



ATCO Electric Ltd.

**Decision on Preliminary Question
Application for Review of Decision 26477-D01-2021
ATCO Electric Ltd.
2020-2022 General Tariff Application Compliance Filing**

November 17, 2021

Alberta Utilities Commission

Decision 26895-D01-2021

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Decision on Preliminary Question

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1 Decision summary

1. In this decision, the Alberta Utilities Commission denies an application by ATCO Electric Ltd. to review and vary Commission Decision 26477-D01-2021, a decision on the compliance filing for its most recent general tariff application.¹

2. Review and variance applications are a two-stage process. At the first stage, the review panel decides the preliminary question of whether the applicant has demonstrated that there are grounds to review the compliance decision. If there are grounds to review, at the second stage the review panel decides whether to confirm, vary or rescind the decision. In this decision, the review panel has decided the preliminary question.

3. ATCO Electric takes issue with the Commission's decision with respect to the calculation of labour costs and the corresponding number of approved full-time equivalents (FTEs). For the reasons that follow, the Commission finds that ATCO Electric has not discharged its onus to demonstrate that the Commission made an error of fact, or mixed fact and law in the compliance decision.

2 Discussion

2.1 The GTA decision

4. In its 2019 general tariff application, ATCO Electric applied for Commission approval of its revenue requirement for the 2020-2022 test period. The Commission members on the panel for the general tariff application (the GTA panel) approved portions of ATCO Electric's application, denied others, and made a number of directions relating to ATCO Electric's forecast revenue requirement for those years (the GTA decision).²

5. The first part of the GTA decision relevant to this review application is the GTA panel's findings and directions with respect to FTEs.

6. ATCO Electric has previously defined an FTE as the measure that is used to quantify the portion of permanent or temporary person years used or needed in a given position.³ An FTE is always less than or equal to one in relation to a position. ATCO Electric forecasts how many FTEs it will need for any particular test period, and the amount of services those FTEs will

¹ Decision 26477-D01-2021: ATCO Electric Ltd., 2020-2022 General Tariff Application Compliance Filing, September 1, 2021. The review was filed pursuant to Section 10 of the *Alberta Utilities Commission Act* and Rule 016: *Review of Commission Decisions*.

² Decision 24964-D02-2021: ATCO Electric Ltd. 2020-2022 General Tariff Application, March 19, 2021.

³ Proceeding 22742, Exhibit 20272-X0002, AET 2015-2017 GTA Section 1 to 30, paragraph 62, PDF page 42.

provide to the transmission utility, to affiliates and to outside parties. The Commission assesses whether ATCO Electric's FTE forecast is reasonable, and approves the recovery of regulated labour costs (i.e. labour costs for FTEs that provide services to the transmission utility and are deemed by the Commission to be necessary for ATCO Electric to provide transmission services to Alberta customers) through ATCO Electric's revenue requirements. This is what the GTA panel did.

7. In the GTA decision the GTA panel found that, subject to a select number of FTE additions and reallocations, ATCO Electric had not justified that it needed additional FTEs, relative to its 2019 actual FTE complement to provide services to Alberta customers in the 2020-2022 test period. The GTA panel directed ATCO Electric as follows:

58. The Commission consequently **directs ATCO Electric to use its internal 2019 actual FTEs as the approved base level FTE complement for all test years.** This base level of FTEs is a starting point for 2020 that will be adjusted as a result of the Commission's findings on incremental FTEs proposed by ATCO Electric in each of the test years. Incremental FTE additions and reallocations are discussed below. (Direction 1)⁴

[citations omitted, emphasis added]

8. Notwithstanding its decision to reject some of ATCO Electric's requested FTE additions, the GTA panel did approve ATCO Electric's forecast of a select number of incremental FTE additions and reallocations for the test period, above its approved base level of FTEs.⁵

9. The second part of the GTA decision addressed in this review application is the GTA panel's findings and direction with respect to affiliate transactions and revenue offsets.

10. ATCO Electric sometimes provides services to its affiliates or outside parties. ATCO Electric includes the costs of providing those services in its general tariff application forecasts, but the costs of those services are not recoverable from ratepayers. Because of this, ATCO Electric offsets any labour costs for FTEs attributable to affiliates or outside parties against its total revenue requirements (i.e. only the costs associated with providing regulated transmission utility services are recoverable through ATCO Electric's revenue requirements). Or, put another way, ATCO Electric's revenue offsets track the costs (including labour costs for FTEs) of resources that are used to provide services to affiliates and outside parties.

