



Report of the AUC Procedures and Processes Review Committee

August 14, 2020

C. Kemm Yates, Q.C., Committee Chair
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AUC Procedures and Processes Review Committee

August 14, 2020

Ms. Carolyn Dahl Rees, Chair
Alberta Utilities Commission
1400, 600 Third Avenue S.W.
Calgary, Alberta T2P 0G5

Dear Ms. Dahl Rees:

AUC Bulletin 2020-17, issued on May 8, 2020, appointed us as an “independent expert committee to assist in improving efficiency of rates proceedings.” Our Terms of Reference required the Committee to report to you on how the Commission’s processes can be made more efficient within the requirements of procedural fairness, and how the new approaches should be implemented.

The Committee has concluded that significant improvements in the efficiency and effectiveness of rates proceedings can be implemented through assertive case management within the Commission’s existing legal framework, without requiring legislative change. We make 30 recommendations for reforms that, in our view, may be implemented by the Commission with optimal respect for the requirements of procedural fairness and with minimal legal risk.

We are pleased to submit the *Report of the AUC Procedures and Processes Review Committee* for your consideration.

The Committee members are available to review the *Report* with you at your convenience.

Yours truly,



C. Kemm Yates, Q.C.
Committee Chair



David J. Mullan
Member



Rowland J. Harrison, Q.C.
Member

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Executive Summary

On May 8, 2020, the Alberta Utilities Commission (“AUC” or “Commission”) announced that it had appointed an independent AUC Procedures and Processes Review Committee (“Committee”) to “review the Commission’s rate application adjudicative processes and procedures and make recommendations...on how process and procedure steps can be made more efficient or eliminated altogether.”¹ The appointment of the Committee was one of several ongoing initiatives by the Commission in response to the enactment in June 2019 of the Alberta *Red Tape Reduction Act*.²

The Terms of Reference (“TOR”) for the Committee³ required it “to propose how the Commission’s processes can be made more efficient within the requirements of the principles of procedural fairness, and how the new approaches should be implemented.” The TOR stated that the Commission was particularly interested in the Committee’s advice on 11 specific issues, but that the Committee was not restricted to only those issues.

The Committee was directed to consult with Commission members, Commission staff and participants in Commission rate-setting proceedings “as deemed necessary by the Committee.”

An examination of the AUC’s procedures and processes must be informed by a clear understanding of the Commission’s role and responsibilities as prescribed by its constating statutes. The Committee therefore undertook a detailed analysis of the legal framework—both substantive and procedural—within which the Commission functions currently, with particular emphasis on legislative provisions that directly or indirectly establish the procedural framework for the AUC’s utility rate regulation mandate.⁴

The Committee conducted consultations through written submissions as well as telephone and virtual meetings.

The Committee has concluded that the process and procedure issues that have been identified through the TOR and the consultation process are primarily the result of an overly conservative approach to regulatory process. In particular, it appeared to the Committee that the Commission has, in process and procedural matters, tended to be unduly receptive and responsive to the desires, expectations and schedules of parties to its proceedings. The Commission is a quasi-judicial, inquisitorial body mandated to make specified determinations as prescribed under applicable statutes. In the discharge of its mandate, it is the needs of the Commission that should prevail, rather than those of the participating parties. The

¹ [Bulletin 2020-17](#): AUC creates independent expert committee to assist in improving efficiency of rates proceedings (May 8, 2020).

² SA 2019, c R-8.2.

³ [Appendix II](#) to this Report of the AUC Procedures and Processes Review Committee (“Appendix II”).

⁴ See [Appendix III](#): Legal Framework and Risk Assessment (“Appendix III”), sections 1 through 3.

Commission's processes and procedures should be designed and applied accordingly, while respecting the requirements of procedural fairness.

Under its enabling legislation, the AUC is the master of its procedure and processes. The Commission has the power to implement an assertive approach to its process, focused on the regulator's information requirements and on procedural efficiency. Specifically, the Committee recommends:

THAT the Alberta Utilities Commission apply an overarching, assertive case management approach to the development and implementation of the Commission's procedures and processes and the implementation of the Committee's specific recommendations.

The Committee has concluded that the consistent application of this approach to the 11 specific issues listed in the TOR (particularly "Scoping of issues" and "Scheduling"), as well as the additional issues identified by the Committee, would address most if not all of the identified concerns.

The essential conclusion of the Committee is that the AUC can and should exercise its existing powers to improve its regulatory efficiency and expedition through assertive case management.

The TOR specifically required the Committee to include in its Report "a discussion of associated risks, in particular legal risks..." of implementation of any recommendations that it may make. Based on its comprehensive analysis of the applicable statutory framework and Canadian jurisprudence,⁵ it is the Committee's considered opinion that active and responsible case management can and should be undertaken by the Commission without fear that judicial review through appeal will result in constraints or delays in the fulfillment of its statutory mandate. An attentive, balanced, and reasoned approach to the exercise of the Commission's discretionary powers over procedural matters should almost invariably secure vindication on appeal. Further, the phrase "legal risk" disguises the fact that a "successful" legal challenge in this context would provide guidance to the Commission for the future. The legal risk is, in a word, minimal.

Finally, the Committee was to consider recommendations for legislative change that would improve the efficiency of the Commission's processes and procedures. The Committee has concluded that it is within the current authority of the Commission to implement both the general approach of assertive case management and the Committee's specific recommendations. Accordingly, the Report does not include any recommendations for legislative change. It does include a recommendation that the Commission review its *Rules of Practice* with a view to supporting implementation of the recommendations of the Committee.

⁵ See [Appendix III](#), Section 4, Legal Risk Assessment.

1. Introduction

1.1. Appointment of the Committee

On May 8, 2020, the Alberta Utilities Commission, Alberta’s independent utilities regulator, issued Bulletin 2020-17 announcing that it had appointed an independent AUC Procedures and Processes Review Committee to “review the Commission’s rate application adjudicative processes and procedures and make recommendations...on how process and procedure steps can be made more efficient or eliminated altogether.”⁶ The Terms of Reference for the Committee are appended to Bulletin 2020-17 in Appendix I of this Report and are exhibited separately as Appendix II.

The genesis of the appointment of the Committee can be traced to the June 2019 enactment of the Alberta *Red Tape Reduction Act (“RTR Act”)*⁷, “with the objective of reducing regulatory burden to enhance economic growth, innovation, competitiveness and investment in Alberta business.”⁸ In response to this enactment, on July 17, 2020 the Commission announced that it would consult broadly with stakeholders “to explore ways to further reduce regulatory burden.”⁹ The Commission invited interested stakeholders to submit written comments on initiatives to reduce regulatory burden and announced that it would host a roundtable on October 4, 2019 to discuss comments received. Roundtables on the Commission’s draft 2019-2022 Strategic Plan¹⁰ followed on October 28 and 29.

In its 2019-2022 Strategic Plan, formally tabled in December 2019, the Commission adopted “efficiency and limiting regulatory burden” as one of four themes under which it proposed to reposition itself to meet the current challenges that it faces.

On February 5, 2020, the Commission’s regulatory efficiency working group submitted its “Improving Regulation Report” to the government, committing the AUC to a number of initiatives, including: “Simplifying Processes and Rules”.

The Commission’s announcement of the appointment of the Committee followed with the release of Bulletin 2020-17 on May 8, 2020.

1.2. Terms of Reference

The Committee’s Terms of Reference state that the Commission “is committed to reforming its processes and procedures and will look to the Committee’s findings and recommendations to

⁶ *Supra*, note 1.

⁷ SA 2019, c R-8.2.

⁸ [Commission Announcement July 17, 2019](#): Regulatory burden stakeholder consultation (“Roundtable Announcement”).

⁹ *Ibid.*

¹⁰ [2019-2022 Strategic Plan](#).

inform its approach.”¹¹ The Committee “is to propose how the Commission’s processes can be made more efficient within the requirements of the principles of procedural fairness...”.

The TOR identified 11 issues on which the Committee’s advice is sought, but did not restrict the mandate to only those issues. The Committee is required to include in its advice on any recommended reforms “a discussion of associated risks, in particular legal risks...”.

The Committee was instructed to consult “with Commission members, Commission staff, and counsel and participants in Commission rate-setting proceedings...” as it deemed necessary. The Committee was given full discretion to determine its processes.

2. Committee Process

2.1. Documentation Review

In accordance with the TOR, the Commission provided the Committee with relevant background documentation. This included submissions received by the Commission in its “Regulatory burden stakeholder consultation” announced on July 17, 2019¹² and other submissions made directly to the office of the Associate Minister of Red Tape Reduction. The Committee also reviewed the transcript of the October 4, 2019 roundtable held by the Commission, the results of that roundtable as reported in Commission Bulletin 2019-18,¹³ and summaries of the Commission’s October 28 and 29 strategic plan roundtables.

2.2. Consultations

2.2.1. Alberta Utilities Commission

Members of the Commission were invited to engage in direct consultations with the Committee, either in writing or by virtual meeting or conference call. The Committee received one written submission and conducted one interview by conference call in response to this invitation.

The Committee consulted with the former and current Chairs of the Commission, via conference call.

The Committee conducted several conference call meetings with senior staff of the Commission.

¹¹ [Appendix II](#).

¹² Roundtable Announcement.

¹³ [AUC Bulletin 2019-18](#): Regulatory burden reduction, AUC roundtable report and next steps (October 18, 2019).

2.2.2. Stakeholders

The Commission’s Bulletin 2020-17 announcing the appointment of the Committee included an invitation from the Committee to interested stakeholders to provide comments.¹⁴ All comments received in response to this invitation were posted to the Commission’s Engage portal.¹⁵

On May 29, the Committee announced that stakeholders who had made submissions could submit comments on the submissions of other stakeholders.¹⁶ Submissions received in response to this announcement were also posted to the Commission’s Engage portal.

On July 14, the Committee advised stakeholders that it had been requested by the Commission to offer a further opportunity to stakeholders to consult directly with the Committee. In response to this invitation, the Committee held further virtual consultations with several individual stakeholders, on the basis of the Chatham House Rule. No additional documentation was presented to the Committee during these consultations.

The Committee carefully reviewed and considered all written and oral submissions.

2.3. The Committee Report

The deliberations of the Committee and, ultimately, the recommendations that are contained in this Report have been informed by our review of the relevant documentation and our consultations with stakeholders, Commission Chairs, and Commission members and staff.

3. Context

3.1. Assumptions

“Regulatory lag” and “regulatory burden” are universally invoked as criticisms of regulatory institutions and processes. The Committee is not aware of any regulated entity having ever argued that regulation should take longer and cost more; it is not controverted that regulation takes time and imposes costs.

The real question is whether regulation is taking longer and costing more than necessary to meet its public purpose goals. Is it “efficient”, not in the sense of taking little time at minimal cost, but in the broader sense of accomplishing the goals of regulation in a reasonable timeframe, at reasonable cost, which cost is outweighed by the benefits that regulation delivers, and that respects the principles of procedural fairness?

¹⁴ *Supra*, note 1.

¹⁵ [Engage consultation page](#): Rate application adjudicative processes and procedures.

¹⁶ [2020-05-29 Invitation for Reply Comments](#).

The question for the Committee, however, is narrower:

[H]ow the Commission's processes can be made **more efficient** within the requirements of the principles of procedural fairness...[emphasis added]¹⁷

Accordingly, the Committee has proceeded from the simple assumption that there is always room for improvement.

3.2. Areas of Concern

The documentation and submissions reviewed by the Committee identified several elements of the Commission's recent processes and procedures of particular concern. In these areas, the Committee has identified potential improvements in efficiency, without compromising principles of procedural fairness.

Most of the concerns raised directly with the Committee come within the 11 specific issues listed in the Committee's Terms of Reference and will be discussed separately in Section 5 of this Report. Other concerns that were raised with the Committee are also discussed there.

Before turning to specific issues, however, the Committee reports that it has identified a pervasive theme permeating many of the submissions – a theme implying that, in managing its procedures and processes in specific proceedings, the AUC is more reactive than proactive. For example, several submissions expressed concern about what was referred to as “scope creep”, describing a tendency for the issues raised by particular applications to expand throughout the course of a proceeding. The solution, it was submitted to us, is for the Commission to be more assertive in defining issues and resisting the tendency to countenance continuous expansion of those issues. Similarly, it was suggested that concerns with respect to scheduling and multiple rounds of interrogatories (often leading to associated motions and, in turn, delays) could be addressed by greater decisiveness on the part of the Commission.

A recurring phrase to describe the Commission in this context was “risk averse”, referring to a tendency on the part of the Commission to default to further process and to defer to the proposition “the more information the better” in the discharge of its mandate and in an effort to avoid judicial review through appeal on procedural fairness grounds.

Further discussion of this issue requires a clear understanding of the role of the Commission in fulfilling its mandate and meeting its responsibilities. The Committee sets out its understanding in Section 4 of this Report.

¹⁷ *Supra*, note 3.

3.3. AUC Ongoing Initiatives to Improve Regulatory Efficiency

The AUC reports that it has consistently sought efficiency and cost accountability in delivering its work.¹⁸ This approach has been impacted by the passage, in 2019, by the Alberta government of the *RTR Act*, with the objective of reducing regulatory burden to enhance economic growth, innovation, competitiveness and investment in Alberta businesses.

One of the responses of the AUC to the *RTR Act* has been to initiate broad consultation with stakeholders to explore ways to further reduce regulatory burden. The Commission's areas of focus for the consultations include its rules of practice, procedural steps that may have become outdated or unnecessary, and opportunities to streamline and improve regulation and adjudication processes.¹⁹

The appointment of the Committee is the most recent initiative of the Commission in its drive to enhance efficiency and encourage expedition in an effort to reduce regulatory burden and regulatory lag. The Committee recognizes that it is part of a much larger and ongoing process. It also understands that the Commission has already implemented a number of changes to bring more efficiency to its processes.

Some of the measures already implemented are referred to or itemized in Bulletin 2020-17 announcing the creation of the Committee:

- inviting written comments from stakeholders on initiatives to reduce regulatory burden, then hosting three stakeholder roundtables to discuss those comments in the fall of 2019;
- holding more technical meetings aimed at reducing the number of information requests;
- directing parties to narrow issues and negotiate outcomes where possible; and
- conducting focused, shorter hearings, some with immediate decisions.

Other steps taken by the Commission include:

- publishing its strategic plan (December 2019), which focuses on what has been done and plans to further remove unnecessary regulatory burden;
- the AUC's regulatory efficiency working group provided the Alberta government with its Improving Regulation Report, which sets out what the Commission intends to do to improve AUC regulation, and reports its progress against those objectives (February 2020);
- establishing the Regulatory Burden Reduction Task Force;
- Project Green Light; and
- the first AUC Annual Report Card ("Report Card").²⁰

¹⁸ Roundtable Announcement.

¹⁹ *Ibid.*

²⁰ The various recent steps taken by the AUC to effect reduction of regulatory burden are described in more detail in the [AUC Report Card](#), released June 19, 2020.

These initiatives of the Commission have met with generally favourable reviews from stakeholders that provided comments to the Committee.

The Commission has also acted with initiative in dealing with two sources of delay that were identified by stakeholders—confidentiality motions and the use of aids to cross-examination (“ATCs”).

As discussed in Section 5.6 of this Report, the AUC revised Rule 001, its *Rules of Practice* to facilitate the exchange of confidential information and enhanced its eFiling system to further reduce delay (February 2020).

As discussed in Section 5.9, the Commission established guidelines for utilization of ATCs which are intended to expedite cross-examination using such aids.

One source of delay and possible regulatory lag was characterized as the Commission’s longstanding culture of caution and conservatism. One criticism that the Committee heard was that the Commission appeared to have a policy that more process was better process. The appearance was that the Commission was risk averse—wanting to avoid appeals on grounds of procedural fairness. It was described as pursuing a comprehensive record to show stakeholders and the public that the process was a fair one, and that it was appropriately discharging its mandate. This could include requiring further information from utilities that have filed deficient applications (rather than rejecting the application for deficiencies), permitting multiple rounds of information requests, allowing extensive cross-examination, and not constraining any opportunity to be heard.

The AUC has already taken steps to seek a better balance between conservatism of approach and efficiency of regulation, including:

- reviewing its record requirements, assessing at what point the costs and delays of seeking out all potentially relevant information exceed any likely gains to be achieved by further inquiry, and
- reorganizing its legal resources. Earlier this year, the AUC lawyers were assigned to the Commission’s various divisions, including the Rates Division, with the objective of implementing a more business-oriented, less legalistic approach to regulation.

It should also be noted that the Commission has had an ongoing focus on improving its processes, expediting regulation, and minimizing regulatory burden. As long ago as 2010, the AUC established performance standards for processing rate-related applications.²¹ Bulletin 2010-16 established performance standards for record development, from application filing to the close of the record. It also reiterated the Commission’s previous commitment to issuing disposition documents (acknowledgement letters or decision reports) for all rate-related

²¹ [Bulletin 2010-16](#): Performance Standards for Processing Rate-Related Applications (April 26, 2010).

applications within 90 days of the close of the record, and stated the AUC's intention to meet the 90-day performance standard 100 per cent of the time.

In AUC Bulletin 2015-09²² the Commission updated its performance standards for processing rate-related applications. The performance standards are intended to provide consistent and predictable timelines and performance measures for a full cycle application process, from the time an application is filed with the AUC until a decision is issued. There are six process types, ranging from one requiring No Notice and resulting in a disposition document within 5-10 days, to the Full Process (including an oral hearing, argument and reply argument) with a disposition document within 233-295 days. The practice and the intention of the Commission is to meet the performance standard for the record development phase 80 per cent of the time.²³

The practice of the Commission is to analyze each application upon receipt for the purpose of determining and employing the appropriate process that will enable the discharge of the AUC's statutory mandate with the minimum regulatory burden. We understand that this has led to fewer oral hearings and improved compliance with performance standards.

The Report Card indicates that, in Rates proceedings, the Commission met its record development performance measure 64% of the time on a "binary" basis²⁴, but 94% of the time when adjusted for consideration of factors beyond the Commission's control.²⁵ It met its disposition document performance measure 94 per cent of the time, on both binary and adjusted bases.²⁶

However, a number of proceedings in recent years took far longer than the Full Process performance standard. Those proceedings were the focus of the criticisms and suggestions that were communicated to the Committee by the stakeholders and Commission staff and members. They were also the focus of a September 2019 AUC internal Rate Proceeding Lag Analysis ("Lag Analysis"), which was conducted to identify the causes for delay in 12 rates proceedings registered from January 1, 2015 through December 31, 2018 that took inordinate times to complete. The Lag Analysis concluded that most rates proceedings met or beat AUC targets. For the 12 proceedings that did not, the Lag Analysis identified the length of delays by type of request (motion, extension, application update, information request round, negotiated settlements, other), by utility and by initiator. The results of the Lag Analysis enabled a focus on areas of concern, and informed the Terms of Reference for the Committee.

²² [Bulletin 2015-09](#): Performance standards for processing rate-related applications, (March 26, 2015). This was preceded by [Bulletin 2010-16](#), *ibid.*, which outlined performance standards for processing gas and electric rate-related applications.

²³ *ibid.*

²⁴ In this context, "binary" meaning whether the relevant performance measure was met or not.

²⁵ [Report Card](#), Appendix E-Performance Measures, Rates, 3.b, page 39. "64 per cent-Binary (56 of 87); 94 per cent-Adjusted when factors beyond AUC's control were considered (76 of 81).

²⁶ Report Card, Appendix E-Performance Measures, 3.c, page 39—84 of 88 in each case.

In the Committee’s view, the Lag Analysis reveals that many of the delays experienced in the 12 “outlier” rates proceedings can be attributed to actions of the participants (e.g. utility requests for adjournments to permit the preparation and filing of updated applications, motions by many parties for extensions of time for various reasons, including to file responses to information requests (“IRs”), motions by interveners for orders directing further and better responses to IRs, requests by interveners for additional rounds of IRs, time for negotiation of potential settlements), but that the delays could have been reduced through more assertive case management by the Commission members hearing the cases.²⁷

4. Role of the AUC

4.1. The Nature of the Commission’s Specific Responsibilities

Any examination of “the processes and procedures of the [Alberta Utilities] Commission for rate-setting cases with the objective of making them more efficient and productive”²⁸ must begin with a clear understanding of the Commission’s role and responsibilities as prescribed by its constating statutes.

For present purposes, that role revolves, firstly, around the Commission’s responsibilities under the *Public Utilities Act* (“PU Act”)²⁹ to “**fix** just and reasonable” rates, including, *inter alia*, to “**fix** proper and adequate rates and methods of depreciation...”, to “**fix** just and reasonable standards...”³⁰, to “**determine** a rate base”, and to “**fix** a fair return on that rate base.”³¹ These responsibilities are vested exclusively in the Commission. While the Commission must give notice to and hear interested parties before making these determinations, it is not the primary role of the Commission to adjudicate competing claims as to what constitute “just and reasonable rates”, except to the extent that it might find it necessary do so in the course of arriving at the Commission’s own conclusions.

Similarly, under section 121(2) of the *Electric Utilities Act* (“EU Act”),³² when considering whether to approve a tariff application, “the Commission **must ensure** that [*inter alia*] (a) the

²⁷ Individual proceedings before the Commission are usually assigned to one or more Commission members, referred to in section 13 of the *Alberta Utilities Commission Act*, SA 2007, c A-37.2 (“AUC Act”) as “a division of the Commission...”. References to the “Commission” throughout this Report include such a division of the Commission designated under section 13. The Committee notes that what is, strictly speaking, “a division of the Commission” under section 13 is widely referred to, within and outside the Commission, as a “Panel”, with the presiding member of the Panel being identified as “Panel Chair”. Where the individual members of the Commission are being referred to, as distinct from the Commission as a corporation under section 2(1) of the *AUC Act*, they are described either as “Commission members” or “members of the Commission.”

²⁸ TOR, [Appendix II](#).

²⁹ RSA 2000, c P-45.

³⁰ *PU Act*, s. 89 [emphasis added].

³¹ *PU Act*, s. 90. [emphasis added].

³² SA 2003, c E-5.1.

tariff [which comprises rates³³ and terms and conditions³⁴] is just and reasonable [and] (b) the tariff is not unduly preferential, arbitrarily or unjustly discriminatory... [emphasis added]" This imposes an affirmative obligation on the Commission that clearly goes beyond merely choosing between competing positions put forward by interested parties.

