

9171-73

In the Court of Appeal of Alberta

Citation: Calgary (City) v. Alberta (Energy and Utilities Board), 2010 ABCA 132

**Date: 20100423
Docket: 0801-0030-AC
Registry: Calgary**

Between:

City of Calgary

**Appellant
(Applicant)**

- and -

Alberta Energy and Utilities Board

**Respondent
(Respondent)**

Régie de l'énergie
DOSSIER: R-3905-2014 PHASE 2
DÉPOSÉE EN AUDIENCE
PAR LE ROEE
Date: 9 JUILLET 2015
Pièces n°: NON NOTÉE

- and -

ATCO Gas and Pipelines Ltd.

**Respondent
(Respondent)**

The Court:

**The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Constance Hunt
The Honourable Madam Justice Marina Paperny**

**Reasons for Judgment Reserved of The Honourable Madam Justice Hunt
Concurred in by The Honourable Madam Justice Paperny**

**Reasons for Judgment Reserved of The Honourable Mr. Justice Côté
Concurring in Part**

**Appeal from the Alberta Energy and Utilities Board
Decision 2008-001 dated January 8, 2008 and
Decision 2005-036 dated April 28, 2005**

2010 ABCA 132 (CanLII)

**Reasons for Judgment Reserved of
The Honourable Madam Justice Hunt**

[1] I agree with Côté J.A. that the orders under appeal should be vacated, but reach that conclusion for different reasons. I would allow the appeal and return the matter to the Alberta Utilities Commission (“Board”)¹ for reconsideration in accordance with this judgment.

Facts

History of Deferred Gas Accounts (DGA)

[2] The modern origin of deferred gas accounts (formerly deferred gas accounting) (“DGA”) is a 1988 decision which arose out of a utility’s general rate application: *Re Northwestern Utilities Limited*, In the matter of an application to determine rate base and fix a fair return thereon for the test years 1987 and 1988, Decision E88018, (Public Utilities Board). The use of a DGA was proposed to deal with seasonal price differences in gas costs. It required segregating the sales rate into two components, gas and non-gas. The latter would be determined in a general rate application while the former, the Gas Cost Recovery Rate (“GCRR”), would be determined twice a year using a formal filing process, subject to Board monitoring or review by way of a hearing. Adjustments to actual and estimated costs of gas would be held in the DGA then reconciled for refund to or recovery from consumers.

[3] In approving these procedures, the Board emphasized that the outcome would be “customers pay for no more or less than the price of gas actually incurred ... the shareholders would not gain or be penalized as a result of price variations ...”: p. 325. The use of a DGA would be beneficial to customers: p. 326. The Board described the GCRR’s gas cost component as “interim”: p. 327. This early decision demonstrates that the Board intended to scrutinize the use of the DGA on an ongoing basis.

[4] The principles from this decision were applied the same year to Canadian Western Natural Gas Company Limited, the respondent ATCO’s predecessor: *Re Canadian Western Natural Gas Company Limited*, In the matter of an Application by Canadian Western Natural Gas Company Limited for approval of Deferred Gas Accounting and Reconciliation procedures respecting its gas supply costs, Order E88019, (Public Utilities Board, 1988). The DGAs at issue here were then created.

[5] In 2001 ATCO and the appellant City of Calgary (Calgary) were both parties to a hearing that considered, *inter alia*, the methodology for determining the GCRR: *Methodology for Managing*

¹ “Board” means the regulator of Alberta’s gas industry which has, over time, been the Public Utilities Board, the Energy and Utilities Board and the Alberta Utilities Commission.

Gas Supply Portfolios and Determining Gas Cost Recovery Rates (Methodology) Proceeding and Gas Rate Unbundling (Unbundling) Proceeding, Part A: GCRR Methodology and Gas Rate Unbundling. Decision 2001-75 (Alberta Energy and Utilities Board, 2001). Its context was the transition to competitive retail gas service. The Board noted its general supervisory power over utilities and its power to fix just and reasonable rates as the basis of its authority to deal with the issues in the hearing: p. 10.

[6] The Board described “GCRR/DGA Programs” as follows at p. 56:

The effect of a Gas Cost Recovery Rate/Deferred Gas Account (GCRR/DGA) mechanism is to spread the cost of gas acquisition and management over a forecast period, keeping consumer gas prices stable during that period. The use of a DGA to keep track of differences between actual and forecast gas costs ensures that customers pay no more and no less than actual costs incurred on their behalf. However, the reconciliation between forecast and actual costs occurs over one or more seasons. [footnote omitted] During periods of rapid gas price increase, as experienced in the winter of 2000/2001, the accumulated balances in the DGA can become large. The current system of GCRRs/DGAs has defined tolerance limits on the size of the DGAs, requiring the utilities to file for gas rate adjustments when the variance between forecast and actual costs becomes too large. [emphasis added]

[7] The Board determined that utilities no longer needed to “file formal GCRR applications with the Board, but would instead file ... on a monthly basis”, and monthly adjustments would be made to the GCRR: p. 64. Interested parties would have an opportunity to raise concerns about the monthly GCRRs filed by the utilities. Reconciliation of DGA balances would be done on a three-month rolling basis. The Board set a date for the commencement of this system, “in conjunction with the revised interim rates noted elsewhere in this Decision”: p. 64.

[8] Since then, the use of DGAs has evolved. For example, in ATCO Gas South Jumping Pound Meter Station – Gas Measurement Adjustment Application No. 1314487, Decision 2004-013, the Board approved adjustments to an ATCO DGA balance to reflect measurement errors caused by equipment malfunction. Part of the Board’s rationale was that the adjustment was made in accordance with approved DGA procedures. A related adjustment to the DGA (timing costs) was rejected by the Board because it was not a previously approved DGA adjustment.

[9] In other DGA decisions, the Board considered factors such as the amount of the adjustment, the timeliness of the application, whether the utility had acted responsibly, the foreseeability of the problem, and whether consumers who received the service were bearing the cost of the adjustment, see e.g., Northwestern Utilities Limited, 1996/1997 Winter Period Gas Cost Recovery Rate, Decision U97053 97053; IN THE MATTER of a Gas Cost Recovery Rate Refund for the 2001 Summer Period for AltaGas Utilities Inc. Order U2001-316.

Origin of this Dispute

[10] In May 2004, ATCO sought Board approval to correct balances in the DGAs for each of its south and north gas distribution service territories. The proposed adjustment to the DGA for northern Alberta was largely attributable to *overstated* gas costs from January 1998 to February 2004, whereas in southern Alberta the actual gas costs ATCO incurred from January 1999 to February 2004 were *understated*. ATCO proposed that its present southern Alberta consumers would pay the shortfalls and that it would refund excesses to its present northern Alberta consumers. Since this appeal concerns only the adjustment proposed to the southern DGA, I make no further reference to the northern DGA.

[11] The adjustments were sought because there had been inaccurate reporting of gas being transported for other entities through ATCO's pipeline network ("transportation imbalances"). It appears the errors began when the administration of ATCO's gas transportation system was moved to a new system, the transportation information system ("System").

[12] ATCO had included the transportation imbalances as prior period adjustments in the DGA as part of its December 2003 GCRR filings. While producing supplementary information requested by the Board, ATCO detected additional transportation imbalances. It then refiled its December 2003 GCRR *excluding* the transportation imbalance adjustments. ATCO engaged chartered accountants to review its re-calculation of the imbalances. The Board's treatment of ATCO's subsequent application to record the revised transportation imbalances in the DGA is at the root of this appeal.

Board Decisions

[13] Three Board decisions are relevant. Each is described in more detail beginning at para. 16.

[14] The first decision partly allowed ATCO's application to use the DGA/GCRR reconciliation process to record the transportation imbalances: ATCO Gas, A Division of ATCO Gas and Pipelines Ltd. Imbalance and Production Adjustments – Deferred Gas Account Application No. 1347852, Decision 2005-036, ("DGA Decision"). In the second, the Board established a general rule that the DGA/GCRR reconciliation process has a two-year limitation period: ATCO Gas, A Division of ATCO Gas and Pipelines Ltd., Deferred Gas Account Limitation Period, Decision 2006-042 ("Limitations Decision"). The third focused on the Board's jurisdiction to make the DGA and the Limitations Decisions: ATCO Gas, A Division of ATCO Gas and Pipelines Ltd. Reconsideration of Decision 2005-036 Deferred Gas Account, Imbalance and Production Adjustments, Application No. 1524763 Proceeding ID. 5, Decision 2008-001 ("DGA Reconsideration Decision").

[15] As to the DGA and DGA Reconsideration Decisions, Calgary obtained leave to appeal on the following question: “Whether the Board erred in law or in jurisdiction by allowing for the recovery, in 2005, of costs or expenses that were incurred between 1991² and 2004.”: *Calgary (City) v. Alberta (Energy and Utilities Board)*, 2009 ABCA 150 at para. 9, [2009] A.J. No. 408. ATCO has discontinued its application for leave to appeal the Limitations Decision.

DGA Decision (Decision 2005-036)

[16] The Board defined the central issue as “whether or not it is appropriate for the DGA to be a vehicle of all and any updates and corrections other than for price and actual gas sales (or deliveries)”: p. 10.

[17] In reviewing the history of the DGA/GCRR process, the Board noted that the DGA/GCRR process was originally approved to provide a method for adjusting for gas price volatility and that, by April 2002, the process was refined so that monthly (not seasonal) reconciliations were made: p. 10. Over time, DGAs were used without complaint to adjust gas rates for reasons unrelated to price volatility, including measurement corrections. While it had become a “relatively common occurrence” for DGAs to be used for making prior period adjustments, most were made “within a reasonable time period”: *Id.*

[18] The Board was troubled by the evolution of DGAs into a ‘catch all’ method for fixing all possible gas cost errors and by the timing of the adjustments. It criticized ATCO for the design errors in the System report and its delay in detecting them, reinforcing its expectation that ATCO’s internal controls should detect material errors in a timely way.

[19] Notwithstanding these misgivings, the Board permitted ATCO to recover eighty-five percent of the amounts it sought through adjustments to its DGA.

Limitations Decision (Decision 2006-042)

[20] The Board’s concerns about ATCO’s delay in applying for the imbalance adjustments led to a hearing to examine whether it ought to impose a general policy limiting the extent to which adjustments are made to DGAs.

[21] In the resulting Limitations Decision, the Board considered its jurisdiction to establish limitation periods for the DGA/GCRR process in the context of its statutory mandate to set just and

² Calgary did not challenge the adjustments the Board approved to ATCO’s northern territory DGA arising from transportation imbalances for the 1998 - 2004 period (Board factum at para. 14). Accordingly, 1999 (not 1998, as was stated in the leave decision) is the appropriate starting point.

reasonable rates and court decisions approving their use. It concluded that setting the GCRR requires the use of DGAs. Moreover:

the deferral nature of the DGAs is specifically contemplated and acknowledged when the rates are set. Deferral accounts, by their nature, anticipate adjustments such as the ones at issue in this matter and, as such, cannot be said to constitute retroactive rate-making. The Supreme Court of Canada has approved the use of deferral accounts for gas and has further noted that such a mechanism is a purely administrative matter [citation omitted]. In *EPCOR Generation Inc. v. AEUB*, 2003 ABCA 374, the Alberta Court of Appeal adopted the same approach and stated that as the deferral account in issue in that decision was not closed, it was not a final order, and was not retroactive rate making or procedurally unfair.

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

p. 4 (emphasis added).

[22] The Board adopted a general limitation period of two years prior to the effective date of the proposed GCRR for refunds to and recoveries from consumers. It permitted applications for

approval of an adjustment to the DGA, where the cause of the adjustment originates outside the two-year limitation period, provided the following conditions are met:

(a) the adjustment sought exceeds the threshold value by being greater than 5% of the average monthly DGA gas commodity costs of the previous 12 months; and

(b) the adjustment arose from special circumstances that were not within the utility's control.

p. 17

[23] As regards possible 'inter-generational equity' issues (a concept discussed more fully at para. 48 that means utility consumers should pay the costs associated with *their* consumption of the service, and future consumers should not benefit from or be burdened by the cost of services consumed by past consumers), the Board said at p. 12:

While intergenerational equity questions ... arise ... particularly in relation to deferral accounts, the Board believes in this case that the imposition of a limitation period for DGAs assists in addressing the intergenerational issue raised ... because it limits the adjustments in the ordinary course. [ATCO] is correct in pointing out that deferred accounts have an inherent intergenerational aspect; however, the Board considers that it is important to not allow too long a period before dealing with adjustments. [emphasis added]

DGA Reconsideration Decision (Decision 2008-001)

[24] Calgary was granted leave to appeal the DGA Decision on the question of whether the Board was authorized under its governing legislation to approve any of the adjustments to the Deferred Gas Account applied for by ATCO Gas. Following a hearing, this Court concluded that since the issue of the Board's jurisdiction to grant ATCO's May 2004 application had not been raised before the Board, the evidentiary record necessary for an appeal was lacking: *Calgary (City of) v. ATCO Gas and Pipelines Ltd.*, 2007 ABCA 133, 404 A.R. 317. The Court returned the matter to the Board, which then considered whether it was "authorized under its governing legislation to approve adjustments to the ATCO Gas DGA in 2005 for costs and expenses incurred between 199[9] and 2004": p. 2.

[25] Calgary argued that the Board's jurisdiction was limited by section 40 of the *Gas Utilities Act* (see para. 27) such that "the Board's jurisdiction to consider prior period financial activity of a utility is limited to a 12-month period, even when the financial activity occurs in a deferral account approved by the Board": p. 7. The Board disagreed, partly because of its interpretation of its broad statutory mandate to fix just and reasonable rates. The Board reasoned that DGAs would serve no purpose under Calgary's interpretation because section 40 specifically authorizes the Board to take into account excess revenues or losses in "the whole of the fiscal year" of the rate application (ss. 40(a)(i)) and in any consecutive two-year period thereto (ss. 40(a)(iii)).

[26] The Board reiterated its Limitations Decision's conclusion on jurisdiction, found above at para. 21.

Legislation

[27] When ATCO applied for this DGA adjustment in 2004, the relevant legislation provided (with emphasis):

Alberta Energy and Utilities Board Act, R.S.A. 2000. c. A-17

Powers of the Board

15(1) For the purposes of carrying out its functions, the Board has all the powers, rights and privileges of the ... PUB that are granted or provided for by any enactment or by law.

[...]

(3) Without restricting subsection (1), the Board may do all or any of the following:

(a) make any order that the ... PUB may make under any enactment;

[...]

(d) with respect to an order made by the Board ... in respect of matters referred to in clauses (a) to (c), make any further order and impose any additional conditions that the Board considers necessary in the public interest;

(e) make an order granting the whole or part only of the relief applied for;

[...]

26(1) Subject to subsection (2), an appeal lies from the Board to the Court of Appeal on a question of jurisdiction or on a question of law.

Gas Utilities Act, R.S.A. 2000, c. G-5

The word "Board" is defined as the Public Utilities Board in section 1(b).

Powers of Board

36 The Board ... may ...

(a) fix just and reasonable ... rates, ...

[...]

(c) require an owner of a gas utility to supply and deliver gas to the persons, for the purposes, at the rates, prices and charges and on the terms and conditions that the Board directs...

Rate base

37(1) In fixing just and reasonable rates ... the Board shall determine a rate base for the property of the owner of the gas utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base. ...

