



**ATCO Electric Ltd.**

**Decision on Preliminary Question  
Application for Review of Decision 24805-D02-2020  
2018-2019 General Tariff Application Compliance Filing**

**April 7, 2021**

**Alberta Utilities Commission**

Decision 25938-D01-2021

ATCO Electric Ltd.

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Proceeding 25938

Application 25938-A001

April 7, 2021

Published by the:

Alberta Utilities Commission

Eau Claire Tower

1400, 600 Third Avenue S.W.

Calgary, Alberta T2P 0G5

Telephone: 310-4AUC (310-4282) in Alberta

1-833-511-4AUC (1-833-511-4282) outside Alberta

Email: [info@auc.ab.ca](mailto:info@auc.ab.ca)

Website: [www.auc.ab.ca](http://www.auc.ab.ca)

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## **1 Decision summary**

1. In this decision, the Alberta Utilities Commission considers whether to grant an application filed by ATCO Electric Ltd.<sup>1</sup> for its transmission function (ATCO Electric or AET) requesting a review of the Commission's directions in Decision 24805-D02-2020<sup>2</sup> (the compliance decision) related to the issues of income tax expense and severance costs.
2. The Commission denies the application for review on the issue of ATCO Electric's severance costs. ATCO Electric has not demonstrated the existence of an error of fact, law or jurisdiction that is apparent on the face of the decision or otherwise exists on a balance of probabilities that could lead the Commission to materially vary or rescind the decision.
3. The Commission approves the application for review on the issue of income tax expense. The review panel finds that ATCO Electric has demonstrated that an error exists, on a balance of probabilities, with respect to the accounting for the allowance for funds used during construction (AFUDC) in the calculation of regulatory income tax expense. The Commission varies paragraph 171 of the compliance decision and directs ATCO Electric to file a second stage variance application to make this required adjustment.

## **2 Background**

4. The compliance decision provided the Commission's determinations on the application of ATCO Electric for its compliance with Commission directions in Decision 22742-D01-2019<sup>3</sup> (original decision) on ATCO Electric's 2018-2019 general tariff application (GTA). ATCO Electric filed its application to review and vary the compliance decision pursuant to Section 10 of the *Alberta Utilities Commission Act* and Rule 016: *Review of Commission Decisions*. The Commission designated the review application as Proceeding 25938.
5. The Consumers' Coalition of Alberta (CCA)<sup>4</sup> opposed the review application on both the income tax expense and severance grounds.

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<sup>1</sup> ATCO Electric Ltd. includes both the transmission function and the distribution function. In this decision, references to ATCO Electric are intended to refer to the transmission function.

<sup>2</sup> Decision 24805-D02-2020: ATCO Electric Ltd. 2018-2019 General Tariff Application Compliance Filing, Proceeding 24805, August 12, 2020.

<sup>3</sup> Decision 22742-D01-2019: ATCO Electric Ltd. 2018-2019 Transmission General Tariff Application, Proceeding 22742, July 4, 2019.

<sup>4</sup> Exhibit 25938-X0013, CCA sur-reply submissions, December 22, 2020.

6. A number of process steps took place over the period of October 9, 2020 to January 22, 2021, including notice, the filing of statements of intent to participate, and two rounds of written submissions from each of ATCO Electric and the CCA.

7. In this decision, the members of the Commission panel who authored the original decision will be referred to as the “hearing panel,” the members of the Commission panel who authored the compliance decision will be referred to as the “compliance panel”<sup>5</sup> and the members of the Commission panel considering the current review application will be referred to as the “review panel.”

8. In reaching its decision, the review panel has reviewed the pertinent portions of the original decision, the compliance decision, relevant materials comprising the record of this proceeding, and:

- ATCO Electric’s 2018-2019 General Tariff Application, Proceeding 22742 (the original proceeding),
- ATCO Electric’s review and variance application of Decision 22742-D01-2019 for the 2018-2019 GTA, Proceeding 24824,
- ATCO Electric’s 2018-2019 GTA compliance filing, Proceeding 24805 (the compliance proceeding), and
- ATCO Electric’s 2018-2019 GTA second compliance filing, Proceeding 25943.<sup>6</sup>

9. Accordingly, references in this decision to specific parts of a record are intended to assist the reader in understanding the review panel’s reasoning relating to a particular matter and should not be taken as an indication that the review panel did not consider all relevant portions of the several records with respect to the matter.

### **3 The Commission’s review process**

10. The Commission’s authority to review its own decisions is discretionary and is found in Section 10 of the *Alberta Utilities Commission Act*. Rule 016 sets out the process for considering an application for review.

11. The review process has two stages. In the first stage, a review panel decides if there are grounds to review the original decision (the preliminary question). If the review panel decides to review the decision, it moves to the second stage where it decides whether to confirm, vary, or rescind the original decision.

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<sup>5</sup> The same three Commission members comprised the panel for both the original decision and the compliance decision.

<sup>6</sup> Note that Proceeding 25943 was closed, no decision was made by the Commission and ATCO Electric filed a new second compliance application in Proceeding 26264.

12. In its review application, ATCO Electric is primarily relying on Section 4(d)(i) and Section 6(3)(a) of Rule 016 in its substantive submissions, but it did generally refer to sections 4(d)(ii) and 6(3)(b)(i) in paragraphs 5 and 58 of the application.

13. In Decision 2012-124, the Commission addressed the role of a review panel and established the principles for its consideration of review applications, including that the review panel's task is not to retry the application based upon its own interpretation of the evidence, nor is it to second guess the weight assigned by the hearing panel to various pieces of evidence. Findings of fact and inferences of fact made by the hearing panel are entitled to considerable deference, absent an obvious or palpable error.<sup>7</sup>

14. Further, Commission decisions are intended to be final and a review should only be granted in limited circumstances.<sup>8</sup> As noted by the Court of Appeal of Alberta in *ATCO Electric Ltd v Alberta (Utilities Commission)*: “In general, a decision-maker's choice to accept evidence that was before it does not give rise to an error in law or jurisdiction.”<sup>9</sup>

15. In this decision, the review panel has decided the preliminary question on the issue of severance costs and denies ATCO Electric's request for a review and variance. On the issue of the accounting for AFUDC in the calculation of regulatory income tax expense, the review panel has considered the preliminary question, has determined that a reviewable error exists, and has directed that the error be corrected in a second stage variance application.

