



Alberta Federation of Rural Electrification Associations

**Decision on Preliminary Question
Application for Review of Decision 24762-D01-2019
Consideration of ISO Rules to Implement and Operate the
Capacity Market Costs Award**

June 10, 2020

Alberta Utilities Commission

Decision 25375-D01-2020

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Proceeding 25375

Application 25375-A001

June 10, 2020

Published by the:

Alberta Utilities Commission
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Calgary, Alberta T2P 0G5

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1 Decision summary

1. In this decision, the Alberta Utilities Commission considers whether to grant an application filed by the Alberta Federation of Rural Electrification Associations requesting a review and variance of specific findings made in Decision 24762-D01-2019. The decision addressed applications from seven parties for approval and payment of their respective costs to participate in Proceeding 23757, which was convened by the Commission to consider an application from the Alberta Electric System Operator for approval of the first set of Independent System Operator rules to establish and operate a capacity market for electrical generation in Alberta. The Alberta Federation of Rural Electrification Associations' review application concerned findings in the decision disallowing costs claimed for the services provided by its legal counsel and consultants in Proceeding 23757.

2. The Commission has decided to deny the review application for the reasons set out below.

2 Introduction

3. The Alberta Federation of Rural Electrification Associations' (AFREA) application (the review application) was filed pursuant to Section 10 of the *Alberta Utilities Commission Act* and Rule 016: *Review of Commission Decisions*. The review application, designated as Proceeding 25375, concerned certain findings of the Commission in Decision 24762-D01-2019 (Decision) on the disallowance of costs claimed by AFREA for the services provided by Main Street Law LLP, Bema Enterprises Ltd. and TENEO Consulting Inc.

4. On February 18, 2020, the Commission issued a filing announcement of the review application. By letter dated February 27, 2020, the Commission advised parties that pursuant to Rule 016, consideration of the review application would follow the two-step process provided for in the rule and as further described in Section 4 of this decision.

5. In the same letter, the Commission also invited parties to register to participate in the proceeding and established a process to file submissions and reply submissions. No other parties registered to participate. The Commission considers that the record for this proceeding closed on March 12, 2020, the date on which statements of intent to participate were due.

6. In this decision, the member of the Commission panel who authored the Decision will be referred to as the "hearing panel" and the member of the Commission panel considering the review application will be referred to as the "review panel."

7. In reaching its determinations, the review panel has reviewed the pertinent portions of the Decision and relevant materials comprising the record of this proceeding and of Proceedings 23757 and 24762. Accordingly, references in this decision to specific parts of the record are intended to assist the reader in understanding the Commission's reasoning relating to a particular matter and should not be taken as an indication that the Commission did not consider all relevant portions of the several records with respect to the matter.

3 Background

8. The Commission commenced Proceeding 23757 by a Notice of Commission Initiated Proceeding dated July 23, 2018. In that notice, the Commission suspended the operation of the prohibition on costs recovery set out in *AUC Bulletin 2008-17*¹ with respect to Proceeding 23757. The notice further indicated that eligibility for costs recovery would be determined by the Commission and that the Commission would direct the AESO to pay approved costs.²

9. The Commission invited applications for costs eligibility in a letter dated August 23, 2018, noting Rule 022: *Rules on Costs in Utility Rate Proceedings* would be applied to the cost recovery process (with the exception that the Commission had exercised its discretion to expand the costs eligibility provisions). The letter also noted that matters such as advance funding, interim funding, criteria for assessing costs claims and the scale of costs would be based on the Rule 022 provisions.³

10. AFREA filed a statement of intent to participate in Proceeding 23757, in which it indicated that a request for costs eligibility was forthcoming.⁴ AFREA subsequently filed a request for costs eligibility, as well as advance funding of 50 per cent of its anticipated fees. AFREA's request included a budget in which it requested legal fees above the scale of costs in Rule 022.⁵

11. In a ruling dated October 26, 2018, the Commission exercised its discretion to grant costs eligibility to seven parties including AFREA. The Commission denied AFREA's request for legal fees above the scale of costs. The Commission approved AFREA's request for advance funding, and directed the AESO to pay advance funding in the amount of \$132,065.50. In its ruling, the Commission cautioned that costs eligibility is not an indemnity for incurred costs, and that the Commission would make its final assessment of costs at the conclusion of the proceeding using the criteria in Rule 022.⁶

12. On April 9, 2019, AFREA filed a request for additional advance funding with an updated budget, stating that the Commission's decision to add process steps since November 2018 had caused its anticipated costs to increase. AFREA revised its budget

¹ AUC Bulletin 2008-17: Costs for Market Proceedings.

² Exhibit 23757-X0002, Notice of Commission Initiated Capacity Market Proceeding.

