AUC
Alberta Utilities Commission

ATCO Gas South

Review and Variance Proceeding of Decision 2009-004 and Decision 2009-067
(Removal of Carbon Related Assets from Utility Service)

December 16, 2009

ALBERTA UTILITIES COMMISSION
Decision 2009-253: ATCO Gas South
Review and Variance Proceeding Of Decision 2009-004 and Decision 2009-067
(Removal of Carbon Related Assets from Utility Service)
Application No. 1605365
Proceeding ID. 281

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ALBERTA UTILITIES COMMISSION
Calgary Alberta

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1 INTRODUCTION

1. On August 6, 2009 the Alberta Utilities Commission (Commission or AUC) issued a letter[1] advising all parties registered in the proceedings that lead up to the release of Decisions 2009-004[2] and 2009-067[3] that the Commission was initiating a Review and Variance proceeding (R&V Proceeding) of certain aspects of these two decisions in accordance with section 10 of the *Alberta Utilities Commission Act* and section 2 of Rule 016 – R*eview and Variance of Commission Decisions*.

2. Submissions were received on October 13 or 14, 2009 from ATCO Gas South (ATCO), a division of ATCO Gas and Pipelines Ltd., The City of Calgary (Calgary), the Office of the Utilities Consumer Advocate (UCA) and The Public Institutional Consumers of Alberta (PICA). All parties, other than PICA, made Reply Submissions on October 20, 2009. The Commission considers the record of this R&V Proceeding to have closed on October 20, 2009.

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

2 BACKGROUND

4. This Background section of the Decision will briefly review the historical development of the ATCO Carbon natural gas storage facility and associated producing properties (collectively, Carbon) as well as the more recent relevant regulatory and court decisions. This section will conclude with a review of the procedural history of the present R&V Proceeding.

[1] Refer to Appendix 2.
[2] 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) (Released: January 9, 2009).
[3] Decision 2009-067 – ATCO Gas South, Removal of Carbon Related Assets from Utility Service, Preliminary Questions (Application No. 1579086, Proceeding ID. 87) (Released: June 26, 2009).

2.1 History of Carbon

5. In the Background section of Decision 2007-005[4] the Board included a description of Carbon and a significant amount of detailed history.[5] This description is attached as Appendix 3 to this Decision. Briefly, Carbon was originally a natural gas production field which was acquired by Canadian Western Natural Gas Company Limited (now ATCO) in 1957 for the purpose of developing a utility source of gas for production and delivery as peaking gas supply in the Calgary area. In 1967 the Carbon gas field was converted into a storage reservoir. Approval was granted by the regulator in 1967 for the conversion of the natural gas production field into a natural gas storage facility. Certain production wells which were not required for storage cycling operations remained as gas production assets, and have remained so to date. Throughout the period during which Carbon was employed by ATCO in providing regulated services it was variously used to produce natural gas for utility customer consumption, store natural gas for utility customers, provide utility revenue through the leasing of excess storage capacity to third parties and for operational and system load balancing requirements. At present the entire storage facility is leased to an affiliate of ATCO Gas South, ATCO Midstream Ltd. and is used for merchant storage capacity.

2.2 Events Leading to Decision 2007-005 on the use of Carbon for Revenue Generation

6. On June 10, 2004, the Alberta Energy and Utilities Board (the Board or EUB) received a letter from the Consumer Group[6] and the UCA. T he letter requested, *inter alia*, the Board to initiate a proceeding to address the concerns raised by ATCO in prior Board proceedings with respect to the Board's jurisdiction as it relates to Carbon.

7. In a letter of July 23, 2004 the Board directed ATCO to file an application with respect to how Carbon would be utilized during the 2005/2006 annual storage cycle and the basis for ATCO's objection to the Board's jurisdiction over Carbon.

8. On August 16, 2004, ATCO submitted an application to the Board regarding the 2005/2006 Carbon Storage Plan.

9. On March 8, 2005 ATCO filed correspondence which purported to withdraw its storage plan application. ATCO stated:

> AGS' management has determined, therefore, that the prudent operation of the AGS distribution system does not require the use of the Carbon storage operation and all relate facilities. …This reasoning underlies AGS' management's decision not to include any Carbon-related costs or revenues in connection with the 2005/2006 storage operation in its jurisdictional rates for distribution service, effective April 1, 2005.[7]

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

[5] A detailed chronological summary of prior Decisions by the Alberta regulator relating to Carbon can be found in Appendix 6 of Decision 2007-005.

[6] The Consumers Group includes: Alberta Irrigation Projects Association, Alberta Urban Municipalities Association, Consumers Coalition of Alberta, First Nations, and the Public Institutional Consumers of Alberta.

[7] Letter from Bennett Jones, counsel for ATCO dated March 8, 2006, filed in proceeding EUB Application No. 1357130 at page 5.

ATCO also provided notice that all related rate riders or charges (Riders G, H, I) would be discontinued effective April 1, 2005.

10. On March 23, 2005 the Board issued Order U2005-133[8] which was described in Decision 2005-063[9] as follows:

> The Interim Order directed AGS to maintain Carbon and all related assets in rate base, authorized a lease of the entire storage capacity to ATCO Midstream at a placeholder rate equal to the existing storage rate of $0.45/GJ and directed AGS to maintain Rate Riders G, H and I. The Interim Order was effective March 23, 2005 and is to remain in place until such time as the Board determines that there has been a final disposition of:
>
> (a) the matters presently before the Court of Appeal;
> (b) the matters being considered by the Board relating to Carbon;
> (c) any additional matters relating to Carbon that the Board may be required to decide as a result of subsequent filings of AGS or an intervener; and
> (d) any additional matters resulting from any direction from the Court of Appeal.

The authorization to lease the entire Carbon storage capacity to ATCO Midstream was provided at page 2 of Order U2005-133 in the following terms:

> AGS is given approval to lease the entire storage capacity of the Carbon storage to ATCO Midstream for the 2005/2006 storage year and for each subsequent storage year until such time as the Board may otherwise determine.

11. In Decision 2005-063 the Board addressed certain Preliminary Questions related to the Board's continuing jurisdiction over Carbon. In that Decision the Board determined that the question of the Board's jurisdiction with respect to Carbon could best be addressed through an examination of whether or not Carbon was used or required to be used to provide service to the public and therefore should remain in rate base, which was the test established for the inclusion of assets in rate base set out in section 37(1) of the *Gas Utilities Act*, RSA 2000 c. G-5. Section 37(1) then read as follows:

> **Rate base**
>
> **37(1)** 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 Board determined that there were two "uses" for Carbon relevant to the Board's analysis. These two uses were revenue generation and distribution system load balancing.[10]

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[8] Order U2005-133 – ATCO Gas South 2005/2006 Carbon Storage Plan Interim Order (Application 1357130) (Released March 23, 2005).

[9] Decision 2005-063 - ATCO Gas South, 2005/2006 Carbon Storage Plan – Preliminary Questions (Application No. 1357130) (Released: June 15, 2005), page 6.

[10] Ibid, page 21.

12. The Board addressed the load balancing use in Decision 2006-098[11] dated October 10, 2006. The Board concluded that Carbon was not used or required to be used to provide service to the public, nor should it otherwise remain in rate base, in connection with the load balancing of the ATCO Gas distribution system.[12]

13. The remaining use to be considered in determining whether or not Carbon was used or required to be used to provide service to the public was revenue generation. Decision 2007-005 addressed this use. The Board concluded that revenue generation was a proper utility use for Carbon given its unique factual and historical circumstances.

2.3 Events Following Decision 2007-005

2.3.1 Carbon Revenue Generation Appeal Decision

14. On May 27, 2008 the Alberta Court of Appeal issued a Decision[13] (Carbon Appeal Decision) which allowed the ATCO appeal of Order U2005-133 and Decisions 2005-063 and 2007-005. Specifically, the Court determined that the Board erred when it included Carbon in rate base as an asset used or required to be used to provide service to the public when the only function of the Carbon facilities was to generate revenue.

15. On June 20, 2008 the Commission issued Order U2008-213[14] which stated that until such time as the Commission might provide further direction, the three below named rate riders and charges related to the Carbon assets were to be suspended from the rate schedules of ATCO, effective July 1, 2008.

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

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

17. Notice of the Application was issued on July 15, 2008.

2.3.2 Decision 2009-004, the Pre-hearing Conference Scoping Decision

18. Following a pre-hearing conference held on December 16, 2008 the Commission issued Decision 2009-004 which established the Final Issues List for the Carbon Compliance Application proceeding. In addition, this Decision also considered whether the unilateral removal of an asset from rate base by a utility was a "disposition" requiring the prior consent of

[11] Decision 2006-098 – ATCO Gas Retailer Service and Gas Utilities Act Compliance Phase 2 Part B (Application 1411635) (Released: October 10, 2006); Decision 2006-098 Errata (Released: November 7, 2006).
[12] Ibid, page 51.
[13] *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)* 2008 ABCA 200.
[14] Order U2008-213 – ATCO Gas Suspension of Riders and Rate (Application 1574733, Proceeding ID. 61) (Released: June 20, 2008)

the Commission under section 26(2)(d) of the *Gas Utilities Act*. In regard to this issue (Disposition Issue), the Commission made the following determination in Decision 2009-004:

> 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 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 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.[15]

[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 restricted the proposed removal from rate base of certain salt cavern assets owned by ATCO Pipelines which were indicated to be surplus to the needs of the utility. Leave to Appeal was granted on November 12, 2008 in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2008 ABCA 382.

It is this Disposition Issue that is one of the two matters to be reconsidered by the Commission in this R&V Proceeding in light of the Court of Appeal's decision with respect to the appeal of the Salt Cavern Letters referred to in the above quote from Decision 2009-004.

2.3.3 Decision 2009-067 – The Preliminary Questions Decision

19. On June 26, 2009 the Commission issued Decision 2009-067 which determined certain Preliminary Questions with regard to the Carbon Compliance Application including the following question:

> With respect to the removal of the Carbon assets from rate base, what is the appropriate date from which adjustments to rate base and revenue requirement should be made (the Adjustment Date)?[16]

20. The Commission determined the Adjustment Date to be October 10, 2006, based in part on the following reasoning:

> 30. The Alberta Court of Appeal ruled that an asset must have an operational purpose in order to be considered used or required to be used.[15] It was not until the Board determined in Decision 2006-098 that Carbon should not be used for load balancing that the question of whether or not Carbon could be used for operational purposes was finally determined. Revenue generation was found not to be a valid operational purpose.

[15] Decision 2009-004, pages 17-18.
[16] Decision 2009-067, page 2, paragraph 6.

> Accordingly, the release date of Decision 2006-098, October 10, 2006, could be the Adjustment Date. …

and

> 34. For the above reasons, the Commission concludes that the proper Adjustment Date is October 10, 2006 being the date that the regulator determined that Carbon no longer had an operational purpose for providing utility service.[17]

[15] Carbon Appeal Decision, paragraphs 25 and 27

This issue relating to the Adjustment Date for when Carbon should be removed from rate base with the necessary revenue requirement and rate adjustments is the second issue to be reconsidered by the Commission in this R&V Proceeding in light of the Court of Appeal's decision with respect to the appeal of the Salt Cavern Letters.

2.3.4 Salt Cavern Letters Appeal Decision

21. Subsequent to the release of Decision 2009-067 the Alberta Court of Appeal, on June 30, 2009, released its decision with respect to the Salt Cavern Letters appeals referred to above (Salt Cavern Letters Appeal Decision).[18] In that Decision the Court stated:

> Ceasing to use an asset for utilities purposes involves the traditional criteria for what is in the rate base (discussed in Part F above), and does not involve or require a s. 26 application at all. The 2008 "***Carbon***" decision (cited in the previous paragraph) clearly adopts the decisions about the "used or required to be used" test, and defines that as operational use in the utility: see para. 25 for example.[19]

2.4 Present Review and Variance Proceeding

22. As referred to in the Introduction to this Decision, the present R&V Proceeding was initiated by the Commission by letter dated August 6, 2009.[20] The Commission considered that the reasons of the Court of Appeal in the Salt Cavern Letters Appeal Decision may :

- raise a substantial doubt as to the correctness of, or
- constitute a new fact or a change in circumstances which raises a reasonable possibility that the new fact or change in circumstances could lead the Commission to materially vary or rescind

the Commission's determinations with respect to the Disposition Issue in Decision 2009-004 and with respect to the Adjustment Date in Decision 2009-067. In commencing this R&V Proceeding, the Commission indicated that written submissions and reply submissions from parties, together with the materials already forming the record of the Carbon Compliance Application would constitute the record for the R&V Proceeding.

