

April 15th, 2008

Bob Heggie
Chief Executive Officer
Alberta Utilities Commission
Fifth Avenue Place, #400, 425-1st Street SW
Calgary Alberta T2P 3L8

Dear Mr. Heggie

**Re: Alberta Utilities Commission (AUC) Bulletin 2008-01
Review of Rule 022, Rules on Intervener Costs**

Thank you for the opportunity to provide comments on AUC Rule 022 with respect to rules on intervener costs. These comments are submitted on behalf of Direct Energy Marketing Limited (Direct Energy). As requested in your letter of March 20th, 2008, enclosed are Direct Energy's comments on each of the issues identified by the AUC 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?

Direct Energy supports policies that improve regulatory efficiency and eliminate the duplication of submissions. Direct Energy also supports the ability of other interveners to represent groups that would be conventionally represented by the UCA provided this group can:

- i) demonstrate that they take a meaningfully different position than the UCA, and
- ii) demonstrate that the outcome of adopting their recommendation would be materially different than adopting that of the UCA, or
- iii) demonstrate that the UCA has willfully chosen not to address an issue identified by the AUC as relevant and of importance to the intervening group.

This intervening group would be expected to make a meaningful contribution to the proceedings that add new arguments, perspectives and evidence to the debate rather than simply reinforcing the position of the UCA. A basic requirement of their participation should be that they can demonstrate that the UCA has, owing to the consensus and inclusive nature of the UCA's position, opted not to address a specific issue of importance to the particular group and that the specific issue is of

importance to the AUC in the application by virtue of its inclusion on the AUC's issue list for the application. The intervening group must demonstrate that they have attempted to bring the specific issue to the UCA prior to their separate intervention.

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

Direct Energy believes that an organization with a mandate to represent a broad group of customers like the UCA should strive for consensus when formulating an advocacy position. However, in the circumstance that a sub-set group represented by the UCA wishes to take an opposing position to the UCA, this group should be allowed to intervene separately to advocate their dissenting position.

Conflicts of interest should be considered on a case by case basis and remedied by the Commission as they see fit.

- 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?

Direct Energy supports this suggestion on the basis that it would provide clarity to the proceedings and avoid a duplication of submissions and information requests. Interveners should be able to demonstrate that they will make a meaningful contribution to the proceedings and add new arguments, perspectives and evidence to the debate in order to receive standing in the proceedings. These groups should also be required to provide adequate proof of representation.

- 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?

The UCA has the legislative mandate to represent small residential, farm and small businesses. Any group wishing to provide separate intervention must meet the criteria provided in 1 a) above.

2. **Business Interest Rule**

- a) Who should be ineligible for cost awards?

Groups with independent financial means should be ineligible for cost awards. This would include municipalities, unions, commercial associations and private companies. Direct Energy believes the intent of cost awards is to provide all interested parties with access to the regulatory process, similar to the reason legal aid is provided in the justice system.

However, for companies that are required by law or regulation to participate in regulatory proceedings, expenses related to these proceedings are an unavoidable cost of doing business. Direct Energy supports the continuation of the Hearing Cost Reserve Account for regulated companies.

- 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 business interest rule should be applied to commercial associations, municipalities, municipal associations and public institutional consumers because they have independent means of funding. Organizations under the business interest rule should evaluate whether the benefit they expect to receive as a result of intervening outweighs the costs of intervening including legal fees, expert witness fees, labor and time.

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

Direct Energy supports the creation of criteria regarding the application of the business interest rule in the interest of improving regulatory efficiency. This would help groups to determine up front whether they are eligible for cost awards thereby aiding them in deciding whether to intervene. If a group determines up front that it is ineligible for cost awards, it may seek to amalgamate with similar ineligible groups or consult with the UCA to pool funding resources which would have the added benefit of avoiding duplicate submissions. Direct Energy believes this would also streamline the cost awards process.

- 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?

