

Bulletin 2008-16

July 31, 2008

Draft Revised Rule 022, *Rules on Intervener Costs in Utility Rate Matters*

Introduction

The Alberta Utilities Commission (AUC or Commission) has considered the written comments received to date and those made at the meetings held on May 20, 2008 and May 21, 2008 regarding the revision of Rule 022, *Rules on Intervener Costs in Utility Rate Matters* and has prepared the attached draft revised Rule 022. The scope of this consultation addresses the award of costs to interveners in proceedings relating to utility rate matters. Costs generally include the professional fees for experts and legal counsel and costs incidental to participation in the proceedings.

The rules for the award of costs in facilities proceedings are found in Rule No. 009.

The rules for the award of costs in other proceedings dealing with changes to the ISO Rules and cases coming before the Commission regarding non-compliance with legislation, ISO rules or AUC Rules are the subject of Rule 015 which is currently being reviewed and will be circulated for comment in due course.

Purpose of and Eligibility for Intervener Costs

The Commission's role in rate making proceedings is, generally, to consider a utility's application and determine whether the rates proposed are just and reasonable and satisfy the rules against unjust discrimination. In carrying out this function, the AUC recognizes that different customers and customer groups may have different interests. The Commission welcomes interventions by utility customers and groups representing various types or classes of utility customers to assist it in coming to a better informed understanding of the public interest.

The Commission must exercise discretion in awarding intervener costs. The rationale for an award of costs in a regulatory proceeding is different from that in a judicial proceeding. A regulatory cost award does not depend on the outcome of the proceeding. Rather, all of the utility's customers pay intervener costs through regulated rates. As such, the Commission considers that it should limit eligibility for cost awards. Costs should be available to an intervener who has or represents a group of utility customers that has a substantial interest in the subject matter of a hearing or other proceeding and who does not have the means to raise sufficient financial resources to enable the intervener to present its interest adequately in the hearing or other proceeding.

Outside Alberta, the award of costs has been limited generally to groups representing a broad base of interests such as residential consumers, farmers and in some cases, small business users. The award of costs to these groups has been made in recognition of the fact that collectively, these customers have a significant interest but have no practical means to raise sufficient financial resources to enable their interests to be represented.

The Commission is of the opinion that the purpose of the intervener costs regime is to permit representation for customers who have a significant interest in the outcome of a rate application, but either individually, or collectively, do not have the means to raise sufficient financial resources to represent their interests adequately. This is the underlying principle for cost eligibility and is reflected in the Draft Revised Rule 022.

Ineligibility for Intervener Costs

Intervenors who are municipalities, utilities, institutions, businesses or commercial associations are able to advance their own specific interests or the interests of their groups. These groups can join together as a result of their common interests. They are readily able to appoint their representative, provide instructions to their representative and take positions which advance the interests of their members. Also, these intervenors have the means to raise sufficient financial resources to fund their participation in a hearing or other proceeding. A group or an association and its members are expected to participate in matters of significant priority to them, and to provide the resources to fund the intervention. If it is not sufficiently important for a group or association to participate at their own expense, then the customer base as a whole should not be called upon to fund the participation of these groups or associations. Municipalities are unique in that they are significant customers of utility services and often intervene in the name of the customers in their municipality. They are unique in this role because they represent a large and diffuse customer base that does, through its elected representatives and the tax base, have the means to raise the financial resources necessary to intervene in a proceeding.

Recovery of Cost Awards By Rate Class

The Commission has considered the argument that groups or associations representing various interests should be eligible for costs if those cost awards would be recovered exclusively from that group's rate class. At this time, the Commission is not prepared to consider assigning responsibility for intervener costs recovery to individual rate classes, although the Commission may consider such an approach to be suitable for some situations in the future.

Business Interest Rule

The Commission has revised the current business interest rule. Section 4 of draft Rule 022 identifies those parties that are, *prima facie*, ineligible to apply for cost recovery. These parties include business and commercial entities or associations of those entities, generators or associations of generators, municipalities or associations of municipalities, institutional (public or private), industrial entities or associations. The Commission did not delineate along the lines of profit or not-for-profit organizations or along the lines of public or private interests. In cases where not-for-profit organizations represent not for profit or "for profit" customers and those

customers have a sufficient interest to warrant participation, they are responsible for making the decision whether to intervene. The cost of that intervention should be a factor in the determination of whether and to what extent those parties will intervene (including a decision to join forces with other customers or groups with similar interests).