#### 4 Issues

16. ATCO Electric alleges in its review application that the compliance panel erred in fact, law and/or jurisdiction:

- (a) by denying the severance costs incurred by ATCO Electric in accordance with the original decision (paragraph 103 of the compliance decision).<sup>10</sup>
- (b) in directing certain adjustments to tax expense and in its direction to ATCO Electric to adjust its AFUDC in the “Utility earnings before tax” in Schedule 7-3 of its MFR [minimum filing requirement] schedules to comply with the Commission's findings to recalculate its income tax expense to adjust for AFUDC (paragraph 171 of the compliance decision).<sup>11</sup>

<sup>7</sup> Decision 2012-124: AltaLink Management Ltd. and EPCOR Distribution & Transmission Inc., Decision on Request for Review and Variance of Decision 2011-436 Heartland Transmission Project, Proceeding 1592, Applications 1607924-1, 1607942-1, 1607994-1, 1608030-1, 1608033-1, May 14, 2012, at paragraph 31.

<sup>8</sup> For example, see Decision 3373-D01-2015: Decision on Preliminary Question, Application for Review of AUC Decision 2014-167: 2013-2014 Transmission General Tariff Application Compliance Filing, Proceeding 3373, January 19, 2015, paragraph 25 and Decision 2012-124, paragraph 31.

<sup>9</sup> *ATCO Electric Ltd v Alberta (Utilities Commission)* 2019 ABCA 417, paragraph 22.

<sup>10</sup> Direction 5 at paragraph 103 in the compliance decision relates to Direction 5 at paragraph 90 in the original decision.

<sup>11</sup> Direction 9 at paragraph 171 in the compliance decision relates to Direction 20 at paragraph 278 in the original decision.

17. For the adjustment to income tax expense, ATCO described the ground as: “Income tax and the determination that AFUDC has been included twice in the calculation of AET’s current income tax expense.”<sup>12</sup>

#### 4.1 Severance costs

18. For the reasons set out below, the review panel finds that ATCO Electric has not shown, either on a balance of probabilities or on the face of the compliance decision, that an error in fact, law or jurisdiction exists in the compliance decision in relation to the approval of severance costs that could lead the Commission to materially vary or rescind the compliance decision respecting severance costs.

19. At the heart of this matter is the compliance panel’s interpretation of the hearing panel’s direction for ATCO Electric to provide, in its compliance filing, a recalculation of its 2018 severance costs based on the proportion of years of service each severed position provided to the transmission function, as identified in Exhibit 22742-X0698 (direction 5 at paragraph 90).<sup>13</sup>

20. In the original proceeding, ATCO Electric requested recovery of \$6.0 million in severance costs for 2018.<sup>14</sup> In the original decision, the hearing panel found that:

AET severance payments are based on the total time an employee has worked in any ATCO group company. However, AET allocated the severance payment amounts included in its revenue requirement forecast based on where the severed position was providing its services in 2018. The Commission does not find this to be a reasonable allocation of severance payments.<sup>15</sup>

21. The hearing panel found that the allocation of severance costs to ATCO Electric transmission was not reasonable because, instead of reflecting an employee’s years of service with ATCO Electric transmission as a proportion of the total years employed within the ATCO group of companies, ATCO Electric allocated the entire cost of severance to ATCO Electric transmission, regardless of the severed employee’s work history with any of the other ATCO entities.<sup>16</sup> The hearing panel instructed ATCO Electric, through direction 5, to recalculate the severance amounts.

22. Exhibit 22742-X0698, which is referenced in direction 5, is an undertaking document filed by ATCO Electric in the original proceeding as an update to its response to AET-AUC-2018OCT04-005 in exhibits 22742-X0557.01 and 22742-X0558.

23. Exhibits 22742-X0558 and 22742-X0698 each show positions severed or forecast to be severed during the test period, the total years of service of each position, and the breakdown of those years of service to each of the described ATCO entities, namely: ATCO I-Tek, ATCO Gas,

<sup>12</sup> Exhibit 25938-X0001, review application, paragraph 1.

<sup>13</sup> Decision 22742-D01-2019, paragraph 90.

<sup>14</sup> Decision 22742-D01-2019, paragraph 75, Table 11: AET severance costs, row “2018 paid.” The Commission recently approved the final 2019 severance costs in Decision 24964-D02-2021: ATCO Electric Ltd. 2020-2022 Transmission General Tariff Application Proceeding 24964, March 19, 2021. Accordingly, the portions of the review application that relate to 2019 are moot. This decision refers only to severance costs for the 2018 test year.

<sup>15</sup> Decision 22742-D01-2019, paragraph 88.

<sup>16</sup> Decision 22742-D01-2019, paragraph 89.

ATCO Electric Yukon, ATCO Electric distribution and ATCO Electric transmission. As clarified by an ATCO Electric witness, the information included in the ATCO Electric transmission column of Exhibit 22742-X0558 related only to the years 2014 to 2018 because ATCO Electric transmission did not exist in ATCO's system as a standalone entity prior to 2014, in spite of the fact that severed employees may have been performing services for both ATCO Electric distribution and ATCO Electric transmission prior to 2014.<sup>17</sup>

24. Prior to its first compliance filing, ATCO Electric sought a review of the hearing panel's disallowance of a portion of the applied-for severance costs (Proceeding 24824). The review panel in that proceeding (the 24824 review panel) found that a final decision regarding ATCO Electric's compliance with the treatment of applied-for severance costs in direction 5 had not been made and that a review of the issue was premature. The 24824 review panel found that any new evidence was best addressed in the compliance proceeding, but went on to indicate that nothing in its decision prevented "the filing of information or argument in the compliance proceeding relating to recovery of severance costs for employees that were not in the employ of ATCO Electric transmission on the date they were severed but who had previously provided services to the transmission function."<sup>18</sup> The 24824 review panel conditioned this observation by adding: "Whether such evidence and argument is in keeping with the premise of direction 5 of the Decision, is best determined in the compliance filing application."<sup>19</sup>

25. In its compliance filing, ATCO Electric provided new evidence of additional years of work history for the 2003-2013 period for ATCO Electric transmission employees severed in 2018.

