



**Enforcement Staff of the  
Alberta Utilities Commission**

**Allegations against ATCO Electric Ltd.**

**June 29, 2022**

**Alberta Utilities Commission**

Decision 27013-D01-2022

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Proceeding 27013

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## **1 Decision summary**

1. This proceeding is the result of a pattern of self-dealing and deception perpetrated by ATCO Electric Ltd. to benefit its shareholders as well as the shareholders of an ATCO affiliate at the cost of Alberta ratepayers.

2. In the course of building a regulated transmission line, ATCO Electric took advantage of its position as a regulated utility to benefit its unregulated affiliate, ATCO Structures & Logistics Ltd. (ASL). ATCO Electric knowingly sole-sourced a major contract for a direct assigned capital project, the Jasper Interconnection Project transmission line, at rates above fair market value, to secure a contract and a financial benefit for ASL. ATCO Electric then sought recovery of millions of dollars in above fair market costs from ratepayers for that sole-source contract. Further, ATCO Electric created a misleading paper trail justifying its decision and concealing critical information about why it sole-sourced the contract – namely, to benefit its unregulated affiliate ASL – in an attempt to avoid Commission detection of its actions and improperly recover those above fair market costs from Alberta ratepayers.

3. Prompted by a whistleblower complaint, Alberta Utilities Commission Enforcement staff investigated ATCO Electric’s dealings over the last five years. Enforcement staff then requested the Commission commence a proceeding to consider whether ATCO Electric contravened its legal obligations. Enforcement staff and ATCO Electric subsequently requested the opportunity to attempt to settle the issues in this proceeding, which the Commission allowed. Ultimately the parties reached a settlement agreement,<sup>1</sup> which was objected to by the Consumers’ Coalition of Alberta (CCA).<sup>2</sup> In this decision, the Commission considers whether approval of the settlement agreement is in the public interest, in accordance with the standards for considering settlement agreements set out in Section 3.2 of this decision.

4. As a regulated utility, ATCO Electric is subject to a number of duties and obligations, including the Independent System Operator rules (ISO Rules) surrounding procurement practices, and the Inter-Affiliate Code of Conduct (Code of Conduct), designed to ensure that ATCO Electric does not take advantage of its position as a regulated utility to benefit its unregulated affiliates. In addition to its other regulatory obligations is the fundamental premise underlying the *Electric Utilities Act* that ATCO Electric must be honest and candid with the regulator. In the settlement agreement, ATCO Electric admits that it contravened the ISO Rules, the Code of Conduct, and the *Electric Utilities Act* in conducting itself as described in this decision. ATCO Electric and Enforcement staff jointly proposed an administrative penalty of \$31 million in light of these contraventions, as well as a number of terms and conditions

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<sup>1</sup> Exhibit 27013-X0069, Settlement Agreement and Agreed Statement of Facts, attached as Appendix 2 to this decision.

<sup>2</sup> Exhibit 27013-X0130, 27013 CCA Loss Harm Penalty submission.

intended to ensure ratepayers do not bear the additional costs described and to mitigate the risk of similar actions occurring in the future.

5. For the reasons that follow, the Commission considers that the settlement reached between Enforcement staff and ATCO Electric is fit and reasonable, falling within a range of reasonable outcomes given the circumstances. The Commission accordingly approves the settlement agreement.

## 2 ATCO Electric's actions that led to the contraventions<sup>3</sup>

*ATCO Electric's contraventions resulted from its actions and its affiliates' actions surrounding the Jasper project and contracts to support a pipeline project*

6. This proceeding concerns the actions of three different corporate entities within the ATCO Group of companies, which includes both regulated and non-regulated entities. ATCO Ltd. is the parent company of the ATCO Group, ATCO Electric is the owner of an electric utility<sup>4</sup> regulated by the Commission, and ASL is a non-regulated affiliate of ATCO Electric which, among others, provides services related to remote workforce camps. An organization chart on the last page of the settlement agreement (attached as [Appendix 2](#)) shows these relationships.

7. The events leading up to these contraventions surround two projects:

- (1) The Jasper Interconnection Project (the Jasper project) – a transmission project direct assigned to ATCO Electric<sup>5</sup> by the Alberta Electric System Operator (AESO), approved by the Commission in 2018, constructed by ATCO Electric using various contractors, and energized in 2019.
- (2) The Trans Mountain Pipeline Expansion Project (the pipeline project) – the twinning of an existing oil pipeline between Alberta and British Columbia, a portion of which is located alongside the Jasper project. ASL and Simpcw Resources LLP, a commercial entity wholly owned and operated by Simpcw First Nation, formed a joint venture to obtain contracts for the operation of camp communities to accommodate temporary workers constructing the pipeline.

8. In May 2016, ASL and Simpcw Resources LLP signed a joint venture agreement setting out a cooperative relationship to develop a number of projects, including the camp contracts for the pipeline project (the joint venture agreement). The pipeline project had five established camp communities to accommodate temporary workers constructing the pipeline. Three of those camps were ultimately operated by the joint venture involving ASL and Simpcw Resources LLP.

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<sup>3</sup> This section is the Commission's view of the relevant facts for the purposes of this decision, summarized, paraphrased or cited directly from the Agreed Statement of Facts and Contraventions agreed upon by Enforcement staff and ATCO Electric and appended to the Settlement Agreement: Exhibit 27013-X0069, Settlement Agreement and Agreed Statement of Facts, starting at PDF page 14.

<sup>4</sup> As defined in Section 1(o) of the *Electric Utilities Act*.

<sup>5</sup> The project was direct assigned to both ATCO Electric and AltaLink Management Ltd.; however, the events leading to the contraventions in this proceeding relate only to ATCO Electric's portion of the Jasper project.

9. The joint venture agreement contained a definition of “energy and infrastructure projects” that included electricity transmission and distribution, and all other projects “which are in the Territory and fall within the business portfolio of ATCO, [Simpco Resources] LLP **and their respective Affiliates**. [emphasis added]” That is, ASL signed a joint venture agreement with Simpco Resources LLP which could be interpreted to bind not only ASL, but also ATCO Ltd. and its affiliates, including ATCO Electric. This definition in the joint venture agreement was later raised by Simpco as it sought work with ATCO Electric on the Jasper project.

10. The Jasper project required ATCO Electric to conduct access and matting work<sup>6</sup> as well as clearing and slashing work to remove brush around the transmission corridor and hydrovac services.

11. ATCO Electric originally estimated the costs of its portion of the Jasper project at approximately \$84 million, **\$6.6 million** of which was estimated for access matting costs. When ATCO Electric returned to the Commission to ask for recovery from ratepayers of the actual costs of the project in 2021,<sup>7</sup> it claimed the project cost \$119 million, **\$31 million** of which was for access matting services. ATCO Electric attributed the cost increase to scope changes.

12. As eventually came to light, a significant portion of the overage (estimated by ATCO Electric to be **\$10.8 million**)<sup>8</sup> was the result of ATCO Electric improperly sole-sourcing a contract for matting services for the Jasper project to benefit ASL in relation to the operation of work camps for the pipeline project. That is, ATCO Electric sole-sourced the matting services contract because to do otherwise would have jeopardized ASL’s joint venture with Simpco Resources LLP. ATCO Electric then attempted to improperly over-recover millions of dollars from ratepayers that it had incurred purely to benefit its affiliate. What occurred here was ultimately the result of placing the demands of Simpco and ASL above ATCO Electric’s regulatory obligations.

13. This decision does not in any way relate to the conduct of Simpco or the pipeline project; the events warranting sanction from the Commission relate only to ATCO Electric and the ATCO Group’s conduct in favouring ASL’s interests above ATCO Electric’s regulatory obligations.

*ATCO Electric originally tendered the work for the Jasper project through a competitive bidding process, before it changed its behaviour as a result of the joint venture agreement*

14. Unaware of the joint venture agreement signed by ASL, in 2017 ATCO Electric tendered the matting services for the Jasper project in accordance with its usual practice, issuing a request for proposals (RFP) to a number of pre-qualified bidders. It received six compliant bids (none of

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<sup>6</sup> Matting is a service involving the placement of large mats that can support heavy equipment in work areas, required to mitigate potential environmental impacts while a transmission line is built.

<sup>7</sup> A deferral account is used to track prepaid expenses or early receipt of income. Projects like the Jasper project cannot be placed into rate base until after they are energized, and the utility’s recovery of costs related to these projects are addressed in deferral account proceedings. ATCO Electric later sought recovery of the actual costs of the Jasper project in a deferral account proceeding, Proceeding 26573.

<sup>8</sup> As noted in the settlement agreement reached between ATCO and Enforcement staff, the precise amount of the overage attributable to the improper sole-sourcing versus changes in scope or other factors will be assessed by the Commission panel presiding over the deferral account proceeding, Proceeding 26573; see e.g., Exhibit 27013-X0069, Settlement Agreement and Agreed Statement of Facts, PDF page 36, paragraph 144 and footnote 2.

which were associated with Simpcw), and **considered each bidder to be capable of performing the matting work. ATCO Electric ultimately concluded that T Ltd., a large, experienced matting and earthworks contractor, was the lowest cost service provider.** The 2017 RFP was cancelled due to delays in obtaining Commission approval for the Jasper project.

15. Also in 2017, the ASL and Simpcw Resources LLP joint venture received a RFP to bid on camp services for the pipeline project. The camps were expected to be located on Simpcw's traditional territory, and the work on the camps was a "guaranteed opportunity" for Simpcw.

16. In 2018, Simpcw told ASL that the joint venture agreement was binding on ATCO Electric and that it expected to be directly awarded the contract for clearing and slashing, hydrovac, and access and matting services work for the Jasper project. At the time, Simpcw advised that it may back out of the joint venture agreement and partner with another company instead of ASL on the bid for the pipeline project camp contracts, should ATCO Electric not directly award the work on the Jasper project to it. Simpcw was clear that failure by ATCO Electric to direct-award it the matting contract for the Jasper project would likely mean forfeiting the camp contracts for the pipeline project with capital costs of approximately \$80-100 million.

*After ATCO Electric became aware of ASL's potential loss of the camp contracts, it improperly took ASL's interests into account when assessing whether to sole-source the matting contract*

17. ASL advised ATCO Electric of the joint venture agreement and Simpcw's position. ASL prepared an internal briefing document in March 2018 setting out the risk to the Simpcw relationship and the potential loss of the camp contracts (the ASL briefing note), which was shared with ATCO Electric management and considered in their decision-making. The ASL briefing note specifically recommended that ATCO Electric "consider the ability to direct award to the Simpcw" the matting services contract "to facilitate strong relations between Simpcw and ATCO in general, particularly ASL's camp opportunities for Trans Mountain pipeline."

18. ATCO Electric's senior management was aware of the potential issues that would arise from directly awarding the Jasper project work to Simpcw. Immediately after the ASL briefing note was shared, an issue brief was prepared by then Supervisor Indigenous Liaisons Ken White and Manager Indigenous Relations Angela Binnie at ATCO Electric. The issue brief was shared with senior management, specifically: (i) Vice-President, Northern Development and Indigenous Relations Doug Tenney at ATCO Electric; and (ii) Senior Vice-President and General Manager Paul Goguen at ATCO Electric.

19. The issue brief informed ATCO Electric's senior management of two primary concerns with ASL's request to direct-award the matting work to Simpcw:

- (1) if Simpcw Resources LLP is direct-awarded the work, "relationships with the rest of the communities who expressed interest in this work<sup>9</sup> will suffer"; and

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<sup>9</sup> The issue brief noted that a number of other First Nations with recognized ties to Jasper National Park had expressed interest in clearing and access work for the Jasper Interconnection Project, that one of the First Nations had a development corporation that had previously done similar work in the area, and apart from the work Simpcw requested be directly awarded, there was "very little other capital and maintenance work that can be parceled out to those community companies.": Exhibit 27013-X0069, Settlement Agreement and Agreed Statement of Facts, PDF page 20, paragraph 39.

- (2) “it will be very difficult to provide the regulators with a justification why this amount of work was direct awarded to one community.” (emphasis added)

20. While the issue brief did not reference the potential loss of the \$80-100 million camp contracts for the pipeline project, subsequent emails exchanged within ATCO Electric make it clear that this was very much a consideration in the decision to direct-award the work to Simpcw. Subsequent emails also make it clear that ATCO Electric recognized that the direct-award was “off-side with the AESO and AUC.”

21. Some members of ATCO Electric’s management at the time believed the joint venture agreement was not legally enforceable against ATCO Electric. However, regardless of its legal nature, both ATCO Electric and ASL understood that Simpcw viewed the agreement as a binding commitment from all of ATCO. In particular, it was clearly understood within ATCO Electric that Simpcw was “still tying” the direct-award for the Jasper project work to the \$80-100 million pipeline project camp contracts. In an email exchange between D. Tenney and Charles Dobson (from ASL), C. Dobson expressed concern that unless they can convince the Simpcw otherwise, there may be “negative fall out on the larger pot of gold.” D. Tenney indicated that a technical legal argument was unlikely to convince Simpcw otherwise, and thus ATCO Electric was as equally “tied into” the joint venture agreement as ASL. D. Tenney was “simply waiting for Paul [Goguen] to agree so we can move forward with the direct award.”

*When assessing whether to sole-source the matting contract, ATCO Electric knew that Simpcw’s proposed rates were above fair market value*

22. Simpcw Resources LLP and Backwoods Energy Services, owned by the Alexis Nakoda Sioux Nation, together submitted two proposals for matting work and brushing work related to the Jasper project. The matting work constituted the largest portion of the work while the brushing and hydrovac work were minimal. They ultimately formed a corporation called Backwoods Contracting Ltd. (Backwoods) to perform the work.

23. The estimated costs of the Backwoods contract were: (i) brushing \$1.5 million; (ii) matting \$13 million; and (iii) hydrovac services \$0.5 million. At the time, ATCO Electric had a number of data points for market rates for matting services available to it, including the rates submitted by vendors in the 2017 RFP (which included T Ltd.). In August 2018, ATCO Electric also conducted an internal analysis concluding that the fees proposed by Backwoods were **30-35 per cent higher than market rates**. As a result of this analysis, ATCO Electric identified between \$2.3 and \$4.0 million to be at regulatory risk for disallowance.

24. The total amount paid in the end to Backwoods for matting work was approximately \$31.1 million, and for brushing work approximately \$2.1 million. While some portion of the increase can be attributable to an increase in scope, ATCO Electric estimated approximately \$10.8 million of the matting costs for the Jasper project is attributable to the above-market rates.<sup>10</sup>

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<sup>10</sup> As noted previously, this is a matter to be ultimately determined in Proceeding 26573.



*When deciding whether to sole-source the matting contract, ATCO Electric knew that the direct-award likely contravened both the ISO Rules and the Inter-affiliate Code of Conduct*

25. It was understood within ATCO Electric that directly awarding the matting work to Backwoods could amount to a contravention of the Code of Conduct and the ISO procurement rules, as the decision to direct-award was driven in part by the actions of a non-regulated affiliate, ASL.

26. Section 9.1.5.2 of the ISO Rules stipulates that for acquisitions where the cost of a specific item exceeds \$50,000, the transmission facility owner (ATCO Electric) “shall solicit written bids from not less than three arm’s length suppliers.”<sup>11</sup> This requirement clearly applied to the matting work awarded to Simpcw for the Jasper project. It was expected to be over \$50,000, and ATCO Electric had initially set out to comply with this requirement in 2017, when it issued the 2017 RFP. But for the joint venture agreement, ATCO Electric would have gone with the proper three-bid approach.

*Knowing that it would likely violate ISO Rules and the Code of Conduct, ATCO Electric direct-awarded the contract to Backwoods anyway*

27. Despite concerns within ATCO Electric that the direct-award would violate both the ISO Rules and the Code of Conduct, the acknowledged regulatory risk of disallowance due to the sole-sourcing, and the knowledge that the Backwoods rates were well above fair market value, P. Goguen in his capacity as Senior Vice-President and General Manager ultimately approved a direct-award for matting, brushing and hydrovac work on the Jasper project to Backwoods (i.e., Simpcw).

28. When P. Goguen authorized the direct-award of the contract to Backwoods in June 2018, he was aware of concerns about the rates being above fair market value and the regulatory risks to ATCO Electric, but also believed work was ongoing to get the rates aligned with market value. After discussions with ASL, and adopting a “One ATCO” perspective, the decision to approve the direct-award to Backwoods was made by ATCO Electric because of concerns related to the perceived commitment made to Simpcw under the joint venture agreement, as well as concerns that a failure to do so could lead Simpcw to back out of the agreement thereby jeopardizing opportunities for ATCO and ASL (including the camp contracts).

29. There is no evidence that any such efforts to lower the Backwoods rates were made.

*Backwoods then subcontracted the matting work to T Ltd., the lowest-cost bidder from the 2017 RFP*

30. Backwoods subcontracted most, if not all, of the matting-related work for the Jasper project to T Ltd. Multiple individuals at ATCO were concerned about whether Backwoods was subcontracting the matting work; A. Binnie was frustrated upon learning of the arrangement as she believed T Ltd. would have been the successful bidder in a competitive bidding process.

31. In what is only one of many concerning examples of a deliberate course of action to justify these decisions and conceal the facts from the Commission, one internal email within

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<sup>11</sup> Subject to limited exceptions under Section 9.1.5.6 of the ISO Rules.

ATCO Electric noted that “[w]e are trying to be careful not to discuss that Simpcw is subcontracting this work out.”