In addition to these explicit assignments of specific responsibilities to the Commission, it was submitted to the Committee that the Commission has "a broad public interest mandate".³⁵ While it is often said of regulatory tribunals that they have a public interest mandate, the Committee notes that, under the *AUC Act*, the only Commission powers that are expressly couched in terms of the public interest are the provisions respecting joint hearings and facilities approvals.³⁶ Neither the *PU Act* nor the *EU Act* refers to the public interest in allocating general rate-making or tariff approval authority to the Commission. However, we note that Commission members are required, "in exercising powers and in discharging functions and duties", to act in the public interest.³⁷ In any event, even assuming that the Commission has a broad public interest mandate in the context of its rate-setting and tariff approval responsibilities, the responsibility for determining the public interest would rest squarely with the Commission, not with the parties to its proceedings.³⁸

The Commission's responsibilities obligate it to reach its own conclusions on certain matters, and not merely to adjudicate between the parties before it in any particular proceeding. It follows that an important purpose of "the processes and procedures of the Commission" is to enable the Commission to fulfill its statutory mandate.

The Commission's processes and procedures also play a critical role in meeting the Commission's obligations with respect to procedural fairness and certain statutory procedural requirements. Procedural fairness, however, is not an end in itself but, rather, is to be considered in the context of the statutory framework within which it arises. Here, procedural fairness arises within the overall requirement that the Commission itself must "fix" just and reasonable rates and "ensure" that a tariff is just and reasonable. In that respect, the Commission's processes and procedures establish the means by which a record is compiled that meets the Commission's needs in fulfilling its statutory responsibilities.

A central question for the Commission in establishing and applying its processes and procedures is, therefore, whether its own information requirements will be satisfied, while at the same time the procedural rights of parties are respected. This overarching principle informs

³³ *EU Act*, s. 1(a)(zz)(i). The term "rates" is defined in s. 1(1)(pp) as "prices, rates, tolls and charges."

³⁴ *EU Act*, s. 1(a)(zz)(ii).

³⁵ Submission of the Consumers' Coalition of Alberta (May 22, 2020).

³⁶ *AUC Act*, sections 16 and 17 respectively.

³⁷ *AUC Act*, section 6(1)(a).

³⁸ A concept that was explicitly acknowledged in some submissions to the Committee, e.g. submission of AltaLink (May 22, 2020).

an understanding of the statutory burden of proof that rests on applicants³⁹ and their procedural right to make their case as they choose.

The Commission should, therefore, be expected to be an active participant in managing the processes and procedures that enable it to make its mandated determinations. The Commission would not properly meet its responsibilities were it to adopt a merely passive role, largely leaving it to other parties to define issues and determine the Commission's information needs for it.

In the Committee's view, many if not all of the issues around the Commission's processes and procedures could be addressed by the Commission adopting a more direct, assertive management approach that reflects the role of those processes and procedures in developing the record the Commission needs in order to meet its statutory obligations.⁴⁰ The Commission's processes and procedures should be designed and applied through the lens of the Commission's own needs and responsibilities, while respecting the procedural rights of parties.

It is implicit in this proposition that the challenge is to strike the appropriate balance between these two potentially competing dynamics. Many factors come into play in meeting that challenge. Without pretense to comprehensiveness, the Committee offers the following observations that in its view are particularly pertinent in the present context.

First, the Commission is an "expert" tribunal, the members of which are presumably to be appointed having regard to the relevance of their individual backgrounds to the Commission's mandate. Further, the Commission is supported by a professional staff with relevant expertise. It is to be expected that this institutional expertise would play a role in the Commission's approach to fulfilling its mandate. At the same time, applicants have the onus of establishing their case and the procedural fairness right to make their case as they choose. So too do other parties have the right to choose how to present their cases. In meeting their onus, applicants may well bring deeper knowledge and wider expertise in specific cases, as may other parties. At the end of the day, however, it is for the Commission to make its mandated determinations for itself. As an expert tribunal, the Commission (taking into account the parties' evidence and submissions) is expected to know what it needs to know and should actively manage its processes and procedures accordingly.

Second, it is for the Commission to determine, as an expert tribunal, whether it has sufficient information for the purposes of making its determinations. Applicants and other parties are the sources of information in individual proceedings and are entitled to submit relevant information. However, in the context of the Commission's specific responsibilities, more information is not necessarily better.

³⁹ *PU Act*, s 103(3); *EU Act* s 121(4).

⁴⁰ As suggested to the Committee by one stakeholder: "The Commission has to own the process."

Third, and analogously to the foregoing proposition with respect to information, more process does not necessarily lead to better outcomes. As is discussed further in Section 6.1 of the Report,⁴¹ proportionality must enter into the assessment of procedural requirements. As noted in Section 3.2 of this Report, it was suggested to the Committee in this context that the Commission has tended to be “risk averse”, leading to more process and delays. In our view, the appropriateness of processes and procedural requirements must be evaluated in the broad context of the Commission’s core responsibility, which is to fulfill its statutory mandate to make certain specific determinations.

Fourth, as is implicitly acknowledged in our Terms of Reference, the Commission, as a public agency, has a responsibility to ensure that its processes and procedures are “efficient and productive”.⁴² At the same time, it must be recognized that measures intended to improve efficiency and productivity can undermine the requirements of procedural fairness (and, indeed, the needs of the Commission itself to develop a comprehensive record).

In formulating its recommendations, the Committee has been mindful of the need to respect the requirements of procedural fairness and to avoid efficiency and productivity measures that could impinge on those requirements or on the ability of the Commission to satisfy its responsibility to make fully-informed determinations. The Committee believes that the more active, assertive management role for the Commission that is proposed overall and in several of the Committee’s recommendations strikes the appropriate balance. As discussed further in Section 6, the Committee has concluded that the legal risks of implementing its recommendations are minimal.

5. The Issues

5.1. Introduction

The Terms of Reference for the Committee state that the AUC is particularly interested in the Committee’s advice on 11 specific issues but that the Committee is not restricted to only those issues.⁴³ This Section of our Report discusses each of the 11 identified issues, as well as other issues that arose in the course of the Committee’s review.

As discussed in Section 4, the Committee has concluded that the efficiency and productivity of the AUC’s processes and procedures would be improved if the Commission were to adopt an assertive case management approach that is more reflective of the Commission’s own needs and responsibilities, while respecting the principles of procedural fairness. This Section discusses the application of this general approach to specific issues. As discussed in more detail

⁴¹ And in greater detail in [Appendix III](#): Legal Framework and Risk Assessment.

⁴² Terms of Reference. See also Section 2.2 of the Commission’s [Rules of Practice](#) providing that the rules must be liberally construed “to ensure the fair, expeditious and efficient determination on its merits of every proceeding.”

⁴³ [Appendix II](#).

in Section 6, the Committee's overall conclusions are that the legal risks of implementing its recommendations are minimal.

The Committee emphasizes, however, that, while the following discussion considers each of the specific issues individually, the effectiveness of the recommended approach would depend in no small measure on its **general** application, reflecting the fact that several of the specific issues are interconnected. For example, were the Commission to adopt a more assertive approach to scoping (Issue #1 in the Committee's Terms of Reference) at an early point in its process, that step could be nullified by a subsequent lax approach to motions (Issue #7) that resulted in expansion of the scope. Similarly, establishing a schedule (Issue #2) would be of little effect were the Commission to take a lenient approach to motions to subsequently amend or extend that schedule. The approach of assertive case management that is proposed by the Committee should, therefore, be applied generally by the Commission, not just to each of the specific issues in isolation from each other.

The assertive management approach is conceptually similar to the practice of "case management" in Canada's civil⁴⁴ and criminal courts.⁴⁵ As applied in the courts, case management is a formalized tool for managing the steps in litigation or trials, including the potential appointment of a case management judge for, *inter alia*, the following reasons:

- (b) to promote and ensure the fair and efficient conduct and resolution of the action;
- (c) to keep the parties on schedule...⁴⁶

The case management judge need not be the trial judge.

The AUC itself has, within its existing authority, the direct ability to apply "case management" techniques, without the need to resort to any additional appointment to assist in this regard.⁴⁷ Therefore, in the Committee's view, a formalized case management process need not be implemented for the Commission. The Committee emphasizes, however, that several of its specific recommendations should be viewed by the Commission, and applied, as elements of a broad case management approach to its proceedings. There should also be an expectation that frontline responsibility for active case management should rest with the Commission members designated to hear any specific matter and the Panel Chair.

⁴⁴ See, e.g. *Alberta Rules of Court*, Part 4: Managing Litigation.

⁴⁵ *Criminal Code*, RSC 1985, c C-46, Part VIII.1.

⁴⁶ *Alberta Rules of Court*, Rule 4.13.

⁴⁷ See further the discussion of the Commission's powers in [Appendix III](#), Legal Framework and Risk Assessment.

5.1.1. Recommendations: Assertive Case Management

Recommendation #1⁴⁸

The Committee recommends that the AUC apply an overarching, assertive case management approach to the development and implementation of the Commission’s procedures and processes and to the implementation of the Committee’s specific recommendations.

Recommendation #2

In the context of specific proceedings before the Commission, it should be recognized that responsibility for implementing assertive case management, particularly with respect to Scoping and Scheduling, rests with the Commission members assigned to process the relevant application, led by the Panel Chair and assisted as appropriate by Commission staff.

5.2. Legal Principles Informing the Committee’s Recommendations⁴⁹

The primary sources of the Commission’s rate-setting authority are found in the umbrella *AUC Act*, and the three statutes that cover the gamut of the Commission’s rate-setting responsibilities – the *EU Act*, the *Gas Utilities Act (“GU Act”)*,⁵⁰ and the *PU Act*. While each of these four statutes contains provisions that deal with procedural matters or process, the critical provision is section 76(1)(e) of the *AUC Act*. It underscores the Commission’s role as by and large the “master of its own procedure”⁵¹ by conferring on the Commission the power to make “rules of practice governing the Commission’s procedure and hearings.” This authority has been exercised primarily through Rule 001, the Commission’s *Rules of Practice*. Procedural requirements are also to be found in other Rules, as well as more informal policies and the precedents established in Commission decision-making.

Where primary legislation is silent or incomplete as to the procedural content of an obligation to afford a hearing to affected persons, the common law of procedural fairness also becomes relevant, to the extent that it will make good the omission of the legislature. In the context of a regulatory agency’s procedural rule-making powers, this means that the common law serves as a standard against which the exercise of that rule-making power will be measured. Where the rules themselves confer discretion on the agency as to aspects of the application of procedural rules, the common law also provides a basis for assessment of rulings made in individual proceedings.

However, the principles of procedural fairness do not impose a single, invariable standard; they vary in intensity with context. This means that, for a utilities regulator such as the Commission,

⁴⁸ The recommendations in this Report are numbered consecutively and are consolidated in [Appendix IV](#).

⁴⁹ For a more extensive discussion of this issue and applicable citations and sources, see [Appendix III](#), Legal Framework and Risk Assessment.

⁵⁰ RSA 2000, c G-5.

⁵¹ “[E]very administrative body is the master of its own procedure and need not assume the trappings of a court”: *Knight v. Indian Head School District No. 19*, [1990] 1 SCR 653, at para. 49 (*per* L’Heureux-Dubé J).

the requirements of procedural fairness will be different (and often less onerous) than the rules that apply, for example, in matters of professional discipline. It is also the case that, while courts will frequently review procedural fairness challenges on a correctness standard, there will nonetheless be considerable deference or respect paid to an agency's procedural rules or rulings. This is especially so where the agency is operating in a highly specialized, policy infused setting, and where the legislature has indicated its confidence in the judgment of the regulator by conferring wide-ranging discretion to make rules and issue rulings. The duty of procedural fairness is, therefore, not a licence for a court to engage in micro-managing the procedural rules and rulings of a specialized regulator such as the Commission. Rather, the duty calls upon a reviewing court to ask whether, in all the circumstances, the decision-maker deprived the affected party of a genuine opportunity to know and respond to the issues at stake in the matter before the Commission.

It is against that background that the Committee has assessed the procedures of the Commission and developed its recommendations for change. The Committee's assessments have also been informed by a recognition that the common law itself and the Commission's *Rules of Practice*, Sections 2.2 and 2.3, treat the demands of procedural fairness not in absolute terms but rather as part of a balancing exercise in which the procedural claims of affected parties have to be evaluated in relation to the "expeditious and efficient" discharge of a decision-maker's statutory mandate. This consideration has special application in the context of broad, public interest decision-making such as rate-setting for public utilities. It also finds more general support in the Supreme Court's endorsement of a principle of proportionality in the procedures governing civil litigation, a concept that has as much, if not more resonance in the Commission's policy-centered, rate-setting mandate. To take just one example, it is reflected in the authority of the Commission to deploy its costs powers to create incentives for focused and efficient participation in rates hearings.

In summary, we have located the exercise of our mandate within the relevant primary legislation, the Commission's own procedural rules, and the overlay of common law procedural fairness. However, in this context, the overall message of all three sources is that the Commission, in general, has considerable room for maneuver in its adoption of procedures and the making of procedural choices. The Committee returns to this theme later in the Report in our consideration of Legal Risk.⁵²

5.3. Scoping of Issues

There was widespread support in the submissions to the Committee for the Commission to issue a List of Issues – "scoping" – early in the process established for each individual proceeding. Several submissions commented on the central role that this step should play in

⁵² Section 6, *infra*.

focusing proceedings, described in one submission as “a foundational issue”⁵³ and in another as “[t]he critical first step...”.⁵⁴

The Committee agrees that early scoping by the Commission of the issues to be addressed in each proceeding should be formalized. In the Committee’s view, the role of scoping in shaping both the substantive focus and the process framework of individual proceedings is central.

It is important to restate in this context our conclusion that it is the core role of the Commission to make its statutorily assigned determinations and not to merely adjudicate between the competing views of parties.⁵⁵ It is ultimately the responsibility of the Commission to settle the issues that are raised by each individual application before it. The Commission’s early identification of those issues should be the focus of the subsequent steps in the process, serving to avoid the introduction of peripheral or extraneous considerations.

At the same time, procedural fairness (including particularly the rights of parties to make their case as they choose) requires that applicants and other interested parties should have an opportunity to make their submissions on what issues are raised by each particular application. Furthermore, the Commission itself would likely benefit from hearing submissions on the appropriateness of the Commission’s proposed List of Issues.

The Committee recommends therefore that the Commission issue a formal Directions on Procedure document for each proceeding that includes a preliminary List of Issues. The Directions on Procedure should, as a step in the Schedule discussed in the next Section, include a fixed date for written comments to be filed on the preliminary List of Issues. The Commission would thereafter issue a final List of Issues that should generally be adhered to.

The Committee’s recommendations on scoping assume a rigorous assessment of the completeness of each application, measured against the Commission’s minimum filing requirements, **before** even a preliminary List of Issues is compiled.

The List of Issues should guide the Commission’s subsequent approach to questions of relevance, particularly in the context of Interrogatories (Issue #5 in the Committee’s Terms of Reference)⁵⁶ and Cross-examination (Issue #6)⁵⁷. At the same time, the Commission would retain the discretion to revise the List of Issues where, as a proceeding evolved, it became clear that it was appropriate to do so⁵⁸, while strenuously resisting incrementalism, or “scope creep”.

⁵³ Submission of ATCO (May 22, 2020).

⁵⁴ Submission of AltaLink (May 22, 2020).

⁵⁵ See Section 4 (Role of the AUC).

⁵⁶ Discussed in Section 5.7 below.

⁵⁷ Discussed in Section 5.8 below.

⁵⁸ The need to retain flexibility was emphasized in the submission to the Committee from the Utilities Consumers Advocate in particular (May 22, 2020). See also the submission of the Consumers’ Coalition of Alberta (May 22, 2020).

The overarching consideration should be the Commission's own determination, informed by parties' submissions, of the issues that it must address in meeting its statutory responsibilities.

5.3.1. Recommendations: Scoping

Recommendation #3

The Committee recommends that the Commission issue Directions on Procedure for each application that include a preliminary List of Issues, and that a date for filing written comments on the List of Issues be fixed in the Schedule for that proceeding. Thereafter, there should be an onus on the parties to persuade the Commission that there are exigent circumstances that make it appropriate to vary the List of Issues, based on the record to date in the particular proceeding.

Recommendation #4

The Committee recommends that the Commission apply the List of Issues as the framework for assessing the relevance of subsequent steps in each proceeding, such as interrogatories and motions to amend or expand the List of Issues.

5.4. Scheduling

Several submissions proposed that the Commission should establish, at the outset, a schedule for each proceeding and generally adhere to that schedule. The Committee agrees. A fixed schedule, specific to each proceeding before the Commission, would benefit all parties, including the Commission itself.

The Committee recommends therefore that, as a key element of the Directions on Procedure for each proceeding (discussed in the preceding Section 5.3), the Commission issue a Schedule, fixing dates, in the case of a proposed full oral hearing, for:

- the filing of the applicant's evidence
- interrogatories from the Commission to the applicant
- responses to Commission interrogatories
- interrogatories to the applicant from other parties
- responses by the applicant
- written motions with respect to interrogatories
- written responses by the applicant to motions
- written replies by motions applicants
- decision by the Commission on the motions
- evidence by interveners to be filed
- interrogatories to interveners
- responses by interveners to interrogatories
- written motions with respect to interrogatories to interveners
- written responses to motions

- written replies
- decision by the Commission on the motions
- reply evidence of the applicant
- hearing date

Appropriate modifications would be made for less than full oral hearing proceedings. Adjustments to the Schedule in the Directions on Procedure should be permitted only where the Commission is persuaded that delay is warranted to ensure that a record will be developed that meets the Commission's needs or where a party's procedural fairness rights would otherwise be infringed.

The Committee's recommended approach to both Scheduling and Scoping emphasizes the foundational role that these two issues should play in improving the efficiency of the Commission's process and procedures. It would, therefore, be essential that, from the outset, responsibility for settling Scheduling and Scoping for each specific application rest with the Commission members assigned to process the application, led by the Panel Chair, assisted as appropriate by Commission staff.

5.4.1. Recommendation: Scheduling

Recommendation #5

The Committee recommends that the Commission formalize the issuance of Directions on Procedure, including a schedule that establishes dates for each step of the proceeding.

5.5. Time Limits

Time Limits were not identified as one of the eleven specific issues included in the Committee's Terms of Reference. The potential introduction of fixed time limits is, however, related to the issue of Scheduling (Issue #2 in the Committee's Terms of Reference) and it is convenient to discuss the subject at this point in our Report.

Neither the *AUC Act* nor the Commission's *Rules of Practice* create any time limits for decision-making in rate-setting matters.⁵⁹ Section 2.2 of Rule 001 specifies that the Rules must be

... liberally construed in the public interest to ensure the fair, **expeditious** and efficient determination on its merits of every proceeding [emphasis added].

⁵⁹ [Rule 016, Review of Commission Decisions](#), Section 3(3), imposes a sixty day limitation period on the filing of applications for review of a Commission decision, though subject to Commission modification. Otherwise, Rule 016, Section 7 subjects Commission's review and variance hearings on which leave has been granted to the Commission's [Rules of Practice](#). Where appropriate, our recommendations on such process matters as scoping and scheduling as well as time limits should be read as also applying to such proceedings.

Section 2.3 then confers on the Commission the authority during a proceeding to “issue any directions that it considers necessary” to achieve those same ends. Beyond that, Rule 001 is silent with respect to time limits, though Section 32.1 contemplates process meetings in which time limits can be established for the various stages in the processing of specific applications. The Commission has, however, currently by Bulletin 2015-09, established “Performance standards for processing rate-related applications.” Those performance standards vary depending on the nature of the matters before the Commission. In the case of applications or other proceedings subject to a Full Written Process, the full cycle is fixed at 214 to 262 days and, for Full Process, it is 233 to 295 days. Included within the full cycle are performance standards for record development that the Commission aims to achieve 80% of the time. The Commission has also established a 90-day standard from the closure of the record for the issuance of disposition documents which it should meet 100% of the time. The Commission’s inaugural Report Card reports that this target was in fact met 96% of the time.⁶⁰

In the submissions that we received, at least one of the utilities was generally content with these as performance standards, though there was concern expressed that an 80% target was insufficiently rigorous. However, these and other utilities were critical of the Commission’s failure to meet these performance standards in several recent proceedings. Aside from the process costs of so-called regulatory lag, the utilities were also concerned about the extent to which delays in the completion of some hearings resulted in what was effectively retroactive rate-setting. This led some to argue for the imposition of time limits, though without any clear sense of whether that should be done by way of primary legislation, Cabinet regulation, or the Commission’s *Rules of Practice*.

There is no doubt that there were serious failures to meet the 2015 performance standards in 12 of the rate proceedings between January 1, 2015 and December 31, 2018. However, the Committee is not persuaded that this less than stellar record is a sufficient basis on which to establish more rigid time limits for rate-setting matters, especially since the Commission’s September 2019 Lag Analysis shows an acute awareness of the problem, and a resolve to more diligently monitor the progress of applications.

The Committee observes that time limits provisions figure prominently in the *Canadian Energy Regulator Act* (“*CER Act*”).⁶¹ Under that Act, the general pattern is that the Lead Commissioner establishes time limits for the disposition of various applications, with time running from the date at which the application is complete.

However, subject to exceptions, the Lead Commissioner is constrained by a legislated outer limit. Thus, for example, in the case of pipeline applications that result in a report to the Minister, the outer limit is 450 days,⁶² while in some other situations, such as applications

⁶⁰ [Report Card](#), Appendix E, at page 39.

⁶¹ Enacted by SC 2019, c 28, section 10.

⁶² Section 182(4).

respecting aspects of off-shore power lines and renewable energy projects, the maximum deadline is 300 days.⁶³

The Committee is also conscious of the fact that the Legislative Assembly of Alberta has recently enacted legislation conferring on Cabinet authority to make regulations establishing time limits for the full panoply of the Alberta Energy Regulator's authority and processes,⁶⁴ including situations where the Regulator otherwise has power to make rules creating time limits for decision-making.

