

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE PUBLIC UTILITIES ACT

- and -

IN THE MATTER OF AN APPLICATION by **HALIFAX REGIONAL WATER COMMISSION** for approval of amendments to its Schedule of Rates and Charges and approval of its Regulations respecting Rates and Charges for the provision of water, public and private fire protection, wastewater services, and stormwater services

BEFORE: Roland A. Deveau, K.C., Vice Chair
Richard J. Melanson, LL.B., Member
Jennifer L. Nicholson, CPA, CA, Member

APPLICANT: **HALIFAX REGIONAL WATER COMMISSION**
John MacPherson, K.C.
Heidi Schedler, K.C.

INTERVENORS: **CONSUMER ADVOCATE**
William L. Mahody, K.C.

HALIFAX HARBOUR BRIDGES
Mark V. Rieksts, Counsel

**NOVA SCOTIA DEPARTMENT OF NATURAL
RESOURCES AND RENEWABLES and DEPARTMENT
OF PUBLIC WORKS**
Mark V. Rieksts, Counsel

BOARD COUNSEL: S. Bruce Outhouse, K.C.

HEARING DATE: June 27, 2022

**CLOSING
SUBMISSIONS:**

August 11, 2022

DECISION DATE:

October 31, 2022

DECISION:

The application is approved, as amended by the Board. Halifax Water is directed to update projected amounts for accumulated surplus (deficit) as at March 31, 2024. New rates are effective December 1, 2022.

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1.0 SUMMARY

[1] The Halifax Regional Water Commission (Halifax Water) is a regulated public utility, which provides water, stormwater and wastewater services in the Halifax Regional Municipality. It has requested approval of amendments to its Schedule of Rates and Charges and its *Regulations* for its water, public and private fire protection, wastewater services, and stormwater services.

[2] For meters used primarily by residential customers, the proposed increases for water and wastewater services total 3.1% in 2022/23 and 3.0% in 2023/24 (test years). Proposed increases for all other meter sizes for water and wastewater services range from 3.5% to 4.8% in 2022/23 and from 1.7% to 5.4% in 2023/24. The proposed annual increase for residential property customers receiving stormwater service ranges from \$2.00 to \$15.00 in 2022/23, with a further annual increase ranging from \$3.00 to \$19.00 in 2023/24. These increases are proposed to take effect on September 1, 2022, for 2022/23 and on April 1, 2023, for 2023/24.

[3] The application set out the need for the rate increases, based upon the projected revenue requirement for each test year. The budgeted expenses and items which make up the revenue requirement were reviewed by the Board. It finds that Halifax Water has provided a reasonable explanation for the need to increase rates and to amend its *Regulations*, including a reduction to the interest rate on overdue accounts from 19.56% per annum to 14% per annum, and a change in the methodology used to calculate the Equivalent Residential Unit (ERU) of the stormwater charge used to allocate costs between residential and non-residential customers for the Site-Related Flow Charge. The Board also accepts Halifax Water's evidence that it has taken a prudent approach to cost containment and cost avoidance.

[4] In response to Information Requests, Halifax Water acknowledged an error in its revenue requirement in the second test year for double counting the new interest/repayment on long-term debt. As a result, the projected revenue requirement in Test Year 2 for water services was overstated by \$899,000. For wastewater and stormwater services, the overstatement was \$134,000 and \$578,000, respectively.

[5] However, Halifax Water noted there have been material changes to some of the budgeted expenses since the application was prepared, such as for chemicals, electricity, salaries, debt interest, pension, and inflation. If these inflationary pressures were reflected in the updated revenue requirements for the test years, rates would increase above that requested in the rate application. Halifax Water stated that it is not asking to adjust the rates above that proposed in the application. In the circumstances, the Board approves Halifax Water's rates as proposed, subject to minor variances to be confirmed in a Compliance Filing. The new rates will be effective December 1, 2022.

[6] The Board finds that the Province and the Halifax Dartmouth Bridge Commission (HDBC) are subject to the *Public Utilities Act*, which is incorporated by reference in the *Halifax Regional Water Commission Act*. The Board concludes that Crown immunity does not apply to the Province and HDBC in the circumstances of this case. The Province and HDBC are subject to the Right of Way Charge for stormwater services.

2.0 BACKGROUND

[7] Halifax Water applied to the Nova Scotia Utility and Review Board on February 25, 2022, to approve amendments to its Schedule of Rates and Charges and

its *Regulations* respecting Rates and Charges for water, public and private fire protection, wastewater and stormwater services.

[8] The proposed range of rate increases depends upon the customer meter size and the volume of water consumed. For a 5/8" meter, used primarily by residential customers, with an average annual water consumption of 160 m³, the proposed increases for water and wastewater services total 3.1% in 2022/23 and 3.0% in 2023/24. Proposed increases for all other meter sizes for water and wastewater services range from 3.5% to 4.8% in 2022/23 and from 1.7% to 5.4% in 2023/24.

[9] For non-residential property customers receiving stormwater service, the current site related flow charge per m² of impervious area of \$0.135 is proposed to increase to \$0.145 in 2022/23 and to \$0.173 in 2023/24.

[10] For residential property customers receiving stormwater service, the site related flow charge is based upon an impervious area tiered rate structure. The proposed annual increase in the tiered rates ranges from \$2.00 to \$15.00 in 2022/23, with a further annual increase ranging from \$3.00 to \$19.00 in 2023/24.

[11] These increases are proposed to become effective on September 1, 2022, for 2022/23 and on April 1, 2023, for 2023/24.

[12] The application also proposes various fee adjustments and administrative changes, including changes to definitions in Halifax Water's *Regulations*. The fee adjustments include amendments to fire protection charges, and the stormwater Right of Way (ROW) Charge, which is currently charged to Halifax Regional Municipality (HRM), and is proposed to be charged to HRM, the Province and the HDBC.

[13] By Hearing Order dated March 1, 2022, the Board established a timeline for the filing of interventions, the exchange of Information Requests (IRs) and the hearing. A publicly advertised Notice of Public Hearing invited interventions from interested parties. Notices of Intervention were received from the Consumer Advocate (CA), HDBC, Nova Scotia Department of Natural Resources and Renewables (NRR) and the Nova Scotia Department of Public Works (Public Works). The hearing was held at the Board's offices on June 27, 2022, with the Board Counsel's consultants testifying by videoconference.

3.0 ISSUES

[14] The Final Issues List established by the Board for this hearing was:

1. Recommended Rate Design, including residential smoothing
2. One-year and five-year Business Plans, including the concept of gradualism
3. Consistency with the updated Integrated Resource Plan (IRP), and associated studies, including funding
4. Projected consumption levels and water demand analysis
5. Updates to the Cost of Service Design Manual
6. Cost containment actions by Halifax Water
7. Halifax Water's institutional capacity (proposed increased staffing)
8. Unregulated activities
9. Fire protection rates
10. Revenue requirements and customer rates for water services effective September 1, 2022, and April 1, 2023, including affordability
11. Revenue requirements and customer rates for wastewater services effective September 1, 2022, and April 1, 2023, including affordability

12. Revenue requirements and customer rates for stormwater services effective September 1, 2022, and April 1, 2023, including a change in the methodology for calculating the stormwater rate, as well as affordability
13. Regulations for the provision of water, wastewater, public and private fire protection, and stormwater

4.0 ANALYSIS AND FINDINGS

[15] The issues are canvassed by the Board in this section of its decision. Some of the issues have been combined or reordered in the discussion.

4.1 Business Plans, Integrated Resource Plan (IRP), and associated studies

[16] In support of its rate application, Halifax Water relies on its current five-year business plan (2020/21 to 2024/25), which includes its five-year capital budget. The business plan and capital budget were informed by its Integrated Resource Plan update, which was completed in 2019 and filed in the Regional Development Charge (RDC) application (M09494) (2019 IRP update). Halifax Water notes that the 2019 IRP update builds upon previous plans addressing three primary drivers: growth (Infrastructure Master Plan - IMP), asset renewal (Asset Management Plan - AMP), and regulatory compliance (Compliance Plan). As noted in the Board's decision in the RDC matter, several information gaps remained after these studies.

[17] Halifax Water also completed additional studies after the 2019 IRP Update, which impact the five-year capital budget. William Brown, P.E., and James Goldstein, the Board Counsel consultants, identified various planning initiatives completed to date, including:

- May 2020 Mill Cove Wastewater Treatment Facility Conceptual Design Report;

- May 2020 Aerotech Biosolids Processing Facility Technical Brief;
- Dalhousie University-led pilot study of ballasted flocculation technology at the Dartmouth Wastewater Treatment Facility;
- Continuing enhancement of asset management programs; and
- Requesting proposals and selecting a consultant to complete the Wastewater Treatment Facility Planning Study.

[18] The planned capital investment in the 2022/23 fiscal year is \$106,485,000, with an additional \$190,047,000 in the 2023/24 test year. Halifax Water's proposed five-year capital budget incorporates and prioritizes IRP projects. However, the proposed amount of capital spending is less than recommended in the 2019 IRP update. While there are other sources of funding for capital projects such as the RDC, Capital Cost Contributions, and external funding, about two-thirds of the funding since 2016/17 has been through rates. Halifax Water noted that increasing capital funding in the test years to meet the IRP recommended level of capital spending is a significant driver for this application.

[19] Brown and Goldstein concluded that the planning activities and studies Halifax Water completed since the 2019 IRP Update provide an adequate foundation for the capital costs estimates in this rate application:

While a better understanding of the wastewater treatment facility issues and the Biosolids Processing Facility issues ... would provide more confidence in the accuracy/reasonableness of the capital cost inputs to the Rate Application, and while the Biosolids Processing Facility upgrade cost inconsistencies ... need to be clarified, the cost estimates in these supporting studies are currently the best available information and are an appropriate foundation for the Rate Application. That said, it is very important that the planning process continue to evolve and become more integrated and more robust moving forward, ...

[Exhibit H-12, p. 20]

[20] Among other concerns, Halifax Water acknowledged that the updated five-year capital budget reflects some delays in the IRP recommended implementation

schedule for capital projects due to staff resource limitations at the Utility. As canvassed in further detail later in this decision, Halifax Water proposes to add 21 staff positions, including in its engineering functions, to address this concern.

[21] Brown and Goldstein noted that Halifax Water had made progress on addressing the planning gaps, but they elaborated on the need to address some of the remaining information gaps in their pre-filed evidence:

- While the Wastewater Treatment Facility (WWTF) Planning Study process has been initiated, there are pending capital projects that would have benefited from the results of this study. In the absence of this study, the “No Regrets/Unavoidable Need” criteria established by the Board could be more challenging to document for some projects (p. 22);
- While a study of the Biosolids Processing Facility (BPF) has been completed, it was narrowly focused and did not assess the impacts the proposed project would have on the Aerotech WWTF, the viability of continued land application of the stabilized biosolids or explore alternative siting options (p. 22);
- While a study of the Mill Cove WWTF has been completed, this study did not establish a rigorous approach to estimating design flows and loadings criteria that could be used on all future evaluations of WWTFs (including the pending WWTF Planning Study). or consider potential climate change impacts on this upgrade project (p. 23);
- The Cogswell Ambient Temperature District Energy System (ATDES) project could be adversely impacted by future upgrades to the Halifax WWTF. The heat recovery system will reduce the primary wastewater effluent temperature. To upgrade the Halifax WWTF to meet the federal *Wastewater System Effluent Regulations* (WSER) standards, it will likely be necessary to relocate the heat recovery system downstream of the new secondary treatment system. This could be very problematic if the secondary upgrade must be accomplished on a remote site (p. 25);
- In summary, it will be important to confirm the gaps and integration issues associated with the BPF project, the Mill Cove WWTF Upgrade project and the Cogswell ATDES project are addressed before approving these projects for implementation (p. 28);
- Until the Future Regulatory Scenario Study is completed, it will be important for Halifax Water to consider the impacts of potential future regulation

changes on near-term projects to ensure appropriate flexibility is built into these projects, [see: Matter M10312, pp. 28-29];

- Halifax Water's trucked waste strategy, should be re-visited in the next five-year planning cycle (p. 29); and
- Halifax Water needs to continue to advance its asset management program by implementing enhanced asset condition assessments and systems for prioritizing renewal investments based on risk and criticality (p. 33).

Findings

[22] Based on the evidence in this matter, the Board is satisfied that the planning activities and studies that Halifax Water has completed since the 2019 IRP Update provide an adequate foundation for the capital costs estimates included in this rate application.

[23] The Board previously directed Halifax Water to address information and planning gaps identified in the 2020 general rate application (M09589) and the 2020 RDC review (M09494). Brown and Goldstein stated that some of the identified gaps are still "a work in progress". They highlighted:

To provide more confidence in the appropriateness of recommended solutions and accuracy/reasonableness of the capital cost estimates moving forward, Halifax Water's planning process should continue to evolve to become more comprehensive and integrated. ... [Emphasis added]

[Exhibit H-12, p. 21]

[24] Most of the planning gaps identified by Brown and Goldstein have been the subject of prior direction by the Board, most notably following the Board's *RDC* decision (M09494) and its review of the Utility's last annual reporting requirements (M10312). Notably, in its *RDC* decision [2020 NSUARB 129], the Board directed that Halifax Water must complete further studies of its various WWTF upgrade project needs before its next IMP, IRP, and RDC five-year updates (see para. 232 in the *RDC* decision).

[25] Further, in a decision letter in the *RDC* matter (M09494) the Board addressed its concern about Halifax Water's coordination of its various planning initiatives:

With respect to the proposed schedule for the WWTF Planning Study, the Board agrees that it is not ideal for the completion of phase 2 to overlap with the beginning of the IMP, as the next IMP update should be fully informed by the WWTF Planning Study. Nonetheless, the Board expects Halifax Water to manage the schedule for all the related work activities such that the next RDC application, IMP update and IRP update will be completely and properly informed by the WWTF Planning Study. Further, the Board directs the schedule to be managed such that the next RDC application is filed with the Board no later than October 31, 2025.

[Board letter, August 4, 2021, p. 2]

[26] The Board does not consider that further direction about these planning gaps is required in this proceeding except to reiterate the importance of Halifax Water diligently pursuing the planning initiatives that have been identified in the Board's prior proceedings, and the related gaps identified by Brown and Goldstein in this matter. It is extremely important that Halifax Water pursue its planning process in a manner that is coordinated and integrated. As previously directed, these planning activities are subject to reporting to the Board and stakeholders and to engagement with the Board Counsel consultants.

4.2 Projected consumption and Water Demand Analysis

[27] Halifax Water indicated in its last rate hearing in 2020 that Advanced Metering Infrastructure (AMI) meters were being installed in most customer households. These meters provide more accurate water consumption information enabling a detailed analysis of water demand by customer class. The Utility's intention was to consider the implementation of class-based volumetric rates once a full year of AMI data was available for all customers. Although approximately 83,000 AMI meters have been installed,

accounting for about 99% of customers, consumption patterns to date have been disrupted by the COVID-19 pandemic. As such, Halifax Water says these patterns are not an accurate representation of expected consumption going forward.