23. In a letter dated August 17, 2009 the Commission referred to the July 31, 2009 approval of the Commission permitting parties to negotiate a possible settlement of all outstanding matters

[17] Ibid, page 7, paragraphs 30 and 34.
[18] *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2009 ABCA 246, Docket: 0701-0325-AC and 0801-0244-AC (refer to Appendix 4).
[19] Ibid, paragraph 56.
[20] Refer to Appendix 2.

related to Carbon, including the Adjustment Date. Noting that a successful settlement might limit the R&V Proceeding to an academic exercise the Commission held the R&V Proceeding in abeyance to allow parties time to negotiate. The Commission imposed a deadline for the conclusion of the negotiations which was subsequently extended.

24. By letter dated September 16, 2009 the Commission stated the question to be addressed in the R&V Proceeding as follows:

> In light of the guidance provided by the Alberta Court of Appeal in the Salt Cavern Letters Appeal Decision should the Commission rescind, vary or modify its determinations in respect of the Disposition Issue in Decision 2009-004 and/or the Adjustment Date in Decision 2009-067?

25. On September 21, 2009 ATCO advised by letter that the negotiation process was being terminated as the likelihood of reaching a settlement appeared very low.

26. By letter dated September 25, 2009 the Commission confirmed its earlier directions to parties to file their respective submissions in this R&V Proceeding by October 13, 2009 and reply submissions by October 20, 2009.

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

2.5 Summary Views of ATCO

28. ATCO submitted that the guidance arising from the Salt Cavern Letters Appeal Decision constituted a new development that had not been considered by the AUC in its decisions. This new development established that the Commission erred in determining the Disposition Issue in Decision 2009-004 and the Adjustment Date in Decision 2009-067.

29. With reference to the Disposition Issue, ATCO submitted that the Salt Cavern Letters Appeal Decision clearly dismisses any suggestion that assets must remain in rate base and rates until the AUC approved a withdrawal of the asset from rate base under section 26 of the *Gas Utilities Act*. A change in use, for example, does not trigger the need for a prior section 26 approval (paragraphs 51, 55-56). This finding of the Court is directly contrary to the Commission's Disposition Issue determination in Decision 2009-004. The Commission, ATCO submitted, should reverse its determination in respect of the Disposition Issue. To support its position ATCO noted the following from the Salt Cavern Letters Appeal Decision (paragraph 56):

> Ceasing to use an asset for utilities purposes involves the traditional criteria for what is in the rate base (discussed in Part F above), and does not involve or require a s. 26 application at all. The 2008 "***Carbon***" decision (cited in the previous paragraph) clearly adopts the decisions about the "used or required to be used" test, and defines that as operational use in the utility: see para. 25 for example.

30. ATCO submitted that the Salt Cavern Letters Appeal Decision was also clearly decisive with respect to the need for the Commission to revise its finding with respect to the Adjustment Date.

31. In its October 13, 2009 submission ATCO provided the following to support its position in respect of the Adjustment Date:

> 19. The AUC had reasoned that until it eliminated load balancing as a potential "operational purpose", the operational use of Carbon was not resolved. Load balancing as an operational use, however, was prospective at best. There was never any actual operational use after April 1, 2005, as the Commission is well aware.
>
> 20. The Salt Cavern Appeal Decision confirms that unless an asset is actually used or required for operational purposes it is not properly included in the rate base. Indeed, the Court stipulated the criteria for any rate base determination are whether the assets in question are "used or required to be used"; defined as operational use in the utility per the Carbon Appeal Decision (para. 56). Furthermore, absent an operational use, the asset is no longer part of the rate base (para. 54):
>
> > [54] Nor is there any sound legislative philosophy which forces us or even permits us to expand the scope of s. 26 beyond the normal meaning of its words. It is true that s. 26 is a very useful section. *But with or without it,* ***an asset no longer used to operate the utility is no longer part of the rate base****, whatever its history or earning capacity: "Carbon" decision, ATCO Gas and Pipelines v. Energy and Utilities Bd.*, 2008 ABCA 200, 433 A.R. 183, 192-193 (paras. 28-30). [Emphasis added by ATCO]
>
> 21. It follows that an asset such as Carbon, that is no longer used to operate the utility, cannot be kept in rates for an improper purpose (i.e. to generate revenue) while considering whether a legitimate purpose might arise in the future.
> [footnote omitted]

32. The guidance provided by the Court should lead the Commission to materially modify, vary and/or rescind its determinations. ATCO submitted that material variance with respect to both determinations was required, that being:

> (a) Reversal of the determination in Decision 2009-004 that unilateral removal of an asset from rate base by a utility is a "disposition" requiring the prior consent of the Commission under section 26(2)(d) of the *Gas Utilities Act* ("GUA); and
>
> (b) Amendment of the Adjustment Date in Decision 2009-067 from October 10, 2006 to April 1, 2005.[21]

2.6 Summary Views of Calgary

33. Calgary stated the following in its Submission:

> a) In light of the Salt Cavern Decision, it appears clear that the Commission should vary its decision on the Disposition Issue in Decision 2009-004 arising out of s. 26 of the *Gas Utilities Act* (the "GUA"). It would appear clear from the Salt Cavern Decision that the ending of a use does not require an application pursuant to section 26(2) of the GUA.

[21] ATCO Submission dated October 13, 2009, paragraph 27.

> b) A variance of the Disposition Issue, does not, in Calgary's view, affect the Commission's decision on the Adjustment Date in Decision 2009-067.[22]

34. In support of its' position Calgary stated that it is clear that utility management does not have the sole discretion over rate base. Calgary cited[23] the following from the Salt Cavern Letters Appeal Decision in support of its position:

> [10] In argument before us, counsel for appellant utility company modified its initial position that the utility decides unilaterally what assets will be included in rate base assets used or required to be used in providing the regulated service to the public. He conceded that, in the context of the general rate application, the Commission has jurisdiction, in determining the rate base, to decide what assets are used or required to be used in providing the utility service to the public, and to require proof when the utility seeks to add or remove assets from rate base.
> …
> [22] Despite some contrary suggestions in its factum, the appellant company properly conceded in oral argument that it cannot unilaterally and conclusively decided what is inside or outside the rate base, nor bring items in and take them out at will. …
>
> [23] Any conclusive unilateral power by the utility company to define its rate base would be contrary to the reasoning in [paragraph 21], indeed contrary to all the case law. Though many rate base cases are about how to value items admittedly in the rate base, many others are about what items should or should not be in the rate base.
> …
> [30] It is true that regulatory commissions pay some attention to the decisions of management … **But the final decision is the regulator's, not the utility company's**.
>
> [31] The paragraphs above show **that the rate-regulation process allows and compels the Commission to decide what is in the rate base** …[Emphasis added by Calgary]

35. Calgary relied upon the above provisions of the Salt Cavern Letters Appeal Decision when it submitted that that Decision dealt with section 26 of the *Gas Utilities Act* and that it does not expand or clarify the Carbon Appeal Decision as it relates to rate base. Calgary submitted that the Commission's authority with respect to the determination of rate base is unaffected by the Salt Cavern Letters Appeal Decision. Further, the Salt Cavern Letters Appeal Decision does not affect or contradict the Commission's interpretation of the Court's requirement for an "operational use" for an asset. Therefore, it was not necessary to revisit the Commission's rate base determinations with respect to the Adjustment Date.[24]

2.7 Summary Views of PICA

36. It was PICA's submission that the guidance provided by the Alberta Court of Appeal in the Salt Cavern Letters Appeal Decision in no way affected the finding in Decision 2009-067 that October 10, 2006, was the appropriate adjustment date.

[22] Calgary Submission dated October 13, 2009 at page 1.
[23] Ibid, page 2.
[24] Ibid, page 3.

37. PICA submitted that:

> Clearly, October 10, 2006, is the date the Commission, in the due exercise of its jurisdiction to determine when a regulated asset may be included in rate base or removed from rate base, determined the Carbon assets were no longer required to be used. PICA submits the Court of Appeal's guidance reinforces the fact traditional criteria continue to be used in determining what assets may be appropriately included the rate base. Accordingly, in Decision 2006-098, the Board/Commission applied the traditional criteria to determine the Carbon assets were no longer required and, therefore, could be removed from rate base. The Court's guidance that ceasing to use an asset for utilities purposes does not require a Section 26 application has no bearing on the Board/Commission's exercise of its jurisdiction to determine whether an asset is required for utility service, using traditional criteria, as it did in Decision 2006-098.[25]

38. PICA noted the rules respecting the criteria for determining whether Carbon assets were used or required to be used for utility service were established by Decision 2006-098 dated October 10, 2006. Accordingly, PICA submitted that application of the rules for any period prior to October 10, 2006, would amount to retroactive rate making.

39. PICA submitted that the Commission's determination in Decision 2009-067 that the adjustment date for removal of Carbon assets from ATCO Gas' rate base was October 10, 2006, should not be varied.

2.8 Summary Views of the UCA

40. The UCA submitted that while the Salt Cavern Letters Appeal Decision indicated that the consent of the Commission was not required to remove assets from rate base in the circumstances of that case, an application to the Supreme Court of Canada, for Leave to Appeal, has been made.

41. The UCA also submitted that nothing in the Salt Cavern Letters Appeal Decision limits or suggests a reduction in the Commission's authority and obligation to determine a rate base and tariffs and "…it is within the sole discretion of the Commission as to what is to be included in rate base and when."[26]

42. The UCA made the following submission relative to the Salt Cavern Appeal Decision at paragraph 11 of its October 13, 2009 Submission:

> 11. The Court went on to make the following additional statements which are relevant not only to the Disposition Issue but also to the determination of rate base:
>
> > [26] If each public utility company could unilaterally decide what was in or out of the rate base, or what was or was not used or useful, each year, then why did all those regulatory commissions and courts spend all that time and ink on such topics?
>
> and

[25] PICA Submission, dated October 14, 2009, page 3.
[26] UCA Submission, dated October 13, 2009, paragraph 39.

> [29] If any of this were not so, any company with both a regulated utility business and another business could shuffle assets in and out of the rate base at will. A host of games could be played to maximize the rates charged by the monopoly utility business to the public.[7]
>
> 12. In summary, although the Court determined that a Sec. 26 application was not required, it did not in any way suggest that removal of an asset from rate base could be done unilaterally by a utility - the "game" playing issue. In addition, it did not make any specific findings regarding an Adjustment Date or how and when the revised rate base should be determined.

[7] ACA Salt Cavern Decision, paras. 26 and 29.

43. The UCA submitted that there was nothing in the Salt Cavern Letters Appeal Decision that suggested that the Adjustment Date had been wrongly decided by the Commission. To the contrary, the Court had confirmed the Commission's jurisdiction to determine rate base and to set just and reasonable rates. In determining the Adjustment Date the Commission was acting under this authority to determine rate base and to set just and reasonable rates.

44. The UCA concluded that there was no factual or legal support for the ATCO proposed Adjustment Date of April 1, 2005. In the opinion of the UCA, there was no doubt as to the correctness of the Commission's decision and the circumstances outlined do not raise a reasonable doubt which could lead the Commission to materially vary or rescind Decisions 2009-004 and 2009-067 by changing the Adjustment Date from October 10, 2006.[27]

3 DETERMINATION OF ISSUES

45. In initiating this R&V Proceeding the Commission requested parties to address the following question:

> In light of the guidance provided by the Alberta Court of Appeal in the Salt Cavern Letters Appeal Decision should the Commission rescind, vary or modify its determinations in respect of the Disposition Issue in Decision 2009-004 and/or the Adjustment Date in Decision 2009-067?

