FortisAlberta Inc.

Decision on Application for Review and Variance of Decision 25916-D01-2021
2022 Phase II Distribution Tariff Application

December 9, 2021

Alberta Utilities Commission
Decision 26757-D01-2021
FortisAlberta Inc.
Decision on Application for Review and Variance of Decision 25916-D01-2021
2022 Phase II Distribution Tariff Application
Proceeding 26757
Application 26757-A001

December 9, 2021

Published by the:
Alberta Utilities Commission
Eau Claire Tower
1400, 600 Third Avenue S.W.
Calgary, Alberta T2P 0G5

Telephone: 310-4AUC (310-4282) in Alberta
1-833-511-4AUC (1-833-511-4282) outside Alberta
Email: info@auc.ab.ca
Website: www.auc.ab.ca

The Commission may, within 60 days of the date of this decision and without notice, correct typographical, spelling and calculation errors and other similar types of errors and post the corrected decision on its website.

Contents

1 Decision **1**

2 Background **1**

3 The Commission's review process **2**

4 Review panel findings **3**

4.1 Questions of law 3

4.1.1 The AUC acted in breach of natural justice and procedural fairness 3

4.1.2 The AUC failed to consider or misinterpreted Section 122 of the *Electric Utilities Act* 4

4.2 Section 2 of Rule 016 4

4.3 Section 5(1)(a) of Rule 016 5

4.3.1 The AUC erred in mixed fact and law in finding that it "does not have authority to approve the type of costs titled 'Fortis costs to serve REAs under integrated operations' in Table 13" 6

4.3.1.1 The AUC misinterpreted the nature of the costs it ordered removed from Fortis's revenue requirement 6

4.3.1.2 The AUC misapprehended or otherwise failed to consider relevant evidence regarding the status of integrated operation agreement negotiations and arbitration 8

4.3.1.3 Unintended consequences – Notional confiscation of rate base and increased regulatory/business risk with implications for cost of capital and return on equity 11

4.3.2 The AUC erred in mixed fact and law in finding that "even if the Commission had the authority to approve the Fortis costs to serve REAs under integrated operations as part of Fortis's tariff, it would decline to do so as it would be contrary to the public interest" 13

4.3.3 The AUC erred in fact by relying on the wrong evidence to deny Fortis's proposed reallocation of shared system costs among small capacity rate classes 15

4.3.4 The AUC erred in fact by including AESO contribution costs in the revenue removal 16

4.3.4.1 Review 16

4.3.4.2 Variance 18

5 Decision **23**

FortisAlberta Inc.
Decision on Application for
Review and Variance of Decision 25916-D01-2021 **Decision 26757-D01-2021**
2022 Phase II Distribution Tariff Application **Proceeding 26757**

1 Decision

1. FortisAlberta Inc. filed an application to review and vary Commission Decision 25916-D01-2021[1] (the Decision), regarding Fortis's 2022 Phase II distribution tariff application.[2] The Decision addressed, among other things, issues of rate design and the allocation of distribution costs between Fortis and certain rural electrification associations (REAs), whose service areas overlap. Fortis identified eight grounds in support of its review request, with some of the grounds alleged identifying multiple errors. The Alberta Federation of Rural Electrification Associations (AFREA), EQUS REA Ltd., and the Office of the Utilities Consumer Advocate (UCA) also participated in this proceeding.

2. For the reasons set out below, the Commission has decided to grant Fortis's requested review in relation to AESO contribution costs. The Commission has combined the review proceeding with the variance proceeding with respect to the AESO contribution costs. The Commission has denied all other grounds for review raised by Fortis.

2 Background

3. Fortis filed its application to review and vary the Decision pursuant to Section 10 of the *Alberta Utilities Commission Act* and Rule 016: *Review of Commission Decisions*.

4. The review application primarily concerns the hearing panel's findings in Section 6 of the Decision. Paragraph 12 of the Decision broadly described some of the issues in Section 6 of the Decision as follows:

> Fortis's service area overlaps with the service areas of certain REAs [rural electrification associations], who provide electrical service to their cooperative members. In determining the issues with respect to Fortis's distribution cost allocation and rate design, the Commission had to determine:
>
> • Whether there are costs Fortis incurs as a result of integrated operations with REAs that should not be borne by Fortis's customers through its distribution tariff.
>
> • If confirmed, when and how these costs should be removed from the rates charged to Fortis's distribution customers.

[1] Decision 25916-D01-2021: FortisAlberta Inc. 2022 Phase II Distribution Tariff Application, Proceeding 25916, July 8, 2021.
[2] The distribution rate-setting process, including an explanation of Phase I and Phase II, is provided in Section 2 of Decision 25916-D01-2021.

5. In its review application, Fortis also alleged that the Commission relied on the wrong evidence in denying a proposal to reallocate shared system costs among small capacity rate classes.

6. In this decision, the members of the Commission panel who authored the original decision will be referred to as the "hearing panel" and the members of the Commission panel considering the review application will be referred to as the "review panel."

3 The Commission's review process

7. The Commission's authority to review its own decisions is discretionary and is found in Section 10 of the *Alberta Utilities Commission Act*. Rule 016 sets out the process for considering an application for review.

8. The review process has two stages. In the first stage, a review panel decides if there are grounds to review the original decision (the preliminary question). If the review panel decides to review the decision, it moves to the second stage where it decides whether to confirm, vary, or rescind the original decision (the variance question). In this decision, the review panel has decided the preliminary question and the variance question.

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

10. In its review application, Fortis is relying on Subsection 5(1)(a) of the rule, which states:

> 5(1) The Commission may grant an application for review of a decision, in whole or in part, where it determines that the review applicant has demonstrated:
>
> > (a) The Commission made an error of fact, or mixed fact and law where the legal principle is not readily extricable, which is material to the decision and exists on a balance of probabilities.

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

> There is a well-recognized distinction between questions of law and questions of mixed fact and law. In *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, the Supreme Court noted that questions of law are about the correct legal test, whereas questions of mixed fact and law are about whether the facts satisfy the legal test. A general proposition with precedential value might qualify as a principle of law, but not its application to particular facts or circumstances.
>
> The Supreme Court confirmed this distinction in *Housen v. Nikolaisen*. In that case the Court noted that questions of mixed fact and law involve the application of a legal standard to a set of facts; conversely, errors of law involve an incorrect statement of the legal standard, or a flawed application of the legal test. An example of the latter occurs

> when a decision-maker only considers factors A, B, and C, but the test also requires factor D to be considered. The Court also acknowledged an exception to the distinction between questions of law and questions of mixed fact and law, when it is possible to extricate a pure legal question from what appears to be a question of mixed fact and law. (citations removed)[3]

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

4 Review panel findings

13. The review panel generally repeats Fortis's headings, as used in its application, in this decision. This is because it appears, at times, that Fortis may be relying on information in the heading in combination with the substantive text.

4.1 Questions of law

14. No review is available on errors of law in accordance with the latest amendments to Rule 016. [4] In its review application, Fortis classified multiple grounds as errors of fact or as errors of mixed fact and law. However, the review panel finds that the following two grounds constitute allegations of errors of law, and therefore are outside the scope of Section 5 of Rule 016.

4.1.1 The AUC acted in breach of natural justice and procedural fairness

15. Fortis raised two procedural fairness grounds. First, Fortis argued that the hearing panel failed to provide adequate notice that it would be determining whether it had authority to approve certain REA-related costs as part of Fortis's revenue requirement. This is because the issues list provided notice that the hearing panel would be considering whether REA-related costs "should" be removed from Fortis's revenue requirement which, in Fortis's view, presumed that the Commission had the authority to do so.[5] Second, Fortis argued that the hearing panel's notice that it would consider a Phase I issue (a potential change to revenue requirement) in a Phase II process (the purpose of which is rate design) was contrary to the principle of legitimate expectations.[6]

16. The Commission has previously characterized errors in process as errors of law.[7] Rule 016 specifies that no review is available on errors of law. As such, the review panel is in

---

3 *Alberta (Workers' Compensation Board) v Appeals Commission*, 2005 ABCA 276, paragraphs 21-22.
4 Bulletin 2021-11, Amendments to AUC Rule 016, May 6, 2021.
5 Exhibit 26757-X0001, Fortis application, paragraph 28.
6 Exhibit 26757-X0001, Fortis application, paragraphs 30-31.
7 See, for example, Decision 26508-D01-2021: Office of the Utilities Consumer Advocate, Decision on Preliminary Question Application for Review of Decision 26212-D01-2021, 2022 Generic Cost of Capital, August 9, 2021, paragraph 47; Decision 26529-D01-2021: Decision on Application for Review of Decision 26252-D01-2021, ATCO Electric Ltd. 2020-2022 Transmission General Tariff Application Costs Award, June 7, 2021, paragraph 14.

agreement with the UCA,[8] that these are not grounds for which review is available, and the application for review on these grounds is dismissed.