26. ATCO Electric also filed evidence of positions severed from other ATCO companies with history of prior service to ATCO Electric transmission. Some of these positions were identified in the original proceeding and some were not.

27. Further, ATCO Electric made a request to calculate its severance costs using a different methodology based on the total average hours worked for ATCO Electric transmission between 2004 and 2018, instead of basing severance costs on the proportion of years of service provided by the severed employees to ATCO Electric transmission in accordance with the information filed in Exhibit 22742-X0698.<sup>20</sup>

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<sup>17</sup> Proceeding 22742, Transcript, Volume 6, pages 920-921 and 944-945 where an ATCO Electric witness gave testimony on Exhibit 22742-X0558, AET-AUC-2018OCT04-005(a) Attachment 1, which is the original response that generated an undertaking in Exhibit 22742-X0698. System limitations for the years prior to 2014 were noted in the findings in paragraph 89 of the original decision.

<sup>18</sup> Decision 24824-D01-2020, ATCO Electric Ltd. Decision on Preliminary Question Application for Review of Decision 22742-D01-2019, 2018-2019 Transmission General Tariff Application, Proceeding 24824, January 9, 2020, paragraph 105.

<sup>19</sup> Decision 24824-D01-2020, paragraph 105.

<sup>20</sup> Exhibits 24805-X0001.01, AET 2018-2019 GTA Compliance Filing, Direction Response 05 and Attachment 1, PDF pages 18-22 and Exhibit 24805-X0007, Direction Response 05 Attachment 1. The Commission approved the recovery of \$2.7 million in severance costs based on the methodology directed in Decision 22742-D01-2019. In its compliance filing application, ATCO Electric transmission sought to recover \$5.2 million based on the proposed methodology it put forward, an increase of \$2.6 million from the Commission directed method, but \$0.7 million less than the \$6.0 million it had sought to recover in the original GTA proceeding for 2018. There was an overall reduction of \$3.3 million from the \$6.0 million severance amount that ATCO Electric applied for in Proceeding 22742 to the \$2.7 million amount approved for recovery.



28. In the compliance filing, ATCO Electric stated that it used its financial system to derive the work history of severed employees between 2004 and 2018 and applied common group allocators to each individual year the employee worked. Where a common group allocator was not applicable, work was manually split based on the project type where an employee charged time to ATCO Electric transmission or ATCO Electric distribution.<sup>21</sup>

29. The compliance panel specifically addressed the purpose of a compliance proceeding as articulated by the Commission in Decision 22166-D01-2017,<sup>22</sup> including:

- Compliance filing proceedings are not intended to provide a second opportunity for parties to re-argue issues already decided in the earlier proceeding.
- Findings or directions from earlier proceedings will only be addressed in a compliance filing to the extent necessary to ensure the compliance with the previous Commission decision or if a utility is unable to comply with a direction for reasons not known when the substantive decision was made.
- The purpose of a compliance filing is to provide the utility with an opportunity to reflect the full and interrelated impact of all the Board's [Commission] findings in a general rate application decision in the utility's rates and charges.
- In a compliance filing, it is inappropriate for a party to introduce new evidence.<sup>23</sup>

30. The compliance panel identified three issues that it was required to address in considering the severance cost evidence filed by ATCO Electric:

- 1) new information to provide additional years of work history not previously identified in Proceeding 22742 for ATCO Electric transmission employees severed
- 2) positions severed from other ATCO companies with history of prior service to ATCO Electric transmission and identified in Proceeding 22742
- 3) positions severed from other ATCO companies with history of prior service to ATCO Electric transmission but not previously identified in Proceeding 22742.

31. The compliance decision addressed each of these three issues in turn and in light of the purposes of a compliance filing.<sup>24</sup> The compliance panel found that: "With the exception of information relating to the years 2014 to 2018, none of this evidence was provided on the record of Proceeding 22742."<sup>25</sup> The compliance panel rejected the new evidence finding that it was not

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<sup>21</sup> Exhibit 24805-X0001.01, AET 2018-2019 GTA Compliance Filing, Direction Response 05, PDF page 18.

<sup>22</sup> Decision 22166-D01-2017: ATCO Pipelines Request for Review and Variance of Decision 21515-D01-2016, ATCO Pipelines' 2015-2016 Revenue Requirements Compliance Filing to Decision 3577-D01-2016, Proceeding 22166, April 5, 2017.

<sup>23</sup> Decision 24805-D02-2020, paragraph 79.

<sup>24</sup> Decision 24805-D02-2020, paragraph 80.

<sup>25</sup> Decision 24805-D02-2020, paragraph 83.

directly related to the severance direction in the original decision.<sup>26</sup> Individual reasons on each of the three issues were provided in paragraphs 82-113 of the compliance decision.

