



B R O W N L E E  
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September 15, 2008

Alberta Utilities Commission  
Fifth Avenue Place,  
4<sup>th</sup> Floor, 425 – 1 Street SW  
Calgary, Alberta, T2P 3L8

**Attention: Ms. Giuseppe Bentivegna,  
Commission Counsel**

Dear Ms. Bentivegna:

**RE: CONSULTATION: Review of Rule 022, Rules on Intervener Costs**

Gas Alberta has received the Commission's Draft Revised Rule 022 and associated Bulletin 2008-16. Gas Alberta would like to use this opportunity to provide its comments on the seven issues, as set out by the Commission. In particular, Gas Alberta wishes to express its disappointment in the Commission's decisions, as outlined in Bulletin 2008-16 and the amended draft of Rule 022. With respect, it would appear that the Commission has chosen to discount efforts and opinions put forth by interested parties in the consultation process.

**1. Purpose of and Eligibility for Intervener Costs**

In delineating as to which interveners are eligible for intervener costs the Commission has, in Gas Alberta's view, lost sight of certain of the essential purposes and rationale underlying utility proceedings and the award of intervener costs. As the Commission indicated, the role of the Commission in rate making proceedings is to consider a utility's application and determine whether the rates proposed are just and reasonable and satisfy the rules against unjust discrimination. The award of intervener costs cannot be considered separately from that role. In addition, it must be recognized that a fundamental aspect of utility regulation is the correction of the imbalance between a monopoly utility and its customers. It is trite to say, but important to recognize, that customers served by a monopoly have no market power and the monopoly by definition has no competition to provide incentive to ensure that all customers are fairly treated. Accordingly, utility regulation serves as a proxy for competition, and the intervention process gives a particular customer or group of customers an effective mechanism to demand equitable treatment.

While the ability of a group of utility customers to raise sufficient financial resources to enable the intervener to present its interest adequately may be one valid consideration in the award of costs, it should not override the underlying purpose of the proceedings. For instance, if the proceedings determine that a customer (or customer group) is being charged unfair rates, and in order for that customer to have that situation rectified it is necessary for it to commence proceedings before the Commission, the costs of having that interest represented adequately in an intervention should absolutely be recoverable through costs. Otherwise, the utility is free to exercise its monopoly powers unfairly and unchecked. In Gas Alberta's view, the Commission should never lose sight of the fact that such customers cannot simply choose another provider who will treat them more fairly.

Nor should the matter be "all or nothing". If the costs award hinges entirely on a successful outcome, the effect may be to discourage any intervention, where the underlying concern or complaint may be objectively viewed as rational and legitimate, but where the outcome may still be in doubt. Indeed in any litigated forum, there is no certainty of results. The difference in the regulated arena is that the utility gets to battle its customers with the customers' money. This is the source of the fundamental imbalance referred to above. The existing system of cost recovery for legitimate interveners has historically provided the solution.

The costs awarded to two different groups of utility customers should not vary on the basis of the financial resources a particular group may have to fund the proceedings. The key consideration a customer makes in deciding whether to proceed before the Commission should be the perceived strength and reasonableness of its position.

The costs incurred by interveners to participate at any stage of the process are incurred to ensure that all segments of the Alberta public, and in particular of the utility customers, are given the opportunity to become informed of the issues and to provide input in furthering their interests. Effective interventions are crucial to ensuring that the Commission has the benefit of all relevant information and to maintaining a credible system of regulation. Placing the costs of pursuing such processes on the customers, regardless of how the Commission may view their financial capabilities, provides a significant disincentive to any continuing intervener input into the process. It also clearly discriminates against customers who are perceived to have greater financial resources. As an example, the Commission's model may force a municipality to choose between repairing failing roadways, and protecting its residents against unwarranted rates. On the other hand, another customer group, perceived as "have not" by the Commission, may not have to make that difficult choice between providing core services to its members and advancing their interests before the Commission.

## **2. Ineligibility for Intervener Costs**

While interveners who are municipalities, utilities, institutions, business or commercial associations may have common interests, thus accommodating attempts to act cooperatively, it is self evident that their interests may not always be aligned, particularly on Phase II matters. Utility proceedings necessarily are a vital and effective check on the power of natural monopolies. To impose the consideration of whether a group has the financial stability, or would be able to band together with other groups with similar interests, on a process intended to protect

Albertans from a natural monopoly against which they have no other recourse goes against public interest. The purpose behind having a regulatory oversight of public utilities is defeated when certain interested individuals are not able to pursue their interests due to financial constraints, while others do not face those constraints and therefore can have their interests represented. Further, any effort to deny interested parties a mechanism for cost recovery acts to give ratepayers an unfair advantage. The denial of cost recovery runs directly contrary to the rights of Albertans to intervene and be effectively represented in utility proceedings.