4.1.2 The AUC failed to consider or misinterpreted Section 122 of the *Electric Utilities Act*

17. Fortis submitted that in Section 6.2.2 of the Decision, the hearing panel erred in its analysis that it did not have authority to approve the "costs to serve REAs under integrated operations." It alleged that the hearing panel limited its analysis and interpretation to the *Roles, Relationships and Responsibilities Regulation, 2003* (*3R Regulation*) and did not consider Section 122 of the *Electric Utilities Act*.[9] Fortis submitted that it is entitled to recover, through its distribution tariff, the costs and expenses it has invested in its electric distribution system, and other prudent costs associated with its exchange or distribution of electricity. In Fortis's view, the result of the hearing panel failing to consider, misinterpreting, or failing to apply the evidence applicable to Section 122 resulted in the hearing panel's erroneous conclusion at paragraph 207 of the Decision that the Commission does not have the authority to approve the impugned costs.[10]

18. The review panel finds that Fortis, in essence, argued that the hearing panel erred by incorrectly stating the legal standard, or by conducting a flawed application of the legal test. The review panel agrees with EQUS's submission[11] that this ground is, in nature, an error of law. Rule 016 specifies that no review is available on errors of law. As such, these are not grounds for which review is available and the application for review on these grounds is dismissed.

4.2 Section 2 of Rule 016

19. Fortis submitted that, "given the gravity of the alleged errors and their implications, which strike at the very core of the Commission's ratemaking function and the overarching regulatory compact,"[12] if the review panel finds that any of the alleged errors are errors of law, then the review panel should exercise its discretion under Section 2 of Rule 016 to review the Decision on its own motion.[13] In reply submissions, Fortis advised that the Commission has jurisdiction under Section 10 of the *Alberta Utilities Commission Act* to review a decision, in whole or in part, on its own motion at any time for any reason, and that this is expressly recognized in Section 2 of Rule 016.[14]

20. The Commission has previously stated that, given the important principle of finality in administrative decision-making, it should only exercise its discretion under Section 2 of Rule 016 in exceptional or extraordinary circumstances:

> 30. In exercising its broad discretion under Sections 10 and 23 of the *Alberta Utilities Commission Act*, and Sections 2 and 3 of Rule 016, the Commission maintains the view cited above that finality is an important principle in administrative decision making because it provides certainty to those parties who participated in or are impacted by the

[8] Exhibit 26757-X0014, UCA Submissions on the Review Application, paragraph 5.
[9] Exhibit 26757-X0014, UCA Submissions on the Review Application, paragraph 35.
[10] Exhibit 26757-X0001, Fortis application, paragraph 37.
[11] Exhibit 26757-X0012, EQUS REA response, paragraphs 10-11.
[12] Exhibit 26757-X0001, Fortis application, paragraph 5.
[13] Exhibit 26757-X0001, Fortis application, paragraph 5.
[14] Exhibit 26757-X0015, Fortis reply submission, paragraph 6.

> proceeding. It also provides certainty to all stakeholders in the regulatory process in general. When considering a motion to permit the filing of a review application outside of the permitted period or whether to commence a Commission initiated review proceeding, the Commission should only exercise its discretion in exceptional or extraordinary circumstances.[15]

21. The review panel finds that the basis of the request, which is for the Commission to review an error of law on its own motion, does not constitute the exceptional or extraordinary circumstances necessary to justify the exercise of its discretion under Section 2 of Rule 016.

22. EQUS submitted that, in the present circumstances, it should be left for the Court of Appeal of Alberta to address errors of law.[16] The review panel agrees. As noted in Section 3 of this decision, the Commission recently amended Rule 016 to remove of errors of law or jurisdiction from the scope of Commission review of its own decisions. This amendment was made to minimize overlap with Court of Appeal of Alberta proceedings based on the nature of the question under review or appeal. Fortis has filed an application for permission to appeal[17] the Decision. In the review panel's view, Rule 016 is operating as intended, with parties having the opportunity to seek a review on the basis of errors of fact, and mixed fact and law, before the Commission, and to appeal decisions on the basis of errors of law before the Court of Appeal of Alberta. To permit Fortis's request in the circumstances would be inconsistent with the Commission's rationale for removing errors of law or jurisdiction from the scope of Rule 016,[18] and duplicative of alleged errors already before the Court of Appeal of Alberta.

23. Accordingly, the review panel denies Fortis's request.

4.3 Section 5(1)(a) of Rule 016

24. As a preliminary matter, some of Fortis's submissions allege that the hearing panel improperly weighed evidence.[19] The Commission has consistently held that a review panel's task is not to retry the application based upon its own interpretation of the evidence, nor is it to second guess the weight assigned by the hearing panel to various pieces of evidence.[20] Accordingly, Fortis's application to review certain of the hearing panel's findings on the basis that the hearing panel improperly weighed evidence is denied.

---

[15] Decision 23479-D01-2018: ENMAX Power Corporation, Request for Leave to File an Application for Review of Decision 20414-D01-2016 (Errata), Proceeding 23479, June 20, 2018, paragraph 30.
[16] Exhibit 26757-X0019, EQUS Reply to FortisAlberta re EQUS Motion, paragraph 17.
[17] Court of Appeal file number 2101-0222AC, filed August 6, 2021.
[18] Bulletin 2021-11, Amendments to AUC Rule 016, May 6, 2021.
[19] See Exhibit 26757-X0001, Fortis application, paragraphs 34, 42, 43.
[20] Decision 2012-124: AltaLink Management Ltd. and EPCOR Distribution & Transmission Inc., Decision on Request for Review and Variance of Decision 2011-436 Heartland Transmission Project, Proceeding 1592, Applications 1607924-1, 1607942-1, 1607994-1, 1608030-1, 1608033-1, May 14, 2012, paragraph 31.

4.3.1 The AUC erred in mixed fact and law in finding that it "does not have authority to approve the type of costs titled 'Fortis costs to serve REAs under integrated operations' in Table 13"

25. The hearing panel found that it did not have authority to approve the type of costs called "Fortis costs to serve REAs under integrated operations."[21] Fortis alleged that the hearing panel made three errors of mixed fact and law regarding this finding, which are each addressed below.

4.3.1.1 The AUC misinterpreted the nature of the costs it ordered removed from Fortis's revenue requirement

26. Fortis submitted that the hearing panel erred in mixed fact and law by misinterpreting the nature of the costs ordered removed from Fortis's revenue requirement. While the error was characterized as misinterpretation in Fortis's heading for this ground, in the body of its review application Fortis specified that the error occurred when the hearing panel ignored Fortis's evidence that, at first instance, its distribution system assets were built, and the associated costs were incurred, to serve Fortis's customers.[22]

27. The first issue is the nature of the ground for review. In EQUS's view, Fortis argued that the hearing panel altered the law, which EQUS said is a legal question.[23] Fortis responded that it is asserting that, if the hearing panel applied Section 122 of the *Electric Utilities Act*, then it did not correctly apply the facts put before it regarding the nature of those costs.[24] Fortis cited the Supreme Court of Canada decision in *Teal* stating that "Courts must be vigilant in distinguishing between a party alleging that a legal test may have been altered in the course of its application (an extricable question of law; …), and a party alleging that a legal test, which was unaltered, should have, when applied, resulted in a different outcome (a mixed question)."[25] This ground, in Fortis's view, is an example of a legal test misapplied to the facts.

28. Ignoring evidence may be seen as an error of law. As explained by the Court of Appeal of Alberta,[26] an error of fact amounts to an error of law when a decision-maker*:*

- expressly articulates a test correctly but in its application of the test demonstrated that it had altered the test;
- fails to consider evidence a legal test required it to consider;
- makes a factual finding based on *no* supporting evidence; and
- omits the need for a proper evidential finding supporting one or more of the elements of the test.