³ Exhibit 23757-X0016, Letter regarding cost recovery.

⁴ Exhibit 23757-X0053, AFREA SIP and Comment on Process.

⁵ Exhibit 23757-X0091, AFREA Cost Recovery and Advance Funding Budget.

⁶ Exhibit 23757-X0112, Ruling on cost recovery eligibility.

estimate from \$259,131.00 to \$579,484.00 and requested 50 per cent of the revised budget in advance funding.⁷

13. The Commission issued a ruling on April 15, 2019 denying the request for additional advance funding. In its ruling, the Commission stated that it was incumbent upon parties to manage their budget, even in response to expanded process steps in Proceeding 23757.⁸

14. On July 29, 2019, the Commission closed Proceeding 23757 following a request from the AESO to withdraw its application. On August 7, 2019, AFREA submitted its costs claim application for approval and payment of its costs of participating in Proceeding 23757, and the Commission assigned Proceeding 24762 to the costs proceeding.

15. The hearing panel issued the Decision on December 18, 2019. In the Decision, the hearing panel approved AFREA’s claim for recovery of costs in the total amount of \$252,797.83, representing a disallowance of approximately 55 per cent of its total claimed costs of \$557,839.97. The costs claimed and the costs ultimately awarded to AFREA are provided in the table below:

Claimant	Total Fees Claimed	Total Disbursements Claimed	Total GST Claimed	Total Amount Claimed	Total Fees Awarded	Total Disbursements Awarded	Total GST Awarded	Total Amount Awarded
AFREA								
Main Street Law LLP	\$145,902.50	\$2,695.06	\$7,425.28	\$156,022.84	\$89,580.50	\$2,097.86	\$4,583.92	\$96,262.28
Bema Enterprises Ltd.	\$319,089.00	\$0.00	\$15,954.45	\$335,043.45	\$148,304.34	\$0.00	\$7,415.22	\$155,719.55
TENEO Consulting Inc.	\$62,590.75	\$69.04	\$3,132.99	\$65,792.78	\$0.00	\$0.00	\$0.00	\$0.00
AFREA	\$0.00	\$937.29	\$43.61	\$980.90	\$0.00	\$777.14	\$38.86	\$816.00
Total	\$527,582.25	\$3,701.39	\$26,556.33	\$557,839.97	\$237,884.84	\$2,875.00	\$12,038.00	\$252,797.83

16. In the Decision, the hearing panel determined that while AFREA generally acted responsibly and contributed to the Commission’s understanding of the relevant issues, it was unable to approve the full amount of the costs claimed in respect of the services performed by Main Street Law, Bema, and TENEO, and for the disbursements claimed by AFREA. The hearing panel’s findings on AFREA’s cost claim are at Section 4.2 of the Decision and are summarized in greater detail below.

4 The Commission’s review process

17. The Commission’s authority to review its own decisions is discretionary and is found in Section 10 of the Alberta *Utilities Commission Act*. That act authorizes the Commission to make rules governing its review process and the Commission established Rule 016 under that authority. Rule 016 sets out the process for considering an application for review. A person who is directly and adversely affected by a decision may file an application for review within

⁷ Exhibit 23757-X0541, AFREA Request for Additional Funding.

⁸ Exhibit 23757-X0575, Ruling on AFREA additional advance funding.

60 days of the issuance of the decision, pursuant to Section 3(3) of Rule 016. AFREA filed its review application within the required period.

18. The review process has two stages. In the first stage, a review panel must decide whether there are grounds to review the original decision. This is sometimes referred to as the “preliminary question.” If the review panel decides that there are grounds to review the decision, the Commission moves to the second stage of the review process where the Commission holds a hearing or other proceeding to decide whether to confirm, vary, or rescind the original decision.

19. In this decision, the review panel has decided the preliminary question.

20. Section 4(d) of Rule 016 requires an applicant to set out in its application the grounds it is relying on, which may include the following:

- (i) The Commission made an error of fact, law or jurisdiction made by the hearing panel;
- (ii) Previously unavailable facts material to the decision, which existed prior to the issuance of the decision in the original proceeding but were not previously placed in evidence or identified in the proceeding and could not have been discovered at the time by the review applicant by exercising reasonable diligence;
- (iii) Changed circumstances material to the decision, which occurred since its issuance.

