



**ATCO Pipelines, a division of ATCO Gas and
Pipelines Ltd.**

**Decision on Preliminary Question
Application for Review of Decision 26443-D01-2021
2021-2023 General Rate Application Compliance Filing**

October 25, 2021

Alberta Utilities Commission

Decision 26719-D01-2021

ATCO Pipelines, a division of ATCO Gas and Pipelines Ltd.

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Proceeding 26719

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**Decision 26719-D01-2021
Proceeding 26719**

1 Decision summary

1. In this decision, the Alberta Utilities Commission denies an application by ATCO Pipelines, a division of ATCO Gas and Pipelines Ltd., to review and vary Decision 26443-D01-2021 for the utility's 2021-2023 general rate application (GRA) compliance filing.¹ ATCO Pipelines alleged that the Commission erred in adjusting ATCO Pipelines' operating costs by: 1) excluding certain labour costs and information technology operating costs from a five percent top-down adjustment to the utility's forecast operating costs; and 2) making further reductions to forecast labour costs and IT operating costs. The Commission finds that ATCO Pipelines has not demonstrated that the Commission made an error of fact, or mixed fact and law.

2 Proceeding summary

2.1 Review application and process

2. ATCO Pipelines filed its application to review and vary Decision 26443-D01-2021 (the compliance decision) pursuant to Section 10 of the *Alberta Utilities Commission Act* and Rule 016: *Review of Commission Decisions*.

3. In its review application, ATCO Pipelines raises three issues, which it labeled errors of fact or mixed fact and law:

- (i) The Commission erred in determining that ATCO Pipelines' exclusion of some of the total labour costs from the top-down adjustment to forecast operating costs was improper and not compliant with Directions 10 and 11.
- (ii) The Commission erred in determining that ATCO Pipelines' exclusion of IT operating costs from the top-down adjustment to forecast operating costs was unreasonable and not consistent with Directions 10 and 11.
- (iii) The Commission erred in making further reductions to ATCO Pipelines' total labour costs and approved IT operating costs.

4. The Commission issued a filing announcement for the review application and established a process schedule for the proceeding.

¹ Decision 26443-D01-2021: ATCO Pipelines, a division of ATCO Gas and Pipelines Ltd. 2021-2023 General Rate Application Compliance Filing, Proceeding 26443, June 24, 2021.

5. The City of Calgary filed submissions and opposed the application. Calgary commented on the general reductions to the forecast operating costs found in the compliance decision and it specifically commented on the merits of ATCO Pipelines' assertions regarding IT operating costs. ATCO Pipelines filed a reply submission.

2.2 Background

6. In Decision 25663-D01-2021 (the GRA decision),² the Commission determined ATCO Pipelines' revenue requirements to provide natural gas transmission service for 2021, 2022 and 2023. The Commission subsequently issued the compliance decision, in which the Commission addressed ATCO Pipelines' compliance filing arising from certain directions included in the GRA decision. It is the compliance decision that is the subject of ATCO Pipelines' review application.

7. In the remainder of this decision, the members of the Commission panel who authored the GRA decision will be referred to as the "GRA panel", the Commission members of the panel for compliance decision will be referred to as the "compliance panel", and the members of the Commission panel considering the review application will be referred to as the "review panel".

8. In the GRA decision, the GRA panel found that there was a consistent pattern of conservative forecasting of operating costs by ATCO Pipelines, with the result being that the accuracy of ATCO Pipelines' forecasts had not been reflective of its actual costs for previous periods.³ It determined that a top-down adjustment to the forecast operating costs was warranted. The GRA panel directed ATCO Pipelines, in the compliance filing, "to incorporate and provide an overall reduction to forecast operating costs of five per cent in each of 2021, 2022 and 2023."⁴ (Direction 10)

9. The GRA panel also found that reductions were required to specific operating costs based on the evidence filed on the record of the proceeding. To avoid the effects of double counting the top-down adjustment and these specific operating adjustments, the GRA panel issued Direction 11, which directed ATCO Pipelines to:

... remove any cost categories where the Commission has made specific reductions in Section 5.2 to Section 5.9 before applying the five per cent top-down adjustment. As a result, the total O&M costs to be included in revenue requirement are: (i) the costs approved for the individual cost categories in Section 5.2 to Section 5.9; plus (ii) the cost approved for the remaining O&M categories not included in (i), with a five per cent reduction applied.⁵

10. In sections 5.2 to 5.9, referred to in the quotation above, the GRA panel discussed specific types of operating costs, including salary escalators of in-scope and out-of-scope employees, vacancy rates, and IT operating costs. The GRA panel made reductions in some instances, but not in others.

