ATCO Gas South

2005/2006 Carbon Storage Plan
Preliminary Questions

June 15, 2005

Alberta Energy and Utilities Board

ALBERTA ENERGY AND UTILITIES BOARD
Decision 2005-063: ATCO Gas South
2005/2006 Carbon Storage Plan – Preliminary Questions
Application No. 1357130

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640 – 5 Avenue SW
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T2P 3G4

Telephone: (403) 297-8311
Fax: (403) 297-7040

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Calgary Alberta

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1 INTRODUCTION

On August 16, 2004, ATCO Gas South (AGS) (an operating division of ATCO Gas and Pipelines Ltd.) submitted an application to the Alberta Energy and Utilities Board (the Board) regarding the 2005/2006 Carbon Storage Plan (the Application). The submission by AGS was made in compliance with Decision 2004-022[1] and the Board's letter of July 23, 2004 referred to below.

During the course of this proceeding only the Consumers Group and the Utilities Consumer Advocate (collectively the CG) and the City of Calgary (Calgary) have filed intervener submissions.

The Panel assigned to deal with the Application consists of B. T. McManus, Q.C. (Presiding Member), C. Dahl Rees, LL.B., Acting Member and J. I. Douglas, FCA, Member.

2 BACKGROUND

The procedural background to this Decision is complex, necessitating a recitation of a certain amount of detail to assist the reader in understanding the chronology of events and the context of this Decision.

On June 10, 2004, the Board received a letter from the CG requesting the Board to:

(a) instruct AGS to initiate, as soon as possible, a collaborative process to discuss alternative proposals for the use and operation of the Carbon storage facilities for the gas year 2005/2006; and
(b) initiate a proceeding "as soon as can be conveniently arranged" to address the jurisdictional concerns expressed by AGS.

The Board issued a letter dated July 23, 2004 providing direction on the two matters raised by the CG. With regard to a collaborative process to discuss alternative proposals for the use and operation of the Carbon storage facilities (Carbon or the Carbon Facilities) for the gas year 2005/2006, the Board noted the comments of AGS in its letter of July 8, 2004 and agreed that, in the circumstances, such a process would not have a realistic prospect of success. Accordingly, the Board did not require AGS to establish such a process.

[1] Decision 2004-022 – *ATCO Gas South 2004/2005 Carbon Storage Plan*, dated March 9, 2004

With regard to CG's request to initiate a proceeding on the jurisdictional issues relating to Carbon, the Board considered that these jurisdictional issues could most conveniently be dealt with in the context of the Board's direction provided in Decision 2004-022, requiring AGS to file an application by August 1, 2004 for a 2005/2006 Carbon Storage plan.

In the July 23, 2004 letter the Board established a procedural schedule and directed AGS to file an application by August 16, 2004 addressing the following matters:

(a) the 2005/2006 Carbon Storage plan application contemplated by Decision 2004-022;
(b) the basis upon which AGS takes issue with the Board's jurisdiction over the Carbon Storage Facility; and
(c) a listing of those portions of prior proceedings which AGS considers could usefully comprise part of the new proceeding.

On August 16, 2004, AGS submitted the Application. AGS amended the Application by letter of August 23, 2004 by withdrawing the 16.7 petajoule storage option for utility purposes.

Calgary, in letters of August 20, 2004 and August 26, 2004, submitted that the Application was deficient with respect to information related to AGS' position that all costs and revenues associated with Carbon should be removed from the distribution tariff. Calgary was also of the view that the Application was deficient in identifying the portions of the record of previous proceedings that may be relevant. Following AGS' amendment to the Application, Calgary submitted that AGS should be directed to file a new application that would have sufficient detail to satisfy Rule 19 of the *Alberta Energy and Utilities Board Rules of Practice*, AR 101/2001 (Board Rules).

On September 13, 2004, the Board issued a letter[2] in response to the issues brought forward by Calgary. The Board assumed from the amendment to the Application that AGS was proposing the lease of the entire Carbon storage capacity to ATCO Midstream at the rate of $0.45/gigajoule (GJ) last approved by the Board in Decision 2004-022. The Board agreed with Calgary that AGS had not provided the detail that would be required by the Board and interveners to assist the Board in reaching a conclusion as to the merits of the Application. However, while Calgary had suggested that a refiling of the Application was in order, the Board preferred to stay as close as possible to the original schedule.

The Board considered that an issues list would assist in focusing information requests, evidence and the conduct of an oral hearing, should the latter prove to be necessary. Accordingly, the Board prepared an issues list (the Issues List)[3] as a guide to parties with respect to matters that the Board considered to be relevant in this proceeding. As stated in the Issues List, it was not intended to be exhaustive, and parties could address, as they saw fit, other issues which might be relevant to the proceeding.

The Board considered that an interrogatory process alone might not be sufficient to provide an adequate informational base for proceeding with the Application, with respect to the appropriate price to be paid to ATCO Midstream for a lease of the entire Carbon storage facility, should the Board determine that the Carbon assets remain used or required to be used. Accordingly, AGS

[2] The Board's letter of September 13, 2004 is attached as Appendix 2
[3] See attachment to Board's letter of September 13, 2004 attached as Appendix 2

was directed to file evidence on or before October 4, 2004 in support of AGS' position on the appropriate consideration to be paid by ATCO Midstream to AGS in respect of the storage lease. The Board required AGS to address the requirements of the ATCO Group Code of Conduct in its filing. The Board also issued a revised schedule for the proceeding.

By letter dated September 20, 2004, AGS submitted a Motion to Stay Proceedings (the AGS Motion) pursuant to Rule 9 of the Board Rules. The AGS Motion requested that the proceeding be stayed until AGS's leave application to the Alberta Court of Appeal with respect to Decision 2004-022 (Leave to Appeal) and any appeal for which leave may be granted was decided. AGS submitted that the proceeding should only continue, if at all, for the limited purpose to protect the status quo until the Court proceedings were completed. By letter dated September 21, 2004, the Board requested comments on the AGS Motion by interested parties by September 24, 2004 and reply by AGS on September 27, 2004.

The Board also received a letter dated September 21, 2004 from AGS making a Procedural Request (the Procedural Request) with respect to certain information requests (IRs). The Board issued a letter dated September 22, 2004 requiring comments from interested parties to be submitted together with their comments on the AGS Motion.

The Board received comments on the Procedural Request and on the AGS Motion from Calgary and from the CG by correspondence dated September 22, 2004 and September 24, 2004 respectively, and from AGS by correspondence dated September 27, 2004.

AGS had advanced two grounds in support of the AGS Motion as follows:

(a) Deference to Court of Appeal/Multiplicity of Proceedings; and
(b) The Board is Conflicted

After consideration of the submissions of AGS and of the Interveners with respect to the Motion, the Board denied the AGS Motion by letter dated September 29, 2004.

In disposing of AGS' Procedural Request the Board noted that the determination of the answers to the questions posed in Part 1 of the Issues List are key to whether or not the information highlighted in Part 3 of the Issues List is necessary. In order to be efficient the Board had considered it reasonable to have all information available early in the process. However, in balancing the effort required to produce historical information beyond 10 years with the potential benefit such prior information might provide to the Board in considering the matters presently before it, the Board did not require the production of historical information more than 10 years old when AGS responded to certain IRs. AGS would have until October 8, 2004 to respond to certain other IRs.

AGS submitted two procedural requests by letter dated October 4, 2004 (the AGS Second Procedural Request) with respect to Part 2 of the Issues List. On October 14 and 15, 2005 respectively, Calgary and the CG each submitted a motion, both in respect of obtaining additional responses from AGS in respect of certain IRs (the IR Motions). AGS submitted the outstanding IR responses on October 8, 2004.

On December 23, 2004 the Board issued a procedural letter.[4] The purposes of the letter were to:

(a) provide the ruling of the Board in respect of the AGS Second Procedural Request;
(b) consider the IR Motions; and
(c) request submissions from the parties on several Preliminary Questions set out in Appendix A to the Board's letter (the Preliminary Questions)[5] related to the appropriate scoping to be utilized by the Board when considering whether an asset is "used or required to be used to provide service to the public within Alberta" or should otherwise remain in rate base.

With respect to AGS's request contained in the AGS Second Procedural Request, for clarification on the leasing arrangements for the uncontracted Carbon capacity with ATCO Midstream, the Board ruled that it would not proceed with a review of the terms and conditions of the Uncontracted Capacity Agreement (being the contract between AGS and ATCO Midstream for the uncontracted capacity of Carbon) in the context of the 2005/2006 storage year (Part 2(a) of the Issues List) at this time. It would, however, proceed in due course with a review of the consideration to be paid by ATCO Midstream for the uncontracted storage capacity (Part 2(b) of the Issues List) should it determine that it is appropriate for Carbon to remain in rate base. In Section 1.1.3.1 of the December 23 letter, the Board provided reasons for its ruling.

With respect to AGS' request for directions to interveners set out in the AGS Second Procedural Request, the Board viewed questions with respect to adjustment to revenue requirement, should the Board determine Issues 1(b) and (c) in the negative, to be relevant to Part 3 of the Issues List. The Board however, did not consider it necessary at the time to direct interveners to address the particular question[6] suggested by AGS. The Board considered that the positions of interveners on this matter could be pursued by AGS through IRs or cross examination in relation to Part 3 matters, if required, in the Part 2/3 Module discussed in Section 4.3 of the December 23, 2004 letter. The Board also noted that an understanding of AGS' position on this matter would be of assistance in its consideration of Part 3 matters.

The Board further considered in the December 23, 2004 letter, that the purpose of preparing the Issues List was to provide for a relatively expeditious and focused process to address the question as to whether Carbon is used or required to be used to provide service to the public, or whether it should otherwise remain in rate base, and the consequences of making either an affirmative or negative determination on this question. It was apparent to the Board that matters relating to Carbon storage continued to raise a number of complex questions. In light of the events that had transpired in the proceeding, the Board believed that addressing issues in stages would be more effective going forward. The Board decided to proceed with Part 1 matters before proceeding with either Part 2 or Part 3 of the Issues List.

In respect of the IR Motions, the Board considered that these motions and the AGS response raised an important initial question as to the proper scope to be utilized by the Board when considering whether an asset is "used or required to be used to provide service to the public

[4] The Board's letter of December 23, 2004 is attached as Appendix 3.
[5] Refer to Appendix C of the December 23, 2004 letter, which is attached as Appendix 3 to this Decision.
[6] "What is the appropriate mechanism for, and what is the basis of the Board's jurisdiction to direct, a refund to AGS of any net profits realized from operation of the Carbon storage business in the event it is determined that the Board has no jurisdiction to direct a 2005/2006 storage plan or to otherwise direct the use of the Carbon storage business or its assets."

within Alberta" or should otherwise remain in rate base. The Board believed the scope of the proceeding should be addressed before it considered either the IR Motions or Part 1 of the Issues List.

Accordingly, the Board did not make determinations at the time on the merits of each of the IR Motions, but decided to proceed to address the Preliminary Questions as set out in the following Sections of this Decision.

AGS, Calgary and the CG provided their submissions on the Preliminary Questions on January 24, 2005 and reply submissions on February 7, 2005.

On January 14, 2005, the Board received correspondence from AGS (the AGS Letter) seeking confirmation on certain matters as outlined in the correspondence with respect to compliance with the ATCO Inter-Affiliate Code of Conduct. On January 20, 2005 the Board received correspondence from counsel on behalf of Calgary (the Calgary Letter) taking issue with several of the points raised in the AGS Letter and requesting the Board's advice as to any further process that the Board may wish to establish with respect to the AGS Letter. The Board responded by letter dated February 17, 2005.

In the Board's February 17, 2005 letter, the Board noted the comments in the Calgary Letter and indicated that further process in respect of the AGS Letter would not be required. The Board confirmed that it was prepared to proceed with respect to the 2005/2006 storage year without a review of the terms and conditions of the arrangements between AGS and ATCO Midstream with respect to the Uncontracted Capacity Agreement, other than price. The Board confirmed that on a go forward basis for years beyond the 2005/2006 storage year, to the extent the Board might continue to consider Carbon storage related matters, it would be appropriate for AGS to turn its attention to a more explicit and comprehensive agreement as befitting For Profit Affiliate Service arrangements in accordance with the Code of Conduct.

