



## **The City of Calgary**

**Decision on Application for Review  
of Ruling on Confidentiality  
in Proceeding 26615**

**October 27, 2022**

**Alberta Utilities Commission**

Decision 27403-D01-2022

City of Calgary

Decision on Application for Review of Ruling  
on Confidentiality in Proceeding 26615

October 27, 2022

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)

The Commission may, within 60 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

<b>1</b>	<b>Decision</b> .....	<b>1</b>
<b>2</b>	<b>Introduction</b> .....	<b>1</b>
<b>3</b>	<b>Background</b> .....	<b>2</b>
	<b>3.1</b> The AUC’s review process.....	<b>4</b>
<b>4</b>	<b>Grounds for review and hearing panel findings</b> .....	<b>6</b>
<b>5</b>	<b>Review panel findings</b> .....	<b>7</b>
	<b>5.1</b> Comparability of Wipro and IBM cost for IT services.....	<b>7</b>
	<b>5.2</b> ATCO disclosure of similar information on the public record.....	<b>9</b>
	<b>5.3</b> Hearing panel consideration of the evidence of Calgary .....	<b>11</b>
	<b>5.4</b> MSA definition of confidential information.....	<b>12</b>
	<b>5.5</b> Change in material facts.....	<b>13</b>
<b>6</b>	<b>Further observations of the review panel</b> .....	<b>14</b>
<b>7</b>	<b>Decision</b> .....	<b>15</b>
	<b>Appendix 1 – Confidential Information Definitions from the Wipro MSA and IBM/Kyndryl MSA</b> .....	<b>16</b>

## **1 Decision**

1. In this decision, the Alberta Utilities Commission determines whether to grant an application filed by The City of Calgary (Calgary) requesting a review and variance (R&V) of specific findings made by the Commission in an interlocutory decision on confidentiality in Proceeding 26615 (the Decision).<sup>1</sup> Two versions of the Decision were issued: (a) a public ruling (Public Decision); and (b) a confidential ruling (Confidential Decision). The Decision found that specified information filed by ATCO Electric Ltd. was confidential, and that Calgary had breached confidentiality by filing certain of that confidential information publicly. The Commission referred the confidentiality breaches to the Commission's Enforcement Division.

2. In the normal course, Commission interlocutory decisions are not subject to R&V applications. However, because of the referral to the Commission's Enforcement Division, the Commission has agreed, in these specific circumstances, to review the Decision.

3. The Commission has decided to partially grant the review application for the reasons set out below.

## **2 Introduction**

4. Calgary filed its application on May 25, 2022,<sup>2</sup> and asked that the application be treated as confidential.<sup>3</sup> There followed a series of motions and process steps to address the request for confidentiality and to determine the scope of confidential treatment of certain documents. Upon resolution of these issues, Calgary re-filed its application on August 31, 2022.<sup>4</sup> The Commission subsequently issued a letter confirming that it was incorporating certain documents from Proceeding 26615 into the hearing record for this proceeding.<sup>5</sup>

5. The Commission considers that the record for this proceeding closed on September 6, 2022.

---

<sup>1</sup> Exhibit 26615-X0447-C, Attachment – Confidential ruling on Calgary request, Exhibit 26615-X0448.01, Blackline 2022-04-20 AUC letter – Ruling on Calgary request for a advice and direction regarding confidentiality.

<sup>2</sup> Exhibit 27403-X0001, Application form.

<sup>3</sup> Exhibit 27403-X0003, City of Calgary letter request to treat application in confidence.

<sup>4</sup> Exhibit 27403-X0013, Application for review and variance revised redactions, Exhibit 27403-X0013-C, Application for review and variance – Confidential Unredacted.

<sup>5</sup> Exhibit 27403-X0015, Incorporation of 26615 exhibits into 27403 hearing record.

6. In this decision, the members of the Commission panel who authored the Decision will be referred to as the “hearing panel” and the member of the Commission considering the review application will be referred to as the “review panel.”

