



April 15, 2008

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Dear Mr. Bentivegna

SUBJECT: Alberta Utilities Commission Consultation (AUC) Bulletin 2008-01, dated March 20, 2008

In response to the AUC's Bulletin 2008-01 seeking consultation on intervener funding, the Cities of Red Deer and Lethbridge ("the Cities") appreciate the opportunity to provide their thoughts on an important issue with broad implications. Overall, the Cities conclusions are based on the understanding that the AUC's primary goal is to fully understand the issues and draft better decisions while the problem (perceived or otherwise) is the increasing cost and declining efficiency of regulatory proceedings. On this basis, the Cities argue that the long run solution is not to impose additional and more detailed rules of process because it will always be possible to comply with these rules without necessarily assisting the AUC to achieve its primary goal. Rather, the Cities suggest that the long run solution is to use the tools that are already at the AUC's disposal to ensure that participant interests and motivations are consistent with the AUC's primary goal.

The AUC often uses the intervener funding mechanism as one such tool, which the Cities fully support. However, the Cities also note that another more important tool at the AUC's disposal is the independence, authority, and credibility of its own voice. The AUC's written decisions carry considerable weight and can therefore be used to directly comment on the value each active participant brought to the hearing process. Over the long run, the Cities expect that each hearing participants' own internal governance structures will look to the AUC as the only independent and credible source of information to internally assess the value of their legal and consultant representation.

The Cities encourage the AUC to use these tools more frequently, even imposing higher standards if necessary, and do so by expanding upon the scope of the AUC Cost Order. Specifically, the Cities recommend that the Cost Order comprehensively discusses the quantitative and qualitative value each active participant contributed to the AUC's understanding of the issues. It is critical that this discussion should not be limited to just those who submit cost claims and not just to assessing the value of each participant's factual evidence and legal arguments. To communicate a wider context that will over the long run affect participant behaviour, the discussion must also include a thoughtful assessment of all active participants as well as their professional conduct throughout the proceeding.

### **First Principles - AUC Objective**

Influencing the Cities' comments throughout this letter is the expectation that the AUC's primary policy objective is to produce high quality regulatory decisions that are both credible and transparent. To meet this objective, it is necessary to receive and consider all relevant viewpoints. If potential participants do not have this opportunity to provide input, because of either administrative burden or a lack of funding, the AUC will have less evidence upon which to base its decision. An incomplete evidentiary record leads to a higher risk of becoming biased to one view, creating reoccurring issues, and creating unintended consequences. All of these scenarios lead to a higher cost of regulation through extra proceedings, review and variance applications, and court appeals, all of which cost the AUC in terms of public confidence.

The first-principles rationale for intervenor funding is relatively intuitive and follows from the objective of ensuring an opportunity for all relevant viewpoints to be heard. Suppose that intervenor funding did not exist and all participants must bear all the costs of their intervention. Just as potential intervenors do now, one must weigh the possible and likely costs against the possible benefits of a reduced tariff. However, when a potential intervenor expects to bear all of its costs, the balance is heavily weighted toward not intervening because a million dollar issue for the applicant might represent fractional pennies on a per customer, per month basis. Therefore, intervening becomes more cost prohibitive as the benefits of intervening become increasingly shared.

It is also important to highlight that the problem of under representation is not solved by customer associations financed by voluntary contributions or donations. By virtue of being voluntary, customers may exit from the association, pay none of the costs, yet

still receive a share of the benefits generated by those who continue to fund the association.

The optimal balance of funding that ensures all relevant viewpoints are heard without subsidizing or promoting waste is a theoretical construct, and the Cities believe there will never be a hard and fast rule, formula, or process for determining this balance. Nevertheless, the Cities are confident that the AUC will, more often than not, be able to achieve an acceptable balance by applying its own evaluation criteria and professional judgement to differentiate between productive and unproductive interventions at the conclusion of a proceeding.

### **Role of UCA and Other Interveners**

The UCA's comments dated December 21, 2007 and April 2, 2008 raised the issue of whether the UCA should be granted an opportunity to file "information requests, evidence and arguments in advance of other interveners," with the stated objective of avoiding duplication. While the Cities consider that the UCA could potentially add value to the regulatory process, the Cities also believe that no party should have a monopoly or special status for presenting ideas to the AUC. The UCA's regulatory role is to advocate ideas it considers to be best for its constituents. The AUC's mandate must consider a more broadly defined public interest and therefore, ideas that the UCA internal governance process considers and / or rejects should not be excluded or discouraged from consideration at a regulatory proceeding. Given the nature of issues regularly examined by the AUC, there will not be unanimity on many issues; the AUC still needs to hear these minority viewpoints.

