In the Court of Appeal of Alberta

Citation: ATCO Gas and Pipelines Ltd v Alberta Utilities Commission, 2026 ABCA 285

Date: 20260903
Docket: 2401-0170AC;
2501-0183AC
Registry: Calgary

Between:

ATCO Gas and Pipelines Ltd. and ATCO Electric Ltd.

Appellants

\- and -

Alberta Utilities Commission and Office of the Utilities Consumer Advocate

Respondents

The Court:

The Honourable Justice William T. de Wit
The Honourable Justice April Grosse
The Honourable Justice Alice Woolley

Memorandum of Judgment

Appeal from the Decisions of the
Alberta Utilities Commission
Dated the 22nd day of May, 2024
Decision 28300-D01-2024
and
Dated the 28th day of May, 2025
Decision 29064-D01-2025

Memorandum of Judgment

The Court:

I. Introduction

[1] The appellants ATCO Gas and Pipelines Ltd and ATCO Electric Ltd provide distribution services for natural gas and electricity in Alberta, charging their customers rates approved by the respondent Alberta Utilities Commission. Since 2013, rates have been established for five-year periods through performance-based regulation, under which the Commission determines a utility's "going-in rates" based on its projected costs, with the utility's subsequent annual rates calculated formulaically by applying adjustments to reflect inflation and expected improvements in productivity.

[2] The second term of performance-based regulation ran from 2018 through 2022. During that term, the return on equity approved by the Commission for each appellant was 8.5%. A utility's return on equity is commonly understood as its profit from providing utility services. In 2021 and 2022, the appellants earned more than 300 basis points (3%) above their approved returns. In 2021, ATCO Electric earned 12.85% and in 2022, it earned 14.52%. In 2021, ATCO Gas earned 11.81%, and in 2022, it earned 14.39%. Those elevated returns triggered the "reopener" provision of the performance-based regulation rate plans:

> [T]he Commission will continue to employ the +/- 500 basis point threshold in a single year and the +/- 300 basis point thresholds for two consecutive years <u>as warranting consideration of a reopening and review of a PBR plan</u>.
>
> [emphasis added]
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> *2018-2022 Performance-Based Regulation Plans for Alberta Electric and Gas Distribution Utilities*, AUC Decision 20414-D01-2016 (Errata) (6 February 2017) at para 280 [*Second Term Decision*].

[3] Reopening a plan does not occur automatically when a utility's return on equity exceeds the reopener threshold. Rather, after the threshold is exceeded, the Commission considers whether there is a "design or operation" problem that cannot be resolved without re-opening and reviewing the plan: *Rate Regulation Initiative, Distribution Performance-Based Regulation*, AUC Decision 2012-237 (12 September 2012) at paras 727, 757-758 [*First Term Decision*].

[4] Following an oral hearing with evidence from the appellants and interveners, the Commission decided to reopen the appellants' performance-based regulation plans. It determined a significant portion of the appellants' increased return on equity had resulted from "factors other than efficiencies", such as "opting to not pursue certain capital projects" and "COVID-related externalities including supply chain disruptions". The Commission found the lack of relationship

between the appellants' cost savings and "PBR incentives" revealed an operational issue that resulted in rates "that were not just and reasonable", with customers paying an elevated rate "without receiving the benefit of more efficient utility service": *AUC-Initiated Review Under the Reopener Provision of the 2018-2022 Performance-Based Regulation Plans for ATCO Electric and ATCO Gas*, AUC Decision 28300-D01-2024 (22 May 2024) at paras 77, 111-112 [*Phase One Decision*].

[5] After a second hearing in writing, for which only limited additional evidence was permitted, the Commission ordered the appellants to pay a refund to customers. The Commission calculated the refund by identifying the amount that would reduce the appellants' return on equity to 11.5% for 2022 and then decreasing that amount by 10%. In the result, the appellants retained all of their 2021 returns and earned in excess of 300 basis points above their approved returns for 2022: *AUC-Initiated Review Under the Reopener Provision of the 2018-2022 Performance-Based Regulation Plans for ATCO Electric Ltd and ATCO Gas – Phase 2*, AUC Decision 29064-D01-2025 (28 May 2025) at paras 105-107 [*Phase Two Decision*].

[6] The appellants applied for and were granted permission to appeal both the *Phase One Decision* and the *Phase Two Decision*: *ATCO Gas and Pipelines Ltd v Alberta Utilities Commission*, 2024 ABCA 400; *ATCO Gas and Pipelines Ltd v Alberta Utilities Commission*, 2025 ABCA 316.

[7] The appellants submit the Commission erred in law. They say it assessed the need to reopen their plans against a new standard the governing statutes do not contemplate, and for which no advance notice was provided. In their view, the Commission imposed a retroactive rate adjustment inconsistent with the norms of utility rate regulation in general and their performance-based regulation rate plans in particular. They submit further that the evidentiary standard imposed in the phase one hearing, and the limits on evidence imposed in the phase two hearing, were wrong in law and violated the requirements of procedural fairness.

[8] For the reasons that follow, the appeal is dismissed.

II. Decisions of the Commission

A. *Reopener Decision*

[9] To determine whether to reopen the 2018-2022 performance-based regulation plans, the Commission considered whether the plans had a problem that could not be resolved without reopening and review: *Phase One Decision* at paras 8-9. Reopening was limited to circumstances where the Commission was satisfied there was a problem with either the design or operation of the plans. A design problem is structural; an operational problem arises from the application of an otherwise structurally sound plan and may include "a problem arising from the discretionary actions of a utility": *Phase One Decision* at paras 30-36.

[10] The Commission held that neither the interveners nor the utility bears the onus of establishing a problem with the rate plan. The nature of the proceeding is one of inquiry, in which the Commission issues "information requirements and process directions", seeking "factual information and submissions", and then determines "whether a reopener is warranted based on the accumulated evidence and argument": *Phase One Decision* at paras 8, 38, 42.

[11] The Commission reviewed the structure of performance-based regulation, observing that because a performance-based regulation rate plan decouples revenues and expenses, a utility that improves efficiency and lowers costs, while maintaining safe and reliable service, will enjoy increased profits. Customers will benefit from the efficiencies achieved in a number of ways, including through the long-term downward pressure on the utility's costs, which will be reflected in subsequent plans: *Phase One Decision* at paras 23-24. Performance-based regulation acts as a "proxy for the workings of a competitive market" with a focus on prices and quality of service, and a reduction of regulatory oversight: *Phase One Decision* at para 25. Despite that reduced regulatory oversight, the Commission nonetheless retains an obligation to ensure the amount "recovered by the utility and paid by end-use customers is just and reasonable". The reopener provision acts "as a safeguard or check against unexpected results" arising from a problem with the design or operation of the plan, for the protection of both the utility and customers: *Phase One Decision* at paras 26, 28.

[12] The Commission held that central to the assessment in this case were the reasons why the appellants earned as much as they did – "what factors contributed to the ATCO Utilities' achieved returns": *Phase One Decision* at para 37. The "main issue" was "whether the significant difference between funded and actual spend … were the result of PBR incentives or were the result of a flaw in the design or operation of the PBR2 plans": *Phase One Decision* at para 77.

[13] The Commission directed the appellants to provide submissions "explaining the reasons for the achieved ROE [(return on equity)] in each of 2021 and 2022 exceeding the approved ROE", including "[a]n analysis of items that contributed to the achieved ROEs exceeding the approved ROE... for capital and operating and maintenance costs (e.g., productivity improvements implemented by the utility, externally driven factors affecting costs)": *Phase One Decision* at para 10.