*ATCO Electric embarked upon a campaign of concealment and deception, attempting to recover above-market costs from ratepayers by creating a misleading paper trail that excluded the true reason for its sole-sourcing decision*

32. Following the awarding of the contract to Backwoods, ATCO Electric began documenting a justification to defend that decision. ATCO Electric uses Requisition Enhancement Forms (REFs) to internally document the justification for a sole-source contract, and will typically disclose the REF and any appended documents (like an issue brief) to the regulator if requested.

33. In preparing a REF in August 2018 to justify the award to Backwoods (the August 2018 REF), ATCO Electric deliberately avoided disclosing the connection between the direct-award to Backwoods, the joint venture, and ASL’s interests. To “reduce the risk of discovery,” an issue brief was not created for the Backwoods contract.

34. Choosing not to include key facts in a REF is a critical omission, as these documents are typically created to document relevant background internally, and are subject to potential disclosure to the regulator in a later proceeding. They are normally saved to ATCO Electric’s internal file management system specifically to ensure that despite employee turnover or employees changing positions within the company, the relevant information will be available to those who require it in the future, including in further updates to REFs for the same project.<sup>12</sup> In this case, ATCO Electric deliberately did the opposite – burying key facts so that they would not be unearthed when there were cost over-runs requiring further REFs, or in the course of preparing and defending its deferral account application.

35. Instead of including the connection between the direct-award to Backwoods, the joint venture, and ASL’s interests in the August 2018 REF, ATCO Electric put what it deemed to be the “necessary background info” into a backgrounder document (the Backgrounder) circulated via email. A. Binnie took these steps following advice from Spencer Weiss, Manager, Regulatory at ATCO Electric, about what was discoverable in a rates proceeding. P. Goguen was aware that the August 2018 REF did not mention the joint venture agreement or the connection with ASL.

36. ATCO Electric produced several drafts of the Backgrounder. The first draft reflected an awareness that Backwoods’ service rates were well above market rates, and the role of the joint venture agreement in the direct award to Backwoods. The second draft was amended to ensure that those who would ultimately sign the REF were aware of concerns related to ATCO Electric’s compliance with the Code of Conduct and “key risks” arising from the sole-sourcing to Backwoods. The second draft specifically indicated that “one of the drivers behind the decision to sole source this work to Simpcw” was the potential loss of the camp contracts, which “again is not in compliance with the ATCO Affiliate Code of Conduct (AET is incurring a higher cost for

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<sup>12</sup> In this case, a second REF was signed in May 2021 because of cost overruns. Those who signed the second REF in 2021 would have likely been unaware of the information regarding the direct-award to Backwoods (Simpco), the Joint Venture, and ASL, unless they had been advised through materials distributed in 2018: Exhibit 27013-X0069, Settlement Agreement and Agreed Statement of Facts, paragraph 108.

a Regulated Direct Assigned Capital Project in order to secure a contract and an economic benefit for a non-regulated entity – ASL).”<sup>13</sup>

37. The second draft of the Backgrounder was sent to four of the five individuals who signed the August 2018 REF, including Peter Martyniuk, Manager, Transmission and Large Distribution; Kumail Moledina, Director Project Execution; Todd McLaren, VP Maintenance and Construction, Transmission and Distribution; and Justin Claude, Director Regulatory. It was also sent to Corrinne Severson, then Director, Regulatory, Utilities Common Matters, ATCO Electric. Severson’s role was to advise ATCO Electric on the implications for Code of Conduct compliance of direct-awarding the work to Backwoods and to support and report to the Compliance Officer and Chief Regulatory Officer, who was Melanie Bayley at the time.

38. C. Severson made a number of edits to what became a third draft of the Backgrounder, removing the addition referenced above that the sole-sourcing decision “again is not in compliance with the ATCO Affiliate Code of Conduct.” C. Severson then added a section called “Code of Conduct implications,” noting that the matting rates were above fair market value, and one of the drivers behind the sole-sourcing decisions was the “potential advantage for a non-utility affiliate,” ASL. This third draft concluded that ATCO Electric “should work with the Simpcw” to attempt to align the cost with fair market value, and **“should [ATCO Electric] seek to recover from customers costs that are in excess of [fair market value] as a result of a sole source contract for the benefit of a non-utility affiliate, it would not comply with the spirit and intent of the Code.”**

39. At the time she produced the third draft of the Backgrounder, C. Severson mistakenly believed that the Backwoods contract had not yet been awarded. This was incorrect – P. Goguen had approved the direct-award around two months earlier – and reflects a critical communication and process error by ATCO Electric.

40. So, ATCO Electric wrote the August 2018 REF in a manner designed to justify the decision to sole-source the Backwoods contract, without discussing the joint venture agreement or ASL’s interests. Critical information was left out of the REF and put into the Backgrounder instead, to avoid future detection in a regulatory process. A. Binnie felt pressure from ATCO Electric senior management that pursuing and justifying a direct-award was the path they should take. Multiple members of ATCO Electric’s management team signed the REF knowing<sup>14</sup> that it did not disclose the relevant and important information in the second draft of the Backgrounder (concerning the driver to sole-source the contract or that the decision would violate the Code of Conduct). Rather, ATCO Electric deliberately concealed that information in preparing the final version of the REF.

41. After the August 2018 REF was signed and the final Backwoods contract executed, ATCO Electric employees, including senior employees who had signed the REF, continued to discuss that the rates charged by Backwoods were significantly above fair market value, as well

<sup>13</sup> Exhibit 27013-X0069, Settlement Agreement and Agreed Statement of Facts, PDF page 26, paragraph 83. P. Goguen, who approved the award, did not receive the second draft of the Backgrounder.

<sup>14</sup> At least four of the five signatories to the August 2018 REF had received the second draft of the Backgrounder (which pointed out the Code of Conduct non-compliance) and were aware of its contents: Exhibit 27013-X0069, Settlement Agreement and Agreed Statement of Facts, PDF page 28, paragraph 96. The fifth person, P. Goguen, who had another person sign on his behalf, was also aware in August 2018 that the pricing for the contract had not changed since he had approved the direct-award in June 2018: Exhibit 27013-X0069, Settlement Agreement and Agreed Statement of facts, PDF page 28, paragraph 95.

as the regulatory risk of ATCO Electric seeking cost recovery that resulted from matting rates that were materially higher than market.

*In creating its misleading paper trail, ATCO Electric failed to include the true reason for its sole-sourcing decision and non-compliance issues from its justification for increased matting costs in 2021*

42. After the Jasper project was energized, a second REF was prepared and signed in May 2021 to justify change orders that had led to increased project costs (the May 2021 REF). The matting services portion of the project had increased from the originally estimated \$13 million to \$28 million. The May 2021 REF stated that the increased costs were the result of changes in scope, including the number of mats used (28,000 to 43,000), longer time periods for mat requirements due to construction delays, increased requirements to build up higher air bridges, and a higher volume of non-repairable mats.

43. While the August 2018 REF was attached to the May 2021 REF, none of the draft backgrounders from 2018 were provided (i.e., the documents containing the critical information on the reasons for the sole-sourcing decision, regulatory non-compliance concerns, or above-market costs). However, two of the May 2021 REF signatories had received drafts of the Backgrounder. K. Moledina received the second draft of the Backgrounder and M. Bayley received the third draft of the Backgrounder. The text of the second Backgrounder is almost entirely present in the third draft of the Backgrounder in full text or tracked changes, with the exception of one statement dealing with the reason to sole-source the matting work.<sup>15</sup> As noted above, at the time she made her edits to the second draft backgrounder, C. Severson mistakenly believed that the sole-source contract had not yet been awarded.

44. The May 2021 REF and August 2018 REF failed to disclose relevant and material information regarding the Backwoods contract. Either REF could have, and should have, based on ATCO Electric's typical practice, documented the material background information that: (i) ASL had requested ATCO Electric to direct-award to the Simpcw; (ii) ATCO Electric's reason for sole-sourcing the contract to Backwoods was concern for ASL's potential loss of the camp contracts; (iii) but for the joint venture agreement, ATCO Electric would have used a competitive tender process for the Jasper project matting work; (iv) Backwoods' rates were 30-35 per cent above fair market value; and (v) Backwoods was not the only entity capable of performing the work, and in fact it had subcontracted most, if not all, of the work to the likely winning bidder of a competitive process.

*Knowing that recovering above fair market value costs from ratepayers violated the Code of Conduct, ATCO Electric sought to recover those costs from ratepayers anyway*

45. ATCO Electric filed an application to recover the actual costs incurred on the Jasper project in the deferral account proceeding in June 2021.<sup>16</sup> Specifically, ATCO Electric asked for

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<sup>15</sup> Exhibit 27013-X0069, Settlement Agreement and Agreed Statement of Facts, PDF page 27, paragraph 86; Exhibit 27013-X0093, Tab 26 - Second Draft Backgrounder; Exhibit 27013-X0096, Tab 29 – Third Draft Backgrounder.

<sup>16</sup> ATCO Electric filed an application for disposal of its 2018-2021 transmission deferral account in Proceeding 26573: ATCO Electric Transmission Application for Disposal of 2018-2021 Transmission Deferral Accounts and Annual Filing for Adjustment Balances, which included a request to approve additional costs for the Jasper Interconnection Project as well as a number of costs unrelated to the subject matter of this proceeding.

the Commission's approval to add \$119.1 million to its rate base for recovery of costs related to the Jasper project, **which included the full costs incurred under the Backwoods contract.**

46. Back in 2018, J. Claude had emailed S. Weiss, copied to C. Severson, requesting confirmation that the \$2.5 million (the amount originally estimated to be the above fair market value costs of the contract) be moved into a non-regulated uniform system account. This is an account where a utility records costs that are not claimed for recovery from ratepayers in a rates proceeding before the AUC. In a later email to T. McLaren, J. Claude stated that any difference between fair market value and the Backwoods rates would need to be moved into a non-regulated account, and that "we will be in non-compliance if we don't. This way we can proceed without having to notify the AUC." The transfer of costs to a non-utility account occurs after costs are incurred. **No steps to transfer the difference between the fair market value and the Backwoods rates to a non-regulated account were ever taken by ATCO Electric.** Instead, ATCO Electric included those costs in its deferral account application in 2021.

47. ATCO Electric's Senior Vice-President and General Manager P. Goguen (a role taken over by M. Bayley and changed to President, ATCO Electric) is ultimately responsible for the costs incurred and claimed in the deferral account proceeding. Approximately 45 individuals were involved in the deferral account proceeding, most of whom were not aware of the events surrounding the decision to directly award the Backwoods contract. The reason they were not aware of those events is because the individuals at ATCO Electric who understood the critical information relating to the contract deliberately concealed that information, for the specific purpose of avoiding discovery at a rates hearing before the Commission. Key information had been left out of the August 2018 REF and the May 2021 REF in favour of "backgrounders," and the backgrounders were not saved in ATCO Electric's file management system where they could be retrieved for a later regulatory proceeding. Regardless of the lack of properly saved documentation, some of the individuals involved in the deferral account proceeding were involved in or aware of the events surrounding the direct-award decision.

48. In its initial deferral account application, ATCO Electric indicated that the Backwoods contract was sole-sourced but did not provide the real reasons for that decision, omitting material information. When **directly asked** about matting costs for the Jasper project (by both the CCA and the Commission through information requests), ATCO Electric stated that rates under the Backwoods contract were market competitive and that matting work was directly awarded to the only entity capable of completing the work. **Neither of those statements were true, and ATCO Electric knew it.**

49. First, ATCO Electric was specifically asked for "evidence that the prices were cost competitive." ATCO Electric had in its possession:

- (1) The matting rates submitted by vendors for the 2017 RFP;
- (2) The matting rates submitted by T Ltd. for survey matting on the Jasper project in response to a request for quotes process in March 2018;
- (3) The matting rates under a master services agreement with T Ltd. entered into following an RFP process in June 2018;
- (4) Research conducted by ATCO Electric's own forestry team around fair market value assessments; and

- (5) An internal analysis conducted by ATCO Electric in August 2018 concluding that Backwoods' rates were 30-35 per cent higher than market rates, and at that time, therefore a range of \$2.3-4 million was subject to a regulatory risk of disallowance in respect of the matting work.

50. ATCO Electric provided none of that information in its responses to the information requests, choosing instead to falsely assert that rates under the Backwoods contract were market competitive.

51. Second, with respect to the decision to sole-source the Backwoods contract, ATCO Electric knew:

- (1) ASL had requested ATCO Electric to consider a direct-award to Simpcw;
- (2) The sole-sourcing to Backwoods resulted from the ASL and Simpcw Resources LLP joint venture agreement, out of concern for the commitments Simpcw felt had been made and the loss of current and future commercial opportunities;
- (3) Simpcw's position, expressed to ASL, was that it had an alternative joint venture opportunity that it would be willing to back out of the agreement with ATCO to pursue "if they don't get the respect that the Simpcw has provided to ATCO."
- (4) But for the joint venture agreement, ATCO Electric would have used a competitive tender process (as it originally started in 2017) and would not have sole-sourced the contract to Backwoods;
- (5) Backwoods was not the only entity capable of performing the matting services awarded under the contract; and
- (6) Backwoods subcontracted most, if not all, of the matting work it had been awarded to another entity, T Ltd. (the lowest cost bidder from the 2017 RFP process).

52. ATCO Electric provided none of that information in its responses to the information requests, choosing instead to falsely assert that matting work was directly awarded to the only entity capable of completing the work.

*ATCO Electric made no effort to disclose its wrongdoing; the only reason these events came to light was through the actions of a whistleblower*

53. Section 7.6 of the Code of Conduct requires ATCO Electric to prepare regular compliance reports, which should include a comprehensive description of instances of material non-compliance with the code and any steps taken to correct such non-compliance.

54. ATCO Electric filed its compliance reports for 2018, 2019 and 2020 stating that it had complied with the Code of Conduct during that year, with no mention of any of the information set out above. ATCO Electric did not file an exception report<sup>17</sup> until November 29, 2021, after it had been contacted by Enforcement staff.

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<sup>17</sup> Pursuant to Bulletin 2010-24, Inter-Affiliate Code of Conduct process changes and clarification of requirements, September 17, 2010.

55. The AESO conducted a compliance audit of the Jasper project, and did not identify any suspected contraventions of Section 9.1.5 of the ISO Rules, which required ATCO Electric to have solicited bids from at least three arm's-length bidders for the project. However, the AESO was not provided with critical information, such as the reasons for the sole-sourcing of the Backwoods contract or any other facts set out at paragraph 44 of this decision.

56. No ATCO Electric employee or management personnel reported any concerns regarding the contraventions discussed in this decision to senior regulatory personnel responsible for preparing the deferral account application.

57. Instead, the events forming the basis for the contraventions were only brought to Enforcement staff's attention through a whistleblower who was an employee of ATCO Electric with direct knowledge of the events surrounding the Backwoods contract. The Commission acknowledges the integrity and courage required for the whistleblower to bring these events to the Commission's attention; the Commission is grateful to this individual on its own behalf and on behalf of Alberta ratepayers.

58. The whistleblower emailed then-Executive Vice-President and Chief Financial Officer Dennis DeChamplain in June 2021 expressing "significant concerns" with the decision to sole-source the Backwoods contract, and indicating that ATCO Electric should self-report the "clear contravention of the ISO Rules" to the Commission. ATCO Electric made some efforts to conduct an internal review between June and September 22, 2021. During the same time period, employees involved in the deferral account proceeding for ATCO Electric filed rebuttal evidence, unaware that a complaint had been made either internally or to Enforcement staff.

59. After ATCO Electric was made aware of Enforcement staff's investigation, ATCO Electric's corporate security completed an investigation into the conduct, and ATCO Electric filed a letter on the public record of the deferral account proceeding, asking the Commission hearing panel presiding over that proceeding for a temporary stay. The deferral account proceeding continues to be suspended pending determination of the issues in this proceeding.

### **3 Should the Commission accept the settlement agreement?**

#### **3.1 Does the Commission have authority to approve the settlement agreement?**

60. In this decision, the Commission considers whether to accept the settlement agreement reached between ATCO Electric and Enforcement staff as filed. The settlement agreement proposes an administrative penalty, various terms and conditions, undertakings made by ATCO Ltd. and the payment of Enforcement staff's legal costs for the investigation and hearing.

61. The Commission's jurisdiction to consider and approve a settlement agreement is grounded in sections 8, 23, 63 and 66 of the *Alberta Utilities Commission Act*.

62. Under Section 23, the Commission has general authority regarding the enforcement of contraventions of matters within its jurisdiction, and Section 8 enables the Commission to do all things necessary for or incidental to the exercise of its powers and the performance of its duties and functions. Section 63 provides that if the Commission determines in a hearing or other

proceeding<sup>18</sup> that a person has contravened or failed to comply with any enactment under its jurisdiction, the Commission can impose an administrative penalty and any terms or conditions it considers appropriate. There is no dispute that the matters covered in the settlement agreement fall within the Commission’s jurisdiction.

63. Section 66 of the *Alberta Utilities Commission Act* provides that if the Commission is satisfied that a contravention has been established, the Commission may also order a person to pay the costs of an investigation or hearing into that non-compliance. The parties have agreed that invoiced costs incurred by Enforcement staff’s external legal counsel will be paid as part of the settlement.

