

Bulletin 2022-10

June 30, 2022

Request for comments on draft amendments to Rule 022: *Rules on Costs in Utility Rate Proceedings*

[Rule 022](#) governs the recovery of the costs of participating in rates proceedings before the Commission, costs which are ultimately borne by ratepayers through the rates they pay for utility service.

Through the consultation, the Commission received written submissions from stakeholders and held a virtual engagement session on December 8 and 9, 2021. The Commission is considering a number of proposed revisions to Rule 022 that incorporate the feedback received and the Commission's objective to promote consistent and effective participation in rates proceedings and provide clarity to participants. The Commission also wants to ensure that the revisions to Rule 022 promote the retention of high quality experts and allow for ratepayers to be fairly and adequately represented in rates proceedings. The Commission is seeking stakeholder comments on the draft amendments to the rule through the [AUC Engage platform](#).

The changes to Rule 022 do not impact whether or not a particular party can participate in a proceeding, they only address whether the party is eligible to recover the costs associated with that participation.

There are a number of changes in the proposed rule that the Commission wishes to highlight for stakeholders' consideration. Not all changes, however, are highlighted in the discussion below - stakeholders should refer to the [draft rule](#) for a more complete picture of the proposed amendments.

Rule 022 is not intended to provide full indemnity for costs

The Commission agrees with those stakeholders that suggested the purpose of Rule 022 is not to provide parties with an opportunity to recover 100 per cent of the costs of their participation in rates proceedings; rather, it is intended to provide partial indemnity. Partial indemnity achieves a balance between ensuring eligible participants have resources to meaningfully participate and bring value in rates proceedings, while achieving that participation at a relatively low cost to ratepayers. Parties can choose who to retain for professional advisory services and how much to pay those professionals for their services, but the Commission will limit how much ratepayers are required to fund. Parties appearing before the Commission should be incented to pursue cost-effective strategies (such as negotiated settlements and more collaboration with other parties aligned in interest) if they have to pay for a portion of their costs of participation (for example, costs of professionals in excess of the scale of costs) themselves.

Accordingly, while the Commission will revisit the scale of costs as requested by the vast majority of stakeholders, the scale will not be increased to cover 100 per cent of the market rates that counsel, experts and consultants may charge. Rather, the scale of costs will be adjusted to account for some measure of inflation and in recognition of the fact that the scale has been unchanged since 2008.

Rule 009: *Rules on Local Intervener Costs* will be reviewed later this year, and the Commission will consider whether a separate scale of costs is required in light of the different purpose of these rules. Until then, the Commission will adjust the Rule 009 scale of costs to align with the changes to Rule 022.

Intervener eligibility expanded on a case-by-case basis

i. The role of the UCA and other organizations in representing customers

The Office of the Utilities Consumer Advocate (UCA) has a statutory mandate to represent the interests of residential, farm and small business consumers of electricity and natural gas in AUC proceedings, and it is a frequent intervener in rates proceedings. While the UCA does not claim costs pursuant to Rule 022, it does use the scale of costs provided under Rule 022 as a guideline for the costs permitted to be recovered by the external legal, expert and consulting resources it retains. The Commission will not comment on this practice beyond its comments elsewhere in this bulletin that the Rule 022 scale of costs is not intended to provide full indemnity and, as highlighted by stakeholders in the consultation, the maximum rates prescribed in the scale of costs are not generally representative of market rates.

The Commission appreciated the UCA's participation in this consultation to ensure that any changes to cost eligibility took into account all those that regularly represent customers in rates proceedings (whether they claim costs pursuant to Rule 022 or not). The Commission wants to ensure that Rule 022 helps enable valuable and effective customer representation and intervention in rates proceedings.

The Commission heard from a number of customer representatives (including the UCA itself) that the UCA should not be the only representative of customers intervening in rates proceedings. The Commission is also mindful of an increase in the concerns expressed by customers in a number of settings with respect to utility bills and affordability. Accordingly, while there was some suggestion that the Commission should entirely eliminate cost eligibility for any prospective interveners that represent the same (or a subset of the same) group of customers as the UCA, the Commission is not prepared to make this change at this time. Rather, the Commission will seek to avoid duplication amongst interventions in rates proceedings, and will also encourage those who represent customers to ensure their accountability and communication to those that they represent.

ii. Changes to the existing eligibility criteria

The Commission is retaining the criteria that the intervener must have, or represents a group with, a substantial interest in the subject-matter of the proceeding. However, the Commission proposes that an eligible intervener must also demonstrate that:

- They bring special expertise or insight to bear on the issues facing the Commission in the proceeding or will otherwise assist the Commission in determining the issues before it.
- Funding through Rule 022 is required to fully permit the intervener to bring that expertise, insight or assistance.