### 3 Background

7. The Decision at issue in this R&V proceeding arose during Proceeding 26615, which considered the 2023 cost-of-service applications for the rebasing of ATCO Electric (distribution) and FortisAlberta Inc. The hearing panel later determined that it would hear oral evidence related to Information Technology (IT) Programs<sup>6</sup> for both ATCO Electric and ATCO Gas in Proceeding 26616,<sup>7</sup> given the common issues and evidence for both ATCO entities. The IT matters at issue included an examination of rates charged by IBM Canada Ltd. (IBM/Kyndryl) and Wipro Solutions Canada Ltd. (Wipro). The hearing panel granted confidential treatment for the Wipro Master Services Agreement (MSA) and the IBM/Kyndryl MSA.<sup>8</sup>

8. The Commission had previously examined costs under the Wipro MSA in Proceeding 20514 (the IT Common Matters Decision),<sup>9</sup> a proceeding which included a significant confidential component, and where a portion of the public decision was redacted. The IT Common Matters Decision was relevant to the issues the hearing panel was examining in Proceedings 26615 and 26616, and an unredacted version of the IT Common Matters Decision was part of the 26615 and 26616 hearing records.<sup>10</sup>

9. On March 11, 2022, Calgary filed a request for the hearing panel’s advice and direction on the confidentiality of certain materials.<sup>11</sup> This request followed Calgary’s filings on the public record on February 9, 2022,<sup>12</sup> and March 4, 2022<sup>13</sup> (the Disputed Filings). ATCO Electric contacted Commission staff immediately after each of the Disputed Filings were uploaded to the record, advising that they contained unredacted confidential information (the Impugned Information). Commission staff immediately voided the public Disputed Filings, and requested that Calgary refile unredacted copies of the Disputed Filings confidentially.

10. In a letter issued on the morning of March 4, 2022, and prior to the March 4, 2022 Disputed Filing by Calgary, the hearing panel outlined its concerns regarding confidentiality breaches by Calgary and the Office of the Utilities Consumer Advocate, and made note of the

---

<sup>6</sup> Exhibit 26615-X0426, 2022-04-08 AUC letter – Process and scope for oral questioning and oral argument and reply.

<sup>7</sup> Proceeding 26616 examined 2023 cost of service applications from ATCO Gas and Apex Utilities Inc. for rebasing.

<sup>8</sup> 26615-X0108-2022-01-22 AUC letter – Ruling on ATCO Electric motion for confidentiality.

<sup>9</sup> Decision 20514-D02-2019: The ATCO Utilities (ATCO Gas and Pipelines Ltd. and ATCO Electric Ltd.) Information Technology Common Matters Proceeding, Proceeding 20514, June 5, 2019.

<sup>10</sup> Exhibit 26615-X0282-C, IT Common Matters Decision 20514-D02-2019 – Unredacted, Exhibit 26616-X0239-2022-05-09 AUC letter – Process and scope for oral questioning and oral argument and reply.

<sup>11</sup> Exhibit 26615-X0340, Calgary letter – Advice and Direction on ATCO Confidential Information, and Exhibit 26615-X0341-C, Confidential Attachment to Calgary Submission.

<sup>12</sup> Initially filed as Exhibit 26615-X0260, subsequently filed confidentially as Exhibit 26615-X0263-C.

<sup>13</sup> Initially filed as exhibits 26615-X0337 and 26615-X0337-C, subsequently filed confidentially as Exhibit 26615-X0339.01-C.

potential for administrative penalties under Section 63 of the *Alberta Utilities Commission Act* if further breaches were to occur.<sup>14</sup>

11. On March 11, 2022, Calgary filed a request for advice and direction, seeking the hearing panel's confirmation regarding whether the Impugned Information in the Disputed Filings was confidential.<sup>15</sup> ATCO filed an unsolicited response to Calgary's request for advice and direction.<sup>16</sup> The hearing panel required that ATCO respond to the specifics of Calgary's submissions, and allowed Calgary the right of reply.<sup>17</sup>

12. The hearing panel issued its Decision on Calgary's request for advice and direction on April 20, 2022, in two parts. As previously noted, the hearing panel issued a Public Decision<sup>18</sup> and a Confidential Decision.<sup>19</sup> It found that Calgary did disclose confidential information in the Disputed Filings on February 9 and March 4, 2022. In the Public Decision, the hearing panel made the following general comments regarding issues raised by Calgary's request.