---

[21] Decision 25916-D01-2021, paragraph 196.
[22] Exhibit 26757-X0001, Fortis application, paragraph 34.
[23] Exhibit 26757-X0012, EQUS REA response, paragraph 13.
[24] Exhibit 26757-X0015, Fortis reply submission, paragraph 8(a).
[25] Exhibit 26757-X0015, paragraph 7 citing *Teal Cedar Products Ltd. v British Columbia*, 2017 SCC 32, paragraph 45.
[26] *ATCO Electric Ltd v Alberta (Utilities Commission*, 2019 ABCA 417, paragraph 17 citing *Beta Management Inc v Edmonton (City)*, 2017 ABQB 571, paragraph 24.

29. The Court of Appeal of Alberta also found in *Ball v Imperial Oil Resources Limited* that an error of law includes "failing to consider relevant evidence."[27]

30. Further, the review panel takes judicial notice that Fortis alleged that the hearing panel failed to consider relevant evidence as an error of law in its application for permission to appeal the Decision. Again, the review panel considers it duplicative and inefficient to have the same ground, framed as a different kind of error, heard in a review proceeding and in an application for permission to appeal.

31. The review panel provides notice that, going forward, consistent with *Ball v Imperial Oil Resources Limited*, the Commission may consider a ground alleging a failure to consider relevant evidence[28] to be an error of law,[29] and therefore outside the scope of Rule 016. The onus is always on the review applicant to demonstrate that failing to consider relevant evidence is a question of fact or mixed fact and law.

32. Despite this, for the purposes of this proceeding, the review panel is prepared to consider Fortis's ground as an error of mixed fact and law. This is because some prior Commission decisions have accepted review applicants' characterization of grounds alleging failure to consider evidence as errors of mixed fact and law, including some of the grounds alleged in the AFREA's request to review the Decision.[30] In the review panel's view, it would be unfair to Fortis to learn of the Commission's position on the characterization of the nature of these types of grounds in this decision.

33. Proceeding, in the circumstances, on the basis that the alleged error is one of mixed fact and law, the review panel finds that the hearing panel did not err in its interpretation of the nature of the costs ordered removed from Fortis's revenue requirement.

34. The review panel is satisfied that the hearing panel was alive to the nature of the costs at issue and to Fortis's arguments that its assets were principally built for its own customers[31] based on the following:

- Paragraphs 149 and 178 of the Decision include findings made by the hearing panel that Fortis incurs costs to construct, operate and maintain facilities to provide service to its customers:

> 149. <u>Fortis and REAs each incur costs to construct, operate and maintain distribution facilities to provide service to their respective customers and members</u>. Fortis and REAs use and rely on each other's systems to provide service to their respective customers and members as part of their integrated operations. … (underlining added)…
>
> 178. In assessing whether REAs should be allocated some portion of Fortis's total costs, the key facts are: (i) <u>that Fortis incurs costs to construct, operate and maintain distribution facilities</u>; and (ii) REAs use Fortis's distribution facilities under IOAs to provide service to their members. Accordingly, the Commission

---

27 *Ball v Imperial Oil Resources Limited*, 2010 ABCA 111, paragraph 28.
28 Exhibit 26757-X0015, Fortis's reply submissions, paragraph 8(s).
29 *Ball v Imperial Oil Resources Limited*, 2010 ABCA 111, paragraph 28.
30 See, for example, Decision 26756-D01-2021, paragraphs 27 and 44.
31 Exhibit 26757-X0014, UCA Submissions on the Review Application, paragraph 21.

> finds it appropriate that some portion of Fortis's costs should be allocated to integrated operations with the REAs. (underlining added)

- Paragraph 179 of the Decision includes an explicit acknowledgement of Fortis's position that its assets were principally built to serve Fortis customers:

> 179. In terms of the method by which costs associated with integrated operations are determined, the Commission does not agree with EQUS that cost allocation should be limited to only the marginal or incremental costs associated with integrated operations. Fortis's cost-of-service study is an embedded cost-of-service study, meaning that when assets are used by multiple Fortis customers, all customers share in the cost of the asset, regardless of which customer came first and necessitated the construction of the asset. Whether Fortis's lines were principally built first for its own customers as Fortis submitted, or may have been acquired from the REAs as the EQUS evidence suggests, it would be inconsistent to apply different sets of cost allocation methods to different users of Fortis's system (i.e., charge a set of users based on marginal, rather than embedded, costs). The Commission finds that the appropriate method to determine Fortis's costs to allocate to the REAs is in the same way in which Fortis allocated costs to all other users of its system. This is what Fortis did in its application. (underlining added)

35. The review panel finds that these examples from the Decision demonstrate that the hearing panel considered Fortis's submissions that its distribution assets were built, and the associated costs were incurred, to serve Fortis customers.

36. Accordingly, with respect to the hearing panel's consideration of the nature of the costs called "Fortis costs to serve REAs under integrated operations" in the Decision, the review panel finds that Fortis has not demonstrated that an error of mixed fact and law exists on a balance of probabilities as required by Section 5(1)(a) of Rule 016. Fortis's request for a review on this ground is therefore denied.

4.3.1.2 The AUC misapprehended or otherwise failed to consider relevant evidence regarding the status of integrated operation agreement negotiations and arbitration

37. Fortis argued that the hearing panel made the following errors of fact, or mixed fact and law, in finding that the proper avenue for Fortis to recover its costs to serve REAs was under the process set out in the *3R Regulation*:[32]

- Failing to consider the integration operation agreement arbitration award recently made between EQUS and Fortis, and its implications.[33] This, in Fortis's view, is evident by the fact that the hearing panel made no reference in the Decision to the integration operation agreement arbitration award recently made between EQUS and

[32] Exhibit 26757-X0001, Fortis application, paragraph 41.
[33] Exhibit 26757-X0001, Fortis application, paragraphs 41 and 42.

Fortis, or to the evidence that this award would apply to another full integrated operation agreement term after its expiry.[34]

- Failing to consider clear and uncontested evidence that Fortis could only have a reasonable opportunity to recover the costs to serve REAs if such costs were confirmed to be recoverable under its own tariff.[35]

- Misapprehending evidence regarding the state of integrated operation agreement negotiations and arbitrations, as the hearing panel found that "most of the [integrated operation agreements] were underway at the time that the record of this proceeding closed," as Fortis's evidence was that it had only expressed interest in renegotiating the integrated operation agreements.[36]

38. The review panel disagrees for the following reasons.

39. The review panel finds that Fortis's submission that the hearing panel should have made express reference in the Decision to the recent arbitration awarded between itself and EQUS, or to its term, to be an allegation that the hearing panel failed to address a central concern raised by the parties in its reasons. Lack of sufficiency of reasons would, if proven, be a breach of procedural fairness. The Commission has previously characterized errors in process as errors in law, and Rule 016 specifies that no review is available on errors of law. As such, these are not grounds for which review is available and the application for review on this ground is dismissed.

40. Regarding Fortis's argument that the hearing panel ignored clear and uncontested evidence that Fortis could only have a reasonable opportunity to recover the costs to serve REAs if such costs were confirmed to be reasonable under its own tariff, the review panel notes that this argument was made in the original proceeding, as summarized in paragraph 193 of the Decision.[37] The review panel finds that Fortis is re-arguing a point that was before the hearing panel and suggesting that different conclusions could be or should have been reached. This does not, in and of itself, identify an error of fact or mixed fact and law. Fortis's disagreement with the hearing panel's findings does not meet the test in Section 5(1)(a) of Rule 016. Fortis's request for a review on this ground is therefore denied.

[34] Exhibit 26757-X0001, Fortis application, paragraph 41 citing Exhibit 25916-X0144, 2021-01-29 FortisAlberta re 2022 Phase II DTA IR Responses to UCA(h), PDF page 32 stating "While the arbitration award remains in effect for the current and next term of the IOA, FortisAlberta does not consider it is foreclosed from seeking recovery of distribution costs from EQUS REA as part of a future negotiation or arbitration. The IOA may be amended by the Parties by agreement in writing (Section 23.02). The IOA states that "Failing agreement on the terms of a new IOA, then the establishment of a new IOA shall be done in accordance with the provisions of the RRR Regulation" (Section 23.04)."

[35] Exhibit 26757-X0001, Fortis application, paragraph 42.

[36] Exhibit 26757-X0001, Fortis application, paragraphs 42-43 citing Decision, paragraph 232.