Having considered the guidance provided by the Court of Appeal in the Salt Cavern Letters Appeal Decision and the submissions of parties the Commission has determined that it must vary its findings in respect of both the Disposition Issue and the Adjustment Date in the manner and for the reasons provided below.

3.1 Disposition Issue

46. In Decision 2009-004 the Commission determined 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 *Gas Utilities Act* and section 101(2) of the *Public Utilities Act* requiring the prior approval of the

[27] Ibid, paragraph 43.

Commission.[28] In the Salt Cavern Letters Appeal Decision the Court of Appeal restated the question before it as follows:

> If a utility company owns an asset whose price or value in previous rate hearings has been included in the rate base calculation, and the company now alleges that the asset is no longer used, nor useful, nor needed for its regulated utility business, or alleges that it will soon become none of those things, does s. 26 of the *Gas Utilities Act* apply, and does the company need leave under that section?[29]

47. In answering this question in the negative the Court stated:

> Ceasing to use an asset for utilities purposes involves the traditional criteria for what is in the rate base (discussed in Part F above), and does not involve or require a s. 26 application at all.[30]

48. In light of the clear guidance from the Court of Appeal and having considered the submissions of the parties, the Commission has determined to vary its finding in Decision 2009-004 with respect to the Disposition Issue. The Commission does not agree with the UCA that the outstanding Application for Leave to Appeal the Salt Cavern Letters Appeal Decision to the Supreme Court of Canada is sufficient reason in the circumstances of this proceeding for an administrative tribunal like the Commission to delay applying the guidance of the Alberta Court of Appeal in a timely manner. Should the Supreme Court of Canada grant leave and subsequently overturn or otherwise change the Court of Appeal's determinations, such a decision might give the Commission and parties a basis upon which to again review the findings of the Commission in Decision 2009-004 and in this R&V Decision. Accordingly, the Commission varies Decision 2009-004 to the extent required to reflect the finding of the Court of Appeal in the Salt Cavern Letters Appeal Decision. Specifically, the Commission concludes with respect to a utility asset whose price or value in previous rate hearings has been included in the rate base calculation, that the approval of the Commission is not required under section 26(2) of the *Gas Utilities Act* or under section 101(2) of the *Public Utilities Act* prior to the removal of that asset from rate base where the utility "alleges that the asset is no longer used, nor useful, nor needed for its regulated utility business, or alleges that it will soon become none of those things".

3.2 Adjustment Date Issue

49. Decision 2007-005 determined that Carbon was used or required to be used for revenue generation purposes. The Alberta Court of Appeal in the Carbon Appeal Decision overturned this finding and determined that revenue generation was not a valid use for Carbon and that section 37 of the *Gas Utilities Act* required that an asset must have an operational purpose in order for it to be considered "used or required to be used to provide service to the public." The Court stated at paragraph 25 of the Carbon Appeal Decision:

> …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.

[28] Decision 2009-004, pages 17-18
[29] Salt Cavern Appeal Decision, paragraph 40.
[30] Ibid, paragraph 56

The Court continued in paragraph 27 to state:

> 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.

50. In Decision 2006-098, released on October 10, 2006, the Board determined that Carbon no longer had an operational purpose when it determined that the last operational purpose under consideration, load balancing, was not a proper use for the Carbon facility. The Board made the following finding in Decision 2006-098:

> Based on the facts, evidence and argument of the parties on the record of this proceeding, the Board finds that the Carbon storage facility (including the associated producing properties) is not used or required to be used to provide service to the public, nor should it otherwise remain in rate base, in connection with the load balancing of the ATCO Gas distribution system.[31]

51. The combined effect of Decision 2006-098, Decision 2007-005 and the Carbon Appeal Decision was that an asset required an operational purpose to be considered "used or required to be used" in the context of section 37 of the *Gas Utilities Act.* Further, revenue generation was not a valid operational purpose and the last potential operational use for Carbon, load balancing, was dismissed by the Board in Decision 2006-098.

52. The above analysis led the Commission to conclude in Decision 2009-067:

> 30. The Alberta Court of Appeal ruled that an asset must have an operational purpose in order to be considered used or required to be used.[15] It was not until the Board determined in Decision 2006-098 that Carbon should not be used for load balancing that the question of whether or not Carbon could be used for operational purposes was finally determined. Revenue generation was found not to be a valid operational purpose. Accordingly, the release date of Decision 2006-098, October 10, 2006, could be the Adjustment Date.

and

> 34. For the above reasons, the Commission concludes that the proper Adjustment Date is October 10, 2006 being the date that the regulator determined that Carbon no longer had an operational purpose for providing utility service.[32]

53. The Court of Appeal in the Salt Cavern Letters Appeal Decision has now made it clear as discussed above in connection with the Disposition Issue, that the consent of the Commission is not required prior to the removal of an asset from rate base when utility management "alleges that the asset is no longer used, nor useful, nor needed for its regulated utility business, or alleges that it will soon become none of those things." Should the utility act imprudently in removing an asset from rate base and utility service the Commission may address the consequences to ratepayers through the exercise of its rate setting powers. As stated by the Court of Appeal in paragraph 53 of the Salt Cavern Letters Appeal Decision:

> Indeed, counsel for the appellant stressed to us what the Commission could do when hearing a rate application if it found want of due prudence in starting or stopping the use

[31] Decision 2006-098, page 51.
[32] Decision 2009-067, page 7, paragraphs 30 and 34.

> of some asset in the regulated utility. It could make some adjustment of values in the rate base or in the expenses or return on investment, so that rates approved would not make the consumers pay rates based on that type of imprudence.

54. The Commission has carefully considered the guidance provided by the Court of Appeal in the Salt Cavern Letters Appeal Decision that section 26 of the *Gas Utilities Act* does not require the consent of the Commission prior to a utility removing an asset from rate base, in light of the Court's finding in the Carbon Appeal Decision that section 37 of the *Gas Utilities Act* requires an asset to have an operational purpose in providing utility services to be included within rate base. When these two decisions are read together it appears that a utility may, without obtaining prior Commission approval, remove an asset from rate base at the time that utility management considers that the asset is no longer used or required to be used, or will soon become no longer used or required to be used, in an operational sense to provide regulated utility services. However, as pointed out by the Court of Appeal in paragraph 53 of the Salt Caverns Letters Appeal Decision quoted above, the Commission has the authority to assess the prudence of the utility's decision to remove the asset from rate base and to adjust rate base and rates should a finding of imprudence be made. The Commission may also adjust rates if the removal of an asset from rate base results in rates for utility services no longer being just and reasonable.

55. Neither section 26 nor section 37 of the *Gas Utilities Act* has been materially amended since June 10, 2004 when the proceedings ultimately leading to or related to, the Carbon Appeal Decision, the Salt Cavern Letters Appeal Decision, Decision 2009-004 and Decision 2009-067 originally commenced. Accordingly, the guidance of the Court of Appeal is directly applicable to the circumstances before the Commission in this proceeding.

56. In order to apply the guidance of the Court of Appeal to the facts of the present proceeding the Commission must consider the date when ATCO management clearly indicated that Carbon no longer had an operational purpose, was no longer used or required to be used in providing utility service and should be withdrawn from rate base and utility service. It is that date that should be the Adjustment Date for removing Carbon from regulated service and making the necessary rate adjustments.

57. As reflected by the following quote from ATCO's letter dated March 8, 2005, April 1, 2005 was the date that ATCO management determined that Carbon no longer had an operational purpose and was no longer used or required to be used to provide regulated utility services.

> AGS' management has determined, therefore, that the prudent operation of the AGS distribution system does not require the use of the Carbon storage operation and all relate facilities. …This reasoning underlies AGS' management's decision not to include any Carbon-related costs or revenues in connection with the 2005/2006 storage operation in its jurisdictional rates for distribution service, effective April 1, 2005.[33]

58. Carbon was not being used to provide utility services as of April 1, 2005 with the knowledge and consent of the Board as reflected by Order U2005-133 dated March 23, 2005. As reflected in paragraph 10 above, Order U2005-133 authorized the lease of the entire Carbon storage capacity to ATCO Midstream "…for the 2005/2006 storage year and for each subsequent storage year until such time as the Board may otherwise determine." Accordingly, there is no

[33] Letter from Bennett Jones, counsel for ATCO dated March 8, 2006, filed in proceeding EUB Application No. 1357130 at page 5.

need to consider if ATCO management acted imprudently in indicating that there was no operational need for the continuation of Carbon in providing utility services and that Carbon should be removed from rate base as of April 1, 2005. There is therefore no basis to consider if a rate adjustment may be required as contemplated by the Court in the Salt Cavern Letters Appeal Decision as the consequence of an imprudent action of the utility in removing an asset from utility service.

59. In light of the guidance provided by the Court of Appeal, after having considered the submissions of the parties, the Commission considers that it must vary its determination of October 10, 2006 as the Adjustment Date in Decision 2009-067. The effective date that ATCO management determined that Carbon would no longer have a utility operational purpose, would no longer be used or be required to be used for providing utility service and should be withdrawn from rate base and utility service was April 1, 2005. It is clear that Carbon was not providing an operational service to ratepayers as of April 1, 2005 with the consent of the Board. There is no issue, therefore, about the prudence of management in deciding not to use Carbon in an operational capacity to provide utility service as of that date. It is of no consequence to the date that ATCO management was entitled to remove Carbon from rate base that the Board subsequently agreed in Decision 2006-098 with ATCO management that Carbon could not be used in providing load balancing services. Accordingly, the Commission determines that the Adjustment Date will be April 1, 2005 and Decision 2009-067 is varied accordingly. The Commission considers that an Adjustment Date of April 1, 2005 is in keeping with the guidance provided to the Commission by the Carbon Appeal Decision and the Salt Cavern Letters Appeal Decision as it applies to the facts before the Commission related to Carbon.

60. As stated above with respect to the Disposition Issue, the Commission does not agree with the UCA that the outstanding Application for Leave to Appeal the Salt Cavern Letters Appeal Decision to the Supreme Court of Canada is sufficient reason in the circumstances of this proceeding to delay applying in a timely manner the guidance of the Alberta Court of Appeal. Should the Supreme Court of Canada grant leave and subsequently overturn or otherwise change the Court of Appeal's determinations, such a decision might give the Commission and parties a basis upon which to again review the findings of the Commission in Decision 2009-067 and in this R&V Decision. In this regard, the Commission reminds parties that the financial implications of resetting the Adjustment Date again to October 10, 2006, or to any other date, based on an interpretation of the law by the courts could be calculated and rates adjusted accordingly in the future.

61. The Commission also dismisses the argument by PICA that a change of the Adjustment Date would amount to retroactive ratemaking on the basis that the rules respecting the criteria for determining whether Carbon was used or required to be used for utility service were not established until the Board issued Decision 2006-098 dated October 10, 2006. The Alberta Court of Appeal has stated that a utility may determine if an asset is used or required to be used in providing utility service and remove that asset from rate base and utility service without the prior consent of the Commission. This Decision applies the provisions of sections 26 and 37 of the *Gas Utilities Act* in a manner consistent with the Court's guidance.

4 ORDER

62. IT IS HEREBY ORDERED THAT:

(1) The findings of the Commission with respect to the Disposition Issue in Decision 2009-004 and the Adjustment Date in Decision 2009-067 are varied in accordance with the determinations made by the Commission in this Decision.

Dated in Calgary, Alberta on December 16, 2009.

ALBERTA UTILITIES COMMISSION

(original signed by)

Willie Grieve
Chair

(original signed by)

N. Allen Maydonik, Q.C.
Commissioner

(original signed by)

Tudor Beattie, Q.C.
Commissioner

APPENDIX 1 – PROCEEDING PARTICIPANTS

Name of Organization (Abbreviation) Counsel or Representative
ATCO Gas South (ATCO) L. Smith, Q.C.
C BP Canada Energy C. Worthy
The City of Calgary (Calgary) B. Brander P. Quinton-Campbel
Public Institutional Consumers of Alberta (PICA) N. McKenzie
Office of the Utilities Consumer Advocate (UCA) J. Bryan, Q.C.