- Confidentiality rulings and undertakings apply to all forms in which confidential information may appear by reference or incorporation, including calculations and conclusions that are derived from the confidential information. It is the nature and content of the confidential information, and not any specific format by which the confidential information is conveyed that is protected by such rulings. For further clarity, third parties who have signed undertakings to access confidential information are not permitted to assume that their "aggregated" calculations derived from confidential information can be publicly disclosed. Third parties who have signed confidentiality undertakings should assume that such aggregations, summaries and conclusions that are drawn from confidential information are covered by Commission confidentiality rulings.
- When a number or fact has been publicly disclosed in another proceeding, or has been otherwise publicly disclosed (i.e., in a securities filing), that number or fact is not confidential.
- Insofar as there are issues regarding what is or is not confidential, parties are expected to work together in good faith to resolve those issues.
- Before publicly filing any document that may contain confidential materials, it is expected that parties carefully review the document prior to filing, to ensure that they are abiding by the confidentiality undertakings filed with the Commission.

13. On April 20, 2022, the hearing panel also issued a Confidential Decision, which examined the specific confidential issues raised by Calgary in its request, and ruled on each of those issues. On multiple matters in dispute, the hearing panel found that the information was not

---

<sup>14</sup> Exhibit 26615-X0331, AUC letter – Breaches of confidentiality.

<sup>15</sup> Exhibit 26615-X0340, Calgary letter – Advice and Direction on ATCO Confidential Information, and Exhibit 26615-X0341-C, Confidential Attachment to Calgary Submission.

<sup>16</sup> Exhibit 26615-X0355, ATCO Electric's Letter to Calgary's Request re Confidential Information.

<sup>17</sup> Exhibit 26615-X0356, AUC letter – Process for The City of Calgary request for direction; Exhibit 26615-X0369-C, ATCO Electric's response to City of Calgary filing dated March 11, 2022; Exhibit 26615-X0371-C, City of Calgary reply to ATCO Electric's response.

<sup>18</sup> 26615-X0448.01, Blackline 2022-04-20 AUC letter – Ruling on Calgary request for advice and direction regarding confidentiality.

<sup>19</sup> Exhibit 26615-X0447-C, Attachment – Confidential ruling on Calgary request.

confidential, and that Calgary had therefore not breached confidentiality in uploading it to the public record of the proceeding. The information that the hearing panel found was not confidential included the existence and use of a benchmarking term in the Wipro MSA. On other issues, the hearing panel found that information was confidential, and that there was a breach of confidentiality.<sup>20</sup>

14. The Public Decision was amended on April 25, 2022.<sup>21</sup>

15. The Commission’s authority to review its own decisions is discretionary and is found in Section 10 of the *Alberta Utilities Commission Act*. That act authorizes the Commission to make rules governing its review process and the Commission established Rule 016 under that authority. Rule 016 sets out the process for considering an application for review. A person who is directly and adversely affected by a decision may file an application for review within 30 days of the issuance of the decision, pursuant to Section 3(3) of Rule 016.

16. While the Public Decision and Confidential Decisions were issued on April 20, 2022, and none of the April 25, 2022, amendments to the Public Decision are at issue in Calgary’s R&V application, the review panel finds that the amended date of the Public Decision creates a degree of uncertainty regarding the 30-day period within which a request for R&V of a Commission decision must be filed. It has therefore determined that it will exercise its discretion to consider Calgary’s R&V application filed on May 25, 2022.

### 3.1 The AUC’s review process

17. The review process has two stages. In the first stage, a review panel must decide whether there are grounds to review the original decision. This is sometimes referred to as the “preliminary question.” If the review panel decides that there are grounds to review the decision, it moves to the second stage of the review process where the Commission holds a hearing or other proceeding to decide whether to confirm, vary, or rescind the original decision.

18. In this decision, given the nature of the error(s) alleged, the review panel has decided both the preliminary question and the variance question as it is permitted to do pursuant to Section 6(1) of Rule 016.

19. Section 5 of Rule 016 describes the circumstances in which the Commission may grant a review as follows:

5(1) 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.

