁴ It was established for the purpose of accounting for sales of natural gas to customers by Northwestern Utilities Limited and Canadian Western Natural Gas Company Limited, predecessors of ATCO.⁵

8. The DGA was used to reconcile over or under recoveries of money from regulated customers resulting from changes in the price of natural gas forecasted and actually incurred by ATCO. This reconciliation procedure ensured that regulated customers paid only the actual cost of gas consumed by them, and that ATCO did not incur a profit or loss from selling the gas. ATCO referred to the rate used to make recoveries from regulated customers as the gas cost recovery rate (GCRR). The GCRR was based on a forecast of the market prices for gas and received prior regulatory approval before being applied by ATCO.

9. When the DGA was first established, the GCRR was set on a winter and summer seasonal basis, and the DGA was reconciled on this seasonal basis. In Decision [2001-75](#),⁶ the Board approved a change in this procedure. The Board decided to adjust the GCRR on a monthly basis and reconcile the DGA balance over a three-month rolling period. The procedures, however, allowed for adjustments to costs or revenues that related to periods outside of the reconciliation period.

10. Effective May 4, 2004, DERS assumed the role of the default supply provider⁷ for ATCO. As the default supply provider, DERS undertook to supply gas to regulated customers

¹ Decision 2005-036: ATCO Gas, A Division of ATCO Gas and Pipelines Ltd., Imbalance and Production Adjustments – Deferred Gas Account (Application No. 1347852) (Released: April 28, 2005).

² Decision 2008-001: ATCO Gas, A Division of ATCO Gas and Pipelines Ltd., Reconsideration of Decision 2005-036, Deferred Gas Account, Imbalance and Production Adjustments (Application No. 1524763, Proceeding ID. 5) (Released: January 8, 2008).

³ Order E87117, Northwestern Utilities Limited, In the matter of an application by Northwestern Utilities Limited for approval of a change in its existing rates, tolls or charges (Files E.4.14.35-66, E4.14.35-60) (Released: December 2, 1987); Order E87118, Canadian Western Natural Gas Company Limited, In the matter of an Application by Canadian Western Natural Gas Company Limited for approval of a change in its existing rates, tolls or charges (File E.4.7.35-50) (Released: December 2, 1987).

⁴ Decision E88018, Northwestern Utilities Limited, In the matter of an application to determine a rate base and fix a fair return thereon for the test years 1987 and 1988 (File E4.14.35-66) (Released: March 18, 1988); Order E88019, Canadian Western Natural Gas Company Limited, In the matter of an application by Canadian Western Natural Gas Company Limited for approval of Deferred Gas Accounting and Reconciliation procedures respecting its gas supply costs (Files E4.14.35-66, E4.14. 35-60, E4.14. 35-50) (Released: March 18, 1988).

⁵ In the remainder of this decision any references to ATCO will include references to its predecessors.

⁶ Decision 2001-75: Methodology for Managing Gas Supply Portfolios and Determining Gas Cost Recovery Rates (Methodology) Proceeding and Gas Rate (Unbundling) Proceeding Part A: GCRR Methodology and Gas Rate Unbundling (Application No. 2001040 & 2001093; File No. 5680-1 & 5680-2) (Released: October 30, 2001).

⁷ As defined in the *Gas Utilities Act*, RSA 2000, c.G-5, subsection 28(d).

served in ATCO's north and south distribution service territories. Therefore, any adjustments affecting the DGAs for either territory after that date have to be made through DERS.

2.2 Board Decision 2005-036

11. In May 2004, ATCO applied for Board approval to include adjustments for imbalances that occurred in its north and south distribution service territory during the period from January 1998 to February 2004. Although the original application covered both the north and south territories, this Decision only deals with the south distribution service territory, as that is the territory affected by the Court of Appeal's judgment.

12. The net amount of the imbalance errors represented an under-recovery of \$11,285,459 in the DGA, for which ATCO requested Board approval to recover from regulated customers. Many years prior to the discovery of the error, seven to be exact, ATCO had implemented a new tracking and accounting system to manage its various gas accounts. This accounting system, however, immediately started generating imbalances due to various errors in the system. The errors cut both ways: sometimes in favour of customers and sometimes in favour of ATCO. Close to the end of the seven years, however, ATCO determined there was a large amount owed to ATCO due to imbalance errors.