Notwithstanding the arguments of the regulated utilities and the apparent attractiveness to some legislatures of time limits, the Committee is not persuaded that they are a panacea for regulatory lag or necessarily lead to more "expeditious" decision-making.⁶⁵

The Committee notes that the enactment of a time limits regime is often complex and is usually qualified by discretionary authority to extend such limits. For example, section 183(6) of the *CER Act* grants the Minister unfettered authority to grant "one or more extensions of the time limit specified under section (4)", without specifying any grounds for granting such extensions. Thus, in the Committee's view, the certainty that it is argued would be provided by a time limits regime may prove to be illusory.⁶⁶ It is also telling that, while the *CER Act* establishes time limits for facilities applications, it does not do so for the CER's rate-setting jurisdiction.⁶⁷

Furthermore, in the Committee's view, it is within the ability of the Commission itself to implement measures that would provide all parties with confidence in the timeliness of its proceedings. It is interesting to note in this context that the recent amendment of the *RED Act*⁶⁸ dealing with time limits merely empowers the Cabinet to make regulations establishing such limits, thus implicitly recognizing that the Alberta Energy Regulator itself has the authority to address the matter with the tools at its disposal.

Given the range of applications coming before the Commission (as reflected in the variations provided for in the current performance standards), it is the Committee's recommendation that a more flexible option to legislated time limits is preferable.

⁶³ Section 298(5).

⁶⁴ *Responsible Energy Development Act, 2020*, SA 2020, c 16 ("*RED Act*"), section 5, amending section 60 of the *Responsible Energy Development Act*, SA 2012, c R-17.3. The Act received Royal Assent and came into effect on June 26, 2020.

⁶⁵ There is evidence that many of the examples provided by the utilities in criticism of the Commission's timeliness record and in justification of legislated time limits were outliers in the sense that the time to final decision was influenced heavily by the novelty or exceptional nature of the proceedings and other exogenous circumstances. We sense that on a going forward basis, such distortions to the statistics on the time taken to reach a decision will be less common, particularly given the Commission's determination to become more expeditious in its processes.

⁶⁶ In addition to the Minister's discretion to grant extensions, section 216 the *CER Act* empowers the Regulator to make regulations prescribing the circumstances in which periods may be excluded from the calculation of the time limit, often referred to as "off ramps".

⁶⁷ *CER Act*, sections 225-238.

⁶⁸ *Supra*, note 64.

Under this alternative, and consistent with the Committee’s recommendations on scheduling,⁶⁹ the Commission would preserve (though keep under review) its current performance standards for processing rate-related applications, with those standards being the presumptive starting point for the scoping and scheduling process under an enhanced case management system. Using the current performance standards as a starting point, but responsive to its needs and the needs of the applicant and other parties, the Commission would then produce the detailed schedule recommended in Section 5.4 for all procedural steps in the application process.

The need for flexibility and ready adaptation in performance standards suggests to us that it would be better to continue their status as a policy document rather than incorporating them into [Rule 001](#). And, we certainly would not favour giving them the force of law by either Cabinet regulation or legislative amendment.

As also recommended, the Commission should make it abundantly clear that, except in extreme circumstances, participants would be held to the established Schedule.

With strict policing of that Schedule by the Commission, the timely disposition of applications would in our view become much more achievable. It would also avoid the complexities of the *CER Act* time limit regime with all its qualifications and exceptions. Indeed, the time taken dealing with issues of interpretation and application to the facts of particular proceedings may themselves give rise to another cause of regulatory lag.

The Committee notes that, if mandatory time limits were imposed in a Schedule for each proceeding, setting specific dates within the framework of mandated time limits would be an important tool in ensuring compliance.

5.5.1. Recommendations: Time Limits

Recommendation #6

The Committee is not recommending that there be legislative change to implement time limits. However, the Committee recommends that the Commission retain its current performance standards for record development (e.g. 143-205 days for Full Process; 80% of the time) and disposition documents (90 days from close of the record; 100% of the time), and strictly adhere to them.

Recommendation #7

The Commission’s commitment in Section 2.2 of Rule 001 to the “expeditious and efficient determination on the merits of every proceeding” is more appropriately achieved through a rigorous scoping of issues and scheduling of proceedings as recommended in Sections 5.3 and 5.4 of this Report than by the imposition of statutory time limits.

⁶⁹ Section 5.4 above.

5.6. Confidentiality

From the submissions and our consultations, it appears that confidentiality, as a process efficiency issue, is essentially past tense. The Commission has dealt with the issue such that, going forward, it will be a matter of improving efficiency through assertive case management in the application of now-established standards to fewer confidentiality motions.

The Committee was informed that the use of confidential filings increased, particularly related to the “Big Build” of electricity infrastructure and the competitive bid process relating to contractors in that context. Regulatory burden was increased through segmented information requests, motions, hearings and arguments, as well as physical issues, particularly the lack of an e-filing process for confidential information.

The Committee appreciates the concept of the open court principle that encourages rate-setting processes that instill public confidence through being open and transparent. We also appreciate the need for confidentiality in specific circumstances, as reflected in the legislative empowerment of the AUC in Section 28 of Rule 001. The acceptance by the regulator of confidential information should be minimized, and limited to situations where the Commission has concluded, in accordance with Section 28.7, that granting the motion for confidential treatment:

- a) is necessary to prevent a serious risk to an important public interest, including a commercial interest, because reasonable, alternative measures will not prevent that risk; and
- b) the benefits of granting the request outweigh its harmful effects, including the effects on the public interest in open and accessible proceedings.

Our consultations revealed a general view that the steps already taken by the Commission have been effective in reducing the regulatory burden of confidentiality. The amendments to Section 28 of Rule 001 (effective February 8, 2020) and the AUC eFiling System enhancement (released on the same date)⁷⁰ are seen as significantly improving the process and reducing the regulatory burden.

The Committee sees merit in the suggestion that requests for confidentiality that have clear precedent could be granted without further process⁷¹, or subject to objection.⁷² However, the Commission should be suspicious of routine assertions of confidentiality, especially where there is no obvious threat to competitive advantage should the documents be released.

⁷⁰ [Bulletin 2020-05](#): Amendments to AUC Rule 001 to facilitate exchange of confidential information (February 9, 2020).

⁷¹ Submission of AESO (May 22, 2020).

⁷² Submission of AltaGas (May 22, 2020).

Ultimately, however, it is the Commission that needs to be more vigorous in its case management to the confidentiality issue.

5.6.1. Recommendation: Confidentiality

Recommendation #8

The Commission should build on its proactive resolution of the confidentiality issue and aggressively apply case management to enhance the efficiency of its processes in this respect.

5.7. Hearings

For rate-related applications, the Commission has established six different process classifications: No Notice, Notice Only, Basic Written Process, Minimal Written Process, Full Written Process, and Full Process. Each application is assigned to one of those categories.⁷³ The vast majority of those assignments are automatic and non-controversial. It is, however, in the context of applications subject to a Full Written Process or a Full Process that issues have arisen with respect to the conduct of proceedings, either orally or in writing. It was on this aspect of the process that those making submissions focused.

In general, submissions were supportive of the Commission's greater use of written processes. Some even argued that the Commission should go further with suggestions that presumptively all hearings would be written unless a case could be made for phases of the hearing to be oral. Reference was made to the high costs of oral processes.

Other correspondents were more muted in their support of written processes. The principal criticism was directed at one aspect of written processes: the use of information requests as a surrogate for oral testimony tested by cross examination. It was urged that this resulted in inefficiencies and process delays. Some also argued against the use of written (as opposed to oral) argument either generally or at least when there had been an oral hearing. The Committee deals with those two concerns in Sections 5.8 and 5.11 of the Report.

Section 9(4) of the *AUC Act* provides that, subject to considerations of procedural adequacy, the Commission has authority to order that representations be made in writing, not orally. More generally, Section 35.1 of the *Rules of Practice* allows the Commission to conduct both written and oral hearings. However, Section 35.1 does not elaborate on the standards or criteria on which that choice should be made.

Recently, as noted earlier, the Commission has increasingly turned to written hearings. Moreover, during the COVID-19 pandemic, the Commission has confined itself to hearings entirely in writing.

⁷³ On occasion, the initial assignment of an application as between a Full Written Process and a Full Process may be revisited.

The choice to proceed in whole or in part by way of writing is obviously a matter for the Commission's discretion, and the Committee is of the view that there will often be significant advantages, in terms of expedition and cost, to proceeding in that manner. Deadlines for written processes are generally easier to impose and enforce than in oral hearings. Oral hearings will frequently involve the attendance of all participants and their lawyers at an obvious cost to the Commission, the regulated utility, or utilities, and interested parties. Moreover, in the case of utilities, much of those costs will ultimately be passed on to their customers in rates. Hearings in writing can also be a more efficient and effective way of proceeding when highly detailed, technical issues are critical to the issues raised by an application. Certainly, there are situations where oral hearings may be necessary to ensure procedural fairness, such as where issues of credibility of witnesses are in play or parties opposing the application lack the capacity or resources to participate effectively in writing.

On balance, the Committee's view is that functional considerations indicate that the Commission should have a policy or presumption that applications be heard entirely in writing, subject to any participant's entitlement to make the case for all or parts of the process to take place orally. When in issue, any requests for a full or partial oral hearing should be an integral part of the case management process and generally be resolved⁷⁴ at the scoping and scheduling stage.

5.7.1. Recommendations: Hearings

Recommendation #9

There should be a strong presumption that all Commission rate-setting hearings be conducted in writing, subject to the applicant or a party demonstrating to the satisfaction of the Commission, or the Commission determining in view of its own needs, that a hearing or part thereof be oral.

Recommendation #10

Issues as to whether a hearing should be written, oral, or partly oral and partly written should be determined in the context of the recommended scoping of issues (Recommendation #3) and scheduling (Recommendation #5), within an assertive case management process.

5.8. Interrogatories

The interrogatories issue is inextricably linked to the Scoping issue, discussed in Section 5.3. Interrogatories, referred to as information requests ("IRs") in the AUC *Rules of Practice*, were identified by many of those consulted by the Committee as a source of extensive delay and consequent regulatory lag. Specific criticisms were levelled at multiple rounds of information requests, so-called "fishing expeditions", and lack of any materiality or proportionality filters.

⁷⁴ Section 35.2 provides the Commission "at any time during the written hearing" may choose to "hold an oral hearing." The Committee accepts that such a provision is necessary even if rarely exercised, particularly when there has been a full scoping and scheduling process.

On the other side, it is argued that interrogatories are necessary to reduce the “information asymmetry” between the utility and the interveners, and to act as a necessary discipline on monopolies that have an incentive to be less than forthcoming in their applications to facilitate increases in their revenues. This appears to the Committee to be another area where the Commission can improve efficiency and expedition by moving in the direction of more active and assertive case management.

Conflicting views were expressed on the suggestion that the Commission present its IRs to the utilities before those of interested parties. One view is that this process would increase efficiency by causing the interveners to focus on matters of concern to the regulator. The other view is that, in practice, the approach did not limit duplication but instead inspired more detailed requests from interveners on the same topics, resulting in a delayed process.

Concerns were also expressed about the experience with motions relating to IR responses (see Motions, Section 5.10). One such concern was the time taken by the AUC members hearing the cases to rule on motions to compel further and better responses to IRs, and the length of some AUC decisions on such motions.

The AUC already has in place rules that define the IR process. It is worth reviewing Section 24 of Rule 001 which establishes the parameters for information requests:

24 Information requests

24.1 A party may make an information request to another party in accordance with a direction of the Commission, to

- a) clarify any documentary evidence filed by the other party;
- b) simplify the issues;
- c) permit a full and satisfactory understanding of the matters to be considered; or
- d) expedite the proceeding.

The operative words are important—“clarify”, “simplify”, “permit...understanding”, and “expedite”. Some of those consulted by the Committee are concerned that the IR process is being used, at least in certain instances, to obfuscate, complicate, confuse and delay.

It is also noteworthy that Section 25.1 requires “a full and adequate response to each question” in a request for information, and Section 26.1 requires a full justification where a party is not able or not willing to prepare a response.

The Commission also has in place comprehensive guidelines for motions relating to IRs. In 2008, the Commission stated:

The Commission also notes that although the Impugned IR Responses are a small fraction of the total number of IRs directed at [ATCO Gas (“AG”)], significant time

savings could have been achieved if the information directed to be filed by this Ruling had been filed with the initial information request responses.

Further, the Commission considers that future motions requesting direction from the Commission with respect to allegedly deficient information request responses should clearly include as part of the ground on which the motion is made.

- the reasons why the information request response does not comply with the provisions of Rule 001, Section 30(1)(b) or 31(1);
- the materiality of the requested information, in the context of either the principle involved or the approximate impact to the applied for revenue requirement (or to the subject matter of the application);
- the purpose for which the requested information is required;
- the prejudice to the intervener if the requested information is not provided; and
- how the requested information will assist the Commission in evaluating the application.

This information should be provided with respect of each such allegedly deficient information request response. This information will assist all parties in understanding the rationale for the Motion, promote more complete response and reply submissions and assist the Commission in evaluating the merits of the motion.

...

The Commission has also considered the materiality and potential impacts to parties of either providing or not providing the requested information. In particular, the Commission was concerned with balancing the level of detail requested in some of the IRs, the effort required to produce the material requested, potential prejudice to AG if the information is produced over its objections and the potential benefit to interveners and the Commission of receiving it.⁷⁵

The Committee considers that the relevant provisions of Rule 001, and the guidance provided in the ATCO Gas 2008 IR Ruling, clearly establish the parameters within which the Commission can and should exercise assertive case management to prevent regulatory delay from arising during the IR process.

The Committee recognizes that the need for interrogatories is driven by the nature, extent, and quality of disclosure of relevant information by the utility in its application. An application that is less than forthcoming with relevant facts or is evasive or long on obfuscation should properly be subjected to a vigorous IR process.

The need for more than one round of information requests can depend on whether the Commission Panel has decided that the proceeding should be conducted entirely in writing (Full Written Process), or should involve an oral element including cross-examination (Full Process).⁷⁶

⁷⁵ ATCO Gas (AG) 2008-2009 General Rate Application, Application No. 1553052, Proceeding ID.11, Commission Ruling on UCA and Calgary Motions, March 7, 2008 (ATCO Gas 2008 IR Ruling).

⁷⁶ [Bulletin 2015-09](#), *supra*, note 22.

In the former case, more than one round of IRs could be justified in the interests of developing an appropriate record. In the latter, questions that remain after the responses to IRs have been provided can be pursued through cross-examination.

The Committee also notes that the Commission has the power to modify the IR process in mid-hearing. For example, in a written hearing where the Commission is faced with requests for multiple rounds of IRs, it could determine that the most expeditious way to deal with the disclosure of information would be to schedule cross-examination on the existing IR responses, rather than permitting further rounds of IRs.

In the Committee's view, rigorous application of assertive case management, particularly with respect to scoping and scheduling, would be effective in limiting the use of interrogatories to matters that are properly before the Commission in individual proceedings. A number of measures specific to the interrogatory process should be implemented within that overall approach, together with a more assertive application of the principles outlined by the Commission in the ATCO Gas 2008 IR Ruling.

5.8.1. Recommendations: Interrogatories

Recommendation #11

The Committee recommends that the Commission:

1. Strictly limit interrogatories to matters within the List of Issues as settled by the Commission for each specific proceeding (Recommendation #3).
2. Include in the schedule for each proceeding (Recommendation #5) fixed dates for filing interrogatories, responses to interrogatories, motions to compel further and better responses, and the issuance of Commission rulings on such motions.
3. Adopt the practice of other regulators of processing motions relating to interrogatories in writing, using a Word document template.
4. Not permit interrogatories to parties that are not adverse in interest to the requesting party.
5. Hold technical meetings, including AUC staff or Commission members, to discuss potential interrogatories questions (particularly on technical issues), including relevance, materiality, and proportionality, to reduce the number and expanse of interrogatories.
6. Enforce the interrogatory parameters established in the ATCO Gas 2008 IR Ruling. Each interrogatory must contain justification of the value of the requested information to the Commission Panel in considering the particular application, including:

- a. Implementing a materiality filter: what is the amount in question on the issue, and what will it cost to deal with it?
 - b. Applying a proportionality test: is the effort involved in the preparation of a “full and adequate response” to the interrogatory, and in dealing with the response in evidence, justified by the probative value of the information that is requested?
7. In written hearings, permit additional rounds of IRs only where determined to be absolutely necessary, and consider permitting oral cross-examination on IR responses where it appears to be more expeditious than additional rounds of IRs.
 8. In oral hearings, establish a presumption that there will be only one round of Interrogatories, with follow up questions as necessary in cross-examination.
 9. Penalize abuse or inefficient use of the interrogatory process through reduction of costs allowed to utilities and eligible interveners.

5.9. Cross-examination

The Committee received input on the cross-examination issue from many parties. Several expressed concern about the time and expense of oral hearings (including cross-examination). Some suggested limiting oral hearings, and thereby cross-examination. Others suggested time limits for cross-examination. Specific concerns were voiced about the use of aids to cross-examination, and about the Commission permitting witnesses to provide opinion evidence without having been qualified as experts, thereby compelling that time be taken to cross-examine such witnesses.

Two observations need be made at the outset.

First, the Commission is the master of its own procedure,⁷⁷ meaning that it possesses the power to decide whether to provide for cross-examination in a particular proceeding, or not.

Second, the law on cross-examination is well settled. There is no absolute right to cross-examination. The content of the duty of fairness varies according to context and circumstances, meaning that the duty of fairness does not always require the right of cross-examination. It should only be permitted when it is determined by the regulator to be necessary to provide the parties with a meaningful opportunity to present their case fully and fairly.

The current state of the law was well-expressed and applied in the litigation relating to the expansion of the Trans Mountain pipeline (“TMX”). There, the National Energy Board (“NEB”) established a process that did not provide for oral cross-examination. It upheld its process

⁷⁷ Section 20, *AUC Act*. See also section 76(1)(e) re authority to set rules of practice.

decision in dismissing two motions⁷⁸ as well as a request for reconsideration.⁷⁹ The NEB decision granting conditional approval to the TMX was appealed to the Federal Court of Appeal (“FCA”) on various grounds, one of which was the denial of cross-examination. The FCA allowed the appeal on two grounds but dismissed the ground relating to denial of cross-examination, saying that, in the context of the proceeding (which included multiple parties, the ability to test evidence through information requests, the opportunity to file evidence, and legislative timelines for adjudication), the duty of fairness was not breached by the NEB decisions not to allow oral cross-examination. The Court found that the procedure established by the NEB did allow the parties a meaningful opportunity to present their cases fully and fairly.⁸⁰ Certain parties sought leave to appeal to the Supreme Court of Canada against the grounds of appeal that were dismissed, including cross-examination, but were unsuccessful.

The Committee understands that the current practice of the Commission is, upon receipt of an application, to consider the level of process that is required to discharge its mandate.⁸¹ The policy is to establish a process that minimizes the regulatory burden—utilize the minimum process necessary to fulfil the AUC’s mandate in respect of the application. Only the Full Process involves cross-examination.⁸²

Generally speaking, cross-examination is permitted when the regulator considers credibility to be in issue. Often this would relate to technical areas, such as cost of capital, which involve the evidence of expert witnesses.

The Committee understands that oral hearings are increasingly rare in AUC practice, and that the Commission takes the position that, in virtually all cases, written proceedings meet the requirements of procedural fairness by providing all parties with a meaningful opportunity to present their case fully and fairly.

The Committee sees no need to recommend changes to the Commission’s practice for process determination.

Several written submissions and oral consultations included concerns about so-called “non-expert expert” evidence causing regulatory burden and resulting in wasted time and expense. Essentially, the concern is that parties present witnesses to provide opinion evidence in areas where they are not, in fact, expert, with the result that the evidence is of little or no value to the Commission in discharging its mandate.

⁷⁸ National Energy Board letter decision re Notices of motion from Ms. Robyn Allan and Ms. Elizabeth May to include cross-examination of witnesses, Ruling No. 14, May 7, 2014.

⁷⁹ National Energy Board letter decision re Requests to establish new deadline for additional information requests to Trans Mountain for intervenors receiving late participant funding decisions, Ruling No. 51, January 30, 2015.

⁸⁰ *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2019] 2. F.C.R. No. 3, at paras. 241-258.

⁸¹ See discussion in Section 3.3 (AUC Ongoing Initiatives to Improve Regulatory Efficiency).

⁸² [Bulletin 2015-09](#), Table 2: Record development process steps by process type.

Bulletin 2016-07: Practice advisory and procedural change—expert witness qualifications no longer required⁸³ recognized that the Commission allows witnesses who are not expert to provide opinion evidence. This practice is endemic to the regulatory process, and differentiates it from civil and criminal litigation. It also means, however, that the litigation standard of admissibility of opinion (as opposed to factual) evidence only from witnesses who have been qualified as experts is not workable in the regulatory context. Regulators must therefore find other ways to constrain the cluttering of the record with evidence that is of little or no use and contributes to regulatory burden and lag.

Bulletin 2016-07 changed AUC procedure such that it no longer requires that witnesses be qualified as experts in rates and other hearings. It states:

All relevant evidence, including opinion evidence, will be assessed in accordance with the weight accorded the evidence by the Commission after considering the submissions of the parties.

Bulletin 2016-07 appears to implement a trend that the Committee understands to be current in litigation—to focus the evidentiary process on weight rather than admissibility. The problem with this trend is that it is antithetical to enhancing efficiency and expedition of the regulatory adjudicative process.

Another problem is that much time would be wasted even if the Commission reverted to the previous process of qualifying experts. The practice was that the determination of expertise was done at the time the witness appeared for cross-examination. Prior to that, much time would have already been expended by the Commission and parties reviewing the proffered evidence, and any IRs and responses that related to such evidence.

The Commission needs to find a different method to constrain “non-expert experts”. It could reinstitute a requirement that witnesses be qualified before they be allowed to present evidence that is accepted as expert opinion evidence (as opposed to non-expert opinion evidence), and deal with the qualification requirement as soon as the evidence is filed. Expert opinion will, by definition, be accorded greater weight than other opinion evidence.

It should also be possible to discourage “non-expert expert” evidence through a more vigorous application of the AUC’s costs jurisdiction. Elsewhere, the Committee recommends that the Commission’s costs powers be aggressively exercised to discourage behaviour that is unhelpful to the Commission in discharging its mandate, including its policy of reducing regulatory burden by increasing the efficiency of its procedures and processes.