### 3.2 What principles apply when the Commission considers a settlement agreement?

64. In Decision 3110-D03-2015,<sup>19</sup> and more recently followed in Decision 26379-D02-2021,<sup>20</sup> the Commission indicated that in considering a settlement agreement, guidance can be taken from the principles developed by courts for joint submissions on sentencing in criminal law. Specific reference was made to the Alberta Court of Appeal’s approach to joint submissions on sentencing in a decision called *R v GWC* where the court stated:

[17] The obligation of a trial judge to give serious consideration to a joint sentencing submission stems from an attempt to maintain a proper balance between respect for the plea bargain and the sentencing court’s role in the administration of justice. The certainty that is required to induce accused persons to waive their rights to a trial can only be achieved in an atmosphere where the courts do not lightly interfere with a negotiated disposition that falls within or is very close to the appropriate range for a given offence. “The bargaining process is undermined if the resulting compromise recommendation is too readily rejected by the sentencing judge.”

[18] Joint submissions, however, should be accepted by the trial judge unless they are unfit: In *R. v. Dorsey*, the Ontario Court of Appeal held at p. 345 that “**a joint submission should be departed from only where the trial judge considers the joint submission to be contrary to the public interest and, ... if accepted, would bring the administration of justice into disrepute.**” That view accords with the position of the Manitoba Court of Appeal in *R. v. P Ashe*, supra, at para. 12, that “while a sentencing judge has an overriding discretion to reject a joint recommendation, ‘there must be good reason to do so, particularly ... where the joint recommendation is made by experienced counsel.’” [citations omitted; emphasis added]

65. The Saskatchewan Court of Appeal and many Canadian tribunals that administer disciplinary schemes adopted the approach to joint sentencing submissions described in *R v GWC*. The Commission then stated in Decision 3110-D03-2015:

20. Taking guidance from the foregoing, the Commission must not ask itself if the proposed consent order is the order that it would have issued. Rather, **the Commission must decide if the consent order is fit and reasonable and falls within a range of**

<sup>18</sup> The Commission has previously found that “other proceeding” includes a settlement process.

<sup>19</sup> Decision 3110-D03-2015: Market Surveillance Administrator, Market Surveillance Administrator allegations against TransAlta et al., Phase 2-request for consent order, Proceeding 3110, October 29, 2015, paragraphs 15-21.

<sup>20</sup> Decision 26379-D02-2021: Enforcement staff of the Alberta Utilities Commission, Allegations against Green Block Mining Corp. (formerly Link Global Technologies Inc.), Westlock Power Plant Phase 1, Proceeding 26379, August 19, 2021, paragraphs 14-15.



**acceptable outcomes given the circumstances.** When making this assessment, the Commission is guided by the factors set out in Rule 013: *Rules on Criteria Relating to the Imposition of Administrative Penalties* (Rule 13) and other applicable sanctioning principles.<sup>21</sup> [emphasis added]

66. Since the decision in *R v GWC* and the Commission’s application of its principles in Decision 3110-D03-2015, the Supreme Court of Canada has addressed the legal test trial judges should apply in deciding whether it is appropriate in a particular case to depart from a joint submission on sentence. This test has since been adopted by a number of regulatory and disciplinary tribunals in Canada.<sup>22</sup> In *R v Anthony-Cook*, the Supreme Court of Canada concluded that the proper test for trial judges assessing whether to depart from joint submissions on sentencing is “whether the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.”<sup>23</sup> This “public interest test” (notably similar to that articulated in *R v GWC* and adopted by the Commission in Decision 3110-D03-2015) sets an “undeniably high threshold” for rejecting a joint submission on penalty. As explained in *Anthony-Cook*:

[33] ... [A] joint submission will bring the administration of justice into disrepute or be contrary to the public interest if, despite the public interest considerations that support imposing it, it is so “markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system”....

[34] [A] joint submission should not be rejected lightly ... **Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down.**<sup>24</sup> [emphasis added]

67. The Supreme Court of Canada went on to observe that the need for a stringent public interest test is grounded in two important considerations, which the Commission considers apply in the regulatory enforcement context. First, a negotiated resolution has significant benefits as compared to a contested process – including benefits for the accused, for witnesses, for victims, for the prosecuting authority and for the administration of justice in terms of overall efficiency and allowing for precious time, resources and expenses to be channeled into other matters. Second, for joint submissions to be possible, “the parties must have a high degree of confidence that they will be accepted.” Thus, the public interest test – and the high threshold it imposes – is necessary to achieve the benefits of joint submissions.<sup>25</sup>

68. The Supreme Court of Canada further noted that a high threshold is appropriate given that the parties to the joint submission are well placed to take into account both the interests of the public and the accused, and are highly knowledgeable about the circumstances of the offender and offence and relative strengths and weaknesses of their respective positions. The court noted that Crown and defence counsel in the criminal context are bound professionally and

<sup>21</sup> Decision 3110-D03-2015, paragraph 20.

<sup>22</sup> See e.g., *Bradley v Ontario College of Teachers*, 2021 ONSC 2303, paragraph 9.

<sup>23</sup> *R v Anthony-Cook*, 2016 SCC 43, paragraph 32.

<sup>24</sup> *Anthony-Cook*, paragraphs 33-34.

<sup>25</sup> *Anthony-Cook*, paragraphs 35-41.

ethically not to mislead the court and “are entirely capable of arriving at resolutions that are fair and consistent with the public interest.”<sup>26</sup> In this case the parties are both represented by counsel with similar professional and ethical obligations.

69. Further, as set out in Bulletin 2016-10, Enforcement staff have an obligation to safeguard the public interest in pursuing the mandate to bring forward – and in appropriate circumstances settle – enforcement proceedings.<sup>27</sup> Given Enforcement staff’s responsibility to consider the public interest, which in this case necessarily includes the direct and indirect impacts on ratepayers as well as the factors set out in Rule 013: *Rules on Criteria Relating to the Imposition of Administrative Penalties*, and the parties’ respective professional and ethical obligations, the Commission considers that the rationale articulated in *Anthony-Cook* for a high threshold to overturn joint submissions is appropriately applied in this context.

### 3.3 Is approval of the settlement agreement in the public interest?

70. In the settlement agreement, ATCO Electric admits that it contravened the ISO Rules, the Code of Conduct, and the *Electric Utilities Act*.<sup>28</sup> ATCO Electric admits that it sole-sourced the matting, brushing and hydrovac work for the Jasper project (violating the ISO Rules respecting competitive procurement), at above fair market rates to the benefit of its unregulated affiliate (violating the spirit, intent and letter of the Code of Conduct), and deliberately concealed those actions from the Commission in an attempt to recover those above fair market rates from Alberta ratepayers (violating its fundamental duty of honesty and candour under the *Electric Utilities Act*).

71. ATCO Electric and Enforcement staff agreed on an administrative penalty of \$31 million in light of these contraventions, as well as a number of terms and conditions intended to ensure ratepayers do not bear the additional costs described and to mitigate the risk of similar actions occurring in the future. As part of the settlement, ATCO Electric has committed to amend its deferral account application to exclude from its claim all costs above fair market value for matting, brushing and hydrovac services for the Jasper project (currently estimated at \$10.8 million). The settlement agreement provides that the precise amount of the overage attributable to the improper sole-sourcing versus changes in scope or other factors will be assessed by the Commission panel presiding over the deferral account proceeding.<sup>29</sup>

72. The Commission has carefully considered the proposed administrative penalty and the terms and conditions agreed to by Enforcement staff and ATCO Electric. It has also taken into account the commitments made by ATCO Ltd. in the settlement agreement, recognizing that ATCO Electric has acknowledged that it may suffer potential regulatory consequences should ATCO Ltd. fail to live up to its commitments. In assessing the joint submission from

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<sup>26</sup> *Anthony-Cook*, paragraph 44.

<sup>27</sup> Bulletin 2016-10, Practices regarding enforcement proceedings and amendments to AUC Rule 001: Rules of Practice, March 29, 2016, paragraph 13.

<sup>28</sup> Specifically, sections 9.1.5.2 and 9.1.5.6 of the ISO Rules Part Two – Market Participation (Transmission), the purpose, intent, spirit and letter of sections 1.1(a), 1.1(d), 3.1.1, 7.6(e), 7.6(f) and 7.6(g) of the Inter-affiliate Code of Conduct, the quarterly exception report requirement set out in Bulletin 2010-24, Inter-Affiliate Code of Conduct process changes and clarification of requirements, and the *Electric Utilities Act* by failing to fulfil the duties and obligations imposed upon it as an electric utility owner and operator in Alberta, which among other things, require that the information ATCO Electric provides in its applications, filings and other representations before the AUC be honest, true, accurate and not misleading, either expressly or by omission.

<sup>29</sup> Proceeding 26573.

Enforcement staff and ATCO Electric, the Commission is guided by its previous decisions and the “public interest test” articulated in *Anthony-Cook*. The Commission will decide whether the settlement agreement is fit and reasonable and falls within a range of acceptable outcomes given the circumstances, and in accordance with *Anthony-Cook* it will only depart from the joint submission if “the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.”<sup>30</sup> In assessing whether the settlement reaches this threshold, the Commission has taken into account its criteria relating to administrative penalties in Rule 013, and other sentencing principles from the criminal law context as applicable.

73. Having regard for the seriousness of the contravention and the harm caused, and taking into account that the purpose of the Commission’s sanctioning authority is protective and preventative, not punitive, the Commission considers that the \$31 million penalty and associated terms and conditions in the settlement fall within a range of acceptable outcomes, and it is in the public interest to approve the settlement agreement.

*The \$31 million administrative monetary penalty falls within a range of acceptable outcomes and is proportionate to the severity of the contraventions*

74. Penalties imposed under Section 63 of the *Alberta Utilities Commission Act* can comprise two parts: (i) an administrative monetary penalty of up to \$1 million per day or part thereof, for each contravention; and (ii) a “disgorgement” payment to remove the economic benefit of the contravention from the contravening party. The settlement agreement proposes the former, in the amount of \$31 million. Enforcement staff and ATCO Electric indicate that the proposed administrative monetary penalty is to be considered globally for all of the contraventions; this takes into account the interrelated nature of the contraventions and is consistent with the approach approved by the Commission in Decision 3110-D03-2015. The penalty is also proposed in addition to the obligation by ATCO Electric to amend its deferral account proceeding application to exclude all claims for costs above fair market value for the Jasper project.

75. Rule 013 sets out factors that the Commission must consider in making its enforcement decisions, including the seriousness of the contravention, the compliance system, and self-reporting or cooperation of the contravener. The Commission finds that ATCO Electric committed numerous, gravely serious contraventions that, if unchecked, would undermine the very fabric of the regulatory system in Alberta.

76. First, ATCO Electric contravened the *Electric Utilities Act* by failing to fulfil the duties and obligations imposed upon it as an electric utility operator in Alberta, which among others require that the information ATCO Electric provides in its applications, filings and other representations before the Commission are honest, true, accurate and not misleading, either expressly or by omission. This contravention strikes at the core of a properly functioning regulatory system and its importance cannot be overstated.

77. Under sections 37 and 119 of the *Electric Utilities Act*, ATCO Electric must file a tariff with the Commission for approval to recover its prudent costs and expenses. It is a fundamental underlying premise of our regulatory system that regulated utilities must be honest and candid in their dealings with the regulator. They have an obligation to fully and accurately disclose to the

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<sup>30</sup> See Section 3.2 above for further discussion of the test; *Anthony-Cook*, paragraph 32.

Commission all material facts and information relevant to its decisions. As it relates to these particular circumstances, this fundamental duty is explicitly reflected in the obligation to provide “full and adequate” responses to information requests in Section 27 of Rule 001: *Rules of Practice*. More generally, this obligation underlies the entirety of the *Electric Utilities Act* and other legislation under the Commission’s ambit – the existence of information asymmetry between utilities and the regulator necessarily and critically requires honesty, candour, and full and adequate disclosure of material facts by the utility in the course of rates proceedings before the Commission.

78. As described in Section 2 above, ATCO Electric, with the full knowledge of multiple members of senior management, made the decision to direct-award the contract to Backwoods, knew that it likely violated both the ISO Rules and the Code of Conduct, and deliberately buried critical information for the purpose of hiding it from the Commission in a future regulatory proceeding. The Commission recognizes that many ATCO Electric employees involved in preparing its deferral account application were not directly involved in the events leading up to the direct-award and in many cases had no knowledge of relevant events. This does not alleviate ATCO Electric’s culpability for the deception.

79. The issue is not whether a particular ATCO Electric employee preparing an information response in the deferral account proceeding was actively intending to deceive the Commission at the time. Rather, the issue is that multiple employees had previously created and shared a set of records underlying the project (the REFs and backgrounders) in a manner inconsistent with ATCO Electric’s normal practices, to ensure that those records were not discoverable by the Commission in its regulatory process. These employees did so with the knowledge and/or prompting of senior management, or in many cases **were** senior management. Further, as it fully admitted in the settlement agreement, ATCO Electric is responsible for the conduct of its employees.

80. The Commission considers this contravention of the *Electric Utilities Act* to be deeply serious and finds that it has caused significant harm in the form of a breach of trust, both of the public and the Commission.

81. Second, the Code of Conduct is designed precisely to avoid this type of behaviour, where benefits are sought for unregulated affiliates at the expense of ratepayers. The Code of Conduct governs relationships and transactions between regulated and non-regulated affiliates within the ATCO Group of companies, to anticipate and adjust for the potential misalignment of interest between shareholders and utility customers, and avoid uncompetitive practices between utilities and their affiliates, which may be detrimental to the interests of utility customers.

82. The Code of Conduct stresses “the need to respect the spirit and intent behind the Code.” Section 1.1(a) states that one of its purposes is to prevent utilities from cross-subsidizing affiliate activities. Section 1.1(d) states that another purpose is to avoid uncompetitive practices between utilities and their affiliates, which may be detrimental to the interests of utility customers. Section 3.1.1 requires that the business and affairs of a utility be managed and conducted separately from the business and affairs of its non-utility affiliates, except as required to fulfil corporate governance, policy, and strategic direction responsibilities of the corporate group of businesses as a whole. In short, the purpose of the Code of Conduct is to prevent exactly the type of self-dealing that ATCO engaged in here, by attempting to recover significant costs above fair market value that it was only paying to Backwoods so that it could obtain a benefit to ASL.

ATCO Electric very clearly attempted to have ratepayers subsidize ASL's business, in contravention of the Code of Conduct.

83. Third, Section 7.6 of the Code of Conduct requires ATCO Electric to prepare regular compliance reports, which should include among others a comprehensive description of instances of material non-compliance with the code and any steps taken to correct such non-compliance. As particularized in Bulletin 2010-24, Inter-Affiliate Code of Conduct process changes and clarification of requirements, the Code of Conduct also required ATCO Electric to "provide a quarterly exception report within 60 days of the quarter end" where there is an "instance of non-compliance with the code or plan," with the report detailing "the non-compliance and corrective actions taken." ATCO Electric never filed any such compliance or exception reports on the matters discussed in this decision.

84. Fourth, Section 9.1.5.2 of the ISO Rules required ATCO Electric to "solicit written bids from not less than three arm's length suppliers," as the Jasper project fell into the category of acquisitions where the cost of a specific item exceeds \$50,000. This was a clear contravention; there were concerns from the outset within ATCO Electric that the direct-award to Backwoods would violate the ISO Rules, and ATCO Electric decided to do it anyway, in pursuit of a "larger pot of gold" for its unregulated affiliate, ASL.

85. The Commission finds that these contraventions are very serious, in consideration of the factors outlined in Rule 013. Factors in Rule 013 that speak to the seriousness of the contraventions, among others, include:

- (1) The contraventions involved significant sums of money and could have resulted in material financial benefits for ASL and ATCO Electric (sections 4(6) and 4(8));
- (2) ATCO Electric's contravention of the *Electric Utilities Act* was the result of manipulation, deceit or artifice, and it fraudulently misrepresented material facts in preparing its justification for the direct-award to Backwoods for the purposes of the deferral account proceeding (sections 4(9), 4(10) and 4(11));
- (3) The wrongdoing lasted for multiple years, wherein ATCO Electric had numerous chances to self-report the issue through its Code of Conduct compliance reports or otherwise – the course of wrongdoing was systematic and persistent, despite many opportunities to report its non-compliance (Section 4(17));
- (4) ATCO Electric's senior management was aware of the potential contraventions at multiple points in the process of justifying the direct-award and documenting the events to enable ATCO Electric to pursue recovery from ratepayers without discovery by the Commission in the deferral account proceeding, and lower-level employees felt pressure from management to pursue and justify the direct-award (sections 4(18), 4(19)); and
- (5) ATCO Electric did not self-report the contraventions, which only came to light through the actions of a whistleblower (Section 4(20)).

86. The Commission has also considered the harm caused by the contraventions (Section 4(1) of Rule 013), and finds that both the magnitude of the proposed \$31 million penalty and the

proposed terms and conditions are proportionate to that harm. There are two facets of the harm to ratepayers that could have arisen as a result of the contraventions.

87. The first aspect of the harm to ratepayers is the potential for actual financial harm. Had ATCO Electric successfully recovered the above fair market value costs of the Jasper project in the deferral account proceeding, ratepayers would have suffered a direct harm – they would have paid for costs that they should not be responsible for. As indicated in the settlement agreement, this harm did not materialize.

88. The Commission finds that no actual financial harm occurred as ATCO Electric will remove costs determined to be in excess of competitively obtained market value, or imprudently incurred, from its deferral account application. The Commission allowed the CCA to provide submissions in this proceeding on the harm to the customers it represents; the Commission does not agree with the CCA's central argument, which is that ratepayers have already paid the inflated costs from 2019-2022 "albeit under a deferral mechanism."