13. In Decision 2005-036, the Board allowed ATCO to recover 85 percent of the net imbalance errors. The Board did not allow full recovery because it said doing so may be viewed as rewarding ATCO for poor management.⁸ The Board summarized the following factors that led it to hold ATCO accountable in part for the imbalance errors:⁹

- ATCO did not demonstrate that its transportation information system report was adequately tested at the time of inception
- ATCO did not audit the transportation information system
- ATCO may have unilaterally destroyed data
- ATCO lacked adequate internal controls and supervisory systems
- ATCO provided inadequate proof of corrections and opening balance
- There was a lengthy delay in discovering the errors

14. The Board directed ATCO to submit a compliance filing that reflected a 15 percent reduction in the imbalance adjustment, among other things.

15. In addition, the Board considered that a proceeding was needed to examine whether a policy should be implemented that would limit the extent to which adjustments could be made to the DGA outside of the reconciliation period. To that end, the Board directed ATCO to file an application to set out its views on the merits of having limitation periods for adjustments to the DGA and what types of adjustments should be allowed through that account.

⁸ Decision 2005-036, at page 5.

⁹ Decision 2005-036, at page 11. See also Decision 2005-036 at pages 4-5, 7-8 and 11.

2.3 Board Decision 2005-093

16. On May 25, 2005 ATCO submitted a compliance filing that specified the amount of imbalance adjustments ATCO would recover from regulated customers. In its filing, ATCO indicated that it required imbalance adjustments to be recovered from customers of \$9,575,419.58 after taking into consideration the Board-ordered disallowance of 15 percent, among other things, pursuant to Decision 2005-036.

17. In Decision 2005-093,¹⁰ the Board approved the recovery amount of \$9,575,419.58 as being in compliance with the Board Decision 2005-036 and ordered ATCO Gas recover a total of \$9,575,419.58 from regulated customers served by DERS in the ATCO's southern distribution service territory. The adjustments were passed through DERS, because DERS had assumed the role of the default supply provider for ATCO, as set out above.

2.4 Board Decision 2006-042

18. On June 30, 2005, in compliance with the direction in Decision 2005-036, ATCO applied to the Board and set out its views on whether the Board should implement a policy that limits adjustments to DGA for prior periods. Although ATCO made this application, the Board made clear that the proceeding was to apply to other utilities that used a DGA.

19. In Decision 2006-042¹¹ (the Limitations Decision) the Board determined that a general limitation period of two years prior to the effective date of a proposed GCRR would be instituted for making adjustments to the DGA. The Board made exceptions to this general limitation period if special circumstances were present.¹² The Board also commented that, as a matter of principle, a utility should not recover amounts from customers, within or outside the two-year limitation period, to the extent the adjustment arose due to its own mismanagement or imprudent operations.¹³

2.5 The DGA Jurisdiction Appeal

20. Calgary applied to the Alberta Court of Appeal for leave to appeal Board Decision 2005-036 on the basis that the Board erred in jurisdiction in issuing that decision. Calgary obtained leave from the Court on July 6, 2006.¹⁴

21. On April 13, 2007, the Alberta Court of Appeal, in an oral decision, found that it should not determine whether the Board had jurisdiction to issue Decision 2005-036. The Court made that finding, because it was not satisfied that issue was considered by the Board at first instance. The Court referred the matter back to the Board to consider whether the Board is authorized

¹⁰ Decision 2005-093: ATCO Gas, A Division of ATCO Gas and Pipelines Ltd., Imbalance and Production Adjustments, Deferred Gas Account Compliance Filing Pursuant to Decision 2005-036 (Application No. 1401921) (Released: August 23, 2005).

¹¹ Decision 2006-042: ATCO Gas – A Division of ATCO Gas and Pipelines Ltd. (This Decision is also applicable to Direct Energy Regulated Services and AltaGas Utilities Inc.) Deferred Gas Account Limitation Period (Application No. 1407502) (Released: May 11, 2006).

¹² Ibid. The Board held that prior period adjustments originating outside of the two-year limitation period may be submitted to the Board if the threshold value of the proposed adjustment is greater than five percent of the average monthly DGA gas commodity costs of the previous 12 months before the Board would consider such an application, and that the adjustment arises from circumstances that were not within the utility's control.

¹³ Ibid, page 13.