In order to ensure that ratepayers are not funding duplicative interventions, an eligible intervener will be required to summarize the issues the intervener intends to address and explain why those issues are material and not duplicative of the issues to be pursued by any other intervener in the proceeding. An eligible intervener must also provide an explanation of the group's membership, governance structure and sources of funding, and the cost claim must be signed by the intervener itself (not one of the counsel, consultant or experts that the intervener retained to support its intervention in a particular case). With this requirement, the Commission seeks to ensure that customers are aware of and have access to those groups that seek to represent their interests and that seek to recover costs associated with this representation under Rule 022.

iii. Recognizing the difference between cost eligibility and standing

It is important to recognize the purpose of Rule 022 in considering these changes. Eligibility for cost recovery under Rule 022 is *not* the same as standing to participate in Commission proceedings, nor is it the same as cost eligibility for "local interveners" in Rule 009. The eligibility requirements in Rule 022 – including the listing of "ineligible participants" – do *not* prohibit interveners from participating in a Commission proceeding. Instead, they govern whether that intervener must decide in their own self-interest that participating is worth bearing the cost themselves, or whether ratepayers ultimately bear the costs of that person's participation.

Many interveners in the Commission's proceedings have the means to fund their own intervention. These types of interveners can continue to choose to participate based on a cost-benefit analysis of whether the cost of intervention versus the potential impact on their rates warrants moving forward with an intervention. However, the Commission has emphasized in its proposed revisions that it may exercise its discretion to grant cost eligibility on a case by case basis, if a proposed participant can demonstrate that the value it will bring to the Commission's proceeding justifies the cost that ratepayers will be asked to pay by allowing cost recovery under Rule 022.

Ineligible participants continue to be specifically enumerated in the Rule, and now include applicant utilities, regulated rate and default service providers (as described further below). An otherwise ineligible intervener may be able to recover a portion of its proceeding-related costs on a case-by-case basis if approved by the Commission. As part of a request to allow some recovery

of costs for an otherwise ineligible intervener, the intervener must demonstrate to the Commission that they will bear a portion of their costs of participating in the proceeding, and explain why additional funding recovered from ratepayers under Rule 022 is required to enable their participation in a given proceeding.

A prospective intervener may bring a request for eligibility in this regard to the Commission at any time. For example, a group representing a specific class of customers may review the [36-month application forecast](#) and determine that a specific, upcoming rates proceeding is expected to be of particular interest to its constituents. This group may wish to request a ruling from the Commission prior to the application being filed in order to ascertain whether it will be eligible to recover some portion of its costs through Rule 022.

In all of its proposed changes to the rule, the Commission has kept in mind the principle of encouraging effective participation that brings value to the Commission's proceedings while ensuring ratepayers do not bear any excessive costs for that participation. It is also about ensuring that customers, through their representatives, have access to and are heard by the Commission.

Uniform, incentive-based cost recovery for utilities, regulated rate and default service providers

In the draft rule, "applicants" in rates proceedings (i.e. utilities, regulated rate and default service providers) have been added to the list of ineligible participants. The Commission is proposing that applicants will no longer seek cost recovery under the Rule 022 process for external proceeding costs. Instead, applicants will be provided with a yearly budget for its proceeding costs based on the average of those costs incurred and approved over the last 5 years, similar to the approach adopted for distribution utilities under performance-based regulation. Applicants will recover this average amount every year in lieu of recording amounts in their hearing cost reserve account as they are awarded to them following the cost claim process. Applicants will retain their hearing cost reserve accounts for any intervener cost awards.

This will reduce regulatory burden for applicants, as they will no longer have to file cost claim applications or go through any additional regulatory process to recover their hearing costs. This should also better control overall costs for ratepayers, as it transitions the costs regime for applicants into an incentive-based system which encourages efficiencies and simplifies (and therefore reduces the administrative costs) of the costs regime. It will also provide greater certainty to applicants at the outset in terms of the hearing costs they will recover each year. Subject to the discretionary exception noted below, any spending over the designated amount will not be recoverable, nor will any spending under the designated amount be refunded. The Commission expects that these changes will ensure uniformity in the costs regime for applicants while incenting applicants to pursue cost-effective strategies (such as negotiated settlements, longer test periods, etc.) to keep their hearing costs within the designated amount.

The Commission is not proposing to index the designated amounts by I-X every year (as is the case for distribution utilities as part of their existing PBR plans), rather, these amounts would be

reviewed at the same time the Commission next reviews the scale of costs under Rule 022. While applicants may spend more than the designated amount in some years, the Commission expects that they will spend less than the designated amount in other years (or they will be motivated to reconsider how they engage with the regulatory process to better minimize hearing costs). As with other participants under Rule 022 who are generally ineligible to claim costs, the Commission will retain the discretion to grant cost eligibility to a utility or regulated retail provider in exceptional circumstances which the designated amount would not be intended to account for (as the Commission did, for example, as part of the Distribution System Inquiry in Proceeding 24116).

As part of this consultation, the Commission is soliciting comments on this approach and **requires all applicants who currently recover their hearing costs under Rule 022 to calculate their 5 year average and provide their total approved Rule 022 proceeding costs, per year, for the last 5 years with references to the decisions approving the costs (2017-2021 actuals)**. The Commission requires ENMAX Power Corporation (transmission) to provide both the 5 year average of its actual hearing costs (at scale) and a 5 year average of the hearing costs forecast (at scale) approved as part of various general tariff applications, along with these amounts, per year, for the last 5 years with all associated references. The Commission will review and confirm all calculations received and may follow up with individual applicants if it cannot reconcile the calculations with the AUC's records. The Commission also invites comments in terms of how best to transition to this new approach given that applicants are at different stages of their application / tariff cycles.