89. The Commission considers the deferral mechanism aspect of this observation to be critically important. The deferral account process is a well-established aspect of the regulatory system. Transmission direct assigned capital project costs (like the Jasper project costs) are generally subject to deferral account treatment, routinely included as interim rates in regulated transmission utilities' tariffs, and are subject to a final true-up years later in a deferral account proceeding. That there is a true-up in a deferral account, which is used specifically to deal with instances where variances are expected, cannot be considered "financial harm" to customers. Rather, any true-up, plus or minus, is a by-product of the deferral account regulatory process that treats customers and the utility fairly.

90. The Commission considers that the settlement agreement fully addresses the potential for actual financial harm to ratepayers. ATCO Electric must amend its deferral account application to remove any costs incurred for the Jasper project that are above fair market value, and this will be considered by the Commission panel assigned to the deferral account proceeding. That panel will determine what the fair market value of the work is, based on the evidence of all the parties participating in the deferral account proceeding. The Commission has taken this into account when assessing the overall fitness of the settlement agreement.

91. The second aspect of the harm to ratepayers is difficult to quantify, but very serious. There is a broader harm to ratepayers and all other participants in the regulatory system resulting from ATCO Electric's actions. In making its decisions, the Commission **must** be able to rely on the information presented by the utility as full, fair and accurate. This is a fundamental premise of the *Electric Utilities Act* and our regulatory system more generally, as set out above. ATCO Electric's contraventions represent an egregious breach of trust, which has eroded the public's trust and confidence in the Commission's regulatory process, and the Commission's trust of ATCO Electric. Regardless of the financial harm suffered, this harm is in and of itself material and significant.

92. In assessing the settlement agreement, the Commission has carefully considered whether the proposed monetary penalty, ATCO Electric's withdrawal of the claim for above-market costs in the deferral account proceeding, and the associated terms and conditions as discussed below, are reasonable in addressing that harm. The Commission finds that taken together, these

components of the settlement agreement are reasonable, and approving the settlement is in the public interest.

93. The Commission finds that the \$31 million penalty is significant. The parties indicated that as far as they are aware, the high watermark for similar sanctions (administrative monetary penalties) in Canada is \$33 million; in that case the misconduct was deemed to be “at the highest end of the scale of seriousness.”<sup>31</sup> In Decision 3110-D03-2015, the administrative penalty portion of the final sanction approved by the Commission was \$25 million.<sup>32</sup> The Supreme Court of Canada has commented that in determining the magnitude of monetary penalties, the amount “should reflect the objective of deterring non-compliance with the administrative or regulatory scheme,” and must be large enough that it is not merely a “cost of doing business,”<sup>33</sup> or, as the Alberta Court of Appeal put it, a “licencing fee.”<sup>34</sup>

94. The Commission considers that the \$31 million penalty does not reflect merely a cost of doing business for ATCO Electric in this case. The Commission notes that the \$80-100 million “larger pot of gold” in camp contracts that ATCO Electric attempted to gain on behalf of ASL through its misconduct represents capital costs, not profit, and also that the \$31 million penalty is imposed alongside ATCO Electric’s obligation to amend its deferral account application to exclude all costs above fair market value for the Jasper project (a currently estimated reduction of \$10.8 million). This means that the Commission can be reasonably assured that the benefit gained by ATCO Electric through this contravention does not outweigh the proposed penalty, nor render the \$31 million penalty a mere licencing fee. Instead, the magnitude of the penalty encourages both general and specific deterrence – the penalty sends a message to all utilities operating under the Commission’s jurisdiction that this type of conduct will not be taken lightly, and carries significant repercussions.

95. The proposed administrative monetary penalty is within the Commission’s jurisdiction to award under Section 63 of the *Alberta Utilities Commission Act*, and the Commission considers it to be proportionate to the nature of the contraventions.

*The terms and conditions proposed are protective and preventative, in keeping with the Commission’s sanctioning objectives*

96. The Commission has recognized before that its sanctioning authority is intended to achieve general and specific deterrence, encourage compliance and protect the public. Sanctions are intended to be protective and preventative, not punitive. In that light, the Commission considers that the terms and conditions proposed in the settlement in addition to the monetary penalty are reasonable, proportionate to the severity and the circumstances of the offence, and most importantly have been well-designed to mitigate the likelihood that similar conduct may reoccur. These mitigations are intended to assist in restoring the trust of both the public and the Commission.

97. Enforcement staff and ATCO Electric have agreed to the terms and conditions set out in paragraph 12(b)(i-ix) of the settlement agreement. Among others, ATCO Electric must:

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<sup>31</sup> *Re Samji*, 2015 BCSECCOM 29.

<sup>32</sup> Decision 3110-D03-2015, paragraphs 34-45.

<sup>33</sup> *Guidon v Canada*, 2015 SCC 41, paragraphs 77 and 80.

<sup>34</sup> *Walton v Alberta (Securities Commission)*, 2014 ABCA 273, paragraph 165.

- (1) develop and implement a knowledge continuity plan for regulatory applications that outlines the types of documents that must be retained;
- (2) have a senior officer (the President, ATCO Electric) certify that the materials in ATCO Electric's next deferral account application are full and accurate;
- (3) internally audit compliance with the above two requirements for at least three years and file those reports with the Commission;
- (4) file with the Commission the results of an internal review of all payments made by ATCO Electric to affiliates or joint venture partners and related entities from 2018-2021, intended to identify single-sourced contracts and determine the circumstances of such arrangements;
- (5) file with the Commission an amended whistleblower program for the ATCO Group of companies that ATCO Ltd. institutes after receiving advice from an independent third party; and
- (6) file with the Commission an independent third-party report reviewing the implementation of the terms and conditions agreed upon in the settlement, and identify any recommendations made that have not been implemented and why.

98. The Commission finds that the terms and conditions proposed have been targeted at the conduct from which the contraventions arose, and are designed to encourage compliance, help restore trust by increasing transparency and implementing appropriate compliance systems, and ensure accountability.

99. The settlement agreement also includes at Section 13 a number of undertakings voluntarily made by ATCO Ltd., ATCO Electric's unregulated parent company. The parties ask the Commission to take these undertakings into account when assessing the settlement agreement, notwithstanding that ATCO Ltd. is not a party to the settlement agreement. However, given the nature of the contraventions, namely the involvement of unregulated affiliates, the Commission finds it reasonable to take into account the undertakings voluntarily agreed upon by ATCO Ltd. in assessing the settlement agreement as a whole. Moreover, ATCO Electric has agreed that Enforcement staff and/or the Commission may take into account a failure by ATCO Ltd. to fulfil its undertakings in the event of any future compliance concerns or contraventions by ATCO Electric.

100. Similar to the terms and conditions described above, ATCO Ltd. undertakes to review and improve its policies for procurement, strengthen controls so that no ATCO business unit can commit ATCO utilities to future actions, separate its compliance and regulatory functions, implement additional compliance measures, and enhance training, among others. The Commission considers that the ATCO Ltd. undertakings similarly support the goals of specific and general deterrence, and help reassure it that the likelihood of similar conduct reoccurring will be lower in the future. The Commission has accordingly taken these undertakings into account in assessing the overall settlement and considers that they favour approval of the settlement.

101. Finally, the Commission recognizes that the terms and conditions proposed in the settlement agreement come with their own associated costs. The settlement agreement specifies



that ATCO Electric must also pay the costs of Enforcement staff's external legal counsel, and cannot seek to recover from ratepayers any of the costs associated with the above terms and conditions or otherwise arising out of the settlement, whether incurred by ATCO Ltd. or ATCO Electric. While the Commission does not expect these costs to be material compared to the administrative penalty amount, it considers that holding ATCO Electric to account going forward, at its own cost and not on ratepayers' account, is an outcome that promotes the sanctioning goals of general and specific deterrence.

102. The Commission finds that ATCO Electric's deception was unprecedented in the Commission's knowledge and deeply corrosive of the proper functioning of our ratemaking system in Alberta. However, the Commission has taken into account that ATCO Electric cooperated with Enforcement staff's investigation, and agreed to a significant settlement, thereby saving regulatory time and resources in avoiding a contested application. The Commission considers that adherence to the terms and conditions of the settlement and the undertakings voluntarily agreed to by ATCO Ltd. should help rehabilitate this contravener and prevent the risk of reoccurrence. The Commission considers this cooperative behaviour on ATCO's part to be a good beginning for reformative conduct on its part in the future.

*Considered globally, the Commission finds that the settlement is fit and reasonable*

103. Taking into account the magnitude of the proposed \$31 million administrative monetary penalty, that the settlement ensures that any above fair market costs will not be recovered from ratepayers, and the terms and conditions achieve various protective and preventative purposes and come with their own associated costs that ATCO Electric cannot recover from customers, the Commission considers that the settlement is fit and reasonable, falling within a range of reasonable outcomes given the circumstances.

104. The Commission has carefully considered the settlement agreement in its entirety and is satisfied that accepting this settlement agreement is consistent with the public interest and will not bring the administration of justice into disrepute.<sup>35</sup>

#### **4 Order**

105. For the reasons stated above, the Commission approves the settlement agreement without variation, **and hereby orders:**

- (1) The negotiated settlement agreement between Enforcement staff and ATCO Electric, attached as Appendix 2 to this decision, is approved without variation.
- (2) ATCO Electric must pay an administrative penalty in the amount of thirty-one million dollars (\$31,000,000) pursuant to sections 63(1)(a) and 63(2)(a) of the *Alberta Utilities Commission Act*. The payment may be made via wire transfer,

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<sup>35</sup> *R v GWC*, 2000 ABCA 333, paragraph 18.

certified cheque or bank draft made out to the General Revenue Fund of Alberta and delivered to the AUC within 30 business days of the date of the order.

- (3) ATCO Electric must abide by the terms and conditions stipulated in Clause 12(b)(i-ix) in the settlement agreement pursuant to Section 63(1)(b) of the *Alberta Utilities Commission Act*.
- (4) ATCO Electric must pay, on a full indemnity basis, the invoiced costs of Enforcement staff's external legal counsel for the investigation and hearing of the proceeding pursuant to Section 66 of the *Alberta Utilities Commission Act*, in the form of a wire transfer, certified cheque or bank draft made out to the Alberta Utilities Commission and delivered to the AUC within 30 business days of the date of the order. ATCO Electric shall not claim or seek to recover these costs in any AUC proceeding.
- (5) ATCO Electric shall not claim or seek to recover in any AUC proceeding any incremental and/or new costs arising out of the settlement agreement, whether incurred by ATCO Ltd. or ATCO Electric, as set out in paragraph 12(d) of the settlement agreement.

106. The Commission further acknowledges the commitments made by ATCO Ltd. in the settlement agreement and approves this settlement agreement on the basis that ATCO Ltd. will abide by those commitments.

Dated on June 29, 2022.

**Alberta Utilities Commission**

*(original signed by)*

Douglas A. Larder, QC  
Vice-Chair

**Appendix 1 – Proceeding participants**

<b>Name of organization (abbreviation) Company name of counsel or representative</b>
Alberta Utilities Commission Enforcement A. Gonsalves, Stockwoods LLP J. Safayeni, Stockwoods LLP C. Wall, Alberta Utilities Commission Enforcement
ATCO Electric Ltd. L. Cusano, Torys LLP L. Plumpton, Torys LLP L. Keough, Bennett Jones LLP
Consumers' Coalition of Alberta (CCA) J. Wachowich

Alberta Utilities Commission  Commission panel D.A. Larder, QC, Vice-Chair  Commission staff K. Macnab (Commission counsel) L.M. Berg (Commission counsel) T. Richards C. Strasser
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## Appendix 2 – Settlement agreement

[\(return to text\)](#)



Appendix 2 -  
Settlement agreeme  
(consists of 38 pages)

AUC PROCEEDING NO. 27013

## BEFORE THE ALBERTA UTILITIES COMMISSION

ALBERTA UTILITIES COMMISSION ENFORCEMENT STAFF

Applicant

and

ATCO ELECTRIC LTD.

Respondent

## SETTLEMENT AGREEMENT

### RECITALS

- A. WHEREAS on November 29, 2021, Alberta Utilities Commission Enforcement Staff (**Enforcement staff**) filed an application pursuant to sections 8 and 63 of the *Alberta Utilities Commission Act* (**Application**) for the commencement of a proceeding against ATCO Electric Ltd. (**ATCO Electric**), alleging that ATCO Electric violated sections 9.1.5.2 and 9.1.5.6 of the ISO Rules Part Two – Market Participation (Transmission) (**ISO Rules**), subsections 1.1(a), 1.1(d), 7.6(e), 7.6(f), 7.6(g) and section 3.1.1 of the ATCO Inter-affiliate Code of Conduct (**Code of Conduct**), the *Electric Utilities Act* and the duty of honesty and candour.

B. WHEREAS on December 6, 2021 the Alberta Utilities Commission (**AUC**) commenced **Proceeding 27013** to consider the Application (**the Proceeding**).

C. WHEREAS Enforcement Staff and ATCO Electric (together, **the Parties**) have reached a comprehensive settlement on all issues of fact, contraventions and penalty in the Proceeding as set out herein (**Settlement**) and further agree that the Commission has the jurisdiction to approve the Settlement and all specific requests for approval made herein.

NOW THEREFORE, in consideration of the covenants, agreements and commitments set forth herein, it is agreed by the Parties that the Proceeding be settled, subject to the approval of the AUC, on the following terms and conditions:

## **PART I – ACKNOWLEDGEMENTS AND REPRESENTATIONS**

1. The Parties acknowledge this Settlement is a comprehensive package dealing with all outstanding issues arising in the Proceeding and will jointly ask the AUC to accept and approve the Settlement in its entirety and without variation.

2. ATCO Electric acknowledges and agrees that:

- (a) It has had the opportunity to obtain and has received independent legal advice with respect to the Settlement;
- (b) It has no issues or objections as to procedural fairness;
- (c) It is entering into the Settlement voluntarily, understanding the nature of the allegations made against it in the Application, and with full knowledge of the

consequences of agreeing to the Settlement and admitting to the contraventions set out herein;

- (d) Although it has reached an agreement with Enforcement staff on the terms of the proposed penalty, it understands that such agreement does not bind the AUC;
- (e) If the Settlement is accepted and approved by the AUC without variation:
  - i. The AUC's decision and order will constitute a fair and reasonable resolution of all matters arising in the Proceeding;
  - ii. The AUC's decision and order will be final and binding; and
  - iii. ATCO Electric will abide by and fully comply with the AUC's decision and order.
  - iv. ATCO Electric will not initiate any appeal or other proceeding seeking in any way to challenge the AUC's decision and order.

3. The Settlement includes representations by ATCO Electric as to undertakings voluntarily made by ATCO Ltd. ATCO Electric represents that:

- (a) ATCO Ltd. is the parent company within the ATCO Group of companies, which includes both regulated and non-regulated entities;
- (b) ATCO Ltd. is the majority shareholder of Canadian Utilities Limited, a designated public utility pursuant to the *Public Utilities Designation Regulation (PUDR)*;

- (c) Canadian Utilities Limited owns 100 per cent of the shares of CU Inc., another designated public utility under the PUDR; and
  - (d) CU Inc. owns 100 per cent of the shares of ATCO Electric.
4. ATCO Electric further represents that, although ATCO Ltd. is not a respondent in the Proceeding and does not fall under the AUC's jurisdiction, ATCO Ltd. has committed to undertake the steps described in paragraph 13 in light of the agreed statement of facts and contraventions forming part of the Settlement, and in order to work towards restoring the public's trust.
5. In considering the terms and conditions to be imposed on ATCO Electric under section 12(b) of the Settlement and whether they reasonably address Contraventions (detailed and defined in Part II below) and the related public interest considerations, the Parties will jointly ask the AUC to take into account the undertakings made by ATCO Ltd. as represented by ATCO Electric and set out in paragraph 13. In addition, the Parties will ask the AUC to consider ATCO Electric's agreement that any failure of ATCO Ltd. to fulfil those undertakings, may be taken into account by Enforcement staff and/or the AUC in the event of any future compliance concerns or contraventions involving ATCO Electric.
6. The Parties agree that in the event the AUC considers rejecting the Settlement or any part of it, and provides notice to the Parties of its concerns, the Parties will engage in further discussions and make best efforts to agree on further submissions to the AUC to address those concerns.



## **PART II – THE AGREED FACTS AND ATCO ELECTRIC’S ADMITTED CONTRAVENTIONS**

7. The Parties agree that the agreed statement of facts (**ASF**) attached as **Appendix “A”** is included as part of this Settlement and sets out the facts to which the Parties agree and admit for the purposes of the Proceeding as well as the contraventions admitted by ATCO Electric. The Parties agree the AUC can accept the facts set out in the ASF as true and proven in the Proceeding.

8. Based on the facts contained in the ASF, and as expressly acknowledged at paragraph 150 thereof, ATCO Electric admits that it has:

- (a) Contravened sections 9.1.5.2 and 9.1.5.6 of the ISO Rules;
- (b) Contravened the purpose, intent, spirit and letter of subsections 1.1(a), 1.1(d) and 3.1.1 of the Code of Conduct;
- (c) Contravened subsections 7.6(e), (f) and (g) of the Code of Conduct, and the quarterly exception report requirement set out in Bulletin 2010-24<sup>1</sup>; and
- (d) Contravened the *Electric Utilities Act* by failing to fulfil the duties and obligations imposed upon it as an electric utility owner and operator in Alberta, which among other things, require that the information ATCO Electric provides in its applications, filings and other representations before the AUC be honest, true, accurate, and not misleading, either expressly or by omission  
  
(together, the **Contraventions**).

<sup>1</sup> Bulletin 2010-24: *Inter-Affiliate Code of Conduct process changes and clarification of requirements*.

