



# ENERGY REGULATORY REPORT

*This monthly report summarizes matters under the jurisdiction of the Alberta Energy Regulator (“AER”), the Alberta Utilities Commission (“AUC”) and the Canada Energy Regulator (“CER”) and proceedings resulting from these energy regulatory tribunals. For further information, please contact a member of the RLC Team.*

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**ALBERTA COURT OF APPEAL*****AlphaBow Energy Ltd v Alberta Energy Regulator, 2023 ABCA 221***  
*Permission to Appeal*Application

AlphaBow Energy Ltd. (“AlphaBow”) applied for permission to appeal a decision of the AER that dismissed its request to stay a reasonable care and measures order (“RCAM Order”) issued by the AER.

AlphaBow argued that the AER erred in law in determining that AlphaBow had failed to demonstrate that: it would suffer irreparable harm if the RCAM Order was not stayed pending its regulatory appeal before the AER; and the balance of convenience weighs in favour of granting the stay.

Decision

The ABCA denied the application for permission to appeal submitted by AlphaBow. The ABCA determined that there was no extricable question of law, as required by section 45(1) of the *Responsible Energy Development Act* (“REDA”).

Pertinent Issues

AlphaBow raised several issues regarding the AER’s application of the well-known tripartite test for both, interlocutory injunctions and stays, established by the Supreme Court of Canada in *RJR-MacDonald Inc v Canada (Attorney General)* (“*RJR-MacDonald*”).

The ABCA noted that section 45(1) of the *REDA* permits appeals “on a question of jurisdiction or on a question of law” and accepted that the standard of review for issues of law and procedural fairness is correctness.

The ABCA held that, absent an extricable question of law, the application of the tripartite test in *RJR-MacDonald* to the facts of a particular case is considered a question of mixed fact and law.

The ABCA was not convinced that any of the issues raised by AlphaBow amount to questions of law and concluded that AlphaBow did not seek to appeal the AER’s stay decision on a question of law or jurisdiction. Accordingly, the ABCA dismissed the application for permission to appeal pursuant to section 45(1) of the *REDA*.

## ALBERTA ENERGY REGULATOR

***New Edition of Directive 001, AER Bulletin 2023-27******Oil and Gas - Geothermal Resources***

On July 4, 2023, the Alberta Energy Regulator released a new edition of *Directive 001: Requirements for Site-Specific Liability Assessment*, which includes the following changes:

1. Removal of irrelevant or duplicative information, updates to the regulatory requirements and formatting standards, including moving the forms out of the directive;
2. The definition of liability assessment was revised to emphasize the obligations of licensees to provide care and custody from shut-down of operations through suspension, abandonment, remediation and reclamation of sites;
3. Inclusion of sites regulated under the *Geothermal Resource Development Rules* and *Brine Hosted Mineral Resource Development Rules* within the scope of the directive;
4. Integration of the Appendix 2 requirements into the main body; and
5. Removal of the requirement to submit the On-Site Reclamation and Remediation Details, and the Facility Summary forms.

***File Changes for Brine Hosted Minerals, AER Bulletin 2023-28******Minerals – Resource Development***

The AER updated its Digital Data Submission system to enable the collection, in the pressure ASCII standard (PAS) file, of the data required to be submitted by licensees pursuant to requirement 79 of *Directive 090: Brine-Hosted Mineral Resource Development*, which data includes:

- A routine water analysis that includes major ions, total dissolved solids, pH, H<sub>2</sub>S, resistivity, conductivity, density; and
- A trace element analysis for barium, boron, bromine, iodine, lithium, manganese, silicon, strontium, titanium, uranium, vanadium, zinc and the results for any other trace elements analyzed.

## ALBERTA UTILITIES COMMISSION

**Alberta Electric System Operator Needs Identification Document Application, EPCOR Distribution & Transmission Inc. Facility Applications Clover Bar Interconnection Project, AUC Decision 27676-D01-2023**

*Electricity - Facility*

Application

The AUC previously granted approval to Air Products to construct and operate an electric system, designated as an industrial system, at its hydrogen plant, which included a 90.5-megawatt (“MW”) combined-cycle power plant and a substation designated as Aurum Park 1007S Substation in northeast Edmonton (the “Project”).

The Alberta Electric Systems Operator (“AESO”) filed a needs identification document (“NID”) application with the AUC to connect the Project to the Alberta Interconnected Electric System. The AESO also directed EPCOR Distribution & Transmission (“EDTI”) to apply for approval to construct, operate and connect the proposed transmission development. EDTI filed three applications for the facilities to meet the need identified by the AESO. The AESO and EDTI requested that the AUC consider these applications jointly, which was granted.

The Lac Ste. Anne Métis Community Association (“LSAMCA”) filed a statement of intent to participate objecting to the proposed transmission development.

Decision

The AUC denied LSAMCA standing finding it did not demonstrate how the construction of the transmission line and modifications to the existing substation may directly and adversely impact LSAMCA’s asserted rights and interests.

The AUC approved the AESO’s NID application. The AUC approved the facility applications conditional on the AUC receiving ministerial consent from Alberta Infrastructure in accordance with s 4 of the *Edmonton Restricted Development Area Regulations* (“ERDAR”).

Pertinent Issues

In response to the system access service requests from EDTI and Air Products, the AESO examined nine alternatives to meet the identified need and provided a preferred option. S 38(e) of the *Transmission Regulation* provides that the AUC must consider the AESO’s assessment of the need to be correct unless an interested person satisfies the AUC that the AESO’s assessment of the need is technically deficient, or approval of the NID application is not in the public interest. Since there were no interveners in the proceeding, the AUC concluded that the AESO’s assessment of the need was correct.

The AUC also found that the facility applications filed by EDTI complied with the information requirements prescribed in *Rule 007: Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations, Hydro Developments and Gas Utility Pipelines* and that they were consistent with the need identified by the AESO.

Under s 4 of the *ERDAR*, the AUC shall not issue a permit and license for transmission facilities within the transportation and utility corridor without prior written consent from the Minister of Infrastructure. The AUC granted approval for the construction and connection of the facilities, subject to receiving the required ministerial consent.

**Aura Power Renewables Ltd. Burdett Solar Project, AUC Decision 27488-D01-2023**

*Facilities - Site Selection*

Application

Aura Power Renewables Ltd. (“Aura”) applied for approval to construct and operate the 17.5-megawatt (MW) Burdett Solar Project near the hamlet of Burdett in the County of Forty Mile No. 8 (the “Project”). Aura also applied for approval to connect the Project to the FortisAlberta Inc. distribution system and to change the ownership of the Project.