Schedule of rates

38(1) For the purpose of fixing the just and reasonable rates that may be charged to consumers of gas by an owner of a gas utility who purchases gas pursuant to a contract under which provision is made

- (a) for the progressive increase in the price of gas to the owner of the gas utility,
- (b) for an increase in the price of gas to the owner of the gas utility by reason of changes in any prices received by the owner on resale of the gas,
- (c) for an increase in the price of gas to the owner of the gas utility by reason of the payment of higher prices by any purchaser of gas in any gas producing area, or
- (d) for the redetermination of the price of gas to the owner of the gas utility either by agreement of the parties or pursuant to arbitration,

the Board ... may receive for filing a new schedule of rates that are alleged by the owner to be occasioned by the rise in the price required to be paid by the owner for purchased gas.

(2) The new schedule may be put into effect by the owner of the gas utility on receiving the approval of the Board to it ...

[...]

Excess revenues or losses

40 In fixing just and reasonable rates, tolls or charges ...,

- (a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of
 - (i) the whole of the fiscal year of the owner in which a proceeding is initiated ...,
 - (ii) a subsequent fiscal year of the owner, or
 - (iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,

and need not consider the allocation of those revenues and costs to any part of that period,

[...]

(c) the Board may give effect to that part of ... any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates ... that the Board determines has been due to undue delay in the hearing and determining of the matter, and

(d) the Board shall by order approve

(i) the method by which, and

(ii) the period, including any subsequent fiscal period, during which,

any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (b) or (c), is to be used or dealt with.

Public Utilities Board Act, R.S.A. 2000, c. P-45

Jurisdiction and powers

36(1) The Board has all the necessary jurisdiction and power

(a) to deal with public utilities and the owners of them as provided in this Act;

(2) In addition to the jurisdiction and powers mentioned in subsection (1), the Board has all necessary jurisdiction and powers to perform any duties that are assigned to it by statute

[...]

Fixing of rates

89 The Board ... may ...

(a) fix just and reasonable ... rates ...

Chronology of Legislation

[28] Some of the following discussion refers to judicial interpretations of predecessor legislation. An understanding of those decisions requires an appreciation of the interaction between the earlier and current legislation.

[29] Subsection 67(a) of the *Public Utilities Act*, R.S.A. 1955, c. 267 provided:

67. The Board ... may ...

(a) fix just and reasonable individual rates

[30] Section 67 of the *Public Utilities Act* was amended in April 1959 by S.A. 1959, c. 73, s. 9 as follows:

(a) by renumbering the present section as subsection (1), ... [in other words, s. 67(a) became s. 67(1)]

(d) by adding immediately after the renumbered subsection (1) the following subsections: ...

(2) In fixing just and reasonable rates, ... the Board shall determine a rate base for the property of the proprietor ... and fix a fair return thereon.

[...]

(8) ... in fixing just and reasonable rates, the Board may give effect to such part of any excess revenues received or losses incurred by a proprietor after an application has been made to the Board for the fixing of rates as the Board may determine has been due to undue delay in the hearing and determining of the application.

[31] In 1960, the *Gas Utilities Act*, S.A. 1960, c. 37 was enacted and provided:

Powers of the Board

27. The Board ... may ...

(a) fix just and reasonable individual rates ...

Rate base

28.(1) In fixing just and reasonable rates ... the Board shall determine a rate base for the property of the owner that is used or required to be used in his services to the public within Alberta and fix a fair return thereon.

Excess revenue or losses

31. ... in fixing just and reasonable rates, the Board may give effect to such part of any excess revenues received or losses incurred by an owner of a gas utility after an application has been made to the Board for the fixing of rates as the Board may determine has been due to undue delay in the hearing and determining of an application.

[32] To summarize, the predecessor of present section 36 of the *Gas Utilities Act* (the power to set just and reasonable rates) is section 27 of the S.A. 1960 version of the *Gas Utilities Act*. The latter's predecessor is subsection 67(a) of the *Public Utilities Act* (later subsection 67(1)). The present section 37 of the *Gas Utilities Act* (fixing just and reasonable rates by determining rate base and fixing a fair return thereon) was section 28 in the S.A. 1960 version and it, in turn, was based on section 67(2) of the 1959 amendments to the *Public Utilities Act*. The predecessor to the present section 40 of the *Gas Utilities Act* is section 31 of S.A. 1960, which took its wording from ss. 67(8) of the 1959 amendments to the *Public Utilities Act*.

Discussion

[33] Calgary sees the central issue as the extent to which the Board can engage in retroactive ratemaking. ATCO says the appeal concerns an exercise of discretion by the Board. In my view, the appeal raises the following issues:

- (1) What is the source of the Board's jurisdiction over DGAs?
- (2) Did the Board retroactively change rates or did its decision have a prohibited effect?
- (3) What standard applies to this Court's review of the Board's decisions?
- (4) Against that standard, do the Board's decisions to allow ATCO to use the DGA to record transportation imbalances for 1999 to February 2004 warrant this Court's intervention?

The first two are threshold issues; if the decision under appeal falls because of the answer to either of them, the subsequent issues do not arise.

Issue 1. What is the source of the Board's jurisdiction over DGAs?

[34] Calgary acknowledges "the Board has jurisdiction to set up a DGA or what classes of costs or recoveries are to be included or how they are to be allocated.": Factum at para. 43. This Court implicitly approved the use of deferral accounts in regulated utility rate setting: *ATCO Electric Limited v. Alberta (Energy and Utilities Board)*, 2004 ABCA 215 at para. 26, 361 A.R. 1 ("ATCO Electric").

[35] That said, it is critical to identify the source of the Board's jurisdiction over deferral accounts. If it is section 40 of the *Gas Utilities Act*, time limits apply. If, as ATCO argues, it is sections 36 and 37, that legal impediment disappears.

A. Nature and Function of Deferral Accounts in Utility Regulation

[36] A consideration of the nature and function of deferral accounts provides context: Deferral accounts allow a utility to accumulate variances between a utility's approved rate based on forecasted costs and the utility's actual costs for a given period. Typically, at the end of the period, a utility will then collect from customers through a rate rider any balances in the deferral accounts owing by them and refund any balances owing to them.

ATCO Electric at para. 26.

In Alberta, utilities are usually regulated using a future test year regulatory framework in which the Board approves a forecast of a utility's revenue requirements that equates to a forecast of its future costs. However, if the Board is unable to determine a just and reasonable forecast, deferral accounts may be established to deal with uncertain items. In this case, due to the inability to accurately forecast pool prices, deferral accounts were created for 1999 and 2000 ...

Epcor Generation Inc. v. Alberta (Energy and Utilities Board), 2003 ABCA 374 at para. 2, 346 A.R. 281 ("*Epcor*").

[D]eferral accounts ... are accepted regulatory tools, available as a part of ... rate-setting powers ... [they] ... 'enabl[e] a regulator to defer consideration of a particular item of expense or revenue that is incapable of being forecast with certainty for the test year' [citation omitted]. They have traditionally protected against future eventualities, particularly the difference between forecasted and actual costs and revenues, allowing a regulator to shift costs and expenses from one regulatory period to another.

Bell Canada v. Bell Aliant Regional Communications, 2009 SCC 40, [2009] 2 S.C.R. 764 at para. 54 ("*Bell Aliant*").

[37] To summarize to this point, descriptions of the general purpose of deferral accounts and the history of this DGA shows that DGAs in gas utility regulation exist to ensure that consumers pay the cost of the gas they consume, with no resulting profit or loss to the utility's shareholders. This general objective has been fully supported by the courts: *ATCO Electric*, *Epcor*, *Bell Aliant*, *City of Edmonton*, *infra*.

B. Source of the Board's Authority

[38] What, then, is the source of the Board's jurisdiction to permit the use of DGAs as a regulatory tool? As outlined above at para. 3, the DGA at issue was approved in 1988. Nevertheless,

before 1988 the Board employed tools with a similar function to regulate gas utilities. Judicial views about the source of the Board's authority to use those tools are instructive.

[39] In the late 1950s the Board proposed a "purchased gas adjustment clause". It would permit the utility to recoup from consumers in the future amounts the utility had to pay for gas that proved more expensive than the utility's estimates, and to refund amounts to consumers if the estimates proved to be greater than the actual cost: *City of Edmonton et al. v. Northwestern Utilities Ltd.*, [1961] S.C.R. 392 at 396-397, 28 D.L.R. (2d) 125 ("*City of Edmonton*"). The Board's jurisdiction to approve such a device was upheld by the Supreme Court, which said that its purpose was to:

ensure that the utility should from year to year be enabled to realize, as nearly as may be, the fair return mentioned in [s. 67(2)] and to comply with the Board's duty ... to permit this to be done. How this should be accomplished...was an administrative matter for the Board to determine ... under the powers ... to fix just and reasonable rates which would yield the fair return mentioned in s. 67(2).

Id at 406-407 with emphasis added.

The counterparts to the section referred to in this passage are the present sections 36(a) and 37 of the *Gas Utilities Act*.

[40] In *Bell Aliant*, the telecommunication regulator, the Canadian Radio Television and Telecommunications Commission's ("CRTC") source of authority to establish deferral accounts was held to be the combined effect of sections 27 and 37(1) of the *Telecommunications Act*, S.C. 1993, c. 38: para. 37. Section 27(1) concerns setting just and reasonable rates, while section 37(1) permits the CRTC to require carriers to adopt any method of identifying the costs of providing services and to adopt any accounting method. The Court added that the "guiding rule of rate-setting under the *Telecommunications Act* is that the rates be 'just and reasonable', a longstanding regulatory principle."; para. 30. The authority to establish the accounts "necessarily includes the disposition of the funds they contain."; *Ibid*.

[41] These cases suggest that the Board's authority over DGAs flows from its power to set just and reasonable rates and a fair rate of return on rate base found in sections 36 and 37 of the *Gas Utilities Act*. Underlying that mandate is the "regulatory compact":

Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated.

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), 2006 SCC 4, [2006] 1 S.C.R. 140 (“*Stores Block*”) at para. 63.

[42] I agree with ATCO that the Board’s authority over DGAs does not come from section 40. Although that provision uses broad language, its function is limited. It permits, among other things, consideration of utility’s revenues and costs for the whole fiscal year in which an application for rates is made. It also authorizes adjustments for regulatory lag, that is, the difference between rates the utility seeks when its general rate application is made, and those appropriate when the rates are approved. But it does not limit the Board’s general authority to employ other tools (such as the gas purchase adjustment clause and DGAs) that assist in the discharge of its obligation to set just and reasonable rates.

[43] It is worth repeating that this principle flows from *City of Edmonton*, where the Supreme Court considered the newly enacted section 67(8) of the *Public Utilities Act* (section 40’s predecessor) in conjunction with the recovery of 1959 transitional losses which arose as a result of the 15-month delay between the utility’s rate application (June 1958) and the rate approval (September 1959). As to the second issue before the Court, the Board’s jurisdiction to permit the establishment of the gas purchase adjustment clause (the DGA’s predecessor), the Court referred to “s. 67(2) of the 1959 amendment” (which the Court of Appeal found did not grant the Board the necessary jurisdiction to permit the gas purchase adjustment clause) and held at 407 (emphasis added):

With great respect, however, the proposed order [establishing the gas purchase adjustment clause] would be made in an attempt to ensure that the utility should from year to year be enabled to realize, as nearly as may be, the fair return mentioned in that subsection and to comply with the Board’s duty to permit this to be done. How this should be accomplished, when the prospective outlay for gas purchases was impossible to determine in advance with reasonable certainty, was an administrative matter for the Board to determine, in my opinion. This, it would appear, it proposed to do in a practical manner which would, in its judgment, be fair alike to the utility and the consumer.

... the Board ... propose[s] to make the order under the powers given to it and the duty imposed upon it by the sections to which I have referred to fix just and reasonable rates which would yield the fair return mentioned in s. 67(2).

[44] Calgary argues against reliance on sections 36 and 37 as the source of the Board’s authority because of the Supreme Court’s admonition against employing general statutory authority to ground the exercise of overly-broad Board powers, see e.g., *Stores Block* at para. 50. Elsewhere in the same decision, however, the Court emphasized the need to determine whether the exercise of the proposed power is a “practical necessity for the regulatory body to accomplish the object prescribed by

legislation”: para. 77. According to the majority, such necessity was lacking in *Stores Block*. Here, for reasons outlined above at paras. 36-37, the use of DGAs is required if the Board is to regulate utilities effectively. Moreover, in *Bell Aliant*, Abella J. explained at paras. 51 - 53 that *Stores Block* did not “preclude the pursuit of public interest objectives through rate-setting”. She contrasted *Stores Block* by pointing out that in *Bell Aliant*, the CRIC’s rate-setting authority and its ability to establish deferral accounts for that purpose were at the very core of its competence. The same holds true in this case.

Issue 2. Did the Board retroactively change rates or did its decision have a prohibited effect?

[45] Calgary argues that by permitting ATCO to use the DGA to make adjustments going back several years the Board engaged in prohibited ratemaking because, in the result, ATCO’s present consumers must make up for a past shortfall. I do not agree. I have already explained why I think its power to set just and reasonable rates allowed it to authorize the use of DGAs. It follows that its further orders about *how* to use a DGA did not constitute prohibited ratemaking. As discussed at paras. 69-71, however, this does not mean that the effect of its decision on future ratepayers is irrelevant in determining whether the Board reasonably exercised its powers over the DGA.

[46] A brief overview of some central principles of ratemaking, including the related concepts of retroactive and retrospective ratemaking, is necessary. Generally, ratemaking and rates must be prospective: *Coseka Resources Ltd. v. Saratoga Processing Co.* (1981), 31 A.R. 541 at para. 29, 16 Alta. L.R. (2d) 60 (C.A.). A utility’s past financial results can be used to forecast future expenses, but a regulator cannot design future rates to recover past revenue deficiencies: *Northwestern Utilities Ltd. and al. v. Edmonton*, [1979] 1 S.C.R. 684 at 691 and 699 (“*Northwestern Utilities*”).

[47] Retroactive ratemaking “establish[es] rates to replace or be substituted to those which were charged during that period”: *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722 at 1749 (“*Bell Canada 1989*”). Utility regulators cannot retroactively change rates (*Stores Block* at para. 71) because it creates a lack of certainty for utility consumers. If a regulator could retroactively change rates, consumers would never be assured of the finality of rates they paid for utility services.

[48] Retrospective ratemaking, in contrast, imposes on the utility’s current consumers shortfalls (or surpluses) incurred by previous generations of consumers. It is generally prohibited because it creates inequities or improper subsidizations as between past and present consumers (who may not be the same). “[T]oday’s customers ought not to be held responsible for expenses associated with services provided to yesterday’s customers”: Yvonne Penning, “*The 1986 Bell Rate Case: Can Economic Policy and Legal Formalism be Reconciled*” (1989), 47(2) U.T. Fac. L. Rev. 607 at 610. This is sometimes referred to as the problem of inter-generational equity (which the Board discusses at p. 12 of the Limitations Decision reproduced at para. 23).

[49] Sometimes *retrospective* ratemaking is referred to as *retroactive* ratemaking. This is because rates imposed on a future generation of consumers, while prospective, create obligations in respect of past transactions, and in this sense they are retroactive: *City of Edmonton* at 402.

[50] In this case, the proposed accounting adjustments had retrospective effect: past costs would be borne by ATCO's present southern Alberta consumers, not the 1999 - 2004 consumers who received gas utility services when ATCO's gas costs were incurred.

