



# AUC

Alberta Utilities Commission

**Direct Energy Regulated Services**

**2015 Late Payment Penalty Charge Settlement Agreement**

**Costs Award**

**October 3, 2016**



**Alberta Utilities Commission**

Decision 21694-D01-2016

Direct Energy Regulated Services

2015 Late Payment Penalty Charge Settlement Agreement

Costs Award

Proceeding 21694

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Fifth Avenue Place, Fourth Floor, 425 First Street S.W.

Calgary, Alberta

T2P 3L8

Telephone: 403-592-8845

Fax: 403-592-4406

Website: [www.auc.ab.ca](http://www.auc.ab.ca)

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## 1 Introduction

1. In this decision the Alberta Utilities Commission considers applications by Direct Energy Regulated Services (DERS) and the Consumers' Coalition of Alberta (CCA) for approval and payment of their costs of participation in Proceeding 20732 (the costs claim applications). The following table sets out the costs claimed and the amounts awarded:

| Claimant  | Total Fees Claimed  | Total Disbursements Claimed | Total GST Claimed | Total Amount Claimed | Total Fees Awarded  | Total Disbursements Awarded | Total GST Awarded | Total Amount Awarded |
|---|---------------------|-----------------------------|-------------------|----------------------|---------------------|-----------------------------|-------------------|----------------------|
| DERS  |                     |                             |                   |                      |                     |                             |                   |                      |
| Lawson Lundell LLP                              | \$57,351.00         | \$0.00                      | \$0.00            | \$57,351.00          | \$51,615.90         | \$0.00                      | \$0.00            | \$51,615.90          |
| McCarthy Tetrault LLP                           | \$204,012.00        | \$3,025.38                  | \$0.00            | \$207,037.38         | \$163,209.60        | \$1,521.74                  | \$0.00            | \$164,731.34         |
| <b>Total</b>                                    | <b>\$261,363.00</b> | <b>\$3,025.38</b>           | <b>\$0.00</b>     | <b>\$264,388.38</b>  | <b>\$214,825.50</b> | <b>\$1,521.74</b>           | <b>\$0.00</b>     | <b>\$216,347.24</b>  |
| CCA   |                     |                             |                   |                      |                     |                             |                   |                      |
| Wachowich & Company                             | \$39,462.50         | \$0.00                      | \$1,973.13        | \$41,435.63          | \$33,543.13         | \$0.00                      | \$1,677.16        | \$35,220.29          |
| Regulatory Services Inc.                        | \$22,747.50         | \$72.40                     | \$1,141.00        | \$23,960.90          | \$19,335.38         | \$72.40                     | \$970.39          | \$20,378.17          |
| <b>Total</b>                                    | <b>\$62,210.00</b>  | <b>\$72.40</b>              | <b>\$3,114.13</b> | <b>\$65,396.53</b>   | <b>\$52,878.51</b>  | <b>\$72.40</b>              | <b>\$2,647.55</b> | <b>\$55,598.46</b>   |
| <b>Total of all amounts claimed and awarded</b> |                     |                             |                   | <b>\$329,784.91</b>  |                     |                             |                   | <b>\$271,945.70</b>  |

2. The Commission has awarded reduced costs to DERS and the CCA for the reasons set out in this decision.

3. Proceeding 20732 (the original proceeding) was convened by the Commission to consider DERS' application for approval to collect the costs associated with the no-fault settlement and defence costs of the late payment penalty (LPP) class action brought against it by certain regulated customers. The original proceeding included information requests (IRs) and responses to IRs, argument and reply argument. The close of record for the original proceeding was May 18, 2016 and the Commission issued Decision 20732-D01-2016<sup>1</sup> on August 10, 2016.

4. The CCA submitted its costs claim application on June 7, 2016, within the 30 day timeline permitted by the Commission's rules. The CCA's application was assigned Application 21694-A001 under Proceeding 21694, which was established to address the costs claim application. The CCA subsequently filed a revised application on June 15, 2016<sup>2</sup> noting that it had come to the CCA's attention that there were errors made in its original filing. However, the

<sup>1</sup> Decision 20732-D01-2016: Direct Energy Regulated Services 2015 Late Payment Penalty Charge Settlement Agreement, Proceeding 20732, Application 20732-A001, August 10, 2016.