Decision

The AUC denied the applications. It determined that the applications were not in the public interest as the Project was sited within 1,000 metres of a named lake and has the potential to create unacceptably high risks to migratory and water birds. The AUC found that the Project, as sited, did not align with Alberta Environment and Protected Areas' ("AEPA") *Wildlife Directive for Alberta Solar Energy Projects* (the "*Directive*").

Pertinent Issues

The AUC determined that, due to the siting of the Project in proximity to Yellow Lake (approximately 438 metres from the lake), which does not align with the *Directive*, the corresponding risk to migratory and water birds from the project was unacceptable. The AUC found that the project resulted in increased environmental risks, that the potential impacts of the project on the environment were unacceptable and that the project was not in the public interest.

As the AUC denied the application on the basis that the project was sited in close proximity to Yellow Lake with the potential to negatively effect migratory and water birds, it found it unnecessary to comment on the other aspects of the application, including glare and noise impacts, and the participant involvement program.

**ATCO Electric Ltd. Mitsue Area Fibre Optic Project, AUC Decision 28265-D01-2023**

*Facilities - Communication*

Application

ATCO Electric Ltd. ("AE") applied for approval to construct and operate a five-kilometer underground fibre optic cable, designated as ELADFO020, between AE's existing Mitsue 732S Substation and Alberta PowerLine General Partner Ltd.'s existing Transmission Line 12L41, in the Mitsue area (the "Project"). The Project created interconnection between existing communications facilities to enhance the network and augment AE's capacity to manage services during outages and emergencies.

Decision

The AUC approved AE's application to construct and operate the Project.

Pertinent Issues

The Project is part of the SOC2 Strategic Fibre Project, which aims to extend the fibre network and establish a high-capacity communications backbone connecting the Fort McMurray region with AE system operations centers. The overall Project increases communications capacity, integrates with regional transmission facility operators, introduces regional route diversity in the north-central portion of AE's communications network, and ultimately improves overall system resilience.

The AUC determined that the information requirements specified in *Rule 007: Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations, Hydro Developments and Gas Utility Pipelines* were met. The AUC accepted that the construction effect on wildlife was expected to be minimal since the project site is situated near existing linear disturbances and there would be limited and localized vegetation removal. The AUC found that the Project's environmental impact will be minimal given that the cable will be located underground, will be routed along pre-disturbed land below an existing transmission line next to a road, and mitigation measures will be implemented.

Based on the foregoing, the AUC concluded that the application was in the public interest in accordance with s 17 of the *Alberta Utilities Commission Act*.

**Balancing Pool Application for an Order Permitting the Sharing of Records Not Available to the Public Regarding the Youngstown Solar Project, AUC Decision 28305-D01-2023**

*Electricity - Records*

Application

The Balancing Pool, pursuant to 7 of the *Small Scale Generation Regulation*, acting on behalf of 2079816 Alberta as a small-scale power producer, filed an application under the *Fair, Efficient and Open Competition Regulation* ("FEOCR"), seeking permission to share records not available to the public related to the 6-Megawatt Youngstown Solar Project, near Youngstown. The sharing of information was between the Balancing Pool, 2079816 Alberta Ltd., PACE Canada LP and URICA Energy Real Time Ltd ("URICA").

Decision

The AUC was satisfied that the Balancing Pool had demonstrated that: (i) the sharing of records with URICA was reasonably necessary for the Balancing Pool to carry out its business; and (ii) the subject records would not be used for any purpose that did not support the fair, efficient and openly competitive operation of the Alberta electricity market. The AUC was also satisfied that the total offer control of the parties would not exceed the offer control limit of 30 percent under s 5(5) of the *FEOCR*. The AUC approved the application.

**Creekside Solar Inc. Creekside Solar Project,  
AUC Decision 27652-D01-2023**  
*Solar – Facility*

Application

Creekside Solar Inc. (“CSI”) applied for approval to construct and operate the 18.4-megawatt (“MW”) Creekside Solar Power Plant and to connect the power plant to the FortisAlberta Inc. electric distribution network (the “Project”). The Project would be sited on approximately 127 acres of privately owned cultivated land in Leduc County.

The AUC granted standing in the proceeding to the Creekside Concerned Landowners Group (“CCLG”), which consisted of individual stakeholders adjacent to the Project boundary, and the Leduc County (the “County”).

Decision

The AUC approved the application from CSI, with conditions.

Pertinent Issues

Applying the criteria set out in s 17 of the *Alberta Utilities Commission Act* the AUC must consider the public benefits of the proposed Project. In this respect, consideration was given to the impact the Project may have on surrounding landowners, as premised on the CCLG’s concerns. In assessing these concerns, specific consideration was given to the position of the McKells (the property owners of the adjacent property). Overall, the AUC found that the negative impacts associated with the Project are outweighed by the benefits of the Project. In reaching this conclusion, the most pertinent findings made by the AUC were in relation to the following issues.

Consultation

Overall, the AUC was satisfied that CSI’s participant involvement program met the minimum requirements as set out in *Rule 007: Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations, Hydro Developments and Gas Utility Pipelines*. Nonetheless, the AUC identified some concerns with CSI’s consultation activities and expressed an expectation that CSI would make improvements in the future, such as posting a larger newspaper advertisement that included: key information about CSI as a company; a description of the project; and a map of the project area. Additionally, it would have been more meaningful to communicate with potentially affected stakeholders through attendance at an open house.

The AUC also noted the high level of tension between certain CCLG members and CSI and expressed an expectation that CSI will consult and work with local stakeholders proactively and in good faith as it constructs and operates the Project since its consultation responsibilities to stakeholders do not end when the application is approved.

Project Impacts on Adjacent Landowners

The McKells were the landowners most impacted by the Project due to the proximity of their land, which is located on the same quarter section, immediately east of the Project. Specific concerns involved noise, dust and visual impacts. The AUC found that the proposed construction and dust mitigation measures were a good start but insufficient and required CSI to implement the following additional mitigation measures:

- Prohibit idling of heavy truck engines during construction;
- Limit installing piling to daytime hours;
- Advise nearby residents of significant noise-causing activities and provide a schedule of construction activities causing significant noise;
- Use best efforts to rent equipment with white noise backup beepers; and
- Ensure that internal combustion engines are well maintained and have muffler systems.

The AUC also required CSI, in consultation with the McKells, to develop a construction impact mitigation plan with creative solutions to address noise and dust impacts, including submitting the plan with the AUC as part of the final project update.

With regard to visual impacts, the AUC directed CSI to file a visual screening plan and maintain all vegetation screening associated with the Project, including watering, maintenance and upkeep, and the removal and replacement of dead vegetation adjacent to the McKell property.

#### *Noise Impacts*

The AUC assessed the expert evidence regarding low frequency noise (“LFN”), ambient sound levels (“ASLs”), noise mitigation and post-construction sound monitoring.