[51] In summary, whether termed retrospective or retroactive ratemaking, imposing gas cost shortfalls or surpluses incurred by past consumers on future consumers is generally prohibited. Although this prohibition against retroactive and retrospective ratemaking is relatively clear, how to apply it in practice is less so. A review of key cases illustrates the complexity.

[52] A one-time credit order for consumers was upheld despite the fact that it was "retrospective in the sense that its purpose is to remedy the imposition of rates approved in the past and found in the final analysis to be excessive": *Bell Canada 1989* at 1749. Although the Board's review was retrospective in manner, the credit order was approved through an adjustment to interim rates. The Supreme Court stressed that the regulator had consistently stated its intention to review the interim rates: at 1755. Gonthier J. stated at 1752:

... one of the differences between interim and final orders must be that interim decisions may be reviewed and modified in a retrospective manner by a final decision. It is inherent in the nature of interim orders that their effect as well as any discrepancy between the interim order and the final order may be reviewed and remedied by the final order... the words "further directions" do not have any magical, retrospective content. ... It is the interim nature of the order which makes it subject to further retrospective directions. [emphasis added]

[53] In *Bell Aliant*, the Supreme Court also upheld a CRTC decision to order the disposition of funds that had accumulated in a deferral account. The Court rejected the argument that this constituted retrospective rate-setting because the rates had already been finalized. Abella J. pointed out that it was known at the outset that the CRTC would make subsequent orders about how to use the balance in the deferral accounts. At para. 63 she added (citations omitted and emphasis added):

In my view, the credits ordered out of the deferral accounts in the case before us are neither retroactive nor retrospective. They do not vary the original rate as approved, which included the deferral accounts, nor do they seek to remedy a deficiency in the rate order through later measures, since these credits or reductions were contemplated as a possible disposition of the deferral account balances from the beginning. These funds can properly be characterized as encumbered revenues, because the rates always remained subject to the deferral accounts mechanism established in the Price Caps Decision. The use of deferral accounts therefore

precludes a finding of retroactivity or retrospectivity. Furthermore, using deferral accounts to account for the difference between forecast and actual costs and revenues has traditionally been held not to constitute retroactive rate-setting ...

[54] Calgary argues that cases such as *Bell Canada 1989*, *Coseka* and *Bell Aliant* are distinguishable. The first two involved interim rather than final rates. In *Coseka*, it was pointed out at para. 36 that consumers must be aware that interim rates may be subject to change. As for *Bell Aliant*, all the parties knew in advance that the telecommunications companies would be obliged to use the balance of the deferral accounts in accordance with subsequent regulatory decisions: para. 61.

[55] Calgary suggests that gas rates here had long been finalized because the DGA had been reconciled in accordance with the Board's earlier orders that required forecast and actual gas costs to be reconciled on a three-month rolling basis (see Decision 2001-75 at p. 64). It adds that when the seasonal or monthly DGA/GCRR process was approved it was not expressed to involve interim rates, therefore by definition the rates must be final: *Factum* at para 67.

[56] In *Epcor* Fruman J.A. opined that whether deferred accounts are interim or final depends on the facts: para. 15. The material before the Court makes such a determination impossible. Language in the 1988 decision quoted above at para. 4 suggests that the use of the DGA involved interim rates, but that language is vague. In the DGA Decision, the Board noted in section 4.2 ATCO's argument that deferral accounts are by nature interim and therefore not retroactive. Unfortunately, the Board did not express its views on this topic.

[57] Both *Bell Canada 1989* and *Bell Aliant* (which concerned deferral accounts rather than interim rates) illustrate the same preoccupation: were the affected parties aware that the rates were subject to change? If so, the concerns about predictability and unfairness that underlie the prohibitions against retroactive and retrospective ratemaking become less significant.

[58] Were these parties aware that gas rates were potentially subject to change through the use of the DGA? If so, whether the rates are characterized as interim or final, the principles in *Bell Aliant* govern.

[59] The history of DGAs demonstrates that affected parties knew they would be used from time to time to alter gas rates based on later, actual gas costs. Indeed, the Board so found as a fact in the Limitations Decision at p. 4. It adopted the reasoning from that decision in the Reconsideration Decision. The Board's fact findings are not appealable: *Alberta Energy and Utilities Board Act*, s. 26(1).

[60] Reconciliation of the DGA/GCRR would sometimes benefit consumers and sometimes not. Gas rates sometimes changed because of the lack of predictability (volatility) in gas prices and sometimes from other factors such as measuring errors. Whatever the cause, the objective was to ensure that the consumer paid the actual cost of the gas. This legitimate object was accepted by all

parties. It strengthened the utility regulatory system by ensuring that the utility received a fair rate of return on its rate base.

[61] Therefore, whether the rates should be characterized as final or interim, the use of the DGA in this case did not involve prohibited ratemaking.

Issue 3 - What standard applies to this Court's review of the Board's decisions?

[62] The conclusion that the Board had jurisdiction to make the orders about the use of the DGA, and did not thereby engage in prohibited ratemaking, suggests that the reasonableness standard of review should be applied.

[63] Abella J. employed this standard in *Bell Aliant* because, in her view, the issues went to the heart of the CRTC's specialized expertise, "the methodology for setting rates and the allocation of proceeds derived from those rates, a polycentric exercise with which the CRTC is statutorily charged and which it is uniquely qualified to undertake.": para. 38, see also para. 56. The same point applies here.

[64] Reinforcing this conclusion are the reasons given for applying the reasonableness standard in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2008 ABCA 200, 433 A.R. 183 at paras. 15 - 18 (leave to appeal refused [2008] S.C.C.A. No. 347). See also *ATCO Electric*, where the Court determined in its standard of review analysis that "[w]ith ... the widespread use of deferral accounts, determining the appropriate methodology to be used in calculating prudent costs of financing these deferral accounts engages the Board's specialized expertise.": para. 63. Reasonableness is also the standard applied to a gas regulator's decision to permit a utility to recover material and previously unrecorded costs for the provision of gas services: *Natural Resource Gas Ltd. v. Ontario (Energy Board)* (2006), 214 O.A.C. 236, 149 A.C.W.S. (3d) 889.

Issue 4. Has the reasonableness standard been breached ?

[65]

Reasonableness is a deferential standard ... A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. ... [R]easonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47.

In my view, this standard has been breached.

[66] The Board's sole justification for permitting ATCO to recoup eighty-five percent of the gas costs it sought from present consumers is found in the following passage of the DGA Decision at p. 11:

... the Board must remain mindful of the essential nature of the DGA as a deferral account and the allowances in the past of certain prior period adjustments spanning a number of years. Accordingly, the Board is inclined to allow [ATCO] substantial recovery of the applied for prior period adjustments.

Stripped to its essentials, two reasons emerge: the nature of the DGA as a deferral account and the fact that the DGA had been used in the past to make adjustments over several years.

[67] Presumably the "nature of the DGA" point refers to the Board's historical assessment of the DGA contained in section 2.3, entitled "Nature of DGA Adjustments & Recovery Period". In that section, the Board examined the purpose of the DGA when approved in 1988: "reconciling actual costs of gas incurred by a utility with forecasts that it used in setting a GCRR, i.e. the rate it used to recover the commodity costs of gas from sales customers." In describing the change made in 2001 (altering the reconciliation period from a seasonal to a monthly basis), the Board repeated that the purpose of DGA adjustments was "to allow for forecasting inaccuracies, relative to the timing of actual gas acquisition costs incurred". It is manifest that the costs approved in the decisions under appeal did not fall within the original purpose of the DGA, namely, adjusting for gas price volatility.

[68] That brought the Board to its second point, that "during the approximate 16 years that the DGA has been in place, it has been used to update adjusted imbalance amounts from shippers, producers and interconnecting pipelines."; *Id* at p. 10. Usually those adjustments were made within a reasonable time, although sometimes the periods exceeded one year. This observation boils down to "we previously permitted adjustments over longer periods, so we will do so here".

[69] Set against these two rationales for granting the bulk of ATCO's application are the Board's many other comments:

- DGAs have evolved into a vehicle to fix all possible gas cost errors and pass them on to consumers;
- when first implemented reconciliations of the DGA were not expected to go back further than 12 months. Longer periods were sometimes accepted under special circumstances
- the DGA "was never set up with the intention of permitting all prior period accounting errors, particularly those that would have been subject to ATCO's management and control";
- accounting errors should typically be absorbed by the utility's shareholders;
- the DGA should not be treated as a catch-all for fixing errors, including those with a long history or resulting from human error, when adequate processes have not been in place to capture and correct the problem at an early stage;
- seven years represents a significant lag presenting obvious inter-generational equity issues;

- ATCO had an onus to ensure the System was working properly and was providing correct data;
- it did not appear that ATCO implemented an appropriate and timely review process for System design;
- there was no evidence of actual internal or external audits being performed to ensure the design was valid as the System was being put into service; and
- between 1998 and 2002 there was a lack of oversight by ATCO to test and develop appropriate controls to ensure that the System output generated was as intended.

[70] Mirroring these observations were the Board's reasons for concluding that ATCO should bear fifteen percent of the costs claimed:

- it doubted whether it could rely on ATCO's revised imbalance amounts;
- little on the record demonstrated the extent to which the numbers were faulty, perhaps partly because of ATCO's unilateral actions in destroying data;
- there was no demonstration that the System report was adequately tested at the time of inception;
- the System lacked audits;
- ATCO lacked adequate internal controls and supervisory systems;
- there was inadequate proof of corrections and opening balances; and
- there was a lengthy delay in discovering the errors.

[71] In summary, the Board's own analysis highlights the accumulation of factors that make unreasonable its decision to allow ATCO to recover eighty-five percent of the transportation imbalances through the DGA. Unlike most previous uses of DGAs, these charges did not result from gas price volatility. Nor did they resemble other past uses of DGAs where errors were attributable to measuring equipment problems and where there had been no suggestion of utility fault. Here the failure to levy appropriate gas charges was entirely due to deficiencies within ATCO's own system, exacerbated by a long delay in discovering the problem. ATCO's destruction of data made data verification impossible. As a result of the delays, at least some who were not consumers when the problems originated would have to absorb the costs of ATCO's carelessness. Even though this was not prohibited ratemaking *per se*, the long delays gave rise to inter-generational equity issues which lie at the heart of the prohibition against retrospective ratemaking.

[72] As outlined in para. 9, previous DGA decisions took account of matters such as the amount of the adjustment, the timeliness of the application, the extent to which the utility acted responsibly, foreseeability of the problem, and whether consumers who received the service would bear the cost of the adjustment. When such factors are applied to this case, it is apparent why the Board's decision is not defensible on its facts.

[73] As the Board intimated, there are compelling reasons why this sort of loss should be borne by shareholders rather than long-after-the-fact consumers. Shareholders have the ability to control

or at least influence ATCO's management practices. Consumers do not. Requiring consumers rather than shareholders to bear most of the loss does not encourage utilities to conduct operations in a careful, time-sensitive way. The Board itself appropriately observed at p. 5 of the DGA Decision that allowing ATCO (full) recovery "could be considered ... a reward for poor management".

[74] The Board's Limitations Decision at least partly addresses the above concerns because it generally limits DGA claims to a two-year period, except in special circumstances not within the utility's control. That decision is not subject to appeal and it would be inappropriate to comment on it further here. Nevertheless, it seems unlikely that the present DGA adjustments would have passed muster under the Board's criteria in the Limitations Decision.

Procedural Matters

[75] I agree with Côté J.A.'s suggestion at para. 238 that the efficient disposition of an appeal can be hindered if parties neglect to provide sufficient copies of Extracts of Key Evidence in appeals like this that require only one copy of the Tribunal's record to be filed. In this case, that difficulty was largely alleviated because the key Board decisions were included in the parties' Books of Authorities.

Conclusion

[76] The appeal is allowed, the orders under appeal vacated and the matter returned to the Board for consideration in accordance with these reasons.

Appeal heard on January 13, 2010

Reasons filed at Calgary, Alberta
this 23rd day of April, 2010

Hunt J.A.

I concur:

Authorized to sign for: Paperny J.A.

**Reasons for Judgment Reserved of
The Honourable Mr. Justice Côté
Concurring in Part**

A. Introduction and Issues

[77] This is an appeal from what was the Alberta Energy and Utilities Board, the rate-regulating tribunal for natural gas utilities. (Its name has changed over the years and is not up-to-date in the style of cause, but I will call it “the Commission”.) The issue is whether that tribunal could let the utility company recover a lump sum from present consumers because of mistakes in accounting for past gas purchases by the utility company extending back about six years.

[78] Here is an overview of this judgment. Part B describes the odd and lax way in which the respondent utility’s problem arose, and the Commission’s three decisions about how to handle the utility’s ensuing request, and agrees that the Commission’s treatment is unreasonable. Part C describes how the Supreme Court of Canada and our Court of Appeal have consistently interpreted the governing statutes and barred retroactive rate-making; and the very limited amendments which the Legislature made in response. Part D describes Alberta’s rate-making procedure and law, and shows how the decision under appeal is illegal because retroactive. Part E shows how the deferral accounts used here were created for very different purposes and long since reconciled, remaining almost by oversight. Part F describes the recent *Bell* decision and how it does not apply here. Part G similarly distinguishes two other decisions. Part H is about the standard of review. Part I is about the conclusion and remedy, and Part J makes some requests about procedure.

B. Facts

1. ATCO Finds Significant Error

[79] An outsider might suppose that it would not be particularly difficult for a gas public utility to keep track of how much gas it bought, sold or transported, particularly when it does not store any significant amount. Similarly, one supposes that the utility would have accounting records reliably keeping track of what it paid for the various amounts of gas which it got. This case suggests that at some times and places it may not be that easy or straightforward.

[80] One reason might be that the respondent ATCO divides its operations. A second reason may be that gas supply to consumers in Alberta has become more complex in the last generation. No longer is the owner of a pipe necessarily the owner of the gas flowing through it, and no longer is the owner of a local gas distribution pipe running under a street necessarily the vendor of the gas being bought by the consumers located on that street.

[81] The Commission found a bigger third reason. ATCO had set up some inappropriate accounting systems to handle this situation, inconsistently administered them for years, and throughout made inadequate checks of their operation or adequacy. The Commission so finds in its 2005 decision (pp. 4-5, 7-8, 11-12 A.B. pp. F7-8, F10-11, F14-15).

[82] For many years, ATCO seems not to have realized the depth of these problems. Helped by some gentle prodding by the Commission in late 2003, ATCO and its outside accountants investigated their accounting problem more deeply. By early 2004, they recognized fairly serious accounting errors that ATCO had made in northern Alberta for all of the years 1998, 1999, 2000, 2001, 2002, 2003, and for early 2004. In the south, the problem started a year later than in the north, but also lasted until early 2004.

[83] The amounts were significant. ATCO's recalculations suggested that in southern Alberta its gas costs from 1999 to 2004 had in fact been a total of \$11.6 million higher than it had recorded in any of its books or its regular filings with the Commission. In the north, they were almost \$2 million lower for 1998 to 2004.

[84] In its first (2005) decision on the subject, the Commission (then the Alberta Energy and Utilities Board) explained the errors as follows.

AG [ATCO Gas] submitted that there were two distinct aspects of imbalances: the management, control and reporting of other gas owners' imbalances that result from the shipment of other owners' gas through the pipeline network (collectively referred to herein as Transportation Processes), and the recognition of the effect that other gas owners' imbalances have on regulated gas supply procurement and the timing of cost recovery from regulated sales customers (DGA/GCRR Processes).

