AUC
Alberta Utilities Commission

ATCO Gas South

Removal of Carbon Related Assets from Utility Service Pre-hearing Conference Scoping Decision

January 9, 2009

ALBERTA UTILITIES COMMISSION
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

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1 INTRODUCTION

ATCO Gas (ATCO), a division of ATCO Gas and Pipelines Ltd., filed an application (Application) on July 11, 2008 with the Alberta Utilities Commission (AUC or the Commission). ATCO applied to have the Commission set aside Order U2005-133[1] and Decisions 2005-063[2] and 2007-005[3] and grant a new Order implementing the findings of the Alberta Court of Appeal (the Court of Appeal) in a Decision issued May 27, 2008[4] (Carbon Appeal Decision). The Carbon Appeal Decision and the ATCO Pipelines relates to the Carbon natural gas storage facility and associated producing properties presently included with the rate base of ATCO Gas South (Carbon).

2 BACKGROUND

In the Application, ATCO requested that:

- the Carbon related assets should be removed from ATCO Gas South's rate base and distribution service rates effective April 1, 2005;
- the placeholder lease rate of $0.45/GJ for utility purposes should be made $0/GJ effective April 1, 2005;
- ATCO Gas South should be allowed to recover all amounts it was directed to provide to customers through Riders G, H, and I on and after April 1, 2005; and
- interest should be applied to the net amounts owed to ATCO Gas South consistent with AUC Rule 23.

ATCO stated these actions were required to implement the Court of Appeal's findings in the Carbon Appeal Decision. ATCO stated that it was entitled to be returned to the position it would have been in but for the impugned Order and Decisions.

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1 Order U2005-133 – ATCO Gas South, 2005/2006 Carbon Storage Plan Interim Order (Application 1357130) (Released: March 23, 2005).
2 Decision 2005-063 – ATCO Gas South, 2005/2006 Carbon Storage Plan – Preliminary Questions (Application 1357130) (Released: June 15, 2005).
3 Decision 2007-005 – ATCO Gas South, Carbon Facilities - Part 1 Module – Jurisdiction (2005/2006 Carbon Storage Plan) (Application 1357130) (Released: February 5, 2007).
4 *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)* 2008 ABCA 200 (Refer to Appendix 2 of this Decision).

ATCO indicated that the net impact to ATCO Gas South customers to the end of 2009 (including amounts that would be recovered in the year 2010) would be a recovery by ATCO Gas South of $21.4 million.

It its Application ATCO proposed that the recovery would be accomplished as follows:

> ATCO Gas is proposing to recover the net difference shown in Appendix A, Schedule I in the amount of $47.8 million over a two year time period to reduce the rate impact on customers providing that it is able to recover interest over the full recovery period. This excludes the removal of the Carbon related costs from ATCO Gas' 2008/2009 GRA forecast, which amounts to a reduction to customers of $26.4 million. The net impact to customers therefore to the end of 2009 (including amounts that will be recovered in the year 2010) is a recovery by ATCO Gas of $21.4 million. ATCO Gas has assumed that the decision for this Application, the Court of Appeal Compliance, will endorse the amounts to be removed from ATCO Gas' 2008/2009 GRA forecast (Proceeding ID 11) at the time of the compliance filing for that proceeding. It is therefore imperative that a decision be issued on this matter prior to the deadline for that compliance filing process.
>
> ATCO Gas has prepared the estimated 2009 and 2010 commodity charge required for each rate group based on the amounts calculated in Appendix A (refer to Schedule J), assuming that half of the shortfall is recovered in the year 2009, and half in the year 2010.
>
> ATCO Gas proposes that it would develop and file the final rider for the year 2009 once a decision on this Application has been issued by the Commission. Changes related to additional amounts billed through the Riders and Production and Storage charge as a result of unbilled amounts and billing adjustments and related interest calculations will be incorporated in the final 2009 rider calculations. A compliance application would be filed with the Commission finalizing the amount of the 2009 rider for each rate groups prior to the implementation of the final rider on (assumed to be) January 1, 2009. In October 2009 ATCO Gas would then file an application calculating the final rider for the year 2010. That filing would incorporate final billing adjustment impacts related to Riders G, H and I and the production and storage charge, final interest calculations and an updated throughput forecast for the year 2010 into the rider calculations for that year.

Notice of the Application was issued on July 15, 2008 indicating that any party who wished to intervene in this Proceeding must submit a Statement of Intent to Participate (SIP) to the Commission by July 28, 2008.

SIPs were received from the Office of Utilities Consumer Advocate (UCA), BP Canada Energy Company (BP Canada), The City of Calgary (Calgary) and the Public Institutional Consumers of Alberta (PICA).

The Commission issued a letter on September 9, 2008 requesting interested parties to provide comments by September 25, 2008 on the appropriate process for dealing with the Application. The Commission noted submissions made by both Calgary and PICA with their SIPs, and that process submissions had also been received with respect to related issues before the Commission in Application 1566373 - Utility Asset Disposition Rate Review Proceeding, ID. 20.

ATCO submitted a letter on September 17, 2008, expressing concerns with the pace of the process in respect of the Application. It was ATCO's view that Order U2005-133, Decision 2005-063 and Decision 2007-005 issued by the Alberta Energy and Utilities Board (EUB or the Board) had been overturned and that these were the only proceedings relevant to implementation of the Carbon Appeal Decision. ATCO stated that "there is no justification to entangle compliance with the Court's directions with any other regulatory proceedings."

Following receipt of the aforementioned comments the Commission issued a letter on September 29, 2008 (attached as Appendix 3 to this Decision), which suspended the process dealing with the Application. In the letter the Commission referred to the Supreme Court of Canada's Calgary Stores Block Decision[5] (the Stores Block Decision) and stated the following:

> The Commission agrees with Calgary that to proceed in advance of a decision in Proceeding 20 would be inefficient and premature. In the quote from the Notice on Proceeding 20 referred to above, the Commission specifically noted the benefits of dealing with the implications of the Stores Block Decision in a single generic process. In a related matter the Commission issued Order U2008-213[6] removing the rate riders, which were in relation to the Carbon related assets, in order to mitigate potential financial impacts to all parties. In the circumstances, the Commission considers it to be appropriate to suspend further consideration of the Application pending receipt of the guidance that may be provided by a decision issued in Proceeding 20.

[6] Order U2008-213 – ATCO Gas Suspension of Riders and Rate (Application 1574733, Proceeding ID. 61) (Released: June 20, 2008)

In Decision 2008-123,[6] issued on November 28, 2008, the Commission suspended the *Review of Rate Related Implications of Utility Asset Dispositions Following the Supreme Court's Calgary Stores Block Decision* generic proceeding (Application No. 1566373, ID 20). The suspension was in response to the guidance provided by the Court of Appeal in granting Leave to Appeal[7] of Decision 2007-101[8] (the Harvest Hills Decision). The Court suggested that the Commission could benefit from further clarification of the Stores Block Decision prior to continuing with the generic proceeding.

Also on November 28, 2008, the Commission issued a letter announcing the resumption of proceedings in this Application. The letter is attached as Appendix 4. In this correspondence the Commission recommenced consideration of the Application in light of the suspension of Proceeding ID. 20. Further, the Commission determined that the Application process should be conducted on an expedited basis given that many of the relevant issues are in the nature of legal issues. The Commission attached a Preliminary List of Issues to its letter of November 28, 2008 (See Schedule A in Appendix 4) and requested comments in respect of the list by December 5, 2008.

[5] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140.
[6] Decision 2008-123 - Review of Rate Related Implications of Utility Asset Dispositions Following the Supreme Court's Calgary Stores Block Decision, Reasons for Decision on Motion by the ATCO Utilities dated October 21, 2008 (Application No. 1566373, Proceeding ID. 20) (Released: November 28, 2008).
[7] *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2008 ABCA 381 (Harvest Hills Leave Decision).
[8] Decision 2007-101 - ATCO Gas, Disposition of Land in the Harvest Hills Area (Application No. 1512932) (Released: December 11, 2007).

Comments were received on the Preliminary Issues List on December 5, 2008 from Calgary, the UCA and ATCO. In addition, on December 9, 2008, Calgary submitted a letter in which it expressed concern with ATCO's comments and characterized them as "an application to strike the entire Preliminary Issues List and proceed with an ATCO truncated proceeding." Calgary stated: "[i]f the Commission is prepared to entertain such an application Calgary submits that all affected parties should be provided with an opportunity to address that quasi-application."

Comments received on the Issues List demonstrated little consensus on the issues relevant to the Application. The Commission considered it would benefit from a Pre-hearing Conference to determine the final scope of the proceeding. In a letter dated December 11, 2008, the Commission issued notification of a Pre-hearing Conference to be held in Calgary on December 16, 2008. All other scheduled matters were suspended pending the results of the Pre-hearing Conference, although the Commission expressed its intent to maintain March 16, 2009 as the commencement of an oral hearing on the Application.

The Pre-hearing Conference was attended by ATCO, Calgary, the UCA, and BP Canada.

The Division of the Commission assigned to hear the proceeding was W. Grieve (Chair) and Commissioners N. A. Maydonik Q.C. and T. Beattie Q.C.

The Pre-hearing Conference took the form of oral argument and reply presented by counsel for ATCO, Calgary and the UCA followed by questions from Commission Counsel and the Commissioners. BP Canada did not actively participate.

The purposes of this Decision are to consider the arguments of the parties with respect to the Final Issues List, to determine the Final Issues List and to establish a process for the balance of the proceeding.

In reaching the determinations contained 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.

3 ISSUES

The attached Appendix 5 provides a summary table (Comparison Table) of the views of the parties on the matters to be included within the Final Issues List for this proceeding. The Comparison Table juxtaposes the Preliminary Issues List provided by the Commission with the views of the parties on how that list should be modified. Calgary and the UCA accepted, with certain clarifications and expansions, the Preliminary Issues List. ATCO proposed a narrow issues list, appropriate in its view to a compliance application the sole purpose of which is to implement the Carbon Appeal Decision by removing Carbon from rate base with the necessary adjustments to reflect a removal of Carbon from revenue requirement effective April 1, 2005. A review of the Comparison Table reveals agreement among the parties that the following issues, subject to certain clarifications, should appear on the Final Issues List:

(a) Verification of Carbon related accounts;
(b) Required adjustments to distribution revenue requirement to reflect the removal of the assets from regulated service and the revenue associated therewith; and
(c) Update Carbon-related capital expenditures.

The Commission considers that these issues remain relevant to the Application and given the agreement among the parties with respect to the relevance of these issues, these issues have been included in the Final Issues List attached as Appendix 6 to this Decision.

With respect to the clarifications and expansions sought by Calgary and the UCA the Commission has addressed some of these requests below. In the Commission's opinion it is not necessary for the Commission to address any additional clarifications to the Final Issues List in this Pre-hearing Conference Decision.

In addition, all parties agreed that should Carbon be removed from rate base adjustments to revenue requirement must reflect the implications of the time period when Carbon is effectively removed from rate base and revenue requirement. There is no agreement on the time period for these adjustments.

The Comparison Table and the Pre-hearing Conference focused the areas for this scoping decision on the following matters:

- Should the scope of this proceeding be limited to compliance with the Carbon Appeal Decision or broadened to also include generic issues related to the Stores Block Decision? (Compliance Decision / Generic Issues)

- What is the relevant value of the Carbon assets, who is entitled to that value and under what circumstances? (Entitlement / Harm Issue)

- Is the withdrawal of Carbon from rate base out of the ordinary course of business a disposition under section 26(2) of the *Gas Utilities Act* (GUA) and section 101(2) of the *Public Utilities Act* (PUA) requiring prior approval by the Commission? (Disposition Issue)

- What is the date from which adjustments to revenue requirement should be made should Carbon be removed from rate base? (Date of Adjustment Issue)

A discussion and determination in respect of each of these matters follows.

