



AUC

Alberta Utilities Commission

ATCO Utilities (ATCO Gas, ATCO Pipelines and ATCO Electric Ltd.)

**2010 Evergreen Proceeding for Provision of Information
Technology and Customer Care and Billing Services Post 2009
(2010 Evergreen Application)**

June 13, 2014

The Alberta Utilities Commission

Decision 2014-169: ATCO Utilities (ATCO Gas, ATCO Pipelines and ATCO Electric Ltd.)
2010 Evergreen Proceeding for Provision of Information Technology and Customer Care and
Billing Services Post 2009 (2010 Evergreen Application)
Application No. 1605338
Proceeding No. 240

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Telephone: 403-592-8845
Fax: 403-592-4406

Website: www.auc.ab.ca

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1 Introduction

1. On July 31, 2009, ATCO Electric Ltd. (ATCO Electric), ATCO Gas, and ATCO Pipelines¹ (collectively, the ATCO Utilities) filed an application seeking various orders and approvals for the provision of information technology (IT) and customer care and billing (CC&B) services post 2009, referred to as the 2010 Evergreen application (the original application).²

2. In the original application, the ATCO Utilities requested that the Alberta Utilities Commission (the AUC or the Commission) issue orders as stated in the subject Evergreen Phase II application:

- a) The pricing of IT and CC&B services for the purpose of determining the revenue requirements of each of the ATCO Utilities for 2010 through to 2015, shall be based on the Master Service Agreements (MSAs) filed in the application and the terms and conditions also contained therein. The pricing determined by the MSAs shall be applied to forecasted volumes through each Utility's subsequent GRA/GTA [general rate application/general tariff application] process.
- b) Confirmation that the MSAs, including price, are consistent with the provisions of the ATCO Utilities Code of Conduct.
- c) The Price Review process reflected in Article 7, Section 7.3 of the IT MSAs and Article 8, Section 8.4 of the CC&B MSAs and as described in paragraphs 11 and 12 of the Overview section of the application [sic].³

3. The Commission issued notice of application on August 14, 2009. Any party that wanted to intervene in the proceeding was required to submit a statement of intent to participate (SIP) to the Commission) by August 31, 2009. The Commission received SIPs from The City of Calgary (Calgary), the Consumers' Coalition of Alberta (CCA) and the Office of the Utilities Consumer Advocate (UCA).

4. In its correspondence of September 16, 2009, the Commission stated that it would prefer to have the 2003-2007 Benchmarking, and 2008-2009 Evergreen proceedings completed prior to turning its focus on this application.

¹ ATCO Gas and ATCO Pipelines are divisions of ATCO Gas and Pipelines Ltd.

² Exhibit No. 1, original application, July 31, 2009.

³ Exhibit No. 1, original application, PDF page 13 at paragraph 28, July 31, 2009.

5. The approved prices for IT and CC&B services for the 2003-2007 and the 2008-2009 periods were decided in decisions 2010-102⁴ and 2011-228⁵ respectively.

6. Subsequent to the release of Decision 2011-228, the ATCO Utilities submitted a letter to the Commission on June 23, 2011, stating that it was expecting to file an updated application by July 15, 2011. On July 14, 2011, the ATCO Utilities informed the Commission that the updated application would be filed on July 27, 2011 rather than July 15, 2011.

7. On July 27, 2011, the Commission received a letter from the ATCO Utilities which included an amendment to their original application (referred to as amended application).⁶ In their amended application, the ATCO Utilities proposed that all elements of the original application remain unchanged including the treatment of confidential information and the relief requested, except for the following:

- (i) Amending the IT MSAs to include the pricing of new Distributed Applications;
- (ii) Amending the CC&B MSAs to include a benchmarking provision to assess disaggregated pricing for each of ATCO Gas and ATCO Electric.⁷

8. On September 21, 2012, with the Commission's approval,⁸ the ATCO Utilities filed an updated application⁹ and clarified that they would be referring to their July 31, 2009 application as the "original application" and to their July 27, 2011 application as the "amended application." The updated application included the following requests for the provision of IT and CC&B services for the post 2009 period:

The pricing of IT and CC&B services for the purpose of determining the revenue requirements of each of the ATCO Utilities for 2010 and onward shall be based on the MSAs filed herewith and the terms and conditions thereof;

Confirmation that the MSAs, including pricing, are consistent with the provisions of the ATCO Utilities Inter-Affiliate Code of Conduct;

The Price Review process reflected in Article 7, Section 7.3 of the IT MSAs and Article 8, Section 8.4 of the CC&B MSAs.¹⁰

9. The ATCO Utilities further requested that placeholders for IT and CC&B services for the 2010 to 2012 period be finalized once a decision was made on approved pricing. In addition, the ATCO Utilities requested that CC&B and IT Services pricing derived as a result of the price review be applied to forecast utility volumes on a prospective basis, commencing January 1, 2013, replacing placeholders in the relevant GRA for ATCO Pipelines and the ATCO Electric

⁴ Decision 2010-102: ATCO Utilities (ATCO Gas, ATCO pipelines and ATCO Electric Ltd.) 2003-2007 Benchmarking and ATCO I-Tek Placeholders True-Up, Application No. 1562012, Proceeding ID. 32, March 8, 2010.

⁵ Decision 2011-228: ATCO Utilities (ATCO Gas, ATCO Pipelines and ATCO Electric Ltd.), 2008-2009 Evergreen Application, Application No. 1577426, Proceeding ID No. 77, May 26, 2011.

⁶ Exhibit No. 26.01, amended application, July 27, 2011.

⁷ Exhibit No. 26.01, amended application, PDF page 4 at paragraph 3, July 27, 2011.

⁸ Exhibit No. 115.01, AUC ruling.

⁹ Exhibit No. 116.01, updated application, September 21, 2012.

¹⁰ Exhibit No. 116.01, updated application, PDF page 2 at paragraph 3, September 21, 2012.

Transmission GTA; and that ATCO Gas and ATCO Electric-Distribution pricing updates starting in 2013 will be addressed in accordance with AUC Decision 2012-237,¹¹ Rate Regulation Initiative, Distribution Performance-Based Regulation.

10. On October 18, 2012, the ATCO Utilities provided updated information responses to the information requests (IRs) in the July 27, 2011 amended application. On November 1 and November 7, 2012, parties asked additional IRs on the updated application. These IRs were responded to by the ATCO Utilities on December 7, 2012.

11. On January 7 and 11, 2013, Calgary filed intervener evidence on the updated application. On January 28, 2013, parties asked Calgary IRs on both their March 2012 and January 2013 evidence. These IRs were responded to on February 20, 2013, and following a Commission ruling on a motion, final responses were provided on April 2, 2013.

12. The Commission issued a further round of IRs to the ATCO Utilities and Calgary on April 11, 2013, with responses received on May 1, 2013.

13. Rebuttal evidence was filed by the ATCO Utilities on May 15, 2013. IRs were sent to the ATCO Utilities on their rebuttal evidence on July 2, 2013 and information responses were received from the ATCO Utilities on July 30, 2013. Written argument on jurisdictional matters were submitted by parties on November 4, 2013.

14. An oral hearing took place at the Commission's Calgary hearing room from January 13 to 22, 2014, and oral argument on jurisdictional issues took place on January 23, 2014. Written final argument was received on February 24, 2014, and written reply argument was tendered on March 17, 2014.

15. The Commission considers that the record with respect to the original, amended and updated Evergreen application closed on March 17, 2014. The Commission panel assigned to deal the original, amended and updated Evergreen application comprised of Commission Chair Willie Grieve, and Commission members Bill Lyttle and Anne Michaud.

16. In reaching its determinations set out within this decision, the Commission has considered all relevant materials comprising the record of this proceeding, including the submissions provided by each party. Accordingly, references in this decision to specific parts of the record are intended to assist the reader in understanding the Commission's reasoning relating to a particular matter and should not be taken as an indication that the Commission did not consider all relevant portions of the record with respect to that matter.

2 History

17. The historical and procedural background pertaining to the matters in the 2010 Evergreen proceeding has been lengthy and complex. In order to assist the reader in understanding the chronology of events leading up to this decision, the Commission provides the following

¹¹ Decision 2012-237: Rate Regulation Initiative, Distribution Performance-Based Regulation, Application No. 1606029, Proceeding ID. 566, September 12, 2012.

information and list of related decisions and a brief summary of the key findings in those decisions. A more detailed summary may be found in decisions 2010-102¹² and 2011-228.¹³

- In the late 1990s, Canadian Utilities Ltd. (CUL) concluded there could be benefits to outsourcing its computing services without there being additional costs. The computing assets were owned jointly by the ATCO Utilities and the services were provided to the utilities and other affiliates by CUL on a shared service basis.
- In January 1999 ATCO I-Tek (I-Tek) was formed to provide computing services and ATCO Singlepoint (later renamed ATCO I-Tek Business Services Ltd. (ITBS)) was formed to provide call centre and billing services. The concept was that these two non-regulated entities would provide the services needed by all the ATCO subsidiaries and offer their services to third parties.
- The ATCO Utilities made several submissions that dealt with the transfer of computing assets to ATCO I-Tek and established a *code of conduct*. The following decisions addressed the related issues:
 - 2002-069:¹⁴ ATCO Group, Affiliate Transactions and *Code of Conduct* Proceeding
 - 2002-095:¹⁵ ATCO Electric Ltd. – Asset Transfer and Outsourcing Arrangements
 - 2002-096:¹⁶ ATCO Pipelines South 2001/2002 GRA
 - 2002-097:¹⁷ ATCO Gas South 2001/2002 GRA, Carbon Storage
 - 2002-111:¹⁸ ATCO Pipelines South 2001/2002 GRA
 - 2003-002:¹⁹ ATCO Electric Ltd. – Asset Transfer and Outsourcing Arrangements
 - 2003-006:²⁰ ATCO Gas South 2001/2002 GRA, Carbon Storage

18. In Decision 2002-069 pertaining to the ATCO I-Tek and ATCO Singlepoint (now ITBS) arrangements, the Alberta Energy and Utilities Board (board or EUB), predecessor to the Commission, expressed concerns with respect to the price adjustment provisions of the original

¹² Decision 2010-102, pages 4-13.

¹³ Decision 2011-228, paragraphs 22-28.

¹⁴ Decision 2002-069: ATCO Group, Affiliate Transactions and Code of Conduct Proceeding, Part A: Asset Transfer, Outsourcing Arrangements, and GRA Issues, Application No. 1237673, July 26, 2002.

¹⁵ Decision 2002-095: ATCO Electric Ltd., Part A: Asset Transfer, Outsourcing Arrangements, and GRA Issues Compliance Filing, Application No. 1278432, November 19, 2002.

¹⁶ Decision 2002-096: ATCO Pipelines South, 2001/2002 General Rate Application, and Part A: Asset Transfer, Outsourcing Arrangements, and GRA Issues Compliance Filing, Application No. 1278433, November 19, 2002.

¹⁷ Decision 2002-097: ATCO Gas South, 2001/2002 General Rate Application, Carbon Storage Transfer and Part A: Asset Transfer, Outsourcing Arrangements, and GRA Issues Compliance Filing, Application No. 1278564, November 19, 2002.

¹⁸ Decision 2002-111: ATCO Pipelines South, 22001/2002 General Rate Application, and Part A: Asset Transfer, Outsourcing Arrangements, and GRA Issues Second Compliance Filing, Application No. 1284317, December 17, 2002.

¹⁹ Decision 2003-002: ATCO Electric Ltd., Part A: Asset Transfer, Outsourcing Arrangements, and GRA Issues Second Compliance Filing, Application No. 1286362, January 14, 2003.

²⁰ Decision 2003-006: ATCO Gas South, 2001/2002 General Rate Application, and Part A: Asset Transfer, Outsourcing Arrangements, and GRA Issues Second Compliance Filing, Application No. 1286129, January 21, 2003.

ATCO I-Tek Master Service Agreements and the original ATCO Singlepoint Master Service Agreements. The board included the following directions in Decision 2002-069.²¹

With respect to the future operation of the I-Tek MSA, the Board has continued misgivings with respect to the operation of the pricing mechanisms within the agreement. The Board directs ATCO, prior to any future material engagements of consultants to undertake a price review applicable to I-Tek and the regulated Utilities, to file terms of reference applicable to the engagements. Following participation of the parties, the Board will make a preliminary determination as to the reasonableness of those terms of reference to assist in providing a complete and useful record for future applications.

19. In Decision 2003-040²² the board established a *code* to govern relationships and transactions between regulated and non-regulated affiliates within the ATCO Group of Companies. This *code* was named the *ATCO Group Inter-Affiliate Code of Conduct (Code)*. The *Code* was intended to supplement legislated *code* of conduct regulations²³ which focus on retail affiliate matters.

20. The board issued Decision 2003-073²⁴ to address the renewal of the ATCO I-Tek Master Service Agreements. The renewal ATCO I-Tek Master Service Agreements effectively extended the term of the original ATCO I-Tek Master Service Agreements from five years starting January 1, 1999, to five years starting January 1, 2002.²⁵ The board directed that certain changes be made to the agreements. In addition, the board made the following findings:

The Board believes the matters to be addressed in this Decision will require a consideration of substantial differences between the Original MSA and the Renewal MSA, certain alleged non-standard provisions that may not be appropriate, and whether or not the provisions of the Renewal MSA are, individually and collectively, reasonable and prudent from the perspective of a public utility, and whether or not the Renewal MSA can and should be benchmarked.²⁶

The Board considers that it would assist all parties and the Board if the terms of reference explicitly required the benchmarker to identify which elements of the Renewal MSA it found to be non-standard or unusual, to explain how these non-standard components compare to industry norms, to clearly provide a value for any appropriate price discount or adjustment arising from each non-standard clause, and to comment on its ability to provide a confident estimate of such discount or adjustment.²⁷

The Board expects the benchmarker's report would include its supporting documentation for adjustments to prices relating to various components of the agreement. In particular,

²¹ Decision 2002-069, page 52; an identical direction was given in respect of Singlepoint, page 67.

²² Decision 2003-040: ATCO Group Affiliate Transactions and Code of Conduct Proceeding Part B: Code of Conduct, Application No. 1237673, May 22, 2003.

²³ Alberta Regulation 160/2003, *Electric Utilities Act, Code of Conduct Regulation*; Alberta Regulation 183/2003, *Code of Conduct Regulation*.

²⁴ Decision 2003-073: ATCO Electric, ATCO Gas, and ATCO Pipelines (the ATCO Utilities), ATCO I-Tek Information Technology Master Services Agreement (MSA Module), Application No. 1285881, September 26, 2003.

²⁵ Decision 2003-073, page 9.

²⁶ Decision 2003-073, page 14.

²⁷ Decision 2003-073, page 42.

the Board expects that the adjustments would be itemized, and that the benchmarker would disclose the degree of confidence relating to specific adjustments (i.e. the number of data points relied upon, etc.). The Board also expects the benchmarker to disclose the degree of confidence for any price ranges developed and used in the process of determining the FMV of ATCO I-Tek services. Inclusion of these various elements in the benchmarker's report would greatly enhance the transparency, and hopefully the confidence of stakeholders, in the benchmarking exercise.²⁸

The Board is hopeful that subject to a satisfactory Compliance Filing, ATCO and the interveners will now be able to arrive at terms of reference for the benchmarking study that are acceptable to all parties, and that can be submitted to the Board for approval as originally required by Decision 2002-069.²⁹

21. The board issued Decision [2004-026](#)³⁰ to address the compliance filings. ATCO Electric, ATCO Gas and ATCO Pipelines were directed to submit a second compliance filing by April 30, 2004. The board also expressed concerns about the efficiency of the process regarding the various outsourcing arrangements with ATCO I-Tek as shown below:

The Board is very concerned with the efficiency and effectiveness of the process by which the various outsourcing arrangements with ATCO I-Tek have transpired. The Board is not ordinarily interested in being involved in the affairs of the utilities under its jurisdiction to the level or degree demonstrated in this Decision and in Decision 2003-073. Furthermore, the present regulatory schedule makes such involvement problematic. The Board is becoming increasingly concerned with the time and effort expended with respect to the ATCO I-Tek contractual arrangements and the benchmarking processes. It is incumbent on all parties to ensure they use the Board's processes efficiently and that they participate with the objective of contributing to a better understanding of the issues before the Board.³¹

With the additional guidance from the Board set out in this Decision, the Board remains hopeful that the ATCO Utilities and the interveners alike will redouble their efforts at structuring appropriate terms of reference for the contemplated benchmarking study and that terms of reference can be submitted to the Board for consideration within 3 months of the date of this Decision. The Board further anticipates that the benchmarking process can be completed shortly following the Board's review of the terms of reference with an application submitted expeditiously thereafter for approval of the benchmarking study and the related cost placeholders from the GRA/GTA proceedings.³²

22. The board issued Decision [2004-055](#)³³ to address the second compliance filing. The board approved the filing and provided the following direction:

²⁸ Decision 2003-073, page 42.

²⁹ Decision 2003-073, page 45.

³⁰ Decision 2004-026: ATCO Electric, ATCO Gas, and ATCO Pipelines (the ATCO Utilities) Compliance Filings Pursuant to Decision 2003-073 – ATCO I-Tek Master Services Agreement Module, Application Nos. 1319530 and 1319698, March 12, 2004.

³¹ Decision 2004-026, page 14.

³² Decision 2004-026, page 14.

³³ Decision 2004-055: ATCO Electric, ATCO Gas, and ATCO Pipelines (the ATCO Utilities), Second Compliance Filings Pursuant to Decisions 2003-073 & 2004-026 – ATCO I-Tek Master Services Agreement Module, Application Nos. 1319530 and 1319698, July 13, 2004.

...directs the ATCO Utilities to report in their annual Code of Conduct compliance filings all instances where the parties agreed through a Statement of Work, that IP ownership rights or privileges with respect to the product or output of the Statement of Work would reside in whole or in part with ATCO I-Tek.

23. The board issued Decision [2004-057](#)³⁴ to address the ATCO I-Tek Collaborative Process Committee's (CPC) requested approval of the ATCO I-Tek IT benchmarking terms of reference and which indicated that the request for proposal document was for the board's information. In addition, the CPC made the following submission:

The Committee submitted that the efforts to develop Terms of Reference and RFP documents were fruitful and that it was now turning its attention to developing similar Terms of Reference and RFP documents for the Customer Care and Billing (CC&B) Master Services Agreements (MSAs). The Committee agreed to wait until completion of Terms of Reference and RFP documents for the CC&B MSAs before issuing the IT RFP. The Committee's plan was to issue the RFP for both the IT and CC&B Benchmarking studies together.³⁵

24. In approving the ATCO I-Tek IT benchmarking terms of reference in Decision 2004-057, the board noted that the terms of reference were not finalized, but were subject to the outstanding matters.

25. On May 2, 2005, the ATCO Utilities applied to the board for approval of certain CC&B Master Service Agreements, approval of certain IT Master Service Agreements, and approval of an extension to the period covered by the benchmarking project. The board established Application No. 1398892 for this proceeding and issued Order [U2005-376](#).³⁶

26. In Order U2005-376 the board addressed the requests made in the application. The board's approvals however, were subject to any required changes that may be necessary as a result of the sale by the ATCO Utilities of the retail gas and electric business to Direct Energy Regulated Services. The board's approval did not include approval of forecast volumes contained in the IT renewal MSAs. The board also approved the request to amend the IT terms of reference approved in Decision 2004-057 to include the IT renewal MSAs for the years 2005 and 2006 and expand the period covered by the yet to be developed CC&B terms of reference to include 2005 and 2006.

27. The board issued Order [U2006-216](#)³⁷ to address the requests made in application nos. 1454339 and 1470351. The requests were for approval of the terms of reference for the benchmarking of CC&B services. Approval was also requested for an extension to the period covered by the benchmarking to include 2007 for both the IT and CC&B Services. The board's approvals in Order U2006-216 included the following:

³⁴ Decision 2004-057: ATCO Electric, ATCO Gas, and ATCO Pipelines (the ATCO Utilities), Benchmarking Terms of Reference Pursuant to Decisions 2003-073 & 2004-026 – ATCO I-Tek Master Services Agreement Module, Application No. 1347599, July 13, 2004.

³⁵ Decision 2004-057, page 1.

³⁶ Order U2005-376: ATCO Electric Ltd., ATCO Gas and ATCO Pipelines Master Services Agreements and Benchmark Extension, Application No. 1398892, October 7, 2005.

³⁷ Order U2006-216: ATCO Electric Ltd., ATCO Gas and ATCO Pipelines Master Services Agreements and Benchmark Extension, Application Nos. 1454339 and 1470351, August 31, 2006.

Therefore, the Board accepts the use of the 2003 and 2004 volumes provided in Application No. 1454339 as set out in the Application and that the CC&B TOR [terms of reference] is in compliance with Decisions 2005-037^[38] and 2005-039.^[39] Accordingly, the Board approves the TOR for the benchmarking of CC&B from ITBS in Attachment 1 of this Order.

Accordingly, the Board approves 2003 to 2007 as the period to be covered by the benchmarking for both the IT and CC&B MSAs.

The Board notes that the CPC is proposing to submit for approval by the Board, an updated IT TOR based upon the CC&B TOR the Board has approved in this Order.⁴⁰

28. The board approved the ATCO Utilities' application to the board on behalf of the Collaborative Process Committee in Order U2007-111⁴¹ for the following:

1. Approval of Compass Management Consulting Limited as the recommended consultant to conduct benchmarking of the Information Technology and Customer Care and Billing Services which the ATCO Utilities receive from ATCO I-Tek Business Services Ltd.; and approval of UtiliPoint International Inc. to provide benchmarking assistance to Compass Management Consulting Limited in connection with the Customer Care and Billing Services benchmarking.
2. Approval of the Information Technology and Customer Care and Billing Services benchmarking contracts.
3. Approval of the total costs of the Information Technology and Customer Care and Billing Services benchmarking contracts of \$1,765,000 plus disbursements and Goods and Services Tax.
4. The allocation of the above-noted costs to the affected utilities.
5. Confirmation that there would be a process for the recovery of all reasonable costs incurred by the ATCO I-Tek Collaborative Process Committee associated with the Information Technology and Customer Care and Billing Services benchmarking projects at the completion of the projects.

29. In Decision 2010-102 the Commission dealt with, and accepted, the Benchmark Report prepared for the ATCO Utilities by the benchmarkers, regarding IT services provided by ATCO I-Tek and CC&B services provided by ITBS, respectively, for the years 2003 to 2007. The Benchmark Report was the product resulting from an extensive process conducted by the Collaborative Process Committee made up of representatives from interested parties⁴² which included the Customer Group⁴³ and the ATCO Utilities.

³⁸ Decision 2005-037: ATCO Electric Ltd., 2003/2004 General Tariff Application, Impact of the Retail Transfer and ITBS Volume Forecast, Application No. 1355435, April 29, 2005.

³⁹ Decision 2005-039: ATCO Gas, 2003/2004 GRA – Impact of the Retail Transfer and ITBS Volume Forecast, Application No. 1355457, May 3, 2005.

⁴⁰ Order U2006-216, page 5.

⁴¹ Order U2007-111: ATCO Electric Ltd., ATCO Gas and ATCO Pipelines, Application for Approval of the Contracts, Cost and Allocation of the Costs Associated with the Benchmarking of Information Technology and Customer Care and Billing Services, Application No. 1509540, April 23, 2007.

⁴² For a list of interested parties represented on the CPC refer to Decision 2010-102, footnotes 52, 53 and 54.

⁴³ For a list of members of the Customer Group refer to Decision 2010-102, footnote 4.

30. In Decision 2010-102, the Commission accepted the Benchmark Report as filed as meeting the terms of reference pursuant to the directions and directives of the EUB. Subject to a compliance filing to be made by the ATCO Utilities, the Commission also approved the increased/decreased placeholder amounts for each of ATCO Gas, ATCO Pipelines and ATCO Electric for 2003 to 2007, the approach to quantify the revenue requirement impacts, including the adjustments to property, plant and equipment, using the present value methodology, and interest on revenue requirement amounts for ATCO Electric and ATCO Gas in accordance with AUC [Rule 023: Rules Respecting Payment of Interest](#).

31. The ATCO Utilities submitted their compliance filing on March 25, 2010, which was approved as submitted in Decision [2010-269](#).⁴⁴

32. On May 6, 2010, Calgary filed an application for a review and variance (R&V) of Decision 2010-102. In Decision [2010-362](#),⁴⁵ the Commission denied Calgary's request for an R&V on the basis that the applicant failed to raise a substantial doubt about the correctness of Decision 2010-102 as required by Section 12(a) of AUC [Rule 016: Review of Commission Decisions](#).

33. On May 27, 2011, the Commission released Decision 2011-228 which set out the Commission's findings in respect of the IT and CC&B services provided to the ATCO Utilities by their non-regulated affiliates, ATCO I-Tek and ITBS during the 2008 and 2009 test years.

34. In the 2008-2009 Evergreen application Compass and UtiliPoint prepared a report titled, *Compass/UtiliPoint Review of the Application of the Evergreen Strategy (Compass Report)*⁴⁶ which provided the following:

- (a) Description of the process and results of analyzing the prices to be applied to 2008-2009 volumes for IT and CC&B services provided by ATCO I-Tek and ITBS, using an approach that would analyze the prices in the context of the 2007 benchmark rates and the application of the recommendations in the Evergreen Strategy.
- (b) Evaluation of the cost for the IT and CC&B governance function by analyzing the current governance structure and comparing it to other organizations.
- (c) Review of the evidence supporting the cessation of CIS royalty payments in the context of the Evergreen Strategy and market practices and provision of a detailed critique.⁴⁷

⁴⁴ Decision 2010-269: ATCO Utilities (ATCO Gas, ATCO Pipelines and ATCO Electric), 2003-2007 Benchmarking and ATCO I-Tek Placeholders True-Up, Compliance Filing to Decision 2010-102, Application No. 1606022, Proceeding ID. 564, June 14, 2010.

⁴⁵ Decision 2010-362: The City of Calgary, Decision on Preliminary Question, Review and Variance of Decision 2010-102, 2003-2007, Benchmarking and ATCO I-Tek Placeholders True-Up, Application No. 1606190, July 29, 2010.

⁴⁶ ATCO Utilities 2008-2009 Evergreen Application, Application No. 1577426, Proceeding No. 77, Exhibit 35.01, ATCO Utilities Amended Application, Appendix 5, dated October 7, 2009.

⁴⁷ ATCO Utilities 2008-2009 Evergreen Application, Application No. 1577426, Proceeding No. 77, Exhibit 16.01, page 1-3, dated October 3, 2008.

35. In Decision 2011-228, the Commission determined the following main issues:

- Fixed IT and CC&B prices – The Commission considered the methodology used to determine the pricing for fixed items,⁴⁸ produced by the evergreen process were sufficient to approximate the fair market pricing for IT and CC&B services for 2008 and 2009.⁴⁹
- Variable IT prices – In comparing the description of the methodology used in the Benchmark Report to the description of the methodology used in the 2008-2009 Evergreen proceeding, it appeared to the Commission that the 2008-2009 Evergreen Strategy to determine the fair market value (FMV) for variable items was similar to the methodology used in the 2003-2007 Benchmarking proceeding. The Commission concluded that a consistent strategy, including the trending methodology applied, had been used to determine the 2008-2009 FMV for both variable and fixed items.⁵⁰

36. In considering the continued use of variable items, the Commission noted the difficulty reviewing and understanding the amounts associated with variable items. The Commission considered that on a going forward basis, should the ATCO Utilities continue with the practice of using variable amounts that do not disclose volume and rate information, the ATCO Utilities would be at risk of not receiving approval of these amounts.⁵¹

37. In spite of the concerns expressed above pertaining to the ATCO Utilities' affiliate arrangement, the board nevertheless approved the initial arrangement in Decision 2002-069 and has continued to approve, albeit some on an interim basis, related applications pertaining to the provision of IT and CC&B services. In reaching its determinations set out within each related decision, the board/Commission has had regard for the fact that the ATCO Utilities have, at all relevant times, presented the affiliate arrangement as an arrangement that is reasonable and prudent, the rates of which are reflective of fair market value and just and reasonable, and which constitute arrangements with many benefits, particularly for customers.

38. In the Affiliate Transactions and *Code of Conduct* Proceeding – Part A, the ATCO Utilities stated that “it became apparent that through a restructuring of the roles and relationships within CUL, the Applicants could achieve all the benefits of outsourcing without any additional costs.”⁵² When asked to describe the benefits of outsourcing received through the creation of ATCO I-Tek over and above those benefits that would be received through provision of the same services internally, the ATCO Utilities responded:

Through the outsourcing exercise, ATCO became aware of the benefits of a commercial relationship. With the creation of I-Tek we have captured those benefits by structuring roles and responsibilities to provide better accountability and management of IT costs.

By moving to a fee-for-service methodology, the Applicants are now responsible for the services that they use and the volumes of those services consumed. They can correlate

⁴⁸ IT and CC&B services that were composed of a volume and a rate.

⁴⁹ Decision 2011-228, paragraph 76.

⁵⁰ Decision 2011-228, paragraphs 114-115.

⁵¹ Decision 2011-228, paragraph 118.

⁵² Exhibit No. 61.01, AUC-AU 75(d) attachment, PDF page 226 of 302; page 1 of 4; referencing Information Response No. 1, BR-ATCO.32.

their cost to the consumption of services. They also have direct price signals that help them determine if they should use more or less of those services.⁵³

39. In their supplementary response,⁵⁴ a comparison of the anticipated 1999 costs of the functions associated with the ATCO Singlepoint and ATCO I-Tek agreements were provided, which indicated that there was a benefit of \$771,000.00 to customers. The supplementary responses also provided the cost/benefit analyses for the ATCO Group, particularly, the net benefit expected to be achieved with proceeding with ATCO I-Tek and Singlepoint.⁵⁵

40. The board considered the ATCO Utilities' assertions pertaining to the benefits of outsourcing at page 40 of Decision 2002-069:

ATCO stated that the decision to outsource the information technology function was made in order to obtain the benefits of outsourcing and was not in any way related to or dependent upon the sale of the existing computer assets to I-Tek. From the outset, the ATCO Group sought to structure the I-Tek arrangements in a commercially sensible manner, and establish a relationship equivalent to what one would find in a third party, outsourced arrangement versus an internal insourcing transaction. The outsourcing of the IT function was seen as having many benefits, including:

- allowing management to focus on their principal business;
- establishing a separate IT governance process to optimize the use of information technology in the overall ATCO Group;
- gaining access to a specialized group that would meet the requirements of the ATCO companies at competitive prices; and,
- having access to personnel that were not likely to find the regulated environment attractive (reference omitted).

41. Additionally, the board understood the ATCO Utilities to provide the following benefits or expected benefits of outsourcing to ATCO I-Tek at pages 41-43 of Decision 2002-069:

The ability to control costs and shift risk to the unregulated affiliate, through contract provisions, were also noted as key reasons for outsourcing (reference omitted).

...

It was also submitted that the costs currently being incurred are less than those when the function was performed in house.

...

ATCO noted that the arrangement between I-Tek and the regulated utilities meant the ATCO Group utilities are paying the competitive market price for the services rendered. Other benefits, including the transfer of risk to I-Tek and away from utilities, permitting management to focus on their principal business, establishing separate IT governance,

⁵³ Exhibit No. 61.01, AUC-AU 75(d) attachment, PDF page 227 of 302; page 2 of 4; referencing Information Response No. 1, BR-ATCO.32.

⁵⁴ Exhibit No. 61.01, AUC-AU 75(d) attachment; PDF page 231 of 302; page 2 of 2; referencing Information Response No. 1, BR-ATCO.32 (Supplementary).

⁵⁵ Exhibit No. 61.01, AUC-AU 75(d) attachment; PDF pages 232-238 of 302; referencing Information Response No. 1, BR-ATCO.32 (Supplementary); Schedule B.

gaining access to a specialized IT group, attracting personnel, and implementing cost signals and controls, were all byproducts of this approach. It also noted that the commercial arrangements provided the flexibility to respond to anticipated changes in the regulatory environment while still benefiting from economies of scale.

...

In reply argument, ATCO reiterated that the agreements with I-Tek were reflective of terms and conditions typically found in arm's-length third party transactions.

42. While the board took into consideration many of the benefits presented by the ATCO Utilities, it remained concerned with other aspects of the affiliate arrangement. In particular, at page 48 of Decision 2002-069, the board held:

The Board accepts that, prima facie, and without considering the effect of this decision on costs, there is evidence to support the view that the business decision to establish a separate IT company will not have a negative effect on the utilities' ability to operate reliably. However, the Board notes that the risk that this decision should eventually be found to be unwise will continue to rest with ATCO. Should this approach prove to be more expensive or less effective than ATCO has represented, such outcomes may be subject to further review, on a going forward basis.

The Board will now discuss its views with regards to the claim by ATCO that this restructuring is transferring risk from the utilities to I-Tek. The Board notes that the ATCO regulated utilities and I-Tek are not at arm's-length. Therefore it would not be surprising that I-Tek's owners would try to avoid I-Tek assuming substantial investment risk for any purchases it makes on behalf of the ATCO utilities. Further, it would not be surprising, if adverse outcomes occurred, that the owners would attempt, in some manner, to recover adverse outcomes through some form of revised pricing. It should be clear that the Board does not condone non-market based activity by the I-Tek owners which would unduly affect the risk assumption of I-Tek and effect a transfer of risk back to the regulated utilities.

With regards to the claim by ATCO that this restructuring is transferring risk from the utilities to I-Tek, the Board does not accept that there is necessarily a substantial amount of risk being transferred. In a true arms-length [sic] transaction, negotiations between the parties would, by their very nature, be more balanced. The Board also considers that the operational risk for I-Tek is not unlike the utility. Further, customers now face the risk of varying market prices. All in all, the Board is not convinced that customers are made better off in terms of future price risks for CIS operations.

The Board notes ATCO stated that it must demonstrate that the cost of these services is either the same as or less than what it would cost to perform these services internally. The Board is not at all satisfied that ATCO has provided reasonable evidence as to the expected cost impact of the establishment of I-Tek. ATCO has relied upon evidence which blends the cost impact of Singlepoint and I-Tek.

43. The Commission has provided certain relevant portions of prior related decisions that have dealt with ATCO I-Tek IT and CC&B services above. It has done so with the intention of illustrating the process which has led to this proceeding. During the course of the proceedings that have led to the decisions discussed above, the Commission has consistently and continuously expressed concern in respect of the potential misalignment of interests between the utility and customers which are often associated with affiliate transactions. The ATCO Utilities

have, at all times, presented the affiliate arrangement as prudent and reasonable, the rates of which are reflective of fair market value, just and reasonable, and which constitute arrangements with benefits. However, the Commission is not satisfied that this is in fact what has transpired since the restructuring and reorganizing of the ATCO Group. It has become apparent that the benefits of the subject arrangement that were presented to the board have not materialized.