<sup>2</sup> Exhibit 21694-X0030.

revised application was identical to the original application. The Commission has therefore referred to the CCA’s original application for the purposes of this decision.

5. DERS submitted its costs claim application on June 8, 2016, within the 30 day timeline permitted by the Commission’s rules. DERS’ application was assigned Application 21694-A002 within Proceeding 21694. On June 15, 2016, DERS submitted a revised costs claim application that included two additional invoices that were accidentally omitted from its original costs claim application.

6. No comments were filed with respect to the costs claim applications. The Commission considers the close of record for this proceeding to be July 5, 2016, the deadline for filing comments.

## 2 Commission findings

7. The Commission’s authority to award costs for participation in a utility rates proceeding is found in Section 21 of the *Alberta Utilities Commission Act*. When considering a claim for costs for a utility rates proceeding, the Commission is also guided by the factors set out in Section 11 of AUC Rule 022: *Rules on Costs in Utility Rate Proceedings* (Rule 022). Appendix A of Rule 022 prescribes a Scale of Costs applicable to all costs claimed.

### 2.1 Direct Energy Regulated Services

8. The following table summarizes DERS’ costs claim:

| Claimant                 | Hours               |            |          | Fees         | Disbursements | GST    | Total        |
|--------------------------|---------------------|------------|----------|--------------|---------------|--------|--------------|
|                          | Preparation         | Attendance | Argument |              |               |        |              |
| DERS                     |                     |            |          |              |               |        |              |
| Lawson<br>Lundell LLP    | 166.30              | 0.00       | 0.00     | \$57,351.00  | \$0.00        | \$0.00 | \$57,351.00  |
| McCarthy<br>Tetrault LLP | 746.10              | 0.00       | 0.00     | \$204,012.00 | \$3,025.38    | \$0.00 | \$207,037.38 |
| <b>Total</b>             | 912.40 <sup>3</sup> | 0.00       | 0.00     | \$261,363.00 | \$3,025.38    | \$0.00 | \$264,388.38 |

9. Under the Commission’s rules, costs claims are assessed pursuant to Section 11.1 of Rule 022:

The Commission may award costs, in accordance with the scale of costs, to an eligible participant if the Commission is of the opinion that:

- (a) the costs are reasonable and directly and necessarily related to the hearing or other proceeding, and
- (b) the eligible participant acted responsibly in the hearing or other proceeding and contributed to a better understanding of the issues before the Commission.

<sup>3</sup> The costs application by DERS did not allocate time between preparation and argument.

10. DERS redacted portions of the invoices of its legal counsel, Lawson Lundell LLP and McCarthy Tetrault LLP, citing that it had redacted certain information due to privilege. DERS submitted in its cost claim application:

Privilege is being claimed on the same basis as the partially redacted legal accounts previously filed in support of the Updated Application (Exhibits 20732-X0045 and 20732-X0046). The redacted portions relate to confidential communications made within the framework of a solicitor-client relationship for the purpose of obtaining legal advice in respect of the defence of the Action. Privilege is further supported in detail in DERS' Argument at paragraphs 158 to 165 (Exhibit 20732-X0061).<sup>4</sup>

11. The Commission must assess eligible costs claims based on the information before it in light of the provisions of Rule 022. The Commission considers the following findings from Decision 20732-D01-2016 relating to the ability to recover certain legal costs in customer rates to be equally applicable in the context of the present costs proceeding:

Regardless of whether the redacted information is or is not protected under privilege from public disclosure, DERS has the onus of proof to demonstrate that the legal and expert costs which it requests Commission approval to collect through regulated rates are reasonable. Sufficient information must be supplied on the public record to support the quantum and activities performed to inform the Commission on the substance of the costs claimed. Because the Commission's findings will address costs to be recovered through customers' rates, the Commission requires sufficient descriptions of the activities undertaken and an explanation as to why these actions were necessary and why the quantum of the associated costs are reasonable.<sup>5</sup>

12. DERS' invoices have been reviewed as redacted and the Commission finds that DERS generally acted responsibly in the original proceeding and contributed to the Commission's understanding of the relevant issues. However, the Commission is unable to approve the full amount of the costs claimed in respect of the services performed by Lawson Lundell and McCarthy Tetrault because the original costs claim application and the revised costs claim application did not provide sufficient descriptions of the activities of counsel, and for other reasons, all of which are discussed below.

