



Corix Utilities (Foothills Water) Inc.

Decision on Preliminary Question

Application for Review of Decision 27844-D02-2023

2023-2025 Revenue Requirements and Rates Application

November 28, 2023

Alberta Utilities Commission

Decision 28417-D01-2023

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**Application for Review of Decision 27844-D02-2023
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1 Decision summary

1. In this decision, the Alberta Utilities Commission grants, in part, an application by Corix Utilities (Foothills Water) Inc. (Corix) to review Commission Decision 27844-D02-2023¹ (the Decision).

2 Background

2. Corix is a water utility that provides potable water service to 955 customers in Heritage Pointe, Alberta. It is a public utility within the meaning of the *Public Utilities Act*. In Decision 27844-D02-2023 (the Decision), the Commission decided Corix’s application for approval of its 2023-2025 revenue requirement and rates. The Commission processed Corix’s application under Rule 011: *Rate Application Process for Water Utilities*.

3. Rule 011 governs the rate application process for investor-owned water utilities with a small customer base. It contemplates that some water rates applications will need to be developed in two phases: an application development phase, and an application review phase. In the application development phase, Rule 011 provides that Commission staff may assist the applicant in preparing the application so that it meets the requirements set out in the AUC’s *Information Required for Water Applications*. This is a departure from the Commission’s ordinary practice as a quasi-judicial tribunal wherein the role of staff is to support the Commission, and not assist or advise any individual party. By making Commission staff expertise available to water utilities during the application development phase, Rule 011 reduces the need for investor-owned water utilities and customer groups to rely on outside consultants and legal counsel during this phase.

4. In the application review phase, a Commission member is assigned to the application and the Commission begins to test the merits of the application through the hearing process, which may include information requests and argument from the applicant. The application review stage represents the beginning of the quasi-judicial adjudicative process by the Commission. During this phase, the role of AUC staff is the same as during any other type of application – to support the Commission.

5. Rule 011 does not displace or modify an applicant’s statutory burden of demonstrating and supporting the reasonableness of all the elements comprising its revenue requirement and all other aspects of its general rate application.

¹ Decision 27844-D02-2023: Corix Utilities (Foothills Water) Inc. 2023-2025 Revenue Requirements and Rates Application, Proceeding 27844, July 25, 2023.

The Review Application

6. Corix filed its application to review the Decision pursuant to Section 10 of the *Alberta Utilities Commission Act* and Rule 016: *Review of Commission Decisions*. The Commission designated the review application as Proceeding 28417.

7. In this decision, the member of the Commission panel who authored the 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.”

8. In reaching its determinations, the review panel has reviewed the pertinent portions of the Decision and relevant materials comprising the record of this proceeding and of Proceeding 27844. 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 several records with respect to the matter.

3 The Commission’s review process

9. 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.

10. Usually, the review process has two stages. In the first stage, a review panel decides if there are grounds to review the 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 Decision (the variance question). In this decision, the review panel has decided the preliminary question with respect to each of the grounds advanced by Corix.

11. Section 5(1) of Rule 016 describes the circumstances in which the Commission may grant a review. Of particular relevance to this decision is Section 5(1)(a) of Rule 016, 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.

12. In its review application, Corix relied on Section 5(1)(a) and alleged that the hearing panel committed errors of fact or mixed fact and law. Corix also alleged that the Commission breached its duty of procedural fairness. As described below, questions of procedural fairness are questions of law. These may be reviewed through a statutory appeal, but are not subject to review under Rule 016.² In this decision, the review panel has focused its attention on

² Bulletin 2021-11, Amendments to AUC Rule 016, May 6, 2021.

determining whether Corix has demonstrated that the hearing panel made errors of fact or mixed fact and law.

13. 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*³ and *Housen*.⁴ These decisions were summarized by the Court of Appeal of Alberta in *Alberta (Workers' Compensation Board) v Appeals Commission*:⁵

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.*, 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748 at paras. 35-37, 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*, [2002] 2 S.C.R. 235, 2002 SCC 33 at paras. 27-31. 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: at para. 34

14. The onus of demonstrating the existence of an error under Rule 016 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 and facts that are at issue and explain how the Commission erred in applying that legal test to those facts.

4 Issues

15. In its review application, Corix advanced five separate grounds to support a review. In response to the Commission's request for additional particulars, Corix characterized the grounds as follows:

1. Ground 1: The hearing panel erred by failing to adhere to and apply Rule 011 correctly, resulting in a significant breach of the Commission's duty of procedural fairness.
2. Ground 2: The hearing panel erred by disallowing capital costs based on assumed facts not in evidence and by substituting its business decisions for the utility.

³ *Canada (Director of Investigation and Research, Competition Act) v Southam Inc.*, [1997] 1 SCR 748.

⁴ *Housen v Nikolaisen*, 2002 SCC 33.

⁵ *Alberta (Workers' Compensation Board) v Appeals Commission*, 2005 ABCA 276, paragraphs 21-22.

3. Ground 3: The hearing panel erred in its misinterpretation of Corix’s evidence on its allocated costs.
4. Ground 4: The hearing panel erred by relying on financials of incomparable water utilities.
5. Ground 5: The hearing panel erred by not providing Corix an opportunity to address the Commission’s concerns regarding the proposed return on equity (ROE).

5 Review panel findings

5.1 Procedural fairness

16. As confirmed by the Court of Appeal of Alberta on several recent occasions, questions of procedural fairness are questions of law.⁶ Section 29 of the *Alberta Utilities Commission Act* provides a statutory right of appeal on questions of law. Under Rule 016, the Commission does not review its own decisions for errors of law. Although Corix characterized its first ground of review as both a question of procedural fairness and a question of mixed fact and law, the substance of this ground is that the hearing panel breached its duty of procedural fairness. Corix has not identified any specific alleged errors of fact, or mixed fact and law in this ground. Accordingly, the Commission dismisses this ground of review as an error of law beyond the Commission’s scope of review under Rule 016.

