In the Court of Appeal of Alberta

Citation: ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board), 2008 ABCA 200

Date: 20080527
Docket: 0501-0102-AC
0501-0171-AC
0701-0048-AC
Registry: Calgary

Between:

ATCO Gas and Pipelines Ltd.

Appellant

- and -

Alberta Energy and Utilities Board

Respondent

- and -

The City of Calgary and Utilities Consumer Advocate

Interested Parties

The Court:

The Honourable Madam Justice Elizabeth McFadyen
The Honourable Madam Justice Constance Hunt
The Honourable Mr. Justice Frans Slatter

Memorandum of Judgment

Appeals from Decisions of the
Alberta Energy and Utilities Board:
U2005-133 Dated the 25th day of March, 2005

2005-063 Dated the 15th day of June, 2005
2007-005 Dated the 5th day of February, 2007

Memorandum of Judgment

The Court:

[1] The appellant was granted leave to appeal on certain issues arising from three decisions of the respondent Board: Decisions U2005-133, 2005-063 and 2007-005. Those decisions all relate to the Carbon storage facility owned by the appellant, which has for decades been a part of the appellant's regulated gas business. That business is operated through a division of the appellant known as ATCO Gas South ("AGS"). The fundamental issue is whether the Carbon storage facility continues to be used or required to be used to provide service in the context of the appellant's regulated business given the changes that have occurred in the industry, and in the facility's function.

Facts

[2] The appellant's gas storage facility located near Carbon, Alberta started out as a producing gas field. From 1959 to 1967 the Carbon field was used to supply gas to the appellant's customers.

[3] In 1967 the Carbon field was converted to a storage reservoir. From time to time gas was injected into the Carbon storage reservoir under high pressures. Later on, the gas would be withdrawn from the storage reservoir to meet demand. Gas could be purchased for injection into the reservoir in the summer months when prices were typically lower, and withdrawn in the winter months as needed. The storage reservoir was also used to manage peak utility supply requirements, for utility risk mitigation, and for system load balancing.

[4] The appellant has seldom, if ever, needed or been able to use the total storage capacity of the Carbon reservoir in its regulated gas business. From time to time the excess capacity was leased to third parties, and the capacity of the reservoir was even increased at times for the sole purpose of leasing the new capacity to other users. For example, between 1986 and 1991 the appellant used approximately 25% of the capacity. After 1992 its use of the capacity increased to 38%. However, in the 2001, 2005 and 2006 storage seasons all the capacity was leased to ATCO Midstream Ltd., an affiliate of the appellant.

[5] All the capital costs associated with the Carbon storage reservoir have been included in the appellant's rate base since the storage reservoir was first developed. Revenues received from the leasing of excess storage capacity to third parties were used to offset the overall revenue requirements of the appellant, thereby reducing the amount that would otherwise be recovered from customers through rates. Thus the revenue earned from leasing out parts of the Carbon storage facility has always been included by the Board in the calculation of the appellant's rates.

[6] In more recent years, the structure of the Alberta gas utility business has been changed by legislation. The previously integrated gas utilities (that provided gas services from the gas field to the retail customer) were divided, and different entities were assigned different functions in the overall gas system. The appellant was required to divest itself of its retail gas supply business, and in 2004 Direct Energy Regulated Service ("DERS") took over that service as the default supplier. The appellant no longer sells gas to customers, but now only operates a gas distribution business, consisting of the transportation of gas for third parties. As a result, the appellant no longer needs a gas storage facility as a part of its regulated business, and indeed it even argues that it is prohibited by legislation from operating any gas storage facility. The Board has determined that the Carbon storage facility is no longer required for utility operational purposes related to the appellant's regulated gas distribution business. The gas storage business itself is not regulated.