21. The arguments advanced by AFREA in its review application fall within the grounds in Section 4(d)(i) of Rule 016.

22. Section 6(3) describes the circumstances in which the Commission may grant a review:

6(3) The Commission may grant an application for review of a decision, in whole or in part, where it determines, for an application for review pursuant to subsections 4(d)(i), (ii) or (iii), that the review applicant has demonstrated:

- (a) In the case of an application under subsection 4(d)(i), the existence of an error of fact, law or jurisdiction is either apparent on the face of the decision or otherwise exists on a balance of probabilities that could lead the Commission to materially vary or rescind the decision.
- (b) In the case of an application under subsections 4(d)(ii) or 4(d)(iii), respectively, the existence of:
 - (i) Previously unavailable facts material to the decision, which existed prior to the issuance of the decision in the original proceeding but were not previously placed in evidence or identified in the proceeding and could not have been discovered at the time by the review applicant by exercising reasonable diligence; or
 - (ii) Changed circumstances material to the decision, which occurred since its issuance

that could lead the Commission to materially vary or rescind the decision,

(...)

23. The Supreme Court of Canada in *Housen v Nikolaisen*,⁹ as recently reaffirmed in *Canada (Minister of Citizenship and Immigration) v. Vavilov*,¹⁰ determined that the applicable appellate review standard concerning an alleged error of fact, or mixed fact and law is a “palpable and overriding error.” This guidance was incorporated by the Commission in Decision 2012-124,¹¹ as reflected in the following paragraph:

30. ... [F]indings of fact or inferences of fact made by the hearing panel are entitled to considerable deference, absent an obvious or palpable error. In the Commission’s view, this approach is consistent with that prescribed by the Supreme Court in *Housen v. Nikolaisen* [2002 SCC 33] and by the Court of Appeal in *Ball v. Imperial Oil* [2010 ABCA 111]. It is also consistent with the general principle that the trier of fact is better situated than a subsequent review authority to make factual findings or draw inferences of fact given the trier of fact’s exposure to the evidence and familiarity with the case as a whole.

24. In light of this guidance, the Commission addressed the role of a review panel and concluded that it should apply the following principles to its consideration of the review applications before it:

- First, decisions of the Commission are intended to be final; the Commission’s rules recognize that a review should only be granted in those limited circumstances described in Rule 016.
- Second, the review process is not intended to provide a second opportunity for parties with notice of the application to express concerns about the application that they chose not to raise in the original proceeding.
- Third, the review panel’s task is not to retry the ... application based upon its own interpretation of the evidence nor is it to second guess the weight assigned by the hearing panel to various pieces of evidence. Findings of fact and inferences of fact made by the hearing panel are entitled to considerable deference, absent an obvious or palpable error.¹²

25. The Commission has endorsed these principles in its subsequent decisions¹³ and they have been applied by the review panel in its consideration of the review application filed in this proceeding.

⁹ *Housen v Nikolaisen*, 2002 SCC 33.

¹⁰ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 paragraph 37.

¹¹ Decision 2012-124: AltaLink Management Ltd. and EPCOR Distribution & Transmission Inc., Decision on Request for Review and Variance of Decision 2011-436 Heartland Transmission Project, Proceeding 1592, Applications 1607924-1, 1607942-1, 1607994-1, 1608030-1, 1608033-1, May 14, 2012.

¹² Decision 2012-124, at paragraph 31.

¹³ See for example: Decision 22166-D01-2016: Request for Review and Variance of Decision 21515-D01-2016, ATCO Pipelines’ 2015-2016 Revenue Requirements Compliance Filing to Decision 3577-D01-2016, Proceeding 22166, April 5, 2017, at paragraph 30; Decision 22797-D01-2017: Applications to Review and Vary Decision 21115-D01-2017, Proceeding 22797, December 11, 2017, at paragraph 42.

5 AFREA's review and variance application

26. In its review application, AFREA advanced several general arguments in support of its request for review. AFREA discussed the unique circumstances surrounding Proceeding 23757, including the complexity of the proceeding and its materiality to AFREA, the number of changes to the process schedule, and the fact that the AESO's application was eventually withdrawn.

27. Additionally, AFREA identified eight specific disallowances that it characterized as errors of fact, law or jurisdiction. The specific disallowances challenged by AFREA are as follows:

- i. The hearing panel erred in imposing a five percent reduction to the hours of Shauna Gibbons.
- ii. The hearing panel erred in reducing Main Street Law's fees for argument by 40 per cent.
- iii. The hearing panel erred in disallowing the 96.95 hours billed by Dustin Madsen for argument.
- iv. The hearing panel erred in disallowing half of David Butler's claimed hours for argument.
- v. The hearing panel erred in disallowing \$2,959.75 of the fees claimed by Bema.
- vi. The hearing panel erred in disallowing \$4,781.25 in fees claimed for Bema.
- vii. The hearing panel erred in directing a further 45 per cent reduction of Bema's remaining fees, after accounting for the reductions described earlier.
- viii. The hearing panel erred in disallowing all claimed fees and disbursements for TENE0.