² Decision 25663-D01-2021: ATCO Pipelines, 2021-2023 General Rate Application, Proceeding 25663, March 1, 2021.

³ Decision 25663-D01-2021, paragraph 114.

⁴ Decision 25663-D01-2021, paragraph 116.

⁵ Decision 25663-D01-2021, paragraph 117.

11. In its compliance application, ATCO Pipelines made specific reductions to its forecast operating costs related to the pressure vessel inspection compliance program, pandemic expenses, mid-term incentive program, IT operating costs, property taxes, shared services, and head office rent in accordance with the findings and directions from sections 5.2 to 5.9 of the GRA decision. ATCO Pipelines also indicated that it had reflected the five percent top-down adjustment to operating costs categories not included in sections 5.2 to 5.9 of the GRA decision for each of 2021, 2022 and 2023. ATCO Pipelines specified in its application that the impact of the five percent top-down adjustment to the 2021-2023 operating costs was a reduction of \$1.553 million in 2021, \$1.686 million in 2022, and \$1.76 million in 2023.⁶

12. Two out of three members of the GRA panel were assigned as the compliance panel who heard and assessed ATCO Pipelines' compliance application, including the compliance with Directions 10 and 11 (the two directions).

13. In the compliance decision, the compliance panel determined that it was not satisfied that ATCO Pipelines had complied with the two directions because the utility excluded the entirety of total labour and IT operating costs from the top-down adjustment.⁷

14. With respect to total labour costs, the compliance panel found that only certain components of labour costs, i.e., salary escalators and vacancy rate reductions, should have been excluded from the top-down adjustment, as opposed to the entire category of "total labour costs."⁸

15. In respect of IT operating costs and Direction 11, the compliance panel found that the IT operating costs in Section 5.7 of the GRA decision were approved as filed, and not reduced by the GRA panel, and therefore, the resulting costs approved were to be the starting point for calculating the five per cent top-down adjustment. Therefore, ATCO Pipelines' exclusion of IT operating costs from the top-down adjustment was not consistent with the two directions. The compliance panel found that on plain reading, consistent with the intent of the direction and in the context of that entire section of the GRA decision, ATCO Pipelines' exclusion of IT operating costs from the five per cent top-down adjustment was unreasonable.⁹

16. Based on its determinations that ATCO Pipelines improperly excluded total labour costs and IT operating costs from the five per cent top-down adjustment to operating costs, the compliance panel further reduced ATCO Pipelines' revenue requirements by \$1.517 million in 2021, \$1.555 million in 2022 and \$1.577 million in 2023.¹⁰

3 The Commission's review process

17. 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.

⁶ Exhibit 26443-X0001, Application, paragraph 23 and Table 8: Adjusted Operating Costs, PDF page 13.

⁷ Decision 26443-D01-2021, paragraph 41.

⁸ Decision 26443-D01-2021, paragraphs 42-43.

⁹ Decision 26443-D01-2021, paragraphs 38-39.

¹⁰ Decision 26443-D01-2021, paragraphs 7 and 29.

18. The AUC recently amended Rule 016. Included in the amendments was the removal of errors of law or jurisdiction from the scope of Commission review of its own decisions.¹¹ This amendment was made to minimize overlap with the Court of Appeal of Alberta proceedings based on the nature of the question under review or appeal.

19. In its review application, ATCO Pipelines is relying on Subsection 5(1)(a) of the rule in its application. Section 5(1)(a) states:

The Commission may grant an application for review of a decision, in whole or in part, where it determines that the review applicant has demonstrated:

(a) The Commission made an error of fact, or mixed fact and law where the legal principle is not readily extricable, which is material to the decision and exists on a balance of probabilities.

