



AltaGas Utility Group Inc.

Share Transfer and Amalgamation

October 1, 2009



ALBERTA UTILITIES COMMISSION

Decision 2009-152: AltaGas Utility Group Inc.

Share Transfer and Amalgamation

Application No. 1605414

Proceeding ID. 295

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1 INTRODUCTION

1. On September 2, 2009, the Alberta Utilities Commission (AUC or Commission) received an application (Application) from AltaGas Utility Group Inc. (AUGI) requesting an order of the Commission pursuant to Part 2 of the *Gas Utilities Act*, R.S.A. 2000, c. G-5, as amended and section 23 of the *Alberta Utilities Commission Act*, S.A. 2007, c. A-37.2, as amended, permitting AUGI to make on its books a transfer of its shares of capital stock from its current shareholders to AltaGas Holdings #3 Inc. (Holdco), an indirect wholly-owned subsidiary of AltaGas Income Trust (AIT) (Share Transfer). AUGI also requested that the Commission approve the subsequent amalgamation of Holdco with AUGI (the Amalgamation).

2. On September 3, 2009, the Commission distributed a Notice of Application (Notice) to all parties on the gas and pipelines distribution list and published the Notice on the Commission's website, requesting that any party who wishes to intervene in the proceeding to file a Statement of Intent to Participate (SIP) by September 11, 2009.

3. The Commission indicated that it may grant the Application without a hearing, or any additional process, if:

- (a) the Commission considers the SIP to be frivolous, vexatious or of little merit; or
- (b) the person filing the SIP has not demonstrated that the person may be directly and adversely affected by a decision of the Commission on the proceeding.

4. The Commission received SIPs from ATCO Gas, the Consumers Coalition of Alberta (CCA), and the Office of the Utilities Consumer Advocate (UCA).

5. On September 14, 2009, AUGI held a meeting in Edmonton to discuss the Application. Representatives from CCA and UCA participated in the meeting. A representative from the Commission was in attendance as an observer.

6. In the minutes filed by AUGI with respect to the September 14, 2009 meeting,¹ AUGI indicated that representatives of AUGI presented an overview of the Share Transfer and Amalgamation and discussed issues raised by CCA and UCA regarding those transactions.

7. On September 21, 2009 AUGI advised the Commission that, as a result of an unsolicited third party acquisition proposal made to AUGI, AIT had amended its offer to purchase the

¹ Minutes from the meeting held on September 14, 2009 were filed by AUGI on September 24, 2009 as Exhibit 22.01.

outstanding common shares by increasing the consideration payable from \$9.05 to \$10.50 per share. While AUGI indicated that the only revisions required to the Application were the date of the offer, which changed from September 1, 2009 to September 25, 2009 and the purchase price, the Commission also notes that the termination fee increased from \$2.4 million to \$3.9 million, and the reimbursement fee increased from \$700,000 to \$1,000,000.

8. By letter dated September 22, 2009, UCA stated that it did not object to approval of the Share Transaction and Amalgamation, subject to certain conditions. In particular, the UCA submitted that any cost reductions or changes in cost allocations determined by the Commission in its pending decision regarding AltaGas Utilities Inc.(AUI) 2008-2009 general rate application (GRA) should also apply to AUGI's costs and cost allocation if the Share Transfer and Amalgamation is approved and AUGI operates as a division of AIT.

9. By letter dated September 23, 2009, CCA stated that it was not in a position to oppose the Application on the understanding that the impacts of the Share Transfer and Amalgamation will be examined in a subsequent AUI GRA.

10. On September 24, 2009, AUGI filed the minutes to the September 14, 2009 meeting along with a pro forma forecast of AUGI's 2009 general and administrative expenses.