On March 8, 2005 AGS filed correspondence (the Withdrawal Letter) with the Board, which purported to withdraw "…all plans, proposals or options previously filed by it in this proceeding pursuant to the Board's orders, including Direction #5 in Decision 2004-022." The Withdrawal Letter also confirmed at page 5 statements made by AGS in its submissions on the Board's Preliminary Questions dated January 24, 2005 and February 7, 2005 referring to "…management's decision not to include any Carbon-related costs or revenues in connection with the 2005/2006 storage operation in its jurisdictional rates for distribution service, effective April 1, 2005." At page 6 AGS provided "notice that all related riders (Riders G, H, I) will be discontinued effective April 1, 2005."

By letter dated March 11, 2005, Calgary and the CG jointly provided a submission (Calgary/CG Letter) with respect to the Withdrawal Letter. AGS provided its reply on March 21, 2005 (AGS Reply).

The Board issued a letter dated March 23, 2005 in respect of the Withdrawal Letter. The Board referred to the AGS Motion and noted that it had been denied by the Board at the time for the reasons set out in the Board's correspondence of September 29, 2004. The Board noted that the AGS Motion had raised the possibility of an order or direction preserving the status quo and the positions of AGS and the interveners. The Board considered that such an order would be appropriate in the circumstances related to the Withdrawal Letter.

The Board decided to issue Interim Order U2005-133 (Interim Order) concurrently with its letter of March 23, 2005. The Interim Order directed AGS to maintain Carbon and all related assets in rate base, authorized a lease of the entire storage capacity to ATCO Midstream at a placeholder rate equal to the existing storage rate of $0.45/GJ and directed AGS to maintain Rate Riders G, H and I. The Interim Order was effective March 23, 2005 and is to remain in place until such time as the Board determines that there has been a final disposition of:

(a) the matters presently before the Court of Appeal;
(b) the matters being considered by the Board relating to Carbon;
(c) any additional matters relating to Carbon that the Board may be required to decide as a result of subsequent filings of AGS or an intervener; and
(d) any additional matters resulting from any direction from the Court of Appeal.

Accordingly, the Interim Order is to remain in place until such time as it is terminated or otherwise modified by the Board. In accordance with the Interim Order, AGS is required continue to include in revenue requirement all operating expenses, working capital, depreciation, taxes, return, and other related costs and is to continue to account for applicable revenue credits, in respect of the Carbon related assets in the same manner as it has previously done, with any necessary adjustments, until such time as the Board may otherwise determine. AGS may apply for new capital additions to rate base in the ordinary course during the time period that the Interim Order is in effect. It is contemplated that at the time that the Interim Order is terminated, the Board will address any required adjustments between AGS and ratepayers to reflect the Board's jurisdictional and rate base findings.

3 PURPOSE OF DECISION

The purpose of this Decision is to provide the Board's findings in respect of each of the Preliminary Questions.

The Board referred to the purpose of the Preliminary Questions in its letter of December 23, 2004 as follows:

> The decision resulting from the Preliminary Questions Module will result in a better definition of the appropriate scope for a consideration of whether Carbon is used or required to be used or should otherwise be required to remain in rate base. In particular, the Board will determine which use(s) selected from a spectrum which includes the existing use and the range of possible alternative uses of Carbon, is (are) appropriate for consideration in addressing the issues set out in Part 1 of the Issues List.[7]

The Board also addressed how its findings in respect of the Preliminary Questions would be employed in the balance of the Board's process:

> …once the Board has considered the Preliminary Questions and determined the appropriate scope of uses of Carbon to be applied in a consideration of whether the assets are used or required to be used or should otherwise remain in rate base, the Board would then turn to a consideration of the detailed circumstances specific to Carbon in making its

[7] Board's letter dated December 23, 2004, p. 10

> determination on Part 1 of the Issues List. Circumstances particular to Carbon, including the history of its usage, prior Board decisions, the retail sale to DERS, recent legislation, etc. would then be considered in determining if Carbon is used or required to be used to provide service to the public or should otherwise remain in rate base.
>
> Following a determination by the Board on Part 1 matters, the Board would then proceed to deal with Part 2 of the Issues List, if the facility continues to be used or required to be used or should otherwise continue in rate base. Alternatively, if the Board determines that Carbon should no longer be included in rate base, the Board will proceed with Part 3 of the Issues List.[8]

4 AGS INITIAL OBJECTION TO PRELIMINARY QUESTIONS

AGS argued that the first and only "Preliminary Question" is the jurisdictional question of whether the Board has the "ability to direct AGS to implement the 2005/2006 storage plan".[9] To this end AGS explained further by stating at page 9 of the AGS Reply Submission:

> In the context of the present proceeding, the threshold question is the only "*Preliminary Question*" – whether the legislation requires the gas distributor to use commercial storage operations in order to provide safe, reliable and economic gas distribution service and whether the Board, therefore, has the authority to direct AGS to perform the 2005/2006 storage plan.

On this basis, AGS contended that the Preliminary Questions "are misconceived, premised on an underlying assumption of jurisdiction, and outside the scope of the application which the Board itself has directed to be brought."[10] ATCO also registered its concern with respect to the potential delay associated with addressing the "basic jurisdictional issue" and on the above basis registered its objection to the procedural directions set out in the Board's letter of December 23, 2004, and in particular to the Preliminary Questions.

In response to AGS's objection Calgary responded at page 5 of its Reply Submission dated February 7, 2005 as follows:

> It appears from the AGS "Preliminary Objection" that it is seeking to have the Board address its jurisdiction in the absence of facts, or without consideration for the various factual scenarios that have or may arise. With respect, AGS has provided no authority for such a proposition. This is hardly surprising given that such a proposition simply defies common sense. The issues surrounding Carbon have a long and acrimonious history. The Board's jurisdiction over Carbon is a complex issue that cannot be undertaken in a piecemeal fashion in the absence of facts. The Board's Preliminary Questions show, not as alleged by AGS that the Board is assuming jurisdiction or is outside the scope of the application before it[11], but, rather, that the Board is embarking on a comprehensive analysis of its jurisdiction over Carbon and the extent of that jurisdiction, not just for 2005/2006 but for now and for the foreseeable future. Such examination of its jurisdiction is within the Board's jurisdiction. Indeed, AGS has argued in the Court of Appeal that the Board must always examine its jurisdiction if the issue arises. The Board's examination is

[8] Ibid p.10
[9] AGS Reply Submission dated February 7, 2005 (AGS Reply Submission), p. 1
[10] AGS Submission Relating to "Preliminary Questions" dated January 24, 2005 (AGS Preliminary Questions Submission), p. 2
[11] AGS Preliminary Questions Submission, p. 2

> in accordance with its mandate, and will hopefully serve to prevent a multiplicity of proceedings in which jurisdiction over Carbon is annually re-litigated in perpetuity.

The Board agrees with Calgary that a review of the Preliminary Questions is part of a comprehensive analysis of the question of its jurisdiction over Carbon, and was required in the Board's estimation in response to various procedural issues and scoping matters raised by AGS, Calgary, and the CG. As indicated in the Board's letter of December 23, 2004, these additional procedural and scoping issues required further definition and analysis through consideration of the Preliminary Questions.

As indicated earlier, the purpose of considering the Preliminary Questions is to refine and define the scope of the "uses" that may properly be considered by the Board in addressing whether Carbon is used or required to be used or should otherwise remain in rate base. (See pages 9 and 10 of the Board's December 23, 2004 letter.) Such consideration will assist the Board to focus in detail on particular "uses" in light of Carbon specific facts, the relevant legislation (including the *Gas Utilities Act*, R.S.A. 2000, c. G-5, as amended (GUA) and the regulations promulgated thereunder), prior Board decisions and legal precedent in later determinations involving Parts 1, 2 and 3 of the Issues List.

5 PRELIMINARY QUESTIONS

5.1 First Preliminary Question

The first of the Preliminary Questions (the First Preliminary Question) was laid out by the Board in its December 23, 2004 letter as follows:

1. *In general, once an asset or capital expenditure has been approved by the Board for inclusion in rate base, what should be the criteria for removing it from rate base at the request of the utility?*

AGS asserted in relation to the First Preliminary Question:

> The determination of what assets may be required in order to render a safe and reliable distribution service is a matter which should be left to the managerial discretion of the gas distributor. As noted in AGS' responses to information requests, the role of the Board is simply to determine whether the related costs are prudently incurred and can be included for the purposes of fixing just and reasonable rates, tolls or charge in the gas distribution tariff (see, for example, BR-AGS.3).[12]

The CG referred to previous Board decisions dealing with the sale of regulated assets and the application by the Board of the "no harm test" to the circumstances. The CG supported the no harm test as the appropriate criterion to be applied when considering the removal of assets from rate base.

Calgary's view was expressed at page 9 of its January 24, 2005 submission:

> Calgary submits that the "criteria" the Board employs to remove an asset from rate base should be similar to those that it inherently employs to determine that an asset forms part

[12] AGS Preliminary Questions Submission, p. 13

> of the rate base. The underlying principle is that the assets are used or required to be used in providing safe and reliable services at the lowest reasonable cost and that they are dedicated to public service. This is an economic decision, as are most of the factors involved in setting just and reasonable rates.

Calgary went on to describe the factors that the Board should consider in making its determination on whether or not the asset is used or required to be used. The Board agrees with Calgary's submission on the underlying principle, and that an economic assessment is involved.

Section 37 of the GUA requires the Board to consider whether or not particular assets, or classes of assets, are "used or required to be used to provide service to the public within Alberta" at the time the assets are proposed to be included within rate base. This qualification for inclusion within rate base, implies that should the functionality of, or need for, the asset change, or should some other event occur (such as a change in legislation), so as to render the asset no longer "used or required to be used to provide service to the public within Alberta", the asset should be reassessed as to potential removal from rate base. Removal from rate base would result in the revenue requirement being adjusted to reflect the removal of the asset, associated operating expenses, return, income tax, etc., on terms that the Board found appropriate in the circumstances. For example, if certain utility rate base assets became antiquated and no longer economically useful, the Board might find it appropriate that the assets be sold or salvaged in order to reduce rate base. The Board might also agree that any un-depreciated capital, net of salvage or disposition, should remain in rate base given that the assets were prudently acquired by the utility even though the assets are no longer used or required to be used.[13]

With respect to the criterion to apply in determining if an asset qualifies for rate base treatment at any given time, the Board notes the response of AGS to BR-AGS-3(c):

> Whether or not an asset qualifies for rate base at any given point in time depends upon whether it is used or required to be used to provide utility service. The question is one of fact and not dependant upon approval. The Board's role is to determine, in accordance with proper legal principles, whether or not an asset is used or required for gas distribution service. If it is determined that an asset is not used nor required to be used to provide gas distribution service, then the Board, as a consequence, should make any appropriate adjustments in the rates…

The Board agrees with AGS that the determination of whether an asset should be in rate base depends on a factual examination of whether an asset is used or required to be used as determined by the Board in accordance with proper legal principles including a consideration of the public interest and the applicable legislation.

When a designated utility applies in the context of Section 26(2) of the GUA for approval of the sale of an asset outside of the ordinary course, the Board has considered whether the sale will cause any harm to customers. Harm is assessed from a perspective of impact to rates and service. Key to understanding the question of potential harm is determining if the asset is "used or required to be used to provide service to the public within Alberta". If the asset is used or required to be used in providing service, harm may result if the asset is removed from regulated

[13] See for example Board Orders U2001-143 dated June 15, 2001 dealing with the disposition of the NOVA Operations Centre and U2001-196 dated August 2, 2001dealing with the disposition of the NGTL Athabasca Maintenance Facility. See also Board Decision 2001-108 *UtiliCorp Networks Canada (Alberta) Ltd. Disposition of the High River Facility*, dated December 11, 2001.

service. Quantifying the potential harm, may depend on the mitigation strategy proposed by the utility or on the ability of the Board to address the potential harm in future regulatory proceedings. The Board agrees with the CG that the withdrawal of a significant asset from regulated service and rate base out of the ordinary course of business, may warrant adoption of a similar approach to that which is utilized by the Board when considering an application under Section 26(2) of the GUA. Namely, the asset should be assessed from a perspective of whether it is used or required to be used. The no harm test would be an appropriate criterion to be applied when considering the removal of assets from rate base where they have been found to be used or required to be used to provide service. The Board considers that the circumstances with respect to a potential removal of Carbon from regulated service and rate base would merit consideration on this basis.

In summary, the Board considers that the central criterion for the inclusion of a particular asset in rate base, or its subsequent exclusion, is whether the asset is "used or required to be used to provide service to the public". The "uses" that are appropriate for the Board to take into account in determining if Carbon is used or required to be used are discussed in the context of the fourth Preliminary Question.