¹⁴ *Calgary (City) v. Alberta (Energy and Utilities Board)*, 2006 ABCA 180, [2006] A.J. No. 817.

under its governing legislation to approve the adjustments made to the DGA in Decision 2005-036.¹⁵

2.6 Board Decision 2008-001

22. On September 5, 2007, the Board issued notice of a Board-initiated proceeding in response to the Court's judgment. In accordance with that judgment, the Board limited the scope of that proceeding to examine whether it is authorized under its governing legislation to approve adjustments to the DGA in 2005 for costs and expenses incurred between 1998 and 2004. Calgary argued that the Board's jurisdiction to consider adjustments to the DGA was limited by section 40 of the *Gas Utilities Act*. That section, Calgary argued, allows the Board to adjust the balance of the DGA for imbalances found twelve months before an application is made.

23. In Decision 2008-001,¹⁶ the Board disagreed with Calgary's interpretation of section 40 of the *Gas Utilities Act*. The Board reiterated its findings from Decision 2006-042. There, the Board noted that the deferred nature of the DGA was specifically contemplated at the time of its creation and found that recognizing adjustments to the DGA did not constitute retroactive ratemaking and were not prohibited or limited by section 40 of the *Gas Utilities Act*.

2.7 The DGA Appeal Decision

24. Calgary applied to the Alberta Court of Appeal for leave to appeal Board Decision 2005-036 and Board Decision 2008-001. Calgary obtained leave from the Court to do so on April 21, 2009.¹⁷

25. On April 28, 2010 the Court of Appeal issued the DGA Appeal Decision.

26. The majority of the Court (Hunt J.A. and Paperny J.A.) found that the Board had jurisdiction to establish deferral accounts and that its authority to make adjustments to those accounts was not limited by section 40 of the *Gas Utilities Act*. The majority concluded, however, that the Board exercised its jurisdiction unreasonably in the circumstances of the case by allowing ATCO to recover 85 percent of the deficiency in the DGA. The majority allowed the appeal, vacated the orders under appeal and returned the matter to the Board for consideration in accordance with their reasons for judgment.

27. Justice Côté, writing for himself, found that the Board was prohibited by binding case law and statute from considering revenues and expenses in years prior to the fiscal year an application is made to the Board. Justice Côté concurred with the majority insofar as they held that the Board's decision to allow ATCO to recover 85 percent of the deficiency was unreasonable.¹⁸

28. Justice Côté found that section 40 of the *Gas Utilities Act* was the legislature's response to Court decisions that prohibit retroactive ratemaking due to regulatory delay or otherwise.

¹⁵ *Calgary (City) v. ATCO Gas and Pipelines Ltd.*, 2007 ABCA 133, 404 A.R. 317, [2007] A.J. No. 420.

¹⁶ Decision 2008-001: ATCO Gas, A Division of ATCO Gas and Pipelines Ltd., Reconsideration of Decision 2005-036 Deferred Gas Account Imbalance and Production Adjustments (Application No. 1524763, Proceeding ID. 5) (Released January 8, 2008).

¹⁷ *Calgary (City) v. Alberta (Energy and Utilities Board)*, 2009 ABCA 150, [2009] A.J. No. 408.

¹⁸ DGA Appeal Decision, at paragraph 113.

That provision allowed the Board to consider financial information from the fiscal year in which an application is made. Justice Côté said the *Gas Utilities Act* was incompatible with finding that the Board could adjust rates on actual shortfalls for a year earlier than the year in which a utility files an application to recover the shortfall.

29. Justice Côté also found that the Board engaged in retroactive ratemaking and would have allowed the appeal and vacated the Board's orders insofar as they allowed ATCO to recover the deficiency in the DGA.

30. Justice Côté's reasons for judgment will not be further discussed in this Decision. Therefore, when the Commission refers to the Court's judgment in the rest of this Decision the Commission is referring to the reasons for judgment of the majority of the Court, with whom Justice Côté concurred. The majority's reasons for judgment will be set out in greater detail in the following section of this Decision.

3 DISCUSSION

3.1 What imbalance errors, if any, should be recovered by ATCO?

3.1.1 Views of ATCO

31. ATCO noted that the Alberta scheme of regulation aims to protect the interests of both the customer and the utility investor. ATCO noted that the Court of Appeal reaffirmed the objective of the DGA and that objective is to ensure that customers pay for the gas consumed with no profit or loss to the utility's shareholders. ATCO said that it would be unreasonable to create a significant windfall for consumers, so that they receive free gas.