11. The Commission considers the record of the proceeding to have closed on September 24, 2009.

2 BACKGROUND

12. On August 16, 2009 AUGI and AIT entered into a support agreement (the Support Agreement) whereby, subject to certain terms and conditions, AIT agreed to offer to purchase, directly or indirectly, all of the outstanding AUGI common shares (AUGI Shares), excluding the AUGI Shares already owned by AIT or its affiliates. AUGI stated that acquisition of the AUGI Shares will be completed in the following manner:

- (a) In accordance with applicable securities legislation, an offer was mailed to all holders of AUGI Shares (the AUGI Shareholders) on September 1, 2009 in which Holdco is offering to pay \$9.05 per share of AUGI (the Offer). The Board of Directors of AUGI (with the non-independent directors abstaining) has determined that the Offer is fair and recommends that AUGI Shareholders accept the Offer by tendering their AUGI Shares. Subject to withdrawal or any extensions of the Offer, the Offer is to remain open for acceptance until 5:00 pm on October 7, 2009 (the Expiry Date).
- (b) In accordance with the Offer and pending receipt of the requisite regulatory approvals, including without limitation AUC approval of this Application, and any extensions of the Offer, Holdco will take-up and pay for tendered AUGI shares within 10 days of the Expiry Date (the Payment Date) provided that at least 66 2/3% of the outstanding AUGI Shares (excluding AUGI Shares held by AIT or associates or affiliates of AIT) are deposited under the offer and not withdrawn (the Minimum Condition) (or such lower number of AUGI Shares as determined by Holdco in its sole discretion, provided that Holdco shall not be permitted to waive the Minimum Condition to below 50.1% of the AUGI Shares). Concurrent with the acquisition of the publicly held AUGI Shares,

AltaGas Holding Limited Partnership No. 1 will transfer its AUGI Shares to Holdco.

- (c) Assuming that the Minimum Condition is met, then on the Payment Date Holdco and its affiliates will own, directly and indirectly, in excess of 73% of the issued and outstanding AUGI Shares.
- (d) Subsequent to the Payment Date Holdco will complete a second stage transaction to acquire the AUGI Shares it does not own (the Second Stage Transaction). The Second Stage Transaction will be completed in one of two ways:
 - (i) If subsequent to the Payment Date Holdco owns no less than 90% of the AUGI Shares (excluding those held at the date of the Offer by Holdco and its affiliates or associates) it will complete a compulsory acquisition, in accordance with the CBCA and applicable securities legislation, of the remaining AUGI Shares (the Compulsory Acquisition). Following the completion of the Compulsory Acquisition the AUGI Transaction will be completed by way of Holdco being amalgamated with AUGI. The corporation formed through the amalgamation will continue under the AUGI name.
 - (ii) If subsequent to the Payment Date Holdco owns less than 90% of the AUGI Shares (excluding those held at the date of the Offer by Holdco and its affiliates or associates) but a sufficient number of AUGI Shares to approve a special resolution of AUGI Shareholders, it will call a meeting of AUGI Shareholders at which it will propose, and at which it is anticipated will be approved, a special resolution with respect to the amalgamation of Holdco with AUGI (the Subsequent Amalgamation Transaction), following which the Subsequent Amalgamation Transaction will be effected. This will complete the AUGI Transaction. [Share Transfer and Amalgamation]. The corporation formed through the amalgamation will continue under the AUGI name.
- 13. Following completion of the AUGI Transaction [Share Transfer and Amalgamation], including any necessary Second Stage Transaction, AUGI will make application for the AUGI Shares to be delisted from the Toronto Stock Exchange.
- 14. Holdco will complete the AUGI Transaction [Share Transfer and Amalgamation] using funds sourced from existing AIT banking facilities.
- 15. No costs associated with the AUGI Transaction [Share Transfer and Amalgamation] will be borne indirectly or directly by AUI or AUI's customers.²

13. As noted above, on September 21, 2009, AUGI filed supplemental information in respect of the amendment to AIT's offer to purchase to increase the consideration payable from \$9.05 to \$10.50 per AUGI share. The date of the offer, the termination fee and reimbursement fee were also amended as previously indicated.

² Application, Exhibit 002.00, paras. 12-15.