In relation to LFN, the AUC found that the LFN test in CSI’s noise impact assessment (“NIA”) met the requirements of *Rule 012: Noise Control* (“*Rule 012*”), accepting the conclusion that the Project is unlikely to have LFN impacts.

The AUC accepted CSI’s evidence that the consideration of rail lines and industrial area close to the Project would likely result in an upward adjustment to the permissible sound levels (“PSLs”), which would demonstrate the conservative nature of the NIA. Based on this, the AUC found that an ASL survey is unnecessary in the circumstances.

Although the project was predicted to comply with *Rule 012* at all receptors, the NIA considered an optional mitigation measure, such as installation of sound baffles to reduce fan noise associated with the Project power stations. As a result, the AUC expressed an expectation that CSI will not only ensure the Project was compliant with *Rule 012* but also apply best feasible practices to mitigate noise and directed CSI to submit in the final project design a report detailing the measures it has implemented to mitigate noise from operations.

The AUC imposed a condition of approval in relation to post-construction sound monitoring directing CSI to conduct a post-construction comprehensive sound level (“CSL”) survey, including an evaluation of low frequency noise, at Receptor R09 (the McKell residence) to verify compliance with *Rule 012*.

#### *Visual Impacts and Glare*

The AUC noted that, in general, the extent of the solar panels’ visual impacts depends on the size of the project, the distance between the solar panels and homes, and the topography of the land. The AUC also noted that most residences surrounding the Project have existing tree screening that exceeds the height of the Project’s solar panels, which mitigates to some extent the visual impacts to nearby residences.

The AUC found that the glare assessment conducted by CSI’s expert meets the requirements of *Rule 007*, and that residential and route receptors are predicted to have little to no glare from the Project. The AUC imposed a condition of approval requiring CSI to file a report detailing any complaints or concerns regarding solar glare from the Project during its first year of operation. The AUC also directed CSI to use anti-reflective coating on the solar panels since the solar glare modelling was premised on the use of anti-reflective coating.

#### *Agricultural Impacts*

CCLG expressed concerns that the Project takes out of production the most productive agricultural land in the province and that food production is more important than power generation. The AUC acknowledged that agricultural land will be removed as a consequence of the Project. However, the Project is sited on private land, which CSI intended to purchase should the Project be approved. The Project will not impact the agricultural use of lands belonging to CCLG members and, in the absence of legal or government policy restrictions that affect a private landowner’s ability to take agricultural land out of production, the AUC attributed significant weight to a private landowner’s discretion over land use.

#### *Property Value Impacts*

The AUC found that, with the exception of the impacts to the McKells, the property value impacts to CCLG members are minimal considering: the distance between the Project and CCLG members’ residences; the height of the Project and its fence; the significant tree screening at the majority of properties nearest to the Project; and the low impact on property value proffered by CCLG’s own expert. The AUC also found that there could be a property valuation impact for the McKell property but that the conditions in this decision related to screening should help mitigate that impact.



### *Environmental Impacts*

The AUC held that CSI appropriately considered the standards and best management practices outlined in the *Wildlife Directive for Alberta Solar Energy Projects* (the “*Directive*”) when initially selecting a site for the project. The AUC imposed a condition of approval directing CSI to submit an annual post-construction monitoring survey report to Alberta Environment and Protected Areas (“*AEPA*”) and the AUC in accordance with *Rule 033: Post-approval Monitoring Requirements for Wind and Solar Power Plants*.

The AUC found the mitigation measures included in CSI’s environmental protection plan sufficiently robust to address the introduction and spread of clubroot and weeds. The AUC was also satisfied that the mitigation and strategies outlined by CSI in the environmental protection and, the conservation and reclamation plans were sufficient to protect soil quantity and quality.

In relation to the Project’s proximity to Conjuring Creek, the AUC imposed a condition of approval requiring CSI to delineate a 20-metre setback from the fenceline to the top of the break for Conjuring Creek, which must be properly delineated by a qualified professional.

CSI submitted a Phase 1 and Phase 2 environmental site assessment which identified *Alberta Tier 1 Soil and Groundwater Remediation Guidelines* exceedances at the former wellsite for select salinity, petroleum hydrocarbon, polycyclic aromatic hydrocarbon and metal parameters, as well as elevated chloride values, within the Project area.

In response to the prior Project site contamination, CSI committed to remediating the contaminated soils identified within the Project boundary prior to construction in areas where contamination is identified. In addition, CSI committed to the assessment of remediated lands by a qualified third-party expert and to also apply for a remediation certificate after remediation is completed. The AUC imposed a condition of approval requiring CSI to submit a report demonstrating that contamination associated with the former wellsite has been remediated to *Alberta Tier 1 Soil and Groundwater Remediation Guidelines* standards.

With respect to end-of-life management, CSI submitted a conservation and reclamation plan in accordance with the *AEPA Conservation and Reclamation Directive for Renewable Energy*

*Operations*. The AUC was satisfied that the CSI made sufficient plans, for the purposes of *Rule 007*, for decommissioning and reclaiming the Project land.

### *Municipal Concerns*

The County expressed concerns with the AUC’s approvals taking precedence over the County’s development permits pursuant to s 619 of the *Municipal Government Act* (“*MGA*”) and requested that the AUC expressly impose conditions to address the County’s concerns with regard to the development permits CSI must obtain. The AUC held that ss 619 and 620 of the *MGA* confirm that the AUC’s provincial authority prevails over that of the municipalities and that conditions of a provincial approval will take precedence over any conflicting condition resulting from a municipal development process. The AUC, however, also clarified that ss 619 and 620 of the *MGA* do not displace a municipality’s planning and development decision-making authority and are only used if it is necessary to resolve conflicts between the AUC’s and the municipality’s decisions. According to the AUC, if there is no conflict between these levels of authority, both authorities’ decisions may apply in the circumstances.

### *Conclusion*

The AUC concluded that approval of the Project application was in the public interest having regard to the social, economic, and other effects of the projects, including the effects on the environment.

### ***Corix Utilities (Foothill Water) Inc 2023-2025 Revenue Requirements and Rates Application, AUC Decision 27844-D02-2023*** *Water – Rates*

#### Application

Corix Utilities (Foothills Water) Inc. (“*Corix*”) provides water utility service that comprises of potable water distribution service to 955 customers (residential and commercial), potable bulk water service at its fill station, and raw water transportation service to four customers. Corix also has a wastewater utility (Foothills Wastewater) serving the same community, which is unregulated.

Corix applied for approval of proposed changes to the terms and conditions, rate design and rates for 2023 to 2025. Corix requested a 2023 rate increase of 18.6 percent for its typical residential and

commercial customers, as well as smaller increases for 2024 and 2025.

