



**Enforcement Staff of the
Alberta Utilities Commission**

**Settlement Agreement with the Office of the Utilities
Consumer Advocate – Enforcement and
Administrative Penalty**

December 13, 2022

Alberta Utilities Commission

Decision 27705-D01-2022

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Settlement Agreement with the Office of the Utilities Consumer Advocate – Enforcement and Administrative Penalty

Proceeding 27705

December 13, 2022

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**Enforcement Staff of the Alberta Utilities Commission
Settlement Agreement with
the Office of the Utilities Consumer Advocate –
Enforcement and Administrative Penalty**

**Decision 27705-D01-2022
Proceeding 27705**

1 Decision summary

1. In this decision, the Alberta Utilities Commission approves the settlement agreement between AUC Enforcement staff and the Office of the Utilities Consumer Advocate (UCA) related to a disclosure by the UCA in breach of a confidentiality order¹ of the Commission in Proceeding 26615 (contravention). In accordance with the settlement agreement, the Commission imposes a one-time penalty on the UCA of two-thousand and five-hundred dollars (\$2,500) for the contravention.

2 Background and AUC Enforcement staff's application

2. An investigation was commenced by AUC Enforcement staff following a referral made to it by the Commission panel that presided over Proceeding 26615. In that proceeding, the Commission panel granted confidential treatment to certain evidence filed by ATCO Electric Ltd. To gain access to the confidential information for the purposes of its participation in the proceeding, individuals who participated on behalf of the UCA filed confidentiality undertakings that prevented the UCA from disclosing the confidential information. The UCA subsequently filed evidence on the public record of the proceeding that disclosed confidential information.

3. The investigation ultimately resulted in AUC Enforcement staff filing the application and settlement agreement that is the subject of this proceeding. The contravention was described as:

On February 25, 2022, the UCA disclosed information on the public record of Proceeding 26615 contrary to Section 30.11 of Rule 001: *Rules of Practice* and Form RP5 (confidentiality undertakings) concerning the use and protection of information that had been granted confidential protection pursuant to an AUC order.²

4. In the settlement agreement, the UCA admitted to the contravention and agreed to the imposition of an administrative penalty of \$2,500 under sections 63(1)(a) and 63(2)(a) of the *Alberta Utilities Commission Act*. The amount of the penalty, in the submission of AUC Enforcement staff, will reasonably achieve the objectives of the AUC's sanctioning authority, corresponds to the seriousness of the contravention and appropriately considers mitigating factors. The parties to the settlement agreement recognized that all settlements must be examined and approved by the AUC.

¹ Proceeding 26615, ATCO Electric Ltd. and FortisAlberta Inc., 2023 Cost-of-Service Review, Exhibit 26615-X0108, AUC ruling on ATCO Electric motion for confidentiality, January 11, 2022.

² Exhibit 27705-X0002, paragraph 20.

5. AUC Enforcement staff referred to its obligation to safeguard the public interest in pursuing the mandate to bring forward – and in appropriate circumstances settle – enforcement proceedings.³ AUC Enforcement staff submitted that the imposition of an administrative penalty is necessary in the circumstances to encourage compliance with Commission confidentiality orders. In addition, it provides assurance to parties whose materials are determined by the Commission to be confidential that parties who receive those materials will exercise the care expected in preventing public disclosure.

6. In this proceeding, the UCA filed a statement of intent to participate submitting no further process was necessary and that the settlement agreement between it and AUC Enforcement staff should be approved.⁴

3 Should the Commission approve the application and settlement agreement?

7. The Commission’s jurisdiction to consider and approve this settlement agreement is grounded in the Commission’s general powers in sections 8 and 23(1)(b) of the *Alberta Utilities Commission Act* and the administrative penalty section, Section 63.

8. The parties to the settlement agreement have agreed that:

- There was a confidentiality order in place.
- Individuals participating on behalf of the UCA filed confidentiality undertakings and received access to the confidential materials.
- The UCA filed evidence on the public record on February 25, 2022, that included unredacted passages from information request responses provided on the confidential record and incorrectly referenced this information on the public record.
- The information was available on the public record for approximately 19 hours, from February 25 at 14:13 until February 26, 2022, at 9:08 a.m.

