
# City of Calgary
# ATCO Gas and Pipelines Ltd.

## Decision on Preliminary Question
## Review and Variance of Alberta Energy and Utilities Board Decision 2006-098

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## Review and Variance of Alberta Energy and Utilities Board Utility Cost Order 2006-064

November 3, 2008

**ALBERTA UTILITIES COMMISSION**
Decision 2008-110:
City of Calgary
ATCO Gas and Pipelines Ltd.

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Application No. 9500-1494570

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## 1 INTRODUCTION

ATCO Gas (AG), a division of ATCO Gas and Pipelines Ltd., filed Application No: 1411635 dealing with Phase 2, Part B of the Retailer Service and Gas Utilities Act Compliance process (the Retailer Service Application) with the Alberta Energy and Utilities Board (EUB or Board) on July 29, 2005. The division of the Board assigned to the Retailer Service Application was Douglas (Chair), McManus, and Dahl Rees. An oral hearing was held from June 6-9, 2006. Written Argument and Reply Argument were received on June 28 and July 12, 2006. The record was considered to be complete on July 12, 2006.

Decision 2006-098, *ATCO Gas Retailer Service and GUA Compliance Phase 2 Part B, Customer Account Balancing and Load Balancing* was issued on October 10, 2006 (Load Balancing Decision).

The cost order in respect of this proceeding (Load Balancing Proceeding), Utility Cost Order UCO 2006-064 was issued on December 1, 2006 (Cost Order).

The City of Calgary (Calgary) filed an Application for Review and Variance (Application) on December 31, 2006 seeking a review and variance of the Load Balancing Decision and of the Cost Order. Calgary asserts that the Board erred in law, or jurisdiction, or fact such as to raise a substantial doubt as to the correctness of the Load Balancing Decision and of the Cost Order. In addition, Calgary submitted that the availability of new evidence or the presence of a change in circumstances not previously before the Board materially effects the Load Balancing Decision.

The Board established a process in respect of the Application by letter dated January 8, 2007. Submissions were received in favor of the Application from the Consumers Coalition of Alberta (CCA) (January 16, 2007) and the Alberta Urban Municipalities Association (AUMA)/Office of the Utilities Consumer Advocate (UCA) (January 18, 2007). Submissions opposed to the Application were received from AG (January 18, 2007) and Nexen Marketing (Nexen) (January 18, 2007). Calgary filed its Reply submission on January 29, 2007.

Calgary filed an additional submission on June 14, 2007, which was responded to by AUMA/UCA (June 21, 2007), AG (June 26, 2007) and Nexen (June 26, 2007). The record for this proceeding closed June 26, 2007.

## 2 BACKGROUND

The Retailer Service Application is one of several filings by AG which originated in Application No. 1308709, ATCO Gas Retailer Service and Gas Utilities Act Compliance (the Original Application) which was filed with the Board on July 25, 2003. The Original Application was filed in response to amendments to the *Gas Utilities Act*, R.S.A. 2000, c.G-5 (GUA) as well as the introduction of new regulations under the GUA. The Board established a process to review the Original Application in two phases. Phase 1 would deal with interim matters related to the Terms & Conditions proposals, as well as the continuation of the Rate 11/13 processes with respect to load balancing. Phase 2 would deal with final approval of the Terms & Conditions, load balancing and load settlement issues.

The Phase 1 issues were addressed in Decision 2003-102.[1] That Decision also provided direction to AG to address, jointly with ATCO Pipelines (AP), an application with respect to SCADA facilities between AP and AG. These facilities were required to provide the data necessary for load balancing the two systems which was to be considered in the Phase 2 process. That SCADA application was approved by the Board in Decision 2004-078.[2]

Phase 2 issues were subsequently divided between Part A and Part B. Phase 2 Part A was to consider the principle of separating the load balancing function from the Default Supply Provider (DSP) and shifting the cost burden for load balancing from DSP customers to all end use customers. Phase 2 Part B was to deal with account balancing and load balancing directly.

Decision 2005-081[3] dealt with Phase 2 Part A. In that Decision, the Board approved the conceptual separation of the load balancing function from the DSP and shifting the cost burden for load balancing from DSP customers to all end use customers.

On July 26, 2005, the Board issued a letter which established a process to advance Phase 2 Part B. The Retailer Services Application dealing with Phase 2 Part B was received by the Board on July 29, 2005. In the Retailer Services Application AG proposed a consultative process to advance topics using modules.

In a letter of October 3, 2005, the Board provided direction with respect to the potential for overlap between the Retailer Services Application and the ATCO Gas South 2005/2006 Carbon Storage Plan Part 1 Module associated with Application No. 1357130. Both applications could

[1] Decision 2003-102 *ATCO Gas North and South Retailer Service and Gas Utilities Act Compliance - Phase 1* dated December 22, 2003 (Application 1308709).

[2] Decision 2004-078 *ATCO Gas and ATCO Pipelines SCADA Project* dated September 17, 2004 (Application 1308709).

[3] Decision 2005-081 *ATCO Gas Retailer Service and Gas Utilities Act Compliance Phase II Part A* dated July 26, 2005 (Application 1380942) dealt with Board approval for the separation of the load balancing function from the DSP, and shifting the cost burden for load balancing from Default Supply Provider customers to all end use.

involve a consideration of the potential use of the AG Carbon natural gas storage facility (Carbon) in connection with load balancing of the AG system. The Board concluded that, in the interests of efficiency and completeness, it would be appropriate for the issues related to load balancing, including the use of storage, to be assessed through a single process within the Retailer Service Application.

By letter dated December 22, 2005 the Board determined to combine Module 1 on customer account balancing and Module 2 on load balancing, into a single litigated proceeding. The Board also agreed to permit the inclusion of the issues related to scope and cost of the Daily Forecasting and Settlement System (DFSS) into the litigated Module 1/Module 2 process. The modules and their contents were also updated on December 22, 2005 with the modules summarized as follows:

> Module 1 – Customer Account Balancing Fundamentals
> Module 2 – Load Balancing
> Module 3 – Load Settlement Information Systems
> Module 4 – Procedural Documentation
> Module 5 – Phase 2 Part B Application

Decision 2006-098 addressed Modules 1 and 2, with respect to customer account balancing and load balancing for AG.