Corix also requested that the proposed residential and commercial customer rates be made effective on an interim basis beginning on January 1, 2023. The AUC denied that request in *Decision 27844-D01-2023*, stating that Corix had not demonstrated that an interim rate increase was in the public interest and directed a continuation of the existing rates charged by Corix on an interim basis commencing on January 1, 2023, until such time the new rates are approved.

### Decision

The AUC approved certain parts of the application and ordered Corix to file a compliance filing to this decision by August 31, 2023, to reflect the findings, conclusions and directions in this decision.

### Pertinent Issues

#### *Interrelation with the Wastewater Utility*

A customer group expressed concerns that the unregulated nature of the wastewater business provides an opportunity for Corix to “sidestep” any disallowances to its regulated potable water rates, by increasing its wastewater rates commensurately. The AUC found that sewage disposal and waste management are not enumerated as public utility services in the *Public Utilities Act*, which establishes the regulation of investor-owned public utilities. As a result, the AUC concluded that it was not empowered under legislation to set rates for Foothills Wastewater or to investigate its conduct.

### Findings Regarding Proposed Values or Increases

The AUC was not persuaded to accept all proposed values or increases requested by Corix. Specifically, the AUC took issue with the following items.

#### *Revenue Requirement*

The AUC noted the submitted revenue requirement forecast for the application test period, recognized that some of the revenue requirement numbers will change as a result of its findings in this decision and directed Corix to update its revenue requirement as part of its compliance filing to this decision.

#### *Rate Base*

Corix provided mid-year rate base calculations for its 2021 actual, 2022 projected forecast, and 2023 to 2025 test period forecast. The AUC noted that the forecast mid-year rate base approved for 2014 was \$4,586,184,22, which is \$436,239 greater than Corix’s 2021 actual rate base. This decrease in rate base suggests that during this period (2015 to 2021), when Corix did not file any new rate applications, depreciation on its assets in service was outpacing new capital additions and contributions in aid of construction (“CIAC”).

#### *Capital Additions*

Corix proposed 12 capital projects to be approved in its 2023 to 2025 revenue requirement. Out of these 12 projects, five projects incurred capital costs in 2022, which required AUC approval for those costs to be included as capital additions into the opening rate base for 2023. The AUC scrutinized the proposed capital costs and made findings on specific capital projects, while the projects not specifically mentioned in the decision were approved as filed.

#### *Depreciation*

The AUC observed that in certain asset classes, the service life of the asset did not match the depreciable life of the asset recorded in Corix’s rate model. As a result, the AUC directed Corix to retire certain assets and to remove from rate base in its 2023 forecast any residual amounts for certain assets being replaced.

#### *Operating and Maintenance*

The total operating and maintenance (“O&M”) expenses forecasted for each year make up approximately 65 per cent, 62 per cent and 61 per cent of the 2023-2025 forecast revenue requirements, respectively. The AUC did not accept the proposed allocated costs (being corporate services, common administrative and regional services costs) and instead approved single total allocated costs amounts for 2023, 2024 and 2025 that will cover all three allocation categories: corporate, regional and common administrative costs.

#### *Salaries and Wages*

The AUC accepted Corix’s forecast of a 0.7 full-time equivalent employee (“FTE”) for the area supervisor

for 2023-2025 and approved 1.9 operator FTEs in each year, instead of the requested 2.3 operator FTEs. The AUC found reasonable the use of the labour escalators of 4.3 per cent for 2023, three per cent in 2024 and three per cent in 2025 and agreed with Corix that these rates will maintain salaries at a level equal to or higher than the Bank of Canada's inflation projections for 2023, 2024 and 2025. The AUC denied the forecast increase in salaries and wages for 2024 related to operator certification advancement, as Corix did not adequately justify the need for these additional salary increases.

#### *Consulting and Outside Services*

Corix explained that the costs for consulting/outside services include services provided for engineering reviews and analyses along with professional services related to the monitoring and testing of equipment. The AUC found that using the 2022 projected costs as the base for the 2023 forecast was unreasonable and that it would be more reasonable to use the 2021 restated cost of \$31,900 as the base year for the 2023 forecast. The AUC found that the use of the inflation rates of three per cent for 2023 and 2024, and two per cent in 2025 was reasonable and agreed with Corix that these rates reflect the Bank of Canada's inflation projections for 2023, 2024 and 2025 as reported in the October 26, 2022, monetary policy report.

#### *Fleet and Vehicles*

Corix indicated that vehicle costs are tied to the number of hours costed to the utility by the operators and area supervisor. It stated that the forecast fleet/vehicles costs for 2023 were calculated using the forecast FTEs of 2.7, which is the total forecast FTEs of 3.0 less 0.3 FTEs for summer students, who do not have dedicated vehicles. The AUC noted that it already approved 0.7 FTEs for the area supervisor for 2023 and 1.9 FTEs for operators for 2023, for a total of 2.6 FTEs. Deducting the forecast 0.3 FTEs for summer students from this total resulted in 2.3 FTEs to use in the calculation of the fleet/vehicles costs for 2023. The AUC directed Corix to use the revised calculation.

#### *Lab Testing*

Corix explained that the costs for lab testing are required to ensure that the potable water meets the standard potable water quality indicating that lab testing costs are not consistent year over year and that testing requirements from regulators tend to increase over time. The AUC accepted Corix's

submission that lab testing costs tend to increase over time. The AUC found that the forecasts for 2023-2025 should be based on the 2022 actual costs, plus inflation, directing Corix to update these costs in its compliance filing.

#### *Other Miscellaneous Expenses*

Corix indicated that other miscellaneous expenses included expenses for customer freight charges and memberships and dues directly related to the water utility. The AUC found that Corix provided no explanation why the customer freight/courier charges forecast for 2023 was greater than the 2022 projected costs, which represented forecast increase was 40.5 per cent. The AUC also found that Corix provided no explanation why the memberships and dues forecast for 2023 was greater than the 2022 projected costs, which resulted in forecast increase of 176.9 per cent. The AUC denied both applied-for increases.

#### *Information Technology*

Corix indicated that information technology ("IT") costs are the annual cost of operations support software, explaining that, starting in 2023, the costs also include estimates for computer and IT costs related to the new office located at the water utility. Based on the information provided, the AUC found that Corix did not provide sufficient evidence in support of the IT forecast for 2023 and 2024.

#### *Travel*

Corix explained that the costs for travel include costs related to any operator or supervisor meals and travel costs, which reflect travel expenses that can be charged directly to a specific utility; otherwise, the actuals are charged to common administrative costs. The AUC found that Corix provided no explanation why the travel costs forecast for 2023 was greater than the 2022 projected costs, which represented a forecast increase of 250 per cent. In the absence of any support for this forecast increase, the AUC denied the applied-for increase.