[14] In the Commission's view, the existence of a reopener provision ought to lead a utility to "maintain accounts of the business practices that contributed to that utility's achieved ROE at a level of detail sufficient" for the Commission to assess whether the plan should be reopened, including accounts and schedules similar to what would be maintained under the previous model of cost of service regulation: *Phase One Decision* at paras 39-40. The Commission emphasized the informational asymmetry inherent to utility rate regulation where utilities "control almost all, if not all, information concerning the factors that contributed to their achieved returns": *Phase One Decision* at para 41.

[15] The Commission found the appellants had failed to provide quantitative evidence regarding the majority of their cost savings: specifically, for 68% of ATCO Electric's total capital savings;

90% of ATCO Gas' total capital savings; and 71% of ATCO Gas' 2022 operating and maintenance savings: *Phase One Decision* at paras 45, 75-76. Much of the detail offered by the appellants was only provided following requests for information. The Commission emphasized that when it asked the appellants to quantify savings related to specific programs, they declined: *Phase One Decision* at paras 62, 71.

[16] The Commission identified no deficiencies in the design of the appellants' plans. Interveners challenged the model used to provide the appellants with supplemental funding for capital, arguing it resulted in funding envelopes set "at an excessively high level": *Phase One Decision* at para 82. The respondent Utilities Consumer Advocate suggested the funding envelope was excessive because it was based on the appellants' historical capital additions during the first term of performance-based regulation when capital expenditures were in part governed through a cost of service model. In the Commission's view, however, the gap between capital funding and expenditures did not arise from a flaw in the funding mechanism. That mechanism was not intended to fund capital on a line-by-line basis, some capital cost saving incentives were in place during the first term, and the stronger incentives in place during the second term were accounted for in setting the funding envelope: *Phase One Decision* at paras 87-89.

[17] The Commission was satisfied, however, that there was a flaw in the operation of the plans. The Commission found much of the appellant's "unquantified and unexplained savings" were "the result of factors other than efficiencies": *Phase One Decision* at para 111. To reach this conclusion, it relied in part on the information and evidence of the interveners that the appellants' savings were a result of their decision "to not pursue certain capital projects (what the UCA and CCA referred to as 'lower workloads'), and realizing cost savings as a result of COVID-related externalities including supply chain disruptions that prevented the ATCO Utilities from executing certain required projects": *Phase One Decision* at para 111.

[18] The Commission also placed weight on the appellants' failure to provide evidence or information to quantify or track the source of its cost savings, noting this failure left the Commission with "minimal meaningful information related to the source and quantification" of the savings, creating an evidentiary gap "which the Commission [was] left to address": *Phase One Decision* at para 101.

[19] The Commission stated it adopted a "conservative" approach to the evidence, giving the appellants the benefit of the doubt by: accepting the limited quantification evidence that was provided as sufficient to show the associated cost savings "were the result of efficiency gains as intended by the PBR2 plans"; making allowance for the fact that the precise impacts of specific cost-saving drivers was difficult to determine; and recognizing a "tolerance band" to account for programs that were described but not quantified: *Phase One Decision* at paras 102-106.

[20] The Commission was not, however, prepared to accept the appellants' claim that all unquantified cost savings ought to be treated as arising from general "organizational transformation". These assertions were "high level, unsubstantiated, and insufficient in proportion to the otherwise unquantified or unexplained cost savings": *Phase One Decision* at para 106. The

Commission questioned the appellants' claim that they did not "have the information required to reconcile their cost savings any further than what has already been provided": *Phase One Decision* at paras 62, 107. It viewed that claim as inconsistent with the appellants' other claims "related to their sophisticated and superior business management" and of "ongoing monthly processes to manage their capital and O&M programs": *Phase One Decision* at paras 107-108. The Commission said:

> It strains credulity for the Commission to accept that entities as sophisticated as the ATCO Utilities, with professed business practices as described in their evidence, would not have documented or tracked the source of hundreds of millions of dollars in savings.
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> *Phase One Decision* at para 108.

[21] The Commission pointed to the asymmetry between the information held by the appellants and that available to the Commission and interveners and said it was available to the Commission to draw "a negative inference from the absence of relevant information on the record ... that the matter that was not recorded did not occur or exist", citing materials discussing section 30(2) of the *Canada Evidence Act*, RSC 1985, c C-5: *Phase One Decision* at para 110. It relied in part on the "magnitude of the savings that were neither quantified nor attributed to particular projects, programs or initiatives" to conclude that the "savings cannot be attributed to utility-driven efficiency gains resulting from the incentives intended under PBR": *Phase One Decision* at para 111. It concluded:

> The Commission therefore finds that the PBR2 plans of ATCO Electric and ATCO Gas did not operate as intended in each of 2021 and 2022. The result is rates that were not just and reasonable in those years because customers were required to pay rates (including the rates of return achieved by the ATCO Utilities that exceeded the approved return and the threshold for the reopener) without receiving the benefit of more efficient utility service. In other words, <u>the operation of the plans was inconsistent with the bargain that is inherent in PBR, and customers paid more than what was reasonably required for the provision of safe and reliable utility service.</u> The Commission finds that this constitutes a problem with the operation of each of ATCO Electric's and ATCO Gas's PBR2 plans.
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> [emphasis added]
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> *Phase One Decision* at para 112.

[22] The Commission rejected the appellants' argument that the downward effect of cost savings on the rates for the subsequent performance-based regulation term meant no reopening of the existing term was required. If rebasing at the start of the next term were sufficient, "there would be no need for a reopener" provision, since all problems, whether under or over recovery by the utility, could be addressed in the subsequent rate term. The Commission noted that certain cost

savings might arise, as here, from "factors unrelated to PBR incentives, such as the earnings driven by factors other than achieved efficiencies": *Phase One Decision* at paras 114-118.

[23] The Commission considered whether the problems with the operation of the plans could be addressed through other plan features but found that to be impossible because the operational problems arose during the plans' final two years: *Phase One Decision* at para 119.

[24] The Commission rejected various specific issues identified by the interveners, including the suggestion that the appellants' reduced capital expenditures had compromised system safety and reliability at the time of the hearing. It found that conclusion to be unsupported by the record, which included compliance filings provided by the appellants, assessments performed by the appellants, and representations made by them. The Commission observed, however, that it could not "conclude that the ATCO Utilities' actions over the PBR2 term will not have an adverse impact on safety and reliability of their systems over time or will not result in future requests for additional cost recovery": *Phase One Decision* at paras 147-152.

[25] Finally, the Commission determined that the only years in the performance-based regulation term that ought to be reopened were the years in which an excess return was earned, and that doing so would not violate the rule against retroactive rate making:

> The Commission is satisfied that applying a remedy for the years in which the reopener provision was triggered (2021 and 2022) is not prohibited by the principle of retroactive ratemaking. <u>All parties were aware of the reopener provisions (including the ROE thresholds that applied). As discussed in Section 3, the reopener provision was specifically included in the PBR2 plans to provide a mechanism to review and, if necessary, address results that may suggest a problem with the design or operation of a PBR plan. In the Commission's view, as the affected parties were aware that the rates were subject to change, this matter is clearly within the knowledge exception to the prohibition against retroactive ratemaking</u>, as discussed in cases such as *ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission)* [2014 ABCA 28 at paras 51-57] and *Calgary (City) v Alberta (Energy and Utilities Board)* [2010 ABCA 132 at para 57].
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> [emphasis added]
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> *Phase One Decision* at para 165.

B. *Remedy Decision*

[26] The hearing to determine the appropriate response to the reopening of the appellants' plans proceeded in writing and largely based on evidence adduced during the phase one proceeding. While no further fact evidence was permitted, "submissions that analyze, consolidate or utilize the fact evidence filed in Phase 1 ... or submissions that relate to options or methodological approaches

for an appropriate remedy based on the fact evidence in Phase 1" were allowed: *Phase One Decision* at para 181.