4 DISCUSSION OF ISSUES

4.1 Compliance Decision / Generic Issues

Considerable discussion occurred in the written submissions and at the Pre-hearing Conference on the nature of the present proceeding. ATCO took the position that the Application was not really an application at all. Rather, the proceeding was simply a mechanism to implement the guidance of the Court of Appeal in the Carbon Appeal Decision. Calgary referred to the

"operational" requirement on the inclusion of assets in utility rate base referred to in paragraph 25 of the Carbon Appeal Decision. Calgary suggested that the proceeding should be broadened to "include consideration of how the questions posed by the Preliminary Issues List apply to other assets which may be identified as non-operational."[9] The UCA suggested that the proceeding should "be expanded to include non-income generating assets such as Bow Island and other old production properties which are still in rate base."[10]

During the Pre-hearing Conference, counsel for ATCO argued for a substantial narrowing of the issues to be included in the Final Issues List and opposed any expansion of the issues. Counsel for both Calgary[11] and the UCA[12] acknowledged that the implications of the Carbon Appeal Decision with respect to other non-operational assets could be pursued in future proceedings. The Commission agrees.

In Decision 2008-123 the Commission suspended the generic proceeding. Having suspended the generic proceeding, the Commission will not broaden the issues to be considered in this proceeding beyond those directly required to be dealt with in this Application. These broader issues are best addressed in the generic proceeding or in subsequent issue-specific applications. However, the Commission will not decline to address matters directly relevant to the present Application merely because they were included within the scope of the generic proceeding.

The Commission considers that the Final Issues List should be confined to those matters directly related to the Application and to the removal of Carbon from rate base in light of the guidance provided by the Supreme Court in the Stores Block Decision and the guidance and direction received from the Court of Appeal in the Carbon Appeal Decision.

For the above reasons, the Commission will not expand the issues list to deal with other "non-operational assets" as proposed by Calgary and the UCA but it will consider the implications of the Stores Block Decision as it relates to the Application.

4.2 Entitlement / Harm Issue

Both Calgary and the UCA suggest that the entitlement to the "value" of Carbon is an issue for this proceeding, particularly the "appropriateness of considering the value as a source[s] of utility revenue."[13] Further, it is the transactional value or market value of Carbon determined on some basis, rather than book value that is the value to consider.

At pages 78-80 of the transcript the following exchange occurred between Commission Counsel and counsel for Calgary, which summarizes, in part, Calgary's position with respect to why the Commission is entitled to consider the "value" of Carbon when it is removed from rate base and what that value would be:

> MR. McNULTY: So, sir, I take it, then, you are making the -- your logic train would say that the removal of carbon from rate base is first a disposition; is that correct?

[9] Calgary Letter dated December 5, 2008, page 1.
[10] UCA Letter dated December 5, 2008, page 1.
[11] Tr. pages 96-97.
[12] Tr. page 145.
[13] Calgary Letter dated December 5, 2008, page 1.

MR. BRANDER: Yes, sir.

MR. McNULTY: And that the disposition would create revenue and that the value of carbon is the revenue to be considered? Is that what you're saying?

MR. BRANDER: Yes, sir. First I will say I'm using the word disposition broadly. I don't want to keep repeating all the words in Section 26, that have sell, encumber -- or sell, dispose of, lease, transfer, or otherwise encumber, but I'm using the broad context which was before the Court of Appeal. And yes, sir, I believe it is open to then discuss exactly what the value of the asset would be or what attributed value that the Board should consider taking into account. I'm not saying at the end of the day the Board would decide to do so, but I believe the statute leaves it open for consideration.

MR. McNULTY: Sir, when you talk about value, what is the appropriate value, in your view, when you talk about carbon? That's something you haven't made a determination on?

MR. BRANDER: I would have to say no, that's something I haven't made a determination on, sir, whether you would be talking about the entire asset value or some deemed revenue stream that the Board considered appropriate to take into account in a rate case.

MR. McNULTY: I'm not, sir, asking you for a factual determination, but from your legal argument you've set out in the December 5th letter, when you refer to the value as being an appropriate consideration for this Commission to consider, what is it that you are referring to?

MR. BRANDER: It's got to be some sort of transactional value related to the disposition. Don't ask me to define exactly what that would be or how it would be calculated. It's just the statute leaves it open for the Board to -- Commission, rather, to consider revenues. And I believe we have a disposition that it's something that the -- whether there's some actual actualized in the sale or some deemed value or transactional value that the Commission could consider.

MR. McNULTY: You would agree with me, sir, there is no transaction? Whether or not there's a disposition, there is no transaction?

MR. BRANDER: That's correct.

MR. McNULTY: So how do you determine a transactional value if there is no transaction?

MR. BRANDER: You were looking at, in my view, this is the -- this is what the issue of the Court of Appeal did not decide. You have a change in the use, which is the way the precise questions in the Court of Appeal would be before -- when it was in rate base, you had a use for the benefit of customers, for revenue generation. Afterwards you had a change of use. There is a value associated with that use, which is bringing the asset out into the marketplace.

MR. McNULTY: So are you saying that the value is market value?

MR. BRANDER: It would have to be some estimate of market value of the use to which the asset is being put.

The UCA appeared to agree with the above position expressed by Calgary.[14]

Calgary and the UCA base their positions on section 26(2) of the GUA and section 101(2) of the PUA on the premise that the removal of Carbon from rate base is a disposition. Sections 26(2) of the GUA and 101(2) of the PUA are discussed in a later section of this Decision. Calgary suggested that sections 26(2), 45 and 40 of the GUA and sections 101(2) and 91 of the PUA allow the Commission to consider this revenue in considering the Application and in setting utility rates. Calgary and the UCA go on to suggest that the revenue arising on a disposition of Carbon may be attached for the benefit of customers pursuant to paragraphs 77, 81 and 84 of the Stores Block Decision.

Counsel for the UCA went further, suggesting that the fact that Carbon has been in rate base and rates for a substantial number of years should be recognized in any determination with respect to entitlement to asset value and that the Stores Block Decision did not preclude this.

> Mr. Smith talked in terms of "sticky fingers," and I think he was talking about customers trying to get some entitlement as referred to in the Supreme Court of Canada decision. But I think we have to remember that 100 percent of the cost of these facilities were paid for by customers, and the Supreme Court of Canada did say there were options, and they didn't clearly say that customers have no rights and that there should never be any adjustment to revenue requirement or rates.[15]

There were also submissions by parties with respect to the possibility that individual categories of assets making up Carbon, in particular “base gas”,[16] could be separately considered by the Commission in determining a value for Carbon. A separate consideration of each category of assets could involve a separate consideration of whether the purported removal of that group of assets might harm customers.

ATCO took the position that the Court of Appeal did not differentiate among the Carbon assets and that it was improper to do so now. Rather, the Carbon Appeal Decision contemplated the Carbon assets as a whole,[17] determining that revenue generation was an improper use of these assets.

Calgary took the position that issue 1(h) on the Preliminary Issues List, “Appropriate treatment of base gas (unproduced native gas)”, should continue as an issue. While the Carbon Appeal Decision did not differentiate between assets, neither was it an issue before the Court.[18] Accordingly, Calgary considered that it would be a valid exercise of the Commission’s jurisdiction to consider the value of the base gas in a “blowdown” or deemed blowdown scenario when considering the removal of the Carbon assets from rate base.

[14] Tr. pages 140-141.
[15] Tr. pages 154-155.
[16] In relation to Carbon “base gas” or cushion gas, is the native gas in the natural gas reservoir that has not been produced and is required to maintain operating pressure for the Carbon storage facility. See also Decision 2007-005, p.3, section 3.1, for a more general discussion of base gas.
[17] ATCO Letter dated December 5, 2008, page 2 and Tr. pages 48-52.
[18] Tr. pages 82-83.

4.2.1 Paragraph 77 of the Stores Block Decision

In paragraph 77 of the Stores Block Decision, the Supreme Court indicated that the Board could attach certain conditions in certain circumstances to an approval of a sale of an asset.

> This is not to say that the Board can never attach a condition to the approval of sale. For example, the Board could approve the sale of the assets on the condition that the utility company gives undertakings regarding the replacement of the assets and their profitability. It could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system.

Counsel for Calgary clarified at the Pre-hearing Conference that a finding of harm to customers was required before the value of the asset could be attached in this manner. At page 88 of the transcript the following exchange occurred with Commission Counsel:

> MR. McNULTY: So, sir, do you read that paragraph 77 as suggesting that you have to have an effect on quality or quantity or creating additional operating costs, i.e. harm, before you can attach the value of the asset?
>
> MR. BRANDER: Yes, sir. I think that's one of the things that flows out. You've got to be seeing some sort of harm before you get into the value. I don't think valuation and the impact on rates just exists in the air.

Counsel for the UCA took the position, that harm was not a necessary prerequisite under paragraph 77 of the Stores Block Decision to attaching conditions to an asset sale approval that would permit ratepayers to obtain some benefit from the proceeds of sale.[19]

ATCO's counsel was not totally clear on the issue but appeared to agree that conditions could be attached in certain circumstances. At pages 203-204 of the transcript the following exchange occurred:

> MR. McNULTY: So are you saying that conditions -- you can either refuse the sale if there's harm or you can attach conditions to mitigate the harm? Is that what you're saying?
>
> MR. SMITH: It depends on what the harm is, as contemplated by the Board -- or by the Court. Clearly the quality and quantity of the service offered and the additional operating costs.
>
> I mean, again, I'm reluctant to get too far into a non-carbon compliance scenario, just in case we confuse things. I mean, things are complicated enough I think as they are.

The Commission considers that in the context of a disposition (including a sale) application, the exercise of the Commission's discretion to deny the application or to condition its approval must be grounded in its jurisdiction to protect the quantity and quality of customer service and in setting just and reasonable rates.

[19] Tr. pages 130-131.

At paragraph 78 of the Stores Block Decision the Supreme Court states:

> The Board's seemingly broad powers to make any order and to impose any additional conditions that are necessary in the public interest has to be interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The limits of the powers of the Board are grounded in its main function of fixing just and reasonable rates ("rate setting") and in protecting the integrity and dependability of the supply system.

The Commission considers that paragraph 77 of the Stores Block Decision must be read in a manner that is consistent with the overall findings of the Court. In general, the Stores Block Decision stands for the premise that customers do not obtain a proprietary interest in the assets of the utility even though customers have paid regulated rates to obtain utility services utilizing those assets. Further, the utility is entitled to the value of its assets on a disposition, provided the disposition and any consequences arising from the disposition do not impact the quality or quantity of service to customers or adversely affect the rates customers pay for those services.

At paragraph 68 of the Stores Block Decision the Court states:

> Thus, can it be said, as alleged by the City, that the customers have a property interest in the utility? Absolutely not: that cannot be so, as it would mean that fundamental principles of corporate law would be distorted. Through the rates, the customers pay an amount for the regulated service that equals the cost of the service and the necessary resources. They do not by their payment implicitly purchase the asset from the utility's investors. The payment does not incorporate acquiring ownership or control of the utility's assets.

And at paragraph 44 the Court states:

> 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.

Further, at paragraph 84 the Court states:

> In my view, as I have already stated, the power of the Board to allocate proceeds does not even arise in this case. Even by the Board's own reasoning, it should only exercise its discretion to act in the public interest when customers would be harmed or would face some risk of harm.

The Commission notes that even within paragraph 77 itself, there is an indication that interference by the Commission with a proposed disposition must be done in a manner consistent with its statutory mandate to ensure just and reasonable rates and to maintain the quantity and quality of service.

> The Board has other options within its jurisdiction which do not involve the appropriation of the sale proceeds, the most obvious one being to refuse to approve a sale that will, in

> the Board's view, affect the quality and/or quantity of the service offered by the utility or create additional operating costs for the future.

An order denying a section 26(2) of the GUA, section 102(2) of the PUA application or attaching conditions to it that would apply the "value" of the asset or the proceeds (or deemed proceeds) arising from a sale to the benefit of ratepayers, must be directed at protecting customer services or for preventing or mitigating rate impacts. Subject to the comments below in respect of paragraphs 81 and 84 of the Stores Block Decision, the Commission has no jurisdiction to attach the value of the asset or the proceeds arising from a sale by way of conditions in other circumstances. In the absence of such justification, the value of the asset, or the proceeds of sale belong to the owner of the property, the utility, for the benefit of its investors.