14. With respect to inter-affiliate relationships and services following the Share Transfer and Amalgamation, AUGI noted:

20. AUI, as the Alberta regulated operating utility within the AUGI corporate structure, will not be impacted by the AUGI Transaction [Share Transfer and Amalgamation]. AUI management and personnel will not be impacted by the transaction nor will AUI operations. AUI will continue to be financed as it has historically on a stand alone basis through market cost debt obtained from its parent AUHI. Following the AUGI Transaction [Share Transfer and Amalgamation] AUI will continue to operate as a stand alone owner of a gas utility as it did prior to the transaction.
21. AUHI, as the holding company within the AUGI corporate structure, will not be impacted by the AUGI Transaction [Share Transfer and Amalgamation]. AUHI will continue to be financed as it has historically on a stand alone basis through market cost debt obtained from its parent. Following the AUGI Transaction [Share Transfer and Amalgamation] AUHI will continue as the sole shareholder of AUI as it was prior to the transaction.
22. AUGI, as the sole shareholder of AUHI, will be minimally impacted by the AUGI Transaction [Share Transfer and Amalgamation]. AUGI will continue as a corporate entity and the organization of its subsidiaries, including AUHI and AUI as outlined above, is not anticipated to change following the AUGI Transaction [Share Transfer and Amalgamation]. AUGI management and personnel are anticipated to remain the same following the AUGI Transaction [Share Transfer and Amalgamation] and AUGI anticipates that it will continue to be financed by its existing third party credit facilities. AUGI operations will not be impacted by the transaction with the exception that:
 - (a) AUGI will no longer engage in activities related to maintaining AUGI's listing on the Toronto Stock Exchange and complying with Canadian securities regulations as AUGI will cease to be a public entity once it becomes an indirectly wholly owned subsidiary of AIT; and
 - (b) AUGI will no longer access public equity markets directly for the purposes of funding its investments, including its investments in AUHI and AUI, but instead will access these markets via its parent AIT.³

3 REGULATORY FRAMEWORK

15. AUGI applied for Commission approval pursuant to section 23 of the *Alberta Utilities Commission Act*, and sections 26(2)(d)(ii) and 27 of the *Gas Utilities Act*. Those sections state:

Alberta Utilities Commission Act

General power

23(1) The Commission may order any person

³ Application Exhibit 002.00, paras. 20-22.

- (a) to do any act, matter or thing, forthwith or within or at a specified time and in any manner directed by the Commission, that the person is or may be required to do under this Act or any other enactment or pursuant to any decision, order or rule of the Commission, and
- (b) to cease doing any act, matter or thing, forthwith or within or at a specified time, that is in contravention of this Act or any other enactment or any decision, order or rule of the Commission.

(2) If a rule, order or decision of the Commission requires that an act, matter or thing be done within a specified time and in the opinion of the Commission the circumstances so require, the Commission may, on giving any notice that it considers reasonable, or in its discretion without notice, extend the time so specified.

Gas Utilities Act

Designated gas utilities

26(1) The Lieutenant Governor in Council may by regulation designate those owners of gas utilities to which this section and section 27 apply.

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

...

(d) without the approval of the Commission,

...

(ii) merge or consolidate its property, franchises, privileges or rights, or any part of it or them,

...

and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a gas utility designated under subsection (1) in the ordinary course of the owner's business.

Prohibited share transactions

27(1) Unless authorized to do so by an order of the Commission, the owner of a gas utility designated under section 26(1) shall not sell or make or permit to be made on its books any transfer of any share or shares of its capital stock to a corporation, however incorporated, if the sale or transfer, by itself or in connection with previous sales or transfers, would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the gas utility...

16. The Lieutenant Governor in Council designated AUGI as an owner of a gas utility, pursuant to section 2 of the *Gas Utilities Designation Regulation*.⁴ As such sections 26 and 27 of the *Gas Utilities Act* apply to AUGI.