17. The remaining four grounds advanced by Corix involve alleged errors of fact or mixed fact and law. The Commission has assessed each of these grounds below. In each case, Corix has asserted that the alleged errors of fact or mixed fact and law are “linked inextricably” with the hearing panel’s failure to properly apply Rule 011. For example, Corix has identified instances where it submits that the hearing panel ought to have rephrased its information requests or made other inquiries so as to better understand Corix’s position. The review panel has considered each of the grounds of review holistically, in light of the existing evidentiary record and with regard to the full context in which the determinations were made. However, the review panel makes no findings in this decision about the sufficiency of the process afforded to Corix because this issue is beyond the scope of Rule 016.

5.2 Ground 2: Did the hearing panel err by disallowing capital costs based on assumed facts not in evidence and by substituting its business decisions for the utility?

18. Ground 2 alleges that the hearing panel erred by disallowing capital costs based on erroneous or assumed facts not in evidence, by applying these assumed or erroneous facts to the legal test, and by substituting its own business decisions for the utility.

19. Ground 2 relates to the recovery of capital costs incurred by Corix for an intake replacement and riverbank rehabilitation project (the Project) carried out in 2022. Corix sought

⁶ See for example: *AltaLink Management Ltd v Alberta Utilities Commission*, 2023 ABCA 325, paragraph 35; *Stubicar v Calgary (Subdivision and Development Appeal Board)*, 2022 ABCA 299, paragraph 46; *ENMAX Power Corporation v Alberta Utilities Commission*, 2021 ABCA 347, paragraph 22; *Carbone v McMahon*, 2020 ABCA 328, paragraph 18(c).

approval to recover \$1,255,000 for the Project from ratepayers. In assessing the application, the hearing panel is required to determine if the costs were prudently incurred, and if the associated increase to rates are just and reasonable. In conducting its prudence review, the hearing panel is required to consider whether Corix had exercised good judgment and made decisions which were reasonable at the time they were made, based on information Corix knew or ought to have known at the time of the decision, and whether those decisions reflected the best interest of customers by avoiding needless expense.⁷

20. The hearing panel ultimately disallowed one-third of the Project costs on the basis of its prudence review. This determination was premised on the hearing panel's understanding that at least some portion of the costs were driven by the need to repair damages caused by deficient repair work conducted in the aftermath of the 2013 floods (the 2013 Work). The hearing panel found that it was not just and reasonable to recover the entirety of the \$1,255,000 in Project costs from ratepayers:⁸

The costs that Corix now seeks to recover from customers are not costs associated with responding to the 2013 floods (which was largely funded by government grant) or necessary maintenance or upkeep to the original repair work. Instead, the costs relate largely to damages caused by the original repair work, such as the replacement of the damaged intake screen and sloughing of the original rip rap. The Commission considers it unreasonable to ask customers to pay for all these costs, especially where avenues to recover these costs from the original contractors have not been exhausted.

Therefore, the Commission finds it unreasonable to grant Corix the full recovery of the intake replacement and riverbank replacement project cost. The Commission does recognize that Corix responsibly sourced the subsequent repair work done to properly remedy the deficiencies of the original repair work. The Commission finds that granting two-thirds of the project costs achieves a balance between the costs that are necessary and prudently incurred, and the costs that could have been offset or avoided by different business decisions. Accordingly, the Commission approves two-thirds of the intake replacement and riverbank rehabilitation project's 2022 forecast, in the amount of \$836,667, to be added to rate base.

21. Corix initially suggested that the hearing panel made the two following errors of fact or mixed fact and law:

1. The hearing panel made an assumption that other cost recovery avenues had not been considered by Corix.
2. The hearing panel unreasonably substituted its own business decision for Corix (contrary to the principle that utility regulators do not exercise general supervisory authority over the business decisions of utilities).

22. In response to the Commission's request for particulars, Corix elaborated on each of these alleged errors. Corix asserted that the hearing panel erred in fact by finding that the

⁷ EUB Decision 2001-110, Methodology for Managing Gas Supply Portfolios and Determining Gas Cost Recovery Rates Proceeding and Gas Rate Unbundling Proceeding – Part B-1: Deferred Gas Account Reconciliation for ATCO Gas, December 12, 2001, page 10; Decision 2013-407, AltaLink Management Ltd. 2013-2014 General Tariff Application, Proceeding 2044, November 12, 2013, paragraph 1286.

⁸ Decision 27844-D02-2023, paragraphs 43-44.

2013 Work was deficient and by finding a direct causal connection between the 2013 Work and the Project. Corix also submitted that the hearing panel made an erroneous inference that it acted imprudently in not pursuing legal or regulatory recourse. Corix submitted that each of these findings constituted an error in fact, as they were based on mistaken inferences that were unsupported by evidence on the record. Further, Corix submitted that these errors of fact formed the basis for errors of mixed fact and law, insofar as the Commission applied these facts to a legal test (namely, the justness and reasonableness of rates). Lastly, Corix stated that the hearing panel's substitution of its own business decision for Corix amounts to an error of mixed fact and law. Given the number of alleged errors contained within this ground, the review panel has addressed each component of Ground 2 separately below.

Did the hearing panel err in fact by finding that the 2013 Work was deficient?