AG submitted that other gas owners' imbalances were made up of transportation imbalances and exchange imbalances. Transportation imbalances are associated with active transportation contracts, which reflect the physical movement of gas through ATCO's pipeline system. AG described Transportation Processes as including, without limitation, measurement, nomination, allocation, reporting, preparing statements, invoicing and receiving payment from other gas owners who contract for transportation service. AG also noted that exchange imbalances are those associated with active exchange contracts, which reflect a physical swap of gas between ATCO and a counterparty and in which there are no monthly imbalance settlement provisions.

(§ 2.1, p. 3, A.B. p. F6)

* * *

The Board [now the Commission] agrees with AG that this Application concerns the disconnection that occurred between the true and correct imbalances reported in the Transportation Processes.

...

(*id.* at p. 4, A.B. p. F7)

* * *

... In addition, the Board notes that ATCO did not appear to take the appropriate action to modify the functionality of the TIS system with respect to Rate 11 delivery input which ultimately led AP [ATCO Pipelines] employees to input inaccurate delivery data in order to 'quiet' an error message.

(*id.* at p. 5, A.B. p. F8)

2. ATCO Proposed to Pass on the Shortfall

[85] As a result of its belated discoveries, ATCO filed with the Commission's predecessor Application #1347852 of May 31, 2004. ATCO proposed a simple solution: to make ATCO's problem the consumers' problem. The rates for gas delivered from 1998 to 2003 had long since been fixed, charged, and paid, and the gas in question long since sold, delivered, billed, and paid for. Yet ATCO now wanted to turn its old long undiscovered \$11.6 million southern shortfall into a new additional lump-sum charge to present southern customers. Conversely, ATCO volunteered to give a rebate of almost \$2 million to present northern customers.

3. The Commission's Three Decisions

[86] The Commission responded to ATCO's "error-correction" application in three decisions.

(a) "Imbalance Adjustments" April 2005 Decision # 2005-036

[87] In this decision, the Commission made fact-findings about the causes of the errors, which findings are not challenged on appeal by Calgary or ATCO. They reveal ATCO's multifold and long-lasting accounting inadequacies (pp. 7-8, 12 A.B. pp. F10-11, F15). The Commission found as follows:

... The Board [now the Commission] considers that the error in the design of the TIS Report along with the management practices related to process control, including those related to the TIS Report, are of concern.

... The Board, however, notes a lack of documented audit evidence that would support the correctness of the imbalances reporting systems in the present case, and is thus concerned with the degree of accuracy that AG [ATCO Gas] contends exists for the present imbalances adjustments. Moreover, the Board is concerned with the amount of time, dating back to 1998, that it took ATCO to find, and ultimately make, the imbalances corrections.

(2005 decision, p. 4, A.B. p. F7)

The Board is troubled by what it considers to be **an apparent lack of diligence exhibited by either of AG or AP or both** of them over the reporting of imbalances in as much as the errors included in the review had occurred since at least 1998.

(*id.* at p. 5, A.B. pp. F8, Emphasis added)

* * *

... The Board notes that AG stated in the Application that "ATCO found that the original design specification for the monthly TIS Report was not correct." This acknowledgment would indicate that before the imbalances problem was identified there had been a **lack of system control over, and audit of, the design.**

... It appears to the Board that if AP employees had not entered the inaccurate Rate 11 delivery data, the incorrect TIS Report may not have been noticed by AG in the normal course of business, given that **it does not appear that ATCO tested or planned to test the integrity of the report** ...

(*id.* at p. 5, A.B. p. F8, Emphasis added)

[88] Yet the Commission did little about the utility's various longstanding accounting inadequacies. It merely deducted 15% as a penalty for them. Subject to that deduction, the Commission did as ATCO asked; it ordered the current southern customers to top up ATCO's profits by an amount equal to ATCO's past bookkeeping errors for those five or more past years.

[89] The Commission also allowed ATCO to give the current northern customers a rebate. The Commission did not mention the suggestion that the northern refund bear interest for all the years the utility company had had the funds (January 21, 2005 argument, Commission Record Tab 47, p. 29). Instead, the Commission did the reverse: it dictated that that consumer rebate would be **reduced** by 15% (p. 12, A.B. p. F15). There was no explanation for the reduction, and I cannot think of any logical one. It might have been the Commission's desire for aesthetic facial symmetry between north and south. It seems most unlikely that the Commission intended to penalize the northern consumers for ATCO's shortcomings. Maybe it was just an oversight. After various adjustments, on August 23,

2005 the Commission fixed the northern refund at \$541,000, and the leave to appeal does not cover the northern errors or rebate. No one in the north has appealed.

[90] The Commission noted that since 1987, ATCO has maintained a deferral account. It was originally set up to allow quick reconciliation of unpredictable fluctuating future gas purchase cost estimates, with actual costs for the same period. The Commission said the purpose for the account has nothing to do with the type of errors in question here, and that the accounts were never designed for purposes such as the current errors. See Part E below for details and citations.

[91] Though all the reconciliations of that deferral account had been completed years before, the Commission decided that the new error charge (and rebate) described above would be done through or because of that deferred account.

[92] Apart from background and recitals, the actual reasoning of the Commission in this 2005 decision was brief, and contained little or no explanation beyond that summarized here.

[93] In particular, these 2005 reasons said nothing about the rule against retroactivity, nor whether the governing legislation permits this sort of retroactive adjustment (going back some six or so years). However, the Commission did seem to suggest that such steps are retroactive rate adjustment for past years' errors: (2005 decision, § 2.8, first para., p. 14, A.B. p. F17).

[94] It is probably idle to speculate on the reasons for that significant omission.

[95] The Commission's later 2008 Decision says that no one raised the rule against retroactivity during this first (2004) application (2008 Decision §4.3, p. 7, A.B. p. F31). The Commission may have got that idea from allegations in ATCO's October 5, 2007 argument (Commission Record on present appeal, Tab 60, pp. 2, 5, 6). ATCO also alleged the same thing to this Court in 2007: see ATCO's February 22, 2007 factum filed for that previous appeal (pp. 1, 4, 7, 8, 9, 11; cf. p. 10). And cf. similar allegations in the Commission's February 21, 2007 factum (pp. 5, 6). The Commission evidently did not recall its own file (though its 2004-2005 record was consolidated with its 2007-2008 record).

[96] In fact, the various statements by ATCO and by the Commission alleging Calgary's silence are not correct. Calgary **did** argue the retroactivity issue during the first hearing, especially in its reply written argument of January 28, 2005 (Tab 50 of the Commission's Record). See especially pp. 2-3, quoting s. 40 of the *Gas Utilities Act*, the key legislation. The date, application number, and title of that written argument all confirm that it was filed for this first application which led to this first Commission decision in April 2005. The Commission's 2008 decision says that all argument to the Commission on this first 2004-2005 application had been written, not oral (pp. 2-3, A.B. pp. F5-F6).

[97] ATCO's inaccurate allegations of Calgary's silence are puzzling. Maybe counsel relied on memory alone. Maybe they interpreted Calgary's written 2004-2005 argument in some unreasonable narrow fashion. And ATCO's 2007 factum may have used terms like "jurisdiction" in a narrow way (e.g. excluding non-jurisdictional Calgary arguments). (See Part D.9. below.) In any event, this is an appeal from the Commission's rehearing, and the "alleged silence" point no longer influences the result (if it ever did).

[98] The City of Calgary sought leave (May 30, 2005) and got leave (July 6, 2006: see 2006 ABCA 180) to appeal from this 2005 Commission decision. The Court of Appeal allowed the appeal. It said the question could not be decided on the record before the court, doubtless relying on ATCO's erroneous factum. The Court sent the matter back to the Commission to rehear and to reconsider: see 2007 ABCA 133, 404 A.R. 317.

[99] On August 23, 2005, the Commission gave decision 2005-093 approving ATCO's computation of the precise amounts ATCO would collect and refund under the April 2005 decision.

(b) "Limitation Period" May 2006 Decision #2006-042

[100] Meanwhile, the Commission itself was properly troubled by the implications of its 2005 precedent. If carried to its logical extreme, it could leave gas rates charged to consumers and payments by past customers forever open to alteration, approaching the lengthy uncertainties in Lord Eldon's Court of Chancery. The Commission therefore ordered a second application about whether the Commission should impose its own limitation period, maybe two years. (It proceeded under a further application which the Commission ordered ATCO to make.) Little was said about the existing limitation period (beginning of the fiscal year of application) found in the *Gas Utilities Act*, and described in Part C below.

[101] The Commission's decision on this limitation-period hearing was that the utilities statutes did not matter or apply, because of the old deferral account. So the Commission thought that the extent of retroactivity was more or less a matter of its own discretion. The Commission ordered that henceforth (not retroactively) there would sometimes be a new two-year limitation period for retroactive rate changes. I say "sometimes", because the two-year time limit would not apply where the adjustment sought was large and there were "special circumstances" not within the utility's control.

[102] It is not clear whether the "special circumstances" phrase referred to what caused the initial problem, or why the application was made after the expiry of two years.

[103] I note that ATCO's limitation-period application was filed after Calgary moved for leave to appeal from the Commission's first decision. And the Commission's reasons on that in May 2006 were almost a year after such leave was sought. The Commission likely knew of those events. But we have to look at the 2006 reasons because they are incorporated into the 2008 decision.

[104] ATCO filed a motion in the Court of Appeal for leave to appeal this 2006 decision, but by agreement that motion was adjourned from time to time over the years, and was never heard (see 2008 Commission decision, p. 1). That motion was discontinued recently (February 12, 2010). ATCO later argued before the Commission that Calgary's not trying to appeal this 2006 decision somehow estopped it from questioning the 2005 Commission decision which it has twice appealed (October 5, 2007 argument, p. 6, para. 12, Commission Record Tab 60). I cannot see the logic of that, nor do I recall any law to support it (and none was cited). In any event, no such argument was put to the Court of Appeal on this appeal.

(c) **“Reconsideration” January 2008 Decision #2008-001**

[105] This third Commission decision is the fruit of the rehearing directed by the Court of Appeal, as mentioned above (end of subpart (a)), and the consequent reconsideration application.

[106] The Commission refused to let Calgary file any more evidence, despite the Court of Appeal's 2007 direction. (That point is discussed further in Part E.4 below.)

[107] The Commission reached the same conclusion as it had in 2005. The key issue was retroactivity.

[108] Almost the only significant thing which the Commission said in 2008 about retroactivity was to quote what it had said on the subject in its 2006 limitations decision (subpart (b) above). That is two short paragraphs which read as follows:

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

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

(p. 4 of 2006 decision, § 3.1 near end, and quoted on pp. 7-8 of 2008 decision, A.B. pp. F31-32)

A Commission footnote says that the Supreme Court of Canada approval referred to in the quotation is in *Edmonton v. N.W.U.L.* [1961] S.C.R. 391.

[109] I am not certain, but the Commission's next 2008 paragraph seems to be about retroactivity as well. So I quote it:

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

(p. 8, A.B. p. F32)

One curious feature of that paragraph is discussed at the end of Part D.6 below.

[110] There is another paragraph in the decision immediately after that one. I am not entirely certain how to interpret it. It contains some assertions and conclusions. But the only actual reason which I can find in it is one. I read it as saying that the Commission has often acted this way, and if it refused to do so now, it would bring into question its previous decisions.

[111] To sum up, the basic real reason given by the Commission was the idea that a deferred account bypasses the ordinary rule against retroactivity.

[112] Martin J.A. gave leave to appeal this 2008 Decision (order of July 2, 2009). That is the present appeal.

4. Unreasonable Decision

[113] Hunt J.A. concludes that the Commission's decision here is unreasonable. I agree with that conclusion, and with the reasons which she gives for finding unreasonableness. Many other things discussed in my reasons would also help to support that conclusion.

C. Legislative History

1. Introduction

[114] The question of whether the impugned Commission decision violates the law forbidding retroactivity requires examining a number of aspects of the nature and policy of that law. I can best start with the history of the relevant legislation and the court decisions about it. That is what this Part C does.

[115] A half-century's dialogue between courts and the Legislature is outlined in subpart 2. It reveals a very clear picture. The courts found firm legislative limits which the Legislature adjusted only slightly, and otherwise confirmed, basically keeping them to the present day.

2. Chronology

- (a) The *Public Utilities Act*, R.S.A. 1955 c. 267, s. 67 gave the Commission (then the Board of the Public Utilities Commissioners) general powers to fix utility rates, but said little express about time limits or retroactivity.
- (b) March and August 1959 saw Commission decisions which were then appealed to the Court of Appeal, whose decision is described in (e) below.
- (c) April 1959 the Legislature amended (c. 73, s. 9(d)) the *Public Utilities Act*, adding s. 67(8). Undue delay in hearing and deciding an application henceforth lets the Commission give effect to excess revenues or losses, incurred after filing a utility's rate application, when the Commission fixes just and reasonable rates.
- (d) Legislature passed new *Gas Utilities Act* as 1960 c. 37. In its s. 31 has identical wording to the *Public Utilities Act* s. 67(8) just discussed (with one trivial exception).
- (e) September 22, 1960 Appellate Division decided *Edmonton v. N.W.U.L. (#2)* 34 W.W.R. 241, considering items (b) and (c) above. The Supreme Court of Canada varied this decision on April 25, 1961 on other grounds (allowing a purchased-gas adjustment clause): [1961] S.C.R. 392, 34 W.W.R. 600. The Supreme Court of Canada held that utility rates must be based on an estimate of future expenses (p. 612 W.W.R.). It apparently accepted the proposition that until the 1959 amendment, the Commission had no power at all to make retroactive rates or allowances, not even for regulatory delay.

- (f) Adoption of *Gas Utilities Act* R.S.A. 1970, c. 158, s. 31, which merely re-enacted 1960 c. 37, s. 31 (item (d) above) with no change.
- (g) December 9, 1976: Appellate Division decided *Northwestern Utilities v. Edmonton* 2 A.R. 317. Its decision was not novel, and is similar to *Calgary (City) v. Madison Nat. Gas Co.* (1959) 28 W.W.R. 353, 360 (Alta. C.A.). The *N.W.U.L.* decision reversed a Commission decision, and held that unexpected shortfalls in revenue or unexpected expenses incurred by a utility before the date of the rate application cannot be considered (paras. 6, 25-26, 34). The Supreme Court of Canada affirmed the Appellate Division in late 1978: [1979] 1 S.C.R. 684, 12 A.R. 449. The Supreme Court explained the 1959 amendment: its scope is narrow.
- (h) 1977: Legislature amended s. 31 of the *Gas Utilities Act*: see c. 9, s. 5(1), (2). That did not affect pending cases. Old s. 31 became new s. 31(c). The rest of the section was new.
- (i) That new s. 31 (of 1977) became R.S.A. 1980, c. G-4, s. 32, with no significant change.
- (j) That section became the present R.S.A. 2000, c. G-5, s. 40, with only minor changes in drafting style. The *Public Utilities Act*, R.S.A. 2000, c. P-45, s. 91 contains virtually identical words. Section 40 of the *Gas Utilities Act* now reads as follows:

40 In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility,

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

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

any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (b) or (c), is to be used or dealt with.
(Emphasis added)

(Presumably the last three lines should be indented more, but I quote them the way that they appear in the Revised Statutes of Alberta. The equivalent lines are indented more in the *Public Utilities Act*.)