32. ATCO proposed that Decision 2006-042 is a reasonable basis to determine an adjustment to the DGA. As such, ATCO did not claim recovery beyond the two-year limitation period established in that decision, although ATCO said the Court did not restrict adjustments to the DGA to a two-year period.

33. ATCO stated that adjustments within the two-year limitation period were reasonable. The Court, ATCO said, did not indicate that adjustments within a two-year period were unreasonable. ATCO noted that the Court found that the two-year limitation period addressed concerns about intergenerational equity and retrospective ratemaking. ATCO noted that the Court expressed concern about utility fault and lengthy delays and noted that the Court said the two-year limitation period partially addressed these concerns.

34. ATCO submitted that Decision 2006-042 identified a period of time beyond which parties had to demonstrate that extenuating circumstances existed in order to seek an adjustment to the DGA. ATCO said adjustments within the two-year limitation period should be viewed as adjustments made in the ordinary course of business. ATCO noted that Decision 2006-042 did not set out special criteria for adjustments that fall within the limitation period. ATCO noted that the UCA agreed that Decision 2006-042 established that beyond a period of time parties have to demonstrate extenuating circumstances to seek an adjustment to the DGA.

3.1.2 Views of Calgary

35. Calgary submitted that the only option available to the Commission is to refund all of the amounts recovered by ATCO through Decision 2005-093. Calgary noted that ATCO was prepared to make the necessary rate adjustments and, as such, there was no controversy over the amount of refund.¹⁹

36. Calgary argued that the Commission was compelled to issue a full refund. Calgary argued that the Commission must reconsider the Board's decision on the basis that the original decision was not reasonable, because consumers absorbed costs and not ATCO's shareholders. Calgary said there were no compelling reasons to have consumers bear these costs, and that the theme of the Court's judgment in the DGA Appeal Decision was that a utility should not be rewarded for its poor management.

37. Calgary said ATCO was incorrect to rely on Decision 2006-042 as a reasonable basis for an adjustment. First, Calgary argued the Board did not intend for that decision to apply to adjustments made in Decision 2005-036. Second, Calgary argued that the Court of Appeal's comment about Decision 2006-042, relied upon by ATCO, was *obiter dicta*. Third, Calgary noted that the Court of Appeal's decision deals with the reasonableness of Decision 2005-036, whereas Decision 2006-042 deals with remedies.

38. If Decision 2006-042 applied, Calgary argued that decision does not immunize ATCO from its own poor management. Calgary said it was designed to limit recovery by a utility to two years, to ameliorate intergenerational inequity, and was not a shield to blunt utilities' transgressions. Calgary said it does not shield ATCO for problems caused due to factors solely within ATCO's control. Calgary said the adjustments to the DGA do not pass muster under Decision 2006-042 because the Board found evidence of poor management.

3.1.3 Views of the UCA

39. The UCA argued that any recovery by ATCO would be unreasonable. To support this argument, the UCA noted the following comments from the Court of Appeal's judgment to the effect that:

- a. Seven years represents a significant delay that presents obvious intergenerational equity issues;
- b. ATCO was solely responsible for the delay given that:
 - i. ATCO had an onus to ensure its transportation information system was working correctly and providing correct data;
 - ii. It did not appear that ATCO implemented an appropriate and timely review process for the system design of its transportation information system;

¹⁹ In reply, ATCO noted that its May 11, 2010 correspondence did not indicate that it was prepared to proceed with a full refund to the South DGA, as intimated by Calgary in its Argument.

- iii. There was no evidence of actual internal or external audits being performed to ensure the design was valid as the transportation information system was put in service;
 - iv. Between 1998 and 2002, there was a lack of oversight by ATCO to test and develop appropriate controls to ensure that the transportation information system generated output as intended; and,
- c. Shareholders have the ability to control or influence ATCO's management practices and, as such, allowing ATCO to recover could constitute a reward for poor management.

40. The UCA said that the Court of Appeal recognized that there were compelling reasons why any loss suffered by ATCO as a result of its own mismanagement should not be passed on to consumers. The UCA argued that the errors that gave rise to the adjustments are fully attributable to ATCO's own actions. Relying on the Court's judgment, the UCA said that requiring consumers to bear these losses does not encourage utilities to conduct operations in a careful, time-sensitive way because consumers have no control over how the utility is operated.