23. In the Decision, the hearing panel found that the 2013 Work was deficient and that this deficiency contributed to the need for the subsequent repair work. Corix submits that the hearing panel erred in fact by inferring that the 2013 Work was deficient.

24. In its application in the original proceeding, Corix provided the following explanation of the Project:⁹

The riverbank alongside the Heritage Pointe raw water pump house was repaired by Blue Ox construction in 2013, with a design completed by Matrix Solutions, who approved and stamped the 2013 repair work. Since installation, the embankment has eroded, the rip rap has been sloughing into the river, and damage to the intake pipe was noticed by Corix operators. **Investigation revealed that the wrong size of rip rap was installed.** After the intake pipe damage was initially noticed Corix conducted an investigation with our consultant, Associated Engineering, to determine the extent of the damage. The amount of sand that was being introduced into the system along with what seemed to be a broken valve stem suggested that the valve for the intake was broken and allowing a bypass to the screen. The broken valve was replaced, however the problem persisted. **Further investigation revealed that there was a puncture to the intake screen (see Figure 3 below), likely caused by the sloughing in of the rip rap.** [emphasis added]

25. The hearing panel asked an information request to clarify whether, during the 2013 Work, the size of rip rap was specified incorrectly, or whether rip rap was installed that did not meet specifications. Corix responded as follows:¹⁰

Corix believes that Blue Ox installed a rip rap that didn't meet specifications. However, during installation the size of the rip rap was identified as different and work done to address the concern as per Matrix Solutions report. Corix relied on our consultant to ensure it was installed correctly.

26. For clarity, Corix's initial application was not seeking approval of the costs of the 2013 Work as these costs were largely funded by a government grant. Rather, Corix's application was seeking approval of the Project costs. Nevertheless, in its written argument, Corix tied its request for approval of the Project costs to the circumstances in which the

⁹ Exhibit 27844-X0001, Corix Rates Application, PDF page 49.

¹⁰ Exhibit 27844-X0020, Corix Response to AUC IRs Round 1, CORIX-AUC-2023MAR03-001(e), PDF page 4.

2013 Work was conducted, with reference to the fact that “certain actions” related to the 2013 Work “could have been improved”:¹¹

Corix submits that the given the unprecedented regional flooding, the urgency of the situation and the limited available resources the 2013 intake repair was reasonable and prudent at that time... Hindsight may indicate certain actions could have been improved but the reality of dealing with a natural disaster and recovery from the natural disaster in real time is much different than looking at the situation ten (10) years later.

27. Based on the entirety of the evidence available during the original proceeding, the review panel is not persuaded that the hearing panel erred in fact by inferring that the 2013 Work was deficient.

Did the hearing panel err in fact by finding a direct causal connection between the Project and the 2013 Work?

28. As described above, Corix stated that in 2013, the “wrong size of rip rap was installed” by Blue Ox construction. Subsequently, “investigation revealed that there was a puncture to the intake screen, **likely caused by the sloughing in of the rip rap**” [emphasis added].¹²

29. As described by Corix, the two main deliverables for the Project were: the repair of the riverbank alongside the utility, including “the **removal of existing undersized rip rap** and...installation of new rip rap material”; and “the replacement of the damaged intake screen” [emphasis added].¹³

30. Corix’s statements of fact in the original proceeding suggested a likely causal connection between the sloughing of the undersized rip rap that was originally installed in 2013 and the subsequent damage to the intake screen. Corix later asserted, in its review application, that there “was no direct causal connection between the Project and the 2013 Work.”¹⁴ However, a review and variance application is not an opportunity to introduce facts and evidence that could have been provided in the original proceeding and were not,¹⁵ nor to bolster or reargue the evidence provided in the original proceeding. The review panel is not persuaded that the hearing panel erred in fact by finding a causal connection between the original repair work and the Project.

Did the hearing panel err in fact by inferring that Corix failed to pursue all recovery avenues for the Project costs?

31. Corix argued that the hearing panel made erroneous inferences related to the prudence of its actions, including erroneously inferring that Corix failed to pursue other potential avenues to recover the Project costs, besides collecting the entirety of these costs from ratepayers. Corix explained that this inference is erroneous because (i) there was never any causal connection between the 2013 Work and the Project and that (ii) even if there were a causal connection

¹¹ Exhibit 27844-X0042, Corix Written Argument, PDF page 17, paragraph 33.

¹² Exhibit 27844-X0001, Corix Rates Application, PDF page 49.

¹³ Exhibit 27844-X0001, Corix Rates Application, PDF page 50.

¹⁴ Exhibit 28417-X0001, Corix Application for Review, paragraph 22.

¹⁵ Rule 016, Section 5(1)(b).

between the two events, it would be reasonable not to pursue litigation as it is costly, recovery is not guaranteed and, had Corix considered legal action, it may have been limitations-barred.

32. Importantly, the assertions now provided by Corix in its review application - that there was no direct causal connection and that it was reasonable not to pursue litigation - were not on the record of the original proceeding or available to the hearing panel. Rather, as the review panel has found above, Corix's statements of fact in the original proceeding suggested the opposite: that there was a likely causal connection between the 2013 Work and the need for the Project. Further, when the hearing panel asked Corix to explain whether it had considered or taken any legal or regulatory action for damages that occurred as a result of the wrong size of rip rap having been installed, Corix did not dispute the suggestion that there was a causal link between the rip rap installation and the subsequent damage. Nor did Corix provide any explanation about the costs and risks of pursuing litigation in the circumstances. Instead, when asked whether it had considered pursuing any legal action, Corix provided a one-word response:¹⁶

(c) Has Corix considered or taken any legal action against Matrix Solutions or Blue Ox for the damages to the Corix system that occurred as a result of their design and work where the wrong size of rip rap was installed?