3. Conclusion

[116] That legislative history shows that current s. 40 of the *Gas Utilities Act* is the Legislature's limited response to the decisions of the Court of Appeal and Supreme Court of Canada described above (in subpart 2). So the principle of the Court decisions has not changed. The only small change was that the time limits were extended slightly. Though **later years'** expenses or excess revenue can be considered (if they are consecutive), shortfalls or excesses in **previous years'** expenses or excess revenue are still off-limits (as always). Only shortfalls or excesses of revenues and costs back to the beginning of the fiscal year in which the application is filed, can be considered. That was the precise point in issue in the Court of Appeal decision of 1976 (and Supreme Court of Canada affirmation).

That is the only legislative amendment to the Court decisions. New para. (d) on methods and periods is vague, but seems to be purely ancillary (on which see the *Stores Block* decision discussed in Part D.5 below).

[117] Given this history, this Alberta legislation is incompatible with any Commission power to take into account to base, or adjust, rates on actual shortfalls or excesses of revenues or expenses in a year earlier than the year in which the application by the utility is filed.

[118] Precedent is not the only reason for such rules. The Supreme Court of Canada's and this Court's decisions are based on fairness, certainty and logic. That is explained further below in Part D, which describes those court decisions more fully.

D. The Decision Appealed is Retroactive

1. Introduction

[119] This Part D approaches the whole topic of retroactivity from several directions. All these subtopics interlock. Retroactivity cannot be properly described without showing the basics of setting utility rates.

2. Final Prospective Rate-Making

[120] There are two ways in which one could regulate how much consumers pay for gas from public utilities. The usual and traditional way is to have rates fixed for a period, at least part of which period is in the future. Then one forecasts all the likely expenses (including cost of capital), and sets rates accordingly. There is some risk to the utility company, as it may get fewer revenues or higher expenses than forecast (or both). Conversely, the company also enjoys the chance of making a higher profit, if costs are below forecast, or revenues higher than forecast. That is the traditional way of making utility rates. (See further subpart 6 below.)

[121] That is also the practice with respect to Alberta natural gas rates, and the law requires that procedure. The Supreme Court of Canada explains that clearly in *N.W.U.L. v. Edm. (City)* [1979] 1 S.C.R. 684, 12 A.R. 449, on pp. 452 ff. (A.R.). I quote from that judgment (using A.R. para. numbers):

[4] The Board [now the Commission] is by the [Gas Utilities Act] directed to "fix just and reasonable . . . rates, . . . tolls or charges . . ." which shall be imposed by the Company . . . The Board then estimates the total operating expenses incurred in operating the utility for the period in question. The total of these two quantities is the 'total revenue requirement' of the utility during a defined period. A rate or tariff of rates is then struck which in a defined prospective

period will produce the total revenue requirement. The whole process is simply one of matching the anticipated revenue to be produced by the newly authorized future rates to future expenses of all kinds. Because such a matching process requires comparisons and estimates, a period in time must be used for analysis of past results and future estimates alike. . . . It is a process based on estimates of future expenses and future revenues. Both according to the evidence fluctuate seasonally and both vary according to many uncontrollable forces such as weather variations, cost of money, wage rate settlements and many other factors. . . .

* * *

[5] While the Statute does not precisely so state, **the general pattern of its directing and empowering provisions is phrased in prospective terms. Apart from s. 31 [now s. 40] there is nothing in the Act to indicate any power in the Board to establish rates retrospectively in the sense of enabling the utility to recover a loss of any kind which crystallized prior to the date of the application** (*vide: City of Edmonton et al. v. Northwestern Utilities Limited*, [1961] S.C.R. 392, *per* Locke J. at 401, 402).

[6] The rate-fixing process was described before this Court by the Board as follows:

The PUB approves or fixed utility rates which are estimated to cover expenses plus yield the utility a fair return or profit. This function is generally performed in two phases. . . . The revenue required to pay all reasonable operating expenses plus provide a fair return to the utility on its rate base is also determined in Phase I. The total of the operating expenses plus the return is called the revenue requirement. In Phase II rates are set, which, under normal temperature conditions are expected to produce the estimates of “forecast revenue requirement”. These rates will remain in effect until changed as the result of a further application or complaint or the Board’s initiative. . . .

[7] The statutory pattern is founded upon the concept of the establishment of rates *in futuro* for the recovery of the total forecast revenue requirement of the utility as determined by the Board. The establishment of the rates is thus a matching process whereby

forecast revenues under the proposed rates will match the total revenue requirement of the utility. It is clear from many provisions of *The Gas Utilities Act* that **the Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under rates established for past periods. There are many provisions in the Act which make this clear . . .** Section 32 likewise refers to rates “to be imposed thereafter by a gas utility”.

* * *

[22] It is conceded of course that the Act does not prevent the Board from taking into account past experience in order to forecast more accurately future revenues and expenses of a utility. **It is quite a different thing to design a future rate to recover for the utility a ‘loss’ incurred or a revenue deficiency suffered in a period preceding the date of a current application. A crystallized or capitalized loss is, in any case, to be excluded from inclusion in the rate base and therefore may not be reflected in rates to be established for future periods.** (emphasis added)

See also Netz, “Price Regulation: a (Non-Technical Overview)”, in *Encyclopedia of Law and Economics* 396 (2000), at 401-03. (A version of that paper is cited in the *Stores Block* decision of the Supreme Court of Canada, *infra*.)

[122] The word “losses” above is ambiguous. In such discussions of retroactivity, it does **not** have its ordinary meaning of a business not so much as breaking even and running at a loss. Instead, the “losses” referred to in this particular context mean actually making less money in a period than had been forecast for that period, because expenses proved larger than anticipated, or revenues proved smaller than anticipated. See *N.W.U.L. v. Edmonton* (1979), *supra* (p. 455 A.R. para. 10, p. 693 S.C.R.). So it can readily refer to a company which is operating at a profit and making a significant return on its investment.

[123] The above shows that even the small degree of retrospectivity permitted by the 1959 and 1977 *Gas Utilities Act* amendments is more limited than it sounds. Rates come into force in the future, and are intended to reflect estimates of **future** costs revenues and conditions when they are in force. The rule against looking at losses (or extra profits) which occurred before the application date is not arbitrary; in part it reflects that rule of future rate-making. Past ongoing expenses can be looked at when predicting future ones, but past unexpected shortfalls (one-time events) in general can never be recovered. I return to the stages of the rate-making process, and some confusion about it in subpart 6 below.

[124] That is orthodox and traditional rate-making law: see I Priest, *Principles of Pub. Util. Regulation* 75, including n. 102 (1969); Netz, *loc. cit. supra*. And see subpart 4 below. The legislation confirms that law. What was referred to in the earlier court decisions as s. 31 or s. 32 of the *Gas Utilities Act* is now s. 40. It requires “rates, tolls or charges . . . to be imposed, observed and followed afterwards by an owner of a gas utility.” (emphasis added)

[125] The Supreme Court of Canada’s 1979 *N.W.U.L.* decision then quoted with approval another decision of this Court also explaining the 1959 amendment to the legislation:

. . . It was to deal with rates prospectively and having done so, so far as that particular application is concerned, it ceased to have any further control. To give the Board [now the Commission] retrospective control would require clear language and there is here a complete absence of any intention to so empower the Board.
 – *Calgary (City) v. Madison Nat. Gas Co.* (1959) 28 W.W.R. 353, 19 D.L.R. (2d) 655, 661 (quoted at end of para. 7 (A.R.) of the Supreme Court of Canada’s 1979 *N.W.U.L.* decision)

[126] The Supreme Court also quoted with approval another decision of this Court on the unfairness of retroactive rate hikes:

One effect of this ruling is that future consumers will have to pay for their gas a sum of money which equals that which consumers prior to August 31, 1959 ought to have paid but did not pay for gas they had used. In short, the undercharge to one group of consumers for gas used in the past is to become an overcharge to another group on gas it uses in the future. When the Board capitalized this sum, it made all the future consumers debtors to the company for the total amount of the deficiency, payable ratably with interest from their respective future gas consumption.
 – *Re N.W.U.L.* (1961) 34 W.W.R. 241, 25 D.L.R. (2d) 262, 290 (quoted in para. 21 (A.R.) of Supreme Court of Canada’s 1979 *N.W.U.L.* decision)

[127] That danger is acute here, with 2005 customers asked to pay what 1999 customers consumed but allegedly did not pay. And Calgary has a very mobile population and grew rapidly through the early 2000s.

3. Cost-Plus Billing

[128] If one were to ignore all the law above, in theory gas utilities could instead use a different system. Consumers could pay them for gas on a cost-plus basis. Cost-plus is the way that

government contractors like to be paid, and that law firms often charge. In theory, one could simply set rates for each year after the fact, once all the gas had been consumed, and all the consumption and expense figures were in and verified. In the meantime, consumers would merely pay something on account, and have the actual final figure adjusted later by a refund or extra charge.

[129] Such a full cost-plus system would be novel in public utilities. And probably unworkable if done openly. But, in my view, ATCO's request which the Commission approved here is perilously close to that in all but name. That is not just my speculation. The Commission more or less said so itself, in its 2005 decision (p. 10, A.B. p. F13), and its 2006 decision (p. 2), both quoted in Part E.2 below.

[130] The cost-plus system has dangers. Of course one is the intergenerational expropriation referred to by this Court, and by the Supreme Court of Canada (in its *N.W.U.L.* 1979 para. 21 quoted at the end of subpart 2 above).

[131] When I discuss incentives at various places in this judgment, I am not imputing improper motives. A utility company is not a charity, and its directors and officers have a duty to its shareholders to maximize its profits (to the extent that the regulatory bodies and law and honesty permit).

[132] Here is another danger. If the utility ends by making a profit, and there is no automatic adjustment at year end, the utility can hope that no consumer group will make a fuss, and so the company can hang on to the profit. If consumers do apply to the Commission, the utility can suggest that it is too early to tell, and to wait a few years to see if arguable offsetting losses turn up elsewhere. So what revenues to offset against what expenses becomes almost arbitrary. Conversely, if the utility makes a loss at year end, it can apply immediately for an additional payment by consumers. The utility will have recourse to the regulator only when the facts mean that it will win and the consumers will lose. On the evils of changing the rules in mid-game, see MacAvoy and Sidak (2001) 22 Enr. L.J. 233, 238. Recall that the Alberta deferred rate account is just a number written in a book. It is not a trust account in a bank, or any other type of segregation of funds; nor is it even funds.

[133] And of course cost-plus billing contains no incentive to be economical. Cf. Netz, *loc. cit. supra*, at 403 ff.

[134] Therefore, routing later claims immediately through an old deferred account to give refunds or extract higher rates, in respect of profits or losses years before, in substance is no fixed rate at all (and so clearly illegal). At best it is simply basing rates to be paid in the future on failure to forecast expenses in past fiscal years. As noted above in Part C.2 and in Part D.2, the legislation forbids that. Section 40 of the current *Gas Utilities Act* (quoted in Part C.2) only lets that process look back to the beginning of the fiscal year in which the rate application was filed. I see no exception there for different accounting methods.

4. Commission Powers are Confined by Legislative Aims

[135] In Parts C and D.2 above, I showed that the Supreme Court of Canada and this Court consistently barred retroactive rate-making in general, and banned increasing present rates to cover a past unexpected shortfall in particular, and showed how the Legislature affirmed that (with only small changes).

[136] The justice, consistency, and policy underlying those legal rules have since been explained by the Supreme Court of Canada. It also shows how to interpret such legislation. Its latest decision on the Alberta régime in general, and gas utilities in particular, is the “*Stores Block*” decision, cited as *ATCO Gas and Pipelines v. E.U.B.*, 2006 SCC 4, [2006] 1 S.C.R. 140, 344 N.R. 293, 380 A.R. 1. It clearly sets out the Commission’s proper approach.

[137] The Supreme Court there says that how much discretion utilities or other regulatory tribunals have varies from board to board, but each board must respect the limits of its jurisdiction, and can only act in areas where the Legislature has given it authority (paras. 2 and 35). Utilities regulators regulate rates to protect consumers from natural monopolies (para. 3).

[138] The Supreme Court of Canada says that though Alberta’s *Alberta Energy and Utilities Board Act* and *Public Utilities Board Act* and *Gas Utilities Act* contain seemingly broad powers, that legislation must be interpreted within the entire context of the statutes, which balance need for consumer protection against owners’ private property rights. The main function of the Commission is to fix just and reasonable rates, so ensuring dependable supply (paras. 7, 60). Therefore, imprecise undefined wide statutory provisions letting the Commission make any order, or impose any condition necessary in the public interest, do not give an unfettered discretion. They must be limited to the purpose of the legislation and the context of the regulatory scheme and principles generally applicable to regulatory matters (paras. 46, 48, 49, 50, 51, 60, 61, 64, 73-77). The “power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates” (para. 60).

[139] The Supreme Court then examines the history of the Alberta legislation, which is based on similar American traditional utilities rate-regulation legislation (para. 54). Such “public utilities are very limited in the actions they can take” and the Commission has no “discretion . . . to interfere with ownership rights” (para. 58). The 1995 (temporary) merger of the Public Utilities Commission and the Energy Resources Conservation Board (as the Alberta Energy Utilities Board) did not change that, says the Supreme Court (para. 59).

5. Shareholders’ Risk

[140] The law's time restrictions are neither mechanical, nor trivial. They are bound up with who enjoys windfall profits, and who risks losses or low returns on investment. The Supreme Court of Canada begins by describing the rate-making process:

The [Commission] approves or fixes utility rates which are **estimated** to cover expenses plus yield the utility a fair return or profit. . . . The revenue required to pay all reasonable operating expenses plus provide a fair return to the utility on its rate base is also determined In Phase II rates are set, which, under normal temperature conditions are **expected** to produce the estimates of 'forecast revenue requirement'. These rates will remain in effect until changed as the result of a further application or complaint or the Board's initiative. Also in Phase II existing interim rates may be confirmed or reduced and if reduced a refund is ordered.

(*"Stores Block"*, 2006 SCC 4, para. 65, quoting the Supreme Court of Canada's 1979 *N.W.U.L. v. Edm.* decision, emphasis added)

[141] Then the Supreme Court shows that the object is to leave key risks to the equity holders, the utility shareholders:

Despite the consideration of utility assets in the rate setting process, **shareholders are the ones solely affected** when the actual profits or losses of such a sale are realized; the **utility absorbs losses and gains**, increases and decreases in the value of assets, based on economic conditions and occasional unexpected technical difficulties, but continues to provide certainty in service both with regard to price and quality. (*id.* at para. 69, emphasis added)

[142] Therefore, the Commission cannot act retroactively and offload risk onto consumers:

. . . the Board [now Commission] was in no position to proceed with an implicit refund by allocating to ratepayers the profits from the asset sale because it considered ratepayers had paid excessive rates for services in the past. . . . **The Board was seeking to rectify what it perceived as a historic over-compensation to the utility by the ratepayers. There is no power granted in the various statutes for the Board to execute such a refund in respect of an erroneous perception of past over-compensation. It is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates [citing *N.W.U.L.*, *Coseka*, and *Dow* cases]. But more importantly, it cannot even be**

said that there was over-compensation: the rate-setting process is a speculative procedure in which both the ratepayers and the shareholders jointly carry their share of the risk related to the business of the utility.