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 – AUC LETTER OF AUGUST 6, 2009

(return to text)

Appendix 2 - AUC
Letter of August 6-20

(consists of 4 pages)

APPENDIX 3 – HISTORY OF CARBON

(return to text)

Decision 2007-005 provided the following overview of the history of Carbon commencing at page 3:

Section 3.1 General Comments on Carbon as a Storage Facility
Section 3.2 Development and Uses of the Carbon Facilities
Section 3.3 Evolution of ATCO's Use of Carbon

Appendix 3 - History of Carbon.pdf

(consists of 7 pages)

APPENDIX 4 – SALT CAVERN COURT OF APPEAL DECISION

(return to text)

Appendix 4 - Salt Cavern Court of Appe

(consists of 15 pages)

AUC
Alberta Utilities Commission

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Calgary, Alberta, Canada T2P 3L8
Phone 403-592-8845 Fax 403-592-4406
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ELECTRONIC NOTIFICATION

August 6, 2009

To Interested Parties

ATCO GAS SOUTH
REMOVAL OF CARBON RELATED ASSETS FROM UTILITY SERVICE
APPLICATION NO. 1579086, PROCEEDING ID. 87 (CARBON COMPLIANCE PROCESS OR APPLICATION)

COMMISSION INITIATED REVIEW AND VARIANCE PROCEEDING

1. ATCO Gas South (ATCO or AGS), a division of ATCO Gas and Pipelines Ltd. filed the Application on July 11, 2008. The Application requested the Alberta Utilities Commission (AUC or the Commission) to set aside Order U2005-133[1] and Decisions 2005-063[2] and 2007-005,[3] which were issued by the AUC's predecessor, the Alberta Energy and Utilities Board (EUB or Board), and to grant a new Order implementing the findings of the Alberta Court of Appeal in a Decision issued May 27, 2008[4] (Carbon Appeal Decision). The Carbon Appeal Decision dealt with the Carbon natural gas storage facility and associated producing properties (collectively, Carbon) owned and operated by ATCO which were formerly employed by ATCO in providing regulated services to customers.

2. Notice of the Application was issued on July 15, 2008.

3. On January 9, 2009 the Commission issued Decision 2009-004[5] which established the Final Issues List for the proceeding. In addition, this Decision also considered whether the unilateral removal of an asset from rate base by a utility was a "disposition" requiring the prior consent of the Commission under section 26(2)(d) of the *Gas Utilities Act*. In regard to this issue (Disposition Issue), the Commission made the following determination:

> 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 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

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1 EUB Order U2005-133 – ATCO Gas South, 2005/2006 Carbon Storage Plan Interim Order (Application No. 1357130) (Released: March 23, 2005)
2 EUB Decision 2005-063 – ATCO Gas South, 2005/2006 Carbon Storage Plan – Preliminary Questions (Application No. 1357130) (Released: June 15, 2005)
3 EUB Decision 2007-005 – ATCO Gas South, Carbon Facilities - Part 1 Module – Jurisdiction (2005/2006 Carbon Storage Plan) (Application No. 1357130) (Released: February 5, 2007)
4 *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)* 2008 ABCA 200
5 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) (Released: January 9, 2009)

> 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 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.[6]

[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 restricted the proposed removal from rate base of certain salt cavern assets owned by ATCO Pipelines which were indicated to be surplus to the needs of the utility. Leave to Appeal was granted on November 12, 2008 in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2008 ABCA 382.

4. On June 26, 2009 the Commission issued Decision 2009-067[7] which determined certain Preliminary Questions including the following question:

> With respect to the removal of the Carbon assets from rate base, what is the appropriate date from which adjustments to rate base and revenue requirement should be made (the Adjustment Date)?[8]

5. The Commission determined the Adjustment Date to be October 10, 2006, based in part on the following reasoning:

> 30. The Alberta Court of Appeal ruled that an asset must have an operational purpose in order to be considered used or required to be used.[15] It was not until the Board determined in Decision 2006-098 that Carbon should not be used for load balancing that the question of whether or not Carbon could be used for operational purposes was finally determined. Revenue generation was found not to be a valid operational purpose. Accordingly, the release date of Decision 2006-098, October 10, 2006, could be the Adjustment Date. …
>
> 34. For the above reasons, the Commission concludes that the proper Adjustment Date is October 10, 2006 being the date that the regulator determined that Carbon no longer had an operational purpose for providing utility service.[9]

[15] Carbon Appeal Decision, paragraphs 25 and 27

[6] Decision 2009-004, pages 17-18
[7] Decision 2009-067 – ATCO Gas South, Removal of Carbon Related Assets from Utility Service, Preliminary Questions (Application No. 1579086, Proceeding ID.87) (Released: June 26, 2009)
[8] Decision 2009-057, page 2, paragraph 6
[9] Decision 2009-067, page 7, paragraphs 30 and 34

6. On June 30, 2009 the Alberta Court of Appeal released its decision with respect to the Salt Cavern Letters appeals referred to above (Salt Caverns Appeal Decision).[10] In this Decision the Court stated:

> Ceasing to use an asset for utilities purposes involves the traditional criteria for what is in the rate base (discussed in Part F above), and does not involve or require a s. 26 application at all. The 2008 "***Carbon***" decision (cited in the previous paragraph) clearly adopts the decisions about the "used or required to be used" test, and defines that as operational use in the utility: see para. 25 for example.[11]

7. On July 3, 2009 the Commission received a letter from ATCO which included a request for Commission approval to enter into a negotiated settlement with respect to the outstanding matters related to the Application. ATCO requested the Commission to defer further process with respect to the Application to allow the proposed settlement discussions to occur. ATCO also indicated its intention to seek guidance from the Court of Appeal to confirm whether the Commission's determination of an October 10, 2006 Adjustment Date in Decision 2009-067 complies with the Carbon Appeal Decision.

8. On July 31, 2009 the Commission issued a letter granting ATCO's request for approval to enter into discussions with interested parties for the purpose of negotiating a settlement of all outstanding matters relating to the Application. The Commission directed ATCO to file with the Commission by September 16, 2009 the negotiated settlement, a request for an extension or confirmation that a settlement was not likely to be achieved.

9. While the Commission does not wish to unduly impact the ongoing negotiated settlement discussions, the Commission has authorized me to communicate to parties that it considers that the guidance provided by the Court of Appeal in the Salt Caverns Appeal Decision either:

- raises a substantial doubt as to the correctness of; or

- constitutes a new fact or a change in circumstances which raises a reasonable possibility that the new fact or change in circumstances could lead the Commission to materially vary or rescind

the Commission's determinations with respect to the Disposition Issue in Decision 2009-004 and with respect to the Adjustment Date in Decision 2009-067.

10. Accordingly, in accordance with section 10 of the *Alberta Utilities Commission Act* and section 2 of Rule 016 the Commission considers that it should initiate a Review and Variance proceeding with respect to the Disposition Issue in Decision 2009-004 and with respect to the Adjustment Date in Decision 2009-067.

11. The Commission considers that written submissions and reply submissions from parties to the Application, together with the materials already forming the record of the Application would provide a sufficient record for the Commission to expeditiously complete a Review and Variance proceeding. The Commission however, understands that the Adjustment Date is one of the issues to be considered by the parties in the negotiation. A successful settlement

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

[11] Salt Cavern Appeal Decision, paragraph 56

agreement which includes the Adjustment Date would limit a Review and Variance proceeding to an academic exercise and may accordingly cause the Commission to reconsider its decision to proceed with the Review and Variance proceeding. The Commission is also aware of ATCO's intention to commence proceedings with the Court of Appeal to confirm whether the Commission's determination of an October 10, 2006 Adjustment Date in Decision 2009-067 complies with the Carbon Appeal Decision. The Commission notes that its decision in a Review and Variance proceeding may be of assistance to the Court of Appeal and parties or may potentially render moot an application to the Court of Appeal for a consideration of the Adjustment Date issue. The Commission therefore requests confirmation from the parties that the Adjustment Date is one of the issues to be considered by the parties in negotiations.

12. Submissions with respect to the scope of the negotiations shall be filed by **4:00 p.m. August 13, 2009**.

13. Following receipt of parties' submissions, the Commission will confirm further process in respect of a Review and Variance proceeding.

14. If you have any questions please contact the writer at Doug.Larder@auc.ab.ca or call (403) 592-4520.

Yours truly,

(electronic notification)

ALBERTA UTILITIES COMMISSION

Douglas A. Larder, Q.C., General Counsel

3.1 General Comments on Carbon as a Storage Facility

Reservoir storage facilities, like Carbon are developed from fully or partially depleted oil or natural gas reservoirs. These reservoirs are made up of one or more hydrocarbon bearing formations usually composed of sand or other porous material. The hydrocarbons within these formations are partially or fully produced before the reservoir is converted into a storage facility. The depleted formations are utilized for storage through the injection of gas purchased in the market for storage purposes. A minimum operating pressure must be maintained in the storage reservoir to provide for optimum operation for injecting and withdrawing the gas. This minimum operating pressure is created by the retention of a certain amount of the original natural gas in situ or through the injection of gas into the reservoir. The gas used to provide the minimum pressure is referred to as base gas or cushion gas.

Gas intended for cycling storage is injected using compression into wells drilled or converted and equipped for both injection and withdrawal. Reservoir storage (like Carbon) differs from other types of storage such as aquifer storage, which uses gas to displace water in water bearing formations, or salt cavern storage, which uses old salt mines or specially formed holes, called caverns, in salt formations, where the caverns have been developed using solution mining to dissolve and extract the salt. The surface facilities are generally the same for all types of storage and are composed of a variety of wells and processing related equipment, compressors, piping facilities, meters and system control equipment. (Refer to Appendix 5 for two maps showing the Carbon area facilities and land holdings.) [Appendix omitted]

3.2 Development and Uses of the Carbon Facilities

The Carbon facilities have a long history as regulated assets. Carbon has been in regulated utility service and used for almost 50 years to provide one or a combination of three functions: company owned gas production (COP), operational requirements (i.e. peaking gas, seasonal storage, load balancing, emergency supply) and/or revenue generation (rental of capacity to third parties and seasonal price mitigation differentials, with income credits/revenue offsets applied to reduce customer rates or the cost of gas to customers).

The Carbon Glauconite gas field was discovered by third parties in 1955 near Carbon, Alberta. In 1957 the rights to the field were purchased by Canadian Western Natural Gas Company Limited (CWNG, now AGS), for the purpose of developing a utility source of gas for production and delivery as peaking gas supply in the Calgary area. In 1958 the Oil and Gas Conservation Board, a precursor to the EUB, approved the construction of a gathering system in the Carbon field and a 94 kilometre, 16 inch, high pressure gas transmission pipeline to the Calgary area. Further, in Decision 23616, dated March 4, 1959, The Board of Public Utility Commissioners, also a precursor to the EUB, approved the inclusion of Carbon in rate base. The facilities were constructed by the company and have been in the company's regulated rate base since 1958. Gas deliveries from the Carbon field commenced in December 1958.

From 1959 to 1967, CWNG used the Carbon field to meet the gas supply requirements of its regulated customers. When first acquired by CWNG, the Carbon field provided COP usually in the form of seasonal and/or peaking gas for customer use. Following initial low production levels, COP grew from 577 MMCF in 1962 to 5,355 MMCF in 1967.

In 1967 the Carbon gas field was converted into a storage reservoir. Approval No. 956 was issued by the Oil and Gas Conservation Board on June 23, 1967, approving CWNG's scheme for the storage of gas in the Carbon field. Certain production wells, the Producing Properties, which were not required for storage cycling operations remained as gas production assets, and have remained so to date, providing COP for the benefit of customers.