17. While sections 26 and 27 of the *Gas Utilities Act* apply to AUGI, it should be noted that the Lieutenant Governor in Council has not designated AUGI as an owner of a public utility to

⁴ AR 257/2007, section 2.

which sections 101 and 102 of the *Public Utilities Act*, R.S.A. 2000, P-45 apply.⁵ As such, Commission approval of the proposed Share Transfer and Amalgamation is not required under those sections.

18. Since the general purpose of section 26(2) of the *Gas Utilities Act* is to protect the public,⁶ the Commission continues to be of the view that the “no harm” test is an appropriate means of assessing applications pursuant to sections 26(2) and 27 of the *Gas Utilities Act*. That test is well established⁷ and has been acknowledged by the Alberta Court of Appeal and also by the Supreme Court of Canada.⁸ The “no harm” test ensures that the Commission’s broad mandate to “safeguard the public interest in the nature and quality of the service provided to the community by public utilities” is met.⁹

19. In assessing the merits of the Application, the Commission takes into account its public interest mandate, the position of customer groups, and the potential impacts or ramifications of the Share Transfer and Amalgamation. An expression of the “no harm” test by the Commission’s predecessor, the Alberta Energy and Utilities Board (Board) was made in its consideration of the sale by ATCO Gas and ATCO Electric to Direct Energy Marketing Limited of ATCO’s retail gas and electric businesses.¹⁰ There, the Board said:

(...) The Board’s no-harm test considers the transaction in the context of both potential financial impacts and service level impacts to customers. The Board also assesses the prudence of the sale transaction. As well, the Board considers whether the availability of future regulatory processes might be able to address any potential adverse impacts that could arise from a transaction.¹¹

20. The “no harm” test is intended to balance the potential positive and negative impacts of the proposed Share Transfer and Amalgamation on customers to ensure that they are at least no worse off after those transactions are completed.

4 DISCUSSION

21. In support of the Application, AUGI described the impacts of the Share Transfer and Amalgamation on various aspects of its operations.

⁵ *Public Utilities Designation Regulation*, AR 194/2006.

⁶ *Atco Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2004 ABCA 3, 339 A.R. 250 at para. 36 aff’d 2006 SCC 4.

⁷ [Decision 2008-116](#): TransAlta Corporation, TransAlta Utilities Corporation, TransAlta Generation Ltd. Reorganization of the TransAlta Corporation Group’s Corporate Structure (Issued November 14, 2008); [Decision 2005-112](#): AltaGas Utility Holdings Inc. Request for Approval of Share Transfer (Issued October 14, 2005).

⁸ *Atco Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2004 ABCA 3, 339 A.R. 250 and *Atco Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4.

⁹ *ATCO Ltd. v. Calgary Power Ltd.* [1982] 2 S.C.R. 557, at 576 (per Estey J.).

¹⁰ [Decision 2003-098](#): ATCO Electric Ltd., ATCO Gas North and ATCO Gas South, Both Operating Divisions of ATCO Gas and Pipelines Ltd.: Transfer of Certain Retail Assets to Direct Energy Marketing Limited and Proposed Arrangements with Direct Energy Regulated Services to Perform Certain Regulated Retail Functions (Issued December 4, 2003).

¹¹ [Decision 2003-098](#): p. 4.

22. In particular, AUGI stated that there would be no direct or indirect impacts, and hence no harm, to the level, safety and reliability of AUI service to utility customers as a result of the Share Transfer and Amalgamation. In this regard, AUGI also noted that there would be no changes in AUI management, personnel or operations as a result of the Share Transfer and Amalgamation.¹²

23. AUGI provides operational and financial market services to AUI in accordance with an administrative services agreement¹³ (Administrative Services Agreement). AUI's current Code of Conduct and Code of Conduct Compliance Plan address the services provided under the Administrative Services Agreement. AUGI indicated in the Application that it will continue to provide services to AUI under these agreements after the Share Transfer and Amalgamation and AUGI will cause AUI to amend the AUI Code of Conduct and Code of Conduct Compliance Plan to the extent that these documents need to be amended as a result of the Share Transfer and Amalgamation.¹⁴

