MCL Development Corp. and Horse Creek Water Services Inc.

Decision on Preliminary Question

Applications for Review of Decision 21340-D01-2017: Horse Creek Water Services Inc. General Rate Application

May 22, 2018

Alberta Utilities Commission
Decision 23203-D01-2018
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1 Decision

1. In this decision, the Alberta Utilities Commission must decide whether to grant separate applications by MCL Development Corp. (MCL) and Horse Creek Water Services Inc. (HCWS) for review of Decision 21340-D01-2017 (the original decision).[1]

2. The original decision addressed an application by HCWS for approval of terms and conditions of service as well as its forecast revenue requirements, rate base, and the resulting rates for 2017 and 2018 (the original proceeding). The Commission panel that authored the original decision (the hearing panel) directed HCWS to maintain its current rates, ruled on HCWS' terms and conditions for water service and approved a tie-in fee of $10,000.00. It also determined that the Commission's jurisdiction to deal with public utilities as provided for in the *Public Utilities Act*, RSA 2000, c P-45 does not generally extend to waste water utilities.

3. By application dated December 15, 2017, MCL asked for review of the original decision alleging errors of fact, law or jurisdiction, including breaches of natural justice and procedural fairness.

4. For reasons later described, the Commission interpreted correspondence received from HCWS on December 19, 2017 as an application for review of the original decision on the grounds of previously unavailable facts or changed circumstances material to the decision that could lead the Commission to materially vary or rescind that decision.

5. The Commission panel assigned to this proceeding (the review panel), has denied the review applications filed by MCL and HCWS based on its finding that:

- MCL has not demonstrated the existence of errors of fact, law or jurisdiction (including alleged breaches of natural justice and procedural fairness), that could lead the Commission to materially vary or rescind the original decision
- HCWS has failed to establish the existence of previously unavailable facts or changed circumstances material to the decision, which occurred since its issuance that could lead the Commission to materially vary or rescind the original decision.

2 Introduction and background

6. HCWS was the applicant in the original proceeding. HCWS provides treated water supply and distribution services to over 150, primarily residential, water customers.[2]

[1] Decision 21340-D01-2017: Horse Creek Water Service Inc. General Rate Application.
[2] 21340-D01-2017, at para 18.

7. The Monterra Homeowners' Association and MCL (collectively, the Monterra group) filed a joint statement of intent to participate in the original proceeding.[3] The Monterra group actively participated in the original proceeding, including filing information requests (IRs), intervener evidence, argument and reply argument.[4]

8. In the original decision, the hearing panel approved the continuation of then existing rates for HCWS based, in part, on the following:

- HCWS's forecast operations, maintenance and administration expenses[5]
- A rate base reflecting an allocation of the amount paid by HCWS to purchase the water utility and its affiliated waste water utility out of receivership[6]
- Depreciation rates as filed by HCWS, based largely on the continued use of previously-approved depreciation rates[7]
- A deemed capital structure of 60 per cent debt and 40 per cent equity[8]
- An approved return on equity reflecting the Commission's Decision 20622-D01-2016: 2016 Generic Cost of Capital[9]
- A deemed cost of debt based on the Monterra group's recommendation of 3.5 per cent[10]

9. The hearing panel also approved a tie-in fee of $10,000, finding that "connection and tie-in fees should represent the cost of connecting a new customer to the water distribution system."[11]

10. Additionally, the hearing panel determined that the definition of public utility in the *Public Utilities Act* generally excludes the provision of waste water services and, accordingly, the Commission lacks jurisdiction to set rates for Horse Creek Sewer Services (HCSS) an affiliate of HCWS, which provides waste water service.

11. MCL's application for review (MCL review application) was filed on December 15, 2017, pursuant to Section 10 of the *Alberta Utilities Commission Act*, RSA 2007, c A-37.2 and AUC Rule 016: *Review of Commission Decisions* (Rule 016). As will be described in greater detail below, the MCL review application alleged that the hearing panel:

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3 21340-D01-2017, at para 5.
4 21340-D01-2017, at paras 8 – 13.
5 21340-D01-2017, at paras 34, 39 – 44, 47 – 49, 55 - 59, 63 – 65, 68 – 78, 81 – 83 and 87 – 90.
6 21340-D01-2017, at paras 96 – 112.
7 21340-D01-2017, at paras 119 – 123.
8 21340-D01-2017, at paras 128 – 129, 136 – 140.
9 21340-D01-2017, at paras 130 – 131.
10 21340-D01-2017, at paras 132 – 135.
11 21340-D01-2017, at para 165.

- Erred in law and jurisdiction in its interpretation of the *Public Utilities Act* and determination that the Commission has no jurisdiction over waste water utilities

- Erred in fact, law or jurisdiction by making "unreasonable determinations outside the range of defensible outcomes" relative to the debt equity ratio approved for HCWS and in its consideration of the Monterra group's rate calculations

- Breached the rules of natural justice and procedural fairness in failing to provide notice to the parties and afford them an opportunity to know the case to be met relative to the hearing panel's approval of a 60/40 debt equity ratio for HCWS, determination of tie-in fees, and inclusion of waste water debt in rate base

- Breached the rules of natural justice and procedural fairness giving rise to a reasonable apprehension of bias as a result of certain actions and overlapping functions of Commission staff

12. On December 19, 2017, the Commission received correspondence on behalf of HCWS entitled "Horse Creek Water Services Inc. Review and Variance Request" in which HCWS stated that "new information has been brought forward" to HCWS. Attached to the December 19, 2018 letter was a November 29, 2017 letter of intent concerning the acquisition of certain of the assets of HCWS by a third party (prospective purchaser) and an email from the prospective purchaser. The HCWS correspondence, the attached letter of intent and the email from the prospective purchaser (collectively, the HCWS review application), was uploaded to the Commission's electronic filing system on December 20, 2017.

13. The Commission consolidated the MCL review application and the HCWS review application (collectively, the review applications) into Proceeding 23203.

14. On January 19, 2018, the Commission issued correspondence advising parties that pursuant to Rule 016, consideration of the review applications would follow a two-stage process. The Commission would first determine the preliminary question of whether the original decision should be reviewed. If the Commission issued a decision granting a review, a hearing or other proceeding on the merits would be ordered to decide whether to confirm, rescind or vary the original decision. By the January 19, 2018 letter, the Commission also established a process that provided parties an opportunity to submit comments on the review applications and, thereafter, for parties to file reply submissions on any comments filed.

15. MCL filed comments with respect to the HCWS review application on February 7, 2018, and HCWS submitted reply comments on February 21, 2018. No submissions were received with respect to the MCL review application.