[7] Since about 2000, the appellant has taken the position that the Carbon storage facility is no longer "used or required to be used to provide a service to the public", and is therefore not properly part of its rate base under s. 37 of the *Gas Utilities Act*, R.S.A. 2000, c. G-5. Its various efforts to obtain confirmation from the Board to that effect led eventually to the orders that are now under appeal.

[8] The Board established a procedure to resolve the matter, approaching the underlying issues in stages. The procedure (discussed in detail in Decision 2005-063) took longer than anticipated, and on March 8, 2005 the appellant wrote to the Board, effectively attempting to unilaterally withdraw the Carbon storage facility from its rate base. In decision U2005-133 the Board ruled that the appellant could not unilaterally withdraw assets from the rate base. The Board also issued an Interim Order preserving the status quo until the process had run its course. As the Board later stated in Decision 2005-063, at pg. 6: "It is contemplated that at the time that the Interim Order is terminated, the Board will address any required adjustments between AGS and ratepayers to reflect the Board's jurisdictional and rate base findings." Interim Order U2005-133 is one of the orders presently under appeal. There is no direct challenge in this appeal to the ability of the Board to issue interim orders preserving the status quo while it considers issues before it.

[9] The next phase of the process considered four "Preliminary Questions". In Decision 2005-063 the Board stated and answered the questions as follows:

> (1) In general, once an asset or capital expenditure has been approved by the Board for inclusion in rate base, what should be the criteria for removing it from rate base at the request of the utility? The Board decided that an asset is removed from the rate base when the Board (and not the utility) concludes that it is no longer "used or required to be used to provide service to the public".
>
> (2) In general, is it appropriate for the Board to attach conditions to the removal of an asset from rate base that would require the utility to add the asset back into the rate base at some future time should subsequent application by the Board of the criteria identified in

Question 1 lead to a different result? The Board concluded that such a condition would not be appropriate, workable or reasonable in most circumstances.

(3) In general, to what extent can (should) the Board direct a utility to deal with a particular asset presently included within rate base in a specific manner? The Board concluded that it has such a jurisdiction, but that normally it would leave the operation and management of the regulated business to the utility.

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

(a) historical uses.
(b) proposed uses.
(c) possible contingent uses by AGS should obligations presently being performed by DERS revert to AGS.
(d) potential alternative uses by AGS, ATCO Pipelines or DERS.

The Board concluded that the only possible relevant uses (to be considered in the next phase of the process) would be the use of the Carbon storage facility for revenue generation purposes, or for distribution system load balancing.

Decision 2005-063 is the second of the orders presently under appeal.

[10] In Decision 2006-098 (which is not presently under appeal) the Board concluded that the Carbon storage facility was not required for load balancing of the appellant's distribution system. The Board confirmed that the appellant no longer had any operational need for a gas storage facility as a part of its regulated business, and that there was no operational reason to include the Carbon storage facility within the rate base. The only remaining reason to keep the Carbon storage facility within the rate base would, therefore, be to generate revenue which could be used to reduce the rates otherwise payable by customers.

[11] The Board then embarked on the last phase of the process, which was a determination of whether an asset that has no functional or operational use could be kept in the rate base for revenue generation purposes, as well as several related questions. In Decision 2007-05 the Board first determined that there were no legal impediments to the appellant owning a storage facility, so long as it was not used to provide retail gas services. The Board secondly confirmed its view that "it has the overriding legislative responsibility to review and approve which assets are in rate base."

[12] On the central question, the Board decided: “Ordinarily, revenue generation on a stand-alone basis would likely not satisfy the used or required to be used test for inclusion in rate base.” The Board concluded, however, that the Carbon storage facility was unique, in that, in addition to its operational role, it had always provided some revenue generating service by the leasing of excess storage capacity. While the Carbon storage facility no longer had any utility operational purpose, in the Board’s view:

