ALBERTA ENERGY AND UTILITIES BOARD
Calgary, Alberta

ATCO GAS AND PIPELINES LTD.	**Decision 2002-037**
DISPOSITION OF CALGARY STORES BLOCK	**Application No. 1247130**
AND DISTRIBUTION OF NET PROCEEDS – PART 2	**File No. 6405-17-2**

1 BACKGROUND

1.1 The Application

By letter dated August 28, 2001, ATCO Gas – South (AGS or the Company), a division of ATCO Gas and Pipelines Ltd., filed an application (the Application) with the Alberta Energy and Utilities Board (the Board) for approval of the sale of the AGS properties located in the City of Calgary, known as the Calgary Stores Block (the Stores Block) and further described as:

North Parcels: Plan A1, Block 63, Lots 1-20
South Parcels: Plan A1, Block 63, Lots 21-40, and the buildings located thereon.

The Company submitted that the assets comprising the Stores Block were no longer used and useful in the provision of utility service and requested the Board's approval of the following:

1. The sale transaction (the Sale) to Calgary Co-Operative Association Limited (Co-Op), summarized on Attachment 1 to the Application, pursuant to section 25.1 (now section 26) of the *Gas Utilities Act* (GU Act), and
2. Disposition of the proceeds of sale as outlined in Attachment 1 to the Application. The Company submitted that the land proceeds net of the remaining net book value of the assets sold and disposition costs should be recognized as 'Profit from Sale of Plant' by AGS, and accrue to the benefit of shareholders.

Further, the Company requested the Board's approval of the Sale prior to October 31, 2001 so that parties to the Land Sale Agreement between the Company and Co-Op dated August 13, 2001 could waive or satisfy certain conditions precedent by that date.

1.2 The Withdrawn Application

The Application was substantially similar to AGS's earlier application #2000366 that was withdrawn (the Withdrawn Application). The Board noted from the record of the proceeding from the Withdrawn Application, that parties did not generally object to the proposed sale of the Stores Block, but did object to the allocation of the proceeds from the disposition.

The Withdrawn Application was filed with the Board by letter dated December 21, 2000. A written proceeding was conducted that consisted of an interrogatory process, followed by argument and reply. The Board received reply submissions on or around March 13, 2001. By letter dated May 16, 2001 AGS advised the Board that due to the passage of time the sale of the Stores Block would not be completed. The Company subsequently withdrew the Withdrawn Application.

The parties that participated in the written proceeding with respect to the Withdrawn Application included City of Calgary (Calgary), Consumers Coalition of Alberta, Federation of Alberta Gas Co-ops Ltd. and Gas Alberta Inc. (FGA), and Municipal Interveners (MI).

1.3 Notice

The Board by letter dated September 14, 2001 provided notice (the Notice) that a proceeding would be held to consider the Application. Parties were advised in the Notice that the Board would use a two-part process with respect to the Application. The first part would consider whether or not the sale of the Stores Block should be approved. This first part was conducted by way of a written proceeding. Secondly, if the Board decided to approve the Sale, the Board would conduct a further proceeding to deal with the allocation of the proceeds from the disposition, and any other relevant issues related to the sale of the Stores Block.

1.4 Decision 2001-78 (Part 1)

The Board approved the Sale in Decision 2001-78 dated October 24, 2001 (Part 1) pursuant to section 25.1 of the GU Act. In approving the Sale in advance of the consideration of the remainder of the Application, the Board stipulated that it was not making a finding with respect to the specific impact on future operating costs, including the proposed lease arrangement being entered into by the Company. The Board also established a written proceeding wherein parties were provided the opportunity to argue as to the appropriate allocation of the proceeds from the disposition of the Stores Block, and any other relevant issues related to the Sale. The written process (Part 2) was completed on December 21, 2001.

The Board considers that the record for Part 2 of this proceeding closed on December 21, 2001.

Members of the Board assigned to consider the Application were B. T. McManus Q.C., Presiding Member, T. McGee, Member, and G. J. Miller, Member.

2 DETAILS OF THE APPLICATION

The details of the Application, previously summarized in Decision 2001-78, are as follows:

> The Company submitted that in 1999 it undertook a review of its operations at the Calgary Service Centre Complex, which included the Stores Block. The review had identified several issues with respect to the continued use of the Stores Block in the provision of utility service. Those issues were related to physical deficiencies of the Calgary Stores building, and to the location of the facilities. The major deficiencies of the Calgary Stores building related to its physical layout, age, condition and location. The location was problematic due to its

proximity to a high-density residential community, retail commercial developments, and the downtown core.

Alternatives to address those issues were identified and reviewed. The Company considered renovations to the existing buildings, as well as relocation to a leased facility. The Company decided to relocate to new facilities, and advised that it had entered into a lease arrangement for the relocation of the stores function. That decision was expected to lower costs to customers by at least $625,000 over a ten-year period on a net present value basis, when compared to the alternative of remaining at the current site and renovating existing facilities. The Company submitted that the decision to relocate would best meet the needs of both customers and the Company.

The Company also submitted that the decision to relocate to the new leased facility resulted in assets included in rate base that would no longer be required for the provision of utility service. Therefore, the Company had executed a conditional purchase and sale agreement with Co-Op. AGS suggested that the Stores Block would provide no on-going benefit or service to customers, and that the Sale would result in no harm to customers. Rather, the Company submitted that the Sale mitigated any stranded cost issues.

AGS requested that the Sale be approved and that the treatment of the proceeds of sale be consistent with the removal of an asset from the provision of regulatory service. AGS submitted that the proceeds of sale should first be used to retire the remaining net book value of the assets and to cover the costs of disposition, with the balance to accrue to shareholders as a gain on sale.

3 REGULATORY POLICY AND GENERAL PRINCIPLES

The Board considers it would be helpful to set out a description of certain policy and general principles that impact the Application.

3.1 Regulatory Policy

Pursuant to section 25.1 of the GU Act, the Board's approval is required for the sale of property by a designated utility that is considered to be outside the ordinary course of business. The utility is expected to seek Board approval of an actual sale transaction, be it conditional or final. The Board's responsibility under section 25.1 (and similarly under section 91.1 (now section 101) of the *Public Utilities Act* (PUB Act)) does not generally apply to proposed or potential transactions, which are typically dealt with in the context of a GRA. The Board approved the Sale in Decision 2001-78 based on evidence that customers did not object to the Sale would not suffer a reduction in services nor would they be exposed to the risk of financial harm as a result of the Sale that could not be examined in a future proceeding. On that basis the Board determined that the no-harm test had been satisfied and that the Sale could proceed.

The Board employs a "no-harm" test when evaluating applications to dispose of rate base assets pursuant to section 25.1 of the GU Act. The Board's no-harm test addresses the potential impact on both rates and the level of service to customers. The Board also assesses the prudence of the sale transaction, taking into account the purchaser (for example, any relationship to the vendor), and the tender or sale process followed. As well, the Board considers whether the availability of future regulatory processes might be able to address any potential adverse impacts that could arise from a transaction.[1]

In conjunction with the no-harm test, the Board also addresses the treatment of gains or losses on the disposition of utility assets. The Board acknowledges that the treatment employed is not formulaic or mechanical. In previous decisions[2] referred to by the Board in Decision E86073 "the Board pointed out that it has not applied any consistent formula or rule which would automatically determine the accounting procedure to be followed in the treatment of gains or losses on the disposition of utility assets. In each of those decisions the Board went on to state, "The reason for this is that the Board's determination of what is fair and reasonable rests on the merits or facts of each case."[3]

The Board also stated in Decision E86073 that a reading of the Alberta Court of Appeal in *TransAlta Utilities Corporation v. Alberta (Public Utilities Board)*, (1986) 68 A.R. 171 (TransAlta Appeal) "would tend to support the view that the treatment of the proceeds of the disposition of utility assets is a question to be resolved having regard to the circumstances peculiar to each given case that comes before the Board for decision."[4]

However, notwithstanding the Board's consideration of the circumstances peculiar to each case, the Board also recognized in Decision E86073 that "certain statements made during the course of the decision in the TransAlta Appeal are matters of general application and are relevant to the matter before the Board."[5] In other words, the Board will endeavor to be consistent in its general approach to determining what is fair and reasonable.