To our knowledge, there is no formal or informal government policy direction to the AUC to place additional weight on the opinion of the UCA, and this is appropriate. The UCA is independent of the AUC by legislation, which means that the UCA is no different from any other intervener in the AUC process.

The Cities are also concerned that special status, special privileges, grandfathering exemptions, and exclusive rights will lead to several unintended consequences that will discourage an efficient and effective regulatory process. Firstly, the Cities are concerned that any type of special status or exclusive rights will by virtue of human nature, lead to unproductive power struggles, discourage cooperation, cultivate resistance to change, and ultimately prevent or discourage new participants from

entering the debate. In addition, the Cities are concerned that without competing intervenor voices, those who remain will strategically adopt extreme positions. Without the presence of a more moderate position that may take relatively more effort, consideration, and risk to develop, the AUC is forced to either accept the argument out of a lack of any other evidence or choose an ad hoc ‘saw-off’ or compromise that is not based on evidence presented at the hearing. Neither option lends itself to credible and transparent regulatory decisions.

Finally, the Cities are concerned that a single or small number of intervenors will be able to hold the AUC ‘hostage’ on major issues of importance and matters of scheduling. The AUC will be compelled to modify its schedule to the demands of a single or small number of intervenors because of the unspoken threat that the AUC will not have any intervenor evidence to weigh against that of the applicant. Thus, the AUC is faced with the choice of delaying the proceeding or considering the application without a full and complete examination of the evidence. Neither scenario can be considered ideal in the broader public interest, which includes the applicant and all customers.

The Cities agree that duplication of effort is a relevant concern, but consider the issue and its solutions to be more complex than simply preventing or eliminating all chance for duplication. For example, a small and reasonable duplication of effort may actually be productive in assisting the AUC maintain its schedule as well as understand the issues and arrive at a more complete decision. Moreover, behaviour that may appear to be a duplication of effort early in the regulatory proceeding may actually self-correct as long as the proper incentives exist. These incentives exist through the intervenor funding mechanism and the Cities have also observed the AUC to use this tool with increased frequency to considerable success. One rarely observes parties, particularly those who are subject to the intervenor funding, file identical or even similar evidence and arguments, even though they may submit similar information requests.

Nevertheless, it remains possible for two parties to consider the same evidence and arrive at different conclusions even if they seem to represent the same interests. Given the subtle and complex issues that the AUC is regularly asked to adjudicate, there may be many causes for disagreement: there may be no single or clear answer, or in some circumstances, it may be that one party simply makes an error in its analysis. No matter what the cause, the debate may still positively contribute to the AUC’s decision, which underlines the importance of evaluating this issue on a case-by-case basis at the conclusion of each hearing. While it cannot penalize a party that does not file a cost

claim, the Cities encourage the AUC to also use the Cost Order document to influence long term behaviour by publicly evaluating the performance of all active participants in the proceeding.

## **Business Interest Rule**

In their December 21, 2007 comments to the EUB regarding the continuation of EUB Directive 031B as AUC Rule 022, the Cities noted that the Business Interest Rule is of limited value. In practice, the Business Interest Rule does not always provide the Commission with a meaningful tool to measure whether the participant acted responsibly in the proceeding and contributed to a better understanding of the issues. On this basis, the Cities submit that the AUC should place little, if any weight on “business interest” when reviewing intervener funding.

In practice, the Cities observe that the rigid application of the Business Interest Rule leads to inconsistent results because there is not necessarily a consistent relationship between an intervener’s motivation and an intervener’s impact on the regulatory process. While an intervener’s motivation may be exclusively driven by its own financial interests, it is possible for those same interests to closely align with the Commission’s interest to gain a better understanding of the issues. In cases where the Business Interest Rule does not apply, the Commission will still need to judge whether the intervener added value to the process and the Cities believe that this over-riding principle should be applied to all parties.

## **Process Steps and Budgets**

As a general principle, the Cities believe that the AUC should not at the outset of a hearing impose additional administrative requirements or comment on a participant’s intentions or actions as a means to influence behaviour. Such actions foster the perception that the AUC has already ruled on intervener funding, which affects the credibility and transparency of the AUC’s decision. This is not to say that the AUC should not or cannot positively influence efficient behaviour over the long run by taking action after the close of record, which the Cities will discuss in greater detail in their final recommendations and conclusions.