41. The UCA said that the Board recognized that a utility should not be permitted to recover any amounts, either within or outside the limitation period, to the extent that the adjustments arose due to the utility's own mismanagement and imprudent operations. This, the UCA noted, reflects the concern noted by the Court of Appeal about how it is inherently unfair to make consumers bear losses due to utility mismanagement.

3.2 Commission Findings

42. The main question that the Commission must address is the quantum of recovery. To answer this question, however, a second issue must also be answered, which is the appropriate time within which ATCO should be allowed to recover its imbalances. The Commission will address the latter issue first, in order to ultimately answer the former question.

3.2.1 The Appropriate Quantum and Time for Recovery

43. For the Commission, therefore, the question is: what is the appropriate time for which ATCO should be allowed to recover the imbalance adjustments, in light of the circumstances surrounding this particular set of facts?

44. ATCO has argued that two years would be the right time period within which it would be entitled to recover prior period adjustments to the DGA.

45. Prior to dealing with ATCO's argument, the Commission first notes that the two-year Limitation Decision did not apply in the original instance to ATCO when it brought its original application for the recovery of the outstanding amounts in the DGA. As such, the analysis in this Decision is limited to the set of facts surrounding this Decision.

46. The Commission notes that answering the question is no easy task. Had ATCO, and other utilities, been faced with the two-year limitation period in the first place, there would be no doubt that ATCO would bear the blame for not bringing its application seeking the recovery for the imbalances in a timely fashion.

47. Had ATCO wished to recover the early imbalances, and the two-year limitation from the Limitations Decision was in place, the proper time for ATCO to have brought its application would have been immediately following the 1998-2000 time period. Counting the two-year limitation from that period would have given ATCO the maximum incentive to discover its errors.

48. That, of course, is not how the Commission's limitation periods apply pursuant to the Limitation Decision. The Commission's limitation period, generally speaking, stops the clock in the time period just prior to the filing of the application. In this case, it would mean that ATCO would be limited in its recovery to the time period 2002-2004.

49. The limitation period set out in the Limitation Decision is problematic, however, for several reasons. The first is that the nature of the imbalances in this account due to the accounting system errors could fluctuate by year. Hence, the imbalances could be owed to the customers one year and owed to ATCO the next.²⁰ As such, the choice of time period in which the Commission would limit recovery could result in a refund to customers or a refund to ATCO.

50. In fact, were a two-year limitation period applied rigidly, in this situation, a perverse set of incentives could be generated, whereby a utility faced with these fluctuating imbalances could choose not to bring their application for adjustments to the Commission until the imbalances turned in the utility's favour.

51. When a utility is testing a new accounting or managerial system, initially, it is likely that it would not know if the errors were systematically under-reporting in one direction viz-a-viz customers or the utility. It also would not know in whose favour the errors would lie in the first instance of measurement. Therefore, the Commission recognizes the need to provide some measure of recovery for the utility, in order to provide it with incentives to discover any errors that might be owing to customers. This also will provide customers with a speedy recovery.

52. In fact, the Commission notes that as recently as April of this year, ATCO applied and received approval²¹ from the Commission to refund amounts owed to customers that were outside the two-year limitation period established by the Commission's Limitation Decision. Those imbalances also resulted from accounting type errors on ATCO's part, yet, nonetheless ATCO sought the Commission's approval for the refund.

53. Hence, the time period should not act as an incentive for when to strategically choose a time for when to seek an application for a refund to customers or the utility. Rather, a time limitation period must be incentive-neutral depending on the particular set of circumstances surrounding the specific facts in play. In the case of routine errors that are beyond the control of the utility, a two-year limitation period is incentive-neutral, because the errors generated are random, from the utility's perspective. Hence, there is no sense of strategically timing an

²⁰ The Commission also notes that these imbalances could vary by region. In the original application, ATCO Gas South was owed monies from the imbalances, while ATCO Gas North refunded its customers an amount outstanding from the DGA. The Commission is aware that this Decision only deals with the ATCO Gas South portion of the original decision, as that is the only subject of the Court of Appeal's decision. The Commission simply notes this as an observation.

²¹ Decision [2010-437](#): ATCO Gas Measurement Adjustments Outside of the Deferred Gas Account Limitation Period (Application No. 1606079, Proceeding ID. 587) (Released: September 9, 2010).

application, as the imbalances could accrue in one direction continuously, and the utility would be foolish to forfeit those imbalances with the passage of time.

