



ATCO Gas North

Disposition of Red Deer Operating Centre
Part B – Final Disposition

December 13, 2006

ALBERTA ENERGY AND UTILITIES BOARD

Decision 2006-127: ATCO Gas North

Disposition of Red Deer Operating Centre, Part B – Final Disposition

Application No. 1421444

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ALBERTA ENERGY AND UTILITIES BOARD

Calgary Alberta

ATCO GAS NORTH DISPOSITION OF RED DEER OPERATING CENTRE PART B – FINAL DISPOSITION

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Application No. 1421444

1 INTRODUCTION

On October 3, 2005 ATCO Gas North (AGN), a division of ATCO Gas and Pipelines Ltd., filed an application (the Application) with the Alberta Energy and Utilities Board (Board or EUB) requesting approval for the sale of AGN's old Red Deer Operating Centre assets pursuant to section 26(2)(d) of the *Gas Utilities Act* (GUA). AGN submitted that it was prepared to defer the issue of the disposition of the proceeds of the sale transaction until the Supreme Court of Canada (SCC) rendered a judgment in the appeal regarding the ATCO Gas South Calgary Stores Block disposition and allocation of proceeds (SCC Stores Block Appeal).¹ As a condition of the purchase agreement, Board approval of the sale was required by December 19, 2005. On December 14, 2005, the Board issued Decision 2005-141,² which approved the sale of the old Red Deer Operating Centre assets from AGN to 1135968 Alberta Ltd. with conditions. The judgment in the SCC Stores Block Appeal was issued on February 9, 2006 (SCC Judgment).³

The division of the Board assigned to hear the Application was Mr. B. T. McManus Q.C. (Chair), Mr. G. J. Miller and Mr. J. I. Douglas, FCA.

The following parties registered as interveners in this proceeding:

- Consumers Coalition of Alberta (CCA)
- Public Institutional Consumers of Alberta (PICA)
- Alberta Urban Municipalities Association (AUMA)
- City of Edmonton (Edmonton)
- Nova Gas Transmission Ltd. (NGTL)
- AltaGas Utilities Inc. (AUI)
- Office of the Utilities Consumer Advocate (UCA)

2 BACKGROUND

On September 26, 2005 AGN reached an agreement with 1135968 Alberta Ltd. for the sale of AGN's old Red Deer Operating Centre located at 5439 - 47th Street, Red Deer, Alberta. The assets included in the sale were 0.967 hectares (2.39 acres) of fenced yard area⁴ with a two storey

¹ Supreme Court of Canada Case #30247

² Decision 2005-141 – ATCO Gas North Disposition of Red Deer Operating Centre (Application 1421444) (Released: December 14, 2005)

³ *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4

⁴ BR-AGN 2(a) Attachment 1, p. 4 of 70

commercial/light industrial structure with a total area of approximately 18,900 square feet.⁵ The net proceeds from the transaction were \$2.02 million.

In Decision 2005-141 dealing with the first part of the Application the Board stated the following:

This Decision is a partial decision with respect to the Application and therefore once the Supreme Court of Canada has issued its decision, AGN is directed to submit a filing addressing the disposition of the proceeds from the sale.

In the Order section the Board stated:

IT IS HEREBY ORDERED THAT:

- (1) The sale of the old Red Deer Operating Centre is approved.
- (2) ATCO Gas North will hold the net proceeds from the sale in trust until the disposition of the net proceeds is decided by the Board.
- (3) After the Supreme Court of Canada releases a decision in the Calgary Stores Block matter, ATCO Gas North shall submit a filing to the Board to approve the disposition of the net proceeds of the sale of the Red Deer Operating Centre.
- (4) The issue of allocation of the net proceeds between land and building value is a matter that will be determined in the disposition of proceeds filing.

Process

Subsequent to the issue of the SCC Judgment and as per Order (3), AGN submitted a letter on February 16, 2006 requesting the Board "...approve the disposition of the Red Deer assets in accordance with the guidance provided by the Supreme Court of Canada...".

In the submission AGN stated:

In the Stores Block Appeal, the Supreme Court of Canada concluded that the full amount of the gross proceeds of the sale of the Stores Block belonged exclusively to ATCO Gas (at paragraphs 86 and 87). ATCO Gas submits that the same finding is applicable to the Red Deer assets...