The Cost Order reduced various elements of Calgary's cost claim in respect of the Load Balancing Proceeding by 20%-30%.

## 3 APPLICABLE TESTS FOR PRELIMINARY QUESTION

The Rules of Practice establish the procedure for the Commission to follow when considering an application for a review and variance of a decision or order. The Application was filed on December 31, 2006 with the EUB. Although the Commission is by virtue of Section 80(3) of the *Alberta Utilities Commission Act* the appropriate party to decide the Application, the applicable Rules of Practice are those that were in place at the time the Application was filed. The *Alberta Energy and Utilities Board Rules of Practice* A.R. 101/2001, as amended, are the governing Rules of Practice (Rules) with respect to the Application.

Section 46 of the Rules applies to applications for review. Pursuant to Section 46(5) of the Rules, the regulator in considering an application for review must determine the preliminary question of whether the decision should be reviewed. Section (46)5.1 provides as follows:

> When determining the preliminary question, the Board shall grant an application for review,
>
> (a) With respect to a review of an order, decision or direction other than a review under section 40 of the *Energy Resources Conservation Act*, if the Board determines that,
>
> i. in the case where the applicant has alleged an error of law or jurisdiction or an error of fact, the applicant has, in the Board's opinion, raised a substantial doubt as to the correctness of the Board's order, decision or direction, or

ii. in the case where the applicant has alleged new facts, a change in circumstances or facts not previously placed in evidence, the applicant has, in the Board's opinion, raised a reasonable possibility that new facts, a change in circumstances or facts not previously placed in evidence, as the case may be, could lead the Board to materially vary or rescind the Board's order, decision or direction,

The Commission will consider the preliminary question in respect of the Application as it relates to each of the Load Balancing Decision and the Cost Order in accordance with the above provisions.

# 4 ISSUES – LOAD BALANCING DECISION

## 4.1 Application

Calgary submits that the Board erred in law, or jurisdiction, or fact such as to raise a substantial doubt as to the correctness of the Load Balancing Decision or such as to materially affect the Load Balancing Decision on the following six grounds:

1. Relying on evidence not on the record / Failing to comply with the Board's Rules on Motions
2. Failing to comply with statutory requirements
3. Changing the definition of load balancing
4. Onus of proof and standard of proof
5. Undertaking irrelevant considerations / Failure of natural justice
6. Making erroneous conclusions of fact about use of Carbon for monthly load balancing

In addition, Calgary submitted that the availability of new evidence or the presence of a change in circumstances not previously before the Board materially effects the Load Balancing Decision.

The submissions by the parties and the Commission's decision in respect of each of the above matters are addressed below. [4]

In reaching the determinations contained within this Decision, the Commission has considered all relevant materials comprising the record of this proceeding, including the submissions provided by each party. In addition, the Commission has considered the record of the Load Balancing Decision and the record of the Cost Order. 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 of the Application, the record of the Load Balancing Decision and the record of the Cost Order with respect to that matter.

[4] The CCA submission supported Calgary's Application without reasons or argument.

### 4.2 Relying on Evidence not on the Record / Failing to Comply with the Board's Rules on Motions

In its Reply Argument dated July 12, 2006, filed in the Load Balancing Proceeding, Calgary objected to certain "new evidence" included within the Argument filed by Nexen Marketing (Nexen). The "new evidence" was identified by Nexen as "Evidence" and contained factual material that Calgary submitted had not been introduced as evidence in accordance with the Board's directions on procedure.

Calgary contended in the Application that the Board erred in law by failing to comply with the Rules in not responding separately to or acknowledging this issue in the Load Balancing Decision. Secondly, the Board erred in law by relying on the Nexen Argument without considering which facts in the Nexen Argument were properly placed on the record. Calgary submitted that it is *prima facie* entitled to a review as the use of the improper new evidence was material to the Load Balancing Decision.

Calgary submitted in the Application or in its Reply that references in the Nexen's Argument regarding contracting practices, market strategies and impacts could not be found in AG's evidence. Calgary submitted that it was denied the opportunity to examine and test this new evidence and that the Board relied on this information improperly. Calgary had a similar concern regarding Nexen's new evidence which referred to the support of ENMAX, Direct Energy Regulated Services and Direct Energy Partnership for daily account balancing. Calgary also submitted that Nexen presented new evidence by providing different information on the AP negotiated settlement process than existed on the public record. Further, Nexen's new evidence on increased complexity, costs and benefits to customers was more expansive than the AG Rebuttal Evidence.

AUMA and the UCA took the position that the Board had relied on evidence not properly placed on the record, including those parts of the Nexen Argument identified as "Evidence".

AG disagreed with the assertion by Calgary and AUMA/UCA that Nexen's argument constituted new evidence. AG referred the Board to Nexen's submission dated December 7, 2005 and to its Argument. The Argument touched upon the positions outlined by Nexen in its submission or on matters that were otherwise raised in evidence or under cross examination. More specifically, AG submitted that Nexen, as a party to the negotiated settlement with AP, was entitled to express a view that the AP procedures were working well. Nexen's statement that daily account balancing commenced on April 1, 2006 for AP was a well known fact and the assertion that Carbon was considered and rejected in the AP negotiations does not constitute new evidence and was in fact confirmed by Calgary under cross examination. Finally, the fact that parties to the Settlement agreed that AP would seek gas supply services for load balancing from a third party also does not constitute new evidence as it forms part of the negotiated settlement which forms part of the public record.

Nexen contended that Calgary's assertion that Nexen provided new evidence is unfounded. Nexen relied on its December 7, 2005 submission and documents filed in relation to AG's Application, including submissions of evidence, information request responses, AG's Rebuttal Evidence and hearing transcripts.

With respect to Calgary's observation that Nexen's Argument included the heading "Written Evidence", Nexen advised that it simply used a previous template and erred in not changing the heading.

Nexen disputed Calgary's assertion that Nexen provided new evidence relating to its contracting practices and use of various market strategies and the establishment of a balancing procedure other than on a daily basis. Calgary had asserted that there was no evidence on record establishing the impact of an account balancing procedure other than on a daily basis. Nexen submitted that it did not provide new evidence, rather it was relying on evidence filed by AG. Nexen referred specifically to AG's Evidence dated February 3, 2006, including Table 1 on page 19, Tables 11-14 on pages 52-55, AG's Account Balancing Conclusions at page 59 and on AG's information request responses to AUMA.