In 1967, CWNG entered into an Exchange Agreement with TransCanada PipeLines Limited (TransCanada or TCPL), which involved deliveries to TCPL at Carbon. The facility was upgraded with additional compression, SCADA and control wells in order to meet the terms of the Exchange Agreement. In 1970 the Exchange Agreement with TCPL was further expanded and additional compression was again added at Carbon to meet the terms of this agreement. At this point, the capacity of the storage facility was approximately 10 BCF (11 PJ).[7]

Under the Exchange Agreement TCPL had access to a substantial amount of deliverability without an annual gas purchase obligation given that gas taken in the winter was replaced by gas injections in the summer. CWNG and its customers received revenue from TCPL for providing the service and increased deliverability through facility additions.

Between 1967 and 1972, in conjunction with the TCPL Exchange Agreement, a combination of base gas production as COP and injection for TCPL took place during which time an additional 23,700 MMCF of base gas was produced as COP from the storage facility while TCPL's annual injections were as little as 1,639 MMCF in 1968 and as much as 4,351 MMCF in 1971. COP from the storage facility was suspended in 1972 to retain the unproduced native gas as base gas for the storage operation.

In 1972 CWNG entered into a 20-year storage agreement with TCPL. This agreement allowed for a major expansion of the storage facility. Storage working cycle capacity increased significantly, to approximately 36.5 BCF (41.0 PJ) with TCPL being the predominant user of that capacity.

During the 20-year storage rental agreement with TCPL, from 1972 – 1992, at times TCPL may have exclusively utilized the capacity of Carbon, such as in 1978, 1979 and 1980 when it had as much as 36,500 MMCF in inventory. However pursuant to the TCPL agreement, the utility always retained the right to encroach upon the use by TCPL of the capacity and deliverability of the facility for utility operational purposes,[8] such that the extent to which the facility may have been used for revenue generation purposes and the extent to which the facility may have been used for utility gas supply or system balancing purposes is not precisely clear on the present record. Although the data available on the record is not complete, the available evidence indicates that between 1986 and 1991, AGS used up to approximately 25% of the Carbon capacity on a variable basis for its utility uses.

The TCPL storage arrangement expired in 1992. From 1993 until approximately 1996, capital expansions were undertaken at Carbon, and approved by the Board, relating to the storage reservoir, compression equipment, dry gathering lines, wells and meter stations, all of which increased storage capacity and enhanced reliability for CWNG and services to Northwestern Utilities Limited (NUL). The services to NUL, an affiliated distribution utility operating in

[7] For the purpose of consistency, conversions are based on 39.7megajoules/cubic metre.
[8] Agreement between TCPL and CWNG dated April 1, 1972, sections 4.6, 4.12, and 5.2

northern Alberta, were provided by CWNG under the Firm Service Gas Storage Agreement dated February 1, 1993. This contract was for 9 PJ of storage and had a 20-year term with a 5-year termination notice. AGS elected to treat the contract as terminated in early 2001. From 1996 to the present, it appears that capacity expansions were undertaken to provide benefits to ratepayers and additional third party storage contracts.

All the capital costs associated with the expansions that have occurred over the years have been included in rate base regardless of the purpose of the expansion or which customers' requirements were being addressed. Revenues received from TCPL and other third party users of Carbon storage were not directly used to offset the capital requirements of development and expansion of the Carbon facilities, rather they were used to offset the overall revenue requirement of the utility, thereby reducing the amount that would have otherwise been recovered through rates in order to recover the full costs of funding the capital and operating costs of existing Carbon facilities and expansions.

During the period since 1992, AGS increased its use of storage capacity to 16.7 PJs or 38% of capacity while continuing to rent out the balance of the capacity. Starting in 1998, AGS engaged the services of an unregulated affiliate, ATCO Gas Services Ltd., now ATCO Midstream Ltd. (Midstream), to manage and operate the storage operations.[9] Midstream also entered into an agreement to lease a portion of the storage facility.[10] In Decision 2005-121, the Board described the arrangements with Midstream as follows:

> Since 1998, AGS has contracted with Midstream to provide Carbon storage management and operations services pursuant to the Storage Services Agreement. Appendix "A" – Scope of Services portion of the Application, outlines the work performed by Midstream in 2003 and 2004. Nine areas are identified in Appendix "A": operations; gas coordination; storage reservoir and facilities; production reservoirs and facilities; planning; regulatory support; production accounting; surface and mineral land management; administration and marketing services (Storage Services). The services identified in Appendix "A" appear to have been modified from time to time although no formal amendments have been filed. In addition, the parties entered into the Uncontracted Capacity Agreement addendum.

Midstream operated an unregulated storage business utilizing the portion of Carbon capacity not required for utility operations or already the subject of existing third party storage contracts and the lease payments were treated as revenue offsets to regulated rates. During the same period the usage evolved to the point at which AGS leased out the entire capacity to Midstream, in particular, during the storage seasons starting in 2001, 2005 and 2006.

The record in respect of the percentage of Carbon storage capacity and deliverability reserved for the utility uses in the years since the termination of the TCPL agreement in 1992 is incomplete. What is clear is that the amount of capacity so used has been variable. At present the Carbon storage facilities consist of 38.7 BCF (43.5 PJ) of working gas capacity, 48 BCF (54 PJ) of base

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[9] Gas Storage Services Agreement entered into on February 20, 1998 between CWNG (now ATCO Gas) and ATCO Gas Services Ltd. (now ATCO Midstream).

[10] Midstream leased Carbon storage capacity pursuant to the addendum to Gas Service Storage Agreement between CWNG and Midstream dated December 15, 1999 which is referred to as the Uncontracted Capacity Agreement.

or cushion gas,[11] twenty four injection and withdrawal wells, one well with withdrawal only, four observation wells, two Joules-Thompson plants and a total of 11800 HP of compression. The Producing Properties associated with Carbon consist of production wells, compression, gathering lines, refrigeration and approximately 19 PJs[12] of recoverable gas.

3.3 Evolution of ATCO's Use of Carbon

As indicated above, CWNG used Carbon for gas supply purposes from 1958 to 1967. After conversion to a storage operation in 1967, CWNG continued until 1972 to supply its customers with 23.7 BCF of COP produced from base gas at the storage facility in addition to COP from the associated Producing Properties. This gas was utilized for system load balancing and security of supply purposes for regulated service. In addition, CWNG used a portion of the capacity and deliverability of Carbon Storage which was not contracted to third parties for utility purposes. A large portion of the capacity of the storage facility during this time was surplus to the utility's needs, and was contracted to TCPL under the Exchange Agreement and the revenues utilized as revenue offsets or income credits to regulated rates.

In the early 1980's Carbon was the only commercial storage facility in Alberta. During the 1980's CWNG's storage business changed operationally and commercially along with the natural gas industry as it moved from regulated gas prices and reserve requirements to a deregulated environment.

During the gas cost recovery rate (GCRR) processes[13] in the 1990's, CWNG dedicated a certain amount of the capacity of Carbon to customers for use in annual storage plans,[14] wherein gas was purchased for injection in summer months and withdrawn in winter months, when prices were typically higher, in order to provide gas price mitigation to customers during the winter. CWNG also continued to use Carbon storage for peak utility gas supply requirements and system balancing, given its favorable deliverability characteristics. ATCO Gas continued to provide annual storage plans for gas price mitigation to customers using a portion of the Carbon capacity up to the year 2004.

As deregulation in the gas market progressed and the competitive storage market evolved in Alberta during the 1990's and early 2000's, ATCO Gas concluded that Carbon was no longer needed for utility purposes. In the years from 2000 onward, AGS has repeatedly stated this conclusion and has sought for the facility to be removed from regulation, and for its regulated operations involving the facility to be terminated. In more recent years AGS has maintained that the Board no longer has jurisdiction over the facility.

Commencing in 1998 AGS leased the portion of Carbon capacity which was surplus to the utility needs and third party contracts to its affiliate, Midstream. Midstream then operated an

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[11] The base gas quantities are estimated based on a recovery rate of approximately 75%.

[12] Calgary Evidence dated October 31, 2005 Exhibit E

[13] A summer/winter period GCRR was calculated by adding the balance in the Deferred Gas Account at the end of the previous summer/winter period to the gas costs forecast for the upcoming summer/winter period and dividing the result by the forecast summer/winter period gas sales volume. GCRR's were determined twice a year for each of the summer and winter periods.

[14] The storage years commenced on April 1 of each year with injection taking place ordinarily from April 1 up to November 1 of each year, then withdrawals take place from November 1until March 31 in the succeeding year. Commencing in 1998 up to 2004 (excluding 2001) the amount of capacity reserved to customers in the annual storage plans was 16.7 PJs.

unregulated storage business utilizing that portion of Carbon capacity and the lease payments were treated as revenue offsets to regulated rates. The Board fixed a rate for this lease at 32¢/GJ in Decision 2000-9,[15] and subsequently updated this rate in Decisions 2002-072[16] and 2004-022 to its current rate of 45¢/GJ.

ATCO Gas filed evidence in its 2000/2001 winter GCRR application that storage was no longer required in the gas portfolio.[17] During the winter of 2000/2001 AGS did not vary the withdrawals from Carbon storage as had typically been done in past years to optimize pricing advantages for customers, but rather staged the withdrawals in a uniform pattern. In Decision 2001-110[18] the Board required AGS to credit $4 million to customers based on suboptimal use of the facility during this winter period.

In the winter of 2001/2002 ATCO Gas did not use Carbon at all for utility storage or operational purposes but utilized third party contracted storage instead. This result followed a negotiated process among AGS and customers and was accepted by the Board. The Board noted that AGSs broader strategy relating to Carbon storage would be reviewed in future.[19]

In the proceeding leading to Decision 2001-75,[20] ATCO Gas filed evidence that storage was no longer needed for operations, indicated that COP introduced market distortions and stated that it would be filing an application to remove Carbon from regulated utility service.[21] Customers did not agree with ATCO's position in this regard, but generally preferred an approach whereby AGS continued to provide COP and the benefits of storage to customers. Calgary in particular characterized ATCO's arguments as nothing less than astounding.[22] In Decision 2001-75, the Board decided that Carbon was a "legacy asset"[23] and should remain in regulated service to provide rate payers with the benefit of a physical hedge of gas supply on the expectation that gas injected in the summer months would be less expensive than gas acquired in the winter months. The benefits of Carbon storage and COP were directed to be credited to customers in the distribution delivery rates, rather than in the gas commodity rate, in order to enable the development of the retail gas market.[24] These credits to customers, reflected in credit riders for

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15 2000-9 – Canadian Western Natural Gas Company Limited 1997 Return on Common Equity and Capital Structure and 1998 General Rate Application – Phase I (Application 980413 & 980421) (Released: March 2, 2000)

16 Decision 2002-072 – ATCO Gas, A Division of ATCO Gas and Pipelines Ltd. Transfer of Carbon Storage Facilities (Application 1237639) (Released: July 30, 2002)

17 Decision 2001-22, ATCO Gas-South Application for Approval of an Arrangement for Acquisition of Storage Services for the 2001/2002 Gas Storage Year for ATCO Gas-South (Application 2001094) (Released: March 27, 2001), p. 1

18 Decision 2001-110 – Methodology for Managing Gas Supply Portfolios and Determining Gas Cost Recovery Rates Proceeding and Gas Rate Unbundling Proceeding. Part B-1: Deferred Gas Account Reconciliation for ATCO Gas (Application 2001040) (Released: December 13, 2001)

19 See Decision 2001-16, ATCO Gas-South and ATCO Gas-North, Divisions of ATCO Gas and Pipelines Ltd., Gas Cost Recovery Rate Adjustments (Applications 2000367 & 2000368) (Released: February 28, 2001), Decision 2001-22 and Decision 2001-81, ATCO Gas–North, A Division of ATCO Gas and Pipelines Ltd., Winter Period Gas Cost Recovery Rate (Application 1246114) (Released: October 30, 2001).

