In the Court of Appeal of Alberta

Citation: ATCO Gas and Pipelines Ltd v Alberta Utilities Commission, 2025 ABCA 316

Date: 20250922
Docket: 2501-0183AC
Registry: Calgary

Between:

ATCO Gas and Pipelines Ltd and ATCO Electric Ltd

Applicants

- and –

Alberta Utilities Commission and
The Office of the Utilities Consumer Advocate

Respondents

Reasons for Decision of
The Honourable Justice William T de Wit

Application for Permission to Appeal

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Introduction

[1] ATCO Gas and Pipelines Ltd. and ATCO Electric Ltd. (collectively, "ATCO Utilities") seek permission to appeal the Alberta Utilities Commission (the "AUC") Decision 29064-D01-2025 (the "Remedy Decision") pursuant to section 29 of the *Alberta Utilities Commission Act*, SA 2007, c A-37.2 [*AUCA*].

Background

[2] The AUC initiated a reopener proceeding of the 2018-2022 performance-based regulation ("PBR") plans for the ATCO Utilities. This Court provided a thorough explanation of the PBR regime and the ATCO Utilities' PBR plans in a related permission to appeal decision and there is no need to repeat those details here: see *ATCO Gas and Pipelines Ltd v Alberta Utilities Commission*, 2024 ABCA 400 at paras 2–7 [*Reopener Permission to Appeal Decision*].

[3] The reopener proceeding was divided into two phases, from which the AUC issued two decisions: (i) the Decision 28300-D01-2024, which reopened the PBR plans of the ATCO Utilities because the plans did not operate as intended (the "Reopener Decision"); and (ii) the Remedy Decision.

[4] The ATCO Utilities applied for and were granted permission to appeal the Reopener Decision: *Reopener Permission to Appeal Decision*.

[5] The Remedy Decision determined the appropriate remedy in response to the problem identified by the AUC in the Reopener Decision. The Remedy Decision retroactively adjusted the 2022 rates and directed a refund to customers from a portion of the ATCO Utilities' 2022 revenues.

Test for Permission to Appeal from the AUC

[6] Pursuant to section 29(1) of the *AUCA*, an appeal to this Court is permitted on a question of law or jurisdiction, with permission of a justice of this Court. The applicant must demonstrate that the question of law or jurisdiction raises a "serious arguable point": *ATCO Electric Ltd v Alberta (Energy and Utilities Board)*, 2003 ABCA 44 at para 17.

[7] To assess whether an applicant has satisfied this test the Court will generally consider:

(i) Whether the point on appeal is of significance to the practice.

(ii) Whether the point raised is of significance to the action itself.

(iii) Whether the appeal is *prima facie* meritorious.

(iv) Whether the appeal will unduly hinder the progress of the action.

(v) The standard of appellate review that would be applied if permission to appeal is granted: *Equs Rea Ltd v Alberta (Utilities Commission)*, 2022 ABCA 61 at para 26.

Analysis

[8] The ATCO Utilities take the position that the Remedy Decision was made contrary to the *Electric Utilities Act*, SA 2003, c E-5.1 [*EUA*], the *Gas Utilities Act*, RSA 2000, c G-5 [*GUA*] and legal ratemaking principles, and it failed to consider the relevant factors identified in those acts. Additionally, the ATCO Utilities argue that they were not afforded the required procedural fairness in the second phase leading to the Remedy Decision.

[9] The AUC made no submissions on the substance of the application.

[10] The Office of the Utilities Consumer Advocate (the "Consumer Advocate") submits the errors alleged in the Remedy Decision are a mere duplication of the grounds on which permission to appeal was already granted in the *Reopener Permission to Appeal Decision*, or otherwise lack merit.

[11] The ATCO Utilities have raised three grounds of appeal, which I have summarized as follows:

(i) Whether the AUC erred in its interpretation of the relevant acts, including the *EUA*, the *GUA*, and the legal PBR ratemaking principles;
(ii) Whether the AUC erred by engaging in retroactive or retrospective ratemaking, contrary to the relevant acts and the legal PBR ratemaking principles; and
(iii) Whether the AUC failed to meet the requirements of procedural fairness in the remedy proceeding.

[12] I am satisfied that the ATCO Utilities have demonstrated these are questions of law that raise a serious arguable point.

[13] The Consumer Advocate argues that whether a decision is impermissible retroactive ratemaking is, at minimum, an error of mixed fact and law. However, the ground of appeal raised

by the applicant is whether the AUC failed to properly consider the relevant factors and the legal ratemaking principles in rendering its decision, as required by the governing legislation. Where a decision maker has erred in principle or fails to consider relevant factors there is an error of law: *Housen v Nikolaisen*, 2002 SCC 33 at para 27.

[14] The Consumer Advocate vigorously argues the impermissible retroactive ratemaking arguments are without merit because the knowledge exception applies. However, the ATCO Utilities raises arguments in reply that the knowledge exception does not apply. The debate this issue raised before me highlights that this ground of appeal, much like the other grounds, raises a serious arguable point to be put to a panel of this Court.

[15] Whether a retroactive adjustment of rates is an available remedy for the AUC following a reopening proceeding is a question of sufficient significance to the practice and to the action itself. The interpretation of the relevant acts and ratemaking principles and the requirements of procedural fairness before the AUC are also of significance to the practice and the parties. The grounds raised by the ATCO Utilities are *prima facie* meritorious.

[16] As to the Consumer Advocate's argument that permission to appeal should be dismissed because it would merely duplicate an appeal on which permission to appeal has already been granted, I disagree. The Reopener Decision and the Remedy Decision relate to one proceeding, but an appeal of the former would not necessarily affect the latter. If anything, the interwoven nature of these two decisions warrants them both being heard and being heard together so the panel may have the record in its entirety before them. To refuse to hear the related appeal of the Remedy Decision would risk leaving the panel with an incomplete record and risk a duplication of efforts in the long run.

[17] Further, in the *Reopener Permission to Appeal Decision*, it was noted that the AUC had not yet determined a remedy, and it was premature to consider a remedy related ground of appeal: *Reopener Permission to Appeal Decision* at para 19. The AUC has now determined a remedy, and a panel of this Court can consider whether the remedy constituted impermissible retroactive ratemaking and was contrary to the applicable acts and principles.

[18] The parties agree that permission to appeal would not unduly hinder the progress of the action and that the standard of review that applies to the procedural fairness question is whether the required standard of fairness was met and correctness for the other questions, being questions of law.

[19] For these reasons, I grant permission to appeal on the grounds referenced above in paragraph 11.

Application heard on September 18, 2025

Reasons filed at Calgary, Alberta
this 22nd day of September, 2025

de Wit J.A.

Appearances:

E.B. Mellett, KC
S.R. Assie
J. Eadie
for the Applicants

N.A. Fitz-Simon
A.E. Marshall
for the Respondent, Alberta Utilities Commission

K. Rutherford
C.J. Auch
for the Respondent, Office of the Utilities Consumer Advocate