Corix Response:

No.

33. Corix provided a similar one-word response when asked if it had pursued other regulatory mechanisms:¹⁷

(d) Did Corix make a complaint or consider involving the Association of Professional Engineers and Geoscientists of Alberta if the damage to the intake pipe damage [sic] was caused by engineering errors?

Corix Response:

No.

34. The review process is not intended to provide a second opportunity for parties that had notice of an application to provide evidence or argument that they chose not to raise in the original proceeding. In the original proceeding, Corix had the statutory burden to demonstrate that its proposed rates were just and reasonable. Corix put the prudence of the Project costs at issue by requesting recovery of the entirety of the costs from ratepayers. Corix had full control over what evidence it chose to provide during the application review process to support its application and meet its burden. Unlike some other water utilities that appear before the Commission, Corix has experience preparing and supporting its rate applications. Based on the information that was available to the hearing panel on the record of the original proceeding, the review panel does not find that the hearing panel erred in fact or mixed fact and law by inferring that Corix had not exhausted all other cost recovery avenues.

¹⁶ Exhibit 27844-X0020, Corix Response to AUC IRs Round 1, CORIX-AUC-2023MAR03-001(c), PDF page 4.

¹⁷ Exhibit 27844-X0020, Corix Response to AUC IRs Round 1, CORIX-AUC-2023MAR03-001(d), PDF page 4.

Did the hearing panel commit an error of mixed law and fact by unreasonably substituting its own business decisions for Corix?

35. Corix argued that the hearing panel erred by unreasonably substituting its own business decisions for Corix. This argument relates to the hearing panel’s decision to disallow the recovery of a portion of the Project capital costs on the basis that some of these costs “could have been offset or avoided by different business decisions.”

36. In its review application, Corix referred to the principle that utility regulators do not exercise general supervisory authority over the business decisions of utilities. Corix also maintained that the decisions made by Corix in relation to both the 2013 Work and the Project were prudent business decisions, and that its decision not to pursue other avenues to recover the Project costs was also prudent.

37. Corix cited *British Columbia Hydro and Power Authority v. British Columbia (Utilities Commission)* for the proposition that regulators have no jurisdiction to interfere with or manage the business of a utility. In that case, the British Columbia Court of Appeal considered Section 28 of the *Utilities Act*, which provided the British Columbia Utilities Commission (BCUC) with a general supervisory authority over utilities. The Court commented that, while the provision directs the BCUC to make examinations and conduct inquiries to keep itself informed about the conduct of public utility business, it “does not authorize the [BCUC] to direct how that business is conducted.”¹⁸ The BCUC therefore exceeded its jurisdiction when it directed BC Hydro, under threat of sanction, to comply with prescriptive guidelines detailing how to conduct internal resource planning.

38. The review panel disagrees that the hearing panel substituted its own business decisions for that of Corix. The hearing panel did not make any direction or order to Corix in relation to its business activities; rather, in the course of considering a rates application, the hearing panel exercised its discretion, based on the evidence before it, to disallow certain capital costs from rates on the basis that it would not be reasonable to place these costs on ratepayers.

39. The core role of an economic regulator such as the Commission is to regulate rates charged by natural monopolies. A regulator does not typically involve itself in the day-to-day business decisions of a regulated utility. However, when a utility makes a decision to incur capital costs, and then seeks to recover those costs from ratepayers, the regulator must necessarily examine the circumstances surrounding expenditure to determine whether the costs are prudent, and whether inclusion of the costs in rates is fair to both the utility and its customers. This prudence review “limit[s] a utility’s recovery to what it reasonably or prudently costs to efficiently provide the utility service. In other words, the regulatory body ensures that consumers only pay for what is reasonably necessary.”¹⁹ This relationship between regulator and a utility’s business decisions was described by the Supreme Court of Canada as follows:²⁰

As in any business venture, public utilities make business decisions, their ultimate goal being to maximize the residual benefits to shareholders. **However, the regulator limits the utility's managerial discretion over key decisions, including prices, service**

¹⁸ *British Columbia Hydro and Power Authority v. British Columbia (Utilities Commission)*, 20 BCLR (3d) 106, 1996 CanLII 3048 (BCCA), paragraph 33.

¹⁹ *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45, paragraph 61.

²⁰ *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, paragraph 4.

offerings and the prudence of plant and equipment investment decisions. [emphasis added]

40. The review panel therefore disagrees that the hearing panel's disallowance of some amount of capital costs, in part on the basis that it would be unreasonable to recover the entirety of these costs from ratepayers without having exhausted other potential means of mitigating these costs, constitutes an interference with Corix's business decisions. Rather, the hearing panel was carrying out a core statutory function of considering whether costs were prudent, such that they should be included in rates.

Did the hearing panel commit an error of mixed fact and law by applying assumed facts (i.e. facts not in evidence) to the test for just and reasonable rates?

41. As described above, the hearing panel made findings of fact based on the evidence available on the record of the original proceeding. The review panel is not persuaded that these findings of fact were made in error. The review panel is therefore also not persuaded that the hearing panel committed an error of mixed fact and law by applying these facts in determining whether the proposed rates were just and reasonable.

Did the hearing panel err in disallowing one third of the Project costs?