4.2.2 Does Harm Result from the Removal of Carbon from Rate Base?

Both Calgary and the UCA submitted that the removal of Carbon from rate base and the permanent cessation of the accompanying revenue rate riders which had been suspended on an interim basis by Order U2008-213 will result in an increase in rates and de facto financial harm to ratepayers. Further an increase in rates should also be seen as impacting the quality of the services being provided.

> MR. McNULTY: Are we looking at harm in connection with the removal of carbon from rate base?
>
> MR. BRANDER: I believe we are, sir. I believe the evidence is incontroversial -- is not controversial, that the rates are going to go up.
>
> MR. McNULTY: Are those rates going up as a result of an impact of quality of service or additional operating costs?
>
> MR. BRANDER: I would certainly call it --you also omitted the word "quantity", but I would certainly view the rates you are paying as part of the quality of your service
>
> MR. McNULTY: So the fact that carbon has no operational use and has been found by the Court of Appeal not to be appropriately used for revenue generation is irrelevant to the question of whether or not there's still harm because the rates will go up if you take carbon away; is that right?
>
> MR. BRANDER: Yes, sir. And bear in mind, sir, under Section 45 of the Act, the Board does not have to have regard for the considerations under Section 36 and 37.[20]

Subject to Calgary's application for Leave to Appeal the Board's load balancing decision (Decision 2006-098),[21] Calgary and the UCA appear to concede that there is no "operational" purpose for Carbon in providing utility service. The position of the UCA can be seen in the following exchange at pages 148-149 of the transcript:

> THE CHAIR: …But the question here is there doesn't seem to be an operational issue here for the removal of these assets, so what you're saying is that the only kind of harm

[20] Tr. page 89.
[21] Decision 2006-098 - ATCO Gas, Retailer Service and Gas Utilities Act Compliance Phase 2 Part B, Customer Account Balancing and Load Balancing (Application No. 1411635) (Released: October 10, 2005).

> on the removal of these assets, if we did go with Section 26, is a financial harm, is that right, the same as Mr. Brander?
>
> MR. BRYAN: Yes.
>
> THE CHAIR: The financial harm would be consequent on the loss of the revenues –
>
> MR. BRYAN: The loss of the revenues.
>
> THE CHAIR: -- the loss of the revenues that subsidize the rates of the consumers in the south?
>
> MR. BRYAN: Right.
>
> THE CHAIR: But these are the same revenues that the Court has already found that it's not proper for the Board to include in revenues? You're saying they found that they're not -- it's not appropriate to -- not correct to have those revenues included in the revenues to subsidize rates on the basis that these assets shouldn't be in rate base. But even if they're out of rate base, you could still use those revenues to subsidize rates because in a disposition case, the harm is that you lost those revenues that you never had the right to put in in the first place? Is that the argument?
>
> MR. BRYAN: Except that as I spoke to Mr. McNulty, I'm not sure that harm is necessarily a criteria if you're talking in terms of the Supreme Court of Canada decision and the use of the proceeds of the sale.

ATCO submits that the finding of the Court of Appeal that revenue generation was not a legitimate use for Carbon invalidates that use. Consequently, an increase in rates from the cessation of a revenue generation service, to which customers were not entitled in the first place, is not harm. It is merely the necessary consequence of overturning the extension of a benefit bestowed by the regulator without proper authority. The Commission agrees that an increase in rates in these circumstances is not a type of harm within the contemplation of the Supreme Court of Canada in paragraph 77 of the Stores Block Decision.

With respect to the suggestion that the Commission should be able to differentiate among Carbon assets, the Commission notes that neither Calgary nor the UCA suggested that the harm to customers would be different depending on the group of assets under consideration. Parties did not argue that the harm to customers arising in connection with the exclusion of base gas as part of a regulated asset would somehow be different from the removal of the Carbon assets as a whole. Rather, as discussed above, the alleged harm was financial in nature stemming from the rate impact of withdrawing the assets as a whole. It is this financial harm that would justify attachment of the value of the Carbon assets. When counsel for Calgary was asked by Commission Counsel with reference to the Board's earlier decision, Decision 2005-063, "… why is base gas still a relevant consideration", counsel for Calgary responded: "Sir, my short answer would be as part of the value….".[22]

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

[22] Tr. page 84.

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.

Accordingly, if no harm will result from the removal of Carbon from rate base, the Commission may not rely on its governing legislation and paragraph 77 of the Stores Block Decision to condition the removal so as to attach the value of the asset in some manner for the benefit of ratepayers.

4.2.3 Paragraphs 81 and 84 of the Stores Block Decision

Calgary[23] and the UCA[24] suggested that paragraph 81 of the Stores Block Decision permits the Commission in a "rate-setting process" "to modify and fix just and reasonable rates to give due consideration to any new economic data anticipated as a result of the sale". The UCA also pointed to paragraph 84 as confirming that the Commission "has considerable discretion in the setting of future rates in order to protect the public interest."[25]

Calgary and the UCA submitted that the value of Carbon can be considered in a rate-setting proceeding as utility revenue arising from the "disposition" of the asset. The rate-setting proceeding does not necessarily have to be a general rate application.[26] This revenue associated with the value of Carbon must be taken into consideration as "new economic data" in determining future rates.

> MR. McNULTY: So in the event that the Board -- the Commission continued with the present proceeding with the preliminary issues list as it is today, without change, is that sufficient in your perspective to constitute a valid proceeding to deal with the question of carbon?
>
> MR. BRANDER: Yes, I believe it is.
>
> MR. McNULTY: How would Section 81 of the Stores Block decision be relevant to that consideration? That's the new economic data section.
>
> MR. BRANDER: Just give me a second, sir, to read paragraph 81 again. Maybe I'm misunderstanding the question, but as I read paragraph 81, the suggestion from the Supreme Court is that the matter should be dealt with as part of a rate review. And if you're reviewing the impact on rates, of removing carbon from rate base, it's in compliance with the Court of Appeal's decision, that's where the new economic data comes into it.
>
> MR. McNULTY: What is new economic data that we would look at?
>
> MR. BRANDER: That gets into what we were discussing before about trying to assign some value to what is going on.[27]

[23] Tr. pages 99-100.
[24] Tr. pages 140-142 and UCA letter dated December 5, 2008, page 2.
[25] Tr. pages 139-142 and UCA letter dated December 5, 2008, page 2.
[26] Tr. pages 97-99.
[27] Tr. pages 99-100.

In an exchange with the Chair at transcript page 112 counsel for Calgary discussed the ambit of paragraph 81 as follows:

> THE CHAIR: I understand that. So is it your view that paragraph 81 should be interpreted to say that if only the City of Calgary had said to the Board you have to have a rate case and the Board initiated a rate case, that anything goes in terms of the value of the assets, anything the Board decides? The Board could then have said -- the asset's going to generate revenue, we're within a rate case, so because it's in a rate case we can use it for -- the carbon assets for revenue generation?
>
> MR. BRANDER: I don't know if I would quite use the phrase "anything goes," Mr. Chairman. Probably anything relevant goes. I always took Section 81 as a -- paragraph 81 of Stores Block as being a late slap upside the head from the Supreme Court saying somebody dropped the ball on -- along the way here. You guys shouldn't have let this thing go ahead an stand-alone basis. You should have always recognized that this sort of disposition was part of -- should have been part of a rate application.

ATCO suggested that the reference to "new economic data" in paragraph 81 was a reference to the necessary consequence of modifying revenue requirement to eliminate operating costs, return and taxes associated with an asset that is no longer in rate base.[28] Further, it would be nonsensical to allow the Commission to attach the value of an asset through a rate-making proceeding to subsidize rates if it was unable to do so in a stand-alone disposition application. At page 178 of the transcript, counsel for ATCO stated:

> Now, this is -- it was paragraph 81 that counsel for Calgary had suggested was the Supreme Court giving all of us a slap upside the head about how we could go about doing this the right way. With great respect, you can't read this decision, the Stores Block decision or the Carbon decision, as a road map for how to confiscate private property.

The interpretation of paragraph 81 is presently before the Court of Appeal in the Harvest Hills appeal. In the Harvest Hills Decision, the Board found that the proposed disposition of certain properties would result in harm to customers and referred the possibility of using the proceeds of sale for the benefit of customers to a GRA.

The Commission considers that any reliance on paragraph 81 or paragraph 84 of the Stores Block Decision must be consistent with the overall finding of the majority judgment of the Court. In general, the Stores Block Decision stands for the premise that ratepayers do not have a proprietary interest in the assets owned by regulated utilities in Alberta. The Commission's finding above that conditions imposed on a sale transaction in reliance on the wording of paragraph 77 must be premised on addressing some consequence to the quality or quantity of service or to rates, arising from the sale, is consistent with the ratio of the Stores Block Decision. Conditions must be grounded in the jurisdiction of the Commission to protect ratepayers from the harm resulting from the proposed actions of the monopoly service provider. If so grounded, conditions properly limit the right of the utility to deal with its property in the manner it proposes. Similarly, any interpretation of paragraph 81 must be consistent with the overall tenor of the Decision. Accordingly, the Commission considers that a finding of harm is a prerequisite to the ability of the Commission to consider the value of Carbon in a rate-making context for the purpose of limiting the right of the utility to deal with its property in the manner it proposes. In

[28] Tr. page 175.

the Harvest Hills Decision, a finding of harm had been expressly made by the Board. Given the finding of the Commission in Section 4.2.2 above, that no harm will result from the removal of Carbon from rate base, it is improper to utilize the wording of paragraph 81 as a vehicle to consider the value of Carbon as revenue available to off-set customer rates in a rate-making process. For the purposes of this proceeding, paragraph 81 may continue to be relied on to ensure that the consequences of removing Carbon from rate base in terms of the proper adjustments to the regulatory accounts and to revenue requirement are made. As a consequence of the above reasoning, the "value" to be considered in connection with the removal of Carbon from rate base is the value presently attributed to the Carbon assets in revenue requirement.

With respect to the adjustment of accounts, the proper revenue requirement adjustments and the regulatory account adjustments required under the Uniform Classification of Accounts for Gas Utilities (Alberta Regulation 546/63)[29] to reflect the withdrawal of an asset from rate base in the present circumstances, this continues to remain an issue. Included within this issue are potential adjustments to depreciation amounts and net negative salvage amounts and other monies previously collected through rates in respect of future liabilities in respect of the Carbon assets.

Based on the above reasoning:

- Issues 1(a), 1(b), 1(c), 1(h), 2, and 3(a) from the Preliminary Issues List will be excluded from the Final Issues List: and
- Issues 1(d), and 1(g) from the Preliminary Issues List will be incorporated into the Final Issues List.

4.2.4 Sections 45 and 40 of the GUA

Calgary referred to section 45[30] of the GUA as a mechanism that would allow the Commission to look at just and reasonable rates outside of the traditional rate setting and rate base provisions of the GUA, and to take into account the value of Carbon as "revenue" realized upon removal of Carbon from rate base. Further, section 40[31] of the GUA allows the Commission to consider these "revenues" in determining rates.

The Commission does not consider that either sections 45 or 40 of the GUA are applicable in the present circumstances. The sections do not clearly provide the Commission with jurisdiction to consider the value of an individual asset that is not required for utility service and as a consequence is being withdrawn from rate base without harm to customers, as "revenue" to the utility which should be considered in determining just and reasonable rates.

4.3 Disposition Issue

In Decision 2007-005, the EUB determined that a removal of an asset from rate base was a "disposition" requiring the consent of the Commission pursuant to section 26(2)(d) of the GUA and section 101(2)(d) of the PUA. At page 33 of that Decision, the Board stated:

> The Board agrees with interveners that the intent of section 26(2)(d)(i) of the GU Act was to provide the Board with the opportunity to consider any dealing with assets employed

[29] *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*
[30] Tr. pages 89, 103-110.
[31] Tr. pages 162-164.

by a designated utility out of the ordinary course. The intent of the legislation appears to provide the Board with the authority to review any situation where the use of an asset might be withdrawn from utility service to the detriment of ratepayers. The Board finds support for this position in the recent SCC Stores Block Decision where Bastarache J. speaking for the majority of the Court stated at paragraph 29:

> The particular provision at issue, s. 26(2)(d)(i) of the GUA, which requires a utility to obtain the approval of the regulator before it sells an asset, serves to protect the customers from adverse results brought about by any of the utility's transactions by ensuring that the economic benefits to customers are enhanced (MacAvoy and Sidak, at page 234-36).