[27] The Commission defined its task as identifying the appropriate remedy for the operational problem identified in the *Phase One Decision*. It characterized that problem as one "with the operation of each of ATCO Electric's and ATCO Gas's PBR2 plans resulting in customers paying more than what was reasonably required for the provision of safe and reliable utility service": *Phase Two Decision* at para 23. It rejected the appellants' characterization of the problem as exclusively related to their levels of spending, rather than with the revenues they received, emphasizing that the operational problem "is related to the ATCO Utilities retaining revenues … without providing evidence of achieved efficiencies associated with those revenues"; it was not an issue with the appellants' spending levels *per se*. The problem was "the retention of profits above the Commission-approved return that cannot be attributed to decisions of the utility to provide the same or better utility service at a lower cost by deploying capital or operating and maintaining its system more efficiently": *Phase Two Decision* at paras 30-32.

[28] The Commission rejected the remedies proposed on behalf of the appellants, which would have required them to spend a portion of their identified cost savings on capital additions, or alternatively would have required them to provide a refund in the event future service quality, safety or reliability deteriorated: *Phase Two Decision* at paras 37, 39. The Commission rejected the first option as not addressing the fact that customers paid unjust and unreasonable rates, and as inconsistent with the intention of performance-based regulation, which is to encourage utilities to reduce their costs: *Phase Two Decision* at para 38. It rejected the second option as based on a misinterpretation of its reasons, since the Commission did not conclude that the capital savings had impacted safety or reliability; the Commission's concern was with unjust and reasonable rates, which the proposed remedy did not address: *Phase Two Decision* at paras 50-55.

[29] The appellants submitted an analysis to demonstrate that if they had spent the amounts for which they received revenues in 2021 and 2022, their overall returns would have been comparable, customers would have received less benefits at rebasing, and customers would have paid more for supplemental capital funding in the subsequent rate term. This "notional spend" scenario showed, the appellants argued, that "whether or not the ATCO Utilities had spent the unquantified and unexplained capital savings in 2021 and 2022, the rates in those years would not have changed": *Phase Two Decision* at paras 56-60. The Commission rejected this position as well, saying it similarly reflected an inaccurate characterization of the operational problem, which was not the fact of the cost savings alone, but the absence of evidence that those savings "were the result of efficiencies, which would in turn provide the assurance that customers were paying rates that were just and reasonable": *Phase Two Decision* at para 63.

[30] The Commission concluded the appropriate remedy was a refund, because it was responsive to the problem of consumers paying unjust and unreasonable rates as a result of the appellants not upholding "their end of the PBR bargain by providing more efficient utility service": *Phase Two Decision* at para 65. It calculated the refund based on a threshold model that did not attempt to calculate the revenue impact of the unquantified and unexplained savings but rather

adjusted the revenues to the level of the 300 basis point reopener threshold. The Commission explained that its approach recognized the appellants "could not explain the majority of the savings achieved during the PBR2 term that contributed to their earnings exceeding the approved level"; the adjustment reduced their earnings to the point where the Commission would not have investigated the cause of their returns: *Phase Two Decision* at para 85.

[31] The Commission observed that this method sidestepped the problems that arise from the deficiencies in the evidence and information provided by the appellants, relied on the "actual achieved returns" filed by the appellants, and had a direct relationship with the threshold that triggered the proceeding: *Phase Two Decision* at para 87. The Commission excluded 2021 from its calculation of the refund, finding that limiting the refund to 2022 avoided any risk that earnings from earlier years were clawed back. It ensured the appellants earned a fair return throughout, while still protecting customers against paying unjust and unreasonable rates: *Phase Two Decision* at para 104. The Commission applied a further reduction to the refund based on a tolerance band to reflect the "conservative approach" it had taken in the *Phase One Decision* and, in particular, its conclusion that some of the cost savings the appellants had qualitatively described, but were unable to quantify, reflected actual efficiencies. The Commission found reducing the refund by 10% would account for those unquantified efficiencies: *Phase Two Decision* at paras 106-107.

[32] In the result, the Commission ordered ATCO Gas to issue a refund of $36 million, and ATCO Electric to issue a refund of $35 million: *Phase Two Decision* at para 107.

[33] The Commission rejected the appellants' submission that the refund effectively imposed an earnings sharing mechanism after the fact, since the refund arose from and remedied an identified problem with the plans' operation: *Phase Two Decision* at para 108. It also rejected the suggestion that the impact of the cost savings on the rates paid by customers in the subsequent term eliminated the need for the refund, or that the refund should result in an alteration to the appellants' subsequent term rates. The rebasing proceeding is forward looking, and the refund does not change the amount of costs incurred by the appellants in the 2018-2022 performance-based regulation term: *Phase Two Decision* at paras 111, 115.

III. Issues and Standard of Review

[34] As noted, the appellants received permission to appeal both the *Phase One Decision* and the *Phase Two Decision*. The issues identified in the permission to appeal decisions evolved and became more specific in the written materials and oral submissions provided during the appeal. In substance, the appellants submit the Commission erred because:

1. It considered only whether the appellants' cost savings were the result of efficiencies, contrary to the requirements of the governing legislation;

2. It found the appellants' rates were not just and reasonable, even though it identified no problem with the design of their rate plans;

3. It unfairly imposed an evidentiary burden on the appellants contrary to representations made in prior Commission decisions and contrary to the stated onus;

4. It ordered a refund contrary to the rule against retroactive ratemaking;

5. It ordered a refund contrary to the structure and principles of the applicable performance-based regulation plans; and

6. It unfairly denied the appellants the ability to file further fact evidence in the phase two proceeding.

[35] To support their assertion that the Commission imposed an unfair evidentiary burden, the appellants apply to introduce new evidence about their reliance on the Commission's prior representations; the new evidence application is considered as part of the assessment of that issue.

[36] The fact that permission to appeal was granted means the appellants have identified questions of law to which a correctness standard of review applies: *FortisAlberta Inc v Alberta Utilities Commission*, 2026 ABCA 258 at para 32 [*Fortis 2026*]; *ATCO Electric Ltd v Alberta Utilities Commission*, 2023 ABCA 129 at para 15 [*ATCO 2023*]; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 36 [*Vavilov*]. Nevertheless, the Commission's determinations on matters of fact and policy, even where related to the questions of law leading to the granting of permission to appeal, are entitled to deference from this Court, consistent with the Commission's statutory mandate to regulate utility rates and services: *ATCO 2023* at para 16; *Fortis 2026* at paras 33-34; *FortisAlberta Inc v Alberta (Utilities Commission)*, 2015 ABCA 295 at para 172 [*Fortis 2015*].

[37] Here, the Commission's interpretation of its governing legislation and of the rate-making principles established in prior case law, and its decisions on matters going to procedural fairness, are reviewed without deference. However, the Commission's assessment of the operational and business circumstances of the appellants, including with respect to record-keeping, and its interpretation of the performance-based regulation plans it established in prior decisions, including the interrelationship between different aspects of those plans, are entitled to deference.

IV. Analysis

A. *Was the focus on efficiencies contrary to the governing legislation?*

[38] The appellants submit the Commission erred by focusing its phase one assessment on whether the cost savings they had achieved, and which resulted in the triggering of the reopener provision, were the result of specific "efficiencies". They submit the governing legislation endorses rate plans that encourage a utility to achieve "cost savings" and "other benefits". Within that legislative framework, efficiency is a means of generating cost savings and benefits but is not itself the goal or point of a rate plan. As a result, they submit they were entitled to retain all profits arising from cost savings, regardless of their source.

[39] We disagree. The appellants' position mischaracterizes the legislative framework and substance of the Commission's decision.