16. In reaching its determinations, the review panel has reviewed the original decision, the relevant materials comprising the record of the original proceeding and the materials filed in this proceeding. References in this decision to specific parts of a particular record are intended to assist the reader in understanding the Commission's reasoning and should not be taken as an indication that the Commission did not consider all relevant portions of these records with respect to the matter.

3 The Commission's review process

17. The Commission's authority to review its own decisions, and establish rules for that purpose, is discretionary and is found in Section 10 of the *Alberta Utilities Commission Act*. The Commission established Rule 016 under that authority.

18. Pursuant to Section 3(3) of Rule 016, a person who is directly and adversely affected by a decision may file an application for review within 60 days of its issuance. Both MCL and HCWS filed their respective review applications within the required period.

19. As noted in Section 2, the review process has two stages. In the first stage, which is the subject of this decision, a review panel must decide whether there are grounds to review the original decision. This is sometimes referred to as the "preliminary question." If the review panel decides that there are grounds to review the decision, it moves to the second stage of the review process where the Commission holds a hearing or other proceeding to decide whether to confirm, vary, or rescind the original decision.

20. Section 4(d) of Rule 016 sets out four possible grounds for review. They include errors of fact, law or jurisdiction (4(d)(i)), previously unavailable facts material to the decision (4(d)(ii)) and changed circumstances material to the decision which occurred since its issuance(4(d)(iii)). Section 6(3) describes the circumstances in which the Commission may grant a review as follows:

> 6(3) The Commission may grant an application for review of a decision, in whole or in part, where it determines, for an application for review pursuant to subsections 4(d)(i), (ii) or (iii), that the review applicant has demonstrated:
>
> (a) In the case of an application under subsection 4(d)(i), the existence of an error of fact, law or jurisdiction is either apparent on the face of the decision or otherwise exists on a balance of probabilities that could lead the Commission to materially vary or rescind the decision.
>
> (b) In the case of an application under subsections 4(d)(ii) or 4(d)(iii), respectively, the existence of:
>
> (i) Previously unavailable facts material to the decision, which existed prior to the issuance of the decision in the original proceeding but were not previously placed in evidence or identified in the proceeding and could not have been discovered at the time by the review applicant by exercising reasonable diligence; or
>
> (ii) Changed circumstances material to the decision, which occurred since its issuance.
>
> that could lead the Commission to materially vary or rescind the decision,
>
> …

21. In Decision 2012-124,[12] the Commission addressed the role of a review panel and articulated the principles that should apply to its consideration of a review application:

> - First, decisions of the Commission are intended to be final; the Commission's rules recognize that a review should only be granted in those limited circumstances described in Rule 016.
>
> - Second, the review process is not intended to provide a second opportunity for parties with notice of the application to express concerns about the application that they chose not to raise in the original proceeding.
>
> - Third, the review panel's task is not to retry the … application based upon its own interpretation of the evidence nor is it to second guess the weight assigned by the hearing panel to various pieces of evidence. Findings of fact and inferences of fact made by the hearing panel are entitled to considerable deference, absent an obvious or palpable error.[13]

22. The Commission has endorsed these principles in many subsequent decisions and they have been applied by the review panel in its consideration of the review applications.

4 The Review Applications

23. Although the review applications have been consolidated in this proceeding, they will be addressed separately in Sections 5 and 6 below.

5 The MCL Review Application

24. The MCL review application included sections titled, "III. Facts Relevant to Review Application" and "IV. Grounds for the Application". The section titled "Facts Relevant to Review Application" offered detail elaborating on the grounds later described in Section IV but also advanced one additional argument concerning the absence of findings in relation to the obligation to serve (the additional argument). As it was not entirely clear whether MCL intended that its application be restricted to the specific grounds identified in Section IV of its application, the hearing panel has considered all those matters detailed in the MCL review application. Where practical, the review panel has addressed the matters detailed in Section III within the broader issues articulated in the formal grounds set out in Section IV of the MCL review application. The additional argument has been addressed under a separate heading entitled "Other issues raised".

25. In summary, MCL's review application alleged that the hearing panel:

> - Erred in law and jurisdiction in its interpretation of the *Public Utilities Act* and more specifically, in determining that the Commission has no jurisdiction over waste water utilities

[12] 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 10, 2012.

[13] Decision 2012-124, at paragraph 31.

- Erred in fact, law or jurisdiction "by making unreasonable determinations outside the range of defensible outcomes":

    i. In approving a 60/40 deemed debt equity ratio for HCWS

    ii. In declining to consider evidence submitted by the Monterra group, on the grounds that it was "overly complex"

- Breached the rules of natural justice and procedural fairness giving rise to a reasonable apprehension of bias as a result of:

    i. Offline communications between Commission staff and HCWS during the application development stage of the process, a general lack of transparency relative to the involvement of Commission staff during the development of HCWS' rate application as well as the failure to afford interested parties an opportunity to participate in the application development process

    ii. Overlapping functions of Commission staff in the development of HCWS's rate application and the adjudicative review of the application

- Breached the rules of natural justice and procedural fairness in failing to provide notice to the parties and afford them an opportunity to know the case to be met and respond to the following:

    i. Approval of a 60/40 debt equity ratio for HCWS

    ii. Determination of tie-in fees

    iii. Inclusion of waste water debt in rate base

- Made no findings regarding the obligation to serve owed by HCWS and HCSS.

26. Because a breach of the rules of natural justice, or procedural unfairness, if established, may vitiate a decision, those grounds will be considered first.

5.1 Alleged breach of natural justice and procedural fairness

27. As previously described, MCL advanced a number of arguments in support of its contention that the hearing panel breached the rules of natural justice and procedural fairness. Each of those arguments is addressed in turn below.

5.1.1 Reasonable apprehension of bias

5.1.1.1 Reasonable apprehension of bias based on Rule 011 Process: Offline communication, lack of transparency and no opportunity for participation at the application development stage

28. MCL expressed concern with respect to certain "off line" communications between Commission staff and HCWS (as the applicant in the original proceeding), an alleged lack of

transparency regarding the involvement of AUC staff at the application development stage and the absence of an opportunity for interested parties to participate in the application development process.

29. With respect to the alleged "offline communication", MCL asserted that there is evidence of communication between Commission staff and HCWS after HCWS filed its initial water rates application on February 2, 2016 that was not made public at the time. In particular, MCL noted that a revised application was filed by HCWS on June 6, 2016 and that the revised application included a section entitled "Additional Support Requested by Alberta Utilities Commission."[14] MCL also referenced a process letter from the Commission, which records that the Commission had requested additional information from HCWS to complete the filing as well as the following statement from the Decision: "As provided for in Rule 011: *Rate Application for Water Utilities*, Commission staff worked with HCWS to develop the application. An updated application was filed by HCWS on June 8, 2016.[15]" MCL noted that copies of the above referenced communications between HCWS and the Commission were not filed on the record of the proceeding.