#### *Cost of Capital*

Corix applied for a continuance of its previously approved capital structure set at 40 per cent equity and 60 per cent debt. The AUC found 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 AUC and

approved Corix's capital structure of 40 per cent equity and 60 per cent debt.

#### *Return on Equity*

Corix applied to use an 8.75 per cent return on equity ("ROE"), which was its last equity rate approved by the AUC. Given the 2023 ROE rate in the AUC's most recent generic cost of capital ("GCOC") proceeding was maintained at 8.5 per cent, and since Corix's former ROE rate was approved based on the approved GCOC ROE rate in place at that time, the AUC found that Corix's approved ROE for its application years of 2023 to 2025 should be the current ROE of 8.5 per cent.

#### *Cost of Debt*

Corix requested a deemed interest rate of 5.52 per cent for its cost of debt based on the calculation of the deemed interest rate on debt financing. The cost of debt rate previously approved for Corix in its last rate application was 6.5 per cent based on the actual cost of Corix's fixed rate debt. The AUC found that the methodology Corix has used to determine a deemed interest rate was reasonable and approved the proposed deemed interest rate of 5.52 per cent as its cost of debt.

#### *Rate Design*

Corix currently has two core customer classes, residential and commercial, which are billed two types of charges, namely basic monthly and metered charges. The rate for each charge differs between the customer classes. In its application Corix proposed to: refine the residential and commercial basic monthly charge to be based on meter size with the 15 mm (5/8 inch) meter considered as the standard minimum size to which the larger meters are charged based on the meter ratio; and apply the commercial basic monthly charge to all potable commercial customers regardless of whether they are using water for commercial or irrigation purposes.

The AUC found that the rate design for fixed and variable charges proposed by Corix for its two core customers was reasonable and that it appropriately reflected cost causation. Additionally, the AUC found the commercial basic charge meter ratios, as proposed, to be reasonable. The AUC also noted Corix's non-compliance with the AUC's previous direction to file its next rate application within five years of its previous application, without providing

the reason for the delay. The AUC advised Corix that further non-compliance with AUC instructions could result in financial or other penalties.

#### *Proposed rates*

Corix stated the proposed residential and commercial rates for 2023 to 2025 reflect rate increases of 18.6 per cent in 2023, 0.6 per cent in 2024, and 2.6 per cent in 2025. The AUC held that it will not establish the amount of the rate increase for residential and commercial customers at this time and directed Corix to update its schedules as part of its compliance filing to incorporate the directions contained in this decision and, based on the results of the amendments, submit a new rate proposal as part of its compliance filing.

The AUC directed Corix to set its 2023 bulk water rates at \$4.50 per m3, in 2024 at \$5.00 per m3 and in 2025 at \$5.40 per m3. The increases to 2024 and 2025 follow the same dollar value increment of increases as proposed by Corix in its application for bulk water rates in 2024 and 2025, which are increases of \$0.50 and \$0.40, respectively. Corix was also directed to forecast in its compliance filing its bulk water revenues using the approved bulk water rates.

#### *Number of Customers and Forecast Water Consumption*

After reviewing the forecasting methodology, the forecast number of customers by customer type and the water consumption forecasts provided by Corix, the AUC found them to be reasonable and reasonably consistent with historical numbers and usage patterns. Consequently, the AUC accepted Corix's approach to its forecasting methodology, as well as its customer count and water consumption forecasts for the test years.

#### *Water Losses*

Corix reported its historical system water losses from 2014 to 2021. Corix stated that its water treatment plant ("WTP") is above ground where leaks are easily identified. As a result, the WTP water loss is due to unmetered water used in the water treatment plant as part of the process for the production of potable water. Corix's distribution system is below ground and water consumption is tracked by meters at the point of delivery. Corix explained that the cause of distribution system water losses was due to: undetected system leaks; unmetered use from

waste streams, fire hydrants and water used in operations; dated process technology; and failed meters.

The AUC was of the view that Corix could do more to improve its water loss tracking and reduce the amount of water lost. The AUC observed that the WTP and distribution system water losses were at the high end of the range of the AUC's expectations for a water utility, and that the losses have been relatively volatile from year to year. If the water loss ratio remains high, Corix's customers would continue to bear the cost of that inefficiency. The AUC directed Corix to establish system-specific water loss targets for each of WTP and distribution system water losses measured in loss percentages and litres per customer, and to provide justifications for its selected targets. The AUC also directed Corix, in its next rate application, to provide its historical and present water loss statistics beginning in 2010 to its most recently available year and an update on the progress of Corix's water loss mitigation plan and achievement of its targets.

#### *Terms and Conditions of the Water Utility Tariff*

Corix included a list of the proposed changes that it intended to make to the currently approved terms and conditions of service, the standard fees and charges schedule, and the schedule of fines. The AUC was of the view that Corix sufficiently justified each of the proposed changes, approving them as filed.

#### **Enforcement Staff of the AUC Settlement Agreement with ENMAX Energy Corporation, AUC Decision 28201-D01-2023**

*Electricity - Markets*

#### Application

AUC enforcement staff ("Enforcement Staff") submitted an application for approval of a settlement agreement between Enforcement Staff and ENMAX Energy Corporation ("EEC") ("Settlement Agreement"). Enforcement Staff began an investigation following EEC's self-disclosure of an incident that resulted in the issuance of 1,426 late customer bills (the "Contravention"). EEC disclosed that the late billing was caused by a system error with its automated billing check system, where certain bills failed to reach EEC staff for review.

In accordance with the Settlement Agreement, Enforcement Staff requested approval of an

administrative penalty of \$23,500, and EEC to pay customer bill credits totaling \$71,300.

#### Decision

The AUC approved the Settlement Agreement between Enforcement Staff and EEC, as filed.

#### Pertinent Issues

The AUC held that its jurisdiction to consider and approve the Settlement Agreement was grounded in its general powers in ss 8 and 23 of the *Alberta Utilities Commission Act* ("AUC Act") and the administrative penalty provisions in s 63 of the *AUC Act*. The AUC applied the public interest test to negotiated settlements for enforcement proceedings, which was adopted from criminal law. The public interest test sets a high threshold for departing from a joint submissions (or negotiated settlements in the regulatory context), such that "a trial judge should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest."

In approving the Settlement Agreement, the AUC noted that the parties to the settlement considered factors listed in s 4 in *Rule 013: Criteria Relating to the Imposition of Administrative Penalties* ("Rule 013"), including the mitigating factors in s 6 of *Rule 013*. Furthermore, the AUC observed that EEC self-disclosed the wrongdoing to Enforcement Staff, and co-operated fully in Enforcement Staff's investigation. Finally, the AUC acknowledged that EEC had taken steps to implement process changes to avoid future non-compliance and had begun to apply the customer bill credits it committed to in the Settlement Agreement.

As a result, the AUC was satisfied that the public interest test was met by approving the Settlement Agreement.