5.2 Second Preliminary Question

The second of the Preliminary Questions (the Second Preliminary Question) was laid out by the Board as follows:

> 2. *In general, is it appropriate for the Board to attach conditions to the removal of an asset from rate base that would require the utility to add the asset back into rate base at some future time should subsequent application by the Board of the criteria identified in Question 1 lead to a different result?*

In response to this question AGS reiterated its position that determination of the assets required to render safe and reliable distribution service is a matter for management of the utility. AGS also stated that customers do not acquire any legal or equitable interest in the property used by the gas distributor to provide that service.

The CG submitted that it would normally be unworkable or unreasonable for the Board to impose a condition, on removal of an asset from rate base, that the asset be re-included within rate base at a future time.

Calgary asserted that it is within the jurisdiction of the Board to determine when assets should be included and when they should be excluded from rate base. Whether an asset is in rate base depends on whether it is used or required to be used to provide service to the public. Section 15(3)(d) of the AEUB Act allows the Board to attach conditions to any order if such conditions are in the public interest. Calgary indicated that if the Board determined that there was a potential for future use of an asset, the Board would be entitled to require that an asset be returned to rate base, as a condition to allowing its removal from rate base, if it was necessary in the public interest.

The Board considers that, while it may have the ability to attach conditions to an approval for the removal of an asset from rate base that would allow for the asset to be re-included in rate base at some future time, it should not do so in most circumstances. The Board agrees with the CG that

such a condition would not normally be workable or reasonable. The utility and potential third parties who may wish to acquire an interest in, or contract for service involving, the asset, should be entitled to rely on the unregulated status of the asset. The utility should not ordinarily be encumbered in dealing with the asset once the regulator approves the removal of the asset from regulated service, provided any conditions for removal are met.

5.3 Third Preliminary Question

The Board's third Preliminary Question (Third Preliminary Question) was stated as follows:

3. *In general, to what extent can (should) the Board direct a utility to deal with a particular asset presently included within rate base in a specific manner?*

AGS took the position that the Board should not be directing a particular use of an asset, rather, the management of the utility should be making decisions with respect to the assets required to provide distribution service. AGS went on to state:

> Nor should the Board seek to so direct, particularly where the Board's directed use of the assets in question are contrary to the current legislation and are intended simply to generate revenue in excess of cost to be applied to subsidize distribution rates.[14]

Both the CG and Calgary argued that the Board has the ability, where the public interest so requires, to provide a utility with specific direction in respect of a particular asset. The CG expressed the view that this authority should not generally be used, however, as it may constitute micromanaging the utility. Rather, the appropriate vehicle for the Board to utilize in dealing with the inappropriate or inefficient use of assets is through a prudence review. At pages 10 and 11 of its January 24, 2005 submission the CG stated:

> The CG submits that it is only where the utility has been given the opportunity to agree to operate an asset in a particular manner that has been clearly established to the Board's satisfaction to be beneficial to customers, but still refuses to do so, that the Board should intervene with an order directing its utilization.
>
> As an example of this approach, in the case of the Carbon assets, the Board has in fact directed utilization of the Carbon facilities in a specific manner when it found that AGS had not utilized an optionality model for scheduling of withdrawals from Carbon storage in the 2000/2001 storage year.[15]

The GUA provides the Board with specific authority to deal with utility assets in the context of setting rate base (Section 37) and in approving the sale, lease, mortgage or other disposition of property of a designated utility out of the ordinary course (Section 26(2)). The Board notes Section 36(2) of the *Public Utilities Act* R.S.A. 2000, c. P-45, as amended (PUB Act), which provides that the Board has all necessary jurisdiction and powers to perform any duties that are assigned to it by statute or pursuant to statutory authority. In addition, the Board has a general supervisory jurisdiction over utilities under Section 85(1) of the PUB Act and over gas utilities under Section 22 of the GUA. Section 22 of the GUA provides that the Board "…may make any

[14] AGS Preliminary Questions Submission, p. 13

[15] Decision 2001-110, Part B-1 Deferred Gas Account Reconciliation, at pp. 19-30, Section 5.2, Carbon Working Gas Utilization.

orders regarding equipment, appliances, extensions of works or systems…that are necessary for the convenience of the public…"

The Board also notes Section 15(1) and Clauses 15(3)(a) and (d) of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c.A-17 (AEUB Act) which provide:

> 15(1) For the purposes of carrying out its functions, the Board has all the powers, rights, and privileges of the ERCB and the PUB that are granted or provided for by an enactment or by law.
>
> 15(3) Without restricting subsection (1), the Board may do all or any of the following:
>
> (a) make any order that the ERCB or the PUB may make under any enactment;
>
> (d) with respect to an order made by the Board, the ERCB or the PUB in respect of matters referred to in clauses (a) to (c), make any further order and impose any additional condition that the Board considers necessary in the public interest.

Clearly from the above, the Board's regulation is not confined solely to matters of rate setting. The Board considers that it has the ability to make orders dealing with particular assets of a regulated utility, for example to address a deficiency or a matter of prudence, or where the public interest would so require.

The Board also notes the decision of the Supreme Court of Canada in *ATCO Ltd. v. Calgary Power* [1982] 2 S.C.R. 557, wherein the Court discussed the nature of the powers of the Board to carry out its responsibilities under the PUB Act and the GUA. At page 576, the Court stated:

> It is evident from the powers accorded to the Board by the legislation in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the community by the public utilities.

The powers of an administrative tribunal were considered by the Supreme Court of Canada in *Bell Canada v. Canada* (Canadian Radio-Television and Telecommunications Commission), [1989] 1 S.C.R. 1722. At page 1756 the Court held:

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the working of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.

Although the Board recognizes that the management of the utility must be accorded due consideration in making decisions on the appropriate assets required to provide safe and reliable service, the Board also observes that utility management is not always granted Board approval for all projects or capital acquisitions that they seek to include in revenue requirement.

The Board concludes that it has the ability to direct a utility to utilize a particular asset in a specific manner, even over the objection of utility management, in order to ensure that the public

interest is protected. The Board believes that the directed use must be consistent with the public interest in the circumstances. Possible examples of such direction might include situations where public safety, service availability, service reliability, service quality or the cost of service may be at issue. These types of situations are not expected to be the norm, and the Board agrees with the CG that a "micromanaging" trend would not be desirable.

5.4 Fourth Preliminary Question

The Board's fourth Preliminary Question (Fourth Preliminary Question) was stated as follows:

> 4. *What is the appropriate scope for the Board to adopt in conducting an examination of whether or not Carbon is used or required to be used to provide service to the public or should otherwise remain in rate base? In particular, the Board would like submissions and argument, without reliance on detailed operational or technical Carbon specifics, on which of the following uses or potential uses of Carbon can (should) the Board consider in addressing this question:*
>
> a. *historical uses*
>
> b. *proposed use(s)*
>
> c. *possible contingent uses by AGS should obligations presently being performed by DERS revert to AGS*
>
> d. *potential alternative uses by AGS, ATCO Pipelines or DERS.*

Clause (a) – historical uses

The types of uses (but not necessarily the extent or duration of the uses) to which Carbon has been employed at various times since its acquisition do not appear to be materially in dispute between the parties. These uses include: natural gas production for purposes of supplying ratepayers (company-owned production or COP), COP for sale into the marketplace with a credit to ratepayers, natural gas storage for utility purposes (including operational requirements, load balancing and peaking supply), natural gas storage for purposes of utility risk mitigation and natural gas storage for third parties with a credit to ratepayers.

AGS argued that the historical uses are irrelevant and inappropriate for consideration, given the decision of AGS management that the Carbon facility is not necessary for the provision of gas distribution service and that the legislation may now preclude the utilization of Carbon for gas distribution service. At page 12 of the AGS Reply Submission, AGS stated:

> The historical use of the asset is not relevant to founding jurisdiction. The fact that only a portion of the storage facility had been used from time to time but that all costs and revenues have been treated as utility use merely reflects an arrangement that was considered to be beneficial to all parties at the time and to which no one took exception. It is not a basis for assuming jurisdiction in different circumstances and under different governing legislation.

Calgary and the CG urged the Board to take note of the unique circumstances under which Carbon was first included in rate base and its conversion from a natural gas production field into

a storage facility. The complex development and evolution of Carbon, and the various regulated and unregulated services it has provided while in rate base, arguably demonstrate an allocation of risk, costs and revenues that properly informs the context for a present determination of whether or not Carbon is used or required to be used. In particular, Calgary argued that revenue generation through the sale of storage services, load balancing and price risk mitigation during peak winter periods were among the primary purposes for which Carbon has been used at various points in the past.

In considering whether a utility's rates are just and reasonable, the Board must determine a rate base for the property of the utility that is used or required to be used in providing service. In order to determine if an asset is used or required to be used before admitting it into rate base, or in deciding that it should no longer remain in rate base, a review of the asset must be undertaken. The Board believes that such a review should include factual, legal and public interest elements as determined by the Board using its expertise and judgement acting within its jurisdiction.

The public interest aspects inherent in determining when an asset is used or required to be used were apparent in the Alberta Court of Appeal decision of *Alberta Power Ltd. v. Alberta (Public Utilities Board)*, [1990] A.J. No.147. In this decision the Court considered the meaning of "used or required to be used" and drew parallels to the phrase "used and useful" which is often used in the United States. The Court commented on the American phrase in these terms:

> The phrase "used and useful" has come to import a measure of flexibility in determining when assets may be brought into the rate base. "Used and useful" may be viewed as both conjunctive and disjunctive: Used and useful: Autopsy of a Ratemaking Policy, (1987), 8 Energy Law Journal 303. The object of these kinds of provisions is to recognize the need of utility operators to acquire property in advance of actual need while, at the same time, recognizing that ratepayers need only pay a return on that property from which they have a reasonable guarantee of receiving service: Central Maine Power Company v. The Public Utilities Commission et al. (1981) 433 Atl. R. (2nd) 331 (Supreme Court of Maine).
>
> Once the interpretation is determined, whether a particular item is to be brought within the rate base is essentially a question for the judgement of the board which does not involve a question of jurisdiction or law: B.C. Hydro and Power Authority v. West Coast Transmission Co. Ltd. et al. (1981), 36 N.R. 33 at 56.

Further the Board notes the discussion of the public interest in the recent decision of the Alberta Court of Appeal in *ATCO Electric Limited v. Alberta (Energy and Utilities Board)*, (2004) ABCA 215. In that decision the Court commented that the public interest is not a static concept and that it will vary with the circumstances and the context in which it arises.[16]

The Board notes that Calgary and the CG consider that an understanding of the unique history of the acquisition, development, evolution and usage of the Carbon facility are critical to a proper understanding of the public interest in determining whether Carbon continues to be used or is required to be used. Although the Board considers that an understanding of the unique history of Carbon is necessary to appreciate the background to this proceeding and that such an understanding may be important to a determination of the basis upon which the asset would be removed from rate base (Part 3 of the Issues List), the Board does not believe that the historical

[16] ATCO Electric Limited v. Alberta (Energy and Utilities Board), (2004) ABCA 215, paragraph 134

context should be used to determine which uses should be included within the scope of uses that the Board will review for Carbon in the Part 1 Module. In the Board's view, historical uses which are no longer employed at a facility would not typically be relevant in determining whether the asset is used or required to be used today. This would be particularly true where obsolescence is involved or where fundamental changes may have occurred in the regulatory or market regime. However, the historical context of any use approved for consideration in the Part 1 Module will be relevant to a determination of whether or not such use continues to be appropriate.

Further, should the Board determine Carbon does have an appropriate continuing use, it may still be possible upon application to the Board to remove Carbon from regulated service and in evaluating such an application the Board would consider applying the no harm test. The application of the no harm test would give due consideration to the historical context of the acquisition, development, expansion and changing use of Carbon as well as the current factual and legislative framework. This approach is consistent with the approach taken in Decision 2001-65 [17] relating to the sale of certain petroleum and natural gas rights and related assets held by ATCO Gas North. In that Decision, the Board concluded that, while the subject assets were used in regulated utility service to customers, they were no longer required for that purpose. Nevertheless the assets remained "useful" to customers as a hedge against increasing market prices. The Board considered the historical context of the assets in determining that it was appropriate to apply the no harm test to the application to sell the assets. This conclusion was reached after considering the context in which the assets had been acquired and utilized over time, the changes in the governing legislation and the development of the competitive wholesale and retail natural gas marketplace in Alberta.

Similarly, if the Board determines in the Part 1 Module Decision that Carbon is not used or required to be used and should not otherwise remain in rate base, the history of the use of Carbon might be relevant in determining the appropriate mechanism for its removal from rate base and the related accounting treatment in the Part 2/3 Module.