9. Based on the foregoing, the Commission accepts that the contravention occurred.

10. The Commission will now consider whether to accept the settlement agreement, as filed. Recently in Decision 27013-D01-2022,⁵ the Commission commented that in considering a settlement agreement, guidance can be taken from the principles developed by courts for joint submissions on sentencing in criminal law.

11. In *R v Anthony-Cook*, the Supreme Court of Canada affirmed that the proper test for trial judges assessing a departure from joint submissions on sentencing is “whether the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the

³ Bulletin 2016-10, Practices regarding enforcement proceedings and amendments to AUC Rule 001: Rules of Practice, March 29, 2016, paragraph 13.

⁴ Exhibit 27705-X0006, UCA Statement of Intent to Participate, October 31, 2022.

⁵ Decision 27013-D01-2022: Enforcement Staff of the Alberta Utilities Commission, Allegations against ATCO Electric Ltd., Proceeding 27013, June 29, 2022, paragraphs 64-68.

public interest.”⁶ Further, the Supreme Court of Canada stated that a high threshold is appropriate given that the parties to the joint submission are well placed to take into account both the interests of the public and the accused, and are highly knowledgeable about the circumstances of the offender and offence and relative strengths and weaknesses of their respective positions.⁷

12. The Commission in this proceeding considers it appropriate to apply the public interest test as articulated in *Anthony-Cook* for a high threshold to reject joint submissions (i.e., a settlement agreement) on AUC enforcement matters. Based on *Anthony-Cook*, the Commission should only depart from a joint submission if it would bring the administration of justice into disrepute or is otherwise contrary to the public interest. In assessing whether the terms of the settlement reach this threshold, the Commission has taken into account its criteria relating to administrative penalties in Rule 013: *Criteria Relating to the Imposition of Administrative Penalties* and sentencing principles from the criminal law context.

13. Information in the settlement agreement that addresses the seriousness of the contravention and mitigating factors includes:

- The confidential information disclosed by the UCA was available on the public record for a limited period of time.
- The UCA did not benefit from the disclosure.
- The UCA has changed its practices to prevent future disclosure, including ensuring that either the confidential or non-confidential document is open, but not both simultaneously, when preparing evidence and increasing efforts to review and check all references before filing documents.
- The UCA cooperated with AUC Enforcement staff and made efforts to reach a settlement agreement on an administrative penalty.

14. In addition, there is no evidence before the Commission to indicate that ATCO Electric or ratepayers were harmed by the disclosure. The Commission is reassured that the UCA has implemented changes to its practices to prevent any future disclosure of confidential information in an AUC proceeding.

15. The Commission finds that the magnitude of the administrative penalty is proportional to the seriousness of the contravention. In addition, taking into account that the purpose of the Commission’s sanctioning authority is protective and preventative, not punitive, the Commission finds that the quantum of the penalty is reasonable. The penalty of the nature agreed to in this case should deter the UCA and act, more broadly, as a general deterrent to other stakeholders who execute a confidentiality undertaking.

16. As noted in the settlement agreement, the penalty imposed will likely ultimately be paid for by some of the same ratepayers whose interests are being represented by the UCA given the UCA’s funding structure. The Commission has considered whether this is contrary to the public interest. Given the relatively small magnitude of the penalty in this case, and that the penalty is

⁶ *R v Anthony-Cook*, 2016 SCC 43, paragraph 32.

⁷ *Anthony-Cook*, paragraph 44.

the result of a settlement agreement, the Commission does not find this to cross the high threshold of bringing the administration of justice into disrepute or being contrary to the public interest in this case.

17. The Commission concludes that it is in the public interest to approve the settlement agreement and the \$2,500 penalty.