If, at the end of the day, the Commission members hearing the case find the evidence to be of little or no use, they could penalize the party that adduced that evidence, in costs. The costs of subpar intervenor “experts” could be disallowed as intervenor costs to be recovered from

⁸³ March 24, 2016.

utilities. The costs of subpar utility witnesses could be directed to be excluded from recovery by the utility from its customers, effectively making them payable by utility shareholders.

The Committee recognizes that the Commission's costs power cannot be used as a tool to influence the behaviour of interveners that are ineligible for cost recovery. However, the submissions to the Committee on this issue were focused on the regular interveners in rate-setting proceedings—the Consumers' Coalition of Alberta ("CCA") and the Office of the Utilities Consumer Advocate ("UCA")—and did not identify other interveners as contributors to the problem.

It was suggested that a process that limited interrogatories to one round, with follow up cross-examination would be a step in the right procedural direction.⁸⁴ In the Committee's view, this has some merit. Clearly, cross-examination can play an important role in the development of the appropriate record for a proceeding, but it must be tempered by assertive case management not only in the hearing room but in the process leading to the hearing.

Several parties suggested that Commission counsel should examine witnesses before parties conduct their cross-examinations. Some suggested AUC counsel should also be afforded the opportunity to examine further after the cross-examinations of other parties are concluded. These suggestions make some sense to the Committee, provided that the procedure is combined with assertive case management by the presiding Commission member or members. The Commission needs to control the cross-examination of parties that follow the AUC counsel examination so as to constrain repetition and focus the process on the information that the Commission has determined that it requires, rather than the adversity of interest of the parties.

Several parties expressed frustration with the time that appears to be wasted on aids to cross-examination. The records of oral hearings are replete with legal fencing over the admissibility and appropriateness of the use of ATCs. This, however, appears to the Committee to be another situation where appropriate action has already been taken by the Commission in establishing the parameters and criteria, and it is time to enforce the rules.

Section 39 of Rule 001—Aids to question witnesses—requires provision of ATCs no less than 24 hours before the witness is to be questioned, and requires highlighting of the passages in the document that are to be the subject of the questioning. It also prohibits filing of aids until the Commission so directs,⁸⁵ which allows the Commission to enforce the established rule that only those parts of an aid that have been discussed with the witness may become part of the evidentiary record, thereby avoiding extraneous material cluttering the record. Further, the Commission dealt specifically with the use of ATCs in its decision on the 2018 Generic Cost of Capital (GCOC) proceeding, stating:

⁸⁴ See section 5.8 Interrogatories.

⁸⁵ [Rule 001](#), Section 39.3.

A valid aid to cross-examination must be relevant to the matters in question and must be put to the witness in a fair manner. While a document may be relevant, the party or counsel who seeks to use the aid to cross-examination must also demonstrate the probative nature of the document by tying it to the direct evidence or testimony of the witness(es). Fairness involves sufficient time to review the document as well as allowing the witness to address questions on it in the context of testing the witness's evidence. The document's connection to the evidence and its intended use should be made clear.⁸⁶

In the same decision, the Commission indicated that it would consider if changes to its existing process regarding the use of ATCs could address its concerns, and that it might consider amendments to Rule 001 or directions to parties to follow a revised process.⁸⁷ The Committee does not believe such steps to be necessary. Section 39 of Rule 001, assertively applied in accordance with the guidance provided by the Commission in the GCOC Decision, should enhance expedition and efficiency of the process.

5.9.1. Recommendations: Cross-Examination

Recommendation #12

The Committee recommends that the Commission maintain and increase its focus on reduction of regulatory burden in determining whether to allow cross-examination.

Recommendation #13

The Commission should provide for cross-examination only where, in its considered view, it would be necessary or worthwhile in the circumstances of the case. An opportunity for cross-examination should only be provided when the Commission determines that it is necessary for it to discharge its mandate. It should limit cross-examination to specific evidence. Most importantly, however, the Commission should engage in assertive case management in the hearing room (see Recommendation #22). Cross-examination should be limited to areas and issues that the Commission considers to be necessary to inform its judgment on the application before it.

Recommendation #14

Aids to cross-examination should be strictly controlled in accordance with the Commission's *Rules of Practice* and stated policies.

Recommendation #15

Non-expert opinion evidence should be discouraged through reduction of costs allowed to utilities and eligible interveners.

⁸⁶ [Decision 22570-D01-2018](#) Generic Cost of Capital, pages 171-172.

⁸⁷ *Id.*, at page 172.

5.10. Motions

Concerns were expressed with respect to the number of motions, the materiality thereof, and the time taken by the Commission to render decisions on motions. There were suggestions of implementing controls on the level, amount, and timing of motions. Most of the concern focused on motions to compel further and better responses to information requests.

Some of those who made submissions or were interviewed noted recent improvement in the time taken by the AUC to rule on motions, and in the use of pre-emptive motions for IRs that are out-of-scope or that fail a proportionality test—requiring more effort than is justified by the probative value of the information to be generated. Further, it was noted that increased use of technical meetings has had the positive impact of enhancing understanding and reducing the number of information requests.

Rule 001 provides for motions in a very general way, requiring only the grounds on which the motion is made.⁸⁸

The Committee is of the view that the Commission could further enhance efficiency in dealing with motions by including dates for motions, responses, replies *and* decisions in the hearing schedule that is issued at the outset of the proceeding, and sticking to the schedule (see Section 5.4). Motions would be conducted entirely in writing.

We were informed that the Commission has already experimented with this approach, which is used by other regulators, including the Canada Energy Regulator (“CER”). In the case of the CER, the motions are conducted through the vehicle of a Word document template which is populated with the motion, the responses, and the reply on the dates specified in the hearing order. The CER does not set dates for decisions on the motion, but in our view it would be an improvement for the AUC to do so.

The CER has also established parameters for consideration of motions in respect of IRs. It applies three criteria—relevance, significance, reasonableness (no undue burden). Confidentiality/commercial sensitivity is also considered, if raised. These criteria are similar to those established by the Commission in the ATCO Gas 2008 IR Ruling, discussed in Section 5.8.

It was suggested that the AUC should disallow any motion in one proceeding that is virtually identical to a motion in an earlier proceeding that had been ruled on by the Commission hearing the earlier case. The Committee does not find this suggestion to be persuasive. The doctrine of *stare decisis* does not apply to regulation. The Commission is not bound by its previous decisions. Further, strict adherence to past decisions could confine the regulator’s exercise of its statutory discretion and constrain its ability to adapt to new situations.

⁸⁸ Section 27.3(b)(ii).

Administrative tribunals do, however, properly strive to achieve continuity, consistency and a degree of predictability. It would follow from this that the Commission could introduce a presumption that rulings in earlier motions that deal with similar issues will apply unless the party bringing the new motion can provide justification for a different ruling. The party bringing the motion would bear the burden of persuading the Commission that the earlier ruling should not apply.

The Committee is not persuaded that it would be productive to introduce limits on the number of motions, or the subject matter. There should, however, be requirements of materiality and proportionality, measured against the List of Issues, that are strictly enforced as part of assertive case management.

5.10.1. Recommendations: Motions

Recommendation #16

The Commission should establish a schedule for written motions in the Directions on Procedure (Recommendation #5), including dates by which the decisions on the motions are to be issued.

Recommendation #17

The Commission should enforce the ATCO Gas 2008 IR Ruling and implement materiality and proportionality standards for requested information. Parties requesting information, and bringing motions for further and better responses to such requests, bear the onus of persuading the Commission that the information requested is not only relevant but material, and that the time required to generate the response does not exceed the probative value of the information requested.

Recommendation #18

The Commission should implement a rebuttable presumption of *stare decisis* in respect of previous rulings on similar motions.

5.11. Argument

The Committee received varying views on argument. There was both criticism and praise for the current Commission practice of simultaneous written argument and reply. Oral argument in the litigation format was advocated by some and opposed by others.

The AUC deals specifically with argument in its *Rules of Practice*:

47. Argument

- 47.1 Argument must be in the form directed by the Commission.
- 47.2 No argument may be received by the Commission unless it is based on the evidence before the Commission.

It is clear that the Commission has a free jurisdictional hand to choose the nature and extent of argument that, in its view, will best inform the exercise of its regulatory mandate. The spectrum ranges from no argument at all through written to oral to hybrid formats. We understand that the Commission has exercised its discretion to utilize various forms of argument in differing cases and circumstances.

In significant rates proceedings, it has become common practice for the Commission to direct simultaneous written argument and reply. This is a two-step process. On a date prescribed by the Commission—usually 2-3 weeks after the close of evidence—all parties (applicants and interveners) file simultaneous written argument. On a second prescribed date—2-3 weeks later—all parties file reply arguments.

The simultaneous written argument practice plays to mixed reviews. It facilitates the most comprehensive analysis of the record by providing parties with ample opportunity to deal with any and all issues, unconstrained by limits on volume of submissions. While we were not informed of the genesis of the practice—unique in the experience of the Committee—it is plausible that its adoption was seen by a Commission predecessor as the most comprehensive way to inform the discharge of the regulator’s mandate. Certainly, this form of argument is the most consistent with the “pursuit of the perfect record” approach. It permits parties to deal in detail with the many complex issues that populate significant rates proceedings. It also enables interveners to deal with differing interests as amongst them. However, it does so at enormous cost, both in terms of the multiple hours spent by lawyers and consultants and employees in developing the detailed arguments, and in terms of the time—many weeks—added to the proceeding.

The simultaneous written argument approach deprives applicants of their traditional right of ultimate reply. This may be viewed as a good thing if one accepts the “asymmetry of information” theory. However, it comes with a risk of further extension of the proceedings through motions to allow sur-reply or other response to assertions made in reply filings.

A different form of written argument is also time consuming. It involves three steps. The applicant is given time to prepare and file its argument. The interveners are given time to file their arguments in response—the premise being that it is only fair for the interveners to know the applicant’s argument before being required to prepare their own. The applicant is then given time—usually less—to prepare and file its reply argument.

Argument may also be oral, or a combination of written and oral.

With oral argument, the tradition in the Courts is that the applicant first presents argument, the respondent responds, and the applicant has the right to final reply. This form is the general rule for many regulatory tribunals as well. The ethical standard is that the applicant, in its initial argument, is required to speak to all the positions of the interveners that, from the evidence, it can anticipate will be taken by those interveners in their arguments. It is improper to save any matters—particularly any of substance—for reply argument when the interveners have no

opportunity to respond. This is sometimes referred to colloquially as the “no sandbagging rule”.

A common practice of the NEB (now the CER) has been to allow a brief period after the close of the record before hearing oral argument, and to then hear that argument in the top down/bottom up mode. In our experience, this has the effect of expediting the process by time-constraining the preparation of the arguments, forcing hearing participants to focus on the issues of greatest importance, and significantly reducing the costs of argument.

The top down/bottom up oral argument format involves the applicant presenting its argument first, then going down the list of interveners (in whatever order) to deliver their arguments in chief, then (sometimes with a short break), coming back up the list in reverse order to deliver reply arguments, with the applicant last to reply. This format, frequently used by the NEB/CER, provides all parties with the opportunity to respond to all others and in practice has been generally viewed as fair. It does require the regulator to exercise discipline in enforcing the ethical standard of the “no sandbagging rule”.

Another advantage of oral argument is that the format enables Commission members to ask questions of counsel, and to limit argument to matters that they consider to be necessary to inform their judgment on the issues. This is another opportunity for the Commission to exercise control over the process in the name of efficiency and expedition.

Time limits for oral argument are a well-established practice in the judicial system, and could be used to advantage by the regulator.

It is also possible to use a hybrid of written and oral argument, an option that has been used by regulators in proceedings that do not involve an oral evidentiary hearing. A recent example of this format involved coincident filing of written arguments, followed by top down/bottom up oral argument.⁸⁹ Expedition can be enhanced through the use of time limits for the oral presentations, or imposition of hearing room discipline by the Commission (“We will not allow you to read your filed argument. We have read it. What we want is for you to speak to us about what you think is most important, respond to the other parties’ arguments, and answer our questions.”)

Some regulators have found it efficient to stipulate topics for argument. The Committee sees this option as entirely consistent with a more assertive approach to case management with a focus on the information that the Commission determines is necessary to enable it to fulfil its mandate in the particular case.

In our view, argument is another area where the processes and procedures of the Commission can be improved through active case management. The Commission members hearing a rates

⁸⁹ See National Energy Board Proceeding MH-053-2018 Coastal GasLink Pipeline Ltd.: Jurisdiction over the Coastal GasLink Project, oral argument May 2-3, 2019.

proceeding have wide latitude to choose the form and timing for argument that they consider will meet the needs of the Commission for that particular case. The Commission may choose that argument be oral, written, or a hybrid, and it can and should establish an expeditious argument schedule.

5.11.1. Recommendations: Argument

Recommendation #19

The Committee recommends that the Commission adopt a presumption for efficient and expeditious oral argument to be delivered within 3 business days of the close of the hearing record, using the top down/bottom up format. This presumption should be varied only in exceptional circumstances with appropriate justification.

Recommendation #20

The Committee recommends that the Commission adopt an assertive approach to management of oral argument including utilization of time limits, stipulation of topics on which it will hear argument, or other measures as it deems necessary or advisable in pursuit of the goal of improving efficiency and expedition.

5.12. Adequacy of the Record

As discussed in Section 4 of the Report (Role of the AUC), a central question for the Commission in establishing and applying its processes and procedures is whether the Commission's own information requirements will be satisfied, while at the same time the procedural rights of parties are respected. The Committee also observed that the Commission is an expert tribunal, supported by a professional staff.

It is, therefore, up to the Commission to determine the adequacy of the record before it in specific proceedings. While the Commission should respect the expertise of parties and the rights of parties to present their cases as they choose, it should do so guided by the Commission's own needs⁹⁰ and resist attempts by parties to expand the record beyond the Commission's central role, namely, to inform the Commission's deliberations on the determinations it is mandated to make. In particular, just as the Commission should resist "scope creep", so too it should resist suggestions that more information is necessarily better.

⁹⁰ It was suggested in one submission to the Committee that "[s]cope creep, voluminous submissions, and continuing disputes between litigants regarding the relevance or sufficiency of evidence are all related to a lately developed vagueness regarding exactly what information the Commission requires to make its decisions" (Submission of FortisAlberta (June 5, 2020)).

5.12.1. Recommendation: Adequacy of Record

Recommendation #21

The Committee recommends that the Commission assess the adequacy of the record in each proceeding by reference to the List of Issues (Recommendation #3) and that it resist attempts to persuade it that more information is necessarily better.

5.13. Panel Assertiveness in the Hearing Room

One possible reading of this aspect of our mandate was that the Committee should reflect upon how aggressive a Commission Panel and its individual members could be in controlling hearing room behaviour and the conduct of a party's presentation of its evidence and arguments. When would the actions of the Panel or one or more of its members transcend acceptable assertiveness and become reviewable by reason of a reasonable apprehension of bias? While the answer to that question is heavily fact sensitive, the general principles are not controversial.

The Committee therefore determined that behind the terms in which the issue was couched was a more fundamental question bearing on the very nature of the Commission's regulatory role. To what extent is the rate-setting process one in which the Commission may legitimately be interventionist or controlling in orchestrating the proceedings? Would it be appropriate for the Commission to interpret its mandate as being more inquisitorial as opposed to a sphinxlike refereeing of an adversarial, adjudicative process? Seen in that light, "assertiveness" is more properly understood, not as "aggressive", but as "active" or "proactive."

Earlier in our Report, the Committee proposed that, despite the fact that its processes are commonly triggered by the filing of an application, the Commission is primarily responsible for determining what it requires in any particular situation to fulfill its statutory mandate. Moreover, central to meeting that obligation are the procedures that the Commission determines are best suited in any specific situation, subject, of course, to statutory and common law procedural fairness constraints.

When viewed from that perspective, the Commission has every right to be both assertive and proactive in setting the procedures to be followed in responding to applications or when acting on its own motion. Indeed, it is not really a stretch to regard such activism as a matter of obligation and not just choice. It is therefore in line with this conception of the nature of the Commission's role that the Committee is making many of its recommendations respecting the Commission's processes. More generally, it has also prompted the Committee's umbrella recommendation that the Commission move in the direction of more active case management. In the Committee's view, such an evolution will assist greatly in the fulfilment of the expectations set out in Section 2 of Rule 001 of a process that is "fair, expeditious and efficient."

5.13.1. Recommendation: Panel Assertiveness

Recommendation #22

The Committee recommends, consistent with the focus of this Report on assertive case management, that the Commission endorse assertiveness not only in the hearing room but generally throughout the process as a virtue that should inform all rate-setting and rate-related proceedings.

5.14. Decisions

Few of those making submissions to or interviewed by the Committee faulted the Commission's decision-writing methodology. If there was a problem, it was said to be the extent to which Commission panels felt obliged to deal with all arguments that were raised in the hearing process. However, those making that point saw this not so much as a problem of decision-writing competence as the result of earlier process flaws and, in particular, a failure to focus on what was truly or reasonably relevant to the determination of the particular application. Many argued that greater structuring and, more generally, rigor from the outset would eliminate that problem and lead to shorter, clearer, and more concise decisions. These are matters that the Committee has addressed in our discussion of other issues and do not require further elaboration here.

A small number of stakeholders did, however, draw our attention to what they considered to be a design flaw in the usual template for Commission reasons. The AESO submission captured it well, faulting the Commission for "typically" including within its decisions free-standing or disembodied extensive recitations of the evidence and submissions or arguments made by the parties.⁹¹ In the words of another correspondent, there is a practice of "rote recitation of parties' positions on substantive issues."⁹²

The Committee has not engaged in an empirical review of the Commission's recent decisions to evaluate the extent of this practice. However, it certainly was a format that the Commission followed in two earlier decisions that we examined for other purposes: the 2010 Commission ruling in *Re Lavesta Area Group*,⁹³ and, much more recently, the 2017 Commission *Ruling on jurisdiction to determine the Notices of Questions of Constitutional Law*.⁹⁴ In the earlier of these decisions, the panel devoted 39 paragraphs to straight recitation or summary of the positions of the parties. We also found further support for the accuracy of this characterization of the Commission's reason writing template as recently as a June 29, 2020 Commission decision on an ATCO Gas and Pipelines Ltd. application for review and variance of a decision.⁹⁵ Twenty-four

⁹¹ Submission of AESO (May 22, 2020).

⁹² Submission of FortisAlberta (May 22, 2020).

⁹³ 2010 LNAUC 507.

⁹⁴ 2017 LNAUC 4 (*sub nom. Re Alberta PowerLine General Partner Ltd.*).

⁹⁵ [Decision 25380-D01-2020](#), *ATCO Gas and Pipelines Ltd., Decision on Preliminary Question, Application for Review of Decision 24333-D01-2019, 2017 Capital Trucker True-Up Compliance Filing to Decision 23789-D01-2019* (June 29, 2020).

paragraphs were a detailed, non-analytical description of the parties' submissions, while only seven paragraphs were devoted to a consideration of the substantive grounds on which the application was based.

Attention to the arguments of the parties is an indispensable part of the duty to give reasons. However, in the context of judicial decision-making, the clearly preferred approach is now one that is issues driven. In other words, the arguments of the parties and detailing of the evidence are to be found not in separate sections of the reasons but are integrated into the elaboration of each issue that is at stake in the proceedings. Moreover, it is instructive that, in separate power point presentations prepared for the 2019 Canadian Association of Members of Public Utility Tribunals ("CAMPUT") energy regulation course, both Justice Michael Penny of the Ontario Superior Court and Justice David Brown of the Ontario Court of Appeal, both previous members of the Ontario Energy Bar, urged this approach.

One of the primary objectives of a reasons requirement is to ensure that the parties know and understand the reasons for the decision and its various components. That legitimate expectation is in general met much more readily by reason writing that is issues driven. Moreover, such an approach brings with it two additional benefits – it generally leads to shorter decisions,⁹⁶ and the clarity that attends such an integrated approach is also more likely to attract a deferential or respectful approach on the part of any reviewing court.

The Committee therefore recommends that the Commission adopt a reasons writing template that is committed to an issues driven approach, rather than a fact/chronology approach. While we recognize that shorter, issue-focused reasons do not necessarily mean more prompt decisions, in many instances, they should produce decisions that deal directly with relevant issues and diminish the extent of the Commission's exposure to applications for review and variance and applications for permission to appeal to the Court of Appeal.

5.14.1. Recommendations: Decisions

Recommendation #23

The Commission should adopt a template for decision-writing that is issue-driven.

Recommendation #24

The Commission should provide appropriate training to its members and staff on issue-driven decision-writing.

5.15. AUC Member Training

In the Committee's view, the effectiveness of applying an assertive case management approach to the Commission's proceedings would very much depend on the members of the Commission

⁹⁶ Though admittedly ones that may take longer to write.

having a shared understanding of the function of the Commission and of their role in conducting individual proceedings.

As discussed in Section 4, the Commission's statutory responsibilities require the Commission to make certain determinations for itself, and not simply to adjudicate between competing claims. The Commission's function is inquisitorial, rather than adjudicative; hence the frequent description of tribunals like the Commission as "quasi-judicial". It is imperative that Commission members have a common understanding of the nature of that function, and how it differs from the judicial function of the conventional courts.

The Committee has observed that the Commission is an expert tribunal, the members of which are presumably to be appointed having regard to the relevance of their individual backgrounds to the Commission's mandate.⁹⁷ However, the criterion of having a background relevant to the Commission's mandate in order to qualify for appointment to the Commission will likely result in many, if not most, appointees not having experience in managing a quasi-judicial proceeding, even where an appointee has a background as a legal professional.

Furthermore, the Committee's overall recommendation that the Commission adopt an assertive case management approach would require the skillful balancing of measures that focus proceedings on the Commission's needs, while respecting the requirements of procedural fairness. In other words, individual Commission members need more than just their expertise in specialized areas.

In the Committee's view, these considerations suggest that Commission members (and the Commission's overall processes) would benefit from training on the elements of the quasi-judicial process,⁹⁸ particularly with respect to balancing procedural requirements with the need to conduct an effective and efficient process intended to enable the Commission to fulfil its mandated responsibilities.