In light of the above and after considering the submissions of parties, the Board does not consider historical uses for Carbon that are no longer being carried out today appropriate for further review in the Part 1 Module.

Clause (b) – proposed use(s)

"Proposed use(s)" for Carbon refers to the uses of Carbon that are proposed in the Application, namely the lease of the entire storage capacity to ATCO Midstream and the production of COP in the manner it is presently being produced, with the revenues generated from these activities being provided to ratepayers through various rate riders. Following the sale of ATCO's retail gas business and the appointment of Direct Energy Regulated Services (DERS) as the gas default supply provider, Carbon is presently being used in a revenue generation capacity, providing revenue by way of rate riders to ratepayers.

[17] Decision 2001-65 – *ATCO Gas – North (A Division of ATCO Gas and Pipelines Ltd.), Sale of Certain Petroleum and Natural Gas Rights, Production and Gathering Assets, Storage Assets and Inventory: Reasons for Decision 2001-46*, dated July 31, 2001

AGS refers to the proposed use(s) as "a reference to the use directed by the Board". AGS argued that the proposed uses of Carbon are irrelevant and inappropriate for consideration, given the decision of AGS management that the Carbon facility is not necessary for the provision of gas distribution service and that the legislation may now preclude the utilization of Carbon for gas distribution service.

Calgary advocated in connection with clause 4(b) – proposed use(s), of the Fourth Preliminary Question, that Carbon should continue to be used for the purpose of generating revenues to potentially reduce regulated rates.

> As previously discussed, since its inception, a primary use of Carbon storage has been for revenue generation. Where an asset has been in rate base as a revenue generation asset since its inception, in Calgary's view it is only fair and reasonable that any examination by the Board should include its retention for revenue generation purposes to continue reducing rates.[18]

Calgary also argued that: "A gas utility has an obligation to deliver natural gas at the lowest possible price and to use any of its assets at its disposal to reduce its rates".[19]

AGS responded to Calgary's argument by stating: "…it is a radical notion indeed that the Board has jurisdiction to direct any utility to perform non-utility functions in an attempt to generate profits to subsidize rates."[20]

Calgary supported its position by arguing that the future use of Carbon to generate revenue to reduce rates would be consistent with the use of Carbon throughout its regulated history. The Board notes the unique circumstances in which Carbon was acquired and developed, and that revenue generation was among the uses for Carbon in the past.

With respect to revenue generation as a stand-alone use of an asset, the Board believes it would have difficulty approving the inclusion in revenue requirement of costs associated with a new asset, where the function of the asset was unconnected to utility service and where its sole purpose was to generate revenue to offset rates otherwise payable. Revenue generation as a sole use pending some potential future use of an asset for regulated service is also problematic. Revenue generation which is a by-product or an associated benefit of the use of an asset to provide regulated services would be less problematic. However, the Board is not prepared at this time, to dismiss stand alone revenue generation as a potential justifiable use of Carbon when considering if Carbon is used or required to be used, particularly where it has clearly been one of the uses for Carbon for the majority of its history. The need for an understanding of this historical context is underscored by AGS in its submission quoted under clause (a) of the Fourth Preliminary Question: "The fact that only a portion of the storage facility had been used from time to time but that all costs and revenues have been treated as utility use merely reflects an arrangement that was considered to be beneficial to all parties at the time and to which no one took exception". In considering whether or not revenue generation is an appropriate ongoing use for Carbon, the Board believes that it will be necessary to consider the historical basis for the continued inclusion of Carbon in rate base subsequent to its conversion into a storage facility. This Preliminary Questions Module was not intended to delve into the specific detailed history of

[18] Preliminary Questions Submission of Calgary dated January 24, 2005, p. 18
[19] Preliminary Questions Submission of Calgary dated January 24, 2005, p. 20
[20] AGS Reply Submission, p. 12

the Carbon facility. In its letter of December 23, 2004, the Board identified the next phase of the current Board process (the Part 1 Module discussed in Section 7 of this Decision) as the appropriate time to consider the detailed circumstances relating to Carbon, including the conversion of the production field into a storage facility and the ongoing justification for retaining Carbon within rate base at the time of conversion and thereafter.

Clauses 4(c) – possible contingent uses by AGS should obligations presently being performed by DERS revert to AGS; and 4(d) – potential alternative uses by AGS, ATCO Pipelines or DERS.

With respect to clause (c) of the Fourth Preliminary Question, AGS argued that the potential reversion of regulated gas supply services presently being performed by DERS is irrelevant given that AGS management has determined that Carbon would not be necessary to provide such services if they did revert to AGS. With respect to the potential uses outlined in clause (d), AGS argued that it is beyond the jurisdiction of the Board to direct AGS to utilize Carbon in a different capacity, to transfer Carbon to another utility or to transfer the use of Carbon to another utility.

Calgary and the CG argued that both clause 4(c) and 4(d) described appropriate uses for consideration by the Board. With respect to clause 4(d), additional potential uses included the possible production of some or all of the base gas associated with the Carbon facility and the use by AGS of Carbon to potentially reduce transmission costs that AGS will have to pay to ATCO Pipelines.

The Board does not view the contingent use of Carbon by AGS, should obligations presently being performed by DERS revert to AGS, as an appropriate consideration in determining if Carbon is used or required to be used or should otherwise remain in rate base. The Board does not consider it appropriate or fair to AGS that its assets would be held in abeyance for an indeterminate period of time for this contingent purpose, a purpose that the utility has indicated it could provide in any event without Carbon.[21]

With respect to the possible production of the base gas, utilizing Carbon primarily as a source of COP is one of the historical uses of Carbon. Today only the associated other producing properties are currently producing COP, with the bulk of the Carbon related gas being retained as base gas to support the storage operation. As the Board has indicated above, it will not consider historical uses for Carbon that are no longer being carried out in the scope of uses for review in the Part 1 Module. The fundamental nature of Carbon is presently a storage operation and it has been so since the Oil and Gas Conservation Board approved the storage scheme in 1967. Carbon has been operated as a storage facility with this Board's approval since that time. It is also likely that Carbon will continue to be a viable storage operation in the future. In these circumstances, the Board does not consider it to be appropriate to include a potential "use" within the scope of the Part 1 Module if such use would require the termination of the present storage operation over the objections of the owner of the asset. The Board notes however, that the CG argued that a blow down of the cushion gas would not require the physical blow down of the Carbon facility. Rather, the use of Carbon that is envisioned is a deemed production of the remaining marketable reserves, which are being used as cushion gas, that would be used to generate a production value in a manner similar to that used in Decision 2001-65 with respect to the disposition of COP assets. The Board sees the possibility of deemed production in order to determine a production

[21] AGS Preliminary Questions Submission, p. 14

value as a matter to be considered in the Part 2/3 Module described in the Board's December 23, 2004 letter. In the event that the Board determines that Carbon is not used or required to be used or should not otherwise remain in rate base in the Part 1 Module, the Board will then have to consider the basis upon which Carbon would be extracted from rate base in the Part 2/3 Module. Any consideration of the basis upon which Carbon would be removed from rate base would examine the appropriate accounting methodology for such removal.

To the extent that there may be associated production today with the operation of the storage facility, such use falls within the category of present uses and will be considered in the context of considering revenue generation as a potential use in the Part 1 Module.

With respect to the possible use of Carbon to defer transmission charges, the CG argued that Carbon may be useful to AGS as a distributor on the ATCO Pipelines system. The CG pointed out that transmission charges passed on to distributors will be increasing as a result of the recently approved Other Pipeline Receipt (OPR) charges on the ATCO Pipelines system and that core customers will be incurring higher costs associated with gas sourced off of the NGTL system. The CG suggested that Carbon storage capacity might be useful to reduce the amount of gas required to be sourced from NGTL in the winter months, thereby reducing transmission charges.

The Board does not consider the CG's argument persuasive with respect to distribution service provided by AGS. Since AGS has transferred its retail business to DERS, DERS is the shipper on the ATCO Pipelines system that may incur the OPR commodity charges. The DERS contracting strategy, and whether its use of a storage service might be prudent as a method of reducing or avoiding OPR charges, are matters outside the scope of this proceeding.

The Board also does not agree with the arguments put forward by Calgary and the CG which urge the Board to consider using Carbon for system balancing related to gas fired power generation or relating to the ATCO Pipelines system. These uses and their costs and benefits, appear to be unduly speculative at present.

The Board finds problematic the following statement of the CG:

> It is the position of the CG that Carbon should be maintained as a rate based asset that is available for use on a regulated cost of service basis to all parties involved in providing transmission, distribution or gas supply service to consumers of gas from the AGS system.[22]

The Board does not believe it is appropriate to require AGS to maintain Carbon as a rate base asset for potential use by other gas utilities or service providers. If these other parties determine that they need storage services, or if storage is a prudent management or portfolio option for them, then it would appear that commercial storage arrangements could be made in the market at Carbon or elsewhere and the pricing and contract choices would be weighed at the time of contracting.

The Board does not believe that an examination of uses in respect of Carbon should involve the possible compulsion of ATCO Gas or ATCO Pipelines to use Carbon for unduly speculative

[22] Submission of the Consumer Group dated January 24, 2005, p. 18

purposes. In most circumstances, it is up to utility management to decide how best to provide their regulated services, and the prudence of those decisions will be reviewed by the Board in due course. The Board also does not believe it would be justifiable to consider the compulsion of DERS to utilize Carbon as a storage facility in order to provide default supply service, as a possible use of Carbon, on the basis of the historic use of the facility for peaking supply or for risk management.

Both the CG and Calgary support considering load balancing of the gas distribution system as a possible use for Carbon. The CG points to section 4(1)(i) of the *Roles, Relationships and Responsibilities Regulation*, Alta. Reg. 186/2003 which provides that a gas distributor has the responsibility to perform load balancing for the gas distribution system. The CG states at page 21 of its January 24, 2005 Submission on the Preliminary Questions:

> As a facility capable of rapid and highly variable injection or withdrawal of gas, Carbon historically has had a role in balancing the gas distribution system and can obviously continue that role in the future.

The Board notes the appropriate mechanism to use in balancing the gas distribution system is the subject of the ongoing ATCO Gas Application No. 1380942, entitled ATCO Gas Retailer Service and Gas Utilities Act Compliance Application ("Retailer Service Application") Phase 2 Process. The advantages and disadvantages of using Carbon as a means of load balancing is one of the matters being explored in that proceeding.

Given this ongoing and detailed consideration and debate over the possibility of utilizing Carbon for gas distribution load balancing purposes, the Board should not in this Decision forestall such a possible use. Accordingly, the Board will consider load balancing as being within the scope of uses to be reviewed in the context of the Part 1 Module. The Part 1 Module panel will take into consideration any available decision made by the panel of the Board considering application No. 1380942 with respect to the potential use of Carbon for load balancing purposes.

The Board is unaware of any other current or potential use for Carbon that is the subject of an application or potential application before the Board.

Summary of Fourth Preliminary Question

The Board considers that the relevant uses to be further reviewed by the Board in the Part 1 Module are the present use employed for Carbon (revenue generation through the storage lease and through COP sales from the associated producing properties) and a use that is presently before the Board for determination (load balancing). It is these uses which the Board has determined to be relevant to the question of whether or not Carbon is used or required to be used or should otherwise remain in rate base. The Board will consider whether Carbon is used or required to be used or should otherwise remain in rate base in the context of either or both of these uses and will consider if they can be implemented by AGS and can be performed in accordance with the applicable legislation.

6 SUMMARY OF CONCLUSIONS

The Preliminary Questions and the Board's findings are summarized below. Reference is made to the detailed provisions above, for the Board's complete findings.

6.1 First Preliminary Question

In general, once an asset or capital expenditure has been approved by the Board for inclusion in rate base, what should be the criteria for removing it from rate base at the request of the utility?

Board Finding

The central criterion with respect to the inclusion of a particular asset in rate base, or of its subsequent exclusion, is whether the asset is "used or required to be used to provide service to the public within Alberta".

6.2 Second Preliminary Question

In general, is it appropriate for the Board to attach conditions to the removal of an asset from rate base that would require the utility to add the asset back into rate base at some future time should subsequent application by the Board of the criteria identified in Question 1 lead to a different result?

Board Finding

Based on the evidence before it in this proceeding, it is the view of the Board that although the Board may have the ability to attach conditions to an approval for the removal of an asset from rate base that would allow for the asset to be re-included into rate base at some future time, it should not do so in most circumstances.

6.3 Third Preliminary Question

In general, to what extent can (should) the Board direct a utility to deal with a particular asset presently included within rate base in a specific manner?