28. The relief requested by AFREA was for the Commission to vary the Decision and approve 100 per cent of the applied for costs claimed by AFREA.

29. The review panel will first address AFREA's grounds for review relating to the specific disallowances with respect to each claimant, followed by AFREA's general arguments in support of review.

5.1 Main Street Law LLP

30. AFREA was represented in Proceeding 23757 by Shauna Gibbons of Main Street Law. In the Decision, the hearing panel determined that a five per cent reduction to the total hours claimed by Ms. Gibbons was warranted in relation to time spent by Ms. Gibbons preparing reports and summaries for the AFREA board of directors and executive. The hearing panel also reduced Main Street Law's fees for argument by 40 per cent.

31. In its review application, AFREA characterized both of these reductions as errors of fact, law or jurisdiction. With respect to Ms. Gibbons' summarization and reporting activities, AFREA submitted that its co-operative business model and the *Rural Utilities Act* routinely require approval from the board of directors to properly instruct counsel, and that this role

could not be appropriately delegated to junior personnel. AFREA submitted that the hearing panel's determination that this function could be carried out by junior personnel contradicted the Commission's earlier decision to disallow Ms. Gibbons an hourly rate in excess of the scale of costs.

32. With respect to hours spent on argument, AFREA submitted that its intervention addressed many material and complex issues. AFREA also submitted that the practice of issuing general disallowances creates uncertainty for parties, and that the amount of recovery ultimately allowed for AFREA's time spent on argument was excessively low.

5.2 Bema Enterprises Ltd.

Disallowance of time spent on argument

33. In the Decision, the hearing panel disallowed 96.95 hours billed by Dustin Madsen for argument, and reduced David Butler's time spent on argument by 50 per cent, resulting in a reduction of 69.01 hours.

34. In its review application, AFREA stated that it provided detailed timesheets demonstrating its consultants' contributions to argument, and questioned why the hearing panel ignored this evidence. AFREA argued that the hearing panel should have requested further explanation through information requests if it was concerned about the sufficiency of AFREA's timesheet descriptions. AFREA submitted that the hearing panel created a new standard wherein work not specifically commented on would be disallowed, and that this precedent has not been applied consistently to other costs claim applications.

35. AFREA argued that the cumulative effect of the hearing panel's reductions and disallowances was to allow AFREA to recover costs at a rate of only 0.7 hours per page of written argument, which it submitted is excessively low and prejudicial, and demonstrates an error of fact, law or jurisdiction.

Disallowances for particular time entry activities

36. The hearing panel applied reductions to certain timesheet entries by Bema consultants on the basis that the activity descriptions did not comply with the scale of costs. These entries included 13.45 hours of tasks that appeared to the hearing panel to be administrative in nature, and which the hearing panel concluded should properly be claimed at a rate of \$45.00 per hour. The result was a reduction of \$2,959.75 in fees claimed by Bema. The hearing panel disallowed a further 21.15 hours of work performed by Mr. Butler associated with the description "responding to questions raised on the transcript." This amounted to a reduction of \$4,781.25 in fees.

37. AFREA submitted that its consultants did not perform administrative work, and that the hearing panel based its disallowance on an erroneous assumption. AFREA argued that it is inappropriate to disallow costs "simply based on the appearance of wording that suggests administrative work."¹⁴ Lastly, AFREA argued that even if the disputed tasks were considered

¹⁴ Exhibit 25375-X0001, AFREA R&V of Decision 24762-D01-2019, at PDF page 13.

to be administrative in nature, the timesheet entries subject to the rate reduction show time from a variety of other non-administrative tasks.

38. With respect to Mr. Butler's hours, AFREA submitted that the timesheet entries related to Mr. Butler reviewing transcript notes prepared by Ms. Gibbons and responding to questions raised in the notes. AFREA argued that this time is clearly documented, and is not vague or inconsistent with Rule 022.

45 per cent reduction to Bema's remaining fees

39. The hearing panel imposed a 45 per cent reduction to Bema's remaining fees after accounting for the other reductions. The hearing panel determined that this reduction was warranted in relation to excessive time spent reviewing the AESO's application and website materials, duplication of effort between Bema consultants on evidence and rebuttal evidence, and excessive time spent preparing cross-examination questions.

40. AFREA submitted that the hearing panel erred in fact, law or jurisdiction in applying the 45 per cent reduction. AFREA argued that the hearing panel had benchmarked AFREA's time for website and application review against that of other parties, without considering the differences in parties' scope of work and available resources. AFREA submitted that it was necessary for it to review all publicly available documents, and that the hearing panel failed to identify particular time or costs that were unreasonable.