[37] Decision, paragraph 193 states: "Fortis argued that it must remain whole and that, until it recovers the REA-related costs through IOAs or arbitration, it has no other mechanism to recover these amounts apart from its distribution tariff. Fortis proposed to return any amounts recovered through the IOA negotiations or arbitrations with REAs, dollar-for-dollar, to its customers through a Y-factor-based mechanism in the annual PBR rate adjustment filings. Fortis submitted that doing so would ensure that it had a reasonable opportunity to recover its revenue requirement, while helping mitigate the cross-subsidy paid by Fortis customers to REA." (footnotes omitted)

41. Regarding the allegation that the hearing panel erred on the state of integrated operation agreements, the review panel characterizes this as an alleged error of fact.

42. The review panel notes the following exchange on the record of the proceeding between Fortis's counsel and the Chair of the hearing panel, in which the Chair asked how long it would take for Fortis to recover dollars from REAs. Fortis's counsel responded that they could not forecast how long the negotiations or arbitrations would last or when the agreement or arbitral award would take effect. As highlighted by the UCA,[38] Fortis's counsel stated that "FortisAlberta and the REAs are just going into those further negotiations and arbitrations now." A part of this discussion is reproduced below:

> THE CHAIR: … Your Y factor already proposes that you're going to refund dollar for dollar what you recover. I'm asking you how long does it take to recover dollars?
>
> MR. HUNTER: From the REAs through those agreements or through the arbitrations?
>
> THE CHAIR: Yes. Yes.
>
> MR. HUNTER: That -- that was what I had indicated in my earlier submissions, Madam Chair. We have no way to know. We can't forecast how long those negotiations are going to take. We can't forecast how long the arbitrations will take. We can't forecast when they will take effect. We're --
>
> FortisAlberta has indicated that it's incented, and it's going to avail itself of all available means.
>
> But there's nothing -- I cannot tell you -- I cannot give you a reasonable forecast of what that timeframe might be.
>
> THE CHAIR: Does Fortis have a unilateral right to reopen?
>
> MR. HUNTER: I don't believe so, Madam Chair. I believe that the way that the triple R regulation stipulates is that, as you're reaching the sunset of your existing WOA, there's an obligation to -- on both parties to start to negotiate a new one. The -- the reality is, though, five years has come and gone, and the parties haven't -- FortisAlberta and the REAs are just going into those further negotiations and arbitrations now.[39] (underlining added)

43. Further, the AFREA's counsel advised during oral argument that "as demonstrated in our evidence, Fortis has already given notice [regarding negotiating the integrated operation agreements] to the REAs."[40]

44. The hearing panel did not make a factual finding on when the negotiations or arbitrations would conclude. Rather, in the last sentence of paragraph 232 of the Decision, the hearing panel directed a placeholder for the 2023 REA distribution use credit if the negotiations or arbitrations were not resolved at the time Fortis's 2023 cost-of-service application was due.

---

[38] Exhibit 26757-X0014, UCA Submissions on the Review Application, paragraph 31.
[39] Transcript volume 1, pages 52-53.
[40] Transcript volume 1, page 201.

45. Accordingly, the review panel is not persuaded that the hearing panel erred in finding that most of the integrated operation agreements were underway at the close of record of the original proceeding. The term "underway" in paragraph 232 of the Decision is broad in nature and captures both the statements of Fortis's counsel that Fortis and the REAs were going into those further negotiations and arbitrations "now," meaning, at the time of oral argument, and of the AFREA's counsel advising that notices of negotiations had been given. Further, even if there was an error, the review panel finds it would not be material given the hearing panel's direction to use a placeholder if the negotiations and arbitrations were not resolved at the time of Fortis's 2023 cost-of-service application filing.

46. Therefore, with respect to Fortis's allegation that the hearing panel failed to consider or misapprehended evidence regarding the status of the integrated operation agreement negotiation and arbitrations, the review panel finds that Fortis has not demonstrated that an error of fact exists on a balance of probabilities as required by Section 5(1)(a) of Rule 016. Fortis's request for a review on this ground is therefore denied.

4.3.1.3 Unintended consequences – Notional confiscation of rate base and increased regulatory/business risk with implications for cost of capital and return on equity

47. Fortis argued that the hearing panel failed to discharge its legislated duty under Section 122 of the *Electric Utilities Act* when it directed Fortis to remove from its revenue requirement an estimate of its costs to serve REAs under integrated operations for 2023 (i.e., an update to the $14.451 million reflected in Table 13 of the Decision). Fortis submitted that it is legislatively required to incur these costs in order to provide safe and reliable distribution service to its ratepayers but, as a result of the Decision, is no longer able to recover these costs within the ratemaking framework. Fortis submitted that "nowhere in the Decision is this issue or the potential severity of its implications" (i.e., increased regulatory/business risk and capital market reactions including expectations of higher rates of return) considered or acknowledged by the hearing panel.[41] In Fortis's view, this demonstrates that hearing panel disregarded or failed to consider the consequences of removing these amounts from Fortis's revenue requirement and that the hearing panel did not provide Fortis with a reasonable opportunity to recover the costs associated with capital invested by Fortis in its electric distribution system.[42]

48. In EQUS's view, Fortis argued that the hearing panel altered the law.[43] Fortis responded that it is asserting that, if the hearing panel applied Section 122 of the *Electric Utilities Act*, then it did not correctly apply the facts put before it regarding the nature of those costs.[44]

49. The review panel re-iterates that, in submitting an application for review, it is incumbent upon the review applicant, in order to meet its onus, to identify the alleged error. As stated in Decision 26895-D01-2021, when alleging an error of mixed fact and law, the review applicant should identify the legal test and facts that are at issue and explain how the Commission erred in

[41] Exhibit 26757-X0001, Fortis application, paragraph 44.
[42] Exhibit 26757-X0001, Fortis application, paragraph 45.
[43] Exhibit 26757-X0012, EQUS REA response, paragraph 13.
[44] Exhibit 26757-X0015, Fortis reply submission, paragraph 8(a).

applying that legal test to those facts. Otherwise, a review applicant is at risk of its review application being disposed of on the basis of a lack of specificity on the alleged errors alone.[45]

50. Overall, the review panel finds that there is insufficient clarity regarding the alleged error to allow the review panel to determine if the ground alleged is an error of mixed fact and law, or an error of law. The review panel could, for example, interpret Fortis's submissions as alleging the hearing panel failed to address a central concern raised by the parties in its Decision, which would be a procedural fairness ground and therefore an error of law. However, given the recency of the Rule 016 amendments, and the fact that the notice to applicants in Decision 26895-D01-2021 regarding the expected specificity of the alleged error was issued after the close of record of the current review proceeding, the review panel will, in the specific circumstances of this proceeding, address the alleged errors, notwithstanding the lack of specificity on the alleged errors.

51. In Section 6.2.1 of the Decision, the hearing panel held that it "considers the quantum of the costs at issue to be sufficient to warrant careful consideration."[46] In Section 6.3 of the Decision, the hearing panel addressed when Fortis's costs to serve REAs under integrated operations should be removed from the rates charged to Fortis's distribution customers. The hearing panel described the amount as approximately two per cent of Fortis's revenue requirement and made a factual finding that the amount was not material enough to warrant the effort to remove the amount from Fortis's revenue requirement in 2022:

> 226. The Commission finds that it is just and reasonable to maintain Fortis's 2017 revenue requirement for [the] remainder of the current PBR term. This is because Fortis's 2017 revenue requirement has already been approved as just and reasonable, the amount at issue is approximately two per cent of Fortis's revenue requirement, and therefore is not material enough to warrant the effort required to correct it for 2022, and Fortis's next Phase I will be filed in the near future (November 15, 2021).

52. These findings demonstrate that the hearing panel considered the materiality of the Fortis costs to serve REAs under integrated operations, and weighed that fact in its determinations, particularly with respect to when those costs should be removed. The review panel's task is not to retry the application based upon its own interpretation of the evidence, nor is it to second guess the weight assigned by the hearing panel to various pieces of evidence.[47]

53. The review panel is also cognizant that Fortis made arguments about business risk before the hearing panel. As pointed out by the UCA,[48] Fortis's counsel stated in reply argument that "If FortisAlberta shareholder [*sic*] were to bear the risk of paying REA-related costs, it would constitute a utility business risk unique in Alberta and that disproportionately affects FortisAlberta."[49] The review panel finds that Fortis is re-arguing a point that was before the

[45] Decision 26895-D01-2021, ATCO Electric Ltd., Decision on Preliminary Question, Application for Review of Decision 26477-D01-2021, Proceeding 26895, paragraphs 27-28.
[46] Decision 25916-D01-2021, paragraph 190.
[47] Decision 2012-124, at paragraph 31.
[48] Exhibit 26757-X0014, UCA Submissions on the Review Application, paragraph 36.
[49] Transcript Volume 2, page 278. See also pages 285-286 of the same transcript, in which an argument about notational confiscation is made.

hearing panel and suggesting that different conclusions could be or should have been reached. This does not, in and of itself, identify an error of fact or mixed fact and law.