### **2.1.1 Lawson Lundell LLP**

13. DERS was represented by Lawson Lundell in the original proceeding. The fees claimed relate to legal services provided by Mr. Lewis Manning, Ms. Shailaz Dhalia, Mr. Mark Graham and Ms. Daphne Rodzinyak. These services relate to reviewing and revising the draft application and updated application, reviewing IRs, drafting IR responses, and drafting argument and reply argument.

14. The Commission considers that some of the activities related to the hours claimed were not sufficiently described in the application or in the accompanying invoices to adequately support a portion of the costs claimed. For the four counsel claiming costs, there were several line items that were totally redacted in invoice number 1106048,<sup>6</sup> and numerous partially redacted line items in invoice numbers 1105409, 1106048 and 1106373,<sup>7</sup> which make it difficult

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<sup>4</sup> Exhibit 21694-X0006, DERS costs claim application.

<sup>5</sup> Decision 20732-D01-2016, paragraph 143.

<sup>6</sup> Exhibit 21694-X0011, Invoice No. 1106048, dated January 19, 2016.

<sup>7</sup> Exhibit 21694-X0011.

to identify the activities performed by counsel related to the proceeding. A general description of the activities of each of the counsel was not provided in the costs application, making the respective activities conducted by each counsel also difficult to determine. For example, with respect to the 4.9 hours that were claimed for Mr. Mark Graham in invoice number 1106048, the description of work for two hours is fully redacted and the description for the remaining 2.9 hours is fully redacted except for “discussion with L Manning regarding the same.”<sup>8</sup> Similarly, in invoice number 1106164, 1.1 hours were claimed for Ms. Daphne Rodzinyak. The description of work for Ms. Rodzinyak is fully redacted except for the description “Report to Lewis Manning.”<sup>9</sup>

15. The information on the record does not allow the Commission to determine that all of the services performed, or the hours recorded, by Lawson Lundell were reasonably, directly and necessarily related to DERS’ participation in the original proceeding, as required under Section 11.1 of Rule 22.

16. While the Commission finds that the services performed by Lawson Lundell were generally related to DERS’ participation in the original proceeding, it finds that the fees claimed for these services were unreasonable for the reasons provided above. Accordingly, the Commission is reducing Lawson Lundell’s fees by 10 per cent and approves DERS’ claim for legal fees for Lawson Lundell in the total amount of \$51,615.90.

### **2.1.2 McCarthy Tetrault LLP**

17. DERS was also represented by McCarthy Tetrault in the original proceeding. The fees claimed by DERS for the legal services provided by Mr. Mendy Chernos, Ms. Sarah Babich, Mr. Keith Gunn, Ms. Kara Smyth, Mr. Timothy Froese, Mr. Douglas Scott and Mr. Matthew Bell relate to drafting briefs regarding the cost recovery application, reviewing the application, reviewing IRs, drafting IR responses, and drafting argument and reply argument.

18. The Commission considers that some of the activities related to the hours claimed were not sufficiently described in the application or in the accompanying invoices to adequately support a portion of the costs claimed. DERS did not provide evidence demonstrating why seven McCarthy Tetrault lawyers or articling students were required to address the issues raised in the original proceeding. A general description of the activities of each of the counsel was not provided, making the respective activities conducted by each counsel difficult to determine.

19. Similarly, while Ms. Gunn, Ms. Smyth, and Mr. Bell each billed under 15 hours, the remaining lawyers or articling students billed in excess of 39 hours each, with two of the counsel claiming 295.70 hours and 318.70 hours, respectively. The involvement of four lawyers each recording over 39 hours of work on the file increases the possibility of duplication of work between legal counsel. The invoices provide multiple line item descriptions related to internal meetings at the firm to distribute work on the file, e.g. related to giving instructions on research, briefs, or preparation of authorities. This evidence supports the finding that a general reduction in costs is warranted related to duplication of counsel activities.

