ATCO Gas

A Division of ATCO Gas and Pipelines Ltd.

Reconsideration of Decision 2005-036
Deferred Gas Account
Imbalance and Production Adjustments

January 8, 2008

Alberta Energy and Utilities Board

ALBERTA ENERGY AND UTILITIES BOARD
Decision 2008-001: ATCO Gas, A Division of ATCO Gas and Pipelines Ltd.
Reconsideration of Decision 2005-036
Deferred Gas Account, Imbalance and Production Adjustments
Application No. 1524763
Proceeding ID. 5

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ALBERTA ENERGY AND UTILITIES BOARD
Calgary Alberta

ATCO GAS
A DIVISION OF ATCO GAS AND PIPELINES LTD.
RECONSIDERATION OF DECISION 2005-036 **Decision 2008-001**
DEFERRED GAS ACCOUNT **Application No. 1524763**
IMBALANCE AND PRODUCTION ADJUSTMENTS **Proceeding ID. 5**

1 INTRODUCTION

The City of Calgary was granted leave to appeal Decision 2005-036,[1] issued on April 28, 2005 on the question of whether the Alberta Energy and Utilities Board (the Board or EUB) was authorized under its governing legislation to approve any of the adjustments to the Deferred Gas Account (DGA) applied for by ATCO Gas. In Decision 2005-036 the Board partially approved adjustments to the DGA of ATCO Gas in respect of costs and expenses incurred between 1998 and 2004.

2 BACKGROUND

On April 19, 2007, the Alberta Court of Appeal issued a Memorandum of Judgment Delivered from the Bench in which it declined to consider whether the Board had jurisdiction to approve any of the adjustments to the DGA the Board partially approved in Decision 2005-036. In its formal Judgment Roll dated June 6, 2007, the Court of Appeal issued the following order:

> The issue of whether the Board erred in law or jurisdiction in assuming that it had the authority to allow recovery in 2005 for costs and expenses which were incurred between 1998 and 2004 cannot be decided on the record before the court and is referred back to the Alberta Energy and Utilities Board for consideration and determination, as the issue may be raised by the parties before the Board.

Since Decision 2005-036 was released, the Board issued Decision 2006-042,[2] on May 11, 2006 (Application No. 1407502) in which it concluded that it has the authority not only to approve adjustments to the DGA in respect of costs and expenses from prior periods, but to establish reasonable limitation periods for these adjustments. ATCO Gas has applied for leave to appeal Decision 2006-042. That leave application is being held in abeyance pending the Board's compliance with the order of the Court of Appeal in respect of Decision 2005-036.

For expediency, the complete record of Decision 2005-036 was incorporated into this new proceeding, which has been assigned Application No. 1524763 (Reconsideration Application).

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

[2] Decision 2006-042 - ATCO Gas, A Division of ATCO Gas and Pipelines Ltd., Deferred Gas Account Limitation Period (Application No. 1407502) (Released May 11, 2006)

The Board proposed a written process in its Notice of September 5, 2007 and set out the following schedule:

Process Step	Due Date
Statements of Intent to Participate (SIP)	September 21, 2007
Argument	October 5, 2007
Reply	October 12, 2007

The Board received SIPs from The City of Calgary (Calgary), the Utilities Consumer Advocate (UCA) and Consumers' Coalition of Alberta (CCA).

In its SIP Calgary requested an opportunity to file evidence. By letter dated September 26, 2007, the Board confirmed the original schedule and stated:

> …the Board indicated that the entire record of the proceeding leading up to Decision 2005-036 would be incorporated into the current proceeding. The Board considers that the evidentiary record of Decision 2005-036 is sufficient for the Board to determine the question of its jurisdiction in relation to ATCO Gas' Deferred Gas Account (DGA) and that further evidence is neither reasonable nor necessary.

On October 5, 2007 the UCA indicated that it would not be submitting Argument or Reply.

The Board considers the record for this proceeding was complete on October 12, 2007 with the submission of Reply Argument.