32. The compliance panel noted that the historic work information in the first identified issue was not part of the evidentiary record in Proceeding 22742, and that ATCO Electric had claimed in the original proceeding that certain of this information was unavailable to it due to system limitations. The compliance panel noted further that ATCO Electric had been given an earlier opportunity to provide this information in response to an IR,<sup>27</sup> but did not provide this information for the years from 2004 to 2013.<sup>28</sup>

33. The compliance panel stated that the hearing panel had been aware of the potential need for additional years of work history for ATCO employees severed and requested this information in the original proceeding, but ATCO Electric did not file the requested information and specifically indicated that it could not provide the information.<sup>29</sup> The compliance panel found that the 2004 to 2013 work history information filed by ATCO Electric in response to direction 5 fell “outside what is appropriate or fair for a compliance filing because such evidence cannot be tested by the Commission or by other parties for its reliability, accuracy and completeness” and “that allowing for new evidence to be filed in a compliance proceeding violates the principle of regulatory efficiency and finality (certainty) in regulatory decision-making.”<sup>30</sup>

34. The compliance panel went on to find that because ATCO Electric was able to provide work history evidence going back to 2004 in the compliance proceeding, “with proper diligence and for AET to meet its onus, AET should have been able to produce this evidence during the original proceeding.”<sup>31</sup>

35. The compliance panel also found that ATCO Electric’s evidence in respect of 28 additional positions severed from other ATCO companies with history of prior service to ATCO Electric transmission but not previously identified in Proceeding 22742 (issue (3) identified in paragraph 30), was new evidence that had not been adduced during the original proceeding and was not included in Exhibit 22742-X0698 or elsewhere on the record. The compliance panel re-iterated that it is inappropriate for a party to introduce new evidence in a compliance filing and added that this new evidence was not required to evaluate ATCO Electric’s compliance with Direction 5.<sup>32</sup>

36. The compliance panel concluded that it would not consider the new information filed on severance for the years 2004 to 2013, or certain new information on positions severed from other ATCO companies with history of prior service to ATCO Electric transmission but not previously identified in the original proceeding (issues (1) and (3) identified in paragraph 30).

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<sup>26</sup> Decision 24805-D02-2020, paragraph 81, referring to Exhibit 24805-X0143, ATCO Electric reply argument, paragraph 4.

<sup>27</sup> Proceeding 22742, Exhibit 22742-X0557.01 and Exhibit 22742-X0558, AET Information Response Round 3 to AUC, AET-AUC-2018OCT04-005(c) Attachment 1.

<sup>28</sup> Decision 24805-D02-2020, paragraph 86.

<sup>29</sup> Decision 24805-D02-2020, paragraphs 86 and 89.

<sup>30</sup> Decision 24805-D02-2020, paragraph 89.

<sup>31</sup> Decision 24805-D02-2020, paragraph 90.

<sup>32</sup> Decision 24805-D02-2020, paragraph 110.

37. The compliance panel accepted the evidence of the positions severed from other ATCO companies with history of prior service to ATCO Electric transmission and identified in the original proceeding (issue (2) identified in paragraph 30), but only for the years 2014-2018. The compliance panel found that the evidence in this category was “consistent with the purpose of a compliance filing...as this gives effect to the ‘interrelated impact’ of the Commission’s findings in Direction 5” and “on the basis that it was first raised in Proceeding 22742 and is therefore consistent with the requirements of Direction 5.”<sup>33</sup>

38. The compliance panel found that the comments made by the 24824 review panel in Decision 24824-D01-2020 did not limit or constrain the compliance panel’s finding. It reasoned that the 24824 review panel had expressly deferred to the discretion of the compliance panel when it stated that any new evidence submitted on severance costs was “also best addressed in the compliance filing application” and that “[w]hether such evidence and argument is in keeping with the premise of direction 5 of the Decision, is best determined in the compliance filing application.”<sup>34</sup>

39. In the review application, ATCO Electric asserted that the compliance panel’s decision resulted in the denial of \$3.3 million in severance costs for 2018<sup>35</sup> and that the compliance panel made numerous errors of fact, law or jurisdiction, including the following:

- (i) the allowed \$2.7 million severance only accounts for the portion of time the severed employee was actually employed by ATCO Electric transmission as a separate entity in its Oracle system, not the portion of time each employee provided service to the transmission function.<sup>36</sup>
- (ii) the compliance panel misapprehended the statements of ATCO Electric’s witness and relied on this incorrect interpretation to mistakenly conclude that certain of the historic work information was unavailable due to system limitations.<sup>37</sup>
- (iii) the compliance panel ignored ATCO Electric’s evidence that the severed employees were, in fact, providing “service to the transmission function,” when in fact, certain employees were providing service to both the ATCO Electric transmission function and the distribution function.<sup>38</sup>

40. ATCO Electric further alleged that the compliance panel erred when it directed ATCO Electric, in paragraph 113 of the compliance decision, to remove severance costs that relate to time spent providing affiliate services between 2014 and 2018. It argued that a further disallowance amounts to a double deduction of this time spent providing affiliate services.<sup>39</sup> However, ATCO Electric acknowledged in its review application that it had appropriately removed the affiliate charges from ATCO Electric distribution and other affiliates as part of the

<sup>33</sup> Decision 24805-D02-2020, paragraph 102.

<sup>34</sup> Decision 24805-D02-2020, see paragraphs 91, 102, and 111.

<sup>35</sup> Exhibit 25938-X0001, review application, paragraph 37.

<sup>36</sup> Exhibit 25938-X0001, review application, paragraph 38.

<sup>37</sup> Exhibit 25938-X0001, review application, paragraph 42.

<sup>38</sup> Exhibit 25938-X0001, review application, paragraph 39.

<sup>39</sup> Exhibit 25938-X0001, review application, paragraph 51.

compliance filing.<sup>40</sup> The review panel finds the direction to remove affiliate services from severance costs was properly reflected in the compliance decision. Because the affiliate charges were removed as part of the compliance filing, there are no further amounts to remove and no “further disallowance” evident in the review application that would constitute an error resulting from a double reduction. Accordingly, ATCO Electric has not demonstrated that an error in fact, law or jurisdiction exists on the face of the compliance decision or otherwise exists on a balance of probabilities that could lead the Commission to materially vary the compliance panel’s direction to remove affiliate services from ATCO Electric’s severance costs.