54. The review panel notes that submissions regarding the appropriate fair return as a component of setting just and reasonable rates are best addressed in generic cost of capital proceedings. The hearing panel's findings regarding the Fortis costs to serve REAs under integrated operations take effect in 2023. The Commission expects to announce the process for determining a fair return for 2023 in due course. This is the proper forum for Fortis to argue that an increase in return is required.

55. Accordingly, with respect to Fortis's allegation that the hearing panel failed to consider Fortis's evidence on the consequences of increased regulatory/business risk and capital market reactions, including expectations of higher rates of return, the review panel finds that Fortis has not demonstrated that an error of mixed fact and law exists on a balance of probabilities as required by Section 5(1)(a) of Rule 016. Fortis's request for a review on this ground is therefore denied.

4.3.2 The AUC erred in mixed fact and law in finding that "even if the Commission had the authority to approve the Fortis costs to serve REAs under integrated operations as part of Fortis's tariff, it would decline to do so as it would be contrary to the public interest"

56. In the Decision, the hearing panel stated that even if it had the authority to include the Fortis costs to serve REAs under integrated operations in Fortis's tariff, that it would decline to do so, as it would be contrary to the public interest. Fortis submitted that these statements include multiple errors:

- First, Fortis argued that because REAs are not customers of Fortis, cost causation as between Fortis's ratepayers and REAs was the incorrect context to apply the cost causation ratemaking principle.[50]

- Second, Fortis argued that the hearing panel's suggestion that Fortis's tariff is inconsistent with the principle of transparency lacks support. This is because the costs that Fortis incurs as a result of the REA's use of its distribution system have always been separately tracked and allocated to REAs in its tariff applications.[51]

- Third, Fortis submitted that in assessing whether the tariff is just and reasonable or in the public interest, the hearing panel must consider Fortis's interest. In Fortis's view, the hearing panel did not consider Fortis's interests,[52] as evident by the fact that the findings do not disclose any broader consideration of Fortis's interest in recovering its prudently incurred costs or increased business risk if it cannot do so.[53] Fortis argued that the hearing panel did not articulate the public interest test it would apply or the

[50] Exhibit 26757-X0001, Fortis application, paragraph 47.
[51] Exhibit 26757-X0001, Fortis application, paragraph 48.
[52] Exhibit 26757-X0001, Fortis application, paragraph 49.
[53] Exhibit 26757-X0015, Fortis reply submission, paragraph 23.

relevant competing interests it would consider under the test, resulting in findings based on an evidentiary vacuum.[54]

57. The review panel notes that the words "error of mixed fact and law" are specified in the heading but not in the substantive content of paragraphs 46-49 of Fortis's review application. As stated in Decision 26895-D01-2021, when alleging an error of mixed fact and law, the review applicant should identify the legal test and facts that are at issue and explain how the Commission erred in applying that legal test to those facts. Otherwise, a review applicant is at risk of their review application being disposed of on the basis of a lack of specificity on the alleged errors alone.[55] Given the recency of the Rule 016 amendments, and the fact that Decision 26895-D01-2021 was issued after the close of record of the review proceeding, the review panel will, in the specific circumstances of this proceeding, address the alleged errors, notwithstanding the lack of specificity on the alleged errors.

58. Regarding the first alleged error, in EQUS's view, Fortis argued that the hearing panel altered the law.[56] Fortis responded that it is asserting that the hearing panel did not apply the public interest test to the facts put before it.[57] Fortis confirmed that it is assuming that "it is appropriate for the Commission to apply a 'public interest test' in assessing whether a distribution tariff is just and reasonable under Section 121 of the *EUA* and affords the electric utility a reasonable opportunity to recover its costs under Section 122 of the *EUA*" for the purpose of the review application. The review panel considers this ground for review to be based on an error of mixed fact and law in the circumstances.

59. The hearing panel's findings at issue are in paragraph 208 of the Decision:

> 208. The Commission is mindful of the fact that Fortis customers are currently paying costs for a service in their distribution tariff that, on a net basis, REAs, not Fortis customers, receive. This is completely contrary to the ratemaking principle of cost causation,[189] and is also inconsistent with the principles of transparency and non-distortion. EQUS considers itself to be a competitor of Fortis.[190] Fortis customers would have no knowledge that they are subsidizing the electric service received by REA members (non-transparency), and the subsidization may lead to a distortion of economically efficient outcomes, in that more people may choose to receive service from REAs than would occur in that absence of the subsidy. For these reasons, even if the Commission had the authority to approve the Fortis costs to serve REAs under integrated operations as part of Fortis's tariff, it would decline to do so in this case, as it would be contrary to the public interest.
>
> > 189 In the Distribution Inquiry Final Report, paragraph 291, it states: "In so far as the allocation of costs to customers is concerned, cost causation means that, to the degree that a particular customer or set of customers is responsible for imposing costs on the system (e.g., by driving the need for system upgrades), that set of customers should be responsible for paying those costs."
> >
> > 190 Transcript, Volume 1, page 164, lines 2-5.

54 Exhibit 26757-X0001, Fortis application, paragraph 49.
55 Decision 26895-D01-2021, paragraphs 27-28.
56 Exhibit 26757-X0012, EQUS REA response, paragraph 13.
57 Exhibit 26757-X0015, Fortis reply submission, paragraph 8(b).

60. The review panel denies Fortis's request for a review on this ground for two reasons. First, the review panel agrees with the UCA's position that the hearing panel's findings in paragraph 208 of the Decision are *obiter dicta.*[58] In this case, the *obiter* statements are an alternative finding, meaning that the hearing panel did not use these statements to reach its actual conclusion. Given that these findings are unnecessary to the Decision they do not constitute an error "which is material to the decision."[59]

61. Next, it appears to the review panel that Fortis argues, in relation to the second and third alleged errors, that the hearing panel made a finding based on no supporting evidence. These are allegations of errors of law and therefore outside the scope of Rule 016.[60] The application for review on these grounds is dismissed.

4.3.3 The AUC erred in fact by relying on the wrong evidence to deny Fortis's proposed reallocation of shared system costs among small capacity rate classes

62. In the original proceeding, Fortis proposed to reallocate a portion of costs among its small capacity customer rate class. The hearing panel denied the proposal in Section 4.6 of the Decision.[61]

63. The hearing panel found that Fortis provided insufficient evidentiary support to justify the proposed reallocation of costs between small capacity rate classes:

> 106. Fortis did not apply for the Commission's approval to consolidate and redefine its customer classes based on capacity in this application. Because Fortis used its intent to transition to capacity-based rates in future Phase II applications as justification for the proposed reallocation of shared system costs, the Commission asked Fortis a number of questions with respect to whether a move from end-use rates to capacity-based rates would ultimately result in just and reasonable rates, including the scope, timing and scale of such a change, as well as what supporting analysis and options identification was done.
>
> 107. The Commission issues no finding on Fortis's intention to move to capacity-based rates, but finds that what Fortis provided in this application was insufficient to justify the proposed reallocation of costs between small capacity rate classes. The Commission requires analysis and testing to demonstrate whether a capacity-based rates approach is more reflective of cost causation than the current design, as well as a description of the advantages, disadvantages and trade-offs inherent in such a change, along with alternatives considered, before a move to capacity-based rates can be used to justify interim rate design changes such as the proposed small capacity cost reallocation.

64. The hearing panel also found that the bill impacts shown in Table 7 were unacceptable within the current economic climate:

> 108. The Commission also considers that the proposed reallocation of costs among small capacity rate classes results in significant bill impacts, particularly when considering the distribution charges in isolation. These are shown in column A of Table 7. The

[58] Exhibit 26757-X0014, UCA Submissions on the Review Application, paragraph 50.
[59] Rule 016, Section 5(1)(a).
[60] *ATCO Electric Ltd v Alberta (Utilities Commission*, 2019 ABCA 417 paragraph 17 citing *Beta Management Inc v Edmonton (City*), 2017 ABQB 571, paragraph 24.
[61] Decision 25916-D01-2021, paragraph 109.