Hourly rates for experts in excess of the scale of costs allowed on a case by case basis

In addition to the proposed inflationary increases to the scale of costs, the Commission will consider requests to award costs for experts whose hourly rates are in excess of the scale of costs. The Commission considers that this will strike a reasonable balance between ensuring recognized experts participate in complex proceedings and therefore increase the overall quality of the ratemaking process, while keeping the overall costs of intervention on ratepayers low. Rates in excess of the scale of costs are not intended to apply to consultants and other individuals who regularly appear before the Commission to provide evidence on a wide variety of rate-related matters.

As part of its budget filed at the outset of the proceeding, an intervener may request that the Commission confirm whether a particular expert may recover an hourly rate that exceeds the rate for a consultant of that level in the scale of costs. The Commission considers that this should allow parties to retain experts who specialize in a particular area (e.g. incentive regulation, cost of capital and finance, depreciation, etc.) who typically bill in excess of the scale of costs. The Commission's approval of such a request does *not* constitute a pre-emptive approval of that intervener's cost claim; it is an approval of the allowable hourly rate for a given expert. The Commission retains its discretion to assess the reasonableness of the overall cost claim and disallow costs if that intervener's participation did not contribute to a better understanding of the issues before it, or based on the other factors outlined in the rule.

In assessing these requests, the Commission will have regard for whether the expert has acquired specialized knowledge through study and experience of a particular issue that is before the Commission in a proceeding. This may include consideration of education, professional designations and experience directly relevant to a particular technical area. The Commission notes that there are a number of consultants with significant experience in the utility industry (e.g. senior and highly experienced intervener consultants, some of whom may be former utility employees) who regularly appear before the Commission and provide assistance to it. The contributions of these consultants can be valuable to the Commission and their costs are available for recovery under Rule 022; however, for the Commission to consider awarding an hourly rate in excess of the scale of costs, the individual must be a recognized expert in the particular technical area at issue in the proceeding (e.g. an expert with advanced degrees in regulatory finance and significant academic or sectoral contributions in the context of a generic cost of capital proceeding).

This proposed change is for the sole purpose of allowing cost recovery at an hourly rate that exceeds the scale of costs to promote the retention of high quality experts that will provide analysis and evidence that assists the Commission in determining the issues before it. This change does not alter the Commission's direction in [Bulletin 2016-07: Practice advisory and procedural change – expert witness qualification no longer required](#) that it will not conduct a formal qualification of experts in its proceedings, nor does it place any constraints on the weight a Commission panel may afford the evidence proffered by that expert or any competing evidence.

Enhanced discretion to direct costs to be paid by any person including utility shareholders

The Commission has included a provision in the draft rule explicitly allowing it to direct costs to be paid by any participant or other person, including the shareholders of a participant utility or regulated service provider. This is consistent with the Commission's broad discretion under Section 21 of the *Alberta Utilities Commission Act* which provides that the Commission "may order by whom and to whom its costs and any other costs incidental to any hearing or other proceeding" are to be paid. The Commission will consider taking such a step if a participant or other person in its proceedings fails to comply with the Commission's rules or directions, or exhibits conduct that impedes the fair, expeditious and efficient resolution of any issue.

No more comments on cost claims

The *Alberta Utilities Commission Act* provides the Commission with very broad discretion over cost recovery in its proceedings. The Commission considers a number of factors, set out in Section 9.1 of its proposed Rule 022, including whether the intervener contributed to the Commission's understanding of the issues.

The Commission considers that it is in the best position to assess the question of whether an intervener's participation contributed to a better understanding of the issues in a given proceeding, as well as the other factors set out in the proposed rule. In keeping with its goal of ensuring fair, expeditious and efficient resolution of the matters before it, the Commission has

removed the process for parties adverse in interest to comment on the merits of their respective cost claims, as it is not necessary for the Commission to exercise its broad discretion in deciding whether to award costs. This will further reduce the regulatory burden associated with the Commission's cost regime.

Cost claims for negotiated settlements and other pre-application costs

The Commission has added a section to Rule 022 that specifies cost recovery is available for pre-proceeding costs. Given the possibility that parties may be able to settle matters before a formal application is filed, the Commission considers that allowing recovery of the costs of that settlement process is consistent with its goals to ensure efficient and fair outcomes in proceedings before it.

Review period

The Commission will review the scale of costs in Rule 022 in five years to determine whether further changes are necessary to adjust for inflation or changing market conditions. Input can be provided through the [AUC Engage platform](#).

Please submit email comments regarding the proposed amendments and calculations to leslie.diebolt@auc.ab.ca by August 10, 2022.

Any questions related to this bulletin should be directed to J.P. Mousseau at jp.mousseau@auc.ab.ca or Kristjana Kellgren at kristjana.kellgren@auc.ab.ca.

Alberta Utilities Commission