[28] Halifax Water, therefore, based its application on the existing rate structure which uses a single unit volumetric rate with base charges increasing relative to meter size. The Utility's consultant, Raftelis, recommended delaying the implementation of class based volumetric rates until the next general rate application. Energy Consultants International Inc. (ECI), Board Counsel consultant, agrees with this recommendation.

[29] During the pandemic in 2020/21, Halifax Water experienced significant changes in consumption by customer class. The industrial, commercial and institutional classes saw large decreases as businesses were closed, employees worked from home and students learned online. This resulted in increased consumption in the residential and multi-residential customer classes.

[30] In 2021/22 customer consumption returned to pre-COVID-19 levels. The budget for 2022/23 includes an increase in consumption related to growth of 1% based on the addition of 680 new customers. The budget for 2023/24 also includes growth of an additional 680 customers but does not include an additional increase in consumption. Halifax Water stated that this was a conservative assumption.

[31] ECI argued that Halifax Water's assumptions are too conservative and that, based on an expected return to normal consumption levels with expected growth, consumption should be budgeted to increase by 0.5% in 2023/24.

[32] In its Rebuttal Evidence, Halifax Water disagreed with ECI's recommendation:

Halifax Water disagrees with ECI's recommendation to adjust the budgeted levels of consumption. As noted in the application and illustrated by Figure 14 (page 21) there has been a long-term trend of declining water consumption. Figure 2 in the rate application shows the volatility in the consumption by customer class. In 2021/22, total consumption increased by 1.2% from 2020/21 (IR-8(b)NSUARB). With the 2021/22 increase, total water consumption has only now returned to the 2018/19 pre-pandemic levels.

Halifax Water acknowledges that the pandemic impacted consumption trends, and that projecting normal patterns in the face of a pandemic and global supply chain issues is challenging. Increasing consumption by an additional 0.5% in each of the test years, as recommended by ECI, would impact the rates only nominally. Because the increase in consumption would be offset by the decrease in rates, it would result in no material impact on the average residential customer. However, if consumption does not increase as suggested by ECI, Halifax Water will see a shortfall in revenue and a further increase to its deficit.

Given the variations in the pattern of consumption over the last number of years, Halifax Water is of the view that the more fiscally prudent course is to maintain the assumptions in respect of consumption as contained in the application. This is especially important given the increased uncertainties related to increases in expenses as noted above.

[Exhibit H-13, p. 8]

[33] In its response to Undertaking U-4, Halifax Water completed a detailed analysis of the impact of increasing consumption by 0.5% in 2023/24 as recommended by ECI. The results show a reduction in volumetric rates that is offset by the increase in the projected average consumption. Halifax Water stands by its initial projections.

Findings

[34] The Board agrees that water consumption growth assumptions cannot be based on the experience since Halifax Water's last rate hearing. Based on Halifax Water's response to Undertaking U-4, the Board agrees with its projected consumption growth of 1% in 2022/23 and no growth in 2023/24.

4.3 Proposed increase to institutional capacity

[35] The application includes funds to support Halifax Water's capital budget. The proposed five-year capital budget (2020/21 to 2024/25) in Halifax Water's five-year business plan incorporates and prioritizes IRP projects. However, Halifax Water noted that its capital spending has been lower than that recommended in its IRP, primarily due to its lack of institutional capacity, and other factors such as the COVID-19 pandemic and delays in HRM-integrated projects.

[36] The Utility highlighted the importance of delivering on its capital budget:

... The current water, wastewater and stormwater rates are insufficient to meet the capital needs for sustainable infrastructure as identified in the IRP. The IRP acknowledges that water, wastewater, and stormwater assets are currently underfunded, and wastewater and stormwater have been historically underfunded. Growth in Halifax Water's customer base, more stringent environmental regulations and the need to renew current assets are driving capital expenditures. Institutional capacity will have to increase over the test years in order to deliver the required capital projects.

[Exhibit H-1, p. 14]

[37] Brown and Goldstein noted they had identified this concern about 10 years ago during Halifax Water's initial IRP process. At the time, they had recommended that the Utility conduct an "Institutional Capacity Assessment". Halifax Water commissioned the Opus study, which concluded that Halifax Water required an additional 25-40 full-time equivalent positions (FTEs), most of which would be in engineering, to deliver the 2012 IRP of \$125 million.

[38] As noted in response to Board staff IR-1(b), Halifax Water decided in early 2021 to investigate and address its inability to deliver on its capital budgets. It observed that, among other factors, its engineering project staff was largely unchanged since its structure was established in 2010, when the capital budget was only about \$30-40 million compared to much higher current levels.

[39] Acknowledging its ability to deliver capital projects has been negatively impacted by its institutional capacity and the staff available to deliver these projects, Halifax Water will improve its institutional capacity over the next two to three years and implement revised business processes to reach the recommended IRP level of spending. The proposed 2022/23 operating budget reflects an increase of 21 FTEs, primarily related to improving the level of capital spending. Halifax Water indicated it would also commission an updated Institutional Capacity Assessment.

[40] Brown and Goldstein were unable to confirm that 21 additional FTEs were sufficient to adequately address the concern about Halifax Water's institutional capacity. However, the consultants supported Halifax Water's initiative of placing high priority on addressing its institutional capacity and described the addition of 21 FTEs to its staff complement as "a very good initial step":

Certainly expanded staff resources are critically important. However, until HW's Institutional Capacity Assessment is completed it is difficult to know whether the proposed increased staffing level identified (21 new positions in 2022/23) will be sufficient. What is clear is that HW's capital spend is projected to more than double over the next two years, while it plans to increase overall staffing levels by 21 FTEs or about 4% over current staffing levels (562 total), and increase the Engineering and Technology Services staffing level by about 10 positions in 2022/23 or 8% over its current 132 FTEs. Given the likely staff recruiting and staff assimilation challenges, adding 21 new positions in 2022/23 would be a very good initial step.

[Exhibit H-12, p. 37]

[41] In its pre-filed evidence, Brown and Goldstein recommended Halifax Water report annually to the Board on its efforts to improve its institutional capacity, based on the following:

- HW's efforts and results to enhance its institutional capacity, including hiring goals, number and position of new hires, staff terminations and departures, and net increase in staff for each department, etc.
- The effectiveness of the current recruiting strategies and an assessment of the need to modify the approach to recruiting.
- The hiring goals for the coming year.

- The planned recruiting strategies for the coming year.

[Exhibit H-12, p. 41]

[42] In its Rebuttal Evidence, Halifax Water agreed with this recommendation and submitted these annual reports be provided to the Board starting September 30, 2023 (which the Board notes coincides with numerous other annual reports filed by the Utility).

Findings

[43] As noted elsewhere in this decision, increased capital funding in the test years to meet the IRP recommended level of capital spending is a significant driver for this application. It is acknowledged that Halifax Water's increased institutional capacity is integral to delivering upon its proposed capital budget.

[44] The Utility's ability to deliver on its proposed capital budget has several benefits for ratepayers, which include accommodating customer growth, meeting more stringent environmental regulations, and renewing its infrastructure. Also, as noted by Brown and Goldstein, insufficient institutional capacity may lead to increased costs for ratepayers from a lack of comprehensive and integrated planning before contractor procurement and project implementation.

[45] Based on the evidence, the Board endorses Halifax Water's efforts to improve its institutional capacity. The Board is satisfied this initiative will benefit ratepayers. As noted by the Board Counsel consultants, the addition of 21 new FTEs in 2022/23 is a very good initial step.

[46] Halifax Water indicated it would also commission an updated Institutional Capacity Assessment, as recommended by Brown and Goldstein. The Board notes that this study was filed on September 28, 2022. The study states that Halifax Water has only

added 3 FTEs from March 31, 2022 to August 31, 2022, falling short of a pace noted in the evidence in this application, which forecasts an increase of 21 FTEs in 2022/23. A number of experienced managers retired in the last six months. Over 6% of the total workforce is eligible to retire now, while over 9% will be eligible in the next five years. This is consistent with the challenge being faced by many employers in the current economy, but it only serves to heighten the urgency of this initiative for Halifax Water. Halifax Water should continue to pursue this initiative aggressively, failing which it will fall even further behind in its institutional capacity.

[47] Halifax Water has agreed to file annual reports detailing its efforts to improve its institutional capacity. The Board so directs, with the next report due September 30, 2023. The reports must address the points identified above by Brown and Goldstein.

4.4 Cost of Service Design Manual updates, including unregulated activities

[48] The application proposes updates to Halifax Water's Cost of Service (COS) Manual, which was last reviewed and updated as a part of Halifax Water's 2020 general rate application. The revisions can generally be categorized as: updates to the narrative, percentages, and formulas, based upon current information; adjusted language to provide clear definitions and descriptions; adjustments to reflect the requested changes contained in the application; and housekeeping and cleanup of typographical errors.

[49] Halifax Water engaged Raftelis, who prepared the *Water Demand Analysis Summary*, dated January 28, 2022, in the application. The analysis, using data from Halifax Water's AML meters, concluded there is differentiation in peaking characteristics

but not enough information to use these differences as a basis for rate design. Halifax Water accepted this conclusion and proposed an addition to the COS Manual:

The 2021 work concludes there may be sufficient differentiation in daily peaking characteristics by customer class now to warrant using max hour as a factor in allocating costs for rate setting purposes, however the consumption data for the period under review was not normal as customer consumption patterns were impacted by the COVID-19 pandemic. At this time Halifax Water is not proposing to do further allocations to functionalize costs to customer classes. Raftelis also notes that "there is enough differentiation between the daily peaking characteristics by customer class that class-based volumetric water rates could be supported, although would not necessarily be required."

[Exhibit H-1, pp. 372-373]

[50] In response to an IR from the CA asking when Halifax Water intends to reconsider differentiation in peaking characteristics, Halifax Water explained that this issue will be a significant part of its next COS Manual update and rate application, anticipated to be filed in the fall of 2023.

[51] Brown and Goldstein's evidence noted that they reviewed the proposed COS Manual, focusing on: the establishment of wastewater rates for high-strength users; the establishment of wastewater rates for non-regulated waste streams, such as septage, leachate and non-regulated sludge sources; the determination of the costs of treating non-regulated waste streams; and how each of these factors impact general rates. As a result of their review, Brown and Goldstein concluded:

- 4) The COS Manual O&M cost classification models could use some fine-tuning to establish more accurate rates for accepting high-strength wastewater discharges and for accepting non-regulated waste streams.
- 5) We suspect that the rate impacts of our concerns are relatively minor.
- 6) We recommend Halifax Water provide background information concerning its program to ensure high-strength sewer users do not go undetected and concerning the rate setting and cost accounting for non-regulated activities. Once provided, we recommend Halifax Water orchestrate informational meetings with the Board Counsel Consultants before the next rate case to review in more detail the above issue, and as appropriate, consider modification in the next rate application.

[Exhibit H-12, pp.14-15]

[52] Brown and Goldstein noted that if there are high-strength sewer users, these users would increase Halifax Water's wastewater treatment costs. If these users do not pay an appropriate increase in rates for the high-strength wastewater, the rate for all users increases, which would be inconsistent with cost-based ratemaking. Brown and Goldstein were also concerned about how rates are set to recover costs for treating non-regulated waste streams.

[53] In its Post Hearing Submission, Halifax Water confirmed that Brown and Goldstein's conclusions do not have any direct rate impacts on the current application and noted that it has no objection to their recommendations.

[54] Halifax Water receives unregulated revenues, projected to remain at a consistent level of about \$1.7 million from 2019/20 through the 2023/24 test year. Halifax Water noted that the primary source of unregulated revenues is septage tipping. It stated unregulated revenues are used to fund programs like the H2O Fund and sponsorships, and any additional surplus is used to help mitigate the extent of future rate increases.

[55] During cross-examination, Board Counsel referred to Halifax Water's response to a Board staff IR that questioned the differences in operating and capital cost allocations between the last application and the current application for the water system function of Water Storage Tanks. The IR response stated:

When updating the COS Manual an error in calculating the Storage Tank function was discovered. Average-Day Demand was calculated as being $59\% \times 91\% = 46\%$. However, it should read 54%. Maximum-Day Demand was calculated as being $59\% \times 9\% = 11\%$. However, it should read 5%. As restated prior to current updates to the COS Manual (see below), the cost classifications are comparable to those reported in the current application, and revisions to the COS Manual:

- Average-Day Demand - 54%
- Maximum-Day Demand - 5%
- Maximum-Hour Demand - 14%
- Fire Protection - 27%

[Exhibit H-8, IR-64a) ii]

[56] During the hearing, Cathie O'Toole, Halifax Water's General Manager, confirmed that the error does not impact rates because there is a single unit volumetric charge. If different rates were being proposed based upon time of day, or peaking factors, any changes in these percentages would impact rates. She added that the percentages will be corrected in the final COS Manual to be filed as part of a Compliance Filing.

[57] Halifax Water identified another error in the proposed COS Manual in the definitions of Transmission and Distribution, set out in Table 9 - Water System Cost Allocation - System Functions:

The change in the COS Manual was made in error, as the proposed change was a point of discussion only. References to 14" Transmission and Distribution Mains in the COS Manual contained within lines 913-935 inclusive should be removed and previous text restored.

[Exhibit H-8, IR-107]

[58] Halifax Water also confirmed a typo in line 138 of the COS Manual, which should read "updated Water Demand Analysis" [Exhibit H-8, IR-102].

Findings

[59] There were no objections to the proposed changes to the COS Manual. Halifax Water adequately addressed any questions set out in the IRs and that arose during the public hearing. Based upon the information presented, the Board accepts Halifax Water's recommendation to defer the consideration of differentiation in peaking characteristics until the next COS Manual update and rate application.

[60] The Board directs Halifax Water to respond to Brown and Goldstein's recommendations about more accurate rates for accepting high-strength wastewater

discharges and non-regulated waste streams and provide the Board with an update on these initiatives no later than February 28, 2023.

[61] The Board further directs Halifax Water to correct the errors noted above in the COS Manual filed with the application and refile the COS Manual with these corrections as part of the Compliance Filing.

[62] The level of unregulated revenues is relatively minor and anything arising from Brown and Goldstein's concerns should not have any material impact on rates. The Board is satisfied that Halifax Water does have adequate processes in place, as explained in its Post Hearing Submission, to accurately allocate costs to its unregulated activities. The Board understands Brown and Goldstein's concerns are limited to ensuring that Halifax Water identifies high-strength sewer users and that rates are appropriately set for unregulated waste streams.