41. AFREA asserted that there was no duplication of efforts between its consultants, and that its explanation of the segregation of duties between Bema consultants in the costs application was clear. AFREA re-iterated its concern that the hearing panel had acted on "appearance of fact, rather than established facts." Lastly, AFREA argued that the hearing panel erroneously overestimated the time spent by Bema consultants on cross-examination.

5.3 TENEO Consulting Inc.

42. In the Decision, the hearing panel disallowed all claimed fees and disbursements for TENEO and the services performed by Joy Monsma.

43. AFREA argued that the Commission indicated approval of costs recovery for TENEO in its ruling on costs recovery eligibility, and that the Commission's failure to communicate that a complete disallowance was forthcoming had significantly harmed AFREA. AFREA submitted that TENEO substantially supported its intervention and provided input that could not have been provided by its limited in-house resources or its other external support. AFREA also disputed the hearing panel's characterization of Ms. Monsma's qualifications, emphasizing that she provided specific expertise in rural electrification in Alberta and cooperative business systems, as well as ability to effectively communicate AFREA's unique position and role in Alberta's electric industry.

5.4 Further submissions in support of the review application

44. AFREA advanced several general grounds in support of its review application. AFREA submitted that the costs awarded by the hearing panel failed to reflect multiple changes to the process schedule for Proceeding 23757 that were driven by the AESO and approved by the

Commission. AFREA submitted that it was penalized for costs it incurred responding to process changes over which it had no control.

45. AFREA emphasized that Proceeding 23757 was complex, and that the AESO's application would have resulted in material impacts to AFREA and its members. AFREA stated that it expended all possible efforts to manage its budget, but was required to file substantial volumes of evidence, review and respond to many large and complex submissions, attend the oral hearing and present witnesses, field objections, and cross-examine multiple panels. Notwithstanding the variety of activities undertaken by AFREA, AFREA noted that the hearing panel issued several general disallowances of its costs. AFREA argued that the practice of issuing general disallowances impacts activities that AFREA was required to perform to effectively assist the Commission and creates uncertainty and unpredictability for parties.

46. Lastly, AFREA argued that its contributions could not have been fully assessed by the hearing panel, as the AESO's application was withdrawn and no final decision was rendered. AFREA submitted that, for these reasons, the hearing panel erred in fact, law, or jurisdiction by disallowing a portion of its costs.

6 Review panel findings

6.1 Main Street Law LLP

47. In exercising its discretion to award costs, the Commission is guided by the factors set out in Section 11 of Rule 022. These factors include whether the costs claimed are reasonable and directly and necessarily related to the original proceeding, and whether the participant acted responsibly and contributed to a better understanding of the issues before the Commission.

48. The hearing panel reviewed Ms. Gibbons' timesheets and made a determination that the amount of time allocated towards summarization and reporting was excessive and did not directly contribute to a better understanding of the issues before the Commission. The review panel finds that this was a discretionary decision that, on its face or on a balance of probabilities, was not unreasonable. The review panel recognizes AFREA's unique business model and statutory obligations, but does not agree with AFREA that there is a reviewable error in the hearing panel's determination that the time spent preparing reports and summaries was excessive, and that the costs associated with this time should not be borne by all ratepayers.

49. Contrary to AFREA's characterization, the review panel considers that the ruling denying Ms. Gibbons' costs in excess of the scale of costs made at the outset of Proceeding 23757 was not based on an assessment of her seniority, but because the scale of costs provides adequate compensation to support effective legal representation. The review panel does not find that this ruling was contradicted by the hearing panel's subsequent assessment that Ms. Gibbons' time spent preparing reports and summaries warranted a reduction.

50. The hearing panel determined that the total hours claimed by Main Street Law for argument was excessive given that AFREA's argument and reply argument discussed a

relatively limited number of technical issues, and AFREA's position on these issues did not vary drastically over the course of the proceeding. The review panel finds that the hearing panel's assessment of Main Street Law's time spent on argument, relative to the number and complexity of issues it addressed, is a reasonable exercise of discretion and is entitled to deference.

51. AFREA has not shown, either on a balance of probabilities or apparent on the face of the Decision, that an error of fact, law or jurisdiction exists on these grounds that could lead the Commission to materially vary or rescind the Decision. Accordingly, AFREA's request for a review on these grounds is denied.

6.2 Bema Enterprises Ltd.

52. The hearing panel reviewed AFREA's costs application and its consultants' timesheets, and determined that reductions were warranted with respect to time spent by Mr. Madsen and Mr. Butler on argument. The hearing panel determined that the need for Mr. Madsen's hours and the nature of his contribution to argument and reply argument were not sufficiently explained. The hearing panel also determined that Mr. Butler, who recorded substantially more hours than any other individual consultant, spent an excessive number of hours on argument, which the hearing panel characterized as concerning given AFREA's relatively small scope of intervention.