42. As detailed above, the review panel finds that Corix has not demonstrated any error in the hearing panel's decision to disallow a portion of the Project costs on the basis that it was unreasonable in the circumstances to ask customers to pay for all these costs. The review panel further notes Corix's related submissions that a disallowance of one third of the Project's costs, in the amount of \$418,333, is significant given Corix's size, and Corix's suggestion that this disallowance would result in potential economic hardship to Corix. With respect to this disallowance, the hearing panel stated that "granting two-thirds of the project costs achieves a balance between costs that are necessarily and prudently incurred, and costs that could have been offset or avoided..."²¹ The review panel is not persuaded that Corix has demonstrated any error of fact, or mixed fact and law, in the hearing panel's conclusion that disallowing one third of the Project costs represents a fair balancing of the interests of customers and Corix. A prudence review necessarily involves some exercise of discretion on the part of the hearing panel, including with respect to whether the amount of costs sought are reasonable.

43. Despite not having found any demonstrated error, the Commission has considered Corix's arguments on the economic impacts associated with the magnitude of the disallowance to determine whether to re-open this matter, on its own motion. The Commission is not persuaded to do so. The review panel has carefully considered Corix's assertion that the disallowance would "essentially wipe out its earnings for two years"²² but finds that this characterization overstates the impact of the disallowance on Corix's revenue requirement. While Corix appears to suggest, at paragraph 25 of its review application, that the disallowance is reflected as a one year write-down with a reduction to forecast earnings in the single year of 2023, this is not reflective of how regulated utilities treat capital assets or record revenue for regulatory purposes. Specifically, regulated utilities recover the costs of capital projects and earn a return on those assets for the duration of the service life of that capital project. Similarly, the

²¹ Decision 27844-D02-2023, paragraph 44.

²² Exhibit 28417-X0001, Corix Application for Review, paragraph 25.

impact of any disallowance of capital costs for the Project is also spread out over the service life of the assets that comprise the Project.

44. In summary, the review panel maintains the view that the size of the disallowance is within the discretion of the hearing panel. In any event, when considering the size of the disallowance in the context of Corix's anticipated revenue requirement for 2023-2025 and the expected service life of the assets, Corix has not demonstrated to the satisfaction of the review panel that the disallowance would jeopardize Corix's continued ability to provide safe and reliable service, or deprive Corix of a reasonable opportunity to recover its prudent costs and earn a fair return, such that the review panel should take the extraordinary step of intervening on its own motion.

5.3 Ground 3: Did the hearing panel err in its interpretation of Corix's evidence on its allocated costs?

45. Corix submitted that the hearing panel "disregarded Corix's projected 2023-2025 allocated costs for corporate services, common administrative services, and regional services."²³ Allocated costs reflect amounts assigned to Corix by a parent or other related company for services rendered to Corix. Generally, these tend to be centralized services provided to multiple companies within the corporate group, in order to take advantage of economies of scale. The Commission scrutinizes these costs to ensure that they fairly represent the cost of necessary services performed and that the allocation across companies does not unfairly transfer costs to the regulated utility.

46. In response to the Commission's request for particulars, Corix alleged that in disregarding these projected allocated costs, the hearing panel made errors of fact by erroneously interpreting Corix's evidence and making inferences unsupported by information on the record. Corix submitted that as a result of these errors of fact, the hearing panel erred by:

1. Setting Corix's total allocated costs for corporate services, common administrative services and regional services based on the average of Corix's actual 2017-2021 costs, rather than relying on Corix's projected 2023-2025 allocated costs for these categories. Corix specifically asserted that the hearing panel erred by not including any amount for billing and customer services.
2. Failing to ask Corix additional questions about, or seeking assistance to decipher, the evidence and allocated costs data provided by Corix in confidential exhibits 27844-X0036-C to 27844-X0041-C, as required under Rule 011.
3. Inconsistently applying the evidence on the record to reach its various findings.

47. Corix further submitted that in applying the legal test (determining just and reasonable rates) to the evidence, the hearing panel's alleged errors of fact formed the basis for an error of mixed fact and law.

48. The review panel makes no findings on the sufficiency of process afforded to Corix, with respect to Corix's allegation that the hearing panel erred by not seeking assistance to decipher

²³ Exhibit 28417-X0001, Corix Application for Review, paragraph 30.

Corix's projected allocated costs data. This is an alleged error of procedural fairness, and therefore out of scope of Rule 016.

Did the hearing panel err in setting Corix's total allocated costs based on the average of Corix's actual 2017-2021 costs?

49. In its original application, Corix sought approval of three categories of allocated costs: corporate services, common administrative services and regional services. These allocated costs categories were not included in Corix's 2012-2014 rate application to the Commission, and so had not been previously considered or approved by the Commission. In its original application, and in response to Commission information requests and direction, Corix provided information on its projected allocated costs, as well as its 2017-2021 actual historic costs for these allocated categories.

50. In the Decision, the hearing panel reviewed Corix's evidence on its projected allocated costs, as provided in the application and in confidential exhibits, noting that Corix had provided limited information on allocated cost categories in its application, and that the hearing panel had been required to issue information requests and additional direction to obtain more detail.²⁴ At paragraph 111 of the Decision, the hearing panel addressed the quality of the information provided by Corix and stated that [emphasis added]: "given the significance of the forecast allocated costs to Corix's revenue requirement, **and the fact that it is Corix's burden to demonstrate that its rates are just and reasonable**, this information should have been made available more readily and in a format that would allow the Commission to understand and scrutinize each cost category." The hearing panel's statement is consistent with Corix's statutory burden under Section 103(3) of the *Public Utilities Act*:

Changes in Rates

103 ...

(3) The burden of proof to show that any such increases, changes or alterations are just and reasonable is on the owner of the public utility seeking to make them.