54. In the situation at hand, the imbalances were a result of mismanagement. The Commission would want the utility to have the right incentive to correct those errors immediately. The Commission would also want the incentives to be neutral in terms of the time the utility brought such an application, given that the errors are not random from the utility's perspective. The Commission would also want the utility to maintain its incentives to discover errors that result in amounts owing to the customers as well as amounts owing to the utility.

55. In the Commission's view, ATCO should have discovered this error quite quickly. Once a new accounting system was implemented, any reasonable managerial apparatus would have tested the new system in order to work out the glitches. It seems odd to have let these errors accumulate for so long, but a look at the yearly imbalances may give some insight into why this happened.

56. In Table 1, the Commission synthesizes the yearly imbalances that ATCO filed in their initial application, and upon which the original Decision 2005-036 was based.²²

57. Some years, the imbalances were in favour of the customer, while in others, they were in favour of ATCO. The cumulative imbalances alternated initially until 2000 after which ATCO was owed money. It was in 2001 that the imbalance jumped to approximately \$6.6 million against ATCO. The yearly imbalances, however, would increase and decrease, and hence, the cumulative went back down to approximately \$4 million in 2002. Finally, in 2003 and 2004 the imbalances seemed to go in an upward direction against ATCO's favour, which meant that by then ATCO probably noticed large negative cash flow losses.²³

Table 1. AGS Imbalances 1998-2004

	Annual (\$000)	Cumulative (\$000)
Opening balance end of 1998	1,551,854	1,551,854
1999	(2,140,040)	(588,186)
2000	2,768,781	2,180,595
2001	4,456,941	6,637,536
2002	(2,349,624)	4,287,912
2003	8,091,471	12,379,383
2004	(758,054)	11,621,329
Purchase/Sales adjustment	(335,870)	11,285,459
Total	11,285,459	

58. The Commission considers that ideally, ATCO should have discovered the error within the first year of the new accounting system being in place.

²² ATCO's Application No. 1347852 (May 31, 2004), Tables 1-1 and 3-1.

²³ At the same time, the balances in the north service territory seemed to be offsetting the balances in the south. This meant that ATCO as a whole probably did not notice the imbalances in the individual territories.

59. The Commission arrives at one-year for a variety of reasons. As a regulated utility, ATCO would have to provide audited financial statements for compliance reasons (as well as general corporate reasons). It would use the annual figures for a variety of comparisons related to regulatory matters (as well as corporate matters). Furthermore, choosing one-year to recover managerial errors is the least burdensome recovery period for intergenerational equity concerns (when counting in discrete years).

60. Furthermore, a prudent manager of a regulated utility would have at least tried to look for errors in the accounting system, especially since it had just been installed.

61. This does not mean that the Commission will only allow the refund within a particular one-year time period. Had ATCO applied to correct the imbalance at the end of 2004, for example, customers, in fact, could have received a refund of \$758,054, if the error began in 2004. On the other hand, had they applied at the end of 2003 to correct the imbalances, ATCO might have received a refund of \$8,091,471. Clearly, choosing one particular year yields inconsistent, and hence, unreasonable outcomes.

62. Given these fluctuating imbalances, and given the desire of the Commission to create the right incentives for utilities implementing new managerial systems to immediately verify and test their new systems, the Commission will not choose a specific one-year time period. Rather, it will allow ATCO a one-year average for the entire time period.

63. In other words, the cumulative balance for the 1998-2004 time period, or seven years, will be averaged over the seven years. This amounts to approximately 14.29 percent of the total amount owing to ATCO.

64. Under the circumstances of these specific facts, however, the Commission views this averaging as the correct outcome. It takes into account the mismanagement, the fluctuating nature of the imbalances, and the need for incentive-neutrality.

65. Hence, in light of these circumstances, the Commission does not view the two-year limitations period, as set out in the Limitations Decision, as helpful for deciding the outcome of this Decision. ATCO never faced that limitation period in the first place, so it is not reasonable to impose the two-years ex post. The reasoning from first principles, in the Commission's view, is more persuasive.

66. Nevertheless, in the future, all utilities should be aware that the Commission will take a hard look at any attempts at recovery for errors resulting from utility mismanagement, and that the Limitation Decision will, most likely, apply.