> . . . it is not material whether or not revenue generation was a stand-alone use or an ancillary use associated with a utility service or function whose purpose was to indirectly offset the costs of providing this utility functionality. It is clear that there has been a unique course of dealing acceptable to all parties with respect to Carbon. Revenue generation has been an integral, long-standing and accepted use of Carbon for approximately forty years driven by the specific characteristics of the Carbon assets. As a consequence, revenue from Carbon has been used to offset regulated revenue requirement and has been part of the Board’s determination of just and reasonable rates to customers for the same extensive period. This aspect of the Carbon assets continues today and the Board sees no reason why Carbon should be considered as no longer used or required to be used for this purpose. (at pp. 26-7)

Decision 2007-05 also concluded that the removal of the Carbon storage facility from the regulated business would be a “disposition” under section 26(2)(d) of the *Gas Utilities Act*, and thus would require the approval of the Board. Decision 2007-05 is the third of the orders presently under appeal.

[13] The appellant applied for and was granted leave to appeal the following issues arising from Decisions U2005-133, 2005-063 and 2007-005:

1. Did the Board err in law or jurisdiction when it included the Carbon facilities in the rate base as an asset "used or required to be used to provide service to the public within Alberta" when the only function of those facilities is to generate revenue?

2. Does the *Roles, Relationships and Responsibilities Regulation* under the *Gas Utilities Act*, prohibit ATCO Gas South from operating the Carbon facilities and if so, is the Board unable to assert further jurisdiction over the Carbon facilities?

3. Can the Board require an owner of a gas utility to continue to include an asset in the rate base or restrict an owner from withdrawing a specific asset from its gas distribution system once an asset has been included in a past rate base?

4. Did the Board err in determining that a change in use of the Carbon facilities is a "disposition" for the purposes of section 26 of the *Gas Utilities Act*?

5. Did the Board commit any other error the panel hearing the appeal identifies and is prepared to entertain?

[14] The City of Calgary and the Utilities Consumer Advocate did not apply to the Court for intervener or any other status, but purported to participate in these appeals as "interested parties". Absent any objection by the parties, the Court has considered their submissions on this occasion.

Standard of Review

[15] The test for selecting the standard of review was comprehensively set out in ***Pushpanathan v. Canada (Minister of Employment and Immigration)***, [1998] 1 S.C.R. 982, and recently re-examined in ***Dunsmuir v. New Brunswick***, 2008 SCC 9 at paras. 55, 64. It is appropriate to identify or advert to the standard of review in all cases. However, it is not necessary to perform a fresh standard of review analysis in every case if the standard of review has already been set for the type of question in issue: ***Dunsmuir*** at paras. 57, 62.

[16] The case law discloses that the following standards of review have been identified for reviewing decisions of the Board under the *Gas Utilities Act*:

(a) Questions of jurisdiction are reviewed for correctness: ***ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)***, [2006] 1 S.C.R. 140, 2006 SCC 4 (the ***Stores Block*** decision) at para 21. "Jurisdiction" is however defined narrowly, and relates only to the ability of the Board to embark on the inquiry. The validity of the result, even on what might be called a "threshold" issue, is not necessarily "jurisdictional": ***Council of Canadians with Disabilities v. Via Rail Canada Inc***., 2007 SCC 15, [2007] 1 S.C.R. 650 at paras. 89, 96, 106.

(b) The interpretation of the *Gas Utilities Act* is a question of law within the expertise of the Board, and such questions are reviewed for reasonableness: ***TransCanada Pipeline Ventures Ltd. v. Alberta (Energy and Utilities Board)***, 2008 ABCA 55 at paras. 17-20. All the important issues in this appeal fall within this category.

(c) Whether a particular asset should be included in the rate base is neither a question of law, nor a question of jurisdiction, and no appeal lies:

> "Once the interpretation is determined, whether a particular item is to be brought within the rate basis is essentially a question for the judgment of the board which does not involve a question of jurisdiction or law": ***Alberta Power Ltd. v. Alberta (Public Utilities Board)*** (1990), 72 Alta. L.R. (2d) 129, 102 A.R. 353 (C.A.) at pg. 149.