4 Order

18. It is hereby ordered that:

- (1) The settlement agreement between AUC Enforcement staff and the Office of the Utilities Consumer Advocate, attached as [Appendix 2](#) to this decision, is approved, as filed.
- (2) The Office of the Utilities Consumer Advocate must pay an administrative penalty in the amount of two-thousand and five-hundred dollars (\$2,500) pursuant to sections 63(1)(a) and 63(2)(a) of the *Alberta Utilities Commission Act*. The payment may be made via cheque or bank draft made out to the General Revenue Fund of Alberta and delivered to the AUC within 30 business days of the date of the order.

Dated on December 13, 2022.

Alberta Utilities Commission

(original signed by)

Renée Marx
Commission Member

Appendix 1 – Proceeding participants

Name of organization (abbreviation) Company name of counsel or representative
Alberta Utilities Commission Enforcement
Office of the Utilities Consumer Advocate (UCA) Brownlee LLP

Alberta Utilities Commission
Commission panel R. Marx, Commission Member
Commission staff A. Sabo (Commission counsel) B. Edwards

Appendix 2 – Settlement agreement

[\(return to text\)](#)



Appendix 2 -
Settlement agreeme
(consists of 5 pages)

ALBERTA UTILITIES COMMISSION

IN THE MATTER OF the *Alberta Utilities Commission Act*, SA 2007, c A-37.2 and the
regulations made thereunder;

AND IN THE MATTER OF the Alberta Utilities Commission Rule 001: *Rules of Practice*;

BETWEEN:

Alberta Utilities Commission Enforcement Staff

Applicant

-and-

The Office of the Utilities Consumer Advocate

Respondent

Settlement Agreement

I Introduction and executive summary

1. In May 2022, the Alberta Utilities Commission Enforcement staff (Enforcement staff) commenced an investigation in response to a referral from the Alberta Utilities Commission (AUC) panel presiding over Proceeding 26615 (26615 Panel) concerning the panel's findings that the Office of the Utilities Consumer Advocate (UCA) breached the panel's confidential orders in that proceeding.
2. The investigation confirmed and, for the purposes of this settlement agreement, the UCA admits that it improperly disclosed information on the public record of Proceeding 26615 contrary to Section 30.11 of Rule 001: *Rules of Practice* and the requirements set out in Form RP5 (confidentiality undertakings) concerning the use and protection of information that has been granted confidential protection pursuant to an AUC order.
3. Enforcement staff and the UCA have entered into a settlement agreement to address the admitted contraventions (Settlement Agreement). The UCA was cooperative, forthright and responsive concerning all aspects of Enforcement staff's investigation. For the reasons set out in further detail below, the settlement includes an administrative penalty of \$2,500.
4. Enforcement staff consider that the Settlement Agreement fosters public protection, encourages compliance, serves as a deterrent and is therefore in the public interest. Enforcement staff and the UCA therefore jointly request that the AUC approve the Settlement Agreement without variation.

II Agreed facts

5. The AUC uses an electronic filing tool, known as its eFiling system, to assist with managing and sharing information in its proceedings. This system is used to access, manage, search and upload documents. Documents filed on the public record of a proceeding in eFiling are accessible to any person who has an eFiling system user account. Documents filed on the confidential record of a proceeding in eFiling are only accessible pursuant to the terms of the AUC's confidentiality rulings.

6. On January 11, 2022, the 26615 Panel issued a ruling granting confidential treatment to certain evidence to be filed by ATCO Electric Ltd. in Proceeding 26615. In the ruling, the 26615 Panel directed ATCO Electric to provide interveners access to the confidential information on the confidential record in eFiling provided such parties filed confidentiality undertakings. The confidentiality ruling was filed as Exhibit 26615-X0108 on the public record in Proceeding 26615.

7. The UCA was an intervener in Proceeding 26615. Beginning January 14, 2022, various people participating on behalf of the UCA filed executed confidentiality undertakings and were granted access to ATCO Electric's confidential information filed on the confidential record in Proceeding 26615.

8. On February 25, 2022, the UCA filed its evidence on the public record for Proceeding 26615 as Exhibit 26615-X0301. The UCA evidence was filed on the public record at 14:13.