3 Background

3.1 The application – procedural steps

44. In a ruling dated May 16, 2008 in the ATCO Gas 2008-2009 General Rate Application (Proceeding No. 11, Application No. 1553052), the Commission dealt with Calgary's evidence that suggested the Master Service Agreements for IT and CC&B services should not be renewed or extended but should rather be tendered in an open and public process in which ATCO I-Tek would be forbidden from bidding. The Commission indicated that it may be appropriate for the ATCO Group of companies to file two applications; one to deal with the pricing of CC&B and IT services in 2008 and 2009 under the terms of the current MSAs, and another to deal with the provision of CC&B and IT services and pricing issues beyond 2009 (2010 Evergreen proceeding).

45. On this basis, the ATCO Utilities filed the original application on July 31, 2009 with the Commission seeking various orders and approvals for the provision of IT and CC&B services, as applicable, for 2010 and beyond.

46. In order to complete the 2003-2007 Benchmarking and 2008-2009 Evergreen proceedings prior to dealing with this Application and recognizing that the current MSAs expire at the end of 2009, the Commission advised parties in its letter of September 16, 2009 that it was considering interim approval for provision of IT and CC&B services to the ATCO Utilities based on the following two options, recognizing that other options might exist:

- interim approval for a set period of time based on the prices and services contained in the current ATCO I-Tek Master Service Agreements
- interim approval for a set period of time based on the prices and services contained in the proposed ATCO I-Tek Master Service Agreements

47. In response, the ATCO Utilities was directed to file an interim proposal on October 5, 2009, with responses from Calgary, the CCA and the UCA by October 14, 2009, followed by a reply submission from the ATCO Utilities on October 20, 2009.

48. The Commission issued Decision [2009-252](#)⁵⁶ on December 11, 2009, approving the new Master Service Agreements (other than the charges and rates provided for thereunder) for the provision of IT and CC&B services to the ATCO Utilities effective January 1, 2010, for an interim period, the term of which will be determined by the Commission in this proceeding.

⁵⁶ Decision 2009-252: ATCO Utilities, 2010 Evergreen – Interim Decision, Application No. 1605338, Proceeding ID. 240, December 11, 2009.

49. Subsequent to the issuance of Decision 2011-228 on May 27, 2011, which set out the Commission's findings in respect of the IT and CC&B services provided to the ATCO Utilities by ATCO I-Tek and ATCO I-Tek Business Services (ITBS) for the 2008 and 2009 test years, the ATCO Utilities filed an amended application on July 27, 2011.

50. On July 29, 2011, the Commission advised parties on its electric and gas and pipelines distribution lists of the amended application and invited any additional parties to file a SIP. The Commission received an additional SIP from EPCOR Utilities Inc. (EUI). In addition, a process schedule was established to deal with the application.

51. By letter dated October 6, 2011, the Commission ruled on a motion submitted by Calgary. In the ruling, the Commission granted Calgary's request to retain PA Consulting Inc. (PAC) to provide expert evidence and granted confidential treatment of redacted information that was filed in the original and amended applications.

52. By letter dated October 21, 2011, the Commission revised the process schedule based on support from the ATCO Utilities and the UCA. An oral hearing was scheduled to begin on May 23, 2012.

53. On November 29, 2011, the Commission adjusted the schedule to allow the ATCO Utilities additional time to prepare and file information responses, while maintaining the above-noted hearing date. On December 28, 2011, the ATCO Utilities filed their information responses.⁵⁷

54. On January 5, 2012, Calgary filed a motion⁵⁸ seeking orders from the Commission directing the ATCO Utilities to file full and complete responses to IRs posed by Calgary. On January 12, 2012, the Commission suspended the proceeding schedule and established a process to deal with the motion. Subsequently, on January 17, 2012, the UCA also filed a motion⁵⁹ seeking further and better information responses from the ATCO Utilities.

55. By letter dated January 19, 2012⁶⁰ the Commission denied the UCA's motion on the basis of the length of time that had elapsed prior to the motion being filed. And by letter dated January 24, 2012,⁶¹ the Commission upheld its ruling based on a request from the UCA to review and vary the January 19, 2012 ruling.

56. On February 13, 2012, the Commission issued its ruling⁶² on the Calgary motion, and directed the ATCO Utilities to provide information responses to certain selected IRs. The Commission also revised the procedural schedule, maintaining the May 23, 2012 hearing date.

57. By letter⁶³ dated March 27, 2012, the Commission ruled on Calgary's request that its evidence, together with further evidence and argument to be filed, be treated as confidential. In

⁵⁷ Exhibit nos. 61, 62 and 63.

⁵⁸ Exhibit No. 65.

⁵⁹ Exhibit No. 67.

⁶⁰ Exhibit No. 71.01.

⁶¹ Exhibit No. 75.01.

⁶² Exhibit No. 77.01.

⁶³ Exhibit No. 89.01.

the ruling the Commission directed Calgary to provide a redacted form of the PAC evidence to be filed on the record of this proceeding, as well as the unredacted form of the PAC evidence that shall only be provided in hard copy to parties upon completion of a confidentiality undertaking. To the extent that Calgary's direct evidence refers to the confidential PAC evidence, similarly, Calgary's evidence should also be treated as confidential.

58. In addition to the written evidence of Calgary, the Commission received written evidence from Ms. Amy-Lynn Williams (Williams' evidence),⁶⁴ Mr. Gregg Edeson and PAC⁶⁵ on behalf of Calgary.

59. By letter⁶⁶ dated May 11, 2012, the Commission granted the ATCO Utilities request to adjourn the current proceeding for approximately four months to allow the ATCO Utilities to file a comprehensive update to their application. The Commission established a process schedule setting August 23, 2012, which was subsequently extended to September 21, 2012,⁶⁷ as the filing date for the updated application with an oral hearing scheduled for December 4, 2012.

60. The ATCO Utilities also requested a ruling on jurisdictional issues. The Commission considered that jurisdictional issues should be dealt with in the course of the proceeding and did not establish a separate process to address these matters.

61. The Commission received the ATCO Utilities updated application as scheduled and by letter dated September 26, 2012, requested submissions from registered parties regarding further process and scheduling with respect to the remaining process for this application.

62. On October 10, 2012, the Commission issued a revised process schedule.⁶⁸

63. By letter dated December 7, 2012, Calgary requested an extension to January 7, 2013, to file supplementary evidence. Subsequently, the Commission also ruled that unredacted copies of the supplementary evidence be provided by January 8, 2013, to parties who signed a confidentiality undertaking. The redacted evidence was to be filed by January 11, 2013.

64. By letter dated December 20, 2012, the Commission granted Calgary's request and extended the deadline for IRs to interveners to January 28, 2013. The Commission maintained the hearing schedule of March 11, 2013.

65. On February 7, 2013, the Commission extended the deadline for Calgary to file its information responses to February 15, 2013, with an extension to the deadline for rebuttal evidence to March 1, 2013.

66. By letter dated February 21, 2013, the ATCO Utilities filed a motion requesting the Commission to direct Calgary to provide full and complete responses to certain IRs.

⁶⁴ Exhibit No. 90.01.

⁶⁵ Exhibit No. 93.01.

⁶⁶ Exhibit No. 107.01.

⁶⁷ Exhibit No. 115.01.

⁶⁸ Exhibit No. 121.01.

67. By letter dated February 22, 2013, the Commission established a process to deal with the ATCO Utilities motion. On March 1, 2013, having reviewed the submissions of parties, the Commission suspended the remaining process schedule for this proceeding, including the dates reserved for the oral hearing. On March 20, 2013, the Commission wrote to registered parties and provided its ruling⁶⁹ on the ATCO Utilities motion. In the same letter, the Commission set a revised proceeding schedule, with rebuttal evidence to be submitted on April 16, 2013, and a hearing scheduled to begin September 9, 2013.

68. In an April 8, 2013 letter⁷⁰ to interested parties, the Commission established a further round of IRs to both the ATCO Utilities and Calgary, with the September 9, 2013 hearing date unchanged.

69. On May 27, 2013, the Commission received a motion from Calgary, requesting that a portion of the ATCO Utilities rebuttal evidence be struck from the record. The Commission established a process by letter⁷¹ dated May 28, 2013, to deal with the Calgary motion.

70. By correspondence⁷² dated June 25, 2013 and June 26, 2013, the Commission denied the Calgary motion and set a revised proceeding schedule, with the oral hearing scheduled to commence January 13, 2014.

71. An oral hearing was held in the Commission's Calgary hearing room from January 13 to 24, 2014. Subsequently, the Commission directed parties to submit argument by February 24, 2014, and reply argument by March 17, 2014.

72. On March 17, 2014, reply argument was received. The Commission considers the record for the proceeding closed on March 17, 2014.

4 Application overview

73. The ATCO Utilities submitted that the updated application, covering the post 2009 period, was required in order to update the original filing and to reflect material changes that have occurred since the submission of the original application.⁷³ Additionally, the ATCO Utilities indicated their experts, ISG/Utilipoint, had advised that a number changes had occurred since the previous Master Service Agreements had been executed and accordingly the updated information was used as a basis for negotiations with ATCO I-Tek in 2009.⁷⁴

74. The ATCO Utilities considered that, with the assistance of their experts to ensure that key terms and conditions were representative of comparable competitive contracts and pricing for similar services, it had acted in good faith to develop contracts and pricing that would provide fair market value and be in accordance with the *Affiliate Code of Conduct*.

⁶⁹ Exhibit No. 179.01.

⁷⁰ Exhibit No. 184.01.

⁷¹ Exhibit No. 190.01.

⁷² Exhibit nos. 193.01 and 194.01.

⁷³ Exhibit No. 116.01, updated application, PDF page 2 at paragraph 3, September 21, 2012.

⁷⁴ Exhibit No. 116.01, updated application, PDF page 2 at paragraph 11, September 21, 2012.

75. The ATCO Utilities requested the following relief in respect of the post 2009 period dealing with both the IT and CC&B services that it proposed should continue to be provided by ATCO I-Tek in accordance with revised Master Service Agreements:

47. The pricing of IT and CC&B services for the purpose of determining the revenue requirements of each of the ATCO Utilities for 2010 through to 2012, shall be based on the MSAs filed herewith, with the exception of the amendments noted below, and the terms and conditions thereof. For ATCO Electric and ATCO Gas, the pricing determined by the MSAs shall be applied to forecasted volumes through each Utility's subsequent GRA/GTA process. In the ATCO Gas 2008-2009 GRA, the Commission directed ATCO Gas to establish placeholder amounts for forecast IT and CC&B Governance costs for 2008 and 2009. This Application proposes to extend those placeholders for 2010, a non-test year for ATCO Gas. For ATCO Pipelines, the pricing will be utilized to finalize IT related costs in accordance with their negotiated settlement.

48. The amendments requested for the MSA's are as follows:

- i. The pricing of the new Distributed Applications implemented post 2009, as outlined in the Amended Application be approved and added to the pricing schedules in the IT MSA's.
- ii. To determine the disaggregated CC&B pricing, ATCO Gas and ATCO Electric request the addition of the following clause to Schedule E, Section 2.1 of the CC&B MSA:
 1. The Benchmarking analysis will include an appropriate separation of the final fees into an ATCO Gas fee and an ATCO Electric fee for regulatory recovery purposes only.

49. For regulatory recovery purposes, ATCO Gas is proposing to use a rate of \$2.0118/service account and ATCO Electric shall use a rate of \$2.4761 and this rate shall remain in effect for the term of the MSA, subject to benchmarking revisions.

50. Approval of a 2010 rate of \$56,103/month for the Outage and Emergency Services rate for ATCO Electric in 2010.

51. Confirmation that the MSAs, including price, are consistent with the provisions of the ATCO Utilities Code of Conduct.

52. The Price Review process reflected in Article 7, Section 7.3 of the IT MSAs and Article 8, Section 8.4 of the CC&B MSAs and as described in paragraphs 11 and 12 of the Overview section of this application.⁷⁵

⁷⁵ Exhibit No. 116, updated application, pages 16-17.

76. Since the filing of the updated application, the ATCO Utilities have modified their request for relief in the following ways:

- From the ATCO Utilities' rebuttal:⁷⁶

3.4. The ATCO Utilities would note that the passage of time has necessitated the updating of its 'Request for Relief' to incorporate AUC decisions and changing circumstances subsequent to the original 2009 Evergreen Application. With the Performance Based regulation that was mandated to commence January 1, 2013 it is necessary to establish 2012 going in rates for ATCO Gas and ATCO Electric-Distribution. In addition to this new regulatory requirement the ATCO Utilities filed a Price Update report prepared by ISG which confirmed that the 2010-12 pricing and terms and conditions under the new MSA's were at FMV. These factors require and support the approval of 2010-12 pricing and the approval of the MSA terms and conditions as the valid basis for determining 2013-2015 pricing for IT & CC&B services obtained from ATCO I-TEK. The significant time period between the filing of the original application and the use of actual costs of comparator companies to verify the FMV should preclude any notion that an adjustment to the 2010-12 is warranted. The view of the ATCO Utilities is that a high level of service has been received that is cost justified and therefore its actions in entering into the subject MSAs were entirely prudent and any adjustments related to this prior period would be entirely inappropriate in the circumstances. These circumstances require a focus on 2010-12 as distinct from 2013-15.

3.5. For ATCO Pipelines, the pricing will not impact IT related costs in accordance with their negotiated settlement(s) for 2010-2012 and will be used to update the 2013/14 GRA placeholder .

3.6. Commencing in 2013, ATCO Gas and ATCO Electric-Distribution pricing updates will be addressed in accordance with AUC Decision 2012-237: Distribution Performance-Based Regulation. This is discussed further in the PBR section of this Rebuttal.

3.7. The IT and CC&B pricing derived as a result of the Price Review in 2012 will be applied to forecast utility volumes on a prospective basis, commencing January 1, 2013, replacing placeholders in the relevant GRA for ATCO Pipelines and the ATCO Electric Transmission GTA.

3.9. The intent of the ATCO Utilities is to finalize existing placeholders for the IT and CC&B Services for 2010-2012. Once a decision is made by the AUC on the approved pricing, there will be no further process or debate regarding this component of the 2010 – 2012 revenue requirements of the ATCO Utilities.

3.11. In summary, acceptance of the proposed MSA including pricing terms will allow ATCO Electric 2010-12 and ATCO Gas 2011-12 placeholders to be finalized to provide going in rates for ATCO Gas and ATCO Electric distribution for the post 2012 period.

⁷⁶ Exhibit No. 188.02, the ATCO Utilities rebuttal, pages 8-9.

- From the ATCO Utilities' reply argument:⁷⁷

33. ... In the current circumstances, the cost of new distributed Applications needed to be factored into the applied-for Revenue Requirements as these were not in place at the time of the Original Application.

34. ... In addition, the ATCO Utilities are seeking the Commission's concurrence that the price review process reflected in the current MSAs is consistent with the requirements of the Code of Conduct.

36. Calgary also erroneously continues to suggest that the ATCO Utilities have applied for approval of the MSAs. This is simply not correct. In fact, as detailed in the Jurisdictional Arguments previously presented to the Commission, it is the ATCO Utilities' clear position that the Commission does not possess the jurisdiction to "approve" commercial Agreements entered into by the ATCO Utilities.

5 Jurisdiction

5.1 Jurisdictional module

Procedural history

77. On April 5, 2012, Calgary filed its written direct evidence in the main proceeding (the Calgary evidence). The Calgary evidence included the following passages at Q/A 59 and Q/A 62, respectively:

Q59 How could a competitive sourcing be implemented by the Commission?

A. Based on their experience, PAC has identified how an effective competitive sourcing process could be established and applies [*sic*] to the IT and CC&B services required by ATCO. The OEB has also gained experience in competitive sourcing, and has established processes to require utilities to conduct competitive sourcing processes.[citation omitted]

The Commission could order a competitive sourcing process to be carried out by the ATCO Utilities in order to have a new third party vendor in place for January 1, 2014. Arrangements for a transition from I-Tek to the new provider could be established immediately upon the Commission's decision in this Proceeding being made in 2012, such that the transition from I-Tek to the new provider would have at least 12 months to be carried out so as to minimize the duplication of costs.

While the competitive process is being carried out, Proposed MSA price and terms adjustments for the period 2010-2012 could be established based on the results of this Proceeding. Once these are finalized, adjustments to placeholders and costs could be made and revenue requirements could be adjusted accordingly for 2010-2012. The 2012 adjustments could be used to finalize the "going in" revenue requirement for the ATCO Gas and ATCO Electric PBR plans.

⁷⁷ ATCO Utilities reply argument (redacted), pages 15-16.

Once the prices for the new provider have been established, parties could address the implications of a shared services arrangement post 2012 as part of the PBR proceeding and any resulting follow up processes.

...

Q62 Should other adjustments be made to the Proposed MSA prices?

A. Yes. PA Consulting took a cautious and conservative approach to estimating the aggregate Proposed MSA adjustments. They identified a number of areas where further adjustments would be expected in the marketplace in similar circumstances: multi-sourcing, global service delivery, volume discounts, balanced contract risk, full access to buyer data and normalization assumptions.

As a result, the recommended adjustments of PA Consulting are generous to the ATCO Utilities. A further adjustment as noted in Q.66 could be made to better approximate what true FMV prices would be having regard for the PAC Report and Williams Evidence.⁷⁸

78. By way of a letter dated April 9, 2012, the ATCO Utilities informed the Commission of their disagreement with the propositions advanced in the Calgary evidence. The relevant portion of this correspondence stated:

Jurisdiction

In its evidence Calgary has requested that the AUC make several findings that are not within its legislative mandate, including that the Commission order the ATCO Utilities to carry out a competitive sourcing process for the subject IT and CC&B services and dictate specific Terms and Conditions of commercial agreements. The ATCO Utilities respectfully submit that it is not within the jurisdiction of the Commission to grant such relief...

While the Commission has a broad discretion to determine just and reasonable rates, in the overall context of the right of a Utility to recover reasonably and prudently incurred costs, this discretion does not extend to the AUC dictating how a Utility acquires the services it needs or who it can contract with. If a Utility does not satisfy the onus of demonstrating that the costs it incurred are just and reasonable, it clearly risks financial disallowances from the Commission. However, nothing in the governing legislation allows the AUC to engage in the activities of management or dictate how management carries out its functions and duties. As such, it is the position of the ATCO Utilities that it is not within the jurisdiction of the Commission to order the ATCO Utilities to carry out a competitive sourcing process. The Calgary Evidence has raised this jurisdictional issue, that, in the ATCO Utilities submission, must be addressed prior to this process proceeding further, so that the ATCO Utilities and all parties are fully aware of the issues or matters to which they must respond.⁷⁹ [Emphasis in original]

79. On April 18, 2012, the Commission wrote to the parties, in part, to inquire on the scope of the jurisdictional issues that it was being asked to determine.⁸⁰ By way of reply dated April 24, 2012, the ATCO Utilities confirmed that they were requesting the establishment of a process to

⁷⁸ Exhibit No. 93.04 at pages 41 and 42.

⁷⁹ Exhibit No. 95.01, correspondence from ATCO Utilities, dated April 9, 2012 at page 4.

⁸⁰ Exhibit No. 101.01, correspondence from AUC to Parties, dated April 18, 2012 at page 2.

determine whether or not the Commission possesses the requisite jurisdiction to: (1) order the ATCO Utilities to carry out a competitive sourcing process for the procurement of services; and (2) dictate specific terms and conditions of commercial agreements⁸¹ (the jurisdictional issues).

80. On May 11, 2012, the Commission confirmed that the determination of the jurisdictional issues would be undertaken in the normal course of the main application.⁸² On November 4, 2013, the parties filed written submissions in respect of the questions to be determined. The materials filed by the ATCO Utilities identified a third matter for determination: whether or not the Commission possessed the jurisdiction to direct the disclosure of costs incurred by a non-regulated third-party service provider. The ATCO Utilities' written submissions did not deal with this issue beyond identifying it and it was not argued in subsequent oral submissions. Consequently, the Commission declines to determine this issue within the context of this application.

81. The Commission heard oral argument regarding the jurisdictional issues on the last day of the hearing, January 23, 2014. By way of correspondence dated January 24, 2014, the Commission requested that the parties file, on or before February 3, 2014, brief supplemental submissions concerning the impact, if any, of the Supreme Court of Canada's decision in *Reference Re Broadcasting Regulatory Policy CRTC [Canadian Radio-television and Telecommunications Commission] 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68⁸³ on the Commission's determination.⁸⁴

5.2 Determination of the jurisdictional issues generally

Commission mandates

82. The Commission considers that there is no disagreement amongst the parties that the determination of the jurisdictional issues must be undertaken in light of its two primary mandates as identified by the Supreme Court of Canada in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)* 2006 SCC 4, namely, its mandate to ensure just and reasonable rates and its mandate to ensure the integrity and safety of utility systems (including service quality standards).⁸⁵

Analytical approach

83. While the parties' submissions in relation to the determination of the jurisdictional issues are not identical in form, they do, to a large degree, address common matters. After reviewing the parties' submissions, and in the interest of efficiency, the Commission has determined that its consideration of the jurisdictional issues will proceed from an evaluation of the following common areas of argument:

- (a) the extent to which the Commission's mandates are engaged in the present case;
- (b) the Commission's express or implied jurisdiction to grant the relief requested;

⁸¹ Exhibit No. 103.01, correspondence from ATCO Utilities, dated April 24, 2012 at pages 4 and 5.

⁸² Exhibit No. 107.01, correspondence from AUC to Parties, dated May 11, 2012 at paragraph 45.

⁸³ *Reference Re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 (hereinafter *Re Broadcasting Regulatory Policy*).

⁸⁴ Exhibit No. 244.01.

⁸⁵ *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)* 2006 SCC 4 (*Stores Block*).

- (c) the impact, if any, of the *ATCO Group Inter-Affiliate Code of Conduct*,⁸⁶
- (d) the impact, if any, of Commission precedent; and
- (e) the impact, if any, of the Supreme Court of Canada's decision in *Re Broadcasting Regulatory Policy*.

5.3 Submissions of the ATCO Utilities

Commission mandates

84. The ATCO Utilities argued that the Commission possesses the jurisdiction required to permit it to discharge two general mandates or functions: (1) ensuring that rates are just and reasonable; and (2) ensuring that the integrity and safety of the utility system, including service quality standards, is maintained.⁸⁷ However, in their view, neither the integrity and safety of the system nor the quality of service being provided is in question in this case.⁸⁸ Consequently, the ATCO Utilities submitted that “the only potential AUC jurisdiction in this context is that which it possesses in relation to ensuring rates are just and reasonable.”⁸⁹

Sources of express or implied jurisdiction

85. The ATCO Utilities submitted that there is nothing in the Commission's network of enabling legislation that provides the express power to grant the relief sought by the interveners in this case.⁹⁰ In support of their argument, the ATCO Utilities stated that “[o]ne must look to the broad powers provided to the Commission” if one is to find the jurisdiction required.⁹¹

86. The ATCO Utilities also cautioned the Commission against appreciating that broad grants of statutory authority, such as the one contained in Section 8(2) of the *Alberta Utilities Commission Act*, SA 2007, c. A-37.2, confer a practically limitless discretion to make whatever orders it might deem necessary in the circumstances. In support of their position in this regard, the ATCO Utilities directed the Commission to the *Stores Block* decision, where the court stated:

46....These provisions on their own are vague and open-ended. It would be absurd to allow the Board an unfettered discretion to attach any condition it wishes to an order it makes. Furthermore, the concept of “public interest” found in s.15(3) is very wide and elastic; the Board cannot be given total discretion over its limitations.⁹²

87. In the view of the ATCO Utilities, the “fettered discretion, as espoused by the Court [in *Stores Block*], must be grounded in, and derived from, the Commission's main functions of fixing just and reasonable rates and maintaining a safe and reliable system.”⁹³

⁸⁶ *ATCO Group Inter-affiliate Code of Conduct*, EUB Decision 2003-040 Appendix 4 (*Code of Conduct* or *Code*).

⁸⁷ Exhibit No. 205.01, ATCO argument on jurisdictional issues, November 4, 2013 at paragraph 14 (ATCO jurisdictional argument).

⁸⁸ Exhibit No. 205.01, ATCO jurisdictional argument at paragraph 15.

⁸⁹ Exhibit No. 205.01, ATCO jurisdictional argument at paragraph 16.

⁹⁰ Exhibit No. 205.01, ATCO jurisdictional argument at paragraph 32.

⁹¹ Exhibit No. 205.01, ATCO jurisdictional argument at paragraph 32.

⁹² *Stores Block* at paragraph 46. Cited in ATCO jurisdictional argument at paragraph 35.

⁹³ Exhibit No. 205.01, ATCO jurisdictional argument at paragraph 36.

88. In the ATCO Utilities' submission, the inclusion of the phrase "all things that are necessary for or incidental to the exercise of its powers" in Section 8(2) of the *Alberta Utilities Commission Act* also informs the intended scope of the jurisdiction granted to the Commission by its operation. The ATCO Utilities argued that, in this case, the Commission has previously - demonstrated an ability to ensure just and reasonable rates without resorting to the ordering of the relief contemplated by the jurisdictional issues, and that this fact militates against a finding that such orders are necessary in the instant case.⁹⁴ In assessing the impact of the phrase "incidental to" in the consideration of explicit jurisdiction, the ATCO Utilities argued that it "does not pertain to independent or distinct actions, but only relates to ancillary actions ..."⁹⁵

89. Proceeding to consider the issue of implied jurisdiction, the ATCO Utilities asserted that the inclusion of the word "necessary" in Section 8(2) of the *Alberta Utilities Commission Act* also indicates that, to a certain extent, the provision constitutes a codification of the common law doctrine of necessary implication.⁹⁶

90. The ATCO Utilities' treatment of the question of implied jurisdiction is straightforward. They state that:

[T]he Commission's [previous] statements acknowledge that its ability to disallow costs or deem revenues enables it to fulfill its regulatory mandate and therefore alternative methods or practices are unnecessary. Such powers as those contemplated by the Jurisdictional Issues are therefore, unnecessary. As such actions cannot be said to be necessary to carry out the Commission's mandate, the jurisdiction to do so cannot be imputed. The AUC has full authority to address any concerns through the rate setting function that it enjoys.⁹⁷

The impact of the ATCO Group Inter-Affiliate Code of Conduct

91. The ATCO Utilities referred to the *ATCO Group Inter-Affiliate Code of Conduct*⁹⁸ (and more specifically, the process that resulted in its creation) in furtherance of their argument that there is no need to supplement the rate-making tools currently available to the Commission with the relief envisaged by the interveners. The ATCO Utilities submitted that "[t]he goal of the *Code of Conduct* is to ensure that affiliated services are provided at no more than fair market value and the AUC's rate-making authority ensures that any amount above fair market value does not find its way into customer rates. Cost disallowance is the tool available to the Commission in this context."⁹⁹ In their view, findings made by the Commission in the "*Code of Conduct Proceeding*"¹⁰⁰ confirm the AUC's acceptance of the proposition that it could not "directly regulate the cost of a product or service provided to a regulated entity and thus could not indirectly do so by controlling the actions of the owner of a utility with respect to its dealings with any party, including affiliates ..."¹⁰¹

⁹⁴ Exhibit No. 205.01, ATCO jurisdictional argument at paragraph 41.

⁹⁵ Exhibit No. 205.01, ATCO jurisdictional argument at paragraph 47.

⁹⁶ Exhibit No. 205.01, ATCO jurisdictional argument at paragraph 48.

⁹⁷ Exhibit No. 205.01, ATCO jurisdictional argument at paragraph 52.

⁹⁸ *ATCO Inter-affiliate Code of Conduct*, EUB Decision 2003-040, Appendix 4 (*Code of Conduct* or *Code*).

⁹⁹ Exhibit No. 205.01, ATCO jurisdictional argument at paragraph 64.

¹⁰⁰ Decision 2003-040.

¹⁰¹ Exhibit No. 205.01, ATCO jurisdictional argument at paragraph 67.

92. The ATCO Utilities argued that their contention in this regard is supported by the following extract from EUB Decision 2003-040, which instituted the *Code of Conduct*:

... The Board considers that the onus is upon the regulated utility to demonstrate that its costs are prudent and that its rates are just and reasonable, including any costs arising from an affiliate transaction. The Board continues to have the ability to conduct prudence reviews, to disallow costs or deem revenues, and to set rates or levels of service the Board determines are appropriate, notwithstanding the presence of affiliate transactions. The Board considers that its ability to disallow costs or deem revenues provides a very broad basis for the Board to meet its regulatory responsibility.¹⁰²

93. The ATCO Utilities submitted that “these conclusions support the position that the Commission’s explicit powers do not include the jurisdiction to interfere with the business or managerial decisions of utilities and their affiliates to the extent of the actions contemplated by the Jurisdictional Issues.”¹⁰³

94. In oral argument, counsel for the ATCO Utilities urged the Commission to accept that neither Section 2.7 nor Section 4.5 of the *Code of Conduct* could be appreciated as bestowing any jurisdiction to grant the relief contemplated by the jurisdictional issues.¹⁰⁴

The impact of Commission precedent

95. The ATCO Utilities did not directly address the impact of Commission precedent on the determination of the jurisdictional issues in their written submissions.

96. In oral argument, counsel for the ATCO Utilities urged the Commission to accept that a referenced ruling in Proceeding No. 1021¹⁰⁵ (IPCAA motion ruling), which had been relied upon by the interveners as representing an earlier direction from the Commission to a utility to engage in a competitive sourcing process, was not on point. In Mr. Keough’s submission, the ruling in question did not actually disclose that the Commission had ever ordered a utility to engage in a competitive sourcing process.¹⁰⁶

97. In addressing the potential impact of two other decisions of the Commission’s predecessor tribunal, the EUB, which appear to demonstrate that the body has previously dictated terms of commercial agreements involving utilities,¹⁰⁷ the ATCO Utilities’ counsel stated:

In relation to these decisions, the ATCO Utilities reiterate their view that simply because the Commission has previously sought to dictate terms and conditions does not give it the jurisdiction to do so, nor does a party’s decision not to challenge the decision expand or create your jurisdiction.¹⁰⁸

¹⁰² Decision 2003-040 at page 15.

¹⁰³ Exhibit No. 205.01, ATCO jurisdictional argument at paragraph 70.

¹⁰⁴ Transcript, Volume 5, page 822, lines 14-19.

¹⁰⁵ Exhibit No. 235.01, Proceeding No. 1021 (IPCAA motion ruling).

¹⁰⁶ Transcript, Volume 5, page 825, lines -11.

¹⁰⁷ Decision 2003-073 and Decision 2004-026.

¹⁰⁸ Transcript, Volume 5, page 832, lines 14-19.

The impact of Re Broadcasting Regulatory Policy

98. The ATCO Utilities submitted that the first interpretive principle described in *Re Broadcasting Regulatory Policy* relating to the jurisdictional content of statements of policy, legislative objective, or both, are not applicable to the determination of the jurisdictional issues. The ATCO Utilities stated that “[t]he only remotely analogous provisions would be those found under s. 5 of the *Electric Utilities Act*, where the purposes of the *EU Act* are set out, and none of these appear to support the granting of the Commission of the relief requested by the interveners.”¹⁰⁹

99. With regard to the second identified *ratio* of the decision, the ATCO Utilities argued that the court’s findings in relation to general or broad grants of power should be appreciated as requiring that such provisions must not be interpreted as providing unfettered discretion not contemplated by the legislature.¹¹⁰

5.4 Submissions of Calgary

Commission mandates

100. Calgary submitted that the Commission’s two primary mandates, as confirmed by the Supreme Court of Canada in the *Stores Block* decision, are to fix just and reasonable rates and protect the integrity and dependability of the utility supply systems in Alberta.¹¹¹ In its view, “[t]he proposed MSAs affect the Commission’s main functions because the agreements will directly affect rates paid by customers and have the potential to affect integrity of the systems.”¹¹²

Sources of express or implied jurisdiction

101. Calgary argued that there are several provisions in the applicable legislative framework that provide express grants of jurisdiction sufficient to allow the Commission to order the relief contemplated by the jurisdictional issues. It begins its analysis with a consideration of the *Alberta Utilities Commission Act*, which it identifies as the “overarching statute providing the Commission with its jurisdiction to order [the relief sought].”¹¹³ In particular, Calgary identified sections 8(2), 8(5), 23(1)(a) and 23(1)(b) of the statute as providing the required express grants of jurisdiction.

102. The relevant sections of the *Alberta Utilities Commission Act* provide:

8(2)The Commission, in the exercise of its powers and the performance of its duties and powers under this Act or any other enactment, may act on its own initiative or motion and do all things that are necessary for or incidental to the exercise of its powers and the performance of its duties and functions.

...

(5) Without restricting subsections (1) to (4), the Commission may do all or any of the following:

¹⁰⁹ ATCO Utilities supplemental jurisdictional argument at paragraph 5.

¹¹⁰ ATCO Utilities supplemental jurisdictional argument at paragraph 16.

¹¹¹ Exhibit No. 206.01, Calgary jurisdictional argument at paragraph 20.

¹¹² Exhibit No. 206.01, Calgary jurisdictional argument at paragraph 34.

¹¹³ Exhibit No. 206.01, Calgary jurisdictional argument at paragraph 33.

- (a) hear and determine questions of law or fact;
- (b) make an order granting the relief applied for;
- (c) make interim orders;
- (d) where it appears to the Commission to be just and proper, grant partial, further or other relief, in addition to, or in substitution for, that applied for as fully and in all respects as if the application or matter had been for that partial, further or other relief.

23(1) The Commission may order any person

- (a) to do any act, matter or thing, forthwith or within or at a specified time and in any manner directed by the Commission, that the person is or may be required to do under this Act or any other enactment or pursuant to any decision, order or rule of the Commission,
- (b) to cease doing any act, matter or thing, forthwith or within or at a specified time that is in contravention of this Act or any other enactment or any decision, order or rule of the Commission...

103. Calgary submitted that these provisions are intended to provide the Commission with a broad, and express, jurisdiction to make orders in furtherance of its two primary mandates of rate-making and ensuring the safety and integrity of utility systems.

104. The next legislative provisions identified by Calgary as providing an express grant of jurisdiction to compel the ATCO Utilities' participation in a competitive procurement process, dictate the terms and conditions of the subject MSAs, or both, are sections 78.1(1) and 85(1) of the *Public Utilities Act*.¹¹⁴ The relevant portion of the statute provides:

78.1 (1) The Commission has all the necessary jurisdiction and power

- (a) to deal with public utilities and the owners of them as provided in this Act

....

85(1) The Commission shall exercise a general supervision over all public utilities, and the owners of them, and may make orders regarding the extension of works and systems, reporting and other matters, that are necessary for the convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

105. The importance ascribed by Calgary to Section 78.1 as a stand-alone provision is unclear. However, it was argued in Calgary's written submissions that "[t]he broad authority granted under the AUC Act is reinforced in s. 78.1(1) of the *Public Utilities Act*."¹¹⁵ The matter does not appear to have been further addressed by any party during oral argument.

¹¹⁴ RSA 2000, c. P-45.