30. Regarding the application development process, MCL argued that, notwithstanding certain customers having filed statements of intent to participate in the proceeding after the filing of the initial application, "the record shows no AUC staff member(s) assigned to the file" contacted these customers nor communicated whether and to what extent AUC staff were involved in assisting HCWS in the further development of its application.[16] Further, no interested parties were given the opportunity to participate in the application development process.

Findings

31. The test for a reasonable apprehension of bias is whether "an informed person, viewing the matter realistically and practically – and having thought the matter through," would have a "reasonable apprehension of bias."[17] The rule against bias is a principle of the duty of fairness which applies to all public decision makers, like the Commission.[18] The onus of demonstrating the apprehension of bias rests with the party alleging it.[19] For the reasons that follow, MCL has failed to satisfy that onus.

32. The impugned communication between HCWS and Commission staff occurred during the application development process. More specifically, AUC staff requested HCWS to provide further information in support of its application and worked with HCWS to develop the application. Both the fact and content of these communications fall squarely within and are part

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[14] Exhibit 23203-X0002, at para 28.
[15] Exhibit 23203-X0002, at para 30.
[16] Exhibit 23203-X0002, at para 31.
[17] *Committee for Justice & Liberty v Canada (National Energy Board)* (1976), [1978] 1 SCR 369 (SCC), cited in David Jones QC & Anne de Villars, QC, *Principles of Administrative Law*, 6 ed (Toronto: Thomson Reuters, 2014) at 417.
[18] David Jones QC & Anne de Villars, QC, *Principles of Administrative Law*, 6 ed (Toronto: Thomson Reuters, 2014) at 411.
[19] As discussed by the Commission in its September 30, 2016 ruling in Proceeding 21030, at para 16, citing *R. v S. (R.D.)*. See also *Continuing Care Employees' Bargaining Association et al. v. Alberta Union of Provincial Employees et al.* (2002), 2002 ABCA 148 2002 ABCA 148.

of what is expressly contemplated by the Commission's Rule 011 *Rate Application Process for Water Utilities*.

33. Rule 011 *Rate Application Process for Water Utilities*, has been established pursuant to Section 76(0.1)(1)(d) of the *Alberta Utilities Commission Act*. That section provides;

> The Commission may make rules governing any matter or person within its jurisdiction, including…the procedures and processes for establishing terms and conditions of service and rates of water utilities.

34. Rule 011 relates exclusively to the rate application process for investor-owned water utilities with a small customer base. Sections 3 and 9 of the rule detail its purpose. Sections 3 and 9 read, in part, as follows;

> **3 Purpose**
>
> **3.1** The purpose of this rule is to provide an efficient**,** cost effective process to mitigate the full regulatory process which is often costly for small water utilities because of the small customer base over which costs are collected, and water utilities generally do not have the personnel and expertise required for complex rate hearings.
>
> **3.2** The process detailed in this rule reduces costs by minimizing the need for parties to engage consultants and legal counsel and by making use of the expertise of staff.
>
> **9 Costs**
>
> As noted in Section 3(1), the purpose of Rule 011 is to provide an efficient and cost effective process for investor owned water utilities. One of the ways to achieve this is through the use of Commission staff expertise during the application development process, reducing the need by water utilities and customer groups for outside consultants and legal counsel…the use of Commission staff expertise will reduce the costs of the regulatory process…

35. Section 4 of Rule 011 details the circumstances to which the rule applies. They include the development of a rate application and the identification of deficiencies where a rate application does not meet the Commission's information requirements. Section 4.2 expressly contemplates that Commission staff may work with the water utility (in this case, HCWS) to prepare a rate application, and provides that this is an information gathering process (also described as the application development process).

36. The fact that this application was being processed pursuant to Rule 011 is clear on a review of the record of the original proceeding and on the face of the original decision. MCL has not challenged the jurisdiction of the Commission to make Rule 011 or its application to the original proceeding. Further, there has been no suggestion that Commission staff engaged with HCWS other than for the purposes contemplated by Rule 011 or acted in a manner contrary to the provisions of Rule 011.

37. Rule 011, like all other Commission rules, is published and readily available on its website. It is therefore information of which MCL was, or should have been, reasonably aware.

As such, the review panel finds no merit in the suggestion that the purpose and nature of the involvement of AUC staff in the development and completion of HCWS's water utility application was lacking in transparency.

38. Having regard to the express purpose and content of Rule 011 and of the impugned communications, MCL has also failed to satisfy the review panel that an informed person, "viewing the matter realistically and practically – and having thought the matter through," would have a "reasonable apprehension of bias" on the part of the Commission or the hearing panel as a result of the impugned communication between HCWS and Commission staff or as a result of the involvement of Commission staff during the application development process. Rule 011 provides a mechanism within the authority of the Commission aimed at assisting parties unfamiliar with regulatory processes, improving regulatory efficiency and reducing regulatory costs for the utility and its customers. This mechanism accomplishes its goals through the utilization of the Commission staff in the application development stage prior to the commencement of the Commission's application hearing process and the assignment of a Commission panel to adjudicate the application.

39. MCL has likewise failed persuade the review panel that natural justice and procedural fairness were compromised, or that a reasonable apprehension of bias arises, because MCL was not contacted during, or offered the opportunity to participate in, the application development process.

40. While Section 6.1 of Rule 011 contemplates the possibility of public information sessions and customer representative involvement at the application development stage, neither is required. This is in contrast to the provisions of Rule 011 regarding the application review stage, which clearly establish specific participatory rights for customers and customer groups, including the opportunity to ask IRs of the applicant (Rule 011, Section 7.3) and the opportunity to provide argument and reply argument (Rule 011, Section 7.4).

41. It is clear, on the face of the original decision as well as on a review of the record from the original proceeding that, consistent with the requirements of Rule 011 and procedural fairness, the Commission established an extensive public process to review the application on its merits, which afforded MCL and other interested parties ample opportunity to participate. The process established for the original proceeding is detailed in paragraphs 3 through 14 of the original decision; it included 2 rounds of IRs to HCWS, a motion from the Monterra group, intervener evidence, IRs on intervener evidence, rebuttal evidence from HCWS, argument and reply argument. MCL, as a member of the Monterra group, was an active participant in all of those process steps [20]

42. For all of the above reasons, the Commission finds that MCL has failed to demonstrate that a reasonable apprehension of bias arises from the communications relied on by MCL, the involvement of Commission staff in the application development process or the absence of an opportunity for other interested parties to participate in that process.

[20] 21340-D01-2017, at paras 8 – 13.