20. In addition, the Commission considers that some of the activities related to the hours claimed were not sufficiently described in the application or the invoices provided, to support a portion of the costs claimed. There were several partially redacted line items in invoice numbers

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<sup>8</sup> Exhibit 21694-X0011, Invoice No. 1106048.

<sup>9</sup> Exhibit 21694-X0025, Invoice No. 1106164, dated February 19, 2016.

2811993, 2820835 and 2842308,<sup>10</sup> which make it difficult to identify the activities performed by counsel related to the proceeding. For example, there were several line items in invoice number 2820835 that make it difficult to identify the activities performed by Mr. Scott related to the proceeding. For example, Mr. Scott's activities between December 28, 2015 and December 31, 2015 read, after they were partially redacted, 7.8 hours for "Prepared [redacted]", 4.1 hours for "Continued [redacted]", 2.1 hours for "Finalized [redacted]", and 1.1 hours for "Revised [redacted]."<sup>11</sup>

21. The information on the record does not allow the Commission to determine that all of the services performed by McCarthy Tetrault, including the number of counsel involved and the hours recorded, were reasonably, directly and necessarily related to DERS' participation in the original proceeding, as required under Section 11.1 of Rule 22.

22. Further, the close of record for the original proceeding was May 18, 2016. On May 31, 2016, Mr. Chernos and Mr. Scott claimed additional hours (5.2 hours and 1.2 hours, respectively).<sup>12</sup> The redacted work descriptions for these hours are noted in part as "Reviewed all [redacted] MT Accounts and prepared redacted versions of the same" and "Processed redactions to DERS McCarthy Accounts November 2015-April 2016..." These activities were not related to the original proceeding. It appears to the Commission that at least some of these hours, if not all of the hours, pertained to redacting invoices in preparation for the current costs claim application. Rule 022 applies to hearings or proceedings for rate applications of utilities, and does not apply to additional costs incurred for preparation of costs claim applications. The Commission has considered these hours that are unrelated to the original application in arriving at its general reduction of the costs claimed for McCarthy Tetrault.

23. For the reasons set out above, the Commission is reducing the costs claimed for McCarthy Tetrault by 20 per cent.

24. Regarding disbursements, McCarthy Tetrault claimed \$1,324.19 for use of LexisNexis – Quicklaw and Westlaw eCarswell search engines. The areas of research for the online searches are, in general, redacted in the invoices. The Commission notes that there are free search services, such as CanLII,<sup>13</sup> available for parties to use. The Commission approves the DERS claim for the online legal research costs of McCarthy Tetrault but advises that future costs for online search engines should be limited because alternate methods for legal research are publicly available. As the costs of a utility proceeding are generally passed on to customers, where a cost claim applicant chooses to use services that require an access fee, that costs claim applicant is expected to demonstrate why it was necessary to use that service rather than using a non-fee service such as CanLII.

25. Included in the costs claim for McCarthy Tetrault's disbursements, there were also litigation data hosting fees charged at \$10.00 per gigabyte, totalling \$640.31. DERS did not provide an explanation as to why it was necessary to pay for data hosting in order to participate in the original proceeding. The Commission considers that this disbursement is a software cost

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<sup>10</sup> Exhibit 21694-X0015, Exhibit 21694-X0016 and Exhibit 21694-X0020 respectively.

<sup>11</sup> Exhibit 21694-X0016.

<sup>12</sup> Exhibit 21694-X0018, Invoice No, 2845918.

<sup>13</sup> The Canadian Legal Information Institute (CanLII).

that is not reasonably, directly and necessarily related to activities required for the proceeding. The \$640.31 in litigation data hosting costs is denied.

26. McCarthy Tetrault claimed \$290.90 for transcripts. According to Rule 022, transcripts must be filed with a receipt, but no receipt was provided. Accordingly, the costs for transcripts are denied.