3.2 The No-Harm Test

The Application before the Board was made by AGS pursuant to section 25.1 of the GU Act. As previously noted, this section requires a designated owner of a gas utility to obtain Board approval before disposing of its property outside the ordinary course of its business.

While the section does not detail the matters to be considered by the Board in determining whether to approve a disposition of property, the Board has in various cases developed a no-harm test to review the impact of the disposition on customers.

---

[1] The Board summarized the general principles of the "no-harm" test in Decision 2000-41, *TransAlta Utilities Corporation, Sale of Distribution Business* (July 5, 2000), and more recently in 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* (July 31, 2001).

[2] Decision E84116 at page 13 and Decision E84081 at page 12.

[3] Decision E86073, page 10

[4] Decision E86073, page 11

[5] Decision E86073, page 11

The rationale for and description of the no-harm test that follows was summarized by the Board in Decision 2001-65 wherein the Board stated:

> *The Board considers that its power to mitigate or offset potential harm to customers by allocating part or all of the sale proceeds to them, flows from its very broad mandate to protect consumers in the public interest. This mandate has been recognized by the Alberta Court of Appeal*[6] *and the Supreme Court of Canada.*[7] *It has also been referred to recently on a number of occasions by the Board.*[8] *In keeping with this broad mandate, section 10(3)(d) of the Alberta Energy and Utilities Board Act*[9] *authorizes the Board to attach conditions to any order that the Board considers to be in the public interest. In the Board's view, conditions allocating sale proceeds to customers in order to mitigate harm caused by proposed asset dispositions are fully within its jurisdiction as characterized by the courts and reflected in the Board's governing legislation.*[10]

In describing the no harm test in Decision 2000-41 the Board stated, "…the Board is of the view that, subject to those issues which can be dealt with in future regulatory proceedings…, it must consider whether the disposition will adversely impact the rates customers would otherwise pay and whether it would disrupt safe and reliable service to customers."[11]

The Board also stated in Decision 2001-65 that:

> *In Decision 2000-41, the Board held that it must be satisfied that the proposed transaction will either not harm customers or, on balance, leave them at least no worse off than before the transaction in terms of financial impact and reliability of service.*
>
> *The Board distilled this principle from several decisions made by it pursuant to section 25.1 of the GU Act.*[12] *In those decisions, the Board developed what has come to be known as the no-harm test, but in Decision 2000-41 the Board recognized that it should conduct a balancing of both the potential positive and negative impacts of the transaction to determine whether it is in the overall public interest. Specifically, the Board held:*
>
> > *As a result, rather than simply asking whether customers will be adversely impacted by some aspect of the transactions, the Board concludes that it should weigh the potential positive and negative impacts of the transactions to*

---

[6] *Dome Petroleum Ltd. v. Alberta (Public Utilities Board)* (1976) 2 A.R. 453, *affd.* [1977] 2 S.C.R. 822.

[7] *ATCO Ltd. v. Calgary Power Ltd.* [1982] 2 S.C.R. 557, at 576 (per Estey J.).

[8] For example, Decision 2000-41, page 7; and Decision 2000-46, *ESBI Alberta Ltd., 2001General Tariff Application, Phase I & II, Part A: System Support Services – Thermal Power Purchase Arrangements (Appendix E)* (July 11, 2000), page 9.

[9] S.A. 1994, c. A-19.5, as amended

[10] Decision 2001-65, page 16

[11] Decision 2000-41, *TransAlta Utilities Corporation, Sale of Distribution Business* (July 5, 2000), in which the Board approved the sale by TransAlta Utilities Corp. (TransAlta) of its electric distribution business to UtiliCorp Networks Canada (Alberta) Ltd. (UtiliCorp). Page 8

[12] Decision 2000-41, page 8

> *determine whether the balance favors customers or at least leaves them no worse off, having regard to all of the circumstances of the case. If so, then the Board considers that the transactions should be approved.*[13]
>
> *…Of particular importance to the Applications is the Board's statement in Decision 2000-41 with respect to the financial mitigation of potential harm to customers: In appropriate circumstances, it might be open to the Board to mitigate or offset any of these potential risks by apportioning some of the gain on sale to customers.*[14]

3.3 Allocation Of Net Sale Proceeds Upon Disposition of Utility Assets

As noted in the previous quote from Decision 2001-65, the gain on sale of a regulated asset is potentially available to mitigate harm to customers determined through the application of the no-harm test. In general however, depending on the circumstances of each case, the allocation of a gain on sale of a regulated asset between the utility's shareholders and its customers will be determined through application of what has come to be known as the TransAlta Formula. As was stated at page 10 of Decision 2001-65:

> *Otherwise, the Board concluded, the treatment (i.e. allocation) of any gain or loss on the disposition of the assets is to be determined according to a somewhat different set of principles. Particularly for purposes of the jurisdictional question discussed hereafter, the Board emphasizes the difference between the no-harm test and the principles otherwise applied to the allocation of sale proceeds among shareholders and customers.*
>
> *The no-harm test determines whether a proposed sale can proceed in a fashion that ensures customers are left at least no worse off. Some form of mitigation may be necessary to ensure this occurs. The allocation principles are applied to allocate the proceeds of a sale between customers and shareholders, whether or not some potential harm to customers must be mitigated."*[15]

The Board notes that there is a pronounced difference of opinion in this case with respect to the allocation of sale proceeds. This is not surprising; the views of shareholders and customers have consistently differed in cases involving a gain on the sale of utility assets.

The Board acknowledges, as previously stated, that each case may have its own specific circumstances. However, as also stated, the Board endeavors to be consistent in its general approach.

Recent decisions, subsequent to the TransAlta Appeal, have been consistent in their use of the TransAlta Formula. This is not to suggest that the circumstances of each case have been identical. Rather it is more of an indication that the Board has not been persuaded that the circumstances of these cases have been sufficiently different to justify a departure from that

[13] Decision 2000-41, page 8
[14] Decision 2000-41, page 9
[15] Decision 2001-65, pages 9-10 – selected paragraphs

approach. For example[16], the Board's findings in Decisions E86073, E87036, E92001, E93023, and 2001-65 have all referenced the TransAlta Appeal and have incorporated the Board's interpretation of the TransAlta Formula.