> Commission does not consider these bill impacts to be acceptable within the current economic climate. (footnotes omitted)

65. Fortis submitted that the hearing panel made an error of fact because it relied on incorrect data in its reasons. Table 7 is titled "Typical bill impacts by rate class (proposed 2021 PBR rates vs. annual 2021 PBR rates)" and pinpoints Exhibit 25916-X0030, Schedule 6.0 – 2021 Typical Bill Impacts by Rate Class, Tab A. Fortis submitted that the correct evidence was filed in Exhibit 25916-X0142, 6.0-A (Sheet 1). Fortis highlighted that the bill impacts to Rate 22 (Farm Demands Metered) and Rate 26 (Irrigation) are lower in the correct evidence relative to the data cited in the Decision. Fortis submitted that the hearing panel's denial of the proposed reallocation of shared system costs among small capacity rate classes results in increased bill impacts, which is a material error of fact.[62]

66. The review panel is in agreement with Fortis and the UCA[63] and finds that the hearing panel made an error of fact. This is because the table in Exhibit 25916-X0142 updates the bill impacts provided in table in Exhibit 25916-X0030.

67. However, the review panel finds that while it may have been more technically accurate to refer to the updated information from Exhibit 25916-X0142 in the Decision, the error is not material to the Decision because the findings in paragraph 108 are additional to the primary reasons set out by the hearing panel in paragraphs 106 and 107, and are effectively *obiter.* Given that these findings are unnecessary to the Decision they do not constitute an error "which is material to the decision."

68. Accordingly, with respect to Fortis's allegation that the hearing panel erred by using the incorrect data, the review panel finds that Fortis has demonstrated on a balance of probabilities that an error of fact occurred, but that Fortis has not demonstrated that the error is material to the Decision on Fortis's proposal to reallocate a portion of costs among its small capacity customer rate class. Fortis's request for a review on this ground is therefore denied.

4.3.4 The AUC erred in fact by including AESO contribution costs in the revenue removal

4.3.4.1 Review

69. In Section 6.2 of the Decision, the hearing panel found that it did not have authority to approve the type of costs called "Fortis's costs to serve REAs under integrated operations" as part of Fortis's distribution tariff.[64] This type of costs included several different cost categories, one being AESO contribution costs allocated to REAs.

70. Fortis submitted that the hearing panel erred in fact in finding that it did not have authority to approve AESO contribution costs allocated to REAs, totaling $1.188 million in 2017.[65] Fortis indicated that these costs result from Fortis's statutory obligation to arrange system access service for REAs under Section 4 of the *3R Regulation.*[66] Fortis noted that, in paragraph

[62] Exhibit 25767-X0001, Fortis application, paragraph 50.
[63] Exhibit 26757-X0014, UCA Submissions on the Review Application, paragraphs 52-53.
[64] Decision 25916-D01-2021, paragraphs 196 and 206.
[65] Decision 25916-D01-2021, Table 13, row B. This is the 2017 amount of the AESO contribution costs allocated to REAs.
[66] Exhibit 26757-X0001, Fortis application, paragraph 51.

206 of the Decision, the hearing panel stated that REA-related system access costs must be included in Fortis's distribution tariff. Fortis submitted that the alleged error results in an internal inconsistency in the Decision, which is a material error that should be corrected.[67]

71. The UCA and the AFREA did not support Fortis's application to review and vary the decision on the AESO contributions issue. In the UCA's view, given that Fortis classified AESO contribution costs allocated to REAs as a cost to serve REAs under integrated operations in the original proceeding, it is now outside the scope of the review proceeding for Fortis to argue that the hearing panel erred in categorizing the cost in this manner.[68] The AFREA submitted that its relationship with Fortis was contractual, and that Fortis was attempting to improperly alter the relationship between itself and REAs in the proceeding.[69] As an example, the AFREA pointed to Fortis's IR response, in which Fortis stated that "…it is likely that in some cases, a pro-rata allocation would have to be done (similar to FortisAlberta's proposed Rate 63 treatment) to recognize that a SASR [system access service request] may be driven by both FortisAlberta customers and REA load."[70] The AFREA considered this to be a hypothetical future scenario lacking the evidentiary foundation necessary for the review panel to weigh in.[71]

72. EQUS supported Fortis's position on this ground and submitted that AESO customer contribution costs allocated to REAs should be included in Fortis's revenue requirement for recovery from Fortis's own customers.[72] However, EQUS held the view that the hearing panel's approval of Fortis allocating any and all costs to REAs through the use of its component analysis model (CAM) model was an error. Accordingly, the costs identified as "Fortis's costs to serve REAs under integrated operations" in Section 6.2 of the Decision should be allocated to all of Fortis's customers.[73]

73. The review panel finds that the nature of the question is mixed fact and law. This is because Fortis alleged that hearing panel did not apply the correct legal standard to a set of facts.

74. In the Decision, the hearing panel referenced "costs for services that Fortis provides the REAs, such as system access service, which the legislation expressly states are to be included as part of Fortis's distribution tariff."[74] The review panel finds that Fortis has provided sufficient evidence and rationale in the review proceeding to demonstrate, based on the Section 5(1)(a) grounds, that AESO contribution costs allocated to REAs could be transmission-related (that is, system access service related) costs[75] associated with AESO tariff amounts, and part of Fortis's legislated system access service obligations. The review panel finds that if the Decision was varied on the basis of the alleged error, this would result in AESO contribution costs allocated to REAs being eligible for recovery through Fortis's distribution tariff, and not through the process set out in Part 2 of the *3R Regulation*, which would be a materially different recovery methodology.

67 Exhibit 26757-X0015, Fortis reply submission, paragraph 24.
68 Exhibit 26757-X0014, UCA Submissions on the Review Application, paragraph 60.
69 Exhibit 26757-X0014, AFREA Submissions, paragraphs 4 and 6.
70 Exhibit 26757-X0013, AFREA Submissions, paragraph 4 citing Exhibit 26757-X0010.
71 Exhibit 26757-X0013, AFREA Submissions, paragraphs 4-5 citing Exhibit 26757-X0010.
72 Exhibit 26757-X0012, EQUS REA response, paragraph 40.
73 Exhibit 26757-X0012, EQUS REA response, paragraph 25.
74 Decision 25916-D01-2021, paragraph 206.
75 Exhibit 26757-X0010, FAI-AUC-2021AUG31-001(a).

75. The review panel is therefore persuaded that an error of mixed fact and law where the legal principle is not readily extricable, which is material to the decision, exists on a balance of probabilities. Accordingly, a review on this ground is allowed.

4.3.4.2 Variance

76. Under Section 6(2) of Rule 016, the Commission may, with or without notice, review and confirm, rescind or vary the decision in a single proceeding, if in the Commission's opinion it is reasonable and practical to do so.

77. Having met the first stage of the review and variance application on the issue of including AESO contribution costs allocated to REAs in the revenue removal, the review panel considers that the record of the original proceeding and this proceeding is sufficient on this matter and that no additional information or submissions from parties is required on this issue. On this basis, the review panel has proceeded to the second stage of deciding whether to confirm, vary or rescind certain paragraphs of the Decision.

Scope of the variance question

78. In the Decision, the hearing panel noted that costs for services that Fortis provides the REAs, such as system access service, are part of Fortis's distribution tariff, due to express statutory language.[76] This finding is not contested in the review application. Rather, the issue is whether AESO contribution costs allocated to REAs are system access service costs.[77] If confirmed, these costs are recoverable through Fortis's distribution tariff.[78]

79. Additionally, the Decision concerns a Phase II proceeding. In a Phase II proceeding, the Commission reviews and approves: (a) the methodology to allocate the total revenue requirement to various groups of customers; and (b) the rate design. In the review application, Fortis referenced[79] a new section in its terms and conditions (T&C) of service that it proposed in the original proceeding to allocate and recover AESO contribution costs from REAs for transmission upgrades to support REA electricity supply requirements. The hearing panel denied the majority of proposed T&C changes in the Decision and therefore, this section of the T&C was not approved.[80] The review panel considers that, if it finds that AESO contribution costs allocated to REAs are system access service costs properly within Fortis's distribution tariff, then the review panel must also assess who should bear these costs, under the Commission's duty to set a just and reasonable tariff. This includes examining whether these costs should be flowed through to REAs.