11. In paragraph 286 of the GTA decision, the GTA panel approved ATCO Electric's forecast revenue offsets:

286. For the above reasons, the CCA's recommendations are denied. The Commission **approves the forecast revenue offset as filed for the test years.**

[emphasis added]

⁴ Decision 24964-D02-2021, paragraphs 49-58.

⁵ Decision 24964-D02-2021, paragraphs 61-64.

2.2 The compliance decision

12. ATCO Electric’s interpretation of Direction 1 was examined in the compliance proceeding. At issue was how ATCO Electric’s revenue offset calculation and the associated affiliate FTE levels related to Direction 1.

13. In 2019, ATCO Electric had 59.4 FTEs that provided operations and maintenance (O&M) services to affiliates and outside parties on an actual basis. In its compliance filing, ATCO Electric submitted a base FTE complement that included 32.9 affiliate and outside party O&M FTEs instead of 59.4. That is, ATCO Electric submitted a base FTE complement that had 26.5 fewer affiliate and outside party O&M FTEs than its 2019 actuals. ATCO Electric indicated that it had reclassified or “re-deployed” those 26.5 FTEs to perform O&M services for the transmission utility. The effect of this was that ATCO Electric’s revenue requirements were only being offset by 32.9 affiliate and outside party O&M FTEs instead of 59.4.

14. ATCO Electric justified its approach to the compliance filing in a response to an information request, stating that it did not adjust its affiliate and outside party O&M FTEs to 2019 actual levels, because its forecast revenue offsets reflected the need for only 32.9 FTEs to provide O&M services to affiliates and outside parties, and because its forecast revenue offsets had been approved as filed in paragraph 286 of the GTA decision. In a further information request, the panel assigned to the compliance filing (the compliance panel) asked ATCO Electric to revise its revenue offset forecasts for the test period to reflect the use of its internal 2019 actual FTEs as the approved base level FTE component for all test years (including actual 2019 affiliate and outside party O&M FTEs of 59.4).

15. ATCO Electric came back with two scenarios. In the first, ATCO Electric used its 2019 actual FTE complement as the base level complement for all test years. In the second, ATCO Electric removed the 26.5 FTEs that it had initially shifted from affiliate and outside party O&M services to regulated transmission utility services, while maintaining its affiliate and outside party O&M FTEs at 32.9.

16. The compliance panel had to determine whether ATCO Electric’s original compliance filing or one of the two scenarios filed properly reflected the GTA panel’s findings in the original decision. Ultimately, the compliance panel did not approve ATCO Electric’s original interpretation of Direction 1.

17. The compliance panel found that the GTA panel’s findings in paragraphs 58 and 286 of the GTA decision were interdependent, noting that paragraph 18 of the GTA decision explicitly stated that “[a]ll directions in this decision and Decision 24964-D01-2021 are subject to all findings and other directions made elsewhere in these decisions.”⁶ The compliance panel acknowledged at the outset ATCO’s argument that because the GTA panel approved the forecast revenue offset as filed, it “would be inappropriate” to update its revenue offset calculation to reflect the 2019 actual affiliate FTEs. The compliance panel further commented that the GTA decision “did not approve a reallocation or “re-deployment” of 26.5 FTEs from affiliate O&M work to non-affiliate O&M work for this test period relative to ATCO Electric’s 2019 actual FTEs.”

⁶ Decision 26477-D01-2021, paragraph 35, citing Decision 24964-D02-2021, paragraph 18.

18. The compliance panel approved the second scenario filed by ATCO Electric, as “the calculation therein more reasonably reconciles the Commission’s approval of ATCO Electric’s forecast revenue offsets with the corresponding number of FTEs required to complete the work (both affiliate and non-affiliate-related) as forecast over the test years.”⁷

2.3 The review application

19. In assessing ATCO Electric’s application, the review panel has reviewed the pertinent portions of the GTA decision and the compliance filing decision, and relevant materials comprising the record of this proceeding, the compliance proceeding, and the general tariff application proceeding.

20. The Commission recently amended Rule 016. Among other amendments, it removed errors of law or jurisdiction from the scope of Commission review of its own decisions.⁸ As the Commission has previously characterized errors in process as errors of law, this amendment also removed procedural fairness arguments from the scope of review.⁹

21. Under Section 5(1)(a) of the amended rule, the Commission may grant an application for review if it determines the applicant has demonstrated that 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.”

22. ATCO Electric relies on Section 5(1)(a) as the grounds for its application, and also broadly alleges that the manner in which the compliance decision was made was procedurally unfair.¹⁰ The onus of demonstrating the existence of an error under Rule 016 lies with the review applicant.