It was suggested to the Committee that the presiding member in a Commission proceeding should have litigation experience. This may not be feasible having regard to scheduling demands on members' availability. However, in the Committee's view, it would be desirable that the presiding member for a full written or oral hearing proceeding include a member with a legal background. It might, therefore, be appropriate to suggest to the Alberta government that it consider appointing sufficient members of the Commission with appropriate legal backgrounds to support this practice.

⁹⁷ See Section 4.1 above.

⁹⁸ Superior Court judges in Canada must have wide experience in legal matters in order to qualify for appointment to the Bench. The Committee notes, however, that newly-appointed judges must still undergo formal training during the first year of their appointment, organized by the Canadian Judicial Council, and are required to participate in continuing education programs thereafter: <https://cjc-ccm.ca/en/what-we-do/professional-development>.

The Committee notes that the Council of Canadian Administrative Tribunals provides various professional development courses, including courses in adjudication for members and refresher courses “for more experienced members.”⁹⁹ The offerings include a course on “Decision Writing.” It is also noted that the purposes of CAMPUT include improving “the education and training of commissioners and staff of public utility tribunals”¹⁰⁰ and that the organization offers various training courses.

5.15.1. Recommendation: Member Training

Recommendation #25

The Committee recommends that members of the AUC be provided with training on the nature of the Commission’s role as a quasi-judicial tribunal and on the principles of procedural fairness and the elements of conducting a quasi-judicial process, particularly with respect to balancing procedural requirements with the need to conduct an effective and efficient process intended to enable the Commission to fulfil its mandated responsibilities. “Refresher” training programs for members should also be available periodically. Such training should include reference to Appendix III: Legal Framework and Risk Assessment, particularly as it relates to the minimal legal risks of assertive case management.

5.16. Consolidated-Bathurst Plenary Meetings

Thirty years ago, in *IWA v. Consolidated-Bathurst Packaging Ltd.*,¹⁰¹ the Supreme Court of Canada endorsed the practice of agencies and tribunals that sit in panels or divisions of holding plenary meetings of the membership of the agency or tribunal to discuss an issue or issues that had arisen in proceedings before a specific panel. Deployed properly, such plenary meetings could, among other things, provide an incentive for achieving consistency on issues that were likely to recur before individual hearing panels. As recently as 2019 in *Canada (Minister of Citizenship and Immigration v. Vavilov*, a recent leading decision of the Supreme Court of Canada, which is discussed in Section 6 and Appendix III, the Supreme Court continued to endorse such meetings as:

... an effective tool to “foster coherence” and “avoid ... conflicting results”.¹⁰²

We were told that within the Commission the idea of such processes had been floated and perhaps tried once but had not so far taken hold. The reason for this apparent lack of enthusiasm was not explained.

⁹⁹ <http://www.ccat-ctac.org/en/professional-development>. The Committee notes, however, that the range of responsibilities of Canadian administrative tribunals is vast - customized training tailored to the responsibilities of economic regulation tribunals such as the AUC would be desirable.

¹⁰⁰ <http://www.camput.org/about-camput/>.

¹⁰¹ [1990] 1 SCR 282.

¹⁰² 2019 SCC 65, at para. 130, citing *Consolidated-Bathurst*.

In a regulatory domain where there are likely to be issues arising before hearing panels that are of significance for the rate-setting operations of the Commission as a whole, the Committee noted that this potentially invaluable consultation facility was not being promoted. Given the range of backgrounds from which members of the Commission are appointed and the varying lengths of their service on the Commission, there is much to be said for encouraging the exchanges of views and perspectives that such processes facilitate.

Certainly, the Commission's hearing panels are not bound by the determinations made by other panels; there is no formal doctrine of precedent applicable to administrative agencies and tribunals. However, even though the Supreme Court in *Vavilov* was not prepared to endorse inconsistency as a free standing ground of judicial review, nonetheless, the majority took pains to emphasize that a persistent lack of consensus on commonly arising issues could raise concerns on the score of arbitrary decision-making. Therefore, in the Committee's view, a Commission policy promoting such plenary sessions could be an effective way of "strengthening institutional best practices."¹⁰³ Provided the constraints recognized in the case law are respected and, in particular, that such meetings "do not operate to fetter decision-making",¹⁰⁴ such meetings will pass legal muster.

5.16.1. Recommendation: Plenary Meetings

Recommendation #26

The Commission should formally recognize the benefits of plenary meetings to discuss generic issues that arise in proceedings before individual Panels, within the terms of the guidance on such meetings provided by the Supreme Court of Canada in the *Consolidated-Bathurst* and *Vavilov* decisions.

5.17. Intervention

Consumer and, more generally, interested party participation in rate regulation proceedings has long been a feature of hearings conducted by the Commission and its predecessors. Presently, the most frequent interveners in these matters are the statutorily recognized and government funded UCA, established in 2003, and the CCA, that has operated since 1978. As part of its statutory mandate, 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 and other bodies whose decisions affect the interests of those consumers.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

On its website, the CCA defines its primary role both originally and today as

... to intervene in [Commission] hearings related to the regulated portions of household utility bills.

It further describes the CCA as

... an independent, non-profit, volunteer-based organization.

In many rate matters, the UCA and the CCA are currently the only interveners. The absence of other interveners is apparently explained in large measure by the provisions of Sections 3 and 4 of Rule 022: *Rules on Costs in Utilities Rate Proceedings*.¹⁰⁵ One of the conditions of cost eligibility in Section 3 is that an intervener

... 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.

Section 4 then excludes from access to intervener funding, “[u]nless the Commission orders otherwise”, a range of “types or classes of interveners” including municipalities and associations thereof, and “business, commercial, institutional, or industrial entities” and associations thereof. The CCA, not coming within the exclusions of either Section 3 or Section 4, is a regular participant and applicant for costs in rate-setting and rate-related matters.

Some of the submissions to the Committee were critical of the participation of each of the regular interveners in rate matters. Generally, the utilities that raised this issue expressed concerns about the duplicative nature of intervener evidence and submissions, their excessive resort to IRs and engagement in “fishing expeditions”, and the quality of the evidence provided by, what have been described to the Committee as the interveners’ “non-expert experts”.

Concerns were also expressed about the breadth of interventions, and a failure on the part of the interveners to confine themselves to matters that were appropriately before the Commission in the specific proceeding. It was further alleged that the interveners tended to concentrate, mainly through the IR and cross-examination processes and the use of “non-expert experts”, on matters of little real moment in terms of their ultimate impact on rates.

This led to various suggestions including one arguing for the prevention of CCA intervention in matters where consumer interests were being represented by the UCA, and another urging, more generally, stricter policing for duplicative interventions particularly where the UCA was a party. A third called for greater accountability principally through increased justificatory requirements for intervener status, and a more restrictive costs regime based in part on the percentage of customers represented by the intervener.

Given the complexity of many rate regulation proceedings, varying consumer positions on issues integral to applications, and the diminution in size of the intervener community, room

¹⁰⁵ Made in part under section 21(2) of the *AUC Act*.

should continue to exist for expression of those differing visions of the consumer interest, and, indeed, additional perspectives on that interest.

Certainly, duplication can be a problem for the efficient and expeditious processing of applications, as can excessive use of the IR process and cross-examination, focus on issues that proportionally are of little or no moment, and the tendering of opinion evidence that is immaterial or unreliable. However, it is also clear that it is not only interveners that have been at fault in the protraction of rate-setting and rate-related matters. This is evidenced by utility resistance to and resulting dueling by motions over information requests, including those revolving around issues of confidentiality.

What is, however, apparent to the Committee is that these are problems that should be managed by more assertive case management. At the front end, preemptive action in the form of more rigorous attention to scoping is one obvious way of reining in any inappropriate expansion of an application, so-called “scope creep”. Unnecessary duplication could also be nipped in the bud in the context of the interveners’ Statements of Intent to Participate, and, more particularly, as now appears to be happening, through technical or issues meetings.

As discussed earlier in the Report, the Commission has also developed new approaches and mechanisms for dealing with one of the biggest sticking points and contributors to delay between regulated utilities and interveners: the determination of claims to confidential treatment of information.

It is otherwise clear that the Commission is aware of the problems identified by the utilities and its own staff and is doing something about it. This is evident in the following 2017 admonition:

In the Commission’s view many of the parties who filed statements of intent to participate in this proceedings raise similar issues. The Commission encourages parties with standing to band together to form a group, because the participation of groups contributes to the efficiency of a hearing and allows interveners to share the work of preparing and presenting an intervention. It should also be noted that costs awards to local interveners are affected by efficiencies that are gained, or which should have been gained by a co-operative approach among interveners and intervener groups.¹⁰⁶

One can also add that another way of improving the efficiency of hearings would be an allocation of responsibilities among those intervening.

In more recent decisions and in the context of applications for review or variance, the Commission has also been more forthcoming in denying at least a significant part of intervener cost claims based on the Commission’s assessment of the quality of interventions. Has the intervener contributed meaningfully to the matters in issue?¹⁰⁷ Were there qualitative defects in the intervener’s evidence? Was there unnecessary duplication of effort in the work for which

¹⁰⁶ *Alberta PowerLine General Partner Ltd. (Re)*, *supra*, note 94, at para. 118.

¹⁰⁷ *Consumers’ Coalition of Alberta*, [Decision 23833-D01-2018](#) (2018).

the intervener was claiming costs?¹⁰⁸ Was the cost of the services for which costs are being claimed proportionate to the value of that evidence to the matters in issue?¹⁰⁹ These considerations as well as others are listed in Section 11 of Rule 022. It also goes without saying that it is not just eligible interveners who are and should be subject to the discipline of costs reduction but also applicants. They too as “participants” are subject to Section 11.

By virtue of Section 3.3 of Rule 022, applicants are eligible to claim costs. This raised the question for the Committee of whether, as another measure of discipline, the possibility exists that the Commission has authority to not only deny or reduce the costs incurred by both utilities and interveners but also order the payment of what in effect are party and party costs. However, there are strong indications¹¹⁰ that the Alberta Court of Appeal would regard Rule 022 as a complete code for the award of costs in rate-setting proceedings. In other words, the Rule amounts to a legitimate structuring of the Commission’s discretion with respect to costs found in sections 11 and 21(1) of the *AUC Act* leaving no room for those sections to operate as free-standing bases for costs awards outside of Rule 022. Moreover, there are serious doubts as to whether Rule 022, properly interpreted, could stretch to utilities making costs claims against interveners. This possibility is not in any way suggested by Section 12(1) of Rule 022. In providing for the costs liability of utilities to interveners and omitting any mention of the costs liability of interveners to utilities, the Commission has in effect spoken on this issue. Of course, the Commission could amend Rule 022 to allow for this possibility, but the Committee is not recommending that.

In summary, the Committee has concluded that, through the Commission’s own recent initiatives, and a more rigorous approach to front end case management and Commission vigilance throughout the hearing of an application, much of the current tension between some of the regulated utilities and the two regular interveners could be eliminated or at least reduced to a state of healthy contestation. As well, Section 11 of Rule 022 provides ample room for costs denial and reduction when either applicants or eligible interveners engage in any of the relevant species of participatory “misconduct” identified in Section 11.

As with other aspects of the Commission’s discretionary powers, there would be little legal risk involved in the deployment of case management and the use of costs powers as a means of channeling the participation of both applicants and interveners (and the UCA and CCA in particular) in order to avoid duplicative and generally unnecessary effort, as well as to enhance

¹⁰⁸ *The Consumers’ Coalition of Alberta*, [25245-D01-2020](#) (2020).

¹⁰⁹ See, in transmission line proceeding, *ENMAX Power Corporation*, [25364-D01-2020](#) (2020).

¹¹⁰ See the judgment of Fraser CJA in *ATCO Gas and Pipelines Ltd. v Alberta Utilities Commission*, 2014 ABCA 397, 588 AR 134, at paras. 82-83 and 98-99, in which she classifies [Rule 022](#) as a complete code on costs for rate and rate related matters. Given that there is no explicit warrant for the award of party and party or equivalent costs to be found in Rule 022, that would seem to speak strongly against the reading of such an authority into the Rule. It must however be noted that it is unclear whether these aspects of Chief Justice’s judgment garnered the support of either the other majority judge or the dissenting judge. (The Fraser judgment has been cited recently by the Commission in a Review and Variance application: *Calgary (City) (Re)*, 2019 LNAUC 265, at paras. 44-45.)

the quality of the regulatory process. The Court of Appeal’s appreciation of the scope of this discretionary power is abundantly clear in the 2014 judgment of the Alberta Court of Appeal in *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*:

The Commission is a specialized body with a high level of expertise in a wide range of issues ... Of particular relevance to this appeal is the Commission’s expertise in determining the amount and appropriateness of legal costs for applicants and interveners in the many kinds of proceeding before it.¹¹¹

5.17.1. Recommendations: Interventions

Recommendation #27

The Committee recommends that the Commission should, through its case management powers, more assertively hold all parties to the scoped issues and guard against repetitious evidence and submissions.

Recommendation #28

The Committee recommends that the Commission should, in appropriate cases, continue to recognize and apply the extensive discretionary authority that it possesses under Section 11 of Rule 022, *Rules on Costs in Utility Rate Proceedings*, to deny or reduce the cost claims of both utilities and eligible interveners.

5.18. Costs

The *AUC Act* confers broad costs powers on the Commission. Section 11 provides that the Commission has the same authority with respect to costs as does a judge of the Court of Queen’s Bench. Section 21(1) is more specific in providing that the Commission can order

... by whom and to whom its costs and any other costs of or incidental to a hearing or other proceeding ... are to be paid.

Section 21(2) then authorizes the Commission to make rules “respecting the payment of costs to interveners”.¹¹² More general rule-making authority with respect to costs is also implicit in section 76(1)(e), and its provision for rules of practice “governing the Commission’s procedure and hearings.”

The Commission has exercised its rulemaking powers with respect to costs in Rule 022,¹¹³ which, as discussed in Section 5.17, creates a costs regime under which both eligible

¹¹¹ *Id.*, at para. 17.

¹¹² This provision does not however apply to “local interveners” as defined in section 22(1) and provided for by way of a separate rulemaking authority in section 22(2). In effect, this means that the rulemaking power in section 21(2) does not apply to transmission proceedings, but it does not affect rate-setting and rate-related proceedings.

¹¹³ *Supra*, note 105.

interveners and applicants¹¹⁴ can claim costs under a Scale of costs attached to the Rule as Appendix A. As far as interveners are concerned, eligibility is restricted to those with “a substantial interest” who do not

... have the means to raise sufficient financial resources to enable the intervener to present its interest adequately in the hearing and other proceeding.

Under Section 12 (Liability for costs) of Rule 022, in proceedings where a utility is an applicant, any costs awarded to an intervener are to be paid by the utility.¹¹⁵ In generic proceedings, the Commission may pay the costs of any eligible participant (including utilities), or order that responsibility for payment of any costs “be shared by one or more utilities.”¹¹⁶

However, Section 12 is silent as to liability for any costs awarded to an applicant utility in a rate-setting proceeding. That omission is puzzling but, as supported by the Commission’s practice, the solution is to be found in Section 13.4. It provides that the Commission may state in any cost order that a named applicant is entitled to “record the costs in its hearing costs reserve account.” The overall effect of this is that the utility becomes entitled to include these costs in its revenue requirements and to pass them on to its customers through its rates. By implication, it supports the contention that Rule 022 does not allow a utility to recover its costs from an intervener.

Section 9.2 is also critical in understanding the reach of Rule 022. It provides that participants in utility rate proceedings may “only claim costs in accordance with the scale of costs.” This suggests that Rule 022 has occupied the field and constitutes a complete code for the awarding of costs in utility rate proceedings. Apparent confirmation is provided by the 2014 judgment of Fraser CJA in *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*,¹¹⁷ noted in Section 5.17. In the context of two generic hearings, she rejected the argument of ATCO that the Commission had not only the authority but also the obligation to award it full legal and other regulatory costs for its participation in those proceedings on the basis that they had been prudently incurred. In other words, ATCO was asserting that its entitlement to costs was not constrained by the Scale of costs in Appendix A to Rule 022. However, Fraser CJA held that, in adopting Rule 022, the Commission had lawfully structured its discretionary powers over the award of costs found in sections 11, 21, and 76(1)(e) of the *AUC Act*. ATCO’s claim for costs was limited by the categories and amounts provided for in Appendix A, subject (as provided for in the introduction to the Scale of costs) to upward adjustment only where the claimant

... can advance persuasive argument that the scale is inadequate given the complexity of the case.

¹¹⁴ Section 3.3.

¹¹⁵ Section 12.1(a).

¹¹⁶ Section 12.1(b).

¹¹⁷ *Supra*, note 110.

After careful consideration, the Committee is not recommending any change in the carefully calibrated costs regime for utility rate proceedings elaborated in Rule 022. As noted in Section 5.17, this included rejection of any amendment of Rule 022 (or the *AUC Act*) that would expose interveners to the possibility of an order that they pay the legal and other regulatory costs of applicants.

However, the Committee does not reject, and in fact endorses the role of costs as a discipline on “behaviour” for those participating in rate-setting or rate-related proceedings. The overarching theme of this Report has been the importance of more assertive case management. In the Committee’s opinion, such an approach should have the impact of eliminating or reducing many of the practices that have characterized the participation of both utilities and interveners in rate-setting and rate-related proceedings that have contributed to regulatory lag. To the extent that this may not necessarily eliminate all such obstacles to the efficient and expeditious processing of applications and Commission-generated proceedings, there should be consequences for subpar participation.

At present, those consequences are provided for in Section 11 of Rule 022, the terms of which deserve elaboration. To qualify for an award of costs, the costs must be “reasonable and directly and necessarily related to the hearing or other proceeding.”¹¹⁸ Another threshold requirement that speaks directly to participatory performance is that

... the eligible participant acted responsibly in the hearing or other proceeding and contributed to a better understanding of the issues before the Commission.¹¹⁹

Section 11.2 then goes on to list a series of considerations or factors that the Commission may take into account in deciding whether to penalize a participant with a reduction in the quantum of costs to which the participant would otherwise be entitled under the Scale of costs. Those factors include many of the “sins” that are detailed and discussed in the preceding sections of this Report. The first is illustrative:

Asked questions on cross-examination that were unduly repetitive of questions previously asked by another participant and answered by the relevant witness.

In terms of the Committee’s mandate, Section 11.2(h) is particularly salient:

Engaged in conduct that unnecessarily lengthened the duration of the hearing or other proceeding or resulted in unnecessary costs to the applicant or other participants.

As discussed in Section 5.17, there is evidence that the Commission is increasingly willing to rely on Section 11.2 in evaluating and, where appropriate, reducing the costs claims of all eligible participants. Especially for some interveners but also more generally, significant participatory misconduct reductions in the costs awarded should be both a salutary experience and an

¹¹⁸ Section 11.1 (a).

¹¹⁹ Section 11.1 (b).

incentive to more focused and measured participation in the future. The Committee urges on the Commission that it continue along this path and diligently subject all costs claims to the code of conduct for participatory engagement that is the core of section 11.

5.18.1. Recommendation: Costs

Recommendation #29

The Committee recommends that the Commission rigorously apply to costs claims in rate-setting and rate-related proceedings the considerations governing eligibility and quantum of recovery set out in Section 11 of Rule 022, *Rules on Costs in Utility Rate Proceedings*.

6. Legal Risks

6.1. Introduction

The Terms of Reference require that the Committee’s report include “a discussion of associated risks, in particular legal risks, arising from moving from traditional procedures and methods to more innovative and flexible approaches.”¹²⁰ This part of our mandate requires an analysis of the legislative context—both substantive and procedural—within which the Commission functions currently, with particular emphasis on legislative provisions that directly or indirectly establish the procedural framework for the AUC’s utility rate regulation. It then requires consideration of the relevant common law influences as embodied in court-imposed rules of procedural fairness and common-law developed regulatory principles. Ultimately, it requires an assessment of the legal risks of implementation of our recommendations for reform, including consideration of the standards of review that we would expect the Alberta Court of Appeal to apply to any challenges to the substantive and procedural rules and rulings made by the Commission in the context of utility rate regulation.

Appendix III: Legal Framework and Risk Assessment presents our detailed analysis and discussion of legal risks. It informs our considered opinion that implementation of our recommendations for reform is subject to little risk of successful judicial review, and our conclusion that the Commission should feel free to implement assertive efficiency-driven procedural innovations, without fear of judicial intervention that is anything other than constructive.

This Section 6 of our Report—Legal Risks—is essentially a summary of the principles and analysis set out in detail in Appendix III.

¹²⁰ [Appendix II](#).

6.2. General

One way of characterizing the Committee's mandate is that it involves reviewing the rate-setting processes of the Commission with a view to making recommendations for change that will ensure an appropriate and legally defensible balance between what are sometimes, but not always, the competing demands of expedition and efficiency, on the one hand, and procedural fairness, on the other. However, it must also be recognized that, at common law, the rules of procedural fairness are both situation specific and content variable. This means that the requirements of procedural fairness vary in intensity and have themselves evolved contextually and with regard to, among other values, the realities of what is feasible as a matter of good administrative practice. In civil litigation, in a way that has obvious resonance in administrative decision-making, this is reflected in the Supreme Court of Canada's espousal of the concept of proportionality.¹²¹ Under this approach, the rules of civil procedure and the extent of procedural entitlements involve a balancing exercise in which the gains in efficacy of decision-making likely to be achieved by procedures are measured against the litigation and other costs of those procedures – in other words, a crude form of cost benefit analysis.

In recommending changes to the Commission's rate-setting processes, the Committee has been mindful of both the principles just identified and the legal framework within which the Commission functions. A central feature of that statutory framework is that the Commission is not primarily an adjudicative body. Rather, it is nearer to the inquisitorial end of the administrative decision-making spectrum. This is reflected in a legislative scheme under which it is the Commission's needs that are paramount in the fulfilment of its core mandate and the setting of just and reasonable rates. Its core function is not so much the refereeing or adjudication of a contest between contending participants as a process by which the Commission determines the appropriate level of rates by reference to its own standards and needs as the designated regulator and as defined by the governing legislation. Among the statutory indicators of this is the authority conferred on the Commission by section 8(2) of the *AUC Act* to act on its own initiative or motion. The most notable examples of the use of this power are the Commission's scheduling of generic hearings.