With the intention of providing constructive feedback, the Cities are also able to provide several comments on the overall effectiveness of the AUC’s current regulatory process. For instance, the Cities are generally supportive of a registration process that

requires interested parties to submit letters of intervention that declare their area of interest. Even if the “Statement of Intention to Participate (SIP)” provides a minimum level of detail, the letter can provide an effective form of communication between parties who may not otherwise be in close contact. Indeed, the Cities can attest to the fact that they have relied upon the SIP letters of other parties to determine the level of their own involvement. We also suspect that the SIP letters are helpful for the AUC to identify potential issues and develop appropriate scheduling.

If the process includes technical workshops, collaborative process, and negotiated settlements (both successful and unsuccessful) assist the AUC in understanding the issues and making better decisions, then the Cities support the use of these process steps. It therefore follows that the AUC should permit intervener funding in these circumstances because to deny such funding would only serve to exclude or discourage discussion and debate, which ultimately assists the AUC in its goals. In endorsing such processes while denying funding, the AUC should also be wary of creating an incentive for participants to shift their efforts away from workshops and meetings, thus reducing or eliminating their effectiveness. However, if the AUC is concerned that technical workshops, collaborative process, and negotiated settlements are simply a more expensive substitute for carefully reviewing the whole application in context, then it should neither endorse them nor provide intervener funding.

Specifically in regard to negotiated settlements, the Cities also believe the AUC has both the authority and means to reduce the likelihood (over time) that a negotiated settlement processes begins despite having little or no hope of success. The Cities note that the AUC’s negotiated settlement process requires AUC representation in the process and we see no reason why the AUC staff member cannot provide valuable input, without disclosing confidential information, to evaluate cost claim submissions at the conclusion of the process. Interveners who commit in advance to a negotiated settlement process should be prepared to negotiate and compromise and therefore, their time and effort should be recognized appropriately. If an intervener voluntarily enters into negotiations but blatantly frustrates the process by refusing to compromise or by consistently renegeing on commitments, these factors should also be considered in the intervener funding.

The Cities also understand and recognize the AUC’s intent for issues lists and budget submissions to introduce discipline into the process. In practice, however, the Cities do not believe these process steps are achieving their desired effect of improving efficiency. As frequent participants in and observers of the regulatory process, the

Cities have noted a trend in submissions in that they have become general, non-committal, and standardized (while occasionally managing to remain voluminous). With the benefit of hindsight, this is not necessarily a surprising outcome. Publicly filed issues lists and budget submissions are of little assistance or benefit to the participant. Responsible participants would already strategize and budget internally, but to file detailed information that may disclose a position, strategy, or course of action may commit the party and close off any opportunity to make pragmatic compromises. Thus, any 'discipline' that might be inspired by the budgeting process may be to stick to the committed position (e.g. file evidence and seat a witness panel) even though recent developments change the cost-benefit decision.

Budget submissions are also unlikely to assist the AUC. For example, even if the budget appears contrary to the AUC's expectations, disallowing cost recovery at the outset of the hearing is prejudicial and even so much as commenting, positively or negatively, creates a perception of bias. Adding to the difficulty is that not all participants are compelled to submit a budget, and therefore any comparisons in a wider context are impossible. Finally, participants are required to file full and comprehensive cost submissions to justify their actual expenditures, and therefore the assumptions made for the initial budget filing will be of little significance in the final evaluation.

## **Recommendations**

Once a specific hearing is underway, there are very few formal administrative processes or requirements that will improve the value per dollar of regulatory proceedings. Ultimately, it is the individual participants that are responsible for their own behaviour, and if they consider that it is in their own best interests to positively contribute to the regulatory process, they will do so no matter how that process is designed. The Cities firmly believe that people respond to incentives, and given that the regulatory process is repeated many times with the same participants, the AUC's Cost Order is a very powerful tool to affect participant behaviour. The Cities are of the opinion that the Cost Order is where the AUC should direct its efforts.

We believe that the participant's responsibility in the cost submission process is to fully justify the value of their intervention. After the conclusion of the proceeding, it is not unreasonable to expect and require an intervener to fully and comprehensively explain the value they brought to the process as well as the cost they incurred in doing so. The Cities encourage the AUC to consistently apply a higher standard and believe that

responsible interveners will have no difficulty in justifying their actions. The Cities also note the UCA's letters of December 21, 2007 and April 2, 2008, which offer to provide the cost of their interventions and recommend that the AUC accept, review, and use this information in developing the Cost Order document.