53. With respect to Mr. Madsen's hours, the review panel does not agree with AFREA that there is a reviewable error in disallowing costs where the hearing panel determines that a costs applicant fails to explain the need for or nature of a claimant's contributions. Nor does the review panel agree with AFREA's assertion that such a disallowance represents a departure from Commission precedent. The Commission has consistently held that in situations where multiple individuals contribute to the same task, an applicant must outline distinct areas of responsibility or otherwise provide sufficient information to allow the Commission to conclude that reasonable steps were taken to avoid duplication of efforts.¹⁵

54. Further, the review panel finds no evidence to support AFREA's assertion that the hearing panel ignored the timesheets AFREA filed in support of its costs claim application. Rather, the hearing panel directly addressed and excerpted items from Mr. Madsen's timesheets in arriving at its determination that the information contained in the timesheets was insufficiently detailed and did not satisfy the requirements of Rule 022.

55. The review panel also disagrees that the hearing panel committed an error in declining to request supplemental information from AFREA. In every costs claim, the onus is on the eligible claimant to provide sufficient information for the Commission to effectively assess its claim. At its discretion, the Commission may issue further process steps such as information

¹⁵ See for example: Decision 21747-D01-2017, ATCO Electric Ltd., 2015-2017 Transmission General Tariff Application Costs Award, Proceeding 21747, January 30, 2017, at paragraph 33; Decision 21498-D01-2016, AltaLink Management Ltd., 2012-2013 Deferral Account Reconciliation Costs Award, Proceeding 21498, September 7, 2016, at paragraph 60 (Application for review denied in Decision 22157-D01-2017, Decision on Preliminary Question, Application for Review of Decision 21498-D01-2016, Proceeding 22157, February 15, 2017).

requests. The costs claim applicant, however, cannot rely on such further process steps to meet its onus to support the reasonableness of its cost claim.

56. The review panel finds that the hearing panel's assessment of Mr. Butler's hours on argument was a discretionary decision that, on its face or on a balance of probabilities, was not unreasonable. The hearing panel considered the evidence before it, including the timesheets provided for Mr. Butler, in light of the nature of AFREA's intervention and the number of technical issues addressed by AFREA in its argument and reply argument. AFREA's assessment of the scope of its participation, and the reasonableness of the disallowance, reveals a difference of opinion but does not, in itself, disclose a reviewable error.

57. AFREA has not shown, either on a balance of probabilities or apparent on the face of the Decision, that an error of fact, law or jurisdiction exists on these grounds that could lead the Commission to materially vary or rescind the Decision. Accordingly, AFREA's request for a review on these grounds is denied.

58. The hearing panel reviewed the timesheets provided by Bema consultants and determined that certain activity descriptions did not comply with the requirements of Rule 022. In particular, the hearing panel determined that the timesheets contained entries describing activities appearing to be administrative in nature, and that a downward rate adjustment to these time entries was warranted. The hearing panel further disallowed time entries containing a description that did not provide sufficient detail to allow the hearing panel to understand the nature of the activity and how it related to the issues advanced by AFREA, as is required by the scale of costs.

59. As stated above, the onus rests with an eligible costs claimant to provide sufficient information for the Commission to effectively assess its claim. Pursuant to the scale of costs, this information must include a description of each activity undertaken, with sufficient detail to allow the Commission to understand the nature of the activity, and the time incurred with respect to each described service. The hearing panel had the benefit of reviewing the timesheets provided by the Bema consultants, including the description and hours of the activities performed, and determined that they provided insufficient information for it to conclude that these particular costs satisfied the requirements of Rule 022 and should be borne by ratepayers. The review panel considers that the hearing panel's assessment of Bema's hours is a finding entitled to considerable deference. The review application is not an opportunity for AFREA to provide additional justification in support of its costs claim, including further explanation of its activities, that was not provided in first instance.

60. The review panel acknowledges AFREA's concern that the downward administrative rate adjustment was applied to timesheet entries containing multiple tasks, only some of which were identified by the hearing panel as appearing administrative in nature. However, the review panel notes that the hearing panel would have been unable to determine the exact time allocated to these tasks because the timesheets provided by AFREA bundled multiple activities into single entries. In the circumstances, and considering that the onus to provide sufficient information to effectively assess a claim rests with the claimant, the review panel considers that the decision to apply a downward adjustment to the sum of these time entries was a determination that, on its face or on a balance of probabilities, was not unreasonable.

61. AFREA has not shown, either on a balance of probabilities or apparent on the face of the Decision, that an error of fact, law or jurisdiction exists on these grounds that could lead the Commission to materially vary or rescind the Decision. AFREA's request for a review on these grounds is denied.