41. The review application is related to a compliance filing decision, which has a more restricted purpose than an original proceeding. As noted by the compliance panel, the purpose of a compliance filing is to provide the utility with an opportunity to reflect the full and interrelated impact of all the Commission findings and it is inappropriate for a party to introduce new evidence in a compliance filing. It is not the review panel’s role to retry the application based upon its own interpretation of the evidence, nor is it to second guess the weight assigned by the compliance panel to various pieces of evidence absent an error of fact, law or jurisdiction that is either apparent on the face of the decision or otherwise exists on a balance of probabilities that could lead the Commission to materially vary or rescind the decision.

42. Given that context, the review panel has considered the records of the original and compliance proceedings, the original decision, and the reasoning provided in the compliance decision in assessing whether errors exist as alleged by ATCO Electric in its review application on grounds (i) through (iii) enumerated in paragraph 39 above. The review panel is of the view that these three grounds are interrelated because they all relate to the compliance panel’s finding not to accept the new work history evidence for ATCO Electric transmission employees severed, or the new evidence of positions severed from other ATCO companies with history of prior service to ATCO Electric transmission but not previously identified in Proceeding 22742.

43. The hearing panel was aware that ATCO Electric’s transmission and distribution functions were not separate entities under the Oracle system prior to January 1, 2014<sup>41</sup> and expressly noted the lack of transparency regarding time allocated for severed employees to ATCO Electric’s transmission function prior to 2014.<sup>42</sup> The compliance panel referenced the system limitations noted by the ATCO witness in the original proceeding<sup>43</sup> and considered that ATCO Electric could have filed the work history information prior to 2014, but that this information was not available to the panel in the original proceeding.<sup>44</sup> As noted above, the compliance panel indicated that ATCO Electric had failed to provide information on the 2004 to 2013 work histories of severed employees in the original proceeding and concluded that allowing

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<sup>40</sup> Exhibit 25938-X0001, review application, paragraph 51.

<sup>41</sup> The evidence given in ATCO Electric’s witness testimony is reproduced in part at paragraph 86 of Decision 22742-D01-2019.

<sup>42</sup> Decision 22742-D01-2019, paragraph 89.

<sup>43</sup> Decision 24805-D02-2020, paragraph 74, referring to Proceeding 22742, Transcript, Volume 6, pages 920-921 and 944-945.

<sup>44</sup> A breakdown of each AET severed work position was requested by the Commission in Exhibit 22742-X0557.01, AET-AUC-2018OCT04-005(a), which stated, “(a) Please break out the years of service for each position/employee by the time spent working for: (i) ATCO Electric Transmission, (ii) ATCO Electric Distribution, and (iii) Other ATCO Affiliates.”

for new evidence to be filed in a compliance proceeding violated the principle of regulatory efficiency and finality (certainty) in regulatory decision-making.<sup>45</sup>

44. To the extent that ATCO Electric has referenced Section 4(d)(ii) of Rule 016 as a ground for review, the review panel finds that this ground does not arise on the basis of the errors alleged. Under Section 6(3)(b)(i) of this rule, the Commission may grant a review if a party is able to demonstrate that new material facts have arisen that could not have been provided at the time of the underlying decision. In the compliance proceeding, ATCO Electric attempted to file new evidence however, this new evidence was not accepted by the compliance panel. Further, the compliance panel determined that this new evidence could have been discovered at the time of the original proceeding by ATCO Electric exercising reasonable diligence.

45. The review panel finds that it was within the compliance panel's discretion to determine what evidence was responsive to the direction on severance costs. Consistent with Decision 22166-D01-2017, in establishing compliance with a GTA decision, the Commission is not obligated or otherwise required to accept the evidence of the applicant regarding its costs if the evidence adduced is beyond what is required for compliance with the direction.<sup>46</sup> Further, the review panel agrees with the compliance panel that, "with proper diligence" and for ATCO Electric transmission to meet its onus, it should have been able to produce work history evidence back to 2004 in the original proceeding.

46. The review panel also agrees with the CCA that the hearing panel's direction to recalculate severance costs using the information "as identified in Exhibit 22742-X0698,"<sup>47</sup> was straightforward. The compliance panel was charged with determining whether or not the evidence filed was consistent with direction 5, i.e., for ATCO Electric to file "a recalculation of its 2018 severance costs based on the proportion of years of service each severed position provided to the transmission function, as identified in Exhibit 22742-X0698." Instead of determining the proportion of years of service provided by the severed employees to ATCO Electric transmission in accordance with the columns in Exhibit 22742-X0698, which should have been a simple arithmetical calculation<sup>48</sup>, ATCO Electric adduced new evidence and proposed an alternative method to calculate its severance costs based on the total average hours worked for ATCO Electric transmission between 2004 and 2018. The compliance panel's assessment that the compliance proceeding was not the proper forum for examination of ATCO Electric's new methodology was reasonable.<sup>49</sup>

47. In its compliance filing, ATCO Electric also adduced new evidence of positions severed by ATCO Electric distribution or other affiliates that had provided service to the ATCO Electric transmission function. The compliance panel was similarly not required to accept this evidence. The compliance panel referred to ATCO Electric's new evidence filed on those additional

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<sup>45</sup> Decision 24805-D02-2020, paragraph 89.

<sup>46</sup> See also, Justice Fruman's decision on behalf of the Alberta Court of Appeal in *Epcor Generation Inc v Alberta (Energy and Utilities Board)*, 2003 ABCA 374, December 22, 2003, paragraph 23.

<sup>47</sup> Exhibit 25938-X0006, CCA submissions, paragraphs 52.

<sup>48</sup> The proportion of years of service required AET to divide column 6 by column 7 of Exhibit 22742-X0698 and multiply the result by the amount of severance awarded to that employee. This calculation was provided in response to a Commission IR that can be found in Exhibit 24805-X0045, AET-AUC-2019OCT07-002, PDF pages 5-10; and Exhibit 24805-X0046, AET-AUC-2019OCT07-002 Attachment 1.

<sup>49</sup> See the compliance panel's similar finding in Decision 24805-D02-2020, paragraph 88.

positions and found that the costs associated with the additional employees severed by other ATCO entities, for example, ATCO Electric distribution or ATCO I-Tek, fell outside the hearing panel's direction, which made specific reference to Exhibit 22742-X0698.