51. The hearing panel concluded that Corix had provided insufficient information to substantiate its forecast amounts, or demonstrate that its projected allocated costs would result in just and reasonable rates. The hearing panel stated at paragraphs 112-113 of the Decision:

This is the first application for which Corix is requesting approval of corporate services, common administrative and regional services costs. These three cost types account for 39 per cent of the 2023 forecast total O&M costs and 35 per cent of the 2024 and 2025 forecast total O&M costs. Given that the utility has been operating in a safe and reliable manner for many years without inclusion of these costs in its revenue requirement, the Commission considers that Corix must clearly demonstrate how these new costs are tied to its provision of service to customers. As the Customer Group suggested, and the Commission concurs, concluding that rates are just and reasonable requires clear and compelling demonstration that an expense or expenditure results in tangible and necessary service to the ratepayers or allows the utility to provide reliable and safe service. **Based on its review of the record, the Commission finds that the information provided by Corix in support of these costs was inadequate and does not substantiate the requested forecast amounts for 2023-2025.**

²⁴ See Decision 27844-D02-2023, paragraphs 109-111.

In a rates application, the Commission is required to assess the utility's cost and service structures to determine if the requested rates are just and reasonable. In part, this requires the Commission to determine if operations and maintenance and capital expenditures are necessary to provide safe, reliable provision of utility services to the public. **When an application contains broad categories of allocations assessed against the utility by other corporate entities, and the dollars involved are not explicitly linked to a necessary function of the utility, it is difficult to conclude that the expenditure is necessary and that the resultant rates are just and reasonable.** [emphasis added]

52. The hearing panel considered, at length, Corix's evidence with respect to its allocated costs and changes in its overall business structure, as well as Corix's arguments that customers had previously been receiving certain common administrative services at no cost.²⁵ The hearing panel concluded that in the absence of sufficient supporting evidence and viewed objectively, the amount of Corix's projected 2023-2025 allocated costs were excessive. As an example, the hearing panel noted, at paragraph 117 of the Decision, that Corix's assigned 2023 cost allocation for information technology (IT) was more than \$78,000, while Corix's direct IT costs for 2023 were \$2,002. The hearing panel stated at paragraph 117 that: "... the increased amount of benefits commensurate with the increased amount of costs was not demonstrated by the applicant in spite of the Commission requesting additional information and rationale. Without that justification, it is impossible for the Commission to assess if it is just and reasonable for a small water utility to pay over 30 times its direct IT costs in IT cost allocations from corporate entities."²⁶

53. The hearing panel instead approved a single, total amount for allocated costs across the three applied-for categories, based on the average of Corix's 2017-2021 actual costs, plus inflation. These 2017-2021 actuals were provided by Corix as part of its original application and in response to the hearing panel's information requests.²⁷ At paragraphs 123-124 of the Decision, the hearing panel stated as follows:

In the absence of sufficient supporting evidence, the Commission finds that, viewed objectively, **Corix's applied-for total allocated costs appear excessive** considering the relative size of the utility operations, the small number of customers, and the small number of full-time personnel who operate the water system.

The Commission finds that it is reasonable to include some level of allocated costs for 2023-2025, because there are certain services that are required that are not part of the direct O&M costs. These include accounts payable, customer billing, information technology, accounting and tax, human resources and regulatory. As explained above, **the evidence provided by Corix does not enable the Commission to determine a reasonable level of the costs for these or any other cost categories.** Consequently, the Commission will approve a single total allocated costs amount for 2023, 2024 and 2025 that will cover all three allocation categories: corporate, regional, and common administrative costs. [emphasis added]

²⁵ Decision 27844-D02-2023, paragraphs 88-137.

²⁶ Decision 27844-D02-2023, paragraph 117.

²⁷ As summarized in Decision 27844-D02-2023, paragraph 91 and Table 5. The review panel notes that footnote 79 of the Decision contains a typographical error: the reference to "Exhibit 278044-X0020" should be corrected to reference to Exhibit 278044-X0021.

54. There is no evidence to suggest that the hearing panel disregarded Corix’s evidence on its projected 2023-2025 allocated costs. Rather, the review panel concludes that Corix disagrees with the weight the hearing panel assigned to this evidence, and the hearing panel’s choice of methodology for determining Corix’s allocated costs. However, the hearing panel is free to accept or reject evidence presented by the parties, and is entitled to use its expertise to arrive at different conclusions.²⁸ The statutory framework under the *Public Utilities Act* provides discretion to the Commission to determine what methodology to rely on in assessing operating and maintenance costs.²⁹ The hearing panel provided substantial reasons in the Decision for why it could not approve, or rely on, Corix’s projected 2023-2025 allocations. Accordingly, the review panel finds that Corix has failed to demonstrate any error of fact, or mixed fact and law, in the hearing panel’s decision to fix a total allocated costs amount for corporate services, regional services and common administrative services based on the average of Corix’s actual 2017-2021 costs in these categories, adjusted for inflation.

Did the review panel err in not including any amount for billing and customer services costs?

55. The review panel finds, however, that the hearing panel made an error of fact by not including any amount for billing and customer services costs in the amount the hearing panel approved for Corix’s total allocated costs amount. The review panel finds that the average of Corix’s actual 2017-2021 amount for billing and customer service costs, adjusted for inflation, should have been included as a common administrative cost in determining the total allocated costs amount. Accordingly, the review panel will hear the variance question on this error of fact in a Stage 2 proceeding.

Did the hearing panel err in applying the evidence to reach its findings on allocated costs and bulk water rates?