3 ISSUE

In accordance with the order of the Court of Appeal, the scope of the current proceeding is limited to whether the Board is authorized under its governing legislation to approve adjustments to the ATCO Gas DGA in 2005 for costs and expenses incurred between 1998 and 2004.

4 DISCUSSION OF ISSUES

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

4.1 Interveners' Submissions

Calgary submitted that in Decision 2005-036 the Board was participating in retroactive ratemaking by adjusting past costs (between 1998-2004) and by ordering consumers to pay for those costs incurred in current rates (2005), but by statute and by judicial pronouncement of public utilities policy is not allowed to do so.

In argument Calgary provided a summary of Board Decisions and Orders that dealt with the DGA dating back to 1988. Calgary submitted that a review of the regulatory jurisprudence for the entire history of the DGA would show that there is a disconnect from what was a regulatory practise and what was valid from a legislative perspective. Calgary argued that the key ingredient of finality of rates for respective periods was either overlooked or otherwise inadvertently was not considered. As such, it brought into question whether the rates in play from time to time, since the advent of the monthly DGA mechanism for the imposition of gas cost recovery rates (GCRR), were final rates; were permanent interim rates (a legal oxymoron); or were some hybrid approved by the Board.

Calgary argued that a review of the history of the DGA showed that the Board was fixing rates within the DGA context either on an interim basis, subject to rates being final; or alternatively, in some instances on a final basis. Calgary submitted that if the order was not expressed to be interim, then it was a final order. The only other conclusion, Calgary argued, was that in some instances the rates were treated as perpetual interim rates, which was a legal impossibility. If such was the case, then the costs, which were the subject of the Board's approval in Decision 2005-036, and which ATCO Gas sought to place into the rates were costs which were:

(a) finalized in prior decisions;
(b) in some cases with respect to different legal entities; and
(c) in respect of different customers.

Calgary considered that the issue was whether the Board had the jurisdiction to include in rates matters of revenue or costs which related, in this case, as far back as seven years. Calgary queried whether an overall reading of the provisions of the Board's "constating statutes," would show that the Board has the jurisdiction to increase rates to consumers relating to costs incurred beyond a certain period of time; in this case beyond a 12 month fiscal or gas period. "In essence, does the Board have jurisdiction to engage in retroactive ratemaking; if so, is it unlimited?"

Calgary argued that there was no provision in the *Gas Utilities Act* (GUA) or the *Public Utilities Board Act* (PUBA) which would permit the Board to allow ATCO Gas to recover costs beyond a fiscal period. Calgary argued that it was quite the contrary. Calgary quoted section 40 of the GUA (which has the same effect as section 91 of the PUBA) in support of its argument.

Section 40 of the GUA reads as follows:

> **40** 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,
>
> (a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of
>
> (i) the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them,
>
> (ii) a subsequent fiscal year of the owner, or
>
> (iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,

> and need not consider the allocation of those revenues and costs to any part of that period,
>
> (b) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner that is in the Board's opinion applicable to the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines is just and reasonable,
>
> (c) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines has been due to undue delay in the hearing and determining of the matter, and
>
> (d) the Board shall by order approve
>
> (i) the method by which, and
>
> (ii) the period, including any subsequent fiscal period, during which,
>
> any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (b) or (c), is to be used or dealt with.

Calgary stated that what was at issue was:

> …that the DGA, as an ongoing account, can be adjusted at any time for costs no matter how far back they have occurred. Calgary states, on the contrary, that it is invalid to treat an account, which may be indefinitely an "open" account as one in which all costs, no matter when they occurred, are prospective, when rates dealing with cost applications have already been determined. The fact of the matter is that rates are set every month and subject to review on a three-month rolling average (see par. 5 above). They have received Board approval and rather than close the DGA and open a new one each month, the DGA, as a mechanism, is the device by which to "park" the current adjustments. The *GUA* and *PUBA* state clearly and unequivocally that no revenues and costs can be adjusted beyond the fiscal period in question (i.e. 12 months). Any adjustments in the fiscal period therefore are not deemed to be retroactive.