9. Enforcement staff agree to not undertake any further prosecutions or commence any further enforcement proceedings against any ATCO affiliated entities or individuals relating to the facts and Contraventions in the ASF, provided that ATCO Electric complies with the terms of the Settlement and any related decision and orders made by the AUC.

### **PART III – JOINT SUBMISSION ON PENALTY AND COSTS**

10. The Parties will jointly request that the AUC issue a decision accepting the Settlement, without variation, and issue an order imposing on ATCO Electric the administrative penalty, the other terms and conditions, and the direction to pay costs collectively detailed in paragraph 12 below.

11. On November 26, 2021, ATCO Electric filed an exception report in accordance with Bulletin 2010-24 bringing itself into compliance with the quarterly exception report requirement set out in that bulletin. Accordingly, Enforcement Staff agree that no further order is required regarding this specific contravention.

12. Regarding the remaining Contraventions, the Parties agree to jointly request that the AUC issue an order (**Order**):

- (a) Requiring ATCO Electric to pay an administrative penalty in the amount of THIRTY-ONE MILLION DOLLARS (\$31,000,000) pursuant to subsections 63(1)(a) and 63(2)(a) of the *Alberta Utilities Commission Act*. The payment may be made via wire transfer, certified cheque or bank draft made out to the General Revenue Fund of Alberta and delivered to the AUC within 30 business days of the date of the Order;

(b) Imposing on ATCO Electric the following terms and conditions pursuant to subsection 63(1)(b) of the *Alberta Utilities Commission Act*:

i. ATCO Electric shall amend its application in AUC Proceeding 26573 to exclude from its claim all costs above fair market value for matting, brushing and hydrovac services for the Jasper Interconnection Project, currently estimated by ATCO Electric to be \$10.8 million.

ii. ATCO Electric shall develop and implement a knowledge continuity plan regarding regulatory applications, which will establish a framework with respect to document control and retention. This policy will outline the types of documents that need to be retained and how documents are to be stored electronically. This policy will be in place by September 30, 2022 and communicated to all regulatory staff at least once per year.

iii. ATCO Electric shall include with its filed application for its next deferral account application a form of certification from a senior officer of ATCO Electric certifying that to the best of his/her knowledge, the materials filed in that application are full and accurate.

iv. ATCO Electric shall be audited annually by Internal Audit regarding the implementation of and compliance with the terms and conditions outlined in subparagraphs 12(b)(ii) and (iii) for a period of 3 years, at which time the future frequency of such audits and filing of associated reports will be reviewed by the Chief Financial Officer of Canadian Utilities Limited to determine the appropriateness of a continued requirement for annual audits. ATCO Electric will

file reports of the results of these audits, including the determination of the Chief Financial Officer of Canadian Utilities Limited (**Chief Financial Officer**), with the AUC upon completion in such manner as the AUC directs.

v. ATCO Electric shall file with the AUC no later than June 30, 2022 and in such manner as the AUC directs, the results of the review undertaken by Internal Audit of all payments made by ATCO Electric to an ATCO affiliate, ATCO joint venture partners or entities related to joint venture partners during the period January 1, 2018 to December 31, 2021. The purpose of the review is to identify single sourced contracts and, to the extent there are any, determine the circumstances of each arrangement and whether there is any link between the arrangement and the ATCO affiliate. The review was initiated in October 2021 and the results will be reported internally by Internal Audit to the ATCO Electric management team, the Chief Financial Officer and the Audit and Risk Committees (as defined in paragraph 13(e) below), by May 2022.

vi. ATCO Electric shall file with the AUC no later than July 31, 2023 and in such manner as the AUC directs the amended whistleblower program for the ATCO Group of Companies, that ATCO Ltd. institutes upon receiving advice regarding process improvement opportunities for whistleblower investigation, reporting and protection from an independent third-party advisory firm with appropriate expertise.

vii. ATCO Electric shall file with the AUC, no later than July 31, 2023 and in such manner as the AUC directs, a full copy of a report made by the independent

third party reviewer engaged by ATCO Ltd. as set out in paragraph 13(g) below. In this filing, ATCO Electric shall also identify any recommendations made by the third party reviewer that have not been implemented and the reasons why.

viii. ATCO Electric shall file confirmation of its completion of the requirements of subparagraph 12(b) with the AUC no later than July 31, 2023 in such manner as directed by the AUC.

ix. ATCO Electric shall file confirmation of ATCO Ltd.'s completion of the undertakings outlined in paragraph 13 with the AUC no later than July 31, 2023 in such manner as directed by the AUC. Any failure of ATCO Ltd. to fulfil those undertakings may be taken into account by Enforcement staff and/or the AUC in the event of any future compliance concerns or contraventions involving ATCO Electric.

(c) Requiring ATCO Electric to pay, on a full indemnity basis, the invoiced costs of Enforcement Staff's external legal counsel for the investigation and hearing of the Proceeding pursuant to section 66 of the *Alberta Utilities Commission Act*, in the form of a wire transfer, certified cheque or bank draft made out to the Alberta Utilities Commission and delivered to the AUC within 30 business days of the date of the Order. ATCO Electric shall not claim or seek to recover these costs in any AUC proceeding.

(d) Directing that ATCO Electric shall not claim or seek to recover in any AUC proceeding any incremental and/or new costs arising out of the Settlement whether incurred by ATCO Ltd. or ATCO Electric. Without limiting the foregoing,

incremental costs are anticipated to arise from the requirements of paragraphs 13(c), (d) and (f) and new costs are anticipated to arise from the requirements of paragraphs 12(b)(ii), (iv), (v), (vi), (vii) (viii) and (ix) and paragraphs 13(a), (b), (e) and (g).

13. ATCO Electric represents that ATCO Ltd. commits to undertake the following steps in light of the ASF, the Contraventions, and in order to work towards restoring the public's trust:

- (a) ATCO Ltd. will cause a review of and modification to procurement and contracting policies and practices across the ATCO companies to strengthen controls to ensure that no ATCO business unit can enter into a contract which commits any ATCO Utilities to future actions. Potential contracts considered for sole sourcing by any of the ATCO Utilities (namely ATCO Electric Transmission, ATCO Electric Distribution, ATCO Gas Distribution and ATCO Pipelines) will be first reviewed by procurement personnel to determine if a contractual relationship exists between the counterparty (or an entity related to the counterparty) and any other ATCO company. If a contractual relationship is found to exist, steps will be taken to ensure and demonstrate that there will be no harm to utility customers from the sole sourcing of the contract by the ATCO Utilities. ATCO's procurement practices will also include a review to ensure compliance with ISO Rules where applicable. These policies and practices will be overseen by ATCO's Common Services Supply Chain group, which is under separate management from ATCO Electric.
- (b) ATCO Ltd. will separate the Compliance function from the Regulatory function or any operational functions within ATCO Utilities upon receiving advice from an

independent third-party advisory firm as to how to best structure this function. This separation is to ensure independence of the compliance function from the management of the ATCO Utilities.

- (c) ATCO Ltd. will require the Compliance Officer to implement additional compliance measures which will require a signed certificate from the Vice President Common Services attesting that they have completed an annual review of the implemented procedures put in place to address procurement and contracting policies outlined in paragraph 13(a) and that no contraventions have occurred. Additionally, the Compliance Officer will review the Internal Audit reports identified in paragraph 12(b)(iv) for the next three years prior to signing off on the annual compliance report.
- (d) ATCO Ltd. will implement the following:
  - i. Enhanced training to all ATCO Utilities' employees regarding the spirit and intent of the Code of Conduct to be conducted annually, along with additional in-depth scenario-based training to compliance personnel;
  - ii. Training and education materials around compliance requirements of the ATCO Utilities for delivery to the management teams and select departments of all non-regulated ATCO companies to ensure that compliance requirements are known and understood across ATCO Ltd.; and
  - iii. Training and expectation setting among individuals participating in regulatory proceedings before the AUC to remind and reinforce disclosure

requirements and expectations around regulatory conduct within regulatory proceedings. This training will be delivered at the beginning of each major regulatory application.

- (e) The boards of ATCO Ltd. and Canadian Utilities Limited will cause their Audit & Risk Committees, which are sub-committees of the Boards of ATCO Ltd. and Canadian Utilities Limited, to review and ensure that all terms and conditions to be performed by ATCO Electric and the undertakings of ATCO Ltd. have been established and put into practice.
- (f) ATCO Ltd. shall amend the whistleblower program for the ATCO Group of Companies on or before September 30, 2022, upon receiving advice regarding process improvement opportunities for whistleblower investigation and reporting from an independent third-party advisory firm with appropriate expertise.
- (g) ATCO Ltd. will engage an independent third party with appropriate expertise to:
  - i. Review and ensure the implementation of the terms and conditions to be performed by ATCO Electric as set out in paragraph 12(b)(ii) and the measures to which ATCO Ltd has committed in paragraphs 13(a), (b), (d) and (f).
  - ii. Prepare and provide a report no later than June 30, 2023, that will include confirmation of the above, as well as any recommendations for improvements or modifications, including to the systems, practices and policies of ATCO Electric and ATCO Ltd., as set out in paragraphs 12(b)(ii)



and 13(a), (b), (d) and (f), so as to protect against reoccurrence of the  
Contraventions.

- (h) ATCO Ltd. will fulfil the requirements of paragraphs 13(a) through (g) on or before  
June 30, 2023.

DATED this 14<sup>th</sup> day of April, 2022

**Alberta Utilities Commission  
Enforcement Staff**

**ATCO Electric Ltd.**

Per: *Catherine Wall*  
Catherine Wall, counsel  
AUC Enforcement staff

Per: *M/Bayley*  
Melanie Bayley, President

## AGREED STATEMENT OF FACTS AND CONTRAVENTIONS

**This agreed statement of facts and contraventions contains facts admitted for the purpose of dispensing with formal proof thereof. This agreement is being entered into by ATCO Electric Ltd. and Alberta Utilities Commission Enforcement staff (Enforcement staff) solely for the purpose of resolving all matters raised in AUC Proceeding 27013.<sup>1</sup>**

### **1 Background: ATCO Entities, Personnel and Projects**

#### ***A. ATCO entities and personnel***

1. ATCO Electric Ltd. (**ATCO Electric**) is the owner of an electric utility as defined in Section 1(o) the *Electric Utilities Act* and a designated owner of a public utility pursuant to the *Public Utilities Designation Regulation*. It is a regulated electricity transmission and distribution utility serving customers in northern and east-central Alberta, which builds, operates and maintains transmission and distribution lines.
2. ATCO Structures & Logistics Ltd. (**ASL**) is a non-regulated affiliate of ATCO Electric. It provides modular construction services for workforce and residential housing, modular facilities, site support services as well as logistics and operations management. ASL provides relocatable structures, permanent offsite construction, workforce camps and lodges.
3. **ATCO Ltd.** is the parent company within the ATCO Group of companies. The ATCO Group of companies includes both regulated and non-regulated entities; among them, ATCO Electric and ASL.
4. Attached as **Schedule 1** is a copy of the ATCO Group organization chart for the year 2020.

#### ***B. Jasper Interconnection Project***

5. On May 4, 2018, the Alberta Utilities Commission (**AUC**) approved the Jasper Interconnection Project consisting of a new substation and transmission line to connect the Jasper area to the rest of the Alberta Interconnected Electric System. The project was energized on May 9, 2019. Below is a map of the project area.

<sup>1</sup> For further clarity this agreement is not an admission by ATCO Electric for the purpose of any other proceeding, including Proceeding 26573.



6. Two transmission facility owners were involved in the project: ATCO Electric and AltaLink Management Ltd. ATCO Electric's involvement was to construct and operate a new substation and a new transmission line approximately 45 kilometres (km) in length.

7. ATCO Electric originally estimated that its portion of the Jasper Interconnection Project would cost a total of \$84 million, with access matting costs estimated to be approximately \$6.6 million (in 2016 dollars) of that total amount.

8. In Proceeding 26573 (**Deferral Account Proceeding**) commenced in 2021, the actual costs claimed by ATCO Electric for recovery in respect of the Jasper Interconnection Project are \$119 million, of which approximately \$31 million are for matting services.

### ***C. The Trans Mountain Pipeline Expansion Project***

9. The Trans Mountain Pipeline Expansion Project is an energy project distinct from the Jasper Interconnection Project.

10. ATCO Electric has no involvement in the Trans Mountain Pipeline Expansion Project.

11. The \$12.6 billion Trans Mountain Pipeline Expansion Project is a twinning of an existing 1,150-km oil pipeline between Strathcona County (near Edmonton), Alberta, and Burnaby, British Columbia.

12. The Trans Mountain Pipeline Expansion Project has established camp communities to accommodate temporary workers constructing the pipeline. There are presently five major camp communities, three of which are being operated by a joint venture involving ASL and Simpco Resources LLP (**SR LLP**) under the name Tsetsk'wem' Management Services (**TMS**). These

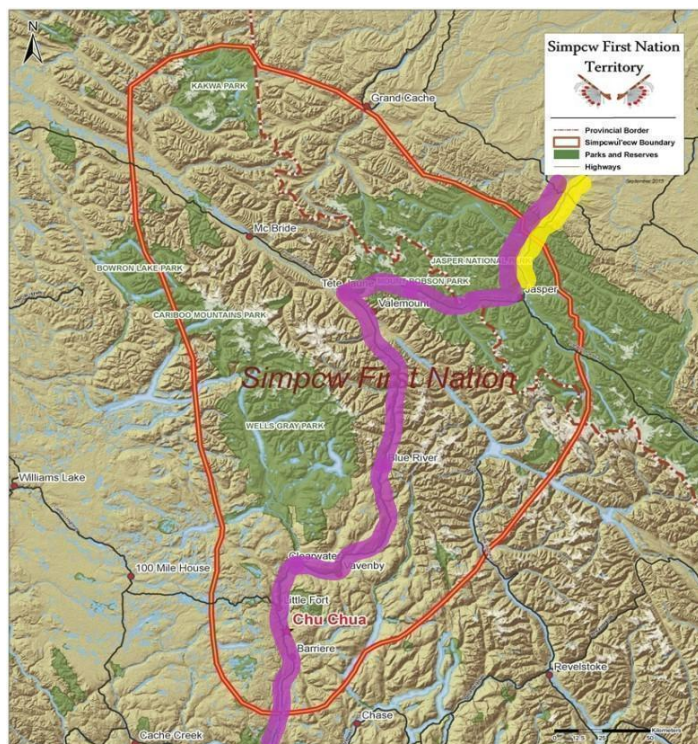
three camp communities will house a total of approximately 1,700 workers. SR LLP is owned and operated by the Simpcw First Nation (**Simpcw**).

***D. The Simpcw First Nation, the Trans Mountain Pipeline Expansion Project and the Jasper Interconnection Project***

13. The project areas associated with the Jasper Interconnection Project and the Trans Mountain Pipeline Expansion Project fall inside lands that Simpcw claim as their traditional territory.

14. Other First Nations also assert that the project areas fall within their traditional territories. Simpcw was one of 26 Indigenous communities invited to participate in the Aboriginal forum with Parks Canada during consultations for the Jasper Interconnection Project. Of these communities, 23 participated in the consultations. Simpcw was not identified by Parks Canada as having any greater right in the area than other participants in the forum.

15. Below is a map of the traditional territory of Simpcw bordered in red with the Jasper Interconnection Project area highlighted in yellow, and the Trans Mountain Pipeline Expansion Project highlighted in purple.



16. In February of 2015, ATCO Electric began consulting with 23 Indigenous groups, including Simpcw, regarding the Jasper Interconnection Project.

## 2 Events leading up to ATCO Electric's direct award of the brushing, matting and hydrovac services contract

### *A. Contracts between ASL and Simpcw, and between Simpcw and other ATCO entities*

17. On May 26, 2016, ASL and SR LLP, a commercial entity wholly owned and operated by Simpcw, signed a joint venture agreement (**Joint Venture Agreement**). A copy of the Joint Venture Agreement is attached at **Tab 1**.

18. The Joint Venture Agreement expresses the parties' shared desire to establish a cooperative relationship to facilitate the development of energy and infrastructure projects, with the specific identification of proposed project opportunities including all temporary work force accommodation, camp support and management services required during and after completion of the Trans Mountain Pipeline Expansion Project, a mining development project, Valemount Glacier Desintation community development project, a power generation development and first response facility services within the territory.

19. Although not specifically mentioned in the proposed list of opportunities in Appendix B of the Joint Venture Agreement, Article 1 of the Joint Venture Agreement defines the "energy and infrastructure projects" to which the agreement applies as including "electricity transmission and distribution, and all other projects which are in the Territory and fall within the business portfolio of ATCO, SR LLP and their respective Affiliates."

20. Several provisions in the Joint Venture Agreement, including the above referenced Article 1, purport to bind not only ASL but also its ATCO affiliates in providing certain exclusive work opportunities to SR LLP – including with respect to services relating to electrical transmission and distribution projects (which ASL does not build or own, but ATCO Electric does).

21. The Joint Venture Agreement with ASL and SR LLP contains mechanisms to bring forward disputes/claims. However, at no point did SR LLP trigger any of the provisions of the Joint Venture Agreement that would seek to terminate the agreement, nor was this matter raised in management committee meetings as contemplated in the Joint Venture Agreement.

22. Simpcw's relationship with ATCO companies pre-dates the Joint Venture Agreement. Simpcw and ATCO Energy Solutions Ltd. signed a Relationship Agreement dated January 12, 2014. In October 2014, SR LLP and ATCO Energy Solutions Limited created a Project Charter designed "to pursue sustainable business opportunities in the North Thompson valley." A copy of the Relationship Agreement is attached at **Tab 2**. A copy of the Project Charter is attached at **Tab 3**.