4.5 Cost containment

[63] Halifax Water started formally reporting its cost containment initiatives after a direction from the Board in its June 24, 2013 decision (M05463):

[141] The Board directs HRWC to institute a more rigorous and focused cost containment process. A proposal describing this process should be filed with the Board no later than September 30, 2013.

[64] The process for cost containment was approved by the Halifax Water Board on October 3, 2013, and recommended actions that would assist Halifax Water in addressing the Board's direction. One key recommendation was that "on a quarterly basis, the monthly financial report of the Board will also include an update on Cost Containment Initiatives." In the Board's decision, 2015 NSUARB 71 (M06540), the Board directed Halifax Water to annually report its efforts to contain the operating costs of the

Utility, no later than June 30 of each year. The 2021/22 Cost Containment Report was filed with the Board on June 30, 2022. The estimated cost savings from 2013/14 to 2021/22 are \$6.9 million, as outlined by category in Figure #1 below:

Figure #1

Procurement Strategies	\$1,144,942	16.6%
Human Resource Strategies	\$3,170,972	45.9%
Information Technology Strategies	\$108,700	1.6%
Facilities/Process Strategies	\$2,336,011	33.8%
Reduce Paper and Printing Costs	\$33,611	0.5%
Technology and Business Process Changes	<u>\$112,138</u>	<u>1.6%</u>
	<u><u>\$6,906,374</u></u>	<u><u>100.0%</u></u>

[Exhibit H-22, p. 2]

[65] New cost containment initiatives implemented during 2021/22 resulted in one-time and ongoing cost savings of \$0.6 million between the categories of Procurement Strategies and Facilities/Process Strategies.

[66] Halifax Water has taken further cost containment steps by proposing to capitalize additional costs and to spread the amortization of debt over a longer period, reducing the impact on the annual revenue requirement.

[67] Ms. O'Toole cautioned that Halifax Water has taken advantage of the "low-hanging fruit" and that significant cost saving opportunities will be harder to find going forward. She also said that Halifax Water needs to be mindful not to undermine the reliability of service to customers or the safety of the environment.

[68] Because of limited ongoing cost reduction opportunities, Ms. O'Toole said Halifax Water is focused on cost avoidance.

The other thing that is not reflected in the cost containment we report to the UARB, you know, there are things that are cost avoidance, not necessarily cost containment. So for

instance, cost containment is an initiative that's coming forward that's going to result in a savings against our budget. Cost avoidance is a decision we're taking to avoid future risks.

So the best example, and probably one of the most material examples I can give to this is when we started our business plan this year in our budget process, we had requests for 43 new FTEs, new fully funded positions, and we did a thorough review and cut that back, and only 25 were included within the budget.

I would also say that cost containment is a very direct linkage to institutional capacity. So we have been somewhat slow, I would say; prudent, I would say, in adding new positions until we make sure we have exhausted all other opportunities to get the work done without adding those new costs.

[Transcript, pp. 49-50]

[69] Halifax Water said that it has taken a prudent approach to cost containment and cost avoidance while continuing to maintain capacity to deliver its services at levels expected by its customers.

[70] The CA submitted Exhibit H-20, a report dated June 24, 2022, from the Angus Reid Institute titled "*Highest inflation rates in forty years have Canadians tightening belts, bracing for more financial turbulence.*" The CA referred to several sections of this report during the hearing and highlighted the sections that referred to how Atlantic Canadians were harder hit by this situation than other areas of Canada:

Q. Again, Ms. O'Toole, consistent with what your customer groups are experiencing, that it's -- with an essential service like water, it's those who are most vulnerable who are feeling the impacts most? You'd agree with that?

A. (O'Toole) I would agree. And this is why we are not proposing an increase to the base charge, and we've also proposed to reduce interest on outstanding accounts and waive some of the fees that most impact customers who are struggling to pay their bills.

...

Q. And here, the authors are addressing the cost of living in relation to other priorities. At the bottom of the page, the study indicates:

Some regions of the country are under more economic stress than others. In Atlantic Canada, the cost of living was already higher than most other parts of the country last year. And Newfoundland and Labrador, Nova Scotia, and New Brunswick have experienced higher rates of inflation than other provinces, alongside Manitoba and British Columbia.

And it goes on to note the Nova Scotia inflation rate of the 8.8 percent on the next page.

And then over at page 7, Ms. O'Toole, there's reference here in the first paragraph on page 7:

A majority in each of the Atlantic provinces fall under the Struggling or Uncomfortable categories, ranging from 55 per cent in Nova Scotia to two thirds (64%) in Newfoundland and Labrador.

Q. Again, those are the types of realities that Halifax Water is aware that their customer groups are facing?

A. (O'Toole) Yes.

[Transcript, pp. 36-38]

[71] The CA submitted:

It is the Consumer Advocate's view that the acute financial pressure currently faced by ratepayers places a particular emphasis on Halifax Water to take all steps available to curtail costs and maximize operational efficiencies.

[CA Closing Submission, p. 3]

[72] ECI analysed Halifax Water's expenses as presented in the application and concluded that it provided reasonable clarification on all significant variances.

Findings

[73] The Board accepts Halifax Water's evidence that it has taken a prudent approach to cost containment and cost avoidance. The Board also understands the importance of having adequate staff, equipment and supplies to maintain capacity to deliver its services at levels expected by its customers in a manner that respects the environment and the safety of its employees.

4.6 Fire protection rates

[74] Halifax Water's COS-based water rates consist of three rate design components. These are base rates, volumetric charges, and fire protection.

[75] The proposed Fire Protection Rates are based on a Board approved model introduced at the Utility's 2015 rate hearing. In its application, Halifax Water proposed to increase annual Public Fire Protection Rates to \$7,907,144, effective September 1, 2022, and \$8,056,564, effective April 1, 2023.

[76] Additionally, Halifax Water proposed increases in Private Fire Protection Rates per year on September 1, 2022, by:

- \$1.00 for fire lines of 50mm, resulting in an annual charge of \$69
- \$3.00 for fire lines of 100mm, resulting in an annual charge of \$272
- \$38.00 for fire lines of 150mm, resulting in an annual charge of \$582
- \$118.00 for fire lines of 200mm, 250mm and 300mm, resulting in an annual charge of \$815

[77] Further, in its application, Halifax Water proposed Private Fire Protection Rates per year would further increase on April 1, 2023, by:

- \$3.00 for fire lines of 100mm, resulting in an annual charge of \$275
- \$37.00 for fire lines of 150mm, resulting in an annual charge of \$619
- \$117.00 for fire lines of 200mm, 250mm and 300mm, resulting in an annual charge of \$932

[78] Halifax Water is proposing no increase in Private Fire Protection Rates for fire lines sizes of 25mm and 75 mm for 2022/23 and 2023/24.

[79] Halifax Water's response to Board staff IR-40 indicated that after review of the fire protection model, it was noted that the current fire lines rates, as stated in s. 35 of the Halifax Water *Regulations*, were not being used. As part of Undertaking U-7, Halifax Water updated s. 33 of the proposed *Regulations* for HRM to pay for public fire protection: for the period April 1, 2021, to March 31, 2022, the sum of \$7,627,564; for the period April 1, 2022, to March 31, 2023, the sum of \$7,798,386; and effective April 1, 2023, the sum of \$8,083,080.

[80] Halifax Water also updated s. 35 for Private Fire Protection Rates of fire lines with a diameter of 200mm, 250mm and 300mm for service on or after September 1, 2022, up to and including March 31, 2022, to an annual charge of \$801. This is an increase of \$104, which is \$14 less than the \$118 initially proposed by Halifax Water. For the same size fire lines, Halifax Water updated the annual charge for service on or after April 1, 2022, to \$904. This is an increase of \$103, which is \$14 less than the \$117 initially proposed by Halifax Water. The above underlined dates of March 31, 2022, and April 1, 2022, were provided by Halifax Water in its Undertaking U-7 response. The Board infers they were intended to refer to 2023 in each case.

Findings

[81] While the Board accepts the proposed Fire Protection Rates as submitted by Halifax Water in Undertaking U-7, the Board refers to its comments later in this decision about the reconciliation of rates in the Compliance Filing.

4.7 Revenue requirements and customer rates for water services effective September 1, 2022, and April 1, 2023, including affordability and rate smoothing

[82] The application lists the objectives and criteria for developing revenue requirements, which includes providing sufficient operating revenue in each of 2022/23 and 2023/24 to: cover the operating and non-operating costs for water, wastewater and stormwater; accommodate depreciation associated with additional utility plant in service; accommodate debt servicing requirements; enable Halifax Water to address its infrastructure deficit and regulatory compliance issues; and recognize increased utility plant in service, increased numbers of customers and connections, changes in factors, as well as a 1% increase in water consumption in 2022/23.

[83] In its evidence, ECI reviewed the rate application against these objectives and confirmed they have been met or exceeded by Halifax Water.

[84] The revenue requirement in the test years in the water rate studies is determined from the budgeted operating expenses, including depreciation, and non-operating expenses (debt expenses, dividend/grant in lieu of taxes and miscellaneous), less other revenues (bulk water stations, late payment and other miscellaneous fees) and other adjustments. For the projected operating expenditures, the key assumptions are annual increases in each of the test years of: salaries and benefits (3.5%); chemicals (5.0%); electricity (3.0%); furnace oil and natural gas (15.0% in 2022/23 and 2.0% in 2023/24); and other (2.0%). The interest rate on new debt issued in the test years is budgeted at 2.5%.

[85] ECI conducted a detailed review of the expenditures in the revenue requirements for each of the test years. It found that Halifax Water provided reasonable clarification on all the significant variances that were questioned by the intervenors and

Board consultants. With respect to the projected chemical costs, ECI noted that Halifax Water tenders for chemicals annually in January, and is projecting an annual 5% increase in cost in each of the test years. It recommended that Halifax Water update the rate application with the appropriate chemical costs once they are available.

[86] In its Rebuttal Evidence, Halifax Water explained that the rate application is based upon December 2021 forecast results for the year ended March 31, 2022. At the time of filing the Rebuttal Evidence in late June 2022, the 2021/22 fiscal year financial statements were in the final stages of approval and showed a deterioration in the application's forecasted financial position. Halifax Water attributed this to increased depreciation, debt servicing, chemical and staffing costs and fewer than forecasted new customers. With the most recent information, the accumulated surplus (deficit) information, Figure 13 from the application, was updated for all services and showed that the previously projected surplus for water of \$9.825 million, has decreased by \$1.073 million to \$8.752 million.

[87] Halifax Water's Rebuttal Evidence further noted that there have been material changes to some of the budgeted expenses included in the application, due to changed circumstances since the application was prepared. In response to ECI's recommendation that chemical prices be updated, Halifax Water noted that the prices received from vendors after the submission of the application indicate an 11.9% increase in chemical prices, higher than the 5% assumed in the application.

[88] For electricity, it was noted that if Nova Scotia Power Inc.'s current rate application before the Board is approved as filed, it would result in approximate rate increases of 6.4% and 10.5%, respectively, in each of the test years, in comparison with

the annual 3% increase budgeted in the application. With respect to furnace oil and petroleum, Halifax Water noted the significant increase in furnace oil cost in the calendar year beginning January 1, 2022, of 41.3%, in comparison to the budgeted increases of 15% and 2%, respectively, in each of the test years. It added that gasoline fuel increased by 56.6% in the period between January 1 and June 10, 2022, which will have an impact on both gasoline and diesel fuel expenses in the test years.

[89] The current collective agreements for unionized Halifax Water staff expire October 31, 2023, so payroll costs are stable for 2022/23. However, Halifax Water noted that there could be several months of contract negotiations with the two unions in 2023/24 if the current state of the economy continues, resulting in increased costs in the second test year. With respect to pensions, Halifax Water stated that a January 2022 actuarial valuation of the pension plan recommended that the current service contribution rates on pensionable earnings for employees and the employer be decreased from 10.34% of payroll to 9.6%. This was not known at the time of the application and results in an estimated savings.

[90] Halifax Water commented that the prime lending rate has recently increased, and the Bank of Canada has signaled that due to high levels of inflation, there will likely be further increases. Halifax Water's debenture issued in May 2022 through the Municipal Finance Corporation has an all-in rate of 3.74%, in comparison to the budgeted rate of 2.5%. The Utility noted that if interest rates continue to rise, the interest charged on new debt will be higher than budgeted and will impact the projected revenue requirements. Halifax Water added that inflationary pressures, which it has little ability to mitigate, will impact all levels of its service. These will also increase the revenue

requirements in the application. In the test years, an annual inflationary factor of 2% was assumed for the expenses not assigned a specific escalation factor. For its analysis of increased costs in its Rebuttal Evidence, Halifax Water assumed that inflation would reach a level of 5%.

[91] Halifax Water pays a dividend/grant in lieu of taxes to HRM, based upon 1.56% of water utility plant in service and 0.25% of wastewater and stormwater utility plant in service, instead of paying municipal property taxes. The current agreement with HRM expires on March 31, 2023. The 2023/24 budget included in the application is based upon the existing methodology for the determination of the amount. Halifax Water added that it does not believe that any new agreement with HRM will have a material impact on the rates proposed in the application.

[92] Halifax Water explained that taking all the cost changes into consideration, the total increase in the revenue requirement for water service, compared to the original application, is approximately \$1.1 million in the first test year and \$2.0 million in the second test year. If these changes are used to calculate water rates, the per cubic meter consumption rates would increase from the current rate of \$0.976 to \$1.041 in 2022/23 and to \$1.171 in 2023/24. This can be compared to the per cubic meter consumption rates proposed in the application of \$1.017 in 2022/23 and \$1.128 in 2023/24.

[93] In its Post Hearing Submission, Halifax Water stated:

The adjusted revenue requirements for water service are found in the Rebuttal (H-13) and have been discussed above. As noted above, Halifax Water is not adjusting the rates it is requesting for water service based on the updates to the revenue requirement and requests approval of the rates as filed in the Application.

[Halifax Water Post Hearing Submission, p. 28]

[94] In response to Board staff IRs, Halifax Water acknowledged an error in the revenue requirement in the second test year due to double counting the new interest/repayment on long term debt:

The new interest/repayment on long term debt appear as separate line items in Worksheet W-3 to highlight the special attention and reporting for "Proposed Additions to Utility Plant in Service and Capital Funding" within the Rate Studies, and associated debt servicing. These amounts were included in the interest/repayment on long term debt as reported in Worksheet W-2 however, when carrying forward these figures to Worksheet W-3, the figures should have been netted against the line items appearing as new interest/repayment on long term debt. As a result, revenue requirement in Test Year 2 in the Water Rate Study was overstated by \$899,000. The same can be said for Test Year 2 in both the Wastewater and Stormwater Rate Studies, resulting in an overstatement in the revenue requirement of \$134,000 and \$578,000 respectively. If the current approaches for proposed rate increases are maintained and the revenue requirements are reduced as indicated above, the impacts would be as follows:

For Water Service, the potential impact compared to the proposed rates within the Rate Application for Test Year 2 would be as follows:

- Base rate: - no change
- Consumption rate: - reduced from \$1.128/m³ to \$1.103/m³
- Fire protection: - reduced from \$9,681,481 to \$9,573,301.
- The proposed reduction in accumulated surpluses has been maintained at \$2.4M.