9. ATCO Electric contacted AUC staff/counsel assigned to Proceeding 26615 concerning the disclosure of information in the UCA evidence (Exhibit 26615-X0301) on the public record that it contended was confidential. The UCA evidence was voided by the AUC from the public record on February 26, 2022, at 9:08 (18 hours, 55 minutes later). There were no unified logging service (ULS) logs in the eFiling system to indicate whether any persons who had not signed a confidentiality undertaking had accessed Exhibit 26615-X0301.

10. On February 28, 2022, the UCA refiled its evidence. A redacted version was filed on the public record as Exhibit 26615-X0328.

11. On March 4, 2022, the 26615 Panel issued a letter on the public record noting the disclosure of confidential information on the public record and stated Exhibit 26615-X0301 "contained reference to confidential information or quoted the confidential record." This letter was filed as Exhibit 26615-X0331.

12. Portions of the A22 response in the UCA evidence (Exhibit 26615-X0301) included unredacted passages from information responses provided on the confidential record and incorrectly referenced the information response containing these responses on the public record.

13. The disclosure arose due to a failure to ensure that in preparing the UCA evidence, the information included in the UCA evidence was from the public and not the confidential record as both versions of the exhibits were simultaneously open at the time that the UCA evidence was being prepared.

14. The UCA has implemented changes in its practices and procedures to avoid a re-occurrence. These changes include ensuring that either the confidential or non-confidential

document is open, but not both simultaneously, when preparing evidence and increasing efforts to review and check all references before filing documents.

III Regulatory framework and governing legislation

15. Section 76(1)(e) of the *Alberta Utilities Commission Act* authorizes the AUC to make rules of practice regarding its procedure and hearings. The AUC enacted Section 30 of Rule 001 pursuant to this authority.

16. Section 30.7 of Rule 001 enables the AUC to grant a motion for confidential treatment on any terms it considers reasonable or necessary.

17. Section 30.9 of Rule 001 further enables the AUC to establish or adopt any process or procedure considered necessary or reasonable in the public interest to consider the confidential information.

18. In Proceeding 26615, the 26615 Panel directed ATCO Electric to provide access to its confidential information provided the requesting parties executed and filed a confidentiality undertaking as provided for in Section 30.11 of Rule 001 and Form RP5.

19. Form RP5 requires each recipient of confidential information to, *inter alia*, “use all reasonable and necessary efforts to safeguard the confidential information and related materials from any unauthorized disclosure or use” and to “not disclose the confidential information or related materials to any person except to the Commission or to a person who is authorized by the Commission to receive access to the confidential information and who has executed and filed with the Commission an undertaking, unless otherwise required by law.”

IV Admitted contraventions:

20. For the purposes of the Settlement Agreement, the UCA admits and agrees to the following contravention:

On February 25, 2022, the UCA disclosed information on the public record of Proceeding 26615 contrary to Section 30.11 of Rule 001: *Rules of Practice* and Form RP5 (confidentiality undertakings) concerning the use and protection of information that had been granted confidential protection pursuant to an AUC order.

V Agreed terms and conditions of settlement

21. Section 63 of the *Alberta Utilities Commission Act* states, *inter alia*, that if the Commission determines in a hearing or other proceeding that a person has contravened or failed to comply with any provision of that act or any other enactment under the jurisdiction of the Commission or any Commission rule, it can impose an administrative penalty and any terms or conditions considered appropriate. The Commission has found that the reference to “other

proceeding” includes a settlement process.¹ The purpose of the Commission’s sanctioning authority is to achieve general and specific deterrence, encourage compliance and protect the public. As well, while sanctions are intended to be protective and preventative, they are not to be punitive.

22. The Commission makes enforcement decisions based on the relevant factors of the case before it and has enacted Rule 013: *Criteria Relating to the Imposition of Administrative Penalties* to provide guidance when considering the imposition of an administrative penalty under the act. Section 4 of Rule 013 lists factors to be considered in determining the seriousness of the offence and Section 6 lists mitigation factors to be considered.