#### **Enforcement Staff of the AUC Settlement Agreement with ENMAX Energy Corporation, AUC Decision 28213-D01-2023**

*Markets - Enforcement*

#### Application

The enforcement staff of the AUC ("Enforcement Staff") applied for approval of a settlement agreement reached with ENMAX Energy Corporation ("EEC") related to disclosure of

confidential information by EEC in breach of a confidentiality order regarding EEC's evidence in Proceeding 27495 (the "Settlement Agreement"). In the Settlement Agreement, the parties agreed EEC to pay a one-time penalty of two thousand and five hundred dollars for the contravention.

#### Decision

The AUC approved the Settlement Agreement between Enforcement Staff and EEC, as filed.

#### Pertinent Issues

The AUC held that its jurisdiction to consider and approve the Settlement Agreement is grounded in its general powers in ss 8 and 23 of the *Alberta Utilities Commission Act* ("AUC Act") and the administrative penalty provisions in s 63 of the *AUC Act*. The AUC applied the public interest test to negotiated settlements for enforcement proceedings, which was adopted from criminal law. The public interest test sets a high threshold for departing from a joint submissions (or negotiated settlements in the regulatory context), such that "a trial judge should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest."

The AUC noted that in the Settlement Agreement, the parties considered the factors in s 4 of *Rule 013*, more specifically the harm caused and its duration, who discovered the incident and the fact that this was not a repeat offence. The AUC also observed that EEC's conduct in respect of both, its reaction to the misconduct and the extent of co-operation, is reflected in the Settlement Agreement, including the admitted contravention and agreed-upon administrative penalty.

As a result, the AUC was satisfied that the public interest test was met by approving the Settlement Agreement.

#### **ENMAX Power Corporation – Victoria Park Transmission Line Relocation Project, AUC Decision 28001-D01-2023**

*Facilities – Alteration*

#### Application

ENMAX Power Corporation ("ENMAX") sought approval to relocate portions of the transmission lines in the Victoria Park area of southeast Calgary.

ENMAX stated that its existing overhead 138-2.82L and 138-2.83L transmission lines are in conflict with the City of Calgary's Green Line Light Rail Transit and 6th Street underpass projects.

#### Decision

The AUC approved the application for the reasons that will follow in a subsequent decision.

#### **Future Energy Park Inc. Future Energy Park Power Plant, Industrial System Designation and Interconnection, AUC Decision 28154-D01-2023** *Facilities - Industrial System Designation*

#### Application

Future Energy Park Inc ("FEP") applied for approval to construct and operate a 30-megawatt ("MW") cogeneration power plant (the "Power Plant") at its proposed Future Energy Park biofuels facility. FEP also requested approval to connect the Power Plant to the ENMAX Power Corporation Distribution network, and for an industrial system designation for the electric facilities at the biofuels facility.

#### Decision

The AUC approved the applications from FEP.

#### Pertinent Issues

##### *Cogeneration Power Plant*

The AUC was satisfied that the information requirements specified in *Rule 007: Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations, Hydro Developments and Gas Utility Pipelines* were met.

The AUC found that FEP's participant involvement program satisfied the requirements of *Rule 007*. The AUC also found that the noise impact assessment submitted by FEP met the requirements of *Rule 012: Noise Control*.

The AUC was satisfied that the air quality assessment submitted by FEP demonstrated that the project will comply with the *Alberta Ambient Air Quality Objectives and Guidelines*.

The AUC held that the FEP's environmental evaluation addressed the environmental information requirements of *Rule 007* and that the residual environmental effects of the project will not be

significant; any potential adverse effects on the environment can be effectively mitigated in accordance with FEP's environmental protection plan.

Based on the foregoing, the AUC concluded that the project is in the public interest in accordance with s 17 of the *Alberta Utilities Commission Act*.

#### *Interconnection to the ENMAX Distribution System*

The AUC approved the interconnection application but found that FEP did not provide sufficient evidence that confirmed ENMAX has agreed to connect the Power Plant. Consequently, the AUC imposed a condition of approval requiring FEP to provide confirmation from ENMAX indicating its agreement to connect the Power Plant to the ENMAX distribution system.

#### *Industrial System Designation*

After reviewing the principles and criteria contained in s 4 of the *Hydro and Electric Energy Act* ("HEEA") regarding industrial system designation ("ISD"), the AUC found that granting an ISD is consistent with the principles and criteria set out in S 4 of the *HEEA*.

#### ***Paintearth Wind Project Ltd. Application for an Order Permitting the Sharing of Records Not Available to the Public Regarding the Paintearth Wind Power Plant, AUC Decision 28284-D01-2023*** *Solar – Records*

##### Application

Paintearth Wind Project Ltd. ("Paintearth") applied pursuant to s 3 of the *Fair, Efficient and Open Competition Regulation* ("FEOCR"), seeking permission to share records not available to the public between Paintearth, Paintearth Wind Project LP, CWP Energy Inc. and URICA Energy Real Time Ltd.

##### Decision

The AUC was satisfied that Paintearth had demonstrated that: (i) the sharing of records was reasonably necessary for Paintearth to carry out its business; and (ii) the subject records would not be used for any purpose that did not support the fair, efficient and openly competitive operation of the Alberta electricity market. The AUC was also satisfied that the total offer control of the parties would not exceed the offer control limit of 30 percent

under s 5(5) of the *FEOCR*. The AUC approved the application.

#### ***Process and Protocol for Rule 012: Noise Control Technical Meeting, AUC Bulletin 2023-03*** *Rules - Facilities*

The AUC is conducting an ongoing consultation on certain provisions of Rule 012: *Noise Control* to streamline and improve regulatory and adjudicative processes. On July 12, 2023, with this bulletin, the AUC provided the process and protocol information for participants in the technical meeting, which was held on July 21, 2023.

#### ***TransAlta Corporation Application for Approval to Issue Shares, AUC Decision 28331-D01-2023*** *Markets - Reporting*

##### Application

TransAlta Corporation ("TransAlta") entered into an arrangement agreement ("Agreement") with TransAlta Renewables Inc. ("TransAlta Renewables"), which provided for the acquisition of TransAlta Renewables by TransAlta. Following the Agreement, TransAlta applied for an order authorizing it to issue \$46,441,779 TransAlta Common Shares together with such number of TransAlta Common Shares issuable to holders of a deferred share unit of TransAlta Renewables ("Renewables DSUs") before or on the closing date of the acquisition. TransAlta also requested that the AUC issue orders authorizing the issuance of TransAlta Common Shares as being made in accordance with law, including approving the purposes of the issuance of TransAlta Common Shares.

##### Decision

The AUC approved the application from TransAlta to issue the applied-for shares.