Further in paragraph 43 Justice Bastarache stated:

> I would note in passing that this power is sufficient to alleviate the fear expressed by the Board that the utility might be tempted to sell assets on which it might realize a large profit to the detriment of ratepayers if it could reap the benefits of the sale.

Although, the Court was considering a sales transaction, these words seem equally appropriate to a removal of an asset from rate base out of the ordinary course of business. It would be incomprehensible that a utility could cause harm to ratepayers by circumventing the Board approval process under section 26(2)(d)(i) by simply removing an asset from rate base and declaring it to be non-utility and thereafter retaining all economic benefit therefrom, when it would be unable to realize that economic benefit through a sale transaction without first obtaining Board approval, thereby accomplishing indirectly what it could not do directly. The legislation is intended to prevent diminution of service or adverse rate impacts from the disposition of assets out of the ordinary course. The unilateral removal of a major asset from rate base outside of the ordinary course raises the same potential for harm to ratepayers as does a sale, mortgage or other disposition of such property. Accordingly, the Board considers that AGS will require the consent of the Board pursuant to section 26(2)(d)(i) of the GU Act prior to any removal of Carbon assets from rate base and prior to operating such assets as non-utility property. Any such application will have to demonstrate to the Board that the removal of Carbon from rate base satisfies the no harm test commonly applied by the Board when considering applications under that provision of the legislation.

Although this finding was one of the grounds for which leave to appeal was granted in the Carbon Appeal Decision, the Court did not expressly address it, stating "No answer is appropriate at this time." [32]

Parties at the Pre-hearing Conference expressed differing views on the effect of the Carbon Appeal Decision on the EUB decisions under appeal and specifically with respect to the Board's "disposition" finding.

Counsel for ATCO suggested that only those matters that had to be addressed in order to implement the Carbon Appeal Decision needed to be addressed in this Application and that a determination of whether or not the removal of Carbon from rate base was a disposition was not necessary in order to implement the Court's direction in the Carbon Appeal Decision. Further,

[32] Carbon Appeal Decision, page 10.

that the Board's conclusions with respect to its disposition finding were based on faulty assumptions and predicated on the conclusion that revenue generation was a legitimate use for Carbon.[33] It was for this reason that the Court did not proceed to directly address the other questions on which leave was granted, including the question with respect to the Board's disposition determination.

Counsel for ATCO suggested that the Carbon Appeal Decision and the Stores Block Decision supported the premise that utility property was under the control of utility management and that rate base was only an accounting precept employed in Alberta as a method of determining rates. The quality and quantity of the service and the rates charged for providing the service are regulated by the Commission, but not management's decision on which particular assets should be employed in providing the service. Further, the value and benefits/liabilities of an asset withdrawn from utility service belong to the utility. Accordingly, the withdrawal of any particular asset from rate base is within the prerogative of utility management but the prudence of that decision, in light of the service and cost impacts of removing the asset, is reviewable by the Commission.[34] Section 26(2) creates a checkpoint for regulator supervision with respect to the sale, lease or other "disposition" of utility property while a prudence review is the regulatory checkpoint in respect of a removal of a material asset from rate base. At page 201 of the transcript the following exchange occurred:

> MR. McNULTY: So I think you're suggesting, then, Mr. Smith, that the policing function, as you referred to it to the Commission, in the case of a sale, it's before the transaction occurs, otherwise the transaction could be void. In the case of a removal of an asset from rate base, it occurs after the fact. It occurs by way of a prudence review? Is that correct?
>
> MR. SMITH: It does, and remember that the asset is still owned by the utility. The utility is subject to the jurisdiction of the Board. It hasn't parted totally with the asset.
>
> MR. McNULTY: But I have understood you correctly? Is that right?
>
> MR. SMITH: I believe so.

Calgary and the UCA took the position that the Carbon Appeal Decision had not overturned the finding of the Board with respect to the "disposition" issue. Accordingly, a withdrawal of an asset from rate base is a disposition requiring the consent of the Commission pursuant to section 26(2)(d) of the GUA and section 101(2)(d) of the PUA.

The "disposition" question is again before the Court of Appeal in the appeal of the Salt Cavern Letters.[35] In each of those two letters, the Board and then the Commission, agreed with the decision of the Board in Decision 2007-005 that a withdrawal of an asset from rate base out of the ordinary course of business was a "disposition" under section 26(2) of the GUA and section

[33] Tr. pages 196-201.
[34] Tr. pages 204-205.
[35] 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 13. The first letter was issued by the EUB on November 6, 2007 and the second was issued by the Commission on July 30, 2008. Both letters restrict 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.

101(2) of the PUA. The Commission continues to support this position and agrees with Calgary and the UCA that the Carbon Appeal Decision does not overturn the determination of the Board in Decision 2007-005 that a withdrawal of an asset from rate base out of the ordinary course of business is a disposition.

The Supreme Court of Canada expressed its position on employing a purposive analysis to legislation in *Covert v. Nova Scotia (Minister of Finance)*, [1980 S.C.J. No. 101, [1980] 2 S.C.R. 774. At page 807 Dickson J. stated:

> The correct approach, applicable to statutory interpretation generally, is to construe the legislation with reasonable regard to its object and purpose and to give it such interpretation as best ensures the attainment of such object and purpose.

Lamer C.J. supported these sentiments in *R. v. Z. (D.A.)*, [1992] S.C.J. No. 80, [1992] 2 S.C.R. 1025 at 1042 when he stated:

> In interpreting… an Act, the express words used by Parliament must be interpreted not only in their ordinary sense but also in the context of the scheme and the purpose of the legislation… [T]he Court of Appeal properly proceeded on this basis when it stated that the best approach to the interpretation of words in a statute is to place upon them the meaning that best fits the object of the statute, provided that the words themselves can reasonably bear that construction.

The analysis of the Board in Decision 2007-005 quoted above conforms with the purposive analysis approach to the legislation.

For the above reasons, the Commission concludes that the approval of the Commission is required prior to a removal of an asset from rate base out of the ordinary course of the owner's business.

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.

The Commission notes the position of counsel for ATCO that ATCO has repeatedly indicated over the last several years that it does not consider Carbon to belong in rate base and that an application under section 26(2) of the GUA and section 101(2) of the PUA is not necessary in order to implement the Carbon Appeal Decision. For that reason the Application does not contain a request to withdraw Carbon from rate base under these statutory provisions. Obviously, ATCO must continue to maintain that such a request is unnecessary given the identical position taken in the ongoing Salt Cavern Letters Appeal litigation. Nevertheless, given the above conclusions that a withdrawal of an asset from rate base out of the ordinary course requires the

approval of the Commission, the Commission will consider the Application as if it contained a request for permission to withdraw Carbon from rate base under section 26(2) of the GUA and section 101(2) of the PUA. The alternative would be to adjourn this proceeding until the Court of Appeal renders its decision in the Salt Cavern Letters Appeal, an action that would not be consistent with the Court of Appeal's direction in the Carbon Appeal Decision in allowing the appeals and remitting the matter back to the Commission. The Commission will continue to require regulated companies to apply to the Commission for approval to withdraw assets from rate base out of the ordinary course of business unless and until otherwise directed by the courts.

Based on the above reasoning, issues 3(a) and 3(b) from the Preliminary Issues List will be excluded from the Final Issues List.

4.4 Date of Adjustment Issue

Counsel for ATCO suggested that the present proceeding was simply a mechanism to implement the Carbon Appeal Decision by taking Carbon out of rate base as of April 1, 2005, being the effective date of Order U2005-133. ATCO considers the Court of Appeal to have overturned Order U2005-133 as an invalid action taken without jurisdiction. Further, ATCO points to the wording of paragraph 28 of the Carbon Appeal Decision which stated:

> If the Carbon storage facility does not now meet the requirements of s. 37, the appellant is entitled to a ruling to that effect.

Counsel for ATCO submitted that the effect of overturning Order U2005-133 and the statement that ATCO was entitled to a ruling that Carbon did not "now" meet the requirements of s. 37, entitled ATCO to be put back in the place it would have been if the Order had never been issued.

Calgary and the UCA suggested that the correct time period was far from clear and may require a review of the entire history of the use of Carbon as a revenue generating asset, given the finding of the Court of Appeal that revenue generation is not a proper reason for maintaining an asset in rate base. At pages 92-93 of the transcript the following exchange occurred with respect to the appropriate date from which to adjust rate base and revenue requirement on account of the removal of Carbon from rate base:

> MR. McNULTY: It could be a date going back 40 years potentially? Is that what you're saying?
>
> MR. BRANDER: It could be. And it could be June 1, 2009 if the Commission views retroactivity as prohibited.
>
> MR. McNULTY: I understand. Is there any support you have for that position in terms of the Act or the case law or the Stores Block of the Court of Appeal case?
>
> MR. BRANDER: No, sir. The fact of life is the Court of Appeal decision doesn't express any date. The case law, the only comments in the case law are what – if ATCO doesn't want you going back -- they refer to as the absolute prohibition against retroactive rate making, the -- so those are the only cases. I don't have the cites with me, obviously, but that would be the initial concern about going back at all, is that you're into retroactive rate making and you've got a lot of things potentially to adjust flowing out of the Carbon decision.

> Sir, the underlying -- I should say the underlying comment about this has been recognized by the Court of Appeal and argued many times. The Commission or the Board can't get jurisdiction by estoppel or acquiescence. So there is the concern that if carbon isn't properly a rate base today for revenue generation, it never was properly a rate base because the evidence before the Commission and the court was that from day one revenue generation was a substantial use of carbon, if not in the earlier years, the only use of carbon.
>
> MR. McNULTY: So in effect the inclusion of carbon was a nullity, it shouldn't have ever occurred?
>
> MR. BRANDER: Yes, sir. That's certainly one approach.

The Commission agrees with counsel for Calgary that the Court of Appeal in the Carbon Appeal Decision did not provide clear guidance on an effective date for any adjustments to revenue requirement resulting from the Court's decision that Carbon could not be included in rate base solely for revenue generation purposes.

The questions of the proper adjustment period, interest charges, if any, and implementation mechanism, remain issues for the Commission to determine. However, the Commission does not consider that the Carbon Appeal Decision can reasonably be interpreted to apply to time periods prior to the earliest effective date of the decisions that were appealed, that being April 1, 2005 for Order U2005-133. The use of Carbon prior to April 1, 2005 was not at issue in the appeal and the Court did not address whether or not revenue generation was an appropriate use of Carbon prior to that time, nor did it fully address the correctness of utilizing Carbon for revenue generation in conjunction with other operational uses of Carbon. Accordingly, the Commission will not consider adjustments to revenue requirement prior to April 1, 2005.

The Commission notes the comments of counsel for Calgary with respect to a possible future date as being the proper date for revenue requirement adjustments. There are many possible dates that may be relevant to this issue, including:

- April 1, 2005, being the effective date of Order U2005-133;
- October 10, 2006, being the issue date of Decision 2006-098 which considered the use of Carbon for load balancing;
- May 27, 2008, being the date of the Carbon Appeal Decision;
- November 3, 2008, being the date of Decision 2008-110[36] which considered Calgary's review and variance application in respect of Decision 2006-098;
- December 4, 2008, being the date that the Supreme Court denied Calgary's leave to appeal the Carbon Appeal Decision;
- The date Calgary's application for Leave to Appeal Decision 2006-098 is determined or if leave is granted, the date of the ultimate disposition of the appeal; or
- Or some other date.

[36] Decision 2008-110 – City of Calgary and ATCO Gas and Pipelines Ltd., Decision on Preliminary Question, Review and Variance of Alberta Energy and Utilities Board Decision 2006-098 and Review and Variance of Alberta Energy and Utilities Board Utility Cost Order 2006-064, (Application 1494570) (Released: November 3, 2008).

The Commission would benefit from further argument and a consideration of the case law on this issue. Based on the above reasoning, issue 1(e) from the Preliminary Issues List will be included in the Final Issues List.