[40] The core rate-making principle in both the *Gas Utilities Act*, RSA 2000, c G-5 and the *Electric Utilities Act*, SA 2003, c E-5.1 is that a utility's rates must be "just and reasonable": *Electric Utilities Act*, ss 121(2)(a), 121(4); *Gas Utilities Act*, ss 36(a), 37(1); *ATCO Gas and Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para 65 [*ATCO 2006*]. The legislation characterizes a just and reasonable rate as one that, *inter alia*, provides the utility with a reasonable opportunity to recover its prudent costs and expenses, including a fair return on capital-related equity: *Electric Utilities Act*, s 122; *Gas Utilities Act*, ss 37, 40, 45. Historically, the rate setting process was described as follows:

> <u>The [Public Utilities Board] approves or fixes utility rates which are estimated to cover expenses plus yield the utility a fair return or profit</u>. This function is generally performed in two phases. In Phase I the PUB determines the rate base, that is the amount of money which has been invested by the company in the property, plant and equipment plus an allowance for necessary working capital all of which must be determined as being necessary to provide the utility service. <u>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</u>.
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> [emphasis added]
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> *ATCO 2006* at para 65, citing *Northwestern Utilities Ltd and al v Edmonton*, [1979] 1 SCR 684 at 691, [*Northwestern Utilities*].

[41] The shift to performance-based regulation somewhat alters this process. Under performance-based regulation, the Commission establishes the revenue requirement for the first year of a rate plan based on a utility's predicted costs and expenses. That revenue requirement is then adjusted annually over a multi-year period by applying a formula based on inflation less a factor to reflect the utility's expected productivity improvements. After the first year, performance-based regulation detaches a utility's rates from an ongoing assessment of its anticipated costs and expenses. As a consequence, a utility may have revenues that exceed its anticipated costs and expenses by more or less than expected, depending on its ability to make productivity improvements; over its performance-based regulation term, a utility generally carries the risk and reward of a more variable return on equity.

[42] Performance-based regulation nonetheless complies with the requirements of the *Gas Utilities Act* and the *Electric Utilities Act* because those statutes permit rate structures that incentivize utilities to achieve efficiencies or intended cost savings. Section 45(1)(a) of the *Gas Utilities Act* provides that just and reasonable rates include rates "that are intended to result in cost savings or other benefits to be allocated between the owner of the gas utility and its customers". Section 120(2)(d) of the *Electric Utilities Act* similarly permits an approved tariff to include

"incentives for efficiencies that result in cost savings or other benefits that can be shared in an equitable manner between the owner of the electric utility and customers". Section 121(3) of the *Electric Utilities Act* provides that a "tariff that provides incentives for efficiency is not unjust or unreasonable simply because it provides those incentives".

[43] These provisions permit material separation between a utility's rates and its costs and expenses, including its approved return on equity, provided that separation arises from an intentional effort to incentivize the utility to achieve cost savings and other benefits that can be shared with customers. Thus, to be just and reasonable, a utility's rates must provide it with a reasonable opportunity to recover its costs and expenses; however, material separation between revenues and expenses, in either direction, is permitted so long as that separation is the result of aspects of the utility's rates that, in the language of the *Gas Utilities Act* are "intended to result in cost savings" or, in the language of the *Electric Utilities Act*, provide "incentives for efficiency". In practice, a utility whose revenues materially exceed its costs and expenses, resulting in a significantly higher return on equity than approved in its rate plan, has just and reasonable rates so long as that high return on equity flows from the intended incentive structure of the rate plan. On the other hand, if its materially higher return on equity arose from factors unrelated to the intended incentive structure of its rate plan – such as external events, unrelated business decisions, reduced quality of service, or an overstatement of anticipated costs during rebasing – its rates will not be just and reasonable.

[44] Consistent with that legislative direction, performance-based regulation includes mechanisms to guard against the risk that an undue separation of revenues and expenses either denies the utility a reasonable opportunity to recover its anticipated costs and expenses, or results in customers paying rates irrationally disconnected from the utility's costs and expenses. The reopener provision is one such mechanism. From the outset, the Commission identified a reopener provision as a "necessary" component of performance-based regulation: *First Term Decision* at para 727.

[45] Both the *Phase One Decision* and the *Phase Two Decision* reflect this legislative framework and the scheme of performance-based regulation adopted pursuant to it. The Commission reiterated that performance-based regulation does not alter its obligation "to ensure that the rate or tariff ultimately recovered by the utility and paid by end-use customers is just and reasonable": *Phase One Decision* at para 26. The Commission identified the purpose of the reopener provision as "a safeguard or check against unexpected results, including results that would have a material impact on a utility or its customers", with the Commission's concern being whether the rates can still be considered just and reasonable given that the utility's revenues have become materially disconnected from its costs and expenses: *Phase One Decision* at paras 26, 28, 36. In this case, the fact that the appellants' return on equity exceeded the approved level by 300 basis points in 2021 and by 500 basis points in 2022 raised a *prima facie* issue, and as a result the Commission undertook to assess whether the plans "resulted in just and reasonable rates": *Phase One Decision* at para 37.

[46] The question for the Commission, once the reopener had been triggered, was whether, despite the material gap between their revenues and their costs and expenses, the appellants' rates could nonetheless be considered just and reasonable because they resulted from the type of incentive based rate scheme permitted by section 45(1) of the *Gas Utilities Act* and sections 120(2)(d) and 121(3) of the *Electric Utilities Act*. The Commission sought "factual information and submissions on the factors that led to the utility's earnings triggering the reopener thresholds", thereby allowing it to determine whether, despite the unexpected results, the appellants' rates were nonetheless just and reasonable because they "were the result of PBR incentives", as opposed to "other factors" such as external events or unrelated business decisions: *Phase One Decision* at paras 38, 77, 91, 111, 118.

[47] To answer that question, the Commission considered both the design and operation of the appellants' rate plans and, in particular, whether the incentive structure of performance-based regulation supported the propriety of the appellants' return on equity so significantly exceeding the approved amount.

[48] In the course of that inquiry, the Commission referred to and considered whether the appellants' expenses "were the result of PBR incentives" (*Phase One Decision* at para 77; see also paras 1, 27, 91, 103, 105, 111, 117, 118, 125) and/or whether they arose from "utility-driven efficiency gains" (*Phase One Decision* at para 111; see also paras 72, 80, 93-95, 98, 100, 103, 105, 109, 117). The Commission unsurprisingly used these terms interchangeably given the *Electric Utilities Act* expressly describes the desired incentives as "incentives for efficiency": *Electric Utilities Act*, ss 5(h), 120(2)(d), 121(3). Although the *Gas Utilities Act* does not expressly refer to efficiencies, it similarly focuses on "[i]ncentives" for "intended" cost savings or other benefits: *Gas Utilities Act*, s 45(1)(a). The Commission adopted performance-based regulation in part to "create the same <u>efficiency</u> incentives as those experienced in a competitive market" [emphasis added]: Alberta Utilities Commission, *Regulated Rate Initiative – PBR Principles,* Bulletin 2010-20 (15 July 2010).

[49] In considering whether the appellants' cost savings were the result of efficiencies, the Commission was not imposing a new operational test under which every cost decision made by a utility must be efficient. Nor was it requiring every cost decision made by the utility to be a response to the incentives of the applicable performance-based regulation plan. Rather, the Commission was assessing whether the legislative issue addressed by the reopener provision, and raised because it had been triggered – namely, whether the revenues earned from the appellants' rates were so detached from costs and expenses that they could no longer be considered just and reasonable – was resolved by establishing the appellants' rate plan had operated as "intended" through creating efficiencies that resulted in cost savings.

[50] In assessing the issue this way, the Commission interpreted the legislative framework correctly and made no error of law.