67. As to the question of equity, the Commission notes that averaging the imbalances over the seven years means that customers only have to pay the average of the net imbalances for that period. This smoothes out the inequities both for and against the customers. The customer bears no large impact for any one particular time period. Rather, the cumulative balance, which swung in both directions, is averaged and smoothed out. The resulting amount to be refunded under this methodology is more equitable than even picking the last year of time period, 2004.

68. The Commission notes that even if no amount was allowed for recovery, customers would be receiving a windfall that amounts to the net of the imbalances over the past seven years. All that the Commission is doing is apportioning a 1/7th of that average to ATCO.

3.2.2 The Parties' Other Arguments

69. The parties advanced various arguments, which the Commission deals with here.

ATCO

70. ATCO argued that the objective of the DGA was to ensure that customers pay for the cost of gas they consumed, and that the Commission should allow prior period adjustments to the DGA for a two-year period.

71. The Commission disagrees with ATCO and finds that allowing a two-year period would not be in accordance with the Court's reasons for judgment. The reason is that ATCO's shareholders should bear the gas cost deficiencies resulting from the imbalance errors, because those costs are associated with utility mismanagement. Allowing a two-year recovery would not provide the right incentives when utility mismanagement is in issue and does not encourage the timely discovery of errors.

72. Furthermore, for the reasons outlined above, the choice of which two years to pick, in these circumstances, do not necessarily provide the proper incentives for error discovery.

73. ATCO also argued that the Court did not disagree that adjustments within a two-year period were reasonable. The Commission is not persuaded by this argument. The Court provided little to no comment on this point because, as Calgary pointed out in argument, the issue was not before the Court.

74. ATCO argued that an adjustment of two years provides symmetry between the gas supply costs borne by ATCO and the gas supply costs borne by consumers. ATCO said that if a two-year adjustment would be made, each side would pay about \$6 million. ATCO also said that this approach would also provide symmetry with other adjustments that have been made to the DGA.

75. The Commission disagrees with ATCO's approach. ATCO submission is symmetrical only on a superficial basis. ATCO's submission fails to acknowledge the lack of symmetry between consumers and ATCO about how ATCO is managed and how the errors happened. Customers have little to no control over how ATCO is managed and the imbalance errors were substantially attributable to ATCO's mismanagement. In the Commission's view symmetry supports having shareholders bearing costs caused by mismanagement because they, and not consumers, can influence management.

76. The Commission has awarded a year's worth of recovery, as explained above, to provide some incentive to discover the error in the first place, in case the error is pointing in the customers' favour.

Calgary and the UCA

77. Both Calgary and the UCA argued that the Commission should refund in full the amounts allowed recovered in Decision 2005-093. Calgary and the UCA justified that position by noting imbalances were caused by ATCO's mismanagement, and that a full refund dealt with the Court's concerns about intergenerational equity.

78. The Commission disagrees that concerns about ATCO's mismanagement should preclude ATCO to recover any of the imbalance amounts. The Commission notes that some of ATCO's errors would not have precluded the imbalances from occurring in the first place. In particular, had ATCO:

- a. performed internal or external audits to ensure the design was valid as the transportation information system was put in service; and/or
- b. tested and developed appropriate controls to ensure that the transportation information system generated output as intended;

the imbalances in the DGA would likely still have happened but, assuming appropriate measures were in place, ATCO may have recognized that they were happening and taken action to correct them in a timely manner.

79. The Commission does not believe that the principle of intergenerational equity should preclude ATCO from recovering all of the imbalance errors. The Court of Appeal appeared to recognize as much when it noted that the Board's Limitation Decision "partly addresses the above concerns [including concerns about intergenerational equity,] because it generally limits DGA claims to a two-year period, except in special circumstances not within the utility's control."²⁴

80. Finally, the Commission notes Calgary's contention that any recovery by ATCO will mean that consumers will be absorbing the costs and not the shareholders. The Commission points out that in this case, consumers will still benefit from the error to the amount of 6/7th of the imbalance.

3.3 What is the appropriate recovery?

81. The Commission finds that ATCO can recover 1/7th of net imbalances that occurred during the seven years (1998-2004) prior to the effective date it applied to include those balances in DERS's gas cost flowthrough rate (GCFR).

82. The Commission will consider imbalances that occurred in the DGA from the end of 1998 to February 29, 2004.

83. In the Commission's view, taking the average of the imbalances over the seven years to the date deals with concerns about intergenerational equity. While the Limitation Decision does not apply to the circumstances of this application, in the Commission's view, however, the

²⁴ 2010 ABCA 132, paragraph 74.

principles set out in that decision help address intergenerational equity concerns that arise from the facts of this proceeding.