5 FINAL ISSUES LIST

For all of the above reasons the Commission has established the Final Issues List attached as Appendix 6. The List is not intended to prevent parties from addressing new matters that may arise during the course of the proceeding that have not been anticipated in the reasons herein provided and which can be demonstrated to be relevant to the Application and the matters to be decided by the Commission. The Commission acknowledges that the filing of information requests, evidence, cross-examination and argument will further help to refine and develop the relevant issues.

6 SCHEDULE

As noted at the Pre-hearing Conference, the Commission will establish a new schedule with the objective of maintaining March 16, 2009 as the commencement of an oral hearing once ATCO has advised the Commission if it considers the filing of supplemental evidence to be necessary in light of the Commission's final scoping of the issues. The Commission directs ATCO to advise the Commission by January 14, 2009 of its intention in this regard.

7 ORDER

IT IS HEREBY ORDERED THAT:

(1) The Final Issues List is attached as Appendix 6.

Dated in Calgary, Alberta on January 9, 2009.

ALBERTA UTILITIES COMMISSION

(original signed by)

Willie Grieve
Chair

(original signed by)

Tudor Beattie, Q.C.
Commissioner

(original signed by)

N. Allen Maydonik, Q.C.
Commissioner

APPENDIX 1 – HEARING PARTICIPANTS

Name of Organization (Abbreviation) Counsel or Representative (APPLICANTS)
ATCO Gas South (ATCO) L. Smith, Q.C.
The City of Calgary (Calgary) B. Brander P. Quinton-Campbell
Office of the Utilities Consumer Advocate (UCA) J. Bryan, Q.C.
BP Canada Energy D. Field

Alberta Utilities Commission
Commission Panel W. Grieve, Chair N. A. Maydonik, Q.C., Commissioner T. Beattie, Q.C., Commissioner
Commission Staff B. McNulty (Commission Counsel) R. Armstrong, P.Eng. M. McJannet

APPENDIX 2 – ALBERTA COURT OF APPEAL DECISION

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Appendix 2 - Alberta
Court of Appeal Decis

(consists of 12 pages)

APPENDIX 3 – SEPTEMBER 29, 2008 COMMISSION LETTER

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Appendix 3 - Sept
29-08 Commission Let

(consists of 4 pages)

APPENDIX 4 – NOVEMBER 28, 2008 COMMISSION LETTER AND SCHEDULE A

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Appendix 4 - Nov
28-08 Commission Let

(consists of 5 pages)

APPENDIX 5 – ISSUES LIST COMPARISON TABLE

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Appendix 5 - Issues List Comparison Table

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APPENDIX 6 – FINAL ISSUES LIST

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Appendix 6 - Final Issues List

(consists of 1 page)

In the Court of Appeal of Alberta

Citation: ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board), 2008 ABCA 200

Date: 20080527
Docket: 0501-0102-AC
0501-0171-AC
0701-0048-AC
Registry: Calgary

Between:

ATCO Gas and Pipelines Ltd.

Appellant

- and -

Alberta Energy and Utilities Board

Respondent

- and -

The City of Calgary and Utilities Consumer Advocate

Interested Parties

The Court:

The Honourable Madam Justice Elizabeth McFadyen
The Honourable Madam Justice Constance Hunt
The Honourable Mr. Justice Frans Slatter

Memorandum of Judgment

Appeals from Decisions of the
Alberta Energy and Utilities Board:
U2005-133 Dated the 25th day of March, 2005
2005-063 Dated the 15th day of June, 2005
2007-005 Dated the 5th day of February, 2007

Memorandum of Judgment

The Court:

[1] The appellant was granted leave to appeal on certain issues arising from three decisions of the respondent Board: Decisions U2005-133, 2005-063 and 2007-005. Those decisions all relate to the Carbon storage facility owned by the appellant, which has for decades been a part of the appellant's regulated gas business. That business is operated through a division of the appellant known as ATCO Gas South ("AGS"). The fundamental issue is whether the Carbon storage facility continues to be used or required to be used to provide service in the context of the appellant's regulated business given the changes that have occurred in the industry, and in the facility's function.

Facts

[2] The appellant's gas storage facility located near Carbon, Alberta started out as a producing gas field. From 1959 to 1967 the Carbon field was used to supply gas to the appellant's customers.

[3] In 1967 the Carbon field was converted to a storage reservoir. From time to time gas was injected into the Carbon storage reservoir under high pressures. Later on, the gas would be withdrawn from the storage reservoir to meet demand. Gas could be purchased for injection into the reservoir in the summer months when prices were typically lower, and withdrawn in the winter months as needed. The storage reservoir was also used to manage peak utility supply requirements, for utility risk mitigation, and for system load balancing.

[4] The appellant has seldom, if ever, needed or been able to use the total storage capacity of the Carbon reservoir in its regulated gas business. From time to time the excess capacity was leased to third parties, and the capacity of the reservoir was even increased at times for the sole purpose of leasing the new capacity to other users. For example, between 1986 and 1991 the appellant used approximately 25% of the capacity. After 1992 its use of the capacity increased to 38%. However, in the 2001, 2005 and 2006 storage seasons all the capacity was leased to ATCO Midstream Ltd., an affiliate of the appellant.

[5] All the capital costs associated with the Carbon storage reservoir have been included in the appellant's rate base since the storage reservoir was first developed. Revenues received from the leasing of excess storage capacity to third parties were used to offset the overall revenue requirements of the appellant, thereby reducing the amount that would otherwise be recovered from customers through rates. Thus the revenue earned from leasing out parts of the Carbon storage facility has always been included by the Board in the calculation of the appellant's rates.

[6] In more recent years, the structure of the Alberta gas utility business has been changed by legislation. The previously integrated gas utilities (that provided gas services from the gas field to the retail customer) were divided, and different entities were assigned different functions in the overall gas system. The appellant was required to divest itself of its retail gas supply business, and in 2004 Direct Energy Regulated Service ("DERS") took over that service as the default supplier. The appellant no longer sells gas to customers, but now only operates a gas distribution business, consisting of the transportation of gas for third parties. As a result, the appellant no longer needs a gas storage facility as a part of its regulated

business, and indeed it even argues that it is prohibited by legislation from operating any gas storage facility. The Board has determined that the Carbon storage facility is no longer required for utility operational purposes related to the appellant's regulated gas distribution business. The gas storage business itself is not regulated.

[7] Since about 2000, the appellant has taken the position that the Carbon storage facility is no longer "used or required to be used to provide a service to the public", and is therefore not properly part of its rate base under s. 37 of the *Gas Utilities Act*, R.S.A. 2000, c. G-5. Its various efforts to obtain confirmation from the Board to that effect led eventually to the orders that are now under appeal.

[8] The Board established a procedure to resolve the matter, approaching the underlying issues in stages. The procedure (discussed in detail in Decision 2005-063) took longer than anticipated, and on March 8, 2005 the appellant wrote to the Board, effectively attempting to unilaterally withdraw the Carbon storage facility from its rate base. In decision U2005-133 the Board ruled that the appellant could not unilaterally withdraw assets from the rate base. The Board also issued an Interim Order preserving the status quo until the process had run its course. As the Board later stated in Decision 2005-063, at pg. 6: "It is contemplated that at the time that the Interim Order is terminated, the Board will address any required adjustments between AGS and ratepayers to reflect the Board's jurisdictional and rate base findings." Interim Order U2005-133 is one of the orders presently under appeal. There is no direct challenge in this appeal to the ability of the Board to issue interim orders preserving the status quo while it considers issues before it.

[9] The next phase of the process considered four "Preliminary Questions". In Decision 2005-063 the Board stated and answered the questions as follows:

(1) In general, once an asset or capital expenditure has been approved by the Board for inclusion in rate base, what should be the criteria for removing it from rate base at the request of the utility? The Board decided that an asset is removed from the rate base when the Board (and not the utility) concludes that it is no longer "used or required to be used to provide service to the public".

(2) In general, is it appropriate for the Board to attach conditions to the removal of an asset from rate base that would require the utility to add the asset back into the rate base at some future time should subsequent application by the Board of the criteria identified in Question 1 lead to a different result? The Board concluded that such a condition would not be appropriate, workable or reasonable in most circumstances.

(3) In general, to what extent can (should) the Board direct a utility to deal with a particular asset presently included within rate base in a specific manner? The Board concluded that it has such a jurisdiction, but that normally it would leave the operation and management of the regulated business to the utility.

(4) What is the appropriate scope for the Board to adopt in conducting an examination of whether or not Carbon is used or required to be used to provide service to the public or

should otherwise remain in rate base? In particular, the Board would like submissions and argument, without reliance on detailed operational or technical Carbon specifics, on which of the following uses or potential uses of Carbon can (should) the Board consider in addressing this question:

(a) historical uses.
(b) proposed uses.
(c) possible contingent uses by AGS should obligations presently being performed by DERS revert to AGS.
(d) potential alternative uses by AGS, ATCO Pipelines or DERS.

The Board concluded that the only possible relevant uses (to be considered in the next phase of the process) would be the use of the Carbon storage facility for revenue generation purposes, or for distribution system load balancing.

Decision 2005-063 is the second of the orders presently under appeal.

[10] In Decision 2006-098 (which is not presently under appeal) the Board concluded that the Carbon storage facility was not required for load balancing of the appellant's distribution system. The Board confirmed that the appellant no longer had any operational need for a gas storage facility as a part of its regulated business, and that there was no operational reason to include the Carbon storage facility within the rate base. The only remaining reason to keep the Carbon storage facility within the rate base would, therefore, be to generate revenue which could be used to reduce the rates otherwise payable by customers.

[11] The Board then embarked on the last phase of the process, which was a determination of whether an asset that has no functional or operational use could be kept in the rate base for revenue generation purposes, as well as several related questions. In Decision 2007-05 the Board first determined that there were no legal impediments to the appellant owning a storage facility, so long as it was not used to provide retail gas services. The Board secondly confirmed its view that "it has the overriding legislative responsibility to review and approve which assets are in rate base."

[12] On the central question, the Board decided: "Ordinarily, revenue generation on a stand-alone basis would likely not satisfy the used or required to be used test for inclusion in rate base." The Board concluded, however, that the Carbon storage facility was unique, in that, in addition to its operational role, it had always provided some revenue generating service by the leasing of excess storage capacity. While the Carbon storage facility no longer had any utility operational purpose, in the Board's view:

> . . . it is not material whether or not revenue generation was a stand-alone use or an ancillary use associated with a utility service or function whose purpose was to indirectly offset the costs of providing this utility functionality. It is clear that there has been a unique course of dealing acceptable to all parties with respect to Carbon. Revenue generation has been an integral, long-standing and accepted use of Carbon for approximately forty years driven by the specific characteristics of the Carbon assets. As a consequence, revenue from Carbon has been used to offset regulated revenue requirement and has been part of the

> Board's determination of just and reasonable rates to customers for the same extensive period. This aspect of the Carbon assets continues today and the Board sees no reason why Carbon should be considered as no longer used or required to be used for this purpose. (at pp. 26-7)

Decision 2007-05 also concluded that the removal of the Carbon storage facility from the regulated business would be a "disposition" under section 26(2)(d) of the *Gas Utilities Act*, and thus would require the approval of the Board. Decision 2007-05 is the third of the orders presently under appeal.

[13] The appellant applied for and was granted leave to appeal the following issues arising from Decisions U2005-133, 2005-063 and 2007-005:

1. Did the Board err in law or jurisdiction when it included the Carbon facilities in the rate base as an asset "used or required to be used to provide service to the public within Alberta" when the only function of those facilities is to generate revenue?

2. Does the *Roles, Relationships and Responsibilities Regulation* under the *Gas Utilities Act*, prohibit ATCO Gas South from operating the Carbon facilities and if so, is the Board unable to assert further jurisdiction over the Carbon facilities?

3. Can the Board require an owner of a gas utility to continue to include an asset in the rate base or restrict an owner from withdrawing a specific asset from its gas distribution system once an asset has been included in a past rate base?

4. Did the Board err in determining that a change in use of the Carbon facilities is a "disposition" for the purposes of section 26 of the *Gas Utilities Act*?