B. *Was the finding of unreasonable rates inconsistent with the conclusion that there was no design error?*

[51] The Commission determined the evidence did "not support the conclusion that there was a flaw in the design of the ATCO Utilities PBR2 plans": *Phase One Decision* at para 90. The appellants submit that, once the Commission found no problem with the methodology or forecasts used for setting their customer rates, it ought to have concluded their rates were just and reasonable. They argue the Commission erred because it "ignored that rates in 2021 and 2022 were set by the design of the PBR2 plan, with which the Commission found no problems, and were not affected by ATCO's actual cost performance".

[52] The difficulty with this argument is that it ignores the legislative framework explained above and reflected in the appellants' performance-based regulation rate plans. Under that framework, and performance-based regulation, a rate ceases to be just and reasonable when the utility's revenues materially exceed its costs and expenses, resulting in an unexpectedly large return on equity, and do so for reasons unrelated to the structure and incentives of performance-based regulation – reasons such as external events, unrelated business decisions, reduced quality of service, or an overstatement of anticipated costs. Consistent with this regulatory scheme, a problem with a utility's rates can be revealed by identifying an issue with how its revenues were set but can also be revealed by identifying a material reduction in a utility's costs that has no apparent relationship to the intentions or incentives of the utility's rate plan.

[53] In some cases, a utility's low costs may lead a regulator to conclude that the utility's revenues were set too high; *i.e.*, that the utility's unexplained and unexpected low costs reveal a design issue or that the utility overstated its cost estimates and forecasts when its rates were set. The Commission did not reach such a conclusion with respect to the appellants on the record before it. But its failure to do so does not undermine its conclusion that the appellants' rates were not just and reasonable. The identification of the material gap between the appellants' revenues and its costs and expenses, and the lack of connection between the appellants' cost savings and the incentives of the appellants' rate plans, were sufficient for the Commission to conclude the appellants' rates were not just and reasonable.

C. *Did the Commission impose an unfair burden on the appellants?*

[54] The appellants submit the Commission previously represented it would not require utilities to track or quantify efficiencies. They argue they relied on these prior "directions to shape [their] approach to monitoring cost savings". By abruptly introducing a "new test" requiring them to have tracked and quantified efficiencies, the *Phase One Decision* was manifestly unfair, imposing a test that was "impossible to meet because of its *own* decisions and representations to utilities" [emphasis in original]. In the appellants' view, "[t]he Commission should not be allowed to reverse course from its previous clear representations and decisions that were reasonably relied on by ATCO".

[55] The appellants invoke the doctrine of public law promissory estoppel, saying the Commission ought to be estopped from taking a position inconsistent with its prior "clear and specific representations that were intended to be acted on, and were in fact acted upon", citing *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 at para 46 [*Mount Sinai*]. They also rely on the doctrine of legitimate expectations, saying that reopening "because of a purported failure to meet the new Operational Test was a breach of procedural fairness, including ATCO's legitimate expectations", citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 26 [*Baker*].

[56] The appellants' arguments are without merit.

[57] Promissory estoppel occurs where a party changes its position in reliance on a promise or assurance given by another party who intended to affect their legal relationship and who intended for the promise or assurance to be acted upon: *Maracle v Travellers Indemnity Co of Canada*, [1991] 2 SCR 50 at 57; *Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47 at para 15. While the doctrine can arise in the public law context, it "must yield ... to an overriding public interest and may not be invoked to prevent the application of an express legislative provision": *Immeubles Jacques Robitaille inc v Québec (City)*, 2014 SCC 34 at para 20 [*Immeubles Jacques Robitaille*]. Public law promissory estoppel "requires an appreciation of the legislative intent embodied in the power whose exercise is sought to be estopped. The legislation is paramount": *Mount Sinai* at para 47, Binnie J, cited in *Immeubles Jacques Robitaille* at para 22.

[58] Public law promissory estoppel cannot apply to prevent the Commission from determining the substantive matters it is required to determine under the *Electric Utilities Act* and *Gas Utilities Act*. The doctrine cannot circumscribe or qualify the Commission's statutory obligation to ensure just and reasonable rates: *Electric Utilities Act*, s 121(2)(a); *Gas Utilities Act*, s 36(a). Moreover, while the Commission should be concerned with the "general consistency" of its decisions, the doctrine of *stare decisis* does not apply to the Commission in the same way it applies to the courts: *Vavilov* at paras 129-131; *Pepa v Canada (Citizenship and Immigration)*, 2025 SCC 21 at para 67. Here, the Commission could not be estopped from assessing evidence or inquiring of the appellants as to the source of their cost savings simply because of a comment or observation made in a previous decision. The Commission was required to correctly interpret and reasonably apply its governing legislation.

[59] The doctrine of legitimate expectations is similarly inapplicable. The doctrine applies to representations that "are procedural in nature and do not conflict with the decision maker's statutory duty": *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 68 [*Mavi*]; see also *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 97 [*Agraira*]. The representation alleged here – that the appellants would not be asked for evidence related to the tracking or quantification of achieved efficiencies – conflicts with the Commission's "statutory duty" to ensure just and reasonable rates.

[60] Even if public law promissory estoppel or the doctrine of legitimate expectations could apply, the appellants have not identified the "clear and unambiguous promise" (*Immeubles Jacques Robitaille* at para 19) or "clear, unambiguous and unqualified" representation (*Mavi* at para 68; *Agraira* at para 95) required by these doctrines.

[61] The appellants rely on statements made by the Commission in its February 2019 decision declining to reopen their first performance-based regulation plans: *AUC-Initiated Review Under the Reopener Provision of the 2013-2017 Performance-Based Regulation Plan for the ATCO Utilities,* AUC Decision 23604-D01-2019 (27 February 2019) [*First Reopener Decision*]. In that decision, the Commission stated, "it would be difficult, if not impossible, to isolate the impact of earnings resulting from changes directly related to the AMR project from other contributing factors" and "it is difficult if not impossible to identify and separate cost reductions that the ATCO Utilities would have undertaken only as a result of the Evergreen 2 decision and additional measures taken as a result of PBR incentives": *First Reopener Decision* at paras 64-65.

[62] These were discrete findings related to specific utility costs. The argument before the Commission was that the going-in rates for the first term were set too high in part because they did not account for cost savings related to the "AMR project" and the "Evergreen 2 decision". Interveners argued that anticipated savings related to the AMR project were unrelated to the operation of plan incentives because the AMR project was approved and partly implemented before the performance-based regulation term. They also suggested the Evergreen 2 decision reduced costs of "IT and CC&B" services for reasons unrelated to performance-based regulation. The Commission was satisfied on the record before it that at least some of the savings associated with the AMR project arose from performance-based regulation incentives and also observed the difficulty of separate attribution given the pre-existing nature of the AMR project and the Evergreen 2 decision: *First Reopener Decision* at paras 60-65. Those findings could not be reasonably relied upon by the appellants as a general permission not to quantify or explain the reason for their cost savings. No "clear and unambiguous promise" or "clear, unambiguous and unqualified" representation was made.