48. The compliance panel's reasoning shows that it was cognizant of the additional information filed on severance costs and of ATCO Electric's submissions thereon. In its reasoning, the compliance panel expressly rejected ATCO Electric's argument that the entirety of the information filed in the compliance filing was required for the utility to comply with the original panel's direction.<sup>50</sup>

49. Extensive analysis and reasons followed at paragraphs 82-113 that addressed the evidence adduced by ATCO Electric and assessed whether this evidence was necessary to comply with direction 5 of the original decision. In those paragraphs, the compliance panel determined what data should be used to determine ATCO Electric's 2018 severance costs. It is not apparent on the face of the compliance decision or on a balance of probabilities that the compliance panel either misapprehended or ignored the evidence resulting in an error. To the contrary, the compliance decision specifically explained, at some length, why certain evidence was accepted and other evidence was rejected.

50. Based on the reasons above, ATCO Electric has not demonstrated the existence of an error of fact, law or jurisdiction that is either apparent on the face of the compliance decision or otherwise exists on a balance of probabilities that could lead the Commission to materially vary or rescind the compliance decision on the issue of severance costs.

## **4.2 Income tax expense**

51. AFUDC represents the financing cost of a capital asset during the construction phase of a project. It is only calculated and included in the cost of a capital asset if construction of the capital asset exceeds one year. When a utility calculates AFUDC, one of the inputs used is the weighted average cost of capital, which consists of a debt component and an equity component. In other words, there is a debt component and an equity component to the calculated AFUDC amount.

52. AFUDC is not an operating expense and it is not included as a separate revenue requirement item. Instead, recovery of AFUDC commences in the year that the capital asset to which AFUDC applies is included as part of rate base, and the utility includes a return on that rate base as well as a return of that rate base through depreciation.

53. An issue with respect to how AFUDC is accounted for in the calculation of the income tax expense component of ATCO Electric's transmission revenue requirements for 2018-2019 was identified in the original proceeding, addressed in the compliance decision, and is one of the subjects of this review proceeding.

54. In its review application, ATCO Electric challenged the basic findings of the compliance panel and alleged that those findings result in an unsupported assumption that the regulatory income tax expense over the life of a capital asset should be the same for a non-AFUDC

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<sup>50</sup> Decision 24805-D02-2020, paragraph 81.

capitalized asset and for a capital asset that includes AFUDC.<sup>51</sup> ATCO Electric submitted that the Commission-directed accounting for AFUDC in the calculation of regulatory income tax expense was in part, not correct.<sup>52</sup>

55. Perhaps more importantly, ATCO Electric disclosed, for the first time in the review application,<sup>53</sup> that it had made an inadvertent error in its accounting for AFUDC in the calculation of regulatory income tax expense. ATCO stated that it had improperly added the debt portion of AFUDC to the utility earnings before tax.<sup>54</sup> Until this point, ATCO Electric's unwavering position was that it had properly added both components of AFUDC, debt and equity, to its utility earnings before tax. To correct its identified error, ATCO Electric proposed to adjust its regulatory income tax expense by removing the debt portion of AFUDC from the total utility earnings before tax.

56. In the original proceeding, ATCO Electric made the following submission regarding the accounting for AFUDC in the calculation of regulatory income tax expense:

AFUDC is included in the calculated total of utility earnings, before tax, to ensure that there is no impact on utility earnings or revenue requirement from the corresponding tax deduction, **as AFUDC is a form of a non-cash capitalized interest and it is deductible for income tax purposes.**<sup>55</sup> [emphasis added]

57. In accordance with this accounting, when calculating the regulatory income tax expense, ATCO Electric added both the debt and equity components of the AFUDC amount to the utility earnings before tax, and then included offsetting income tax deductions for the same amounts. This resulted in AFUDC having no impact on the regulatory income tax expense component of the transmission revenue requirements for 2018-2019.

58. The hearing panel was concerned that ATCO Electric's accounting might be erroneous, and directed ATCO Electric to demonstrate in the compliance filing that its accounting for AFUDC, in calculating the income tax expense component of the revenue requirements, did not involve two potential errors,<sup>56</sup> either by: (1) adding AFUDC to the utility earnings before tax, or (2) removing AFUDC from the undepreciated capital cost pool.<sup>57</sup>

59. In the compliance filing, ATCO Electric maintained that its accounting for AFUDC for the purposes of its regulatory income tax expense calculation did not involve any errors<sup>58</sup> and that adjustments regarding the accounting for AFUDC in calculating regulatory income tax expense were not required.<sup>59</sup> The compliance panel accepted that ATCO Electric's removal of AFUDC from the undepreciated capital cost pool was proper, but held that ATCO Electric had made an error in calculating regulatory income tax expense by adding AFUDC to the utility

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<sup>51</sup> Exhibit 25938-X0001, review application, paragraph 16.

<sup>52</sup> Exhibit 25938-X0001, review application, paragraph 10.

<sup>53</sup> Exhibit 25938-X0001, review application, paragraph 11.

<sup>54</sup> Exhibit 25938-X0001, review application, paragraph 11.

<sup>55</sup> Decision 22742-D01-2019, paragraph 270, quoting from Exhibit 22742-X0725, ATCO Electric final argument, paragraph 165.

<sup>56</sup> Decision 22742-D01-2019, paragraph 278.

<sup>57</sup> Decision 22742-D01-2019, paragraph 267.

<sup>58</sup> Decision 24805-D02-2020, paragraph 155.