The Net Book Value of the Red Deer assets at the time that they were removed from utility service was \$1,089,000. In addition, ATCO Gas incurred non-utility depreciation expense in the amount of \$28,000 prior to the closing of the sale. The net book value of the assets at the time of sale, therefore, amounted to \$1,061,000. The resulting gain on sale (pre-tax) amounts to an estimated \$959,000.

In accordance with the Supreme Court of Canada judgment in the Stores Block Appeal, ATCO Gas seeks the Board's confirmation that shareowners are entitled to the entire proceeds of the sale of the Red Deer assets, which would result in a pre-tax gain on sale to shareowners of an estimated \$959,000.

⁵ Ibid, p. 19 of 70

By letter of February 28, 2006, the Board requested comments from interveners by March 20, 2006 and reply from AGN by March 27, 2006. The CG responded on March 8, 2006 suggesting that notice of the process should be extended to interested parties other than those registered due to “the far reaching implications of this decision.” On March 9, 2006 AGN provided its reply and argued against the CG proposal. On March 16, 2006 the CG revised its request and instead asked the Board to defer consideration of this application pending the Board’s consideration of the ATCO Gas South Calgary Stores Block (Stores Block) matter.

After considering the submissions of the parties and in recognition of the broad issues resulting from the SCC Judgment, on March 16, 2006 the Board issued a letter indicating it would suspend the schedule for this Application. The Board stated it would, in due course, provide a new schedule and indicate how to proceed.

On March 21, 2006 The City of Calgary submitted a letter suggesting the Board dispose of the Stores Block matter before completing consideration of the Application. On April 20, 2006 the Board issued a letter essentially agreeing with Calgary to complete the Stores Block matter before proceeding with this Application. In a letter from the Board on March 22, 2006 it had stated that the Stores Block matter “would be dealt with in the context of ATCO Gas’ Compliance Filing to the Board Decision 2006-004 (Application No. 1452948).”

Following the release of Decision [2006-083](#),⁶ dated August 11, 2006, the Board received a letter on August 16, 2006 from AGN requesting the Board approve the Application. AGN noted that Decision 2006-083 had stated “that the direction of the Supreme Court is clear with respect to the proceeds arising from the disposition of the Calgary Stores Block” and “[o]n this basis, the Board ordered that payment of the entire proceeds of the sale be issued to ATCO.” AGN requested that the Board confirm that shareholders were entitled to the entire proceeds of the sale of the old Red Deer Operating Centre in the amount of \$959,000.

On August 29, 2006, the Board issued a letter requesting comments from registered interveners by September 7, 2006 and reply from AGN by September 14, 2006. The CG submitted an additional unsolicited letter on September 15, 2006 in which it responds to comments made by AGN regarding cost recovery for this proceeding.

The Board considers that the record for this proceeding closed on September 15, 2006.

3 ISSUES

In the Application AGN sought two distinct approvals. First, AGN requested that the Board approve the sale of the Red Deer Operating Centre assets to 1135968 Alberta Ltd. Second, AGN asked the Board to defer the issue of the disposition of the net proceeds of the sale until after the SCC rendered a decision in the Stores Block appeal. In Decision 2005-141 the Board approved the sale and deferred further consideration of the disposition of the proceeds of the sale until after

⁶ Decision 2006-083 – ATCO Gas 2005-2007 General Rate Application – Phase I Compliance Filing to Decision 2006-004 Part B (Application 1452948) (Released: August 11, 2006)
Decision [2006-004](#) – ATCO Gas 2005-2007 General Rate Application Phase I (Application 1400690) (Released: January 27, 2006) SEE ALSO Decision [2006-014](#) for Errata to this Decision (Released: February 24, 2006)

the SCC Judgment. The issue to be dealt with in this Decision is consideration of the disposition of the proceeds of the sale.

The old Red Deer Operating Centre was removed from utility service on April 18, 2005 concurrent with the completion and occupation of AGN's new Red Deer facility. The need for a new facility was approved in Board Decision [2003-072](#), ATCO Gas 2003/2004 General Rate Application, dated October 1, 2003.

At page 4 of Decision 2005-141 the Board stated the following:

The assets are no longer being used to provide gas distribution service and they have been removed from the utility rate base. There has been no evidence or argument brought forward that the safe and reliable operation of the utility or customer service has been adversely impacted by the fact that the assets are no longer being used to provide gas distribution service. Given this, and in the absence of any evidence to the contrary, the Board expects that if it approves the sale of the assets, there should not be an adverse impact on the service levels or the safe and reliable operation of the utility. With respect to financial impacts, the Board notes that the net proceeds from the sale will exceed all the valuations as shown in Table 1. Based on these factors, the Board finds that the disposition of the old Red Deer Operating Centre should not harm customers and should be approved.