The Board's views with respect to the allocation of utility asset sale proceeds were set out in Decision 2000-41 and summarized extensively in Decision 2001-65 as follows:

> *The Board emphasized in that Decision [2000-41] that the treatment of any gain or loss on sale of utility assets would depend on the merits of a particular case. It was noted, however, that prior to the decision of the Alberta Court of Appeal in TransAlta Utilities Corporation v. Alberta (Public Utilities Board),[17] the Board had adopted a general rule that any difference between the NBV of utility assets included in rate base and the sale proceeds of those assets should accrue to customers, whether the difference was positive or negative. As an example, the Board noted the following passage from Order E84115:*
>
> > *In Alberta, under the provisions of the Public Utilities Board Act, all utility assets that are used or required to be used to provide service to utility customers are permitted to be included in the rate base of the utility at the original cost of those assets (assuming the original cost is prudent).*
> >
> > *In fixing and approving customer rates, the Board is required to fix a fair return on the rate base. The fair return forms part of the revenue requirement of the utility.*
> >
> > *The Board also fixes the depreciation rate to be applied to the assets which form the rate base and the resulting depreciation expense also forms part of the revenue requirement of the utility. The revenue requirement is funded through customer rates which are approved as just and reasonable by the Board.*
> >
> > *Through this process or mechanism, the Board is required to be satisfied that the owner of the utility is given the opportunity to earn a return **of** his investment in the utility assets and a fair return **on** his investment in those assets. At the same time the Board is required to be satisfied that the customers are paying just and reasonable rates for the utility service they receive.*
> >
> > *The Board generally takes into account, inter alia, any relevant evidence with respect to inflation or deflation in the test year or test years in fixing the fair return on rate base.*
> > *Therefore, as a general rule, the Board considers that any profit or loss (being the difference between the net book value of the assets and the sale*

[16] The Decisions listed are for illustration only; the list is not exhaustive.
[17] (1986) 68 A.R. 171 (TransAlta Appeal).

> *price of those assets) resulting from the disposal of utility assets should accrue to the benefit of the customers of the utility and not to the shareholders of the utility.*[18]

In the TransAlta Appeal, the Court of Appeal held that the Board had erred in that case in allocating all of the gain on disposition of assets to customers. The Court agreed, in principle that shareholders were entitled to a return of the NBV and customers were entitled to a return of depreciation expense paid through their rates. However, the Court held that compensation should be in terms of current dollars, with current dollars being measured by the ratio of the actual sale price to original cost of the assets.

In Decision 2000-41, the Board summarized its interpretation and subsequent application of the TransAlta Appeal as follows:

> *In subsequent decisions, the Board has interpreted the Court of Appeal's conclusion to mean that where the sale price exceeds the original cost of the assets, shareholders are entitled to net book value (in historical dollars), customers are entitled to the difference between net book value and original cost, and any appreciation in the value of the assets (i.e. the difference between original cost and the sale price) is to be shared by shareholders and customers. The amount to be shared by each is determined by multiplying the ratio of sale price/original cost to the net book value (for shareholders) and the difference between original cost and net book value (for customers). However, where the sale price does not exceed original cost, customers are entitled to all of the gain on sale.*[19]

This approach to the allocation of sale proceeds has been referred to by several parties … as the "TransAlta Formula". The Board will use this phrase for ease of reference.

In Decision 2000-41, the Board summarized what it considers to be the general rule with respect to allocation of gains or losses on sales of utility assets:

> *The Board accepts that where particular rate base assets are being sold so that they are no longer part of the regulated rate base, the disposition of the gain on sale should, as a general rule, be treated according to the principle set out by the Court of Appeal in the TransAlta Appeal and subsequently applied by the Board.*[20], [21]

The difference between the no-harm test and the Board's approach to allocating sale proceeds was further described in Decision 2001-65 as follows:

[18] Order E84115, *Re TransAlta Utilities Corporation* (October 12, 1984), pages 10-12.
[19] Decision 2000-41, pages 26-27
[20] Decision 2000-41, page 28
[21] EUB Decision 2001-65 pages 11-13

> *In the Board's view, if the TransAlta Formula yields a result greater than the no-harm amount, customers are entitled to the greater amount. If the TransAlta Formula yields a result less than the no-harm amount, customers are entitled to the no-harm amount. In the Board's view, this approach is consistent with its historical application of the TransAlta Formula.*[22]

The Board confirms the applicability of this general rule, but notes once again that it will be subject to the particular circumstances of this case.

4 JURISDICTION

The Board received argument regarding the Board's jurisdiction to utilize proceeds of the sale to satisfy the no-harm test and to otherwise allocate the proceeds of sale.

Positions of the Parties

AGS

AGS argued that the Board, as a creature of the Legislature, did not have any powers other than those conferred by statute. Any determination regarding the jurisdiction of the Board to allocate the proceeds of sale in the present case would therefore, be a matter of statutory interpretation. AGS stated that it was clear the legislation did not allow the unfettered disposition of property used for utility purposes. The Board's approval was required unless the sale was made "in the ordinary course of business". AGS noted that the Sale was clearly outside the ordinary course of business.

AGS stated that neither the GU Act nor the PUB Act provided statutory authority for the allocation of any portion of the proceeds of the sale of a utility's asset no longer required in regulated service. AGS argued that the Board's approval of the Sale in Decision 2001-78 confirmed that the Stores Block was no longer used and useful and could be considered "non-utility". AGS recommended that the proceeds from the Sale should be used first to retire the remaining "non-utility" net book value of the assets and cover the costs of disposition. The remaining proceeds would then be recognized as "Profit from the Sale of Plant" consistent with section 8(B) of the Uniform Classification of Accounts in Alberta Regulation 546/63 regarding the sale of non-depreciable plant no longer required for gas utility purposes.

AGS submitted that their review of the GU Act and the PUB Act revealed that they restricted an owner's use and enjoyment of property only in limited ways. For example, AGS noted that the legislative regime provided the Board with supervisory powers intended to ensure that consumer rates were just and reasonable and that the service provided was safe and adequate. However, AGS contended that the Board's jurisdiction in connection with the costs and revenues of regulated utilities only related to the setting of just and reasonable rates.

[22] EUB Decision 2001-65 pages 10-11 and pages 41-44

AGS argued that an application under section 25.1 of the GU Act did not invoke the exercise of ratemaking which fell under other sections. Accordingly, AGS submitted that the governing legislation did not authorize the Board to direct that any proceeds of the sale be allocated to customers in this case. AGS emphasized that since shareholders had a legal entitlement to their assets, conditioning an approval under section 25.1 of the GU Act stating proceeds must be yielded to customers, would be tantamount to confiscation.

AGS submitted the principles of statutory interpretation were absolutely clear that such power should not be implied. AGS submitted that if the Company were to be deprived of the ownership or full benefit of its own assets, the statutes would require clear and unambiguous language. In the absence of clear statutory language to this effect, any allocation of proceeds would represent an "arbitrary" taking and an improper exercise of the Board's authority. Accordingly, AGS maintained that the lack of express power in the GU Act or the PUB Act, in relation to allocating to customers the proceeds of sale of assets no longer required to provide utility service, should be determinative in this case.

In reference to Decision 2001-65, AGS stated that it did not concur with the Board's reasoning. AGS argued that i) there is no harm to mitigate and the TransAlta Appeal is not determinative, and ii) even if the TransAlta Appeal were applied, the same result would follow given that the proceeds do not relate to depreciable property. AGS also argued that if the Board was correct in relying on the TransAlta Appeal it was limited to including only an amount equal to accumulated depreciation as a revenue offset. AGS stated that the return of any other component of past tolls would constitute retroactive ratemaking and be contrary to the law.

Calgary

Calgary considered that the Company's argument in this case was the same argument that was rejected by the Board in Decision 2001-65. Calgary replied that the cases cited by the Company's argument in this case were again all distinguishable from the facts of this case.

Calgary argued that the allocation of proceeds to customers did not constitute expropriation. Calgary stated that section 83(1)(a) (now section 91) of the PUB Act gave the Board the power to consider all revenues of the utilities under its jurisdiction and suggested no expropriation was involved. Calgary argued that AGS would receive back its full investment in the assets and had been compensated for the purchasing power tied up in those assets. Furthermore, Calgary argued that the legislation gave the Board the authority to interfere in the right to property if a public utility or gas utility was the owner of that property. Calgary noted that, based on sections 91.1 of the PUB Act and 25.1 of the GU Act, AGS must seek the approval of the Board in order to sell these assets.