[63] The appellants also rely on statements made to the Commission in 2021 during a proceeding evaluating performance-based regulation in Alberta, where the "utilities indicated they could not precisely quantify the efficiencies in terms of dollar savings and that the efficiencies were not tracked on a granular basis, as doing so would have increased regulatory burden contrary to PBR incentives": *Evaluation of Performance-Based Regulation in Alberta*, AUC Decision 26356-D01-2021 (30 June 2021) at para 78 [*Evaluation Decision*]. While the Commission summarized the utilities' submissions on this point, it did not accept those submissions as accurate or sufficient. Instead, it went on to note its direction from a decision issued days earlier that utilities should "[q]uantify and clearly demonstrate how the efficiencies found, and cost reductions achieved, during the current PBR term are reflected in their forecast revenue requirement, and will be passed on to customers": *Evaluation Decision* at para 80. In that earlier decision, the Commission was clear that utilities "should be able to quantify the outcomes of the initiatives they undertook". It wrote:

> The Commission expects that utilities tracked and monitored their expenditures in various accounts, or cost centres, as a normal course of managing their businesses. In the Commission's view, where costs have changed or trended in a certain direction, <u>DFOs should be in a position to explain what has caused the changes, be it an internal cost-reducing action, or the result of external factors. Further, DFOs should be able to quantify the outcomes of the initiatives they undertook</u>. For example, if a DFO undertook a number of initiatives to reduce its inspection costs, while it may not be able to quantify how each specific initiative impacted the costs, it should be able to quantify how its inspection costs have changed over time and what portion of those reductions are attributable to efficiency initiatives.
>
> [emphasis added]
>
> *Process to Establish 2023 Rates for Alberta Electric and Gas Distribution Utilities*, AUC Decision 26354-D01-2021 (18 June 2021) at para 39.

[64] The appellants also rely on passages from two cost of service review decisions issued in 2022, towards the end of the second performance-based regulation term. They highlight that the Commission stated it was "not inclined, at this time, to require the utilities to begin tracking all individual initiatives and programs that may result in efficiencies and the associated cost savings": *ATCO Electric Ltd FortisAlberta Inc 2023 Cost-of-Service Review*, AUC Decision 26615-D01-2022 (28 July 2022) at para 90 [*ATCO Electric Cost of Service Review*]; *ATCO Gas Apex Utilities Inc 2023 Cost-of-Service Review*, AUC Decision 26616-D01-2022 (1 September 2022) at para 102 [*ATCO Gas Cost of Service Review*]. The Commission acknowledged the appellants' evidence that they do not systematically track efficiencies achieved for individual projects or programs in real time.

[65] Yet, despite not requiring tracking of "all individual initiatives", the Commission found it "not to be credible for the utilities to suggest that they are unable to assess potential efficiency gains at the project approval stage and subsequently track whether these efficiencies were realized". It stated it "does ... expect ... the utilities can and should be tracking and measuring whether the programs and large-scale initiatives that they implement are achieving the intended goals, including efficiency gains and related cost savings": *ATCO Electric Cost of Service Review* at paras 89-90; *ATCO Gas Cost of Service Review* at paras 101-102. Again, the Commission made no "clear and unambiguous promise" or "clear, unambiguous and unqualified" representation excusing the appellants from tracking the source of their cost savings.

[66] The appellants also argue that, apart from the doctrines of promissory estoppel and legitimate expectations, the Commission had an obligation to provide reasons explaining its change of position regarding the tracking and quantification of efficiencies. It is true that where a decision maker departs from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons: *Vavilov* at para 131. However, as evident from the foregoing review, there was no practice or internal authority suggesting the

Commission would not look for evidence attributing unanticipated cost savings to utility-driven efficiency gains.

[67] On the contrary, the appellants were asked during the first reopener in 2019 for "an analysis of items that contributed to the achieved ROEs exceeding the approved ROE … for capital and operating and maintenance costs (e.g., productivity improvements implemented by the utility, externally driven factors affecting costs)" [emphasis added]: *First Reopener Decision* at para 16. In response, the appellants at the time claimed their cost savings had arisen from "decisions responding to the incentives of PBR that led to productivity improvements", which indicates they understood then the salience of that point to the Commission's analysis: *First Reopener Decision* at para 27. The very passages on which the appellants rely establish that a central question in 2019 was whether the unexpected cost savings could be characterized as a "response to the incentive properties of PBR": *First Reopener Decision* at para 64.

[68] We have reviewed the evidence the appellants seek to submit from ATCO Electric's Vice President, Regulatory, who had served in that same role with ATCO Gas from 2022 to 2024. In her affidavit she attests that the prior Commission decisions and statements meant "ATCO … understood that it was not required to specifically track, quantify and attribute costs savings to specific 'efficiencies' during the PBR2 term". The appellants submit this evidence shows the appellants' "reasonable reliance" on the Commission's prior decisions and statements and supports the argument of unfairness. We acknowledge people within the appellants may have believed the Commission had more relaxed standards for assessing the source of a utility's cost savings than proved to be the case in the *Phase One Decision*. However, the doctrines of promissory estoppel and legitimate expectations, and the unfairness asserted by the appellants, depend on the decision-maker having made a clear and unambiguous promise or representation that a particular approach would be taken. Whether it did so depends on the Commission's own words and conduct, not on what the appellants subjectively believed or understood. The new evidence submitted by the appellants does not relate to the arguments on which they rely, and thus is inadmissible: *Palmer v The Queen*, [1980] 1 SCR 759 at 775.

[69] This Court must defer to the Commission's assessment of the evidence before it, including its assessment that it "strains credulity … that entities as sophisticated as the ATCO Utilities, with professed business practices as described in their evidence, would not have documented or tracked the source of hundreds of millions of dollars in savings": *Phase One Decision* at para 108. That assessment was not precluded by the discrete findings of the *First Reopener Decision*, by submissions made by utilities in other proceedings about the limits in their records, or by the Commission's response to those submissions.

[70] The Commission in many respects treated the appellants' evidence generously, accepting any evidence of quantified efficiencies the appellants provided, and applying a 10% "tolerance band" to reflect cost savings that the appellants described but could not quantify. The Commission continued to make inquiries and ask questions of the appellants to obtain the evidence they required, allowing the appellants to respond to identified gaps and deficiencies in the evidence, rather than simply assessing the evidence provided by the appellants at the outset.

[71] In short, the Commission did not act unfairly in asking the appellants to provide evidence explaining the source of their cost savings, and in placing weight on the appellants' failure to do so.

[72] Relatedly, the Commission did not err in considering the appellants' failure to quantify and attribute cost savings to specific efficiency initiatives in its assessment of the evidence. The Commission explained the basis for its determination that the appellants should be able to provide quantitative evidence that their cost savings were due to efficiencies, if that was in fact what had happened, noting in particular: the reopener provision existed "at the outset of each PBR plan"; it is "essential and good regulatory and business sense for a utility to maintain accounts of the business practices that contributed to that utility's achieved ROE at a level of detail sufficient to ensure that it can provide the necessary information ... where a reopener is triggered"; "[i]mplementing efficiency enhancements is a deliberate and active choice"; the appellants had provided "thorough and commensurate" explanations regarding certain "ROE variances"; and the appellants had given evidence about having "sophisticated and superior" business capacities and processes: *Phase One Decision* at paras 39, 41, 98-100, 107-108, 110. The Commission's reasons justified its determination that the lack of evidence from the appellants supported its conclusion that the appellants' "unquantified and unexplained savings were the result of factors other than efficiencies, including those asserted by the interveners, such as the ATCO utilities opting to not pursue certain capital projects … and realizing cost savings as a result of COVID-related externalities": *Phase One Decision* at para 111.

[73] The appellants point out that the Commission relied on a textbook passage about the evidentiary inference addressed in section 30(2) of the *Canada Evidence Act*, RSC 1985, c C-5, which may arise when a business record "does not contain information in respect of a matter the occurrence or existence of which might reasonably be expected to be recorded". The appellants note the Commission did not identify what record it was considering or whether such records could reasonably be expected to include details about the quantification of efficiencies. The appellants further argue that other inferences, aside from that the unquantified and unexplained cost savings were due to factors other than efficiencies, were available to the Commission.

