

April 15, 2008

VIA E-MAIL  
Alberta Utilities Commission  
Fifth Avenue Place  
400, 425 - 1<sup>st</sup> St SW  
Calgary, Alberta T2P 3L8

Attention: Mr. Robert D. Heggie, Chief Executive Officer

Dear Sirs :

**Re: Commission initiated Consultation – Review of Rule 022 Rules on Intervener Costs**

In response to Bulletin 2008-01, Consultation, Review of Rule 022, Rules on Intervener Costs, issued March 20, 2008, we offer the following comments on behalf of the D410 Group, a group of large industrial, commercial and institutional consumers who intervene in ENMAX Power related electricity utility matters, and on behalf of the Rate 13 Group, a group of large industrial, commercial and institutional consumers who intervene in ATCO Gas related natural gas utility matters. We will structure our comments to respond to the issues and questions as outlined in Bulletin 2008-01.

**1. Role of the Utilities Consumer Advocate (UCA)**

- (a) Schedule 13.1 of the Government Organization Act states that the UCA has the responsibility of representing the groups listed. May other interveners also represent these groups?

Yes. As a general rule we believe that each party has an unqualified right to be represented before the Commission in the manner it chooses, and by counsel and experts of its choice. Both at common law and under statute the rules of natural justice and the *Administrative Procedures and Jurisdiction Act*, RSA 2000 c – A – 3<sup>1</sup> requires this:

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<sup>1</sup> The AUC is an authority under AR 64/2003 to which the *Act* applies.

**Evidence and representations**

**4** Before an authority, in the exercise of a statutory power, refuses the application of or makes a decision or order adversely affecting the rights of a party, the authority

- (a) shall give the party a reasonable opportunity of furnishing relevant evidence to the authority,
- (b) shall inform the party of the facts in its possession or the allegations made to it contrary to the interests of the party in sufficient detail
  - (i) to permit the party to understand the facts or allegations, and
  - (ii) to afford the party a reasonable opportunity to furnish relevant evidence to contradict or explain the facts or allegations,

and

- (c) shall give the party an adequate opportunity of making representations by way of argument to the authority.

RSA 1980 cA-2 s4

**Cross-examination**

**5** When an authority has informed a party of facts or allegations and that party

- (a) is entitled under section 4 to contradict or explain them, but
- (b) will not have a fair opportunity of doing so without cross- examination of the person making the statements that constitute the facts or allegations,

the authority shall afford the party an opportunity of cross-examination in the presence of the authority or of a person authorized to hear or take evidence for the authority.

Moreover, nothing in the UCA's mandate should be taken to encroach upon the legal rights of other bona fide parties that have an interest in matters that come before the Commission. In our submission only the clearest possible language in a statute could attempt to remove parties' legal rights – and even then if such language was enacted it would be subject to being found ultra vires and in direct conflict with the *Charter of Canadian Rights and Freedoms* and the *Alberta Bill of Rights*, RSA 2000 c A-14 which inter alia provides:

**2** Every law of Alberta shall, unless it is expressly declared by an Act of the Legislature that it operates notwithstanding the *Alberta Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared.

- (b) How should conflicting views and positions and conflicts of interest among groups that the UCA has the responsibility of representing be dealt with?

We believe the UCA and other interested parties that fall within the UCA's ambit of responsibility should be responsible for determining a method of resolving conflicting views and positions. If these parties cannot determine a method to resolve conflicting views and positions on issues then it is open to refer the matters to an independent entity for resolution. One way this could be accomplished is through a prior agreement to refer such matter to arbitration.

Conflicts of interest are another matter. If a legitimate conflict of interest arises between groups that the UCA is charged with representing we suggest that the traditional rules of conflicts should be followed to resolve the matters in issue. The Alberta Law Society rules of conflicts provide a useful template for conflict resolution.

- (c) Should any group representing persons wanting to intervene in a hearing or other proceeding be required to demonstrate who they represent and how their participation may differ from other similar groups?

Avoidance of duplication and regulatory efficiency is a key objective of the AUC. It follows from this objective that the AUC has an interest in establishing rules that allow it to meet this objective.

The AUC has a legitimate interest in establishing that parties that intervene in Commission proceedings are bona fide, and have legitimate standing. This is a matter for the AUC to determine. How each group can satisfactorily answer the question of who it represents will depend in turn upon the nature of the particular group. Again this is a matter for the AUC to determine. For example, the D 410 and R 13 Group typically state in their filings what companies and institutions they represent. By way of contrast we do not think it is reasonable for groups representing residential customers, or legitimate public interest interveners to be able to list all members of their groups. None the less the Commission is entitled to the level of information it deems appropriate to satisfy its requirements regarding standing.