Calgary also argued that the allocation of proceeds to customers did not constitute retroactive ratemaking. Calgary suggested that giving customers the benefit of the proceeds, now in their rates, did not have the effect of changing rates already collected.
Calgary did not agree that either the TransAlta Appeal or the Yukon Energy Corp. v. Yukon Utilities Board (1996) 74 B.C.A.C 58 (Yukon Energy) decisions were determinative. The

TransAlta Appeal involved a partial loss of franchise and the Yukon Energy case involved land that was non-rate base property.

FGA

The FGA argued that none of the authorities cited by AGS with respect to jurisdiction dealt with the distribution of proceeds of sale of regulated assets used by a regulated utility. The FGA submitted that the Board's findings in Decision 2001-65 were consistent with several previous decisions that applied the TransAlta Formula (E86073, E86078, E92001, the Centra Decisions).

MI

MI quoted Decision 2001-65 wherein the Board referred to the Supreme Court of Canada and the Alberta Court of Appeal. MI submitted that Decision 2001-65 confirmed the Board's jurisdiction to make provision for the allocation of sale proceeds. The TransAlta Formula specifically provided for the sharing of sale proceeds between customers and shareholders, and had been employed by the Board in many decisions. The MI submitted that the Company had in the past acknowledged the Board's authority to share sale proceeds between customers and shareholders.

The MI disagreed with the Company's use of the term "non-utility" in reference to the Stores Block. The MI argued that the Stores Block was used and useful in the provision of utility service. The MI also submitted that the Board's approval of the Sale was based on the understanding that the disposition of the proceeds would be dealt with in Part 2 of the proceeding.

Views of the Board

The Board's jurisdiction to allocate proceeds according to the TransAlta Formula was similarly questioned by ATCO Gas – North (AGN) and addressed by the Board in Decision 2001-65. The Board stated that its historical approach is based on equitable principles rooted in the regulatory compact. The Board also stated its view that this general rule received more than tacit approval in the TransAlta Appeal. The Board considers that the Court of Appeal has accepted the Board's jurisdiction to include, as a revenue offset, an amount equal to accumulated depreciation to be returned to customers (even in circumstances where the no-harm test is not an issue).[23]

AGS has contended that in those cases where an amount greater than the no-harm amount is allocated to customers, the Board is unlawfully expropriating a utility's property. The Board notes, however, that none of the expropriation cases cited by AGS deal with an allocation of proceeds of the sale of regulated assets of a regulated utility. Therefore, the Board does not find them particularly helpful. In fact, the majority of the Board's decisions, both preceding and following the TransAlta Appeal, would support the Board's allocation of an amount greater than the no-harm amount to customers.

Prior to the TransAlta Appeal, which directed the allocation of a portion of the gain to shareholders, the Board generally allocated all of the gain or loss on sale to customers. For example, the Board in Decision E84113 concluded that "as a general rule, the Board considers

[23] TransAlta Appeal, at 181-182

that any profit or loss (being the difference between the net book value of the assets and the sale price of those assets) resulting from the disposal of utility assets should accrue to the benefit of the customers of the utility and not to the shareholders of the utility."[24] The Board added in Decision E84113 that no exception to the general rule should be made whether or not the asset was depreciable or non-depreciable, or whether or not the sale was in the ordinary course of business.[25]

The fact that a regulated utility must seek Board approval before disposing of its assets is sufficient indication of the limitations placed by the legislature on the property rights of a utility. In appropriate circumstances, the Board clearly has the power to prevent a utility from disposing of its property. In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.

Regarding AGS's argument that allocating more than the no-harm amount to customers would amount to retrospective ratemaking, the Board again notes the decision in the TransAlta Appeal. The Court of Appeal accepted that the Board could include in the definition of "revenue" an amount payable to customers representing excess depreciation paid by them through past rates. In the Board's view, no question of retrospective ratemaking arises in cases where previously regulated rate base assets are being disposed of out of rate base and the Board applies the TransAlta Formula.

The Board is not persuaded by the Company's argument that the Stores Block assets are now 'non-utility' by virtue of being 'no longer required for utility service'. The Board notes that the assets could still be providing service to regulated customers. In fact, the services formerly provided by the Stores Block assets continue to be required, but will be provided from existing and newly leased facilities. Furthermore, the Board notes that even when an asset and the associated service it was providing to customers is no longer required the Board has previously allocated more than the no-harm amount to customers where proceeds have exceeded the original cost of the asset.

5 APPLICATION OF THE NO-HARM TEST

As discussed in Section 3 of this Decision, the no-harm test and the allocation of sale proceeds are separate steps in the Board's consideration of an application for approval pursuant to section 25.1 of the GU Act. The Board previously found in Decision 2001-78 that it considered the no-harm test to be satisfied. The Board was persuaded that customers would not be harmed by the Sale, with a prudent lease arrangement to replace the sold facility. In approving the Sale, the Board did not make a finding with respect to the specific impact on future operating costs, including the particular lease arrangement being entered into by the Company. Furthermore, the Board noted that the costs associated with the relocation, and the terms and conditions of the lease, including rent and operating costs, were matters that could be reviewed by the Board and interested parties in a future General Rate Application.

[24] E84113, page 19
[25] E84113, page 20

However, the Board provided interested parties an opportunity in Part 2 of the proceeding to raise "any other relevant issues related to the sale of the Stores Block."[26] Some parties used that opportunity to make submissions regarding the potential harm as a result of the Sale. The Board does not view the submissions regarding no-harm as being in the nature of a review and variance; nor does the Board consider itself obligated to consider the submissions. Nevertheless, out of an abundance of caution, the Board will evaluate the submissions, noting that AGS responded to them in a detailed fashion.

5.1 Impact on Service Levels

AGS

In the Withdrawn Application, AGS confirmed that the functions provided within the Stores Block would continue to be required but could be more efficiently provided by moving to different facilities.[27] In the Application, the Company confirmed that it would continue to provide the affected services to its customers from existing and newly leased facilities. No reduction in the level of service was expected.

Positions of Parties

Customers did not specifically object to the relocation of services to other locations.

Views of the Board

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

5.2 Risk of Financial Harm

Positions of the Parties

AGS

AGS submitted that no further process was required to ensure that a proper no-harm calculation was done since the Board had already determined that customers would suffer no harm as a result of the Sale pursuant to Decision 2001-78. AGS argued that Part 2 of the proceeding should be considered without rearguing the no-harm test.

AGS also pointed out that the submission of FGA regarding the analysis or calculation of no-harm was not appropriate since it was first introduced in argument. However, to clarify the record, AGS addressed the issues argued by FGA in AGS' Reply Argument Appendix A. The Company in Appendix A submitted that it was concerned the FGA's analysis provided by way of

[26] Decision 2001-78, page 2
[27] Withdrawn Application BR-ATCO GAS.4

argument could influence the Board's decision. The Company therefore was quite detailed in its response to the FGA's analysis.

AGS submitted that any sharing of the proceeds of sale would be inequitable and unfair as it would result in customers benefiting twice from the decision to relocate the facilities; first, as a result of the avoided costs associated with the renovation of the current facilities and, second through the sharing of proceeds as a result of the sale. AGS submitted that since no depreciation had been booked in respect of the land, any "risk", had been limited to the original cost of the asset. AGS submitted that it was the customers who faced no risks. They simply paid for a service offered by the utility that they had already consumed. AGS submitted that entitlement to appreciation in an asset's value was clearly a benefit of ownership.