Contribution as an Eligibility Criterion

Some parties argued that eligibility for costs awards should be based on an assessment of the contribution made by an intervener to the proceeding. The Commission does not agree that eligibility for costs should be based on an assessment of whether a party has contributed to a better understanding of the issues before the Commission in a hearing or other proceeding. Such a criterion for eligibility would take the responsibility for interventions, including the decisions of whether the intervention is warranted, out of the hands of the intervener or the customers being represented by the intervener. This is more fully discussed in the next section. To base eligibility for costs on a contribution criterion would also be inconsistent with the Commission's stated purpose for which intervener costs are awarded – to permit representation for customers who have a significant interest in the outcome of a rate application, but either individually, or collectively, do not have the means to raise sufficient financial resources to represent their interests adequately. Contribution is one of the factors that the Commission will consider in the assessment of the amount of costs that might be awarded to an eligible intervener but is not used by the Commission to determine whether a party is eligible to claim costs in the first instance. Other factors which are considered by the Commission in assessing the quantum of costs to be awarded are in section 11 (1) and (2) of draft Rule 022.

Need for Change

Some interveners expressed the view that the current intervener costs rules and practices do not need to be changed because there is nothing wrong with them. The Commission disagrees. In the Commission's view, the award of costs to interveners in rate cases should be more the exception than the rule. Cost awards should be made in a way that ensures to the greatest extent that participants in the process take responsibility for their intervention, including the decisions of whether the intervention is warranted, the issues to be addressed, the positions to be taken, at what stage of the process they need to intervene and whether the costs of the intervention are warranted given their interests. The current intervener cost rules do not support this objective because they leave to the Commission the responsibility to assess cost claims of interveners who have the means to raise sufficient financial resources to represent their interests adequately. This approach requires the Commission, rather than the interveners themselves, to ultimately impose cost discipline and therefore tends to reduce cost accountability.

Role of the Utilities Consumer Advocate (UCA)

In Bulletin 2008-05, the Commission offered the following statement for consideration at the public consultations:

As stated in Schedule 13.1 of the *Government Organization Act*, the UCA represents the interests of Alberta residential, farm and small business consumers of electricity and natural gas before proceedings of the Alberta Utilities Commission. The Commission accepts that there is value in the UCA being proactive in contacting and cooperating with others representing these groups and discussing the issues and position the UCA will present on their behalf. Such a process would also identify areas where there may be conflicting interests and how they may be handled by the UCA. However, the Commission does not consider it necessary to implement rules or special processes of the AUC for that purpose. The UCA is expected to establish its own relationships with its constituencies and the parties that represent those constituencies.

However, the fact that the UCA represents these groups does not preclude the participation in a proceeding of other groups or persons representing residential, farm and small business consumers. Nor would it preclude those groups from eligibility for costs if they have no other source of funding to participate in a meaningful way and contribute to a better understanding of the issues or raise a unique and relevant issue or position. To the extent these groups duplicate the efforts of other groups, including the UCA, who represent the same interests, the expectation is that the costs would be adjusted downward in recognition of the duplication.

A number of parties had expressed the view that they were not satisfied with the UCA representing them and did not want to lose the opportunity to participate and to apply for costs. The Commission understands, through the process of this consultation on intervenor costs, that the UCA accepts that other intervenors can be given standing to represent residential, farm and small business customers. In addition, the UCA has indicated that it will cooperate with other intervenors and establish its own processes for doing so rather than relying on the Commission to provide direction. Therefore, it appears to the Commission that there is general acceptance of the Commission's approach as outlined above, and the Commission will adopt that approach.

Other Matters

Some participants argued that since the costs of applicants in utility rate matter proceedings before the Commission are paid by all customers as a cost allowed in revenue requirement, the costs of all intervenors should also be recovered from all customers. The Commission disagrees. A regulated utility has no option but to apply to the Commission for relief in rate matters. It cannot change its rates or service levels in the marketplace and it has the legislative burden of demonstrating that the relief it applies for is consistent with the policy of the relevant Act. Therefore, the Commission will continue to allow the prudent costs of a utility to be recovered through rates. This is reflected in the amended Rule 22 in section 3(3).

The Commission has amended the scale of costs to increase legal fees and the fees of consultants, analysts and experts, as well as the mileage fee, as set out in the draft Rule 022. As the scale of costs is also referred to in Rule 009, Rules on Local Intervenor Costs, the Commission has amended that rule to include the new scale of costs.

A minor change was made to reflect the current practice regarding the Commission's discretion to advance funds or grant interim funds from its own monies. This discretion has not been exercised to date because it is inefficient. In these situations, the Commission will order the applicant to advance the funds or pay the interim award directly to the recipient.

The Commission has also made a minor change to the requirement to submit budgets in section 6. The change limits the requirement to file budgets to those parties that are eligible for costs. Parties are encouraged to submit comments respecting this proposed change.

The Commission has proposed that these rules come into force on October 1, 2008. The costs claimed for any rate applications filed with the Commission prior to the date in which these new rules come into force will be assessed in accordance with the rules currently in effect.

The Commission thanks the interested persons who have submitted comments or who participated in the meetings for their efforts and time. These comments and minutes from the meetings, as well as, the revised draft Rule 022 are posted on the Commission website at www.auc.ab.ca under the "[Projects & Initiatives](#)" page.

If you have any additional comments on the draft Rule 022, please send them to Giuseppa Bentivegna at giuseppa.bentivegna@auc.ab.ca by September 15, 2008.

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