The proper interpretation of the statutory definition of the rate base is, however, a question of law reviewed for reasonableness.

Since the jurisprudence has established the standard of review to be used with respect to questions of the type presented in these appeals, it is not necessary to conduct a fresh standard of review analysis: ***Dunsmuir,*** *supra*.

[17] The appellant argues that the issues under appeal raise jurisdictional questions, namely whether the Board has any authority over assets that serve no purpose in the utility system other than to generate revenue, and whether the Board has any authority to require that assets remain with the regulated business, even though the utility considers them no longer to be a part of the rate base. These questions raise, at most, issues about the proper interpretation of the definitional provisions of the *Gas Utilities Act,* and are not properly categorized as jurisdictional in nature.

[18] ***Dunsmuir*** explained the concept of reasonableness at para. 47 as follows:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. 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. In judicial review, reasonableness 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.

The Board's interpretations of the various provisions of the *Act* must accordingly be reviewed to see whether they are "justifiable, transparent and intelligible", and fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

Including Revenue Generating Assets in the Rate Base

[19] The first question on which leave was granted is:

> 1. Did the Board err in law or jurisdiction when it included the Carbon facilities in the rate base as an asset "used or required to be used to provide service to the public within Alberta" when the only function of those facilities is to generate revenue?

[20] Section 37 of the *Act* provides:

> 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, 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.

The issue is whether an asset which merely generates revenue is "used" to provide a service, or whether only assets that have a functional or operational role in the system qualify for inclusion in the rate base.

[21] These appeals raise no factual issue about the role that the Carbon storage facility plays in the appellant's gas distribution system. The Board has held that it plays no operational role, and its only present contribution is to generate revenue that would reduce rates. This is not, therefore, a case on whether a particular asset should be included in the rate base, something that (as just noted) is neither a question of law nor of jurisdiction. Rather, the issue here is an extricable question of law: whether revenue generation by the Carbon storage facility qualifies as "use" under the proper interpretation of the statute. As noted, the standard of review on this issue is reasonableness. The Board's decision must be examined to see if it is within the range of "possible, acceptable outcomes which are defensible in respect of the facts and law.": ***Dunsmuir***, *supra*.

[22] It is contrary to the general approach to utility regulation to suggest that assets can be included in the rate base merely because they generate revenue that could serve to reduce rates. The Board recognized this when it said in Decision 2005-063 at pg. 16:

> With respect to revenue generation as a stand-alone use of an asset, the Board believes it would have difficulty approving the inclusion in revenue requirement of costs associated with a new asset, where the function of the asset was unconnected to utility service and where its sole purpose was to generate revenue to offset rates otherwise payable.

The Board confirmed this view in Decision 2007-05 at pg. 26:

> Ordinarily, revenue generation on a stand alone basis would likely not satisfy the used or required to use test for inclusion in rate base.

The Board, however, found that the Carbon storage facility was unique, because of its historical role as both an operational part of the system and as a source of revenue from the leasing of surplus capacity. It used this history to justify its conclusion that the Carbon storage facility met the requirements of s. 37.

[23] The Board's interpretation of the section is unreasonable for several reasons. Firstly the Board relied largely on the historical role that the Carbon storage facility played in the system, as opposed to its present or future use. Section 37 of the *Act* is primarily forward looking. The Board's jurisdiction is to set rates "afterwards", that is for the future: ***Northwestern Utilities v. City of Edmonton***, [1979] 1 S.C.R. 684 at pg. 691. The words "used or required to be used" are intended to identify assets that are

presently used, are reasonably used, and are likely be used in the future to provide services. Specifically, the past or historical use of assets will not permit their inclusion in the rate base unless they continue to be used in the system. The fact that the Carbon storage facility was previously used to provide service may provide some context, but it is largely irrelevant to whether that asset should remain in the rate base.