##### Pertinent Issues

According to the Agreement, TransAlta will acquire all of the issued and outstanding common shares of TransAlta Renewables not already owned, directly or indirectly, by TransAlta (the "Renewables Shares"). The maximum aggregate amount of cash to be paid to TransAlta Renewables shareholders is CAD\$800 million and the maximum aggregate number of common shares in the capital of TransAlta that may be issued to the TransAlta Renewables

shareholders in exchange for the Renewables Shares is \$46,441,779.

Section 101(2)(a)(i) of the *Public Utilities Act* requires that the AUC determine: (a) whether the proposed issuance is to be made in accordance with law; and (b) whether the AUC is satisfied regarding the purposes of the proposed share issuance described in the application.

In ascertaining whether a proposed issuance of shares will be made in accordance with applicable law, the AUC typically requests, and relies upon, the opinion of the applicant's legal counsel to confirm that the owner of the public utility is duly authorized

by its directors to undertake the issuance of the proposed shares, and that the form and content of the issuance is in compliance with applicable laws. After reviewing the legal opinion provided by TransAlta's counsel, the AUC was satisfied that due diligence was being exercised and steps have been taken to ensure that the common shares issuance will be made in accordance with law.

The AUC also accepted TransAlta's submitted purpose of the common shares issuance and was satisfied that no part of the issuance will impact TransAlta's transmission assets, the approved or future transmission rates or the provision of utility services.



## CANADA ENERGY REGULATOR

### ***Hydro-Québec Application for the Hertel-New York Interconnection Power Line Project Under Section 248 of the Canadian Energy Regulator Act, OF-Fac-IPL-Q016-2022-01 01***

#### *Facilities - Electricity*

#### Application

Hydro-Québec (“HQ”) applied for a permit for a project designated as the Hertel-New York Interconnection Power Line, which involves building and operating an underground 400 kilovolt (“kV”) direct current (“DC”) transmission line approximately 58 kilometers (“km”) long, from the Hertel substation in La Prairie, Quebec to an interconnection point at the Canada-United States border (with New York State) under the Richelieu River. The proposed international power line will enable HQ to provide New England with up to 1250 megawatts (“MW”) of power at 400 kV DC (the “Project”).

#### Decision

The CER approved the application, with conditions, and issued electricity Permit EP-306.

#### Pertinent Issues

S 248 of the *Canadian Energy Regulator Act* (“*CER Act*”) provides that the CER must, subject to s 8 of the *Impact Assessment Act*, issue a permit on application, except where the Governor in Council (“GIC”) designates a proposed international power line (“IPL”) for certification pursuant to s 258 of the *CER Act*. The CER reviews a permit application, before determining whether to recommend designation to the GIC for assessment as a certificate or to issue the permit, in accordance with the criteria in s 257 for the *CER Act*.

The CER determined that no further process was required and, as a result, it did not recommend the GIC to designate the application for a certificate process. The CER was satisfied that the construction and operation of the Project will not have any unacceptable effects on other provinces, that the Project is not likely to cause significant adverse environmental effects and that consultation has been adequate.

The CER found that HQ’s program and public engagement efforts were appropriate for the scope and scale of the Project and that HQ has responded

to the public concerns received through the provincial comment period, including proposing mitigation measures to address those concerns.

The CER found that there has been adequate consultation and accommodation, and that the effects of the Project on the rights of Indigenous Peoples are of low severity that can be effectively mitigated. The CER also found that the issuance of a permit under section 248 of the *CER Act* is consistent with section 35 of the *Constitution Act*, 1982 and the honour of the Crown.

The CER was of the view that the route selection and the criteria used to determine the route were acceptable and appropriate given the scope and scale of the Project.

Regarding the facilities’ design, the CER found that the Project makes use of sound engineering practices with respect to the structural design, layout, equipment selection, specifications and protection system.

HQ stated that the drilling site at the Canada-United States border crossover point is located in an environmentally sensitive area and that HQ plans to perform a horizontal directional drilling (“HDD”) to install the cable in order to avoid the environmentally sensitive area. The CER found that the clay deposit in the area is of high sensitivity to disturbance and vibration, and that it may pose a challenge to surface stability when disturbed. As a result, the CER imposed a condition, which requires HQ to file a geohazards assessment report that considers the geohazards associated with the proposed HDD installation. In addition, the CER imposed another condition, which requires HQ to file an execution and drilling fluid management plan that include the mitigation measures for the risks mentioned in the HDD feasibility report before the start of HDD activities.

The CER was of the opinion that the Project will not have a negative impact on the reliability of the bulk power system as long as some modifications are performed prior to operation. The CER imposed a condition requiring HQ to perform the necessary modifications to existing HQ system components to maintain reliability.

The CER was of view that the Project operation limits should be stated on the permit to require HQ to

operate the IPL within the limits for which it was designed, which will also require HQ to apply to the CER to modify those limits, should HQ decide to operate the line in deviation from the line intended operation limits.

In making its determination on the economic feasibility of a proposed project and related facilities, the CER generally assesses the need for the project and the likelihood of the project being used at a reasonable level over its economic life. The CER concluded that the Project is responding to market needs and that there is currently adequate supply of electricity available to be delivered.

The CER found that HQ demonstrated that it has the ability to finance the construction and operation of the Project and that HQ has sufficient financial strength to finance the future abandonment of the Project. The estimated costs of the Project were \$1.15 billion (\$500 million for the construction of the transmission line and \$650 million for work at the Hertel substation).

The CER found that the Project is not likely to cause significant environmental effects given: the nature and scope of the Project and the mitigation and avoidance measures proposed by HQ; the fact that 95% of the chosen route is on a public right-of-way along existing roads and highways; the recommendations made in the Quebec's investigation and public hearing report regarding the Project; and the conditions imposed by the CER.

The CER identified that the construction, operation and maintenance of the Project may require an authorization pursuant to paragraphs 34.4(2)(b) and 35(2)(b) of the *Fisheries Act*. As a result, and pursuant to a memorandum of understanding ("MOU") between the CER and Fisheries and Oceans Canada ("DFO"), the CER referred the Richelieu River crossing to the DFO with respect to the impacts on fish and fish habitat. According to the MOU, the DFO may transfer the file to the CER so that it can conduct a more in-depth analysis of the impacts on fish and fish habitat or conduct an assessment of impacts on fish and fish habitat under the *Fisheries Act* and the *Species at Risk Act*. Consequently, the CER asked the DFO to confirm whether one or more authorizations are required under paragraphs 34.4(2)(b) or 35(2)(b) of the *Fisheries Act* for some of the proposed work. The CER also imposed a condition requesting HQ to file with the CER a copy of the authorization(s) in line with paragraph 34.4(2)(b) and paragraph 35(2)(b) of

the *Fisheries Act* or a letter of advice, if an authorization is not required.