¹¹⁵ Exhibit No. 206.01, Calgary jurisdictional argument at paragraph 38.

106. Calgary submitted that Section 85(1) of the *Public Utilities Act* provides the Commission with the jurisdiction to grant the requested relief by virtue of the fact that:

Ordering that a CSP be carried out and ordering specific terms to be included in the Proposed MSAs are within the Commission's express jurisdiction under PUB Act s. 85(1) because doing so is a component of the Commission's general supervisory obligations and furtherance of the public convenience.¹¹⁶

107. Calgary also contended that various provisions of the *Gas Utilities Act*¹¹⁷ and *Electric Utilities Act*¹¹⁸ provide express grants of jurisdiction that are sufficient to provide a foundation for the orders sought.

108. In relation to the *Gas Utilities Act*, Calgary argued that sections 35, 36 and 59 of the statute, when read in conjunction with Section 8(2) of the *Alberta Utilities Commission Act* provide the Commission with a broad jurisdiction to supervise the "business of an owner" and set "standards" and "practices". It further contended that this confirms "the legislative intent for the Commission to have jurisdiction over the Proposed MSAs with I-Tek."¹¹⁹

109. Similarly, Calgary asserted that Section 121 of the *Electric Utilities Act*, which requires the Commission to ensure that the tariff approved for an electric utility is just and reasonable, when read in the context of the Section 8(2) of the *Alberta Utilities Commission Act*, leads to the conclusion that the AUC has an express jurisdiction to "make orders that will impact the costs incurred by electric utilities, which will then be recovered from the ratepayers."¹²⁰

110. Calgary's written submissions did not attempt to apply the criteria identified in the *Stores Block* decision to an assessment of whether or not the Commission has, by necessary implication, the jurisdiction required to grant the relief contemplated by the jurisdictional issues. Instead, Calgary argued jurisdiction by necessary implication generally and stated:

In the alternative, should the Commission find that the AUC Act does not grant it express authority to award the relief sought by Calgary, Calgary submits that the Commission nevertheless possesses the jurisdiction to do so because ordering the relief sought is, as provided for in s.8(2) of the legislation, necessary for or incidental to the Commission setting just and reasonable rates and ensuring the integrity of the system.¹²¹

...

Thus, the supervisory obligations mandated by PUB Act s. 85(1) expressly provide, or in the alternative implicitly provide, the Commission with the jurisdiction to award the relief sought by Calgary.¹²²

¹¹⁶ Exhibit No. 206.01, Calgary jurisdictional argument at paragraph 39.

¹¹⁷ RSA 2000, c. G-5.

¹¹⁸ SA 2003, c. E-5.1.

¹¹⁹ Exhibit No. 206.01, Calgary jurisdictional argument at paragraph 43.

¹²⁰ Exhibit No. 206.01, Calgary jurisdictional argument at paragraphs 47 and 48.

¹²¹ Exhibit No. 206.01, Calgary jurisdictional argument at paragraph 37.

¹²² Exhibit No. 206.01, Calgary jurisdictional argument at paragraph 40.

The impact of the ATCO Group Inter-Affiliate Code of Conduct

111. Calgary's submissions on the *Code of Conduct* focussed on Section 4.5 of the *Code of Conduct*, which states:

4.5 Determination of Fair Market Value

In demonstrating that Fair Market Value was paid or received pursuant to a For Profit Affiliate Service arrangement or a transaction contemplated by sections 4.1, 4.2 and 4.4 hereof, the Utility, **subject to any prior or contrary direction by the EUB**, may utilize any method to determine Fair Market Value that it believes appropriate in the circumstances. These methods may include, without limitation: **competitive tendering, competitive quotes**, bench-marking studies, catalogue pricing, replacement cost comparisons or recent market transactions. The Utility shall bear the onus of demonstrating that the methodology or methodologies utilized in determining Fair Market Value of the subject goods or services was appropriate in the circumstances.¹²³
[Emphasis added by Calgary]

112. In Calgary's submission, the fact that Section 4.5 of the *Code of Conduct* imposes no restriction on the nature of any "prior or contrary direction" that may be provided by the tribunal is supportive of a finding that the Commission has the jurisdiction to prescribe that a specific method of establishing FMV must be used by the subject utility, and that, by extension, the Commission has the jurisdiction to order the ATCO Utilities to engage in a competitive procurement process.¹²⁴

The impact of Commission precedent

113. Calgary submitted that there is precedent for the Commission ordering relief of the kind sought by the interveners in this case. In its view, this "demonstrates that the relief sought by Calgary is within the Commission's powers and jurisdiction to grant."¹²⁵

114. Calgary points to the IPCAA motion ruling as being illustrative of the AUC's authority to order that a utility engage in a competitive sourcing process and maintains that several aspects of the factual and legal matrix underlying the IPCAA motion ruling are also present in the instant case.¹²⁶

115. In Calgary's view, this past decision "affirm[s] [the Commission's] jurisdiction to 'take whatever measures are necessary to ensure that the rates to be paid by ratepayers' are just and reasonable and to ensure that the services contracted for do not jeopardize the integrity of the system."¹²⁷

116. Regarding the Commission's ability to dictate terms of an agreement between a utility and its affiliate, Calgary referenced Decision 2004-026, in which the tribunal directed the ATCO Utilities to amend certain provisions of existing MSAs. Calgary notes that the directions

¹²³ *Code of Conduct*, Section 4.5. as cited by Calgary jurisdictional argument at paragraph 69.

¹²⁴ Exhibit No. 206.01, Calgary jurisdictional argument at paragraph 70.

¹²⁵ Exhibit No. 206.01, Calgary jurisdictional argument at paragraph 56.

¹²⁶ Exhibit No. 206.01, Calgary jurisdictional argument at paragraph 61.

¹²⁷ Exhibit No. 206.01, Calgary jurisdictional argument at paragraph 63.

contained in Decision 2004-026 are prescriptive and are of the kind necessary to address several of the concerns identified by Ms. Williams in her evidence,¹²⁸ and suggested that they should inform the Commission's current assessment of the extent of the jurisdiction provided to it by Section 23(1) of the *Alberta Utilities Commission Act*.¹²⁹

The impact of Re Broadcasting Regulatory Policy

117. Calgary submitted that the Supreme Court of Canada's decision in *Reference re Broadcasting Policy* stands for two propositions. Firstly, that statements of policy and regulation-making provisions contained in enabling legislation are not jurisdiction-conferring and, secondly, that legislative conflict would result if an enabling statute was interpreted so as to permit an administrative body to enact a functional equivalent to a legislative scheme through a related regime. Calgary stated that the second proposition is not engaged in the consideration of the jurisdictional issues.¹³⁰

118. In Calgary's view, the findings contained in *Re Reference Regulatory Policy* do not impact its arguments in relation to the jurisdictional issues because its position is that the required jurisdiction is either explicitly or implicitly found in the Commission's enabling legislation; it does not attempt to invoke policy objectives or rule-making provisions in support of its positions.¹³¹ Calgary further stated that, in any event, the decision "supports [its] position by reiterating the significance and dominance of overarching jurisdiction-conferring provisions like ss.8(2),(5) and 23(1) of the AUC Act and ss.78.1(1) and 85(1) of the PU Act."¹³²

5.5 Submissions of the UCA

Commission mandate

119. The UCA submitted that both of the Commission's primary mandates are engaged in the circumstances of this case.¹³³ In the UCA's estimation, the identified Commission mandates of rate-making and general supervision are related, and in this instance, "[t]here is a straight line from the Commission's duty to supervise utilities, the legislative prohibition of undue preferences, and the Commission's obligation to fix just and reasonable rates to the establishment of a general code of conduct."¹³⁴

Sources of express or implied jurisdiction

120. The UCA conceded that the Commission possesses no explicit power to either order the ATCO Utilities to participate in a competitive sourcing process¹³⁵ or to dictate the terms and conditions of the subject MSAs.¹³⁶

¹²⁸ Exhibit No. 206.01, Calgary jurisdictional argument at paragraph 66.

¹²⁹ Exhibit No. 206.01, Calgary jurisdictional argument at paragraph 67.

¹³⁰ Calgary supplemental jurisdictional argument at paragraphs 3 and 5.

¹³¹ Calgary supplemental jurisdictional argument at paragraph 8.

¹³² Calgary supplemental jurisdictional argument at paragraph 12.

¹³³ Exhibit No. 207.02, UCA jurisdictional argument at paragraphs 65 and 66.

¹³⁴ Exhibit No. 207.02, UCA jurisdictional argument at paragraph 98.

¹³⁵ Exhibit No. 207.02, UCA jurisdictional argument at paragraph 97.

¹³⁶ Exhibit No. 207.02, UCA jurisdictional argument at paragraph 112; Transcript, Volume 5, page 781, line 25 and page 782, lines 1-3.

121. However, the UCA argued that the required jurisdiction may be identified from a careful consideration of the Commission's express public interest jurisdiction as provided for by Section 85(1) of the *Public Utilities Act*¹³⁷ as it relates to other provisions of the *Gas Utilities Act* and the *Electric Utilities Act* pertaining to the determination of just and reasonable rates.¹³⁸

122. In the UCA's submission, Section 85 of the *Public Utilities Act* both imposes a duty on the Commission to exercise a general supervision over all utilities, and provides it with a "broad jurisdiction to make any orders necessary to protect the public interest in the discharge of this duty."¹³⁹

123. The UCA also argued that sections 8 and 23 of the *Alberta Utilities Commission Act* may be relied upon by the Commission to provide an adequate jurisdictional foundation upon which to issue the relief requested by Calgary.¹⁴⁰

124. The UCA submitted that administrative decision makers such as the Commission can also derive implicit powers from application of both the common law doctrine of "necessary implication," and statutory provisions. In the Commission's case, the UCA submits that Section 8(2) of the *Alberta Utilities Commission Act* can be appreciated as a source of implied jurisdiction sufficient to grant the relief requested by Calgary.¹⁴¹

125. While the UCA acknowledged that where the Commission enjoys broad grants of jurisdiction, the scope of such jurisdiction is limited by a consideration of its explicit powers and main functions, it also contended that "economic regulators may still fashion specific and, indeed, creative directions where there is a clear connection to the statutory purpose and function of those regulators."¹⁴²

The impact of the ATCO Group Inter-Affiliate Code of Conduct

126. In addressing the impact of the *Code of Conduct* on the determination of the jurisdictional issues, the UCA first identified the stated purposes of the *Code of Conduct* as including: the anticipation and adjustment for the misalignment of interests between utility shareholders and customers; the prevention of cross-subsidization in affiliate activities; and the avoidance of uncompetitive practices.¹⁴³

127. The UCA did not invoke the *Code of Conduct* as a source of jurisdiction that would permit the Commission to order the ATCO Utilities to engage in a competitive sourcing process.

128. The UCA did, however, make reference to Section 2.7 of the *Code of Conduct* in support of the contention that the Commission has the authority to dictate specific terms and conditions of commercial agreements between utilities and their affiliates. Section 2.7 of the *Code of Conduct* provides:

¹³⁷ Exhibit No. 207.02, UCA jurisdictional argument at paragraphs 61 to 65.

¹³⁸ Exhibit No. 207.02, UCA jurisdictional argument at paragraphs 72 and 74.

¹³⁹ Exhibit No. 207.02, UCA jurisdictional argument at paragraph 65.

¹⁴⁰ Exhibit No. 207.02, UCA jurisdictional argument at paragraphs 50 to 55.

¹⁴¹ Exhibit No. 207.02, UCA jurisdictional argument at paragraph 38.

¹⁴² Exhibit No. 207.02, UCA jurisdictional argument at paragraph 47.

¹⁴³ Exhibit No. 207.02, UCA jurisdictional argument at paragraph 80.

2.7 Authority of the EUB

Although this Code has been approved by the EUB, such approval does not detract from, reduce or modify in any way, the powers of the EUB to deny, vary, approve with conditions, or overturn, the terms of any transaction or arrangement between a Utility and one or more Affiliates that may be done in compliance with this Code.

129. The UCA argued that the effect of this provision is to subject inter-affiliate agreements to approval, variation (and presumably cancellation) at the discretion of the Commission, despite the fact that the governing agreements may be in compliance with the terms of the *Code of Conduct*.¹⁴⁴

The impact of Commission precedent

130. In its consideration of relevant precedent, the UCA considered several past determinations made by the Commission and its predecessor to be germane to the present inquiry. For example, the UCA identified Decision 2007-012 as being one in which the tribunal ordered a utility to engage in a competitive sourcing process by stating that the contract at issue in that proceeding “should not be renewed or extended beyond its current term without providing a rigorous competitive process”¹⁴⁵

131. With respect to the Commission’s IPCAA motion ruling, the UCA highlighted portions that acknowledge the Commission’s “dual role of ensuring that rates are just and reasonable and that the integrity and safety of the system is maintained” and confirm the Commission’s understanding that “it has the jurisdiction to take whatever measures are necessary to ensure that the rates to be paid by ratepayers for ... services that could be provided by a non-arm’s length provider are prudent.”¹⁴⁶

132. The UCA also argued that the power to dictate terms and conditions of commercial agreements was exercised by the Commission’s predecessor in EUB Decision 2003-073,¹⁴⁷ where the tribunal ordered changes to MSA renewal provisions after making the following finding:

Generally, with respect to termination provisions, the Board is inclined to believe that the ATCO Utilities have entered into arrangements with ATCO I-Tek that are more favourable to ATCO I-Tek than would have been the case if the ATCO Utilities were contracting with an arm’s length third party service provider. This being the case, the Board is concerned that these provisions would constitute a transfer of value from the ATCO Utilities to ATCO I-Tek that would not adequately protect the interests of the ATCO Utilities or their customers.¹⁴⁸

¹⁴⁴ Exhibit No. 207.02, UCA jurisdictional argument at paragraph 106.

¹⁴⁵ Exhibit No. 207.02, UCA jurisdictional argument at paragraph 100.

¹⁴⁶ Exhibit No. 207.02, UCA jurisdictional argument at paragraph 101.

¹⁴⁷ Exhibit No. 207.02, UCA jurisdictional argument at paragraphs 108-110.

¹⁴⁸ Decision 2003-073 at page 17.

The impact of *Re Broadcasting Regulatory Policy*

133. The UCA submitted that the effect of *Re Reference Regulatory Policy* is to confirm that “both (i) the Commission’s express powers, and (ii) the Commission’s broad general powers, interpreted through the lens of express powers, provide the Commission jurisdiction to grant the contested Calgary relief.”¹⁴⁹

134. In the UCA’s view, given the absence of stated objectives in the Commission’s enabling legislation, the main influence of *Re Reference Regulatory Policy* on the current proceeding relates to how general grants of jurisdiction must be interpreted with regard to “core purposes” and how express powers can be distinguished from general ones as part of the overall interpretive exercise.¹⁵⁰

135. The UCA argued that its assessment of express jurisdictional grants contained in the Commission’s enabling legislation accords with the approach described in *Re Reference Regulatory Policy*. It further stated that “[a]ny doubt about the Commission’s jurisdiction based on its express powers is erased by considering the Commission’s broad general powers, because ordering competitive sourcing or changes to affiliate contracts is within the ‘core purposes’ intended for the Commission by the legislature.”¹⁵¹

5.6 Commission findings

136. The Commission accepts that its two primary mandates, as confirmed by the Supreme Court of Canada in *Stores Block*, are to ensure just and reasonable rates and ensure safety and integrity of the utility system in Alberta. It further considers that all exercises of its jurisdiction must flow in some way from its obligation to discharge one or both of these identified mandates.

137. The primary mandate that the Commission must discharge with respect to the subject MSAs in the present case is to ensure that the resulting rates charged to customers are just and reasonable in the circumstances. In arriving at this conclusion, the Commission wishes to clarify that it does not understand its responsibility to ensure the safety and integrity of utility systems to have been abrogated in this instance, as was suggested by the ATCO Utilities.¹⁵² Rather, the Commission considers that the appropriate scope of its remedial jurisdiction is most appropriately appreciated in light of its rate-setting function.

138. An express grant of jurisdiction is, by definition, one which is recognizable on its face as providing the explicit authority necessary to undertake the action contemplated. Upon considering the submissions of the parties, the Commission is unable to conclude that its enabling legislation contains any provision that constitutes an explicit grant of authority to order the relief contemplated by the jurisdictional issues. This being said, the Commission’s inquiry into the extent of its express jurisdiction does not end there.

139. The Commission understands that some express grant of jurisdiction bestow broad, as opposed to well-delineated, authority. Several of these broadly worded provisions were referred

¹⁴⁹ UCA supplemental jurisdictional argument at paragraph 4.

¹⁵⁰ UCA supplemental jurisdictional argument at paragraph 11.

¹⁵¹ UCA supplemental jurisdictional argument at paragraph 16.

¹⁵² Exhibit No. 205.01, ATCO jurisdictional argument at paragraph 16.

to by the parties in argument, including sections 8(2) and 23 of the *Alberta Utilities Commission Act* and Section 85 of the *Public Utilities Act*.

140. With respect to Section 8(2) of the *Alberta Utilities Commission Act*, the Commission agrees with the interpretation advanced by the ATCO Utilities and finds that the wording of the provision is consistent with it representing a codification of the common law doctrine of necessary implication. If the interveners are to successfully rely upon this provision as being a source of the requisite jurisdiction, they must, at minimum, demonstrate the necessity of the relief requested to the satisfaction of the appropriate Commission mandate or, alternatively, establish that the requested exercise of jurisdiction is incidental to another express power. In the Commission's view, neither requirement has been met in the present case.

141. With regard to Section 23(1) of the *Alberta Utilities Commission Act*, the Commission is unable to conclude that it contains any express grant of jurisdiction that would permit the issuance of the orders sought by the interveners in this case. The purpose and effect of this provision is to provide it with the ability to issue orders of an injunctive nature (both mandatory and prohibitive) as a means of enforcing compliance with applicable legislation and any decisions, orders or rules of the Commission. The Commission finds that its conclusion in this regard is supported by, and is consistent with, the wording of Section 23(2) of the same statute, which permits it to vary the time afforded to a person subject to achieve compliance with an existing Commission rule, order, or decision.

142. In assessing the potential application of Section 85(1) of the *Public Utilities Act*, the Commission is cognizant of the fact that the provision incorporates the phrase "the convenience of the public" which has been judicially recognized as being synonymous with the "public interest."¹⁵³ Further Section 85(1) of the *Public Utilities Act* imports a requirement of necessity as a precondition to the exercise of the public interest jurisdiction it describes. Because the requirement of necessity has not been satisfied in this case, this provision does not assist the interveners in establishing the jurisdictional foundation required to support the issuance of the orders contemplated by the jurisdictional issues.

143. The Commission is also mindful of the direction provided by the Supreme Court of Canada in *Stores Block* relating to the criteria that must be considered in the course of determining whether or not the doctrine of jurisdiction by necessary implication may be applied. In that decision, the court indicated that application of the doctrine was only appropriate if:

- (a) The jurisdiction sought is necessary to accomplish the objects of the legislative scheme and is essential to the tribunal fulfilling its mandate;
- (b) The enabling act fails to explicitly grant the power to accomplish the legislative objective;
- (c) The mandate of the tribunal is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
- (d) The jurisdiction sought must not be one which the tribunal has dealt with through the use of expressly granted powers, thereby showing an absence of necessity; and

¹⁵³ *Sincennes v Alberta (Energy and Utilities Board)*, 2009 ABCA 167 at paragraphs 66-67.

- (e) The Legislature did not address its mind to the issue and decide against conferring the power upon the tribunal.¹⁵⁴

144. The criteria described in connection with the application of the doctrine of necessary implication are prescriptive and conjunctive. The doctrine cannot support a finding of implied jurisdiction unless all of the identified criteria are met.

145. In the present case, the Commission finds that the interveners have not established that the issuance of the orders contemplated by the jurisdictional issues is necessary to the accomplishment of the objects of the legislative scheme, or essential to the discharge of the Commission's dual mandates to ensure just and reasonable rates and ensure the safety and integrity of the utility system in Alberta. The Commission therefore finds that the interveners have failed to establish that the doctrine of necessary implication is applicable in the instant case.

146. As a preliminary observation, the *Code of Conduct* is not a statutory instrument. As a result, while it may serve to clarify the Commission's understanding of its jurisdiction in given circumstances and provide stakeholders with a degree of certainty respecting how the provisions of the *Code* will be applied, it is not, in and of itself, a source of Commission jurisdiction.

147. The Commission is unable to accept the UCA's characterisation of Section 2.7 of the *Code of Conduct* as constituting a recognition of an otherwise-derived Commission jurisdiction to unilaterally vary the terms of an affiliate transaction. The Commission considers that a plain reading of this provision indicates that its purpose is simply to provide confirmation that: (1) the *Code* is not a source of jurisdiction in and of itself; and (2) nothing in the *Code* should be appreciated by parties as detracting from or modifying the tribunal's authority as described in its various pieces of enabling legislation.

148. The Commission likewise finds that Section 4.5 of the *Code of Conduct* does not provide it with the ability to order that the ATCO Utilities must engage in a competitive sourcing process in respect of the services currently provided by ATCO I-Tek. Section 4.5 of the *Code* provides the Commission with the ability to prescribe or proscribe the employment of a particular method of establishing FMV for the purpose of demonstrating compliance with the *Code* on a prospective basis. It does not, however, consider that this provision provides it with, or is indicative of, a grant of jurisdiction that would enable the Commission to compel a utility to adopt a given sourcing strategy in respect of a service.

149. Calgary and the UCA submitted that the Commission has previously ordered relief similar, if not identical, to that contemplated by the jurisdictional issues and suggest that this should be probative in the Commission's current consideration of the extent of its remedial jurisdiction. In Calgary's submission, these decisions and orders demonstrate that "the relief sought by Calgary is within the Commission's powers and jurisdiction to grant."¹⁵⁵ The UCA takes a somewhat more conservative view, but nonetheless contends that the Commission has previously interpreted its jurisdiction in a manner that is consistent with its being able to grant the requested relief.¹⁵⁶

¹⁵⁴ *Stores Block* at paragraph 73.

¹⁵⁵ Exhibit No. 206.01, Calgary jurisdictional argument at paragraph 56.

¹⁵⁶ Exhibit No. 207.02, UCA jurisdictional argument at paragraphs 101-102, 111 and 113.

150. As a preliminary observation, the Commission considers that, as an administrative tribunal, it is not bound by the application of the doctrine of *stare decisis*.¹⁵⁷ Put another way, “Decisions of administrative agencies do not create precedents for anyone, including the agency. They are, at best, persuasive.”¹⁵⁸

151. Both Calgary and the UCA identified the IPCAA motion ruling as being supportive, albeit to slightly different extents, of a finding that the Commission has the authority to order the ATCO Utilities to engage in a competitive sourcing process. The Commission finds the IPCAA motion ruling to be unpersuasive in the circumstances for a number of reasons.

152. In its original May 13, 2011 motion, IPCAA requested no less than 12 individual forms of relief, the majority of which, if granted, would have constituted substantial encroachments upon the utility’s managerial functions.¹⁵⁹ The Commission’s consideration of jurisdictional scope contained in the IPCAA motion ruling is, in its view, entirely consistent with its determination in the current case.

153. Excerpts from the IPCAA motion ruling clearly indicate that the Commission’s direction to AltaLink in Decision 2009-151¹⁶⁰ does not approximate either in form, or in degree, to the kind of intervention in utility management being sought by the interveners in this case. In Decision 2009-151, the Commission directed the utility to ensure that it took steps to avoid incurring unnecessary costs in connection with the renewal of a contract. It did not dictate the exact manner in which the utility was to achieve that goal. Paragraphs 55 and 56 of the subject ruling state:

55 ...[T]he Commission directed AltaLink to plan for the transfer of EPCM services as a necessary result of the expiry of the current EPCM contract with SNC-ATP. To satisfy this direction, AltaLink had to plan sufficiently in advance of the expiry of its EPCM service contract in order to avoid putting at risk its statutory obligation to complete direct assigned projects...

56 The Commission, in its direction [in Decision 2009-151], did not dictate the specifics of how AltaLink was to complete its transition other than to ensure that timing delays did not dictate the need to continue sole-source its EPCM work to SNC-ATP. Rather, the Commission’s concern was focused on the prudence of the costs that would be borne by ratepayers for EPCM services following the expiration of the contract with SNC-ATP and on ensuring that whatever action AltaLink chose to take, that it did not impair its ability to deliver on its legislative obligations. This focus is consistent with the more general purpose flowing from the Commission’s legislative mandate to ensure that rates are just and reasonable and to ensure that the integrity and safety of the system is maintained. Any determination of the prudence of the actual costs that now arise from the

¹⁵⁷ Robert W. Macauley and James L.H. Sprague, *Practice and Procedure before Administrative Tribunals* Volume 2, loose-leaf (consulted on 21 May 2014), (Toronto, Ont: Carswell, 2004), ch 6 at 7.

¹⁵⁸ Ibid.

¹⁵⁹ Exhibit No. 208.01, Proceeding No. 1021.

¹⁶⁰ Decision 2009-151: AltaLink Management Ltd. and TransAlta Corporation, 2009 and 2010 Transmission Facility Owner Tariffs, Application No. 1587092, Application No. 1594573, Proceeding ID. 102, October 2, 2009.

action taken by AltaLink is a separate matter to be considered at a future time, once these costs are known. [emphasis added]¹⁶¹

154. Paragraph 33 of the IPCAA motion ruling, which is relied on by interveners in their respective submissions,¹⁶² states “[t]he Commission considers that it has the jurisdiction to take whatever measures are necessary to ensure that the rates to be paid by ratepayers for facilities constructed using out-sourced EPCM services that could potentially be provided by a non-arm’s length provider are prudent.[Emphasis Added]”¹⁶³ This passage simply constitutes a confirmation of the Commission’s understanding that there is a requirement of necessity that must be met before broad statutory grants of authority (e.g., Section 85 of the *Public Utilities Act*) may be relied upon as a source of implied jurisdiction; it does not assist the interveners.

155. The persuasive value of the cases cited by the interveners in support of their contention that the AUC has the authority to dictate terms and conditions of commercial contracts is limited, at best. The Commission considers that neither Decision 2004-026 (cited by Calgary¹⁶⁴) nor Decision 2003-073 (cited by the UCA¹⁶⁵) contains a detailed examination of the jurisdictional foundation underpinning the orders made in those instances. This being the case, the Commission finds that these determinations do not assist it in its current inquiry.

156. For these reasons, the interveners’ reliance on the identified precedent provides them with minimal assistance in establishing that the AUC has the jurisdiction to order the relief contemplated by the jurisdictional issues.

157. In *Re Broadcasting Regulatory Policy*, the CRTC asserted that the scope of the authority provided to it by Section 9(1)(h) of the *Broadcasting Act* was sufficient to permit it to impose license conditions affecting signal rights because the provision permitted a wide discretion to impose terms and conditions “in furtherance of its objectives.” Section 3(1) of the *Broadcasting Act* contains a lengthy list of CRTC objectives, which are identified by the statute as constituting “the broadcasting policy for Canada.”

158. In addressing the effect of the CRTC’s stated objectives on the scope of the jurisdiction provided by Section 9(1)(h) of the *Broadcasting Act*, the majority held that:

22 Policy statements, such as the declaration of Canadian broadcasting policy found in s. 3(1) of the *Broadcasting Act*, are not jurisdiction-conferring provisions. They describe the objectives of Parliament in enacting the legislation and, thus, they circumscribe the discretion granted to a subordinate legislative body (Sullivan, at pp. 387-88 and 390-91). As such, declarations of policy cannot serve to extend the powers of the subordinate body to spheres not granted by Parliament in jurisdiction-conferring provisions.¹⁶⁶

159. Having addressed the question of whether or not the CRTC could rely on the incorporation of policy objectives in the delineation of the scope of authority granted by

¹⁶¹ IPCAA motion ruling at paragraphs 55 and 56.

¹⁶² Calgary supplemental jurisdictional argument at paragraph 59, UCA supplemental jurisdictional argument at paragraph 101.

¹⁶³ IPCAA motion ruling at paragraph 33.

¹⁶⁴ Calgary supplemental jurisdictional argument at paragraph 65.

¹⁶⁵ UCA supplemental jurisdictional argument at paragraph 108.

¹⁶⁶ *Re Broadcasting Regulatory Policy* at paragraph 22.

Section 9(1)(h), the majority then went on to consider the extent of the discretion afforded to tribunal as a result of the incorporation of broad language. The majority held that:

29 ...[A]n open-ended power to insert “such terms and conditions as the [regulatory body] deems appropriate” (s.9(1)(h)) cannot be read in isolation: *ATCO*, at para. 46. Rather, “[t]he content of a provision ‘is enriched by the rest of the section in which it is found...’”¹⁶⁷

160. After considering the *Broadcasting Act* in its entire context, Rothstein J. found that the analysis did not support the contention that Section 9(1)(h) of the statute was intended to confer a jurisdiction that was sufficiently broad to permit it to control rights over signals, programming, or both, though the imposition of licencing conditions. Rothstein J. held:

33 Nowhere in the Act is there a reference to the creation of exclusive control rights over signals or programs. Reading the *Broadcasting Act* in its entire context reveals that the creation of such rights is too great a stretch from the core purposes intended by Parliament and from the powers granted to the CRTC under the *Broadcasting Act*.¹⁶⁸

161. The Commission considers that the contextual “core purposes” analysis used by the majority in *Re Broadcasting Regulatory Policy* is applicable to, and helpful in, its consideration of the Jurisdictional Issues. In the Commission’s assessment, and for the purposes of the following analysis, “core purposes” are synonymous with the dual AUC mandates of rate-setting and ensuring the safety and integrity of utility systems.

162. As a preliminary consideration, the only provision in the panoply of its applicable enabling legislation that may be reasonably construed as identifying AUC legislative objectives is Section 5 of the *Electric Utilities Act*. After carefully considering the nature of this provision, which is entitled “Purposes of the Act,” the Commission finds that it is primarily concerned with the establishment and propagation of a deregulated electricity market in Alberta and therefore, does not inform the present inquiry into the jurisdictional issues.

163. Turning first to the provisions of the *Alberta Utilities Commission Act* relied upon by the interveners (sections 8(1), 8(5) and 23(1)), the Commission notes that Section 8 is located in Part 1 of the statute, which is primarily concerned with the constitution of the AUC and the general delineation of its procedural and substantive jurisdiction. Upon review of the statutory context, the Commission is unable to conclude that anything in the *Alberta Utilities Commission Act* or its companion legislations would support a finding that the scope of Section 8 was intended to include the ability to intervene in the day-to-day management of the utilities to the extent contemplated by the jurisdictional issues. The Commission finds that such an interpretation of Section 8 would, in the language of *Re Broadcasting Regulatory Policy*, “constitute too great a stretch from the core purposes” intended by the legislature.

164. Similarly, the interpretation of the jurisdictional scope attributed to Section 23 of the *Alberta Utilities Commission Act* by the interveners is overreaching for the same reason. Further and in any event, this provision is contained in Part 3 of the statute, which prescribes the various types of orders that may be issued by the Commission, including ones of an injunctive nature,

¹⁶⁷ *Re Broadcasting Regulatory Policy* at paragraph 29.

¹⁶⁸ *Re Broadcasting Regulatory Policy* at paragraph 33.

orders without notice, and enforcement orders. This being the case, the Commission considers that the purpose of this part of the statute is primarily to delineate the species of orders that may be issued by the AUC, and not to define the extent of its jurisdiction over a particular aspect of utility operations.

Summary of conclusions on jurisdictional issues

165. In summary, having considered the submissions of all parties, the Commission finds that it does not possess the jurisdiction required, in the circumstances of this case, to order the ATCO Utilities to engage in a competitive sourcing process, nor does it have the ability to dictate terms and conditions of commercial contracts as suggested by the interveners. The Commission finds that its jurisdiction in this application flows primarily, though not exclusively, from its mandate to ensure just and reasonable rates, as opposed to its general supervisory jurisdiction to ensure the safety, integrity, or dependability of the services provided to ratepayers by the ATCO Utilities.

166. Further, and in light of this finding, the effective performance of the Commission's mandate to ensure just and reasonable rates in this case permits it to engage in an assessment of the ATCO Utilities prudence in negotiating the terms of the subject IT and CC&B Master Service Agreements, including an evaluation of whether the prices agreed to for the provision of the identified services were, at the time that they were negotiated, at or below fair market value. The results of this enquiry will, in turn, inform the Commission's assessment of the proportion of the costs incurred through the operation of the subject Master Service Agreements is properly includable in the utilities' revenue requirements.

6 Retroactive ratemaking

6.1 Submission of the ATCO Utilities

167. The ATCO Utilities argued that "the material regulatory lag that has been experienced by the ATCO Utilities with respect to the processing of the subject Evergreen II Application is indeed extraordinary and creates a very unique situation for the Commission to address."¹⁶⁹

168. With regard to the disallowances requested by the interveners, the ATCO Utilities submitted that because they "have had to fulfill their obligations under the subject Master Service Agreements since January 1, 2010," an adjustment to disallow costs would constitute a retroactive adjustment.¹⁷⁰ The ATCO Utilities argued that while the Commission has permitted the recovery of the costs associated with the provision of IT and CC&B services on an interim basis, it would be extremely unfair and prejudicial to the ATCO Utilities to direct disallowances.¹⁷¹ Therefore, the ATCO Utilities argued "that there should be no retroactive adjustments for the 2010-2013 period. In particular, the retroactive 25% price reduction advocated by Interveners using some sort of deemed shared services model is based on inappropriately altering the Code of Conduct in a retroactive fashion..."¹⁷² In any event, the ATCO Utilities argued that there is no need to engage in any retroactive adjustments because the

¹⁶⁹ ATCO Utilities argument, paragraph 50.

¹⁷⁰ ATCO Utilities argument, paragraph 3, Exhibit No. 188.02, paragraph 1.3.

¹⁷¹ ATCO Utilities argument, paragraphs 6 and 18.