<sup>59</sup> Decision 24805-D02-2020, paragraph 151.

earnings before tax. The panel's rationale was that AFUDC was counted twice: once through future period revenue requirements and once through the inclusion of AFUDC in total utility earnings before tax while the asset was under construction and not yet in-service. The compliance panel also relied on a comparison of the regulatory income tax accounting for: (1) non-AFUDC capitalized assets, which are added to rate base in the same year the assets are constructed, and (2) capital assets that include AFUDC.<sup>60</sup> The compliance panel directed ATCO Electric to account for AFUDC in the calculation of regulatory income tax expense by excluding it from total utility earnings before tax, and by including a deduction for the total AFUDC amounts.<sup>61</sup>

60. In its review application, ATCO Electric submitted that while the debt portion of AFUDC should be removed from the total utility earnings before tax, the equity portion of AFUDC should continue to be included as part of the total utility earnings before tax. It submitted that if the equity portion of AFUDC was excluded from the total utility earnings before tax, which would be required in order for ATCO Electric to comply with the compliance panel's direction, and if the equity portion was claimed as a deduction in calculating regulatory income tax expense, this would result in a revenue requirement that is too low, because it is based on an incorrect assumption that the equity portion of AFUDC is deductible when calculating statutory income tax expense.<sup>62</sup> ATCO Electric submitted that there is no statutory income tax deduction for the equity portion of AFUDC. It added that if it followed the Commission's direction to include a tax deduction for the equity portion of AFUDC in calculating regulatory income tax expense, there would be a shortfall between the regulatory income tax expense collected from customers and the statutory income tax expense. This shortfall would not allow ATCO Electric a reasonable opportunity to earn a fair return or recover its reasonably incurred costs.<sup>63</sup>

61. There are two concerns that arise in respect of ATCO Electric's review submission on the accounting for AFUDC in the calculation of regulatory income tax expense. The first is that ATCO Electric only recently disclosed that it had made an error with respect to how it accounts for AFUDC in the calculation of regulatory income tax expense.<sup>64</sup> The second is that ATCO Electric's discovery of its error means that it was not properly calculating the regulatory income tax expense component of its revenue requirement in the past, including in years prior to the test period, to the detriment of customers. In fact, ATCO Electric acknowledged that under its historical methodology, no effective income tax deduction for the debt portion of AFUDC was reflected in the calculation of the regulatory income tax expense and this resulted in an overstated revenue requirement.<sup>65</sup>

62. The review panel finds that information about separately accounting for the debt portion and the equity portion of AFUDC in the calculation of regulatory income tax expense arose only during this review proceeding and represents a significant change from ATCO Electric's submission in the original proceeding that the entire amount of AFUDC is deductible for income

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<sup>60</sup> Decision 24805-D02-2020, paragraph 161.

<sup>61</sup> Decision 24805-D02-2020, paragraph 171.

<sup>62</sup> Exhibit 25938-X0007, ATCO Electric reply submission, paragraph 10.

<sup>63</sup> Exhibit 25938-X0001, review application, paragraph 13.

<sup>64</sup> The review application at Exhibit 25938-X0001 was filed on October 9, 2020. ATCO Electric filed a second compliance filing application as Exhibit 25943-X0001 in Proceeding 25943 two business days later (on October 13, 2020) that also identified the error in its income tax expense calculations.

<sup>65</sup> Exhibit 25938-X0007, ATCO Electric reply submission, paragraphs 17-18.



tax purposes. ATCO Electric steadfastly maintained, throughout the original proceeding and its first compliance filing, that there was no potential error in its current accounting for AFUDC in the calculation of the regulatory income tax expense component of revenue requirement. The discovery of the “inadvertent error” ultimately resulted from Commission directions in the original and compliance decisions.

63. The issue before the review panel is whether ATCO Electric’s new submissions arising from its review and its calculations filed in this proceeding reveal an error in the accounting for AFUDC in the calculation of regulatory income tax expense, and if so, whether it constitutes a reviewable error that should be corrected as part of a second stage review proceeding.

64. It is clear to the review panel that neither the hearing panel, nor the compliance panel, had the benefit of this information in assessing the nature and extent of any errors associated with the accounting for AFUDC in the calculation of regulatory income tax expense in those previous decisions. ATCO Electric has filed new evidence in this proceeding, which should, in the review panel’s view, have been discoverable prior to the review proceeding and which ATCO Electric had the clear onus to adduce in response to the direction in the original proceeding. ATCO Electric’s failure to exercise the diligence required to adequately respond to the original direction, which would have uncovered the error in its accounting for AFUDC in the calculation of the regulatory income tax expense, was neither efficient, nor helpful to the regulatory process. Further, ATCO Electric’s error has resulted in the overcharging of customers, and has unjustifiably benefitted the shareholders of ATCO Electric in past rates.

65. Despite these significant reservations, based on the material presented in the review application, the review panel finds that there is an error in the compliance decision in the Commission-directed regulatory accounting for the equity portion of AFUDC in the calculation of income tax expense that requires correction. ATCO Electric was directed in the compliance decision to exclude both the debt and equity components of AFUDC from total utility earnings before tax, and to include deductions for both components.

66. The correct accounting, for regulatory purposes, requires ATCO Electric to include the equity portion of AFUDC as part of the total utility earnings before tax, but not the debt portion. The accounting then requires a deduction for the equity portion, which results in no net deduction for the equity component of AFUDC being reflected in the regulatory income tax expense. The accounting also requires a deduction for the debt portion, which reduces revenue requirement.

67. The review panel accepts that a net equity deduction is not permissible for statutory income tax purposes. The equity component of AFUDC is the portion of the financing expense funded by equity, for which there is no offsetting expense, unlike the portion funded by debt, which has an offsetting interest expense that is deductible for statutory income tax purposes.