However, it should be noted that by approving the sale, the Board is not approving AGN's proposed allocation of proceeds between land and buildings. This matter will be decided subsequently in the same proceeding as the disposition of the gain on sale.

At page 5 of Decision 2005-141 the Board also stated:

Given the lack of judicial clarity regarding the jurisdiction of the Board in these matters, the Board agrees that deferring the matter of the allocation of net sale proceeds, until after the Supreme Court of Canada's decision is released, is appropriate. It is anticipated that this deferral will provide for greater certainty regarding the Board's jurisdiction regarding disposition of the sale proceeds and also result in a more efficient process. However, the Board must emphasize that its agreement to a deferral of the disposition of the sale proceeds does not affect its jurisdiction to consider the disposition and AGN must still obtain Board approval for its proposed disposition. Further, as indicated in section 4.1 above, this includes obtaining approval for the allocation of the sale price between land and buildings.

The Board considers there are three sub-issues to be determined related to the disposition of the gain on sale: (1) the impact of the SCC Judgment; (2) the nature of the disposition (whether it is an ordinary or extraordinary retirement); and (3) the allocation of the sale price between land and buildings.

4 DISCUSSION OF ISSUES

4.1 Impact of the Supreme Court of Canada Judgment

In AGN's August 16, 2006 letter, it requested the Board approve the disposition of the proceeds of sale pursuant to the methodology set out in the SCC Judgment and in Decision 2006-083, specifically that AGN is entitled to the proceeds of sale in the amount of \$959,000. The CG submitted that the Board should use the sale proceeds to fund a portion of the cost of the new facility that AGN acquired.

The CG argued that the SCC Judgment:

...is clear in its determination that the Board has authority to direct the manner in which the proceeds of sale of a regulated asset are to be used - provided they are not allocated to customers, which was the sole issue considered by the SCC. It is equally clear that a direction by the Board as to the use of these proceeds, in a manner consistent with the Court's decision, would not constitute an "allocation" of the sale proceeds to AGN's shareholder or to its customers.

As support for its proposition that the proceeds be used to fund a portion of the cost of the new facility, the CG cited the following passage from the majority, per Bastarache J., in the SCC Judgment:

In fact, it is not necessary for the Board in carrying out its mandate to order the utility to surrender the bulk of the proceeds from a sale of its property in order for that utility to obtain approval for a sale. The Board has other options within its jurisdiction which do not involve the appropriation of the sale proceeds, ...⁷

The CG stated that the options open to the Board, which the CG submitted are not dependent upon a Board finding of harm, included:

for example, a requirement that "... the utility company gives undertakings regarding the replacement of the assets ...", "... that the utility reinvest part of the sale proceeds back into the company ..." or simply apply the gain-on-sale to "the setting of future rates".⁸

The CG submitted that using the proceeds in such a way would not constitute an "allocation" of the sale proceeds to AGN's shareholder or to its customers.

AGN responded to this argument stating:

The conditions which the Court notes might be imposed, to require replacement of assets and/or re-investment as addressed in para. 44 of the Court's decision, are in the context of the preceding sentence. The reference, and the context within which such conditions may be imposed, is sales which "affect the quality and/or quantity of the service offered by the utility or create additional operating costs for the future".... In this case, however, the assets clearly were not required for regulated service. The Board agreed with that. Indeed, other assets now perform their former functions.⁹

⁷ SCC Decision, para. 77

⁸ SCC Decision, para. 78

⁹ AGN September 14, 2006 submission, p. 2

The CG did not appear to take issue with the fact that the question of harm was addressed in Decision 2005-141. In Decision 2005-141, in approving the sale of the Red Deer Operating Centre, the Board stated:

The assets are no longer being used to provide gas distribution service and they have been removed from the utility rate base. There has been no evidence or argument brought forward that the safe and reliable operation of the utility or customer service has been adversely impacted by the fact that the assets are no longer being used to provide gas distribution service. Given this, and in the absence of any evidence to the contrary, the Board expects that if it approves the sale of the assets, there should not be an adverse impact on the service levels or the safe and reliable operation of the utility. With respect to financial impacts, the Board notes that the net proceeds from the sale will exceed all the valuations as shown in Table 1. Based on these factors, the Board finds that the disposition of the old Red Deer Operating Centre should not harm customers and should be approved.¹⁰