[Exhibit H-8, IR-54a)]

[95] During the hearing, Board Counsel asked Ms. O'Toole whether Halifax Water's intends to reduce the requested rates based upon the reduction in revenue requirements set out in the response to Board staff IR-54a):

Mr. Outhouse: And again, you didn't propose in that IR response that you reduce your rate request by the amounts attributable to those errors, the overstatement of the revenue requirement.

Ms. O'Toole: No, we did not. We'd envisioned that as a result of direction through the hearing, we may be directed to do adjustments on a number of little ups and downs, and we would file them as compliance filing.

[Transcript, p. 92]

[96] The application states that in determining the proposed base and volumetric rates, revenue stability, affordability and gradualism were considered. With these factors

in mind, the application considered three scenarios for the calculation of water and wastewater base and volumetric charges:

Scenario 1 – Rate studies: this scenario is based on the rates calculated using the COS Manual, without any adjustments.

Scenario 2 - Volumetric adjustment only, WITHOUT residential smoothing: this scenario maintains the current base charge and adjusts only the volumetric charge.

Scenario 3 - Volumetric adjustment only, WITH utilization of accumulated water surpluses: this scenario uses the rates calculated in scenario 2 and utilization of a portion of the accumulated water surpluses to smooth the required increase in rates over the two test years.

[Exhibit H-1, p. 35]

[97] The application referenced the Alliance for Water Efficiency recommendation that no more than 40% of a utility's revenue should come from base charges. It noted that this provides both an opportunity and incentive for customers to better manage their water bills through offsetting proposed rate increases by reducing their water use. In response to an IR questioning that approximately 27% of Halifax Water's revenue is proposed to come from base charges, Halifax Water stated:

The Alliance for Water Efficiency recommends a maximum of 40% of a utility's revenue should come from base charges. Halifax Water is below this recommended maximum. Halifax Water believes that in a municipality that is continuing to grow and with total water consumption stabilizing and beginning to increase, the current split between base and volumetric charges are appropriate.

[Exhibit H-8, IR-31e)]

[98] Based upon the factors under consideration, Halifax Water proposed Scenario 3 as the preferred option, which included an unchanged base charge and a smoothed volumetric charge. ECI reviewed the rates proposed and had no comments.

[99] The application referenced industry studies on the issue of affordability, suggesting that 2% of median household income for each of water, wastewater and stormwater service is an appropriate affordability measure. Halifax Water's Five-Year Business Plan notes that the projected increases associated with the plan considered

customer affordability, with the goal of maintaining average residential rates for all three services that is less than 2% of median household income. Halifax Water explained that its current average residential bill equates to 1.13% of median household income. If the median household income does not increase from the current estimate, with the rates proposed in the application, the average residential bills would be 1.17% and 1.21% of average household income in 2022/23 and 2023/24, respectively [Exhibit H-8, IR-11].

Findings

[100] The Board accepts Halifax Water's basis for determining the proposed water rates, which considers revenue stability, affordability, and gradualism. The application set out the need for the rate increases, based upon the projected revenue requirements. The budgeted expenses and items which make up the revenue requirements were reviewed and were the subject of several IRs. The Board finds that Halifax Water has provided a reasonable explanation for the need to increase rates.

[101] From the IR responses, an error was discovered which, when corrected, results in a reduction in the revenue requirements. Halifax Water also provided an update to several budgeted expense items, resulting in an increase to the revenue requirements.

[102] The Board notes that direction on the impact of these items on rates will be discussed in the Compliance Filing section.

4.8 Revenue requirements and customer rates for wastewater services effective September 1, 2022, and April 1, 2023, including affordability and rate smoothing

[103] On August 1, 2007, municipal wastewater and stormwater facilities were transferred to Halifax Water and these became regulated under the *Public Utilities Act*. In the Board's decision about the Utility's 2020 rate application, 2020 NSUARB 113, (M09589), considering the worldwide COVID-19 pandemic, the Board approved a reduction in the requested volumetric rate increase for wastewater on April 1, 2021, from \$2.097 per cubic meter in the application to \$2.073. The audited 2020/21 results for wastewater services saw a deficit of (\$8.0) million.

[104] In the current application, Halifax Water is applying for increases in wastewater rates to take effect September 1, 2022, and April 1, 2023. Halifax Water initially forecasted a revenue requirement level that resulted in an average 5.6% rate increase in discharge for residential wastewater services in 2022/23 and a 2.5% increase in 2023/24. This results in proposed discharge rates of \$2.189 in 2022/23 and \$2.259 in 2023/24. Halifax Water is proposing no increase in base charges for wastewater in each of the two test years, remaining at \$14 per month.

[105] The basis for determining the proposed water rates, which considers revenue stability, affordability and gradualism, also applies to wastewater services. ECI stated in its evidence that upon reviewing the rate application against these objectives, it confirmed they have been met or exceeded by Halifax Water.

[106] The revenue requirement in the test years included in the wastewater rate studies is determined from the budgeted operating expenses, including depreciation and non-operating expenses (debt expenses, dividend/grant in lieu of taxes and miscellaneous), less other revenues (overstrength surcharge, late payment and other

miscellaneous fees) and other adjustments. Halifax Water is including an increase of 1% in wastewater discharge and an increase of 680 customer connections in 2022/23, and no change in total discharge, and an increase of 680 customer connections, in 2023/24. As noted earlier in this decision, ECI recommends a different approach than the flat usage suggested by Halifax Water, with an increase to budgeted usage of 0.5% in each test year.

[107] For the wastewater operating expenditure projections, the key assumptions are annual increases in each of the test years for salaries and benefits (3.5%); chemicals (5.0%); electricity (3.0%); and other (2.0%). The interest rate on new debt issued in the test years is budgeted at 2.5%. ECI reviewed the expenditures in the revenue requirement for each of the test years in detail. ECI found that Halifax Water reasonably clarified all the significant variances that were questioned by the intervenors and Board consultants. Similar to water services, ECI noted that Halifax Water issues tenders for chemicals annually in January and is projecting an annual 5% increase in cost in each of the test years. ECI recommended that Halifax Water update the rate application with the appropriate chemical costs once they are available.

[108] In its Rebuttal Evidence, Halifax Water forecasted a deterioration in the financial position presented in the application, which Halifax Water attributed to increased depreciation, debt servicing, chemical and staffing costs and fewer than forecasted new customers. With the most recent information, the accumulated surplus (deficit) information, Figure 13 from the application, was updated for all services, and showed that the previously reported projected surplus for wastewater of \$1.232 million at the end of 2023/4 has decreased by \$262,000 to \$970,000.

[109] As discussed previously for water services, in its Rebuttal Evidence Halifax Water identified a few expense areas where changes to the projections could impact rates such as chemicals, electricity, salaries, debt interest, pension, and inflation. For wastewater services, the inflationary pressures would increase the revenue requirement, compared to the original application, by \$1.1 million and \$2.3 million for the first and second test years, respectively. Halifax Water noted this would result in a per cubic meter change from the current rate of \$2.073 to \$2.225 in 2022/23 (7.33% increase), and to \$2.336 (4.99% increase) in 2023/24.

[110] In its Rebuttal Evidence, Halifax Water also noted the previously mentioned error, due to double counting of interest/repayment on long-term debt, in the calculation of revenue requirement that would impact the revenue requirement for wastewater services in the second test year by \$134,000 and rates as follows:

For Wastewater Service, the potential impact compared to the proposed rates within the Rate Application for Test Year 2 would be as follows:

- Base rate: - no change
- Discharge rate: - reduced from \$2.259/m³ to 2.255/m³.

[Exhibit H-8, IR-54a)]

[111] As stated in its Post Hearing Submission and during the hearing, Halifax Water did not specifically request adjustments to its proposed rates.

Findings

[112] The Board accepts Halifax Water's basis for determining the proposed rates for wastewater services and the components that make up the revenue requirement. The application set out the need for the rate increases, based upon the projected revenue requirements. The budgeted expenses and items making up the revenue requirements

were reviewed and were the subject of several IRs. The Board finds that Halifax Water has reasonably explained the need to increase rates.

[113] From the IR responses, an error was discovered which, when corrected, results in a reduction in the revenue requirements for wastewater services. Halifax Water also provided an update to several budgeted expense items, resulting in an increase to the revenue requirements for wastewater services.

[114] The Board notes that direction on the impact of these items on rates will be discussed in the Compliance Filing section.

4.9 Jurisdiction to impose stormwater rates on the Province and HDBC

[115] In 2007, HRM transferred its wastewater and stormwater operations to Halifax Water, which became the first regulated water, wastewater and stormwater utility in Canada. The *Halifax Regional Water Commission Act*, S.N.S. 2007, c.55 (*HRWC Act*), was enacted by the Legislature of the Province, in part, to facilitate this transfer. In particular, s.19 of the *HRWC Act* established stormwater service as a public utility service as follows:

19 The *Public Utilities Act* applies to the Commission and any water, wastewater or stormwater facility or system owned, operated, managed or controlled by the Commission for service to the public is deemed to be a public utility within the meaning of that *Act*.

[116] Before 2013, stormwater and wastewater were combined for ratemaking purposes. They were both tied to water consumption. This was problematic for stormwater, because unlike the “water in, water out” link between water consumption and wastewater generation, there was no relationship between water consumption and the costs associated with the stormwater system. In 2013, Halifax Water proposed a separate rate for stormwater service based on the cost-of-service methodology

introduced in that hearing. The Board approved a two-part stormwater charge [see: *2013 Stormwater* decision, 2013 NSUARB 127, at paras. 36 to 48]. Both parts were based on impervious area calculations.

[117] Impervious surfaces reduce natural water infiltration and provide a reasonable proxy for estimating the amount of stormwater runoff that enters Halifax Water's stormwater system from a particular property. It has therefore been used as a billing determinant in establishing the amount of the stormwater charges. One part of the stormwater charge is the ROW Charge established to recognize the benefit provided by stormwater management on street rights-of-way. The other is a Site-Related Flow Charge, which captures the benefit to individual properties which discharge stormwater runoff, whether directly or indirectly, into Halifax Water's stormwater system.

[118] The introduction of these charges meant that thousands of people who were not receiving water service from Halifax Water became customers of the Utility. Because of this, and the novelty of having stormwater service provided as a utility service, the Board received an unprecedented number of complaints and appeals related to the stormwater charges. Many argued that they did not receive any stormwater service. Many others argued that they already paid for stormwater services through their municipal taxes and charges. The stormwater rate became known as the "ditch tax" by some of its opponents. This latter group did not fully understand that responsibility for the operation and upkeep of much of the stormwater system had been transferred from HRM to Halifax Water.

[119] Originally, Halifax Water did not ask HRM to pay the ROW Charge. Halifax Water reasoned that the owners of transportation corridors, such as HRM, the Province,

HDBC, CN and other federal agencies, while receiving a benefit from its stormwater management, should be exempt from the charge, because the roadways help move stormwater, providing a benefit to adjacent properties, while providing the other public benefits associated with road networks.

[120] The Board indicated in the *2013 Stormwater* decision that it was not in keeping with public utility principles that a major beneficiary of Halifax Water's stormwater service should receive it for free, thereby shifting the cost to the remaining ratepayers:

[190] With respect to the other argument raised by IPOANS and HPA, the Board agrees that normal cost of service principles require that HRM, who is the owner of the streets and who receives the benefit of the service, must pay for the cost that it incurs with respect to HRWC's services, like any other customer. The Board does not understand the reasons for the exemption. In the passage quoted in para. 178, IPOANS noted how HRM itself has recognized the benefit it obtains from stormwater removal from streets.

[191] The Board therefore finds that the ROW costs should be charged to HRM.

[paras. 190-191]

[121] HRM had not participated in the proceeding leading to the Board's *2013 Stormwater* decision. It objected to being charged the ROW Charge in a subsequent proceeding. One of the arguments advanced by HRM was that the Board had no jurisdiction to impose the charge because it was not a member of the public as required by s.42 of the *Public Utilities Act (PUA)*. In its decision, 2017 NSUAR 53, the Board confirmed HRM was a customer of Halifax Water, subject to its ROW Charge. It dismissed HRM's jurisdictional argument based on the wording of the *PUA*:

[153] HRM argued that the Board has no authority to set rates which apply to the Municipality in relation to water, wastewater and stormwater services. HRM stated:

It is then necessary to look to the PUA to determine the powers of the Board in relation to the services and facilities provided by the HRWC. Section 42(1) of the PUA provides that the Board has jurisdiction to fix and determine rates with respect to services supplied by the HRWC to the public.

42(1) The Board shall fix and determine a separate rate base for each type or kind of service furnished, rendered

or supplied to the public by a public utility, [emphasis added in original]

HRM is the owner of HRWC, and is a municipal entity responsible for governance of the public within its jurisdictional boundaries. It is not a member of the public for the purposes of the PUA as it relates to HRWC. It is up to HRM and HRWC to determine what if any charges HRWC can levy against the Municipality in relation to **water, wastewater** and stormwater services. The Board's jurisdiction is limited by s. 42(1) of the PUA to instances where the service is being provided to the public, [emphasis added]

[HRM Closing Submission, p. 3]

[154] The logical extension of HRM's argument is that the Board is without authority to set any utility rates, including electricity, which apply to HRM. An odd result.

[155] In the Board's view, HRM has misconstrued, and indeed misinterpreted, the use of the word "public" in s.42 of the PUA. In order for an entity to be a public utility it must provide a regulated service to the "public" as opposed to a private service. So, for example, if HRWC had only one customer, it would not be providing service to the "public" and, therefore, would not be regulated. However, HRWC has many thousands of customers so meets, quite clearly, the definition of public service. That is the context and meaning of the use of the word "public" in s.42.

[paras. 153-155]

[122] In this application, for the first time, Halifax Water seeks to recover a ROW Charge of \$2.3 million over the two test years from the Province and \$31,700 from the HDBC over the same period. They object to paying for the service provided by Halifax Water. They do so not by contesting the amount of the charge, or how it is derived, or its rate design and structure, or that they are not receiving the stormwater service provided by Halifax Water. Rather, the Province says the Crown is not subject to the *PUA* at all. Therefore, it is immune from any rates or charges imposed by the Board for the services rendered to it by Halifax Water, be it for water, wastewater or stormwater. It says any fee for services would have to be negotiated. Alternatively, the Province submits the request for a specific charge levied against the Province is an action *in rem* against the Crown, which is prohibited by s.17(3) of the *Proceedings against the Crown Act*. HDBC says it is a Crown agent with the same immunities as the Province.