20 Decision 2001-75, Methodology for Management Gas Supply Portfolios and Determining Gas Cost Recovery Rates (Methodology) Proceeding and Gas Rate Unbundling (Unbundling) Proceeding Part A: GCRR Methodology and Gas Rate Unbundling (Application 2001040 & 2001093) (Released: October 30, 2001)

21 Decision 2001-75, p. 49

22 Ibid, p. 52

23 Refer to p. 55, Decision 2001-75

24 Decision 2001-75, pp. 19, 55-56, 80-82 and 126

storage and COP, remain in place today by order of the Board, pending final disposition of the issue of the Board's jurisdiction over Carbon, and related matters.[25]

In July 2001 ATCO Gas filed an application with the Board requesting approval of a process whereby Carbon could be transferred to its unregulated affiliate Midstream. This application resulted in Decision 2002-072, wherein the Board indicated that:

> The Board considers that there is evidence to indicate that Carbon continues to be a used and useful regulated asset, notwithstanding there are alternatives to its use available.[26]

The Board determined that AGS could bring an application to dispose of Carbon in a way that met the no-harm requirements of the Board; i.e. there must be no detrimental impact on customers that could not be mitigated.[27]

For the 2002/2003 winter storage period, ATCO Gas and the customers were unable to agree on a storage strategy through a negotiated process. The Board approved a storage plan based on 16.7 PJs being reserved for utility use as a physical hedge and also approved an active management of storage volumes in order to optimize benefits of winter withdrawals to customers.[28]

For the 2003/2004 storage year, AGS applied for Board approval to tender the total volume of Carbon capacity, at fair market value determined by a request for bids process, and to retain no capacity as physical hedge for core customers. If the Board required a physical hedge for customers, then AGS proposed to obtain it from market storage providers. The Board denied this request and ordered that the status quo be maintained, with 16.7 PJs reserved for utility use and the same injection, withdrawal and risk mitigation strategies utilized as in the 2002/2003 storage year.[29]

In 2003 legislation was passed to restructure the retail gas market in Alberta.[30] Although the impact of this legislation is discussed in greater detail later in this Decision, broadly speaking, it served to narrow the regulated function of AGS to that of a distributor only, being responsible for system operations, load balancing and customer metering. The legislation assigned the gas supply and billing functions to retailers and to the distribution utility as the default supply provider (DSP). Distributors were enabled to contract out or assign the DSP function to third party retailers with Board approval, subject to the statutory requirement that the contracting out or assignment of this function did not relieve the distributor of its responsibilities or liabilities under the legislation.

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25 Order U2005-133, dated March 23, 2005. Rider G, the company-owned production rate rider (COPRR), and Riders H and I, the company-owned storage rate riders (COSRR) (Rider I is applied to irrigation customers only), remain in place pursuant to this Order.

26 Decision 2002-072, p. 22

27 Decision 2002-072, pp. 52–55

28 Decision 2002-092, ATCO Gas South, a Division of ATCO Gas and Pipelines Ltd. -2002/2003 Winter Storage Plan (Application 1272527) (Released: October 29, 2002)

29 Decision 2003-021, dated March 11, 2003

30 The *Gas Utilities Act*, R.S.A. 2000, c.G-5 (GU Act or GUA) section 28 was amended and Alberta Regulations 184/2003 – Default Gas Supply Regulation, 185/2003 – Natural Gas Billing Regulation and 186/2003 - Roles, Relationships and Responsibilities Regulation (R3 Regulation) under the GUA were introduced.

In 2003 AGS agreed to transfer certain retail assets to Direct Energy Marketing Limited and assigned the DSP function to Direct Energy Regulated Services (DERS). The Board approved this transaction in Decision 2003-098,[31] dated December 4, 2003, and the transfer became effective June 1, 2004. Thus AGS has not been in the retail gas supply business since May 2004.

The 2004/2005 storage year was considered in Decision 2004-022. AGS filed a storage plan, at the direction of the Board in Decision 2003-021.[32] AGS submitted a plan comprising four options for managing utility-related storage. AGS reiterated prior statements that Carbon was no longer required for utility purposes and in argument raised challenges to the jurisdiction of the Board over the facility, in part based on the 2003 legislation mandating the separation of the distribution and retail functions. The Board declined in Decision 2004-022 to make a jurisdictional finding that was based on submissions raised by AGS in argument and considered that, in view of several past acrimonious proceedings involving Carbon, the issue of jurisdiction should be considered in a proceeding where all parties had a proper opportunity to participate. The Board's decision not to consider the jurisdictional challenges raised by AGS in argument was upheld on appeal to the Alberta Court of Appeal.[33] Decision 2004-022 approved a storage plan for 2004/2005 based on a continuation of the 2003/2004 practices.[34] AGS' jurisdictional challenges led, in part, to the June 10, 2004 letter from the CG requesting the Board to initiate the present proceeding to address the Board's jurisdiction relating to the Carbon assets.

For the 2005/2006 storage year AGS withdrew its storage plan, as will be discussed in greater detail below, and the Board did not direct such a plan in Order U2005-133.[35]

At present AGS no longer has a requirement to use Carbon for regulated gas supply, and does not use Carbon for annual storage plans as a physical hedge in mitigation of the gas price or for load balancing. DERS, as the DSP for the ATCO Gas system, does not use Carbon storage in performing its functions of obtaining gas supply or in load balancing in accordance with ATCO Gas' tariff.[36]

At present the storage facility is used 100% for merchant storage capacity, with AGS leasing out the entire capacity of Carbon to Midstream at a rate of 45¢/GJ. The revenue from the AGS lease to Midstream is applied against customer rates through Riders H and I. The COP wells from the Carbon field produce approximately 820 TJs (730 MMCF)[37] of gas per year, the market value of which is credited to customers through Rider G. No COP is produced from the base gas.

The storage and COP riders are maintained as revenue offsets to distribution customers in accordance with Board Order U2005-133.

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31 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 Ltd. and Proposed Arrangements with Direct Energy Regulated Services to Perform Certain Regulated Retail Functions (Application 1299855) (Released: December 4, 2003)

32 Decision 2003-021 – ATCO Gas South Determination of the Fair Market Value of Uncontracted Carbon Storage (Application 1286912) (Released: March 11, 2003)

33 *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2005 ABCA 226, 48 Alta. L.R. (4th) 1, 34 Admin. L.R. (4th) 218

34 Decision 2004-022 dated March 9, 2004

35 Order U2005-133 – ATCO Gas South 2005/2006 Carbon Storage Plan Interim Order (Application 1357130) (Released March 23, 2005)

36 Exhibit 51, DERS's letter of October 19, 2004

37 2005 ATCO Gas South cumulative Company Owned Production from Schedule CM2

In the Court of Appeal of Alberta

Citation: ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission), 2009 ABCA 246

Date: 20090630
Docket: 0701-0325-AC
0801-0244-AC
Registry: Calgary

Between:

ATCO Gas and Pipelines Ltd.

Appellant

- and -

Alberta Utilities Commission and Alberta Energy and Utilities Board

Respondents

-and-

Utilities Consumer Advocate

Respondent

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Elizabeth McFadyen
The Honourable Madam Justice Patricia Rowbotham

Reasons for Judgment Reserved of the Honourable Mr. Justice Côté
Concurred in by The Honourable Madam Justice Elizabeth McFadyen
Concurred in by The Honourable Madam Justice Patricia Rowbotham

Appeal from the Decisions of the Alberta Utilities Commission
(formerly, Alberta Energy and Utilities Board)
Dated November 6, 2007 and July 30, 2008

Reasons for Judgment Reserved of
The Honourable Mr. Justice Côté

A. Introduction and Facts

[1] The argument in this case ranged over a number of interesting topics, and disclosed some degree of friction or mistrust between the opposing parties (not their counsel). However, I have concluded that some of that discussion is either academic, or *res judicata*, and so I will not address here all the arguments which we heard.

[2] ATCO has been granted leave to appeal two decisions; the first, issued by the Alberta Energy and Utilities Board on November 6, 2007, and the second issued by the Alberta Utilities Commission, its successor, on July 30, 2008 on three grounds:

(a) Do the Alberta Utilities Commission and the Alberta Energy and Utilities Board have the jurisdiction or authority to compel the owner of a gas utility to use assets neither used nor required to be used in utility service and include the related costs in an application for new rates?

(b) Did the Alberta Utilities Commission and the Board err in directing that the use of the Salt Cavern assets and the inclusion of asset costs based on a prior rate base calculation, for a prior period, require that those assets must continue to be included in future rate base determinations?

(c) Did the Alberta Utilities Commission err in determining that a change in use of the Salt Cavern assets is a disposition requiring Alberta Utilities Commission approval under s. 26 of the *Gas Utilities Act*?

[3] A brief history will suffice. The appellant filed a general rate application with the Alberta Energy and Utilities Board, seeking the approval of its revenue requirements for the 2008 and 2009 test years. In that application, the appellant identified certain assets (called the "Salt Cavern" Assets) which, historically had been included in its rate base. It stated that those assets were not being used in its regulated transmission service, and would not be used in the foreseeable future. So it indicated that it proposed to exclude those assets in its rate calculations.

[4] By letter dated November 6, 2007, the Board directed the appellant to include the assets in its application and rate calculations, on the grounds that the Board considered that any removal from rate base constituted a disposition which required prior Board approval pursuant to s. 26(2)(d) of the *Gas Utilities Act*. The appellant complied.

[5] In February, 2008, the appellant sought the Commission's approval of a proposed transfer of the assets to a related company, pursuant to s. 26(2)(d). In April, the Commission placed the application on hold, pending an industry-wide consideration of the effects of the Supreme Court of Canada decision in "***Stores Block***": ***ATCO Gas & Pipelines v. Energy & Utilities Bd.***, 2006 SCC 4, [2006] 1 S.C.R. 140, 344 N.R. 293.

[6] When attempts to resolve a timing issue created by the delay failed, the appellant company cancelled the transaction and withdrew its approval application. The appellant advised the Commission that, in light of the recently-issued decision of this Court in "***Carbon***" it intended to resubmit its rate application and to exclude the assets in its rate calculations: ***ATCO Gas and Pipeline v. Energy and Utilities Bd.***, 2008 ABCA 200, 433 A.R. 183.

[7] The Commission, in a letter dated July 30, 2008, referred to this Court's decision in "***Carbon***", and concluded that "***Carbon***" had not resolved the question whether removal from rate base constituted a disposition under s. 26 of the Act, and essentially repeated the reasons and the directions set out in its November 6 letter, stating in part:

> "Accordingly, the Commission considers the above direction by the Board and the finding by the Board in Decision 2007-005 with respect to the unilateral withdrawal of assets from utility service by a utility remain valid and continue to be appropriate. Therefore, [the utility company] is directed not to re-file the relevant GRA schedules in its Phase I compliance filing to reflect the withdrawal of the Identified Salt Cavern Assets without first obtaining the consent of the Commission as required by section 26(2)(d) of the *Gas Utilities Act* and section 101(2)(d) of the *Public Utilities Act*. Such an application would allow the Commission and interested parties to adequately examine the merits of the application and assess whether or not the Identified Salt Cavern Assets are used or required to be used to provide service to the public within Alberta."

[8] The appellant sought leave to appeal both orders.

[9] The parties subsequently settled the rate application without including the "Salt Cavern" assets in rate base. The Commission approved the settlement, and cancelled the scheduled rate hearings.

B. Issues

[10] In argument before us, counsel for the appellant utility company modified its initial position that the utility decides unilaterally what assets will be included in rate base as assets used or required to be used in providing the regulated service to the public. He conceded that, in the context of the general rate application, the Commission has jurisdiction, in determining the rate base, to decide

what assets are used or required to be used in providing the utility service to the public, and to require proof when the utility seeks to add or remove assets from rate base.

[11] Although leave to appeal was granted on three grounds (listed above), counsel for the Commission suggested that the only live issue before this Court is as follows:

> Is the unilateral withdrawal of assets from utility service and rate base out of the ordinary course of business a "disposition" under s. 26(2) (d) of the *Gas Utilities Act* requiring approval from the Commission?"

[12] The argument of the Utilities Consumer Advocate is also based on the question of whether the withdrawal of assets from utility service and rate base is a disposition under s. 26(2)(d).