Board Finding

The Board has the ability, when necessary in the public interest, to direct a utility to utilize a particular asset in a specific manner, even over the objection of the utility. The directed use must be consistent with the public interest in the circumstances.

6.4 Fourth Preliminary Question

What is the appropriate scope for the Board to adopt in conducting an examination of whether or not Carbon is used or required to be used to provide service to the public or should otherwise remain in rate base? In particular, the Board would like submissions and argument, without reliance on detailed operational or technical Carbon specifics, on which of the following uses or potential uses of Carbon can (should) the Board consider in addressing this question:

a. historical uses

b. proposed use(s)

c. possible contingent uses by AGS should obligations presently being performed by DERS revert to AGS

d. potential alternative uses by AGS, ATCO Pipelines or DERS.

Board Finding

The Board has determined that either or both of revenue generation and distribution system load balancing are the two uses which are relevant to the question of whether or not Carbon is used or required to be used or should otherwise remain in rate base.

7 PART 1 MODULE

As contemplated at pages 10 and 11 of the Board's December 23, 2004 letter, the answers to the Preliminary Questions will be used by the Board in the Part 1 Module:

> The purpose of the Part 1 Module is to make a determination on Part 1 of the Issues List in light of the detailed circumstances relevant to Carbon. The Part 1 Module will consider the uses for Carbon that were determined by the Preliminary Questions Module decision to be appropriate for an examination of whether Carbon is used or required to be used or should otherwise remain in rate base. This proceeding will consider all relevant detailed information relating to these identified uses for Carbon in arriving at a determination of the Part I [sic] issues.
>
> At the commencement of the Part 1 Module, AGS will be provided an opportunity to file additional evidence to be followed by information requests by interveners. Whether or not AGS elects to file additional evidence, Calgary and the CG will have the opportunity to resubmit any information requests that were the subject of the [IR] Motions and which remain relevant following the determinations reached in the Preliminary Questions Module. They will also be afforded the opportunity to submit new information requests related to the Board's determinations from the Preliminary Questions Module. This will be followed by evidence on Part 1 matters by interveners. AGS will have the opportunity to ask information requests followed by Rebuttal Evidence on Part 1 matters. After the filing of Rebuttal Evidence, the Board will seek advice from parties on whether to proceed to an oral hearing or directly to written argument.

The Board is issuing concurrently a procedural letter to commence the Part 1 Module process.

Dated in Calgary, Alberta on June 15, 2005.

ALBERTA ENERGY AND UTILITIES BOARD

(original signed by)

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

(original signed by)

C. Dahl Rees
Acting Member

(original signed by)

J. I. Douglas, FCA
Member

APPENDIX 1 – PARTICIPANTS

Name of Organization (Abbreviation) Counsel or Representative
ATCO Gas South (AGS) L. E. Smith
Consumers Group (Utilities Consumer Advocate [UCA], Aboriginal Communities, Alberta Irrigation Projects Association, Alberta Urban Municipalities Association, and Public Institutional Consumers of Alberta) (CG) J. A. Bryan, Q.C.
City of Calgary R. Bruce Brander
Alberta Energy and Utilities Board Board Panel B. T. McManus, Q.C., Presiding Member C. Dahl Rees, LL.B., Acting Member J. I. Douglas, FCA, Member Board Staff B. McNulty (Board Counsel) R. Armstrong, Staff H. Gnenz, Staff M. McJannet, Staff D. Popowich, Staff

APPENDIX 2 – BOARD LETTER – ISSUES AND REVISED SCHEDULE, SEPTEMBER 13, 2004

Appendix 2 - Board Letter - Issues and R

(consists of 5 pages)

APPENDIX 3 – BOARD LETTER – PROCEDURAL DIRECTIONS, DECEMBER 23, 2004

Appendix 3 - Board Letter - Procedural D

(consists of 16 pages)

EUB Alberta Energy and Utilities Board

Edmonton Office 10th Fl. 10055 - 106 St. Edmonton Alberta Canada T5J 2Y2 Tel 780 427-4901 Fax 780 427-6970

ELECTRONIC NOTIFICATION

September 13, 2004

To Interested Parties

ATCO GAS SOUTH
2005/2006 CARBON STORAGE PLAN – APPLICATION NO. 1357130

ISSUES AND REVISED SCHEDULE

Further to the Alberta Energy and Utilities Board's (the Board) letter of September 1, 2004, the Board has considered the issues brought forward by the City of Calgary (Calgary) in its letters of August 20, 2003 and August 26, 2004.

In essence, Calgary submitted that the filing made by ATCO Gas South (ATCO) on August 16, 2004 was "seriously deficient" with respect to information related to ATCO's position that all costs and revenues associated with Carbon should be removed from the distribution tariff. Calgary was also of the view that the application was deficient in identifying the portions of the record of previous proceedings that may be relevant.

By letter of August 23, 2004, ATCO withdrew the 16.7 petajoule storage option for utility purposes leaving only a lease option for the entire storage capacity.

The Board assumes from the amendment to the Application that ATCO is proposing the lease of the entire Carbon storage capacity to ATCO Midstream at the rate last approved by the Board in Decision 2004-022 of $0.45/GJ.

Following ATCO's amendment to the application, Calgary submitted that ATCO should be directed to file a new application that would have sufficient detail to satisfy Rule 19.

The Board agrees with Calgary that ATCO has not yet provided the detail that will be required by the Board and interveners to assist the Board in reaching a conclusion as to the merits of the application. However, while Calgary has suggested that a refiling of the application is in order, the Board would prefer to stay as close as possible to the original schedule.

Although the Board recognizes that it would have been preferable if ATCO had submitted a detailed filing with respect to the jurisdictional issue (including its proposal with respect to the potential removal from rate base of the storage assets) and the lease option proposal, the Board believes, with the one exception noted below, that establishing an issues list, followed by interrogatories by interveners and the Board, will be sufficient to provide the requisite information. The Board requests ATCO and interveners to deal with the specific information requirements and policy positions related to the matters relevant to the proceeding through the IR process and subsequent evidentiary filings.

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An interrogatory process alone, however, may not be sufficient to provide an adequate informational base for proceeding with the application in the absence of additional information with respect to the appropriate price to be paid to ATCO Midstream in consideration of a lease of the entire Carbon storage facility should the Board determine that the Carbon assets remain used or required to be used. Accordingly, ATCO is directed to file evidence on or before **October 4, 2004** in support of ATCO's position on the appropriate consideration to be paid by ATCO Midstream to ATCO in respect of the storage lease. The Board requires ATCO to address the requirements of the ATCO Group Code of Conduct in its filing. The Board will permit additional information requests from interveners in respect of this additional evidence.

The Board considers that an issues list will assist in focusing Information Requests, evidence and the conduct of an oral hearing, should the latter prove to be necessary. Accordingly, the Board has prepared the attached Issues List as a guide to parties with respect to matters that the Board considers to be relevant in this proceeding. As stated on the Issues List, it is not intended to be exhaustive, and parties may address, as they see fit, other issues which may be relevant to the proceeding.

With respect to the record of past proceedings, the Board has decided not to incorporate the complete record of any prior proceeding into the present proceeding at this time. In the interest of efficiency and fairness to all parties, the Board will require parties to specifically identify any portion of the record of any prior proceeding that they wish to have included as part of the record of the present proceeding. Accordingly, in formulating evidence, information requests, information responses and cross examination, parties are directed to refer to the specific portion of the non-confidential record of any previous proceeding on which they wish to rely in the context of the present proceeding.

In accordance with the Board's aforementioned determination of the process, the schedule is revised as follows:

Information Requests to ATCO on Parts 1 and 3 of the Issues List	September 20, 2004
Responses to Information Requests on Parts 1 and 3 of the Issues List	October 1, 2004
Supplemental Evidence on Storage Lease Pricing	October 4, 2004
Information Requests to ATCO on Part 2 of the Issues List	October 12, 2004
Responses to Information Requests on Part 2 of the Issues List	October 26, 2004
Intervener Evidence	November 9, 2004
Information Requests to Interveners	November 16, 2004
Responses to Information Requests from Interveners	November 30, 2004
Rebuttal Evidence, if any	December 7, 2004
Tentatively reserved for Hearing, if necessary	December 14-15, 2004

The Board will advise, at a later date, as to the timing of Argument and Reply, should an oral hearing not be required.

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Interested parties are to provide the Board with a written request for an oral hearing, with reasons and noting the areas of cross-examination, no later than **2:00 pm, November 10, 2004**. Please submit the requests electronically to EUB.UTL@gov.ab.ca.

Yours truly,

(original signed R. Armstrong)

R. Armstrong, P. Eng.
Application Officer

Attachment

ISSUES LIST

ATCO GAS AND PIPELINES LTD.
2005/2006 CARBON STORAGE PLAN
Application No. 1357130

INTRODUCTION

The Board received a letter dated June 10, 2004, from Bryan and Company representing the Utilities Consumer Advocate (UCA) and other interveners referred to as the Consumer Group (CG), requesting that the Board, *inter alia*, initiate a proceeding "as soon as can be conveniently arranged" to address the jurisdictional concerns expressed by ATCO Gas South (ATCO) with respect to the Carbon storage facilities. The Carbon Storage facilities (Storage Facilities) and the Carbon producing properties (Producing Properties) are collectively referred to herein as "Carbon".

By correspondence dated July 23, 2004 the Board noted that Decision 2004-022 directed ATCO to file an application by August 1, 2004 for a 2005/2006 Carbon Storage plan. The Board considered that any jurisdictional issues could most conveniently be dealt with in the context of that proceeding.

ATCO filed its 2005/2006 Carbon Storage Plan Application on August 16, 2004 and amended the application on August 23, 2004 to provide only for a lease option for the entire storage capacity, presumably to its affiliate ATCO Midstream at the rate last approved by the Board in Decision 2004-022 of $0.45/GJ.

The Board must consider in this proceeding:

(i) if the Storage Facilities and/or the Producing Properties are used or required to be used to provide service to the public or should they otherwise remain in rate base, and

(ii) if the answer to any portion of (i) above is affirmative, the Board must deal with the requirement to have an approved storage plan in place by the start of the 2005/2006 storage year in April 2005.

Given the nature and timing of matters to be considered in the Application, the Board is prepared to proceed to consider only the proposed lease option to ATCO Midstream for the 2005/2006 storage year even though a lease of the entire capacity of the Storage Facilities may not ultimately relate to any Board determination with respect to how the facilities are used or required to be used or are otherwise appropriate to remain in rate base. The Board recognizes that should either the Storage Facilities or the Producing Properties continue to be required for utility purposes, or if it is otherwise appropriate for them to remain in rate base, there may be other issues relating to the best use of Carbon which may need to be considered in future proceedings.

Accordingly, the Board has determined that the purpose of this proceeding is primarily to consider two general questions, namely:

1. Are the Storage Facilities and/or the Producing Properties used or required to be used to provide service to the public or should they otherwise remain in rate base?

2. If the answer to any portion of question 1 is affirmative, what are the appropriate terms and conditions, including price, with respect to the lease of the entire storage capacity of Carbon to ATCO Midstream?

To assist in addressing these general questions the Board has proposed the following issues as relevant to the proceeding. The issues outlined are not intended to be exhaustive of the matters that may be relevant to the matters to be addressed by the Board by this proceeding.

ISSUES

Part 1. Used or Required to be Used

(a) What assets make up the Storage Facilities and the Producing Properties?
(b) Are either the Storage Facilities or the Producing Properties used or required to be used by ATCO Gas or ATCO Pipelines to provide service to the public?
(c) In the event that either the Storage Facilities or the Producing Properties are not used or required to be used by ATCO Gas or ATCO Pipelines to provide service to the public, should the assets remain within rate base on some other basis?

Part 2. Storage Lease

If the Board determines 1(b) or (c) in the affirmative, then the following matters must be addressed:

(a) What are the appropriate terms and conditions of a storage lease with ATCO Midstream?
(b) What is the appropriate consideration to be paid by ATCO Midstream and how should it be determined?

