



ATCO Electric Ltd.

**Decision on Preliminary Question
Application for Review of Decision 24964-D02-2021
2020-2022 General Tariff Application**

June 23, 2021

Alberta Utilities Commission

Decision 26483-D01-2021

ATCO Electric Ltd.

Decision on Preliminary Question

Application for Review of Decision 24964-D02-2021

2020-2022 General Tariff Application

Proceeding 26483

Application 26483-A001

June 23, 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

Website: www.auc.ab.ca

The Commission may, within 30 days of the date of this decision and without notice, correct typographical, spelling and calculation errors and other similar types of errors and post the corrected decision on its website.

Contents

1	Introduction	1
2	The Commission’s review process	1
3	Section 4(d)(i) grounds – errors of fact, law or jurisdiction	2
3.1	Background	2
3.2	Review panel findings	3
3.2.1	Clarification of issue	3
3.2.2	Analysis	3
4	Decision	5

1. In this decision, the Alberta Utilities Commission denies an application by ATCO Electric Ltd. for a review and variance of findings in Decision 24964-D02-2021¹ regarding inflation rates for in-scope labour for each of 2020 and 2021.

1 Introduction

2. Decision 24964-D02-2021 (the Decision) related to ATCO Electric’s 2020-2022 general tariff application. ATCO Electric was also the applicant in that proceeding. ATCO Electric filed its application to review and vary the 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 26483.

3. The Commission issued a filing announcement for the review application and, by letter dated April 26, 2021, established a process schedule for the proceeding. The review application was opposed by the Consumers’ Coalition of Alberta (CCA).²

4. In this decision, the members of the Commission panel who authored the original decision will be referred to as the “hearing panel” and the members of the Commission panel considering the review application will be referred to as the “review panel.” The Commission considers that the record for this proceeding closed on May 25, 2021, the date ATCO Electric’s reply submissions were received.

5. In reaching its determinations, the review panel has reviewed the pertinent portions of the Decision and relevant materials comprising the record of this proceeding and of Proceeding 24964. Accordingly, references in this decision to specific parts of the record are intended to assist the reader in understanding the Commission’s reasoning relating to a particular matter and should not be taken as an indication that the Commission did not consider all relevant portions of the several records with respect to the matter.

2 The Commission’s review process

6. 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.

¹ Decision 24964-D02-2021: ATCO Electric Ltd. 2020-2022 Transmission General Tariff Application, March 19, 2021.

² Exhibit 26483-X0006, CCA Submission on AET Review and Variance – 26483, May 10, 2021.

7. 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 (the variance question).

8. In this decision, the review panel has decided the preliminary question.

9. In its review application, ATCO Electric relied on sections 4(d)(i) and 6(3)(a) of Rule 016.

10. Section 4(d) of Rule 016 requires an applicant to set out in its application the grounds it is relying on which may include the following:

(i) The Commission made an error of fact, law or jurisdiction made by the hearing panel.

...

11. Section 6(3) provides that the Commission may grant a review in the case of an application under subsection 4(d)(i) when the existence of an error of fact, law or jurisdiction 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.

3 Section 4(d)(i) grounds – errors of fact, law or jurisdiction

3.1 Background

12. In Proceeding 24964, ATCO Electric applied for in-scope labour increases of 2.25 per cent in 2020 and 2.75 per cent in 2021.³ In-scope labour is a common term used by utilities to refer to employees that are within the scope of a collective agreement.

13. In Decision 24964-D02-2021, issued March 19, 2021, the hearing panel approved in-scope labour inflation rates of 1.90 per cent for 2020 and 1.75 per cent for 2021.⁴ The hearing panel based its decision on three factors: (i) the results of a binding labour arbitration that concluded in December 2019; (ii) actual wage settlements in 2020 and 2021 for other Alberta utilities; and (iii) the economic uncertainty surrounding the pandemic.⁵

14. ATCO Electric submitted that the hearing panel failed to apply or incorrectly applied the correct legal test, under Section 122 of the *Electric Utilities Act*, regarding the rights of ATCO Electric to recover its reasonably and prudently incurred costs. This is because ATCO Electric is legally required to pay its in-scope employees the amounts approved as a result of the binding labour arbitration process. In ATCO Electric's view, paying amounts that legally must be paid is clearly reasonable and prudent. ATCO Electric asserted that Section 122, therefore, imposes a mandatory obligation on the Commission to approve these costs as just and reasonable and

³ Decision 24964-D02-2021: ATCO Electric Ltd., 2020-2022 Transmission General Tariff Application, March 19, 2021, paragraph 99.

⁴ Decision 24964-D02-2021, paragraphs 102-103.

⁵ Decision 24964-D02-2021, paragraphs 99-103.

argued that denial of these amounts from its tariff deprives ATCO Electric of a reasonable opportunity to recover its approved fair return on equity.

15. ATCO Electric also alleged that the hearing panel erred in its reliance on hindsight and irrelevant information. This is because the hearing panel took into account, information such as wage settlements by AltaLink Management Ltd. and by ENMAX, and uncertainties surrounding the COVID-19 pandemic, that was not available to the labour arbitrator.

16. The CCA opposed ATCO Electric's requested relief. In the CCA's view, the requirement for ATCO Electric to pay a cost, does not mean that the cost is just and reasonable for tariff purposes. The CCA referenced the Supreme Court of Canada cases *ATCO Gas and Pipelines Ltd. v Alberta (Utilities Commission)*⁶ (*ATCO Gas*) and *Ontario (Energy Board) v Ontario Power Generation Inc.*⁷ (*OEB*), as demonstrative of the Commission's discretion to deny recovery of costs in a tariff that ATCO Electric is legally required to pay.