62. The hearing panel applied a general 45 per cent reduction to Bema's remaining fees in respect of time allocated to several activities it identified as unreasonable, duplicative or excessive.

63. The hearing panel observed that Bema consultants claimed a combined 70 hours of pre-hearing work to review materials from the AESO website, and an additional 75 hours to review the AESO's application, notwithstanding that much of the content between these sources overlapped. The hearing panel further noted that other parties in Proceeding 23757 who retained three or more consultants, and submitted evidence on a similar number of issues as Bema, billed far fewer hours for the same review.

64. AFREA submitted that this finding represents an improper benchmarking exercise and results in an arbitrary comparison between parties. The review panel considers that improper benchmarking arises where a hearing panel relies on a direct comparison of parties' total hours as its primary tool for assessing costs, without exercising its discretion to consider relevant factors such as the nature of the interests represented by the claimant and the particular activities performed.¹⁶ The Commission has previously determined that where it is reviewing similar tasks on related issues, comparisons between parties can be made to assess the relative reasonableness of the costs claims.¹⁷

65. In this case, the hearing panel arrived at a general reduction, in part, by determining that the time spent by Bema consultants reviewing the AESO application and website was unreasonable given the reproduction of content between these sources. In making this determination, the hearing panel referenced the time recorded on the same activities by other interveners whose scope and depth of intervention in Proceeding 23757 was similar to AFREA's. The review panel does not consider that this constitutes a benchmarking exercise that predetermined the review panel's exercise of discretion or otherwise gives rise to an error of fact, law or jurisdiction.

66. The review panel also disagrees that the hearing panel erred in determining that Bema consultants performed duplicative work on evidence and rebuttal evidence. Pursuant to Appendix C of Rule 022, an eligible costs claimant is required to explain what efforts were expended to avoid duplication between consultants. The hearing panel reviewed the evidence before it, including AFREA's timesheets and IR responses, and determined that AFREA had not provided sufficient clarity on the distinct roles of its consultants. This determination is a reasonable exercise of the hearing panel's discretion to weigh evidence and award costs accordingly.

¹⁶ See for example: *Consumers' Assn. of Canada v Alberta Public Utilities Board*, [1985] A.W.L.D. 170, at paragraph 22.

¹⁷ Decision 2014-124, Decision on Request for Review and Variance of AUC Decision 2013-415, EPCOR Energy Alberta Inc. 2011-2014 Energy Price Setting Plan Amending Agreement Costs Award, Proceeding 3006, May 2, 2014, at paragraph 52.

67. Lastly, the review panel disagrees with AFREA that the hearing panel erroneously overestimated the time spent by Bema consultants on cross-examination. The hearing panel stipulated that its estimate of hours was approximate,¹⁸ and used this estimate to inform a discretionary assessment of the reasonableness of Bema's time preparing cross-examination relative to AFREA's actual cross-examination time during the hearing.

68. The review panel finds no error of fact, law or jurisdiction, demonstrated on these grounds, that could lead the Commission to materially vary or rescind the decision. AFREA's request for review on these grounds is denied.

6.3 TENE0 Consulting Inc.

69. AFREA submits that the hearing panel erred in disallowing the entirety of the costs claimed for TENE0 Consulting.

70. As mentioned earlier, in costs proceedings, it is the applicant claiming an award of costs who bears the onus of demonstrating the reasonableness of its own costs. There is no guarantee that eligibility for costs will result in full or partial recovery of these costs. This lack of guarantee was specifically noted by the Commission in its proceeding process letter,¹⁹ and in its rulings on AFREA's eligibility for costs and request for additional advance funding. In its ruling on costs eligibility, the Commission stated:²⁰

In granting each party cost claim eligibility, the Commission is not approving each party's preliminary budget or ruling that cost recovery will be based on the maximum hourly rate set out in AUC Rule 022. The Commission reminds parties that cost claim eligibility is not an indemnity for incurred costs. The Commission will make its final assessment of costs at the conclusion of the proceeding using the criteria in AUC Rule 022 to determine whether a claimant has made a meaningful and efficient contribution to the Commission's understanding of the issues.

71. The Commission re-iterated this statement in its ruling on AFREA's request for additional advance funding.²¹

72. The review panel therefore disagrees with AFREA's assertion that the Commission "indicated approval of cost recovery for TENE0 Inc. as a general consultant to AFREA"²² or otherwise failed to convey the prospect that costs for TENE0 might be disallowed. Rather, the review panel considers that the hearing panel properly followed the process established for eligible claimants in Proceeding 23757 and made an assessment of costs at the conclusion of the proceeding on the basis of the criteria in Rule 022.