### **3. Recovery of Cost Awards by Rate Class**

It is Gas Alberta's position that reasonable costs incurred in proceedings should be recoverable. At the very minimum, customers that are found to have been treated unfairly should be able to recover costs incurred to rectify the injustice through a reserve or deferred fund.

Clearly there are situations in which recovering the costs of interventions by a customer in a particular rate class only from within that rate class would simply compound an inequity. An example would be if an entire rate class were being treated unfairly, and a different rate class was receiving unduly preferential treatment. Recovery of the costs incurred only from the rate class seeking a more equitable result would be absurd and grossly unfair in those circumstances. On the other hand if one entity in a particular rate class were being discriminated against in favour of all of the other members of that same rate class, recovery of costs from within that rate class may be an entirely reasonable outcome. Again, the underlying principle in making a determination as to cost recovery should relate to fairness for customers. Perhaps the Commission should have the discretion to make such an order in appropriate circumstances.

### **4. Business Interest Rule**

Gas Alberta's fundamental position with respect to the business interest rule is that it should not be used to remove cost recovery for well-established intervenor groups who have consistently and effectively represented the interests of utility customers. Again, to impose a cost consideration into the decision of whether to intervene on particular customers creates an unfair disadvantage. Further, effectively making cost considerations of substantial importance inhibits the ability of customers to be represented by those best able to understand and advocate their positions.

### **5. Contribution as an Eligibility Criterion**

Basing eligibility for costs awards on an assessment of the contribution made by an intervenor to the proceeding is consistent with the underlying basis of Gas Alberta's position; an assessment of contribution is parallel to a determination of reasonableness of cost incurred. Section 11(1) and (2) of draft Rule 022 outline factors which are considered by the Commission in assessing the quantum of costs to be awarded; however, these factors should equally be applied to all interested parties commencing proceedings. Basing an award of costs on contribution criteria as outlined by Rule 022 ensures that costs incurred unnecessarily remain the responsibility of the customer, as opposed to becoming a liability for the customer base as a whole. Further, it would support the proposition that any interested party should have the opportunity to be represented before the Commission by an effective advocate.

## 6. Need for Change

While it is recognized that cost accountability is a factor that must be taken into consideration, Gas Alberta firmly believes that the current intervener costs rules and practice do not need to be changed. In fact the information provided (Attached Charts) by the Commission indicates that interveners costs have continually decreased since 2002. The fundamental and necessary purpose of the Commission is to ensure that utility customers are treated fairly. To place any restrictions or unnecessary hurdles to the right of customers to receive safe, reliable service at fair rates severely undermines the Board's purpose. Enabling interested parties to file interventions to advocate on their behalf before the Commission has been and should continue to be a necessary and effective check on the power of natural monopolies. Any system that inherently places particular groups at a disadvantage, or in a position where additional considerations come into play, does not coincide with the well-established principles of rate regulation. The existing system has protected Albertans for decades and should not be abandoned without a clear and compelling rationale. Should the Commission consider this objective to be compelling and necessary, less drastic changes, that do not adversely affect particular parties over others, should be considered and pursued prior to implementing draft Rule 022, as advocated by the Commission.

## 7. Role of the Utilities Consumer Advocate (UCA)

The Commission has indicated that the UCA accepts that other interveners can be given standing to represent residential, farm and small business customers. Indeed the UCA may not be fully cognizant of the particular expertise, or body of knowledge and/or evidence that another intervener may have. For this reason, the UCA may not be able to satisfactorily represent all parties.

It is reiterated that neither Schedule 13.1 of the *Government Organization Act* nor any other legislation provides that the UCA shall have the exclusive right to represent residential, farm and small business consumers. Further, sections 58 of the *Gas Utilities Act* and 78.2 of the *Public Utilities Act* expressly contemplate the right of a municipality to intervene in a regulatory proceeding to represent the interests of the public within that municipality or a considerable portion of it. An understanding and acceptance of the potential for such interveners to cooperate with the UCA does not adequately address these legislated rights.

If there is duplication, the Commission should consider how in the particular instance the duplication arose, instead of just automatically reducing the claim of the intervener other than the UCA.

The Commission also has to consider the effectiveness of the regulatory process if the UCA chooses not to participate or only selectively participates in any proceeding. Who then will represent the interests of small consumers? How effective will the process be if there are no interveners?

Finally, the Commission has not commented on the very real question of how the UCA can reconcile the potentially competing interests of the various customers it is mandated to represent, particularly in Phase II matters. Surely that is the role of the Commission. The Commission will be in the best position to exercise that role when it has the benefit of independent and responsible interventions advocating the competing interests.

Yours truly,

**BROWNLEE LLP**

**PER:**

A handwritten signature in black ink, appearing to read 'T.D. Marriott', with a long horizontal line extending to the right.

THOMAS D. MARRIOTT

TDM/rd

cc: Lyle Kuzik, Executive Director - Federation of Alberta Gas Co-ops  
Via email: [lkuzik@fedgas.com](mailto:lkuzik@fedgas.com)