5. Did the Board commit any other error the panel hearing the appeal identifies and is prepared to entertain?

[14] The City of Calgary and the Utilities Consumer Advocate did not apply to the Court for intervener or any other status, but purported to participate in these appeals as "interested parties". Absent any objection by the parties, the Court has considered their submissions on this occasion.

Standard of Review

[15] The test for selecting the standard of review was comprehensively set out in ***Pushpanathan v. Canada (Minister of Employment and Immigration)***, [1998] 1 S.C.R. 982, and recently re-examined in ***Dunsmuir v. New Brunswick***, 2008 SCC 9 at paras. 55, 64. It is appropriate to identify or advert to the standard of review in all cases. However, it is not necessary to perform a fresh standard of review analysis in every case if the standard of review has already been set for the type of question in issue: ***Dunsmuir*** at paras. 57, 62.

[16] The case law discloses that the following standards of review have been identified for reviewing decisions of the Board under the *Gas Utilities Act*:

(a) Questions of jurisdiction are reviewed for correctness: ***ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)***, [2006] 1 S.C.R. 140, 2006 SCC 4 (the ***Stores Block*** decision) at para 21. "Jurisdiction" is however defined narrowly, and relates only to the ability of the Board to embark on the inquiry. The validity of the result, even on what might be called a "threshold" issue, is not necessarily "jurisdictional": ***Council of Canadians with Disabilities v. Via Rail Canada Inc***., 2007 SCC 15, [2007] 1 S.C.R. 650 at paras. 89, 96, 106.

(b) The interpretation of the *Gas Utilities Act* is a question of law within the expertise of the Board, and such questions are reviewed for reasonableness: ***TransCanada Pipeline Ventures Ltd. v. Alberta (Energy and Utilities Board)***, 2008 ABCA 55 at paras. 17-20. All the important issues in this appeal fall within this category.

(c) Whether a particular asset should be included in the rate base is neither a question of law, nor a question of jurisdiction, and no appeal lies:

> "Once the interpretation is determined, whether a particular item is to be brought within the rate basis is essentially a question for the judgment of the board which does not involve a question of jurisdiction or law": ***Alberta Power Ltd. v. Alberta (Public Utilities Board)*** (1990), 72 Alta. L.R. (2d) 129, 102 A.R. 353 (C.A.) at pg. 149.

The proper interpretation of the statutory definition of the rate base is, however, a question of law reviewed for reasonableness.

Since the jurisprudence has established the standard of review to be used with respect to questions of the type presented in these appeals, it is not necessary to conduct a fresh standard of review analysis: ***Dunsmuir,*** *supra*.

[17] The appellant argues that the issues under appeal raise jurisdictional questions, namely whether the Board has any authority over assets that serve no purpose in the utility system other than to generate revenue, and whether the Board has any authority to require that assets remain with the regulated business, even though the utility considers them no longer to be a part of the rate base. These questions raise, at most, issues about the proper interpretation of the definitional provisions of the *Gas Utilities Act,* and are not properly categorized as jurisdictional in nature.

[18] ***Dunsmuir*** explained the concept of reasonableness at para. 47 as follows:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend

> themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

The Board's interpretations of the various provisions of the *Act* must accordingly be reviewed to see whether they are "justifiable, transparent and intelligible", and fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

Including Revenue Generating Assets in the Rate Base

[19] The first question on which leave was granted is:

> 1. Did the Board err in law or jurisdiction when it included the Carbon facilities in the rate base as an asset "used or required to be used to provide service to the public within Alberta" when the only function of those facilities is to generate revenue?

[20] Section 37 of the *Act* provides:

> In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility, the Board 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.

The issue is whether an asset which merely generates revenue is "used" to provide a service, or whether only assets that have a functional or operational role in the system qualify for inclusion in the rate base.

[21] These appeals raise no factual issue about the role that the Carbon storage facility plays in the appellant's gas distribution system. The Board has held that it plays no operational role, and its only present contribution is to generate revenue that would reduce rates. This is not, therefore, a case on whether a particular asset should be included in the rate base, something that (as just noted) is neither a question of law nor of jurisdiction. Rather, the issue here is an extricable question of law: whether revenue generation by the Carbon storage facility qualifies as "use" under the proper interpretation of the statute. As noted, the standard of review on this issue is reasonableness. The Board's decision must be examined to see if it is within the range of "possible, acceptable outcomes which are defensible in respect of the facts and law.": ***Dunsmuir***, *supra*.

[22] It is contrary to the general approach to utility regulation to suggest that assets can be included in the rate base merely because they generate revenue that could serve to reduce rates. The Board recognized this when it said in Decision 2005-063 at pg. 16:

> With respect to revenue generation as a stand-alone use of an asset, the Board believes it would have difficulty approving the inclusion in revenue requirement of costs associated with a new asset, where the function of the asset was unconnected to utility service and where its sole purpose was to generate revenue to offset rates otherwise payable.

The Board confirmed this view in Decision 2007-05 at pg. 26:

> Ordinarily, revenue generation on a stand alone basis would likely not satisfy the used or required to use test for inclusion in rate base.

The Board, however, found that the Carbon storage facility was unique, because of its historical role as both an operational part of the system and as a source of revenue from the leasing of surplus capacity. It used this history to justify its conclusion that the Carbon storage facility met the requirements of s. 37.

[23] The Board's interpretation of the section is unreasonable for several reasons. Firstly the Board relied largely on the historical role that the Carbon storage facility played in the system, as opposed to its present or future use. Section 37 of the *Act* is primarily forward looking. The Board's jurisdiction is to set rates "afterwards", that is for the future: ***Northwestern Utilities v. City of Edmonton***, [1979] 1 S.C.R. 684 at pg. 691. The words "used or required to be used" are intended to identify assets that are presently used, are reasonably used, and are likely be used in the future to provide services. Specifically, the past or historical use of assets will not permit their inclusion in the rate base unless they continue to be used in the system. The fact that the Carbon storage facility was previously used to provide service may provide some context, but it is largely irrelevant to whether that asset should remain in the rate base.

[24] Secondly, the Board itself decided in Decision 2005-063 at pg. 15 that historical uses of the property were largely irrelevant:

> In the Board's view, historical uses which are no longer employed at a facility would not typically be relevant in determining whether the asset is used or required to be used today. This would be particularly true where obsolescence is involved or where fundamental changes may have occurred in the regulatory or market régime.

However in identifying the "unique" features of the Carbon storage facility in Decision 2007-005 that justified keeping the facility in the rate base, the Board relied almost entirely on historical factors. They were summarized in the Board's factum as follows:

- Carbon represents an exceptional and unique asset in the history of regulated utilities in Alberta.
- Carbon Storage was initially acquired as a company-owned gas production asset, then converted to a storage facility and expanded over a period of roughly 40 years.

- Company-owned production (COP) from the associated Producing Properties continued throughout this period and to the present.
- Carbon has had multiple utility uses throughout its history, including COP operational security, system balancing, peaking supply, emergency use and revenue generation.
- The acquisition and operation of the Producing Properties have been intertwined with the acquisition, development, protection and evolution of Carbon Storage, such that Carbon has generally been considered by the Appellant, customers and the Board to be a single set of assets.
- Revenue generation has been one of the continuing uses of Carbon since it was converted to a storage facility.
- Some of Carbon's capacity has been leased to third parties since 1967 and lease payments from these parties has always been used to offset utility customer rates.
- Since 1972, it has been accepted by the Appellant and customers that the majority of Carbon capacity be used for revenue generation.
- Although Carbon's use for operational purposes was intermittent and variable, and ultimately declined altogether, the revenue generated from third party leases has had a very significant impact on customer rates for most of Carbon's existence.

The reasoning in the two Decisions is inconsistent, making the overall conclusion unreasonable.

[25] Thirdly, the only reasonable reading of s. 37 is that the assets that are "used or required to be used" to provide service are only those used in an operational sense. It strains the meaning of the word "used" when applied to "property" to suggest that merely accounting for the revenue generated by the asset constitutes "using" the asset.

[26] Fourthly, while the Board sometimes identified revenue generation as a "use"of assets, it also sometimes identified revenue generation as a "service". The test in the statute is whether the assets are "used" to "provide service". In Decision 2007-005 at pp. 1, 19 the Board said:

> In this decision the Board has determined that the Carbon storage and associated production assets are used or required to be used for *purposes of generating revenue* to offset customer rates. . . . accordingly, it is appropriate for the Carbon assets to remain in regulated rate base subject to the Board's jurisdiction.
>
> The purpose of this decision is to determine whether or not Carbon is used or required to be used or should otherwise remain in rate base in order to provide *a revenue generation service* for the benefit of regulated customers. (Emphasis added)

In the utility regulatory regime "revenue generation" cannot reasonably be regarded as a "service". The delivery of gas is the "service": s. 28(e) of the *Act* defines "gas distribution service" as "the service required to transport gas to customers by means of a gas distribution system". Therefore, the issue is whether the Carbon storage facility is required to transport gas to customers, not whether it is required to generate revenue.

[27] Fifthly, while the Board noted that "fundamental changes" in the regulatory regime might change the status of an asset, the Board failed to give effect to the fact that the present issue respecting the use of the Carbon storage facility came about largely because of just such a change. The regulatory regime has changed radically and the operations of the traditional integrated utility have now been split among a number of players. For many years the Carbon storage facility played a dual role as an operational asset, as well as a generator of revenue from the leasing of surplus capacity. Under the present circumstances, the Carbon storage facility has no operational role at all. The Board found in Decision 2007-05 at pp. 26-7 that: "it is not material whether or not revenue generation was a stand-alone use or an ancillary use associated with a utility service or function whose purpose was to indirectly offset the costs of providing this utility functionality." The failure to recognize the fundamental change in the role played by the Carbon storage facility once it lost all of its operational purposes was unreasonable.

[28] Finally, the Board over-emphasized that for over 40 years the Carbon storage facility was included in the rate base. The facility always had excess capacity, and the Board noted all its revenues and expenses were included in setting rates, something that is unusual in utility regulation. All concerned were content with that arrangement, and in this respect the Carbon storage facility probably is unique, as the Board held. The reasons why no one challenged these long standing arrangements are undoubtedly complex, but the failure to object in the past does not create any kind of estoppel preventing the present appeal. If the Carbon storage facility does not now meet the requirements of s. 37, the appellant is entitled to a ruling to that effect.

[29] The *Act* does not contain any provision or presumption that once an asset is part of the rate base, it is forever a part of the rate base regardless of its function. The concept of assets becoming "dedicated to service" and so remaining in the rate base forever is inconsistent with the decision in ***Stores Block*** (at para. 69). Such an approach would fetter the discretion of the Board in dealing with changing circumstances. Previous inclusion in the rate base is not determinative or necessarily important; as the Court observed in ***Alberta Power Ltd. v. Alberta (Public Utilities Board)*** (1990), 72 Alta. L.R. (2d) 129, 102 A.R. 353 (C.A.) at pg. 151: "That was then, this is now".

[30] Regulation of the gas utility does not give the end customers an ownership interest in the assets of the utility: ***Stores Block*** at paras. 63-68. The end customers are entitled to service, not assets. The service that they are entitled to is the delivery of gas on reasonable and just terms, not revenue generation. Just as the end customers have no ownership interest in the assets of the utility, they have no interest in the profits, unregulated revenues, or unregulated businesses of the utility. The value of economic assets is often largely determined by the revenues they can generate, and if the end customers are not entitled to any ownership interest in the assets, they are likewise not entitled to any interest in the cash flow generated by those assets: ***Stores Block*** at para. 78. The end customers are entitled to receive gas delivery services from the utility, not revenue-generating services or gas rate subsidization.

[31] The view that the Carbon storage facility could remain in the rate base purely to generate revenue is not one that the section can reasonably bear. The first question upon which leave was granted is answered in the affirmative.

The Remaining Questions

[32] The Board's answers to Questions 2, 3 and 4 were predicated on its conclusion that the Carbon storage facility could be kept in the rate base as a revenue generating asset. Our conclusion to the contrary undermines the assumption on which the Board answered these remaining questions, and the basis on which leave to appeal was granted. In the circumstances, it is neither necessary nor advisable to answer the remaining questions at this time.