### *B. ATCO Electric conducts a tender for the Jasper matting work before becoming aware of the Joint Venture Agreement*

23. The Jasper Interconnection Project required ATCO Electric to conduct access/matting work to mitigate potential environment impacts in Jasper Park while the transmission line was being built. The project also required clearing/slashing work to remove brush around the transmission corridor and hydrovac services.

24. In June 2017, consistent with its usual practice, ATCO Electric tendered the matting services portion of the brushing, matting and hydrovac services required for the Jasper Interconnection Project through a competitive bidding process.
25. On June 9, 2017, ATCO Electric issued Request For Proposals #411914 (**2017 RFP**) to seven pre-qualified bidders to provide matting services for the Jasper Interconnection Project. A copy of the 2017 RFP is attached at **Tab 4**.
26. The vendors to which the 2017 RFP was issued were pre-qualified to provide matting services through ATCO Electric's Contractor Qualification Network. ATCO Electric received six compliant bids in response to the 2017 RFP and evaluated each of those bids. ATCO Electric considered all of the bidders to be capable of performing the matting work. T Ltd., a pre-qualified vendor, was the lowest cost service provider that bid on the 2017 RFP. T Ltd. is a large, experienced matting and earthworks contractor with 14 offices across Western Canada, approximately 100,000 access mats in their inventory and 2,800 completed projects since its inception in 2006. T Ltd. is not a First Nation vendor.
27. Neither SR LLP, nor any other entity associated with Simpcw, submitted a bid for the matting work in response to the 2017 RFP. Neither SR LLP, nor any other entity associated with Simpcw, was a pre-qualified vendor, nor were they invited by ATCO Electric to submit a bid for the work.
28. The 2017 RFP was cancelled by ATCO Electric on August 14, 2017, due to delays in obtaining AUC approval for the project.

***C. ASL advises ATCO Electric of the Joint Venture Agreement and Simpcw's position***

29. In July 2017, TMS, a joint venture between ASL and SR LLP made pursuant to the Joint Venture Agreement in 2016, received an RFP to bid on camp services for the Trans Mountain Pipeline Expansion Project. In the months that followed, TMS provided a "pre-scope work proposal" for the camp services contract, and had meetings with Ledcor Pipeline Limited, the entity that issued the RFP, to discuss that proposal.
30. The camps were expected to be located on Simpcw's traditional territory, and the work on the camps was a "guaranteed opportunity" for Simpcw pursuant to a master business agreement Simpcw had with Ledcor. From the period of July 2017 to March 2018, pre-contract work on the camp services for the Trans Mountain Pipeline Expansion Project progressed. Special permits were sought and approved by the town of Valemount related to the TMS camp itself. TMS also provided detailed camp options and pricing to Ledcor and was authorized to engage in certain pre-construction activities, which it undertook. Efforts related to the camp services contract only ceased upon direction from Ledcor, related to the acquisition and reconsideration of the Trans Mountain Pipeline Expansion by the Government of Canada. The contract between TMS and Ledcor in respect of the camp contract work was signed on August 28, 2018. Documents discussing the work to be completed on the camp contracts and directions ceasing the work are attached at **Tab 5**.
31. In or around March 2018, Simpcw expressed to ASL that it (Simpcw) expected to be directly awarded the contract for clearing and slashing, hydrovac, and access and matting

services work in respect of the Jasper Interconnection Project. This position was based on Simpcw's interpretation of the commitment made in the Joint Venture Agreement, which it viewed as binding all ATCO Group companies, including specifically ATCO Electric. At the time, Simpcw was upset and advised that it may back out of the Joint Venture Agreement and partner with a company other than ASL on the bid for the camp contracts, namely, Horizon North, should ATCO Electric not directly award the work on the Jasper Interconnection Project to it.

32. On March 15, 2018, an internal ASL briefing document prepared by Brook CARPENTER (Manager, Indigenous Business Development and Relations at ASL) and titled "*ISSUE: ASL JV with Simpcw First Nation at Risk if ATCO Electric does not provide Direct Awards for Jasper Interconnection Project*" (**Briefing Note**), documented the risk to the Simpcw First Nation relationship and the Joint Venture Agreement. Simpcw stated that "ATCO needs to treat the Simpcw First Nation with the same respect that the Simpcw has treated ATCO, and should be willing to provide direct awards for the JIP opportunities." Furthermore, Simpcw stated that "ATCO should move mountains to ensure these 2 contracts are directly awarded to the Simpcw, as the Simpcw are solely responsible for bringing Kinder Morgan, TranMountain Expansion camp Opportunities to ASL...\$80-100M capital costs." The Briefing Note also accurately documents the Simpcw's position that "Horizon North ... has offered a compelling partnership opportunity for camps and the Simpcw would be willing to back out of the JV with ATCO if they don't get the respect that the Simpcw has provided to ATCO." Simpcw's position raised concerns with ASL regarding damage to its productive working relationship with Simpcw, and the potential loss of the camp contracts for the Trans Mountain Pipeline Expansion Project worth approximately \$80-\$100 million. A copy of the Briefing Note is attached at **Tab 6**.

33. The Briefing Note was submitted to Charles DOBSON (Senior Manager, Business Services, ASL), with a copy to Ken WHITE (Supervisor Indigenous Liaisons, ATCO Electric). CARPENTER, the author of the Briefing Note, was the ASL lead on the Joint Venture Agreement and had direct discussions with Simpcw about the issues in the Briefing Note.

34. The Briefing Note reflects:

- (a) Simpcw's position as expressed to ASL with respect to the Joint Venture Agreement, and
- (b) The input ASL personnel received from ATCO Electric personnel regarding the issue of a direct award of the access/matting and clearing/slashing work to Simpcw (under the "Notes from Electric" section).

35. The ASL Briefing Note, which was not a decision-making document itself but was reviewed and considered by ATCO Electric management in their decision-making, includes the following request made by ASL to ATCO Electric (under the "Recommendation" section):

Request ATCO Electric to consider the ability to direct award to the Simpcw First Nation, Clearing and Matting Access for JIP subcontracts, to facilitate strong relations between Simpcw and ATCO in general, particularly ASL's camp opportunities for Trans Mountain pipeline.

***D. ATCO Electric examines issues raised by ASL's request to consider a direct award***

36. On March 16, 2018, WHITE and Angela BINNIE (Manager Indigenous Relations, ATCO Electric) prepared an Issue Brief (**Issue Brief**) addressed to Paul GOGUEN (then Senior Vice President and General Manager, ATCO Electric) and Doug TENNEY (Vice President, Northern Development and Indigenous Relations, ATCO Electric) regarding the matter with the Simpcw. TENNEY, who reported to GOGUEN, reviewed the Issue Brief before it was submitted to GOGUEN. During the October 2021 ATCO Electric internal investigation interview (**2021 Internal Interview**), GOGUEN stated that he considered TENNEY to be “the most astute and knowledgeable on the matters,” and relied on his information and insight. A copy of the Issue Brief is attached at **Tab 7**.

37. The Issue Brief provided: (1) background information regarding work opportunities for the Simpcw on the Jasper Interconnection Project (2) an outline of issues with respect to the direct award of clearing and matting work (3) a summary of actions taken to date and (4) next steps. In her 2021 Internal Interview, BINNIE, who authored the Issue Brief, explained that the purpose of the Issue Brief was to advise GOGUEN and TENNEY of what ATCO Electric had learned about the Joint Venture Agreement and of the various risks associated with a direct award of work on the Jasper Interconnection Project.

38. BINNIE and TENNEY were the main individuals at ATCO Electric responsible for analyzing information concerning the issues raised in the Issue Brief, informing and seeking direction from GOGUEN and others about a response to those issues. While the Issue Brief is watermarked as a “draft”, there is no final or substantively more updated version of the Issue Brief so far as ATCO Electric is aware.

39. The Issue Brief notes the following facts:

- (a) ASL and SR LLP signed the Joint Venture Agreement in May 2016. The agreement states that “Simpco and ATCO wish to ensure maximizing social and economic benefits in activities arising from resource and related energy and infrastructure projects within Simpcw’s territory...”
- (b) The Alexis Nakota Sioux Nation, Aseniwuche Winewak Nation, Kelly Lake Cree Nation, Métis Nation of Alberta and Paul First Nation all expressed interest in clearing and access work for and employment opportunities connected with the Jasper Interconnection Project;
- (c) The Aseniwuche Development Corporation (an entity owned by the Aseniwuche Winewak Nation) has previously done clearing work within Jasper National Park and has demonstrated the ability to work within the strict guidelines in the Park; and
- (d) Apart from the work that Simpcw requested they be directly awarded there is “very little other capital and maintenance work that can be parceled out to those community companies.”



40. The Issue Brief describes ATCO Electric's two primary concerns with respect to ASL's request that it direct award the work to Simpcw, as follows:

- (a) "[ATCO Electric] is concerned that if SR LLP is direct awarded the work, relationships with the rest of the communities who expressed interest in this work will suffer"; and
- (b) "it will be very difficult to provide the regulators with a justification why this amount of work was direct awarded to one community."

41. The Issue Brief did not reference the ASL camp contract as a concern to ATCO Electric.

42. On March 27, 2018, TENNEY emailed GOGUEN the Briefing Note, the Joint Venture Agreement, and a version of the Issue Brief, with certain text highlighted as a tracked change to the version referenced in paragraph 38 above. A copy of the version of the Issue Brief provided to GOGUEN by TENNEY is attached at **Tab 8**.

43. In the March 27, 2018 email, TENNEY restated previous information outlined in the Briefing Note about the \$80-100 million camp contracts for the Trans Mountain Pipeline Expansion Project and Simpcw's position that if they were not direct awarded the brushing and access matting contracts on the Jasper Interconnection Project, they may back out of the agreement with ASL and partner with Horizon North. TENNEY then outlined the two "primary risks" for ATCO Electric making a direct award to Simpcw, those being (1) "SFN's request is off-side with the AESO and AUC in that contracts need to be tendered to at least three bidders, how do we defend the direct award?" and (2) "Relationship risk with the other indigenous communities. ASL only has to worry about Simpcw – we have to worry about 23 other Nations/Groups, most of which are on other projects in our service territory." TENNEY's email stated that "this may be an issue for Wayne and Adam Beattie to discuss and provide an "ATCO direction," referring to Wayne STENSBY who held the most senior position in ATCO Electric at the time, (Managing Director, Electricity Global Business Unit) and Adam BEATTIE (Senior Vice President & General Manager, Structures, of ASL at the relevant time). A copy of this email is attached at **Tab 9**.

44. BINNIE was of the view that the direct award to Simpcw was problematic for the relationships ATCO Electric had with other First Nations with recognized ties to Jasper National Park, which ATCO Electric should have honoured with the opportunity to bid for the matting services work. GOGUEN was also concerned that ATCO's relationship with other First Nation communities would be put in jeopardy if the direct award took place.

45. Notwithstanding the terms of the Joint Venture Agreement, some members of ATCO Electric's management at the time believed it was not legally enforceable against ATCO Electric.

46. ATCO Electric and ASL understood, however, that Simpcw viewed the Joint Venture Agreement as a binding commitment from all of ATCO, including ATCO Electric.

47. Communication about the direct award issue also occurred between TENNEY (from ATCO Electric) and Charles DOBSON (from ASL). In an email exchange dated April 17, 2018, DOBSON noted that he agrees with TENNEY that the Joint Venture Agreement is unlikely to be

legally binding on ATCO Electric, and the Simpcw “are still tying” the direct award of the clearing and matting services on the Jasper Interconnection Project to the commitments made under the Joint Venture Agreement. DOBSON expressed concern that unless they can convince the Simpcw otherwise (that they are not legally “tied”), there may be “negative fall out on the larger pot of gold” (presumably a reference to the camp contracts under the Joint Venture Agreement).

48. TENNEY responded that “there is no way” ATCO Electric could use a technical legal position about not being bound by the Joint Venture Agreement, “ever.” He stated that “[i]t may be a valid position with another commercial entity but with the Simpcw, AE is tied into this contract the same as AS&L,” and he was “simply waiting for Paul [Goguen] to agree so that we can move forward with a direct award.” A copy of this email exchange is attached at **Tab 10**.

49. There was also an awareness and concern among some ATCO Electric employees involved with the direct award issue, including BINNIE, that proceeding with a direct award to Backwoods in the circumstances could amount to a contravention of the Inter-affiliate Code of Conduct (**Code of Conduct**). ATCO Electric’s management knew that making a direct award to Simpcw could be problematic in terms of the independent system operator (ISO) procurement rules and the Code of Conduct, given that the decision to direct award was driven in part by the actions of a non-regulated affiliate (ASL).

50. The decision on whether to direct award the clearing and matting services contract to Simpcw was GOGUEN’s to make, in his capacity as Senior Vice President and General Manager, ATCO Electric. Before making that decision, GOGUEN received and reviewed the Briefing Note and Issue Brief as well as the March 27, 2018 email from TENNEY.

51. GOGUEN also discussed the direct award issue with both STENSBY (from ATCO Electric) and BEATTY (from ASL).

52. Before GOGUEN made his decision about the direct award, he understood that there was a risk that ATCO Electric could potentially be in breach of the ISO Rules, he was aware of the two risks identified in the Issue Brief, and was involved in discussions with BINNIE and others about those risks as well as concerns about the rates being charged. During the 2021 Internal Interview, GOGUEN stated that he “wouldn’t suggest that we were knowingly breaking the rules...” and “had a position we could put forward.” GOGUEN further stated that he considered there was an avenue for sole sourcing with a proper justification or defense and ATCO Electric was “going to build said defense” with the understanding that there was a risk associated with it. GOGUEN does not recall if issues around compliance with the Code of Conduct were discussed with him and is not sure he felt this was a compliance matter.

### ***E. ATCO Electric approves a direct award to Backwoods***

53. In May 2018, ATCO Electric representatives met with Simpcw representatives to discuss the scope of and expectations for the matting, brushing and hydrovac work on the Jasper Interconnection Project. In these discussions, Simpcw representatives were very clear that they believed they had rights to the matting work for the Jasper Interconnection Project because of the

Joint Venture Agreement that was in place. ATCO Electric representatives attempted to negotiate the rates down over a series of discussions but were unsuccessful.

54. On June 11, 2018, SR LLP and Backwoods Energy Services (owned by the Alexis Nakota Sioux Nation) together submitted two proposals to ATCO Electric: a construction access matting proposal (**Matting Proposal**) and a brushing proposal (**Brushing Proposal**), including rate sheets. A copy of the Matting Proposal is attached at **Tab 11**.

55. SR LLP and Backwoods Energy Services ultimately formed a corporation — Backwoods Contracting Ltd. (**Backwoods**) — and it was this entity that was awarded the contract for brushing, matting and hydrovac services for the Jasper Interconnection Project (**Backwoods Contract**).

56. Before or around the same time that ATCO Electric received the Brushing and Matting Proposals, ATCO Electric had the following data points regarding market rates for matting services:

- The matting rates submitted by vendors for the 2017 RFP. A copy of these rates is attached at **Tab 12**.
- The matting rates submitted by T Ltd. for survey matting (RFP 414606 Jasper Daylighting) on the Jasper Interconnection Project in response to a request for quotes process in March 2018 (**Survey Matting Rates**). This contract was for a “relatively small scope of work (~225K)” compared to the work awarded under the Backwoods Contract (initially 28,000 mats). A copy of the Survey Matting Rates is attached at **Tab 13**.
- The matting rates under a “Master Services Agreement” with vendor T Ltd., entered into following an RFP (RFP 1600000118) in June 2018 (**MSA Rates**). A copy of the MSA Rates is attached at **Tab 14**.
- Research conducted by ATCO Electric’s own forestry team around fair market value assessments, a copy of which is attached at **Tab 15**.

57. Backwoods also provided to ATCO Electric rate proposals for the brushing and hydrovac work.

58. Although Simpcw sought a direct award in respect of matting, brushing and hydrovac work on the Jasper Interconnection Project, the matting-related work constituted the largest portion of the work, while the brushing and hydrovac work were minimal. The breakdown of the estimated costs of the Backwoods Contract is as follows: Brushing \$1.5M, matting \$13M and Hydrovac services \$0.5M. The total amount ultimately paid to Backwoods under the Backwoods Contract in respect of matting-related work was approximately \$31.1 million, whereas the total amount paid to Backwoods under the Backwoods Contract for brushing-related work was approximately \$2.1 million. ATCO Electric attributed the cost increase to scope changes.

59. On June 21, 2018, GOGUEN formally approved a direct award for the matting, hydrovac and brushing services for the Jasper Interconnection Project to Backwoods. A copy of the email exchange reflecting this approval is attached at **Tab 16**. When he approved the direct award, GOGUEN believed he had all the information necessary to make the decision. He was aware of

concerns within ATCO Electric about the rates in the Matting Proposal being above fair market value and he was aware of the risks raised in the Issue Brief and those other matters detailed in paragraph 43 above, among them the regulatory risk to ATCO Electric (including the risk of violating ISO Rules and the potential for disallowance due to sole sourcing in circumstances where it was not permitted).

60. However, GOGUEN also believed that work was ongoing to get the rates aligned with market value at the time he authorized the awarding of the contract, and he believed that successfully aligning the rates with fair market value would mitigate any contravention of the ISO Rules.

61. After discussions with ASL, and adopting a “One ATCO” perspective, the decision to approve the direct award to Backwoods was made by ATCO Electric because of concerns related to the perceived commitment made to the Simpcw under the Joint Venture Agreement, as well as concerns that a failure to do so could lead the Simpcw to back out of the Joint Venture Agreement with ASL, potentially jeopardizing current and future opportunities for ATCO and ASL, including the camp contracts for the Trans Mountain Expansion Pipeline.