Direct Energy is not supportive of grandfathering existing groups because it would inhibit the realization of the full potential gains to be made from improving regulatory efficiency.

3. **Budgets**

Direct Energy considers that the filing of budgets by all participants allows for some transparency into the process. Additionally, the filing of budgets can provide an indication to stakeholders as to the level of intervention on some issues and also may highlight areas where duplication may exist. Budgets should be required from all parties so as to provide insight into areas that will be canvassed and examined in the application. Direct Energy is of the view that a thorough critique of and commentary on budgets by the AUC may provide parties with additional guidance in applications. A rigorous comparison of budgets to the AUC's issues list for any particular application should provide the AUC with insight to areas where parties

may be planning to expend significant resources that are of only limited interest to the AUC. In such cases, the AUC should then provide parties with further guidance on areas or issues to either scale back their efforts or to examine in more detail. This upfront exercise should reduce after the fact reductions in cost claims by the AUC.

4. **Scale of Costs**

Direct Energy is of the view that it is difficult to put any limitation on preparation time through cost awards. The amount of preparation time is not always related to hearing time, or other measures, in a linear fashion, but may be more proportional to the complexity of issues. The opportunity to instill discipline respecting preparation time is at the time of budget review in the context of the AUC's issue list on a specific application.

Direct Energy is of the view that the scale of costs should be market based and provide all parties the opportunity to engage and recover legal and expert fees that are in line with the market. Increasing legal and expert fees to market rates would allow utilities to reduce the shareholder burden related to the regulatory process and would allow other stakeholders in the process to access an expanded universe of legal counsel and experts. Additionally, setting below market rates for cost recovery conveys an unfair advantage to the UCA, as that entity does not apply for intervenor funding but rather accesses funds from taxpayers through provincial government funding. On that basis, the UCA is not bound by cost recovery guidelines or association or shareholder constraints when making decisions on retention of counsel and outside experts. If cost recovery rates are set below market rates, the UCA continues to have the ability to retain market priced counsel and experts at taxpayer expense, while utility shareholders are burdened with the costs above the recovery cap and other consumer groups may either not obtain representation or be forced to select from a smaller available resource pool.

Direct Energy also considers that a market based scale of costs should apply to pre-hearing technical workshops and collaborative processes.

5. **Costs of Negotiated Settlements**

a) Should costs for negotiated settlement be treated differently?

Direct Energy considers that the same rules regarding the determination of intervenor standing, application of the business interest rule and the scale of costs should be applicable to negotiated settlements as they are to conventional processes. While negotiated settlements in most cases should reduce the regulatory costs when compared to a litigated process, it should not remove or minimize the burden on parties to demonstrate that they acted responsibly and cost effectively.

b) How concerns about the transparency of the process be addressed?

Direct Energy considers that in order to increase the transparency of negotiated settlements, the AUC staff attending negotiated settlements should, in addition to providing process commentary, provide comments and recommendations to the AUC in the review and determination of any cost awards.

6. Proceedings without Cost Recovery

Direct Energy believes that the application of the business interest rule should be sufficient, and that few if any proceedings should be undertaken with no cost recovery. Those instances where the AUC proposes to proceed on that basis should be evaluated on their individual merits.

7. Cost Officer

To date Direct Energy has had limited interaction with the cost officer and the officer's findings. Direct Energy has no comments with respect to the cost officer.

8. Additional Comments

Direct Energy is of the view that insistence on adherence to issues of interest to the AUC, in conjunction with a budget review in light of the issues list, would provide an improvement in regulatory efficiency. Direct Energy respectfully urges the AUC to view its determination of cost rules and cost determinations in the context of a more formal determination of issues of importance. In addition, given the aim of regulatory efficiency, Direct Energy also suggests that the use of generic proceedings to examine major issues may be of some value.

Please let me know if you have any questions. I can be contacted at (403) 290-7745.

Yours sincerely

<<Original Signed by G. Newcombe>>

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