¹⁷² ATCO Utilities reply argument, paragraph 39.

evidence demonstrates that the prices reflected in the current Master Service Agreements are no more than Fair Market Value and should be approved, as filed.¹⁷³

169. The ATCO Utilities asserted that “[c]ontrary to the normal circumstances, which result from the handling of an application by the Commission in a timely manner, the ATCO Utilities now have no practical way in which to respond to any subsequent Decision that is rendered by the AUC regarding this matter.”¹⁷⁴ In support of their argument, the ATCO Utilities referenced the Ontario Court of Appeal decision of *Power Workers’ Union, (Canadian Union of Public Employees, Local 1000) v Ontario (Energy Board)(Power Workers’)*,¹⁷⁵ which it asserted “addressed the concept of ‘committed costs’ wherein the Ontario Energy Board decided that, because certain costs had already been incurred or were committed to be incurred, the board would approve their recovery by the Utility, as there would be no opportunity for the Utility to respond to any decision made by the Board in this regard.”¹⁷⁶

170. The ATCO Utilities argued that the ATCO Group *Code of Conduct*, which expressly authorizes the provision of services such as IT and CC&B as a for-profit utility services, “cannot be retroactively altered or ignored to supposedly characterize or classify the subject IT and CC&B services as something they are, in fact, not.”¹⁷⁷

171. In response to Calgary’s request that the Commission deem, the services provided as a “shared service,” the ATCO Utilities stated that “it appears that Calgary is now focused on a position that the Commission should retroactively ‘deem’ the services provided pursuant to the subject Master Service Agreements to be a ‘shared service’ proposal, purportedly in accordance with the existing Code of Conduct.”¹⁷⁸

6.2 Submission of Calgary

172. In its final argument Calgary responded to the assertions made by the ATCO Utilities regarding retroactivity. Calgary stated:

While ATCO appears to now be raising an issue with respect to retroactive ratemaking should the placeholders be adjusted for any periods prior to 2013, that issue, even if valid (which Calgary does not accept), does not derogate or remove the Commission’s ability to accept the PAC recommendations for adjustment.¹⁷⁹

173. Calgary argued that “[s]ince the MSAs are approved on an interim basis effective January 1, 2010, any adjustments to placeholders must be made retroactive to January 1, 2010.”¹⁸⁰ With respect to the ATCO Utilities’ claim that adjustments back to 2010 would constitute retroactive rate making, Calgary submitted this position is not supportable in law.¹⁸¹

¹⁷³ ATCO Utilities reply argument, paragraphs 29 and 38.

¹⁷⁴ ATCO Utilities argument, paragraph 51 and ATCO Utilities reply argument, paragraph 29.

¹⁷⁵ 2013 ONCA 359.

¹⁷⁶ ATCO Utilities argument, paragraph 20.

¹⁷⁷ ATCO Utilities argument, paragraph 7.

¹⁷⁸ ATCO Utilities argument, paragraph 17.

¹⁷⁹ Calgary argument, paragraph 53.

¹⁸⁰ Calgary argument, paragraph 688.

¹⁸¹ Calgary argument at paragraph 690.

174. Calgary further added that:

Both findings and directions of the Commission in Decision 2009-252, and the previous notice given to ATCO in Proceeding 11 (ruling dated May 16, 2008), demonstrate that ATCO had clear notice that any renewal of the arrangement with I-Tek would be subject to further review, and as noted in the interim decision, to termination, and that the use of the rates from the Proposed MSAs was on an interim basis.¹⁸²

175. Calgary reiterated in its reply that the ATCO Utilities, like all parties, had clear notice and it was fully aware that the approval of the proposed Master Service Agreements, and the prices associated with the provision of IT and CC&B services, were interim and subject to review and adjustment and were to be finalized in this proceeding.¹⁸³

176. Calgary argued that the ATCO Utilities have not met the legal requirements for establishing a breach of the rule against retroactive ratemaking.¹⁸⁴ In support of its submission, Calgary referenced *ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission)*¹⁸⁵ where Conrad, J. stated at paragraph 57 that “[i]f a utility is aware that a rate is interim and subject to change, then a regulator’s revision of the rate will not be disallowed for impermissible retroactive ratemaking.”

177. Calgary submitted that the *Power Workers’* case referenced by the ATCO Utilities “is of no assistance to the retroactive ratemaking issue”¹⁸⁶ as it does not relate to an affiliate transaction and in that case, the utility was seeking to recover future costs of its unionized workforce arising under collective agreements. Calgary added that the Court of Appeal held that “committed” costs, including those in relation to the unionized workforce, should have been, and can be subject to a prudence review rather than the type of review used for forward test periods.¹⁸⁷

178. In response to the ATCO Utilities assertion that it would not have the ability to go back and correct the amounts that would be collected by the ATCO Utilities for the provision of IT and CC&B services, Calgary stated:

Calgary is not seeking to have the MSA terms revised on a retroactive basis, nor to have the MSAs themselves unwound. Nor is Calgary seeking to have the services already performed by I-Tek be done in an operational manner as Shared Services. Rather, Calgary is simply seeking rate adjustments back to January 1, 2010, consistent with the Commission’s direction and confirmation in Decision 2009-252.¹⁸⁸

6.3 Submission of the UCA

179. In response to the ATCO Utilities assertion that any directions reflecting placeholder adjustments prior to 2013 would constitute retroactive ratemaking, the UCA submitted that this objection must be disregarded for the following reasons:

¹⁸² Calgary argument, paragraph 691.

¹⁸³ Reply argument of Calgary, paragraphs 212-216.

¹⁸⁴ Written argument of Calgary, paragraph 692.

¹⁸⁵ 2014 ABCA 28.

¹⁸⁶ Calgary reply argument, paragraph 77.

¹⁸⁷ Calgary reply argument, paragraph 78.

¹⁸⁸ Calgary reply argument, paragraph 224.

- i. It is simply not supported by the law. The Courts are clear that “retroactive ratemaking” does not arise where, as here, the utility has received notice of interim and refundable rates.
- ii. The ATCO Utilities are seeking to be rescued from circumstances that they have created at the expense of customers, which would result in unjust and unreasonable rates.¹⁸⁹

180. In support of its first submission, the UCA referenced *Calgary (City) v Alberta (Energy and Utilities Board)*¹⁹⁰ *ATCO Gas and Pipelines Ltd. v Alberta (Utilities Commission)*¹⁹¹ and *Bell Canada v Canada (Canadian Radio-Television and Telecommunications Commission)*¹⁹² for the proposition that “[r]etroactive ratemaking, by definition, does not arise in the context of interim rates”¹⁹³ and “that there is no retroactive ratemaking when the affected party has prior knowledge that rates were subject to change.”¹⁹⁴

181. The UCA stated:

The circumstances in the present case bring it squarely within the exception to the general prohibition on retroactive ratemaking clearly set out by the Supreme Court of Canada and confirmed by the Alberta Court of Appeal. The ATCO Utilities were well aware that the Commission had approved implementation of the new MSAs effective January 1, 2010 on an *interim* basis: the Commission did so at the ATCO Utilities’ request.¹⁹⁵

182. The UCA submitted that the *Power Workers’* case referenced by ATCO is distinguishable from the circumstances in this proceeding and therefore should not provide any weight to the ATCO Utilities’ related submissions. The UCA argued that:

The case turned on whether labour costs under a collective agreement should be treated as forecast costs capable of being managed going forward, or “committed costs” subject to a prudence review based on the information that the utility had at the time that the contract was entered into. The presence of interim refundable rates here, and notice to the ATCO Utilities of interim refundable rates, ends any application of that decision or its principles to the current facts because notice to the ATCO Utilities provided them the opportunity to modify their conduct *vis a vis* I-Tek going forward.¹⁹⁶

183. The UCA reiterated that “there is no basis for the ATCO Utilities’ claim that adjusting placeholders would constitute retroactive ratemaking.”¹⁹⁷

¹⁸⁹ UCA final argument, paragraph 154.

¹⁹⁰ 2010 ABCA 132.

¹⁹¹ 2014 ABCA 28 (*Salt Caverns Appeal*).

¹⁹² [1989] 1 SCR 1722.

¹⁹³ UCA final argument, paragraph 157.

¹⁹⁴ UCA final argument, paragraph 158 referencing *Salt Caverns Appeal* at paragraphs 56-59.

¹⁹⁵ UCA final argument, paragraph 163.

¹⁹⁶ UCA reply argument, paragraph 24.

¹⁹⁷ UCA reply argument, paragraph 124.

6.4 Commission findings

184. The general rule that rates must be prospective and the law's stance against retroactive ratemaking was discussed by the Alberta Court of Appeal in *Calgary (City) v Alberta (Energy and Utilities Board) (City of Calgary)*¹⁹⁸ where Hunt J.A. stated:

46 A brief overview of some central principles of ratemaking, including the related concepts of retroactive and retrospective ratemaking, is necessary. Generally, ratemaking and rates must be prospective: *Coseka Resources Ltd. v. Saratoga Processing Co.* (1981), 31 A.R. 541 at para. 29, 16 Alta. L.R. (2d) 60 (C.A.). A utility's past financial results can be used to forecast future expenses, but a regulator cannot design future rates to recover past revenue deficiencies: *Northwestern Utilities Ltd. and al. v. Edmonton*, [1979] 1 S.C.R. 684 at 691 and 699 ("Northwestern Utilities").

47 Retroactive ratemaking "establish[es] rates to replace or be substituted to those which were charged during that period": *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722 at 1749 ("Bell Canada 1989"). Utility regulators cannot retroactively change rates (*Stores Block* at para. 71) because it creates a lack of certainty for utility consumers. If a regulator could retroactively change rates, consumers would never be assured of the finality of rates they paid for utility services.

185. In *City of Calgary*, the court discussed retroactive and retrospective ratemaking in the context of ATCO Gas⁷, a division of ATCO Gas and Pipelines Ltd., deferred gas accounts and determined that, in the case of the deferred gas accounts, affected parties were aware that the rates were subject to change, regardless of whether they were characterized as interim or final. As the parties were aware that rates might change, the unpredictability and unfairness that underlie the rule against retroactive and retrospective ratemaking became less significant.¹⁹⁹

186. More recently in *ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission)(Salt Caverns Appeal)*,²⁰⁰ the Alberta Court of Appeal affirmed the guiding principles for determining whether ratemaking was impermissibly retroactive. In her reasons, Conrad J.A. stated:

56 Simply because a ratemaking decision has an impact on a past rate does not mean it is an impermissible retroactive decision. The critical factor for determining whether the regulator is engaging in retroactive ratemaking is the parties' knowledge...

57 If a utility is aware that a rate is interim and subject to change, then a regulator's revision of the rate will not be disallowed for impermissible retroactive ratemaking. This was the conclusion reached by the Supreme Court of Canada in *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 SCR 1722, 60 DLR (4th) 682 [*Bell Canada 1989*].

58 According to the Supreme Court of Canada in *Bell Canada 1989* at 1756, alteration of an interim rate by a regulator is simply a function of regulators who have the mandate to ensure rates and tariffs are, at all times, just and reasonable.

¹⁹⁸ 2010 ABCA 132 (*City of Calgary*).

¹⁹⁹ *City of Calgary*, paragraph 57.

²⁰⁰ 2014 ABCA 28 (*Salt Caverns Appeal*).

187. As stated above by Conrad J.A., when determining whether ratemaking is impermissibly retroactive, the critical question is whether the utility knew from the actions or words of the regulator that the rates were subject to change.

188. There is no dispute or ambiguity about the fact that the rates that were approved for the subject Master Service Agreements were interim rates.²⁰¹ The ATCO Utilities, Calgary and UCA all acknowledge this fact. This was clearly set out at paragraph 40 of Decision 2009-252:

For the reasons stated above, the Commission approves the new MSAs (other than the charges and rates provided for thereunder) for the provision of IT and CC&B services to the ATCO Utilities effective January 1, 2010 **for an interim period**, the term of which will be determined by the Commission in the 2010 Evergreen Proceeding. In the event the Commission does not approve the extension of the new MSAs beyond the interim period, the new MSAs shall be terminated in the manner provided by the Commission in that decision. The final charges and rates that will be applied to approved volumes for the interim period under the new MSAs will be established by the Commission in the 2010 Evergreen Proceeding. [Emphasis added].²⁰²

189. The issue of retroactive ratemaking was recently considered in Decision 2014-100, in which the Commission held that “[t]he prohibition against retroactive rate-making is not triggered where rates are interim and such rates may be adjusted.”²⁰³

190. The *Power Workers’* case referenced by the ATCO Utilities is not applicable and is distinguishable from the circumstances in this proceeding primarily because of the existence of the interim rates that are subject to change in this proceeding. In the *Power Workers’* decision, the Ontario Court of Appeal allowed the Ontario Power Generation’s appeal from a decision of the Ontario Energy Board regarding the rate it was permitted to charge for the transmission of electricity on two main grounds. First, the compensation costs subject to review in that decision were considered to be committed costs because of the nature of the collective agreements in effect. Second, the Ontario Court of Appeal held that the board failed to conduct a prudence review of the compensation costs.

191. The Commission does not accept the ATCO Utilities’ claim that it would be unfair and prejudicial to the ATCO Utilities to direct disallowances or adjustments to the placeholders. The ATCO Utilities have, at all relevant times, had knowledge of the fact that the rates for the provision of IT and CC&B services approved in Decision 2009-252 were interim and were fully aware that those interim rates are subject to adjustment, and if necessary to termination. Because all parties, including the ATCO Utilities were aware that the rates may change, the Commission is not persuaded by the argument that directing adjustments would result in unfairness and prejudice.

²⁰¹ The Commission’s authority to set interim rates is found in Section 8(5)(c) of the *Alberta Utilities Commission Act* and Section 124(2) of the *Electric Utilities Act*.

²⁰² Decision 2009-252: ATCO Utilities 2010 Evergreen – Interim Decision, Application No. 1605338, Proceeding ID 240, December 11, 2009 at paragraph 40.

²⁰³ Decision 2014-100: ENMAX Power Corporation – Formula-Based Ratemaking Transmission Tariff Re-Opener, Application No. 1608905, Proceeding No. 2182, April 15, 2014 at paragraph 37.

192. The Commission is not satisfied by the ATCO Utilities' argument that the circumstances in this proceeding have created an "extraordinary and...very unique situation" such that any adjustments to the prices for the provision of IT and CC&B services would constitute retroactive ratemaking. The fact remains that the subject rates were approved for an interim period, the final rates and the term of which were always known to be determined in this proceeding.

193. Based on the above, the Commission considers it reasonable and fair to the parties to allow for an adjustment to the placeholders for the provision of IT and CC&B services going back to 2010. The principles set out above demonstrate that the prohibition against retroactive rate-making is not triggered where rates are interim and such rates may be adjusted.

7 ATCO Inter-Affiliate Code of Conduct

194. In Decision 2003-040, the EUB established a *code*, the *ATCO Group Inter-Affiliate Code of Conduct (Code)*, to govern relationships and transactions between regulated and non-regulated affiliates within the ATCO Group of companies. The *Code* was intended to supplement legislated code of conduct regulations²⁰⁴ which focus on retail affiliate matters. Some of the most relevant sections of the *Code* for the purposes of this decision are set out below:

1.1 Purpose and Objectives of the Code

Purpose of the Code

The purpose of this Code is to establish standards and conditions for interaction between each ATCO Utility and its Utility and Non-Utility Affiliates. This Code attempts to anticipate and adjust for the potential misalignment of interest between shareholders and Utility customers occasioned by Affiliate interactions through the establishment of parameters for transactions, information sharing and the sharing of services and resources, while permitting economies of scale and operating efficiencies.

These parameters are intended to:

- (a) prevent Utilities from cross-subsidizing Affiliate activities;
- (b) protect confidential customer information collected in the course of providing Utility services;
- (c) ensure Affiliates and their customers do not have preferential access to Utility services; and
- (d) avoid uncompetitive practices between Utilities and their Affiliates, which may be detrimental to the interests of Utility customers.

Objectives of the Code

While the overall purpose of the Code is to establish standards and parameters which prohibit inappropriate Affiliate conduct, preferences or advantages, which may adversely

²⁰⁴ Alberta Regulation 160/2003, *Electric Utilities Act, Code of Conduct Regulation*; Alberta Regulation 183/2003, *Gas Utilities Act, Code of Conduct Regulation*.

impact the customers of regulated businesses, this purpose reflects several important underlying objectives, including:

- (a) creating a clearly defined set of rules designed to enhance inter-affiliate transparency, fairness and senior management accountability with respect to inter-affiliate interactions impacting regulated businesses;
- (b) providing an environment in which inter-affiliate economies and efficiencies can legitimately occur for the mutual advantage of both a Utility's customers and its shareholders;
- (c) developing support and respect for the Code by the employees, officers and directors of the ATCO group of companies, which will in turn promote ratepayer confidence in the application of the Code; and
- (d) the creation of regulatory processes and cost efficiencies through the consistent application of a clear set of standards and reporting requirements to Utility inter-affiliate transactions, enhanced by a practical, resolution driven, dispute process.

2.1 Definitions

n) **"Fair Market Value"** means the price reached in an open and unrestricted market between informed and prudent parties, acting at arms-length and under no compulsion to act.

o) **"For Profit Affiliate Service"** means any service, provided on a for-profit basis:

- 1) by a Utility to a Non-Utility Affiliate, other than a Utility Service; or
- 2) by a Non-Utility Affiliate to a Utility.

v) **"Shared Service"** means any service, other than a Utility Service or a For Profit Affiliate Service, provided on a Cost Recovery Basis by a Utility to an Affiliate or by an Affiliate to a Utility.

4 TRANSFER PRICING

4.1 For Profit Affiliate Services

Where a Utility determines it is prudent in operating its Utility business to do so, it may obtain For Profit Affiliate Services from an Affiliate or provide For Profit Affiliate Services to an Affiliate.

If a Utility intends to outsource to an Affiliate a service it presently provides for itself, the Utility shall, in addition to any other analysis it may require to demonstrate the prudence of a For Profit Affiliate Services arrangement, undertake a net present value analysis appropriate to the life cycle or operating cycle of the services involved.

Each Utility shall periodically review the prudence of continuing For Profit Affiliate Services arrangements.

4.2 Pricing For Profit Affiliate Services

4.2.1 Utility Acquires For Profit Affiliate Service

When a Utility acquires For Profit Affiliate Services it shall pay no more than the Fair Market Value of such services. The onus is on the Utility to demonstrate that the For Profit Affiliate Services have been acquired at a price that is no more than the Fair Market Value of such services.

4.5 Determination of Fair Market Value

In demonstrating that Fair Market Value was paid or received pursuant to a For Profit Affiliate Service arrangement or a transaction contemplated by sections 4.1, 4.2 and 4.4 hereof, the Utility, subject to any prior or contrary direction by the EUB, may utilize any method to determine Fair Market Value that it believes appropriate in the circumstances. These methods may include, without limitation: competitive tendering, competitive quotes, bench-marking studies, catalogue pricing, replacement cost comparisons or recent market transactions. The Utility shall bear the onus of demonstrating that the methodology or methodologies utilized in determining the Fair Market Value of the subject goods or services was appropriate in the circumstances.

7.1 Submissions of Calgary

195. Calgary submitted that the proposed Master Service Agreements do not meet the requirements of the *Code* because (i) they are not prudent arrangements with an affiliate, (ii) the requested prices and terms result in an affiliate transaction that is at more than fair market value, (iii) the ATCO Utilities do not use an appropriate method to demonstrate fair market value and (iv) the IT and CC&B services should be treated as a shared services arrangement.²⁰⁵

196. Calgary submitted that the *Code* has been structured to consider and implement two types of arrangements between utilities and their respective affiliates – either by way of shared services or by way of for-profit affiliate services.²⁰⁶ Since Calgary is of the view that there is no basis for the ATCO I-Tek services to be considered and “for-profit affiliate services”, it submitted that they must be deemed to be “shared services” for all associated revenue requirement matters connected with the provision of IT and CC&B services by ATCO I-Tek to the ATCO Utilities for the period of January 2010 onwards.²⁰⁷

197. Calgary submitted that under the *Code*, “Shared Services” are defined as services which are not “Utility Services” or “For Profit Affiliate Services.”. Calgary requested that the Commission deem the IT and CC&B arrangements between the ATCO Utilities and ATCO I-Tek to be a “Shared Service” for the purposes of Section 3.3 of the *Code* on the basis that ATCO I-Tek does not operate as a *bona fide* marketplace competitor or participant. In support of its position, Calgary stated that “PAC reviewed the financial statements of the ATCO Group for 2010 and determined that [REDACTED] of the ATCO I-Tek 2010 revenues were derived

²⁰⁵ Exhibit No. 93.04, written evidence of Calgary, page 6 at lines 20-24 and page 7 at lines 1-4.

²⁰⁶ Calgary argument at paragraph 214.

²⁰⁷ Calgary argument at paragraphs 215-216.

from outside customers. As a result, ATCO I-Tek cannot be considered a *bona fide* participant in the marketplace.”²⁰⁸

198. Calgary also noted that Section 4.1 of the *Code* requires that transactions between a utility and an affiliate that provides services to the utility for a profit must be reviewed and assessed for prudence. Calgary argued that the proposed Master Service Agreements are not prudent arrangements for the purposes of the *Code* for various reasons including that the ATCO Utilities did not conduct a competitive bidding or sourcing process, that the ATCO Utilities did not adopt or apply any multi-sourcing or global delivery approaches and that the ATCO Utilities did not secure additional price concessions or discounts as a result of assuming additional contract risk.²⁰⁹ Calgary argued that the prudence requirement is so fundamental to the arrangement’s existence and continuation that it operates as a condition precedent to the ATCO Utilities having a legal right to recover the costs of the arrangement.²¹⁰

199. Calgary referred to Decision 2005-120,²¹¹ where the EUB established the following test for prudence at page 10:

In summary, a utility will be found prudent if it exercises good judgment and makes decisions which are reasonable at the time they are made, based on information the owner of **the utility knew or ought to have known at the time the decision was made. In making decisions, a utility must take into account the best interests of its customers, while still being entitled to a fair return.** [emphasis added by Calgary]

200. Calgary also referenced Decision 2005-120, where, at page 3, the board identified additional factors to be considered for testing prudence, even if it can be assumed the utility acted prudently:

Although the Board will start with the presumption, confirmed by the Alberta Court of Appeal, that AltaLink has acted prudently, the presumption can only be confirmed or overturned **through an examination of the information and circumstances that were available to AltaLink or that it ought to have known at the time it executed decisions in respect of the direct assigned projects. The Board’s prudence review will assess if the actions undertaken by AltaLink were reasonable, demonstrated good judgment, and were undertaken with the best interests of customers in mind.** [emphasis added by Calgary]

201. Calgary submitted that “ATCO should have known and acted upon commonly understood sourcing and diligence principles in both deciding to renew the relationship with ATCO I-Tek and negotiating the terms of the renewal. Instead, ATCO failed to do so, and failed to act prudently in entering into a long-term sole source arrangement with the I-Tek companies for the IT and CC&B services.”²¹²

²⁰⁸ Exhibit No. 93.04, written evidence of Calgary, page 39 at lines 7-11.

²⁰⁹ Exhibit No. 93.04, written evidence of Calgary, page 22 at lines 4-26.

²¹⁰ Calgary argument at paragraph 169.

²¹¹ Decision 2005-120: AltaLink Management Ltd., Reconciliation of Direct Assigned Project, Capital Deferral Accounts for the May 1, 2002 to April 30, 2004 Period, Application No. 1359518, November 22, 2005.

²¹² Calgary argument at paragraph 339.

202. In addition to the prudence requirement under the *Code*, Calgary submitted that a second *Code* requirement which applies to this proceeding is that the prices charged for the transactions must be at or lesser than fair market value.²¹³ Under Section 4.2.1 of the *Code*, the ATCO Utilities may not pay more than fair market value for the IT and CC&B services it acquires from ATCO I-Tek.²¹⁴

203. According to Calgary, “the final requirement under the ATCO *Code* that is germane to this Proceeding is that the methodology or methodologies utilized in determining the Fair Market Value of the subject goods or services was appropriate in the circumstances.”²¹⁵ In regards to the ATCO Utilities’ obligations under the *Code* with respect to fair market value, Calgary stated:

Per Section 4.2.1 of the ATCO Code, the onus is on ATCO to demonstrate that the IT and CC&B services it has or will acquire from I-Tek will be at a price that is no more than the Fair Market Value of such services.

Under Section 4.5 of the ATCO Code, the ATCO Utilities have a further onus of demonstrating that the methodology or methodologies utilized in determining the Fair Market Value of the subject goods or services was appropriate in the circumstances.²¹⁶

204. Calgary argued that the ATCO Utilities have not met their *Code* obligations because their business case is flawed and does not appropriately reflect the market circumstances, that the evidence relied upon by the ATCO Utilities did not appropriately determine fair market value nor did it reflect industry best practices and that the consultants for the ATCO Utilities relied on outdated market information primarily by applying trending factors.²¹⁷ Calgary expressed particular concerns related to the ATCO Utilities’ methodology of trending off of 2003 to 2007 benchmark results and stated that this was not an appropriate methodology for the *Code*.²¹⁸ Calgary provided its own approach or methodology to determine fair market value pricing and stated:

PAC has suggested that a RFI and/or RFP could have been used to assist in the determination of FMV. Another appropriate alternative is to review actual practices and results in the marketplace for the time period in question and test FMV. On this basis, the reviews and assessments conducted by PAC and Ms. Williams are the best available and most comprehensive evidence available to test FMV.²¹⁹

205. Calgary submitted that a key issue for determination is whether the applicable purposes and objectives of the *Code*, as outlined above under Section 1, have been met when whether the utility affiliate actually operates in the open market is questioned.²²⁰ Calgary is of the view that the purposes and objectives are not being met because it submits that no basis exists to qualify the ATCO I-Tek companies as a for-profit affiliate for the purposes of the ATCO *Code*.²²¹

²¹³ Calgary argument at paragraph 175.

²¹⁴ Exhibit No. 93.04, written evidence of Calgary, page 24 at lines 1-2.

²¹⁵ Calgary argument at paragraph 177.

²¹⁶ Exhibit No. 93.04, written evidence of Calgary, page 24 at lines 12-18.

²¹⁷ Exhibit No. 93.04, written evidence of Calgary, page 25 at lines 20-25 and page 26 at lines 1-10.

²¹⁸ Exhibit No. 93.04, written evidence of Calgary, page 26 at lines 12-20.

²¹⁹ Exhibit No. 93.04, written evidence of Calgary, page 27 at lines 13-18.

²²⁰ Calgary argument at paragraph 181.

²²¹ Calgary argument at paragraphs 185-186.

Calgary argued that “[i]f the prices charged by I-Tek do not meet the requirements of the ATCO Code”...or “[i]f the I-Tek services continue to be allowed to be a For Profit Affiliate Service for the ATCO Code”...“the resultant rates of the ATCO Utilities will not be just and reasonable.”²²²

7.2 Submissions of the UCA

206. The UCA submitted that the ATCO Utilities’ evidence shows that the Master Service Agreements neither reflect prudently-incurred costs nor do they comply with the *Code* and as a result, the Commission must find some way to deem costs to reflect reasonable costs associated with providing the IT and CC&B elements of utility service.²²³ The UCA recommended that the Commission should conclude that under the *Code*, “ATCO has an onus to clearly and transparently show that customers are not harmed, by showing that the Master Service Agreements contain industry standard terms, fair market value pricing, and reflect the lowest cost solution that will result in adequate utility service.”²²⁴

7.3 Submissions of the ATCO Utilities

207. The ATCO Utilities acknowledge that they must act within the provisions of the *Code* as it existed at the time the relevant actions were taken and that they are at risk for a financial disallowance if it is found that the pricing of the subject IT and CC&B services is inconsistent with what is permitted pursuant to the *Code*.²²⁵

208. Throughout the proceeding, the ATCO Utilities have maintained that their application, including their business cases and methodologies are consistent with the *Code*. In the original application,²²⁶ the ATCO Utilities made the following statements:

The business case and the entire Application have been approached in a way to ensure the requirements of the Inter-Affiliate Code of Conduct are met. [paragraph 5]

.....

The ATCO Utilities see the approach described herein as an efficient and effective way to demonstrate that the services received by the ATCO Utilities are appropriate and are priced at Fair Market Value. [paragraph 12]

...

Tabs 3 and 4 contain the expert evidence of Compass and UtiliPoint, respectively. The evidence of Compass/UtiliPoint was used to establish fair market value pricing for the proposed MSAs for 2010 onward for the Renew and New Provider options. [paragraph 17]

...

Tab 6 (sub-tabs A-E) of the Application contains the new Master service Agreements for both IT and CC&B services that relied on the independent expert evidence of Compass

²²² Calgary argument at paragraphs 192-193.

²²³ UCA argument at paragraph 11.

²²⁴ UCA argument at paragraph 194.

²²⁵ ATCO Utilities argument at paragraph 55.

²²⁶ Exhibit No. 1, ATCO Utilities original application, July 31, 2009.

and UtiliPoint to establish FMV pricing for IT and CC&B services for the 2010-2015 period, which confirms that the agreements, as proposed, are industry standard.
[paragraph 19]

The business case also tests the current sourcing arrangement against the ATCO Group Inter-Affiliate Code of Conduct, through an analysis of NPV costs (revenue requirements). [paragraph 20]

209. In the updated application, the ATCO Utilities submitted that they acted in good faith to develop contracts and pricing that would deliver fair market value and be in accordance with the *Code*.²²⁷

210. The ATCO Utilities submitted that the 2010 Master Service Agreements, including price, are consistent with the provisions of the *Code*. Additionally, the approach or methodology employed reflected the standard approach employed in the past to derive fair market value pricing. The ATCO Utilities noted that the current methodology²²⁸ as well as the existing relationship between the ATCO Utilities and ATCO I-Tek as a for-profit affiliate service²²⁹ has been examined and consistently accepted and recognized on previous occasions by the Commission. Therefore, the ATCO Utilities argued that there is no rationale or legal basis to classify or characterize the relationship as a “Shared Service.”

211. The ATCO Utilities stated that the *Code of Conduct* authorizes a utility to obtain for-profit affiliate services from an affiliated company and argued that this is precisely what they have done and the arrangement of IT and CC&B services have been treated by the Commission as a for-profit affiliate service since the commencement of the arrangements in 1999.²³⁰ In regard to the methodology utilized, the ATCO Utilities noted that the *Code* explicitly recognizes that the use of benchmarking is an appropriate approach for establishing fair market value for for-profit affiliate services acquired from an affiliate.²³¹ The ATCO Utilities argued that to suddenly treat them as a “shared service” on a retroactive basis would be inconsistent with the *Code*.

212. The ATCO Utilities expressed concern about Calgary’s use of language of the *Code* when discussing the manner in which pricing is to be derived with respect to for-profit affiliate services:

In its Argument (p. 47-48), Calgary actually quotes from the Code of Conduct and acknowledges that the language states: “When a Utility acquires For Profit affiliate services it shall pay no more than the Fair Market Value of such services.” [emphasis added] However, Calgary quickly converts this language to say that the prices must be at or less than Fair Market Value.²³²

213. The ATCO Utilities asserted that the distinction is important because the *Code* requires a utility to demonstrate that it is paying no more than fair market value for the provision of certain services, whereas Calgary and the UCA appear to infer that the utility must demonstrate that it is

²²⁷ Exhibit No. 26.01, ATCO Utilities amended application, July 27, 2011, at paragraph 12.

²²⁸ ATCO Utilities argument at paragraph 52.

²²⁹ ATCO Utilities argument at paragraph 60.

²³⁰ ATCO Utilities argument at paragraph 17.

²³¹ ATCO Utilities argument at paragraph 31.

²³² ATCO Utilities reply argument at paragraph 41.

paying less than fair market value in order to comply with the *Code*. The ATCO Utilities submitted that the language and test put forward by the interveners in this regard are incorrect.²³³

7.4 Commission findings

214. In Decision 2003-019,²³⁴ the board stated the following on the standard that must be met to assure the board that transactions between affiliated companies are appropriate:

The Board is of the view that affiliated companies may legitimately do business with utilities, and that consortiums of companies may work together to provide efficiencies of scale, organization, and ingenuity. However, the Board also acknowledges that there is a lack of operational transparency that comes with affiliate transactions.

Where the Board has full purview to examine detailed aspects of a utility's operations and expenditures, that purview is – for practical purposes – more limited when it comes to affiliated companies. Although the Board has permitted affiliate transactions for utilities, the Board does hold that there is a substantial standard that must be met to assure the Board and the public that transactions with affiliated companies are appropriate for providing goods or services to a utility. The entire onus rests with the Applicant to demonstrate that the above criteria have been clearly satisfied. It should not be left for parties and the Board to try to find a valid basis for the transactions. The Board notes that the difference between perception and reality regarding whether or not affiliate transactions are structured to take advantage of the regulated business and customers is difficult to discern, and as such, the Applicant must clearly demonstrate that customers are not disadvantaged by reason of the affiliate transaction. In order to avoid the perceptions of bias and disadvantage to customers, the Applicant must present assessments of options which led to the conclusion to use an affiliate.

215. The principles set out above were reiterated in Decision 2003-040²³⁵ in which the EUB established the *Code* and stated:

The Board has previously noted its view that it is appropriate for affiliate transactions to occur in situations where customers are not harmed by those transactions, and moreover, where the choice of purchasing goods or services from the affiliate is prudent. In order that customers are not harmed by affiliate transactions, it is necessary to ensure that these transactions occur at a reasonable price, that the reasonableness of that price can be clearly determined, and that the price paid is less than what it would have cost for the utility to either provide the goods or services itself or have them procured from a third party, all else being equal.

216. As stated above, Section 4.1 of the *Code* deals with for-profit affiliate services and provides that “[e]ach Utility shall periodically review the prudence of continuing For Profit Affiliate Services arrangements.”

²³³ ATCO Utilities reply argument at paragraph 41.

²³⁴ Decision 2003-019: Aquila Networks Canada (Alberta Ltd.), 002/2003 Distribution Tariff, Application No. 1250392, February 28, 2003, pages 58-59.

²³⁵ Decision 2003-040, page 75.

217. At paragraph 46 of Decision 2010-362,²³⁶ the Commission stated the following in respect of the *Code* and assessing the prudence of transactions between utilities and their non-regulated affiliates:

The purpose of the Code requirement for a net present value analysis with respect to the life cycle or operating cycle of the services to be outsourced to an affiliate is to assist parties and the regulator in assessing the prudence of the arrangement and to ensure that customers are not harmed by the affiliate transaction. **The periodic reviews required by section 4.1 of the Code serve the same purpose.** The Original Proceeding was convened to consider the price Benchmark Report filed in accordance with the prior directions of the Board. The purpose of the proceeding was not to conduct a periodic review of the ongoing approved MSAs. The time for a periodic review of the prudence of continuing with the outsourcing arrangements is at the time of the next renewal of IT and CC&B services when the current MSAs or any Commission approved extensions expire. Application 1605338, ID 240, the 2010 Evergreen Proceeding (2010 Evergreen Proceeding), is the proceeding currently before the Commission that will consider the prudence of continuing to use ATCO I-Tek and ITBS to provide IT and CC&B services beyond 2010. [emphasis added]

218. Part of the relief requested by the ATCO Utilities is confirmation that the Master Service Agreements for the provision of IT and CC&B services post 2009, including pricing, are consistent with the provisions of the *ATCO Utilities Inter-Affiliate Code of Conduct*.²³⁷

219. The onus is on the ATCO Utilities to demonstrate compliance with the *Code*. During this proceeding, as well as in prior related proceedings, the ATCO Utilities acknowledged that they were at risk of disallowance in the event that the Commission did not find that their affiliate transactions were reasonable and prudent. One consideration of this analysis is the determination of whether the prices paid by the ATCO Utilities to ATCO I-Tek for the provision of IT and CC&B services provided under the respective Master Service Agreements is priced at no more than fair market value.