Nexen also disputed Calgary's assertion that Nexen provided new evidence relating to the impact of removing control over managing supply from retailers, the use of market tools and strategies and the difficulties with offering customers balancing alternatives. Nexen identified the sources of information relied upon as AG's Rebuttal Evidence, the evidence of Alberta Energy Savings, Calgary's Evidence and cross examination of Alberta Energy Savings and Calgary.

Nexen clarified that although Calgary asserted that Nexen provided evidence on the AP settlement negotiations and resulting agreements, the information was not confidential and it related to the Settlement and Daily Account and Load Balancing procedures that had been approved by the EUB. Further these settlement negotiations and agreements were discussed in information request responses and in the oral hearing.

### *Commission Decision*

Calgary argued that Nexen's argument contained a significant amount of new factual material. Nexen clarified that it had pointed out and commented on evidence, information request responses, and cross examination previously on the record and on information that was publicly known. Calgary disputed that the information was found in evidence and was in fact different information than what exists on the public record. It is unclear to the Commission that Calgary made a formal motion in its Reply Argument filed in the Load Balancing Proceeding with respect to the alleged new evidence file by Nexen. Regardless of whether Calgary made a formal motion, the Commission has considered Calgary's Application from the perspective of whether the Board erred in the manner submitted by Calgary.

Following a review of the records for the Load Balancing Proceeding and the Application, the Commission agrees with Nexen and AG and finds that the Nexen Argument was materially made in reliance on evidence that was already on the record and that the substance of Nexen's Argument was to reflect Nexen's support for that evidence and for the Load Balancing Application in general. Further, the Commission is satisfied that each of the submissions made by Nexen and alleged by Calgary to constitute new evidence relate to issues which where fully canvassed in the Load Balancing Proceeding.

In the opinion of the Commission, the referenced ground for review has not established an apprehension that the Board committed an error of law, or jurisdiction, or fact, sufficient to raise a doubt as to the correctness of the Load Balancing Decision.

### 4.3 Failing to Comply with Statutory Requirements

Calgary submitted that the Board failed to require AG to carry out certain statutory requirements with respect to load balancing thereby committing a clear error of law and acting outside of its jurisdiction. In support, Calgary pointed to the *Roles, Relationships and Responsibilities Regulation* (R3 Regulation) promulgated under the *Gas Utilities Act* ("GUA") which imposes under Section 4(1)(i) an obligation on the gas distributor to perform load balancing functions for the gas distribution system. Calgary submitted that the GUA and R3 Regulation do not give the Board the discretion to exempt a gas distributor from the statutory requirement or to defer the assumption of the statutory obligation for some unknown, or any period.

Calgary pointed out that the Load Balancing Decision acknowledges the statutory obligation on AG to perform load balancing but failed to establish or impose a load balancing procedure. Instead, the Board gave AG approval in principle to move toward daily account balancing with Direct Energy Regulated Services continuing to carry out load balancing responsibilities in the interim. AG was authorized to proceed with the development of the DFSS, a system that was only in the early stages of development.

Calgary argued that the history and extensive record of the use of Carbon demonstrated how its proposal to utilize Carbon for load balancing could be immediately moved toward implementation. Carbon is already in the utility rate base, and the processes for using storage as well as the capabilities and costs are well known. Further, AG has had significant expertise in forecasting its overall loads and requirements. The methods of assessing storage value have been presented to the Board on more than one occasion. Calgary suggested that its proposal could be facilitated through the use of the voluminous material on the use of Carbon that already exists.

AG indicated that almost 85% of the costs to develop the DFSS system had already been incurred by AG at the time its Retailer Service Application had been filed and that the system had progressed well beyond the early stages of development. Further, a detailed review of the DFSS had occurred with interested parties prior to the filing of the Retailer Service Application. AG referred to evidence on the record which indicated that the DFSS inaccuracies would have to be extreme before AG would consider an alternative to daily account balancing. Further AG stated during the hearing that the DFSS assessment metrics would be developed as part of the Module 3 process to follow the Decision. Development in Module 3 was necessary as it is difficult to assess the accuracy of a system without having a good indication of what rules the system is going to operate under.

AG rejected Calgary's contention that Calgary's load balancing proposal involving the use of Carbon could be moved toward implementation as soon as the Load Balancing Decision was reached. Calgary had not provided specific timelines for implementation. Further, despite Calgary's assertions to the contrary, the process outlined by Calgary did not bear any resemblance to the use of Calgary historically. Calgary's proposal also ignored the fact that the facility had not been used for operational purposes since 2001. AG pointed out that Calgary had admitted that Carbon is not used for distribution load balancing today and that it is not physically necessary to load balance the AG or AP systems.

AG also submitted that Calgary's proposal was not reflective of the obligations imposed on AG by legislation and would require AG to be returned to the residual shipper position for the AG and AP systems before it could be implemented, contrary to the legislation.

Nexen disagreed with Calgary's assertion that no procedure for load balancing was established. Nexen argued that the Board in its decision clearly established a process that includes establishment of a customer account balancing process on a daily basis that will reduce the volume AG will be required to manage in order to load balance its distribution system. Carbon is not an instrument that can react within the timeframe required to balance the gas day. Nexen pointed out that AG has through technical meetings, evidence, Rebuttal Evidence and cross examination, detailed the distinction of customer account balancing from distribution system load balancing and the effect that the customer account balancing has on load balancing.

### *Commission Decision*

Contrary to Calgary's interpretation of the statutory requirements, the Board in directing the staged implementation of a load balancing procedure through the use of consultative procedures for development and a reasonable testing period did not violate the legislation. No fixed date or process is directed by the legislation. To force implementation of a system for load balancing without working out the details and without finalizing the components would be imprudent. As AG pointed out, substantial costs had already been incurred to develop the DFSS system, a detailed review had occurred with interested parties, and logical next steps would be addressed in Module 3. The Commission agrees with AG that Calgary's proposal could not be instituted immediately. The Commission also agrees with AG that a review of the record of the Load Balancing Decision demonstrates that the proposal put forward by Calgary had not been employed historically in the manner suggested by Calgary and required materially more effort than simply using existing information and applying well known prior practices and processes.