In our respectful submission it is not appropriate for the AUC to preclude a bona fide party from participation in any matter before it. It is however appropriate for the AUC to make it clear through its rules that parties with similar interests will be expected to work together where possible to allow for an efficient regulatory process. In our submission this is clear from the current rules.

- (d) If the UCA and other interveners may represent the same groups, how will the UCA and the other interveners work together to avoid duplication of submissions and reduce hearing time and costs?

We believe these issues should properly be resolved by the UCA and the other interveners that represent the same groups. Both the UCA and the other interveners are in the end subject to the same rules as established by the Commission. None should be afforded any special treatment under the rules.

If these groups cannot resolve the issues then the matter can be brought before the Commission in the context of a workshop/technical proceeding or ultimately through dispute resolution.

## **2. Business Interest Rule**

- (a) Who should be ineligible for cost awards?

As the Commission noted in its March 20, 2008 Bulletin, comments were received on this issue in December 2007. The D 410 and R 13 Groups submitted comments at that time and we will not repeat them in their totality. However we do think it bears repeating that the expressed policy of the Government of Alberta as clearly set out by Minister Knight was that the intervener cost regime was to continue under the Bill 46/AUC regime just as it did under the AEUB regime.

We understand that Minister Knight's specific comments with respect to the continuation of the intervener cost regime were set out in the November 27, 2007 Alberta Energy News release as follows:

*Under the amendments, all interveners will be eligible to apply for funding in any regulatory hearing or proceeding, just as they do today.*

And in the accompanying Alberta Energy Backgrounder

***With the amendments, who will be eligible to apply for intervener funding?***  
*Section 21 of the Act is being amended to allow the AUC the discretion to provide funding to a local intervener or other interveners in any hearing or other proceeding-just as the EUB does today. This allows the AUC to provide any intervener with funding in respect to hearings or other proceedings to ensure the public interest is considered in AUC decisions.*

In light of this clear expression of the legislative intention behind the *Alberta Utilities Commission Act* we offer the following comments:

We submit that the following types of interveners should be ineligible for cost awards:

- Individual corporations (or ad hoc coalitions of corporations) who are intervening to test a specific issue that is primarily for commercial consequences
- Utilities who are intervening in other utility applications

We submit that the following types of interveners should be eligible for cost awards:

- Groups of corporations (and/or institutions) who are intervening to test utility rate applications where the issues being tested may impact other customers in the same or similar rate classes or may be of general significance;
- Groups, Associations and Intervenors that were eligible for funding under the AEUB regime.
  - (b) Should the business interest rule have a broader application to include commercial associations whose individual members are ineligible, municipalities, municipal associations, rural electrification associations, rural gas cooperative associations, irrigators or public institutional consumers?

The answer to the question is no. The key considerations for the AUC should be upholding the public interest, fairness and efficiency.

Effective regulation, and the requirement to uphold the public interest, requires that issues be tested from different perspectives. Industrial, commercial and institutional customers can offer the AUC views and expertise that differ from small consumers. We submit that without balanced positions on issues the AUC cannot appropriately fulfill its mandate. The elimination of cost recovery for any consumer referred to in the question will likely deprive the Commission of the evidence and expertise it needs in order to carry out its mandate.

This is to say nothing of the fact that in our respectful submission the AUC's role should not be to "effectively" preclude interventions from parties that have a legitimate role to play.

Interveners that are that are directly affected by the outcome of Commission Decisions are necessary parties. Picking and choosing whether an intervener group is eligible for funding may seriously erode the ability of existing interveners to fully participate in AUC proceedings.

It is helpful to compare and contrast the funding mechanisms that are in place at the moment. For electricity matters, the UCA receives funding from the Balancing Pool. For natural gas matters, UCA funding is received from all customer classes by way of a levy from the utility (need to check). As the Government of Alberta has determined that all electricity and natural gas consumers should be funding the UCAs regulatory interventions, fairness dictates that cost recovery should be made available for all other types of consumer classes.

In terms of efficiency, we submit that the administration of various groups and association members is a time consuming and expensive endeavour. With cost recovery, more consumers are willing to donate their resources to supporting regulatory interventions. Without cost recovery, the additional cost of funding legal counsel and regulatory consultants often leads consumers to minimize their participation. A common complaint is the “free rider” issue – those consumers who participate and fund an intervention are subsidizing the majority of customers who receive the same benefit by doing nothing.