Among the features of that legal framework are the relative lack of procedural detail contained in the Commission's home or governing statutes and the extent to which, either directly or by necessary implication, matters of procedure are left to the on the ground judgment of the Commission. This finds its strongest manifestation in the extensive discretion that the *AUC Act* bestows on the Commission to make procedural rules. This discretion has been most notably exercised in the Commission's Rule 001, *Rules of Practice*. These *Rules of Practice* undoubtedly have been formulated with a close eye on the Commission's sense of what the common law rules of procedural fairness demand within the realities of this specific statutory decision-making process. The same is true of the way in which the Committee has developed its recommendations for change.

¹²¹ *Hryniak v. Maudlin*, 2014 SCC 7, [2014] 1 SCR 87.

The Committee has been attentive throughout to legal risk. To what extent are the changes that we are recommending legally consistent with the overall legal framework within which the Commission operates in its rate-setting jurisdiction? In this regard, we have paid particular attention not only to the governing statutes but also the overlay of common law procedural fairness when those statutes are not explicit and the role of the courts is to determine whether to fill the void left by the legislature.

Of course, where a recommendation runs up against the explicit or necessarily implicit provisions of a statute, the only way of putting that recommendation into effect is by way of legislative amendment or repeal. In fact, we are not making any such recommendations for legislative change by the Legislative Assembly of Alberta.

Similarly, if a recommendation were contrary to Rule 001, its implementation would involve the Commission in rewriting the relevant provisions of those rules. If the Committee believes that that is required or where prudence indicates that, in any event, the recommendation be embodied in a new Rule or set of Rules, we should say so. Moreover, when considering possible changes to Rule 001, the Committee was conscious of the reality that a reviewing court might measure the validity of any such changes against the common law rules of procedural fairness, rules that implicitly act as a limitation on the procedural rule-making powers of the Commission.

The Committee has reviewed all our recommendations for change in the light of these general principles, as well as our perception of the current requirements of both the statutory and engrafted common law. Our overall conclusions are that the legal risks of implementing the Committee's recommendations are minimal. The common law of procedural fairness is sufficiently flexible to accommodate our recommendations. None of them requires changes to the primary legislation or, for that matter, the Commission's *Rules of Practice*, though we do recommend that the Commission review Rule 001 in light of our recommendations. Given the comprehensiveness of Rule 001, there may be an argument for furthering that objective by the incorporation of some at least of the recommendations in the form of rules.

Certainly, both rules and rulings resulting from the implementation of any of our recommendations have some exposure to the possibility of judicial review through appeals on leave to the Alberta Court of Appeal. Since the judgment of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*,¹²² it remains likely that any challenge on procedural fairness grounds to a Commission rule or ruling will be categorized as a "question of law" for the purposes of the threshold for an application for leave to appeal, and, if leave is granted, reviewed on a correctness standard.¹²³ However, while the Supreme Court in *Vavilov* may have reaffirmed the proposition that questions of procedural fairness are to be reviewed by reference to a correctness rather than a reasonableness standard, the Supreme Court also made it clear that, in assessing the intensity of the procedural fairness demands on

¹²² *Supra*, note 102.

¹²³ *Id.*, at para. 23.

particular decision-makers, reviewing courts must have regard to the procedural choices made by a regulatory body on which the legislature has bestowed discretionary authority to set its rules of practice and procedure.¹²⁴ In other words, any exercise in judicial review of the content of procedural rules will have a significant element of deference or respect for the choices made by the front-line regulatory agency. This approach is captured well in the following extract from the pre-*Vavilov* judgment of Evans JA in the Federal Court of Appeal in *Re Sound v. Fitness Industry Council of Canada*:

In short, whether an agency's procedural arrangements, general or specific, comply with a duty of fairness is for a reviewing court to decide on a correctness standard, but in making that determination it must be respectful of the agency's choices. It is thus appropriate for a reviewing court to give weight to the manner in which an agency has sought to balance maximum participation on the one hand, and efficient and effective decision-making on the other. In recognition of the agency's expertise, a degree of deference to an administrator's procedural choice may be particularly important when the procedural model of the agency under review differs significantly from the judicial model with which courts are most familiar.¹²⁵

Moreover, it is highly likely that any such respect or deference will be reinforced if the relevant rule change has been preceded by consultation with affected constituencies and justified by reference to considerations of proportionality.

As for individualized exercises of discretion under changed rules or simply based on the Committee's recommendations, *Vavilov* emphasizes that the quality of a decision-maker's reasons is critical in the conduct of judicial review. Given that, the Alberta Court of Appeal is likely to support any well-reasoned procedural ruling either on the basis of correctness or perhaps even as not raising a question of law or jurisdiction under the appeal provisions in the *AUC Act*.

The Committee also believes that the Commission should not retreat from what it believes to be appropriate procedural changes and innovations by adopting a risk averse posture. The worst that can happen is that the Court of Appeal will "correct" the Commission and, in so doing, provide guidance on the future exercise of its mandate.

In summary, it is the Committee's considered opinion that active and responsible case management can and should be undertaken by the Commission without fear that judicial review through appeal will result in constraints on the fulfillment of its statutory mandate. An attentive, balanced, and reasoned approach to the exercises of the Commission's discretionary powers over procedural matters should almost invariably secure vindication in the Court of Appeal (and, similarly, in the context of review and variance proceedings).

¹²⁴ *Id.*, at para. 77.

¹²⁵ 2014 FCA 48, [2015] 2 FCR 170, at para. 42.

6.3. Specific

As a general matter, the Commission's existing authority under both relevant legislative provisions and its rule-making powers provides a legal basis for many of the procedural steps and aids covered by the list of issues that forms the core of the Committee's mandate. For example, there is no legal impediment to the Commission establishing a formal regime for the scoping and scheduling (including the setting of time limits) of applications designated for a full written process or an oral hearing. The Commission's discretionary powers on matters of procedure are sufficiently broad to enable the introduction and modification of these species of channeling aids.

This does not mean, however, that such regimes are without exposure to legal risk. The rules or policies may have elements that amount to a denial of procedural fairness. In individual interpretations and applications of the rules and policies, the Commission might violate the rules of procedural fairness. Particularly in the context of scoping, the Commission could face claims that it has misinterpreted the terms of its substantive mandate by excluding considerations that should have been included or including matters that should have been excluded.

Even with more assertive and efficiency driven case management, it is unlikely that there will be many situations where this risk would be significant. In fact, conversely, case management aimed at eliminating unnecessary delay and insufficiently focused processes can be an overall enhancer of fairness, as opposed to a contraction in the procedural fairness entitlements of participants. At the very least, the deployment of such techniques should be viewed as a relevant factor in determining the intensity of the Commission's procedural fairness obligations.

With respect to the content of the rules and policies that the Committee is recommending on scoping, scheduling and time limits, there is built-in flexibility and, more generally, the recommendations have been forged with an eye to the demands of procedural fairness. They also contemplate engagement with both applicants and other affected parties and over scoping and what represents an appropriate and fair schedule for the progress of the particular application. Moreover, in relation to both the content and application of the rules and policies, the Court of Appeal, in the context of both applications for leave to appeal and the appeal itself, is likely to be deferential to the procedural choices of the Commission, having regard to the extent of its discretionary powers and the policy laden nature of its rate-setting roles.

To the extent that the Commission in scoping and scheduling is involved in a process that is largely fact-based, it is also predictable that most proceedings in the Court of Appeal will be dismissed at the leave to appeal stage as not raising a question of law or jurisdiction. Rather, they will likely be classified as impermissible attempts to seek review of a mixed question of law and fact from which there is no readily extricable pure question of law. Only in situations that

involve a transcendent issue of procedural fairness is it likely that the application for leave to appeal will be successful.¹²⁶

The same is also true of challenges to the substance of any scoping exercise. The setting of limits to the ambit of a hearing seldom depends exclusively on the determination of a question of law or statutory interpretation. Rather, scoping involves a discretionary exercise of Commission authority which is generally fact specific and not involving a pure question of law.¹²⁷ Of course, should there be a pure question of law on which leave is granted, the standard of review in the Court of Appeal will, after *Vavilov*, be that of correctness. However, the Committee does not envisage that many applications for leave to appeal will come within that category.

Much the same analysis also applies to most of the other issues that are part of the Committee's mandate and form the range of what the law governing the content of procedural fairness obligations may require depending on context – Sections 5.6 (Confidentiality) to 5.12 (Adequacy of the Record). Certainly, some of the Committee's recommendations will involve changes to the Commission's operational policies and practices. Most of those (as in the case of Section 5.8 Interrogatories) propose a tightening up of the processes of the Commission. Others will require a restructuring of existing practices which, while preserving the Commission's discretionary powers, create default positions with respect to certain processes (Section 5.7 Hearings; Section 5.11 Argument). Furthermore, most of the Committee's recommendations have been developed as part of the Committee's more general concern that there be more active and systematic case management particularly for full written and full hearings.

Doubtless, questions will be raised as to whether some or even all these recommendations for tighter and more expeditious processes unduly compromise the procedural fairness rights of some or all participants.

First, there is no common law guarantee that, once adopted, procedural rules are cemented forever as the content or detail of procedural fairness requirements for a particular decision-maker. Changes to procedural rules and practices, including those that remove or limit existing entitlements, and resulting from reflective experience, are obviously within the discretionary procedural powers of a regulator such as the Commission.

Secondly, even some of the most common procedural features of administrative decision-making are not applicable across the entire range of statutory authorities. For example, oral hearings and cross-examination are not universal requirements of procedural fairness. Provided the Commission's processes recognize exceptional circumstances in which such rights should be accorded, rules that presumptively eliminate such rights should in general be legally secure. Thus, for example, the elimination of oral processes except where issues of credibility arise or where those affected cannot effectively function in writing should be safe from judicial review.

¹²⁶ See e.g. *Milner Power Inc. v. Alberta (Utilities Commission)*, 2019 ABCA 127, at paras. 49-59.

¹²⁷ See e.g. *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2104 FCA 245, [2015] 4 FCR 75.

Similarly, the elimination of traditional cross-examination and its replacement by a structured process of information requests would survive.

Thirdly, It is highly unlikely that the Court of Appeal would apply the doctrine of legitimate expectations to set aside a rule or ruling that diminishes or modifies the procedures attendant on a decision-making process. Provided there have been no representations to participants of adherence either generally or in the particular matter to existing processes, there will be little, if any room for the invocation of that doctrine. Moreover, in the instance of rule changes, any argument for legitimate expectations becomes even weaker if the rule changes are developed in the context of a consultative process engaging stake holders and are prospective in their operation, in the sense of not applying to proceedings that have already been commenced.

In summary, it is the Committee's conviction, particularly given the nature of rate-setting processes and the Commission's broad discretion in devising its own processes, that the recommendations will pass legal muster both as written and in implementation.

7. Legislative Change

By the Terms of Reference, the AUC instructed the Committee to consider "any recommendation for legislative change that will improve the efficiency of the Commission's process and procedures." The Committee has concluded that its overarching recommendation that the Commission adopt an assertive case management approach, as well as its specific recommendations, could be implemented within the existing authority of the Commission. Accordingly, the Committee is not making any recommendation for legislative change.

The Committee considered a recommendation that time limits be imposed on the Commission's processes by legislation but, as discussed in Section 5.5, concluded that "expeditious and efficient determination on the merits of every proceeding"¹²⁸ would be more appropriately achieved through rigorous scoping and scheduling of proceedings, as recommended in Sections 5.3 and 5.4.

8. Conclusion

The Committee has concluded that the existing AUC legislative framework is fit for the purpose of implementing efficient and effective regulation, provided that the Commission embraces assertive case management that is focused on the information needs of the Commission to discharge its mandate, always respecting the requirements of procedural fairness.

The recommendations of the Committee are set out in the various analytical sections of this Report, and are consolidated in Appendix IV: Recommendations of the AUC Procedures and Processes Review Committee.

¹²⁸ [Rule 001](#), Section 2.2.

The Committee has concluded that it is within the existing authority of the Commission to apply an overarching, assertive case management approach to the development and implementation of the Commission's procedures and processes and the implementation of the Committee's specific recommendations. The Committee has not identified any legislative changes that would be necessary before the Commission could implement the Recommendations in this Report. It may be, however, that the effectiveness of some of the Recommendations would be enhanced if they were formally incorporated into the Commission's *Rules of Practice*.

8.1. Rules Review

8.1.1. Recommendation: Rules Review

Recommendation #30

The Committee recommends that the Commission review Rule 001: *Rules of Practice* with a view to supporting implementation of the Committee's recommendations, as the Commission may deem appropriate.

Appendix I - Bulletin 2020-17: AUC creates independent, expert committee to assist in improving efficiency of rates proceedings (May 8, 2020)



Bulletin 2020-17 and
Attachments

Appendix II – Terms of Reference of AUC Committee on Procedures and Processes



Terms of Reference

Appendix III – Legal Framework and Risk Assessment



Legal Framework &
Risk Assessment

Appendix IV – Recommendations of the AUC Procedures and Processes Review Committee



Recommendations

Appendix I

Bulletin 2020-17: AUC creates independent, expert committee to assist in improving efficiency of rates proceedings (May 8, 2020)

Bulletin 2020-17

May 8, 2020

AUC creates independent, expert committee to assist in improving efficiency of rates proceedings

This bulletin summarizes the Commission's plans to continue its important discussions with stakeholders about reducing regulatory burden and lag, and provides an update on initiatives underway or planned to pursue further improvements.

These efforts were the subject of three stakeholder roundtables last fall and two related bulletins issued by the Commission, [Bulletin 2019-18](#) and [Bulletin 2020-02](#).

Following the first roundtable on October 4, 2019, the Commission immediately initiated a number of measures intended to bring more efficiency into our adjudicative process primarily in connection with rate and facility applications. These included:

- More technical meetings aimed at reducing the number of information requests.
- Directing parties to narrow issues and negotiate outcomes where possible.
- Conducting focused, shorter hearings, some with immediate decisions.

Not all of the initiatives have as yet met their goals, but Commission members and staff are genuinely committed to introducing more innovation to improve the timelines in our decision-making process.

In November 2019 the AUC published its strategic plan in which it committed to publish an annual report card setting out, among other things, what has been done and plans to further remove unnecessary regulatory burden. As part of that report card, the AUC intended to ask the companies the AUC regulates and other stakeholders for their views on whether the AUC's burden reduction efforts are succeeding. The AUC proposed to solicit those views through an industry impact assessment.

Towards this goal, the AUC published Bulletin 2020-02 on January 17, 2020. For reasons explained in that bulletin, the industry impact assessment was to focus on the AUC's non-adjudicative regulatory functions. However, the overwhelming response from participants centred on the AUC's adjudicative process related to rate applications.

Stakeholders encouraged the AUC to focus its burden reduction efforts in this area because rates proceedings take too long and the associated regulatory lag is having an unfavourable impact on the utilities sector. Because of the COVID-19 pandemic, we are delaying the formal industry impact assessment for one year, although we will continue with our own internal assessment of process efficiencies.

However, given the views that were expressed in response to Bulletin 2020-02, the Commission has decided to focus its attention on improving the effectiveness and timeliness of the processes and procedures used in rates proceedings in our ongoing discussions. Other process efficiency initiatives (such as the reduction of agency overlap, a “trusted traveller” approach for certain applications, fixed hearing dates and more) will proceed unabated for AUC facility applications, but will not be part of the AUC’s next planned roundtable. We will report on our progress and activities in relation to those efficiency efforts in our annual report card.

The AUC is also introducing a change to the composition of our next roundtable, partly because of the COVID-19 pandemic and partly because a smaller group is more likely to make progress in advancing adjudicative efficiencies. The AUC will establish a technical advisory working group of five or six people comprised of representatives from the regulated utilities and intervener groups. The working group and the Commission will identify issues and propose solutions and report back to a wider audience and senior representatives of stakeholders. Once the technical advisory working group is in place, we will propose an agenda and schedule a time to meet. However, given the pandemic’s demands on everyone’s resources, we will schedule the next roundtable when a degree of normalcy returns to the workplace.

To assist the AUC, the Commission has established an independent AUC Procedures and Processes Review Committee. The committee members have deep regulatory experience and includes C. Kemm Yates, QC, noted regulatory counsel; David J. Mullan, Queen’s University professor emeritus in administrative law; and Rowland J. Harrison, QC, a former long-serving member of the National Energy Board (now the Canada Energy Regulator).

The committee will review the Commission’s rate application adjudicative processes and procedures and make recommendations to AUC Chair Mark Kolesar on how process and procedure steps can be made more efficient, or eliminated altogether. An invitation from the committee to submit comments is appended to this bulletin.

Stakeholders can use the [AUC’s Engage consultation tool](#) to provide written submissions directly to the committee. Engage can be accessed from the AUC website on the ribbon in the top-centre of the page. Those responding should focus specifically on the 11 issues identified in the committee's terms of reference while at the same time feeling free to raise other matters bearing upon the committee's mandate.

The committee’s recommendations will inform discussion with the technical working group referenced above in identifying improvements that can be implemented to reduce regulatory burden and streamline the process for rates proceedings. The Commission looks forward to your continued interest and participation in the improvement of utility regulation in Alberta.

Douglas A. Larder, QC
General Counsel

Committee on the Procedures and Processes of the Alberta Utilities Commission

Invitation to interested stakeholders to provide comments

As announced in AUC Bulletin 2020-17, dated May 8, 2020, we have been established as an ad hoc committee “to look into the processes and procedures of the Commission for rate-setting cases with the objective of making them more efficient and productive.” Our terms of reference are found below.

As part of its work, the committee looks forward to consulting with stakeholders.

The current COVID-19 pandemic imposes obvious constraints in this regard. We are, therefore, initiating our consultations by inviting written submissions.

The committee has already reviewed or will be reviewing relevant material provided by the Commission. This includes the written submissions that were received by the Commission in its regulatory burden stakeholder consultation announced on July 17, 2019, the transcript of the October 4, 2019 roundtable held by the Commission, the results of that roundtable as reported in Bulletin 2019-18, and summaries of the October 28 and 29 AUC Strategic Plan roundtables, as well as the filed responses to Bulletin 2020-02. We have also reviewed certain submissions made directly to the office of the Associate Minister of Red Tape Reduction.

Stakeholders are invited to make written submissions directly to the committee through [AUC Engage](#). Those responding should focus specifically on the 11 issues identified in the committee's terms of reference while at the same time feeling free to raise other matters bearing upon the Committee's mandate.

Written submissions, along with contact details, should be filed through AUC Engage by May 22. The committee may also conduct telephone or video consultations as it considers appropriate.

C. Kemm Yates, QC
Committee Chair

David J. Mullan

Rowland J. Harrison, QC

Committee on the Procedures and Processes of the Alberta Utilities Commission

Preamble

The Alberta Utilities Commission has established an ad hoc committee to look into the processes and procedures of the Commission for rate-setting cases with the objective of making them more efficient and productive. The need to examine the Commission's processes and procedures has been a general discussion point for some time and has most recently received attention as a result of the Alberta government's policy initiative to reduce red tape for Alberta's businesses.

The Commission is committed to reforming its processes and procedures and will look to the committee's findings and recommendations to inform its approach.

Terms of reference

The committee shall be composed of Kemm Yates, QC, David Mullan and Rowland Harrison, QC. Kemm Yates shall chair the committee. Without limitation, the committee is asked to review the various steps of the decision making processes used by the Commission in its rate-setting function.

The committee is to propose how the Commission's processes can be made more efficient within the requirements of the principles of procedural fairness, and how the new approaches should be implemented.

The committee will work with Commission staff as necessary to complete its work. The Commission will provide any information and material required by the committee including a description of the process steps typically followed by the Commission upon the filing of a rate application; submissions made by industry and customer groups at roundtables on regulatory burden conducted by the Commission in October 2019; submissions made directly to government by the utilities industry in 2019 and 2020; bulletins related to the roundtables issued by the Commission and copies of Improving Regulation Reports filed by the Commission with the provincial government.

The Commission is particularly interested in advice on the following issues but the committee is not restricted to only these issues:

1. Scoping of issues
2. Scheduling
3. Confidentiality
4. Hearings — written or oral
5. Interrogatories
6. Cross-examination — whether to allow and if so when
7. Motions
8. Argument — written, oral, timing, order
9. Adequacy of the record

10. Panel assertiveness in the hearing room

11. Content and length of decisions

Committee members will consult with Commission members, Commission staff, and counsel and participants in Commission rate-setting proceedings, as deemed necessary by the committee.

The advice on recommended reforms should include a discussion of associated risks, in particular legal risks, arising from moving from traditional procedures and methods to more innovative and flexible approaches as well as any recommendation for legislative change that will improve the efficiency of the Commission's process and procedures.

The committee has full discretion to determine its processes, and will use its best efforts to provide a written report to the chairman by June 15, 2020.

Appendix II

Terms of Reference of AUC Committee on Procedures and Processes

Committee on the Procedures and Processes of the Alberta Utilities Commission

Preamble

The Alberta Utilities Commission has established an ad hoc committee to look into the processes and procedures of the Commission for rate-setting cases with the objective of making them more efficient and productive. The need to examine the Commission's processes and procedures has been a general discussion point for some time and has most recently received attention as a result of the Alberta Government's policy initiative to reduce red tape for Alberta's businesses.

The Commission is committed to reforming its processes and procedures and will look to the Committee's findings and recommendations to inform its approach.

Terms of Reference

The Committee shall be composed of C. Kemm Yates, Q.C., David Mullan and Rowland J. Harrison, Q.C. Kemm Yates shall chair the Committee. Without limitation, the Committee is asked to review the various steps of the decision making processes used by the Commission in its rate-setting function.

The Committee is to propose how the Commission's processes can be made more efficient within the requirements of the principles of procedural fairness, and how the new approaches should be implemented.

The Committee will work with Commission Staff as necessary to complete its work. As soon as possible after the striking of the Committee, the Commission will provide any information and material required by the Committee including a description of the process steps typically followed by the Commission upon the filing of a rate application; submissions made by industry and customer groups at round tables on regulatory burden conducted by the Commission in October, 2019; submissions made directly to government by the utilities industry in 2019 and 2020; bulletins related to the roundtables issued by the Commission; and copies of Improving Regulation Reports filed by the Commission with the provincial government.