Calgary did not agree with ATCO Gas that Calgary wanted to review the old orders. Calgary stated that "those orders are not under review. The rates in those orders are final and all of the costs associated during that time period have long since vanished in the books of ATCO Gas for which it has long since received a rate of return. Calgary is saying the Board is now *functus* from reopening old costs."

In reply argument Calgary submitted that it was totally irrelevant whether adjustments had been made in favour or against the ratepayers in the past. Calgary argued that what was being dealt with was whether there was specific legislation granting powers to the Board to do what was purported to be done in Decision 2005-036. Calgary considered that there was none.

Calgary argued that in the present case under reconsideration

> [w]hat the Board has done is inadvertently treated the rates as permanent interim rates because they are always subject to change. Rates cannot remain permanently interim. They must be finalized. The proper mechanism every month would be to issue a final rate order. The fact that a DGA account is a repository for the difference between actual and forecast costs has no bearing on the issue of whether final rates are established. A prior period adjustment is a misnomer. Only adjustments within a particular period are allowed to be set in rates. The fact that those rates get charged on a perspective basis after the period in question is what was dealt with in *Epcor* and in *Northwestern Utilities*; nothing more and nothing less.

With respect to the CCA's argument, Calgary disagreed with the CCA's statement that there was "no express provision in the legislation that prohibits extending this authority to the EUB". Calgary submitted that the "converse was precisely the case. There was no express provision in the legislation that allowed extending this authority to the EUB."

The CCA generally supported Calgary's position. The CCA noted ATCO Gas' argument that the unique nature of the DGA/GCRR left it open to the regulator to adjust the account for the very long term. The CCA did not believe that was either accurate or desirable from a regulatory perspective. The CCA argued that there must be some degree of finality.

4.2 ATCO Gas' Submission

ATCO Gas argued that with the establishment of a deferral account, rates are expressly subject to prior period adjustments. ATCO Gas submitted that the difference between actual revenues and expenses and the estimated amounts incorporated in rates are recorded in a deferral account and then the difference is either collected from, or refunded to, customers through future rates also approved by the Board. ATCO Gas argued that there was no time limitation in respect of the DGA at the time of the Board's decision. It was evident from the Board's decision that the DGA was intended to simply reconcile actual gas supply consumption costs with those forecast.

ATCO Gas noted that in the proceeding for Decision 2005-036 Calgary had argued before the Board that "any over-recoveries resulting from an error on the part of the utility should be refunded, regardless of timing, because customers would not have caused the error". ATCO Gas argued that Calgary's position acknowledged that the Board had the authority to make adjustments going back a number of years as it had done. ATCO Gas submitted that "Calgary's argument was properly regarded by the Board as an acknowledgment of its jurisdiction and, in particular, an acknowledgment that adjustments going back a number of years would not constitute prohibited retroactive ratemaking. In other words, the City of Calgary argued that the Board had jurisdiction."

ATCO Gas acknowledged that once finalized rates cannot be adjusted unless expressly subject to a DGA or similar deferral mechanism. Adjustments can be subsequently made however, when mechanisms such as deferral accounts or adjustment clauses are in place. ATCO Gas argued that when such mechanism are in place, customers and the utility are both on notice that prior period adjustments will be reflected in future rates.

ATCO Gas noted that Calgary "had said to the Court of Appeal that the issue was whether the Board can go back in time, or how far." ATCO Gas stated its view as follows:

> The Board can go back to the date the DGA was established. All subsequent rates are subject to adjustments to reflect corrections arising in the period the DGA remains open,

> which ATCO Gas submits was from the point of its inception. The adjustments resulting from the DGA for matters subsequently arising are not retroactive in the sense of being prohibited. The DGA mechanism ensures that prior period adjustments are reflected in future rates, thus ensuring customers only pay the actual cost of gas consumed and that the utility recovers its actual costs of providing the service. All parties are on notice that future rates will reflect prior period adjustments. The prohibition against retroactive rate-making thus has no application.