20. The onus of demonstrating the existence of an error lies with the review applicant.

21. To distinguish between questions of fact, mixed fact and law, and law, the Commission takes guidance from the Supreme Court of Canada's decisions in *Southam* and *Housen*. These decisions were summarized by the Court of Appeal of Alberta in *Alberta (Workers' Compensation Board) v Appeals Commission*:

There is a well-recognized distinction between questions of law and questions of mixed fact and law. In *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748 at paras. 35-37, the Supreme Court noted that questions of law are about the correct legal test, whereas questions of mixed fact and law are about whether the facts satisfy the legal test. A general proposition with precedential value might qualify as a principle of law, but not its application to particular facts or circumstances.

The Supreme Court confirmed this distinction in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 at paras. 27-31. In that case the Court noted that questions of mixed fact and law involve the application of a legal standard to a set of facts; conversely, errors of law involve an incorrect statement of the legal standard, or a flawed application of the legal test. An example of the latter occurs when a decision-maker only considers factors A, B, and C, but the test also requires factor D to be considered. The Court also acknowledged an exception to the distinction between questions of law and questions of mixed fact and law, when it is possible to extricate a pure legal question from what appears to be a question of mixed fact and law: at para. 34.¹²

22. In submitting an application for review where a review applicant is alleging an error of fact, it is incumbent upon the review applicant, in order to meet its onus, to identify the alleged error of fact. When alleging an error of mixed fact and law, the review applicant should identify the legal test and facts that are at issue and explain how the Commission erred in applying that legal test to those facts.

23. The Commission's review process has two stages. In the first stage, a review panel decides if there are grounds to review the compliance decision (the preliminary question). If the

¹¹ Bulletin 2021-11: *Amendments to AUC Rule 016*, May 6, 2021.

¹² *Alberta (Workers' Compensation Board) v Appeals Commission*, 2005 ABCA 276, paragraphs 21-22.

review panel decides to review the compliance decision, it moves to the second stage where it decides whether to confirm, vary, or rescind the compliance decision (the variance question). In this decision, the review panel has decided the preliminary question.

4 Issues

4.1 Was there an error of fact, or mixed fact and law, in the compliance panel's determinations related to Directions 10 and 11 in respect of ATCO Pipelines' total labour costs and IT costs?

4.1.1 Directions 10 and 11 and total labour and IT costs

24. The two directions that lie at the heart of ATCO Pipelines' review application read as follows:

Direction 10: The Commission directs ATCO Pipelines, in the compliance filing to this decision, to incorporate and provide an overall reduction to forecast operating costs of five per cent in each of 2021, 2022 and 2023. A five per cent top-down adjustment is within the range of adjustments proposed by the CCA and the UCA, and in the Commission's view, is reasonable having regard to the range of historical variances between forecast, approved and actual costs.

Direction 11: To avoid the effects of double counting, ATCO Pipelines is directed to remove any cost categories where the Commission has made specific reductions in Section 5.2 to Section 5.9 before applying the five per cent top-down adjustment. As a result, the total O&M costs to be included in revenue requirement are: (i) the costs approved for the individual cost categories in Section 5.2 to Section 5.9; plus (ii) the cost approved for the remaining O&M categories not included in (i), with a five per cent reduction applied.

25. ATCO Pipelines bears the onus of demonstrating that the compliance panel made an error of fact, or mixed fact and law. In its review application, ATCO Pipelines disagreed with decisions made by the compliance panel and alleged errors of fact or mixed fact and law generally, without identifying either a specific error in fact or how the compliance panel erred in applying a legal test to the facts. Having regard to the record before it, the review panel is not persuaded that ATCO Pipelines satisfied its onus.

26. In its review application, with respect to both total labour costs and IT operating costs, ATCO Pipelines submitted that the compliance panel's determinations regarding these costs ignore the plain wording of the two directions.

