

June 2, 2021

**Consumers' Coalition of Alberta
Review and variance of Decision 25938-D01-2021
Proceeding 26527
Application 26527-A001**

**Disposition letter dismissing the CCA's application for a review and variance of
Decision 25938-D01-2021**

Background

1. On May 10, 2021, the Consumers' Coalition of Alberta (CCA) filed an application with the Alberta Utilities Commission for a review and variance of Decision 25938-D01-2021 (review application).¹ In Decision 25938-D01-2021 (original review decision), a review panel of the Commission approved ATCO Electric Ltd.'s application to review the Commission's directions in a compliance filing decision, Decision 24805-D02-2020² (compliance decision), related to the issue of the calculation of ATCO Electric's income tax expense.
2. In the original review decision, the review panel found that ATCO Electric demonstrated that an error existed, 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 in its 2018-2019 transmission revenue requirement, and for 2017.³ As part of its findings, the review panel found that for regulatory purposes, the accounting required a deduction for the debt portion of AFUDC in calculating regulatory income tax expense. Ultimately, the review panel granted ATCO Electric's request and revised the Commission's directions from the compliance decision and required ATCO Electric to file a second stage variance application to adjust the debt portion of AFUDC in determining ATCO Electric's regulatory income tax expense.
3. In its review application, the CCA asserted that the review panel erred in fact, law or jurisdiction by directing customers to pay for amounts that are not just and reasonable and which remain in ATCO Electric's transmission revenue requirement.
4. The Commission assigned Proceeding 25938 (original review proceeding) to hear ATCO Electric's review application of the compliance decision. The Commission assigned Proceeding

¹ Decision 25938-D01-2021: ATCO Electric Ltd. Application for Review of Decision 24805-D02-2020, Proceeding 25938, April 7, 2021.

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

³ Decision 25938-D01-2021 at paragraph 72, the Commission noted that the adjustment of AFUDC would also affect ATCO Electric's 2017 income tax expense. For simplicity, this disposition letter only refers to the 2018-2019 revenue requirement.

26527 to hear the CCA's review application of the original review decision. In this disposition, the members of the Commission panel who authored the original review decision will be referred to as the "original review panel" and the member of the Commission panel considering the review application will be referred to as the "current review panel."

5. Based on the contents of the review application and relevant Commission decisions identified in this letter, the current review panel dismisses the application.

Should the Commission reconsider issues regarding the calculation of the income tax expense determined in its original review decision, Decision 25938-D01-2021, due to an error in fact, law or jurisdiction?

6. Specifically, the CCA asserted that the original review panel erred in fact, law or jurisdiction by finding, primarily in paragraph 67 of Decision 25938-D01-2021, that a net equity deduction is not permissible for statutory income tax purposes and that 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. The CCA stated that the original review panel decided to review and vary its findings on a technical interpretation of the statutory tax requirements without any compelling evidence to support such a change. The grounds alleged are:

- i. The Commission made a reviewable error by erring in fact or law by determining without compelling fact-based evidence the statutory tax requirements applicable to AFUDC equity;
- ii. The Commission made a reviewable error by erring in law or jurisdiction by suggesting a statutory interpretation of the *Income Tax Act* that has no basis within the *Income Tax Act*; and
- iii. The Commission has erred in finding that there should be an increase in income taxes paid by ratepayers as a result of the inclusion of AFUDC in rates.⁴

7. In its review application, the CCA provided additional evidence that it states could have been provided in prior proceedings had this issue been framed as it is now framed in the original review decision. The CCA requested that the Commission exercise its judgment and discretion to consider the new evidence appended to its review application.

8. In assessing the review application, the Commission's ability to review its own decisions, at its discretion, is found in Section 10(1) of the *Alberta Utilities Commission Act* (Act). The Commission has established a rule under Section 10(2)(a) of the Act, Rule 016: *Review of Commission Decisions* to adjudicate review applications. Section 4(d) of Rule 016 requires that an application for review must set out the grounds for a review, which may include:

⁴ Exhibit 26527-X0001, paragraph 9.

- i. The Commission made an error of fact, law or jurisdiction.
- ii. Previously unavailable facts material to the decision, which existed prior to the issuance of the decision in the original proceeding but were not previously placed in evidence or identified in the proceeding and could not have been discovered at the time by the review applicant by exercising reasonable diligence.
- iii. Changed circumstances material to the decision, which occurred since its issuance.
[...]

9. Section 6(2) of Rule 016 allows the Commission to decide whether to exercise its discretion to grant an application for review with or without a hearing.

10. Based on the grounds listed in paragraph 6 above, the CCA requested the Commission grant its application for a determination on the preliminary question of an error of fact, law or jurisdiction in the findings of the original review decision.

11. As stated in paragraph 14 of the original review decision, decisions of the Commission are intended to be final and a review should only be granted in those limited circumstances described in Rule 016.⁵ A review application of an original review decision should not be subject to further reviews. The Commission may grant a further review if, for example, there are exceptional circumstances that would require a review or if there is an overriding and palpable error in the original review decision. A further review may also be warranted where there are unavailable facts material to the decision that could not have been discovered at the time by the review applicant exercising due diligence or there are materially changed circumstances.