[74] We agree that the Commission's reference to law related to section 30(2) of the *Canada Evidence Act* did not advance its analysis. However, the Commission did not rely solely on the absence of documentary evidence to infer the subject cost savings were the result of factors other than efficiencies. The Commission considered the evidence from interveners, the evidence of the appellants regarding their business practices, the appellants' detailed evidence for certain cost savings and the absence of evidence for other cost savings, the circumstances of the proceeding, the statutory and regulatory context, and its own regulatory experience and expertise. Appellate scrutiny determines only whether inferences drawn by triers of fact are "reasonably supported by the evidence". If they are, the reviewing court cannot reweigh the evidence by substituting, for the reasonable inference preferred by the trier of fact, an equally – or even more – persuasive inference of its own: *HL v Canada (Attorney General)*, 2005 SCC 25 at para 74; *Phoa v Ley*, 2020 ABCA 195 at para 9. Infelicities in the Commission's use of legal terms do not change the substance of

its analysis. Its conclusion that the unquantified and unexplained cost savings were due to factors other than efficiencies is reasonably supported by the evidence and entitled to deference.

[75] Finally, the appellants submit the Commission erred by "reversing its longstanding direction" that "no party bore the onus" in a reopener proceeding. They argue it was improper for the Commission to impose an evidentiary burden on them to show their cost savings were the result of efficiencies.

[76] When a reopener proceeding is triggered by the Commission, it will be in "the nature of an inquiry" in which the Commission seeks "factual information and submissions on the factors that led to the earnings exceeding the reopener thresholds": *First Reopener Decision* at para 25; *Phase One Decision* at para 38. The inquiry process exists at least in part to minimize the impacts of the information asymmetry inherent to utility rate regulation, in which the utility controls "almost all, if not all, information concerning the factors that contributed to their achieved returns": *Phase One Decision* at paras 41-42.

[77] In conducting this inquiry, the Commission did not err in requesting information from the appellants, including with respect to the quantification and reason for their cost savings. It was also available to the Commission to assess the sufficiency of the information provided, and to weigh that information in its assessment of the record. The Commission considered whether the appellants' cost savings resulted from the intended incentives of performance-based regulation, sought information from the appellants on this issue, and weighed the appellants' responses in determining that the cost savings did not result from the intended incentives of performance-based regulation. Doing so did not place an improper onus on the appellants.

[78] In the *Phase One Decision*, the Commission did not place an unfair burden on the appellants as a result of statements in its previous decisions, its assessment of the evidence, or its approach to onus. It made no reviewable errors in any of these respects.

D. *Was the refund contrary to the rule against retroactive ratemaking?*

[79] The Commission establishes rates prospectively. Its governing legislation does not empower it to adjust a utility's rates retroactively to address a perceived over or under compensation: *Northwestern Utilities* at 690-691; *ATCO 2006* at para 71. The Commission may, however, adjust the rates paid to a utility during an earlier period of time if parties were told that rates are "potentially subject to change"; doing so addresses the "concerns about predictability and unfairness that underlie the prohibitions against retroactive and retrospective ratemaking": *Calgary (City) v Alberta (Energy and Utilities Board),* 2010 ABCA 132 at paras 57-58; *Atco Gas and Pipelines Ltd v Alberta (Utilities Commission)*, 2014 ABCA 28 at paras 56-57; *Bell Canada v Bell Aliant Regional Communications*, 2009 SCC 40 at para 63.

[80] The Commission relied on this principle in deciding to reopen the appellants' rates and provide a refund, saying, "as the affected parties were aware that the rates were subject to change,

this matter is clearly within the knowledge exception to the prohibition against retroactive ratemaking": *Phase One Decision* at para 165.

[81] The Commission explained that the entire point of the reopener provision was to provide a remedy for the year or years in respect of which it was triggered, and that denying a remedy "would have the opposite effect to the purpose of the reopener provision, which is to act as a safeguard against unexpected results": *Phase One Decision* at para 169. The return on equity trigger for the reopener provision is inherently a "lagging indicator of performance", such that it will only signal a problem with rates after the fact: *Phase One Decision* at para 171. The reopener is also not the only aspect of performance-based regulation rates that results in after the fact adjustments; for example, the appellants "performed Y factor and K-bar true-ups pertaining to their PBR2 plans after those plans ended, in 2023 and 2024": *Phase One Decision* at para 173.

[82] Importantly, the Commission noted, the reopener provision has been a feature of performance-based regulation from the outset and had been triggered previously in respect of the appellants: *Phase One Decision* at para 172. The Commission cited earlier descriptions of the reopener mechanism in the *First Term Decision* and in the *Second Term Decision*. It stated:

> To conclude that no remedy is available because the term has ended, because it would be inconsistent with prospective rate setting … would be to ignore or render moot the application of the reopener provision as specifically described in Decision 2012-237 and Decision 20414-D01-2016 (Errata).
>
> [emphasis added]
>
> *Phase One Decision* at para 175.

[83] Nonetheless, the appellants submit the Commission erred in relying on the knowledge exception. They argue the inclusion of the reopener provision in the plans was insufficient to have endowed them with the requisite knowledge that their rates were subject to change. The appellants contrast the reopener provision, which does not apply automatically, to the deferral accounts or interim rates previously recognized as within the knowledge exception. In their view, neither the terms of the reopener nor the prior decisions communicate "that a remedy arising from a reopener was intended to be applied retroactively".

[84] The Commission did not err. The *First Term Decision* and the *Second Term Decision* were clear that material deviation in return on equity might lead to rates being reopened – that is, to rates being subject to review and reconsideration with the purpose of addressing a problem that could not otherwise be resolved.

[85] As noted, in the *First Term Decision*, which set out the form of performance-based regulation that commenced in 2013, the Commission held that a reopener was a "necessary element of any PBR plan": *First Term Decision* at para 727. It explained that a material variance in a utility's actual return on equity relative to what was approved "may be an indicator that a PBR

plan should be reviewed": *First Term Decision* at para 737. It found that a plan should be reviewed if there is "sufficient evidence that there is a problem that cannot be resolved without re-opening and reviewing the plan": *First Term Decision* at paras 729, 757-758. It directed parties "to notify the Commission of all events that they consider signal the need for a re-opener as soon as possible", and directed that:

> the financial impact of any such event be captured in a separate account pending a ruling from the Commission. Any proposed financial impact is to be measured from the time the event occurred. The disposition of the balance in that account (positive or negative) would follow the Commission's ruling.
>
> [emphasis added]
>
> *First Term Decision* at para 758.

[86] In the *Second Term Decision*, which established the parameters to be included in the performance-based regulation plans at issue here, the Commission adopted the reopener provision set out in the *First Term Decision*, declining to reconsider that provision except for a specific issue respecting the methodology for calculating a utility's return on equity: *Second Term Decision* at para 279. For the calculation of the return on equity, the Commission adjusted a utility's reporting requirements so that the returns on equity leading to a reopener would be based on the utility's actual costs and revenues, with adjustments occurring once "new final data becomes available": *Second Term Decision* at para 273.

[87] Parties to the *First Term Decision* and *Second Term Decision* would have known that the reopener permitted the Commission to resolve an apparent problem with a utility's rates to ensure those rates were just and reasonable, and that the Commission was not going to identify a problem just to ignore it. Notably, the *First Term Decision* explicitly contemplated funds associated with the triggering of the reopener being accounted for separately and subject to "disposition" following the Commission's review. This did not create a deferral account, but it certainly communicated to a utility the potential financial implications of its rates being reopened. The *Second Term Decision* at para 263 reiterated this aspect of the *First Term Decision*. It also made clear that the reopener would be triggered by the utility's actual results as they became available, which underscores the ongoing nature of the assessment contemplated.

[88] Further, as the Commission emphasized, there would be little point in a reopener provision that provided the Commission no ability to correct unjust and unreasonable rates discovered in the latter years of a plan term. It would protect consumers and the utility only where the reopener was triggered early enough in the term to permit adjustments within the term scope which, as the Commission also pointed out, would often be of no use, given that return on equity is a lagging indicator of how the plan has operated.