ATCO Gas submitted that the Board's comments in Decision 2005-036, pages 10 - 11 confirmed that the DGA was approved and put in place in 1987 – 1988 and did not indicate any break in the chain of orders and decisions since then with respect to the DGA. ATCO Gas claimed that the Board itself acknowledged that the DGA was never terminated and therefore, all rates since its establishment had been subject to adjustments within the scope of the DGA, and as such, had been considered appropriate and approved by the Board.

ATCO Gas argued that whether or not the prior period adjustments ought to be approved was not an issue of jurisdiction but rather one of policy. ATCO Gas further noted in argument that the Board's interpretation of its own orders and processes was generally a matter for the Board alone and did not constitute an issue of law, let alone jurisdiction.

ATCO Gas argued that if Calgary's argument were correct, deferral accounts would be meaningless. If the Board could only do what was permitted under section 40 of the GUA in terms of prior period adjustments, then there would be no need to establish a deferral account. ATCO Gas argued that the deferral account was intended to accomplish what section 40 alone did not, which was to cover a longer term than a single fiscal year.

ATCO Gas further argued that if the extent of the authority of the Board to look back in time was fixed by section 40, then even interim rates would be ineffective. ATCO Gas noted that the Alberta Court of Appeal explained in *Coseka Resources Ltd. v. Saratoga Processing Co.* [1981] A. J. No. 579, that there was more to the Board's authority than just section 40 or its equivalents. The Court of Appeal also rejected the notion of any injustice in the form of alleged intergenerational inequity as a result of subsequent adjustments stating at paragraph 36:

> It was urged on behalf of Coseka that great injustice will result if interim rates once paid are subsequently varied …
>
> Nevertheless all consumers of a utility service must be aware that the rates in an interim order are subject to change and determine their course of action upon the basis of that knowledge.

ATCO Gas believed that the Court stated the foregoing in the context of possibly adjusting rates already charged, not a prospect raised by a deferral account.

It was argued by ATCO Gas that if the Board did not have the jurisdiction to grant the recovery of the adjustment in Decision 2005-036, then it followed that ATCO Gas ought to be refunded those amounts that were given to customers in previous years under similar circumstances. This would include the payment that was made to ATCO Gas North customers as a result of Decision 2005-036.

4.3 Views of the Board

When the Board initially considered Application No. 1347852 (Original Application), the question of the Board's jurisdiction to make prior period adjustments to a DGA was not raised at any time during the proceeding. Calgary raised this question only in its application for leave to appeal Decision 2005-036 to the Court of Appeal. Leaving being granted, the Court of Appeal then ruled that it could not determine the question since it had not first been raised and considered by the Board. Therefore, the Court referred the question back to the Board, directing it to consider its jurisdiction as the issue might be raised by the parties. The Board initiated the present Reconsideration Application in accordance with the direction of the Court of Appeal.

In the meantime, pursuant to the Board's direction in Decision 2005-036, ATCO Gas filed an application to determine whether it would be prudent for the Board to establish a policy that would impose limitation periods for prior period adjustments to the DGA (Limitation Application).[3] In the course of that Application, Calgary took the opportunity to question the Board's jurisdiction to approve prior period adjustments. In Decision 2006-042, the Board concluded that it did have jurisdiction to make these adjustments, but also concluded that it had jurisdiction to approve reasonable limitation periods for them. An application for leave to appeal Decision 2006-042 has been filed with the Court of Appeal, but has been held in abeyance pending the outcome of this Reconsideration Application.

The arguments made by Calgary in the Reconsideration Application are essentially the same arguments made by it in the Limitation Application with respect to Board jurisdiction. As the Board understands the argument, Calgary is of the view that the provisions of the GUA and the PUBA that authorize the Board to make a tariff effective as of a date prior to the tariff application itself—i.e. a so-called "retroactive tariff"—represent the limit of the Board's authority to consider revenue and cost activity in periods prior to a tariff application. Calgary submits, in particular, that the Board's jurisdiction to consider prior period financial activity of a utility is limited to a 12-month period, even when the financial activity occurs in a deferral account approved by the Board.