Part 3. Removal From Rate Base

If the Board determines 1(b) and (c) in the negative, then the following matters must be addressed:

(a) process to remove assets from regulated service and rate base
(b) value to ascribe to the assets when removed from regulated service and rate base
(c) determination of entitlement to asset value
(d) value ascribed to these assets in rate base
(e) point in time these assets should be removed from rate base
(f) required adjustments to distribution revenue requirement to reflect the removal of the assets from regulated service and the revenue associated therewith
(g) appropriate treatment of depreciation, net negative salvage, and other monies previously collected through rates in respect of future liabilities in respect of the assets
(h) appropriate treatment of base gas (unproduced native gas)

EUB Alberta Energy and Utilities Board

Edmonton Office 10th Fl. 10055 - 106 St. Edmonton Alberta Canada T5J 2Y2 Tel 780 427-4901 Fax 780 427-6970

Brian C. McNulty
(403) 297-3650
brian.mcnulty@gov.ab.ca

ELECTRONIC NOTIFICATION

December 23, 2004

TO INTERESTED PARTIES

ATCO GAS SOUTH (AGS)
2005/2006 CARBON STORAGE PLAN – APPLICATION NO. 1357130

PROCEDURAL DIRECTIONS

The purposes of this letter are to:

(a) provide the ruling of the Alberta Energy and Utilities Board (the Board) in respect of two procedural requests made by AGS by letter of October 4, 2004 with respect to Part 2 of the Issues List (Issues List) set out in the Board's correspondence of September 13, 2004[1];
(b) consider a motion by the City of Calgary (Calgary) and a second motion by the Consumers Group and the Utilities Consumer Advocate (collectively the CG), filed on October 14 and 15, 2004, respectively. Both of these motions were in respect of obtaining additional responses from AGS in respect of certain Information Requests; and
(c) request submissions from the parties on several "Preliminary Questions" related to the appropriate scoping to be utilized by the Board when considering whether an asset is "used or required to be used to provide service to the public within Alberta" or should otherwise remain in rate base.

The writer has been requested to convey the Board's determination in respect of each of the above matters.

1. AGS Procedural Requests

By letter of October 4, 2004 AGS requested the Board to consider two requests. The first request was in respect to Part 2 of the Issues List (the **Part 2 Request**) and was stated as follows:

> AGS respectfully requests confirmation from the Board that Part 2 is no longer at issue in this proceeding and that it is not necessary to make supplementary evidentiary filings or to undergo a Part 2 interrogatory process in light of the foregoing.
>
> Failing such confirmation from the Board, AGS respectfully requests the Board's further directions as to how to proceed.

[1] The Issues List is attached as Appendix A to this letter.

The second request (**Request for Direction to Interveners**) related to the Board's jurisdiction to direct a refund to AGS in certain circumstances and was stated as follows:

> …AGS respectfully requests that intervenors be directed to identify in their evidence the following:
>
> > What is the appropriate mechanism for, and what is the basis of the Board's jurisdiction to direct, a refund to AGS of any net profits realized from operation of the Carbon storage business in the event it is determined that the Board has no jurisdiction to direct a 2005/2006 storage plan or to otherwise direct the use of the Carbon storage business or its assets.

By letter of October 8, 2004, the Board suspended the procedural schedule and requested comments from interested parties on the AGS procedural requests. The Board received submissions from Calgary and the CG on October 14, 2004.

1.1 The Part 2 Request

1.1.1 Background

In a letter dated September 13, 2004 the Board set out the Issues List. (As footnoted above, a copy of the Issues List is attached as Appendix A to this letter.) In the correspondence accompanying the Issues List the Board commented that:

> The Board must consider in this proceeding:
>
> (i) if the Storage Facilities and/or the Producing Properties are used or required to be used to provide service to the public or should they otherwise remain in rate base, and
>
> (ii) if the answer to any portion of (i) above is affirmative, the Board must deal with the requirement to have an approved storage plan in place by the start of the 2005/2006 storage year in April 2005.
>
> Given the nature and timing of matters to be considered in the Application, the Board is prepared to proceed to consider only the proposed lease option to ATCO Midstream for the 2005/2006 storage year even though a lease of the entire capacity of the Storage Facilities may not ultimately relate to any Board determination with respect to how the facilities are used or required to be used or are otherwise appropriate to remain in rate base.

Relevant to the portion of the Part 2 Request that suggests that additional evidence in respect of the Part 2 matters may not be necessary, the Board considered in its September 13, 2004 letter the potential need for additional evidence in respect of matters addressed in Part 2. The Board stated in that letter:

> An interrogatory process alone, however, may not be sufficient to provide an adequate informational base for proceeding with the application in the absence of additional information with respect to the appropriate price to be paid to ATCO Midstream in consideration of a lease of the entire Carbon storage facility should the Board determine

> that the Carbon assets remain used or required to be used. Accordingly, ATCO is directed to file evidence on or before **October 4, 2004** in support of ATCO's position on the appropriate consideration to be paid by ATCO Midstream to ATCO in respect of the storage lease. The Board requires ATCO to address the requirements of the ATCO Group Code of Conduct in its filing. The Board will permit additional information requests from interveners in respect of this additional evidence.

In its letter of October 4, 2004, AGS referred to Part 2 of the Issues List and pointed to clarifications made by AGS as to its intention in referring to a "lease option" in its correspondence of August 23, 2004. This clarification is contained in a Motion to Stay Proceedings dated September 20, 2004 where AGS referred to a continuation of the "status quo" which was further clarified in a letter of September 22, 2004 to mean:

> AGS intended the status quo relative to the 2005/2006 Carbon Storage Plan to mean that ATCO Midstream would use the entire storage capacity pursuant to the existing Uncontracted Capacity Agreement at the existing storage rate of $0.45 per GJ.

On November 22, 2004 the Board issued a letter establishing a placeholder in respect of the fee to be paid by ATCO Midstream in the 2005/2006 storage year for the entire storage capacity of the Carbon Storage facility (Carbon). It was noted that the need for, and the appropriateness of, the placeholder would be reviewed in due course through the balance of the proceeding.

1.1.2. Positions of Parties

With respect to Part 2(a) of the Issues List, AGS stated in its letter of October 4, 2004:

> The UCA [Uncontracted Capacity Agreement] with ATCO Midstream (which appears as an addendum to the Gas Storage Services Agreement dated February 20, 1998) has been the subject of extensive discussion before the Board on many occasions and the arrangement (subject to occasional price adjustment) has been consistently upheld (e.g. Decisions 2000-9; 2002-072; 2003-021; 2004-022). Indeed, under the UCA, ATCO Midstream has previously utilized the entire capacity at Carbon (in 2001/2002), at the same rate which the Board approved for years where it had less than the entire capacity at Carbon due to a direction that 16.7 PJ of capacity be reserved for "utility use" (2002/2003; 2003/2004; see for example Decision 2003-021 at page 16).
>
> It would appear, therefore, that it may no longer be necessary to address the issue identified in Part 2(a) relating to appropriate terms and conditions in light of AGS' clarification of the "status quo" option.

With respect to Part 2(b) of the Issues List, AGS stated in its letter of October 4, 2004:

> AGS notes Decision 2004-022 which ordered, in pertinent part, as follows:
>
> > (4) ATCO Gas South shall reflect revenues from ATCO Midstream Ltd. for uncontracted capacity at the Carbon storage facility for the 2004/2005 storage year based on a fee of $0.45/GJ <u>until such time that ATCO Gas South demonstrates to the Board's satisfaction that a different rate would be in order, or unless the rate is otherwise changed by the Board.</u> (emphasis supplied, at page 23)

> The appropriate consideration under the UCA, therefore, has already been determined in accordance with the Board's past findings earlier this year in Decision 2004-022. For the purposes of the "status quo" option for the 2005/2006 Storage Plan, AGS believes that it is proper to re(p)ly upon the existing $0.45/GJ rate.

AGS then concluded its letter of October 4, 2004 by stating:

> As both the existing UCA and the existing rate have been subject to prior Board reviews, no issue involving the Affiliate Code of Conduct would appear to arise.
>
> In the circumstances, therefore, AGS respectfully submits that the List of Issues Part 2 (a) and (b) were framed in contemplation of a new leasing arrangement with new terms and conditions which could give rise to a new pricing arrangement. With AGS' recent clarification that a new leasing arrangement is not contemplated, AGS respectfully submits that it is unnecessary to address the matters identified as Part 2 of the List of Issues.

The Board received comments from Calgary and the CG in respect of the AGS position. Both Calgary and CG disagreed with the AGS submissions and urged the Board to proceed with a consideration of the arrangements between AGS and ATCO Midstream.

1.1.3 Ruling

For the reasons stated below in Section 1.1.3.1, the Board will not proceed with a review of the terms and conditions of the UCA in the context of the 2005/2006 storage year (Part 2(a) of the Issues List) but will proceed in due course with a review of the consideration to be paid by ATCO Midstream for the uncontracted storage capacity (Part 2(b) of the Issues List) should it determine that it is appropriate for Carbon to remain in rate base.

In coming to these conclusions, the Board has considered the views of the parties, has reviewed relevant previous decisions, has considered the likelihood that a full consideration of the terms and conditions of the UCA would not be complete until well into the 2005/2006 storage year, and the decision of the Board, discussed below, to proceed with Part 1 matters before proceeding with either Part 2 or Part 3 of the Issues List.

A brief review of some of the prior decisions and related materials on these matters is found in Appendix B to this letter.

1.1.3.1. Part 2(a) Terms and Conditions of the UCA

The Board notes that previous decisions have concentrated on the compensation payable under that UCA and have not directly addressed other terms and conditions of the agreement. Accordingly, while the Board does not intend to review the terms and conditions of the UCA in the context of previous storage years, the Board does not agree with ATCO that the terms and conditions of the UCA have been expressly approved by the Board. In addition, AGS has the responsibility, as reinforced by the ATCO Group Inter-Affiliate Code of Conduct (Code), to continually ensure that its affiliate arrangements are prudent and appropriate and that they comply with the provisions of the Code.

The Board is of the view that the UCA, which is an addendum to the Gas Storage Services Agreement, is in the nature of For Profit Affiliate Services, as defined in the Code. The Board

notes that the definition of Services Agreement in the Code requires the detailing of several matters within the agreement, some of which would be appropriate for, but do not appear to be addressed by, the UCA. The standard for documenting For Profit Affiliate Services must at a minimum reflect the contractual standard for Shared Services (as defined in the Code) among utilities as discussed in the extract from Decision 2003-040 in Appendix B. In addition such arrangements must reflect the fair market value (FMV) pricing of the services provided.

The Board refers to the set of proceedings dealing with the For Profit Affiliate Service arrangements between various ATCO utilities and ATCO I-Tek as an example of the requirement that the terms and conditions of an inter-affiliate arrangement must be appropriate in the particular circumstances in order to comply with the Code and to safeguard the interests of ratepayers. At page 7 of Decision 2003-073[2] the Board made the following observation with respect to the information technology arrangements with ATCO I-Tek:

> The Board believes that ultimately it must be satisfied that the Renewal MSA is a contract that a prudent utility would enter into, having regard to appropriate IT service and maintenance, and the protection of its core business.

The above analysis would suggest that the Board should fully consider the terms and conditions of the UCA and whether or not they are appropriate for the use of the uncontracted storage capacity of the Carbon storage facility by an affiliate in the 2005/2006 storage year.

The Board notes the references in Appendix B to the Code compliance filings by AGS, the various changes effected by AGS in light of the Code and its representation that the UCA was among those agreements that comply with the Code. In these filing AGS has stated its ongoing commitment to the spirit and intent of the Code. These representations may, in part, rely on an interpretation of Board decisions and/or internal ATCO Group policies and arrangements which have not been explicitly considered to date in a Board proceeding, especially in relation to the UCA. At this time, the Board does not favor a course of action that may, as in the ATCO I-Tek proceedings, require the preparation and filing of a new UCA with a more expansive set of terms and conditions which would require specific scrutiny by all interested parties and adjudication by the Board. Such a course would most likely not permit sufficient time for a decision until well into the next storage year.

Accordingly, the Board, while still of the view that the matters raised in Part 2(a) of the Issues List remain relevant, is prepared in the context of the 2005/2006 storage year to remove consideration of the existing provisions of the UCA from the proceeding. Therefore the matters raised by Part 2(a) of the Issues List will be removed from the scope of the proceeding. To the extent however, that the terms and conditions of the UCA affect or impact pricing considerations [Part 2(b)], they will continue to be within the scope of the proceeding.

To be clear, the Board does not view the UCA as complying with the full spirit and intent of the Code for the 2005/2006 storage year and beyond, but is prepared to proceed in the fashion described for the reasons stated above. The Board would expect, should it continue to consider storage applications in respect of future storage years, that ATCO would turn its attention to the provisions of the Code and, consistent with its commitment to be guided by the spirit and intent of the Code, would negotiate a more comprehensive Services Agreement with ATCO

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[2] Decision 2003-073, ATCO Electric, ATCO Gas and ATCO Pipelines, ATCO I-Tek Information Technology Master Services Agreement (MSA Module), September 26, 2003

Midstream. Such agreement should contain terms and conditions appropriate for the services being provided and the value of the transaction.