27. McCarthy Tetrault claimed \$365.68 for “Search Fee Agents & NT.” DERS did not provide any explanation in the costs claim application as to why it was necessary to pay for search fee agents in order to participate in the original proceeding, including an explanation as to the type of service performed and why this service was necessary. The \$365.68 in search fee agent costs is denied.

28. DERS’s cost claim application included a \$150.75 disbursement for binder tabs and \$56.00 for binders. The Commission does not consider that the amount claimed for binder tabs or binders is reasonable because this was a written proceeding and preparation of binders was not required in order for DERS to present materials to the Commission through its electronic filing system. Binder tabs and binders would have been for DERS’ or McCarthy Tetrault’s internal use only and are accordingly denied.

29. The Commission finds the additional disbursements claimed for courier fees and photocopying to be reasonable and in accordance with the Scale of Costs.

30. While the Commission finds that that the services performed by Mr. Chernos, Ms. Babich, Mr. Gunn, Ms. Smyth, Mr. Froese, Mr. Scott and Mr. Bell were directly and necessarily related to DERS’ participation in the original proceeding, it finds that the total amount of fees and disbursements claimed for these services were unreasonable for the reasons provided above. Accordingly, the Commission approves DERS’ claim for legal fees for McCarthy Tetrault in the amount of \$163,209.60 and disbursements of \$1,521.74 for a total of \$164,731.34.

## 2.2 Consumers’ Coalition of Alberta

31. The following table summarizes the CCA’s costs claim:

| Claimant                 | Hours       |            |          | Fees        | Disbursements | GST        | Total       |
|--------------------------|-------------|------------|----------|-------------|---------------|------------|-------------|
|                          | Preparation | Attendance | Argument |             |               |            |             |
| CCA                      |             |            |          |             |               |            |             |
| Wachowich & Company      | 98.95       | 0.00       | 61.50    | \$39,462.50 | \$0.00        | \$1,973.13 | \$41,435.63 |
| Regulatory Services Inc. | 66.15       | 0.00       | 18.10    | \$22,747.50 | \$72.40       | \$1,141.00 | \$23,960.90 |
| <b>Total</b>             | 165.10      | 0.00       | 79.60    | \$62,210.00 | \$72.40       | \$3,114.13 | \$65,396.53 |

32. The Commission finds that the CCA acted responsibly in the original proceeding and contributed to the Commission’s understanding of the relevant issues. However, the Commission is unable to approve the full amount of the costs claimed in respect of the services performed by Wachowich & Company for the reasons set out below.

### 2.2.1 Wachowich & Company

33. The CCA was represented by Wachowich & Company in the original proceeding. The fees claimed by the CCA for the legal services provided by Mr. James Wachowich and Ms. Shauna Gibbons relate to reviewing the application, reviewing IRs and IR responses, researching case law, and drafting argument and reply argument.

34. While the Commission finds that the services performed by Mr. Wachowich and Ms. Gibbons were generally directly and necessarily related to the CCA's participation in the original proceeding under Section 11.1 of Rule 022, it finds that the fees claimed for these services were unreasonable because a portion of the argument focused on issues that either were not relevant or contained certain argument that was not of assistance to the Commission in reaching its determinations in Decision 20732-D01-2016. The particular issues raised by the CCA that were not required to address the original application related to: unlawful sub-delegation, the applicability of Section 11 of the *Alberta Utilities Commission Act*, the intention of the Court of Queen's Bench order respecting the settlement agreement, and reference to the *Krayzel Corp. v Equitable Trust Co.*<sup>14</sup> (*Krayzel Corp.*) decision of the Supreme Court of Canada. For example, with respect to the CCA's argument on Section 11 of the *Alberta Utilities Commission Act*, the Commission stated in part at paragraph 226 of Decision 20732-D01-2016:

The CCA argued that Section 11 of the *Alberta Utilities Commission Act* should be applied to "upload" [sic.] the intention of the Court of Queen's Bench to deny the legal and expert costs related to the application. While the court order approving the settlement agreement is silent about whether DERS may apply to recover the refund amount from customers, in the CCA's view, this is because "[if] one supposes for a moment the refund is compensating DERS customers for a perceived harm it is absurd to have customers pay that money back to DERS and illogical to have customers keep DERS whole for the costs of the action." This argument did not assist the Commission in determining whether there should be cost recovery of the settlement, and its associated costs... (footnotes removed)