In the opinion of the Commission, the referenced ground for review has not established an apprehension that the Board committed an error of law, or jurisdiction, or fact, sufficient to raise a doubt as to the correctness of the Load Balancing Decision.

## 4.4 Changing the Definition of Load Balancing

Calgary submitted that in the Load Balancing Decision the Board improperly changed the definition of load balancing by expanding the concept from pure physical operational balancing of the gas distribution system to include the administrative balancing of the AG Firm Service Utility (FSU) accounts on the AP system. At pages 11-12 of the decision the Board stated:

> Calgary argued that balancing the ATCO Gas FSU accounts on ATCO Pipelines should not be considered as load balancing of the ATCO Gas distribution system because it is an after-the-fact reconciliation account balancing while load balancing is a real-time physical activity. The Board appreciates the distinction. However the Board considers both the physical real-time automatic balancing of the distribution system and the after-the-fact administrative reconciliation of the ATCO Gas FSU accounts with ATCO Pipelines as aspects of load balancing for the ATCO Gas distribution systems.
>
> Therefore it seems reasonable to the Board to broaden the definition of load balancing as it applies to ATCO Gas to include the traditional real time physical aspect, as well as the administrative aspect associated with balancing the ATCO Gas FSU accounts on

> ATCO Pipelines. The Board considers that the balancing of ATCO Gas's FSU accounts on ATCO Pipelines is an administrative exercise involving the sale or acquisition of volumes required to balance gas that has largely physically flowed on the ATCO Gas distribution systems. Therefore, the Board will refer to load balancing in relation both to physical load balancing and load balancing administration in this Decision.

Calgary argued that the Board's change in the definition of load balancing was unreasonable and a fundamental denial of natural justice, and that the Board erred in law and jurisdiction to the point of materially affecting the decision. Calgary stated that it developed its case based on the definition of load balancing first articulated by the Board in Decision 2001-075 and confirmed by the Board in a letter dated June 1, 2006. The letter was based on Calgary's request to the Board for clarification of the definition of load balancing to be used by the Board before the commencement of the hearing after AG took issue with Calgary's definition in AG's Rebuttal Evidence.

AUMA and the UCA submitted that the Board had changed the definition of load balancing to include load balancing administration for which there was inadequate or no supporting evidence. The changing definition would mean that load balancing would become a purely accounting function which obviated the need for real time or meaningful physical operation of the gas system. If this did factor into the Board's decision then it constitutes a denial of natural justice as parties were not given the opportunity to address the matter.

AG argued that the Board is not precluded from considering the physical and administrative aspects of load balancing or its interrelationship with other activities. AG pointed out that Calgary knew the position being taken by AG and had every opportunity to present an alternative view, which it did. AG pointed out that Calgary acknowledged that there is no issue with respect to the physical operation of AG's distribution system. Therefore, by extension Calgary provided a solution for a problem that does not exist.

### *Commission Decision*

Calgary was aware of the physical flow relationship between AP and AG and of the relationship of the FSU accounts to gas flows on the two systems[5]. The Board determined that it was logical that administrative aspects of load balancing would have to be considered as part of an examination of load balancing issues connected with the AG system and that this need was clearly apparent based on the AG evidence. Therefore, the Commission can find no unfairness to parties. In addition, the Commission cannot find in the reasoning and conclusions reached by the Board a basis for the assertion that an error of law or jurisdiction has been committed in respect of this matter. The Board was not precluded from considering all aspects, physical as well as administrative, of load balancing particularly in light of the operationally integrated nature of the AG and AP systems and the relationship between the customer account balancing period and load balancing requirements on each of the two systems.

Based on the foregoing, the Commission does not consider that Calgary has established a basis for an assertion that the Board acted unfairly, that the Load Balancing Decision amounted to a denial of natural justice or that the Board committed an error of law or jurisdiction.

[5] Calgary Reply Submission dated January 29, 2007, page 3

In the opinion of the Commission, the referenced ground for review has not established an apprehension that the Board committed an error of law, or jurisdiction, or fact, sufficient to raise a doubt as to the correctness of the Load Balancing Decision.

## 4.5 Onus of Proof and Standard of Proof

Calgary noted that until October 3, 2005, the issue of use of Carbon for load balancing was being dealt with in the Carbon 2005/2006 Jurisdiction Proceeding. On that date, the Board issued a letter shifting the issue to the Load Balancing Proceeding. Calgary submitted that despite the shifting of the issue to the Load Balancing Proceeding, AG filed little initial evidence on the use of Carbon for load balancing. AG's evidence was that gas distribution utilities were prohibited from using storage in providing regulated services. Further, AG argued that management prerogative was determinative with respect to the use to be made of utility assets and that management had determined that it was not necessary to make use of Carbon for load balancing purposes. As a result of these positions, Calgary submitted that AG had in effect, avoided filing any evidence in chief on the use of Carbon Storage for load balancing. AG dealt with the issue in its Rebuttal Evidence resulting in the Board committing two errors meriting a review of the Load Balancing Decision.

***Onus of Proof***

Calgary submitted that the use of Carbon for load balancing was first addressed in evidence when Calgary made its Carbon load balancing proposal. AG only dealt with the issue in its Rebuttal Evidence. Calgary stated that it raised the issue of AG's evidence regarding Carbon in a letter of June 1, 2006 but the Board stated that it was reluctant to delay the proceeding. Consequently, Calgary had to address the AG evidence relating to Carbon through its witnesses on the stand, in cross examination, and in Argument and Reply Argument. Calgary argued that it was deprived of a fair opportunity to deal with AG evidence relating to Carbon, as the Board's process did not allow for information requests on Rebuttal Evidence or for filing of further evidence to deal with the AG Rebuttal Evidence. Further, the Board, according to Calgary, relied on AG's Rebuttal Evidence in assessing Calgary's Evidence.

Calgary submitted that it is an error of law and jurisdiction for the Board to have shifted the onus of proof to Calgary, and then to have given full credence to AG evidence which Calgary had no opportunity to refute.