[123] The Province and HDBC did not file any evidence in this proceeding. They set out their basic position in their respective written opening statements filed on Friday, June 24, 2022, three days before the hearing. Both parties indicated that as the Board did not have the authority to impose the ROW Charge on them, they were withdrawing from any further participation in the hearing. HDBC changed its position over the weekend, filing a revised opening statement on Monday, June 27, 2022, which was the day the hearing of this matter was scheduled to commence. It withdrew its previous statement and took the position it was not a Crown agent. HDBC further indicated it had no questions for the scheduled witnesses and would not be attending the hearing.

[124] The hearing proceeded as scheduled on June 27, 2022. All in attendance were under the impression that only the Province was asserting Crown immunity from the operation of the *PUA*. After discussion with the parties, the Board decided it would address the issue raised by the Province after receiving full post-hearing written submissions. It further indicated that, given the importance of the issue, despite the Province's position that it was withdrawing from further involvement in the hearing, it would allow it to make further written submissions on the Crown immunity issue. On July 4, 2022, after the completion of the oral hearing, HDBC advised the Board and the parties it was reverting to its initial position that it was a Crown agent protected by Crown immunity.

[125] The Province and HDBC's submission on Crown immunity can be summarized as follows:

- Section 14 of the *Interpretation Act* says legislation does not bind the Crown or affect its "...rights or prerogatives in any manner unless it is expressly stated therein that Her Majesty is bound thereby."

- At common law it was presumed that statutes did not bind the Crown unless it was expressly stated or arose by necessary implication.
- Section 14 of the *Interpretation Act* does not provide for the necessary implication exception and any caselaw that suggests otherwise is not applicable or did not actually consider the issue.
- Neither the *PUA* nor the *HRWC Act* expressly bind the Crown.
- There is no commercial enterprise exception to Crown immunity, which is why there are specific provisions in the *HRWC Act* concerning contracts with the Crown and other government agencies.
- To further support the claim of Crown immunity, the Province says a related provision in the *HRWC Act* expressly states no action lies against the Crown in relation to HRWC's utility activities.
- There is no conflict between s.14 of the *Interpretation Act* and the *PUA* and the wording of the *PUA* does not preclude the application of Crown immunity.
- Even if the doctrine of necessary implication was applicable, it is not triggered by the *PUA* and *HRWC Act*.
- There is no clear intention to bind the Crown when the provisions are read in the context of other provisions.
- The purpose of the statutes is not wholly frustrated by the Crown immunity doctrine and doing so does not create an absurd result.
- The Crown has not waived or lost its immunity by taking any specific benefit under the statutes so as to be bound by their corresponding statutory burdens.
- The *HRWC Act* specifically allows the Crown to enter commercial relationships with HRWC for the supply of water without losing its Crown immunity.
- The portion of the proceeding seeking to extend the ROW Charge to the Province and HDBC, being targeted specifically at the Crown and its agent, is an action *in rem* against the Province, which is prohibited by s.17 of the *Proceedings against the Crown Act*.

[126] Halifax Water says the position taken by the Province and HDBC creates an absurd result, which is not supported by the legislative language and the current approach to Crown immunity. The Board summarizes Halifax Water's position as follows:

- The Province and HDBC have been receiving water and wastewater services from HRWC for many years and have paid the rates set by the Board and billed by Halifax Water without further negotiations or contract.
- The Province has paid the Site-Related Flow Charge for stormwater service without engaging in negotiations.
- Both the Province and HDBC receive other utility services subject to regulation under the *PUA*, paying the Board approved rates without further negotiations.
- The scheme of the *PUA* is designed to ensure that a public utility provide adequate service at just and reasonable rates in a non-discriminatory manner. It has an obligation to serve. All customers of the Utility must pay their fair share. There is a positive duty on customers, and on the utility, to pay and collect the rates set by the Board, which cannot be unilaterally changed or ignored.
- Section 117 of the *PUA*, which says that, in the event of conflict with any other statute relating to a public utility, the *PUA* prevails, unless a contrary intention is expressly stated, is a complete answer to the position of the Province and HDBC.
- Section 73 of the *PUA*, by creating an exemption related to the supply of electricity to certain organizations at a "domestic rate" which includes the Province, supports the proposition that the Crown is bound by the *PUA*. Otherwise, there would be no need for an exemption.
- The more recent caselaw, including the most recent decisions from Nova Scotia courts, support the proposition that Section 14 of the *Interpretation Act* is subject to the principle of necessary implication.
- The regulatory scheme of the *PUA*, and the language used, provides a clear indication that it was intended to bind the Crown.
- If the Crown is not subject to the *PUA*, absurd results would flow, including the potential that the Crown is not responsible for paying any rates, or could chose its own rates, or would not be able to receive a monopoly service at all.
- The Crown has accepted the benefits of the *PUA* by taking service from public utilities under the regulatory scheme established by the *PUA* at the Board

approved rates. It has therefore lost any immunity to the burdens imposed by the *PUA*, including the paying of rates imposed by the Board.

- With respect to HDBC, it would be an unusual result if it could charge customers pursuant to rates imposed by the Board under the *PUA* but would not be subject to the burden of paying rates established under the *PUA*.
- There is a common law duty to pay a “fair and reasonable price” for water and other “merchantable commodities” provided by Halifax Water, which is not impacted by s.14 of the *Interpretation Act*. Establishing a fair and reasonable price is what the *PUA* requires of the Board.
- HDBC is not a Crown agent. It is not expressly stated to be a Crown agent in the applicable legislation. HDBC has provided no evidence to the Board as to the degree of control exercised over it by the Province.
- This application is not an *in rem* proceeding.

[127] The CA supports Halifax Water's submission and says that the comments made by the Board in its 2017 decision apply equally to the position advanced on the Crown immunity issues raised by the Province and HDBC.

Findings

[128] This is an issue with important ramifications. Crown immunity from the operation of the *PUA* has never been raised by the Province in the countless matters the Board and its predecessor, the Public Utilities Board, have considered over decades. The Board and its predecessor have made countless orders about rates and charges involving various electric utilities, including Nova Scotia Power Inc., and its predecessor Crown corporation, Nova Scotia Power Corporation. The same can be said about the various municipal water utilities throughout Nova Scotia, many of whom would supply water to buildings owned or occupied by the Province or its agents. Indeed, the Board has not been made aware that the Province does not consider itself bound by the parts of the

PUA incorporated by reference in the *Halifax Dartmouth Bridge Commission Act*, S.N.S. 2005, c.7 (*HDBC Act*). The Board notes the *HDBC Act* itself also does not appear to have any more specific language binding the Crown than the *HRWC Act*. Neither the Province nor HDBC has raised the issue of Crown immunity in relation to the Board approved tolls for use of the bridges operated by the HDBC.

[129] The financial impact to Halifax Water and its ratepayers if the Province and HDBC are not subject to the ROW Charge is set out in Halifax Water's response to Undertaking U-5. It would mean that the shortfall in the revenue requirement would be notionally shifted to the other beneficiaries of Halifax Water's stormwater services, including HRM through its ROW Charge. If the proposed 20% cap (addressed later in this decision) on increases to the residential and non-residential customer stormwater rates is maintained, they would see no impact on their rates. That said, the revenue shortfall would increase by \$1,105,100 in the first test year and \$993,000 in the second test year and would cause a corresponding increase in the deficit for other stormwater customers. This assumes no negotiated rate could be agreed upon with the Province or HDBC to cover this period. Halifax Water says this could result in a decrease in services.

[130] The possible financial impacts of negotiated Crown rates for the other services offered by Halifax Water have not been explored. The financial impact of negotiated Crown rates to other ratepayers for all utility services in the Province is unknown. As there would be no duty to serve if the Crown is not subject to the *PUA*, in most cases service could be cut off or simply not offered if the Province or HDBC were unwilling to pay the rate requested by the Utility. That said, there could be many factors that go into a negotiation between a utility and an entity such as the Crown or its agents.

Because of the toll infrastructure requiring payment of the Board-approved tolls before accessing the harbour bridges, HDBC could deny use of its two bridges unless the Province agreed to pay them.

[131] The stormwater service is different. This service is framed by the definitions set out in s.2(1) (l) and (m) of the *HRWC Act*:

(l) "stormwater" means water from precipitation of all kinds, and includes water from the melting of snow and ice, groundwater discharge and surface water;

(m) "stormwater system" means a method or means of carrying stormwater, including ditches, swales, sewers, drains, canals, ravines, gullies, pumping stations, retention ponds, streams, watercourses, floodplains, ponds, springs, creeks, streets or private roads, roadways or driveways; ...

[132] Because of the nature of ditches, culverts, drains, canals, roadways, driveways and other stormwater infrastructure, they cannot readily be disconnected from one beneficiary of the service without negative implications for other users or properties in the area. Trying to divert water runoff coming from roadways owned by the Province or HDBC away from Halifax Water's stormwater infrastructure is simply not a viable option. As a matter of pragmatism, hydrology, and physics, Halifax Water must offer its street right-of-way stormwater service to the Province and HDBC, whether it is required to do so by the *PUA* or not. Conversely, the Province and HDBC must use Halifax Water's stormwater service. The issue the Board must determine is whether it can impose a charge on the Province and HDBC for this service pursuant to the *PUA* and *HRWC Act*, as requested by Halifax Water.

[133] As a starting point, s.19 of the *HRWC Act* makes no distinction between water, wastewater and stormwater systems when deeming the operation of these systems to be public utilities governed by the *PUA*. Despite its unique characteristics, the stormwater utility service is a public utility service like all others. This helps explain why

the Province and HDBC, while focusing their arguments on the impacts of the ROW Charge, have not sought to hive off the stormwater service in their submissions, except to the limited extent required to advance the *in rem* exemption argument, discussed later.

[134] The term “stormwater service” is used in the *HRWC Act* but is not specifically defined. That said, s. 19 of the *HRWC Act* indicates public utility status attaches when stormwater facilities are owned and operated “for service to the public” by Halifax Water. As discussed above, in the context of the stormwater service, the meaning of the term “public” was discussed in the Board’s 2017 decision. Halifax Water is clearly offering this service to the public. While there is some evidence that portions of the roadways in issue might also create runoff away from the Halifax Water stormwater system, the Board accepts as a fact that some of the runoff from the roadways owned by the Province and HDBC goes into the Halifax Water stormwater system. As such, both these entities are receiving a benefit from this system.

[135] Mr. Rieksts, counsel for the Province and HDBC, points out that neither applied or asked for the stormwater service. The same holds true for many property owners who generate water flow into Halifax Water’s stormwater system. The novel utility service was created by statute. Because there are no shutoff valves or meter connections associated with stormwater infrastructure, persons become stormwater customers of Halifax Water by making use of its system. The Board is therefore satisfied that absent the claimed Crown immunity, the Province and HDBC would be subject to the ROW Charge, just like HRM.

[136] The Board agrees with Halifax Water’s position that the common law doctrine of necessary implication applies to s.14 of the *Interpretation Act*. The Board

understands the history surrounding this issue and that statutory wording like the Nova Scotia statute has been held, in the past, not to encompass this doctrine. In essence, the reasoning was that an express statement cannot be found in a necessary implication [see, for example: *Quebec (Attorney General) v. Canada*, [1932] A.C. 514 (JCPC) at p.523].

[137] The Board further recognizes that three decisions cited by the Province found Crown immunity was established without discussing the doctrine of necessary implication (see: *Thornhill v. Dartmouth Broadcasting*, [1982] NSJ No. 367 (NSSCTD); *Brookfield Lumber v. Nova Scotia*, [1995] NSJ No.175 (NSSC); *Faltenhine v. Bragg Communications*, [2007] NSJ No. 329 (NSSC)).

[138] In *Thornhill*, the Court held that s. 13 (now s. 14) was a complete answer to the issue of whether the provincial Crown was subject to discovery examination under the *Civil Procedure Rules*. *Brookfield* held these same rules do not apply to the Crown, since it is not "... bound by a statute unless specifically stated". *Faltenhine* was a case about the federal *Interpretation Act*. Moir, J., in an opening paragraph, said "one might have thought" the issue of Crown immunity from discovery examination had been decided in Nova Scotia. He then undertook a contextual analysis of the federal *Interpretation Act* in the context of the federal *Crown Liability and Proceedings Act*.

[139] The Board is also aware that in *Nova Scotia (Public Service Commission) v. NSGEU*, 2004 NSCA 55, the Nova Scotia Court of Appeal indicated it did not have to deal with the difficult question of whether the doctrine of necessary implication could survive in the face of s. 14 of the *Interpretation Act*.

[140] Both the Province and Halifax Water cite *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3 (SCC), and *Alberta Government*

Telephones v. Canada (Canadian Radio-television and Telecommunications Commission), [1989] 2 S.C.R. 225 (SCC) in support of their position. In these cases, the Supreme Court of Canada held that s. 16 (now s. 17) of the federal *Interpretation Act*, R.S.C. 1985, c. I-21, was subject to the doctrine of necessary implication. It provides that “[no] enactment is binding on Her Majesty...except as mentioned or referred to in the enactment.”

[141] *Oldman River* summarized the law in relation to the federal statute as follows:

However, any uncertainty in the law on these points was put to rest by this Court’s recent decision in *Alberta Government Telephones, supra*. After reviewing the authorities, Dickson C.J. concluded, at p.281:

In my view, in light of *PWA* and *Eldorado*, the scope of the words “mentioned or referred to” must be given an interpretation independent of the supplanted common law. However, the qualifications in *Bombay, supra*, are based on sound principles of interpretation which have not entirely disappeared over time. It seems to me that the words “mentioned or referred to” in s. 16 [now s.17 of the *Interpretation Act*] are capable of encompassing: (1) expressly binding words (“Her Majesty is bound”); (2) a clear intention to bind which, in *Bombay* terminology, “is manifest from the very terms of the statute”, in other words, an intention revealed when provisions are read in the context of other textual provisions, as in *Ouellette, supra*; and, (3) an intention to bind where the purpose of the statute would be “wholly frustrated” if the government were not bound, or, in other words, if an absurdity (as opposed to simply an undesirable result) were produced. These three points should provide a guideline for when a statute has clearly conveyed an intention to bind the Crown.

In my view, this passage makes it abundantly clear that a contextual analysis of a statute may reveal an intention to bind the Crown if one is irresistibly drawn to that conclusion through logical inference. [Emphasis added]

[142] The Province submits that the words “mentioned or referred to in the enactment” are wider than the words “expressly stated therein” in the Nova Scotia statute. The Province says this was the result of legislative changes following earlier decisions about the necessary implication doctrine not being available under formulations similar to s.14 of the Nova Scotia *Interpretation Act*. The Province cites Professor Hogg’s

Constitutional Law of Canada, 5th Edition (looseleaf) as support for the proposition that the doctrine of necessary implication is not applicable under the Nova Scotia formulation.