(b) There are previously unavailable facts material to the decision, which:

---

<sup>20</sup> Exhibit 26615-X0447-C, Attachment – Confidential Ruling on Calgary Request.

<sup>21</sup> 26615-X0448.01, Blackline 2022-04-20 AUC letter – Ruling on Calgary request for advice and direction regarding confidentiality.

- (i) existed before the decision was issued,
- (ii) were not placed in evidence or identified in the original proceeding,  
and
- (iii) the review applicant, exercising reasonable diligence, could not have discovered at the time.

(c) There are changed circumstances material to the decision, which occurred since its issuance.,

(...)

20. In its review application, Calgary is relying on Sections 5(a) through (c) of Rule 016.

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*, 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."<sup>22</sup> 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.<sup>23</sup>

22. This guidance was incorporated by the Commission in Decision 2012-124,<sup>24</sup> as reflected in the following paragraph:

30. ... [F]indings of fact or inferences of fact made by the hearing panel are entitled to considerable deference, absent an obvious or palpable error. In the Commission's view, this approach is consistent with that prescribed by the Supreme Court in *Housen v. Nikolaisen* and by the Court of Appeal in *Ball v. Imperial Oil*. It is also consistent with the general principle that the trier of fact is better situated than a subsequent review authority to make factual findings or draw inferences of fact given the trier of fact's exposure to the evidence and familiarity with the case as a whole.[citations omitted]

23. In light of this guidance, the Commission addressed the role of a review panel and concluded that it should apply the following principles to its consideration of the review applications before it:

---

<sup>22</sup> *Canada (Director of Investigation and Research, Competition Act) v Southam Inc.*, [1997] 1 SCR 748, paragraphs 35-37.

<sup>23</sup> *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.

<sup>24</sup> Decision 2012-124: Alta Link 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.



- First, decisions of the Commission are intended to be final; the Commission's rules recognize that a review should only be granted in those limited circumstances described in Rule 016.
- Second, the review process is not intended to provide a second opportunity for parties with notice of the application to express concerns about the application that they chose not to raise in the original proceeding.
- Third, 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>25</sup>

24. These principles have been endorsed by the Commission in subsequent decisions and have been applied by the review panel in its consideration of the relevant evidence and argument.

#### 4 Grounds for review and hearing panel findings

25. In its review application, Calgary submitted that the hearing panel erred in fact, or in mixed fact and law, in making findings and determinations that the information Calgary disclosed in Proceeding 26615 was confidential information.<sup>26</sup>

26. Calgary further submitted that evidence in the oral hearing of Proceeding 26616<sup>27</sup> raised a presumption that the breach of confidentiality alleged by ATCO Electric in ID 26615 was not proper, [REDACTED] and did not conform to the reasons for protection of the information found to be confidential in the Ruling. Calgary submitted that this demonstrated that no public interest was served by the hearing panel's Decision.<sup>28</sup>

27. Calgary requested that the Decision be varied to confirm that the information that the hearing panel found to be confidential be deemed non-confidential, and that the Decision therefore confirm that Calgary did not disclose confidential information on the public record.<sup>29</sup> Calgary further requested that the referral by the hearing panel to the Enforcement Division be rescinded.<sup>30</sup>

28. More specifically, Calgary submitted that the hearing panel erred:

---

<sup>25</sup> Decision 2012-124, at paragraph 31.

<sup>26</sup> Exhibit 27403-X0013, at paragraph 1.3.

<sup>27</sup> Because similar issues regarding certain IT expenditures arose in Proceeding 26616, which addressed the ATCO Gas PBR rebasing application, the Commission addressed these issues for both Proceeding 26615 (ATCO Electric) and 26616 in the oral proceeding for 26616.

<sup>28</sup> Exhibit 27403-X0013, at paragraph 1.8.

<sup>29</sup> Exhibit 27403-X0013, at paragraph 1.5.

<sup>30</sup> Exhibit 27403-X0013, at paragraph 1.6.