***Standard of Proof***

Calgary submitted that the Board erred in law in applying different standards of proof to AG and Calgary in the same proceeding. With respect to AG's proposal for load balancing the Board was prepared to accept AG's submission that the DFSS model could be successfully developed, tested and implemented, and would have no impact on any other parties. Calgary further argued that the Board approved AG's unproven proposal even though it was complex, unproven and involves numerous forecasting procedures.

With respect to Calgary's proposal to use Carbon for load balancing, Board Counsel subjected Calgary to extensive cross examination on the actual daily mechanics of how Calgary expected AG to implement Calgary's proposal. Calgary submitted that its proposal reflected a historical use of Carbon and years of industry practice, but despite this, the proposal was rejected by the Board as being complex, costly and defective because of the need for gas supply and storage forecasting.

AG submitted that it had filed evidence dealing with the possible use of storage in the Retail Service Application. Attachment 1 to the Retail Service Application entitled "Analysis of Potential Balancing Sources", provided a detailed review of the alternatives, consistent with legislation, considered for the load balancing function required of AG. In this review, AG had concluded that the use of the yesterday gas trading instrument (YD Instrument) for load balancing is the most reasonable, prudent and cost-effective approach and the use of physical storage, whether available from third parties, from Carbon or from the Salt Cavern peaking facility are not a cost effective means of load balancing AG's FSU accounts.

AG contended that its Rebuttal Evidence was only responding to Calgary's new Carbon proposal filed in Calgary's evidence. This was necessary as Calgary's new evidence advanced a complex proposal to use the facility in a manner in which it had not been used before. It was also necessary given the interrelationship with the operation of other systems such as NGTL and AP.

AG argued that there is no basis to allege a lack of procedural fairness. Calgary had an opportunity to cross examine all of AG's evidence particularly that which refuted Calgary's proposal. Further, AG's Rebuttal Evidence also referenced AG's previously filed evidence which had been incorporated into the record which Calgary had in its possession for some time.

AG argued that the Load Balancing Decision at pages 29-30 concluded that the disadvantages, complexities and uncertainties in the use of Carbon, even if utilized throughout the gas day, as proposed by Calgary, would, in the Board's view, outweigh any potential advantages. The Board then went on to say that the use of the YD Instrument seems to be a more practical and efficient alternative, with adequate liquidity in most typical circumstances and with minimal incremental administrative costs. Accordingly, it was AG's position that the Board considered and weighed the respective proposals and found the AG proposal to be practical and efficient without an error of law or jurisdiction being evident.

> The Board obviously considered and weighed the proposals of both ATCO Gas and Calgary on this matter, finding ATCO Gas' proposal to be a "*practical and efficient alternative*". Again, no error of law or jurisdiction is evident which casts a substantial doubt upon the correctness of the decision.[6]

AG disagreed with Calgary's assertion that different standards of proof were applied to Calgary and AG. AG noted that the burden of proof shifted. First AG filed written evidence (including the incorporated evidence) rejecting the use of physical storage for load balancing. Calgary filed contrary evidence. In response, AG filed evidence rebutting Calgary's evidence.

AG noted that in its argument it had addressed why Carbon is not required, could not be used for addressing pressure maintenance on AG distribution system or for balancing AG's FSU accounts. Calgary ignored and had not provided evidence to counter the fact that the use of Carbon would result in increased costs in comparison to the YD Instrument.

AG submitted that Calgary had made inappropriate comparisons with respect to the standard of proof applied to the DFSS versus Calgary's proposal for using Carbon. Carbon and the DFSS

[6] AG Submission dated January 18, 2007, page 4

are not mutually exclusive or even solutions to the same issue. The alternative to the use of Carbon for load balancing is the YD Instrument. The DFSS relates to Account Balancing and no alternate proposals with respect to that system were brought forward during the Load Balancing Proceeding.

***Commission Decision***

The Board found that Calgary had not developed its proposal fully. Calgary referred to its proposal as simply requiring the use of the voluminous material that exists. However, as the record of the proceeding indicates, Carbon had not been used for operational purposes since 2001 and the Calgary proposal did not reflect the methodology utilized in operating the facility historically. The Board determined that Calgary should have developed a reasonably thorough proposal. Calgary's proposal left many unanswered questions with respect to the impact of its proposal on third party contracts, competition and incremental costs.

The Commission agrees with ATCO Gas's submission that the Board appeared to have considered and weighed the respective proposals and found the AG proposal to be practical and efficient, and that the Board did so without an error of law or jurisdiction being evident to cast a substantial doubt on the correctness of the decision.

Based on the foregoing, the Commission does not consider that Calgary has established a basis for an assertion that the Board acted unfairly, that the Load Balancing Decision amounted to a denial of natural justice or that the Board committed an error of law or jurisdiction. Calgary cross examined AG on its evidence at the hearing and filed Argument and Reply Argument. Further, the Board gave Calgary every opportunity at the hearing and in Argument and Reply Argument to explain its proposal.

In the opinion of the Commission, the referenced grounds for review have not established an apprehension that the Board committed an error of law, or jurisdiction, or fact, sufficient to raise a doubt as to the correctness of the Load Balancing Decision.

## 4.6 Irrelevant Considerations / Failure of Natural Justice

Calgary submitted that the Board had not provided parties with notification that it considered prior Board decisions and orders for AP in relation to load balancing and customer account balancing to be relevant with respect to AG and the Load Balancing Proceeding. As a consequence, Calgary argued in the Application that it was denied the opportunity to properly address AP issues in evidence, and was required to address these previous Board decisions in the extensive cross examination by Board counsel during the hearing.

Calgary contended that the Board by considering the use of Carbon to load balance AP to be an issue, fundamentally misdirected itself. Calgary pointed out that there was no dispute on the record that AG imbalances physically manifest themselves on the AP system. Carbon is an AG asset not an AP asset, therefore by proposing the use of Carbon to deal with AG's load balancing; Calgary was appropriately addressing the needs of AG. How AP develops its load balancing rules, and how other shippers on AP deal with their balancing requirements, should not have been an issue in the AG load balancing proceeding.