68. For regulatory purposes, the Commission has deemed that the financing expense is funded by debt and equity by allowing the AFUDC amount to be calculated using the weighted average cost of capital. The benefit customers receive from the AFUDC amounts for a given year arises because of the deduction of the debt portion of AFUDC in the calculation of regulatory

income tax expense, which reduces that expense and lowers the revenue requirement. This is demonstrated by ATCO Electric in its proposed AFUDC tax methodology.<sup>66</sup>

69. The review panel finds that a reviewable error exists and considers that a correction is required to ATCO Electric's accounting for AFUDC in the calculation of regulatory income tax expense to ensure the accuracy of the income tax expense component of the revenue requirement in ATCO Electric's 2018-2019 GTA. The correct way for ATCO Electric to account for AFUDC in the calculation of the income tax expense component of its 2018-2019 GTA has been set out above, and the net result is a tax deduction for the debt portion of the AFUDC. The material presented by ATCO Electric in the AFUDC tax scenarios in Table 6 of Attachment 1 of its reply submissions is instructive in this regard.<sup>67</sup>

70. For these reasons, and based on ATCO Electric's proposed method outlined in Table 6 of Attachment 1 of ATCO Electric's reply submissions, ATCO Electric's request for a review and variance of paragraph 171 of the compliance decision is allowed. The review panel varies the finding in the first sentence of paragraph 171 of the compliance decision, and that sentence is amended, with additional language in bold type, as follows:

~~In its consolidated filing, ATCO Electric is directed to adjust its AFUDC in the "Utility earnings before tax" in Schedule 7-3 of its MFR schedules to comply with the Commission's findings with respect to AFUDC in this decision.~~ **adopt the method outlined in Table 6 of Attachment 1 of ATCO Electric's reply submissions (Exhibit 25938-X0007 in Proceeding 25938) in accounting for AFUDC in the calculation of the income tax expense component of the 2018-2019 Transmission GTA, and to amend any and all revenue requirement schedules that are affected by the adoption of this method.**

71. The review panel directs ATCO Electric to file a second stage review application to comply with the revision in paragraph 70 above by May 5, 2021. The second stage variance application will allow the Commission to fully examine how ATCO Electric's adjustments to income tax expense affect the revenue requirement calculations and any other corresponding adjustments to ATCO Electric's MFR schedules.

72. As a final matter, this review decision and the second stage review decision will not only affect the calculation of income tax expense in the 2018-2019 test years, but will also impact ATCO Electric's income tax expense included in future applications, including the 2020-2022 GTA compliance filing.<sup>68</sup> It will also affect ATCO Electric's 2017 income tax expense because, as stated by the compliance panel in paragraphs 185-188 of the compliance decision, an adjustment would be required to the income tax expense related to the refund/collection calculation for the differences in 2017 AFUDC tax inputs between the forecast and actual costs

<sup>66</sup> Exhibit 25938-X0008, ATCO Electric AFUDC tax scenarios, worksheet 'Table 06 AET Proposed Method', column 'Year 0.'

<sup>67</sup> Exhibit 25938-X0008, ATCO Electric AFUDC tax scenarios, worksheet 'Table 06 AET Proposed Method.'

<sup>68</sup> A compliance filing for the 2020-2022 general tariff application was directed to be filed in Decision 24964-D02-2021. The compliance filing has not yet been filed with the Commission.

as part of its settlement of deferral account balances in Proceeding 24375.<sup>69</sup> The compliance panel then noted, “the differences between forecast and actual utility income tax inputs used to calculate income tax expense, such as AFUDC, for the direct assigned capital are still subject to true-up because these amounts have not been finalized in ATCO Electric’s deferral account in Proceeding 24375.”<sup>70</sup>

73. On April 5, 2021, the Commission issued the compliance filing decision related to ATCO Electric’s 2017 deferral account balances and directed a placeholder of \$2.99 million for the difference in 2017 AFUDC tax inputs between the forecast and actual costs.<sup>71</sup>

74. The review panel directs AET to indicate in its second stage review application where it proposes to address the final settlement of the placeholder of \$2.99 million for its 2017 income tax inputs between forecast and actual costs, and where it proposes to update its revenue requirement schedules for its 2020-2022 GTA forecasts to adjust its income tax expense.

## 5 Decision

75. In answering the preliminary question on the issue of ATCO Electric’s 2018 severance costs, the review panel finds that ATCO Electric has not demonstrated the existence of an error of fact, law or jurisdiction that is apparent on the face of the decision or otherwise exists on a balance of probabilities that could lead the Commission to materially vary or rescind ATCO Electric’s 2018-2019 general tariff application compliance decision, Decision 24805-D02-2020. The application for review on this ground (Section 4(d)(i) of Rule 016) is dismissed.

76. In answering the preliminary question on the issue of income tax expense and more specifically, the accounting for AFUDC in the calculation of regulatory income tax expense, the review panel finds that a reviewable error exists (Section 4(d)(i) of Rule 016) and the application for review is granted. ATCO Electric is directed to file, by May 5, 2021, a second stage variance application to accord with the following revised paragraph 171 of Decision 24805-D02-2020, as amended in paragraph 70 of this decision:

ATCO Electric is directed to adopt the method outlined in Table 6 of Attachment 1 of ATCO Electric’s reply submissions (Exhibit 25938-X0007 in Proceeding 25938) in accounting for AFUDC in the calculation of the income tax expense component of the 2018-2019 Transmission GTA, and to amend any and all revenue requirement schedules that are affected by the adoption of this method.

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<sup>69</sup> Proceeding 24375, ATCO Electric Transmission Application for Disposal of 2015-2017 Transmission Deferral Accounts and Annual Filing for Adjustment Balances, leading to Decision 24375-D01-2020: ATCO Electric Ltd., Disposal of 2015-2017 Transmission Deferral Accounts and Annual Filing for Adjustment Balances, Proceeding 24375, November 30, 2020.

<sup>70</sup> Decision 24805-D02-2020, paragraph 185.

<sup>71</sup> Decision 26247-D01-2021: ATCO Electric Ltd., 2015-2017 Transmission Deferral Accounts and Annual Filing for Adjustment Balances Compliance Filing, Proceeding 26247, April 5, 2021.

77. In answering the preliminary questions on the issues of severance and income tax expense, ATCO Electric has not met its onus for a review under Section 4(d)(ii) of Rule 016.

Dated on April 7, 2021.

**Alberta Utilities Commission**

*(original signed by)*

Kristi Sebalj  
Panel Chair

*(original signed by)*

Vera Slawinski  
Commission Member

*(original signed by)*

Douglas A. Larder, QC  
Acting Commission Member