56. The review panel notes Corix’s assertion, related to its allegation that the hearing panel erred in setting Corix’s total allocated costs based on the average of Corix’s actual 2017-2021 costs, that the hearing panel arbitrarily and inconsistently applied the evidence in reaching its findings. Here, Corix pointed as an example to the hearing panel’s rejection of Corix’s forecast projected allocated 2023-2025 costs, but acceptance of Corix’s forecast bulk water volumes when setting Corix’s bulk water rates. Corix also alleged, in its review application, that the hearing panel “erred in accepting the bulk water forecast based on the existing rates while ignoring the potential for a reduction of bulk water sales under the new increased rates.”³⁰ However, the hearing panel is under no obligation to simply accept an applicant’s forecasts. As detailed above, the hearing panel in this case assessed Corix’s projected allocated costs, and determined that Corix had failed to demonstrate that the forecast costs were substantiated or would result in just and reasonable rates. Similarly, in accepting Corix’s forecast bulk water volumes when setting bulk water rates, the hearing panel reviewed the evidence and determined that doing so would result in just and reasonable rates. This is because, as discussed in paragraph 259 of the Decision, the hearing panel found there was little risk to retention of bulk water customers associated with a rate increase. The review panel finds that Corix has failed to

²⁸ *Epcor v Alberta (Energy and Utilities Board)*, 2003 ABCA 374, paragraph 23.

²⁹ *Public Utilities Act*, Section 89(a).

³⁰ Exhibit 28417-X0001, Corix Application for Review, paragraph 32.

demonstrate, on a balance of probabilities, that the hearing panel made any error of fact, or mixed fact in law in this regard.

5.4 Ground 4: Did the hearing panel err by relying on financials of an incomparable water utility?

57. French Creek is a water utility owned by an EPCOR subsidiary and located on Vancouver Island. In the original proceeding, customers identified French Creek as a reasonable comparator for Corix, in considering Corix’s allocated costs. In response, Corix challenged the value of French Creek as a comparator. In its review application, Corix asserted that the hearing panel “unreasonably proceeded with relying exclusively on French Creek using a line-by-line comparison in assessing Corix’s deemed allocated costs.”³¹ Corix characterized this as the hearing panel making an error of fact, by finding that the financial information of French Creek could be used as a direct comparator to Corix’s financial costs.

58. The hearing panel considered French Creek to be the best comparator on the record for Corix with regard to the level of allocated costs.³² However, the hearing panel clarified that it was not conducting a strict line-by-line comparison between Corix and French Creek, but was considering French Creek as a comparator for Corix’s allocated costs, in conjunction with the Commission’s expertise and Corix’s historical costs. The hearing panel stated at paragraph 126 of the Decision:

The Commission recognizes Corix’s position that comparisons between water utilities are challenging in the absence of detailed knowledge of the unique customer base, water treatment technologies, cost structure and impact of corporate economies of scale and scope. Nevertheless, the Commission maintains the view that French Creek is a helpful comparator, having regard to the characteristics it does share with Corix. **For that reason, the Commission has considered the example of French Creek, in conjunction with its own expertise and Corix’s historical costs, to determine a reasonable costs allocation.** [emphasis added]

59. In assessing allocated costs, the hearing panel stated that the proportion of total allocated operating costs to total non-corporate operating costs for Corix for 2023 “should roughly approximate the same proportion as the French Creek water utility.”³³

60. The review panel disagrees that the hearing panel made an error of fact in determining that French Creek could serve as a helpful comparator. Rather, the hearing panel weighed the distinguishing factors provided by Corix but concluded, at paragraph 129 of the Decision, that it could “find no compelling rationale why French Creek could run its similar-sized water utility prudently with a much lower level and cost of corporate support.” Accordingly, the hearing panel took the magnitude of French Creek’s corporate allocations, as compared with those of Corix, into consideration to guide its determination of an appropriate corporate allocation. This alleged ground for review amounts to disagreement by Corix with how the hearing panel interpreted and weighed evidence, and does not constitute a reviewable error.

³¹ Exhibit 28417-X0001, Corix Application for Review, PDF page 13, paragraph 33.

³² Decision 27844-D02-2023, paragraph 125.

³³ Decision 27844-D02-2023, paragraph 129.

5.5 Ground 5: Did the hearing panel err by not providing Corix an opportunity to address the Commission’s concerns regarding the proposed return on equity (ROE)?

61. Corix asserted that the hearing panel erred by failing to consider all of the factors that influence the determination of a ROE. Corix further asserted that the hearing panel breached its duty of procedural fairness by failing to allow Corix an opportunity to know and meet the case it was expected to meet.

62. The review panel makes no findings on the alleged error of procedural fairness. This is out of scope of Rule 016. The review panel focuses its attention in this section on the allegation that the hearing panel erred by failing to consider all of the factors that influence the determination of a ROE.

63. There is no prescribed list of factors that the hearing panel must consider in determining a fair ROE. Rather, Section 90(3) of the *Public Utilities Act* provides as follows:

(3) In fixing the fair return that an owner of a public utility is entitled to earn on the rate base, the Commission shall give due consideration to all those facts that, in the Commission’s opinion, are relevant.

64. If the hearing panel had failed to consider a factor that it was obliged to consider, this would constitute an error of law. However, the statutory framework provides a hearing panel with broad discretion to determine what factors it considers relevant in setting a fair return. The Commission’s broad discretion was recently confirmed by the Court of Appeal of Alberta.³⁴

65. In the original proceeding, Corix requested that the Commission approve an 8.75 per cent ROE. This is the same ROE approved in Corix’s previous rate application in 2012, which reflected the approved generic cost of capital (GCOC) rate at that time. The GCOC rate subsequently decreased to 8.5 per cent, and was reaffirmed at 8.5 per cent in a 2022 decision (the 2023 GCOC).³⁵

66. Corix suggested that a higher ROE was justified based on the relatively higher business risk faced by a small water utility, but did not provide evidence to support its request, stating in its original application that such evidence would be challenging to produce:³⁶

Corix submits that requiring a small utility in Alberta to put forward expert evidence to justify the higher additional business risk faced by a small water utility is unreasonable.