Having made a determination that no harm arose from the sale of the Red Deer Operating Center, the Board considers the comments made in Decision 2006-083 to be instructive:

All parties agree, as does the Board, that the question of harm with respect to the disposition of the Calgary Stores Block was addressed in Decision 2001-78 and is not now open for re-determination. Given this determination that no harm arose as a result of the asset disposition the Supreme Court concluded that:

‘In my view, as I have already stated, the power of the Board to allocate proceeds does not even arise in this case. Even by the Board's own reasoning, it should only exercise its discretion to act in the public interest when customers would be harmed or would face some risk of harm. But the Board was clear: there was no harm or risk of harm in the present situation (Decision 2002-037; para. 54):

With the continuation of the same level of service at other locations and the acceptance by customers regarding the relocation, the Board is convinced there should be no impact on the level of service to customers as a result of the Sale. In any event, the Board considers that the service level to customers is a matter that can be addressed and remedied in a future proceeding if necessary.

After declaring that the customers would not, on balance, be harmed, the Board maintained that, on the basis of the evidence filed, there appeared to be a cost savings to the customers. There was no legitimate customer interest which could or needed to be protected by denying approval of the sale, or by making approval conditional on a particular allocation of the proceeds.’

The Supreme Court concluded further:

‘In consequence, I am of the view that, in the present case, the Board did not identify any public interest which required protection and there was therefore, nothing to trigger the exercise of the discretion to allocate the proceeds of sale.’

¹⁰ Decision 2005-141, p. 4

In light of the Board’s finding of no harm and the guidance supplied by the Supreme Court, the Board does not consider that it has the jurisdiction, in the circumstances of the Calgary Stores Block proceeding, to attach conditions to the disposition of the sale proceeds or to consider the proceeds of sale as utility revenue for purposes of Section 91(1)(a) of the PUBA and Section 40(a) of the GUA.¹¹

The CG did not agree with AGN’s submission that the circumstances in the Calgary Stores Block case are the same as those in this case. The CG made a number of submissions in this regard; however, the Board accepts that the general principles articulated above from Decision 2006-083 apply equally to this case given the Board’s previous finding of no harm with respect to the sale of the old Red Deer Operating Centre. Further, the Board does not accept the CG’s position that it has jurisdiction to impose conditions of the nature the CG suggests, given that the Board previously made a determination that no harm resulted from the sale. However, the Board considers that the comments made by the majority in the SCC Judgment do suggest that such options are open to the Board in the appropriate circumstances. In future cases the Board expects to examine further the implications of the SCC Judgment and the impact of this on the Board’s assessment of harm when considering asset disposition applications.

4.2 Nature of the Disposition

The CG submitted that the Board had not yet determined whether the sale of assets constituted an ordinary retirement or an extraordinary retirement pursuant to Alberta Regulation 546/63, Uniform Classification of Accounts.¹² AGN considered this submission to be incorrect. AGN was of the view that this had been determined in the previous decision approving the sale, Decision 2005-141. AGN stated that its application to the Board was for approval of an asset disposition outside the ordinary course of business; it is not required to seek special approval for dispositions in the ordinary course.

The Board agrees with AGN on this issue. The fact that AGN applied to the Board for approval of the asset disposition under section 26(2)(d) of the GUA which requires dispositions outside the ordinary course of business to be first approved by the Board, and that this is the basis upon which the Board disposed of the first part of the application in Decision 2005-141 indicates that this determination is not an issue for this proceeding. However, this latter determination is distinguished from a determination of whether or not the retirements of the assets are “Ordinary” or “Extraordinary” in accordance with Alberta Regulation 546/63 (Uniform Classification of Accounts), which provides the criteria for “Ordinary” and “Extraordinary” retirements. The Uniform Classification of Accounts will be considered in the discussion found in the next section of this Decision.

4.3 Allocation of Sale Price Between Land and Buildings

In Decision 2005-141 the Board ordered that the issue of the allocation of the net proceeds between land and building value would be determined in this part of the proceeding.