24. AUGI stated that no costs associated with the Share Transfer and Amalgamation will be borne directly or indirectly by AUI or AUI's customers, and that funds sourced from existing AIT banking facilities will be used to complete the Share Transfer and Amalgamation.¹⁵

25. AUGI submitted that the Share Transfer and Amalgamation meets the financial aspect of the no harm standard since AUI and AUI customers will be no worse off, or in the same position financially as they otherwise would be if the Share Transfer and Amalgamation did not occur, since AUI customers will continue to be expected to pay the prudent, necessary and reasonable costs incurred by AUI for the provision of utility service, as determined by the Commission.¹⁶

26. Notwithstanding its submissions in support of the Share Transfer and Amalgamation, AUGI requested that any order issued by the Commission pursuant to the Application be subject to certain terms, including the following:

AUGI shall cause AUI in its 2010 -2011 General Rate Application and the next AUI debenture application to fully address the effect, if any, of the AUGI Transaction on AUI customers;¹⁷

27. CCA submitted that it was not in a position to oppose the Application, on the understanding that the impacts would be examined in a subsequent AUI GRA.

28. While UCA did not oppose the Share Transfer and Amalgamation, the UCA conditioned its response subject to any cost reductions or changes in cost allocations as a result of the Commission's determinations with respect to inter-affiliate costs and debt in the AUI 2008-2009 GRA also being applied to AUGI.

¹² Application, Exhibit 002.00, para. 36.

¹³ Application, Exhibit 002.00, para. 28.

¹⁴ Application, Exhibit 002.00, para. 26.

¹⁵ Application, Exhibit 002.00, paras. 14 and 15.

¹⁶ Application, Exhibit 002.00, para. 37.

¹⁷ Application, Exhibit 002.00, para. 42.

5 DECISION

29. The Commission considers that UCA and CCA represent a diverse group of end-use customers, and their conditional non-objection to the Share Transfer and Amalgamation signals to the Commission that it would be reasonable to approve the Application, provided that certain terms are imposed on that approval.

30. The Commission considers that the impacts of the Share Transfer and Amalgamation should be tested and fully examined in AUI's next GRA and debt financing. Any failure to adequately justify costs when weighed against the no harm test would therefore be to the risk of AUI's shareholders and not its customers. The Commission considers that it is in the public interest that no costs arising directly or indirectly from the Share Transfer and Amalgamation should be borne by AUI customers.

31. The Commission notes that AUI's revenue requirement for 2009 will be determined pursuant to the Commission's pending decision in AUI's 2008-2009 GRA. Any effects of the Share Transfer and Amalgamation on AUI's revenue requirement after 2009 will be examined in AUI's next GRA. An examination of the effects of the Share Transfer and Amalgamation in AUI's next GRA (and debt financing, as applicable) will include consideration of, without limitation, whether any costs of those transactions are allocated to the utility, whether those transactions result in any change in inter-affiliate costs, or whether those transactions require any changes to AUI's Inter-affiliate Code of Conduct, Inter-affiliate Code of Conduct Compliance Plan, or Administrative Services Agreement, or any other relevant matter that may come to the attention of the Commission. This will allow sufficient time for testing and examining potential impacts while also allowing for this Application to be completed in a timely manner.

32. The Commission hereby approves the Share Transfer and Amalgamation. However, the Commission's approval of the Share Transfer and Amalgamation does not constitute approval of any underlying costs, changes in service levels, contractual obligations, affiliate or shared service agreements or arrangements, changes in risk profile or capital structure, debt financing costs or provisions, or any other areas that may give rise to potential harm to AUI customers as a direct or indirect result of the Share Transfer and Amalgamation. The Commission expects any such issues to be fully scrutinized during AUI's next GRA and debt financing application, with the acknowledgment that the examination of the ramifications of the Share Transfer and Amalgamation in the debt financing application will be limited strictly to financial matters. Therefore, the Commission will condition its approval of the Application to require that these matters will be thoroughly explored.