A review of many of the “well established” intervener associations will show that the membership is, in most cases, a small sub-set of the customers the association advocates for. While the D410 and Rate 13 Groups represent a significant cross section of commercial industrial and institutional clients its members represent a relatively small number of the sites served that are served on these rates. It would not be fair, or efficient, to have these Group members fully fund the cost of interventions when all ENAMX Rate D410 and all ATCO Gas Rate 13 (now High Usage Rate) customers receive the benefit that flows from the interventions. This is to say nothing of the general principles of rate design that have been offered in evidence by our clients in a number of past proceedings and accepted by the AEUB as having broad application to all rate classes.

In our view, cost recovery, with appropriate checks and balances to ensure all consumers receive value, has been very effective in Alberta for many years and should continue.

Indeed, the rationale regarding the practice and policy of the AUC and predecessors Boards in Alberta in maintaining intervener funding was clearly enunciated by the Alberta Court of Appeal in *Re Green & Assoc Ltd. And the Public Utilities Board* 94 D.L.R.(3d) 641, at 653, where Clement, J.A. in commenting upon the intervener cost regime stated:

The Board was engaged in the balancing of interests. On the one arm there was-and is – the general public interest in the reasonable control of monopolistic utilities serving the public, and interest affirmed by the purpose of the Act itself and extending to the segment of the public served by the utility. That interest is aided by well-considered intervention, a matter recognized explicitly by the Board and inherently by the Act. Thus, on the other arm is financing of intervenors. Intervention is in large measure in the public interest undertaken by those who are legitimately concerned in that interest and who are sufficiently good citizens to become active in its aid. It is patent that in most cases substantial expense must be incurred for useful intervention, which need be no more than adequate testing of the propositions and figures put forward by an applicant, whether by cross-examination or further evidence. These are factors to which the Board has properly given recognition. The Board is prepared to pass on to the public those costs of intervention which it has found to be of some value to the public interest....

We believe the observations made by Justice Clement are as valid today as when they were first made.

- (c) Should the Commission set out criteria regarding the application of the business interest rule?

Yes. We submit that rules should be developed that adhere to the following principles:

- Interveners should where possible address issues that may affect not only their members, but other customers generally in the same or similar customer classes;
- Interveners representing consumers of similar customer classes should where possible combine their efforts to minimize duplication;
- All Interveners should where possible combine their efforts to minimize duplication when addressing utility revenue requirements (Phase I processes);
- All interventions should be reviewed to ensure the Commission (and consumers) received value for the costs incurred by interveners in participating in the matters before the Commission.

- (d) Is it appropriate to grandfather any existing groups, and if so, are there criteria that should apply in making a determination to grandfather an intervener group?

We do not think existing groups have acquired some form of “grandfathered right” to cost recovery. Any group that responsibly represents customers should be eligible for cost recovery. Over time, groups/associations may change their focus, move on to establish new groups with similar interests or dissolve. Having said that, it is likely that well established groups that have responsibly participated in the past can be expected to continue to do so in the future.

### **3. Budgets**

- (a) Comment on the current rules on filing of budgets

For parties that are not eligible for costs, a budget should not be required. However, all interveners should be required to provide an issues list to assist with minimizing duplication.

In addition, the budget process needs to be kept in perspective. They are estimates only based on experience and judgement. It is not possible to accurately predict all issues that may arise in the course of a proceeding or the extent of involvement that may be required to deal with an issue.

- (b) Propose any changes to the budget provisions they believe to be necessary

A Commission provided form that outlined the issues identified by Commission staff that interveners could respond to with any additional issues and their budget estimates would be helpful for interveners and may assist the Commission with its review of budgets and issues. Perhaps a standard spreadsheet could be used?

### **4. Scale of Costs**

- (a) Should the Scale of Costs limit the preparation time claimed based on the number of hearing days or any other criteria?

No. We do not believe that a formulaic approach is appropriate. The amount of time required reviewing and analyzing an issue can vary considerably depending on the technical complexity or the legal implications.

Furthermore, we do not believe the AUC role is to limit or pre-empt interveners from doing what they believe they must to effectively make their case on behalf of their customers. The existing Commission rules are adequate to deal with and disallow costs when and where the Commission determines a particular interveners participation is of little or no assistance to the Commission in carrying out its public interest mandate.