We also consider it is the AUC's responsibility to more effectively communicate the standards upon which cost submissions will be judged. Partly, this will be accomplished by formalizing and publishing the detailed criteria that the AUC already uses when evaluating cost submissions. More importantly, the most direct and practical form of communication will be to provide detailed feedback to all participants within the text of Cost Orders. In other words, the AUC should provide specific feedback to not only those who are denied funding, but all participants including those who do not submit cost claims. For each participant, the AUC Cost Order should describe how the AUC scrutinized a particular cost submission (where one was filed) and identify areas (if any) for improvement. It should also describe how the AUC valued the participant's contribution at each stage of the proceeding from information requests to final argument and comment on more than just quantitative matters, but also qualitative matters such as the participant's conduct throughout the proceeding.

In special circumstances, the Cities also consider it is appropriate and within the AUC's authority to direct some costs be entirely attributable to specific rate classes. This would not be appropriate in most situations, particularly in Phase 1 tariff proceedings. However, the ability to assign certain costs to a particular rate class may be a useful tool in certain situations where a participant's contribution was sufficiently valuable, but overly narrow in scope.

While the Cities consider there to be a purpose and role for a Cost Officer in this process, we believe it is unfair and inappropriate for the Cost Officer to take the lead role in developing a Cost Order of this level of detail. The Cost Officer's role should be to lead the AUC's own internal processes and ensure consistent results, however, the Cost Officer cannot observe first hand the specific circumstances and behaviours that should be encouraged or penalized. It is for this reason that the critical text of the Cost Order must be authored by the same Commission members and staff that are assigned to the original proceeding. The Cities recognize that adding considerably more detailed and specific content to the Cost Order will require a challenging investment in time and effort. However, we are confident that if the AUC sets a higher standard demanding respectful conduct as well as thoughtful and reasonable evidence and argument, several positive changes will over a relatively short period of time. Participants will police their

own behaviour, AUC decisions will refer fewer issues to future study, and regulatory costs will decline.

## Conclusions

Within the above comments and recommendations, the Cities' response to the AUC's questions found in Bulletin 2008-01 can be summarized briefly as follows:

- **Role of UCA:** The UCA should not receive any special privileges in the AUC process. Avoiding duplication at all costs will not lead to a better understanding of the issues and better decisions. It is fair to scrutinize duplication of effort after the fact, but duplication of effort should not necessarily be punished.
- **Business Interest Rule:** Ideas should stand on their own merit and ideas that are helpful to the AUC in understanding the issues should not be precluded from funding. Attempting to understand an intervenor's motivation, financial backing, or the exact customers it represents – particularly before the proceeding unfolds – is fraught with difficulty, creates a perception of bias, and ultimately provides little value.
- **Budgets:** The Cities observe that the budget process provides little value because in practice, they become general, non-committal, and standardized. Responsible participants already strategize and budget internally, but to file detailed information that may disclose a position, strategy, or course of action may commit the party and close off any opportunity to make pragmatic compromises.
- **Scale of Costs & Cost of Negotiated Settlements:** The system must provide a reasonable opportunity for participants to recover costs or else it defeats the purpose of intervenor funding. Failing to consider inflationary pressures in legal or consulting rates does not provide a reasonable opportunity for participants to recover costs. If the hearing includes process that ultimately assist the AUC in making better decisions, then the AUC should not preclude participants of that process from intervenor funding.
- **Proceedings without Cost Recovery:** It is reasonable that some proceedings may not require intervenor funding and it is also reasonable for the AUC to announce this in advance. Going back to first principles, as long as there is no direct or material impact on utility customers, then there is little need for intervenor funding. The NGL Inquiry is the best example where utility customers are not directly affected while the Competitive Pipeline Review proceeding does require careful consideration of how the diverse views of utility customers will be heard.

- Cost Officer: The Cities agree with the concept of a Cost Officer to fulfil the role of coordinator and ensure process efficiency and consistency. However, Commission Members and staff who participated in the original proceeding must take an active and leading role in critically evaluating cost claim submissions and preparing the AUC Cost Order.

The AUC will need to invest more energy in improving the credibility and transparency of its cost award decisions by identifying evaluation criteria and expanding the text of its decision to fully explain how it determined the value of an intervention. On the other hand, however, it can expend less time and effort attempting to understand the motivations and financial backing of the intervener as well as evaluating administrative submissions such as the completeness of its intervention or budget letter.

Thank you for the opportunity to provide feedback. Should you have any questions or concerns, please feel free to contact the undersigned.

Sincerely,



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