The Commission is particularly interested in advice on the following issues but the Committee is not restricted to only these issues:

1. Scoping of issues
2. Scheduling
3. Confidentiality
4. Hearings—written or oral
5. Interrogatories
6. Cross-examination—whether to allow and if so when
7. Motions
8. Argument—written, oral, timing, order
9. Adequacy of the record
10. Panel assertiveness in the hearing room
11. Content and length of decisions

Committee members will consult with Commission members, Commission staff, and counsel and participants in Commission rate-setting proceedings, as deemed necessary by the Committee.

The advice on recommended reforms should include a discussion of associated risks, in particular legal risks, arising from moving from traditional procedures and methods to more innovative and flexible approaches as well as any recommendation for legislative change that will improve the efficiency of the Commission's process and procedures.

The Committee has full discretion to determine its processes, and will use its best efforts to provide a written report to the Chairman by June 15, 2020.

Appendix III
Legal Framework and Risk Assessment

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1. Introduction and Summary

1.1. The Committee's Mandate and Summary Conclusions

The mandate of the Committee is essentially threefold:

1. review the current processes and procedures of the Commission in rates proceedings;
2. make recommendations on how the Commission's processes can be made more efficient within the requirements of the principles of procedural fairness; and
3. provide an assessment of the legal risks arising from implementation of any of our recommendations.

Each of the tripartite elements of our mandate must be informed by the reality of the legal framework within which the AUC operates. That legal framework establishes the parameters within which we have undertaken the task of evaluating what is feasible both practically and legally in the crafting of recommendations that we believe will lead to greater efficiency and expedition in the AUC's carrying out of its rate-setting and rate-related mandates. Equally, the assessments provided in Appendix III are critical to the development of a greater awareness by the Commission of the opportunities that the legal framework affords for the carrying out of its own mandate in a way that balances the often competing considerations that are urged upon it by those with strong interests in the substance of the Commission's rate regulation role. In other words, we also define our task as one of enabling the Commission to proceed confidently in the continuing development of a regime that will pass legal muster while at the same time lead to more efficient and expeditious fulfillment of its rate regulation responsibilities.

In this section of our Report (presented as Appendix III), we set out in detail the primary legislative context—both substantive and procedural—within which the Commission functions currently, with particular emphasis on legislative provisions that directly or indirectly establish the procedural framework for the AUC's utility rate regulation mandate. We detail and discuss relevant common law influences as embodied in court-imposed rules of procedural fairness and common-law developed regulatory principles. We then assess the legal risks of implementation of our recommendations for reform. In that specific context, we consider the standards of review that we would expect the Alberta Court of Appeal to apply to any challenges to the substantive and procedural rules and rulings made by the Commission in the context of utility rate regulation, with emphasis on the evaluation of procedural challenges. Within that standard of review framework, we examine the extent to which the common law rules of procedural fairness (and regulatory principles) are likely to have traction. We conclude with an assessment of the legal risk involved in the implementation of specific recommendations for procedural change.

In summary, having given extensive consideration to the applicable legislative and common law, our considered opinion is that implementation of the recommendations that we make—primarily the application of assertive case management within the enabling context of the

existing legislative and common law regime—is subject to little risk of successful judicial review. The Commission should feel free to implement assertive efficiency-driven procedural innovations, without fear of judicial intervention that is anything other than constructive.

Section 6 of our Report—Legal Risks—is essentially a summary of the principles and analysis set out in detail in this Appendix III.

1.2. The Mandate in Greater Detail

As already described, a core component of our mandate from the Commission was to consider how the Commission’s processes could be made more efficient while still meeting its obligations to adhere to the principles of procedural fairness. To that end, we were asked to evaluate eleven specific aspects of the Commission’s processes as well as any other issues that we saw as potentially providing room for greater efficiencies. The mandate then elaborated on our responsibilities with respect to the legal aspects of any recommendations for change. In our Report, we were to

... include a discussion of associated risks, in particular legal risks, arising from moving from traditional procedures and methods to more innovative and flexible approaches as well as any recommendations for legislative change that will improve the efficiency of the of the Commission’s process and procedures.

Section 6 of our Report to the Commission—entitled Legal Risks—first sets out a summary overview of the legal risks associated with the kinds of changes that the Committee is recommending as well as a brief discussion of the potential for legal challenge to our specific recommendations.¹ The basis for that section of our Report is to be found in this Appendix.

Appendix III commences with a detailed outline of the legal foundations for the Commission’s rate setting roles and the procedures currently supporting the exercise of those functions – the relevant primary legislation, potentially applicable constitutional and *quasi*-constitutional imperatives, the Commission’s extensive body of procedural rules bearing on its rate making function, the common law of procedural fairness, and generally accepted regulatory principles which might also be described as a form of common law.²

We then examine in greater detail the potential limitations on the Commission’s processes and recommendations for change imposed by the relevant constitutional and *quasi*-constitutional norms.³ There follows an examination of the standard of review that the Alberta Court of Appeal is likely to apply in assessing the substantive, and, more importantly for current purposes, procedural rules and rulings of the Commission in the exercise of its rate-setting

¹ Section 6: Legal Risks, 6.1 Introduction.

² Appendix III, Legal Framework and Risk Assessment, Section 2: Relevant Legal Norms.

³ Appendix III, Section 3: Impact of Legal Norms, Section 3.1 Constitutional and *Quasi*-Constitutional Limitations.

functions. This section concludes with an evaluation of the general demands that the principles of procedural fairness are likely to impose on the Commission in this context.⁴

Appendix III then concludes with a consideration of the extent of the legal risk to any of our specific recommendations on each of the eleven issues that we were asked to address as well as additional issues that our experience and consultations identified as relevant to our mandate. As already noted, our conclusion was that the chances of successful legal challenge to either rules or rulings resulting from Commission acceptance of our recommendations would be negligible.

2. Relevant Legal Norms

2.1. Primary Legislation⁵

2.1.1. *Alberta Utilities Commission Act*⁶

The starting point for this analysis is the *Alberta Utilities Commission Act* (“AUC Act”). Section 8 of that Act specifies the powers of the Commission. They are expansive. Subsection 2 provides that the Commission

... in the exercise of its powers and the performance of its duties and functions under this Act or any other enactment, may act on its own initiative or motion and do all things that are necessary for or incidental to the exercise of its powers and the performance of its duties and functions.

Subsection 3 then goes on to confer discretionary power on the Lieutenant Governor in Council (“Cabinet”) to expand the “powers, duties and functions” of the Commission beyond those already provided for in the *AUC Act* or any other enactment. The role of the Cabinet is further fortified in subsection 4 to include the making of orders requiring the Commission to fulfill “any function or duty specified in the order” including

... inquiring into, hearing and determining any matter or thing in respect of any matter within the jurisdiction of the Commission under this Act or any other enactment.

Particularly relevant to the Commission’s rate-setting (and, more generally, hearing) functions is subsection 5 conferring on the Commission authority to

- (a) hear and determine all questions of law and fact;
- (b) make an order granting the relief applied for;

⁴ Appendix III, Subsection 3.2 Standard of Review.

⁵ In addition to the Utilities legislation outlined below, there is the *Rural Utilities Act*, RSA 2000, c R-21. It recognizes and provides for the establishment and running of Rural Utilities Associations, cooperative enterprises that provide utilities for groups of residents of rural Alberta. They function largely on a contractual basis. However, in interacting with other utilities they do become amenable to the rate-setting jurisdiction of the Commission. As illustrated by *FortisAlberta Inc. v. Alberta (Utilities Commission)*, 2020 ABCA 271, this interface can create some complex jurisdictional issues.

⁶ SA 2007, c A-37.2 (as amended).

- (c) make interim orders;
- (d) where it appears to the Commission to be just and proper, grant partial, further or other relief in addition to, or in substitution for, that applied for as fully and in all respects as if the application or matter had been for that partial, further or other relief.

Directly relevant, indeed critical to the work of the Committee is section 9. Subsection (1) provides that the Commission need not give notice or hold a hearing prior to making “any order or decision”, unless expressly provided otherwise “by this Act or any other enactment to the contrary, and subject to this section...”⁷ However, subsection (1) is qualified significantly by subsection (2). Where the Commission is of the view that a

... decision or order on an application may directly and adversely affect the rights of a person, the Commission shall

- (a) give notice in accordance with Commission rules,
- (b) give the person a reasonable opportunity of learning the facts bearing on the application as presented to the Commission by the applicant and other parties to the application, and
- (c) hold a hearing.

Nonetheless, by virtue of subsection (3), a hearing is not required where no one requests one in response to the filing of an application. Moreover, while “hearing” is not defined in the *AUC Act* (or any of Alberta’s other utility rate-setting statutes), subsection (4) provides that any entitlement to make representations arising out of subsection (2) does not include the right to make oral representations, or to be represented by counsel, provided the Commission “affords ... an adequate opportunity to make representations in writing.”

Thereafter, section 10 confers on the Commission authority to review any decision or order under rules promulgated for that purpose. These rules can address the criteria the Commission will apply in determining whether to conduct a review, who is eligible to apply for a review, the information that must accompany any request for a review, and the time within which any application for a review can be made.

Section 11 then entrusts the Commission with “all the powers, rights, privileges and immunities that are vested in” Court of Queen’s Bench judges with respect to a range of procedural matters extending from the compelled attendance and examination of witnesses to the payment of costs, and, more generally,

... all other matters necessary or proper for the due exercise of its jurisdiction or otherwise for carrying any of its powers into effect...

⁷ The *AUC Act* does not define “enactment”. However, by virtue of section 28(1)(m) of the *Interpretation Act*, RSA 2000, c I-8, when an Act refers to an “enactment”, it covers both an Act and a regulation.

Part 1 then ends with a typical contempt provision under which the Commission may apply to a judge of the Court of Queen's Bench for a committal order. This is triggered where someone

... commits or does an act, matter or thing that would, if done in or in respect of the Court of Queen's Bench, constitute a contempt of the Court...⁸

Thereafter, in Part 2, the Act contains detailed provisions respecting the conduct of hearings, including the authority of the Chair to designate which and how many members will sit on a particular application with authority to act in the name of the Commission. After provisions respecting evidential privilege and witnesses, section 20 makes it clear that:

The Commission is not bound in the conduct of its hearings by the rules of law concerning evidence that are applicable in judicial proceedings.

It is also significant that, in providing for awards of costs, section 21(2) anticipates rules "respecting the payment of costs to an intervener" in rate-setting proceedings.

Part 4 of the Act deals with appeals from decisions or orders of the Commission. Section 29 provides for an appeal to the Court of Appeal on "a question of jurisdiction or on a question of law" but only if permission is granted by a judge of the Court of Appeal. There then follows a privative clause⁹, which at least on its face seems calculated to confine any challenge to decisions or orders of the Commission to appeals on leave under section 29. This is one of the strongest exclusions of common law judicial review found in Canadian legislation. It makes "every action, order, ruling or decision" of the Commission and those acting on behalf of the Commission "final", meaning that any such matter

... shall not be questioned or reviewed in any court by application for judicial review or otherwise, and no order shall be made or process entered or proceedings taken in any court, by way of injunction, declaratory judgment, prohibition, quo warranto or otherwise, to question, review, prohibit, or restrain the Commission or the Chair or any of the Commission's proceedings.

The *AUC Act* also contemplates further elaboration of the processes to be followed by the Commission in responding to applications and otherwise exercising its powers. Under section 75, the Cabinet is given broad regulation making powers, which include, not only defining "any word or expression used but not defined in the Act", but also regulating how the Commission's powers, duties and functions "are to be exercised." Section 76 then confers extensive rule-making powers on the Commission. Among them are the powers to make "rules of practice governing the Commission's procedure and hearings"¹⁰ and establishing the "requirements that must be met by an applicant to satisfy the Commission under section 9(3)(b) that a hearing is

⁸ Section 12.

⁹ Section 30.

¹⁰ Section 76(1)(e).

not necessary.”¹¹ The Commission does not have to hold a hearing before making any such rules,¹² and the making of these rules is not subject to the *Regulations Act*.¹³

By reference to section 76, the Commission has adopted an extensive set of procedural rules, the latest version of which is to be found in Rule 001: *Rules of Practice*, as approved by the Commission on February 3, 2020.¹⁴

2.1.2. *Electric Utilities Act*¹⁵

While the *AUC Act* is an umbrella statute setting out the Commission’s overall mandate and procedural obligations at a general level, the Commission’s specific jurisdiction or authority with respect to utility rate regulation is found in the *Electric Utilities Act* (“*EU Act*”), the *Gas Utilities Act* (“*GU Act*”), and the *Public Utilities Act*, (“*PU Act*”), the first dealing with most but not all electric utilities, the second with gas utilities, and the last with all other utility rate-setting by the Commission.

More specifically, sections 121(2)(a) and (b) of the *EU Act* establish the core of the Commission’s role in rate or tariff setting for most of the electricity sector. Under (a), the Commission “must ensure” that a “tariff is just and reasonable”, while under (b), the Commission is required to ensure that

... the tariff is not unduly preferential, arbitrarily or unjustly discriminatory or inconsistent with or in contravention of this or any other enactment or law.

The term “tariff” is defined as a document that sets out “rates”¹⁶ and “terms and conditions”,¹⁷ with rates being defined as “prices, rates, tolls and charges.”¹⁸

In other words, it is the stuff of standard North American utility regulation principles.

The *EU Act* also contains provisions bearing upon the procedures that apply to most electricity rate regulation proceedings.

Section 118(2) confers on the Commission authority to make rules respecting information that must be filed with the Commission (including the persons responsible for filing). Included within the information that may be required to be filed are forecasts, and

¹¹ Section 76(1)(f).

¹² Section 76(4).

¹³ Section 76(5).

¹⁴The main objective of the February amendments was to “facilitate a major enhancement to the Commission eFiling System supporting the exchange of confidential documents among Commission-authorized proceeding participants”: [AUC Bulletin 2020-05: Amendments to AUC Rule 001 to facilitate exchange of confidential documents](#) (February 10, 2020).

¹⁵SA 2003, c E-5.1.

¹⁶ *Id.*, section 1(1)(zz)(i).

¹⁷ *Id.*, section 1(1)(zz)(ii).

¹⁸ *Id.*, section 1(1)(pp).

separate information in relation to transmission, distribution, exchange, purchase or sale of electric energy when one or more of those functions is undertaken by the same person.

Under section 121(1), the Commission's tariff approval jurisdiction is made contingent on "giving notice to interested parties." However, the term "interested parties" is not defined. Section 121(4) goes on to provide that the burden of proof for showing whether a "tariff is just and reasonable" falls "on the person seeking approval."

Of particular significance in terms of controlling regulatory lag, Division 3 of Part 9 ("Regulation by the Commission") provides for the "Negotiated Settlement of an Issue." As part of this regime, section 132(1) provides that the Commission "**must** [emphasis added] recognize or establish rules, practices and procedures that facilitate

- (a) the negotiated settlement of matters arising under this Act or the regulations, and
- (b) the resolution of complaints or disputes regarding matters arising under this Act or the regulations.

(To the extent that any such rules, practices and procedures affect the Independent System Operator ("ISO"), the Commission owes a duty of prior consultation with the ISO: section 132(2).)

There then follow provisions in section 133 respecting the appointment of mediators as well as the capacity of the Commission to make rules respecting process (notice, disclosure, and participatory rights, including the extent to which non-parties may participate).

Any settlements coming out of this process require the approval of the Commission (section 134), and that section and others that follow (sections 135-137) set out the process by which the Commission determines whether or not to accept the settlement.

2.1.3. Gas Utilities Act¹⁹

The structure of the *GU Act* is similar to that of the *EU Act*, with the Commission's regulatory role defined in terms of fixing "just and reasonable rates, tolls or charges" for the supply of natural gas.²⁰ This is an authority that the Commission may exercise "on its own initiative or on the application of a person having an interest" and generally²¹ requires the Commission "giving

¹⁹ RSA 2000, c G-5.

²⁰ See sections 6(1)(a), 36 and 37.

²¹ Under section 6(1), the Cabinet may order the Commission to fix and determine "just and reasonable" prices for certain categories of gas. On making such an order, the Cabinet may also direct that the Commission proceed without giving notice and without holding a hearing (section 6(3)(a)). However, in such a situation, the Commission, after making an order, must "within a reasonable time" of new prices coming into effect provide notice to "any interested party" and hold a hearing for the purpose of "reviewing its order and, if necessary, amending or replacing it." (section 6(4)).

notice to and hearing the parties interested.”²² At any such hearing, the burden of proof rests with the owner of the gas utility seeking to establish the justness and reasonableness of any proposed “increases, changes or alterations”.²³ Section 36 also requires that where that burden has been met, the Commission is to proceed by way of an “order in writing”.

Sections 28.51 to 28.8 of the Act are virtually identical to the provisions respecting negotiated settlements in the *EU Act* described above. The final three sections²⁴ of the Act then incorporate various aspects of the *PU Act* into the *GU Act*, and specify that, in the case of conflict between any such incorporated provisions in the *PU Act* and the *AUC Act*, the *AUC Act* is to prevail.

2.1.4. Public Utilities Act²⁵

Unlike the *EU Act*, the *PU Act* contains few provisions that either directly or indirectly bear upon the procedures to be followed by the Commission in exercising jurisdiction under that Act. However, section 85, which confers on the Commission “general supervision over all public utilities, and the owners of them” and applies to electric utilities as well as water and gas,²⁶ obviously contemplates the Commission having extensive information gathering powers

... as to the manner in which owners of public utilities comply with the law, or as to any other matter or thing within the jurisdiction of the Commission.²⁷

The Act then follows the typical pattern of a rate regulation statute by clothing the Commission with authority to make orders that “fix just and reasonable ... rates.”²⁸ This is an authority that the Commission may exercise of its own initiative or “on the application of a person having an interest”. However, it is predicated on the Commission “giving notice to and hearing the parties affected.” Thereafter, from section 89(b) through section 95, the Act sets out the bases on which rates are to be set, including the considerations relevant to the determination of a rate base, which is to form the basis for the Commission’s determination of what is “a fair return on the rate base.” However, by virtue of section 116(1), none of sections 89 to 95 applies to electric utilities as defined in the *EU Act*.

²² Section 36.

²³ Section 44(3).

²⁴ Sections 59-61.

²⁵ RSA 2000, c P-45.

²⁶ Section 85(1).

²⁷ Section 85(2).

²⁸ Section 89(a).

2.1.5. Government Organization Act²⁹

Schedule 13.1 of the *Government Organization Act* establishes the Office of the Utilities Consumer Advocate (“UCA”). That office operates within the department of the “responsible Minister” and with such staff as authorized by the Minister.³⁰ Among the responsibilities of the UCA under section 3 is that of

... represent[ing] the interests of Alberta residential, farm and small business consumers of electricity and natural gas before proceedings of the Alberta Utilities Commission and other bodies whose decisions may affect the interests of those consumers.

Necessarily implicit in the imposition of this responsibility is standing as of right in the Commission’s rate-setting proceedings. Moreover, in support of its various responsibilities and capacities, the UCA is given extensive information gathering capacities (including information about electricity and natural gas distributors, providers and retailers which is in the possession of the Commission).³¹

It is also noteworthy that, under section 6(d), the Cabinet may make regulations

... adding to, clarifying, limiting or restricting any of the responsibilities of the Office of the [UCA] or regulating how they are to be carried out

2.1.6. Administrative Procedures and Jurisdiction Act³²

Part 1 of this Act specifies a limited range of procedural obligations for those exercising statutory powers and designated by regulation as subject to the provisions of that Part of the Act.³³ At one time, the Commission and its predecessor were subject to Part 1 but that is no longer the case.³⁴ However, with reference to Part 2 of the Act, Jurisdiction to Determine Questions of Constitutional Law, the Commission has been given authority to determine “all questions of constitutional law.”³⁵

For these purposes, the Act defines a “question of constitutional law” as

- (i) any challenge, by virtue of the Constitution of Canada or the *Alberta Bill of Rights* to the applicability of or validity of an enactment of the Legislature of Alberta, or

²⁹ RSA 2000, c G-10, Schedule 13.1.

³⁰ Section 2.

³¹ Section 4(1).

³² RSA 2000, c A-3.

³³ Section 2.

³⁴ *Authorities Designation Regulation*, Alta Reg 64/2003 (as amended), section 1. The list of four agencies to which the Act applies in whole does not include the Commission nor for that matter the Alberta Energy Regulator. However, the Commission was subject in whole to the Act between January 15, 2008 and September 23, 2013 by reference to the now repealed section 1(f).

³⁵ *Designation of Constitutional Decision Makers Regulation*, Alta Reg 69/2006, section 2, and Schedule 1.

- (ii) a determination of any right under the Constitution of Canada or the *Alberta Bill of Rights*.

The Act does not define “Constitution of Canada” but it presumably includes not only the various *Constitution Acts* and the *Canadian Charter of Rights and Freedoms* but also constitutional norms found in the underlying principles of the Canadian Constitution, as recognized by the *Quebec Secession Reference*,³⁶ and the rights and interests of Indigenous peoples as enshrined in section 35 of the *Constitution Act, 1982* and under common law, as reflected in the duty to consult and, where appropriate, accommodate.

2.2. Constitutional and Quasi-Constitutional Requirements

2.2.1. *Alberta Bill of Rights*³⁷

The *Alberta Bill of Rights* contains two substantive provisions. The first, section 1, is a recognition and declaration of the right on a non-discriminatory basis³⁸ to a range of human rights and fundamental freedoms. Among those rights, the most likely to be engaged in utility rate regulation are

- (a) the right of the individual to liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law

and

- (b) the right of the individual to equality before the law and the protection of the law.

Section 2 then goes on to detail how the *Alberta Bill of Rights* may be invoked in regulatory as well as judicial proceedings. It acts as a directive as to both the construction and application of statutes:

Every law of Alberta shall, unless it is expressly declared by an Act of the Legislature that it operates notwithstanding the *Alberta Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared.³⁹

Legislation containing such provisions, especially when linked to the protection of human rights and freedoms, is often characterized as *quasi-constitutional* and, as such, as having a status

³⁶ [1998] 2 SCR 217.

³⁷ RSA 2000, c A-14.

³⁸ The specifically recognized proscribed grounds of discrimination are “race, national origin, colour, religion, sexual orientation, sex, gender identity or gender expression.” However, section 3(1) goes on to affirm that nothing in the Act should be construed as abrogating or abridging any other non-enumerated “human right or fundamental freedom ... that may have existed in Alberta at the commencement of this Act.”