220. In regards to the parties' concerns expressed with the use of language of the *Code* when discussing the manner in which pricing is to be derived, the Commission recognizes the ATCO Utilities assertion that Section 4.2.1 of the *Code* explicitly references "a price that is no more than the Fair Market Value." However, the Commission is of the view that this is no different than Calgary's assertion that "the prices must be at or less than Fair Market Value." In other words, prices that are at or less than fair market value are in essence no more than fair market value.

221. The *Code*'s definition of fair market value requires consideration of whether the price can be reached in an open and unrestricted market. It follows that when conducting a price benchmarking of services, those services must be available in an open and unrestricted market if the exercise is to result in a relevant fair market value price determination for those services.

²³⁶ Decision 2010-362: The City of Calgary, Decision on Preliminary Question Review and Variance of Alberta Utilities Commission Decision 2010-102, 2003-2007 Benchmarking and ATCO I-Tek Placeholders True-Up, Application No. 1606190, July 29, 2010 at paragraph 46.

²³⁷ Exhibit No. 116.01, updated application, PDF page 2 at paragraph 3.

222. While a utility may utilize any method to determine fair market value, including benchmarking, the utility bears the onus of demonstrating that the methodology utilized in determining the fair market value of the subject goods or services was appropriate in the circumstances. Therefore, while the ATCO Utilities are correct in their assertion that the *Code* explicitly provides for benchmarking as one method of determining fair market value, the Commission is not precluded from conducting a prudence review to determine whether that methodology is conducted in a reasonable and prudent manner.

223. In Decision 2003-040, the board held:

The Board continues to have the ability to conduct prudence reviews, to disallow costs or deem revenues, and to set rates or levels of service the Board determines are appropriate, notwithstanding the presence of affiliate transactions. The Board considers that its ability to disallow costs or deem revenues provides a very broad basis for the Board to meet its regulatory responsibilities. Given that the onus is on the regulated utility to demonstrate the reasonableness of its costs and the adequacy of the services it provides, and given the consequences of not doing so, the Board expects that utilities will provide the necessary evidence to justify their costs and the particulars of how they provide their services.²³⁸

224. With respect to the prudence of the transactions for the IT and CC&B services, the Commission must be satisfied that the ATCO Utilities' arrangements were reasonable in light of the circumstances at the time. In conducting this analysis, the Commission has had regard to the extensive volume of evidence in this proceeding. The Commission finds that while certain aspect of the costs for the provision of IT and CC&B were prudently incurred, it is not satisfied that all costs related to these services were prudently incurred for the reasons discussed in Section 12 of this decision.

7.5 Prudence of continuing the “For Profit Affiliate Services” arrangements

225. In Decision 2003-040, the Commission approved the ATCO Group inter-affiliate *code* (*the Code*) establishing standards and conditions for interaction between each ATCO utility and other utility and non-utility affiliates.

226. The IT and CC&B services are provided by ATCO I-Tek to the ATCO Utilities as a for-profit affiliate transaction governed by Section 4.1 of the *Code*. Section 4.1 of the *Code*, which deals with for-profit affiliate services, states that each utility shall periodically review the prudence of continuing for-profit affiliate services arrangements:

Where a Utility determines it is prudent in operating its Utility business to do so, it may obtain For Profit Affiliate Services from an Affiliate or provide For Profit Affiliate Services to an Affiliate. If a Utility intends to outsource to an Affiliate a service it presently provides for itself, the Utility shall, in addition to any other analysis it may require to demonstrate the prudence of a For Profit Affiliate Services arrangement, undertake a net present value analysis appropriate to the life cycle or operating cycle of the services involved. Each Utility shall periodically review the prudence of continuing For Profit Affiliate Services arrangements.

²³⁸ Decision 2003-040, page 15.

227. In conjunction with obtaining independent expert third party advice from ISG with respect to fair market value pricing of the Master Service Agreements and related terms and conditions, ATCO engaged Tri-global Solutions Group Inc. (Tri-global) to examine the costs of the following sourcing options available to the ATCO Utilities for IT and CC&B services beyond 2009 as required by the *Code*:

- repatriate IT and CC&B services back into the ATCO Utilities (repatriation) and transition to a self-provision model
- move to a new provider through a tender and transition process (new provider)
- renew with the current service provider under ATCO I-Tek new master services agreements.

228. The ATCO Utilities explained that the business case and Tri-global evidence formed the main tool for communication with the ATCO Utilities senior management regarding both the strategy employed by the ATCO Utilities and the evaluation that had been conducted, as well as, the recommended course of action for IT and CC&B services. This business case was front and center in the decision-making process.²³⁹ The ATCO Utilities submitted that the Tri-global report confirmed that renewing with ATCO I-Tek was the best option available to the ATCO Utilities²⁴⁰ based on a cumulative present value revenue requirement (CPVRR) calculation and risk assessment:

Table 1. Summary of business case CPVRR and risk assessment for the three sourcing options²⁴¹

Sourcing alternative for IT and CC&B Services	CPVRR (\$ million) over 10 years	Difference vs. least cost alternative (\$ million)	Relative risk
Repatriation	886	53	Medium
New provider	848	15	High
Renew	833	–	Low

229. Both Calgary and the UCA expressed concern that the decision process and the underlying assumptions of the business case and Tri-global evidence were biased towards renewing the IT and CC&B arrangement with ATCO I-Tek.

Submissions of Calgary

230. Calgary asserted that the ATCO Utilities' sourcing decision process was fundamentally flawed. In particular, the ATCO Utilities did not adopt and/or carry out many of the sourcing best practices for end-of-term decisions that were prevalent in the 2008 to 2009 timeframe, when the decision to renew with the ATCO I-Tek companies was made. Calgary also raised numerous other issues with respect to the ATCO Utilities sourcing decision process and evidence of Tri-global including the following:

- No sourcing strategy was developed.²⁴²

²³⁹ Transcript, Volume 1, pages 45-46 and 51.

²⁴⁰ ATCO argument redacted, paragraph 74.

²⁴¹ Exhibit No. 116.07, PDF page 5.

- Tri-global did not undertake a detailed analysis of the suitability of shared services, hybrid, multi-sourcing or offshoring models for the delivery of IT or CC&B services.²⁴³
- Tri-global did not conduct research or interviews with outsourcing service providers to validate or confirm what actually happened in 2008 and 2009.
- The ATCO Utilities' approach to make its decision to renew with ATCO I-Tek was based upon a series of workshops, with ATCO I-Tek personnel present.
- No evidence was provided that the ATCO Utilities leveraged the downturn in the economy or recession to gain price concessions or service benefits.
- The ATCO Utilities have continued to avoid using a competitive procurement process for over 15 years while Direct Energy (also a customer of ATCO I-Tek) undertook a competitive procurement process which resulted in them choosing a different service provider.
- The ATCO Utilities' business case and Tri-global's evidence incorrectly assumed fair market value would be the same under a competitive bid process and the renew option despite anticipated interest from established service providers.²⁴⁴
- The ATCO Utilities failed to use independent legal counsel from that of ATCO I-Tek which demonstrates a lack of prudence and consideration for the best interests of customers.

231. Calgary also asserted that the ATCO Utilities fettered their discretion and their responsibility to conduct *bona fide* negotiations in renewing the proposed Master Service Agreements by relying on consultants to establish price which was jointly agreed to by the affiliate:

535 (confidential module)

[REDACTED]

232. Calgary submitted that, as a result of the ATCO Utilities' actions, prices were set by adopting inappropriate measures to establish the base 2010 prices and the 2010-2015 glide paths.²⁴⁵

²⁴² CAL-AU-185(a).

²⁴³ AUC-AU-77(b).

²⁴⁴ Exhibit No. 93.04, Calgary redacted evidence, PDF pages 22-23.

233. With respect to the sourcing business case and evidence of Tri-global, Calgary submitted that there were numerous assumptions and costs that were inconsistent with a proper assessment of the three sourcing options. Specifically, PAC noted that the renegotiation option did not include reference to any negotiation, contract restructuring or transitions cost or associated risks. The assessment of the renew option also did not reference the potential for improved productivity/efficiencies that could be achieved by ATCO I-Tek as the Master Service Agreements matured and these considerations should have been factored into the costs incurred over time. As part of this option, consideration should have been given to leveraging offshore and nearshore labour and partners, particularly due to the fact that ATCO I-Tek has already partnered with Wipro to deliver offshore CC&B services. With respect to the new provider or re-compete option, the business case assumed that it would not be possible to secure reduced prices as compared with the IT and CC&B services provided under the ATCO I-Tek agreement. The repatriation model also assumed a “greenfield” build of IT assets and resources required to deliver IT services internally instead of acquiring depreciated assets that would be stranded with ATCO I-Tek if they lost the business of the ATCO Utilities.²⁴⁶

234. PAC also criticized the 2012 Tri-global update for failing to assess sourcing options for the increases in project/statement of work (SOW) volumes, failing to explain the disproportionate increase in the ATCO Utilities’ staff for IT requirements versus the ATCO Utilities’ customer growth rates, inconsistent application of changes in exchange rates to all business cases, and the use of the Wynford survey which PAC argued inflates the cost of labour because it fails to take into consideration that Edmonton is one of the lower cost locations for IT and business process outsourcing (BPO) service delivery.

235. Calgary argued that the identified flaws of the 2012 business base are fatal and, therefore, completely invalidate it as support for the prudence of the ATCO Utilities’ decision to engage the proposed Master Service Agreements.²⁴⁷

236. Calgary asserted that the lack of a negotiating plan or formal sourcing strategy underscores the fact that there never was any intent of the ATCO Utilities to undertake a *bona fide* commercial negotiation or decision.²⁴⁸ Instead, the decision process and sourcing arrangement between the ATCO Utilities’ appears to be more designed to maximize ATCO Group profits through a sole source, long term renewal arrangement at the expense of customers. Renewing the existing arrangement between ATCO I-Tek and the ATCO Utilities is therefore imprudent. Based on the above, Calgary argued that the Commission must terminate the Master Service Agreements and the arrangement between the ATCO Utilities and the ATCO I-Tek companies as a for-profit affiliate service under the ATCO Code.

237. Calgary also submitted that ATCO I-Tek is not a *bona fide* participant in the marketplace and therefore its services to the ATCO Utilities should not be considered a for-profit affiliate service for the purposes of the ATCO Code.²⁴⁹ Calgary stated that the I-Tek companies have no material presence in the IT and CC&B services marketplace:

²⁴⁵ Calgary redacted argument, paragraph 370.

²⁴⁶ Exhibit No. 93.03, PAC redacted report, from pages 63 to 65.

²⁴⁷ Calgary redacted argument, PDF page 30.

²⁴⁸ Calgary redacted argument, PDF page 112, paragraph 404.

²⁴⁹ Calgary argument, PDF page 113-114.

- I-Tek does not list any customers on its website (www.atcoitek.com).
- I-Tek has no other disclosed ITO/BPO customers outside of ATCO group companies once Direct Energy leaves
- If the I-Tek companies were truly competitive they would be winning substantial work in the marketplace; instead they have lost the only major external contract they had when it came up for renewal.
- ATCO filed no publically available press releases showing ATCO I-Tek to have won contracts apart from The City of Edmonton co-location agreement, which is not a full ITO/BPO arrangement.
- ISG stated that we have not observed I-Tek in an RFI/RFP situation.
- The ISG webpage in its portal for subscribers "Service Provider Search Tool" does not list "I-Tek" nor "ATCO I-Tek" listed as a Service Provider; nor was I-Tek listed in the Horses for Sources review of utility outsourcing providers.
- ISG stated "From what we know of I-Tek they would be classified as a small Vendor", and
- ISG stated that only ■ % of its utility clients have included the I-Tek companies in RFIs and RFPs. [footnotes omitted]²⁵⁰

238. As a result, Calgary argued that the Commission should deem the IT and CC&B services provided by ATCO I-Tek to the ATCO Utilities a shared service. The shared services approach allows ATCO to maintain ATCO I-Tek operations, but removes the margin for such elements as risk, sales, general and administration (SG&A) and profit. Calgary recommended that the Commission apply a 25 per cent reduction to FMV prices (after taking into consideration PAC's FMV adjustment) as an efficient and simple proxy for determining shared service costs which is based on reversing the 33 per cent uplift that was applied by Compass to internal costs in the 2003-2007 benchmark.²⁵¹

7.5.1 Submissions of the UCA

239. Under the *Code*, the UCA submitted that a utility bears the "entire" onus of "clearly" showing prudence and fair market value.²⁵² In other words, utilities choose to incur an increased level of risk when they submit utility-affiliate transaction costs to the Commission as prudently incurred costs.

240. The UCA argued that the EUB specifically rejected the view that utilities could legitimately pay fair market value costs to non-utility affiliates for services that the utility could provide itself:

The Board is of the view that this pricing scheme would permit a low-cost aspect of the utility to be spun-off to a non-utility affiliate, to the advantage of the parent company, so long as a fair market value could be determined. As long as fair market value could be determined, the ATCO Code would permit the parent corporation to charge the fair market value for the good or service, which could be in excess of the utility's stand-alone cost, had the utility continued to provide the good or service. The Board does not accept that this is a reasonable and fair outcome.²⁵³

²⁵⁰ Calgary redacted argument, page 115.

²⁵¹ Confidential Calgary argument, PDF page 19 and 66.

²⁵² Decision 2003-019, pages 58-59, cited in Decision 2003-040, page 76.

²⁵³ Decision 2003-040, page 76.

241. The UCA submitted that the Tri-global report which underpinned the ATCO Utilities' justification for renewing the arrangement for IT and CC&B services with ATCO I-Tek over repatriation and new service provider alternatives is fraught with assumptions and conclusions that are circumspect. Specifically, the UCA submitted the following key weaknesses of the Tri-global report:

- By rigidly adhering to the “like for like” assumption, most notably with respect to data centre construction, the Repatriation Option avoids calculating an estimate of what a repatriation would look like in reality. The model went down unrealistically expensive paths and is hence useless for the purpose of identifying the least cost IT and CC&B solution.²⁵⁴
- The comparative risk analysis ignores the context of a utilities industry that regularly chooses to outsource IT and CC&B functions.
- There are critical gaps in Tri-Global's credibility.²⁵⁵

242. The UCA argued that the Tri-global report and rebuttal evidence are not credible expert evidence and, overall, should be afforded limited weight. The UCA questioned the independence of the report, the lack of knowledge or understanding that Ms. Bagnell had of the utility business, and understanding of the risks that arise from transitioning IT and CC&B to new providers despite examples of other utilities (for example: BC Hydro) that have successfully outsourced to large global IT and CC&B providers. Further, Ms. Bagnell's concluding comments discussing the “the risks of changing to a new business model”, whether “shared services, repatriate/in-house, [or] new provider” was largely a copy and paste of industry literature that she tried to pass off as her own.²⁵⁶

243. In the repatriation option, the UCA also questioned why it was prudent for the ATCO Utilities to provide enterprise applications services to the ATCO Group on a cost recovery basis rather than on a for-profit basis, why there was no transfer or purchase of shared assets included in the cost assessment,²⁵⁷ and the correlation between the rebadging assumptions and the predicted rebadging level of 60 per cent.²⁵⁸

244. The UCA recommended a finding that either repatriation or better investigation of the IT and CC&B outsourcing market would have been the prudent steps for the utilities to take. The UCA concurred with Calgary that deeming ATCO I-Tek a shared service for the duration of the Master Service Agreements, with an associated 25 per cent reduction from ATCO I-Tek's IT and CC&B placeholder prices, is an appropriate resulting placeholder adjustment.²⁵⁹

²⁵⁴ For example: Tri-global's choice of the construction of two data centres fails to take into consideration the potential cost savings of leasing two data centre which would significantly reduce the cost difference of the repatriation option compared with the renew option that does not require this capital investment. The like for like assumptions of the business cases were also unrealistic and ATCO Utilities did not allow Tri-global look for cost efficiencies in the business cases comparisons.

²⁵⁵ UCA redacted argument, PDF page 14.

²⁵⁶ The black text in the confidential Exhibit No. 270 CONF document comparison shows it is a repackaging of text pasted from an article published by the Information Systems Audit and Control Association, known as ISACA (Confidential Exhibit No. 269 CONF).

²⁵⁷ UCA redacted argument, PDF page 20.

²⁵⁸ UCA redacted argument, PDF page 23.

²⁵⁹ UCA redacted argument, page 4, paragraph 12.

7.5.2 Submissions of the ATCO Utilities

245. Throughout the proceeding, interveners challenged the results of the Tri-global report and the ATCO Utilities' business case because of the assumptions used to develop the cumulative present value of revenue requirement and risk assessment. In response to the criticisms to the Tri-global report, the ATCO Utilities made the following submissions in regards to specific issues of contention:

1. The data centre capacity was very tight in the Edmonton market in 2009²⁶⁰ (and a lease option was not available). As well, ATCO I-Tek had ongoing other business requirements that simply did not allow for the existing data centres to be transferred back to the ATCO Utilities.
2. The idea of multi-sourcing was considered but dismissed at an early stage as it was considered likely that this approach would increase costs and certainly increase risks to the ATCO Utilities.²⁶¹
3. Wynford survey was an accepted source for labour that was used by PAC and used by the ATCO Utilities in the 2003-2007 benchmark.
4. A like for like comparison of the three sourcing options was required to accurately assess results of each options for IT and CC&B service.²⁶²

246. Based on the information available at the time, the best option was to renew with ATCO I-Tek which was validated by the updated business case and updated Tri-global report, which took into account such factors as the increase in volumes, the off-shoring to WIPRO and exchange rate differences.

247. With regard to Calgary's recommendation that the ATCO I-Tek arrangement be deemed a shared service, the ATCO Utilities argued that the acquisition of for-profit utility services from an affiliated company are clearly permissible under the *Code* and are clearly different and distinct from a "Shared Service" concept under the *Code*. Further, the for-profit affiliate transaction between the ATCO Utilities and ATCO I-Tek has been treated as such from the outset, and without change, since these services were first established in 1999. The ATCO Utilities and ATCO I-Tek are separate legal entities, with ATCO I-Tek having the ability to enter into commercial contracts with the ATCO Utilities and other parties.²⁶³ The existing relationship between the ATCO Utilities and ATCO I-Tek constitutes a for-profit affiliate service that has been consistently recognized by the Commission since the inception of this relationship and treated as such.²⁶⁴ Therefore, Calgary stated that there is no rational or legal basis to characterize this relationship as something it clearly is not, such as a "shared service," simply to facilitate a theory advanced by Calgary that would allow for retroactive disallowances of the costs that are sought to be recovered by the ATCO Utilities.²⁶⁵

248. The ATCO Utilities also submitted that Calgary's recommended 25 per cent reduction based on a 33 per cent uplift in order to approximate internal costs is unsubstantiated. The only

²⁶⁰ Exhibit No. 188.06, Tri-global report, Section 3.3.5, page 35.

²⁶¹ ATCO reply argument, PDF page 50.

²⁶² ATCO reply, paragraph 55, PDF page 24.

²⁶³ Transcript, Volume 3, page 398.

²⁶⁴ ATCO argument, PDF page 25.

²⁶⁵ ATCO argument, PDF page 25.

source of the 33 per cent uplift has been Compass/ISG, not PAC, and the ISG witnesses stated that internal service providers recorded costs do not include significant general and administrative costs and other amounts that need to be considered.²⁶⁶ The ISG witnesses were categorical in their view that one simply could not reverse the math and come up with a valid "proxy" for what the services would cost if they were performed internally. The ATCO Utilities explained that any adjustment due to the 33 per cent uplift associated with the 2003-2007 benchmark must recognize that:

- First, CC&B comparators were never uplifted in the 2003-2007 Benchmark process.
- Second, no internal service providers for either IT or CC&B were utilized in the 2012 price update.
- Third, the 2012 price update looked at actual pricing in the market, not trending, and validated the pricing in the current Master Service Agreements as being no more than fair market value.
- Fourth, this type of cost model does not reflect all of the costs (overhead, G&A costs, etc.) associated with the internal costs of delivering the subject IT services.(footnote omitted)²⁶⁷

249. As result of the above, the ATCO Utilities asserted that Calgary's proposed 25 per cent reduction to Master Service Agreement pricing provides an incomplete and inaccurate level of cost. Further, it stated that the retroactive 25 per cent price reduction advocated by interveners using some sort of deemed shared services model is based on inappropriately altering the *Code of Conduct* in a retroactive fashion.

7.5.3 Commission findings

250. In the Decision 2003-040, the board explained the onus is on the utility, as with any arrangement, to justify the prudence of the arrangement.²⁶⁸ While the *Code* does not specifically define prudence, the EUB established a test to assess an affiliate arrangement:

In Decision 2002-069, the Board noted that the following conditions provided a reasonable test to determine if an affiliate arrangement should be used by a utility to procure goods or services:

- Does the decision to acquire goods or services from the affiliate affect the utility's ability to operate safely and reliably?
- Is the affiliate the least cost alternative that meets the requirements of the utility?
- Was the purchase of goods or services by the utility at the lesser of FMV, or the cost it would take for the utility to provide similar goods or services itself?²⁶⁹

251. In Decision 2002-069, the board examined whether an affiliate arrangement should be used by a utility to procure goods or services. Arguably, the context of that decision, where a consideration of whether such an arrangement should be approved in the first place, is not exactly the same as the context of this proceeding, in which the Commission must examine whether the continuation of an affiliate arrangement is reasonable and prudent. Moreover, the Commission recognizes that Decision 2002-069 was released prior to Decision 2003-040, which

²⁶⁶ Transcript, Volume 5, pages 886-888.

²⁶⁷ Confidential ATCO Utilities reply argument, PDF page 35, paragraph 81.

²⁶⁸ Decision 2003-040, page 63.

²⁶⁹ Decision 2003-040, page 75.

established the *Code*. However, while the language pertaining to fair market value set out in Section 4.2.2 of Decision 2002-069 may slightly differ from the language of the *Code* in Decision 2003-040, the Commission is confident that the principles outlined in Decision 2002-069 remain relevant and provide the Commission with important guidance. In making its determination, the Commission has taken into account the fact that the principles developed in Decision 2002-069, which were subsequently established as a reasonable test to assess whether an affiliate transaction should be approved, were generally aligned with the views of the various parties that participated in the proceeding leading up to Decision 2002-069. There is no reason those principles would not apply in the context of this proceeding, where the Commission must examine the prudence of the continuation of an affiliate arrangement. Therefore, the Commission continues to believe that the principles outlined in Decision 2002-069 in conjunction with the language of the *Code* provide an important basis to examine whether the continuation of an affiliate arrangement is prudent.

252. Further, the board also stated that a utility must ensure that customers are not harmed by the affiliate transactions and is required to clearly show that the prices paid for the affiliate services is less than the cost that the utility have performed the services in-house versus the cost of the third party:

The Board has previously noted its view that it is appropriate for affiliate transactions to occur in situations where customers are not harmed by those transactions, and moreover, where the choice of purchasing goods or services from the affiliate is prudent. In order that customers are not harmed by affiliate transactions, it is necessary to ensure that these transactions occur at a reasonable price, that the reasonableness of that price can be clearly determined, and that the price paid is less than what it would have cost for the utility to either provide the goods or services itself or have them procured from a third party, all else being equal.²⁷⁰

253. The Commission finds that there is no evidence on the record that raises substantial concern that renewing the IT and CC&B arrangement with ATCO I-Tek would negatively impact safety or reliability.

254. Although the Tri-global report provided a cost analysis that indicated that renewing with ATCO I-Tek was the least cost option available to the ATCO Utilities²⁷¹ based on a cumulative present value revenue requirement calculation and risk assessment, interveners expressed significant concerns about the reasonableness of the underlying assumptions of the business cases and decision process. The Commission concurs with interveners that certain assumptions used in the business cases resulted in the costs of the comparative sourcing alternatives being inflated. In particular, the repatriation option included potentially higher costs through the greenfield build of two data centres versus investigating leasing alternatives, while also failing to consider the lower costs that might arise from the purchase of partially depreciated assets that would be stranded with ATCO I-Tek if the ATCO Utilities were no longer a customer. The ATCO Utilities and Tri-global also prematurely dismissed the suitability of shared services, hybrid, multi-sourcing or offshoring models for the delivery of IT or CC&B services. The Commission is of the view that a utility would likely have explored the cost/benefit of these

²⁷⁰ Decision 2003-040 page 75.

²⁷¹ ATCO argument redacted, paragraph 74.

alternatives in more depth had the IT and CC&B arrangement been with an unaffiliated third party.

255. While the Commission has expressed some reservations with respect to the assumptions used in the business case, the Commission notes that the cumulative present value revenue requirement analysis of the repatriation option excluding transition and start-up costs results in a cumulative present value revenue requirement of \$818 million²⁷² which is lower than the cumulative present value revenue requirement of the renew option. Based on the above, the Commission considers that the evidence on the record raises significant doubt that the renew option is the least cost alternative and that the ATCO Utilities are likely able to provide the service in-house at a lower cost without the burden of the increased regulatory scrutiny and associated costs where affiliate transactions are involved.

256. In addition, the Commission considers that the decision process and negotiations between ATCO I-Tek and the ATCO Utilities are inconsistent with what would be expected if the transaction were between two arm's length parties. The Commission finds that a utility acting prudently and with proper due diligence would have negotiated pricing and terms of conditions of the Master Service Agreements instead of relying solely on consultants to establish fair market value pricing for the Master Service Agreements based on price trending and glide paths. Further, the Commission considers that the onus resides with the utility to show that the affiliate transaction not only conforms with the inter-affiliate *code* but also ensures that there is no perception that the affiliate arrangement and pricing were not negotiated in good faith. The Commission considers that the utilization of one law firm to represent both sides of the transaction raises potential conflict of interest concerns and weakens the argument that the ATCO Utilities and ATCO I-Tek can be treated as independent contracting parties.

257. The Commission also considers that the ATCO Utilities' decision to avoid a competitive procurement process for approximately 15 years is inconsistent with a utility acting prudently and in the best interest of customers. The Commission considers that contracting for IT and CC&B services with a for-profit affiliate acts as an impediment to dispassionately considering a competitive procurement process. Direct Energy's use of a competitive procurement process and subsequent termination of its contract with ATCO I-Tek to move to a new provider underscores the perceived absence of independent decision making by the ATCO Utilities.

258. The Commission finds that the processes employed for the decision making process and sourcing business cases resulted in the likelihood that renewing the existing arrangement with ATCO I-Tek would be shown to be the least cost option. The ATCO Utilities' failure to adequately consider a competitive procurement process over the last 15 year period, lack of IT and CC&B sourcing strategy, reliance on price benchmarks and trending determined in cooperation with ATCO I-Tek in place of independent Master Service Agreement negotiations to determine fair market value pricing, and lack of independent legal representation between ATCO I-Tek and the ATCO Utilities points to a misalignment of interests between the ATCO Utilities and their customers.

259. There is considerable doubt that the affiliate transaction with ATCO I-Tek is the least cost sourcing option for IT and CC&B services and that the underlying assumptions of the

²⁷² Exhibit No. 124.01, AUC-AU-23(a).

business case and prudence review of continuing the for-profit affiliate services arrangement is consistent with a utility acting prudently and in the best interests of the ATCO Utilities or their customers. The *Code of Conduct* says when a utility acquires for-profit affiliate service, it shall pay no more than fair market value (fair market value effectively being a ceiling).²⁷³ Based on the above, the Commission finds that the ATCO Utilities have failed to meet the requirements of Section 4.1 of the *Code*, the prudence test articulated by the board in Decision 2002-069, and the no harm criteria outlined in Decision 2003-040.

260. With respect to the recommendation by Calgary to deem the affiliate arrangement a shared service and apply a 25 per cent reduction to the PAC adjusted Master Service Agreement pricing, the Commission considers that it would be unreasonable to change the treatment of the IT and CC&B services approximately four years into the proposed Master Service Agreement, especially without the benefit of significant costing information on the record. Further, IT and CC&B services have been provided on a for-profit basis since 1999, and nothing on the record or in the Commission's *inter-affiliate code* clearly defines the criteria of what constitutes a bona fide market participant (for example: revenue or number of customers). The Commission also agrees with ATCO that applying a 25 per cent reduction to ATCO I-Tek Master Service Agreement pricing based on reversing the 33 per cent uplift that was applied to the internal providers used in 2003-2007 benchmark may not adequately take into consideration the acquired economies of scale and overall efficiencies of ATCO I-Tek which may not be reasonably duplicated by an internal provider. Further, the uplift on internal provider costs in the 2003-2007 benchmark was only applied to IT comparators; CC&B was solely benchmarked to external comparators. The Commission therefore denies Calgary's recommendation to deem the affiliate arrangement a shared service and related proxy adjustment for the past services since 2010. However, pricing for the services commencing in 2010 is presented below.

8 Assessment and determination of fair market value prices

261. As documented in the history section of this decision, the selection of Compass/UtiliPoint by the CPC to conduct a benchmark for the period 2003 to 2007 was approved by the board in 2007. Compass/UtiliPoint developed its Benchmarking Report under the direction of the CPC. All CPC members signed off on the report. During the hearing procedure to review the report²⁷⁴ the ATCO Utilities engaged Compass/UtiliPoint as their expert witness for the subsequent compliance applications and the first Evergreen application.²⁷⁵ Compass (now combined with ISG) and UtiliPoint have continued to be engaged as the ATCO Utilities expert witnesses throughout the original and updated applications in the current proceeding. The engagement included workshop presentations that included both the ATCO Utilities and ATCO I-Tek personnel.

262. As part of its updated application, ISG was retained by the ATCO Utilities to "review the Master Service Agreement (MSA) 2010 and 2011 price schedules as well as the Master Service Agreement's terms and conditions. The objective of this review was to identify any changes that

²⁷³ Decision 2003-040: ATCO Group Inter-Affiliate Code of Conduct, Application No. 1237673, May 22, 2003. Page 8 of Appendix 5, Section 4.2.1 which states in part "When a utility acquires For Profit Affiliate Services it shall pay no more than the Fair Market Value of such services." (underlining added)

²⁷⁴ Proceeding No. 32.

²⁷⁵ Proceeding No. 77.

have occurred over the period since the Original (2009) Application.”²⁷⁶ ISG/UtiliPoint was also engaged to provide expert advice and consulting services throughout the Master Service Agreement negotiation process.²⁷⁷

263. ATCO Utilities described the way in which the Master Service Agreements were reviewed as follows:

The MSAs contained in the Original Application reflected the expert views of Compass (now ISG) and Utilipoint International Inc. (“ISG/Utilipoint”), who provided information to the ATCO Utilities regarding the provisions of the existing MSAs that should be changed or updated to reflect marketplace conditions in 2009. The expert advice provided to the ATCO Utilities confirmed that a number of items had evolved over the period since the previous MSAs were executed. The ATCO Utilities used the input from ISG/Utilipoint as the basis for the negotiations with ATCO I-TEK (“I-TEK”) in 2009. ISG/Utilipoint conducted a review of the final MSAs and their views are expressed in the expert evidence filed in this application. The evidence in the Original Application of ISG and Utilipoint detailed the major changes that were incorporated into the IT and CC&B MSAs, respectively.²⁷⁸

264. ISG described itself as “a leading technology insights, market intelligence and advisory services company, offering clients one source for support in driving operational effectiveness.”²⁷⁹ ISG also described itself as providing business and IT benchmarking, performance improvement, data and analytics services. It also described itself as operating in 21 countries having sophisticated proprietary analytical models and a comprehensive database of IT performance metrics to help identify and address operational performance issues. Specifically, the database is described to contain cost, productivity, quality, cycle time and best practices data for both insourced and outsourced organizations. Moreover, ISG has a proprietary set of tools and methodologies designed specifically for benchmarking.²⁸⁰

265. ISG indicated that it estimated the fair market value for the scope of IT and CC&B services provided by ATCO I-Tek over the 2010-2011 timeframe by calculating the average fair market value from a set of “Reference Group” comparators providing similar services with similar economies of scale during a similar time frame in the North American market. Material differences between the scope of services provided by ATCO I-Tek and those of the Reference Group are stated and adjusted for, as are material differences in environmental complexity, workload, and service loads.

266. The following summarizes the IT and CC&B costs as submitted by the ATCO Utilities in the original and updated applications:

²⁷⁶ Exhibit No. 116.03, ISG report, page 1.

²⁷⁷ Exhibit No. 116.01, ATCO Utilities updated application, page 5 of 17 at paragraph 12.

²⁷⁸ Exhibit No. 116.01, ATCO Utilities updated application, page 5 of 17 at paragraph 11.

²⁷⁹ Exhibit No. 116.03, ISG report, page 3.

²⁸⁰ Exhibit No. 116.03, ISG report, page 3.

Table 2. Summary of IT and CC&B costs

ATCO original application (Exhibit No. 2 – July 31, 2009)							
	2010	2011	2012	2013	2014	2015	Total
	(\$)						
IT	53,735,501	54,679,929	54,961,928	56,310,010	57,562,191	59,244,972	336,494,531
CC&B	35,258,385	35,969,523	36,705,947	37,438,651	38,195,866	40,746,981	224,315,352
Total	88,993,885	90,649,452	91,667,875	93,748,661	95,758,057	99,991,953	560,809,883
ATCO updated application (Exhibit No. 116.07 CONF – Sep 21, 2012)							
	2010	2011	2012	2013	2014	2015	Total
	(\$)						
IT	██████████	██████████	██████████	██████████	██████████	██████████	██████████
CC&B	██████████	██████████	██████████	██████████	██████████	██████████	██████████
Total	██████████	██████████	██████████	██████████	██████████	██████████	██████████

267. Calgary and the ATCO Utilities retained their sourcing experts to review the IT and CC&B Master Service Agreements and assess whether the resultant prices were consistent with Fair Market Value.

268. PAC was retained by Calgary to provide a review of the proposed 2010-2015 IT and CC&B Master Service Agreements between the ATCO Utilities and ATCO I-Tek as well as the business case filings. PAC stated that it is a multi-disciplinary, global consultancy operating primarily in North America and Europe offering services to both the private markets and government sectors. PAC stated that the “consultants who participated in this proceeding were experienced in outsourcing, energy, utility benchmarking, IT and business operations.”²⁸¹

269. PAC asserted that a key part of its analysis was to provide its “expert view on sourcing market best practices and pricing for outsourced IT and CC&B services based on PAC’s 20+ years of experience as a sourcing advisor helping utilities and global companies develop, negotiate and implement new IT and BPO arrangements.”²⁸² PAC stated that its analysis was based on market insights and relevant data adjusted and normalized to make it comparable with the ATCO Utilities environment.

270. The data provided in the PAC report was obtained from documents and information requests provided by the ATCO Utilities and PAC’s internal sources and market data from prior studies for companies providing similar types of IT and CC&B Services in North America.²⁸³ Specifically, for IT services, PAC used data from past IT outsourcing contracts and pricing from 2009-2010. For CC&B services, PAC used data from the Polaris benchmarking program as comparator information to assess the market prices.²⁸⁴

²⁸¹ Exhibit No. 93.03, PAC report, page 19 of 134.