Calgary submitted there was no indication until Decision 2006-098 that the Board was going to consider as relevant to the Load Balancing Proceeding the negotiation process that lead to settlements of the account balancing and load balancing issues on the AP system.

Calgary objected to the Board's conclusions with respect to Calgary's participation in the AP settlement process. At page 16 of the Load Balancing Decision the Board stated that "the most opportune time for Calgary to have asserted a role for Carbon storage in load balancing on the AP system would have been in the context of the [AP] settlement discussions and subsequent Board process" and that it was "material that Calgary supported the settlement".

Calgary contended that it was the Board that specifically added the issue of the use of Carbon for load balancing to the AG proceeding. Clearly therefore, the matter was not decided in the AP proceeding. Further, the AP settlement process was expressed to be without prejudice to the positions parties would take in other proceedings and, by implication, without prejudice to a party's level of participation at the AP settlement meetings. Calgary also noted that Mr. Johnson's evidence was that he essentially "got run out of the room" when he raised the issue of Carbon storage at an AP settlement meeting[7]. Calgary states:

> Calgary then ceased to participate in the AP process, and chose to confine its efforts to potential use of Carbon for the load balancing of AG alone in the AG process.[8]

Accordingly, in Calgary's submission, it was inappropriate for the Board to indicate that Calgary had supported the AP settlement and to suggest that Calgary should have advanced the use of Carbon in the AP settlement process.

AG submitted that the Retailer Service Application identified the intent of Module 2 as including the processes of maintaining its upstream account on AP within tolerance with a view toward enabling reliable supply. Furthermore, AG's load balancing proposal makes extensive reference to the balancing rules of AP, to which AG is subject. Calgary's own evidence and Opening Statement make extensive references to the AP system and operations and how it interrelates with the AG system. Calgary's statement calls for the Board to ignore the actual conditions under which AG is operating (i.e., AP Account Balancing rules) and consider only the physical load balancing of AG distribution system in isolation from all other facts.

AG pointed out that contrary to Calgary's assertions that it did not support the AP negotiated settlement, Calgary is listed as a participant to the settlement and did not file an objection to the settlement. It therefore was reasonable for the Board to conclude that Calgary supported or did not object to the settlement.

AG disputed Calgary's assertion that there is an obvious procedural unfairness in the Board concluding that Calgary should have been addressing the use of Carbon for load balancing purpose in the previous AP settlement process. Such a use of Carbon assets for load balancing should have been addressed in the AP negotiation process, not after the negotiated settlement has been approved.

[7] Application, page 10
[8] Application, page 11

### *Commission Decision*

Prior Board decisions and orders relating to AP were clearly relevant to the proceeding given the physical, operational and administrative interrelationships of the AP and AG systems and the relationship of the shippers on both systems. Further, these interrelationships were significant issues throughout the Load Balancing Proceeding. These interrelationships highlight the relevance of load balancing and account balancing on the AP system to a consideration of those same issues on the AG system. With respect to the AP negotiated settlements, if Calgary was intending to indicate its opposition to the settlement agreements, it is reasonable to have expected Calgary to have objected to the approval of these settlement agreements. Without taking an active stance in opposition, it was proper for the Board to have noted that Calgary was listed as a participant in the negotiations and did not object to the approval of the settlement agreements. Even if Calgary's attempts to address Carbon in these settlement discussions were not welcomed by other parties, Calgary was fully able to raise its concerns in the subsequent Board processes which considered these settlement agreements. It was Calgary's decision to cease its participation in the AP process, not to object in the Board's settlement application proceedings and to confine its efforts to the AG process.

Based on the foregoing, the Commission does not consider that Calgary has established a basis for an assertion that the Board acted unfairly, that the Load Balancing Decision amounted to a denial of natural justice or that the Board committed an error of law or jurisdiction.

In the opinion of the Commission, the referenced ground for review has not established an apprehension that the Board committed an error of law, or jurisdiction, or fact, sufficient to raise a doubt as to the correctness of the Load Balancing Decision.

## 4.7 Making Erroneous Conclusions of Fact About Use of Carbon for Monthly Load Balancing

Calgary submitted that the Board's conclusion at pages 29 and 30 of the Load Balancing Decision that Calgary's proposal was "overly complex" was based on several erroneous findings of fact and/or improper considerations of issues not part of the proceeding. Further, the Board's conclusion at pages 29 and 30 that the Calgary proposal would impact third party leasing arrangements raised the connection of Carbon to revenue generation, an issue that was being addressed in the Carbon 2005/2006 Jurisdiction Proceeding. In taking revenue generation into consideration, the Board failed to provide Calgary with notice and the opportunity to deal with the matter.

Calgary submitted that the Board's findings at page 29 that Calgary's proposal could involve a requirement to acquire gas volumes for injection into storage, could require AG to forecast daily withdrawal / injection volumes and could require AG to address storage contracting arrangements, were conclusions not supported by evidence.

Lastly, Calgary submitted that the Board purported to make a finding of fact at page 30 that the Calgary proposal would have implications with respect to retail competition without evidence on the record to support such a factual conclusion.

AG submitted that Calgary's expert in cross examination clearly identified the relationship between Calgary's proposed use of the Carbon assets for load balancing and revenue

generation. Calgary's proposal links the determination of the appropriate level of storage capacity to leasing of the balance to third parties and the fees that can be obtained for that leased capacity. The fact that significant contract limitations must also be put in place in order to use the facility for load balancing also means that there would be an impact on the level of fees that could be obtained from third parties. Calgary's proposal relies on a relationship between the use of the facility for load balancing and its use for revenue generation.

AG referred to Calgary's assertion that there was no need to consider the acquisition of gas volumes for injection into storage as AG would simply manage the flow of gas by those parties contracting the use of Carbon storage. AG submitted that this assertion raised the question of how third parties would be required to provide that gas in the event that the Carbon facility is used entirely for load balancing. This further confirms that Calgary's proposal is dependent on the imposition of further restrictions to the rights of third parties to inject their own storage inventories.

Calgary indicated that there would be no need to forecast daily withdrawal and injection volumes on the basis that the decision regarding the use of the facility for revenue generation would occur first, based on forward market prices. What is left over is the withdrawal/injection capacity available for load balancing. AG suggested that Calgary's proposal is nothing more than an opportunity to appropriate Carbon's revenue generation capabilities under the guise of load balancing, even though revenue generation is addressed in another proceeding.