5.1.1.2 Reasonable apprehension of bias based on overlapping roles of an AUC Staff member in the proceeding

43. MCL also alleged that "The AUC breached the requirements of natural justice as a result of AUC staff having overlapping functions that resulted in a reasonable apprehension of bias."[21] More specifically, MCL alleged that a Commission staff member involved in the application development stage "also had a very high degree of involvement and control over the adjudicative process reviewing the application on the merits."[22] In support of this allegation, MCL relied on the fact that a Commission staff member that had participated in the application development stage was also the signatory on certain written correspondence communicating procedural directions and rulings on behalf of the Commission during the review stage of the proceeding.[23]

Findings

44. For the reasons that follow, MCL has failed to satisfy the review panel that a reasonable apprehension of bias arises from the overlapping functions of Commission staff as alleged by MCL.

45. The basis for MCL's argument on this point is its assertion that a Commission staff member involved in the application development stage of the process also "had a very high degree of involvement and control over the adjudicative process reviewing the application on the merits". However:

- The record from the original proceeding identifies that the subject staff member was one of seven Commission staff members identified in the original decision as staff assisting the Commission in the proceeding[24]. MCL has not offered any persuasive argument or evidence to support its contention that this particular staff member's involvement in both the application development and review stages influenced or impaired the impartiality of the Commission member's decision(s) or otherwise reasonably leads to the conclusion that the original decision "was tainted by a biased decision making process".[25]

- The only evidence offered by MCL in support of its allegation was the fact that the subject staff member was the signatory to various letters from the Commission following its establishment of the proceeding to hear HCWS's application on its merits. However, that correspondence does not demonstrate that the subject staff member "had a very high degree of involvement and control over the adjudicative process reviewing the application on the merits". To the contrary, a review of the correspondence and rulings cited by MCL, indicates that the staff member was communicating the directions of the Commission. For example, in one of the rulings cited by MCL, the staff member stated "[t]he writer has been authorized by

[21] Exhibit 23203-X0002, at para 37.
[22] Exhibit 23203-X0002, at para 38.
[23] Exhibit 23203-X0002, at para 32.
[24] Appendix 1 of the Decision provides the name of each staff member that assisted on the proceeding. Appendix 1 also identifies, separately, the Commission member comprising the Commission panel in the Decision.
[25] Exhibit 23203-X0002, at para 38.

the Commission to provide its ruling, as set out below, in respect of Monterra's request."[26]

- The review panel further observes that:

    i. Rule 011 does not contemplate or require any separation of staff between the application development and review stages.

    ii. As previously identified, the application development stage is simply to develop a complete application and does not involve the decision maker (one or more Commission members).

    iii. A Commission member, who is ultimately responsible for deciding the application is not assigned until the application development process is complete.[27]

    iv. The legislation clearly identifies that only the Commission members have the legislative authority to make decisions on behalf of the Commission[28] and that in the exercise of its powers, duties and functions, the Commission is entitled to receive administrative and technical assistance from its staff.[29]

46. The review panel is not satisfied that a reasonable person, viewing all those matters identified in paragraph 45 "realistically and practically – and having thought the matter through," would have a "reasonable apprehension of bias".

47. Although not a factor in the above analysis, the review panel notes that its analysis and conclusion on this ground of review is consistent with other Commission decisions that have considered the rights and responsibilities of the Commission or circumstances in which an overlap in staff functions may give rise to a reasonable apprehension of bias. For example, in Decision 2011-076, the Commission stated:

> 63. …The Commission has a public interest mandate and the statutory obligation to fix just and reasonable rates for the utilities under its jurisdiction. In fulfilling this obligation, the Commission, acting through its staff and the assigned panel, must be able to probe into the evidence filed before it in order for the Commission panel to determine the merits and the weight to accord such evidence, subject always to the rules of procedural fairness. The Commission can not simply rely on counsel for the parties to act in the public interest or to test the evidence sufficiently to satisfy the Commission's statutory obligations when they do not bear the same statutory obligations, have completely different objectives in participating in the proceeding and where each has a stake in the outcome…

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[26] Exhibit 21340-X0069, at para 5.
[27] AUC Rule 011, s 7.1.
[28] *Alberta Utilities Commission Act*, s 8(6) and 13(3). Unless the Commission has delegated any power, duty or function as it is permitted to do under s 8(7).
[29] *Alberta Utilities Commission Act*, s 68.

48. In Decision 2011-450, the Commission stated:

> 67. As noted in Decision 2011-436 and Decision 2011-076, the Commission is required by statute to ensure that the public interest is served. In a general rate application, the public interest is served by determining a revenue requirement for the utility that is both fair to the utility and to its customers, resulting in just and reasonable rates for the test period. The determination of just and reasonable rates is not a question of siding with one party or another on each cost or revenue item and then tallying up the pluses and minuses. As noted in Decision 2011-436, a proceeding before the Commission is not a *lis inter partes.* In order to carry out its public interest obligation to determine just and reasonable rates, the Commission must be able to fully test, clarify and probe the evidence submitted by the parties. ... The Commission carries out these functions through various mechanisms including issuing information requests, giving directions to the parties on materials to be filed, and through questioning by Commission counsel and Commission members at an oral hearing. ... It is only after a thorough vetting of the evidence that the Commission will be in a position to assess the merits and the weight to accord the evidence and to make a determination in the public interest.
>
> …
>
> 69. Calgary also raised the issue of a potential conflict between Commission counsel's responsibilities to conduct questioning of witness panels as part of the Commission's investigation/regulatory function and the responsibility to provide advice to the Commission on adjudicative matters such as ruling on a motion.
>
> 70. The Commission considers that a separation of these functions may be required where a tribunal is charged with both the responsibility to investigate a party who has allegedly committed a regulatory offense and a prosecutorial responsibility which could result in an adjudication which imposes financial penalties or which may impact the personal rights, privileges or liberties of the party under investigation…The Commission has recognized that special procedural fairness and natural justice requirements may be required in such situations.
>
> 71. In a rate regulation proceeding, such as the current proceeding, no such separation of the investigatory and adjudicative function is required. While the Commission must investigate the evidence in performing its statutory obligations to fix just and reasonable rates the Commission is not acting in a prosecutorial capacity. The Commission must be able to rely on the various tools available to it, including questioning by Commission counsel, in order to complete the record from a public interest perspective, prior to making a determination of just and reasonable rates. The Commission is also entitled to rely on the expertise of Commission counsel with respect to legal and procedural matters that may arise during the course of a rate proceeding.