84. After considering how the errors occurred the Commission is of the view that ATCO's shareholders should bear most of the cost associated with the imbalance errors. In the Commission's view, substantially all of the imbalances were attributed to ATCO's mismanagement and could have been avoided had appropriate controls been in place at the outset. As such, the Commission will allow ATCO to recover 1/7th of the net imbalance amount for the seven year period before the effective date that those imbalances were proposed to be included in DERS's GCFR. In the Commission's view 1/7th recognizes that ATCO's management was substantially at fault for the imbalances while at the same time does not require perfection on the part of ATCO's management. This will require ATCO to return \$7,996,105.36 to customers.

3.4 Carrying Charges

ATCO

85. ATCO recognized customer entitlement to interest effective October 2005; the date ATCO was given approval to recover the allowed amount of the imbalance errors. ATCO calculated that carrying costs would amount to approximately \$0.6 million, based on AUC [Rule 023: Rules Respecting Payment of Interest](#) (Rule 023).²⁵

Calgary

86. Calgary said ATCO's request to obtain procedural guidance about how to comply with the Court of Appeal's decision incorporates carrying cost adjustments. Calgary argued that the Commission should calculate carrying charges based on the Bank of Canada rate plus 1.5 percent pursuant to Rule 023, section 3(2)(e). Calgary argued that there was no reason to deny it full restitution, which in this case means a full refund or recovery of the disallowed adjusted rates plus interest to recognize the time value of money.

UCA

87. The UCA said financing requirements should dictate how to calculate carrying costs. The UCA said carrying costs should be calculated pursuant to Rule 023 when the outstanding balances are volatile and short-term in nature. The UCA said carrying charges should be calculated using a weighted average cost of capital when the outstanding balance is long-term and stable in nature.

88. The UCA said that the amounts in this case were essentially fixed, rather than volatile, and should be viewed as long-term in nature since the recovery from consumers happened approximately five years ago. The UCA said that the recovery avoided long-term financing which would have been obtained in the absence of approvals granted in Decision 2005-036.

89. Neither the UCA nor Calgary replied to each other on the issue of interest.

²⁵ ATCO said that this calculation assumes that ATCO would make a payment to DERS by December 31, 2010 and that the amount could be revised due to changes in the Bank of Canada rate.

Commission Findings

90. The Commission finds that it would be more appropriate in this circumstance to award interest in accordance with Rule 023, section 3(2)(e). In this regard the Commission notes that Calgary and ATCO agreed on how to compensate consumers for the time value of money and recognizes that the amounts were recovered by ATCO pursuant to Board orders that were vacated by the Court of Appeal. The interest calculations should commence September 2005 as this was the start of the recovery period by ATCO.

4 ORDER

91. IT IS HEREBY ORDERED THAT:

- (1) ATCO Gas refund to sales customers served by DERS in ATCO Gas' south distribution service territory the amount of \$7,996,105.36 plus interest calculated in accordance with Rule 023.
- (2) ATCO Gas submit a compliance filing by November 15, 2010 setting out in accordance with this Decision its proposal for the manner and timing in which the refund will be made and its calculation of the amount of interest to be paid to sales customers.

Dated on October 15, 2010

ALBERTA UTILITIES COMMISSION

(original signed by)

Moin A. Yahya
Panel Chair

(original signed by)

Bill Lyttle
Commissioner

APPENDIX 1 – PROCEEDING PARTICIPANTS

Name of Organization (Abbreviation) Counsel or Representative
The City of Calgary (Calgary) M. Rowe B. J. Meronek
ATCO Gas (ATCO) R. Trovato J. Santos
Consumers' Coalition of Alberta (CCA) J. A. Wachowich J. A. Jodoin
Direct Energy Regulated Services (DERS) A. Preston B. J. McIntosh C. S. Puddicombe
Office of the Utilities Consumer Advocate (UCA) T. D. Mariott R. Daw R. L. Bruggeman

Alberta Utilities Commission
Commission Panel M. A. Yahya, Panel Chair B. Lyttle, Commissioner
Commission Staff P. Khan (Commission Counsel) R. Armstrong, P.Eng. M. McJannet D. R. Weir, CA