²⁸² Exhibit No. 93.03, PAC report, page 10 of 134.

²⁸³ Exhibit No. 93.03, PAC report, page 21 of 134.

²⁸⁴ Exhibit No. 93.03, PAC report, page 73 of 134.

271. PAC recommended that the prices in the IT and CC&B MSAs be reduced. In the case of IT, PAC recommended a reduction of [REDACTED] in the total contract value. In the case of CC&B, PAC recommended a reduction to the total contract value of [REDACTED]

272. The Commission considers that the methods used by both expert parties to arrive at a fair market value are, at a high level, generally similar. Both utilize proprietary databases, contract comparisons and information specific to the ATCO Utilities and ATCO I-Tek. However, the differences and questions regarding the data presented, its confidentiality, and its lack of scientific and statistical foundation present the Commission with significant challenges in drawing conclusions.

9 Information technology (IT)

273. In this section the Commission will review the IT prices. As mentioned previously, the ATCO Utilities amended their application in 2011 and then updated their application in 2012. The IT costs as reflected in the original application and subsequent amendment and update are captured in the table above. PAC's recommendations for IT costs from its 2012 market assessment and 2013 supplemental evidence are also reviewed in this section.

9.1 ISG methodology used to establish a fair market value for IT in 2010 Evergreen

274. The procedure used by ISG to establish fair market value pricing involved comparing the Master Service Agreement with contracts from third party providers with similar arrangements, or from an internal source providing similar functions. Both internal providers and third party providers are considered comparators. The comparator arrangements included services and/or equipment that can be divided into various 'towers' for the purpose of the comparison. Each tower is made up of similar or related activities. The IT towers identified in this proceeding were applications, mainframe, storage, network, end use computing (workstation) and labour. The pricing of the towers from each of the comparators selected was used to arrive at an average price. Depending on the timing, detail and rigour used the procedure is referenced as a benchmark or a price validation of that found in the marketplace.

275. During questioning by the Commission²⁸⁵ the witnesses for ISG provided a description of the procedures they follow to arrive at a fair market value for IT pricing. Based on the testimony provided by Mr. Kawamoto and Mr. Fowler, the Commission understands that ISG's methodology has evolved between when it was first retained in 2007 and when it performed its price validation for 2010 in 2012. ISG gave the following explanation in respect of internal comparators, the development of the database and in respect of current processes:

ISG used the following methodology in its early benchmarking:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

²⁸⁵ Confidential Transcript, Volume 5, pages 997-1021.

Evergreen Strategy when determining the rates for 2010. The volume changes from 2007 to 2009 were also reviewed and an overall spend at 2010 rates was calculated to ensure the overall spend was reasonable. The second step then analyzed the typical decline in unit prices of similar agreements so that similar trends could be applied to the 2011-2015 rates.²⁹²

281. In AUC-AU-42(a) ISG explained that to establish the rates for 2010 a similar process to that used to establish the 2008 and 2009 rates in Evergreen I²⁹³ was used.

The trends identified in the Evergreen Strategy that was delivered with the 2003-2007 Benchmark Report were used to extend the 2009 rates to 2010. For example, on page 4 of the Evergreen Strategy, Compass estimated the expected decline in the overall rate for a CPU minute to be roughly 3% per year. In order to derive the 2010 rate, Compass reduced the 2009 rate by 3%. This is a similar process to that used to derive the 2008 and 2009 rates.²⁹⁴

282. In response to questioning from Commission counsel, ISG/Compass explained that they determined the fair market value by first selecting suitable comparators and then using their data to arrive at an average. Mr. Fowler described it as follows:²⁹⁵

6 A. MR. FOWLER: I'm not sure I can answer that
7 question. From my experience and from -- I'll let
8 Mr. Kawamoto speak to ISG, but from my time at Compass, we
9 believed that the average provided a better indicator of
10 for-target pricing, and, in this case, fair market value,
11 than other -- other presentations really.
12 A part of that reason is that it does
13 represent the range of pricing. We recommend a single value
14 because that gets away from an argument, you know, high end
15 and low end, which end of the spectrum should you be on.
16 Just in my perspective, in terms of defining fair market
17 value, because it's not possible for -- mathematically for
18 everyone to achieve a price in the market that is either not
19 the medium or the average, then you're artificially, to me,
20 representing the market.

283. ISG/Compass explained that the comparators selected were all North American although that didn't mean a comparator didn't outsource to an offshore provider.²⁹⁶ Generally, 10 to 20 agreements per clause, depending on the clause, were reviewed. They all supported a broad set of IT services similar to those provided by ATCO I-Tek (desktop, storage, server, LAN, WAN, etc.). All of the agreements supported regional operations and some agreements included global operations. Depending on the clause, the maximum number of comparators that were utilities was two.²⁹⁷

²⁹² Exhibit No. 1, PDF page 216.

²⁹³ Proceeding No. 77.

²⁹⁴ AUC-AU-42(a).

²⁹⁵ Transcript, Volume 2, pages 293-294.

²⁹⁶ Transcript, Volume 2, page 319, lines 2-25.

²⁹⁷ Exhibit No. 61.01, AUC-AU-78(b) and (e).

284. ISG conducted its analyses of the ATCO I-Tek pricing and the Master Service Agreement contract terms utilizing a proprietary database of contracts provided to ISG by its clients on a confidential bases. The template for collecting the data was also considered proprietary.

285. [REDACTED]

286. [REDACTED]

[REDACTED]³⁰⁰ ATCO considered that a critical component of a benchmarking exercise was the determination of a comparator group that was reflective of the target company. “As explained by ISG on a number of occasions, it sought to obtain the best match for the suite of services being purchased by the ATCO Utilities from ATCO I-Tek.”³⁰¹

287. During cross examination ISG also explained how the comparator price was determined for each tower:³⁰²

- 11 Q. I see. Okay. Thank you.
 12 Now, I just have one clarification question
 13 about how the target price for each of the towers was
 14 calculated. How exactly was that done?
 15 A. MR. KAWAMOTO: So the methodology is to select
 16 comparable contracts from the industry, adjust those based on
 17 size, service levels, scope -- the overall scope, complexity,
 18 and a number of other factors.
 19 Upon making those adjustments, we then take a
 20 look at the -- at the average of the normalized pricing to
 21 come up with the comparator pricing for each tower.

288. ISG further explained that normalization of the comparator pricing was dependant on the service level (being aggressive or not), internal costs of internal providers, the source industry, and the service volume.³⁰³

289. In the original application,³⁰⁴ and confirmed in the amended application, ISG/Compass provided a new pricing structure for the new Master Service Agreements that ISG claimed was

²⁹⁸ Confidential Transcript, Volume. 1, pages 51-55.

²⁹⁹ Confidential Exhibit No. 136.29 CONF, CAL-AU-92.

³⁰⁰ Confidential Exhibit No. 136.49 CONF, CAL-AU-107(i).

³⁰¹ ATCO Utilities redacted argument, paragraph 81.

³⁰² Transcript, Volume 2, page 295.

³⁰³ Transcript, Volume 2, page 296, lines 3-24.

³⁰⁴ Exhibit No. 1, ATCO Utilities Evergreen II application (original), Compass testimony, pages 22-25 of 28.

consistent with the structure of other IT services agreements. ISG stated that the pricing recognized that the utilities required a base level of services (base operate, which represents the majority of IT service costs) to operate and a level of investment each year was required for growth, new functionality, and regulatory changes (grow/adapt). ISG submitted that the level of investment will fluctuate year to year, “making it difficult to identify productivity and efficiency gains separately from fluctuations in investments.”

290. ISG believed that the utilities should be expected to realize productivity and efficiency improvements in their base operate costs year-on-year. The base operate costs were not expected to remain static as unit prices are adjusted on an annual basis in accordance with contractual cost of living adjustments (COLA). “In addition, investments (represented by the grow/adapt curve in Chart 1) will increase the volume of work required in the base operate.”³⁰⁵

291. ISG claimed the primary benefits of this structure include:

- Defined level of cost savings for base services over the term of the agreement
- More well defined pricing structures that are consistent with full-service IT services agreements

And,

Conceptually, the pricing model over the term of the agreement appears as follows:

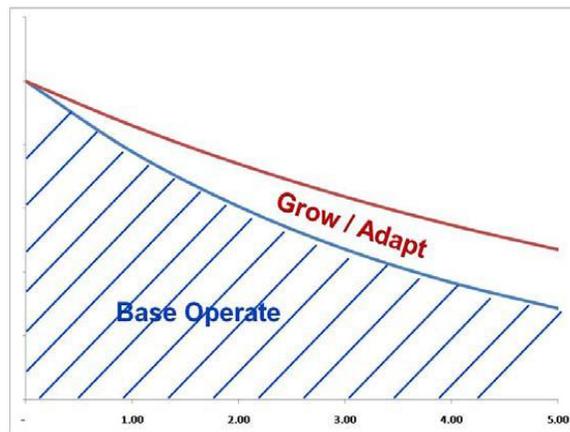


Chart 1³⁰⁶

292. ISG submitted that the impact on the new pricing structure on the cost for base services would “decline by roughly 10% over the term of the agreement.” ISG noted that that overall spend for IT services does depend on the level of investment due to growth, demand for new and existing services, and changing business requirements.³⁰⁷

³⁰⁵ Exhibit No. 1, ATCO Utilities Evergreen II application (original), Compass testimony, page 22 of 28.

³⁰⁶ Exhibit No. 1, ATCO Utilities Evergreen II application (original), Compass testimony, pages 22-23 of 28.

³⁰⁷ Exhibit No. 1, ATCO Utilities Evergreen II application (original), Compass testimony, page 24 of 28.

293. ISG/Compass anticipated that the new pricing structure would impact other areas positively, such as forecasts and benchmarking. ISG/Compass made the following statement and provided the Chart to illustrate the components associated with the pricing structure:

In the case of the ATCO Utilities, there are four inter-related components associated with the pricing structure. Continuity between the components is critical and Compass believes that the new pricing structure will facilitate benefits leading to improved forecasts and lower pricing over the term of the agreement.³⁰⁸

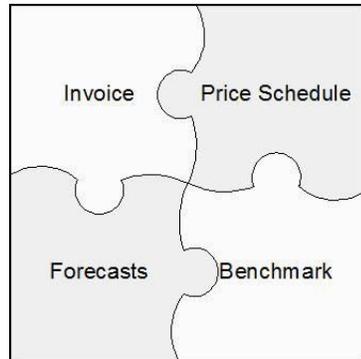


Chart 2

294. ISG stated that the following describes Chart 2:

- Price Schedule – developed by I-Tek and published to the Utilities. In the new agreement, unit pricing will be set in Schedule D at the start of the agreement and will decline year-on-year for the term of the agreement. This decline will be off-set by the application of COLA to the inflation sensitive components (primarily labour) associated with the IT services. It is Compass’ recommendation that I-Tek continue to work with the Utilities to simplify pricing.
- Invoice – I-Tek will generate an invoice on a monthly basis reflecting the actual consumption of the Utilities (on an individual Utility basis). It is important to understand that invoicing will be based on actual consumption (volumes), not the volumes in the Schedule D. Invoicing will also reflect investment spending (projects, etc.) that are not reflected in the volumes of Schedule D.
- Forecast – the Utilities will be in a position to modify the manner in which they present forecasts to the Commission for approval. One benefit is the elimination of the need for “Variable” items in the forecast.
- Benchmark – the benchmark process will be improved as a result of the consistency of all of the components.³⁰⁹

295. Once the new pricing structure was determined, ISG conducted a two-step process to validate the pricing for the new Master Service Agreement (Schedule D) for 2010 thru 2015.

³⁰⁸ Ibid.

³⁰⁹ Ibid.

“The initial step involved establishing the 2010 rates and the second step was to project the rates over the term of the agreement (2011-2015).” Validating the 2010 rates involved applying the principles of the Evergreen Strategy delivered with the 2003-2007 Price Benchmark. It also involved analyzing the results of the 2003-2007 Price Benchmark. ISG considered it necessary look at both the benchmark results and the trends from the Evergreen Strategy when determining the 2010 rates, given the detailed level of billing units required by the agreement. The same process was used in determining the 2008 and 2009 rates in the Evergreen I proceeding.³¹⁰

296. The second step involved projecting the rates over the term of the agreement. The change in pricing was analyzed by Service “over similar terms of comparable agreements in order to derive the average year-on-year decline in unit pricing. The average decline was then applied to the individual billing units within the Service year on year.”³¹¹

297. In the updated application, ISG provided comments on the analysis it performed in 2012:

With respect to IT, the ISG report (Attachment 1) determined that based on its 2012 analysis of relevant agreements entered into during 2008-2010, estimated fair market value pricing was 3.4% lower than I-TEK pricing in 2010 and 3.0% lower than I-TEK pricing in 2011. ISG’s evidence (Attachment 2 Q.36) confirms that the 2010 MSA is performing as designed and no adjustment is required. The difference in pricing in 2010 and 2011 has been proven to be reasonable and competitive with the market, even though the ATCO Utilities MSAs were negotiated in 2009. The ATCO Utilities submit that the differences outlined above are within a reasonable expectation given the long term nature of the MSA’s and therefore support the full recovery of costs based on the MSA pricing. The ISG report confirms that the MSA’s including pricing, are reasonable and prudent.³¹²

9.2 PAC IT market assessment

298. PAC performed a sourcing and market review to assess how the proposed 2010-2015 IT Master Service Agreements between the ATCO Utilities and ATCO I-Tek compared to sourcing best practices and 2010 market prices given the service level and scope defined in the Master Service Agreements. In the market review study, PAC reviewed the 2010-2015 IT Master Service Agreements and provided an assessment of 2010 actual market pricing for similar outsourced IT services given sourcing trends, deals and technology changes over the last five years. PAC stated that this analysis was not intended to replicate the 2003-2007 Benchmarking report prepared by Compass/UtiliPoint but to compare 2010 ATCO I-Tek IT Master Service Agreement prices to actual 2010 market price based on 2010 actual contracts rather than trended historical data.

299. Based on the scope of ATCO I-Tek’s 2010-2015 IT Master Service Agreement services, PAC’s market review first determined key technology towers and components that were most impacted by these trends and are viewed as “standard” and commodity offerings in the market today.³¹³ These towers include:

³¹⁰ Exhibit No. 1, ATCO Utilities Evergreen II application (original), Compass testimony, page 25 of 28.

³¹¹ Ibid.

³¹² Exhibit No. 116.01, ATCO Utilities updated application, pages 10-11, paragraph 25.

³¹³ PAC evidence, March 21, 2012, page 76.

- applications services including support, development, maintenance, enhancement and application service provider
- project labour rates
- mainframe processing services (operations)
- distributed application services – server hosting, support and management
- storage
- end user services including PC support and helpdesk
- network services

300. These towers were mapped to the ATCO I-Tek Master Service Agreements.³¹⁴ In the alignment and categorization of IT towers, PAC noted that:

[REDACTED]

³¹⁵

301. In contrast, ISG submitted that:

[REDACTED]

[REDACTED]

³¹⁶

302. Following the mapping, [REDACTED]

[REDACTED]

303. [REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

³¹⁴ AU-CAL-13.

³¹⁵ PAC supplemental evidence, January 7, 2013, page 19.

³¹⁶ Rebuttal evidence of ISG, May 15, 2013, page 15.

[REDACTED]

311. In order to obtain like for like data points, ISG stated:

[REDACTED]

312. PAC pointed out that in ISG’s 2012 price review only [REDACTED] of its [REDACTED] comparators were electric or gas utilities, and on average only [REDACTED] per cent of the tower data points used by ISG to determine IT fair market value were utility data points.³²⁵ Further, a high number of the contracts used by ISG were stale dated. Calgary considered that:

A price or term negotiated in [REDACTED] is not “reached” anywhere near the relevant 2010 starting year of the Proposed MSAs. Data and information from these stale dated contracts was used to support ATCO’s evidence on IT prices, all labour rates (including CC&B), IT glide paths, and MSA terms. Thus a material and substantial portion of ATCO’s evidence is highly questionable.³²⁶

313. PAC considered that the appropriate basis for negotiating the pricing of the ATCO 2010-2015 Master Service Agreements is the total contract value. A partial period snapshot of 2010 to 2011 (partial contract period), such as that used by ISG for the price review, does not reflect how a vendor would price its services. In fact, the larger the overall contract value and term, the more price incentives vendors will provide to win a deal.³²⁷

314. In contrast, ISG did not agree that:

[REDACTED]

³²³ Confidential Transcript, Volume 5, page 956.
³²⁴ Confidential Exhibit No. 188.04 CONF, confidential ISG rebuttal evidence, May 15, 2013, page 11.
³²⁵ Confidential Calgary reply argument, March 17, 2014, paragraphs 283-284.
³²⁶ Confidential Calgary reply argument, March 17, 2014, paragraph 17.
³²⁷ Exhibit No. 154.03,PAC redacted supplemental evidence, January 7, 2013, page 9.
³²⁸ Confidential Exhibit No. 188.04 CONF, confidential ISG rebuttal evidence, May 15, 2013, page 24.

315. ISG indicated [REDACTED]
[REDACTED]
[REDACTED] In addition, there are drawbacks to using total contract value as the basis for contract selection. In some circumstances, a vendor will subsidize low pricing for a service with higher pricing for other services. If such a contract was used for comparison purposes, an adjustment would be required to both services to ensure that the contract truly reflected fair market pricing. If the services were provided under separate agreements, the subsidization may not be apparent, in which case use of a contract only for a specific service may include pricing that is well above or well below fair market value.

316. While PAC considered that ISG used a partial snapshot of the 2010 to 2011 contract period to establish pricing, ISG pointed out that the pricing in the Master Service Agreements was negotiated in the 2008 to 2009 timeframe.

317. Regarding the collection and review of ATCO I-Tek 2010-2015 Master Service Agreement information and price schedules, while both PAC and ISG used ATCO I-Tek invoices to establish baseline pricing of ATCO I-Tek services, in its analysis ISG stated:

The difference is that the I-Tek invoices represented only one input into the ISG analysis. The I-Tek invoices only tell a portion of the story. In addition to the detailed review of the invoices undertaken by ISG, there were nine onsite data collection workshops/stakeholder interviews conducted with ATCO and I-Tek to obtain a better understanding of the operational environment, the challenges in providing the service, customer satisfaction and other contextual information. This process allowed ISG to better select industry contracts that were similar to the ATCO/I-Tek agreement, as well as to make the necessary pricing adjustments based on the quantitative data available and the qualitative information gathered.³²⁹

318. ISG considered that the PAC selection of comparison contracts was critically flawed because it included pricing for any in-scope services in the contracts as part of the comparator panel. Given the large number of contracts reviewed, it is highly unlikely that all contracts were sufficiently comparable to the ATCO/I-Tek services that they would have similar scope of services, volumes of work and service levels and technology complexity.

319. Further, ISG submitted [REDACTED]
[REDACTED]
This brings into question the comparability of the services in the PAC comparator contracts and/or whether some of the service pricing subsidized other services and/or whether appropriate adjustments were made to the comparator pricing to match the ATCO/I-Tek services.

320. Calgary noted that the ISG contracts did not include the key criterion that the contracts were negotiated in the 2008-2010 time period, as was the case with PAC's IT contract comparators. This is a key distinction, and confirms that the PAC comparators were "actual

³²⁹ Confidential Exhibit No. 188.04 CONF, confidential ISG rebuttal evidence, May 15, 2013, page 14.

prices experienced in the marketplace during the timeframe” under examination, namely 2008 to 2010, as required under the ATCO Code to test fair market value.³³⁰

321. [REDACTED]

322. [REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

323. PAC considered that ISG’s fair market value estimation methodology had similarities to that of PAC. However, the PAC analysis considered additional normalizations and validation factors, not employed by ISG. In particular, those differences are in the use of quartiles rather than average to determine fair market value, normalization of location and labour costs and foreign exchange effect.³³¹

324. While PAC indicated it completed a normalization process and screened its samples for outliers, ATCO argued that this was not evident in the information provided:

99. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (6T1168-1171 - confidential). In the ATCO Utilities submission, this degree of normalization casts complete doubt on the validity of the exercise and clearly leads to the conclusion that one is not comparing the same services, service levels, volumes or other key criteria that are vital to maintaining the integrity and validity of the exercise that PAC is supposedly seeking to complete.³³²

325. The ATCO Utilities also submitted that not adjusting for service levels will result in pricing that may be many multiples different from normalized pricing, depending on other

³³⁰ Confidential Calgary reply argument, March 17, 2014, page 55.

³³¹ Calgary argument, paragraph 427.

³³² Confidential ATCO Utilities argument.

adjustments that may be required, which may explain the variances that exist in the PAC data.³³³ In addition, the ATCO Utilities argued that PAC did not make adjustments to reflect economies of scale, differences between internal costs and external prices, and the size of utilities it relied upon, making the PAC approach inferior to that utilized by ISG.³³⁴

326. In determining fair market value, PAC considered that fair market value was not usually represented by a single discrete price point for services but rather a range of values. PAC defined fair market value pricing as pricing that is in the lowest 25 to 50 per cent of a representative sample of market prices from comparable companies and well-managed outsourcing suppliers, defined as Quartile 2 pricing.³³⁵ [REDACTED]

[REDACTED]³³⁶

327. ISG stated that:

[REDACTED]

[REDACTED]³³⁷

328. The ATCO Utilities argued that once quartiles were determined the remaining data plays no further role in the determination of fair market value. Further:

110. This is to be contrasted with the approach adopted by ISG, which relies upon an average to determine the point specific Fair Market Value. The average takes into account all of the contracts that are included in the comparator sample, which has been determined by ISG on a valid and rigorous basis. As stated by ISG, the average represents a range of market prices (2T292-293). As such, the ISG Fair Market Value determination takes into account all contracts that form the comparator group, as they are all reflective of what is available in the marketplace for the subject service(s).³³⁸

329. The ATCO Utilities considered that the approach and methodology employed by ISG was the same as that presented to and accepted by the Commission in the 2003-2007 Benchmarking as well as the 2008-2009 Evergreen proceeding. Noting the Commission findings in Decision [2012-272](#),³³⁹ the ATCO Utilities argued that:

79. This is to be contrasted with the approach and methodology employed by PAC, which has not previously been considered or approved by the Commission. In fact, in PAC's most recent appearance before the Commission in the EPCOR proceeding

³³³ Confidential ATCO Utilities argument, paragraph 104.

³³⁴ Confidential ATCO Utilities argument, paragraph 105.

³³⁵ Exhibit No. 93.03, PAC evidence, April 5, 2012 page 74.

³³⁶ Confidential PAC supplemental evidence, January 7, 2013 page 21.

³³⁷ Rebuttal evidence of ISG, May 15, 2013, page 37.

³³⁸ Confidential ATCO Utilities argument.

³³⁹ Decision 2012-272: EPCOR Distribution & Transmission Inc., 2012 Phase I and II Distribution Tariff, 2012 Transmission Facility Owner Tariff, Application No. 1607944, Proceeding ID No. 1596, October 5, 2012.

referenced above, it was found that PAC's methodology suffered from significant shortcomings relating to comparability and normalization that made the results unacceptable. Based on the evidence presented in the current proceeding, it is evident that the exercise completed by PAC suffers from the same deficiencies.³⁴⁰

330. In contrast, Calgary submitted that the ATCO Utilities' claims with respect to PAC and Decision 2012-272 are of no relevance to this proceeding and it's contentions with regard to any comparison to its activities in this proceeding should be disregarded.

256. ATCO has mischaracterized the issues at play in the EPCOR proceeding which involved PAC. The reasons for the Commission not fully accepting PAC's analysis in Decision 2012-272 are very specific and apply to an entirely different issue, and do not relate to the price review methodology employed by PAC in this Proceeding. ATCO has provided no evidence to suggest that PAC is employing the EPCOR methodology and data in this Proceeding. Of course not. That simply is not happening.³⁴¹

331. Based on its analysis, PAC considered that the 2010 actual IT Master Service Agreement prices were an average of approximately █ per cent higher in aggregate than fair market value threshold pricing. And that a reduction of █ would be required to bring IT Master Service Agreement prices with fair market value range, as noted in the following table:

Table 3. PAC summary of IT market assessment findings^{342 343}

ATCO Utilities IT MSA spend by tower	ISG 2010 findings		% Labour Component	PAC 2010 market price assessment		
	I-Tek baseline (\$MM)	Market price		2010 price quartile	Average % Above FMV (Q2/Q3)	Annual IT MSA price impact (\$MM)
Application services						
AMS services	█	█	█	█	█	█
ASP services (license maint)	█	█	█	█	█	█
ASP hosting, support & DR (Schedule E)	█	█	█	█	█	█
Project labour services (T&M rates)						
Dev/maint/enh (DME) & large projects	█	█	█	█	█	█
Infrastructure services						
Distributed server & DB hosting & support	█	█	█	█	█	█
Mainframe services (CPU, print)	█	█	█	█	█	█
DR services (dist applications)	█	█	█	█	█	█
Storage (mainframe & distributed)	█	█	█	█	█	█
End user, workstation & print services						
User connectivity (desktop apps/access)	█	█	█	█	█	█
Workstation services - hardware	█	█	█	█	█	█
Support (PC, laptop, printer, Help Desk, IMAC, SRs)	█	█	█	█	█	█
Network services (LAN/WAN)	█	█	█	█	█	█
Voice services	█	█	█	█	█	█
Specified expenses - other	█	█	█	█	█	█
Total IT billing (\$MM)	█	█	█	█	█	█

³⁴⁰ Confidential ATCO Utilities argument.
³⁴¹ Confidential Calgary reply argument.
³⁴² PAC confidential evidence, March 21, 2012, page 83.
³⁴³ PAC supplemental evidence, January 7, 2013, page 20.

332. PAC considered there were several reasons why the 2010 IT Master Service Agreement rates, which were developed based on 2003-2007 benchmarking, were higher than 2010 fair market value rates. PAC stated as follows:

- **Scale, access and ability to retain skilled IT resources** – As ATCO I-Tek is a small niche outsourcing provider, they cannot as easily attract, develop and retain resources as easily as Tier 1 providers can and have to pay premiums to retain or subcontract to acquire IT skills that larger providers may have deeper capabilities and more available resources to deploy in a more cost-effective manner.
- **Market changes** – IT labour rates dropped by ██████ in the 2008 to 2009 timeframe due to the economic downturn and have not yet fully recovered. As 2010-2015 IT MSA pricing is based on FMV calculated in 2007, it does not reflect these global IT price reductions in their trends.
- **Uncapped COLA price increases on IT labour rates** – 2010-2015 IT MSA passes all labour inflation risk onto the ATCO Utilities via annual COLA increases based on Wynford salary data. Based on Wynford data, IT labour rates cost increased ██████ from 2003 to 2007 and ██████ from 2003 to 2010. These types of provisions inevitably lead to a contract being “above FMV” price midway through the contract. Best practices include provisions in MSAs to cap COLA increases over the term of a contract and/or include guaranteed productivity/cost reduction provisions to balance risk appropriately between parties and for vendor to proactively manage rate increases vs. just passing them on to customers.
- **Productivity Gains from “Industrializing” IT services** – It has been proven through numerous studies that costs of supporting and managing IT applications decrease by ██████ over the application lifecycle as outsourcing providers become more familiar with and stabilize the IT applications as well as supporting IT processes. Given that ATCO I-Tek has been managing the ATCO Utilities applications portfolio since 1999 and that there have been no significant changes in the ATCO Utilities environment or applications over the last several years, we would expect increased productivity from staff to provide IT services as well as the ability to have lower cost, more junior staff take on more of the IT support activities. This should tend to lower blended labour rates and support costs. The 2010-2015 IT MSA pricing provide ██████ reduction in cost annually where typical industry practice shows ██████ is typically realized by well-managed vendors and used to offset labour cost increases and improve outsourcing provider margins. Of greater concern is the ATCO Utilities approach to managing applications services. Based on the ATCO Utilities’ IR response, it appears they do not track or care about Applications Services (AMS/ASP) or labour T&M productivity metrics beyond what is in the 2010-2015 IT MSA. Thus there are really no proactive approaches or metrics taken to ensure ATCO I-Tek is driving productivity savings from applications services improvements.³⁴⁴

333. PAC also considered annual productivity and price improvements or glide paths associated with IT services. Noting that as a supplier repeats similar work for a client, costs should decrease as the supplier gains experience as well as efficiencies from increased volumes of activities. These productivity and efficiency improvements allow vendors to increase margin on work as well as provide price discounts to their customers to offset labour rate increases and maintain pricing that is competitive in the market.

³⁴⁴ PA Consulting Group, Sourcing and Market Pricing Review, March 21, 2012, page 84.

334. PAC reviewed the 2010-2015 IT Master Service Agreement annual price reductions or “glide paths” to see how they compared to industry averages for other similar outsourcing contracts. PAC found that the annual productivity and price reductions in the 2010-2015 IT Master Service Agreements were less than half of what is typically found in IT outsourcing contracts. PAC supplied the following table outlining its findings and recommendations:

Table 4. PAC comparison of 2010-2015 IT Master Service Agreement glide paths to industry glide paths

AU IT MSA area by tower	ATCO IT MSA pricing discounts (glide path)		PAC industry productivity discounts (annual)	Difference between annual IT MSA and industry productivity discounts (%)			Recommended annual IT MSA Glide Path (%)
	2010-2015 total discount	annual discounts (%)		Low (%)	High (%)	Average (%)	
Application services							
AMS services	■	■	■	■	■	■	■
ASP services (license maint)	■	■	■	■	■	■	■
ASP hosting, support & DR (Schedule E)	■	■	■	■	■	■	■
Project labour services (T&M rates)							
Dev/maint/enh (DME) & large projects	■	■	■	■	■	■	■
Infrastructure services							
Distributed server & DB hosting & support	■	■	■	■	■	■	■
Mainframe services (CPU, print)	■	■	■	■	■	■	■
DR services (dist applications)	■	■	■	■	■	■	■
Storage (mainframe & distributed)	■	■	■	■	■	■	■
End user, workstation & print services							
User connectivity (desktop apps/access)	■	■	■	■	■	■	■
Workstation services - hardware	■	■	■	■	■	■	■
Support (PC, laptop, printer, Help Desk, IMAC, SRs)	■	■	■	■	■	■	■
Network services (LAN/WAN)	■	■	■	■	■	■	■
Voice services	■	■	■	■	■	■	■
Total IT MSA (average)	■	■	■	■	■	■	■

10 Customer care and billing (CC&B)

10.1 ISG methodology used to establish a fair market value

335. As discussed earlier, the original application featured the proposed Master Service Agreements and the supporting business case. The business case was developed to support the provision of IT and CC&B services for the 10-year period (2010-2019). UtiliPoint was hired by the ATCO Utilities to examine the proposed CC&B Master Service Agreements. UtiliPoint applied trending factors to the 2003-2007 Benchmark as well as the Evergreen Strategy to derive the 2010 rates which were held up to be a reflection of fair market value.³⁴⁵

336. The main purpose of the CC&B benchmarking was to validate ATCO I-Tek pricing and establish that it was within fair market value, as that term is defined in the Master Service Agreements as:

Fair Market Value... means the average of the prices charged by other well-managed service providers for work of a similar nature, type and volume.³⁴⁶

³⁴⁵ Original application, Tab 4, Q 34, paragraph 42.

³⁴⁶ ATCO Gas IT MSA, Section 1.1, definitions.

337. UtiliPoint undertook a process to validate pricing for the new Master Service Agreement (Schedule C) which involved establishing the 2010 “kick-off” rates that would be in effect for the duration of the Master Service Agreement. Mr. Brock,³⁴⁷ on behalf of ISG, described this process as follows:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³⁴⁸

338. The price validation compared actual ATCO I-Tek invoices with actual contracts in the marketplace. The comparison was used to develop an opinion on whether CC&B services at the specific volumes and service levels were priced within the market. The price validation was also done to develop an opinion on the whether the terms and conditions in the Master Service Agreements were consistent with other CC&B Master Service Agreements.³⁴⁹

339. In conducting this analysis, ISG developed a fair market value for the CC&B services. The steps that were used to calculate the fair market value were as follows:

Collect data that defines the scope and volume of services provided. The primary source of this data [REDACTED]
[REDACTED]

Map the services being provided to [REDACTED]
[REDACTED]

Determine the comparators’ price [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Make additional adjustments for the price of any service that cannot be estimated directly from the comparator data. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³⁵⁰

³⁴⁷ Mr. Brock is a self-employed consultant who has previously provided testimony on behalf of the ATCO Utilities for the 2003-2007 Benchmark, Evergreen I and Evergreen II.

³⁴⁸ Confidential Exhibit No. 116.04 CONF, Q41.

³⁴⁹ CC&B is covered in Appendix B of confidential Exhibit No. 116.07 CONF.

³⁵⁰ Confidential Exhibit No. 116.04 CONF, Q41.

340. Mr. Brock described the reference group companies used for the CC&B benchmark:

The reference group used for the original benchmark and for pricing validation is defined as [REDACTED]

[REDACTED] The reference group used by UtiliPoint included [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³⁵¹

341. Mr. Brock provided the comparator categories and numbers in the amended application used to benchmark the CC&B costs for the ATCO Utilities. The primary criteria was [REDACTED] [REDACTED] For CIS maintenance, ISG used [REDACTED] For CC&B core services, [REDACTED] [REDACTED] were used and the primary selection criteria was [REDACTED] For the labor rate benchmark, [REDACTED] were used with [REDACTED] as the primary selection criteria.³⁵²

342. The amended application discussed how two non-standard clauses in the original Master Service Agreements were corrected in order to be more “in-line” with industry standards. Specifically COLA adjustments and right of first refusal.

343. In the application Mr. Brock described the COLA adjustments as follows:

Cost of Living Adjustments (COLA) enable the Service Provider to offset inflation by increasing their rates. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]³⁵³

344. In the ATCO Utilities’ CC&B Master Service Agreement the COLA adjustment was [REDACTED] The Master Service Agreements provided for [REDACTED]

[REDACTED]
[REDACTED]³⁵⁴

345. ISG made a number of adjustments to its comparators in order to account for various factors which were not consistent with ATCO I-Tek CC&B services. The adjustments were classified into four categories:

- scale
- off-shored call centre

³⁵¹ Confidential Exhibit No. 116.04 CONF, Q12.

³⁵² Ibid.

³⁵³ Confidential Exhibit No. 116.04 CONF, Q25.

³⁵⁴ Ibid.

- absence of interactive voice response (IVR)
- market interaction

346. ISG normalized the comparators based on the number of bills processed monthly. Volume discounts were applied to each comparator depending on the order of magnitude of the customer bills processed. The average volume discount applied was based on a minimum of 500,000 bills with a corresponding five per cent discount applied for every additional 250,000 bills. ISG noted that this was the same ratio used in the Evergreen I decision.