49. The review panel considers that the reasoning articulated in the above cases applies equally to the present circumstances. The HCWS application was a general rate application. In determining that application, the hearing panel's statutory responsibility was, *inter alia*, to ensure that the public interest is served by determining a revenue requirement for HCWS that is fair to both HCWS and its customers, resulting in just and reasonable rates for the test period. The determination of those rates by the hearing panel was not a question of siding with one party or another but rather, of determining the public interest based on the record before it. The Commission was entitled to use the resources available to it including the assistance of staff in carrying out the purposes of Rule 011 during the application development stage. In fulfilling its statutory obligation, the hearing panel was entitled to utilize staff for administrative and technical

support and for assistance in completing the record from a public interest perspective during the application review stage.

50. Further, the hearing panel is responsible to make its decision based on of the record of the proceeding before it and, pursuant to Section 6 of the *Alberta Utilities Commission Act*, each Commission member is required, in discharging her/his functions and duties to act honestly, in good faith and in the public interest. MCL has failed to persuade the review panel that a reasonable person, viewing the matter "realistically and practically – and having thought the matter through," would have a "reasonable apprehension of bias" on the basis that it was the staff, not the hearing panel that adjudicated HCWS's application or that the hearing panel did so on the basis of anything other than the record of the original proceeding.

51. For all of the above reasons, MCL has failed to satisfy the review panel that a reasonable apprehension of bias arises from the participation of a Commission staff member in both the development application stage and the review stage associated with the original proceeding.

5.1.2 Sufficient Notice and Opportunity to Participate in the Process

52. MCL alleged that a breach of the rules of natural justice and procedural fairness resulted from the hearing panel's failure to notify parties that it might:[30]

- Consider approving a debt equity ratio for HCWS that was higher than that previously approved and not applied for by HCWS
- Determine the quantum and payment of tie-in-fees based on unapplied for, not approved, not forecasted capital expenditures, potentially to be incurred beyond the test period
- Consider "outstanding sewer servicing fees and the applicable interest owing", to determine the asset rate base amounts for the potable water utility property, while ignoring the same when allocating rate base between the potable water and the waste water assets."[31]

53. As a result of the hearing panel's alleged failure to afford the parties notice of its intention to consider the above, MCL asserted that it had an inadequate opportunity to prepare and offer submissions in response to each of those matters.

54. Before detailing its findings in relation to the arguments described above, the review panel acknowledges that with respect to the hearing panel's approval of a 60/40 debt equity ratio, MCL also argued that the hearing panel's decision should be set aside on the grounds of an error of law or jurisdiction. That argument will be addressed separately in the section below titled, "Alleged errors of fact, law or jurisdiction". This section considers only those arguments of MCL alleging failure to offer sufficient notice and opportunity for response.

[30] Exhibit 23203-X0002, at paras 18-19 and 39.
[31] Exhibit 23203-X0002, at para 39(b).

Findings

55. The Commission is required to fix a fair return as part of fixing just and reasonable rates under the *Public Utilities Act*[32]. In fixing a fair return (which includes a debt/equity ratio) the Commission is required, pursuant to Section 90(3) of the *Public Utilities Act*, to "give due consideration to all those facts that, in the Commission's opinion, are relevant". The review panel is therefore satisfied that in a general sense, MCL knew, or ought to have known, that a determination of HCWS's equity thickness was clearly within the scope of the original proceeding and that the Commission was required to consider all relevant facts in approving what it determined, in its judgment, was reasonable.

56. More specifically, it is evident from a plain reading of paragraphs 127, 128 and 137 of the original decision that capital structure was understood by the parties to be an issue in the application and was the subject of representations from both HCWS and the Monterra group. Those representations included a submission from HCWS, recorded at paragraph 138 of the original decision, that HCWS was targeting a capital structure of 60/40 based on advice from its accountants. Significantly, the footnote to this submission from HCWS identifies that it was generated in response to an IR from the Monterra group. MCL was therefore clearly aware of the HCWS submission that it was targeting a capital structure of 60/40 in advance of the deadlines for intervener evidence, and written argument and reply.

57. In view of the foregoing, it cannot be reasonably concluded that the hearing panel made a decision to award a 60/40 debt/equity structure where not requested, without notice, or without opportunity for representations and submissions from the parties. No breach of the rules of natural justice or procedural fairness has been established relative to the hearing panel's consideration of this issue.

58. There is likewise no reasonable basis upon which to conclude that the hearing panel approved a tie-in fee when not requested, without notice to the parties, or that MCL did not have adequate opportunity to present evidence and make submissions on that issue. The following statements in the original decision refute those assertions:

- At paragraph 162 of the original decision, the hearing panel noted that HCWS proposed a tie-in fee of $16,500 and that in rebuttal evidence, HCWS indicated it would be prepared to accept a tie-in fee of $10,000

- The hearing panel recorded at paragraph 163 that the Monterra group proposed a combined water and waste water tie-in fee of $1800 or, alternatively, no separate water tie-in fee or other form of developer contribution given the existing tie-in fee for waste water

- At paragraph 164 of the original decision, the hearing panel recorded that registered participants considered that the amount of the tie-in fee was having an impact on property values

- The hearing panel's response to the Monterra group's submissions regarding a tie-in fee is recorded at paragraph 171 and its response to concerns expressed regarding

[32] *Public Utilities Act*, Section 90.

the impact of tie-in fees on property values is found at paragraph 172 of the original decision

- The hearing panel's findings regarding tie-in fees and the evidence relied on including evidence from HCWS concerning its forecast revenue deficiencies, its potential costs and expenses over the next five years, as well as its intention to contribute the tie-in fees to a reserve fund for use as a revenue deficiency offset and to fund future capital costs and maintain the plant are detailed in paragraphs 161-175 of the original decision

- At paragraph 175, the hearing panel, made provision for reconsideration of the approved tie-in fees to address the concern expressed by the Monterra group that HCWS had identified only potential capital expenses, not certain expenses.

59. Regarding the inclusion of outstanding sewer service fees and interest in HCWS's rate base, and the allocation of the purchase price of the assets between HCWS and HCSS, the original decision records that these were issues in the proceeding, the subject of submissions made by HCWS, and issues that the Monterra group had an opportunity to and did respond to. The review panel specifically notes the following:

- At paragraphs 102-104 of the original decision, the hearing panel identified HCWS's request for and the arguments offered by HCWS to include the amount associated with outstanding disposal fees and tax arrears in rate base (as part of the delayed purchase price for the utility assets).

- The Monterra group's arguments against the inclusion of outstanding waste water fees in rate base and in relation to the allocation of costs (having regard to the assets that were being used by HCSS for waste water service), were outlined at paragraph 102 of the original decision.

- The fact that the Monterra Group offered a methodology for the allocation of the purchase price is evident from paragraph 108 of the original decision.

- The reasons for the hearing panel's acceptance of HCWS's request to include the outstanding sewer service fees and interest as part of the purchase price which, in turn, was used to establish HCWS's rate base, are articulated at paragraphs 101 and 106 of the original decision and its reasons for adopting the methodology advocated by the Monterra group in allocating the purchase price between HCWS and HCSS are explained at paragraph 108 of the original decision.