(*id.* at para. 71, emphasis added)

[143] Striking for the present appeal is the Supreme Court's discussion shortly before that quotation. It says that the utility is not guaranteed a profit, nor a return on its assets, and is merely given a chance to earn them. The utility company owns the assets, and profits or losses accrue to the company (i.e. shareholders), not to the consumers.

The disbursement of some portions of the residual amount of net revenue, by after-the-fact reallocation to rate-paying customers, undermines that investment process . . .

(*id.* at para. 67)

The customers have no ownership or equity; only shareholders do:

Shareholders have and they assume all risks as the residual claimants to the utility's profit. Customers have only 'the risk of a price change resulting from any (authorized) change in the cost of service. This change is determined only periodically in a tariff review by the regulator'.

(*id.* at para. 68)

[144] The long history of that policy and system are confirmed by an article (also quoted by the Supreme Court): MacAvoy and Sidak (2001) 22 *Enr. L. Jo.* 233, 235, 237, 241-42, 243-44, 245-46.

[145] This traditional prospective fixed rate-making provides very healthy incentives for the utility company and its shareholders and management. If the utility company can find ways to hold its expenses below those which were forecast, all the extra profit accrues to the shareholders and cannot later be confiscated. In the long run, that approach will benefit both the shareholders and the consumers. For a useful discussion of incentives, see Kahn, *The Economics of Regulation: Principles and Institutions*, v. 1, pp. 47-54, 101-09 (repr. MIT Press 1998).

[146] Besides incentives, that system also gives fairness to the utility company's shareholders. If applied consistently, it is just for everyone.

[147] Calgary's initial January 21, 2005 argument to the Commission (Tab 47, p. 3), pointed out that ATCO's 2004 error-correction application was in effect a request for a backstop guarantee against unexpected shortfalls in profit, citing previous Commission decisions. The Commission's 2005 decision does not mention that concern. The quotations from the Supreme Court of Canada

above show the fundamental error in the Commission's 2008 decision now under appeal. And it is also virtually cost-plus billing, as noted in subpart D.3 above.

[148] Indeed, the Commission's own 2005 decision (being reconsidered here) admits that ATCO's proposal "replaced a prospective process where accounting errors, such as those that are the subject of the Application, should typically have been absorbed by the utility's shareholder" (p. 11, A.B. p. F14).

6. Stages of a Rate Hearing

[149] The term "retroactive" is misleading or confusing in some respects. It is conceivable that it led to some of the unexplained aspects of the present situation. Compounding the problem is the fact that several different things are involved. So expanding on what the Supreme Court of Canada said in *Stores Block* will increase clarity.

[150] I will outline simply the traditional and proper process to set or amend rates for a public gas utility in Alberta. (Legal authorities are found above, especially in Part C.2 and subparts D.2 and 5.)

Step A: Utility completes fiscal years #1 and 2, and routinely files or publishes its financial results for those years.

Step B: During fiscal year #3, Utility files an application to the Commission to increase its existing rates to consumers.

- (1) This application always includes (and must include) an **estimate** of what expenses, taxes and rate base will be during the (current) fiscal year #3, and during (upcoming) fiscal year #4.
- (2) If the Utility wishes, it may choose also to show the Commission that in the past, some of its expenses have been higher than had previously been forecast, or that some of its revenues have been lower than had previously been forecast. However, legislation and case law (see Part C above) allow the Commission to rely upon such discrepancies between past estimates and actual figures (revenue or expenses), only for two possible time periods:
 - (a) the current fiscal year, during which the application was filed (i.e. fiscal year #3);
 - (b) any period during which the current rate hearing is still going on, or the rate decision is standing reserved

and not yet decided (i.e. fiscal year #3, and also year #4 up to date of decision).

Step C: In Phase I, the Commission sets its own estimate of the expenses and taxes which the Utility will incur, e.g. in year #4, plus a reasonable rate of return on its investments (rate base) for the foreseeable period after the application date. That is a lump sum of future needed gross revenue per year (or month). Then in Phase II, the Commission estimates future gas consumption, and designs a set of rates which it estimates will produce that lump sum of needed gross revenue.

It will be seen from this outline that all rates are future.

[151] Typically, the word “retroactive” is used in this context to refer to something very specific. That is going outside the time limits in step B(2) above. For example, the Commission cannot set a rate which will yield more than the estimated **future** expense, taxes, and return on investment. It cannot do so even if it is proven that the utility earned much less in year #1 (or earlier) than had been estimated, or than the old rates were designed to cover. That is a past loss and is unrecoverable. Similarly, the Commission cannot set future rates which will yield less than estimated future expenses etc. on the ground that in the past year #1 (or earlier) the utility earned more than had been forecast.

[152] Those forbidden acts would not be “retroactive” (or retrospective) in all the common non-technical senses of the word. The common term “retroactive” is appropriate in two senses only. First, all rates should be for the future and known at the time that the consumer decides to consume some (or more) gas. Rates come into force only on the day they are announced (or a later day). (Interim rates are a partial exception, and ignored above for simplicity.) On any given day, a consumer knows what rates apply.

[153] The second meaning of “retroactive” is that already described above: that deviation between past estimates and past actual performance is no ground to change future rates for a later period.

[154] Therefore, one must not confuse two different topics:

- (1) First topic: whether **future** consumption or expenses will be the same as forecast now;
- (2) Second topic: whether **past** expenses were the same as previously forecast some years ago.

The first topic (future uncertainty) is sometimes handled by purchased-gas adjustment clauses or deferred gas accounts for gas (raw material) expenses or allied topics. It is in effect a type of temporary interim rate. But the second topic (past discrepancies from budget) is never legitimately allowed for, so long as it is for a previous fiscal year. *A fortiori*, past accounting errors are even less legitimate a topic for later adjustment of rates (even by later surcharges to consumers or refunds to consumers).

[155] In my respectful view, what the Commission did here (at ATCO's request) is therefore forbidden by binding case law and statute in two respects.

[156] Written argument to the Commission was not exhaustive, and may not have spelled out every implication of these points. Possibly the Commission did not distinguish the "first topic" from the "second topic". Its actual reasons on this topic were not lengthy, but I note two things. In Part B.3(c), I quoted the middle paragraph of the Commission's 2008 reasons ("The provisions of the GUA and PUBA relied on . . ." p. 8, A.B. p. F32.) In the mention of retroactivity, note the phrase there "in the event that the [Commission] intends to approve a tariff effective prior to the date on which the tariff application is made." But no such condition or qualification exists in s. 40 or the case law. The time limit about past under-recoveries applies just as much to rates to come into effect later (as rates almost always do). Parts C and D show that at length. Little in the Commission's 2006 or 2008 reasons reviews or applies the full force of the law recited here in Parts C and D. And the original purpose of the deferred gas accounts (step B(1) above) morphed in 2005 into a repeal of the restrictions in step B(2) above.

7. Interim Rates

[157] For all the reasons above, the only legitimate exception to the bar on retroactivity which I see as even arguable, is interim rates.

[158] An interim order must later be replaced by a final order, and the rate will no longer be open to change. See *Coseka Res. v. Saratoga* (1981) 31 A.R. 541 (C.A.), and *Calgary v. Madison* (*supra*, Part D.2) at 662-63 (D.L.R.) cited with approval by the Supreme Court of Canada in *Bell Can. v. R.* [1989] 1 S.C.R. 1722, 1752h-1754f; and also see p. 1760g-1761a.

[159] ATCO's October 5, 2007 argument (Tab 60, paras. 23-26, p. 9) is about *N.W.U.L. v. Edmonton* [1961] S.C.R. 392. But that argument acknowledges that the rates dealt with there which were subject to the "purchased gas adjustment clause" were interim. Note Calgary's reply argument of October 12, 2007 (Tab 65) pp. 6-8.

[160] The term "interim" is ambiguous. But the traditional meaning is just that a full rate hearing would take too long, and the company cannot afford to go on that long under the old rates (especially in inflationary times). So a quick and approximate rate increase is put in, in the expectation these

new rates will soon be replaced by more careful ones. That usefully leads to an overlapping topic, the purpose of deferral accounts.

[161] In Parts D.8 and E below, I show why the rates in question here were not interim, still less permissibly interim.

8. Function of Deferred Accounts

[162] The legitimate use of deferred gas accounts fits best here. I will discuss the history of these particular accounts below in Part E.

[163] Is a deferred account any exception to all the law given above? Only to a very limited degree. If the Commission sets an **interim** rate which must be later adjusted and made final, then everything done in the meantime under that interim rate is tentative. That creates two needs. First, the utility company's accounts must be flagged to show that. Second, it may be informative and useful to keep track of and total any discrepancies building up in the meantime, such as the difference between anticipated gas costs and actual gas costs. There are doubtless several methods which would meet those two needs; one method is a temporary deferred account to be adjusted and closed out when the final rate is set.

[164] Therefore, a legitimate deferred account is a result, not a cause; a mere tool, not an objective. Such an account does not cause or legitimize rate changes any more than fur hats cause or legitimize winter.

[165] It is one thing to create a deferred account at the outset of an **interim** rate, to specify what amounts it is to record during that period, and then at the end to reconcile and clear out the account by the final rate, in the way ordained at the outset.

[166] It is quite another thing to return later to a fixed **final** rate and change it after the fact by ordering premium payments by (or refunds to) consumers, and then to try to justify that by **creating** for the purpose a **new** deferred account, into which sums will be put retroactively and immediately be removed (by the premium or refund). And in substance it would be the same to find an old page still in the ledger, which had been created for a different specific purpose but long since closed out and reconciled, and then use it. In other words, retroactively to put into that page (account) the new sum and immediately take it out. That is wrong in principle and in law. It is just changing a final rate after the fact, even after the consumption. See Calgary's argument to the Commission of January 21, 2005, p. 2 (Commission Record, Tab 47).

[167] Any deferred account which is mere memorandum (calculation) by itself changes nothing, excuses nothing, and is at best a result, not a cause. But if it is regarded as unallocated funds whose later ownership depends on profits or losses, then it likely violates the Court of Appeal and Supreme Court of Canada rulings in *Stores Block* and similar decisions (in Parts D.2 and D.5 above). The

refund here to the consumers of the unexpected profits plainly falls within that. And the reverse, recouping unexpected profit shortfalls in the deferred accounts, is an even bigger violation of that case law. So for those reasons, I do not see a deferred account as any licence to violate the usual legal rules barring retroactive rates or use of expense overruns too far back.

[168] What if the utility (with or without the permission of the Commission) were ahead of time to set up an unrestricted all-purpose “deferred account” intended to last indefinitely and to permit any rate to be adjusted later because of old events? In my view, that would be tantamount to a purported repeal of s. 40 and the Supreme Court of Canada decisions. No one but the Legislature has power to do that.

[169] ATCO suggested to the Commission that the 1987-1988 deferred gas accounts were not “closed” but “left open” (para. 28, p. 10, ATCO’s October 5, 2007 argument, Comm. Record, Tab 60). The words “left open” are ambiguous. The account was still there, but the relevant years had been reconciled (cleared out) years ago. See Part E below, and the Appendix to this judgment. So in the meaningful sense, ATCO’s submission was incorrect. It had some accuracy only in an irrelevant sense.

[170] ATCO’s same argument (para. 31, p. 11) said that past rates are not changed by the DGA. In a sense, that is of course so. But it says that “future rates reflect, *inter alia*, prior period adjustments occurring . . . in the setting of future rates.” That is precisely what the *Gas Utilities Act* and Supreme Court of Canada and Court of Appeal decisions all forbid. See Parts C and D.1-8 above.

[171] I stress that using a deferred account is the only real reason which the Commission gave for its 2008 Decision now under appeal.

9. Jurisdiction

[172] First, I put to one side a red herring. In its reasons under appeal, the Commission states (without citing authority) that there are no fixed rules about retroactivity, only discretion. The Commission says that such issues “are not, however, jurisdictional impediments” (second last para., p. 8, A.B. p. F32). That seems to echo part of what ATCO had argued (October 12, 2007 argument, p. 4, para. 8, Record Tab 64).

[173] The Commission’s statement is irrelevant. Errors of law and errors of jurisdiction yield the same result on appeal (if clear and unreasonable). As shown above at great length, retroactivity violates a clear rule of law. This is an appeal, and this Court is not confined to questions of jurisdiction. It has power to reverse decisions of the Commission for errors of law: *Alberta Utilities Commission Act*, 2007, c. A-37.2, s. 29(1).

[174] Now I turn to another topic. I should emphasize that the above portions of my reasons do not find want of jurisdiction or power on the part of the Commission. The preceding parts of my

judgment are not a search for a power. So it cannot be a power which existed somewhere else. My suggestion is not a power, or jurisdiction. Instead, I find a legal statutory prohibition (statutory and judge-made).

[175] That distinction imports two things. The first is that powers are very different from rights, and lack of power (technically called a "disability") is very different from a duty. A prohibition and a lack of power operate in different spheres entirely. A power is the **ability** to affect other people's legal position. A right or duty has to do with what the law **requires** or **forbids**.

[176] One can have a power but be under a legal duty not to use it, or not to use it a certain way. See *Dias on Jurisprudence*, 53-54, 56-57, 64 (4th ed. 1976) or pp. 33-34, 36-38, 43-44 (5th ed. 1985); *Salmond on Jurisprudence* 229-30 (12th ed. 1966). An example is an agent making a contract forbidden by the principal, but within the agent's authority. Another is a divorced spouse who cuts the children out of his will contrary to a contract with his ex-wife. (Of course, we must remember that the Commission is a tribunal, not a litigant.)

[177] The second thing flowing from rights vs. powers in this case is easy to overlook. I find an applicable statutory (and precedential) prohibition, not mere non-existence of a grant of power. In other words, I rely on the presence of an actual thing, not the absence of something. Silence in one place does not contradict an express statutory provision in another (whether the issue is powers or duties).

[178] Probably that is the key point. Existence of even one relevant statutory grant of power **upholds** a positive power; even one statutory provision **prevents** legal action if the statutory provision is a negative prohibition. So if the issue were whether a tribunal or person had **power** to do something, only one source of the power would be necessary, and would suffice. That the power came only from one source or location, would be irrelevant; one source or many would make no difference. If instead the issue is whether there is a statutory **prohibition**, then again it need only be found in one place. Even one such statutory provision means that the tribunal or person has **no** right, and the law forbids it to act. And the provisions on which I rely bar rates based on past losses or optimistic forecasts, not approve it.

[179] But there is one difference between the two situations. A statutory grant of power permits effective action; a restriction makes action illegal.

[180] An appeal from a tribunal's act will succeed if the tribunal lacked power, **or** if it contravened a statutory or judge-made legal prohibition, **or** both. So a tribunal acting within jurisdiction and with power, must be reversed if it violated a rule of law. The Court of Appeal must quash it.

[181] Here the Commission had and has **power** to regulate rates, to enter into a hearing of some sort, to prescribe accounting methods, and to grant a wide variety of remedies. The remedies which the Committee granted here were familiar and within its **powers**. None of that is the issue.

[182] The whole issue is what legal rules that hearing was to follow, what considerations or facts were relevant or irrelevant, times for acting, and the limits on reversing earlier decisions. Violation of those legal rules likely produced no nullity. But such violation is illegality, and permits, indeed mandates, appellate reversal.

10. Conclusion

[183] This charge to the southern customers to reimburse ATCO for its various accounting deficiencies is illegal retroactive rate-making for ten reasons.