Calgary had taken issue with the finding of the Board that Calgary's proposal could involve a requirement to potentially address contracting arrangements as between AG, the storage operator and third parties with gas in storage in relation to storage and borrowing of gas. AG pointed out that in Table A of Calgary's Evidence, Calgary had indicated that in certain shoulder months, third parties would not have any access to storage facilities. Further there could be a requirement for AG to borrow gas from third parties. Therefore, the Board is simply acknowledging that storage and borrowing relationships will have to be addressed through contractual arrangements.

Calgary had also taken issue with the Board's finding that Calgary's proposal has implications with respect to retail competition given the reduction in volumes that would be controlled and supplied by the DSP/retailers. However, in Calgary's proposal the use of the Carbon facility requires retailers to provide gas supply at a uniform rate without any consideration given to the daily consumptions of customers. Therefore, AG contended that the Board was correct in acknowledging that the purchasing practices of the DSP and retailers is impacted.

AG concluded that the Board fully considered the evidence before it, weighed it carefully and arrived at the conclusions outlined in the Decision. In so doing the Board did not commit any errors of law or jurisdiction.

### *Commission Decision*

The Board in reviewing the Calgary evidence made findings at pages 29 and 30 of the Load Balancing Decision that the Calgary's proposal was overly complex. Calgary had the opportunity when presenting its evidence to ensure that it was thorough, well thought-out and could withstand cross examination. The Commission considers that the Board conducted an appropriate and necessary evaluation of Calgary's proposal coming to conclusions with respect

to potential concerns with the proposal. The cost of implementing the proposal to ratepayers and the impacts to the distribution operations of AG, to the operation of the Carbon facilities and to the storage business carried on at Carbon were obvious matters of concern that did not appear to the Board to have been fully addressed in the Calgary proposal. Similarly, the impact to the volumes of gas which the DSP and retailers would be acquiring and therefore to competition was a logical avenue of inquiry. It is also logical that revenue generation would be considered when evaluating the Calgary proposal which required the leasing of excess storage capacity to third parties. The Commission views it as totally appropriate for the Board to have considered these potential broader regulatory and competitive impacts of the Calgary proposal; in fact, it would have been irresponsible of the Board not to have considered these impacts.

Based on the foregoing, the Commission does not consider that Calgary has established a basis for an assertion that the Board acted unfairly, that the Load Balancing Decision amounted to a denial of natural justice or that the Board committed an error of law or jurisdiction.

In the opinion of the Commission, the referenced ground for review has not established an apprehension that the Board committed an error of law, or jurisdiction, or fact, sufficient to raise a doubt as to the correctness of the Load Balancing Decision.

### 4.8 New Evidence or Change in Circumstances

Calgary submitted in the Application that new evidence or a change in circumstances, not previously before the Board that materially effects the Load Balancing Decision had become available. In particular, Calgary submitted that a November 28, 2006 AG technical meeting with respect to the DFSS showed that the model was highly complex and still at the developmental stage. In addition, new information from AP indicated that implementation of daily account balancing on the AP system was encountering difficulties.

Calgary also pointed to evidence that AP shippers utilized same day gas transactions and not just YD Instrument transactions to adjust their accounts on AP, contrary to suggestions by AG that the only way to balance the AP FSU accounts was at the end of the day.

Calgary also referred to certain metering difficulties between the AP and AG systems suggesting that further delay would occur in the implementation of the daily account balancing. Calgary suggested that this information, if known at the time of the Load Balancing Decision, could have impacted the Decision.

In its submission of June 14, 2007, Calgary referred to a letter from AG dated May 30, 2007 which indicated that the DFSS would not be ready for implementation on November 1, 2007 and that implementation on October 1, 2008 was more likely. Calgary submitted that this was further new evidence which may have had a material impact on the Decision had it been know at the time.

AG agreed that the DFSS was a complex system but that there is no indication that it won't be suitable for account balancing. In respect of Calgary's references to the implementation difficulties on AP, AG pointed out that AP is operating under the terms of a negotiated settlement and that AP chose to go live with implementation and make adjustments as opposed to AG's undertaking of a testing period.

AG stated that it did not at any time indicate that the revised implementation date of Retailer Services of October 1, 2008 was a result of difficulties encountered with the DFSS. Rather, several outstanding matters related to Retailer Services required attention prior to implementation. Further, the Board at page 39 of Decision 2006-098 had directed a one year testing period for the DFSS starting November 1, 2006. In its June 26, 2007 Submission, AG contended that the DFSS model was implemented for testing in November 2006 as directed and that the only reason the DFSS could not be implemented immediately was the need to complete the one year testing period directed by the Board.

Nexen submitted that the revised October 1, 2008 implementation date established by AG allows for the proper development, testing and alignment of the daily customer account and system load balancing procedures approved in Decision 2006-098 and the development of a Gas Settlement System Code. Nexen clarified that it, along with other retailers, had requested further documentation of procedures, as well as expressed a concern that a November 1, 2007 timeline would be difficult to manage. Nexen submitted that there was no material change in circumstances or new evidence and the Board should dismiss Calgary's request.

### *Commission Decision*

In the Application and in its June 14, 2007 submission, Calgary asserted that delays in implementing the DFSS system demonstrate that the DFSS system was complex and barely in the early stage of development when approved by the Board. However, in reviewing the record on the matter, there is no indication that the DFSS system is the cause of the changed implementation timeline for Retailer Services. The DFSS model was implemented for testing in November 2006 as directed by the Board. A one year testing period was required by the Board and preferred by certain stakeholders.

The new facts or change in circumstances suggested by Calgary do not raise a reasonable possibility that they would lead the Commission to materially vary or rescind the Load Balancing Decision.

## 5 CONCLUSION ON APPLICATION WITH RESPECT TO THE LOAD BALANCING DECISION

In the opinion of the Commission, the Application has not established an apprehension that the Board committed an error of law, or jurisdiction, or fact, sufficient to raise a doubt as to the correctness of the Load Balancing Decision.