[24] Secondly, the Board itself decided in Decision 2005-063 at pg. 15 that historical uses of the property were largely irrelevant:

> In the Board's view, historical uses which are no longer employed at a facility would not typically be relevant in determining whether the asset is used or required to be used today. This would be particularly true where obsolescence is involved or where fundamental changes may have occurred in the regulatory or market régime.

However in identifying the "unique" features of the Carbon storage facility in Decision 2007-005 that justified keeping the facility in the rate base, the Board relied almost entirely on historical factors. They were summarized in the Board's factum as follows:

- Carbon represents an exceptional and unique asset in the history of regulated utilities in Alberta.
- Carbon Storage was initially acquired as a company-owned gas production asset, then converted to a storage facility and expanded over a period of roughly 40 years.
- Company-owned production (COP) from the associated Producing Properties continued throughout this period and to the present.
- Carbon has had multiple utility uses throughout its history, including COP operational security, system balancing, peaking supply, emergency use and revenue generation.
- The acquisition and operation of the Producing Properties have been intertwined with the acquisition, development, protection and evolution of Carbon Storage, such that Carbon has generally been considered by the Appellant, customers and the Board to be a single set of assets.
- Revenue generation has been one of the continuing uses of Carbon since it was converted to a storage facility.
- Some of Carbon's capacity has been leased to third parties since 1967 and lease payments from these parties has always been used to offset utility customer rates.
- Since 1972, it has been accepted by the Appellant and customers that the majority of Carbon capacity be used for revenue generation.
- Although Carbon's use for operational purposes was intermittent and variable, and ultimately declined altogether, the revenue generated from third party leases has had a very significant impact on customer rates for most of Carbon's existence.

The reasoning in the two Decisions is inconsistent, making the overall conclusion unreasonable.

[25] Thirdly, the only reasonable reading of s. 37 is that the assets that are "used or required to be used" to provide service are only those used in an operational sense. It strains the meaning of the word "used" when applied to "property" to suggest that merely accounting for the revenue generated by the asset constitutes "using" the asset.

[26] Fourthly, while the Board sometimes identified revenue generation as a "use"of assets, it also sometimes identified revenue generation as a "service". The test in the statute is whether the assets are "used" to "provide service". In Decision 2007-005 at pp. 1, 19 the Board said:

> In this decision the Board has determined that the Carbon storage and associated production assets are used or required to be used for *purposes of generating revenue* to offset customer rates. . . . accordingly, it is appropriate for the Carbon assets to remain in regulated rate base subject to the Board's jurisdiction.
>
> The purpose of this decision is to determine whether or not Carbon is used or required to be used or should otherwise remain in rate base in order to provide *a revenue generation service* for the benefit of regulated customers. (Emphasis added)

In the utility regulatory regime "revenue generation" cannot reasonably be regarded as a "service". The delivery of gas is the "service": s. 28(e) of the *Act* defines "gas distribution service" as "the service required to transport gas to customers by means of a gas distribution system". Therefore, the issue is whether the Carbon storage facility is required to transport gas to customers, not whether it is required to generate revenue.

[27] Fifthly, while the Board noted that "fundamental changes" in the regulatory regime might change the status of an asset, the Board failed to give effect to the fact that the present issue respecting the use of the Carbon storage facility came about largely because of just such a change. The regulatory regime has changed radically and the operations of the traditional integrated utility have now been split among a number of players. For many years the Carbon storage facility played a dual role as an operational asset, as well as a generator of revenue from the leasing of surplus capacity. Under the present circumstances, the Carbon storage facility has no operational role at all. The Board found in Decision 2007-05 at pp. 26-7 that: "it is not material whether or not revenue generation was a stand-alone use or an ancillary use associated with a utility service or function whose purpose was to indirectly offset the costs of providing this utility functionality." The failure to recognize the fundamental change in the role played by the Carbon storage facility once it lost all of its operational purposes was unreasonable.