...

Corix knows of no evidence that can support an assertion that a large natural monopoly like ATCO Gas has the same business risk as a small water utility like Foothills Water. It is clear that Foothills Water has higher business risk than ATCO Gas.

³⁴ *The Office of the Utilities Consumer Advocate v Alberta Utilities Commission*, 2021 ABCA 336, paragraph 16.

³⁵ Decision 27084-D01-2022: 2023 Generic Cost of Capital, Proceeding 27084, March 31, 2022, cited at paragraphs 203-204 of Decision 27844-D02-2023.

³⁶ Exhibit 27844-X0001, Corix Rates Application, PDF page 63.

67. However, Corix maintained that the 8.75 per cent rate was justified in light of its business risk:³⁷

Given the large size of natural monopolies the recovery cost per customer is relatively small. As a comparison ATCO Gas has 1.1 million customers in 300 communities in Alberta. [Footnote omitted] Foothills Water in comparison has less than 1,000 customers in 1 community. In simple metrics, ATCO Gas is 1,100 times larger than Foothills Water. It is clearly the case that ATCO Gas has much lower business risk than Foothills Water due to the fact that it is a large natural monopoly that can use its other captive customers in one community to pay for any risk or losses incurred in another community. Foothills Water due to its size and limited operations in one community cannot transfer the cost and risk to another community which ATCO Gas is able to.

68. The hearing panel considered Corix's arguments at paragraphs 197-206 of the Decision. It noted that in Decision 27084-D01-2022 (the 2023 GCOC), the Commission had determined that "an ROE of 8.5 per cent will, when combined with the existing deemed equity ratios, provide the utilities with a fair return for 2023."³⁸ In considering Corix's equity ratio, the hearing panel made a factual finding that "there has been no fundamental or material change to Corix's business risk or its operations since the last time its capital structure was addressed by the Commission."³⁹ Accordingly, the hearing panel found that Corix's business risk had not changed, and determined that it would continue to apply their existing deemed equity ratio,⁴⁰ and the most recently approved GCOC rate,⁴¹ consistent with how Corix has been treated in the past.

69. It appears to the review panel that Corix disagrees with the hearing panel's assessment of the evidence and would have preferred for the hearing panel to adopt its assertion that the business risk faced by Corix warrants a higher rate of return. This does not amount to an error of fact. As stated above, the determination of a fair rate of return is inherently discretionary, and it is apparent from the record that the hearing panel considered Corix's evidence on its business risk. It is not the role of the review panel to second guess the weight the hearing panel assigned to the various pieces of evidence.

70. The review panel has determined that Corix has not made out any error of fact, or mixed fact and law, in the hearing panel's finding that using the most recently approved GCOC rate of 8.5 per cent would provide Corix with a fair return for 2023. However, while not raised by Corix, the review panel considers that the Commission's release of Decision 28585-D01-2023⁴² in November 2023, which set an ROE of 9.28 per cent for 2024, constitutes a changed circumstance material to the Decision, which occurred since its issuance. Accordingly, on its own motion under Section 2(1) of Rule 016, the review panel will consider Corix's ROE for 2024 and 2025, in light of Decision 27084-D01-2022⁴³ (the 2023 GCOC) and Decision 28585-D01-2023⁴⁴ (the 2024 ROE), in a Stage 2 proceeding.

³⁷ Exhibit 27844-X0001, Corix Rates Application, PDF page 63.

³⁸ Decision 27844-D02-2023, paragraph 204, citing Decision 27084-D01-2022, 2023 Generic Cost of Capital, Proceeding 27084, March 31, 2022, paragraph 55.

³⁹ Decision 27844-D02-2023, paragraph 195.

⁴⁰ Decision 27844-D02-2023, paragraphs 194-196.

⁴¹ Decision 27844-D02-2023, paragraph 206.

⁴² Decision 28585-D01-2023, 2024 Return on Equity, Proceeding 28585, November 20, 2023.

⁴³ Decision 27084 D01-2022, 2023 Generic Cost of Capital, Proceeding 27084, March 31, 2022.

⁴⁴ Decision 28585-D01-2023, 2024 Return on Equity, Proceeding 28585, November 20, 2023.

71. The review panel emphasizes that a Stage 2 proceeding is not a *de novo* proceeding. Rather, during a Stage 2 proceeding, the Stage 2 panel must consider the record of the original proceeding in light of the error(s) determined to exist in the findings of the hearing panel in the Stage 1 proceeding (or in light of the previously unavailable facts or changed circumstances accepted by the review panel, or any matters that the review panel has, on its own motion, determined it will review) in order to determine if the original decision should be confirmed, varied or rescinded because of the demonstrated error. In making that determination, the Stage 2 panel will consider the relevant portions of the record in the original proceeding as well as any supplemental evidence and additional submissions made in the Stage 2 proceeding which the Stage 2 panel determines to be necessary in the circumstances.

6 Decision

72. For the reasons stated above, the review panel grants, on its own motion and in part, Corix's request to review Decision 27844-D02-2023, with respect to the errors or changed circumstances identified at paragraphs 55 and 70 of this decision. Accordingly, the Commission will issue a process announcement to commence a Stage 2 proceeding on these paragraphs in due course.

Dated on November 28, 2023.

Alberta Utilities Commission

(original signed by)

Vera Slawinski
Panel Chair

(original signed by)

Matthew Oliver, CD
Commission Member

(original signed by)

Vincent Kostas
Acting Commission Member