The new facts or change in circumstances suggested by Calgary do not raise a reasonable possibility that they would lead the Commission to materially vary or rescind the Load Balancing Decision.

The preliminary question required to be addressed by Section 46(5) of the Rules as to whether the Load Balancing Decision should be reviewed is answered in the negative and the Application insofar as it relates to the Load Balancing Decision is denied.

# 6 ISSUES – COST ORDER

## 6.1 Background

Calgary submitted a cost claim in respect of the Load Balancing Decision for $496,077.70.

At page 30 of the Load Balancing Decision the Board made the following finding:

> As a finding of fact, the Board has determined that the Calgary proposal:
> - is overly complicated and unclear both as to annual development of storage requirements and as to the actual daily mechanics to be employed;
> - provides ambiguous benefits when compared to potential risks and costs to be borne by ratepayers;
> - has implications with respect to retail competition given the reduction in volumes that would be controlled and supplied by the DSP/retailers; and
> - indicates a potential to impact third party storage arrangements.
>
> Overall, the Board found the Calgary evidence with respect to monthly account balancing using Carbon storage in connection with load balancing of the ATCO Gas distribution system to be unpersuasive.
>
> For all of the above reasons the Board rejects the Calgary proposal to utilize the Carbon storage facility.

In the Cost Order the Board reduced the legal fees and consultancy fees, other than the fees of Energy Objective, by 20%. With respect to Energy Objective and its principal Mr. Walsh, the Board reduced the fees by 30% for the following reasons at page 4 of the Cost Order:

> With respect to Energy Objective the Board finds that the IRs and cross examination was not overly helpful. The Board also finds that Mr. Walsh's knowledge of how the ATCO system works was somewhat limited. Overall the Board does not find that Energy Objective contributed to the Board's understanding of the issues before it.

## 6.2 Application

Calgary submits that the Board erred in law, or jurisdiction, or fact in reducing the costs claimed by Calgary on the following two grounds:

1. The person who decides must hear
2. Failure to give reasons

## 6.3 The Person Who Decides Must Hear

Calgary submitted that the Board violated the rules of fairness and natural justice in that the decision maker on the Cost Order must have heard the evidence before the Board in the Load Balancing Proceeding. The Cost Order is signed by a Board Member who Calgary submitted did not appear to have had any involvement in the Load Balancing Decision. Nothing in the Cost Order indicates that input has been obtained from the Board Members or staff who were involved in the Load Balancing Proceeding. Calgary highlighted the concern by pointing to the fact that the Cost Order partially denies the costs to Direct Energy Partnership and Direct Energy Regulated Services on the explicit ground that these parties did not file evidence. The

record indicated however that both parties filed evidence and presented a witness panel at the hearing.

### 6.4 Failure to Give Reasons

Calgary argued that the Board failed in its duty of fairness and under section 7 of the *Administrative Procedures and Jurisdiction Act,* by failing to provide sufficient reasons to allow parties to understand the basis on which the decision was made and to assess whether the decision gives rise to grounds of appeal.

Specifically, Calgary referred to the Board's comments referred to above on page 4 of the Cost Order with respect to the evidence of Energy Objective and its principal Mr. Walsh. The Board found that information requests and cross examination were not overly helpful. The Board also found Mr. Walsh's knowledge on how the ATCO system works to be lacking. Calgary submitted that it is unable to determine whether the Board had committed an error of law or jurisdiction without further details on what information was unhelpful and why, and without an explanation of why knowledge of the ATCO system was relevant to the evidence provided by Mr. Walsh.

AG submitted that the Board's reasons in the Cost Order are sufficient to support its conclusions. There was a fair and accurate record upon which the Board could assess the value of Calgary's contribution, based on the impracticability and implementation difficulties of the Calgary proposal and the extensive cross examination of Calgary's witnesses. A disagreement by Calgary on the value of its contribution does not constitute a basis for review.

#### *Commission Decision*

Calgary asserted that nothing in the Cost Order indicates that input had been obtained from Board Members or staff who were involved in the Load Balancing Proceeding. The Commission has been able to confirm that it was the Board's long-standing standard practice, absent special circumstances, for a single, designated Board member to be responsible for finalization of all cost orders. This practice, of a single Board member signing cost orders, whether or not that Board member was part of the Board panel making the decision on the underlying utility application, was well recognized by parties appearing before the Board, including Calgary. Further, the Commission has verified that the Board's internal practices with respect to the preparation of all cost orders did involve extensive consultation with the Board Members and staff assigned to the subject proceeding and that this practice was followed in relation to the Cost Order.

The Cost Order appears to have mischaracterized Direct Energy Partnership and Direct Energy Regulated Services evidence. The Cost Order rather than stating no evidence was presented by Direct Energy, should have stated that partial costs were awarded due to the quality and usefulness of the evidence. However, mischaracterization of one party's evidence does not impact or nullify the Cost Order as a whole or with respect to Calgary's costs in particular.

The Board is not required to give extensive reasons but only sufficient reasons to support its conclusion, and to have fairly considered the record. Calgary has not shown that the evidence was not fully considered in determining the costs awarded. Further, Calgary has failed to

demonstrate that insufficient reasons were provided for the Board's award or to demonstrate that the Cost Order requires reconsideration in any material way.

Based on the foregoing, the Commission does not consider that Calgary has established a basis for an assertion that the Board acted unfairly, that the Cost Order amounted to a denial of natural justice or that the Board committed an error of law or jurisdiction.

In the opinion of the Commission, the referenced grounds for review have not established an apprehension that the Board committed an error of law, or jurisdiction, or fact, sufficient to raise a doubt as to the correctness of the Cost Order.

## 7 CONCLUSION ON APPLICATION WITH RESPECT TO THE COST ORDER

In the opinion of the Commission, the Application has not established an apprehension that the Board committed an error of law, or jurisdiction, or fact, sufficient to raise a doubt as to the correctness of the Cost Order.

The preliminary question required to be addressed by Section 46(5) of the Rules as to whether the Cost Order should be reviewed is answered in the negative and the Application insofar as it relates to the Cost Order is denied.

Dated in Calgary, Alberta on November 3, 2008.

**ALBERTA UTILITIES COMMISSION**

*(original signed by)*

Willie Grieve
Chair