80. Fortis did not expressly ask that the review panel reconsider who should bear the AESO customer contribution costs, which would include consideration of the proposed T&C. Despite this Fortis referenced the T&C in its review application, and the Commission asked questions

[76] Decision 25916-D01-2021, paragraph 206.
[77] Exhibit 26757-X0001, Fortis application, paragraph 51 citing Section 4 of the *3R Regulation*.
[78] Decision, paragraph 206; Sections 102 and 119 of the *Electric Utilities Act*, Section 2(1)(b) of the *Distribution Tariff Regulation*.
[79] Exhibit 25916-X0001, paragraph 51: "In Table 13 of the Decision, $1.188 million is included in Row B: 'AESO contribution costs allocated to REAs'. In the Application, FortisAlberta proposed, in s. 7.2.3 of FortisAlberta's proposed customer terms and conditions of service ("T&Cs"), to allocate to and recover such AESO contribution costs from REAs for transmission upgrades to support REAs' electricity supply requirements."
[80] Decision 25916-D01-2021, paragraph 234.

about the T&C in information requests (IRs) in this review proceeding. As discussed above, the T&C relates to the allocation and recovery of AESO contribution costs from REAs. The review panel therefore considers that parties had notice of, and an opportunity to provide submissions on this issue. Further, the question of who should bear the AESO contribution costs allocated to REAs flows directly from the consideration of whether such costs are properly part of Fortis's tariff, which was within scope of the original proceeding and for which parties therefore had sufficient notice.

Are AESO contribution costs allocated to REAs system access service costs?

81. In the *Electric Utilities Act*, system access service "means the service obtained by electricity market participants through a connection to the transmission system, and includes access to exchange electric energy and ancillary services."[81]

82. As explained in Decision 26061-D01-2021,[82] the AESO is the sole provider of system access service.[83] It files a tariff to recover the approved tariffs of transmission facility owners (TFOs), and any other prudent costs and expenses the Commission considers appropriate, and to establish the rates to be charged to each class of customers for system access service.[84] System access service for load customers is provided by the AESO under Rate DTS (Demand Transmission Service) and is charged to the AESO's load customers. Load customers receiving system access service under Rate DTS include DFOs, like Fortis. Subject to some exceptions, load customers of DFOs who wish to receive electricity service must obtain that service from the DFO, and the DFO must make arrangements directly with the AESO.

83. The *3R Regulation* establishes that "an owner whose electric distribution system is directly connected to the transmission system [i.e., Fortis] is responsible for arranging for the provision of system access service for all other electric distribution systems interconnected with that owner's electric distribution system [i.e., REAs]."[85] Accordingly, if an REA wants access to the transmission system, it must arrange for system access service through Fortis.

84. The review panel finds that there is sufficient evidence to demonstrate that AESO contribution costs allocated to REAs result from Fortis providing system access service to REAs. This is because Fortis clarified in the review proceeding that the AESO contribution costs represent transmission-related costs that consist of:

> the return and depreciation of the historical AESO contributions amounts that have already been paid to the AESO on behalf of all POD [point of delivery] load 'served by Fortis (including Fortis customers and REA members)' pursuant to the Company's duty under the *Electric Utilities Act* to arrange for system access service for all its customers, as well as REAs.[86]

---

[81] *Electric Utilities Act*, Section 1(1)(yy).
[82] Decision 26061-D01-2021: Commission-Directed Examination of Distribution Facility Owner Payments under the Independent System Operator Tariff Customer Contribution Policy, Proceeding 26061, April 23, 2021, paragraphs 26, 27, 29. In Decision 26608-D01-2021, the Commission denied applications to review and vary Decision 26061-D01-2021.
[83] *Electric Utilities Act,* Section 28.
[84] *Electric Utilities Act*, Section 30.
[85] *3R Regulation*, Section 4.
[86] Exhibit 26757-X0010, FAI-AUC-2021AUG31-001(a), PDF page 3.

Fortis also advised that the allocator it uses to apportion its AESO contributions to Fortis customers and REAs is each rate class's or REA's proportional Transmission DTS POD charges.[87] Given that: (i) the AESO charges AESO contribution amounts to Fortis; (ii) Fortis pays the AESO contribution amounts to the AESO; and (iii) Fortis allocates these costs based on system access service charges ascribed to Fortis customers and REAs; the review panel concludes that AESO contribution costs allocated to REAs are best characterized as system access service costs and are properly part of Fortis's distribution tariff. This finding requires the review panel to vary the Decision accordingly.

Is the allocation of AESO contribution costs just and reasonable?

85. Having decided that AESO contribution costs allocated to REAs are system access service costs, the next issue the review panel considers is who should bear those costs. This is consistent with the Commission's mandate in a Phase II proceeding, which is to assess whether the allocation of costs is just and reasonable. Timing is also an important consideration in this case because, as explained below, who bears the costs will differ based on whether the AESO contribution costs allocated to REAs were incurred prior to January 1, 2023, or after that date.

86. The review panel finds that since AESO contribution costs allocated to REAs result from Fortis arranging for the provision of system access service to REAs, it is just and reasonable for these costs to be flowed through to REAs, just as other system access service costs are.[88] REA members obtain system access service through Fortis. Since REA members cause, or contribute to causing these system access service costs, and it is possible to flow those costs to them, it follows that REA members should pay for the costs. Flowing AESO contribution costs allocated to REAs through to REAs aligns with the reasoning of the hearing panel in the Decision as well; namely, to correct "the fact that Fortis customers are currently paying costs for a service in their distribution tariff that, on a net basis, REAs, not Fortis customers, receive."[89] It also aligns with the reasoning of the Commission in Decision 26061-D01-2021, that, to the extent possible, AESO contributions are to be flowed through by the distribution utility to the customer that is requesting the new connection.[90] (The Commission acknowledges that REAs are not customers of Fortis, but that Fortis arranges for the provision of system access service for REAs under the *3R Regulation*).

87. While the review panel has determined that it is appropriate to flow through AESO contribution costs to REAs, the matter of timing must also be addressed. The review panel finds two time periods must be considered: AESO contribution costs allocated to REAs and incurred prior to January 1, 2023, and those incurred after that date. December 31, 2022 marks the end of the 2018-2022 PBR term and January 1, 2023 is the date when all AESO contribution costs arising from DFO transmission connection projects commencing after April 23, 2021 will be subject to revised regulatory treatment, implementing the findings of Decision 26061-D01-2021 and Decision 26521-D01-2021.[91] In a number of decisions, including Decisions

---

[87] Exhibit 26757-X0010, FAI-AUC-2021AUG31-001(a).

[88] Section 2(1)(b) of the *Distribution Tariff Regulation.* Also see, for example, the Commission's decisions approving Fortis's annual transmission access charge deferral account true-up, including Decision 25801-D01-2020, Decision 24729-D01-2019, and Decision 23834-D01-2018.

[89] Decision 25916-D01-2021, paragraph 208.

[90] Decision 26061-D01-2021: paragraphs 2, 132-133.

[91] Decision 26521-D01-2021: Revised Regulatory Accounting Treatment for Alberta Electric System Operator Customer Contributions, Proceeding 26521, October 6, 2021, paragraphs 32-33.

25916-D01-2021, 26061-D01-2021 and 26521-D01-2021, the Commission expressed its reluctance to fundamentally change the rates under the current PBR regime given the relatively small effect of contemplated changes, the interrelated nature of the PBR plan parameters as they work in concert to elicit the intended efficiency incentives, and the fact that only one year remains until the end of the PBR term.

88. For AESO contribution costs allocated to REAs and incurred prior to January 1, 2023, the review panel finds that it is just and reasonable that these costs continue to be recovered from Fortis's customers through its distribution tariff, as was Fortis's practice prior to the issuance of the Decision. Based on Fortis's responses to IRs in this proceeding, and Fortis's cost allocation study in the original proceeding,[92] it is neither practical nor efficient to attempt to retroactively determine each of the REAs' proportionate share of the historical AESO contribution costs, or how to treat the return and depreciation amounts that form part of the $1.188 million. This is because the allocation of historical AESO contribution costs to REAs appears not to have been based on an analysis of the extent to which an REA drove the need for AESO contribution costs. Instead, "REAs were allocated a portion of AESO contributions in the same manner as historical embedded AESO contributions are allocated to FortisAlberta customers and rate classes."[93] Fortis also explained that a single identifiable REA has not solely or exclusively driven AESO contribution costs to date.[94]

89. For clarity, no variance of the Decision is required regarding the $1.188 million for the 2018-2022 PBR term. In the 2023 cost of service rebasing and the subsequent PBR term commencing 2024, Fortis may continue to recover from its customers the AESO contribution costs allocated to REAs that were incurred prior to January 1, 2023. Fortis's treatment of AESO contribution costs must also be consistent with Decision 26521-D01-2021, and therefore Fortis must expense (i.e., not earn a return on and not include in the 2023 opening rate base) the AESO contribution costs allocated to REAs arising from Fortis's transmission connection projects commencing April 23, 2021, and before January 1, 2023.[95]

90. In contrast, the review panel finds that AESO contribution costs incurred after January 1, 2023 that are attributable to REAs, must be flowed through to REAs. This is consistent with the review panel's general finding above that it is just and reasonable for AESO contributions to be flowed through to the entity that triggers those costs.