347. ATCO I-Tek out-sourced its call centre offshore to Wipro located in the Philippines. [REDACTED]³⁵⁵
[REDACTED]
 ISG stated that the volume of calls for ATCO Gas and ATCO Electric were rather small. The CC&B Core Services reference group was adjusted with off-shore call centre pricing data taken from utility contracts. The call centre portion of the core service tower was adjusted for the impact of off-shoring.

348. ISG adjusted the reference group price and statistics to eliminate the impact of IVR because the ATCO Utilities do not use an IVR. This included eliminating the price benefit of IVR-answered calls and reflected the use of live agents only to handle calls in the reference group and augmented reference group for off-shore call centre.

349. The Alberta unbundled or deregulated market was analyzed to determine if adjustments were required in order to account for the different transactions which take place compared to other jurisdictions. ISG found the major difference to be the system used for transferring files electronically (DropChute), the use of which was found to be unique in the North American marketplace.

350. ISG determined that for the 2010 “kick-off” pricing, fair market value was approximately [REDACTED] lower than I-Tek pricing for both gas and electric core services. ISG found that 2011 fair market value pricing for ATCO I-Tek services is roughly [REDACTED] lower than the 2011 charges from I-Tek for Gas and 1.33 per cent lower than the 2011 charges from ATCO I-Tek for Electric. These numbers were calculated using the following fair market value values:

Table 5. Comparison of CC&B core services to market³⁵⁶

CC&B service	2010			2011		
	I-Tek (\$)	Market (\$)	Difference (%)	I-Tek (\$)	Market (\$)	Difference (%)
ATCO Gas core	[REDACTED]					
ATCO Electric core	[REDACTED]					

351. ISG concluded that the 2010 and 2011 pricing was slightly below its estimate of the market and therefore constituted fair market value. ISG further noted that if upward market

³⁵⁵ Confidential Transcript, Volume 2, page 268.

³⁵⁶ Confidential Exhibit No. 116.04 CONF, Q53.

pricing trends continue, ATCO I-Tek pricing will likely remain below its market estimate for 2013 and 2014.

10.2 ISG versus PAC approach to estimate FMV

352. Calgary and its consultant, PAC, had a number of concerns with the CC&B benchmark and the resultant fair market value evidence provided by ISG and Mr. Brock.

353. Calgary expressed some scepticism that the result of the CC&B market benchmark done by ISG resulted in pricing that was in such close proximity to the ATCO I-Tek pricing for both 2010 and 2011.³⁵⁷ Calgary noted that there was a similarity between the number of comparators (four) and the market estimate done for Direct Energy Regulated Services (DERS) by ISG and the actual ATCO I-Tek invoices in Decision 2011-247:³⁵⁸

33. FMV was very close on a total basis (core plus non-core services) to the actual amounts invoiced by ATCO I-Tek to DERS. FMV was 0.5 per cent lower than invoiced amounts for 2007 and 2008 combined (0.4 per cent lower for 2007 and 0.5 per cent lower for 2008).

354. Calgary’s benchmark utilized a different methodology to determine fair market value using comparator pricing. As noted above, ISG used the average of its comparators to estimate fair market value. Calgary noted that an average is essentially the selection of a single point. In response to ISG’s use of the mean, PAC stated:

[REDACTED]
[REDACTED]
[REDACTED]³⁵⁹
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

355. Calgary noted that the Commission did not have much clarity into what prices were not used or why they were not used. Due to confidentiality concerns ISG was unable to provide the range of their unit price data. This issue was discussed by Mr. Kawamoto during the hearing:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

³⁵⁷ Confidential Calgary argument, paragraph 522.

³⁵⁸ Decision 2011-247: Direct Energy Regulated Services, Fair Market Value of Direct Energy Regulated Services’ Customer Care and Billing Costs for 2007 and 2008, Application No. 1605809, Proceeding ID No. 463, June 6, 2011.

³⁵⁹ Confidential Exhibit No. 154.03 CONF, PAC supplemental evidence, Q33.

percentage ██████████ of the core services fee relate solely to market transactions.³⁶⁵ Calgary noted that the data behind this estimate is not on the record of this proceeding.³⁶⁶ ██████████

363. Calgary questioned the source of Mr. Brock's CC&B data from as there would appear to be a discrepancy. When questioned by Calgary counsel, Mr. Brock informed the Commission that, for the ISG price update for 2010 and 2011, he used a UtiliPoint database.³⁶⁸ ██████████

364. In an IR response³⁷⁰ Mr. Brock reported that there were ██████████ in the ISG database. In the same IR response, Mr. Brock was asked for the reasons for rejecting each of the contracts from the ISG database to arrive at his ██████████ Mr. Brock's response was:

██████████
Please refer to AUC-AU-68.

365. In IR response AUC-AU-68, Mr. Brock stated:

ISG has found that a reasonable number of comparators/contracts to use is in the range of ██████████. The ██████████ CC&B contracts used were selected because ██████████

366. Calgary submitted that the record appears to be inconsistent on which database was used to source the comparator contracts. Calgary characterized the 2012 Price Review as Mr. Brock "reviewing his own work"³⁷¹ and stated that it is not surprising that Mr. Brock's ██████████ comparators would fail under proper scrutiny.

367. Calgary stated that there was no information in either the ISG report or Mr. Brock's testimony on how the price review determined the CC&B Core Service estimated fair market value using the normal CC&B towers ██████████. In an IR response,³⁷² ISG and Mr. Brock did provide some of the normal CC&B towers, but not at the comparator level as requested. Calgary noted this was another incidence of the black box approach.

368. Another area addressed by Calgary is the comparison of time period coverage for contracts in his comparators. In the Brock rebuttal evidence, Mr. Brock stated that he selected

³⁶⁵ Confidential Exhibit No. 137.13 CONF, AUC-AU-CONF-10(a-d).

³⁶⁶ Confidential Calgary argument, paragraphs 579–582.

³⁶⁷ Confidential Exhibit No. 195.01 CONF, CAL-AU-219(p).

³⁶⁸ Transcript, Volume 1, page 87, lines 7-20; confidential Transcript, Volume 1, page 49, lines 12-20 and confidential Transcript, Volume 3, page 563, lines 3-6.

³⁶⁹ Confidential Calgary argument, paragraph 566.

³⁷⁰ Confidential Exhibit No. 195.01 CONF, CAL-AU-228(g-h).

³⁷¹ Confidential reply argument, paragraph 276.

³⁷² Confidential Exhibit No. 195.01 CONF, confidential IR CAL-AU-169.

comparators from a “similar time frame.”³⁷³ Calgary noted that a “similar timeframe” is not the same timeframe. Further, although this information was provided for IT data in IR responses³⁷⁴ and summarized in hearing Exhibit No. 249 it was not provided for CC&B. In hearing Exhibit No. 256, it was shown that the earliest contract start date was [REDACTED] and that the average duration was [REDACTED]. The [REDACTED] contract was prior to the economic downturn of [REDACTED]. Calgary stated:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³⁷⁵

369. In the PAC evidence, a glide path is defined as:

... ongoing productivity and efficiencies gained from operating experience delivering the outsourcing services.³⁷⁶

370. In an information response the ATCO Utilities discussed the concept of a glide path which is that there is typically a change (normally a decrease) in the prices of CC&B services which allows vendors to increase margins and provide customer with a small price discount. A glide path shares the productivity and efficiency gains with both. This concept is confirmed by ATCO Utilities in the Master Service Agreements.³⁷⁷

371. In the PAC report, there was evidence of market glide paths which were at a greater discount level than those found in the Master Service Agreements.³⁷⁸ The attached table summarizes the difference between the PAC report and the ATCO Utilities Master Service Agreements:

³⁷³ Exhibit No. 188.03, Jon T. Brock rebuttal evidence, page 8.

³⁷⁴ Exhibit No. 136.01, CAL-AU-92(f) and CAL-AU-107(i).

³⁷⁵ Confidential Calgary argument, paragraph 577.

³⁷⁶ Confidential Exhibit No. 93.03, PAC report, Section 1.2, page 12.

³⁷⁷ Exhibit No. 63.01, CAL-AU-34(b).

³⁷⁸ Confidential Exhibit No. 93.03, PAC report, Section 11.8, page 118.

Table 6. Master Service Agreements versus PAC glide path

AU CC&B by service area	Annual discounts in proposed MSAs	PAC recommended annual glide path
Core CC&B services		
Metered and non-metered account services	■	■
ATCO CIS application maintenance	■	■
Pass thru charges	■	■
CIS application service		
CIS project labour (DME)	■	■
ATCO CIS extended application maintenance (SOW DME)	■	■
CIS test environment CPU charges mainframe	■	■

372. PAC stated in its evidence that as suppliers repeat similar work for a client the increase in scale and experience should drive the cost down; vendors are incented to get new business and new customers in order to increase the benefits of scale and experience and that there are several drivers of glide path benefits which include:

- Management and Worker Innovations including day-to-day work efficiencies that are developed and increasing use of technologies;
- Process and Technical Innovations including changes to processes and leveraging of new technologies to achieve efficiencies;
- Increased utilization and in particular increases in staff utilization, for example, if staff supplement their day-to-day support responsibilities with project work;
- Scale Efficiencies including increased efficiencies and price discounts achieved as a result of increased volumes;
- Productivity improvements – it is not uncommon for outsourcing vendors to get annual IT support personnel productivity increase of ■ per year;
- Application “Industrialization” Improvements – as managed applications mature and becomes more stable over its lifecycle, AMS costs drop significantly and level off at 5-10 year application life. The trend varies based on the type of application and associated technology.³⁷⁹

373. ■
 ■
 ■³⁸⁰ ■
 ■
 ■
 ■³⁸¹

³⁷⁹ Confidential Exhibit No. 93.03, PAC report, Section 10.5, page 102.
³⁸⁰ Confidential Calgary argument.
³⁸¹ Confidential Exhibit No. 154.01 CONF, Calgary supplementary evidence, Q&A 31, item (IV).

[REDACTED]

378. Calgary argued that a [REDACTED] does not represent a test in the marketplace of the accuracy of the fair market value. Calgary asserted that the [REDACTED] failed to account for [REDACTED] and the entrance of [REDACTED] which would have resulted in the price being adjusted downward.³⁸⁷ PAC stated that [REDACTED] is an inferior approach to determining a final result for fair market value. In order to properly confirm that [REDACTED] is aligned with market realities, it is essential to receive [REDACTED]:

Benchmarking alone is not enough to ensure that buyers will maintain competitive pricing over the course of their contract with their outsourcing suppliers. Best way to do that is by [REDACTED]. Some companies use [REDACTED] or [REDACTED] in their MSAs to ensure vendors proactively manage service delivery costs rather than settle for average.³⁸⁸

10.2.1 Response by the ATCO Utilities/ISG/Brock

379. The ATCO Utilities responded that the evidence of PAC and the resulting downward adjustments would mean a reduction between [REDACTED] to [REDACTED] for the CC&B services provided by ATCO I-Tek.³⁸⁹ The ATCO Utilities asserted that it would be impossible for the ATCO Utilities to obtain such a price in the marketplace from one supplier. In support of their assertion, the ATCO Utilities referenced Mr. Scinto’s testimony where he stated:

[REDACTED]

380. The ATCO Utilities stated that there is one “right approach” to the determination of fair market value for CC&B services, which is the one presented by ISG. The ATCO Utilities noted that ISG initially focused on [REDACTED] that would ensure the comparator companies directly aligned with the Master Service Agreements. This data, which was obtained from [REDACTED], would most accurately reflect the suite of CC&B services received by the ATCO

³⁸⁶ Ibid., paragraph 619.
³⁸⁷ Confidential Calgary argument, paragraph 621.
³⁸⁸ Confidential Exhibit No. 164.01 CONF, AUC-CAL-CONF-10 (b).
³⁸⁹ Confidential ATCO Utilities reply argument, paragraph 30.
³⁹⁰ Confidential Transcript, Volume 6, page 1223.

You've got RFP pricing as a going-in price. That's how you view the responses to an RFP, they're the going-in price, using your words?

A. MR. SCINTO: They're a starting point for negotiations, yes.

Q. Okay. And then on the third line you talk about contract pricing being the price that's negotiated. So the contract price is certainly different than the going-in price or the starting price?

A. MR. SCINTO: It may or may not. Sometimes it will drop, sometimes it will stay the same, sometimes it will go up.³⁹⁷

10.3 PAC CC&B assessment

10.3.1 Introduction

384. PAC provided an analysis of the services provided by ATCO I-Tek under the terms of the 2010-2015 CC&B Master Services Agreements. After reviewing the ATCO Utilities' information responses, PAC provided a breakdown of the 2010 actual CC&B Master Service Agreement expenses in the following table:

Table 8. Summary of 2010 actual CC&B Master Service Agreements expenses³⁹⁸

AU IT spend by tower	IT MSA pricing schedule (source)	2010 actual ATCO cc costs (\$MM)	% of annual spend	2010-2015 MSA price trends (glide path)		Labour % of costs
				total contract	annual discount*	
Core CC&B services						
Metered & non-metered account services	████	████	████	█	█	████
ATCO CIS application maintenance	████	█	█	████	████	████
Pass thru charges	████	█	█	█	█	█
CIS application services						
CIS project labour (DME)	████	█	████	████	████	████
ATCO CIS extended application maintenance (SOW DME)	████	█	█	████	████	████
CIS test environment CPU charges (Mainframe)	████	█	█	████	████	████
Total CC&B billing (\$MM)		████	████			

385. In its market assessment, PAC undertook to match the activities and costs with those in its Polaris Benchmarking database. PAC came to the conclusion that the ATCO Utilities customer service activities are very typical of other North American utilities. PAC also reviewed the customer composition and found that again, the ATCO Utilities mix of residential, commercial and industrial customers was also similar to other North American utilities.³⁹⁹

386. PAC used its Polaris 2010 CC&B benchmarking study (study) which was collected from a panel of North American utility companies annually through a standardized and validated survey. The survey requested CC&B information on labor, technology and associated costs. PAC stated:

³⁹⁷ Transcript, Volume 3, page 540.

³⁹⁸ Confidential Exhibit No. 93.03, PAC Market Assessment Report, page 104. Labour Costs does not include the annual COLA increases included in the CC&B MSAs.

³⁹⁹ Ibid., page 105.

Based on responses, costs were validated and calculated per customer and per transaction to make applicable cost comparisons. The data for all 2010 Polaris panel utilities participants were used for the CC&B assessment.⁴⁰⁰

387. In order to conduct a “like for like” comparison PAC performed a number of adjustments to the Polaris survey data. The principle behind the adjustments was to keep the ATCO I-Tek prices constant and to make targeted adjustments to the Polaris comparators.

388. PAC noted that all of the companies on the Polaris panel are integrated utility companies that have both distribution and retail arms, with CC&B services provided in three areas:

- retailer CC&B office services
- distribution CC&B office services
- distribution CC&B field services⁴⁰¹

389. PAC adjusted the comparators to retain distribution office for CC&B services only.

390. PAC made a number of adjustments to the Polaris data due to differences in scope of services. The attached table summarizes the adjustments made by PAC:

Table 9. Adjustments to scope of services made to Polaris comparators⁴⁰²

Metrics	Adjustments to Polaris panel	Comments on Polaris scope
Contact center	[REDACTED]	[REDACTED]
Billing	[REDACTED]	[REDACTED]
Payment	[REDACTED]	[REDACTED]
Meter reading	[REDACTED]	[REDACTED]
Field service	[REDACTED]	[REDACTED]
Credit & collections	[REDACTED]	
Non-CIS technology	[REDACTED]	[REDACTED]

⁴⁰⁰ Ibid.

⁴⁰¹ Exhibit No. 93.03, page 108.

⁴⁰² Ibid., Figure 11.3.

Metrics	Adjustments to Polaris panel	Comments on Polaris scope
CIS	[REDACTED]	[REDACTED]
Market transactions	[REDACTED]	[REDACTED]
Customer support	[REDACTED]	[REDACTED]
Pension & benefits	[REDACTED]	[REDACTED]
Corporate services	[REDACTED]	[REDACTED]

391. PAC identified that some items which were listed as optional in the CC&B Master Service Agreements, such as credit and collections, were included in the Polaris comparator costs, stating:

In other words, when in doubt, costs were added to the Polaris panel to make it conservatively as expensive as possible.⁴⁰³

392. PAC stated that costs related to technology utilized are excluded from the provisions in the CC&B Master Service Agreements. PAC included technology related costs, which include such things as CC&B non-CIS application maintenance and software license fees, which range between [REDACTED] of the costs for its Polaris comparators. PAC noted that this emphasized the conservative nature of their analysis.⁴⁰⁴

393. PAC stated that deregulated utilities all have similar data management and transfer requirements as part of the billing and account management process regardless of their location within North America. Most of these processes are automated and of little cost. PAC undertook research to understand the costs per customer associated with market transactions and summarized its results a follows:

[REDACTED]

⁴⁰³ Exhibit No. 93.03, page 109.

⁴⁰⁴ Ibid., page 110.

- (2) A large portion of CC&B costs are labour. As utilities become larger they employ proportionally more staff. Labour will continue to be added at the margin or average cost.⁴¹⁰

399. [REDACTED]

400. PAC further noted that ATCO I-Tek receives fewer calls per customer when compared with the Polaris panel. ATCO I-Tek receives less than [REDACTED] per customer per year, while the Polaris panel average is [REDACTED] per customer per year. [REDACTED]

[REDACTED]⁴¹¹

401. PAC stated that the aggregate impact of the normalizations were generally small. PAC used [REDACTED] data points and had range of CC&B costs per customer with a floor of approximately [REDACTED] and a ceiling of just below [REDACTED] per customer.⁴¹² PAC compared this with its determined cost per customer for ATCO I-Tek of [REDACTED],⁴¹³ and concluded that ATCO I-Tek's prices fall in the [REDACTED]. ATCO I-Tek's prices are approximately [REDACTED] greater than the [REDACTED]. PAC recommended pricing reductions to the FMV for CC&B of [REDACTED] and additional Productivity adjustments of [REDACTED], - for a total of \$ [REDACTED] of the 2010-2015 CC&B Master Service Agreement pricing.⁴¹⁴

10.4 The ATCO Utilities response to the PAC evidence

402. The ATCO Utilities responded to the CC&B evidence of PAC by stating that the PAC evidence was deficient on three main fronts:

1. The PAC methodology and comparator selection is critically flawed as it does not take into account any North American utility CC&B BPO full scope contracts operating in unbundled jurisdictions and every company PAC used provides services to itself.
2. The PAC adjustments and normalizations are critically flawed as they do not take into account major factors such as size, service levels, and regulatory complexity.
3. The PAC fair market value calculations are critically flawed as they result in quartiles and Q2/Q3 midpoint pricing that does not exist in North American unbundled utility CC&B BPO full scope Master Service Agreement market in the 2010 timeframe.⁴¹⁵

403. Mr. Brock stated that the Polaris database will not provide an accurate picture of the market pricing for CC&B business process outsourced (BPO) services. Mr. Brock noted that the volume of outsourced CC&B services varies between zero per cent and 43 per cent which does not reflect an outsourced BPO contract. Further, Mr. Brock questioned the validity of data of the Polaris database by stating that few utilities will tell a consultant its contracted prices unless it is

⁴¹⁰ Exhibit No. 93.03, page 114.

⁴¹¹ Confidential Exhibit No. 90.03, page 114.

⁴¹² Ibid., page 115.

⁴¹³ Ibid., page 116, Figure 11.6 shows the breakdown using metered and non metered account services and ATCO CIS maintenance costs per customer.

⁴¹⁴ Ibid., page 118, Figure 11.8 shows a detailed breakdown of the recommended adjustments to CC&B pricing.

⁴¹⁵ Exhibit No. 188.03, Brock rebuttal evidence, pages 4 and 5.

part of a benchmark, price update, renegotiation or selection process and confidentiality agreements are in place.⁴¹⁶ The fact that none of PAC's comparators are fully outsourced make the calculation of a transaction cost a process whereby utilities in different jurisdictions are lumped together along with their transactions, and assuming that this is what a BPO contract would look like. Further, Mr. Brock noted that participants in the Polaris survey are given out awards if they are deemed to be best in class for either reliability or customer service. Mr. Brock indicated that when awards are given out, a utility may be incented to make itself "look good" through practices such as shifting employees to different organization groups on paper but not in reality.⁴¹⁷

404. Mr. Brock specified that the Polaris panel did not include any distribution only utilities which operated in an unbundled jurisdiction, adding that this is problematic because unbundled utilities commonly spend approximately [REDACTED] hours per year making CIS and related system modifications in the provision of CC&B services.⁴¹⁸ The ATCO Utilities included a conservative [REDACTED] hours per year in their CC&B price for this work.

405. Mr. Brock noted the large un-normalized range of costs per customer for CC&B core services ranged from [REDACTED]. Once PAC's survey panel was normalized the prices ranged from [REDACTED]. Mr. Brock stated that the ceiling moved down by over [REDACTED] while the floor only moved downward by [REDACTED].⁴¹⁹ Mr. Brock concluded that PAC does not have an understanding of the inner-workings of a billing department in an unbundled distribution utility. Unbundled markets will typically require two to three times more hours than vertically integrated markets. Mr. Brock added that in an IR response⁴²⁰ the ATCO Utilities detailed a number of transactions that ATCO I-Tek does on behalf of the ATCO Utilities on a regular basis.

406. Mr. Brock also took issue with PAC's statement that optimum service levels are achieved when CC&B costs are minimized and customer satisfaction is maximized. ISG's BPO market contracts did not show this correlation and in fact showed the opposite. Using call center pricing as an example Mr. Brock stated:

10% adjustment (up or down) in the percentage of calls answered in a specified time will impact the Call Centre price component by up to 4.75%.⁴²¹

407. Mr. Brock also contended that BPO contracts also normally include sliding scale pricing for a number of customers. ISG contended that actual BPO contracts would include this sliding scale were the utility to acquire another distribution utility or experience customer growth.

408. Mr. Brock stated that the PAC practice of taking survey data, not interviewing the target, and making (or not making) normalizations based on faulty assumptions of the unbundled marketplace will not result in a correct fair market value. The [REDACTED] fair market value is based on survey data from vertically integrated utilities. ISG broadened its research from beyond its four comparators and was unable to find a single CC&B BPO contract of similar scope in North

⁴¹⁶ Exhibit No. 188.03, Brock rebuttal evidence, page 6.

⁴¹⁷ Ibid., page 8.

⁴¹⁸ Ibid., page 14.

⁴¹⁹ Ibid., page 16.

⁴²⁰ Exhibit No. 78.21, CAL-AU-27, Attachments 1-12.

⁴²¹ Exhibit No. 188.03, page 21.

America for 2010 to 2011 where the [REDACTED] cost per customer was in place.⁴²² Mr. Brock provided an example of the base core service fee that [REDACTED] charges [REDACTED] for its CC&B BPO services. The resulting charge per customer of [REDACTED] puts the [REDACTED] deal in [REDACTED] with the ATCO Utilities/I-Tek.⁴²³ ISG further reviewed BPO outsourcing deals with [REDACTED]. Neither was found to be near the [REDACTED] fair market value provided by PAC. Mr. Brock concluded that the FMV provided by PAC did not exist in the North American CC&B marketplace for the 2010 timeframe for contracts that are of similar scope and service levels to those provided by ATCO I-Tek to the ATCO Utilities.

10.4.1 Response by PAC

409. During the hearing Commission counsel discussed with PAC how its Polaris database is populated and checked for accuracy:

Q. Okay. Is it fair to say, though, that at its core the Polaris program is basically a self-report type of mechanism?

A. MR. EDESON: Let me see, Mr. Finn, if I can understand your question. If you mean that we don't – do you mean that we don't articulate those best practices? The answer is no, we do, in the survey. We absolutely itemize those best practices in the survey. ... Now, further to that, when the results are posted and shared with them at the company site, and by -- just let me give you an example. If they on a scale of 4 they identify their maturity as a 3, and whether that's implementing a new technology, whether that's implementing a customer channel that would otherwise divert it from the contact centre, whether that's in the credit and collections area about how they handle debt, or what he call DSO, whatever that is if they've identified it as a 3 or a 4, and the results -- the results don't indicate that they have -- on the quantitative side results don't indicate that they've achieved the appropriate result, then we will call that out and discuss it with them. So, yes, it is self-reporting, to your question, but it's not as if it isn't challenged or checked.

Q. Okay. So then my understanding is from what you've just said is that there is a kind of quality assurance process in place that PAC employs?

A. MR. EDESON: Yes, sir.⁴²⁴

...

(Mr. Brock) spoke about some of the pitfalls that he thought existed with the FERC Form-1 exercise in the sense that one was not really sure what you were looking at in the end result because there were so many ways that people could -- completely in good faith, but have -- have put data into the front end in different ways, that you had no way of knowing where the end number came from in the sense that if we're looking at, say, a labour cost that has to go with a specific function, a particular company may assign a FTE to a certain business unit as opposed to another business unit. And that may affect how the cost allocation breaks down – or breaks out, rather, and that, in turn, may affect how they respond to one of the questions or inquiries in the Polaris questionnaire in this case. How -- my first question is: Does PAC try to control for that kind of variable?

A. MR. EDESON: I think your first question is, yes, to your point, control and monitor. Right? For the sake of consistency getting back to my reference to the terms and

⁴²² Exhibit No. 188.03, page 23.

⁴²³ Ibid., page 24.

⁴²⁴ Transcript, Volume 4, page 624 and 625.

definitions and glossary that we use for -- to bring about that consistency throughout the panel. And to your point about FERC, the survey absolutely is not FERC-based on the CC&B. Obviously, they have that data as I reported on their own side of things, but at the end of the day, that's why there are some departures. And I think I articulated some of those the other day. Maybe I just dreamt it. That, you know, some people might have field services, gas or electric, on the T&D side, by way of example. Some companies might have meter reading and meter services combined and might take some elements of that and choose to report it in billing -- on the billing side of things. Whether it's for accountability or about how they track their own internal processes or how they choose to report it in their accounting systems, and how they were initially set up, how they were initially organized. That's usually how most of things -- the differences occur. How is it initially organized -- at least in the US and -- that then they -- the FERC accounts came about, and then they were fit into that. So it's the chicken or the egg. I'm not sure which it is. But we do assure, to the extent humanly possible, consistency across our data points.⁴²⁵

410. Calgary argued that the Polaris database is a highly reliable tool which is constantly being updated and verified for accuracy. This makes it ideal to accurately estimate the fair market value for the CC&B services of ATCO I-Tek.

411. [REDACTED]
[REDACTED]⁴²⁶ [REDACTED]
[REDACTED]⁴²⁷ [REDACTED]
[REDACTED]⁴²⁸ Calgary further noted that Decision 2003-040⁴²⁹ discussed the board's view on when a utility should choose to out-source:

The Board is of the view that it is not reasonable to purchase a good or service outside the utility for goods or services that could be provided economically and efficiently by the utility that satisfy the utility's needs.⁴³⁰

412. Calgary stated that this is very significant as the basis for out-sourcing according to the ATCO Code is that the third-party outsource costs should be lower than the utilities' internal costs.

413. Calgary noted that during the hearing, Mr. Brock agreed that PAC did consider the impact of market transactions and that the difference between his estimate for the cost and PAC's was [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

⁴²⁵ Transcript, Volume 4, page 656 and 657.
⁴²⁶ Confidential Calgary reply argument, paragraph 113.
⁴²⁷ AUC Rule 005: *Annual Reporting Requirements of Financial and Operational Results*.
⁴²⁸ Ibid., page 45.
⁴²⁹ Decision 2003-040, ATCO Group, Affiliate Transactions and Code of Conduct Proceeding, Part B: Code of Conduct, Application No. 1237673, May 22, 2003.
⁴³⁰ Ibid., page 77.

■ [REDACTED]
 ■ [REDACTED]
 ■ ■ [REDACTED] [REDACTED]
 ■ [REDACTED]
 ■ ■ [REDACTED]
 ■ ■ [REDACTED] [REDACTED]
 ■ [REDACTED]⁴³¹

414. Calgary also stated that it is difficult to understand how there could be differences in scope of services between Fortis and EPCOR when compared to ATCO I-Tek. [REDACTED]

[REDACTED]⁴³² Calgary concluded that the fact that Fortis and EPCOR have materially lower costs per customer despite facing the same jurisdictional challenges raises serious doubts about the validity of the comparators and the resulting CC&B fair market value provided by Mr. Brock.

415. During the confidential portion of the hearing PAC explained how comparator manipulation will affect estimates of fair market value:

A. MR. SCINTO: If I could just add something. So comparator selection is very challenging. And as we spoke, about benchmarking is kind of going to be subjective, based on the terms of reference you may select these comparator data points. I think what Mr. Edeson has kind of articulated about Polaris, the one thing that is very important is we know exactly what companies provided what data. And we know the operating environments they're in. So, for example, I could take four -- I could normalize for service, scope, LSAs. Say: Okay. Here's like-for-like services from two comparator data points. But there's other factors if I don't know more in-depth of where those are coming from that will influence the outcomes. So, for example, if it's two similar services that are being delivered, but I choose comparator data points from Tier 1 suppliers delivering from high-cost locations, and more niche suppliers that may have lower costs from low-cost locations -- right? -- the same service, but it's going to be completely different dataset -- values for pricing. And with the Polaris data, we know which utilities are reporting and what jurisdictions they're in, whether they're in high-cost locations, whether they have significant overheads, pension and benefits, unionization. You know, there are many outsourcing providers that have to assume labour agreements, and those tend to drive up prices. So if I choose contracts that have labour agreements built in, those are going to be higher prices than market. So just being able to say: Okay. We normalize, and we choose four data points, and normalize then for service, scope, and SLA, well, we need to understand where those have come from. Are they all from high-cost locations? Are they balanced? Do they have unionization? Have they been adjusted for location cost impacts, regulatory complexity. Yeah.⁴³³

416. Calgary argued that that the "self-review"⁴³⁴ performed by Mr. Brock to establish his 2012 price update was performed using [REDACTED]

⁴³¹ Confidential Transcript, Volume 4, page 786.

⁴³² Confidential Calgary reply argument, paragraph 134.

⁴³³ Transcript, Volume 4, page 658.

⁴³⁴ Confidential Calgary reply argument, paragraph 142.

██████████.⁴³⁵ Conversely, Calgary submitted that the PAC fair market value is in-line with the internal costs of comparable Alberta Utilities and PAC disclosed its raw data points.

11 Evidence of Amy-Lynn Williams

11.1 Submission of Amy-Lynn Williams on behalf of Calgary

417. Amy-Lynn Williams was retained by Calgary to review the IT and CC&B Master Service Agreements in order to determine whether there were any significant deficiencies or problems in either of those Master Service Agreements and whether those Master Service Agreements provide sufficient protection against legal risks for the ATCO Utilities, consistent with the protection against legal risks typically provided to customers in outsourcing agreements.⁴³⁶

418. Ms. Williams summarized her conclusions as follows:

The terms and conditions of the IT MSA and the CC&B MSA are, in several key respects, not consistent with the terms and conditions of the outsourcing agreements that I have drafted or have observed in the industry and do not provide the ATCO Utilities, as an outsourcing customer, with the protections from legal risks typically provided to the customer. Both the IT MSA and the CC&B MSA contain significant deficiencies with respect to the imbalance in the allocation of risk between the ATCO Utilities and I-Tek. In addition, they do not provide the ATCO Utilities with sufficient remedies to ensure the maintenance of the level of service for which they are paying or the ability to recover losses that may be suffered as a result of the supplier's failure to properly perform the services and therefore do not provide sufficient protection for the ATCO Utilities from unnecessary legal risks.

The risk allocation in the IT MSA and the CC&B MSA is actually the opposite of what would be expected in an outsourcing agreement. Typically, in an outsourcing agreement, the majority of the risk exposure is on the shoulders of the supplier and not the customer. The supplier is assumed to be well compensated for the services being provided and it is logical and fitting that the burden and liability risk of a supplier's failure to perform in a manner that does not meet the requirements of the agreement should be borne by the supplier. In the IT MSA and the CC&B MSA, the burden has, almost completely, been shifted onto the customer, the ATCO Utilities.

Most suppliers, during the course of negotiations, threaten that their pricing will have to increase as more risk is imposed upon them. There certainly would be no justification for that threat in the case of the IT MSA and CC&B MSA, since most of the risk exposure is borne by the ATCO utilities. In fact, based on my experience, I would expect that, if the same terms in the IT MSA and CC&B MSA were presented to an arm's length supplier, the supplier would be absolutely thrilled to sign these agreements. Outsourcing customers asked to execute agreements similar to the IT MSA and CC&B MSA would expect significant pricing concessions from the outsourcing suppliers for accepting the terms and conditions contained in the IT MSA and the CC&B MSA and moving the typical allocation of risk away from the supplier.⁴³⁷

⁴³⁵ Confidential Calgary reply argument, paragraph 137.

⁴³⁶ Exhibit No. 90.01, written evidence of Amy-Lynn Williams on behalf of Calgary, March 29, 2012, pages 2-3.

⁴³⁷ Exhibit No. 90.01, written evidence of Amy-Lynn Williams on behalf of Calgary, March 29, 2012, pages 3-4.

419. Upon a review of the IT and the CC&B Master Service Agreements, Ms. Williams identified provisions related to liability, service level credits, change order process and automatic long term renewal as four areas of major concern. Ms. Williams submitted that under the IT and CC&B Master Service Agreements, ATCO I-Tek is specifically exempt from a wide range of liability; that service credit levels are only assessed against ATCO I-Tek under limited circumstances; that ATCO I-Tek is not obligated to respond to a change order request and; if the ATCO Utilities failed to respond to a notice of renewal within 30 days, the agreement would automatically renew for a full additional six-year period. Ms. Williams stated that these terms and conditions of the IT and CC&B Master Service Agreements represented a significant departure from the typical outsourcing agreements that she observed in the industry. During cross-examination, examination by counsel for the ATCO Utilities, Ms. Williams testified that she focused on what she perceived to be the four most egregious issues associated with the Master Service Agreements, although she stated there were more.⁴³⁸

11.2 Submissions of the ATCO Utilities

420. The ATCO Utilities argued that Ms. Williams failed to address the overall context of the Master Service Agreements as a whole and “simply isolated four specific clauses within the Master Service Agreements for comment.”⁴³⁹ In identifying and focusing on the four concerns, the ATCO Utilities asserted that it is impossible to assess proper allocation or balancing of risk without looking at the Master Service Agreements as a whole. The ATCO Utilities noted that of the seven most recent BPO Master Service Agreements Ms. Williams had been involved in reviewing, only one, a CC&B Master Service Agreement in the utility sector, dealt with CC&B or utilities.⁴⁴⁰ Accordingly, the ATCO Utilities questioned whether the agreements reviewed by Ms. Williams were appropriate comparator agreements. Adding:

Simply put, Ms. Williams' assessment fails to recognize that there may be balancing or trade-offs made within an MSA. While Ms. Williams may, in isolation, be able to identify certain provisions or aspects of the MSAs that she considers to be areas of concern, and which she would modify if she were building an ideal contract, the fact remains that she did not review the MSAs as a whole and did not review the MSAs relative to appropriate comparator agreements. The fact that Ms. Williams “negotiated” with herself regarding these isolated clauses does not somehow render the extensive comparator analysis conducted by ISG invalid. In addition, the fact that Ms. Williams restricted her examination to seven contracts “her office” had worked on is hardly reflective of the entire marketplace.⁴⁴¹

421. In their argument, the ATCO Utilities stated that “ISG/UtiliPoint also take issue with Ms. Williams’ assertions that the provisions and issues she has raised are not industry specific. In their rebuttal evidence ISG/UtiliPoint provide authoritative testimony that the terms and conditions Ms. Williams has identified as areas of “concern” are in fact found in the market and are present in comparable agreements.”⁴⁴² Therefore, the ATCO Utilities submitted that

⁴³⁸ Transcript, Volume 3, January 21, 2014 page 573 at lines 17-25 and page 574 at lines 1-5.