- by assuming that the costs derived by ATCO for services provided by different providers (Wipro and IBM/Kyndryl) could be directly compared against each other on a factual basis, when ATCO expressly stated that such items could not be so compared;
- by finding certain information to be confidential even though ATCO has consistently and repeatedly disclosed publicly information of a substantially similar nature and content, including in Proceeding 26615;
- by finding the evidence of a Calgary witness in a prior proceeding to be confidential and related to confidential information, when factually such evidence was not confidential and related to a different matter; and
- by finding certain information to be confidential as fact without regard to or application of the specific definition of Confidential Information in the Wipro MSA filed on the record.

29. The review panel has considered each of the grounds raised in the sections below.

## 5 Review panel findings

### 5.1 Comparability of Wipro and IBM cost for IT services

#### *Calgary submissions*

30. Calgary submitted that the hearing panel erred in its finding that the following statements were confidential:

█ [REDACTED]

█ [REDACTED]

31. Calgary noted that in its findings, the hearing panel agreed with the ATCO Electric submission that:

[REDACTED]

32. Calgary submitted that the hearing panel erred in accepting ATCO Electric's submission because ATCO Electric had specifically denied earlier in the proceeding that Wipro and IBM services could be mapped for comparative purposes. Calgary highlighted the following statement from ATCO:

31  
32  
33

[REDACTED]

[REDACTED]

33. Calgary further submitted that the hearing panel erred by equating a tender scenario with the facts of the IBM and Wipro circumstances. Calgary submitted that the IBM and Wipro contracts were separate, and could not be mapped and compared, while in a tender the bids are on the same set of services provided at the same time and are therefore directly comparable.<sup>35</sup> Finally, Calgary submitted that its statements did not identify any actual amount of aggregate costs.

*Review panel findings*

34. The review panel has considered Calgary's submissions, and denies this ground of review. While Calgary highlighted evidence in its R&V application which suggests that Wipro and IBM services could not be compared, that evidence was not part of the Disputed Filings, and did not appear in any of the submissions Calgary made to the hearing panel, notwithstanding the fact that the evidence was available to Calgary at the time. The effect of this omission means that the Disputed Filings provided no context for the reader, and suggested that [REDACTED] – notwithstanding Calgary's later clarification in its R&V application that such rates are not in fact comparable.

35. The review panel finds no error in the hearing panel's assessment that the aggregated information and comparison disclosed by Calgary used and disclosed confidential information. The review panel notes that an after-the-fact reference to other pre-existing evidence indicating that the express comparisons were not valid does not assist Calgary. [REDACTED]

36. The review panel notes that in Decision 26616-D01-2022, the hearing panel ultimately found that given the differences between the Wipro MSA and the IBM/Kyndryl MSA, the rates under those MSAs were not comparable.<sup>36</sup> However, Decision 26616-D01-2022 was issued after Calgary made its submissions in this review proceeding. Therefore, the issue of whether the MSAs were comparable or not was still live at the time Calgary filed the information which the hearing panel determined was confidential. At the time the hearing panel made the Decision, it had not determined whether the MSAs were comparable or not. The review panel finds no error

<sup>34</sup> [REDACTED]

<sup>35</sup> Exhibit 27403-X0013, at paragraph 4.5.

<sup>36</sup> Decision 26616-D01-2022, ATCO Gas Apex Utilities Inc. 2023 Cost-of-Service Review (September 1, 2022) at paragraph 361.

in the hearing panel's ruling on confidentiality, which was based on the facts and contextual framework before it at the time it was assessing Calgary's filing. Further, the hearing panel's subsequent decision in 26616-D01-2022 does not assist Calgary, for the same reasons outlined above in paragraphs 34-35.

37. The review panel therefore finds on this ground of review that Calgary has not demonstrated that the hearing panel 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. Calgary's request for a review on this ground is denied.