91. To do this, the review panel finds that it is necessary to also vary the hearing panel's findings on one section of Fortis's proposed T&C. The hearing panel did not approve Section 7.2.3, REA Transmission Contribution as part of the hearing panel's general finding in paragraph 234 of the Decision that approving the substantial applied-for T&C revisions was not in the public interest. The proposed Section 7.2.3, REA Transmission Contribution, states:

> REA Transmission Contribution
>
> FortisAlberta may incur Transmission Costs as a result of entering into contracts with the Independent System Operator for provision of System Access Service in support of an REA's electricity supply requirements. Transmission Costs include but are not

[92] Exhibit 25916-X0021, Schedule 2.1-B2.
[93] Exhibit 26757-X0010, FAI-AUC-2021AUG31-001(a).
[94] Exhibit 26757-X0010, FAI-AUC-2021AUG31-001(a).
[95] Decision 26521-D01-2021, paragraphs 32-33.

> limited to contributions and application fees made by FortisAlberta to the Independent System Operator in respect of a Point of Delivery providing System Access Service to an REA.
>
> In the event that FortisAlberta incurs Transmission Costs as a result of entering into contracts with the Independent System Operator for provision of System Access Service in support of an REA's electricity supply requirements, such charges will be invoiced or refunded directly to the REA in accordance with the ISO tariff.[96]

92. In response to IRs regarding this revised T&C in the review proceeding[97] Fortis explained that if Section 7.2.3 was approved, REAs would prospectively pay for any AESO contributions allocated to them through application of this section of the T&C.[98] Fortis explained that an REA may solely drive the need for a SASR, which would result in that REA fully paying the related AESO contribution costs, or may contribute to the need for a SASR, resulting in a pro-rata allocation:

> … the section was proposed "[t]o prepare for the eventuality that an REA may solely drive the need for a SASR and to recover AESO contribution costs in the specific circumstance". In some situations, however, it would not be the REA solely driving the need for a SASR. The Company expects that due to ongoing load creep of both FortisAlberta customers and REA members in various areas of the system served by different PODs, it is likely that in some cases, a pro-rata allocation would have to be done (similar to FortisAlberta's proposed Rate 63 treatment) to recognize that a SASR may be driven by both FortisAlberta customers and REA load.[99]

93. The review panel considers it reasonable to adopt Section 7.2.3, or some version of it or a similar mechanism, to allow for a flow through of the AESO contribution costs to REAs. If Section 7.2.3 had been approved in principle in the Decision, then Fortis would have applied for approval of the language for that section in its compliance filing. However, the compliance filing to the Decision has already been approved, meaning that obtaining approval of the wording of Section 7.2.3 in the compliance filing is not feasible.

94. Accordingly, given the review panel finding that AESO contribution costs incurred after January 1, 2023, that are attributable to REAs must be flowed through to REAs, Fortis is required to effect this change prior to January 1, 2023. The review panel therefore directs Fortis to bring forward Section 7.2.3, or some version of it or a similar mechanism, for Commission approval in a future proceeding for example, in the compliance filing to Proceeding 26615 or in the T&C standardization initiative commenced by the Commission[100]).

95. The review panel directs Fortis to update its 2023 cost-of-service application (Proceeding 26615) to reflect the findings in this decision by adding to its revenue requirement the AESO contribution costs allocated to REAs and incurred before January 1, 2023. This should be done no later than the time that Fortis files responses to information requests in that proceeding.

---

[96] Exhibit 26757-X0004, Appendix B-1 - Proposed Customer Terms and Conditions of Service (Clean), page 40.
[97] Exhibit 26757-X0007, FORTIS-AUC-2021AUG31-001 (e), (d).
[98] Exhibit 26757-X0010, FORTIS-AUC-2021AUG31-001 (d).
[99] Exhibit 26757-X0010, FORTIS-AUC-2021AUG31-001 (e).
[100] Bulletin 2021-04, Stakeholder consultations to evaluate performance-based regulation in Alberta and to determine process to establish 2023 rates for distribution facility owners, March 1, 2021.

5 Decision

96. Given the review panel's findings in Section 4.3.4.2 of this Decision, paragraphs 156, 158, 159, and 191, of Decision 25916-D01-2021 are varied as follows:

> 156. The table below summarizes the different amounts that Fortis calculated with respect to REA-related costs. The paragraphs that follow discuss the different <u>REA-related</u> amounts calculated.

Table 1. Fortis's costs that are attributable to REAs as a result of integrated operations[101]

Cost category	Treatment	Row	$ million
Fortis distribution system costs allocated to REAs	Currently recovered from Fortis customers	A	14.760
~~AESO contribution costs allocated to REAs~~	~~Currently recovered from Fortis customers (but proposed to be recovered from REAs under new Section 7.2.3 of Fortis's customer terms and conditions)~~	~~B~~	~~1.188~~
Load settlement costs attributed to REAs	Recovered from REAs	C	0.442
2017 REA-related costs		D = A + ~~B +~~ C	~~16.390~~15.202
2017 REA farm transmission credit	Costs recovered from Fortis customers and subsequently refunded through a Y factor	E	(1.497)
Fortis costs to serve REAs under integrated operations	Currently recovered from Fortis customers (or <u>proposed to be recovered from REAs under new Section 7.2.3 of Fortis's customer terms and conditions)</u>	F = D + E - C	~~14.451~~ <u>13.263</u>
REA distribution system use credit	Notional amount	G	(4.603)

…

> 158. As well, there are also AESO contribution costs that Fortis incurs on behalf of REAs, of which Fortis allocated $1.188 million to them ~~(row B)~~. <u>These are system access service costs and must be removed from the total REA-related costs.</u> Also included in the REA-related costs are load settlement costs Fortis incurs on behalf of REAs, but already collects from REAs ($0.442

101 Exhibit 25916-X0081.01, Virtual technical meeting presentation, PDF page 67.

> million; row C).[102] In total, Fortis calculated its total costs attributable to integrated operations with REAs to be $15.202 million (REA-related costs; row D).
>
> 159. As discussed in Section 4.5, Fortis receives farm transmission credits from the AESO. Fortis calculated that $1.497 million of the credits it receives is attributable to REAs (row E). The farm transmission credits are meant to be equal to the costs associated with farm transmission. Since Fortis customers currently pay for all of the distribution costs, including the costs associated with farm transmission, it is fair to direct the credits Fortis receives from the AESO in their entirety to Fortis customers (through a Y factor). Through this process, Fortis customers are kept whole and do not pay any net amount for REA-related farm transmission costs. The REA-related costs (row D) that Fortis calculated included REA-related farm transmission costs. Deducting this $1.497 million from the REA-related costs, as well as the load settlement costs Fortis already collects from REAs ($0.442 million; row C), ~~$14.451~~ $13.263 million, which is Fortis's costs to serve REAs under integrated operations (row F). This is the first critical amount at issue in this proceeding.
>
> …
>
> 191. Fortis argued that its total revenue requirement is recoverable in its distribution tariff under Section 122 of the Electric Utilities Act. This includes the costs attributable to integrated operations with REAs. In 2017, Fortis calculated its total REA-related costs to be ~~$16.39~~ $15.202 million (row D in Table 13).

97. Paragraphs 81 to 95 of this decision, are added as paragraphs 288-302 of Decision 25916-D01-2021, under the new heading "**7.7 REA Transmission Contribution**."

Dated on December 9, 2021.

Alberta Utilities Commission

(original signed by)

Kristi Sebalj
Panel Chair

(original signed by)

Cairns Price
Commission Member

(original signed by)

Vera Slawinski
Commission Member

[102] Exhibit 25916-X0021, 2017 Distribution Costs Allocation Study, Schedule 2.1-B2, cell F21.