[89] The appellants rely on a previous reopener decision, where the Commission rejected a submission equating the reopener provision to a deferral account, noting that in that case the

Commission refused a requested adjustment on the basis that it would constitute retroactive ratemaking: *ENMAX Power Corporation Formula-Based Ratemaking Transmission Tariff Re-opener*, AUC Decision 2014-100 (15 April 2014) at paras 29, 36 [*Decision 2014-100*].

[90] As the Commission observed, however, *Decision 2014-100* refused to address a problem in a period where the reopener had been triggered by adjusting rates in an earlier period in which the reopener had *not* been triggered. The Commission similarly declined to adjust the appellants' rates in the period prior to the reopener being triggered in this case: *Phase One Decision* at para 167.

[91] Given the existence of the reopener provision as described by the Commission in its prior decisions, and the overall structure of performance-based regulation, the utilities would have understood from the outset that events triggering a reopener could result in a later adjustment to their rates, such that no unfairness or violation of the principles of ratemaking arises from an adjustment being made subsequent to the rate term. The Commission did not err in making such an adjustment here.

E. *Was the refund contrary to the structure and principles of the plans?*

[92] The appellants submit that the Commission's requirement that it issue a refund violated the principles and structure of performance-based regulation. They point out that performance-based regulation is designed to incentivize the utilities to provide more efficient service, thereby generating cost savings that benefit both the utility and consumers. The Commission's decision undermines that incentive structure by confiscating the cost savings achieved by the appellants. In addition, the Commission required the appellants to issue a refund to customers even though the appellants' cost savings were eventually shared with customers through rebasing, the process by which the appellants' rates were set for the following term starting in 2023. The appellants argue rebasing is the cost-sharing mechanism performance-based regulation incorporates, and it worked as intended; the required refund unjustifiably shifts that structure and undermines the incentives performance-based regulation creates. Requiring the appellants to issue a refund effectively imposes an earnings cap, and introduces an earnings sharing mechanism, even though the appellants' rate plans have neither – the Commission had in fact explicitly rejected the incorporation of an earnings sharing mechanism for the second term of performance-based regulation on the basis that doing so would blunt the plan's incentive structure.

[93] The interpretation and analysis of the structure of performance-based regulation implicates the statutory provisions governing utility rates and, in that sense, raises issues of law. Within that statutory framework, however, the Commission's interpretation and analysis of the terms and operation of a performance-based regulation rate plan are largely matters of fact and policy entitled to deference by this Court. The appellants' have not established the Commission made a reviewable error. As the Commission emphasized, the reopener provision is part of the performance-based regulation plans. Using the provision to ensure a utility's rates were just and reasonable does not undermine the operation of the rest of the plan and is not precluded by the existence or absence of other mechanisms for sharing cost savings with customers. The

Commission properly observed that rebasing addresses the future rates paid by customers; it cannot and does not correct for a rate in the previous term that was unjust and unreasonable. Importantly, the Commission did not reopen the appellants' rates automatically. It did not do so simply to share earnings with consumers, or to impose an earnings cap.

[94] The Commission only reopened the appellants' rates and ordered a refund because the quantum of the appellants' return on equity raised the question of whether the rates were just and reasonable, and the Commission's further inquiry led it to conclude that the return on equity did not arise from the appellants' response to the intended incentives of performance-based regulation. In so doing, the Commission made no reviewable error in relation to the structure and principles of performance-based regulation.

F. *Was the refusal to allow further evidence a breach of procedural fairness?*

[95] The appellants submit the Commission denied them a fair procedure because it pre-emptively restricted the phase two proceeding to evidence previously filed in the phase one proceeding, directing that parties provide only "submissions that analyze, consolidate or utilize the fact evidence filed in Phase 1 of this proceeding or submissions that relate to options or methodological approaches for an appropriate remedy based on the fact evidence in Phase 1": *Phase One Decision* para 181. The appellants also note that, when they filed their evidence in the phase one proceeding, they were not told that no further evidence would be permitted in the event their rates were reopened. In addition, the Commission identified relevant gaps in the evidentiary record in the *Phase Two Decision*.

[96] At no point do the appellants identify any specific additional evidence they wished to file in the phase two proceeding that they were not permitted to file. They do not explain how additional evidence they might have introduced would have been relevant and material to the issues before the Commission in the phase two proceeding, as distinct from the phase one proceeding. They do not identify any application to admit evidence that the Commission denied.

[97] In fact, after the Commission issued the *Phase One Decision*, the appellants brought an application seeking permission to file evidence in the phase two proceeding. They represented the following about the type of additional evidence they wanted to adduce:

> ATCO anticipates filing evidence and calculations that are derived from the information and evidence filed in the Phase 1 proceeding, assumptions used in determining and calculating a proposed remedy, as well as expert opinion evidence pertaining to the appropriate remedy to address the problem identified by the Commission in the Decision.

The appellants stated they were unsure whether the additional evidence they wanted to adduce would be compliant with the restriction set out by the Commission on further evidence. In response the Commission advised them the evidence they identified would be permitted:

> The Commission confirms that the type of evidence enumerated in the ATCO Utilities' motion is not precluded by the Commission's evidentiary process direction, and is consistent with the Commission's directions concerning the evidence and submissions that should be filed in the Phase 2 proceeding.

Therefore, the appellants were permitted to adduce the additional evidence they told the Commission they wanted to adduce.

[98] In essence, the appellants ask this Court to find an administrative procedure to be unfair acontextually, as a point of principle, without specifying the limits the chosen procedure imposed on their participation, or how it undermined the Commission's consideration of the substantive issues before it.

[99] Yet, a central feature of administrative law procedural fairness is that it "is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected": *Baker* at para 22; See also *Vavilov* at para 77; *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653 at 682 [*Knight*]. In assessing what procedural fairness requires, a court must "take into account and respect the choices of procedure made by the agency itself": *Baker* at para 27. As the Supreme Court explained in *Knight* at 685:

> It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair.

[100] Here, the Commission explained its procedural choices both in the *Phase One Decision* and in a subsequent clarification to the parties. It provided the appellants numerous and repeated opportunities to submit evidence in the phase one proceeding. When the appellants sought to introduce additional evidence in the phase two proceeding, the Commission allowed them to do so.

[101] The points noted by the appellants, where the Commission identified gaps in the evidentiary record in the *Phase Two Decision*, related to a remedy other than the one the appellants' proposed or the one the Commission adopted. They also related to evidence on "quantification and explanation of cost savings" that the appellants were asked to provide, but failed to provide, in the phase one proceeding: *Phase Two Decision* at paras 73, 75-76, 80-82.

[102] This Court reviews administrative procedures to ensure the procedure chosen was fair in the circumstances, noting that the purpose of the duty is to "provide a meaningful opportunity for those interested to bring evidence and arguments that are relevant to the decision to be made to the attention of the decision-maker": *Fortis 2015* at para 180, citing Donald J M Brown, John M Evans & Chistine E Deacon, *Judicial Review of Administrative Action in Canada* (Toronto: Carswell, 2013) (loose-leaf updated 2014, release 1) vol 2 at para 7:3110; *Alta Link Management Ltd v*

Alberta Utilities Commission, 2023 ABCA 325 at para 46. The appellants have not shown they were denied the opportunity to advance evidence relevant to the decision to be made, or that the procedure chosen was not fair in the circumstances.

V. Conclusion

[103] For the foregoing reasons, the appeal is dismissed.

Appeal heard on April 16, 2026

Memorandum filed at Calgary, Alberta
this 3rd day of September, 2026

de Wit J.A.

Grosse J.A.

Woolley J.A.

Appearances:

E.B. Mellett, KC
S.R. Assie
J.D. Eadie
for the Appellants, ATCO Gas and Pipelines Ltd. and ATCO Electric Ltd.

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