## 5.2 ATCO disclosure of similar information on the public record

### *Calgary submissions*

38. Calgary submitted that the hearing panel made errors of fact or mixed fact and law when it found that aggregated IT costs information filed by Calgary for comparative purposes was confidential information. Calgary contended that ATCO had already disclosed information of such nature and content on the public record.<sup>37</sup>

39. Calgary highlighted the following materials that the hearing panel had found confidential,<sup>38</sup> and submitted that ATCO entities had previously disclosed aggregate and comparative IT cost information of a similar nature:

■ [REDACTED]

■ [REDACTED]

- Disclosure of total termination and transition costs by year for ATCO Electric

40. With regard to the first two extracts cited above, Calgary submitted that both ATCO Electric and ATCO Gas had filed aggregated IT costs in their respective applications and IT Cost Summary documents.<sup>39</sup>

### *Review panel findings*

41. While ATCO Electric and ATCO Gas did submit aggregated IT costs in their respective public applications, those aggregated IT costs included IBM/Kyndryl forecasts (which were necessary to disclose, as they formed the basis of ATCO Electric and ATCO Gas's requested 2023 costs in the application) and costs that were calculated according to the IT Common Matters Decision.<sup>40</sup>

42. None of the public materials filed by ATCO Electric or ATCO Gas included the information that the hearing panel found to be confidential, in particular, [REDACTED]

<sup>37</sup> Exhibit 27403-X0013, at paragraph 4.10.

<sup>38</sup> Exhibit 27403-X0013-C at paragraph 4.10.

<sup>39</sup> Exhibit 27403-X0013, at paragraph 4.11.

<sup>40</sup> Exhibit 26615-X0023, ATCO Electric 2023 Cost-of-Service Application, Table 11 at page 36, and Exhibit 26616-X0018, page 36.

[REDACTED]

[REDACTED]

43. Calgary highlighted other aggregated costs and comparisons that were made public by ATCO Electric and ATCO Gas, and that did not raise confidentiality concerns. The review panel does not find this persuasive as it does not address the specific information in question, in particular, [REDACTED]. This ground of review, which addresses the first two extracts in paragraph 39 above is denied, as Calgary has not demonstrated that the hearing panel 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.

44. With respect to the last extract above, which addresses the total termination and transition costs by year for ATCO Electric, Calgary submitted that the aggregated Wipro termination and transition cost amounts were publicly disclosed in an ATCO public securities filing.<sup>41</sup>

45. The review panel has re-examined the aggregated information on termination and other costs related to the early termination found in Exhibit 26615-X0167, which is an excerpt of a public securities filing by ATCO Ltd. At the time that the hearing panel examined this issue, it only had access to the termination and transition costs for ATCO Electric.

46. Since that time, further information was filed on the termination and transition costs for ATCO Gas,<sup>42</sup> in Proceeding 26616. The combined numbers from the ATCO Electric and ATCO Gas filings are similar to the aggregate estimate of \$75 million provided in the 2020 ATCO Ltd. public securities filing. The review panel notes that the 2020 termination costs were publicly filed by ATCO Ltd., together with the \$75 million aggregate estimate of the overall costs of exiting the Wipro contract. Because similar estimates were publicly disclosed by ATCO Ltd. in 2020, the termination and transition costs for the Wipro contract were publicly available and therefore not confidential. Calgary's disclosure of these aggregated numbers was therefore not a breach of confidentiality.

47. The Review panel therefore finds that on the issue of the disclosure of termination and transition costs, Calgary has demonstrated that the hearing panel made an error of fact, which is material to the Decision and exists on a balance of probabilities. Calgary's request for a review on this ground is granted.

<sup>41</sup> Exhibit 27403-X0013, at paragraph 4.13.

<sup>42</sup> See 26616-X0208-C, Stephens Consulting Evidence at PDF page 35.

### 5.3 Hearing panel consideration of the evidence of Calgary

#### *Calgary submissions*

48. Calgary submitted that the hearing panel erred by finding that certain information disclosed in the Stephens evidence was confidential. It provided the following excerpt from the hearing panel findings:<sup>43</sup>

However, the Commission finds that the disclosure of the [REDACTED] [REDACTED] has not been made public, and was consistently treated as confidential in Decision 20514-D02-2019 and in the publicly filed evidence in that proceeding. It is not acceptable to disclose material that has been derived from confidential information, and which has not been disclosed publicly.