12. In considering the review application, the current review panel considers that principles of finality and certainty are engaged. Finality allows parties to Commission proceedings to rely on Commission decisions once they are issued and the period of time to challenge them through the administrative review or court process has expired. As affirmed by Mr. Justice O'Brien of the Court of Appeal of Alberta, "A decision of a tribunal should be final, subject to decision or appeal. If a tribunal could review and change its decisions at will, the certainty of the decision of the tribunal would be in jeopardy."⁶ The Commission has indicated that a review process is not an opportunity for parties to re-argue matters or express concerns that they chose not to raise at first instance.⁷

13. Keeping the above principles in mind, the current review panel finds that a review of a previous review application should only occur in the most limited of circumstances otherwise each review of a Commission decision would then be subject to challenge by a subsequent, or

⁵ See also 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.

⁶ *AltaGas Utilities Inc. v Alberta Energy and Utilities Board*, 2008 ABCA 46, at paragraph 39. Regarding discretion and finality, see *Windrift Ranches Limited v Alberta Surface Rights Board*, 1986 ABCA 158.

⁷ Decision 2012-124: AltaLink Management Ltd. And EPCOR Distribution & Transmission Inc., Decision on Request for Review and Variance of AUC Decision 2011-436 Heartland Transmission Project (May 14, 2012).

numerous, review applications. The correct calculation of the AFUDC portion of income tax was at issue in the proceedings leading to Decision 22742-D01-2020,⁸ Decision 24805-D02-2020, and Decision 25938-D01-2021. The current review panel finds that the Commission already heard and determined the issues on the statutory tax and regulatory tax in prior decisions based on the evidence and submissions before it in prior proceedings, and where the CCA intervened.

14. In addition, the current review panel has reviewed the review application and the grounds the CCA has raised about the statutory treatment of income tax and finds that the CCA provided submissions in the original review proceeding that the payment of AFUDC is not contemplated within the *Income Tax Act* and the impact on ratepayers.⁹

15. The issue of ATCO Electric's new evidence in the original review proceeding was the basis for it alleging an error in the calculation of the AFUDC portion of its regulatory income tax expense. In fact, when ATCO Electric provided new information in support of its calculations in its reply submissions, the original review panel allowed for an additional round of comments from the CCA and ATCO Electric, and the record of the original review proceeding included spreadsheets and calculations on the proposed treatment of AFUDC in calculating income tax expense.¹⁰

16. Although Commission tariff proceedings do not involve a *lis inter partes*, the parties to a Commission proceeding, similar to court proceedings, are required to put their best foot forward to establish the truth of their allegations when first called upon to do so.¹¹ The CCA, in its review application, appears to recognize that it was given a meaningful opportunity to do so in previous proceedings.¹² The current review panel finds that the CCA's opportunity to request the filing of evidence was either in the original review proceeding or earlier in the compliance decision if it wished to address different approaches to the calculation of AFUDC. The CCA was an active participant in previous proceedings.¹³

17. The current review panel finds that the original review panel was live to the issues of statutory income tax and the treatment of AFUDC under regulatory income tax, as shown in paragraphs 60-70 of the original review decision. In paragraph 60, the original review panel referred to ATCO Electric's submission that there is no statutory income tax deduction for the equity portion of AFUDC. In paragraph 67, the original review panel accepted ATCO Electric's application regarding the statutory treatment of income tax and found: "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." In paragraph 68, the original

⁸ Decision 22742-D01-2019: ATCO Electric Ltd. 2018-2019 Transmission General Tariff Application, Proceeding 22742, July 4, 2019.

⁹ Exhibit 25938-X0006, paragraphs 11-12, 34, 40-41 and 49 and Exhibit 25938-X0013, paragraph 10.

¹⁰ Exhibit 25938-X0010, Commission letter for further process for comments, December 16, 2020.

¹¹ *Danyluk v Ainsworth Technologies Inc*, [2001] 2 SCR 460, 2001 SCC 44, at paragraph 18.

¹² Exhibit 26527-X0001, at paragraph 17.

¹³ Exhibit 25938-X0006, paragraph 2, where the CCA states at paragraph 2, "Accordingly, the CCA submits it has been an active party to these issues and is thus able to provide the Commission with helpful context in its assessment of AET's R&V Application."

review panel decided how AFUDC would be accounted for in the calculation of the regulatory income tax expense component of the 2018-2019 revenue requirement.

18. The current review panel considers that the issues raised in the CCA's review application were considered in the original review proceeding. The current review panel is not persuaded that it should exercise its discretion to allow new evidence on the calculation of the AFUDC portion of the net utility earnings before tax calculation of the regulatory income tax expense for ATCO Electric's 2018-2019 revenue requirement. The original review panel reviewed the submissions and calculations of ATCO Electric and the submissions of the CCA in regard to the calculation of ATCO Electric's income tax expense for regulatory purposes. As reflected in the original review panel's findings, the statutory treatment and regulatory treatment of income tax was at issue and was considered in the original review proceeding. Accordingly, there is no error apparent on the face of the original review decision or that otherwise exists in the original panel's findings in paragraphs 60-70, and the impugned paragraph 67.

Conclusion

19. For the above reasons, the current review panel finds that the CCA has not demonstrated the existence of an error of fact, law or jurisdiction that could lead the Commission to materially vary or rescind the decision.

20. The original review panel allowed parties to provide additional submissions to address the calculations of ATCO Electric's income tax expense when the original review proceeding was before the Commission. As such, there was a reasonable opportunity to provide calculations or submissions in the original review proceeding and to comment on the income tax borne by ratepayers. As such, it is not necessary for the Commission to exercise its discretion and to adjudicate new evidence in this review application.

21. For the reasons set out above, the review panel dismisses the CCA's review application.

Sincerely,

Cairns Price
Commission Member