60. Having regard to all of the above, the review panel is unable to reasonably conclude that MCL did not have: adequate notice of the above issues, an awareness of the evidence and submissions on which the Commission might rely in making its determinations or, an adequate opportunity to offer evidence and submissions in response. Accordingly, MCL's application for review on the grounds of a breach of the rules of natural justice and procedural fairness resulting from an alleged insufficiency of notice and opportunity for response, is denied.

5.2 Alleged errors of fact, law or jurisdiction

61. MCL advanced two arguments for review on the grounds of alleged errors of fact, law or jurisdiction. Each is discussed below.

5.2.1 Did the Commission err in its interpretation of the *Public Utilities Act*?

62. MCL argued that the Commission erred in law and jurisdiction by failing to apply or correctly apply statutory principles in its interpretation of the *Public Utilities Act* resulting in the erroneous determination that the monopoly waste water system owned by HCSS is not a public utility under Section 1(i)(iv) of the *Public Utilities Act*. More specifically, MCL stated that contrary to section 10 of the *Interpretation Act*, RSA 2000, c I-8, and the case law binding on Alberta tribunals regarding the modern purposive approach to statutory interpretation, the hearing panel failed to interpret the language of the *Public Utilities Act*:

- In its grammatical and ordinary sense
- In its entire context; relying instead, on out of context distinctions between the definition under section 1(i)(iv) of the *Public Utilities Act* and definitions set out in other legislation and in a different section of the *Public Utilities Act*
- Harmoniously with the scheme of the *Public Utilities Act*, the intention of the Legislature and in a fair, large and liberal manner consistent with the attainment of the fundamental object of the *Public Utilities Act*; namely, to protect consumers of waste water utility services against unfair prices and charges capable of being imposed by a monopoly supplier of utility services

63. MCL also submitted that the Commission's conclusion that it does not have jurisdiction to regulate waste water results in a regulatory gap where no one has regulatory authority over privately owned, monopolistic waste water utilities. In MCL's submission, this is an incorrect and unreasonable outcome that is contrary to the intended purpose of the *Public Utilities Act* and the Commission's public interest mandate.

Findings

64. MCL bears the onus of demonstrating that the alleged interpretative errors and the hearing panel's determination of its jurisdiction are errors of law or jurisdiction that are either apparent on the face of the original decision or otherwise exist on a balance of probabilities that could lead the Commission to materially vary or rescind the original decision. For the reasons that follow, MCL has failed to satisfy that onus.

65. As a preliminary point, the review panel observes that many of the arguments advanced in the MCL review application regarding the Commission's jurisdiction over waste water and the proper application of statutory interpretation principles to the language of the *Public Utilities Act* were articulated before, and considered by, the hearing panel. The hearing panel summarized the issue brought forward by the Monterra group in the original proceeding at paragraph 19 of the original decision as follows:

> 19. A jurisdictional issue was brought forward in this proceeding by Monterra, who submitted in argument that the AUC's jurisdiction includes wastewater. Monterra

> requested the Commission find that HCSS is a "public utility" under the *Public Utilities Act* or that HCSS and HCWS are functionally integrated and therefore part of a single "public utility." Monterra submitted that the AUC has jurisdiction to set rates for both HCWS and HCSS. Monterra cited the modern approach to statutory interpretation and the *Interpretation Act*, RSA 2000, c. I-8, decisions from this Commission and its predecessor, as well as decisions by the Supreme Court of Canada in *ATCO Ltd. v. Calgary Power Ltd.*, [1982] 2 SCR 557 and *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 SCR 322, in support of its interpretation that the definition of public utility includes wastewater. Monterra also submitted that HCWS and HCSS are functionally integrated, and treating them as one public utility regulated by the Commission best ensures the attainment of the objects of the *Public Utilities Act*. Monterra submitted that HCSS is a natural monopoly and customers of HCSS require protection.

66. Following its consideration of the *Public Utilities Act* and other related legislation, the hearing panel concluded at paragraph 23 of the original decision that:

> …the definition of "public utility" in the *Public Utilities Act* deliberately excludes provision of wastewater services, except in relation to the supply by municipal public utilities and regional services commission on order under Section 122. The Commission does not consider that reading in wastewater or sewage into the definition of "public utility" in Section 1(i) can be justified.

67. That MCL disagrees with the hearing panel's interpretation of the *Public Utilities Act*, is not, of itself, grounds for review. As noted above, a review pursuant to Rule 016 is not intended to provide a second opportunity for parties to retry matters already addressed in the original proceeding, reiterate submissions, or bolster arguments previously made and not accepted. A review is granted under Rule 016 only in exceptional circumstances where an applicant establishes a material error. Otherwise the finality of the Commission's decisions and the integrity of the regulatory process is undermined.

68. Substantively, MCL has failed to demonstrate that the hearing panel failed to apply, or correctly apply, statutory interpretation principles in its consideration of the language of the Public Utilities Act and a review of the original decision supports the contrary conclusion.

69. At paragraphs 20 – 23 of the original decision, the hearing panel engaged in a statutory interpretation exercise consistent with the modern principle of statutory interpretation. That interpretative exercise included a contextual consideration of the definition of "public utility" in section 1(i) of the *Public Utilities Act*. The hearing panel's consideration of the definition of public utility in a different section of the *Public Utilities Act*, and in other legislation, was part of that contextual analysis and undertaken consistent with the well-established principle of coherence and consistency in statutory interpretation. That principle requires that the words in legislation be afforded a meaning consistent with their immediate context, the Act as a whole and the statute book as a whole:

> The presumption of consistent expression applies not only within statutes but across statutes as well, especially statutes or provisions dealing with the same subject matter.[33]
>
> - and -

[33] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6 ed (Markham: LexisNexis, 2014) at 217.

> The presumptions on which statutory interpretation is based apply not only to single Acts and related Acts but also, with lesser force perhaps, to the "statute book as a whole".[34]

70. In view of the foregoing, the hearing panel did not err when it had regard for other sections of the *Public Utilities* Act or the related statutory framework in its interpretation of Section 1(i) of the Public Utilities Act. The review panel is satisfied that the hearing panel reasonably applied the applicable principles of statutory interpretation to its consideration of the Public Utilities Act and the resulting conclusion that it lacked jurisdiction over waste water utilities is one that falls within the range of reasonable outcomes.