[13] Both respondents argue that removal from rate base is a "disposition" requiring Board approval under s. 26. Neither respondent advanced any argument suggesting that the Commission had jurisdiction to require the gas utility to use assets which it was not using in providing the regulated service, or to include those costs in rate base. Neither respondent suggests that the inclusion of an asset in rate base in prior years gives the Commission jurisdiction to continue the inclusion of that asset in rate base.

[14] In any event, to the extent to which the answers to the legal issues raised in the first and second questions on which leave was granted are not premature, they are largely resolved by this Court's recent decision in "***Carbon***" where the Court held that the Board had no jurisdiction to include in rate base, assets which were not being used or required to be used in providing service to the public, in an operational context. Past or historical use of assets does not permit their inclusion in rate base unless they continue to be used in the system. See ***ATCO Gas and Pipelines v. Energy and Utilities Board***, 2008 ABCA 200, 433 A.R. 183. If any snippets remain, they would turn entirely on s. 26's applicability.

C. Mootness: First Part

[15] It is arguable that the rate settlement has rendered this appeal moot. But all parties agree that this Court should answer the last question of law on which leave was granted, (c). It is whether the Commission erred "in determining that a change in use of the Salt Cavern assets is a disposition requiring [the Commission's] approval under s. 26 of the *Gas Utilities Act*".

[16] The reasoning stated in the two orders under appeal does suggest that the Commission relied on s. 26 (or related sections in other Acts). And the orders under appeal here, like many orders of the Commission, combine in one document both reasons and formal decision or order. But it is not clear whether the two orders appealed say that s. 26 is the only way that the Commission gets jurisdiction to decide whether given assets should be inside or outside the rate base.

[17] In any event, any appeal is from the actual disposition (order) by the court or tribunal appealed, not from its reasons, and a clearly correct disposition will not be overturned because of flaws in the reasons stated. So a question arises as to whether it is necessary to decide question (c) (whether s. 26 applies), if it cannot affect the result of this appeal. Why?

[18] There is a simpler more basic reason, apart from s. 26, why the Commission has jurisdiction to decide this question of what is or is not in the rate base. I must now explain it, both to lay a foundation for the question of mootness, and for the merits of question (c). Then I will return to this question of whether question (c) is academic.

D. Commission's Jurisdiction to Fix Rate Base

[19] Neither the Supreme Court of Canada in the "***Stores Block***" decision, nor the Alberta Court of Appeal in the "***Carbon***" decision, held that the utilities company alone fixes the rate base and that the Commission cannot. Those two decisions are properly cited as follows: ***ATCO Gas & Pipelines v. Energy & Utilities Bd.***, 2006 SCC 4, [2006] 1 S.C.R. 140, 344 N.R. 293; ***ATCO Gas and Pipeline v. Energy and Utilities Bd.***, 2008 ABCA 200, 433 A.R. 183.

[20] It is elementary public utilities law that a regulatory commission fixing fair and just tolls, rates or charges does so in two components:

(i) current expenses and taxes, and

(ii) an annual amount constituting a just and proper return on capital invested in the utility.

[21] One cannot even begin to compute (ii) without knowing how much capital is invested in the utility. Regulatory commissions always determine that, using a number of traditional criteria developed in North America for over a century. That calculation of capital invested and properly attributable is called the "rate base". See 1 Priest, *Principles of Public Utilities Regulation* 173 (1969). Even if the legislation were silent on the topic, it would not only be permissible, but probably mandatory, for a regulatory commission to enter into some such analysis. See ***ATCO Gas & Pipelines v. Energy & Utilities Bd.***, 2006 SCC 4, [2006] 1 S.C.R. 140, 344 N.R. 293 (paras. 65-66); ***Edmonton (City) v. Northwestern Utilities*** [1961] S.C.R. 392, 401-2. And the legislation is not silent here. For example, s. 37 of the *Gas Utilities Act* provides that

> "In fixing just and reasonable rates, tolls or charges . . . the Commission shall determine a rate base for the property of the owner of the gas utility used or required to be used to provide service to the public within Alberta . . ."

Similar is the *Public Utilities Act*, s. 90 (R.S.A. c. P-45).

[22] Despite some contrary suggestions in its factum, the appellant company properly conceded in oral argument that it cannot unilaterally and conclusively decide what is inside or outside the rate base, nor bring items in and take them out at will. The company's counsel conceded that during a rate hearing, the Commission could direct that the utility company prove an assertion that assets previously included in the rate base were not now being used and were not required to be used in the utility service.

[23] Any conclusive unilateral power by the utility company to define its rate base would be contrary to the reasoning in the preceding paragraph but one, indeed contrary to all the case law. Though many rate base cases are about how to value items admittedly in the rate base, many others are about what items should or should not be in the rate base.

[24] It is for that precise purpose that regulatory commissions in North America have developed and so long used the "used or required to be used" test for rate base (recited by the July 30 order under appeal), or variants on the test, such as "used or useful." Any textbook or index of cases on rate regulation contains a host of cases on that topic. See, for example, Phillips, *The Regulation of Public Utilities*, especially at pp. 301, 302, 325, 326, and associated notes (citations) at the end of its Chapter 8 (second printing 1988); Priest, *op. cit. supra*, at 174.

[25] Nothing in this judgment is intended to suggest different criteria for inclusion or exclusion of assets in the rate base, than those traditional tests.

[26] If each public utility company could unilaterally decide what was in or out of the rate base, or what was or was not used or useful, each year, then why did all those regulatory commissions and courts spend all that time and ink on such topics?

[27] Nor is one limited to looking at the textbooks or even the words of Alberta's legislation. One can also see a binding decision of this Court. In that case, the utilities wished to have expensive items in the rate base, and the Commission's predecessor held that they should not (yet) be in the rate base. The Court of Appeal affirmed the regulatory decision: ***Alberta Power v. Public Utils. Bd.*** (1990) 102 A.R. 353 (C.A.). So plainly the Commission has jurisdiction to decide that topic, and to disagree about it with the utility company being regulated.

[28] Can it be reasonably argued that this regulatory power is confined to ruling on adding new items to the rate base, but inapplicable to excluding old or unused items? No. Phillips, *op. cit supra*, at 302 quotes another established textbook and lists items which regulatory commissions may exclude from the rate base. They include obsolete property, property to be abandoned, overdeveloped property and facilities for future needs, and property used for non-utility purposes.

[29] If any of this were not so, any company with both a regulated utility business and another business could shuffle assets in and out of the rate base at will. A host of games could be played to maximize the rates charged by the monopoly utility business to the public.

[30] It is true that regulatory commissions pay some attention to decisions of management, who commonly have a good deal of experience, and do not always second-guess every management decision, especially on doubtful topics. So a typical rate hearing does not spend much, if any, time justifying inclusion in the rate base of every item of capital or equipment, nor even every big item. Rate hearings would go on forever otherwise. But the final decision is the regulator's, not the utility company's. See Phillips, *op. cit supra*, at 302. A regulatory commission has the expertise to know which items to examine closely, and how often. And they have statutory powers to call for information and to make their own investigations, and to direct hearings with evidence.

[31] The paragraphs above show that the rate-regulation process allows and compels the Commission to decide what is in the rate base, i.e. what assets (still) are relevant utility investment on which the rates should give the company a return. The traditional test is whether they are used or required to be used, and (as will be seen below) nothing in the legislation changes that. (Whether s. 26 is relevant is discussed below.)

E. Mootness and Academic Questions: Second Part

[32] Now I return to whether the Court of Appeal should answer question (c) put to it, whether s. 26 of the *Gas Utilities Act* applies.

[33] There is no ideal solution as to how much this Court should say or decide in this appeal. On the one hand (as noted) the Commission did not decide whether the assets in question here belonged in the rate base or not. And it will not and cannot decide that, as this rate hearing is over, and the result of it given (by consent) is likely not appealable, and no one wants to object to these rates. So the Court of Appeal lacks the evidentiary record and concrete facts and arguments usually so helpful to deciding any appeal. There is a danger of vagueness or abstraction in any answers which we may give.

[34] But on the other hand, here there are very evident on-going uncertainty, differences of opinion, misunderstanding, ambiguity, and even mistrust. The parties' factums seemed to suggest one position for the parties. But oral argument clarified and even changed their positions, and in places brought them closer together. In one place, they almost traded positions. Certainly the issues became clearer and sharper.

[35] The whole process of getting leave to appeal and running an appeal and writing a decision takes time. No one is completely sure how to handle disputes about allegedly unused assets at or before the next rate hearing. Any appeal then would likely give an answer too late, or would prolong that next rate hearing unconscionably. Answering question (c) now would make the next rate hearing much more effective, and obviate almost inevitable re-litigation of that question.

[36] The distrust and uncertainty are unfortunate, but the rulings of the Commission (or its predecessor) in the "***Stores Block***" and "***Carbon***" cases and "***Harvest Hills***" have done nothing to

calm the utility company's fears. A number of those Commission rulings relied expressly on s. 26 (formerly s. 25.1) in dealing with who got the benefits of those no-longer needed assets. One may find such passages in these Board decisions: 2001-78 (Oct. 24, 2001) p. 3 ("***Stores Block***" Part 1); 2002-037 (Mar. 21, 2002), [2002] A.E.U.B.D. #52, pp. 12, 17 (Distribution of Stores Block Net Proceeds); 2005-063 (June 15, 2005) pp. 9, 10, 11 about four preliminary questions (Carbon Storage Preliminary Questions); 2007-005 (Feb. 5, 2007) pp. 33 and 34 (S. Carbon Facilities, Part 1 Jurisdiction).

[37] Nor have the arguments of the Utility Consumers Advocate reassured the utility company. The appellant utility company suggests that if the Commission receives an application under s. 26 as to whether the assets in question should stay in (be in) the rate base, the Commission will try to evaluate harm to the consumers and impose some penalty or remedy on the appellant company quite outside any adjustment in rates. Or the Commission may treat any application about these assets as a s. 26 application, and do the same.

[38] Oral argument showed that at least one respondent suggests that such an approach would be suitable. Therefore, the appellant's fears that the Commission would take that approach have a real foundation. For one thing, the Consumer Advocate is a permanent statutory office (see the *Government Organization Act*, Schedule 13.1, R.S.A. c. G-10). So the topic is likely not hypothetical and not necessarily premature.

[39] Therefore, I would now give a substantive answer to question (c). It is about whether s. 26 (on dispositions) applies, and must be resorted to. It turns out to be the pivotal question, and is a question of pure law, interpretation of the *Gas Utilities Act*.

F. The Scope of Section 26

[40] We are left with question (c), plus a few bits of questions (a) and (b). So I will slightly narrow what I propose to answer, and restate the question as follows:

> If a utility company owns an asset whose price or value in previous rate hearings has been included in the rate base calculation, and the company now alleges that the asset is no longer used, nor useful, nor needed for its regulated utility business, or alleges that it will soon become none of those things, does s. 26 of the *Gas Utilities Act* apply, and does the company need leave under that section?

[41] Section 26, subsections (2)(d), (4), (5) read as follows:

> "(2) No owner of a gas utility designated under subsection (1) shall
>
> . . .
>
> (d) without the approval of the Commission,

> (i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of it or them, or
>
> (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.
>
> (4) The Commission, on its own initiative or on the application of a person having an interest, may, or on the order of the Lieutenant Governor in Council shall, declare that subsection (2) or any part of it does not apply with respect to any transaction or class of transactions specified in the declaration.
>
> (5) Where a declaration is made under subsection (4) in respect of a transaction entered into before the making of the declaration, the transaction,
>
> (a) in the case of a transaction under subsection (2)(d), is deemed to be no longer void and to have been in force and effect from the date of the transaction, and
>
> (b) in the case of a transaction under subsection (2)(a), (b), or (c), is deemed not to have been in contravention of that subsection,
>
> except that the declaration does not affect any other rights that have accrued prior to the declaration."