[28] Finally, the Board over-emphasized that for over 40 years the Carbon storage facility was included in the rate base. The facility always had excess capacity, and the Board noted all its revenues and expenses were included in setting rates, something that is unusual in utility regulation. All concerned were content with that arrangement, and in this respect the Carbon storage facility probably is unique,

as the Board held. The reasons why no one challenged these long standing arrangements are undoubtedly complex, but the failure to object in the past does not create any kind of estoppel preventing the present appeal. If the Carbon storage facility does not now meet the requirements of s. 37, the appellant is entitled to a ruling to that effect.

[29] The *Act* does not contain any provision or presumption that once an asset is part of the rate base, it is forever a part of the rate base regardless of its function. The concept of assets becoming "dedicated to service" and so remaining in the rate base forever is inconsistent with the decision in ***Stores Block*** (at para. 69). Such an approach would fetter the discretion of the Board in dealing with changing circumstances. Previous inclusion in the rate base is not determinative or necessarily important; as the Court observed in ***Alberta Power Ltd. v. Alberta (Public Utilities Board)*** (1990), 72 Alta. L.R. (2d) 129, 102 A.R. 353 (C.A.) at pg. 151: "That was then, this is now".

[30] Regulation of the gas utility does not give the end customers an ownership interest in the assets of the utility: ***Stores Block*** at paras. 63-68. The end customers are entitled to service, not assets. The service that they are entitled to is the delivery of gas on reasonable and just terms, not revenue generation. Just as the end customers have no ownership interest in the assets of the utility, they have no interest in the profits, unregulated revenues, or unregulated businesses of the utility. The value of economic assets is often largely determined by the revenues they can generate, and if the end customers are not entitled to any ownership interest in the assets, they are likewise not entitled to any interest in the cash flow generated by those assets: ***Stores Block*** at para. 78. The end customers are entitled to receive gas delivery services from the utility, not revenue-generating services or gas rate subsidization.

[31] The view that the Carbon storage facility could remain in the rate base purely to generate revenue is not one that the section can reasonably bear. The first question upon which leave was granted is answered in the affirmative.

The Remaining Questions

[32] The Board's answers to Questions 2, 3 and 4 were predicated on its conclusion that the Carbon storage facility could be kept in the rate base as a revenue generating asset. Our conclusion to the contrary undermines the assumption on which the Board answered these remaining questions, and the basis on which leave to appeal was granted. In the circumstances, it is neither necessary nor advisable to answer the remaining questions at this time.

Conclusion

[33] In conclusion, the questions on which leave was granted should be answered as follows:

1. Did the Board err in law or jurisdiction when it included the Carbon facilities in the rate base as an asset "used or required to be used to provide service to the public within Alberta" when the only function of those facilities is to generate revenue? Yes.

2. Does the *Roles, Relationships and Responsibilities Regulation* under the *Gas Utilities Act*, prohibit ATCO Gas South from operating the Carbon facilities and if so, is the Board unable to assert further jurisdiction over the Carbon facilities? No answer is appropriate at this time.

3. Can the Board require an owner of a gas utility to continue to include an asset in the rate base or restrict an owner from withdrawing a specific asset from its gas distribution system once an asset has been included in a past rate base? No answer is appropriate at this time.

4. Did the Board err in determining that a change in use of the Carbon facilities is a "disposition" for the purposes of section 26 of the *Gas Utilities Act*? No answer is appropriate at this time.

[34] The appeals are allowed and the matter is remitted to the Alberta Utilities Commission to be dealt with in a manner consistent with these reasons.

Appeal heard on May 9, 2008

Memorandum filed at Calgary, Alberta
this 27th day of May, 2008

McFadyen J.A.

Hunt J.A.

Slatter J.A.

Appearances:

H.M. Kay, Q.C., L.E. Smith, Q.C. and L.A. Goldbach
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T.D. Marriott
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