27. For total labour costs, ATCO Pipelines contends in the review application that Direction 11 compelled it to remove from revenue requirement any "cost categories" where the compliance panel made specific reductions in sections 5.2 to 5.9 of the GRA decision before applying the top-down adjustment. It asserted that the "cost category" in question is the total labour cost category that the compliance panel directed specific reductions to in sections 5.2 and 5.3 of the GRA decision.¹³

¹³ Exhibit 26719-X0001, ATCO Pipelines application, paragraphs 28-29, quoting Directions 12, 13, and 14 of the GRA decision.

28. That issue, and ATCO Pipelines' position, was squarely before the compliance panel. The review panel finds that in the compliance decision, the compliance panel acknowledged that the GRA panel made specific reductions to certain costs that were related to labour, i.e., salary escalators and vacancy rates, but the compliance panel did not agree with ATCO Pipelines that such reductions should have resulted in the balance of the total labour category being removed from the top-down adjustment.

29. For IT operating costs, ATCO Pipelines argued that because IT operating costs were approved in Section 5.7 of the GRA decision, the compliance panel erred in concluding that ATCO Pipelines should not have removed these costs from the top-down adjustment.¹⁴ ATCO Pipelines submitted that the plain wording of Direction 11 required ATCO Pipelines to include in operating costs the "costs approved for the individual cost categories in Section 5.2 to Section 5.9",¹⁵ and that the compliance panel's findings effectively changed Direction 11 to require that ATCO Pipelines apply a five per cent reduction to its approved IT operating costs.¹⁶

30. Calgary disagreed that the compliance panel made any errors of fact or mixed fact and law regarding IT operating costs.¹⁷ Calgary argued that ATCO Pipelines focused too narrowly on the wording of Direction 11, without having regard for the entirety of the compliance panel's reasoning and the directions for a top-down adjustment to ATCO Pipelines' operating costs. By relying only on one part of Direction 11, it argued that ATCO Pipelines' analysis was incomplete, and the utility's conclusions were not supported.¹⁸

31. In the compliance decision, the Commission disagreed with ATCO Pipelines' interpretation of Direction 11 as it applied to IT operating costs. It found that the approved costs, including IT operating costs, were the starting point for calculating the five per cent top-down adjustment. Therefore, ATCO Pipelines' exclusion of IT operating costs from the five per cent top-down adjustment was not consistent with the two directions.¹⁹

32. Essentially, for both total labour costs and IT operating costs, ATCO Pipelines in its review application disagreed with the compliance panel's interpretation of the two directions from the GRA decision. It would have been of assistance to the review panel if instead ATCO Pipelines had clearly identified the specific errors of fact it was alleging or the errors that the compliance panel made in applying a legal test to the facts before it. The review panel cannot discern a discrete error of fact or mixed fact and law in the compliance panel's assessment of the issues, nor that the compliance panel misapplied the directions from the GRA decision.

33. The purpose of a compliance filing is to provide the utility with an opportunity to reflect the full and interrelated impact of the Commission's findings and directions from the GRA decision in the utility's rates and charges. The review panel observes that this was not a case where one Commission panel was required to interpret the decision of an entirely separate Commission panel. Rather, the compliance panel was comprised of two Commission members

¹⁴ Exhibit 26719-X0001, ATCO Pipelines application, paragraph 42.

¹⁵ Exhibit 26719-X0001, ATCO Pipelines application, paragraph 44.

¹⁶ Exhibit 26719-X0001, ATCO Pipelines application, paragraph 48.

¹⁷ Exhibit 26719-X0006, Calgary submissions, paragraph 19.

¹⁸ Exhibit 26719-X0006, Calgary submissions, paragraphs 13-15.

¹⁹ Decision 26443-D01-2021, paragraph 38.

who were on the original panel that issued the GRA decision, and who were best able to decide on whether ATCO Pipelines complied with the two directions.

34. In the review panel's view, ATCO Pipelines has failed to demonstrate that the assessment and findings in the compliance decision were inconsistent with the intent of the two directions. There could be the potential for ambiguity when reading the language of Direction 11, directing ATCO Pipelines to "remove any cost categories where the Commission has made specific reductions in Section 5.2 to Section 5.9"²⁰, on its own. However, the preceding wording of Direction 10 expressly refers to ATCO Pipelines' "forecast operating costs", which reflects the broader concept of costs rather than "cost categories". The two directions were considered together by the compliance panel to determine the full context.²¹ The compliance panel read Direction 11 in light of Direction 10, the broad intent of which was to remedy historical overforecasting in ATCO Pipelines' variances between actual and forecast operating costs. The review panel cannot discern an error in the approach taken by the compliance panel.