23. As noted above, procedural fairness is no longer within the scope of Rule 016. To the extent any of ATCO Electric’s three alleged errors discussed below include allegations with respect to procedural fairness, the Commission dismisses its review on that basis.

24. This leaves Section 5(1)(a). ATCO Electric argues that the compliance panel:

- a) rendered decisions that seek to overturn, reverse and alter decisions rendered in the underlying decision;
- b) relied on a purported interdependency of decisions when none was established, shown to be necessary or proved to exist;
- c) rendered decisions that are not supported by any evidence; and which are, in fact, contrary to the only evidence on the record.

⁷ Decision 26477-D01-2021, paragraph 36.

⁸ Bulletin 2021-11: *Amendments to AUC Rule 016*, May 6, 2021.

⁹ Decision 26660-D02-2021, Applications for Review of Decision 26090-D01-2021: Distribution-Connected Generation Credit Module for Fortis’s 2022 Phase II Distribution Tariff Application, October 14, 2021, paragraph 49.

¹⁰ See e.g., Exhibit 26895-X0001, AET R&V of Decision 26477-D01-2021 re: 2020-2022 GTA Compliance Filing, paragraph 4.

25. In its application, ATCO Electric does not identify whether these three alleged errors are errors of fact or mixed fact and law, or whether its procedural fairness argument in fact forms the basis for all three. It stated generally about all three of the above allegations that “it is clear the AUC committed errors of fact and mixed fact and law, as well as deprived AET of its rights under s. 122 of the *Electric Utilities Act*, and its right to procedural fairness.” This was not helpful to the review panel.

26. 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*, which were summarized by the Alberta Court of Appeal in *Alberta (Workers’ Compensation Board) v Appeals Commission*. As indicated by the courts, “... questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal test.”¹¹ A question of mixed fact and law will arise where the matter under review involves the application of a legal test to a set of facts whereas an error of law involves the misstatement or misapplication of a legal test. A pure legal question can be extricated from what appears to be a question of mixed fact and law.¹²

27. 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. As noted, beyond a general reference to the *Electric Utilities Act* provision describing the costs and expenses recovered under a tariff and a general fairness argument, ATCO Electric has not identified any legal tests at issue, nor identified facts that are incorrect (as opposed to outcomes with which it disagrees).

28. It is not up to a review panel to decipher an applicant’s grounds for review, or reframe the issues to attempt to extricate an error which falls within the grounds articulated in Rule 016. Given the applicant’s onus, this lack of specificity on the alleged “errors” alone is sufficient to dispose of this application.

29. However, given the recency of the Rule 016 amendments and the Commission’s confirmation that procedural fairness no longer falls within the scope of that rule, the review panel will address each of the three alleged errors, notwithstanding that ATCO Electric did not identify whether they are ones of fact, or mixed fact and law.

Alleged error 1: the compliance panel rendered decisions that seek to overturn, reverse and alter decisions rendered in the underlying decision

30. At its core, ATCO Electric’s argument appears to be that the cumulative result of the GTA findings was that the total FTEs for the test period would be higher than 2019 actuals, but the result of the compliance decision is that the total FTEs approved for the test period is lower

¹¹ *Canada (Director of Investigation and Research, Competition Act) v Southam Inc.*, [1997] 1 SCR 748, paragraphs 35-37.

¹² *Housen v Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33 at paragraphs 27-31, as summarized by the Alberta Court of Appeal in *Alberta (Workers’ Compensation Board) v Appeals Commission*, 2005 ABCA 276, paragraphs 21-22.

than 2019 actuals. For this reason, ATCO Electric argues that the compliance decision “reverses and is in conflict with the base decision.” If this was the case, ATCO Electric argues that it “could not have known that the AUC would render inconsistent and contradictory decisions” and therefore had no opportunity to address this outcome.

31. There are two flaws with this argument. First, for this argument to succeed, the review panel must accept that the compliance decision does, in fact, reverse the GTA decision in a contradictory manner. The review panel does not accept this, as explained in the sections below. Second, despite ATCO Electric failing to specifically identify the error underlying this argument, the review panel considers that a lack of opportunity to address a potential outcome of a decision appears to be purely a procedural fairness argument. Procedural fairness is no longer within the scope of Rule 016 and review is therefore unavailable on this basis. In any event, the review panel notes that ATCO Electric had an opportunity to address the potential interdependency of the GTA decision directions in its information response, its argument, and its reply argument in the compliance proceeding, and did so.¹³ Failure to convince the Commission of one’s position in argument does not constitute a lack of opportunity to do so.