AGS submitted that the sale of the Stores Block assets would actually benefit customers. AGS suggested that the Board, in Decision 2001-78, specifically recognized that replacing the Stores Block with a prudent lease arrangement would result in cost savings to customers. Furthermore, AGS submitted that matters relating to the prudence of the lease would be more appropriately dealt with in the next AGS General Rate Application.

AGS considered two options to address the issues related to the building deficiencies, one, to renovate the existing facility and two, to relocate to a leased facility.[28] AGS identified the option of building a new facility. The alternative was not pursued because of the amount of time required to complete the project, and the exercise of finding a new property for the facility, given current location issues. Leased facilities were available and could readily meet the Company's requirements. In AGS' view, the Relocation Option best met the needs of both customers and the Company. AGS selected a facility from amongst competitive facilities available for lease.

Calgary

Calgary submitted that the proceeds of the disposition should be paid out to the customers to ensure that the customers would not be harmed by the sale. Calgary noted that if the property had been retained as a rental income producing property, customers could have received a significant benefit (a net present value (NPV) income stream of $2 million). Furthermore, Calgary argued that customer costs could be lower than AGS' proposal if AGS had kept the building, leased it out at the rates estimated by jj Barnicke and customers continued to pay the return and depreciation on the facility.

Calgary stated that the customers of a utility were responsible for all costs incurred so long as the utility's services were in demand. Therefore, it was the customers who bore the risk of such things as prematurely obsolescent assets, market costs, and changes in the economic atmosphere. Calgary stated that it was just and reasonable that the customers should share in the benefits that may accrue as a result of those risks.

Calgary stated that the regulatory compact was such that the utility acquired assets that were required to be used in the provision of utility service, and that customers paid rates that allowed

[28] AGS Application Attachment 2 page 8/11

the utility to earn a fair return on its investment. Calgary argued that if AGS retained the gain on sale it would effectively result in the shareholders being paid twice.

FGA

The FGA submitted that on application to sell an asset that was in rate base the Board may elect to consider the application in two stages. The first was a determination of whether the sale of the asset could be approved on the basis that the net proceeds of the sale would be sufficient to mitigate any harm to customers flowing from the sale. The second was where the Board was free to again consider the matter of no-harm in the distribution of proceeds stage, particularly where there was more complete and accurate information available. The FGA concluded that the Board did not make a final determination on the issue of no-harm in Decision 2001-78.

FGA submitted that AGS had not examined all alternative arrangements and proposed that a proper no-harm test should proceed from the existing situation to compare costs under the proposed situation. The NPV of the difference in costs would then allow the Board to determine whether customers required a share of the proceeds in order to keep them whole (i.e. to ensure that there was no increased cost of service). The FGA prepared a no-harm test attached as Appendix A to its argument. The FGA concluded that customers were worse off due to the Sale. The FGA determined that customers required $2,028,266 from the Sale proceeds to keep them whole, based on their estimation of the harm to customers.

The FGA was critical of the Company’s analysis and the alternatives shown in Appendix C of the Application. FGA claimed that AGS did not perform a no-harm test, since in its opinion Appendix C was not a properly prepared comparison of alternatives. FGA noted that the alternative of building a suitable facility and owning the facility was not one of the alternatives considered. FGA rejected AGS reasoning that leasing an already constructed facility provided a solution in a shorter time frame than construction of a new facility. Furthermore, FGA believed insufficient information was provided concerning the costs and benefits of the alternative lease sites to determine if even the best generic warehouse bay was chosen.

FGA argued that AGS had a regulatory duty to demonstrate that its decisions were in the customers’ best interests. FGA cited Decision E93004, wherein the Board stated:

> *However, the Board is concerned that CWNG has not provided evidence to indicate other alternatives, such as leasing custom built office space in Cochrane, have been investigated and evaluated. The Board considers that the company should provide evidence of this nature in future applications with respect to such facilities.*

Furthermore, FGA cited Decision 2000-9, which stated:

> *The Board reiterates its concern over the manner in which CWNG provided information to both customers and the Board in this proceeding. Stakeholders of CWNG require sufficient detail in their analyses of projects and expenditures. The Board has always required, and continues to require, the following information for all major capital projects:*

- *A detailed justification including demand, energy and supply information*
- *A breakdown of the proposed costs*
- *The options considered and their economics; and*
- *The need for the project.*[29]

FGA stated that it appeared AGS had ignored the Board's explicit directions to provide complete information and the options considered for its projects.

Furthermore, FGA was critical of the assumptions used by AGS. FGA noted that the lease agreement fixed the rate of $6.85/square foot for five years and proposed that it would be unlikely that that rate would be maintained. FGA further considered that the assumption of rent for ten years at a fixed rate was flawed and unsupportable. FGA submitted that the operating costs of $1.60/square foot could be annually adjusted in an upward direction. FGA noted that comparable information on rent and operating costs was not provided for the six other properties referenced and questioned the assumptions used by AGS regarding utility costs, income tax and depreciation rates. FGA noted that capital costs were omitted from the AGS analysis such as security deposits, new furniture and office equipment. FGA submitted that the AGS analysis was invalid due to flawed assumptions and optimistic forecasts.

FGA noted that the Stantec report rated the structural elements of the current facility as "good", "sound", and "fair", with no suggestion by either Stantec or AGS that the current facility could not provide service for another ten years. Therefore, FGA prepared a no-harm test in argument on the basis that the current facility would serve for another ten years as a base case to compare the cost of the current option to lease. FGA claimed its no-harm test demonstrated that customers were far worse off due to the AGS proposal and claimed that a properly prepared no-harm test must examine the costs of the leased facility against the base case of the cost of operating the existing facility. FGA stated that the leased facility was a more costly proposition to customers on an on-going basis than the current base case without renovation.

Views of the Board

As previously noted, the Board's no-harm test was developed to provide some structure to the exercise of its discretion pursuant to sections 25.1 of the GU Act and 91.1 of the PUB Act. In Decision 2000-41, the Board established that, in appropriate cases, it could allocate proceeds to customers that might otherwise flow to shareholders. Over the years, the Board has approved a number of utility asset dispositions in relation to which the Board was satisfied that either customers would not, on balance, be harmed or, if they faced some risk of harm, appropriate conditions could be attached to the Board's approval to mitigate the harm, or a share of the sale proceeds could be used to offset or mitigate the harm.

In Decision 2001-78[30], the Board accepted the premise that there would not be a negative impact on the customer rates, at least during the five-year initial term of the lease. In fact, on the basis of the evidence filed in Part 1, there appeared to be a cost savings to the customers. The Board also

[29] Decision 2000-9, page 26
[30] EUB Decision 2001-78 page 3

stated that in approving the Sale, the Board did not make a finding with respect to the specific impact on future operating costs, including the particular lease arrangement being entered into by the Company. Furthermore, the Board noted that the costs associated with the relocation, and the terms and conditions of the lease, including rent and operating costs, were matters that could be reviewed by the Board and interested parties in a future General Rate Application.

The Board notes the FGA's argument that a proper "no-harm" test must be measured against the current operation. The Board also notes the FGA's suggestion that the Board is free to consider the matter of "no-harm" again in the second stage of this proceeding since there is new and more accurate information available. However, the Board notes that the FGA filed its no-harm evaluation (Appendix A) in argument. Section 41(5) of the Board Rules of Practice states, "No argument may be received by the Board unless it is based on the evidence before the Board." In accordance with this practice, the Board is unable to accept the FGA's evaluation on the basis that its initial presentation was made in Argument and therefore, not appropriately presented to the parties for examination.