- (a) It is all based on events long before the beginning of the fiscal year of the application, indeed totally outside any rate application. That contravenes all the law set out in Part C (history) and in subparts D.2 to D.6 above. If the adjustment application is even a rate application, it is a May 2004 application, but the adjustments go back to 1998 or 1999.
- (b) The rates were final years ago, at the latest when the DGAs were reconciled monthly.
- (c) The DGAs themselves were thus reconciled years before.
- (d) The DGAs were never intended nor ordered to be used for this purpose. See Part D.8 above, and Part E below.
- (e) ATCO's and even the Commission's reasoning would imply that the existence of this one continuous deferred account going back to 1987 or 1988 would leave open all future gas rates back to those years! That would be absurd.
- (f) This is just errors from lax accounting, discovered belatedly.
- (g) The Commission never even discussed the implications of the fact that on its own fact statements, this is basically cost-plus charges, not fixing rates. The essence of that is at best retroactive rates, at worst no rates at all. See Parts D.2, D.3, and D.5.
- (h) The Commission shuffles the risk of shortfalls in profit onto the consumers (or rather different later consumers). See Parts D.3 and D.5.
- (i) The Commission's reasons seem to contain errors on their face. See the end of Part D.6.

(j) This is clear and unreasonable error of law. See Part D.9.

E. History of Deferred Gas Accounts

1. Introduction

[184] Since the Commission later saw deferred accounts as a way to bypass the retroactivity rule, the nature and history of the accounts in question here is important.

[185] These accounts are so old that they were set up 22 years ago for different companies which once had the gas franchises which ATCO now enjoys.

2. Creation and Purpose

[186] I quote the Commission's own history of these accounts, to show that they were never intended for the present purposes, and had long since been reconciled (cleared out) for the years in question.

DGA [deferred gas account] procedures were initially approved by the Board [now Commission] in 1987 and finally approved in 1988 **for the purpose of reconciling actual costs of gas incurred by a utility with forecasts that it used in setting a GCRR [Gas Cost Recovery Rate], i.e. the rate it used to recover the commodity costs of gas from sales customers.** These procedures ensured that customers paid only the actual cost of gas consumed by them. In addition, they ensured that the utility neither profited from nor suffered losses in the course of selling the gas. This premise currently remains in effect for the sale of gas under a regulated rate.

Initially, reconciliation of the DGA was made on a winter and summer seasonal basis when the application for the respective period's GCRR was filed. **In 2001, the Board approved a change in the methodology for determination of a GCRR from a seasonal to a monthly basis.** This change in methodology was implemented in April 2002. The purpose of allowing prior period adjustments in the DGA was to allow for forecasting inaccuracies, relative to the timing of actual gas acquisition costs incurred, that would have otherwise impacted the determination of a GCRR.

(2005 decision at p. 8, A.B. p. F11, emphasis added)

* * *

The Board concluded from this prior decision that the DGA was not intended to be a permanent fixture, but was expected to be in place until the volatility of gas prices had decreased to a point where AG could revert to its previous practice of forecasting the gas costs on a prospective basis. The difference between the two practices was that prior to the implementation of the DGA, any difference between forecast and actual was to the account of the shareholder, whereas in the DGA process the differences fell to the account of the customer.

It is clear to the Board that the only purpose of the DGA was to provide a method of correcting the customer rates due to the volatility in the purchase price of natural gas.

(2005 decision at p. 10, A.B. p. F13)

* * *

... the Board must remain mindful of the essential nature of the DGA as a deferral account and the allowances in the past of certain prior period adjustments spanning a number of years.

(2005 decision at p. 11, A.B. p. F14)

* * *

Decision E88018, dated March 18, 1988 stated:

The DGA procedure was proposed [by AG's predecessors] to be in place until gas costs could be forecast with a reasonable degree of certainty.

and in a later section also stated:

[AG's predecessor] contended that once gas prices attain some stability and can be forecast with some degree of accuracy, there likely will be no need for a DGA type account. If a DGA mechanism is not approved, [the predecessor] suggested that there would be significant swings to its earnings. [The predecessor] confirmed that when the first reconciliation proceedings are held, the Board and the Intervenors may examine not only the projected gas costs for the next reconciliation period but also those costs that are related to the period under review. (Tr. p. 488) And further:

'There's no attempt in the deferred gas account mechanism that's been proposed to bypass the

Board's ability to rule on the prudence of a cost.' (Tr. p. 489)

The Board concludes from this prior decision that **the DGA was not intended to be a permanent fixture, but was expected to be in place until the volatility of gas prices had decreased** to a point where AG could revert to its previous practice of forecasting the gas costs on a prospective basis. The difference between the two practices was that prior to the implementation of the DGA, any difference between forecast and actual was to the account of the shareholder, whereas **in the DGA process the differences fell to the account of the customer.**

It is clear to the Board that the only purpose of the DGA was to provide a method of correcting the customer rates due to the volatility in the purchase price of natural gas.
(*id.* at pp. 9-10, A.B. F12-13, emphasis added, footnotes omitted)

* * *

In some cases, . . . prior period adjustments have been specifically approved for imbalances resulting from measurement errors that have related to periods of over one year.
(2005 decision at pp. 10-11, F13-14)

* * *

Previous to the establishment of the DGAs, a utility treated all estimates for its gas supply, both volume and price, as prospective in its General Rate Application (GRA). The establishment of the DGA provided a means by which a utility could make corrections and adjust for the actual price of the gas supplied and thereby correct the customer rates. The regulated sales rate used to recover the cost of gas was called the gas cost recovery rate (GCRR). Use of the DGA takes into account that, under a regulated gas sales rate, customers pay only the actual costs of the gas consumed by them and **the utility is neither to incur a profit nor suffer a loss** in the course of procuring and selling the gas.

In 1987 parties believed that the DGA would be a temporary feature because the continuing volatility of gas prices was not anticipated. However, contrary to these expectations, the purpose and need for the use of DGAs has continued. Initially, the DGAs were reconciled twice a year on a winter/summer seasonal basis. During the period from 1987 to March 2002, the Board allowed prior seasonal adjustments to be made in reconciliation of the DGA in respect of the preceding same season.

(2006 decision, p. 2, emphasis added, footnote omitted)

[187] More examples are found in the Appendix.

3. Loose Later Practices

[188] However, ATCO's practices later became lax in a number of respects, and sometimes small adjustments of other types were made in the deferral accounts. That had never been the purpose of the accounts. The Commission described that:

... However, the Board [now Commission] is aware that, during the approximate 16 years that the DGA has been in place, it has been used to update adjusted imbalance amounts from shippers, producers and interconnecting pipelines. Prior period adjustments for various types of corrections have been relatively common occurrences. While the Board and interested parties may not have previously taken issue with these types of corrections, the Board is concerned that the DGA seems to have evolved into a vehicle to fix all possible errors as a cost of gas to be charged to sales customers under a regulated rate.

(2005 decision at p. 10, F13)

* * *

... **The Board believes that, normally, reconciliations were not expected to look back further than 12 months.** As the process evolved, some prior period adjustments were made which extended back further than 12 months. Under special circumstances, for example, involving measuring equipment malfunctions, prior period adjustments involving longer periods have been accepted by the Board. However, the Board considers that **the DGA was never set up with the intention of permitting all prior period accounting errors, particularly those that would have been subject to ATCO's management and control, to be processed and rectified through the DGA.**

The Board is troubled by the evolutionary use of the DGA. The DGA replaced a prospective process where accounting errors, such as those that are the subject of the Application, should typically have been absorbed by the utility's shareholder. It now appears that the DGA is being treated as a catch-all for fixing errors, including those that have a long history, or appear to be the result of human error, where adequate processes have not been in place to capture and correct the problem at an early stage. Notwithstanding that some prior period adjustments previously approved by the Board may have covered an extended period of time, the Board considers that **seven years represents a significant lag presenting obvious intergenerational equity issues.**

(*id.* at p. 11, F14, emphasis added)

4. Calgary's Argument

[189] Calgary's factum and book of authorities cite or quote past Commission orders fully confirming the Commission's recitals quoted above (in subparts 2, 3). The appellant also shows that those accounts were promptly reconciled to allow for errors in prediction, and that the Commission gave orders replacing the interim rates initially established with final rates reflecting the reconciliations. After some years, that was done monthly (based on a three-month rolling average).

[190] In written argument filed with the Commission on its 2008 application, ATCO had objected that the Commission should not see a full history of its own orders governing the deferred gas account. That objection is hard to reconcile with the arguments which ATCO had made to the Court of Appeal in the 2007 appeal (need for a fuller record). However, ATCO did not object to that evidence in this new appeal. (ATCO's original argument to the Commission that ATCO lacked time to check old Commission decisions was not made again to the Court of Appeal, and of course became moot long ago.)

[191] Old Commission decisions are not exactly evidence (not really fact) and are not much (if at all) law. They are previous process, and are all about the same utility (or its two predecessors). They are not tendered here to prove facts, but for their directions and decisions.

[192] In the present appeal, the appellant Calgary, the respondent ATCO, and the Commission itself, all reproduced old Commission decisions in their various books of authorities.

[193] Any court can look at its own previous decisions and records. See *Kin Franchising v. Donco* (1993) 7 Alta. L.R. (3d) 313, 316 (para. 7) (C.A.); *Alberta Evidence Act*, R.S.A. 2000, c. A-18, s. 42. Additional authorities are found in 3 *Stevenson & Côté, Civil Procedure Encyclopedia*, p. 45-54 (ch. 45, Pt. Z.3) (2003). I see no reason to withhold that power from a formal tribunal like this Commission (with all its powers). See the *Alberta Utilities Commission Act*, 2007, c. A-37.2, s. 11,

and cf. *Germain v. Auto Injury App. Comm.*, 2009 SKQB 106, [2009] 7 W.W.R. 509. Especially when the tribunal is an ongoing regulator with constant applications over the rates and accounts of the same handful of companies. This Commission has looked at its previous decisions for many many years. A classic decision of the Supreme Court of Canada says that the Commission can get its information in whatever mode it sees fit: *N.W.U.L. v. Edmonton* [1929] S.C.R. 186, 193. And if the Commission can take notice, why cannot the Court of Appeal take such judicial notice on appeal from the Commission?

[194] Furthermore, it was ATCO itself which began all this, and its application to that end expressly submitted that the Commission should make the “adjustments” (surcharges) to consumers by looking back to the Commission’s old approval of DGAs. (See ATCO’s application of May 31, 2004, § 4.1 “History”, present Commission Record Tab 1, pp. 4-5.)

[195] Therefore, it is not surprising that the Commission did **not** decline to look at any previous decisions by itself. Instead it recited and quoted a number of them in its 2005 original decision, and in its 2008 decision reconsidering that. The Commission did **not** say (in 2005 or 2008) that it (or Calgary) lacked evidence about this.

[196] The Commission’s public website gives ready access to some decisions from 1996 to 1999, and many thereafter. Quicklaw also reports its decisions from 2002. Print copies of all Commission decisions (to 1999) are available in one Law Society Library and (to 2008) in the Alberta Government Library. (The University of Alberta law library has some Commission decisions.) The Commission will supply copies on request. So the text of past decisions is not open to doubt. Anyone can access them to check the accuracy of quotations or summaries.

[197] Therefore, the Commission was correct to inspect its past decisions on DGAs. I have amplified my recitals of this history by quoting two or three additional passages from old Commission decisions (pointed out by ATCO in its October 12, 2007 argument, Tab 64, p. 3, quoting decision 2005-036). I have also described some additional passages from Calgary’s argument of October 5, 2007 to the Commission (Tab 61): see an Appendix to this judgment. The description has been checked against the original Commission decisions.

[198] In any event, the old controversy about taking notice of the former Commission orders has no effect on the result, because those additional references to past orders reinforce but do not change the factual picture painted by the Commission itself in the 2008 decision now under appeal.

F. The *Bell Telephone Decision of the Supreme Court of Canada*

1. Introduction

[199] Counsel cited *Bell Canada v. C.R.T.C. (Bell Aliant)*, 2009 SCC 40, [2009] 2 S.C.R. 764. It involved telephone companies’ infrastructure under federal legislation.

2. Legislation

[200] The Canadian Radio-television and Telecommunications Commission no longer regulates telephones under traditional rate-regulating legislation. Now it must follow Canada's *Telecommunications Act*, 1993 c. 38, whose objectives, duties, and powers are vastly broader, and cover more than telephones.

[201] I will outline some features of the *Telecommunications Act*, which have no equivalent in Alberta's 1999-2007 legislation applicable to gas utilities or their rates (the *Alberta Energy and Utilities Board Act*, the *Gas Utilities Act*, and the *Public Utilities Act*.)

[202] The *Telecommunications Act* imposes on the C.R.T.C. a mandatory duty to implement a number of very wide and deep policy objectives when it exercises any of its powers or performs any of its duties (s. 47(a)). Among those mandatory objectives are to

- safeguard, enrich and strengthen the social and economic fabric of Canada . . . (s. 7(a))
- enhance . . . efficiency and competitiveness, at the national and international levels . . . (s. 7(c))
- promote . . . ownership and control . . . by Canadians. (s. 7(d))
- promote the use of Canadian transmission facilities . . . within Canada . . . and points outside . . . (s. 7(e))
- foster increased reliance on market forces . . . (s. 7(f))
- stimulate research and development . . . and encourage innovation . . . (s. 7(g))
- respond to the economic and social requirements of users . . . (s. 7(h))
- contribute to the protection of . . . privacy (s. 7(i))

[203] The C.R.T.C. also has unusual statutory powers. It can require any telecommunications company to provide any service in any manner (s. 35(1)) or to construct any facility (s. 42(1)). And (most apposite here), the Commission can require the company to "contribute . . . to a fund to support continuing access by Canadians." (s. 46.5(1)). Therefore the C.R.T.C. has positive proactive

duties going far beyond fair prices (rates), reliability of service and supply, or even safety, of one company.

3. The Supreme Court's Decision

[204] The Supreme Court of Canada (and the Federal Court of Appeal) confirmed the C.R.T.C.'s decision to follow a scheme which it ordered a few years before. That was not to reduce excessive phone rates (for competition reasons), but instead to hold a portion of the revenue in profitable urban markets in a special account to be later spent on infrastructure improvements to benefit consumers.

4. Is the Supreme Court of Canada Decision Distinguishable?

[205] I have concluded that the *Bell* decision can and should be distinguished here, for the following eight reasons.

(a) Different Legislative Objectives and Powers and History

[206] The Supreme Court of Canada itself expressly distinguished Alberta's *Gas Utilities Act* and said that the federal C.R.T.C. has broader objectives and power than does Alberta's Commission. See the *Bell* case, paras. 17, 22, 36, 39-43, 45-48, 50-53, 55, 57, 72, 74-75 and 77. The Supreme Court of Canada even distinguishes decisions about the C.R.T.C. in earlier years when that tribunal was governed by the more traditional type of rate-of-return regulation like the Alberta system. (In those days the old system was mandated for telephone companies by the *Railway Act*.) See the *Bell* decision at paras. 39-46, and 62. See subpart 2 above. To the same effect is para. 41 of the Federal Court of Appeal decision (2008 FCA 91) which the Supreme Court of Canada affirmed.