35. As noted in previous Commission review decisions, 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."²² In considering the context and language of the two directions, it is apparent to the review panel that the compliance panel weighed the evidence in the application before it to determine whether ATCO Pipelines complied with the two directions. Although ATCO Pipelines may prefer a different interpretation than the one adopted by the compliance panel, the review panel does not consider that the interpretation ultimately adopted by the compliance panel to itself be a reviewable error. Simply alleging an alternative interpretation to the one adopted in the compliance decision falls short of establishing an error of fact or mixed fact and law and does not satisfy the test set out in Section 5 of Rule 016.

4.1.2 Double counting of total labour costs and IT costs

36. ATCO Pipelines submitted that double counting occurred as a result of the compliance panel's findings with respect to both total labour costs and IT operating costs.

37. Regarding total labour costs, ATCO Pipelines argued that because the compliance panel's directions require not only the specific reductions to the salary escalator and vacancy rate components of total labour, but also the top-down adjustment to the other components of ATCO Pipelines' total labour costs that already include inflationary adjustments and vacancy provisions, this results in double counting.²³

38. ATCO Pipelines bears the onus of demonstrating that the compliance panel made an error of fact, or mixed fact and law. The application seems to allege an error in fact on the issue of double counting with respect to labour costs, but the application provides no supporting information to allow the review panel to identify or understand the alleged error.

²⁰ Exhibit 26719-X0001, ATCO Pipelines application, paragraph 33.

²¹ Decision 26443-D01-2021, paragraphs 29, 30, 37-39 and 41-44.

²² Decision 22166-D01-2016: 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, paragraphs 17 and 38.

²³ Exhibit 26719-X0001, ATCO Pipelines application, paragraph 37.

39. The wording of the compliance panel's decision shows that the panel was attuned to the issue of double counting. The compliance panel found that the remaining labour costs, that is, those costs left after the exclusion of labour costs related to salary escalators and vacancy rates from total labour costs (related to Directions 12, 13 and 14 of the GRA decision), were not at risk of being double counted.²⁴ The review panel notes that the excluded labour cost amounts related to salary escalators and vacancy rates (the revenue requirement impacts of Directions 12, 13 and 14) were provided by ATCO Pipelines itself in its compliance application.²⁵ The compliance panel relied on that evidence to make its finding that those specific costs had been excluded from the remainder of the total labour costs.

40. Consequently, given that these remaining labour costs were not subject to any specific reductions in the GRA decision, the compliance panel found that these remaining labour costs should have been subject to the five per cent top-down adjustment.

41. The review panel finds that ATCO Pipelines has not provided support for the assertion that the compliance panel's calculation, which was to remove the revenue requirement impacts of Directions 12, 13 and 14 before applying the five per cent top-down adjustment, results in double counting. Without support in the review application to demonstrate that the compliance panel made an error of fact, or mixed fact and law, ATCO Pipelines' arguments for a review fail to meet the test established in Rule 016.

42. Regarding IT operating costs, while it is not clearly alleged, ATCO Pipelines appears to suggest that double counting results from the compliance panel's interpretation of Direction 11.²⁶

43. The review panel notes that the compliance panel explicitly addressed the issue of double counting of IT operating costs:

Directions 10 and 11 address ATCO Pipelines' history of overforecasting by applying a five per cent general reduction to ATCO Pipelines' operating costs, while requiring ATCO Pipelines to remove certain costs from the adjustment to avoid the effects of double counting costs in specific cost categories for which the Commission directed a reduction. The Commission considers that IT operating costs were not at risk of being "double counted" because they were approved as filed and not subject to any specific reductions in Decision 25663-D01-2021. On plain reading, consistent with the intent of the direction and in the context of the entire decision section, ATCO Pipelines' exclusion of IT operating costs is unreasonable.²⁷

44. Again, the compliance panel addressed issues of double counting in its findings, and ATCO Pipelines' disagreement with the approach used by the review panel to adjust for the utility's forecast IT operating costs that were included in the top-down five percent adjustment is not grounds for a review. The compliance panel found that ATCO Pipelines' exclusion of IT operating costs from the top-down adjustment was unreasonable based on the facts before it. The review panel's task is not to retry the compliance application, and ATCO Pipelines'

²⁴ Decision 26443-D01-2021, paragraph 42.