17. In reply, ATCO Electric submitted that the amounts determined by the labour arbitrator are "committed costs," in that ATCO Electric is legally obligated to pay them, and that "prudence should be assessed on whether it was reasonable to incur the costs at the time they became an obligation for the utility."⁸

3.2 Review panel findings

3.2.1 Clarification of issue

18. The review panel understands ATCO Electric's argument, at a high level, to be as follows:

- (i) ATCO Electric is legally obligated to pay the costs resulting from the labour arbitrator's decision;
- (ii) The hearing panel was required to assess prudence based on whether it was reasonable for ATCO Electric to incur the costs resulting from the labour arbitrator's decision at the time it became an obligation for ATCO Electric;
- (iii) Under this prudence test, the hearing panel was required to find that these costs are just and reasonable and therefore to approve these costs as part of ATCO Electric's transmission tariff for recovery from ratepayers.

19. Accordingly, the review panel frames the issue as whether the hearing panel was statutorily bound under Section 122 of the *Electric Utilities Act* to apply ATCO Electric's asserted prudence methodology in its review of the applied-for inflation rates for in-scope labour for each of 2020 and 2021.

3.2.2 Analysis

20. For the reasons that follow, the review panel denies ATCO Electric's review application.

⁶ 2015 SCC 45.

⁷ 2015 SCC 44, Abella J dissenting.

⁸ Exhibit 26483-X007, paragraph 7.

21. ATCO Electric must apply to the Commission to receive approval for its transmission tariff.⁹ Section 121(4) of *Electric Utilities Act*¹⁰ places the burden on the utility to establish that tariffs are just and reasonable, which necessarily imposes the burden on the utility to establish that costs are reasonable.¹¹ In this case, the burden was on ATCO Electric to establish that its costs are reasonable.¹²

22. The *Electric Utilities Act* directs the Commission to set ATCO Electric's just and reasonable rates.¹³ Sections 121 and 122 of the *Electric Utilities Act* prescribe what the Commission must consider when evaluating a tariff that is submitted to it for approval. Section 122 of the *Electric Utilities Act* does not mandate a specific methodology to determine prudence, the time at which prudence must be evaluated, or a presumption of prudence.¹⁴ Rather, the Commission has been given express discretion over the methodology to be used in setting rates, and may make use of a variety of analytical tools and evidence in assessing the justness and reasonableness of a utility's proposed rates so long as the ultimate rates it sets are just and reasonable to both consumers and the utility.¹⁵

23. In *OEB*, the majority of the Supreme Court of Canada held that if the legislature intended for costs under labour collective agreements to be imposed on consumers, it would not have given the utility regulator oversight of utility compensation costs.¹⁶ In the majority's view, a collective bargaining regime does not "trump" a utility regulator's ratemaking power:

114 There is no dispute that collective agreements are "immutable" between employees and the utility. However, if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant the [Ontario Energy] Board oversight of utility compensation costs. The existence both of collective bargaining for utility employees and of the Board's power to fix payment amounts covering compensation costs indicates neither regime can trump the other. The Board cannot interfere with the collective agreement by ordering that a utility break its obligations thereunder, but nor can the collective agreement supersede the Board's duty to ensure a just and reasonable balance between utility and consumer interests.

Similarly, the review panel considers that the labour arbitration decision does not trump the Commission's power to set just and reasonable utility rates, and did not impose on the hearing panel the specific prudence methodology proposed by ATCO Electric.

24. The hearing panel, in Decision 24964-D02-2021, was setting ATCO Electric's rates for 2020-2022. The review panel finds that the hearing panel was not statutorily bound to apply the prudence methodology proposed by ATCO Electric. This is evident by the burden of proof being on the applicant, and the broad discretion granted to the Commission under Section 122 of the

⁹ *EUA*, Section 119(1).

¹⁰ *EUA*, Section 121(4): "The burden of proof to show that a tariff is just and reasonable is on the person seeking approval of the tariff."

¹¹ *ATCO Gas*, paragraph 42.

¹² *ATCO Gas*, paragraph 43.

¹³ *EUA*, Section 121(2).

¹⁴ *ATCO Gas*, paragraphs 40-43, 46-47.

¹⁵ *OEB*, paragraph 103 and *ATCO Gas*, paragraph 47.

¹⁶ *OEB*, paragraph 114.

Electric Utilities Act to choose a methodology to assess reasonableness. The hearing panel took into account ATCO Electric's evidence regarding the labour arbitrator's decision. It also took into account other information in assessing the reasonableness of in-scope labour escalation for 2020 and 2021; namely, actual wage settlements in 2020 and 2021 for other Alberta utilities and the economic uncertainty surrounding the pandemic. The review panel finds no error in the hearing panel's consideration of these factors.

25. Given the above, the review panel finds that the hearing panel's assessment of ATCO Electric's inflation rates for in-scope labour for each of 2020 and 2021 was reasonable on its face and on a balance of probabilities. ATCO Electric has not shown, either on a balance of probabilities or apparent on the face of the Decision, that an error in fact, law or jurisdiction exists on this ground that could lead the Commission to materially vary or rescind the Decision. Accordingly, ATCO Electric's request for a review on this ground is denied.

26. As the review application is denied on this ground, the review panel makes no findings regarding the materiality of ATCO Electric's review application, which was a secondary issue raised by parties.

4 Decision

27. In answering the preliminary question, the review panel finds that ATCO Electric has not met the requirements for a review of the Decision and the application for review is dismissed.

Dated on June 23, 2021.

Alberta Utilities Commission

(original signed by)

Douglas A. Larder, QC
Vice-Chair

(original signed by)

Kristi Sebalj
Commission Member