The statement [REDACTED] in column 3 is confidential and should be redacted from any public filing. [emphasis added]

49. Calgary further submitted that:<sup>44</sup>

The panel relied on previous treatment of this information in Proceeding ID 20514 to find it confidential, however factually the captioned evidence was the confidential opinion evidence of Calgary's expert PA Consulting. As such, Calgary had the right to determine (and did determine) whether such information should be publicly disclosed or treated as confidential information in this Proceeding; the Hearing Panel omitted this key factual distinction and therefore committed an error of fact.

#### *Review panel findings*

50. The review panel notes that this information was redacted in the public IT Common Matters Decision,<sup>45</sup> and that Calgary did not seek a review of that confidential treatment at that time. The appropriate time for Calgary to take issue with the confidential treatment of this information was in the IT Common Matters proceeding.

51. The review panel also notes that Calgary's submission ignores the hearing panel's statement that "(i)t is not acceptable to disclose material that has been derived from confidential information, and which has not been disclosed publicly". Calgary's assertion is essentially that its experts can use confidential information to conduct calculations, and that the results of those calculations can be made public. Confidential information cannot be transformed into public information by repackaging it in an expert report.

52. The review panel finds on this ground of review that Calgary has not demonstrated that the hearing panel 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. This ground of review is therefore denied.

---

<sup>43</sup> 27403-X0013, paragraph 4.14, citing PDF page 14

<sup>44</sup> 27403-X0013, paragraph 4.15.

<sup>45</sup> Decision 20514-D02-2019 (Public), at paragraphs 77, 81, 88, and 322 (compared with Exhibit 26615-X0282-C, IT Common Matters Decision Unredacted.

#### 5.4 MSA definition of confidential information

53. Calgary submitted that the hearing panel had no regard for the definition of Confidential Information included in the MSAs. It submitted that:<sup>46</sup>

4.18 As noted above, it is necessary as a question of fact to determine whether information is or is not confidential information. This analysis cannot be properly conducted without regard for the contractual definition of Confidential Information in both the Wipro MSA and the IBM/Kyndryl MSA. The Hearing Panel did not conduct the required analysis in the Ruling, and any factual findings made in the absence of such analysis constitute an error of fact or an error of mixed fact and law. Instead, the panel either relied upon its own assessment or ATCO's assessment of whether the information was confidential.

4.19 The definition of "Confidential Information" in each MSA was the result of fair bargaining between the parties to the contract, with all parties being highly sophisticated and having access to legal counsel. Accordingly, that bargain and definition should have been applied by the Hearing Panel but was not done so.

#### *Review panel findings*

54. In the review panel's assessment, the hearing panel did have regard to the confidentiality obligations under the Wipro MSA and the IBM/Kyndryl MSA. This is evidenced by the following finding by the hearing panel:

The Commission considers that the potential breach of ATCO Electric's confidentiality obligations under its agreements is an important commercial interest as contemplated by the Supreme Court in *Sierra Club of Canada v Canada*, 2002 SCC 41 (paragraph 55).<sup>47</sup>

55. The review panel further notes the following submission from ATCO Electric to the hearing panel:<sup>48</sup>

It is important to note that ATCO Electric reached out to IBM/Kyndryl and Wipro when the confidentiality issue initially arose. Both object to the public disclosure of the subject terms and materials.

56. The full definitions of Confidential Information in the Wipro MSA and IBM/Kyndryl MSA are set out at Appendix 1 to this decision. It is noteworthy, however that in both the Wipro MSA<sup>49</sup> and the IBM/Kyndryl MSA<sup>50</sup> the definitions include the following:

#### **IBM/Kyndryl MSA / Wipro MSA**

[REDACTED]

<sup>46</sup> 27403-X0013, paragraph 4.18 and 4.19.

<sup>47</sup> 26615-X0447-C, PDF page 3.

<sup>48</sup> 26615-X0447-C, PDF page 7.

<sup>49</sup> Exhibit 26615-X0280-C, MSA – Exhibit 20514-X0037, AP-AUC-2015FEB03-091.

<sup>50</sup> Exhibit 26615-X0111-C, Master Services Agreement (Regulated Entities).