33. Approval of the Share Transfer and Amalgamation does not effect the Commission's pending determinations regarding inter-affiliate costs or other matters that are currently the subject of review by the Commission in AUI's 2008-2009 GRA.¹⁸

¹⁸ Application 1579247 ID 88, AUI 2008-2009 GRA.

34. The Commission notes that subsequent to the payment date, Holdco and AUGI will be amalgamated. The corporation formed through the amalgamation will continue under the AUGI name. Given that AUGI is designated as an owner of a gas utility,¹⁹ the Commission is of the view that it does not need to add the condition of designating AUGI under that regulation as part of its approval. However, should circumstances arise wherein the amalgamated entity will operate under a name other than AUGI, the Commission will require the new entity to be designated.

6 ORDER

35. IT IS HEREBY ORDERED THAT:

- (1) The transfer of all outstanding shares in the capital stock of AltaGas Utility Group Inc. from its current shareholders to AltaGas Holdings #3 Inc. in accordance with the Share Transfer and Amalgamation as set out in the Application is approved, subject to the terms set forth in this Order.
- (2) The amalgamation of AltaGas Holdings #3 Inc. and AltaGas Utility Group Inc. in accordance with the Share Transfer and Amalgamation as set out in the Application is approved, subject to the terms set forth in this Order.
- (3) AltaGas Utility Group Inc. shall cause AltaGas Utilities Inc. to fully address in AltaGas Utilities Inc. next GRA and debt financing application any changes in AltaGas Utilities Inc. costs, service levels, contractual obligations, affiliate or shared service agreements or arrangements, changes in risk profile or capital structure, debt financing costs or provisions, or any other areas that may give rise to potential harm to AltaGas Utilities Inc. customers as a direct or indirect result of the Share Transfer and Amalgamation, provided that the matters to be explored in the debt financing application shall be limited to financial matters.
- (4) AltaGas Utility Group Inc. shall inform the Commission upon closing of the Share Transfer and Amalgamation of the resulting corporate structure and legal names, if any, of entities created as a result of the Share Transfer and Amalgamation.
- (5) If the Share Transfer and Amalgamation results in the need to amend any one of the AltaGas Utilities Inc. Inter-affiliate Code of Conduct, Inter-affiliate Code of Conduct Compliance Plan, Gas Utilities Act Code of Conduct Regulation Compliance Plan, or Administrative Services Agreement, AltaGas Utilities Inc. shall amend these documents accordingly and file them with the Commission and interested parties for information purposes.

¹⁹ Under section 2 of the *Gas Utilities Designation Regulation*.

Dated in Calgary, Alberta on October 1, 2009.

ALBERTA UTILITIES COMMISSION

original signed by

N. Allen Maydonik, Q.C.
Chair

original signed by

Mark Kolesar
Commissioner

original signed by

Tudor Beattie, Q.C.
Commissioner

APPENDIX 1 – PROCEEDING PARTICIPANTS

Name of Organization (Abbreviation) Counsel or Representative (APPLICANTS)
AltaGas Utilities Group Inc. (AUGI) C. K. Yates P. Newson
ATCO Gas North (ATCO GAS) B. Bale
Consumers' Coalition of Alberta (CCA) J. A. Wachowich A. P. Merani
Bryan & Company Barristers & Solicitors (UCA1) J. A. Bryan
Office of the Utilities Consumer Advocate (UCA) R. L. Bruggeman

<p>Alberta Utilities Commission</p> <p>Commission Panel N. A. Maydonik, Q.C. Chair M. Kolesar, Commissioner T. Beattie, Commissioner</p> <p>Commission Staff V. Slawinski (Commission Counsel) P. Khan (Commission Counsel) C. Burt M. Robinson D. Weir M. McJannet</p>