23. Substantively, the contravention admitted to by the UCA concerns the disclosure, on one occasion, of confidential information on the public record of Proceeding 26615 contrary to the 26615 Panel’s confidentiality orders. In assessing the seriousness of the contravention, of the 23 factors listed in Section 4 of Rule 013, the following matters are of note:

- (a) The harm caused was the failure to comply with the 26615 Panel’s confidentiality orders resulting in the public release of information that the 26615 Panel had determined warranted confidential protection (s. 4(1)).
- (b) The harm was of limited duration (s. 4(17)), scope and impact (s. 4(5)). Although the UCA evidence was publicly available for almost 19 hours, most of that time was in the evening and overnight when it would be expected that there would be less activity accessing the eFiling system. It is unknown who, if anyone, may have improperly accessed the UCA evidence (s. 4(1)).
- (c) The incident came to light through the actions of ATCO Electric (s. 4(20)). There are no filings on the Proceeding 26615 record from the parties whose materials were the subject of the confidential orders to indicate harm from the public disclosure (s. 4(7)).
- (d) The contravention was not a repeat offence (s. 4(14)) and was an isolated incident in this proceeding (s. 4(15)).
- (e) The UCA represents the interests of Alberta residential, farm and small business consumers. In the circumstances, any administrative penalty imposed would likely be paid for by some of the same ratepayers whose interests are being represented by the UCA (s. 4(23)).

24. Many of the other factors enumerated in Section 4 of Rule 013 are not present. For example: there was no loss of life or endangerment of persons, there was no damage to property or the operation of the bulk electric system, it did not involve significant sums of money or material benefit to the UCA, there was no fraudulent conduct or misrepresentation of material facts, the UCA was not reckless or deliberately indifferent nor did it engage in a cover up, and the UCA did not resist or ignore Enforcement staff’s inquiry into the contraventions.

¹ See for example Decision 23013-D01-2018 (Errata): Market Surveillance Administrator, Application for approval of a settlement agreement between the Market Surveillance Administrator, TransAlta Corporation and Capital Power Generation Services Inc., Proceeding 23013, Application 23013-A001, August 24, 2018, paragraph 20.

25. As noted above, Section 6 of Rule 013 details factors to be considered in determining if any mitigation is warranted in the amount of the administrative penalty to be imposed. Many of those factors relate to the presence, strength, integrity and success of an existing compliance system. Section 30.11(a) of Rule 001 requires a party who accesses confidential information to provide a copy of its protocol for the treatment of the confidential documents it receives. The UCA's protocol was submitted as Exhibit 26615-X0150. The UCA protocol concerns the labelling, storage and later destruction of confidential information. Consequently, in this situation, the protocol would not have addressed the breaches and would not serve to mitigate the seriousness of the contraventions.

26. However, mitigation factors such as the response and cooperation of the UCA, including its internal investigation and implementation of changes to its practices, when made aware of the contraventions do apply (s. 6(19) - (20)).

27. In the circumstances of this enforcement proceeding, the public interest requires the imposition of an administrative penalty to achieve the objectives of encouraging compliance with AUC's orders as well as general and specific deterrence. Pursuant to sections 63(1)(a) and 63(2)(a) of the *Alberta Utilities Commission*, the parties jointly request that the AUC issue an order requiring the UCA to pay an administrative penalty in the amount of \$2,500 payable to the General Revenue Fund of Alberta and delivered to the AUC within 30 business days of the date of the order.

VI General

28. This Settlement Agreement includes facts admitted for the purpose of dispensing with formal proof thereof. The UCA's agreement to the terms of this Settlement Agreement does not constitute an admission as to the facts or findings in any other civil or criminal proceedings.

29. Subject to the Commission's approval of this Settlement Agreement, execution and fulfillment of the terms of this Settlement Agreement by the UCA resolves all issues involving the UCA relating to the conduct described above and Enforcement staff will take no further steps against the UCA arising from these facts.

AGREED TO THIS 12th DAY OF OCTOBER, 2022



Thomas D. Marriott, K.C.
Counsel for the Office of the Utilities Consumers Advocate



Catherine M. Wall
Counsel, Enforcement Staff
Alberta Utilities Commission