- (b) What rates should be set for lawyers and experts? Please provide rationale in support of the proposed rates.

Scale of cost rates should to the extent possible reflect current market rates for all lawyers, experts and regulatory consultants. As we understand it the Commission has adopted this approach itself and it has now been implemented under the AUC's current funding model. There should be no differentiation between the rates charged for regulatory work and for work performed for other clients.

We believe there is merit in establishing a cost regime that will allow for those who wish to develop expertise in regulatory matters to work in the area at rates that are comparable to work that is of a similar complexity and which requires a similar level of skill.

We also believe the Commission and all members of the public are well served by having an adequate number of experienced practitioners and experts to appear before it.

- (c) Should the Scale of Costs apply to pre-hearing technical workshops or collaborative processes?

Yes. Based on the principles outlined in response to 2(c) above, all activities related to a proceeding should be eligible for cost recovery as long there is a valid regulatory purpose which is being pursued and the Commission has authorized the process.

## 5. **Costs of Negotiated Settlements**

- (a) Whether the costs for negotiated settlements should be treated differently

Cost recovery for Commission approved negotiated settlements should be treated in the same manner as any other Commission proceedings. Based on the principles outlined in response to 2(c) above, all activities related to a proceeding should be eligible for cost recovery.

- (b) How concerns about the transparency of the process should be addressed.

Negotiated settlements Under AUC Rule 018 (Rules on Negotiated Settlements) have typically been conducted with a requirement that parties sign confidentiality agreements. In addition, Rule 35 of the AUC Rules of Practice (Rule 001) stipulates that negotiated settlements are confidential.

The issue of “transparency” must therefore be considered in the context of the requirement of confidentiality. The issue is more complex than simply stating there is a “concern” regarding transparency.

In our submission it is necessary for parties to negotiate in confidence with adequate protections in place to ensure they will not be prejudiced in later proceedings in the event a negotiated settlement process is unsuccessful – either in whole or part. Without such protection in place we expect no one would be in a position to negotiate feely and effectively.

For most Commission approved negotiated settlements a Commission staff person is typically appointed as an advisor/facilitator. We understand the Commission representative can provide input to the Commission regarding the contributions made by the negotiated settlement participants. Beyond that, the issue of transparency regarding settlement negotiations is going to get caught up in, and prevented by confidentiality requirements.

## **6. Proceedings without Cost Recovery**

- (a) The Commission would appreciate views from parties on the circumstances where it would be appropriate to specify at the commencement of a proceeding that no party will be eligible for cost recovery should they elect to participate.

For applications that address issues between utilities or generators or issues that address commercial issues of interest to a limited number of entities, cost recovery should not be provided.

If the issue may have an impact on consumer end-use rates or raise issues of importance to the regulatory community as a whole then cost recovery should be provided to ensure that customer interests are represented. For example, we do not agree with the approach to precluding cost recovery taken by in the Commission’s recent Notice on the REVIEW OF RATE RELATED IMPLICATIONS OF UTILITY ASSET DISPOSITIONS FOLLOWING THE SUPREME COURT’S CALGARY STORES BLOCK DECISION, where the Commission stated:

Parties who participate shall not be entitled to submit cost claims to the Commission and no funding will be awarded by the Commission to participants. Each party shall be responsible for its own costs. The Commission considers this Proceeding to deal with generic issues which concern all stakeholders and that utility ratepayers should not be required to underwrite the costs of the participants through regulated rates.

For the Calgary Stores Block proceeding, all customer groups could be impacted and therefore all consumers should appropriately be represented. It is not fair for some customers to “carry the burden” for this type of proceeding while other customers receive the potential benefits. Furthermore, in inquires such as that seeking input from parties on the rate related implications of the recent SCC Decision we can reasonably expect the utility interveners to be active in pursuit of their interests. By failing to allow intervener funding in this proceeding it suggests that the Commission will be deprived of the benefit of a large cross section of interested parties that would otherwise be able to provide expertise and perspective that would assist the Commission in carrying out its public interest mandate.

## **7. Costs Officer**

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- (a) The Commission requests the views of participants as to whether such assessment was useful from their perspective.

Having a designated Cost Officer that can oversee and administer the cost process and apply the Commission's rules in a fair and consistent manner is desirable.

Yours very truly,

LAWSON LUNDELL LLP

*"Lewis L. Manning"*

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Enc.

cc. D 410& R 13 Group