57. The assessment of what is confidential under the IBM/Kyndryl MSA and the Wipro MSA therefore also necessarily includes consideration of articles within the MSAs that address specific confidentiality issues between the parties, including [REDACTED]

58. The Decision found breaches of confidentiality by Calgary involving [REDACTED]  
[REDACTED]  
[REDACTED]<sup>51</sup> As noted above, the evidence before the hearing panel was that ATCO Electric, IBM/Kyndryl, and Wipro all objected to such disclosure.

59. The review panel has carefully reviewed the Decision at issue, and has considered each of the breaches of confidentiality found by the hearing panel in the context of the definition of “Confidential Information” in the MSAs, which, as noted above, the review panel has determined the hearing panel took into account. Based on this analysis, the review panel finds that the hearing panel’s decision is consistent with the definition of Confidential Information in the MSAs.

60. The review panel finds on this ground of review that Calgary has not demonstrated that the hearing panel 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. This ground of review is therefore denied.

### 5.5 Change in material facts

61. Calgary submitted that there has been a change in material facts which satisfies the requirements of Section 5(1)(b) of *Rule 16*, as follows:<sup>52</sup>

[REDACTED]

[REDACTED]

62. The review panel notes that Calgary previously argued that the Commission needs to address the definition of “Confidential Information” in the MSAs in its assessment of what is deemed confidential. [REDACTED]

<sup>51</sup> The Decision also found a breach due to disclosure of confidential material from the IT Common Matters proceeding, which was addressed at Section 5.3 of this decision.

<sup>52</sup> 27403-X0013, paragraphs 4.21 and 4.22.



[REDACTED]

63. [REDACTED]

64. While Calgary argues that allowing this information to be kept confidential in this instance does not serve the public interest, the Commission must also consider the contractual confidentiality obligations between parties in its assessment of the public interest in open proceedings.<sup>53</sup> While there may be instances where the Commission will order that such information be made public based on its assessment of the public interest based on the specific facts of a given matter, on the facts before it in this case, the review panel finds that it was not an error for the hearing panel to have found that the confidentiality provisions in the MSAs are an important commercial interest that should be respected.

65. The review panel finds on this ground of review that Calgary has not demonstrated that the hearing panel 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. The review panel therefore denies this ground of review.

## **6 Further observations of the review panel**

66. The review panel notes that the confidentiality issues raised in Proceeding 26615 and in this proceeding have required significant time and resources for all parties involved. These issues could have been resolved at the outset through discussions between Calgary and ATCO Electric. When parties have any uncertainty regarding whether information is or may be confidential pursuant to a Commission order and there is insufficient time to resolve the issue before filing, the best course is to file such information confidentially, and then seek input from the party whose confidential information is at issue. Redacted materials can be filed publicly at a later date.

---

<sup>53</sup> *Sierra Club v. Canada (Minister of Finance)*, paragraph 55.

## 7 Decision

67. In answering the preliminary question, the review panel finds that Calgary has not met the requirements for a review of the findings of the hearing panel in its Decision and the application for review is dismissed, with the exception of the hearing panel's findings on the disclosure of transition and termination costs.

68. On the issue of the disclosure of aggregate transition and termination costs, the review panel finds that Calgary met the requirements of the first stage of the review and variance application, and established that this is public information, and that Calgary did not breach confidentiality in its disclosure. The Decision is therefore varied to confirm that Calgary did not breach confidentiality in disclosing aggregate termination and transition costs.

69. The Public Decision is varied by adding the following paragraph 10(a):

10(a) Having regard to ATCO Ltd.'s public disclosure of similar information, Calgary did not breach confidentiality by disclosing aggregate termination and transition costs related to the exit of the Wipro Ltd. Master Services Agreement.

70. The Confidential Decision is varied by striking the second paragraph at page 21, column 7, and replacing it with the following:

The Commission finds that the totals in Table 2, line 19 (page 17) of the Voided Stephens Evidence and in Exhibit 26615-X0339-C (page 17) are not confidential as similar information was disclosed by ATCO Ltd. in public filings.

Dated on October 27, 2022.

### Alberta Utilities Commission

*(original signed by)*

Kristi Sebalj  
Vice-Chair

**Appendix 1 – Confidential Information Definitions from the Wipro MSA and  
IBM/Kyndryl MSA**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]