The Board will, however, consider other aspects of the FGA's argument. While AGS submitted that the current operation of the Stores Block could not be continued without extensive renovation to the existing buildings, the FGA referenced the Stantec report. The report evaluated the current condition of the buildings as "adequate, fair and good" and stated that none of the existing buildings required extensive renovation to bring them up to minimum standards of safety. The significant deficiency of the buildings was their energy inefficiency as compared to current day standards, their physical layout, and their proximity to a high-density residential community, retail commercial developments, and the downtown core.

The Board recognizes that the existing buildings are old and not near current standards for similar operations. There does not appear at this time to be compelling reasons for discontinuing operations solely based on safety or cost effectiveness. However, the Board is persuaded that relocation to a smaller new facility can be justified. The Board considers that the decision to relocate might have been somewhat premature, however the Board believes the optimum time for such relocation is difficult to determine with certainty. In this case, the Board accepts AGS's submission that relocation was imminent and was the preferred option. The Board is not persuaded, based on the evidence, as to the likelihood that customers would be harmed by the relocation.

The Board also notes Calgary's argument that costs to customers could have been lower in the future than the AGS proposal if AGS had kept the property, leased it out at the rates estimated by jj Barnicke, and if customers continued to pay the return on the facility. The Board considers Calgary's argument to have some merit in terms of reducing the cost of service. However, the Board considers that the Sale is preferable to the lease or rental of the Stores Block in the present circumstances.

The Board has considered the additional submissions on no-harm and maintains its view that, as originally stated in Decision 2001-78, there appears to be no negative impact on the customer rates, at least during the five-year initial term of the lease. The Board agrees with parties that matters relating to the prudence of the lease, relocation costs, and future operating costs can be dealt with in future GRA's.

6 ALLOCATION OF NET GAIN

6.1 Allocation Between Land and Buildings

Positions of the Parties

AGS

AGS submitted that the previous prospective purchasers and the current purchaser, CO-OP, have indicated their intentions to demolish the buildings and redevelop the land. Therefore, AGS evaluated the buildings as having zero or even negative value to the purchasers.

In this case, AGS considered that the application of the TransAlta Formula would result in no proceeds to customers. AGS argued that the proceeds of the sale clearly related only to the land purchased, not the buildings, and land was a non-depreciable asset. AGS emphasized that should the Board apply the TransAlta formula, no value should be assigned to buildings since the purchaser indicated that the buildings will be removed and land redeveloped. Therefore, the result would follow that no proceeds would be allocated to customers.

Calgary

Calgary submitted that no weight should be given to the speculation by AGS that the purchaser intended to remove the buildings and develop the land. Calgary referred to jj Barnicke's valuation of the property worth between $2.4 and $3.2 million on a revenue stream basis. If the buildings were worthless, the South portion of the property would have been valued on the basis of land only, similar to that used for the North portion of the property.

MI

MI noted that simply because the purchaser had another use for the Stores Block, did not mean that the buildings, which had been in active use for many years, had no value. MI suggested that 26,000 square feet of warehouse property in Calgary core had some identifiable value.

The MI argued that an allocation of the Sale price between land and buildings was not required as part of the TransAlta Formula as expressed by the Court of Appeal and in subsequent decisions of the Board. The MI suggested that the Board, in its application of the TransAlta Formula, has consistently treated the sale of utility property as a composite package generically referring to it as "the property" or "the assets". In summary, the MI concluded that the Company misapplied the TransAlta Formula.

Views of the Board

The Board notes that AGS has evaluated the land and buildings based upon changing future uses. AGS further contended that the future intended use of the prospective new owner established the current market value which is vested in redeveloping the land for a higher and better business activity than the current business activity of AGS. The marketing of property for a higher and better use to maximize the proceeds from the sale is prudent. However, the redesignated use of the property for the business objectives of a new owner is not related to the provision of service to natural gas customers. The Board considers that evaluations based on redesignated non-utility use verses the historical utility use of rate base assets does not necessarily result in an appropriate allocation of the net proceeds of the Sale. The Board notes that the evidence of jj Barnicke considered the existing use and improvements of the Stores Block, and determined the value of the southern half to be higher than the value of the northern half as vacant land. The Board also notes suggestions by Calgary and the MI that warehouse property in the Calgary core had some identifiable value. The Board is persuaded by the evidence and agrees that the buildings in their present state have some value. However, for reasons that follow the Board does not consider it necessary to fix a specific value on the buildings.

The Board notes that AGS has separated the net proceeds between land and buildings prior to the application of the TransAlta Formula. The Board considers this a departure from the application of the procedure used by the Board in several decisions since the TransAlta Appeal. The Board considers the TransAlta Formula is a method whereby the ‘windfall’ realized from a utility asset transaction, when the proceeds of sale exceed the original cost of the subject asset, can be shared between customers and shareholders and has been used by the Board to do so. In the circumstances of this case the Board considers it appropriate to apply the TransAlta Formula consistently with past decisions and will consider the gain on the transaction as a whole and will not distinguish between the proceeds allocated to land separately from the proceeds allocated to buildings. The Board believes the TransAlta Formula shares the net gain (above original cost) between customers and the Company. Prior to the TransAlta Appeal, gains from the sale of utility asset would almost always be allocated to the customers.

The Board accepts that the amounts allocated to land and buildings using the TransAlta Formula may not necessarily reflect their individual “market value” at the time of sale, for either the seller or the purchaser. However, the TransAlta Formula is a method that has been used by the Board to allocate the net gain on both NBV and Accumulated Depreciation based upon the appreciation of the assets sold without initially distinguishing between land and buildings.

The Board believes that the methodology developed in the TransAlta Appeal and subsequently applied by the Board will yield a result that is reasonable in the circumstances of this case. The TransAlta Formula does not separate the gain to land and buildings as shown in the AGS evidence nor does it use a determinant for building value such as suggested by Calgary. Instead the TransAlta Formula considers utility property to be sold as a package. As allocation determinants for the proceeds above original cost, the TransAlta Formula focuses on the NBV as the shareholder fraction and the accumulated depreciation charge as the customer fraction.

Alternative methods of allocation could be developed based upon the submission of the parties; however, the Board is not persuaded that departure from the TransAlta Formula is justified in this case.

6.2 Allocation of Gain Between Customers and Shareholders

Positions of the Parties

AGS

AGS maintained the position that the proceeds of sale should be allocated in their entirety to shareholders. Where a determination is made that the assets are no longer required for utility service and that customers are at a minimum no worse off as a result of the sale, the Company must be permitted to enjoy the full benefit of its assets. The AGS position recognizes that the entitlement to the proceeds of sale is a necessary incident of ownership and that it is the shareholders of the Company, not the customers, who own the utility assets.

AGS submitted that a sharing of proceeds would be inequitable and would result in the customers benefiting twice from the decision to relocate. First the customers would benefit as a result of the avoided costs associated with the renovation of the current facilities and second, through the sharing of proceeds as a result of the sale.

AGS emphasized that it did not believe that the TransAlta and Yukon Energy[31] decisions were determinative in this case. Nor were various U.S authorities, as such decisions dealt with different facts and different statutes and thus were distinguishable from the case at hand and should be found to be inapplicable. Furthermore, AGS maintained that the TransAlta Appeal was distinguishable and therefore, not determinative in this case. The Hydro and Electric Energy Act dealt with in the TransAlta Appeal specifically and in detail outlined the rights of a company whose franchise and assets were being forcibly taken by virtue of municipal annexation. The absence of similar language in the relevant statues in relation to the "taking" of the proceeds of sale makes it clear that the power to take has not been conferred.