The Board notes that AGN obtained three estimates of the market value for the old Red Deer Operating Centre from a consultant, Soderquist Appraisals Ltd. Two valuations were performed

¹¹ Decision 2006-083, p. 18

¹² General Instructions to the Canadian Gas Association Uniform Classification of Accounts for Natural Gas Utilities Under the Jurisdiction of the Public Utilities Board of the Province of Alberta, Public Utilities Board Order No. 26402, dated November 29, 1963, Alberta Regulation 546/63

of the land with improvements and the final appraisal considered the value of the land as a vacant lot. The results of these valuations with the most recent assessment for tax purposes are included in Table 1:

Table 1. Red Deer Operating Centre Valuations

Income Approach to Value	\$1,600,000 ¹³
Direct Comparison Approach	\$1,500,000 ¹⁴
Value as Vacant Lot	\$989,000 ¹⁵
2004 Tax Assessment	\$1,036,700 ¹⁶

The allocation of the gross proceeds of the sale set out in the Purchase Agreement was as follows:¹⁷

Land value	\$1,800,000
Building value	\$300,000 ¹⁸

The Board considers that the allocation between land and buildings is important for revenue requirement purposes. The Board recognizes that the allocation agreed to in the purchase contract between vendor and purchaser is what will be considered for income tax purposes by the Canada Revenue Agency. However, for regulatory purposes a different allocation may be approved by the Board.

The parties raised the topic of accounting of the retirement in the context of the Uniform Classification of Accounts.

In response to BR-AGN-1 (d) AGN stated:

...As per the Uniform Classification of Accounts at page 9 under Section 8(B), ATCO Gas would recognize the gain on the sale of land in account No. 351, "Profit from Sale of Plant" if material, or account No. 319, "Other Income" if immaterial. Furthermore, as per the Uniform Classification of Accounts at page 56, in the event that ATCO Gas found that the sale of the land should be charged to account No. 351, it must seek EUB approval to do so.

With respect to the sale of the depreciable property, ATCO Gas would note that there is an estimated loss on the sale of approximately \$767,000. As a result, a further decision as to whether the depreciable property loss is material or not (refer to account No. 355 description at page 57 of the Uniform Classification of Accounts) must be made.

In their submission of September 7, 2006 the CG stated:

¹³ BR-AGN 2(a) Attachment 1, p. 37 of 70

¹⁴ Ibid

¹⁵ BR-AGN-2(a) Attachment 2, p. 25 of 35

¹⁶ BR-AGN-2(b) Attachment, p. 1 of 1

¹⁷ Gross proceeds of the sale were \$2.1 million (BR-AGN-2(c) Attachment, p. 1 of 1)

¹⁸ BR-AGN-2(c) Attachment, p. 1 of 1

The SCC clearly delineated the Board's primary mandate being to set just and reasonable rates. [SCC Judgment, para 60] In dealing with the sale of the Red Deer Operating Centre the Board has not determined if the disposition constitute [*sic*] an ordinary retirement or an extraordinary retirement as defined under the regulations.

The Board agrees that a determination should be made. In section 8 of the Uniform Classification of Accounts, extraordinary retirements are defined as resulting "from causes not reasonably assumed to have been anticipated or contemplated in prior depreciation or amortization provisions." The Board considers that the disposition is appropriately considered an extraordinary retirement. Section 8 goes on to discuss to what accounts gains and losses are to be charged. The CG did not dispute AGN's proposed allocation of sale proceeds between land and buildings and the Board is prepared to accept this allocation in this case.

In accordance with the treatment of the proceeds as an extraordinary retirement, the Board approves the loss on the sale of the building to be charged to Account No. 355, Loss from Sale or Retirement of Plant. The Board also approves the gain on sale of the land to be credited to Account No. 351, Profit from Sale of Plant. Accordingly, the Board directs AGN to account for the gain and loss on sale in this manner and given the Board's determination regarding the absence of harm, the Board approves that the net gain on sale payable to AGN is \$959,000.

5 ORDER

IT IS HEREBY ORDERED THAT:

- (1) In accordance with Alberta Regulation 546/63, Uniform Classification of Accounts, ATCO Gas North shall account for the gain on sale for land in account No. 351, Profit from Sale of Plant, and for the loss on the sale of the buildings in account No. 355, Loss from Sale or Retirement of Plant, such that the net proceeds on sale payable to ATCO Gas North is \$959,000.

Dated in Calgary, Alberta on December 13, 2006.

ALBERTA ENERGY AND UTILITIES BOARD

(original signed by)

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

(original signed by)

Gordon J. Miller
Member

(original signed by)

J. I. Douglas, FCA
Member