Conclusion

[33] In conclusion, the questions on which leave was granted should be answered as follows:

1. Did the Board err in law or jurisdiction when it included the Carbon facilities in the rate base as an asset "used or required to be used to provide service to the public within Alberta" when the only function of those facilities is to generate revenue? Yes.

2. Does the *Roles, Relationships and Responsibilities Regulation* under the *Gas Utilities Act*, prohibit ATCO Gas South from operating the Carbon facilities and if so, is the Board unable to assert further jurisdiction over the Carbon facilities? No answer is appropriate at this time.

3. Can the Board require an owner of a gas utility to continue to include an asset in the rate base or restrict an owner from withdrawing a specific asset from its gas distribution system once an asset has been included in a past rate base? No answer is appropriate at this time.

4. Did the Board err in determining that a change in use of the Carbon facilities is a "disposition" for the purposes of section 26 of the *Gas Utilities Act*? No answer is appropriate at this time.

[34] The appeals are allowed and the matter is remitted to the Alberta Utilities Commission to be dealt with in a manner consistent with these reasons.

Appeal heard on May 9, 2008

Memorandum filed at Calgary, Alberta
this 27th day of May, 2008

McFadyen J.A.

Hunt J.A.

Slatter J.A.

Appearances:

H.M. Kay, Q.C., L.E. Smith, Q.C. and L.A. Goldbach
for the Appellant

A.E. Domes and B.C. McNulty
for the Respondent

T.D. Marriott
for the Utilities Consumer Advocate

R.B. Brander and P.L. Quinton-Campbell
for the City of Calgary

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ELECTRONIC NOTIFICATION

September 29, 2008

To Interested Parties

ATCO GAS SOUTH
REMOVAL OF CARBON RELATED ASSETS FROM UTILITY SERVICE
APPLICATION NO. 1579086
PROCEEDING ID. 87

PROCESS

On July 15, 2008 the Alberta Utilities Commission (AUC or the Commission) gave Notice that ATCO Gas (AG), a division of ATCO Gas and Pipelines Ltd., filed an application (Application) on July 11, 2008. Interested parties were to submit a Statement of Intent to Participate (SIP) to the Commission by July 28, 2008.

SIPs were received from BP Canada, The City of Calgary (Calgary), the Public Institutional Consumers of Alberta (PICA) and the Office of the Utilities Consumer Advocate. Both Calgary and PICA also provided preliminary comments with respect to process.

On September 9, 2008 the AUC issued a letter requesting comments from all interested parties in respect of an appropriate process for dealing with the Application. Comments were to be submitted by September 25, 2008. AG submitted a letter on September 17 and Calgary submitted their comments on September 25.

Calgary noted that the AUC had not yet ruled on Calgary's application for Review and Variance of Decision 2006-098[1] which considered the use of Carbon Storage for load balancing. Calgary also referred to its filing for Leave to Appeal with the Alberta Court of Appeal with respect to the same decision which is presently adjourned awaiting the Commission's decision on the Review and Variance application. Calgary submitted it would be premature to proceed with the Application before the Review and Variance decision and possible Leave to Appeal decision had been issued. In this regard the AUC will be issuing its decision with respect to the Review and Variance shortly.

Calgary also remarked on the fact that the Commission had initiated a comprehensive process with respect to disposition of utility assets, namely Application 1566373, Proceeding ID 20 – the Utility Asset Disposition Rate Review Proceeding. Calgary submitted that it would be efficient to defer dealing with the Application until the Commission had completed Proceeding ID 20. The Commission notes that Reply submissions in Proceeding 20 are due October 27, 2008.

The writer has been authorized to provide the following directions by the Commission.

[1] ATCO Gas: Retailer Service and Gas Utilities Act Compliance Phase 2 Part B Customer Account Balancing and Load Balancing, Application No. 1411635, issued October 10, 2006

The Commission considers that Proceeding 20 will address topics that overlap with those that will be reviewed in this Application. In its April 2, 2008 Notice with respect to Proceeding 20 the Commission stated that the Commission was initiating a generic proceeding:

> …to consider the potential rate related implications for Alberta utilities of the Supreme Court of Canada's Calgary Stores Block Decision[1] (the Stores Block Decision). The Commission considers that a single proceeding with broad stakeholder participation from all Commission regulated utilities and their stakeholders to be in the best interest of regulatory efficiency, procedural fairness and regulatory certainty.

[1] ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), 2006 SCC 4, [2006] 1 S.C.R. 140

The holding of the Supreme Court in the Stores Block Decision was integral to the reasoning of the Court of Appeal in its May 27, 2008 decision in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)* 2008 ABCA 200. This decision overturned certain findings by the Alberta Energy and Utilities Board (EUB) in Order U2005-133[2] and Decisions 2005-063[3] and 2007-005.[4] The Court of Appeal redirected the matter back to the regulator to reconsider the subject decisions in a manner consistent with the Court's reasoning which has lead to the present Application by AG.

The issues list for Proceeding 20 includes the following:

G. Implications of Stores Block Decision - Each party is invited to provide its position with respect to the potential implications of the Stores Block Decision to the extent it relates to the following matters:

a. should the rules allocating gains and losses on a sale of assets sold outside of the ordinary course of business differ from the rules which apply to assets sold in the ordinary course of business?
b. appropriateness of depreciation expense on capital assets which may appreciate over time as a component of a utility's revenue requirement;
c. appropriateness of salvage, reclamation and removal costs on capital assets which may appreciate over time as a component of a utility's revenue requirement;
d. appropriateness of traditional depreciation study methodologies in light of the findings of the Stores Block Decision with respect to entitlement/responsibility for gains and losses;
e. appropriateness of including a return on debt and equity on non-depreciable property in a utility's revenue requirement;
f. appropriateness of a return on debt and equity on capital assets which may appreciate over time as a component of a utility's revenue requirement;
g. the concept that suggests that the reinvestment of sale proceeds by a utility should be treated as equity financing and earn the appropriate return;
h. changes from the *status quo ante* with respect to utility risk, specifically risk of recovery of invested capital and accompanying impacts of any change to appropriate utility capital structure and return on equity. Parties should also include submissions

[2] Order U2005-133 – ATCO Gas South, 2005/2006 Carbon Storage Plan Interim Order (Application 1357130) (Released: March 23, 2005)
[3] Decision 2005-063 – ATCO Gas South, 2005/2006 Carbon Storage Plan – Preliminary Questions (Application 1357130) (Released June 15, 2005)
[4] Decision 2007-005 – ATCO Gas South, Carbon Facilities - Part 1 Module – Jurisdiction (2005/2006 Carbon Storage Plan) (Application 1357130) (Released February 5, 2007)

on integration of Commission findings with the Generic Cost of Capital – Preliminary Questions Proceeding, Application No. 1561663;

i. the jurisdiction of the Commission to require regulatory approval under Section 101(2)(d) of the PUA and Section 26(2)(d) of the GUA prior to the disposition of a utility asset which is no longer used or required to be used to provide service to the public within Alberta;
j. the ability of the Commission to consider proceeds of disposition as "revenue" in fixing just and reasonable rates pursuant to Section 91 of the PUA and Section 40 of the GUA; and
k. potential implications to the practices and requirements established pursuant to the gas Uniform Classification of Accounts Regulation (Alberta Regulation 546/63) and the Uniform System of Accounts (electric) attached to EUB Bulletin 2006-25 dated July 12, 2006.

Some of these items overlap with the following issues enumerated by the EUB in a letter dated December 23, 2004[5] in proceeding No. 1357130 as the issues to be considered by the regulator in the event it was determined that Carbon Storage was not used or required to be used and should be removed from rate base.

Part 3. Removal From Rate Base
(a) process to remove assets from regulated service and rate base
(b) value to ascribe to the assets when removed from regulated service and rate base
(c) determination of entitlement to asset value
(c) value ascribed to these assets in rate base
(d) point in time these assets should be removed from rate base
(e) required adjustments to distribution revenue requirement to reflect the removal of the assets from regulated service and the revenue associated therewith
(f) appropriate treatment of depreciation, net negative salvage, and other monies previously collected through rates in respect of future liabilities in respect of the assets
(g) appropriate treatment of base gas (unproduced native gas)

The Commission agrees with Calgary that to proceed in advance of a decision in Proceeding 20 would be inefficient and premature. In the quote from the Notice on Proceeding 20 referred to above, the Commission specifically noted the benefits of dealing with the implications of the Stores Block Decision in a single generic process. In a related matter the Commission issued Order U2008-213[6] removing the rate riders, which were in relation to the Carbon related assets, in order to mitigate potential financial impacts to all parties. In the circumstances, the Commission considers it to be appropriate to suspend further consideration of the Application pending receipt of the guidance that may be provided by a decision issued in Proceeding 20.

[5] Attached as Appendix 3 to Alberta Energy and Utilities Board Decision 2007-005 ATCO Gas South - Carbon Facilities Part 1 Module – Jurisdiction**,** dated February 5, 2007

[6] Order U2008-213 – ATCO Gas Suspension of Riders and Rate (Application 1574733, Proceeding ID. 61) (Released: June 20, 2008)

Should there be any questions please contact the undersigned at:

Utilities Division, Edmonton Office
Attention: Rob Armstrong
Telephone: (780) 427-8557
Email: rob.armstrong@auc.ab.ca

Yours truly,

<sent by email)

R. Armstrong, P.Eng
Application Officer

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Electronic Notification

November 28, 2008

To: Interested Parties

ATCO GAS SOUTH
CARBON COURT OF APPEAL DECISION COMPLIANCE –REMOVAL OF CARBON RELATED ASSETS FROM UTILITY SERVICE APPLICATION
(Carbon Compliance Application or Application)
APPLICATION NO. 1579086
PROCEEDING ID. 87

RESUMPTION OF PROCEEDINGS

Introduction

On May 27, 2008, the Alberta Court of Appeal rendered its decision in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)* 2008 ABCA 200 (the Carbon Appeal Decision). The Decision overturned certain findings by the Alberta Energy and Utilities Board (EUB or Board) in Order U2005-133[1] and in Decisions 2005-063[2] and 2007-005.[3] The Court of Appeal redirected the matter back to the Alberta Utilities Commission (AUC or the Commission) to reconsider the subject decisions in a manner consistent with the Court's reasoning.

The Application was filed by ATCO Gas South, a division of ATCO Gas and Pipelines Ltd., (AG) on July 11, 2008 in response to the Carbon Appeal Decision.

The Commission provided Notice of the Application on July 15, 2008. Interested parties were required to submit a Statement of Intent to Participate (SIP) to the Commission by July 28, 2008.

SIPs were received from BP Canada, The City of Calgary (Calgary), the Public Institutional Consumers of Alberta (PICA) and the Office of the Utilities Consumer Advocate. Both Calgary and PICA also provided preliminary comments with respect to process.

On September 9, 2008, the AUC issued a letter requesting comments from all interested parties in respect of an appropriate process for dealing with the Application. AG submitted a letter on September 17 and Calgary submitted comments on September 25.

Calgary submitted that the Commission had initiated a generic proceeding to consider disposition of utility assets, namely the "Review Of Rate Related Implications Of Utility Asset Dispositions Following The Supreme Court's Calgary Stores Block Decision" proceeding (the Utility Asset Disposition Proceeding).[4] Calgary submitted that it would be efficient to defer dealing with the Application until the Commission had completed the Utility Asset Disposition Proceeding.

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1 Order U2005-133, *ATCO Gas South, 2005/2006 Carbon Storage Plan Interim Order* (Application 1357130) (Released: March 23, 2005)
2 Decision 2005-063, *ATCO Gas South, 2005/2006 Carbon Storage Plan – Preliminary Questions* (Application 1357130) (Released June 15, 2005)
3 Decision 2007-005, *ATCO Gas South, Carbon Facilities - Part 1 Module – Jurisdiction* (2005/2006 Carbon Storage Plan) (Application 1357130) (Released February 5, 2007)
4 Review Of Rate Related Implications Of Utility Asset Dispositions Following The Supreme Court's Calgary Stores Block Decision (Application 1566373, Proceeding ID 20)

In a letter of September 29, 2008, the Commission agreed with the submission of Calgary in light of the objectives of the Utility Asset Disposition Proceeding as reflected in the following extract from the Notice dated April 2, 2008:

> …to consider the potential rate related implications for Alberta utilities of the Supreme Court of Canada's Calgary Stores Block Decision[1] (the Stores Block Decision). The Commission considers that a single proceeding with broad stakeholder participation from all Commission regulated utilities and their stakeholders to be in the best interest of regulatory efficiency, procedural fairness and regulatory certainty.