Other than allocating proceeds in an amount to ensure no harm, AGS submitted that any allocation to recoup the depreciation component of past tolls was beyond the ratemaking jurisdiction of the Board. Any such allocation would represent a windfall in the hands of customers who have already consumed service they paid for and who would benefit from lower costs as a result of the sale.

AGS argued that the notion of "benefit should follow risk" put forth by interveners actually supported the Company's position. Since no depreciation had been booked in respect of the land, the "risk" to customers had been limited to, at most, the original cost of the asset. AGS claimed it was the customers who faced no risks.
AGS disagreed with arguments made by Calgary and the MI with respect to the TransAlta Formula and its application in this case. AGS stated that the buildings had no value and that it was incorrect to apply the TransAlta Formula when the buildings had no value.

Calgary

Calgary argued that AGS had been given the opportunity to earn a return on its investment at a rate deemed by the Board to be just and reasonable. Calgary submitted that any gain on the sale

[31] [1996] DRS 96-10160 Yukon Territory Court of Appeal

of land should flow to the benefit of the customers. Customers paid rates over the years, which allowed AGS to retain the Stores Block, and therefore, the customers should benefit from the increased value of the land that was reflected in the proceeds of sale. Furthermore, Calgary argued that allocating any gain from the sale of utility assets would represent a recovery in addition to the fair rate of return as determined by the Board in setting the rates payable to the utility. Calgary cited Decision No. E77125 wherein the Board held that "investors in a regulated utility should not expect compensation beyond a return on and of capital. Conversely, they should not be expected to suffer a loss, notwithstanding resistance from customers". As this regime made the investment of shareholders entirely secure, it was not appropriate that customers bore the expenses, without sharing in the gains.

Calgary cited the Massachussets Department of Public Utilities decision re: Boston Gas Co. which stated: "the Company and its shareholders have received a return on the use of these parcels while they have been included in rate base, and are not entitled to any additional return as a result of their sale. To hold otherwise would be to find that a regulated utility company may speculate in non-depreciable utility property and, despite earning a reasonable rate of return from its customers on that property, may also accumulate a windfall through its sale."[32] Also, Calgary cited the Michigan Public Service Commission in the Detroit Edison Co. decision which stated: "since applicant's customers were charged for the property while it was in the rate base, they should receive the benefit of the gain on the sale."[33] For these reasons, Calgary submitted that to allow AGS to retain the gain on disposition of the Stores Block would effectively result in the customers paying the shareholder twice, once through the rates and again through the proceeds of disposition of the asset.

Calgary submitted that the customers are entitled firstly, to the difference between net book value and original cost of the buildings, and secondly, to a percentage of the proceeds attributable to the buildings in accordance with the TransAlta Formula. Calgary utilized the value for the buildings in the formula as being in the range of $1,803,409 to $2,603,409. Thirdly, Calgary submitted that the customers were entitled to a return of depreciation allowance that has been charged to them over the years accounted for in 2001 dollars. Calgary proposed that two potential treatments were acceptable for the customer proceeds; the Board may direct a credit to the revenue requirement on behalf of the customers, or may defer the issue so as to be dealt with in the AGS GRA. Calgary submitted that based on its application of the TransAlta Formula, customers were entitled to between $1,830,731 and $2,440,974.

Calgary also argued that consideration should be given to the rental value of the property to the customers. Calgary stated that the NPV of the rental income stream from the existing facility would be over $2 million before deducting the owning costs and depreciation.

Calgary argued that the Company had not acknowledged the role that customers played in financing the assets, beyond merely using the assets. Furthermore, Calgary noted that in Decision 2001-108, both the distribution and transmission customers were required to bear the loss on the disposal of the High River facility and, therefore, if customers were responsible for

[32] 49 P.U.R. (4th) 1 at 26
[33] 20 P.U.R (4th) 1 at 28

the loss in that case they must also be entitled to the gain on the disposal of facilities such as the Stores Block.

Calgary argued that in the case where regulated assets were being sold, not an entire business, it was open to the Board to allocate a portion of the sale proceeds to customers and this would not be inconsistent with Decision 2000-41.

FGA

FGA affirmed in argument its position, rationale and precedents proposed in the Withdrawn Application and submitted that this was an appropriate case to depart from the TransAlta Formula, favoring 100% allocation of net proceeds to customers who have borne all of the risk with respect to these assets. FGA was satisfied that if customers received 100% of the net proceeds, such proceeds would exceed the no-harm amount of $2 million conservatively calculated by FGA.

However, the FGA noted the Board's views with respect to the TransAlta Formula and the no-harm test provided in Decision 2001-65. In applying the TransAlta Formula to this case, consistent with the Centra Decisions, the FGA determined the shareholder portion of the net proceeds was $2,080,908, and the customer portion was $4,204,092. The FGA replied that an expeditious way of handling the allocation of the proceeds from the Sale would be to use the TransAlta Formula.

The FGA also argued that the $200,000 provision for environmental remediation should be deferred to a future GRA.

MI

MI stated that it was inappropriate to suggest that shareholders should be entitled to windfall profits arising from the sale of a utility asset simply because it was treated, for accounting purposes, as a non-depreciable asset. MI believed this was a distinction without a difference and certainly one that was not recognized in the TransAlta Appeal. In summary, MI's position was that the shareholders have received everything to which they are entitled. In regard to the "regulatory compact", anything further would artificially and improperly increase the Company's return above that which the Board has previously determined to be fair and reasonable. MI did not question the legal ownership of the assets, but like the proceeds of their sale, considered they were encumbered by the regulatory compact. The MI argued this limited the return to which the utility was entitled. MI stated that the TransAlta Formula contemplated both the customers and shareholders "benefiting twice" when the gain exceeds the original cost.

MI suggested that in considering this decision and the application of the TransAlta Formula, the following should be considered regarding the TransAlta Appeal:

(a) The compensation paid to TransAlta resulted from a forced taking and in consequence of the reduction in service area;

(b) The application was made pursuant to the Hydro and Electric Energy Act and there were no similar positions with regard to gas utilities;

(c) Compensation was found to be more than payment for the physical asset (i.e. loss of a portion of the franchise interest and the right to customers), and;

(d) The decision was not intended to apply to every disposition of utility assets.

The MI also noted that the TransAlta Appeal did not reference non-depreciable assets.

MI submitted that the Court of Appeal was attempting to arrive at a method of fairly allocating the sale proceeds as between customers and shareholders. This sharing was based upon its perception of the relative contribution of the two parties as reflected in the ratio of net book value to accumulated depreciation. MI suggested that customers' contribution could come from a number of sources including the annual depreciation allowance. The MI submitted that customers had paid approximately two-thirds of the total cost of the Stores Block.

MI stated its position that there was an over-arching principle that "benefit follows risk" and that customers have borne 100% of the risk associated with the acquisition of the subject land. The elements of risk which were assumed by the customers were:

(a) The Company's decision to purchase (using customer supported funds) was prudent;

(b) The property would continue to be "used and useful";

(c) The commitment to pay 100% of acquisition costs, carrying costs and other collateral costs of ownership; and

(d) The commitment to pay any shortfall if the property was sold at less than original cost.

The MI concluded that there were no Alberta cases that specifically addressed the sharing of a gain on the sale of land, nor were there any Court or Board decision that supported the position that shareholders were entitled to 100% of the gain.