⁴³⁹ ATCO Utilities argument at paragraph 137.

⁴⁴⁰ ATCO Utilities argument at paragraphs 139 and 149.

⁴⁴¹ ATCO Utilities argument at paragraph 141.

⁴⁴² ATCO Utilities argument at paragraph 147.

Ms. Williams' evidence cannot be used as a basis upon which to make determinations on the balancing or allocation of risks within the Master Service Agreements.⁴⁴³

11.3 Commission observations

422. The ATCO Utilities argued that “most telling, and consistent with the positions advanced by ISG, is the fact that Ms. Williams did not recommend any financial or price adjustments to the Master Services Agreement as a result of her evidence.”⁴⁴⁴ The Commission does not consider that the absence of a recommendation of a price adjustment in Ms. Williams' evidence is inconsistent with the position advanced by ISG. Ms. Williams made it clear throughout this proceeding that the scope of her retainer was limited to the review of ATCO Master Services Agreement with a view of determining whether there are any significant legal deficiencies or problems associated with either of those Master Service Agreements.⁴⁴⁵ The fact that Ms. Williams did not extend the scope of her involvement by making recommendations related to “financial or price adjustments to the MSAs” is consistent with the purpose for which she was retained.

423. The concerns raised by the ATCO Utilities pertaining to the types of Master Services Agreement reviewed by Ms. Williams and whether those agreements constitute appropriate comparator agreements go to weight. The Commission does not accept the ATCO Utilities submission that Ms. Williams' evidence assessment was “narrow in scope” and “limited in substance.”⁴⁴⁶ In fact, the Commission found Ms. Williams' evidence persuasive. Ms. Williams' evidence, including the concerns she highlighted, provided the Commission with a better understanding of the issues in this proceeding, particularly the allocation of risk between ATCO I-Tek and the ATCO Utilities.

424. The Commission is not satisfied that the risk allocation between ATCO I-Tek and the ATCO Utilities is reflective of outsourcing agreements in an open and unrestricted market between informed and prudent parties. Based on the evidence in this proceeding, the Commission is of the view that if this were a truly arms-length transaction, in an open and unrestricted market between informed and prudent parties, the terms and conditions between the parties would, by their very nature, be more balanced.

12 Commission findings

425. The Commission has before it an application by the ATCO Utilities to approve the prices contained in the Master Service Agreements for IT and CC&B services for the years 2010 to 2015. The provider of these services is an affiliated company, ATCO I-Tek. It is because ATCO I-Tek is an unregulated company providing services to the ATCO Utilities and that those utility companies are monopoly providers of essential services to the public, that the Commission must scrutinize the prices being paid by the utility companies to their affiliated service provider. It is customers who end up paying for the services provided by the unregulated affiliate, not the shareholders of the regulated utility company.

⁴⁴³ ATCO Utilities reply argument at paragraph 115.

⁴⁴⁴ ATCO Utilities argument at paragraph 15.

⁴⁴⁵ Exhibit No. 163.01, AU-CAL-109(a), Q5.

⁴⁴⁶ ATCO Utilities argument at paragraph 139.

426. The Commission's predecessor recognized the potential for overcharging by affiliates in these circumstances and stated that outsourcing to an affiliate should not occur unless the company could demonstrate that the costs to the utility companies would be no higher than they would be if the service were provided "in-house". On this basis, the predecessors of ATCO I-Tek were created and the ATCO Utilities contracted with those companies for the provision of IT and CC&B services beginning in 2003. The Commission has found that the tools available to protect consumers are limited once a utility decides to outsource its services to an affiliate. In the circumstances of this case, the Commission does not have the authority to order the ATCO Utilities to conduct a competitive process to determine fair market value of the services required

427. A properly carried out competitive process would result in a fair market value price. In addition, if the Commission were to find that the services could be provided at a lower cost if provided "in-house," the Commission has the authority to order that these lower prices be reflected in the rates charged by the utility to consumers. Provision of these services "in house" would also allow the Commission to examine the costs of the services directly. It is because neither of these two courses of action are available to the Commission in this case, that recourse must be had to the guidance provided by the *Code of Conduct*.

428. *The Code of Conduct* requires that the ATCO Utilities demonstrate to the Commission that they are paying no more than fair market value for the services being received from the affiliate. The *Code of Conduct* lists a number of approaches that can be used to satisfy the onus placed on the companies. The ATCO Utilities chose benchmarking as a method to determine fair market value of prices for the services available in competitive markets. A collaborative process was initiated with consumer representatives. This resulted in an agreed benchmark for 2003 and resulting prices for the years 2003 to 2007 through application of a formula to trend prices for the ensuing years. Those prices and the terms of the agreements between the companies and ATCO I-Tek were updated for the years 2008 and 2009 through an Evergreen Process which included trending of prices and were approved by the Commission.

429. In this case, the ATCO Utilities have revised or adjusted the services and pricing structures in the ATCO I-Tek Master Service Agreements, applied prices based on further trending and are seeking approval of the prices for 2010 to 2015, inclusive. The basis of the application, therefore, is the 2003 benchmark adjusted for changing circumstances and services through 2015. The evidence in this proceeding also shows that the way in which price comparisons were carried out changed during this time. Ultimately, fewer comparisons were made with companies incurring costs to obtain services from "in-house" sources. ISG was populating its database with more contracts and determined that it no longer needed to make comparisons to internal costs of comparator companies.

430. After Calgary filed its evidence and included the benchmarking evidence of PAC, ISG conducted a price review using its current database of comparator contracts and determined that the 2010 estimated fair market value prices were [REDACTED] lower for IT services and [REDACTED] lower for CC&B services than the prices in the MSAs.⁴⁴⁷ The ATCO Utilities did not change their application for approval of the 2010 prices they were paying under the Master Services

⁴⁴⁷ Exhibit No. 116.01, ATCO Utilities updated application, pages 10-11, paragraph 25. The results of a similar price review for 2011 estimated fair market value prices were [REDACTED] lower for IT services and [REDACTED] lower for CC&B services than the prices in the MSAs

Agreements because they argued that the price review provides confirmation that the prices in the Master Services Agreements (which were based on a trending of prices from 2003 benchmark forward) were at or in the range of fair market value.

431. Based on the evidence filed in this proceeding the Commission has determined that the ATCO Utilities have not met the burden placed upon them to demonstrate that the prices contained in the Master Services Agreements are at or below fair market value. There are two principal reasons for the Commission's determination.

432. First, the evidence filed by the ATCO Utilities in support of the prices is many years removed from the only comprehensive benchmark conducted, being the 2003 benchmark. Although that benchmark was conducted under the auspices of a collaborative benchmarking process in which customer representatives were involved, the evidence demonstrates that there have been many changes to the contract terms and the approaches to updating those contract terms and prices. This large number of changes combined with the time that has elapsed since the 2003 benchmark without a further full benchmark having been conducted raises considerable doubt about whether the updating process employed by the ATCO Utilities can be relied upon to achieve a fair market value result for 2010 to 2015.

433. Further, the ATCO Utilities stated that ISG had been engaged to assist in their negotiations with ATCO I-Tek. However, the Commission heard evidence that the ATCO Utilities personnel and ATCO I-Tek personnel had attended joint sessions at which ISG consultants helped the parties determine a fair market value. The Commission's impression is that these sessions would not help in negotiating prices because the parties were not adverse in interest. The decision that ATCO I-Tek would provide all of the services through a sole source contract had already been made, meaning that any leverage in the negotiations that the work might go elsewhere had been removed and any potential to lower costs to consumers by seeking alternate suppliers of various parts of the services through multi-sourcing arrangements was lost. Indeed, there had been no new benchmarking or price review undertaken when these sessions took place. It was only after the PAC evidence was submitted that there was a price review. The subject matter of the joint sessions and other dealings between the parties seemed to be focussed on modernizing the service offerings to better match what was happening in the market and on trending prices based on the 2003 benchmarks to arrive at the prices for 2010 and the trending from those prices for the 2011 to 2015 period – much for the purpose of a regulatory filing.

434. The Commission is further concerned in this regard, with the numerous references (by both the ATCO Utilities and Calgary) to the specific circumstances of ATCO I-Tek – especially its size and scope of service offerings. Neither the negotiation process nor the Commission's examination of fair market value pricing should be influenced by the circumstances of ATCO I-Tek. This proceeding is not a cost of service proceeding for ATCO I-Tek. The issue is fair market value pricing available in the market from IT and CC&B service providers of all sizes based on the volumes and types of services required by the ATCO Utilities.

435. The second reason for the Commission's determination is that the benchmarking evidence of PAC shows significantly different results than the results achieved by the ATCO Utilities approaches. Both the ATCO Utilities and Calgary provided benchmarking evidence. Both asserted that the approach, data collection, analysis and experience of their witnesses was superior to that of the other benchmarking team. Both acknowledged that benchmarking is more

an art than a science but the ATCO Utilities stated that their benchmarking approach was the right one.⁴⁴⁸ It should go without saying that there is no right way to carry out an exercise such as benchmarking.

436. The Commission has examined the different approaches to benchmarking offered by the various consultants. Each seek to find suitable comparators for the services they are benchmarking. While there are certainly differences in their approaches, the fact remains that both companies used their expertise to examine prices and price trends available in the market for like services against which to benchmark the Master Services Agreement prices. Both also engaged in normalization processes and other techniques in an effort to make their benchmarking comparisons as close to “like for like” as possible.

437. In addition, the two groups of consultants normally engage in benchmarking in order to advise clients on what they should expect to see when negotiating a service contract as part of a competitive process. In an openly competitive process it is the final result of the negotiations that determines fair market value, not the opinions of the benchmarking consultants. In this case, there has not been an open competitive process to reveal the fair market value price. As a result, the Commission is called upon to examine the benchmarking evidence. However, in this case, many of the critical details of the benchmarking performed by both groups of consultants were withheld because the information was considered by them to be competitively sensitive. In addition, the Commission’s ability to examine the facts was limited because it has not been the Commission’s practice to examine confidential information unless it is also provided to the parties (the applicant and interveners) subject to a confidentiality undertaking.⁴⁴⁹ The Commission was also not able to see and compare the contracts selected by the consultants and the individuals who chose the comparator contracts for use by the consultants were not made available for questioning by the Commission. Indeed, it was not clear what the qualifications of the individuals selecting the comparator contracts were. Nevertheless, the Commission considers that the PAC approach and its data provide a broader view of trends and potential outcomes in competitive markets than the ISG approach which appeared to be narrowly focussed.

438. Despite the Commission’s inability to examine the selection of comparator contracts, the comparator contracts themselves, the normalization processes employed or the individuals who were involved in some of the key stages of the comparator contract selection and comparison processes, the Commission is satisfied that because it has two sets of estimates of fair market value pricing for IT and CC&B Master Services Agreements for 2010, it has sufficient information to conclude that fair market value prices (if achieved in a competitive market), would be somewhere in the range of the higher prices proposed by the ATCO Utilities and the lower prices proposed by Calgary. Therefore, the Commission will exercise its authority under Section 8(5)(d) of the *Alberta Utilities Commission Act* to substitute the prices indicated in the MSAs contained in ATCO Utilities’ application materials with prices it has determined to be no greater than fair market value, based on its assessment of the entirety of the record of this proceeding. In doing so, the Commission must attempt to arrive at an estimation of fair market

⁴⁴⁸ ATCO Utilities argument, page 2, paragraph 4.

⁴⁴⁹ However, the Commission recently made a decision to examine confidential information not made available to all parties involved in a proceeding. Proceeding No. 2957, May 22, 2014 letter, AUC ruling on request by ATCO Utilities to have access to confidential information.

value pricing that would otherwise be determined by parties negotiating at arm's length in a competitive market.

2010 pricing

439. In this proceeding, the Commission must first determine 2010 prices and then how those prices will change annually for IT and CC&B services under each Master Services Agreement.

440. The 2010 Master Services Agreement prices are based on a trending analysis with minimum adjustments from the 2003 benchmark. Some of the comparable contracts employed by ISG to assist in adjustments and comparisons were as old as 2004 and 2006. In the Commission's view this trending is not tenable due to the elapsed time and numerous changes having been made without a full benchmark having taken place to update the process.

441. The fact that the ATCO Utilities have had the right to demand a new benchmark⁴⁵⁰ at any time and chose not to do so is not persuasive evidence of the fair market value of the prices charged by ATCO I-Tek. ATCO I-Tek is an affiliated company. There is no competitive tension between it and the ATCO Utilities to discipline pricing.

442. The Commission also has observed that if one were to remove the transition costs from the Tri-global repatriation model (thereby showing in-house costs) the costs would be lower than the Master Service Agreement prices. In other words, the ATCO Utilities evidence shows that the Master Service Agreement prices are higher than what it would cost to perform the work in-house.⁴⁵¹ Accordingly the current Master Services Agreement prices do not satisfy the test for when services provided in-house can be moved to a for-profit affiliate.

443. The Commission has observed that the price review conducted by ISG for 2010 showed IT estimated fair market value prices that were lower than the 2010 IT Master Service Agreement prices by an average of ██████████ and showed CC&B estimated fair market value prices that were lower than the 2010 CC&B Master Services Agreement prices by an average of ██████████. The Commission is mindful that the 2010 price review was not a full benchmark. There is no full benchmark to support the 2010 Master Service Agreement prices.

444. PAC was retained by Calgary to provide a review of the proposed 2010 to 2015 IT and CC&B Master Service Agreements. The PAC market assessment for IT and CC&B services showed that the proposed Master Service Agreements prices appeared to be substantially higher than fair market value. In the case of IT services the full contract value would be ██████████ than fair market value and the 2010 IT fair market value price would be ██████████ than the Master Service Agreement contract price. In the case of CC&B services the full contract value would be ██████████ than fair market value and the 2010 CC&B fair market value price would be ██████████ than the Master Service Agreement contract price. Calgary emphasized that this did not take into account that further price reductions could have been realized if the ATCO Utilities had chosen a multi-sourcing or a global service delivery model.

⁴⁵⁰ IT Master Service Agreement, section 7.3 and CC&B Master Service Agreement, section 8.4

⁴⁵¹ Exhibit No. 116.06, ATCO Utilities updated application, Tri-global schedules; Exhibit No. 124.01, AUC-AU-23(a).

445. In addition, Calgary observed that the actual volumes of IT and CC&B services provided by I-Tek to the ATCO Utilities in 2010 were higher than the 2010 volumes used for the Master Service Agreements in the original application. PAC stated that an increase in volumes of a magnitude observed in 2010 would typically lead to a price review to take into account increased volumes, scale and efficiency improvements over the full term of the contract. Nevertheless, PAC's market assessment for 2010 also did not take into account the actual 2010 volumes to adjust prices. Indeed, it could not have because those volumes were not available at the time the contracts were agreed to.

446. Calgary recommended that the Commission accept the PAC proposed Master Service Agreement pricing even though Calgary believed that the pricing could be lower if other factors had been taken into account. Calgary stated that it considered the price reductions proposed by PAC to be conservative.

447. Taking all of these factors into consideration, and also taking into account the evidence of Ms. Williams that many of the provisions of the I-Tek Master Service Agreements were not consistent with those found in the marketplace and placed too much risk on the ATCO Utilities, the Commission considers that a significant reduction in the 2010 prices is justified. Therefore, the Commission considers the prices proposed by PAC for 2010 to represent fair market value.

448. The Commission has many of the same concerns with respect to the benchmarking exercises performed for CC&B services that it had for the benchmarking of IT services. In addition, the ISG benchmarking exercise was based on an average of only [REDACTED] comparators. [REDACTED] data points is clearly not sufficient for meaningful statistical analysis. This is compounded by the fact that all [REDACTED] data points are very close to the mean.

449. PAC's market assessment, which was based on data from its Polaris survey database, had its own flaws. The survey data was largely populated by information from firms that only outsource a portion of their CC&B services, or none at all. The interviews held for the purpose of populating the database were not done in person.

450. Both ISG and PAC made a number of adjustments to their data and the processes employed were not visible to the Commission. Despite the technical weaknesses of both approaches, the Commission is satisfied that it can use the information to provide CC&B prices for 2010 that represent fair market value.

451. In making its determination for CC&B pricing for 2010, the Commission has taken into account the evidence of PAC that in its view supports a [REDACTED] to the overall contract value for the 2010-2015 Master Services Agreement. The PAC evidence proposes a [REDACTED] in the CC&B Master Services Agreement pricing for 2010 of [REDACTED]. The 2010 I-Tek Baseline price for CC&B services is [REDACTED] and the PAC recommendation is [REDACTED]. After a consideration of the entirety of the evidence on CC&B services, the Commission finds that a reduction to the 2010 I-Tek baseline price of [REDACTED] is warranted.

452. Taking into account all the evidence, the Commission is persuaded that the PAC proposed IT Master Service Agreement pricing for 2010 is reasonable and directs the ATCO Utilities to adjust their 2010 prices accordingly as shown in Table 10 below. The ATCO Utilities are directed to adjust their 2010 CC&B prices as shown in Table 11 below:

Table 10. Commission approved IT charges for 2010

	2010 (\$ million)				Commission approved
	ISG findings		PAC		
	I-Tek baseline	ISG market price	Baseline reduction	Proposed MSA pricing	
Application services					
AMS services	■	■	■	■	■
ASP services (license maint)	■	■	■	■	■
ASP hosting, support & DR (Schedule E)	■	■	■	■	■
Project labour services (T&M rates)					
DME & large projects	■	■	■	■	■
Infrastructure services					
Distributed server and DB hosting & support	■	■	■	■	■
Mainframe services CPU, print)	■	■	■	■	■
DR services (dist applications)	■	■	■	■	■
Storage (mainframe & distributed)	■	■	■	■	■
End user, workstation & print services					
User connectivity (desktop apps/access)	■	■	■	■	■
Workstation services - hardware	■	■	■	■	■
Support (PS, laptop, printer, Help Desk, IMAC, SRs)	■	■	■	■	■
Network services (LAN/Wan)	■	■	■	■	■
Voice services	■	■		■	■
Specified expenses - other	■	■		■	■
Total IT	■	■	■	■	■

Table 11. Commission approved CC&B charges for 2010

	2010 (\$ million)				
	ISG Findings		PAC		Commission approved MSA pricing
	I-Tek baseline	ISG market price	Baseline reduction	Proposed MSA pricing	
CC&B services					
ATCO Gas	████	████	████	████	████
ATCO Electric	████	████	████	████	████
CIS maintenance					
ATCO Gas	████	████	████	████	████
ATCO Electric	████	████	████	████	████
Project services					
ATCO Gas	████	████	████	████	████
ATCO Electric	████	████	████	████	████
Streetlights					
ATCO Electric	████	████	████	████	████
Total CC&B	████	████	████	████	████

Glide path

453. Both ISG and PAC applied glide paths to their estimation of fair market value pricing in order to determine pricing for years subsequent to 2010. ISG’s recommended glide path was determined by observing changes in pricing found in six-year service-focused agreements.⁴⁵² Calgary indicated that PAC used ██████████⁴⁵³ and considered these amounts to be a more robust and market-reflective estimate. PAC noted that it had based its fair market value pricing on actual 2009-2010 IT outsourcing contracts pricing that were similar in nature and scope to the ATCO I-Tek 2010-2015 IT Master Services Agreements.⁴⁵⁴ PAC confirmed it had used contracts that were negotiated and went into effect between 2008-2010.⁴⁵⁵

454. The average IT glide path proposed by the ATCO Utilities ██████████ and the average IT glide path recommended by PAC ██████████
██████████
██████████⁴⁵⁶ In its reply argument, the ATCO Utilities criticized the PAC recommendation as follows:

⁴⁵² Exhibit No. 116.04, ATCO Utilities updated application, page 20 of 35, paragraph 104.
⁴⁵³ Confidential Calgary final argument, paragraph 233.
⁴⁵⁴ Exhibit No. 93.03, PAC Market Assessment Report, page 83 of 134.
⁴⁵⁵ Transcript Volume 3, page 488, lines 2-13.
⁴⁵⁶ Calgary final argument, paragraph 233.

... the evidence presented in these proceedings confirms that the ATCO Utilities accepted the recommendations with respect to contract pricing structure and inserted glide-paths based on data derived from a series of actual contracts in the marketplace, which showed the year over year variances in the contract pricing. Once again, the ATCO Utilities relied upon information from actual contracts, whereas Calgary/PAC seek to rely totally upon pure speculation as to what an appropriate glide-path should be. While Calgary asserts that the glide-paths reflected in the current MSAs are less than one-half the level recommended by PAC, there is no evidence presented which confirms that the PAC derived glide-paths are even remotely associated with the delivery of a suite of IT and CC&B services similar to those reflected in the MSAs or are present in actual contracts in the marketplace. PAC clearly had full opportunity to present such evidence, but did not.⁴⁵⁷

455. Both ISG's proposed glide paths and PAC's proposed glide paths are based on observing glide paths in contracts related to IT and CC&B services. Other than the assertions by the consultants, there is no evidence that the glide paths proposed by either party have any foundation that the Commission can observe and assess. As previously noted, the parties agreed to keep certain information confidential.

456. Nevertheless, the fact that two parties adverse in interest have provided proposed glide paths suggested by their respective consultants, provides the Commission with a range within which to exercise its judgement. The IT Master Services Agreement includes a labour cost adjustment each year that is applied as part of the annual price adjustments. Therefore, the Commission considers the glide path for IT services proposed by the ATCO Utilities to be too low. However, the Commission recognizes that the upper end of the range observed by PAC would not be indicative of all of the contracts observed by PAC. Therefore the Commission directs a glide path applied at the lower end of PAC's referenced [REDACTED] for each IT tower be applied to the IT Master Services Agreement. Consequently, the Commission directs the ATCO Utilities to apply the glide path for each tower as shown in the table below such that the overall glide path for IT services is set at [REDACTED].

457. The Core CC&B service price contained in the Master Services Agreement [REDACTED] [REDACTED]. PAC has proposed [REDACTED] glide path for core CC&B services. The Commission is not persuaded that [REDACTED] glide path for CC&B services is warranted. Consequently, the Commission directs the ATCO Utilities to apply their applied-for glide path for CC&B services.

⁴⁵⁷ Calgary reply argument (redacted), paragraph 89.

Table 12. PAC comparison of 2010-2015 IT Master Service Agreement glide paths to industry glide paths

AU IT MSA area by tower	ATCO IT MSA pricing Discounts (glide path)		PAC industry productivity discounts (annual)	Difference between annual IT MSA and industry productivity discounts (%)			Commission approved annual IT MSA glide path
	2010-2015 total discount	Annual discounts		Low	High	Average	
Application services							
AMS services	■	■	■	■	■	■	■
ASP services (license maint)	■	■	■	■	■	■	■
ASP hosting, support & DR (Schedule E)	■	■	■	■	■	■	■
Project labour services (T&M rates)							
Dev/maint/enh (DME) & large projects	■	■	■	■	■	■	■
Infrastructure services							
Distributed server & DB hosting & support	■	■	■	■	■	■	■
Mainframe services (CPU, p rint)	■	■	■	■	■	■	■
DR services (dist applications)	■	■	■	■	■	■	■
Storage (mainframe & distributed)	■	■	■	■	■	■	■
End user, workstation & print services							
User connectivity (desktop apps/access)	■	■	■	■	■	■	■
Workstation services - hardware	■	■	■	■	■	■	■
Support (PC, laptop, printer, Help Desk, IMAC, SRs)	■	■	■	■	■	■	■
Network services (LAN/WAN)	■	■	■	■	■	■	■
Voice services	■	■	■	■	■	■	■
Total IT MSA (average)	■	■	■	■	■	■	■

Application to PBR

458. Calgary has submitted that the prices for IT and CC&B services charged to ATCO Electric distribution and ATCO Gas distribution for the years after the PBR base year of 2012 continue to be determined in accordance with the IT and CC&B Master Services Agreements as determined in this proceeding. Further, Calgary also submitted and that the two ATCO distribution utilities be required to file Y factor applications to reflect the annual price changes. Calgary stated:

Regardless of which glide path evidence the Commission relies on, if the Commission chooses to accept ATCO’s recommendations for PBR effects, the glide path downward adjustments to MSA prices will stop after just 2 adjustments (2010 to 2011 and 2011 to 2012) for the PBR Companies. After that, the notional going-in MSA prices will be indexed by (I-X). This would result in the PBR Companies in the ATCO Utilities earning an unwarranted windfall which is unrelated to any incremental risk, and is contrary to the principles established in PBR.⁴⁵⁸

459. The ATCO Utilities submitted that “... no adjustment need be made to the MSA contract prices as they have been confirmed to be no more than Fair Market Value ... In any event, there is simply no basis or justification for isolating the subject IT and CC&B costs from the mandated treatment of other Utility costs under the PBR regime.”⁴⁵⁹

460. The Commission reiterates that the total factor productivity studies used to determine the X factor in the PBR formula are based on the movement of the costs of all factors of production

⁴⁵⁸ Calgary reply argument, paragraph 233.

⁴⁵⁹ ATCO Utilities redacted reply argument, paragraph 46.

and outputs of distribution companies. The costs reflected in the total factor productivity studies included costs for IT and CC&B functions incurred by the companies over time and are reflected in the total factor productivity factor studies. Some costs of utility companies increase on a per unit of output basis over time and some decrease on a per unit of output basis over time. Total factor productivity studies reflect the net contribution of these changes to overall performance. To separate out IT and CC&B costs would be to distort unnecessarily the incentives created by performance based regulation and would be inconsistent with the principles of performance based regulation. Therefore, the Commission will require that ATCO Electric distribution and ATCO Gas distribution apply the glide paths approved in this decision to the 2010 prices as adjusted by this decision in order to establish the 2011 and 2012 IT and C&B prices. The 2012 IT and CC&B costs incurred by the two distribution utilities will be reflected in the 2012 base rates for each of those companies for PBR purposes.

461. The glide paths approved in this decision will continue to apply to the other regulated ATCO entities that are not subject to PBR regulation through to the end of the terms of the Master Services Agreements.

13 Process going forward

462. As stated in the background section of this decision, in the 1990s, CUL concluded there could be benefits to outsourcing its computing services without there being additional costs to utility customers. The concept was that two non-regulated entities would provide the services needed by all the ATCO subsidiaries and also offer their services to third parties in the competitive IT and CC&B outsourcing market.

463. The Commission has consistently examined the provision of these services to customers and tested costs based on the no harm to customers principle. The condition of having the services provided in-house if they were cheaper than through an affiliate or having the contract awarded to the lowest competitive tenderer or by testing the affiliate transaction as having the ratepayers paying no more than fair market value, were all highlighted in previous decisions. All tests related to the Commission's rate setting mandate and afforded utilities the opportunity to structure their operations for the benefit of shareholders while still protecting utility customers based on the no harm principle.

464. The use of benchmarking to justify the prices charged by a for-profit affiliate (whether by a collaborative process or otherwise) has created a substantial regulatory burden over a long period of time and has not increased the Commission's confidence in the outcomes. The Commission's concerns are further exacerbated when the costs of these related proceedings, which are paid for by ratepayers, are considered. The ATCO Utilities have claimed costs in excess of \$8.2 million⁴⁶⁰ in relation to proceedings preceding this current application. The cost estimates for this proceeding up to May 11, 2012 exceed \$2.8 million.⁴⁶¹

465. This has also resulted in having placeholders for rates and no finality of pricing for an unsatisfactory length of time for both the utility and utility customers in this proceeding and

⁴⁶⁰ Exhibit No. 61.09, taken from the hearing costs spreadsheets for gas, electric and pipelines.

⁴⁶¹ From Exhibit No 110.01 (ATCO Utilities) and Exhibit No. 113.01 (Calgary).

previously. The Commission has determined that the efficiency and effectiveness of the present regulatory testing of benchmarking processes cannot continue unchanged. In particular, the refusal of the benchmark consultants to make critical information available to the Commission and the failure of any of the parties to provide publicly available information to corroborate their evidence and support their assertions has contributed to the difficulty in making a decision in this proceeding, an unduly adversarial character of the proceedings and, in turn, the protracted timeline. A competitive outsourcing process would avoid many of these previously discussed pitfalls.

466. Therefore, the Commission will be seeking input from parties in this proceeding on how future benchmarking studies may be tested by the Commission so as to avoid the shortcomings of the current process, if the ATCO Utilities choose to continue to rely on benchmarking. The Commission will, in due course, issue a letter with the specific questions the Commission would like addressed.

Relief requested by the ATCO Utilities

467. With regard to the specific relief sought by the ATCO Utilities, culminating in the updated application, the Commission has made the following determinations.

468. The ATCO Utilities' request that pricing of IT and CC&B services for the purpose of determining revenue requirements for each of the ATCO Utilities for 2010 through 2012 be based on the MSAs, as filed, is denied in accordance with the Commission's decision and Order. The pricing for ATCO Electric and ATCO Gas, as determined in accordance with this decision, shall be applied to forecasted volumes through each respective utility's GRA/GTA process. The placeholders established in the ATCO Gas 2008-2009 GRA in respect of IT and CC&B governance costs for 2008 and 2009 are extended through 2010. ATCO Pipelines shall use the pricing determined in this decision for finalisation of IT-related costs in accordance with the relevant negotiated settlement.

469. The ATCO Utilities' request for approval of pricing for distributed applications identified in the amended application is denied. Pricing of the distributed applications shall be adjusted in accordance with the Commission's findings regarding the overall IT MSA price schedules as detailed in its Order.

470. The ATCO Utilities suggested approach for disaggregation of CC&B pricing for regulatory recovery purposes as between ATCO Gas and ATCO Electric is approved. The actual rates attributed to ATCO Gas and ATCO Electric for regulatory recovery purposes shall be determined in accordance with Commission-approved allocation practices.

471. ATCO Electric's request for approval of the 2010 rate of \$56,103 per month for outage and emergency services is approved.

472. The ATCO Utilities' request for confirmation that the MSAs, as filed, and including price, are consistent with the *ATCO Utilities Code of Conduct* is denied.

473. The provisions relating to the price review process reflected in Article 7, Section 7.3 of the IT MSAs and Article 8, Section 8.4 of the CC&B MSAs constitute terms agreed upon by the parties to the respective contracts. The Commission does not view the described mechanisms

being properly subject to its approval or disapproval in the circumstances of this case, and declines to make any such determination.

14 Order

474. It is hereby ordered that:

- (1) The ATCO Utilities are to provide a compliance filing incorporating the directions in this decision by August 18, 2014 and provide in that compliance filing a proposal on how the ATCO Utilities intend to refund the overcharges to ratepayers from and including 2010.

Dated on June 13, 2014.

The Alberta Utilities Commission

(original signed by)

Willie Grieve, QC
Chair

(original signed by)

Bill Lyttle
Commission Member

(original signed by)

Anne Michaud
Commission Member

Appendix 1 – Proceeding participants

Name of organization (abbreviation) counsel or representative
ATCO Utilities A. Green A. Jukov B. Jones D. Werstiuk D. Olson D. Wilson E. Jansen G. Schmidt J. Laird L. Shaben S. Mah W. Wright K. Worton L. Keough C. Ashton J. Janow L. Kizuk M. Jones S. Ambeault T. Small
The City Of Calgary (Calgary) M. Rowe D. Evanchuk
Consumers' Coalition Of Alberta (CCA) J. Wachowich J. Jodoin
EPCOR Utilities Inc. (EUI) P. Laderoute
Office Of The Utilities Consumer Advocate (UCA) R. Bruggeman R. Bell M. Keen R. Wallace

The Alberta Utilities Commission

Commission Panel

W. Grieve, QC, Chair
B. Lyttle, Commission Member
A. Michaud, Commission Member

Commission Staff

M. Ali (Commission counsel)
R. Finn (Commission counsel)
D. Ward
B. Whyte
M. McJannet
C. Burt
R. Armstrong, P.Eng.

Appendix 2 – Oral hearing – registered appearances

Name of organization (abbreviation) counsel or representative	Witnesses
ATCO Utilities L. Keough B. Williams	W. Wright G. Schmidt J. Brock B. Fowler T. Kawamoto D. Bagnell
The City of Calgary (Calgary) D. I. Evanchuk S. D. Parker	A. Williams G. Edeson L. Scinto G. Matwichuk H. Johnson
Office of the Utilities Consumer Advocate (UCA) M. D. Keen	

<p>The Alberta Utilities Commission</p> <p>Commission Panel W. Grieve, QC, Chair B. Lyttle, Commission Member A. Michaud, Commission Member</p> <p>Commission Staff M. Ali (Commission counsel) R. Finn (Commission counsel) D. Ward M. McJannet C. Burt</p>
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Appendix 3 – Summary of Commission directions

This section is provided for the convenience of readers. In the event of any difference between the directions in this section and those in the main body of the decision, the wording in the main body of the decision shall prevail.

1. Taking into account all the evidence, the Commission is persuaded that the PAC proposed IT Master Service Agreement pricing for 2010 is reasonable and directs the ATCO Utilities to adjust their 2010 prices accordingly as shown in Table 10 below. The ATCO Utilities are directed to adjust their 2010 CC&B prices as shown in Table 11 below: Paragraph 452
2. Nevertheless, the fact that two parties adverse in interest have provided proposed glide paths suggested by their respective consultants, provides the Commission with a range within which to exercise its judgement. The IT Master Services Agreement includes a labour cost adjustment each year that is applied as part of the annual price adjustments. Therefore, the Commission considers the glide path for IT services proposed by the ATCO Utilities to be too low. However, the Commission recognizes that the upper end of the range observed by PAC would not be indicative of all of the contracts observed by PAC. Therefore the Commission directs a glide path applied at the lower end of PAC’s referenced [REDACTED] for each IT tower be applied to the IT Master Services Agreement. Consequently, the Commission directs the ATCO Utilities to apply the glide path for each tower as shown in the table below such that the overall glide path for IT services is set at [REDACTED]. Paragraph 456
3. The Core CC&B service price contained in the Master Services Agreement [REDACTED] [REDACTED]. PAC has proposed [REDACTED] glide path for core CC&B services. The Commission is not persuaded that [REDACTED] glide path for CC&B services is warranted. Consequently, the Commission directs the ATCO Utilities to apply their applied-for glide path for CC&B services. Paragraph 457