Alleged error 2: the compliance panel relied on a purported interdependency of decisions when none was established, shown to be necessary or proved to exist

32. The compliance panel found that ATCO Electric’s original compliance filing “did not accurately reflect the implementation of Direction 1 of Decision 24964-D02-2021 as it pertains to revenue offsets.” ATCO Electric takes issue with the basis for this finding. More particularly, it challenges the compliance panel’s assessment of the interdependent nature of Direction 1 – establishing the base level for FTEs – and ATCO Electric’s forecast revenue offset calculation and associated affiliate FTEs.¹⁴

33. Both the compliance panel in their decision and ATCO Electric in this review application refer to paragraph 18 of the GTA decision in support of their interpretation:

18. This decision deals with the contentious cost items forecast in the application, including updates, and any matters that the Commission has otherwise determined are required to be specifically addressed. Contentious cost items may include those identified on the final issues list. If a matter included in ATCO Electric’s application is not specifically addressed in this decision, it is because the Commission finds the applied-for costs associated with the matter to be reasonable, and therefore approves them for the purposes of this GTA decision. All directions in this decision and Decision 24964-D01-2021 are subject to all findings and other directions made elsewhere in these decisions.

34. In support of its original approach in the compliance filing, ATCO Electric states that the GTA panel made two “clear and unequivocal decisions.” First, the GTA panel directed ATCO Electric to use its internal 2019 actual FTEs as the approved base level FTE complement for all

¹³ Exhibit 26477-X0020, AET Responses to AUC Information Requests, PDF page 15; Exhibit 26477-X0029, AET Reply Argument, PDF pages 4-7; Exhibit 26477-X0036, AET Information Responses Round 2 to AUC, PDF pages 9-14; Exhibit 26477-X0048, AET Supplemental Reply Argument, PDF pages 4-6.

¹⁴ The compliance panel in paragraph 24 of Decision 26477-D01-2021 characterized the issue as “whether ATCO Electric’s base level of FTEs (set at 2019 actual FTEs) should be adjusted to reflect the same quantum of FTEs used to inform its forecast revenue offset calculation.”

test years (Direction 1). Second, the GTA panel approved ATCO Electric’s forecast revenue offsets as filed (paragraph 286 of the GTA decision).

35. The issue ATCO Electric raises on review is fundamentally a matter of interpretation – whether the compliance panel properly considered Direction 1 and paragraph 286 to be interdependent, taking into account the surrounding circumstances and other general statements in the GTA decision. That a difference in opinion is possible as to the proper interpretation is clear given the disagreement in the compliance proceeding between ATCO Electric and the Consumers’ Coalition of Alberta on this issue.

36. Among others, ATCO Electric cites a portion of paragraph 18 of the GTA decision in support of its position, which includes the general statement that if a matter is not specifically addressed, the applied-for costs are considered reasonable and approved for the purposes of the GTA decision. It argues that this statement means that the GTA panel implicitly approved ATCO Electric’s reallocation of 26.5 FTEs from affiliate O&M work to non-affiliate O&M work, precluding the compliance panel’s express finding otherwise and any contextual assessment by the compliance panel of the directions and findings in the GTA decision. ATCO Electric essentially argues that its interpretation of the overall GTA decision and paragraph 18, should be preferred over that of the compliance panel and its application of paragraph 18.

37. As noted above, ATCO Electric’s revenue offsets track the costs (including labour costs for FTEs) of resources that are used to provide services to affiliates and outside parties. The review panel considers that by their very nature, these revenue offsets are inextricably linked to FTEs.

38. It is therefore not surprising to the review panel that the compliance panel would have assessed the nature of Direction 1 and paragraph 286 of the GTA decision and the language in paragraph 18 of the GTA decision indicating that all directions in the GTA decision are subject to “all findings and other directions made elsewhere,” and reached a determination that ATCO Electric’s “original compliance filing did not accurately reflect the implementation of Direction 1 of Decision 24964-D02-2021 as it pertains to revenue offsets.”¹⁵ The review panel considers that this analysis by the compliance panel is clear on the face of the compliance decision, and discloses no discernible error. ATCO Electric’s disagreement with the compliance panel’s conclusions does not constitute an error, whether of fact, mixed fact and law, or otherwise.

39. Finally, the review panel notes that one out of two members of the GTA panel was assigned as the panel for the compliance filing. This means that the compliance panel was on the original GTA decision, and was in the best position to decide whether ATCO Electric complied with the various directions given in the original decision. The review panel considers that in so doing, the compliance panel did not make an error.