[143] The Board agrees with the three basic points raised by Halifax Water. The Board does not see a sufficient distinction between the words “expressly stated therein” and “mentioned or referred to in the enactment” to make *Alberta Government Telephones* and *Oldman River* inapplicable in Nova Scotia.

[144] First, as suggested by Halifax Water, if a legislative provision mentions or refers to Crown immunity in the context of whether or not it applies, there must be express words which make this reference. There would be no need for the doctrine of necessary implication if, in fact, such words were used in the statute in issue. Therefore, the distinction in the language does not lead the Board to conclude the reasoning in *Alberta Government Telephones* is not applicable to s.14 of the Nova Scotia *Interpretation Act*.

[145] Second, while no Nova Scotia Court of Appeal decisions which determined the issue were cited by the parties, and there are apparently conflicting cases from the Supreme Court of Nova Scotia, the Board is satisfied that *Nova Scotia (Attorney General) v. Mattatal*, 2013 NSSC 184, and *Nova Scotia (Attorney General) v. Bungay*, 2015 NSSC 103, express the current availability of the doctrine of necessary implication in this jurisdiction. They are the two most recent cases cited by the parties and both specifically address the availability of the doctrine in Nova Scotia.

[146] The question was addressed succinctly by Murphy, J., in *Mattatal*:

[20] The Plaintiff maintains that the provisions in the *Juries Act* do not bind the Crown by necessary implication; the Defendants say they do. It is clearly possible for the Crown immunity principle to be rebutted by necessary implication when legislation is interpreted in its full context. That is addressed in *Bombay v. Municipal Corporation of Bombay*, [1947] A.C. 58, (P.C.); *Friends of the Old Man River Society v. Canada (Minister of Transport)*, [1992] S.C.R. 3, and *Caisse de dépôt et placement du Québec v. Frederick Sparling and the Attorney General of Québec, et al.*, 1988 CanLII 26 (S.C.C.).

[21] I have concluded in this case that by necessary implication in the context of *Nova Scotia Civil Procedure Rules*, the *Judicature Act* applies to the Crown. The Crown is regulated by the Civil Procedure Rules when it commences litigation in Nova Scotia. By necessary implication, it must be bound by the *Judicature Act* upon which the *Civil Procedure Rules* are founded and derive their authority.

[147] *Mattatal* was followed in *Bungay*, where Moir, J., expressly says that the “difficult question” about the availability of the necessary implication doctrine, which the Province argues has not been resolved, was in fact resolved in *Mattatal*:

[15] This left a “difficult question” about provincial interpretation statutes that, like ours, kept the “expressly stated” formulation of the exception to Crown immunity from statute: *Nova Scotia Government and General Employees Union v. Nova Scotia (Public Service Commission)*, 2004 NSCA 55 at para.30. That question is answered for this court by Justice Murphy speaking in *Nova Scotia (Attorney General) v. Mattatall*, 2013 NSSC 184. See, para. 20.

[16] Accordingly, s. 19(2) of the *Small Claims Court Act* cannot be used to transfer a proceeding started by the Crown, unless the statute expressly says so or necessarily implies as much.

[148] Third, this position is also supported by Professor Hogg, who is a leading scholar in the field. Contrary to Mr. Rieksts assertions, while admittedly pointing out the “expressly stated” formulation is only found in two provinces, including Nova Scotia, Professor Hogg is of the view this wording does not preclude the application of the necessary implication doctrine. As discussed at p. 4 of Halifax Water’s Reply Submission:

Contrary to the Province’s argument, the Nova Scotia Supreme Court’s conclusion in *Mattatal* and *Bungay* aligns with the views of Professor Hogg. *At paragraph 15 of its submissions, the Province cites a passage from paragraph 10.14 of Professor Hogg’s Constitutional Law of Canada, 5th Edition (looseleaf):*

The Interpretation Act of Canada and of each Canadian province [including Nova Scotia] includes a provision that states when the Crown is bound by statute. All but two of the provisions confirm the common law rules of immunity. The provisions contemplate that the Crown may be bound by express words, but they say nothing about necessary implication... [Province’s emphasis]

The remainder of the above-excerpted paragraph, which the Province did not include in its submission, is reproduced below, with emphasis:

[...] It seems unlikely, however, that the provisions are intended to enlarge Crown immunity by denying that the Crown could be bound by necessary implication. The requirement of express words should probably be regarded as including any clear indication of an intention to

bind the Crown. **Indeed, if the Interpretation Act provisions were read as insisting upon only express words, they would constitute an attempted restraint on the future exercise of legislative power, which might be unconstitutional.** The question of constitutionality need not be faced if the Interpretation Act provisions are read as rules of interpretation only, giving way not only to express words, but to any clear indication of an intention to bind the Crown. **That is the better reading of the provisions.** [Emphasis added in original; footnotes omitted]

[Halifax Water Reply Submission, p. 4]

[149] This position is restated in Hogg, Monahan & Wright's *Liability of the Crown*, (2011), at para. 15.4(a):

It is arguable that the Interpretation Act provisions enlarge crown immunity by providing that the Crown is only bound by express words. None of the statutory provisions explicitly recognizes that the Crown could be bound by necessary implication, and there are judicial statements to the effect that under the statutory provisions only express words will suffice. **However, there are also judicial statements that suggest that the statutory provisions are simply declaratory of the common law, so that the Crown can be bound by necessary implication as well as by express words.** Drafting practice in most jurisdictions is undoubtedly premised on the assumption that the Crown may be bound by a clear implication from the context, for it is common to find statutes that do not include an express statement that the Crown is bound, and yet whose primary purpose is obviously to control the actions of the government. **Finally, and perhaps decisively, it must be pointed out that to read the Interpretation Act provisions as insisting upon express words to bind the Crown is to read the provisions as purporting to impose a restraint on the future exercise of legislative power.** Such a reading requires an answer to the question whether the Parliament or a legislature has the power to restrain its future action in this way. This difficult constitutional question does not arise if the Interpretation Act provisions are read as rules of interpretation only, giving way not merely to express words but to any clear indication of an intention to bind the Crown. **It is submitted that this is the better reading of the provisions.** [Emphasis added in original; footnotes omitted]

[Halifax Water Reply Submission, pp. 4-5]

[150] The Board agrees Professor Hogg, and his co-authors, provide sound underlying rationales for the existence of the doctrine of necessary implication in Nova Scotia. Therefore, based on precedent from the Supreme Court of Canada, the Nova Scotia Supreme Court, and leading scholarly texts, the Board finds the common law doctrine of necessary implication is available in this jurisdiction.

[151] The next issue is what the doctrine of necessary implication entails. The caselaw, including *Oldman River*, *Alberta Government Telephones*, *Mattatal*, and

Bungay, establishes two related ways in which the Crown can be bound by necessary implication: i) If the legislation reveals a clear intention to bind the Crown when the relevant provisions are read in context; or, ii) if the purpose of the legislation would be wholly frustrated if the Crown is not bound which would lead to an absurd result. An undesirable or inconvenient result is not enough to invoke the doctrine.

[152] To assess both branches of the test, the context of the statutory regime under the *HRWC Act* and the *PUA* is crucial to the analysis. As discussed at paras. 65-66 in *Oldman River* (also reported at [1992] SCJ No. 1), this involves a broad contextual analysis looking at the purpose and scheme of the legislation, the mischief to be remedied, the legislative text, and the circumstances existing at the time of an enactment. This is similar to the “modern rule” of statutory interpretation which has formed the analytical basis for establishing what legislation means since *Re Rizzo & Rizzo Shoes*, [1998] 1 SCR 27. As the *PUA* is incorporated by reference in the *HRWC Act* and creates the regulatory scheme under which rates can be imposed, it is the main focus of the analysis.

[153] *Nova Scotia (Public Utilities Board) v. Nova Scotia Power Corp.* (1976), 18 N.S.R. (2d) 692 (NSCA), continues to be the case which best summarizes the purpose and scheme of the *PUA*:

The scheme of regulation established by the Act envisages and indeed compels control by the Board of all aspects of a utility’s operation in providing a controlled service. **Two great objects are enshrined – that all rates charged must be just, reasonable and sufficient and not discriminatory or preferential, and that the service must be adequately, efficiently and reasonably supplied to the public.** Almost all provisions of the Act are directed toward securing these two objects – that a public utility give adequate service and charge only reasonable and just rates. [Emphasis added in original]

[Halifax Water Reply Submission, pp. 5-6]

[154] Public utilities are generally created to provide a service where, because of high capital and operating costs, it is inefficient to have competition in the sector. The *PUA* essentially creates the regulatory compact where in exchange for the granting of a monopoly service in a franchise area, a utility has an obligation to serve all customers, within reasonable parameters, without cherry-picking. In return, the utility is allowed to charge sufficient rates to recover its reasonable expenses plus a reasonable rate of return. The utility must fairly allocate the costs of its service between various customer classes, which results in customers in a particular class paying the same rate without any undue cross-subsidization. The utility can only charge those rates which the Board has found reasonable and approved. Unless there are specific exemptions, all customers in a class must pay the same rates. These Board-approved rates cannot be altered, either unilaterally or through negotiations. The Board also approves the rules and regulations which govern the relationship between a utility and its customers. The various provisions of the *PUA* enshrine these objectives in legislation.

[155] As a general proposition, the legislative scheme established by the *PUA* does not contemplate that a major customer, such as the Province and its agents, would fall outside this regulatory compact. The Board does not necessarily agree with Halifax Water that the s.117 conflicts resolution language in the *PUA* is a complete answer to the Crown immunity claim. There is a real issue as to whether the *Interpretation Act* is a statute "... relating to a public utility ...". Section 117 of the *PUA* does reinforce the position that the *PUA* was intended to be a complete code in the regulation of public utility services. This general proposition is supported by legislative language that shows a clear intention that the *PUA* binds the Crown, and a legislative acknowledgement by the

Province, that this is in fact the current state of affairs. Section 73 of the *PUA* states in part:

73 (1) In this Section, "municipality" means a municipality as defined by the *Municipal Affairs Act*.

(2) This Section does not apply to a customer that is the Government of Canada, the Province or a municipality or any of their departments, organizations or agencies.

(3) Subject to subsection (4), the rate or charge for electric energy supplied by an electric public utility to a customer that is a senior citizens' club, service club, volunteer fire department, a Royal Canadian Legion, community hall or recreational facility owned by a community and used for general community purposes, a charitable or religious organization or institution or a non-profit farmers' market with a valid public market permit shall be at a rate or charge not in excess of the domestic rate.

[156] This provision deviates from the scheme of the *PUA* that similarly situated customers should be charged the same rate. It ensures that certain public service organizations pay the "domestic rate," even if they would not necessarily fit in that type of customer class. There would be no need to exempt the Province and its agents from the operation of this provision if Crown immunity exempted them from the *PUA* in any event. The clear intention and necessary implication are that the Crown and its agents, along with municipal entities, are expected to pay the appropriate customer class rate and cannot take advantage of what could generally be a lower rate.

[157] In *Oldman River*, at para. 84, the Supreme Court of Canada discussed this concept:

84 The 1886 Acts were re-enacted in R.S.C. 1886, c. 91 and c. 92, and consolidated in R.S.C. 1906, c. 115, when they were given the short title *Navigable Waters' Protection Act*. The Act has remained substantially the same since. In particular, s. 7 of c. 35 and the 1886 statute has remained materially unaltered, and is now found in s. 4 of the present Act. It was this provision that the Court of Appeal relied upon to find that the Crown in right of Alberta was bound by the necessary implication. I agree with this position. By expressly excepting from the operation of the Act works authorized by Parliament since Confederation and by pre-Confederation provincial legislatures, at a time these bodies had power to interfere with navigation, the statute by necessary implication must be taken to provide that post-Confederation works undertaken by the provinces are subject to the Act.

...

[pp. 58-59]

[158] The Board therefore finds that the history, purpose, legislative scheme and language of the *PUA* show a clear intention to bind the Crown by necessary implication. The Board disagrees with the Province and HDBC that the *HRWC Act* shows a contrary intention.

[159] The Province and HDBC point to ss. 7(4) and s. 7A of the *HRWC Act* as support for their position the legislative scheme which governs Halifax Water was not intended to apply to the Crown and its agents. These provisions, which were added in 2016, say:

7 (4) The Commission may not enter into a contract with a person other than a municipality, a municipal body as defined in Section 461 of the *Municipal Government Act*, a municipal water utility, the Government of the Province or of Canada or a band council pursuant to the *Indian Act* (Canada) for the purpose of providing water, wastewater or stormwater services.

...

7A No action lies against Her Majesty in right of the Province as a direct or indirect result of any of the Commission's activities undertaken pursuant to Section 7.

[160] The Board agrees with Halifax Water that these provisions clearly do not relate to the provision of water, wastewater and stormwater services within its franchise area as regulated under the *PUA*. Halifax Water has a large number of customers. Clearly not all these customers are the entities listed in s.7(4) of the *HRWC Act*. A literal reading of the provisions, if the Board were to accept the Province's interpretation, would mean that Halifax Water could only provide public utility services to the listed entities and that the Province would not be liable for payment even if it contracted for the service.

[161] Halifax Water advances a more reasonable interpretation. It must be kept in mind that Halifax Water is involved in certain unregulated activities. This amendment was meant to provide Halifax Water with the ability to provide utility services on behalf of the listed entities by entering into contracts with them for the operation or management

of such systems. It also placed limits on the type of entities which Halifax Water can engage with in this pursuit. In this context, the limitation of liability makes sense. It would be reasonable that liability risks are shifted to Halifax Water if it accepts management and operational responsibility on behalf of the Province.

[162] In the Board's view, these provisions do not address the utility-customer relationship regulated by the *PUA* at all. There is therefore nothing in the history, language, and scheme of the *HRWC Act* that changes the Board's conclusion that the Crown and its agents are bound by the *PUA* by necessary implication.

[163] With respect to the second way the necessary implication doctrine can be invoked, the Board agrees with Halifax Water that excluding the Crown and all its agents from the *PUA* would lead to an absurd result. This is particularly the case in relation to the obligation to serve. There are numerous financial and logistical reasons why the provider of a monopoly service would choose not to provide it to a customer at any particular location, if not constrained by the duty to serve. This is the reason cherry-picking is not allowed in the public utility context.

[164] For example, electricity and water are essential to the ability of the Province to provide the many public services residents of the Province depend upon. Presumably the Province chooses its locations to best provide these services. Keeping in mind the Board makes its assessment based on the current state of legislation, it would be more than inconvenient or undesirable if the Province could not count on receiving critical utility services, or had to build its own parallel systems.