MI stated that sharing of sale proceeds did not constitute an expropriation of any ownership interest. Rather it simply recognized that the assets in question were encumbered by the regulatory compact and by legislated restrictions with respect to their sale. The MI suggested that if the Board determined the TransAlta Formula should apply there should be a sharing between customers and shareholders. Customers were entitled to recovery of accumulated depreciation, shareholders were entitled to the remaining NBV, with the balance of the proceeds net of disposition costs shared two-thirds to customers, and one-third to shareholders based on the Centra Decisions.

Views of the Board

The Board considered evidence, written authorities and arguments from parties regarding the ratios of allocation of the net gain on the sale of the assets. The parties argued a range of allocations that varied from 100% of gain to the company to 100% of gain to customers while referencing a variety of cases in many jurisdictions. The Board observed that each case was evaluated on its own specific set of circumstances and resulted in a percentage net gain allocated between customers and companies that varied from cases to case.

In balancing the interest of the customers' desire for safe reliable service at a reasonable cost with the provision of a fair return on investment made by the company, the Board considers that the interests of both parties must contribute to the business environment. Both parties' interests should contribute toward the factors affecting decisions made by the company.

To award the entire net gain on the land and buildings to the customers, while beneficial to the customers, could establish an environment that may deter the process wherein the company continually assesses its operation to identify, evaluate, and select options that continually increase efficiency and reduce costs.

Conversely, to award the entire net gain to the company may establish an environment where a regulated utility company might be moved to speculate in non-depreciable property or result in the company being motivated to identify and sell existing properties where appreciation has already occurred.

The Board believes that some method of balancing both parties' interests will result in optimization of business objectives for both the customer and the company. Therefore, the Board considers that sharing of the net gain on the sale of the land and buildings collectively in accordance with the TransAlta Formula is equitable in the circumstances of this application and is consistent with past Board decisions. Appendix A sets out the calculation of the TransAlta Formula with respect to the proceeds of the Sale.

The Board determines in Appendix A that from the gross proceeds of $6,550,000, $465,000 goes to the Company to cover the cost of disposition ($265,000) and the provision for environmental remediation ($200,000), $2,014,690 goes to the AGS shareholder, and $4,070,310 goes to customers. The Board directs the Company to account for the environmental remediation in a deferred account to be reconciled at a future proceeding. The allocation of the $4,070,310 between AGS and APS customers is addressed in Section 6.3 of this Decision.

6.3 Allocation Between ATCO Pipelines and ATCO Gas Customers

Positions of the Parties

AGS

AGS disagreed with the FGA's assertion that the Stores Block was "used or required to be used" by ATCO Pipelines – South (APS). AGS argued that the provision of services to APS did not give APS any interest or claim to the assets of AGS. The Company submitted that APS terminated the service agreement for Materials Management services from ATCO Gas effective July 1, 2001 and further submitted that the new leased facility would not be used to serve APS.

FGA

FGA claimed that it was clear that the Stores Block was used and required to be used for the operations of APS, and that APS customers paid rates that included costs from the Stores Block.

The FGA submitted that APS paid AGS $30,000 annually for supplies management pursuant to an agreement that terminated July 1, 2001. Therefore, the FGA argued that the customers of APS should not be denied a share of the net proceeds from the Sale.

In the Withdrawn Application the FGA submitted that the fairest way to divide the proceeds of the Sale between customers would be to determine the usage of the various functions used by AGS and APS. However, the FGA suggested that might not be possible any longer due to insufficient information. As an alternative, the FGA proposed that the proceeds be divided between AGS and APS in the same proportion as the assets of the two companies. According to the information filed in the AGS and APS GRAs[34], 25.17% of assets were transferred to ATCO Pipelines (as part of the CU Reorganization involving Canadian Western Natural Gas Company Limited, the predecessor to ATCO Gas and Pipelines Ltd.) and therefore, this percent is the share of the proceeds from the Sale that should be allocated to the customers of APS as a method of compensation.

Calgary

Calgary argued that there was not enough evidence to determine the appropriate split of the proceeds between AGS and APS. Calgary suggested that the Board direct AGS to determine the relative use of the Stores Block between the two functions based upon the last 3 years prior to the reorganization.

Views of the Board

The Board notes the Company's claim that "the provision of services to APS does not give APS any interest or claim to the assets of AGS". Alternatively the Board notes that customers who would appear to be at odds regarding the appropriate splitting of any proceeds between AGS and APS, agree that some allocation could be required.

The Board considers that the use of the TransAlta Formula recognizes the historical nature of the Stores Block. The assets comprising the Stores Block are long-lived assets that have been used to provide service to both AGS and APS. Therefore, the Board agrees that any allocation should be based on their historical use. The Board does not agree that is necessary to determine the relative use of the assets between the two functions as suggested by Calgary. Rather the Board is prepared to rely upon the information filed in the AGS and APS GRA's and transfer 25.17% of the $4,070,310 customer portion to APS customers. APS customers shall receive $1,024,497 of the proceeds with AGS customers receiving the remaining $3,045,813.

In making this determination the Board recognizes that other customers no longer served by either AGS or APS could make a similar argument to that of the FGA. The Board notes that it would not normally consider make a finding that would have a rate impact on a party or parties no longer served by a utility, however the Board considers that the circumstances justify an exception in this case. The Board notes that APS was using services located at the Stores Block and that the Materials Management services agreement between ATCO Gas and APS was only terminated on July 1, 2001. The Board also notes that customers represented by the FGA that

[34] e.g. 2001/2002 General Rate Application by APS, Section 4.2, page 10, line 16

would benefit from this Decision have historically been served by AGS and more recently by APS.

7 ORDER

Having regard to the Application, the record developed with respect to the Withdrawn Application, the record developed in Part 1 and Part 2 of the Application, and the Board's own knowledge herein, the Board hereby orders that:

(1) The $4,070,310 portion of the Sale proceeds allocated to customers shall be credited to the customers by a method to be approved by the Board. AGS customer shall receive $3,045,813 and APS customers shall receive $1,024,497.

(2) The $2,014,690 portion of the Sale proceeds allocated to the Company shall be credited to the Company's shareholder, of which $225,245 shall be used to remove the remaining NBV of the Stores Block assets from the Company's accounts. The Company shall also be credited with the $265,000 cost of disposition, and the $200,000 provision for environmental remediation.

(3) The Company shall account for the provision for environmental remediation in a deferred account to be reconciled at a future proceeding.

Dated at Calgary, Alberta on March 21, 2002.

ALBERTA ENERGY AND UTILITIES BOARD

(Original signed by)

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

(Original signed by)

T. McGee
Member

(Original signed by)

G. J. Miller
Member

APPENDIX A – ALLOCATION OF PROCEEDS

		($)
1	Original cost	$680,311
2	Current Dollar Index [1]	8.9444
3	Gross Proceeds	$6,550,000
4	Cost of Disposition	$265,000
5	Provision for Environmental Remediation	$200,000
6	Net Proceeds	$6,085,000
7	NBV to Company	$225,245
8	Available for Allocation	$5,859,755
9	Accumulated Depreciation	$455,066
10	To Customers [2]	$455,066
11	Remainder to be Shared	$5,404,689
12	Share to Company [3]	$1,789,445
13	Share to Customers [4]	$3,615,244
14	Total to Company	$2,014,690
15	Total to Customers	$4,070,310
16	Total	$6,085,000

[1] Current Dollar Index (2) equals Net Proceeds (6) divided by Original Cost (1)

[2] To Customers (10) equals lesser of line 8 or line 9

[3] Share to Company (12) equals (NBV x Current Dollar Index (2)) - NBV)

[4] Share to Customers (15) equals (Accumulated Depreciation x Current Dollar Index (2)) Line 10