71. MCL also argued that the hearing panel's interpretation of the Public Utilities Act leads to a regulatory gap where no one has regulatory authority over privately owned, monopolistic waste water utilities and that this outcome is incorrect, unreasonable and contrary to the intended purpose of the *Public Utilities Act* as well as the Commission's public interest mandate. However, the Commission has only that authority conferred on it by the Legislature. For the reasons described, MCL has failed to demonstrate a reviewable error in the original panel's interpretation of the language of the *Public Utilities Act* or its ensuing conclusion regarding its jurisdiction. Any resulting regulatory gap can only be addressed by the Legislature.

72. In short, MCL has not demonstrated that the hearing panel's interpretation of the definition of "public utility" in Section 1(i) of the *Public Utilities Act* constitutes an error in law or jurisdiction that could lead the Commission to materially vary or rescind the original decision. Accordingly, MCL's request for a review on this ground is denied.

5.2.2 Did the Commission err in fact, law or jurisdiction in approving a 60/40 deemed debt equity ratio for HCWS or in its consideration of evidence from the Monterra Group?

73. Starting at paragraph 40 of its review application, MCL argued that the Commission erred in law and jurisdiction "by making unreasonable determinations outside the range of defensible outcomes":

- In approving a 60/40 deemed debt equity ratio for HCWS
- In declining to consider "highly relevant evidence" submitted by the Monterra group.

74. With respect to the former, MCL stated that approving a debt/equity ratio more favourable to HCWS than was applied-for is contrary to section 95 of the Public Utilities Act.[35]

75. With respect to the latter, MCL asserted that "the AUC declining to consider evidence in a general rate application proceeding on the basis that it is "overly complex" constitutes a determination outside the range of acceptable outcomes, and a failure on the part of the AUC to understand the limits of its discretion."[36]

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[34] *Ibid*, at 422.
[35] Exhibit 23203-0002, at para 40.
[36] *Ibid*, at para 41.

Findings

60/40 debt/equity ratio

76. Beyond its assertion that the awarded equity thickness was more or other than that requested by HCWS, MCL offered no argument in support of its assertion that the hearing panel's decision to approve a 60/40 debt/equity ratio contravenes Section 95 of the *Public Utilities* Act or otherwise constitutes an error of law or jurisdiction. On that basis alone, it could reasonably be concluded that MCL has failed to satisfy its onus to demonstrate a reviewable error that could lead the Commission to materially vary or rescind the original decision. This notwithstanding, the review panel has considered Section 95 of the *Public Utilities Act.* It provides:

> **Increasing rates**
>
> **95** In considering and acting on an application or matter before the Commission and involving the question of rates to be charged for service by an owner of a public utility, the Commission shall not make any ruling or direction to raise rates for the service beyond the amounts that the owner of the public utility desires to impose.

77. As noted, MCL asserted that the hearing panel approved a greater equity ratio than that requested by HCWS. However, a review of the original decision refutes this assertion. One of HCWS's proposals for its capital structure, as summarized at paragraph 136 of the original decision, was to calculate its return on a 100 per cent equity basis, which is in excess of the ratio approved by the hearing panel. Further, one of the bases upon which the hearing panel approved a 60/40 debt/equity ratio was "the submission from HCWS that it is targeting a capital structure of 60 per cent debt and 40 per cent equity, based on advice from its accountants."[37] In view of the foregoing, the review panel is not satisfied that the debt-equity ratio approved by the hearing panel is in excess of the amount requested by HCWS. It follows that there is no reasonable basis on which to conclude that the hearing panel's decision to award a 60/40 debt-equity ratio was contrary to Section 95 of the Public Utilities Act.

78. The review panel further observes that at paragraphs 136 - 140 of the original decision, the hearing panel offered a detailed and reasoned explanation based on the record of the proceeding for its decision to award a 60/40 debt-equity ratio, to which the review panel must extend deference absent an obvious or palpable error. The review panel finds that no such obvious or palpable error has been demonstrated.

79. For all of the above reasons, the review panel finds that MCL has failed to establish the existence of an error in fact, law or jurisdiction regarding the hearing panel's award of a 60/40 debt-equity structure for HCWS that could lead the Commission to materially vary or rescind the original decision. Accordingly, MCL's request for a review on this ground is denied.

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[37] Decision 21340-D01-2017, at para 138. Exhibit 21340-X0082, response to HCWS-MONTERRA-2017APR28-013(f).

Consideration of the Monterra Group's Rate Calculations

80. MCL submitted that the Commission declined to consider "highly relevant" evidence submitted by the Monterra group, namely its proposed rate models, and this constituted a "determination outside the range of acceptable outcomes", as well as a "failure on the part of the AUC to understand the limits of its discretion".

81. A review of the original decision refutes the assertion that the hearing panel declined to consider the Monterra group's rate models on the grounds that the evidence was too complex. To the contrary, the hearing panel expressly considered the Monterra group's proposed rate models and found not only that the models were overly complex for a small utility, but also that: (1) they were not consistent with the stand alone utility approach preferred by the Commission in determining and setting utility rates; and (2) they were not cost specific; but instead, were based on a series of assumptions.[38]

82. From the original decision it is therefore evident that the hearing panel considered the Monterra group's evidence on this point, and then declined to follow the recommendations offered for the specific reasons cited. As noted above, the interpretation and weighting of evidence is matter squarely within the jurisdiction of the hearing panel, and is entitled to considerable deference absent an obvious or palpable error. The fact that MCL disagrees with the hearing panel's assessment of the evidence and ultimate determination does not constitute such an error.

83. The review panel therefore finds that MCL has failed to demonstrate the existence of an error in fact, law or jurisdiction in the hearing panel's consideration of the Monterra group's evidence that could lead the Commission to materially vary or rescind the original decision. Accordingly, MCL's request for a review on this ground is denied.

5.3 Other issues raised

84. At paragraph 7 of the MCL review application, under the heading "MCL is directly and adversely affected by the decision", MCL submitted that the hearing panel declined to make a finding on HCWS and HCSS's obligation to serve and that this directly and adversely affects MCL and future homeowners residing in the MCL development. Thereafter, in the section entitled "Facts Relevant to Review Application" MCL noted that it requested the following relief in the original proceeding:

> … the AUC confirm that HCWS and HCSS are obligated to provide adequate and proper water service, including:
>
> (a) adequate potable water safe for human consumption; and
>
> (b) adequate and proper waste water collection and disposal services,
>
> to all members of the public who seek it, subject to available capacity.[39]

[38] Decision 21340-D01-2017, at paras 25 – 28.
[39] Exhibit 23203-X0002, at para 9.

Findings

85. A review of the argument filed by the Monterra group in the original proceeding verifies that the relief it sought in that proceeding included the confirmation or finding described above. However, the MCL review application does not expressly identify how the absence of a finding by the hearing panel on HCWS and HCSS's obligation to serve, is related to a ground for review under Rule 016. The hearing panel has nevertheless interpreted the MCL review application to implicitly assert that the lack of a finding with respect to an obligation to serve is an error in fact, law or jurisdiction that could lead the Commission to materially vary or rescind the original decision.