Alleged error 3: the compliance panel rendered decisions unsupported by the evidence and contrary to the evidence on the record

40. ATCO Electric argues that the GTA panel made two clear findings in the GTA decision. First, the GTA panel directed in paragraph 58 that ATCO Electric must use its internal 2019

¹⁵ Decision 26477-D01-2021, paragraph 34.

actual FTEs as the approved base level FTE complement for all test years, which was subject to its findings regarding incremental FTE additions and reallocations addressed in paragraphs 61-64 of the decision (which the GTA panel approved as filed). ATCO Electric states that the impact of these decisions was to increase, not decrease, the base level of FTEs. Second, the GTA panel approved ATCO Electric's forecast revenue offsets as filed.

41. ATCO Electric argues that the end result of the compliance decision is that, on a total basis, ATCO Electric had 26.5 less FTEs than its total 2019 actual FTE complement. It is unclear in ATCO Electric's application whether it considers this result an error of fact, or if it is in fact a procedural fairness argument founded in ATCO Electric's first argument, that a compliance decision cannot "overturn, reverse or alter" the original decision. In either case, the review panel finds no basis for the assertion that the decrease in total FTEs is inconsistent with, or reverses, the original GTA decision.

42. The review panel observes that the base FTE complement¹⁶ approved in the compliance decision was consistent with ATCO Electric's actual 2019 FTE complement, when affiliate/services to outside party FTEs are offset against ATCO Electric's total FTEs:¹⁷

- In 2019, ATCO Electric had 95.9 transmission FTEs providing O&M services to the transmission utility. In the compliance decision, the panel directed AET to use a base of 95.9 transmission FTEs to provide O&M services to the transmission utility.
- In 2019, ATCO Electric had 368.0 transmission FTEs providing capital services to the transmission utility. In the compliance decision, the panel directed AET to use a base of 368.0 transmission FTEs to provide capital services to the transmission utility.
- In 2019, ATCO Electric had 29.3 corporate FTEs providing admin and general (A&G) services to the transmission utility. In the compliance decision, the panel directed AET to use a base of 29.3 corporate FTEs to provide A&G services to the transmission utility.
- In 2019, ATCO Electric had 16.4 corporate FTEs providing capital services to the transmission utility. In the compliance decision, the panel directed AET to use a base of 16.4 corporate FTEs to provide capital services to the transmission utility.
- In 2019, ATCO Electric had a total of 509.7 FTEs providing services to the transmission utility. In the compliance decision, the panel directed AET to use a total base of 509.7 FTEs to provide services to the transmission utility.

43. If the compliance panel approved the FTE complement that ATCO Electric originally filed in its compliance filing, the result would have been that ATCO Electric would have 26.5 more FTEs providing transmission utility O&M services than it did in 2019. ATCO Electric can

¹⁶ Excluding ATCO Electric's allocated shared services FTEs (which the GTA panel addressed in separate directions from Decision 24964-D01-2021), and excluding the common group and head office related changes that were directed in paragraphs 59 and 60 of Decision 24964-D02-2021.

¹⁷ The FTE amounts listed here are taken from Proceeding 26477, Exhibit 26477-X0022, AET-AUC-2021MAY12-005 Attachment 1, Microsoft Excel worksheet "24964-D02-2021," Excel rows 11-14, Excel column D, U, V and W. These FTE amounts take into consideration ATCO Electric's responses to Decision 26477-D01-2021, as found in post disposition document "AET Post Disposition Filing," PDF page 7.

only recover the costs from ratepayers of FTEs that provide services to the regulated transmission utility. ATCO Electric therefore would have recovered costs through its revenue requirement on more of its FTEs than it did relative to 2019. This would have been inconsistent with the GTA panel's original decision that, subject to a select number of FTE additions and reallocations, ATCO Electric had not justified that it needed more FTEs, relative to its 2019 actual FTE complement, to provide services to Alberta customers in the 2020 – 2022 period.¹⁸ The review panel considers that it was within the compliance panel's purview to interpret the directions in the GTA decision to give effect to what was clearly the intent of the original findings, and the compliance panel was in the best position to do so, having been on the original GTA panel.

44. ATCO Electric has therefore failed to satisfy the review panel that the compliance panel made an error, whether of fact or mixed fact and law, in assessing whether ATCO Electric's initial filing complied with the directions in the GTA decision.

3 Decision

45. 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 November 17, 2021.

Alberta Utilities Commission

(original signed by)

Vera Slawinski
Panel Chair

(original signed by)

Cairns Price
Commission Member

¹⁸ Decision 24964-D02-2021, paragraphs 49-57.