73. In considering whether an error is either apparent on the face of the Decision or otherwise exists on a balance of probabilities that could lead the review panel to materially vary or rescind the hearing panel's findings with respect to TENE0, the review panel took into account the highly discretionary nature of the hearing panel's exercise. Specifically, the

¹⁸ Decision 24762-D01-2019, at paragraph 50 and footnote 48.

¹⁹ Exhibit 23757-X0099, Process letter, at paragraph 29.

²⁰ Exhibit 23757-X0012, Ruling on costs recovery eligibility, at paragraph 8.

²¹ Exhibit 23757-X0575 Ruling on AFREA additional advance funding, at paragraph 6.

²² Exhibit 25375-X0001, AFREA R&V of Decision 24762-D01-2019, at PDF page 15.

hearing panel assessed, among other factors, whether TENEO's participation contributed to a better understanding of the issues before the Commission in Proceeding 23757.

74. In the Decision, the hearing panel found that Ms. Monsma's primary role was to ensure AFREA's values were represented in Proceeding 23757 and that she was providing evidence from the perspective of her client, rather than serving as an independent expert. In arriving at its findings, the hearing panel referred to evidence before it, including an information response in which AFREA confirmed that TENEO "does not have the expertise in economics or the technical engineering aspects of the electricity industry."²³ The hearing panel made a discretionary determination that AFREA had not demonstrated the need for the services provided by TENEO, or how those services contributed to a better understanding of the issues before the Commission.

75. Lastly, the review panel notes that AFREA's review application contains submissions in support of TENEO's services, beyond what was provided in its costs application. AFREA does not assert that this information was not previously available, but instead states that it "trusts these submissions assist the Commission in re-assessing its characterization of [Ms. Monsma's] expertise."²⁴ As indicated above, it is not the role of a review panel to reassess discretionary findings of a hearing panel in light of new submissions that were not provided at the time of the original decision.

76. The review panel finds no error of fact, law or jurisdiction, demonstrated on this ground, that could lead the Commission to materially vary or rescind the decision. AFREA's request for review on this ground is denied.

6.4 Further submissions in support of the review application

77. AFREA advanced several general arguments in support of its review application including that the hearing panel made an error of fact, law, or jurisdiction by not properly taking into consideration the process changes approved by the Commission, the complexity of Proceeding 23757 and the materiality of the issues to AFREA, and the eventual withdrawal of the AESO's application.

78. The expanded scope of the capacity market proceeding was addressed by the Commission in its ruling in response to AFREA's request for additional advanced funding, which cautioned:²⁵

The Commission understands that cost-eligible interveners have been affected by the number of process steps in this proceeding. The Commission considers that it is incumbent upon parties to manage their budget, even in response to the expanded process, given that consumers will be required to bear the cost of intervention.

79. In any event, the review panel does not consider that any of the above arguments is indicative of an error of fact, law or jurisdiction with respect to the Decision that could lead the review panel to materially vary or rescind the Decision. There is no evidence to suggest that

²³ Exhibit 24762-X0050, AUC-AFRE-A-2019SEPT23-001, October 7, 2019, at PDF page 5.

²⁴ Exhibit 25375-X0001, AFREA R&V of Decision 24762-D01-2019, at PDF page 17.

²⁵ Exhibit 23757-X0575, Ruling on AFREA additional advance funding, at paragraph 5.

the hearing panel failed to appreciate the factors identified by AFREA. The review panel concludes that these arguments amount to a complaint that the hearing panel failed to give the weight desired by AFREA to these factors. As stated by Justice Fruman in *Epcor v. Alberta (Energy and Utilities Board)*, 2003 ABCA 374, at paragraph 23:

The Board is free to accept or reject evidence presented by the parties and, as an expert tribunal, it is entitled to use its expertise to arrive at different conclusions than the parties.

80. The review panel again emphasizes that costs awards to participants in Commission proceedings are discretionary. These costs, which support the particular interests of a specific intervenor group, are nonetheless borne by all ratepayers. In light of the Commission's broad discretion to determine the amount of costs to be awarded to an eligible claimant, the review panel maintains the view that general reductions are a reasonable and efficient mechanism to employ where the Commission's findings and the application of Rule 022 support a disallowance.

81. The review panel finds no error of fact, law or jurisdiction, demonstrated on these grounds, that could lead the Commission to materially vary or rescind the decision. AFREA's request for review on these grounds is denied.

7 Decision

82. In answering the preliminary question, the review panel finds that AFREA has not met the requirements for a review of Decision 24762-D01-2019 and the application for review is dismissed.

Dated on June 10, 2020.

Alberta Utilities Commission

(original signed by)

Anne Michaud
Vice-Chair