86. The hearing panel finds that MCL has failed, based on the record of the original proceeding or the record of this review proceeding, to demonstrate any such error for the following reasons. MCL has failed to:

- Demonstrate if, or how, the requested confirmation was in scope of the original proceeding. The Monterra group expressly noted in argument, that the original proceeding was to consider an application by HCWS pursuant to Section s 89, 90 and 91 of the *Public Utilities Act* for certain orders with respect to the rates to be charged by HCWS, the rate base associated with the property that was used or required to be used to provide utility service, and the terms and conditions of HCW's service; that is, a general rate application

- Offer any submission to support that, in the context of a general rate application, the lack of a finding on HCWS and HCSS's obligation to serve constitutes an error of fact, law or jurisdiction that could lead the Commission to materially vary or rescind the original decision setting rate base and rates or terms and conditions of service.

87. In view of the foregoing, MCL's request for a review on this ground is denied.

6 The HCWS Review Application

88. In its correspondence entitled "Horse Creek Water Services Inc. Review and Variance Request", HCWS indicated that new information had been brought forward regarding the sale of the water utility system. The HCWS correspondence states: "[n]ew information has been brought forward…[prospective purchaser] would like to buy the entire water utility system for less than half of the replacement value" and "…we would like to request that [prospective purchaser's] equity investment of $10,000,000.00 to $12,000,000.00 if option is exercised be recognized as owner invested equity and qualify to earn a fair return as per AUC rules and regulations."[40]

89. Contrary to the requirements of Section 4(d) of Rule 016, HCWS did not specifically identify the grounds for its review application. However, in light of its content, the Commission interpreted the HCWS review application to ask for review of the original decision on the

[40] Exhibit 23203-X0005.

grounds of previously unavailable facts or changed circumstances material to the decision (Rule 016, s 4(d)(ii) and (iii)).

90. In response to the HCWS review application,[41] MCL submitted that HCWS has not set out any previously unavailable facts or changed circumstances material to the original decision, which occurred since its issuance that could lead the Commission to materially vary or rescind the original decision. MCL noted that the "new information" concerned a potential sale of the water utility assets, "[w]hether a transaction of the nature contemplated by HCWS involves the purchase and sale of assets or a share transaction, in either case, HCWS is required under the *PUA* to first obtain AUC approval."[42] Given that such approval had not been granted, MCL submitted that no new facts or changed circumstances yet exist. MCL also pointed to various deficiencies in the HCWS review application and submitted that HCWS had failed to comply with Rule 016. MCL requested that the Commission dismiss the HCWS review application.

91. In reply,[43] HCWS reiterated its request that the prospective purchaser's "equity investment of $10,000,000.00 to $12,000,000.00 if option is exercised be recognized as owner invested equity and qualify to earn a fair return as per AUC rules and regulations." HCWS submitted that the prospective purchaser would be in a severely disadvantaged position with no chance of recouping its investment if it exercised its option to purchase the water utility system and was only entitled to earn a return on the original actual owner-invested portion of the rate being, being $1,165,310.

Findings

92. Leaving aside whether it is compliant with the requirements of Rule 016, the HCWS review application fails for the following reasons.

93. The review panel considers that the only potential grounds raised in the HCWS review application are the existence of previously unavailable facts material to the decision (Section 4(d)(ii) of Rule 016) or changed circumstances material to the decision (Section 4(d)(iii)). No error of law, jurisdiction or fact has been alleged.

94. Where a review is sought on the basis of previously unavailable facts, the review panel is guided by Section 6(3)(b)(i) of Rule 016, which requires the Commission to grant an application for review where it determines that the review applicant has demonstrated the existence of:

> 6(3)(b)(i) Previously unavailable facts material to the decision, which existed prior to the issuance of the decision in the original proceeding but were not previously placed in evidence or identified in the proceeding and could not have been discovered at the time by the review applicant by exercising reasonable diligence; …
>
> that could lead the Commission to materially vary or rescind the decision.

95. Where a review is sought on the basis of a material change in circumstances, the review panel is guided by Section 6(3)(b)(ii) of Rule 016, which requires the Commission to grant an

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41 Exhibit 23203-X0010.
42 Exhibit 23203-X0010, at para 16
43 Exhibit 23203-X0011.

application for review where it determines that the review applicant has demonstrated the existence of:

> 6(3)(b)(ii) Changed circumstances material to the decision, which occurred since its issuance.
>
> that could lead the Commission to materially vary or rescind the decision.

96. HCWS relies on a signed letter of intent detailing discussions between it and another entity as well as an attached email said to provide "additional information".

97. The letter of intent and email post-date the original decision. However, HCWS offered no information about when it first had knowledge of the information that it now relies on in support of its review application. As such, it cannot be determined with certainty whether it is Section 6(3)(b)(i) or Section (3)(b)(ii) of Rule 016 which is most applicable. However, in either case, for HCWS to succeed, it must demonstrate that the facts or changed circumstances detailed in those documents are material; that is, they must have the potential to lead the Commission to materially vary or rescind the original decision. Neither the letter of intent nor the email relied on by HCWS satisfies that test.

98. The email provides general information regarding the potential purchaser and its plan for development in an area within Rocky View County. The email also states that "[i]f the AUC does not let this sale happen, H.C.W.S. will limit the size of this area by selling 359 acre ft to another company to blend it with flow through water top max value of H.C.W.S. and still fulfill all requirements on it license."[44] Further, and significantly, the letter of intent expressly stated that it is not intended to constitute a legal agreement or create legally binding obligations between the parties. It also identified a number of pre-conditions to any potential purchase and sale of the water utility assets.

99. At best, the documents appended to the HCWS review application, and the letter of intent in particular, offer evidence of the possibility of a contingent future event or events. It cannot be reasonably concluded that such evidence constitutes previously unavailable facts material to the decision. Nor can it reasonably be concluded that this evidence discloses changed circumstances material to the decision, which occurred since its issuance that could lead the Commission to materially vary or rescind the decision establishing HCWS's rates and terms and conditions for 2017 and 2018.

100. HCWS has therefore not demonstrated to the review panel that there is previously unavailable information or a change in circumstances material to the decision that could lead the Commission to materially vary or rescind the original decision. The HCWS review application is therefore denied.

[44] Exhibit 23203-X0005.

7 Decision

101. For all of the above reasons, the Review Panel finds that neither MCL Development Corp. nor Horse Creek Water Services Inc. has met the requirements for a review of Decision 21340-D01-2017. Their respective applications for review are therefore denied.

Dated on May 22, 2018.

Alberta Utilities Commission

(original signed by)

Carolyn Hutniak
Commission Member