[42] It is true that this section, this Act, and the related Acts (such as *Public Utilities Board Act*, s. 101), should be interpreted broadly and purposively. But the Court also has to read the wording of the statute in context and in its grammatical and ordinary sense harmoniously with the scheme and object of the Act: ***United Taxi Drivers' Fellowship v. Calgary (City)***, 2004 SCC 19, [2004] 1

S.C.R. 485, 494, 318 N.R. 170 (para. 8); ***Kraft Can. v. Euro Excellence***, 2007 SCC 37, [2007] 3 S.C.R. 20, 365 N.R. 332 (para. 2). So words matter.

[43] I have looked at the various legal reference works and cases cited to us on the topic of interpreting s. 26(2)(d). In my view, its key words on scope refer to giving up ownership, in whole or part. They do not refer to starting or stopping a particular use, nor acquiring a need, nor losing a need. Nor do they refer to objects becoming useful or becoming useless. Counsel have not given us any legal authority really on point which would make s. 26 apply to the question posed above.

[44] The only word in s. 26 which could conceivably be relied on to cover merely ending a use, or switching to a different use, is "disposition". That word came up in ***Cie. Immobilière BCN v. M.N.R.*** [1979] 1 S.C.R. 865, 876, 878-9. However, there was a kind of transfer between two companies there, and the context was terminal losses under the capital cost allowance sections of the *Income Tax Act*. I do not find any support there for the present situation's being a disposition.

[45] The other two Supreme Court of Canada decisions on "disposition" involve union successorship in labor legislation: ***W.W. Lester (1978) v. Utd. Assn. of Journeymen etc. Pipefitting Ind.*** [1990] 3 S.C.R. 644, 675-6, 123 N.R. 241; ***Ajax v. Nat. Automobile etc. Union***, 2000 SCC 23, [2000] 1 S.C.R. 538, 253 N.R. 223, affg. (1998) 113 O.A.C. 188, 41 O.R. (3d) 426, 166 D.L.R. (4th) 516 (C.A.). The ***Lester*** case cannot help the respondents or support finding a "disposition" here, as it found no "disposition" on its facts ("double-breasting"). Furthermore, ***Lester*** held that such labour succession legislation should be broadly interpreted, and that there is no "disposition" unless there is a relinquishment of a business (or part of it) and gaining of that business by another separate entity.

[46] The ***Ajax*** decision adopts fairly brief reasons on this topic by the Ontario Court of Appeal, which also looked for a transfer from one entity to another. Hiring a whole skilled set of workers (for a complete municipal bus operation) was held to qualify. Once again, two entirely separate entities were involved, and it was easy to find a transfer between them. The case merely holds that the transfer need not be by way of sale or any formal legal transaction.

[47] Does "disposition" mean "giving up or relinquishment" as suggested by the *Canadian Law Dictionary* 70 (2d ed. Yogis 1990)? Even if it does, there is no second person here to whom these assets were given or transferred.

[48] None of that applies where there is no second entity and a mere change in (or cessation of) use.

[49] "Disposition" can refer to a person's temperament or character, but that is obviously irrelevant here. It can also refer to some tribunal's final settlement or determination, which is equally irrelevant here. The only other meaning of the word given by Black is, "The act of transferring something to another's care or possession, especially by deed or will; the relinquishing of property." See *Black's Law Dictionary* 505 (8th ed. Garner 2004).

[50] Ceasing use was held not a disposition in ***Sealey v. Crystal*** (1987) 39 D.L.R. (4th) 141, 154 (B.C. C.A.), though the case is weakened by a statutory definition.

[51] So I interpret the words of s. 26 as not applying to ending a use. If that produced an absurd result, or crippled the Commission's power to regulate rates, then one might have to look harder at s. 26 and even try to stretch its words.

[52] But I see no *hiatus* here. It is common ground that as part of a normal rate hearing, the Commission can and must decide what items (property) are to be considered part of the rate base and given a value on which the utility company is entitled to recover a return on investment: s. 37 of the *Gas Utilities Act*. (See Part F. above.)

[53] Indeed, counsel for the appellant stressed to us what the Commission could do when hearing a rate application if it found want of due prudence in starting or stopping the use of some asset in the regulated utility. It could make some adjustment of values in the rate base or in the expenses or return on investment, so that rates approved would not make the consumers pay rates based on that type of imprudence.

[54] Nor is there any sound legislative philosophy which forces us or even permits us to expand the scope of s. 26 beyond the normal meaning of its words. It is true that s. 26 is a very useful section. But with or without it, an asset no longer used to operate the utility is no longer part of the rate base, whatever its history or earning capacity: "***Carbon***" decision, ***ATCO Gas and Pipelines v. Energy and Utilities Bd.***, 2008 ABCA 200, 433 A.R. 183, 192-93 (paras. 28-30). And even on a true disposition of a former utility asset (e.g. its sale), the Commission cannot turn over any of the proceeds or worth to the consumers, nor force the company to hold the proceeds for the consumers. So held the "***Stores Block***" decision in the Supreme Court of Canada. See ***ATCO Gas & Pipelines v. Energy & Utilities Bd.***, 2006 SCC 4, [2006] 1 S.C.R. 140, 344 N.R. 293. That decision is lengthy and thorough, and so difficult to quote from without expanding my reasons unduly. But it expressly rejects any power to allocate any part of sale proceeds to the benefit of the consumers, even as a condition of approving a sale of a former utility asset. Similar is our recent "***Harvest Hills***" decision: ***ATCO Gas and Pipelines v. A.E.U.B.***, 2009 ABCA 171, Calg. 0701-0341-AC (May 8) (paras. 29, 32-33).

[55] So the philosophy in those court decisions would not expand the scope of s. 26, and would do a good deal to restrict it. Both sides suggested in argument to us that if s. 26 applied, there is a good chance that the Commission would inquire into whether ceasing use of the asset in question harmed the consumer, and if so, what remedy for the harm could be imposed. Where merely ending use or usefulness (or both) is involved, that inquiry and remedy would be incompatible with the courts' "***Stores Block***" and "***Carbon***" decisions, *supra*, and so not a ground to expand s. 26's application. Indeed, the "***Harvest Hills***" decision, *supra*, discusses that topic in detail. The Supreme Court of Canada's 2006 "***Stores Block***" decision, *supra*, is also very clear on the subject of s. 26. That section does not even apply to non-utility assets (or former utility assets), nor to sales in the

ordinary course of business, and it gives no power to earmark or allocate sale proceeds (paras. 40-46).

[56] Ceasing to use an asset for utilities purposes involves the traditional criteria for what is in the rate base (discussed in Part F above), and does not involve or require a s. 26 application at all. The 2008 "***Carbon***" decision (cited in the previous paragraph) clearly adopts the decisions about the "used or required to be used" test, and defines that as operational use in the utility: see para. 25 for example.

G. Standard of Review of Statutory Interpretation

[57] What is the standard of review for interpreting s. 26 of the *Gas Utilities Act*? The point was little stressed in oral argument, and counsel for the Commission did not touch on it. The factum of the Consumer Advocate suggests review on the reasonableness test. The appellant suggests a correctness test.

[58] Can it be said this is a topic on which the Commission has expertise in interpreting its home statute? When setting the standard of review for legal interpretations by an expert tribunal, that is traditionally an important consideration: see ***Board of Management v. Dusnmuir***, 2008 SCC 9, [2008] 1 S.C.R. 190, 372 N.R. 1 (para. 54). But public utilities commissions are almost unique. For over a century, their rulings (and appeals to the courts from them) have been reported in law reports, and cited by later decisions. Besides those law reports there are well-known specialized textbooks. So the contents and limits of this tribunal-made law are neither mysterious nor hard to find.

[59] I have carefully checked the two leading textbooks, and find that the subject covered by s. 26 does not come up in either. See *The Regulation of Public Utilities: Theory & Practice*, by Charles F. Phillips Jr. (Public Utilities Reports 1988) (2d printing); *Principles of Public Utilities Rates*, by James C. Bonbright, Albert L. Danielson, and David R. Kamerschen (2d ed. 1988) (Public Utilities Reports). This is not a question of law on which public utilities commissions have special expertise; still less is it part of their core competence.

[60] Section 26 of the *Gas Utilities Act* can be traced back to s. 52(1)(g) of Alberta's *Natural Gas Utilities Act*, 1944 (c. 4), though oddly that Act did not apply to retail gas distributors. A very similar provision to s. 26 is s. 101 of the present *Public Utilities Act*, which can be traced back to Alberta's 1922, c. 20, s. 37(g).

[61] Expert tribunals' interpretations of law or legislation do not always get deference on appeal. Sometimes the test is correctness: see ***Boardwalk Reit Partnership v. Edmonton (City) (#2)***, 2008 ABCA 220, 437 A.R. 347, 91 Alta. L.R. (4th) 1 (paras. 20-22), reh. den. 2008 ABCA 284, 437 A.R. 222, 93 Alta. L.R. (4th) 309, leave den. [2008] S.C.C.A. No. 28. And note the cases cited there.

[62] It is important that the disputed words of s. 26 of the *Gas Utilities Act* give the Commission a second power (beyond rate regulation) to control utilities. Therefore, the issue here is not about

how the Commission should do its work. The issue is whether the Commission has power to forbid a cessation of use with no sale. Could the Utilities Commission force a utilities company to keep actually using a piece of plant? It is a question of jurisdiction.

[63] There could be some drawbacks to letting a statutory tribunal set its own powers. The concern could be heightened where (as here) the same legislation gives a right of appeal to the Court of Appeal on questions of law or **jurisdiction**, and where a Justice of Appeal has found the question arguable, and given leave to appeal. If the Consumer Advocate's argument about standard of review were correct, the right of appeal might have limited utility. To some degree a right of appeal is the opposite of a privative clause, especially on legal questions. But I must emphasize that that is only one aspect of one aspect to weigh, and is not a free-standing ground to adopt one standard of review.

[64] We must also recall that the standard of review on appeal is ultimately up to the Legislature, and is not constitutional: Jones & de Villars, *Principles of Administrative Law* (4th ed. 2004) at 454-6; ***Pushpanathan v. Min. of Citizenship & Immigration*** [1998] 1 SCR 982, at 1004-05 (paras. 26-7) (amended at p. 1222).

[65] I do not suggest that the jurisdictional nature of the question, or the right of appeal, is conclusive. But each is relevant and weighty among the various ***Pushpanathan*** factors. See ***Director of Investigation & Research v. Southam*** [1997] 1 SCR 748, 209 NR 20, (para. 46); Jones & de Villars, *op. cit. supra*, at 556.

[66] Here the main question is the meaning of the word "disposition". It is a concept familiar to lawyers and judges in many parts of the law. It is not a concept from engineering or science, nor rate regulation. This is not, for example, a case where the Commission had to interpret words in the *Act* such as "production" or "gathering" referring to the physical or technical aspects of gas distribution.

[67] I mentioned weighty factors. Normally I would perform a ***Pushpanathan*** weighing analysis here, but it is not necessary in this case. The Supreme Court of Canada has already performed it for interpreting s. 26 of the *Gas Utilities Act*, and said that the standard is correctness: (***Stores Block*** case) ***ATCO Gas & Pipelines v. Energy & Utilities Bd.***, 2006 SCC 4, [2006] 1 S.C.R. 140, 344 N.R. 293, 380 A.R. 1 (paras. 25-32). I realize that the strict questions there was allocating profits on sale, but it was the same section in the same Act; and that case and this one both involve the breadth or scope of the powers given by s. 26.

[68] I conclude that the standard of review on this statutory appeal on this precise question, is correctness.

H. Conclusion

[69] Therefore, I would answer question (c), as slightly amended, in the negative.

[70] The rest of what the Commission actually did in the two orders under appeal is moot. I would dismiss the appeal.

[71] Here there were split results, three partially academic questions, and shifts in argument between factums and oral argument. So I would let each party bear its own costs.

Appeal heard on April 9, 2009

Reasons filed at Calgary, Alberta
this 30th day of June, 2009

Côté J.A.

I concur: McFadyen J.A.

I concur: Rowbotham J.A.

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