[1] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140

The Commission also noted Order U2008-213[5] which had suspended the Carbon storage and production rate riders and the potential overlap of issues to be considered in the Application and the Utility Asset Disposition Proceeding. In these circumstances the Commission decided to suspend the Application pending the guidance that might be provided by a decision in the Utility Asset Disposition Proceeding.

Subsequent Developments

On November 12, 2008 the Alberta Court of Appeal issued two decisions which granted leave to appeal certain decisions and letters of the EUB or the Commission. Leave to Appeal EUB Decision 2007-101[6] (the "Harvest Hills Decision") was granted in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2008 ABCA 381 (Harvest Hills Leave Decision). Leave to Appeal a letter of the Commission dated July 30, 2008 (further to a letter of the EUB dated November 6, 2007), restricting 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 (the "Salt Cavern Letters");[7] was granted in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2008 ABCA 382.

In the Harvest Hills Leave Decision, the Court of Appeal recognized that significant issues arising from the interpretation of the Stores Block Decision remain to be determined by the Commission and that the Utility Asset Disposition Proceeding had been initiated by the Commission for that purpose. The Court then suggested, however, that the Commission would benefit from further guidance from the Court before proceeding with the Utility Asset Disposition Proceeding.

> The hearing of this appeal may assist in clarifying the meaning, scope and application of the Stores Block Decision and provide additional direction for the Board to consider in developing its Rate Review [Utility Asset Disposition Proceeding] guidelines.[8]

In Decision 2008-123 issued on November 28, 2008,[9] the Commission recognized the similarity of certain issues between the matters under appeal and the issues to be considered in the Utility

[5] Order U2008-213, *ATCO Gas Suspension of Riders and Rate* (Application 1574733, Proceeding ID. 61) (Released: June 20, 2008)

[6] Decision 2007-101, *ATCO Gas Disposition of Land in the Harvest Hills Area* (Application 1512932) (Released December 11, 2007)

[7] See ATCO Pipelines 2008-2009 General Rate Application (Application No. 1527976, Proceeding ID. 13).

[8] Harvest Hills Leave Decision, paragraph 27

[9] Decision 2008-123, Review Of Rate Related Implications Of Utility Asset Dispositions Following The Supreme Court's Calgary Stores Block Decision (Utility Asset Disposition Proceeding)- Reasons For Decision On A Motion By The ATCO Utilities Dated October 21, 2008 (Application 1566373, Proceeding ID 20) (,Released November 28, 2008).

Asset Disposition Proceeding and acknowledged the guidance of the Court of Appeal that additional direction of the Court may assist in clarifying these issues to be examined in the Utility Asset Disposition Proceeding. As a consequence, the Commission suspended the Utility Asset Disposition Proceeding pending the decisions on the matters under appeal.

Resumption of Proceedings

The suspension of the Application until a decision was reached by the Commission in the Utility Asset Disposition Proceeding was appropriate in light of the potential overlap of issues between the two proceedings given that the procedural timeline provided for the close of the evidentiary record in late October with a decision expected within three months thereafter. The suspension of the Utility Asset Disposition Proceeding for an indeterminate time, however, now renders a continued suspension of the Application inappropriate in light of the directions of the Court in the Carbon Appeal Decision to reconsider the matters which were the subject of the appeal. In light of these new circumstances, the Commission considers it has the obligation to recommence the Application proceeding. Further, the Commission considers it appropriate that the process for considering the Application be conducted on an expedited basis given that many of the issues that could be considered relevant to the Application are in the nature of legal argument.

To that end, the Commission has attached a Preliminary List of Issues as Schedule A. In preparing the Issues List the Commission has reviewed the Application and has noted and incorporated the issues previously enumerated by the EUB in a letter dated December 23, 2004[10] in proceeding No. 1357130. In that letter, the Board listed the issues it considered to be relevant in the event it was determined that Carbon was not used or required to be used to provide utility service and should be removed from rate base. These issues must, of course, be considered in light of the guidance provided by the Stores Block Decision and the Carbon Appeal Decision.

Noting that the Application may not have addressed all of the issues outlined in the Preliminary Issues List, AG will be provided the opportunity to provide supplemental evidence in the procedural schedule.

The Commission invites comments on the Preliminary Issues List from parties by December 5, 2008. The Commission considers that a one or two day oral hearing may be required and has incorporated tentative hearing dates into the procedural schedule. This procedural schedule is set out as follows:

	Filing Date @ 4 PM
Comments on Preliminary Issues List	**December 5, 2008**
Final Issues List issued by Commission	**December 11, 2008**
Supplemental Evidence of Applicant	**December 17, 2008**
Information Requests to Applicant	**December 22, 2008**
Information Responses from Applicant	**December 31, 2008**
Intervener Evidence	**January 26, 2009**
Information Requests to Interveners	**February 6, 2009**
Information Responses from Interveners	**February 26, 2009**
Rebuttal Evidence	**March 10, 2009**
Oral Hearing Commences	**March 16, 2009**

[10] Attached as Appendix 3 to EUB Decision 2007-005

The Commission recognizes that the procedural schedule is aggressive and that parties have many demands on their resources. However, the Commission would appreciate the cooperation of parties in maintaining the schedule.

Should there be any questions please contact the undersigned at:

Utilities Division, Edmonton Office
Attention: Rob Armstrong
Telephone: (780) 427-8557
Email: rob.armstrong@auc.ab.ca

Yours truly,

<sent by email)

R. Armstrong, P.Eng
Application Officer

Attachment

Schedule A

ATCO GAS SOUTH
CARBON COMPLIANCE APPLICAITON
Application No. 1579086
Proceeding ID. 87

PRELIMINARY ISSUES LIST

1. **Removal From Rate Base Issues Previously Identified By the EUB**
   (To be considered in light of the guidance provided by the Stores Block Decision and Carbon Appeal Decision as more fully addressed below in Sections 2 and 3.)
   a. Process to remove assets from regulated service and rate base.
   b. Value to ascribe to the assets when removed from regulated service and rate base.
   c. Determination of entitlement to asset value.
   d. Value ascribed to these assets in rate base.
   e. Point in time these assets should be removed from rate base.
   f. Required adjustments to distribution revenue requirement to reflect the removal of the assets from regulated service and the revenue associated therewith.
   g. Appropriate treatment of depreciation, net negative salvage, and other monies previously collected through rates in respect of future liabilities in respect of the assets.
   h. Appropriate treatment of base gas (unproduced native gas).

2. **Interpretation, Implications and Application of Stores Block Decision**
   a. Implications and application of Stores Block Decision to the Application
   b. Do paragraphs 29, 77, 83, 84, 81 and 85 of the Stores Block Decision have any application in the context of a removal of assets from rate base?

3. **Interpretation and Application of Carbon Appeal Decision**
   a. Application of Carbon Appeal Decision to the Application.
   b. Guidance received with respect to the need for approval from the Commission under Section 101(2)(d) of the *Public Utilities Act* and Section 26(2)(d) of the *Gas Utilities Act* prior to the removal from rate base of a utility asset which is no longer used or required to be used to provide service to the public within Alberta.

4. **Additional Application Specific Issues**
   a. Verification of Carbon related accounts.
   b. Technical and accounting aspects of the Application.
   c. Identify Carbon related capital expenditures made subsequent to information included in the Application.

APPENDIX 5

ISSUES LIST COMPARISON TABLE

AUC	Calgary & UCA (Agree with Preliminary Issues List with certain clarifications)	ATCO (Does not agree with Preliminary Issues List except where noted)
1. Removal From Rate Base Issues Previously Identified By the EUB (To be considered in light of the guidance provided by the Stores Block Decision and Carbon Appeal Decision as more fully addressed below in Sections 2 and 3.)		
(a) Process to remove assets from regulated service and rate base.	Calgary and UCA- •Expand issue to include, or add new issue, to provide for a review of non-operational or non-income generating assets such as Bow Island; and • Expand issue to include all time periods during which Carbon provided revenue generation and the rate impacts on those time periods. UCA – consideration must be given to GRA processes required to reflect paragraph 81 of the Stores Block Decision	
(b) Value to ascribe to the assets when removed from regulated service and rate base.		
(c) Determination of entitlement to asset value.	Calgary – Clarify issue to include the "treatment of the value of the assets removed from regulated service and rate base when setting just and reasonable rates, and in	

	particular the appropriateness of considering that value as a source[s] of utility revenue".[1] UCA-clarify issue to include consideration of Commission's authority to deny a request for removal from rate base. This would include implications for ATCO in setting rates which reflect the revenue received as contemplated in paragraph 84 of the Stores Block Decision.	
(d) Value ascribed to these assets in rate base.		
(e) Point in time these assets should be removed from rate base.	Calgary and UCA - Clarify issue to include: •consideration of impacts of the date selected including application of mid-year convention; and •applicable point in time could be a date prior to April 1, 2005.	Calculation, Method and Timing of Recovery of Net Revenues from Operation of Carbon Assets pursuant to overturned Order U2005-133.
(f) Required adjustments to distribution revenue requirement to reflect the removal of the assets from regulated service and the revenue associated therewith.	Calgary - Clarify issue to include "all rate related impacts of the removal of the assets from regulated service and rate base".[2] UCA – Consider if paragraph 81 of the Stores Block Decision "requires a GRA proceeding to reflect the revenue received in future rates". [3]	• Required adjustments to distribution revenue requirement to reflect the removal of the assets from regulated service and the revenue associated therewith.
(g) Appropriate treatment of depreciation, net negative salvage, and other monies previously collected through rates in respect of future liabilities in respect of the assets.		

[1] Calgary Letter dated December 5, 2008, page 1.
[2] *Ibid*, page 1.
[3] UCA Letter dated December 5, 2008, page 2.

(h) Appropriate treatment of base gas (unproduced native gas).	UCA – "This will involve not only consideration of the interest which customers have in base gas but also in the unproduced production gas. This will also require consideration of whether the loss of these assets results in harm to customers."[4]	
2. Interpretation, Implications and Application of Stores Block Decision a. Implications and application of Stores Block Decision to the Application b. Do paragraphs 29, 77, 83, 84, 81 and 85 of the Stores Block Decision have any application in the context of a removal of assets from rate base?	 UCA – requires consideration of harm	
3. **Interpretation and Application of Carbon Appeal Decision** a. Application of Carbon Appeal Decision to the Application. b. Guidance received with respect to the need for approval from the Commission under Section 101(2)(d) of the *Public Utilities Act* and Section 26(2)(d) of the *Gas Utilities Act* prior to the removal from rate base of a utility asset which is no longer used or required to be used to provide service to the public within Alberta.		
4. Additional Application Specific Issues a. Verification of Carbon related accounts. b. Technical and accounting aspects of the Application. Identify Carbon related capital expenditures made subsequent to information included in the Application.	 UCA – Clarify issue to include consideration of storage accounts, Carbon-related costs and indirect costs.	 Verification of Carbon related accounts. Update Carbon-related Capital expenditures

[4] *Ibid*, page 2.

APPENDIX 6

ATCO GAS SOUTH
REMOVAL OF CARBON RELATED ASSETS FROM UTILITY SERVICE
Application No. 1579086
Proceeding ID. 87

FINAL ISSUES LIST

1. Verification of Carbon related accounts.

2. Update to Application with respect to Carbon-related Capital expenditures.

3. Date from which adjustments to rate base and revenue requirement should be made should Carbon be removed from rate base.

4. Required adjustments to distribution revenue requirement and regulatory accounts to reflect the removal of the Carbon assets from regulated service and the revenue associated therewith, including without limitation, the proper treatment of depreciation amounts and net negative salvage amounts and other monies previously collected through rates in respect of future liabilities in respect of the Carbon assets.

5. With respect to any amounts to be recovered from ratepayers, the calculation of interest, if any, the methodology to be employed in determining rates and the period during which any amounts to be recovered from ratepayers will be collected.