62. At some point between June 21, 2018 and July 6, 2018, ATCO Electric and SR LLP signed a Letter of Intent, which confirmed the matting and brushing services would be awarded to Backwoods. A copy of the Letter of Intent is attached at **Tab 17**.

63. BINNIE, who was directly involved in discussions and negotiations with Simpcw representatives relating to the Backwoods Contract, was aware that the rates in the Matting Proposal were approximately 30 per cent over market value. The objective in negotiating with the Simpcw was to have them reduce their rates to be within 20 per cent of market value.

64. There is no evidence of any efforts to lower the Backwoods rates after the direct award decision was made on June 21, 2018. The Backwoods rates were never lowered.

65. An internal analysis conducted by ATCO Electric in August 2018 concluded that Backwoods’ rates were 30 to 35 per cent higher than market rates (**August 2018 Rates Analysis**). A copy of the August 2018 Rates Analysis is attached at **Tab 18**. As a result of this analysis, a range of \$2.3 - \$4.0 million was identified as the amount subject to a regulatory risk of disallowance in respect of the matting work.

***F. Backwoods subcontracts the matting work to T Ltd.***

66. There were benefits to awarding all access related work on the right-of-way to a single contractor, so that contractor could manage the various subcontractors within the unusually stringent requirements of a narrower than standard right-of-way with rules unique to working in a national park, required by Parks Canada.

67. As early as April 16, 2018, individuals at ATCO Electric voiced concerns about whether Backwoods itself would be doing the matting work, or whether it would be subcontracting the matting work to another entity. A copy of an email exchange from this date between [REDACTED] and Spencer WEISS (Manager, Regulatory, ATCO Electric) is attached at **Tab 19**.

68. All of the installation and removal of the mats under the Backwoods Contract was subcontracted by Backwoods to T Ltd. This comprised most, if not all, of the matting-related work under the Backwoods Contract.

69. BINNIE was frustrated upon learning that T Ltd. would be doing the matting work because she believed T Ltd. would have been the successful bidder in a competitive bidding scenario, and now T Ltd. would be doing the matting work under a subcontract with Backwoods, but at marked up rates. It is not known what rates Backwoods paid to T Ltd. or what profit, if any, was made by Backwoods or T Ltd.

70. In an email exchange on August 15, 2018, related to the drafting of the August 2018 REF (as defined and discussed further below), WEISS specifically mentioned that “[w]e are trying to be careful not to discuss that Simpcw is subcontracting this work out.” A copy of WEISS’s email is attached at **Tab 20**.

71. The hydrovac work under the Backwoods Contract was subcontracted to GPS Hydrovacs.

72. But for the Joint Venture Agreement, ATCO Electric would have sought bids from at least three arm’s length bidders for the matting work that was directly awarded to Backwoods under the Backwoods Contract.

### **3 ATCO Electric’s documentation relating to the direct award**

#### ***A. Efforts to reduce discoverability of the connection between the direct award and ASL***

73. Once the decision was made to award the matting and other work to Backwoods, ATCO Electric’s focus shifted to documenting a justification to defend that decision.

74. ATCO Electric uses Requisition Enhancement Forms (**REFs**) to document the justification for a decision to sole source a contract. A REF is an internal document used by ATCO Electric to support a decision to award a contract on a sole sourcing basis, as an exception to the ISO Rules requiring a competitive tender process and an award to the lowest qualified bidder. The REF is not used to document or assess compliance with the Code of Conduct. Additional information relevant to a REF, if any, is typically appended to the REF itself, in the form of documents such as an issue brief. If requested by the regulator, ATCO Electric will disclose the REF along with any appended documents.

75. While GOGUEN provided the direction and approval for the sole sourcing arrangement with Backwoods on June 21, 2018, ATCO’s process required a REF to be executed in order to document the sole sourcing arrangement. Accordingly, ATCO Electric employees embarked on the preparation of a REF for the direct award of the Backwoods Contract. This REF would eventually be completed and signed in August 2018 (**August 2018 REF**), as discussed further below.

76. ATCO Electric took actions to avoid disclosing in the August 2018 REF material information including the connection between the direct award to Backwoods and the Joint Venture Agreement as well as the interests of ASL under it.

77. On August 8, 2018, at 9:29 a.m., BINNIE sent an email to various individuals at ATCO Electric with an attached revised REF relating to the Backwoods Contract, which ATCO Electric Indigenous Relations had drafted. BINNIE's email stated that Indigenous Relations "took action to draft up some of the necessary background info" in the form of an email that "would take the place of a formal Issue Brief to reduce [sic] risk under the discovery process." A copy of BINNIE's email (with attachment) is appended at **Tab 21**.

78. In an email sent to Carl RUTA (Project Manager, ATCO Electric) several months later in response to a query about the Issue Brief, BINNIE again explained that a formal Issue Brief was not created for the Backwoods Contract in order to "reduce the risk of discovery" in relation to key background information, namely the connection between the direct award to Backwoods and the Joint Venture Agreement as well as ASL's interests under it. A copy of BINNIE's email is attached at **Tab 22**.

79. BINNIE took steps, including the use of a backgrounder (**Backgrounder**) as opposed to an issue brief that would otherwise have been appended to the August 2018 REF, to try to reduce the risk of discovery following advice from WEISS (Manager, Regulatory at ATCO Electric) about what was discoverable in a rates proceeding. GOGUEN was aware that the August 2018 REF did not include any mention of the Joint Venture Agreement or the connection with ASL.

### ***B. The Backgrounders***

80. At 4:16 p.m. on August 8, 2018, BINNIE sent another email to several ATCO Electric personnel attaching a draft of the Backgrounder. A copy of BINNIE's email is attached at **Tab 23**. A copy of the draft Backgrounder referred to in BINNIE's August 8, 2018 email (**First Draft Backgrounder**) is attached at **Tab 24**.

81. The First Draft Backgrounder reflects both an awareness that Backwoods' matting services rates were well above market rates, and the role played by the Joint Venture Agreement in the decision to direct award the contract to Backwoods.

82. On August 10, 2018 at 10:51 a.m., WEISS provided an updated version of the First Draft Backgrounder (**Second Draft Backgrounder**) to BINNIE, WHITE and Janet BUTLER (Manager, Procurement, ATCO Electric) designed to ensure that concerns related to ATCO Electric's compliance with the Code of Conduct and "key risks" arising from the sole sourcing to Backwoods were brought to the attention of those who would eventually sign the August 2018 REF. A copy of WEISS's email is attached at **Tab 25**. A copy of the Second Draft Backgrounder is attached at **Tab 26**.

83. The Second Draft Backgrounder included the addition that "one of the drivers behind the decision to sole source this work to Simpcw is that Simpcw can influence the camp awards for the Kinder Morgan Trans Mountain Pipeline Expansion Project (3 camps \$80-100M). This, again is not in compliance with the ATCO Affiliate Code of Conduct (AET is incurring a higher cost for a Regulated Direct Assigned Capital Project in order to secure a contract and an economic benefit for a non-regulated entity – ASL)."

84. Less than two hours after he sent the Second Draft Backgrounder to BINNIE, WHITE and BUTLER, WEISS sent the Second Draft Backgrounder, together with the August 2018 REF,

to Todd McLAREN (Vice President, Maintenance & Construction, ATCO Electric). A copy of WEISS's email to McLAREN is attached at **Tab 27**. The same email, with the same attachments, was copied to Justin CLAUDE (Director, Regulatory, ATCO Electric), and forwarded to Kumail MOLEDINA (Director, Project Execution, ATCO Electric) and Peter MARTYNIUK (Manager, Transmission and Large Distribution Projects, ATCO Electric) prior to them signing the August 2018 REF.

85. On August 14, 2018, a version of the Backgrounder was provided by CLAUDE, to Corinne SEVERSON (then Director, Regulatory, Utilities Common Matters, ATCO Electric).

86. SEVERSON's role in the matter was to advise ATCO Electric on the implications for Code of Conduct compliance of direct awarding the brushing, matting and hydrovac services work to Backwoods and to support and report to the Compliance Officer and Chief Regulatory Officer, who was Melanie BAYLEY at the time. SEVERSON made edits to the document. Her version (**Third Draft Backgrounder**) did not include the statement from the Second Draft Backgrounder that "one of the drivers behind the decision to sole source this work to Simpcw is that Simpcw can influence the camp awards for the Kinder Morgan Trans Mountain Pipeline Expansion Project (3 camps \$80-100M)." Instead, the edits included adding a section on "Code of Conduct implications," which expressly addressed the implications arising from the fact that "the rates [for the matting services in the contract with Backwoods] are above FMV and one of the drivers behind the decision to sole source this work to Simpcw is that there is a potential advantage for a non-utility affiliate [*i.e.* ASL]." The Third Draft Backgrounder concluded that "AE should work with the Simpcw in order to attempt to align the cost with FMV" and further concluded that should [ATCO Electric] seek to recover from customers costs that are in excess of FMV as a result of a sole source contract for the benefit of a non-utility affiliate, it would not comply with the spirit and intent of the Code." On August 23, 2018, SEVERSON sent the Third Draft Backgrounder by email to CLAUDE and BAYLEY, indicating it was draft. A copy of SEVERSON's email to CLAUDE and BAYLEY attaching the Third Draft Backgrounder is attached at **Tab 28**. A copy of the Third Draft Backgrounder is attached at **Tab 29**.

87. At the time she produced the Third Draft Backgrounder, SEVERSON mistakenly believed the Backwoods Contract had not yet been directly awarded. That was incorrect (as explained above, the direct award was approved on June 21, 2018 by GOGUEN) and SEVERSON's mistaken belief reflects a critical communication and process error on the part of ATCO Electric.

88. Separately, CLAUDE sent an email which requested confirmation from WEISS and [REDACTED] (with copy to SEVERSON) that the suggested amount of \$2.5 million be moved into a non-regulated uniform system account (**USA**). A non-regulated USA is an account in which a utility records costs that are not claimed for recovery in a rates proceeding from the AUC. A copy of CLAUDE's email is attached at **Tab 30**.

89. In an August 23, 2018, email to MCLAREN, CLAUDE expressed the view that any difference between fair market value and the Backwoods rates would have to be moved into a non-regulated account and that "we will be in non-compliance if we don't. This way we can proceed without having to notify the AUC." Transferring costs to a non-utility account can only

happen after the costs are incurred. No such steps were ever taken by ATCO Electric. A copy of CLAUDE's email is attached at **Tab 31**.

***C. The August 2018 REF***

90. ATCO Electric ultimately executed two REFs related to the Backwoods Contract.

91. The first of these was REF 54909 REF SIMPCW 024, signed in August 2018, (**August 2018 REF**). A copy of the August 2018 REF is attached at **Tab 32**.

92. The August 2018 REF was mainly co-authored by BINNIE and WHITE, although many others at ATCO Electric reviewed and offered input.

93. The August 2018 REF does not reflect all the information related to the decision to proceed with the direct award, but rather details the formal justification put forward and documented by ATCO Electric for that decision.

94. The August 2018 REF records the recommendation to sole source the brushing, matting and Hydrovac services work for the Jasper Interconnection Project to Backwoods at an estimated total value of \$14,872,515.84.

95. Between June 21, 2018 (when GOGUEN approved the direct award) and August 2018 when the REF was signed, no new information was identified, including on the pricing, that differed from the criteria and justifications GOGUEN relied on when approving the direct award. GOGUEN was aware of this at the time the August 2018 REF was prepared and signed.

96. The August 2018 REF was signed by the following ATCO Electric personnel:

- (a) Peter MARTYNIUK (Manager, Transmission and Large Distribution Projects), on August 17, 2018.
- (b) Kumail MOLEDINA (Director, Project Execution), on August 17, 2018.
- (c) Todd McLAREN (Vice President, Maintenance & Construction, Transmission & Distribution), on August 21, 2018.
- (d) Richard ADAMS (Vice President, Operations & Planning), "on behalf of Paul Goguen," (Senior Vice President & General Manager, Transmission & Distribution), on August 22, 2018.
- (e) Justin CLAUDE (Director, Regulatory), on August 23, 2018.

97. At least four of the five signatories to the August 2018 REF (MOLEDINA, MARTYNIUK, MCLAREN and CLAUDE) had received the Second Draft Backgrounder and were aware of its contents.

98. The August 2018 REF was written in such a way as to justify the decision to sole source the Backwoods Contract without having to discuss the Joint Venture Agreement ASL had with



SR LLP, and ASL's interests in pursuing commercial opportunities under that agreement, in light of the pressure BINNIE and her colleagues felt to direct award the contract to Simpcw and Backwoods even though doing so was not compliant with the Code of Conduct. BINNIE felt pressure from ATCO Electric senior management that pursuing and justifying a direct award was the path they should take.

99. The signatories to the August 2018 REF knew that the August 2018 REF did not disclose relevant and important information that was included in the Second Draft Background. Deliberate action was taken in preparing the August 2018 REF to conceal that information.

100. There were other First Nation groups (including those referenced in the August 2018 REF) and other bidders that could have done the work that was the subject of the August 2018 REF. None of these other First Nation groups or other bidders were signatories to a document like the Joint Venture Agreement between SR LLP and ASL.

101. ATCO Electric took limited steps to investigate or determine whether other First Nation groups had the experience or capability of doing the matting services work prior to directly awarding that work to Backwoods. Employees at ATCO Electric were concerned that taking such steps would "arouse suspicions." A copy of an August 15, 2018 email from WEISS in the course of drafting the August 2018 REF, is attached at **Tab 33**.

102. The scope of the matting work described in the August 2018 REF was substantially similar to the scope of the matting work ATCO Electric had put out to tender in the competitive bidding process for the 2017 RFP. The Backwoods Contract included brushing/clearing and hydrovac work but, as stated above, that work was minimal when compared to the matting work.

103. Between August 24, 2018 and September 14, 2018, the final Backwoods Contract was executed with an effective date of July 6, 2018. GOGUEN and McLAREN signed on behalf of ATCO Electric. A copy of the Backwoods Contract is attached at **Tab 34**.

104. After the August 2018 REF was signed, ATCO Electric employees continued to discuss the fact that rates charged by Backwoods were significantly above fair market value. On August 30, 2018, several ATCO Electric employees met. The meeting was to discuss the Backwoods Contract, including the rates to be paid to Backwoods, how those rates compared to fair market value, and the regulatory risk of ATCO Electric seeking cost recovery given that Backwoods' rates for matting were materially higher than market. The invited attendees included senior ATCO Electric employees who had signed the August 2018 REF as well as others with regulatory and project responsibilities for ATCO Electric. The invited attendees were provided with the August 2018 Rates Analysis documents. A copy of the meeting invite for the August 30, 2018 meeting, which shows the invited attendees, is attached at **Tab 35**.

#### ***D. The May 2021 REF***

105. ATCO Electric's second REF related to the Backwoods Contract (REF SIMPCW 20-12-22) was signed on May 18, 2021, well after the Jasper Interconnection Project had been energized (**May 2021 REF**). A copy of the May 2021 REF is attached at **Tab 36**.

106. According to the May 2021 REF, by the end of the project, the matting services portion of the contract costs had increased from \$13 million as set out in the August 2018 REF to \$28 million. The May 2021 REF asserts that the increase in costs was a result of changes in scope, particularly regarding the number of mats and the way in which the matting had to be done. In particular, the May 2021 REF asserts that there were significant changes in scope including increasing mat quantities from 28,000 to 43,000, longer length in requirement of mats due to construction delays, increased requirements to build up a higher air bridges to mitigate any chance of pipeline damage and a higher volume of non-repairable mats. These change orders and the drivers for them were what was reviewed and signed off on in the May 2021 REF and were also described in detail in the 2018-2020 Deferral Application.

107. The May 2021 REF was signed by the following:

- (a) Travis McDONNELL (Supervisor, Projects Electric Transmission, ATCO Electric), on May 13, 2021,
- (b) Kumail MOLEDINA, on May 14, 2021,
- (c) Dan THACKERAY (Manager, Regulatory & Project Development, ATCO Electric), on May 14, 2021, and
- (d) Melanie BAYLEY (President, ATCO Electric), on May 18, 2021.

108. There was no review undertaken by those who signed the May 2021 REF of the justification for the direct award. None of the 2018 documentation, with the exception of the signed August 2018 REF (which did not contain the full background), was circulated to the signatories of the May 2021 REF at or around the time they signed the May 2021 REF. Their sole focus was the justification for the change orders that increased the costs under the Backwoods Contract. Except for BAYLEY and MOLEDINA, the signatories to the May 2021 REF did not receive the Issue Brief or any version of the backgrounder document referred to in paragraphs 80 - 87 above. MODELINA only received the Second Draft Backgrounder as a signatory to the August 2018 REF. As stated above at paragraph 86, BAYLEY had only received the Third Draft Backgrounder from SEVERSON in August 2018, in BAYLEY's capacity as Compliance Officer for ATCO Electric.

109. Both the May 2021 REF and the August 2018 REF fail to disclose relevant and material information about the Backwoods Contract including the reasons for sole sourcing the matting work to Backwoods.

110. In particular, nowhere in the May 2021 REF or the August 2018 REF is there any indication of the following facts, which were known to several ATCO Electric personnel in 2018, and fewer personnel in 2021:

- (a) ASL's request that ATCO Electric consider a direct award to Simpcw (or a commercial entity affiliated with Simpcw).
- (b) The sole sourcing of the contract to Backwoods was done as a result of the Joint Venture Agreement between ASL and SR LLP, the view of ATCO Electric that it could not

breach the commitments that the Simpcw felt were made in that agreement, and a concern for the loss of current and future commercial opportunities.