²⁵ Footnote 42 of Decision 26443-D01-2021 reads: Exhibit 26443-X0001, application. 2021 amount calculated as: \$89,000 (Table 9) + \$39,000 + \$231,000 (Table 10) + \$350,000 (Table 11) = \$709,000. 2022 amount calculated as: \$183,000 (Table 9) + \$179,000 + \$267,000 (Table 10) + \$358,000 = \$987,000. 2023 amount calculated as: \$284,000 (Table 9) + \$405,000 + \$304,000 (Table 10) + 367,000 (Table 11) = \$1,360,000.

²⁶ Exhibit 26719-X0001, ATCO Pipelines application, paragraphs 42-44.

²⁷ Decision 26443-D01-2021, paragraph 39.

disagreement with the compliance panel's interpretations of the two directions that forecast IT operating costs (that were not specifically reduced in sections 5.2 to 5.9 of the GRA decision) were to be included in the top-down adjustment, does not meet the test in Section 5(1)(a) of Rule 016.

45. In summary, the review panel finds that ATCO Pipelines has not demonstrated in its review application that the compliance panel erred in its findings in applying Directions 10 and 11 to ATCO Pipelines' total labour costs and IT operating costs, or with respect to double counting. Accordingly, ATCO Pipelines' request for a review on these issues is denied.

4.2 Was there an error of fact in the compliance panel's determinations related to Directions 10 and 11, in respect of the total amount of the reductions to ATCO Pipelines' forecast operating costs?

46. ATCO Pipelines argued that "because the top-down adjustment would apply to a lower level of forecast operating costs (i.e., ATCO Pipelines' total forecast operating costs after excluding certain cost categories), it would reasonably be expected that the level of the top-down adjustment would also be lower."²⁸ Therefore, it submitted that the further reductions to its operating costs directed by the compliance panel resulted in total operating cost reductions that exceed the five per cent top-down adjustment. ATCO Pipelines concluded that the resulting reductions represent errors of fact regarding the level of ATCO Pipelines' adjustment to its forecast operating costs.²⁹

47. The review panel finds that ATCO Pipelines' submissions that the reductions directed by the compliance panel result in a factual error are not persuasive. The findings made by the compliance panel to recalculate the forecast operating costs were done to remove costs related to areas where the Commission made specific reductions such as salary escalators and vacancy rates. Then, the compliance panel interpreted Directions 10 and 11 to apply a five per cent top-down adjustment to the remainder of the forecast operating costs, including IT operating costs.

48. The review panel sees no language in the GRA decision to suggest that ATCO Pipelines' forecast operating costs could not be reduced in the manner adopted by the compliance panel in giving effect to the two directions. In particular, there is no language to suggest that the total reductions contemplated should not exceed the five per cent top-down adjustment. Accordingly, the review panel finds that ATCO Pipelines has not demonstrated that there is an error of fact in the compliance panel's determinations. ATCO Pipelines' request for a review of the resulting reductions to ATCO Pipelines' total labour costs and IT operating costs used in deriving ATCO Pipelines' forecast operating costs is denied.

²⁸ Exhibit 26719-X0001, ATCO Pipelines review application, paragraph 56.

²⁹ Exhibit 26719-X0001, ATCO Pipelines review application, paragraph 60.

5 Decision

49. In answering the preliminary question, the review panel finds that ATCO Pipelines has not met the requirements for a review of Decision 26443-D01-2021 and the application for review is dismissed.

Dated on October 25, 2021.

Alberta Utilities Commission

(original signed by)

Vera Slawinski
Panel Chair

(original signed by)

Carolyn Dahl Rees
Chair