[165] As well, it would be more than inconvenient and undesirable if the Province and its agents were not required to pay the Board-approved rates for utility services. In

the first place, all the utility capital expenditures made to date, which are included in rate base, were made on the assumption there was a duty to serve the Province or its agents. With the possible exception of the stormwater service, which Halifax Water is trying to address in this application, the Board is not aware of utilities assessing whether to exclude the Province, or its agents, from capital infrastructure requirements, or in cost allocation exercises to derive customer classes and rates.

[166] If the Province and other Crown agencies did not pay the rates approved by the Board under the *PUA*, it would be manifestly unjust, unreasonable and unfair to other ratepayers to shift the burden of capital and operating costs incurred. This would occur if an agreement was eventually reached with all utilities in Nova Scotia, where the Province pays less than the rates approved by the Board. If the Province were to end up paying more than the rates set by the Board, taxpayers would end up with a heavier burden.

[167] The entire scheme of the *PUA* is based on the duty to serve and the recovery of non-discriminatory rates for the service. A situation where many customers are not part of the regulatory compact, in the Board's view, subverts the scheme and purpose of the *PUA*. The absence of significant customers, including hospitals and schools, could have a material impact on rates.

[168] There is another reason the Province and HDBC are subject to the *PUA*. It is based on the benefit/burden concept and the waiver of Crown immunity. The Crown cannot take advantage of the benefits of legislation without accepting its burdens.

[169] Both the Province and HDBC have taken the benefit of the services offered by Halifax Water, and most other utilities in the Province. They have taken advantage of

the duty to serve requirements under the *PUA*, and the benefit of the rates approved under the *PUA*. These rates have been established using the traditional cost of service model with a reasonable return on rate base. These are meant to be a proxy for competition. The Province and HDBC have not been exposed to pricing in an unregulated non-competitive marketplace. The Province and its agents were included as customers in the calculations necessary to establish these rates in most circumstances. With respect to the ROW Charge specifically, the Province and HDBC are using a utility service which was created by the Legislature of the Province.

[170] *Alberta Government Telephones* establishes that for waiver of Crown immunity to apply, any benefit taken by the Crown must be directly related to the statutory provisions that are claimed to have been waived. There must be a strong link between the statutory benefit and the burdens imposed by the statute.

[171] This situation is completely different than in *Alberta Government Telephones*. In that case, the benefits received by the federal Crown were indirect. In this case, with respect to utility services in general, the Province and HDBC have taken advantage of the entire regulatory scheme established by the *PUA*. With respect to the ROW Charge specifically, they are directly taking advantage of the stormwater public utility service established by the Legislature under the *HRWC Act*. The corresponding burden is the Board-approved rate under the *PUA* for that very service.

[172] Halifax Water proposed another case supporting its position. *Minister of Justice v. City of Levis*, 1918 Carswell Que 379 (PC) stands for the proposition that the Crown has no immunity from payment for merchantable commodities. This case does not directly address statutory Crown immunity provisions. Even the common law doctrine

of Crown immunity was not directly raised. That said, the Privy Council made the following determination:

[...] Water supplied at the cost of the municipality from artificially constructed waterworks is in the nature of a merchantable commodity, and their Lordships are of opinion that unless some statutory right is established, the Government of Canada cannot claim to have a supply of water for the government building, unless it is prepared to pay and to continue to pay in respect thereof a fair and reasonable price [...].

[Halifax Water Reply Submission, p. 12]

[173] It is not entirely clear this would establish a stand-alone basis for finding in favour of Halifax Water, as argued by the Utility. The case does show the direct link between the benefit of receiving a service offered for sale to the public and the obligation of the Crown to pay reasonable rates for that service. The Province and HDBC receive public utility services which are regulated under the *PUA*. The Board establishes just and reasonable rates under that statutory scheme. The Crown cannot take the benefits provided under the statute without paying for them. It therefore necessarily follows that Crown immunity has been waived in relation to the *PUA* in general, and rates associated with stormwater service benefits specifically.

[174] A remaining issue the Board must address is whether the imposition of the ROW Charge as part of a regulatory general rate application by Halifax Water is a proceeding *in rem*. Section 17(3) of the *Proceedings against the Crown Act* prohibits *in rem* proceedings against the Crown.

[175] *In rem* judgments affect the status of a particular person in relation to an item of property. Using the impermeable area of the roadways owned by the Province and HDBC as a billing determinant in establishing a rate for water service does not mean this application is an *in rem* proceeding. The Board is not establishing any status rights in relation to the roadways in question. It is simply using impervious area as a reasonable

proxy for the amount of stormwater generated by properties, as it does for all properties who generate stormwater in HRM.

[176] Halifax Water provided a useful overview of what is meant by an *in rem* proceeding:

The following overview of proceedings *in rem* is provided in Halsbury's Laws of Canada, *Civil Procedure* (2021 Reissue), "Trials, Judgments and Orders: Form" (XI.7. (1)) at HCV-253 "Nature of Judgments":

In rem. A judgment *in rem* affects the status of a particular person in relation to a thing (e.g., an item of property). There are three types of judgments *in rem*. The first is a judgment given with respect to the status of the subject-matter of a proceeding. The second is a judgment that is rendered in a proceeding against property. The third is a judgment rendered in a proceeding brought to enforce a right *in rem*. Where an *in rem* order is made against a property, the order involves not the taking of rights of the parties to the action, but the taking of the property itself. A judgment *in rem* is conclusive upon all who may have or claim any interest in the subject-matter of the litigation, and so is said to be binding upon the whole world – although the factual findings on which such a judgment is given are not necessarily so binding. A judgment *in rem* may be given by a court only where the subject-matter of the action was situated within the territorial jurisdiction of the court, and that court had the authority under the law of that jurisdiction to decide as to the disposition of the subject-matter of the action. The following types of judgments are normally considered *in rem*:

1. A judgment as to the validity of a will;
2. A judgment of condemnation in a case of expropriation, nationalization or some other exercise of eminent domain;
3. A judgment of bankruptcy;
4. A determination of the validity of a marriage;
5. A judgment of divorce: a valid decree absolute for divorce dissolves the marriage from the moment it becomes absolute; and
6. A determination of legitimacy.

[Halifax Water Reply Submission, p.13]

[177] The Board finds that the establishment of a rate for stormwater services using impermeable areas as a proxy is not analogous to any of the descriptions of *in rem*

proceedings discussed above. Section 17 of the *Proceedings against the Crown Act* has no application in the matter before it.

[178] Finally, the issue of HDBC's status as a Crown agent is raised. The modern test for establishing Crown agency was addressed in *Nova Scotia Power Inc. v. Canada*, 2004 SCC 51:

12 There are two ways in which an entity can become an agent of the Crown. The first is when the Crown exercises sufficient control over it so that it can be said to be in *de jure* control, which requires a careful examination of the relationship between the parties: see *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551, at pp. 573-74. The respondent Minister conceded before the Federal Court of Appeal that the *de jure* control test would not be met by the degree of control the Province of Nova Scotia exercised over NSPC.

13 The second way is for the legislature to expressly legislate it to be an agent: *Eldorado Nuclear*, *supra*, at pp. 575-76. This is what happened here. The Nova Scotia legislature presumably did not want to leave the finding of agency to the common law and so included s. 4(1) of the *Power Corporation Act*, which reads:

4 (1) The Commission shall continue as a body corporate and as agent of Her Majesty the Queen in the right of the Province under the name of "Nova Scotia Power Corporation" and shall consist of a Board of Directors comprised of a Chairman, President and not more than twelve other Directors. [Emphasis added, in original]

[179] Halifax Water says that having presented no evidence, HDBC has not provided a sufficient basis for the Board to determine it is in fact subject to *de jure* control by the Province.

[180] Mr. Rieksts outlined the statutory regime under which HDBC operates. The *HDBC Act* indicates the following powers which can be exercised by the Crown:

- The majority of the Commission's members are appointed by Cabinet for terms determined by Cabinet;
- The remuneration of Commission members is established by Cabinet;
- Changes to the Commission's bylaws must be approved by Cabinet;
- The Commission cannot borrow money or issue bonds without Cabinet approval;

- The Commission cannot sell specified property and assets without Cabinet approval;
- HDBC must make an annual report to the Province on its operations, including audited financial statements;
- Transportation projects across Halifax Harbour require Cabinet approval;
- The Province has the power to take, on proclamation, all the right and title to the real and personal property of the Commission.

[181] Evidence of the extent and manner which the Crown exercises the above powers would have been useful. As *de facto* control is not the test, on balance, the statutory scheme could arguably establish *de jure* or legal control, if this determination was necessary. Given the Board's findings on Crown immunity, it is not.

[182] Taking all of the above into account, the Board finds that the Province and HDBC are subject to the *PUA*, which is incorporated by reference in the *HRWC Act*. The Board concludes that Crown immunity does not apply to the Province and HDBC in the circumstances of this case.

[183] The Board would make a final comment on the issues raised in this matter. The determination of Crown immunity principles related to the *PUA* had the potential of impacting all public utilities in the province. Because of the late date when the Board became aware of the Crown immunity claim, it was not able to provide notice to these utilities. The Board, and the parties before it, might well have benefitted from submissions from other utilities on this issue. Given its findings, it would appear to the Board this decision has no impact on these other utilities. The Board would suggest that in future, if major jurisdictional arguments are raised, with potentially broad public impacts, which could go beyond the immediate parties, it would be most helpful if this were made known

to the Board as early as possible. In this way, the Board could determine in a timely manner if further notice is required.

4.10 Revenue requirements and customer rates for stormwater services effective September 1, 2022, and April 1, 2023, including a change in the methodology for calculating the stormwater rate, as well as affordability and rate smoothing

[184] As discussed in the previous section, there are two types of stormwater rates. The ROW Charge relates to those customers who own streets and roads that discharge stormwater into the Halifax Water stormwater infrastructure. The Site-Related Flow Charge relates to customers whose properties discharge water into the Halifax Water stormwater system. The Site-Related Flow Charge is divided between Residential and Non-Residential Customers, which are defined terms under the Halifax Water *Regulations*.

[185] Unlike water purchases that are metered, there is no effective way to measure the exact amount of stormwater that properties discharge into the stormwater infrastructure. In many past decisions, the Board has determined that if some water flows from a property into the stormwater infrastructure, either directly into ditches, or through more circuitous routes, that property owner is a customer.

[186] The Board further determined that the use of impermeable surface area as a proxy for measured stormwater flow was the fairest and most expedient way to address the issue. This was based on the concept that impermeable area absorbs little to no water compared to other property surfaces. Thus conceptually, most stormwater flowing over impermeable areas will end up in Halifax Water's wastewater system. The Board

recognizes this is not a perfect cause and effect relationship, but to date no party before the Board has suggested a better methodology.

[187] Stormwater rates have been operating at a deficit since 2017/2018. An increase of 40.4% would be required to meet the budgeted stormwater expenses for the 2022/2023 test year. Halifax Water would have to increase the rates by 46.4% to meet the forecasted expenses for the 2023/2024 test year. Without rate increases, the budgeted accumulated deficit would be \$9.6 million. Halifax Water does not propose to increase stormwater rates to meet the budgeted expenses for the two test years. Rather, it proposes capping the stormwater rate increases to 20%.

[188] In response to Board staff IR-48(a), Halifax Water explained that unless the impervious areas within its service boundary increase, the impact of capping the stormwater rate increases at 20% is to defer further increases to future years. That said, despite the relatively low dollar amounts involved, Halifax Water was concerned about rate shock if an increase beyond the requested 20% was approved. In testimony, Ms. O'Toole elaborated on this issue, pointing to the particularly volatile time for consumers because of the effects of the COVID-19 pandemic and inflation caused by geopolitical global events. She also indicated this was a particularly inopportune time for large increases because the recent expansion of the stormwater service boundary will generate many new customers who have never been billed for this service.

[189] Halifax Water updated its impervious area data to reflect the impervious area in the service territory more accurately. It also updated property ownership information. It was able to delineate the impervious areas owned by the Province and HDBC, which it now proposes to include in the ROW Charge.

[190] Under the methodology used to calculate the stormwater charge, one of the key drivers for allocating costs between residential and non-residential customers for the Site-Related Flow Charge is the Equivalent Residential Unit (ERU). This is derived from the number of parcels and the qualifying impervious area within the service boundary. This figure is then used to establish the five tiers for the residential Site-Related Flow Charge. The current ERU is based on 200 m².

[191] When Halifax Water was preparing its rate studies, it realized that using the current methodology, the ERU would be 279 m². An ERU of 279 m² would result in a significant reallocation of the revenue requirement from non-residential customers to residential customers.

[192] Residential customers are classified into five tiers based on impervious area. Tier 4 is comprised of properties with 41 to 80 ERUs. Tier 5 has all the residential properties with over 80 ERUs. Halifax Water determined that the ERU calculation was significantly impacted by the Tier 4 and 5 properties, while 88% of the stormwater customers were in Tiers 2 and 3. To adjust for this, Halifax Water proposed to base the ERU calculation on the Tier 2 and 3 properties. This results in an ERU of 221 m².

[193] Halifax Water provided the Board with the stormwater rate impacts in Scenarios 4 to 6. In Scenario 4, the current 200 m² ERU was maintained. In Scenario 5, Halifax Water used the 279 m² ERU, calculated with the updated property ownership and impermeable data, using the current methodology. In Scenario 6, Halifax Water used the 221 m² ERU figure, calculated using only Tier 2 and 3 impermeable area.

[194] The impact of the Scenario 6 calculation is explained in the application:

Scenario 6 – Stormwater charge structure using an ERU of 221 m² (see Figure 42)

With an ERU of 221 m², in 2022/23 the annual charges for residential customers would increase in each tier ranging from \$5.00 for tier 2 to \$36.00 for tier 5. In 2023/24, the annual charges for residential customers would further increase in each tier ranging from \$3.00 for tier 2 to \$12.00 for tier 5. The total revenue to be received from residential customers would be approximately \$3.2 million in 2022/23 and \$3.5 million in 2023/24.

In 2022/23, the charges per m² for non-residential customers would increase from \$0.135 to \$0.176, an increase of \$0.041. In 2023/24 the charges for non-residential customers would increase to \$0.195 per m². The total revenue to be received from non-residential customers would be approximately \$5.8 million in 2022/23 and \$6.4 million in 2023/24.

The right-of-way charge will remain unchanged from scenario 4. The right-of-way charge to HALIFAX would increase to \$4.9 million in 2022/23 and to \$5.3 million in 2023/24. The right-of-way charge for the provincial government would be \$1.1 million in 2022/23 and would increase to \$1.2 million in 2023/24. For the Halifax Dartmouth Bridge Commission, the right-of-way charge would be \$15,200 in 2022/23 and \$16,500 in 2023/24.

[Exhibit H-1, p. 49]

[195] When comparing Scenario 6 with the other two scenarios, the basic impact of changing the ERU calculation is to shift the revenue allocation between residential and non-residential customers to close to the same percentages as they are with the current ERU based on 200 m². Conversely, if the current methodology is maintained, the derived 279 m² ERU will allocate more costs to residential customers.