- (c) The Simpcw's position, as expressed to ASL, that "Horizon North ... has offered a compelling partnership opportunity for camps and the Simpcw would be willing to back out of the JV with ATCO if they don't get the respect that the Simpcw has provided to ATCO."
- (d) But for the Joint Venture Agreement, ATCO Electric would not have sole sourced the contract to Backwoods and would have used a competitive tender process for the matting work related to the Jasper Interconnection Project.
- (e) The rates paid to Backwoods for matting work were materially above fair market value (in the range of 30-35 per cent).
- (f) Backwoods was not the only entity capable of performing the matting services awarded under the Backwoods Contract.
- (g) All of the matting work under the Backwoods Contract was subcontracted by Backwoods to another entity (T Ltd.), as was the hydrovac work (to a different entity).

#### ***E. ATCO Electric's Annual Compliance Reports***

111. ATCO Electric filed Compliance Reports for the purposes of Section 7.6 of the Code of Conduct for the calendar years 2018, 2019 and 2020 (**Compliance Reports**). A copy of the Compliance Reports for 2018, 2019 and 2020 can be found at **Tabs 37, 38 and 39**, respectively.

112. Each of the Compliance Reports reported that ATCO Electric had complied with the Code of Conduct during the relevant year, and failed to report any events of material non-compliance during the applicable reporting period. At no point before November 29, 2021 did ATCO Electric file an exception report (pursuant to Bulletin 2010-24: *Inter-Affiliate Code of Conduct process changes and clarification of requirements*) in respect of the matters raised in Enforcement staff's application in Proceeding 27013.

113. At no point during the relevant periods (March 2018 through to September 23, 2021) did the Compliance Officer have awareness or an understanding that there had been a contravention of the Code of Conduct. The Compliance Officer and the most Senior Officer with ATCO Electric sign the annual Compliance Report. The Compliance Plan details the measures, policies, procedures and monitoring mechanisms that ATCO Electric is directed by the Commission to employ to ensure its full compliance with the provisions of the Code of Conduct. A copy of the Compliance Plan is included as part of each of the Compliance Reports. ATCO Electric acknowledges that the Compliance Reports are intended to reflect the activities and knowledge of ATCO Electric as a whole.

#### ***F. AESO Audit***

114. The AESO conducted a compliance audit of the Jasper Interconnection Project, and did not identify any suspected contraventions of Section 9.1.5 of the ISO Rules. However, when

conducting the audit, the AESO was not informed of all ATCO Electric's reasons for sole sourcing the Backwoods Contract, including the expectations of Simpcw arising out of the Joint Venture Agreement between SR LLP and ASL. Nor was the AESO informed of any of the facts outlined at paragraph 110. It is not known whether the AESO would have come to a different conclusion had it been aware of that information. A copy of the AESO audit report is attached at **Tab 40**.

115. At no point did ATCO Electric approach the AESO to inquire if the AESO considered a direct award to Backwoods permissible on the basis of Backwoods' status as a First Nations contractor. In 2009, GOGUEN requested an exemption from compliance with ISO Rule 9.1.5 from the AESO on a different project (unrelated to the Jasper Interconnection Project) to permit ATCO Electric to have a sole source relationship with First Nations for certain work required on the project. The AESO granted "an exemption from ISO Rule 9.1.5.6, on the basis that the matter appeared to fall within the exception in Rule 9.1.5.6 (b)(i)" the details of which can be found in the correspondence attached at **Tab 41**. ATCO Electric has relied on this prior AESO approval for its sole sourcing strategy with First Nation contractors on subsequent projects.

116. On January 31, 2022, the AESO advised ATCO Electric that based on information it has received since conducting the audit, it is now referring certain allegations relating to the direct award to Backwoods to the Market Surveillance Administrator (MSA). Included as **Tab 42** is ATCO Electric's response to the AESO's letter regarding its referral to the MSA. On March 2, 2022, the Market Surveillance Administrator issued two letters; the first, advising that it had decided to discontinue its investigation of the referral and the second, referring the matter to the Alberta Utilities Commission. Included as **Tab 43** are copies of these letters.

#### **4 The deferral account proceeding and ATCO Electric's internal investigation**

##### ***A. ATCO Electric's application in the Deferral Account Proceeding***

117. On June 4, 2021, ATCO Electric filed an application for disposal of its 2018-2021 transmission deferral account in the Deferral Account Proceeding. Included in the application was a request for approval to add \$119.1 million to its rate base for recovery of costs related to the Jasper Interconnection Project. That amount included the full costs ATCO Electric incurred under the Backwoods Contract. ATCO Electric's application is filed on the Alberta Utilities Commission website under Proceeding 26573, Exhibit 26573-X0006.

118. ATCO Electric's Senior Vice President and General Manager had ultimate responsibility for the costs incurred and subsequently claimed in the Deferral Account Proceeding. Up until July 1, 2019, GOGUEN occupied this role. On July 1, 2019, BAYLEY was appointed to this role and GOGUEN was no longer involved in the affairs of ATCO Electric. At the time of filing the Deferral Account Application in June 2021, the title of "ATCO Electric, Senior Vice President and General Manager" had been changed to "President, ATCO Electric" and BAYLEY remains in that role. The President of ATCO Electric has responsibility for all of ATCO Electric's activities and delegates that responsibility as required to the employees of the company but the president is ultimately accountable. Approximately 45 individuals were involved in the Deferral Account Proceeding, including RUTA, [REDACTED] MOLEDINA and MASTERVICK.

119. Except for RUTA, ██████████ MOLEDINA and MASTERVICK, the remaining 41 individuals in the Deferral Account Proceeding were not involved in the events surrounding the decision to make a direct award in favour of Backwoods in 2018 and were not otherwise informed of the true reasons for and circumstances surrounding the Backwoods Contract. The documentation available to them was limited and otherwise designed to conceal material information.

120. In the normal course, documentation setting out the relevant facts and circumstances relating to an REF would be set out in finalized issue briefs or issue statements, appended to an REF and saved on ATCO Electric's "Sharepoint" document and file management system. This is designed to ensure that despite employee turnover or employees changing positions within the company, the relevant information will be available to those who require it in the future. That did not happen with respect to the August 2018 REF and the May 2021 REF. As outlined above, in 2018 specific steps were taken to conceal the relevant information. This included not creating proper documentation and not saving documentation, including the Backgrounders, to the "Sharepoint" system. In her 2021 Internal Investigation interview, when asked about the implications of filing on the site, BINNIE indicated that "it's just that it would be more discoverable at an eventual rates board hearing, because we knew eventually the project would be coming up for a rates review."

121. However, some individuals involved in preparing ATCO Electric's documentation in the Deferral Account Proceeding were involved in or aware of the events surrounding the decision to make a direct award in favour of Backwoods, including the facts at paragraph 110.

122. ATCO Electric disclosed in its Deferral Account application that the Backwoods Contract was sole sourced. ATCO Electric's application did not disclose all relevant facts and information regarding the Backwoods Contract, including the reasons for sole sourcing. In the course of the Deferral Account Proceeding, ATCO Electric omitted material information relating to the Backwoods Contract. ATCO Electric accepts full responsibility for this conduct.

123. In particular, neither ATCO Electric's application, nor any subsequent filing or submission by ATCO Electric, disclosed the facts set out in paragraph 110 above.

124. ATCO Electric's project summary in the Deferral Account Proceeding provided a justification for the direct award that was similar to the justification provided in the August 2018 REF and the May 2021 REF. ATCO Electric's project summary is included in Proceeding 26573 as Exhibit 26573-X0064

125. ATCO Electric filed a post-completion report stating that ATCO "documented the justification of undertaken [*sic*] the sole sourcing of service and material procurement activities" and followed "AESO rules" in respect of sole sourcing procurement contracts. ATCO Electric's post-completion report is included in Proceeding 26573 as Exhibit 26573-X0075.01

### ***B. ATCO Electric's response to information requests***

126. Both the AUC and an intervener in the Deferral Account Proceeding, the Consumers' Coalition of Alberta (CCA), asked ATCO Electric for information concerning the matting costs on the Jasper Interconnection Project, including requests for "evidence that the prices were cost

competitive.” Information requests received from the AUC and CCA are included in Proceeding 26573 as Exhibits 26573-X0135 and X0136.

127. When they submitted their information requests, the AUC and CCA were unaware of the existence of the 2017 RFP and the facts set out at paragraph 110 regarding ATCO Electric’s decision to sole source the Backwoods Contract.

128. As part of its responses to the information requests, ATCO Electric stated that rates under the Backwoods Contract were market competitive and that the matting work was direct awarded to the only entity capable of completing the work. ATCO Electric put forward comparisons to matting rates paid on another major project that had come to light through the passage of time to support the rates but did not disclose the pricing information referenced in paragraphs 56 and 104 above. The information responses omitted material facts, including the facts set out at paragraph 110. ATCO Electric’s responses to information requests are included in Proceeding 26573 as Exhibits 26573-X0137 to X0230.

129. ATCO Electric typically provides AESO procurement audits in support of a claim for recovery of costs for a direct-assigned project in its deferral application with the AUC. In the procurement audit conducted by the AESO, ATCO Electric responded to queries on the costs incurred through sole sourcing and presented the 2009 response from the AESO referenced in paragraph 115. This audit report was provided in the Deferral Account application as Attachment 7.

### ***C. ATCO’s internal investigation and rebuttal evidence***

130. The matters set out in Enforcement staff’s application in Proceeding 27013 were brought to Enforcement staff’s attention by a complainant. The complainant works at ATCO Electric and was involved in many of the discussions and communications surrounding ATCO Electric’s decision to enter into the Backwoods Contract with Backwoods in 2018, as well as the preparation of the backgrounder documents referred to in Section 3B above, and reviewed both the August 2018 and May 2021 REFs, and the 2021 AESO Query and Audit. The complainant is an individual contributor, not in management, but had direct knowledge of key events in 2018 relating to the Backwoods Contract. The complainant was also involved in the Deferral Account Proceeding, but only participated in respect of supporting the legal costs for the Jasper Interconnection Project.

131. No ATCO Electric employee or management personnel reported any concerns regarding the contraventions outlined in Section 6 below to senior regulatory personnel responsible for the preparation of the Deferral Account application, or to the Compliance Officer or the President of ATCO Electric, at any time during the relevant period.

132. However, on June 25, 2021, three weeks after ATCO Electric filed its application in the Deferral Account Proceeding, the complainant sent an email to ATCO’s then-Executive Vice President and Chief Financial Officer, Dennis DeCHAMPLAIN, expressing “significant concerns” about the sole source procurement transaction that led to the Backwoods Contract. The complainant’s email expressed the view that sole sourcing the contract was a “clear contravention of the ISO Rules” and that ATCO Electric should self-report to the AUC.

DeCHAMPLAIN responded to the complainant on the same day, advising that he would “quietly make some inquiries.” A copy of the complainant’s June 25, 2021 email exchange with DeCHAMPLAIN, is attached at **Tab 44**.

133. DeCHAMPLAIN referred the matter to ATCO Ltd.’s Vice President, Internal Audit. Internal Audit conducted an initial review between June 26 and July 8, 2021. This review was found to include “the proper information and detail needed in the necessary protocols and procedures.” Internal Audit requested a meeting with the complainant for July 8, 2021, but the complainant did not accept.

134. On July 19, 2021, the complainant contacted Enforcement staff with concerns.

135. On July 21, 2021, the complainant agreed to meet with Internal Audit, but at that time was hesitant to provide information to them and expressed concerns to DeCHAMPLAIN that Internal Audit was conducting the investigation. At that point, DeCHAMPLAIN referred the matter to Corporate Security, who then commenced their investigation on July 22, 2021. Like Internal Audit, Corporate Security also requested a meeting with the complainant, which was declined. The complainant advised that additional information would be provided via email.

136. On July 27, 2021, the complainant provided the package of documents to both DeCHAMPLAIN and Enforcement staff. A copy of the package of documents provided to DeCHAMPLAIN and Enforcement staff is attached at **Tab 45**.

137. DeCHAMPLAIN commenced vacation on July 30, 2021. On August 15, 2021, while still on vacation, DeCHAMPLAIN suddenly passed away. It is not known whether DeCHAMPLAIN reviewed the package provided on July 27, 2021, nor what he was planning as next steps.

138. On September 22, 2021, without knowledge that a complaint had been made internally or to the AUC, ATCO Electric filed rebuttal evidence in the Deferral Account Proceeding. ATCO Electric’s rebuttal evidence is included in Proceeding 26573 as Exhibits 26573X0262 to X0278.

139. On September 23, 2021, Enforcement staff sent a letter to BAYLEY and Brian SHKROBOT (then ATCO Electric’s Senior Vice President and Interim Chief Financial Officer) at ATCO Electric, advising of its investigation in this matter. This was the first time both SHKROBOT and BAYLEY became aware of the complaints and investigations both internally and by Enforcement staff. ATCO’s September 26, 2021 response to Enforcement staff’s letter of September 23, 2021, is attached at **Tab 46**.

140. After receiving that letter, SHKROBOT directed Corporate Security to investigate the allegations. Corporate Security then conducted and completed its investigation, delivering its report on October 19, 2021. In order to preserve the independence of the investigation, neither BAYLEY nor any other person within ATCO Electric directed, contributed to or was made aware of the particulars of the investigation, until after its conclusion.

141. While ATCO Ltd. was carrying out its internal investigation, ATCO Electric sent a letter to the AUC hearing panel presiding over the Deferral Account Proceeding, requesting a temporary stay of that proceeding (a request that Enforcement staff supported). A copy of that request is attached at **Tab 47**.

142. On December 1, 2021, the AUC determined that it would suspend the Deferral Account Proceeding “until the Commission disposes of the enforcement application.” A copy of the AUC’s letter is attached at **Tab 48**.

#### ***D. ATCO’s conduct***

143. ATCO Electric acknowledges that the components of ATCO Electric’s Deferral Account application which sought full costs of the Backwoods Contract in the Deferral Account Proceeding, were not appropriate.

144. Had a competitive bidding process been used for the Backwoods Contract rather than a direct award, it is likely that the costs incurred would have been lower. By ATCO Electric’s own internal calculations, the decision to direct award the contract for the brushing, matting and Hydrovac services to Backwoods and subsequent inability to obtain market rates resulted in matting costs to be initially approximately \$2.5 million over fair market value, and brushing costs to be initially approximately \$0.5 million over fair market value at the time the decision was made to award the contract (August 2018). ATCO Electric has calculated the final estimated impact of the higher rates for the services at \$10.8 million.<sup>2</sup>

145. The events described in this agreed statement of facts reflect among other things, a failure of process, controls and communication, which led to ATCO Electric not fulfilling the duties and obligations imposed upon it as an electric utility owner and operator in Alberta. Those obligations require that the information ATCO Electric provides in its applications, filings and other representations before the AUC be honest, true, accurate, and not misleading, either expressly or by omission.

146. The events described in this agreed statement of facts resulted in a fundamental lack of transparency with the AUC and the public, such that neither the Commission, nor any of the interveners in the Deferral Account Proceeding, were or reasonably could have been aware of all relevant facts relating to the Backwoods Contract and ATCO Electric’s claim to recover the associated costs, until such time as the complainant came forward and brought this information to light. ATCO Electric alone had the necessary information to ensure the information available to the AUC, the participants in the Deferral Account Proceeding, and the public was true, accurate, complete and not misleading.

147. ATCO Electric acknowledges that it is responsible for the conduct of its employees as outlined in this agreed statement of facts.

## **5 GENERAL**

148. The email correspondence included as part of Appendix “A”, Appendix “B” and Appendix “F” of Enforcement staff’s application in Proceeding 27013 is authentic, in that the emails were sent and received on the dates and times indicated on the face of the documents, and

<sup>2</sup> The Commission panel overseeing the deferral account proceeding may assess this calculation and will test ATCO Electric’s evidence filed in support of the Jasper Interconnection Project, and nothing in this agreed statement of facts purports to bind or limit the Commission’s authority or discretion in that regard.



they were authored by, sent to and received by the individuals indicated on the face of the documents (including any attachments). To be clear, this agreement as to authenticity is not an agreement that the statements made in the email correspondence are true except where otherwise acknowledged in this agreed statement of facts.

149. All documents in the appendices to the enforcement application in Proceeding 27013 that purport or appear to be documents of ATCO Electric or ASL are acknowledged to have come from ATCO Electric and/or ASL's corporate records and files. This is not an agreement that the statements made in the documents are true except where expressly stated in this agreed statement of facts.

## **6 CONTRAVENTIONS**

150. Based on the foregoing facts, ATCO Electric admits that it:

- (a) Contravened sections 9.1.5.2 and 9.1.5.6 of the ISO Rules;
- (b) Contravened the purpose, intent, spirit and letter of subsections 1.1(a), 1.1(d) and 3.1.1 of the Code of Conduct;
- (c) Contravened subsections 7.6(e), (f) and (g) of the Code of Conduct, and the quarterly exception report requirement set out in Bulletin 2010-24; and
- (d) Contravened the *Electric Utilities Act* by failing to fulfil the duties and obligations imposed upon it as an electric utility owner and operator in Alberta, which among other things, require that the information ATCO Electric provides in its applications, filings and other representations before the AUC be honest, true, accurate, and not misleading, either expressly or by omission.

### Schedule 1 ATCO Group Organization Chart