1.1.3.2. Part 2(b) Compensation payable by ATCO Midstream

It is clear from Decisions 2002-072, 2003-021, 2003-040 and 2004-022 (see Appendix B), that the Board would prefer to see evidentiary support filed by ATCO which would address the proposed fee to be paid by ATCO Midstream to AGS in terms of the FMV for the use of the uncontracted storage capacity. The Board also notes that the proceedings resulting in Decisions 2003-021 and 2004-022 were directed in part to a consideration of alternative proposals for tendering the storage capacity or for determining the FMV of the fee to be paid by Midstream, or to AGS's submission that a continuation of the existing fee was inappropriately high. Thus, these decisions established a fee to be used in determining the revenue to be received from ATCO Midstream for the use of the uncontracted capacity in a particular period. Each Decision was in respect of the specific application and time period and provided direction that would prevent a reduction in the fee unless approved by the Board.

As discussed above, the Board is of the view that the UCA is in the nature of a For Profit Affiliate Service as defined in the Code. Pursuant to Section 4.1 of the Code, AGS has the obligation to periodically review the prudence of continuing For Profit Affiliate Service arrangements. Section 4.2.2 requires a utility to charge no less than FMV in respect of For Profit Affiliate Services. The onus is on the utility to demonstrate that For Profit Affiliate Services have been charged at a price that is not less than the FMV of these services. A review of the ATCO filings in respect of the Code confirms ATCO's commitment to comply with the spirit and intent of the Code.

Accordingly, the Board is of the view that the fee of $0.45/GJ, established in Decision 2004-022 in respect of the 2004/2005 storage year, has not been determined to be appropriate for any period of time subsequent to the end of the 2004/2005 storage season. The onus is on AGS to establish in due course the appropriate fee to be paid by ATCO Midstream for the uncontracted storage capacity for the 2005/2006 storage year.

1.1.3.3 Summary of Ruling on Part 2 Request

For the reasons stated above, the Board is of the view that the matters outlined in Part 2 of the Issues List continue to be relevant, but that it is appropriate in the context of the 2005/2006 storage year to focus on the compensation [Part 2(b)] payable to AGS by ATCO Midstream. AGS has the onus to show that the fee payable by ATCO Midstream for the use of the uncontracted storage capacity of the Carbon facility is appropriate and is not less than FMV. The appropriateness of the terms and conditions of the UCA [(Part 2(a)] will be reviewed in subsequent proceedings in respect of subsequent storage years, should the Board continue to exercise authority over the provisions of the storage arrangements and should use of the uncontracted storage capacity by Midstream continue to be applied for and found to be appropriate.

As noted in Section 1.1.1 of this letter, the Board issued a letter on November 22, 2004 establishing a placeholder in respect of the fee to be paid by ATCO Midstream in the 2005/2006 storage year for the entire storage capacity of Carbon. If the Board determines that Carbon

should remain in rate base, the appropriateness of the placeholder will be reviewed in due course through the balance of this proceeding.

In light of the Ruling on the Part 2 Request, the Board considers that AGS should prepare and submit evidence at a future date, as may be required, to address the appropriate compensation to be paid to AGS by ATCO Midstream with respect to the use of the uncontracted capacity of the Carbon Storage facilities during the 2005/2006 storage year. As specified in Section 4.5 of the Code, in such evidence the utility would be entitled to utilize any method to determine FMV that it believes appropriate in the circumstances. However, in light of the establishment of a placeholder in respect of the fee to be paid by ATCO Midstream in the 2005/2006 storage year and the Board's decision, as outlined below in Section 3 of this letter, to proceed with a Preliminary Questions Module and a Part 1 Module, the Board will not require the filing of any such evidence at this time.

As indicated below in Section 4 of this letter, the Board has decided to divide the present proceeding into three parts or modules. Should the Board determine in its Part 1 Module decision to proceed with Part 2(b) of the Issues List, ATCO will be permitted a further period of time in which to file evidence to address the appropriate compensation to be paid to AGS by ATCO Midstream with respect to the use of the uncontracted capacity of the Carbon Storage facilities during the 2005/2006 storage year.

1.2 Request for Direction to Interveners

1.2.1 Ruling

The Board views questions with respect to adjustment to revenue requirement, should the Board determine Issues 1(b) and (c) in the negative, to be relevant to Part 3 of the Issues List. The Board however, does not consider it necessary at this time to direct interveners to address the particular question suggested by AGS. The Board considers that the positions of interveners on this matter may be pursued by AGS through information requests or cross examination in relation to Part 3 matters, if required, in the Part 2/3 Module discussed below in Section 4.3 of this letter. The Board would also find an understanding of AGS's position on this matter to be of assistance in its consideration of Part 3 matters.

2. The Motions

2.1 The Calgary Motion

On October 14, 2004 counsel on behalf of Calgary filed with the Board a "Motion to provide full and adequate responses to Information Requests" (the Calgary Motion). The Calgary Motion requested Board direction on requiring additional responses from AGS with respect to information requests falling into two categories; those that related to the use, need or requirement of Carbon or the Producing Properties as outlined in Part 1 of the Issues List, and those that related to valuation of Carbon and the process of removing Carbon from rate base as outlined in Part 3 of the Issues List.

Calgary's Motion can be summed up in the following extract at page 2 of its letter of October 14, 2004:

> Following release of the Issues List, Calgary did not, and still does not, understand the Board's formulation of the questions before it, and the resulting Issues with respect to use and value, to be confined solely to the 2005/2006 Storage Year. In particular, when dealing with a rate base asset, issues related to "used or required to be used" in Part 1 obviously require an examination of what has been done with the asset in the past and what could be done with it in the future. It is inherent in the nature of assets in rate base that such considerations can hardly be addressed based on a "snap shot" of 2005/2006. The exact same consideration applies to the asset valuation and financial issues addressed by the Board in Part 3. It was on this basis that Calgary prepared its IRs, and on this basis that Calgary believes AGS should be required to answer all IRs.

2.2 The CG Motion

On October 15, 2004 the CG filed correspondence (the CG Motion), which also requested the Board to provide AGS with direction to provide better responses to certain information requests. It also requested the Board to direct ATCO Pipelines to produce witnesses who can speak to the storage requirements of the regulated core market gas service chain which may include representatives of ATCO Pipelines and/or Direct Energy Regulated Services (DERS). The position of the CG can be seen in the following quote from page 1 of its letter of October 15, 2004:

> With respect, the CG submit that this proceeding contemplates and requires the following:
>
> (a) Determination of whether storage is required and/or provides a benefit to core customers, irrespective of where its utilization occurs in the gas service chain.
>
> (b) If the answer to (a) is "yes", determination of which function is best able to provide that service and whether there are any legal impediments/obligations regarding the supply of that service.

AGS provided a response to the Calgary Motion and the CG Motion (the Motions) on October 19, 2004. DERS also provided a response to the CG Motion on October 19, 2004.

Counsel on behalf of AGS submitted that in answering the information requests, AGS had complied with the scope of the proceeding. At page 4 of its correspondence AGS stated:

> On the basis of the foregoing, it is absolutely clear that the instant proceeding was convened to consider AGS' objections to the Board's direction to file a storage plan or to implement any related Board directions over the period of the storage year commencing April 1, 2005 through March 31, 2006.

And at page 5 the letter stated:

> Its [AGS's] responses have been designed to provide the Board with the detailed evidence necessary to assist the Board in reaching a conclusion as to the merits of the "application". AGS notes that it was able to respond to all of the Board's Information Requests within the allotted time. AGS has carefully avoided straying into areas and

> *"other issues relating to the best use of Carbon which may need to be considered in future proceedings"* ("Issues List" at page 1). (emphasis included in AGS letter)

Further, at page 6 the letter provided:

> There is a narrow question to be determined and that relates to AGS' continued objection to the Board's jurisdiction to direct a gas distributor to implement a plan like the 2005/2006 storage plan. AGS is entitled to an answer before descending into a host of increasingly speculative and dramatically different alternatives. ….
>
> AGS is not proposing to destroy its business through a blowdown of the Carbon storage unit; AGS is not proposing to sell the Carbon storage business; AGS is not proposing to transfer the Carbon storage business to any other entity, whether affiliated or otherwise; and AGS is not proposing to conduct highly risky speculative ventures utilizing its storage assets. Rather, AGS proposes to conduct its affairs as described in its filings in the instant proceeding pending resolution of the jurisdictional objections registered with the Board and with the Alberta Court of Appeal.

Calgary and the CG provided responses to the submissions of AGS on October 21, 2004 reaffirming their positions and suggesting that AGS was inappropriately attempting to narrow the scope of the proceeding.

The Board considers that the purpose of preparing the Issues List was to provide for a relatively expeditious and focused process to address both the question as to whether Carbon is used or required to be used to provide service to the public, or whether it should otherwise remain in rate base, and the consequences of making either an affirmative or negative determination. It is apparent to the Board that matters relating to Carbon storage continue to raise a number of complex questions. In light of the events that have transpired to this point in the proceeding, the Board now believes that addressing issues in stages will be more effective going forward.

The Board considers that the Motions and the AGS response have raised an important initial question as to the proper scope of the Board's review. The Board believes this question should be addressed before it proceeds further to consider either the Motions or Part 1 of the Issues List.

Accordingly, the Board will not make determinations at this time on the merits of each of the Motions, but will proceed to address the initial or preliminary issues raised by the parties.

3. Preliminary Matters to Determine

Before the Board can determine if Carbon is used or required to be used to provide service to the public or should otherwise remain in rate base, the Board believes it must first determine the purview it has in considering the matter. Is it appropriate for the Board to consider alternative uses for Carbon or is it more appropriate to consider only the applied for use or the applied for use and historical uses of the facility?

In addressing this question, the Board must consider the criteria used in determining when a fully functional asset should be removed from rate base at the request of the utility and whether the regulated status of the asset should change at any given time, or from time to time, as the application of the criteria leads to differing results. Fundamental to an understanding of what uses are appropriate for the Board to consider when addressing the status of Carbon is an

examination of the scope of the Board's authority with respect to directing specific uses of an asset presently within rate base. The Board has prepared a list of Preliminary Questions relating to this matter, which are set out in Appendix C to this letter (the **Preliminary Questions**). The Board proposes to address these Preliminary Questions at a more general level without particular emphasis at this time on the detailed specifics of the Carbon facility or its present and historical operations. The Board is interested in receiving written submissions from parties on the Preliminary Questions, including supporting authorities and argument for each position taken. **Written submissions from all parties are requested to be filed with the Board by 2 p.m. January 24, 2005. Written reply submissions must be filed by all parties by 2 p.m. February 7, 2005.**

As discussed further in Section 4 of this letter, once the Board has considered the Preliminary Questions and determined the appropriate scope of uses of Carbon to be applied in a consideration of whether the assets are used or required to be used or should otherwise remain in rate base, the Board would then turn to a consideration of the detailed circumstances specific to Carbon in making its determination on Part 1 of the Issues List. Circumstances particular to Carbon, including the history of its usage, prior Board decisions, the retail sale to DERS, recent legislation, etc. would then be considered in determining if Carbon is used or required to be used to provide service to the public or should otherwise remain in rate base.

Following a determination by the Board on Part 1 matters, the Board would then proceed to deal with Part 2 of the Issues List, if the facility continues to be used or required to be used or should otherwise continue in rate base. Alternatively, if the Board determines that Carbon should no longer be included in rate base, the Board will proceed with Part 3 of the Issues List.

4. Process

The Board will divide the present proceeding into three parts or modules, the Preliminary Questions Module, the Part 1 Module and the Part 2/3 Module.

4.1 Preliminary Questions Module

In the first module (the **Preliminary Questions Module**), the Board will consider submissions from parties on the Preliminary Questions in accordance with the schedule set forth in Section 3 of this letter. The decision resulting from the Preliminary Questions Module will result in a better definition of the appropriate scope for a consideration of whether Carbon is used or required to be used or should otherwise be required to remain in rate base. In particular, the Board will determine which use(s) selected from a spectrum which includes the existing use and the range of possible alternative uses of Carbon, is (are) appropriate for consideration in addressing the issues set out in Part 1 of the Issues List.

4.2. Part 1 Module

Following a decision in the Preliminary Questions Module, the Board will proceed with the next module (the **Part 1 Module**). The purpose of the Part 1 Module is to make a determination on Part 1 of the Issues List in light of the detailed circumstances relevant to Carbon. The Part 1 Module will consider the uses for Carbon that were determined by the Preliminary Questions Module decision to be appropriate for an examination of whether Carbon is used or required to be used or should otherwise remain in rate base. This proceeding will consider all relevant

detailed information relating to these identified uses for Carbon in arriving at a determination of the Part I issues.