As in Decision 2006-042, the Board has not been persuaded by Calgary's argument. The Board confirms its conclusion with respect its jurisdiction to approve prior period adjustments to the DGA set out in Decision 2006-042:

> With regard to the issue of retroactive rate-making raised by Calgary, the Board does not accept the position advanced by Calgary. The Board has broad discretion to set just and reasonable rates and, in the case of setting gas cost recovery and flow-through rates, sets these rates in accordance with the use of DGAs. In doing so, the deferral nature of the DGAs is specifically contemplated and acknowledged when the rates are set. Deferral accounts, by their nature, anticipate adjustments such as the ones at issue in this matter and, as such, cannot be said to constitute retroactive rate-making. The Supreme Court of Canada has approved the use of deferral accounts for gas and has further noted that such a mechanism is a purely administrative matter. In *EPCOR Generation Inc. v. AEUB*, 2003 ABCA 374, the Alberta Court of Appeal adopted the same approach and stated that as the deferral account in issue in that decision was not closed, it was not a final order, and was not retroactive rate making or procedurally unfair.

[3] Application No. 1407502

> Consequently, the Board considers that a DGA has not been subject to any limitation regarding jurisdiction either by way of legislation, past Board decision or court ruling which would have prevented the Board from considering prior period adjustments to a DGA. In fact, the Board has dealt with prior period adjustments to DGAs since their inception in 1987, with the prior periods being of varying lengths.[4]

The provisions of the GUA and PUBA relied on by Calgary authorize the Board to take into account financial information for the whole of the year in which a tariff application is filed in the event that the Board intends to approve a tariff effective prior to the date on which the tariff application is made. The "prior period" is limited to some period in the calendar year before the date of the application, depending on when the application might be filed in the calendar year. Strictly speaking, deferral accounts are unnecessary to account for financial activity in this period, so the Board does not find Calgary's argument persuasive on this basis.

If the Board concluded that its jurisdiction to approve prior period adjustments to the DGA was limited to the year in which an application to reconcile the DGA is made, most of the Board's previous approvals of deferral accounts in many other contexts would lose their foundation. In the Board's view, the real issue in this Reconsideration Application (and the Original Application) is not the Board's jurisdiction to approve prior period adjustments to a deferral account, but the reasons for and magnitude of the adjustments being sought. The Board clearly outlined its concerns about the appropriate use of the DGA in Decisions 2005-036 and 2006-042. The Board is sensitive to the DGA, and any deferral account, being used inappropriately as a vehicle by which the utility can recoup past losses regardless of the reason for, and timing of, those losses. However, these are issues for the Board to take into account whenever a deferral account balance is brought forward for reconciliation and disposition. They ought also to be taken carefully into account when a deferral account is originally established to ensure that the account is not used inappropriately. They are not, however, jurisdictional impediments.

In summary, the Board concludes that it has jurisdiction to approve prior period adjustments to the DGA. The consequences of this conclusion are those flowing from Decision 2005-036 and Decision 2006-042 according to their respective terms.

[4] Decision 2006-042, page 4. The Supreme Court of Canada decision referred to by the Board is indicated in note 9 of Decision 2006-042 to be *Edmonton v. Northwestern Utilities* [1961] SCR 391.

Dated in Calgary, Alberta on January 8, 2008.

ALBERTA ENERGY AND UTILITIES BOARD

(original signed by)

B. T. McManus, Q.C.
Presiding Member

(original signed by)

C. Dahl Rees, LL.B.
Member

APPENDIX 1 – HEARING PARTICIPANTS

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Utilities Consumer Advocate (UCA) J. A. Bryan, Q.C.
Consumers' Coalition of Alberta (CCA) J. A. Wachowich

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