The CER expressed an expectation that Project monitoring will encompass all environmental elements, including the effectiveness of wetland restoration since the Project is expected to cause a temporary loss of approximately 6.6 ha of wetlands, and a permanent loss of approximately 0.6 ha. The CER imposed conditions requiring HQ to file an environmental protection plan for the Project and conduct long-term monitoring until the affected areas are reclaimed.

***Review and Variance Application of TransCanada Keystone Pipeline GP Ltd. Concerning the Commission of the Canada Energy Regulator Decision in the RH-005-2020 Hearing, CER Letter Decision***  
*Review - Oil and Gas*

Application

TransCanada Keystone Pipeline GP Ltd ("Keystone") filed an application seeking a review and variance of the CER decision for Phase 1 of the RH-005-2020 ("Decision") proceeding (the "Review Application"). In the Decision, the CER determined that certain costs, such as certain drag reducing agent ("DRA") expenses and the upgraded pressure control valves ("PCV") capital program, were not recoverable through variable tolls and directed Keystone to recalculate and refile the 2020 and 2021 tolls to remove these costs from the variable tolls.

Decision

The CER determined that Keystone did not, on a *prima facie* basis, raise sufficient doubt as to the correctness of the Decision and dismissed the Review Application.

Pertinent issues

In the Review Application, Keystone alleged the following four errors of law.

***Costs of DRA are Recoverable in the Fixed Portion of Keystone's Tolls***

Keystone argued that the CER erred in determining that the costs of DRA are recoverable in the fixed portion of Keystone's tolls ("Fixed Tolls"). Keystone asserted that the CER concluded that costs of DRA are not properly considered operating, maintenance,

and administration (“OM&A”) costs if they are used to increase the capacity of the system, and that those costs of DRA used to increase the capacity are recoverable in the Fixed Toll. Keystone submitted that this finding is an error of law because:

- it is inconsistent with the CER’s finding in the Decision that the definition of the Fixed Toll only included actual development, construction and acquisition costs incurred by Keystone within two years of the system going into service;
- DRA was not contemplated at the time the system was designed and, as a result, DRA commodity costs could not have been included in the “development, construction and acquisition costs” for the purposes of the Fixed Toll; and
- Keystone did not incur any DRA costs within the first two years of the system going into service and, as a result, DRA costs could not be included in the Fixed Toll.

Keystone also asserted that the Federal Court of Appeal’s decision in *Nowlan v Canada (Attorney General)*, 2022 FCA 83 (“*Nowlan*”) states, at paragraph 38, that it is an error to interpret contractual provisions in a manner that is inconsistent with other interpretations of the same provisions.

The CER determined that Keystone failed on a *prima facie* basis to raise doubt regarding the correctness of the CER’s decision on this basis. The CER determined that the Decision does not contain the inconsistent findings alleged by Keystone, nor does it contain findings Keystone alleges the CER made. Also, the *Nowlan* case cited by Keystone does not stand for the proposition asserted by Keystone, and the CER’s findings discussed in the first ground of the Review Application are based on a consistent approach to contractual interpretation, which aligns with the principles from *Nowlan*.

*Fixed Tolls are the Committed Shippers’ Payment for the Costs Required to Create Approximately 590,000 Barrels per Day of Capacity*

Keystone argued that the CER made an error in finding that the Fixed Toll would be the committed shipper’s payment for the costs required to increase the Keystone’s system nominal capacity to approximately 590,000 barrels per day (“bpd”)

because this finding is premised on another finding for which there is no evidence in support. According to Keystone, this finding is premised on Keystone bearing the risk that, if the facility set agreed to with the shippers did not achieve approximately 590,000 bpd of capacity, Keystone would be responsible for the costs of providing capacity to address the shortfall.

The CER noted that these alleged findings all have a common element: that Keystone was required to build an expansion that achieved 590,000 bpd of nominal capacity and, if it fell short, then Keystone was required to incur additional costs to continue to increase capacity to 590,000 bpd, which it could no longer recover through the Fixed Toll because the period to recover had passed.

Keystone could not recover those costs because it incurred them after the recovery period for costs to expand the system’s nominal capacity through the Fixed Toll had ended, which is a consequence of the tolling structure under the transportation service agreements (“TSAs”) and the timing of when Keystone incurred the costs.

The CER determined that Keystone failed on a *prima facie* basis to raise doubt as to the correctness of the CER’s decision on this basis. Keystone failed to establish on a *prima facie* basis that the CER’s impugned finding lacks an evidentiary foundation or that the CER made inconsistent findings.

*Recoverability of Costs Resulting from Alleged Deficiencies in the Keystone Canada Pipeline System’s Design or Construction*

Keystone argued that the CER erred by finding that Keystone cannot recover costs resulting from deficiencies in the Keystone’s system design and construction.

The CER determined that Keystone did not raise sufficient doubt as to the correctness of the Decision because the CER based its findings on cost recoverability pursuant to TSAs. The CER was not required to apply and did not apply the prudence test to make its findings on cost recoverability pursuant to the TSAs. With respect to the DRA costs, the CER based its finding that Keystone could not recover the costs of DRA through variable toll because Keystone used the DRA to increase the system’s nominal capacity, since costs to expand capacity are not recoverable as part of the variable toll. Finally, the NEB decisions that Keystone relied on to support its position do not support Keystone’s

assertion that the appropriateness or reasonableness of how CER-regulated pipelines are designed and constructed is assessed using the prudence test.

*Costs of Keystone's Upgraded Pressure Control Valve Program are not Recoverable in the Variable Tolls*

Keystone submitted that there was a breach of procedural fairness as well as an error of law arising from the CER's interpretation of the TSA regarding its treatment of PCV costs. More specifically, Keystone submitted that: it was not provided a full and fair opportunity to know and respond to the case against it regarding recoverability of the upgraded PCVs program costs through the variable toll: it was not aware that Phillips 66 Canada Ltd. ("Phillips") and Cenovus Energy Inc. ("Cenovus") specifically disputed the issue and was not provided an adequate opportunity to respond; and it did not have a full and fair opportunity to respond to the case against it because the CER's decision about PCV program costs was based on a fundamentally different rationale than the one contained in evidence.

The CER determined that Keystone failed to raise sufficient doubt regarding the correctness of the Decision. The CER found that Keystone had a full and fair opportunity to know and respond to the case against it. The CER did not make findings in the Decision that certain OM&A costs were excluded from recovery in the variable toll. Also, the CER is not required to align its findings with the rationale of witnesses or the positions of parties. Finally, an allegation of an error of law in a review application should not be based on arguments that could have been, but were not, raised before the CER reached its decision, such as the one proffered by Keystone in the form of its "pipeline repairs" argument raised for the first time in its submissions on its Review Application.