Findings

[196] Aside from updating its impermeable area data, updating its property ownership data, adding the ROW Charge to the Province and HDBC, and changing the ERU calculation, Halifax Water has applied the same methodology as in previous rate studies to calculate and allocate the revenue requirement and derive the corresponding rates.

[197] The Board is satisfied that the Province and HDBC receive stormwater service from Halifax Water, in that portions of their roadways drain into the Halifax Water stormwater system. In IRs, the Province and HDBC raised the issue that some water might drain away from this infrastructure and that, in fact, their roadways provided a benefit to Halifax Water. In response to a question from Board Counsel, Halifax Water indicated it had made no adjustments and calculated the ROW Charge to the Province and HDBC, as it does for HRM, based on the entire impervious area. This is consistent with the treatment of residential customers, although the Board notes that, for the Site-Related Flow Charge, some adjustments for impermeable areas that do not flow into Halifax Water's stormwater infrastructure are made for non-residential properties.

[198] It might be possible to quantify the amount of impermeable area that results in flows away from the roadways that are subject to the ROW Charge. It might also be possible to calculate any net benefit derived from water being diverted, if any, from the Halifax Water infrastructure by the roadways owned by the Province and HDBC. Without in any way ruling on the matter, it might be possible to create a rate design that accounts for these items. None of the foregoing was advanced in this hearing. The Board therefore accepts on the evidence before it that the ROW Charge applies to the Province and HDBC in the same manner as HRM.

[199] The Board has reviewed the rationale for the change in methodology for the ERU calculation. Distilled to its essence, the larger properties skew the result, and the revised methodology appears more equitable. The Board therefore accepts the methodology used to develop Scenario 6.

[200] The Board is concerned about the fact the proposed stormwater rates are insufficient to recover the projected expenses related to the stormwater service. Imposing a rate cap when the stormwater service is in a deficit situation appears counterintuitive. This is especially the case where the actual dollar amount increases are not particularly dramatic. Given the number of appeals received when the stormwater charges were first introduced, at a lower amount, the Board is sceptical capping the rate increase at 20% will have any impact on the number of customer complaints and appeals generated by the expansion of the service territory.

[201] Despite the foregoing, conceptually, rate increases of over 40% clearly fall within rate shock. The Board has also been supportive of attempts to mitigate rate impacts in the current volatile and inflationary times.

[202] The Board, therefore, accepts Halifax Water's basis for determining the proposed stormwater rates and the components that make up the revenue requirement. The application set out the need for the rate increases (and more), based upon the projected revenue requirements. The budgeted expenses and items which make up the revenue requirements were reviewed and were the subject of several IRs. The Board finds that Halifax Water has reasonably explained the need to increase rates.

[203] From the IR responses, an error was discovered which, when corrected, results in a reduction in the revenue requirements for stormwater services. Halifax Water also provided an update to several budgeted expense items increasing the revenue requirements for stormwater services. Halifax Water also provided information on the reallocation of certain management charges.

[204] The Board notes that direction on the impact of these items on rates will be discussed in the Compliance Filing section.

4.11 Regulations for the provision of water, wastewater, public and private fire protection, and stormwater, including reduction of interest charged

[205] The application proposed several changes to Halifax Water's *Regulations*, which are outlined as part of the Table of Explanatory Notes (Explanatory Notes) attached as Appendix 9B to the application. The Explanatory Notes indicate that most of the amendments address housekeeping issues or clean up typographical errors. Some of the amendments are required to implement the Board's decision, such as the fire protection charge, the amount of the stormwater charges, and adding the Province and HDBC as customers responsible for a ROW Charge.

[206] Halifax Water proposed two other substantive amendments to the *Regulations*. One amendment would decrease the interest rate on overdue accounts from 19.56% per annum to 14% per annum. Halifax Water explained that many customers who faced overdue accounts were struggling to bring these accounts up to date. The proposed change would, to some extent, alleviate the financial burden on those customers.

[207] Halifax Water also proposed amendments to *Regulations* 7(2)(b), (c) and (d). The application indicates the following phrase should be added for the first year "...plus an incremental amount calculated based on 0.147 per m² of the Impervious Area within HRM/Province of Nova Scotia/Halifax Dartmouth Bridge Commission owned street right of way." The same phrase is repeated in the second year, with a change to show the amount will be calculated based on 0.174 per m² in the second year. In response to

IRs issued by the Province and HDBC, Halifax Water indicated the figures were in error and the calculations should be based on 0.145 per m² and 0.173 per m², respectively. Halifax Water advised it would make these amendments in a Compliance Filing.

[208] These changes would allow Halifax Water to adjust the ROW Charge if, for example, new roadways are constructed within the stormwater service area, or if roads were transferred between HRM and the Province. In response to questions from the Board, Ms. O'Toole confirmed there was no mechanism for a downward adjustment. She indicated she knew of no examples where the type of roads being discussed had been removed. Having effectively withdrawn from the proceeding except for the Crown immunity issue, the Province and HDBC did not comment on the adjustment mechanism for the ROW Charge.

[209] The Board requested clarification on two further amendments. Amendments were proposed to define the terms Non-Residential Property, Residential Property, Stormwater Catchment Boundary and Stormwater Service Boundary. These definitions are important in the process of determining the applicable stormwater charge. In particular, wording was added that provides another means of distinguishing between residential and non-residential properties, aside from property tax classifications. The distinction is made between properties with three or less residential units and those with more than three residential units.

[210] With the elimination of the 45-day period within which Halifax Water had to consider acting on the DRO's recommendations, the Board also sought clarification on when the 14-day period, within which the Dispute Resolution Officer (DRO) had to make

an order, began. Halifax Water indicated the period begins from the date of the DRO's report.

[211] The CA did not raise any issues with the proposed amendments to the *Regulations*. The Board notes ECI reviewed the proposed amendments and concluded they were reasonable.

Findings

[212] The Board agrees with Halifax Water that many of the amendments to the *Regulations* are housekeeping in nature, to implement the approved rates and charges, and to correct typographical errors. With respect to the substantive issues, reducing the interest rate on overdue accounts would not appear to have any undue financial impacts on the utility and other ratepayers. The potential for future adjustments to the ROW Charge would allow for more accurate billing related to the extent of service which is received. The Board is satisfied the definitions related to Residential and Non-Residential properties have a rational basis. With the clarification provided about the DRO process, that proposed amendment would shorten the timelines.

[213] The Board therefore finds that the proposed changes to the *Regulations* are reasonable and approves them, subject to a Compliance Filing to correct the square meter figures discussed in para. [207].

4.12 Contributed Capital – Depreciation

[214] The Board has raised this issue as a concern in past proceedings involving Halifax Water. Historically, Halifax Water has claimed little or no depreciation on

contributed assets, including amounts related to external funding received for capital projects. Depreciation is an important funding source to support the rehabilitation and upgrading of existing infrastructure and the renewal or replacement of infrastructure to meet future needs. This would necessarily apply when contributed assets must be replaced or upgraded in the future. This issue is addressed in the Board's "*Water Utility Accounting and Reporting Handbook*", which is a set of accounting policies and consistent standards for reporting information that applies to all water utilities regulated by the Board.

[215] In its Board letter dated October 27, 2021, about Halifax Water's annual reporting, the Board stated:

Page 3040 - Depreciation, of the *Accounting Handbook* contains the following policies:

...

3. Capital contributions arising from donated assets or grants received to acquire or construct assets shall be amortized at the same rate as the capital assets to which the donations and grants apply.

4. Depreciation shall include depreciation and amortization of all depreciable capital assets which include those acquired or constructed with the benefit of grants and donations or contributions

In accordance with these policies of the *Accounting Handbook*, water utilities expense depreciation on contributed assets to build up the depreciation fund to be used in funding future capital works. The statement referenced on page two of your letter seems to be inconsistent with these policies.

Please provide the Board with Halifax Water's plan to address this inconsistency and begin depreciating contributed assets, to be included in the depreciation reserve used for funding future capital projects. The Board directs this plan is to be filed as part of Halifax Water's next annual reporting, by September 30, 2022, or be included in the next general rate application, whichever is filed first with the Board. The plan should include: the value of contributed assets, with associated depreciation not included in Halifax Water's revenue requirements for rate purposes; the approximate annual depreciation expense associated with these contributed assets; and an assessment of the rate impact of including this depreciation in the utility's revenue requirements.

[Board letter, M10312, p. 3]

[216] In its application, Halifax Water provided its plan on this issue:

...Currently, Halifax Water includes depreciation on 25% of stormwater contributed assets. There is no depreciation on contributed assets for water and wastewater services built into the current rates. Halifax Water has determined that to include 100% of depreciation on contributed assets in its rates would increase the annual depreciation costs by

approximately \$3.9 million for water, by \$10.5 million for wastewater and by \$1.7 million for stormwater...

...[A] strategy is required to smooth the introduction of depreciation of contributed assets. Including additional depreciation on contributed assets in the test years would further increase deficits. Therefore, Halifax Water is proposing to increase the depreciation on contributed assets starting in 2024/25.

[Exhibit H-1, p. 29]

[217] According to its plan, Halifax Water intends to increase depreciation on contributed assets by 1% per year from 2024/25 to 2028/29 and by 2% per year from 2029/30 to 2033/34. Halifax Water indicated it will request the start of these increases in the next rate application. If these proposed increases are implemented, by 2033/34 water and wastewater costs would include 15% of depreciation on contributed assets and stormwater costs would include 40% of depreciation on contributed assets. As a result, this plan has no impact on the proposed rates in this application.

Findings

[218] As noted above, depreciation is an important funding source to rehabilitate, replace and upgrade existing infrastructure to meet future needs. The Board is mindful that increasing depreciation expense will increase rates paid by ratepayers. For example, the Board observes that there would be about a \$1.6 million difference between increasing depreciation in 2024/25 by 1% versus 10% (i.e., \$187,000 versus \$1,870,000). Further, as Halifax Water's assets and future capital budgets increase, so does depreciation expense. This is an important consideration as the Utility plans significant capital additions in the future to meet its customers' needs.

[219] Nevertheless, the Board notes that claiming an appropriate amount of depreciation expense on contributed assets is important to ensure Halifax Water remains

a healthy utility over the long-term. The proposed plan, beginning at only a 1% increase in 2024/25, is a relatively modest start. Taking this into account, Halifax Water should review this issue again to consider whether it can pursue a more aggressive approach in its next rate application to increasing depreciation expense on contributed assets.

5.0 COMPLIANCE FILING

[220] The rate application was based upon December 2021 forecasted results for the year ended March 31, 2022. When the Rebuttal Evidence was filed in late June 2022, it was expected there would be a deterioration in the forecasted financial position for the 2021/22 fiscal year due to increased depreciation, debt servicing, chemical and staffing costs and fewer than forecasted new customers.

[221] In response to Board staff IRs, Halifax Water acknowledged an error in the revenue requirement in the second test year due to double counting the new interest/repayment on long term debt. As a result, the projected revenue requirement in Test Year 2 in the Water Rate Study was overstated by \$899,000. The same applied to Test Year 2 in both the Wastewater and Stormwater Rate Studies, resulting in an overstatement in the revenue requirement of \$134,000 and \$578,000, respectively. Halifax Water indicated at the hearing it would correct these revenue requirements in the Compliance Filing.

[222] While it would not impact revenue requirement, Halifax Water, in Board staff IR-22A, noted a required adjustment to the accumulated surplus for stormwater to reflect the accounting for 25% of the depreciation on contributed stormwater assets. The 25% of the depreciation that is funded should have been recorded as depreciation expense

and should have reduced the accumulated surplus balances. This would reduce the accumulated surplus at the beginning of 2021/22 by \$2.3 million to \$1.2 million, as reflected in Figure 13 of the application.

[223] The Rebuttal Evidence further noted there have been material changes to some of the budgeted expenses in the application (such as chemicals, electricity, salaries, debt interest, pension, and inflation generally), due to changed circumstances since the application was prepared. Halifax Water explained that taking all the cost changes into consideration, the total increase in the revenue requirement for water service (including the Fire Protection Charge) is approximately \$1.1 million in the first test year and \$2.0 million in the second test year. For wastewater services, the inflationary pressures would increase the revenue requirement about \$1.1 million and \$2.3 million for the first and second test years, respectively. For stormwater services, these inflationary pressures would increase the revenue requirement about \$0.2 million in 2022/23 and \$0.3 million in 2023/24.

[224] If the increased costs from these inflationary pressures were reflected in the updated revenue requirement for the test years, rates would increase above that requested in the rate application. However, Halifax Water stated in its Post Hearing Submission that it is not asking to adjust the rates above that proposed in the application. In the circumstances, the Board accepts Halifax Water's position.

[225] Accordingly, the Board directs Halifax Water to update its forecasts to reflect the corrections of the errors noted in its IR responses (i.e., the double counting of new interest/repayment on long term debt and to reflect the accounting for 25% of the depreciation on contributed stormwater assets – the latter not impacting revenue

requirement) and to offset any reductions to revenue requirements with the projected increased costs from inflationary pressures in both test years, but only to the extent of the rates proposed in the application. This will result in the rate increases being generally maintained as initially proposed in the application, except for Fire Protection Rates which are to be amended as noted earlier in this decision. Halifax Water is directed to address any cost allocation issues among customer classes, if any, in its Compliance Filing. This may cause minor variances to the proposed rates. The Board expects that any overage in excess of the requested revenue requirements in the test years would be reflected in updated amounts for accumulated surplus (deficit) as at March 31, 2024.

[226] Halifax Water is directed to file a Compliance Filing, including all amended *Regulations*, including changes in the COS manual, Fire Protection Rates as described in Undertaking U-7 (including the references to the correct year), and the incremental change in *Regulations* 7(2)(b), (c) and (d).

[227] Provided Halifax Water can file its Compliance Filing in short order, the effective date of the rate increases in this application will be December 1, 2022.

[228] Moreover, in its Compliance Filing, the Board directs Halifax Water to update the accumulated surplus (deficit) information in Figure 13 from the application for all services, reflecting actual 2021/22 fiscal year results, the corrections to revenue requirements due to the errors noted in Halifax Water's IR responses, and the impact from the anticipated inflationary pressures for chemicals, electricity, salaries, debt interest, pension, and inflation to the end of fiscal 2023/24.

[229] An Order will issue following the Compliance Filing.

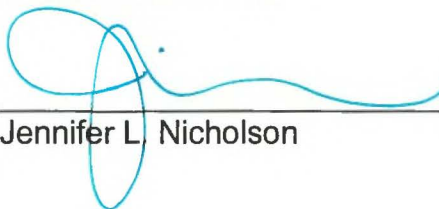
DATED at Halifax, Nova Scotia, this 31st day of October, 2022.



Roland A. Deveau



Richard J. Melanson



Jennifer L. Nicholson