[207] In particular, the Supreme Court of Canada pointed out that traditional rate regulation is a two-way contest between the interests of the utility company and its particular consumers. The C.R.T.C. (on the other hand) has to meet objectives for all Canadians in all parts of Canada, e.g. fostering competition: see paras. 45 and 47. What is in issue in the present dispute between Calgary and ATCO is the limited traditional type of rate-making power. See the precise passages in Court of Appeal and Supreme Court of Canada decisions, describing and mandating that Alberta scheme, quoted in Parts C and D above.

[208] The present ATCO appeal is about a price (rate of revenue) fair as between the utility and the consumer: nothing more. Though the *Bell* decision's origin had a little to do with such questions, the actual *Bell* decision was about increasing access and competition, and dictating to the various telephone companies compulsory long-term infrastructure competition.

[209] See also subpart (b) below, on "price-cap regulation".

[210] There is an even more striking distinction between the C.R.T.C. and Alberta's Commission. For most of its history, the Commission has been separate from the Energy Resources Conservation Board. The rate regulator, the Alberta Utilities Commission, is now again separate. The broader policy about the industry and its physical form is no part of the Commission's functions, as illustrated by the Genesee power plant decision: *Alberta Power v. Public Utilities Bd.* (1990) 102 A.R. 353 (C.A.). Though the Energy Resources Conservation Board had decided that the new second Genesee power plant was needed and gave a permit to build it, after the plant was built, the Public Utilities Board (now the Commission) could and properly did exclude it from the rate base as not "used or required to be used".

[211] Alberta's two tribunals were temporarily merged effective February 15, 1995 (by 1994 c. A-19.5). But the merger ended effective January 1, 2008 (by 2007 c. A-37.2), before the decision under appeal. Furthermore, the **legislation** for the two tribunals remained separate even during the period of the merged tribunal, 1995-2007.

[212] See also *Barrie Pub. Utils. v. Cdn. Cable TV Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476, 225 D.L.R. (4th) 206 (paras. 9-19).

(b) Different Purposes for Setting Up Deferred Accounts

[213] I must stress that in *Bell*, the C.R.T.C. was using an entirely new type of utility regulation (invented in the United Kingdom in the 1980s). It is called price-cap regulation. Unlike traditional rate (price) regulation, this does **not** fix rates; in order to give incentives, it merely sets a maximum and makes sophisticated allowances for the result. The difference between the two types of regulation is explained by Netz, *loc. cit. supra*, at 417 ff., especially p. 425-28.

[214] One cannot just look at the title of an account, or fixate upon a name like "deferred". One must find the purpose and operation of the account in question. See Part D.8 above.

[215] From the outset, the account described in the *Bell* decision was designated expressly to decide later who would own or use the money contained in it. See the Supreme Court of Canada decision, paras. 6, 8-9, 22 (and the Federal Court of Appeal's paras. 43 and 52.) That surplus sum was expected to arise, and did arise, from continuing to charge high urban rates, despite a new theoretical or tentative cap on rates. The difference (surplus) was to be collected and held in the new fund (account) (para. 6). That was a scheme very different from the Alberta fixed-rate scheme. Too many such statements in the Supreme Court's *Bell* decision emphasize the fund's very different purpose to list them fully; some are found in its paras. 37, 57, 61, 63, 64, 66, and 67.

[216] The Alberta accounts (DGAs) had very different purposes. They came from an old short-term system for handling very unpredictable raw material costs (gas field prices). It seems to have been an accident, oversight or happenstance (not a Commission order) that they lasted for years. See the detailed history above in Part E.

(c) **Alberta Balance Was Largely the Product of a Single "Adjustment" Entered After the Fact Years Later, not an Ongoing Thing**

[217] Alberta's deferral account had already been reconciled years earlier, i.e. settled. I doubt that it still "existed" in any real sense in 2004, still less that the 1998 or 1999 parts did. Revisiting the old Alberta deferral account was just a device invented years later when a long-standing and ongoing error was finally discovered: see Parts B.1, 2 and 3(a), and D.3 and D.8 above. Here the Commission let the utility use an old account which had been set up for one temporary purpose to be used for a totally different purpose than that contemplated before.

[218] Conversely, in the *Bell* case, the C.R.T.C. managed an existing fund of money growing steadily. The C.R.T.C. largely and in principle confirmed its original purpose.

(d) **Encumbered Fund vs. Deficit**

[219] The *Bell* judgment and C.R.T.C. order were a final decision about ownership of surplus funds which previously had encumbered or provisional ownership. See the Supreme Court of Canada decision, paras. 63, 65.

[220] However, ATCO's account was on balance (and entirely in the south) a deficit, not a surplus. A deficit cannot have an owner, nor be encumbered. Still less was any deficit intended or ordered to have either here.

(e) **Limited Term in *Bell***

[221] The *Bell* account had a definite beginning and end, forecast at the outset (2001-7 but later ended early, in 2006). See the Supreme Court of Canada decision, para. 9, cf. paras. 10-13.

[222] In *Bell*, the rates were confirmed and adjusted once and for all, to prevent any further accumulations of reserve funds. The fund (account) was to be closed out and cease to exist: see the Supreme Court of Canada decision, paras. 13 and 15 end.

[223] But the Alberta Commission's 2005, 2006, and 2008 decisions allowed the old gas companies' deferred accounts to be available in future to do it all again (though usually not beyond two years). See Part B.3 above.

(f) **The *Bell* Rates Were in Effect Interim, Whereas ATCO's were Final**

[224] This is stated by the Federal Court of Appeal's decision, paras. 50-52, and by the Supreme Court of Canada's decision, para. 61.

(g) ***Bell* was Confined to Certain Geographic Areas**

[225] The funds in the telephone companies' deferred accounts were confined to excess revenue in geographic areas where more competition was needed. Structural changes were needed and so the C.R.T.C. authorized them. Those areas were residential local services in non-high-cost serving areas basket (mostly urban): see *Bell* paras. 4, 6, 10. But in the present ATCO appeal, all (later) gas customers simply got a retroactive rate increase (or refund).

(h) ***Bell Refunds were Incidental***

[226] In principle, the C.R.T.C. ordered the telephone companies to spend all the reserved segregated funds on service improvements (handicapped services and more broad-band capacity). Refunds to customers were just incidental amounts which could not be spent: see the Supreme Court of Canada's decision, paras. 14, 15, and 20.

[227] But the only use or remedy even suggested before Alberta's rate-making Commission was a second charge (or refund) to the customers for the same old gas long since consumed.

G. **Other Distinguishable Decisions**

[228] The Commission's decision and some factums cited *Epcor Generation v. A.E.U.B.*, 2003 ABCA 374, 346 A.R. 281 (one J.A.). Note that a power to change rates retroactively there was conceded; here it is in issue. The rate was agreed there to be interim (paras. 12, 14, 15), not final as here. Calgary's argument to the Commission in the present case (October 12, 2007, Tab 65, p. 2) quotes statements by the Commission in *Epcor* confirming that. The proposed dispute on which leave was sought was only over details, indeed unique sharing ratios (*Epcor*, para. 13), not retroactivity itself as here (paras. 9-10). That motion dealt with a defined time and topic only: the 2000 pool price of electricity. And many issues were factual (paras. 23 ff.). It was a decision by only one Justice of Appeal on a motion for leave, not an appeal. *Epcor* is not on point.

[229] One other case cited is *Re Board of Commissioners of Public Utilities (Ref. re s. 101 Public Utilities Act)* (1998) 164 N. & P.E.I.R. 60 (Nfld. C.A.). This was a split decision. It involved Newfoundland legislation on regulation of electric utilities. Except for the broad outlines, that legislation bears no resemblance to Alberta legislation regulating gas activity rates.

[230] The majority of the Newfoundland Court of Appeal held that setting a rate of return for a utility was not just a step in calculations leading to fixing rates (prices). They held that it set a ceiling for rate of return, and if the later actual rate of return exceeded that ceiling, the Commission could later adjust rates to offset that. Such a rate-of-return ceiling enforced later is emphatically not the Alberta practice or legislation. Nor can I reconcile that view with the Supreme Court of Canada's later decision in the *Stores Block* case, *supra*. Indeed the Newfoundland Court of Appeal largely proceeded on its own interpretation of its legislation, and scarcely mentioned any of the Supreme

Court of Canada decisions cited above (and none of the Alberta Court of Appeal decisions), I do not find the majority decision persuasive. It is distinguishable, in any event.

H. Standard of Review

1. Conflicting Precedents on This

[231] First, the Supreme Court of Canada held that the standard of review was correctness: *Barrie Pub. Utils. v. Cdn. Cable TV Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476, 225 D.L.R. (4th) 206 (paras. 9-19). Then it gave a somewhat different decision, as follows. Whether the Commission has a given power is determined on appeal on the standard of correctness, but if it is found to have that power, the actual method used to carry out the power attracts a more deferential approach: “*Stores Block*” case, *ATCO Gas and Pipelines v. E.U.B.*, 2006 SCC 4, [2006] 1 S.C.R. 140, 344 N.R. 293, 380 A.R. 1.

[232] I am reluctant to try to create my own *Pushpanathan* analysis here, and then use it to decide which Supreme Court of Canada decision to follow, or to try to distinguish one of the Supreme Court of Canada decisions.

2. Standard Does Not Matter Here

[233] Nor need I do so here, for it would not affect the result. Even on the reasonableness tests, the decision of the Commission under appeal is unreasonable and does not survive. That is so for the reasons given in Part D.10 (“Conclusion”) and Part F above. None of those topics is discretionary. The legal limits here are statutory or based on binding precedent, and go to the very nature of the process. The errors are fundamental, and ones of basic principle. Parts D.4, D.5 and D.6 show that. The Commission cannot be acting reasonably when it departs from the fundamental principles laid down by the Legislature and the courts for the Commission to follow. It did depart seriously here, and its decision is unreasonable. See also Part D.9 above.

I. Conclusion

[234] It is now about 12 years since the accounting errors in question began, and about six years since ATCO sought relief from the Commission. The Commission has held three hearings on the topic and has declined to hear more evidence. I would fear denying justice by delaying justice, were we merely to tell the Commission to reconsider the topic in yet a fourth hearing.

[235] I would have allowed the appeal, and vacated so much of the Commission's 2005 and 2008 orders as allows the (southern) recovery of former costs or expenses. I would have directed the Commission under the *Alberta Utilities Commission Act* s. 29(14), that the law requires it to dismiss that part of ATCO's application entirely. There was no appeal, nor leave to appeal from the (northern) rebate to consumers.

[236] I would have awarded costs of the appeal to the City appellant payable by ATCO. There should be no costs to or from the Commission, even though its factum went rather far into the merits. But I would caution the Commission that doing that endangers its position in various respects. See *N.W.U.L. v. Edmonton* [1979] 1 S.C.R. 684, 708-09, paras. 36-37.

J. Procedure

[237] The appeal book contains a fuzzy scan of the three Commission decisions in question, and of some court orders. In future, documents should either be printed from electronic copies, or sharp photostats should be made from originals. In contrast, the Commission's filed record has perfect clarity.

[238] The Commission filed one copy of its record, as directed by s. 29(10) of the *Alberta Utilities Commission Act*. Rule 537.1 then contemplates that counsel for the appellant will file multiple copies of Extracts of Key Evidence to supplement the Appeal Digest, reproducing only those parts of the full record that are needed (by all parties) to dispose of the appeal. If the appellant overlooks including something, the respondent can also file Extracts of Key Evidence. No party filed any extracts here. A panel contains three justices, usually based in two different cities, so the absence of individual sets of Extracts hinders the efficient disposition of the appeal.

[239] The appellant's citations of court cases included no reported citation. That violates the Consolidated Practice Directions, para. D.1(b). In future it would help this Court to have at least one publisher's (or website) citation (as well as the neutral cite).

Appeal heard on January 13, 2010

Reasons filed at Calgary, Alberta
this 23rd day of April, 2010

Appearances:

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Appendix

More History of Deferred Gas Accounts

N.W.U.L. = Northwestern Utilities

C.W.N.G. = Canadian Western Natural Gas

- 1987 Orders E87051 and E87052 (July 3): Commission approved in principle applications by ATCO's predecessors to establish a Deferred Gas Accounting and Reconciliation procedures, to be in place until cost of buying gas could be forecast with reasonable certainty.
- 1988 Decision E88018 and Order E88019 (March 18): Commission held (on N.W.U.L. and C.W.N.G. rates) that the Gas Cost Recovery Rate was interim and would change at least two times/year. Seasonal rates were to be established, but the Commission would monitor the reconciliations more frequently: monthly. The actual review and finalization would be done two times each year. The cumulative actual balance in the DGA on each March 31 and each October 31 would be refunded to or collected from customers through the GCRRs in the ensuing season.
- Thereafter in 1988 further Commission orders did reconcile those accounts two times/year for each gas company.
- 1989-1991 Further Commission orders also in effect reconciled the accounts. Decision C90041 (December 7, 1990) confirmed the system. Some of these orders said that the rates remained subject to review. Interim Order E89020 (April 4, 1989) said that DGA balances should be minimized, and so any significant increase in gas supply costs between normal application dates should lead to an application by C.W.N.G. for a change in the GCRR.
- 1994-1997 By Decision 94072 (October 28, 1994) DGA reconciliations for C.W.N.G. were to be annual, not semi-annual. GCRRs were from time to time approved. Order U97010 (January 16, 1997) quoted and reiterated Order 89020 (of April 4, 1989), which in turn summarized Order 88018. Order U97052 (May 7, 1997) re C.W.N.G. said that the DRA calculation method meant that under- or over-recovery in one-half year cumulated in the DGR would be collected or refunded in the next one-half year's period, given normal weather and accuracy of sales forecasts. This would substantially maintain intergenerational equity. Order U97053 (May 7, 1997) for N.W.U.L. gave final approval of the company's GCRR for 2-1/2 months.

- Decisions U97129 and U97130 (October 31, 1997); Commission reconciled C.W.N.G.'s and N.W.U.L.'s actual gas cost recoveries.
- 1998 Decision U98067 (April 13) accepted C.W.N.G.'s reconciliation and refused requests to re-examine the DGA process. Order U98071 (May 4) confirmed C.W.N.G.'s summer GCRR as final.
- 1999-2000 Various interim orders. Order U2000-161 (April 17) made ATCO Gas-South's GCRR final. More interim orders made for both companies. Order U2000-308 (October 27) deferred acceptance of ATCO North's (former N.W.U.L.'s) reconciliation and set a new interim rate.
- 2001 Order U2001-001 (January 24) left GCRR rates for ATCO South as interim. Order U2001-002 (January 24) was similar for ATCO North. Order U2001-061 (March 28) was similar; as were Orders 2001-062 (March 28) and U2001-448 (December 14).
- In 2001 the Commission held a hearing re methods to set the GCRR. Decision 2001-075 (October 30) (on methodology) described the existing procedures (reconciliation two times/year) (pp. 3-4), but noted the DGA balances had become large. The Commission decided (p. 64) to switch to monthly written reconciliations to minimize DGA balances. A three-month rolling period would be used for reconciliations.
- 2002 Decision 2002-026 (April 18) (p. 3) recited the Commission's duty and power to fix "the appropriate final share of the deferral account balances due from each customer class". On p. 4 the Commission said it had been hoped under- and over- recoveries in the DGA would balance out but unexpectedly they had not. But in principle, rates should be established prospectively.
- 2003 Decision 2003-106 (December 18) (p. 135) said that for the DGA and reconciliation the GCRR would be revised monthly.