35. Similarly, the Commission determined regarding the *Krayzel Corp.* decision in paragraph 232 of Decision 20732-D01-2016:

The Commission finds that *Krayzel Corp.* is not relevant to the current application. This case dealt with specific terms of mortgage renewal agreements and the effect of charging a higher rate for money in arrears under Section 8 of the *Interest Act* related to a foreclosure of mortgage, rather than the circumstances of a settlement or the costs to be addressed in regulatory proceedings. It does not assist the Commission with assessing the costs claimed by DERS in relation to the settlement and its associated costs applied for in this application.<sup>15</sup>

36. Given the above findings with respect to certain of the CCA's submissions, the Commission considers that the total costs claimed for Wachowich & Company cannot be approved. The argument on these matters was either not relevant or it did not contribute to a better understanding of the issues before the Commission as required by Section 11.1 of Rule 022.

37. In addition, the costs claim application did not provide detail of the tasks undertaken by Wachowich & Company, or how those tasks related to the work performed by Regulatory

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<sup>14</sup> 2016 SCC 18, May 6, 2016.

<sup>15</sup> Decision 20732, paragraph 232.

Services Inc. As a result, it was difficult for the Commission to assess how the work performed by legal counsel related to or supported the work performed by the CCA's consultant, Regulatory Services Inc., who both provided support to the CCA as an intervener in the proceeding.

38. For the above reasons, the Commission concludes that a general reduction to the costs claimed for legal services of 15 per cent is warranted. Accordingly, the Commission approves the CCA's claim for legal fees for Wachowich & Company in the amount of \$33,543.13 and GST of \$1,677.16 for a total of \$35,220.29.

### **2.2.2 Regulatory Services Inc.**

39. Regulatory Services Inc. was retained by the CCA to perform consulting services in the original proceeding. The fees claimed by the CCA for the consulting services provided by Mr. Jeffrey Jodoin relate to reviewing the application, drafting IRs, reviewing IR responses, and drafting argument and reply argument.

40. While the Commission finds that the services performed by Mr. Jodoin were generally directly and necessarily related to the CCA's participation in the original proceeding under Section 11.1 of Rule 22, it finds that the fees claimed for these services were not sufficiently described in the costs claim. The costs claim application did not provide detail of the tasks undertaken by Mr. Jodoin, or how those task related to the work performed by legal counsel from Wachowich & Company. A general description of the activities of Regulatory Services Inc. was not provided in the cost application. In addition, the line items on the time sheet provided often did not provide an explanation of the relationship between the hours claimed and the tasks performed, e.g. the descriptions contained references to the proceeding number generally but no further description was provided, for example "RE: ID 20732 – DERS LPP." The Commission is unable to determine the full nature of the tasks performed with respect to the preparation of the application, information requests, and argument and reply argument.

41. A general summary of the individual activities performed related to the application and/or a summary of the subject matter areas addressed by Regulatory Services Inc. should be provided in an invoice or a time sheet for services. A breakdown of hours by activity type, e.g. application, information requests, argument and reply argument, should be submitted in future cost applications.

42. For the above reasons, the Commission concludes that a general reduction of Regulatory Services fees of 15 per cent is warranted. The Commission finds the disbursements claimed for photocopying to be reasonable and in accordance with the Scale of Costs.

43. Accordingly, the Commission approves the CCA's claim for consulting fees for Regulatory Services Inc. in the amount of \$19,335.38, disbursements of \$72.40 and GST of \$970.39 for a total of \$20,378.17.

**3 Order**

44. It is hereby ordered that:

- 1) Direct Energy Regulated Services shall pay external costs in the amount of \$216,347.24.
- 2) Direct Energy Regulated Services shall pay intervener costs to the Consumers' Coalition of Alberta in the amount of \$55,598.46.

Dated on October 3, 2016.

**Alberta Utilities Commission**

*(original signed by)*

Mark Kolesar  
Vice-Chair