At the commencement of the Part 1 Module, AGS will be provided an opportunity to file additional evidence to be followed by information requests by interveners. Whether or not AGS elects to file additional evidence, Calgary and the CG will have the opportunity to resubmit any information requests that were the subject of the Motions and which remain relevant following the determinations reached in the Preliminary Questions Module. They will also be afforded the opportunity to submit new information requests related to the Board's determinations from the Preliminary Questions Module. This will be followed by evidence on Part 1 matters by interveners. AGS will have the opportunity to ask information requests followed by Rebuttal Evidence on Part 1 matters. After the filing of Rebuttal Evidence, the Board will seek advice from parties on whether to proceed to an oral hearing or directly to written argument.

A schedule in respect of the Part 1 Module will be provided by the Board following a decision on the Preliminary Questions Module.

4.3. Part 2/3 Module

Following a decision in respect of the Part 1 Module, the Board will determine a process for the third module (the **Part 2/3 Module**). The Part 2/3 Module, will consider the consequences of the determination made in the Part 1 Module.

Yours truly,

(original signed B. C. McNulty)

Brian C. McNulty
Senior Counsel

Attachments

APPENDIX A

ISSUES LIST

Part 1. Used or Required to be Used

(a) What assets make up the Storage Facilities and the Producing Properties?
(b) Are either the Storage Facilities or the Producing Properties used or required to be used by ATCO Gas or ATCO Pipelines to provide service to the public?
(c) In the event that either the Storage Facilities or the Producing Properties are not used or required to be used by ATCO Gas or ATCO Pipelines to provide service to the public, should the assets remain within rate base on some other basis?

Part 2. Storage Lease

If the Board determines 1(b) or (c) in the affirmative, then the following matters must be addressed:

(a) What are the appropriate terms and conditions of a storage lease with ATCO Midstream?
(b) What is the appropriate consideration to be paid by ATCO Midstream and how should it be determined?

Part 3. Removal From Rate Base

If the Board determines 1(b) and (c) in the negative, then the following matters must be addressed:

(a) process to remove assets from regulated service and rate base
(b) value to ascribe to the assets when removed from regulated service and rate base
(c) determination of entitlement to asset value
(c) value ascribed to these assets in rate base
(d) point in time these assets should be removed from rate base
(e) required adjustments to distribution revenue requirement to reflect the removal of the assets from regulated service and the revenue associated therewith
(f) appropriate treatment of depreciation, net negative salvage, and other monies previously collected through rates in respect of future liabilities in respect of the assets
(g) appropriate treatment of base gas (unproduced native gas)

APPENDIX B

Discussion of Previous Board Decisions and Related Materials

The Board notes Decision 2000-9[3], where at page 136 it found that the arrangement between Canadian Western Natural Gas Company Limited (CWNG) and ATCO Gas Services (now ATCO Midstream) "does not meet its expectations for prudent affiliate transactions". At page 137 the Board went on to find that CWNG was not receiving fair market value for the use of non-contracted capacity at Carbon. It then determined that:

> …for 1998 CWNG will be deemed to have received 32¢/GJ for the non-contracted capacity sold to AGS. This is reflective of the lowest price offered for storage service from third parties and is seen by the Board to be a conservative estimate of the value transferred to AGS from sales of uncontracted capacity at Carbon.

In Decision 2002-072[4] the Board considered certain GRA and Affiliate matters that had been transferred to that proceeding from the AGS 2001/2002 GRA and from the ATCO Group Affiliate proceeding. With respect to the uncontracted capacity storage arrangements between AGS and ATCO Midstream, the Board determined at page 46:

> Accordingly, for the 2001/2002 test years and remainder of the period up to end of 2002/2003 storage year, the Board directs AGS to reflect the revenues from Midstream based on a fee of $0.41/GJ. The Board expects that AGS will conduct a market based evaluation to determine the amount of the fee for storage years subsequent to 2002/2003. The Board considers that a tender process for the uncontracted capacity would reveal the FMV [fair market value] and that it would be preferable to use a tendering process in support of an application by AGS when submitting its evidence to demonstrate the prudence of the arrangement. The Board considers there are benefits to a prospective process rather than relying on consultant evaluations after the fact.

Decision 2003-021[5] considered the 2003/2004 storage year and various proposals and counter-proposals for conducting a request for bids (RFB) process. At page 14 of the Decision the Board reflected on the timing issues confronting the Board in proceeding with an RFB process for the 2003/2004 storage year:

> The Board notes that there is a significant divergence of positions between intervenors and AGS concerning the proposed RFB process. While the Board approves in principle the approach taken by AGS, it considers that, given the circumstances and the timing involved, it cannot approve the process in the proposed form and content.

At page 16 of that Decision the Board stated:

> The Board considers that AGS did not provide conclusive evidence from which the Board could determine that the rate to be charged to Midstream for uncontracted capacity should be less than the $0.41/GJ as set out in Decision 2002-072. The Board thus

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[3] Decision 2000-9, Canadian Western Natural Gas, 1997 Return on Common Equity and Capital Structure, and 1998 GRA-Phase I, March 2, 2000

[4] Decision 2002-072, ATCO Gas, a Division of ATCO Gas and Pipelines Ltd., Transfer of Carbon Storage Facilities, July 30, 2002

[5] Decision 2003-021, ATCO Gas South, Determination of the Fair Market Value of Uncontracted Carbon Storage, March 11, 2003

> considers that the said rate should continue to apply during the 2003/2004 storage season for such capacity at Carbon that is contracted with an affiliate of AGS, until such time that AGS demonstrates to the Board's satisfaction that a different rate would be in order, or unless the rate is otherwise changed by the Board.

In Decision 2004-022[6] the Board considered an Application in respect for the 2004/2005 storage year. The Board considered several options in respect of the utilization of the storage facility, including an RFB process for the entire capacity of the storage facility. The Board found that in the circumstances there was again insufficient time to permit an RFB process. It therefore approved the continuation of the storage plan in place for the previous year. With respect to the fee to be paid by ATCO Midstream in respect of the uncontracted capacity the Board stated at page 20:

> With respect the storage rate used for the uncontracted volume, the Board notes the CG's point that the existence of the number of commercial storage facilities in operation in Alberta confirmed that there must be a sustainable seasonal price differential available to support the continued economic operation of these facilities. The Board also notes EnCana's submission that the storage rate of $0.41/GJ was out of date and not the current market price, as Midstream would not otherwise be offering to take it at that rate. The Board notes EnCana's suggestion that an approximate 50% premium to the $0.41/GJ rate or a minimum bid level of $0.60/GJ should be established for the 2004/2005 gas storage year to recognize the likely escalation in value since the $0.41/GJ rate was chosen in July of 2002. EnCana, however, did not substantiate nor provide support for its recommendation. The Board nevertheless considers that the market for storage is strong and that a properly conducted, timely RFB would demonstrate such. The Board is persuaded that the storage rate of $0.41/GJ is currently too low. Accordingly, in the absence of an RFB the Board agrees that an increase to at least take into account the rate of inflation is appropriate. Since the current rate of $0.41/GJ was initially applicable to the year 2001, inflation calculated over three years to 2004 would produce an increase of $0.04/GJ. Therefore the Board approves a rate of $0.45/GJ, to be used in conjunction with Option 2.
>
> Accordingly, when submitting the final Compliance Filing for the AGS 2003/2004 General Rate Application, AGS is directed to adjust the 2004 amount for Carbon storage revenue from Midstream, to reflect the rate of $0.45/GJ. (footnote omitted)

As referred to above, Order 4 to this Decision provided:

> ATCO Gas South shall reflect revenues from ATCO Midstream Ltd. for uncontracted capacity at the Carbon storage facility for the 2004/2005 storage year based on a fee of $0.45/GJ until such time that ATCO Gas South demonstrates to the Board's satisfaction that a different rate would be in order, or unless the rate is otherwise changed by the Board.

In Decision 2003-040[7] the Board established an ATCO Group Inter-Affiliate Code of Conduct (Code). The Board notes several provisions of the Code that appear to be applicable to the arrangements between AGS and ATCO Midstream. For example, Section 4.1 of the Code imposes the obligation on utilities to periodically review the prudence of continuing For Profit Affiliate Services (as defined in the Code). Section 4.3 requires a utility to enter into a Services

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[6] Decision 2004-022, ATCO Gas South, 2004/2005 Carbon Storage Plan, March 9, 2004

[7] Decision 2003-040, ATCO Group, Affiliate Transactions and Code of Conduct Proceeding Part B: Code of Conduct, May 22, 2003.

Agreement (as defined in the Code) with respect to any For Profit Affiliate Service it acquires or provides. The definition of Services Agreement requires that certain elements be included in the contractual language of the arrangement as appropriate in the circumstances. These elements include a description of the services and pricing, confidentiality provisions, apportionment of risk, dispute resolution and a representation by each party that the agreement complies with the Code. Section 4.2.2 requires a utility to charge no less than Fair Market Value (as defined in the Code) (FMV) in respect of For Profit Affiliate Services. The provision provides that the onus is on the utility to demonstrate that For Profit Affiliate Services have been charged at a price that is not less than the FMV of those services.

The Board also references page 63 of Decision 2003-040 which addressed the level of detail required in documenting Shared Services (as defined in the Code) which are provided on a Cost Recovery Basis (as defined in the Code) among utilities:

> The Board, as previously noted in this Decision, and in Decision 2002-069, considers that a services agreement or an equivalent contract must be entered into with respect to any shared services the Utility provides to, or acquires from, an Affiliate. The Board found in Decision 2002-069 that ATCO's master services agreements formed a suitable framework for most such services. The Board considers that, as with many matters, 'the devil is in the detail'. For the purposes of the Code, a service agreement similar to those considered in Decision 2002-069 should be sufficient to address most services. Where the services are complex, and the dollar amount of the agreement is significant, the onus is on the Utility, as with any arrangement, to justify the prudence of the arrangement.

A contract in respect of a For Profit Affiliate Service, would at a minimum, be required to meet this standard, plus address the pricing for the services provided in terms of FMV.

Section 2.4 of the Code required the ATCO Group of companies to ensure that all arrangements in place at the time of the Affiliate Decision were brought into compliance with the Code by October 31, 2003. The Board notes certain correspondence from AGS which was filed by way of follow-up to this direction.

On August 29, 2003, AGS filed correspondence from Mr. Jerome Engler, President, attaching an Appendix C which enumerated transactions that were being reviewed for compliance with the Code. The UCA was one such agreement. On October 31, 2003 AGS filed correspondence from Mr. Engler, on Board Application No. 1319534 which stated that: "We do want to confirm that we are operating in full compliance and we remain fully committed to the spirit and intent of the Code." Appendix 3 to that letter contained a list of affiliated transactions. Page 16 of that appendix indicated that the documentation necessary to bring the UCA into compliance with the Code had been completed. The Board also notes correspondence from Mr. Engler dated April 29, 2004, also in respect of Board Application No. 1319534, which contained the AGS 2003 Compliance Report. Section 2.5 of that correspondence on page 6 again indicated that "AGS is operating in compliance with all provisions of the Code and is fully committed to the spirit and intent of the Code." Section 3.0 at page 11 contains the conclusion: "AGS believes it has fully complied with and operated within the provisions, spirit and intent of the ATCO Group Inter-Affiliate Code of Conduct."

APPENDIX C

PRELIMINARY QUESTIONS

1. In general, once an asset or capital expenditure has been approved by the Board for inclusion in rate base, what should be the criteria for removing it from rate base at the request of the utility?

2. In general, is it appropriate for the Board to attach conditions to the removal of an asset from rate base that would require the utility to add the asset back into rate base at some future time should subsequent application by the Board of the criteria identified in Question 1 lead to a different result?

3. In general, to what extent can (should) the Board direct a utility to deal with a particular asset presently included within rate base in a specific manner?

4. What is the appropriate scope for the Board to adopt in conducting an examination of whether or not Carbon is used or required to be used to provide service to the public or should otherwise remain in rate base? In particular, the Board would like submissions and argument, without reliance on detailed operational or technical Carbon specifics, on which of the following uses or potential uses of Carbon can (should) the Board consider in addressing this question:

   (a) historical uses

   (b) proposed use(s)

   (c) possible contingent uses by AGS should obligations presently being performed by DERS revert to AGS

   (d) potential alternative uses by AGS, ATCO Pipelines or DERS.