³⁹ Another such statute is the *Alberta Personal Property Bill of Rights*, RSA 2000, c. A-31. Section 4 of that Act is to the same effect as section 2. However, it is highly unlikely that the protection that it affords for personal property rights would have any purchase in the Commission’s rate-setting proceedings.

superior to that of ordinary primary legislation.⁴⁰ Moreover, as outlined already, by virtue of Part 2 of the *Administrative Procedures and Jurisdiction Act*, challenges and determinations involving the *Alberta Bill of Rights* are included within the definition of “question of constitutional law.” However, whether its impact extends beyond the construction and application of ordinary legislation and justifies findings of invalidity of statutes that explicitly or by necessary implication cannot be construed in a manner that does not violate the rights and freedoms enumerated in section 1 is a more controversial question.

2.2.2. Canadian Charter of Rights and Freedoms

Here too, the provisions most likely⁴¹ to be invoked in the context of utility rate regulation are the equivalents of sections 1(a) and (b) of the *Alberta Bill of Rights*: section 7 and the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice, and section 15, the *Charter’s* equality provision. However, these guarantees clearly go further than directing courts as to the construction and non-application of legislation implicating the guaranteed rights and freedoms; they also provide a basis for the striking down of non-compliant legislation.

2.2.3. Indigenous Peoples – The Duty to Consult and Accommodate

It is also possible that the Commission’s rate-setting role might on occasion have an impact on the rights and claims of Indigenous peoples, thereby triggering the constitutional obligation to consult and, where appropriate, accommodate. In that context, issues may arise as to whether the normal processes of the Commission as provided for in primary legislation, regulations, and Commission-developed processes and procedures are adequate to the task that the duty to consult imposes, or whether special or supplementary processes are constitutionally necessary.⁴²

2.3. Subordinate Legislation and Rules of Practice and Procedure

2.3.1. Rule 001 - Rules of Practice

As already noted, the Commission has exercised its authority to make *Rules of Practice* and those Rules have been amended as recently as February of this year.⁴³

⁴⁰ See e.g. *Lavallee v. Alberta Securities Commission*, 2009 ABQB 17, 3 Alta. LR (5th) 232, at para. 166.

⁴¹ Though note *ForestEthics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 FCR 75, and *Ernst v. Alberta Energy Regulator*, 2017 SCC 1, [2017] 1 SCR 3, where section 2(b)’s protection of “freedom of expression” was pleaded in the context of claims asserting a denial of procedural fairness.

⁴² At present, in the context of project applications, the Commission is working on an Indigenous consultation framework. See Commission [Bulletin 2020-22](#): External engagement on the draft AUC Indigenous consultation framework (May 28, 2020), with a link provided to that draft Framework.

⁴³ In contrast, the Alberta Energy Regulator *Rules of Practice*, AR 99/2013, while similar or even identical in most respects to the Commission’s [Rules of Practice](#), were made by way of regulation under the *Responsible Energy Development Act*, SA 2012, c R-17.3.

Section 2 of the Commission's *Rules of Practice* deals with the "Application and interpretation" of the Rules and provides as follows:

- 2.2 These rules must be liberally construed in the public interest to ensure the fair, expeditious and efficient determination on its merits of every proceeding.
- 2.3 The Commission may, at any time before making a decision on a proceeding, issue any directions it considers necessary for the fair, expeditious and efficient determination of an issue.
- 2.4 The Commission may dispense with, vary or supplement all or any part of these rules if it is satisfied that the circumstances of any proceeding require it.
- 2.5 The Commission may set time limits for doing anything provided for in these rules and may extend or abridge a time limit set out in these rules or by the Commission, on any terms that it considers reasonable, before or after the expiration of the time limit.
- 2.6 No proceeding is invalid by reason of a defect or other irregularity in form.

The *Rules of Practice* then go on to create a detailed, though not comprehensive set of procedures for the conduct of proceedings before the Commission, including the exercise of its rate-setting jurisdiction. They contain provisions dealing with many of the issues referred to in the Committee's Terms of Reference: Notice of Hearing ("Scheduling") (Section 14); Documents, evidence, filing and service ("Adequacy of the Record") (Part 3, Sections 16 to 23); Information Requests (or "Interrogatories") (Sections 24 to 26.1); Motions (Section 27); Confidential Filings (or "Confidentiality") (Section 28); Written and oral hearings ("Hearings – written or oral") (Section 35); Cross-examination ("Cross-examination – whether to allow and if so when") (Section 42.3); and Argument ("Written, oral, timing, order") (Section 47.1). Not surprisingly, there is nothing in the *Rules of Practice* about panel control over hearings or the content and length of decisions.

The *Rules* are also noticeably silent on deadlines, in effect leaving timing matters to the discretion of the Commission. Section 32.1 does however confer an explicit discretion on the Commission, either on its own initiative or at the request of a party, to direct the holding of a "process meeting." Among the purposes of a process meeting are, not only recommending "the process, procedures and schedule" for the proceeding (Section 32.1(b)), setting of "the date, time and place for an oral hearing", and the allotment of time for the presentation of evidence and argument (Section 32.1(c)), but also a form of substantive scoping (Section 32.1(a)):

... to determine the issues in question and the position of the parties, including matters relating to costs.

More generally, Section 32.1(d) provides that the Commission may

... decide any other matter that may aid in the simplification or the fair, expeditious and efficient disposition of the proceeding.

The narrowing or clarification of issues is also one of the objectives of Technical Meetings, which are provided for in Section 33.1. Finally, Section 34.1 incorporates Rule 018: *Rules on Negotiated Settlements*, mandated by section 132(1) (“must”) of the *EU Act* and section 28.51(1) of the *GU Act* (“shall”).

2.3.2. Rule 018 - Rules on Negotiated Settlements

Rule 018 providing for negotiated settlement proceedings is specifically directed to “rates and tariffs” proceedings (Section 1). Initiation of the process is confined to applicants and requires the consent of the Commission (Section 4). The Rule contemplates the involvement of Commission staff in the process (Section 5(1)), including providing advice to the Commission “as to the fairness of the process” (Section 5(2)). Thereafter, without the express written consent of all the parties to the process, involved staff cannot take any further part in the Commission’s proceedings “arising from or relating to any issue in the negotiated settlement proceeding” (Section 5(1)).

If agreement is reached on one or more of the issues dealt with in a negotiated settlement proceeding, there must be an application to the Commission for approval, with the process for seeking approval set out in Section 6. Sections 7 and 8 then specify the obligations of the Commission in determining whether to approve the settlement agreement, a process that involves among other things consideration of any dissenting views. Finally, Section 9 subjects the award of costs incurred in the negotiated settlement process to the provisions of the Commission’s *Rules on Intervener Costs*,⁴⁴ subject to the admonition that such costs are “generally the responsibility of the applicant utility, to be recovered through customer rates” (Section 9(1)).

2.3.3. Rule 022 - Rules on Costs in Utility Rate Proceedings⁴⁵

Rule 022 was promulgated primarily under authority conferred on the Commission by section 21 of the *AUC Act*. Subsection 1 empowers the Commission to

... order by whom and to whom its costs and any other costs of or incidental to any hearing or other proceeding are to be paid.

⁴⁴ It is not clear whether this is [Rule 009: Rules on Local Intervener Costs](#) or [Rule 022: Rules on Costs in Utility Rates Proceedings](#).

⁴⁵ The Commission’s costs regime for facilities applications is found in Rule 009: *Rules on Local Intervener Costs*.

Subsection 2 then goes on to provide that the Commission

... may make rules respecting the payment of costs to an intervener other than a local intervener referred to in section 22.

Acting pursuant to this subsection and presumably (as explained below) its authority under section 76(1)(e) of the *AUC Act* to make “rules of practice governing [its] procedure and hearings”, the Commission adopted costs rules with respect to

... hearings or proceedings for rate applications of utilities under the jurisdiction of the Commission or related to rate applications.

Intervener eligibility to apply for costs is spelled out in Section 3.1 of Rule 022:

The Commission may award costs to an intervener who has, or represents a group of utility customers that have, 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.

There then follows a list of exclusions (though subject to Commission override) (Section 4). However, prior to that, Section 3.3 also provides that an “applicant” is eligible to claim costs. To the extent that the Commission’s rule-making power under Section 21(2) is confined to providing for the payment of costs to an intervener other than a local intervener, the authority for Section 3 must be found in section 76(1)(e) of the *AUC Act*.

Section 5 creates a specific costs regime for Review Applications that applies to all “participants” – applicants and eligible interveners.

Rule 022 then set outs the process for making and processing costs claims and, most importantly, in Section 11, the criteria to be applied in deciding on costs.

Section 11.1 establishes a threshold for access to an award of costs for both eligible interveners and applicants. The Commission must be of the opinion that the costs claimed by an eligible participant are “reasonable and directly and necessarily related to the hearing or other proceeding.” As well, the Commission must be of the opinion that the eligible participant has

... acted responsibly ... and contributed to a better understanding of the issues before the Commission.

Section 11.2 follows with a list of nine criteria that the Commission may consider in determining the quantum of costs. They include things such as the presentation of irrelevant evidence and lack of cooperation with other parties with a view to reducing “duplication of evidence and questions.”

In Section 12, Rule 022 allocates liability for costs. Unless the Commission otherwise determines,

- (a) in a hearing or other proceeding that relates to an application of a utility, the utility shall pay the costs awarded to an eligible intervener, and
- (b) in a hearing or other proceeding that relates to policies or concerns respecting utilities, the Commission may pay the costs awarded to an eligible intervener or require that payment of the costs award be shared by one or more utilities.

Critically, for applications for costs by applicant utilities, Section 13.4 provides the Commission with discretionary power to state in a cost order

... whether an applicant named in the order is authorized to record costs in its hearing costs reserve account.

Section 9.2 also provides that eligible participants “may only claim costs in accordance with the scale of costs” found in Appendix 1 of Rule 022. That Scale of costs establishes categories and rates that will be applied unless an eligible participant

... can advance persuasive argument that the scale is inadequate given the complexity of the case.

In Section 12, Rule 022 allocates liability for costs. Unless the Commission otherwise determines

- (c) in a hearing or other proceeding that relates to an application of a utility, the utility shall pay the costs awarded to an eligible intervener, and
- (d) in a hearing or other proceeding that relates to policies or concerns respecting utilities, the Commission may pay the costs awarded to an eligible intervener or require that payment of the costs award be shared by one or more utilities.

2.3.4. Rule 016 - Review of Commission Decisions

Rule 016, issued under section 10 of the *AUC Act*, spells out the details of the Commission’s authority to review and vary its decisions, including decisions in utility rate-setting proceedings.

Section 2 provides that the Commission may review a decision on its own motion at any time. Otherwise, the process is triggered by an application by someone who is “directly and adversely affected” by a decision.⁴⁶ If an applicant cannot meet the standing threshold, the leave of the Commission must first be obtained.⁴⁷ There is a sixty day time limit on the making of applications but the Commission can vary or dispense with that.⁴⁸

⁴⁶ Section 3(1).

⁴⁷ Section 3(2).

⁴⁸ Section 3(3).

Section 4(d) sets out a **non-exhaustive** list of grounds on which an application for review and variance can be made:

- i. The Commission made an error of fact, law or jurisdiction.
- 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.⁴⁹

There then follow further grounds specific to facilities applications.

Under Section 6(1), the Commission generally deals with review and variance applications in two stages. However, Section 8 allows the Commission on giving notice to combine the two stages if, in its opinion, it is “reasonable and practical to do so”.⁵⁰

At the first stage, the Commission in effect decides whether there is enough merit in the application to allow it to proceed to a full review at which the Commission will decide whether the original decision “should be confirmed, rescinded or varied.”⁵¹ Section 6(2) provides that, at the first stage, the Commission may proceed with or without a hearing.

In determining whether the threshold for moving to the second stage has been met, the criterion is that of materiality i.e. the likelihood that the Commission would be persuaded to “materially vary or rescind the decision.”⁵² In the case of alleged error of “fact, law or jurisdiction”, it is expressed in terms of whether the error is “either apparent on the face of the decision or otherwise exists on a balance of probabilities...”⁵³ With respect to the two other relevant subsections, the assessment of materiality is predicated on the “existence” of the circumstances outlined in those subsections.⁵⁴

⁴⁹ For a recent Commission panel decision setting out the Commission’s jurisprudence and current position on how to apply these grounds, see *Re ATCO Gas and Pipelines Ltd*, [Decision 25380-D01-2020](#) (June 29, 2020), at paras. 10-20. In short, it is a power to be exercised sparingly given the principles of finality, it is not an opportunity to reargue the matter, or to raise grounds and arguments that could have been raised at the original hearing but which the applicant for review and variance chose not to, and, in the case of fact-based grounds, the review panel should be very deferential and, generally, only review or vary where there was an “obvious or palpable error.” The last consideration results from the Commission’s explicit incorporation of the “palpable and overriding error” standard adopted by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235, as the standard of appellate review for issues of fact and mixed fact and law in appeals in civil litigation. As the Commission points out obliquely, at para. 16, this is now the standard of review for questions of fact and mixed fact and law for administrative decisions that reach the courts (as in the case of the Commission) by way of appeal, as opposed to judicial review: *Canada (Minister of Citizenship) v. Vavilov*, 2019 SCC 65, at para. 37.

⁵⁰ Section 8.

⁵¹ Section 6(1).

⁵² Section 6(3)(b).

⁵³ Section 6(3)(a).

⁵⁴ Section 6(3)(b)(i)-(2).

Where the Commission proceeds to the second stage, it must issue a notice of hearing and proceed in accordance with the Commission's general rules under Rule 001 for the conduct of hearings.⁵⁵

Nowhere is it provided whether an application for review and variance under Rule 016 is a precondition to an application for leave to appeal to the Court of Appeal under section 29 of the *AUC Act*. In *Calgary (City) v. ATCO Gas and Pipelines Ltd.*,⁵⁶ Costigan JA held that an application for review and variance was a precondition to an appeal to the Court of Appeal on an issue that could have been raised on an application for review and variance. However, while a subsequent panel of the Court of Appeal has acknowledged this issue and its procedural implications, the Court was by no means definitive as to the need to exhaust internal channels of relief. Far from resolving the question authoritatively, it simply indicated that the issue is one that should be dealt with in the circumstances of the particular case.⁵⁷

2.4. Common Law Procedural Fairness

For centuries, the common law has played an important supplementary role in the evolution of the principles of procedural fairness. Where the relevant legislation is silent as to whether a hearing is required, the courts, subject to meeting a threshold, have often imposed a general duty of procedural fairness on administrative decision-makers. The question then becomes what processes are required in the specific situation to fulfill that duty.

That is also the task of the courts where the statute specifies that a hearing is required but is either mute as to what procedures are involved, or possibly incomplete as to the various components of a procedurally fair hearing.

The latter is the situation under the *AUC Act* and other legislation relevant to the Commission's rate-setting role. In this context, the common law of procedural fairness provides criteria on which the courts determine whether there is room for supplementation of the procedural protections contained in the relevant legislation, and, if so, the actual content of any additional process.

There is also a presumption that, in general, the legislature, in conferring regulation and rule-making powers, does not intend to permit the Cabinet or the administrative decision-maker to adopt procedural rules that are contrary to the requirements of procedural fairness. In that context, it therefore becomes necessary to scrutinize procedural rules for consistency with what procedural fairness requires. Therefore, in its Report, this Committee must be concerned with whether the existing *Rules of Practice* and other relevant *Rules* meet those standards, and,

⁵⁵ Section 7.

⁵⁶ 2007 ABCA 133, 404 AR 317.

⁵⁷ See *Calgary (City) v. Alberta (Energy and Utilities Board)*, 2010 ABCA 94, 477 AR 56, at paras. 26-31. For a more detailed consideration of this issue in the context of the Ontario Energy Board, see the judgments of the Ontario Divisional Court in *Planet Energy (Ontario) Corp. v. Ontario Energy Board*, 2020 ONSC 598, at paras. 14-34, and *Enbridge Gas Inc. v. Ontario Energy Board*, 2020 ONSC 3616, at paras. 25-33.

more particularly, whether any recommendations for change in procedural rules would pass muster.

2.5. Regulatory Principles

Lurking in the undergrowth of much of public utility regulation are its historical origins and various commonly accepted norms as, for example, the common law developed principle of non-discriminatory access to public utilities exercising monopoly power, which ultimately became embedded in the so-called regulatory compact. Over time, these underlying principles played little direct role in the evolution of procedural rights in regulatory proceedings. However, general conceptions of regulatory power having to be exercised in the “public interest” have had some bite in the domain of procedural rights or entitlements.

Nonetheless, even where the relevant legislation specifically directs the regulator to have regard to the public interest, the Supreme Court of Canada in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, the *Stores Block* decision,⁵⁸ made it clear that this was not a licence for the Board to introduce into its decision-making general or at large concepts of the public interest; the extent of what came within the reach of a power to make orders in the public interest⁵⁹ had to be grounded in the particular statutory context in which this authority was located. Moreover, it is significant that there is no equivalent “public interest” provision in the *AUC Act*, or in the other relevant rate-setting statutes, the *PU Act*, the *EEU Act*, or the *GU Act*.⁶⁰

The only specific references in the *AUC Act* to the public interest as a concept that is relevant to the authority of the Commission are to be found in provisions respecting joint hearings with another regulatory body,⁶¹ the Commission’s facility approval jurisdiction,⁶² and as an element in the “duty of care” obligations that section 6(1) imposes on members of the Commission.

Aside from those three *AUC Act* provisions, the public interest is a specific criterion for Commission decision-making in only limited situations under the *PU Act*, the *GU Act*, or the *EU*

⁵⁸ 2006 SCC 4, [2006] 1 SCR 140, at paras. 40-46.

⁵⁹ *Alberta Energy & Utilities Board Act*, RSA 2000, c A-17, section 15(3)(d). More specifically, the subsection provided the Alberta Energy & Utilities Board with an ancillary power

... to make any order or impose any additional conditions that the Board considers necessary in the public interest.

⁶⁰ For rejection of an argument that the omission of “public interest” as a relevant consideration meant that the regulator had no authority to assess the adequacy of the Crown’s Indigenous peoples consultation efforts, see *Nova Scotia (Attorney General) v. Nova Scotia (Utility and Review Board)*, 2019 NSCA 66, 436 DLR (4th) 624, at paras. 105-16. However, it is difficult to interpret that part of the judgment of the Nova Scotia Court of Appeal as endorsing the existence of an at large, untethered public interest jurisdiction for the Nova Scotia Utility and Review Board.

⁶¹ Section 16.

⁶² Section 17(1).

Act, with the prime examples found in the Commission’s authority over the ISO under the *EU Act*.⁶³ Even the jurisdiction of the UCA is not expressed in terms of the public interest at large.⁶⁴

Nonetheless, in two recent applications for leave to appeal, O’Ferrall JA has invoked general public interest considerations. The first of these applications for leave involved the interpretation of the scope of the Commission’s necessary and incidental powers under section 8(2) of the *AUC Act*.⁶⁵ The second raised issues of procedural fairness and the discretionary rejection of an application for costs.⁶⁶ Writing in the former, O’Ferrall JA asserted:

The Commission’s first and foremost mandate is to make decisions which are in the public interest. It must make policy choices it considers necessary to achieve the objectives of utility regulation.

...

And so when the Commission makes a decision on remedies which it says will achieve what it considers to be public interest objectives, courts should be hesitant to interfere.

Questions are raised as to whether such broad characterizations of the Commission’s “public interest” mandate are justified given the majority judgment of Bastarache J in *Stores Block* and the subsequent omission from the *AUC Act* of the “public interest” criterion that was under consideration in that case. In any event, in terms of the mandate of this Committee and its focus on the processes and procedures of the Commission, it should be noted that, while O’Ferrall JA asserted that the content of the Commission’s procedural fairness obligations “may

⁶³ See e.g. sections 20.2(4) and 25(1)(b)(iii). For an application of the latter with respect to a complaint about an ISO tariff, see *ENMAX Energy Corp. v. Alberta (Utilities Commission)*, 2019 ABCA 222. In that context, on an application for leave to appeal, O’Ferrall JA asserted at para. 67:

The Commission is a specialized expert tribunal steeped in almost a century of utility rate regulation and its views on what will or will not promote fair, efficient and open competition must be accorded great deference and can be made without direct evidence.

Under the *PU Act*, the public interest or interests is a relevant criterion in the Commission’s authorization of the joint use of equipment (section 96), and the approval of municipal franchises (section 106(2)). Under the *EU Act*, in addition to the Commission’s authority over the ISO, the public interest is also explicitly relevant to the Commission’s approval of rights to distribute electricity granted by municipalities (section 139). Finally, under the *GU Act*, the public interest or interests is specifically relevant to incentive-based rate making under section 45, and the approval under section 49 of municipal granting of privileges or franchises to owners of gas utilities.

⁶⁴ *Government Organization Act*, Schedule 13.1, *supra*, note 29, section 3.

⁶⁵ *Capital Power Corp. v. Alberta (Utilities Commission)*, 2018 ABCA 437, at paras. 52-53. Section 8(2) provides:

The Commission in the exercise of its powers and the performance of its duties and functions under this Act or any other enactment, may act on its own initiative or motion and do all things that are necessary for or incidental to the exercise of its powers and the performance of its duties and functions.

⁶⁶ *Milner Power Inc. v. Alberta (Utilities Commission)*, 2019 ABCA 127, at para. 57.

be impacted by public interest considerations of those before [it]"⁶⁷, nonetheless, in ultimately rejecting the assertion of procedural unfairness, he stated:

The process followed by the Commission in addressing the interest issue was essentially a discretionary choice made within the context of the Commission's statutory scheme following the receipt of input from those affected.⁶⁸

As was the case previously with the review of the Commission's exercise of its supplementary powers under section 8(2), O'Ferrall JA accepted the need for deference to or respect for the Commission's procedural choices even where that choice was, in his judgment, imbued with public interest considerations.

3. Impact of Legal Norms

3.1. Constitutional and *Quasi-Constitutional* Limitations

As noted already, it is possible that recommended procedural reforms may run afoul of a range of constitutional or *quasi*-constitutional rights, freedoms, and entitlements. They are now addressed in greater detail.

3.1.1. *Alberta Bill of Rights*

In contrast to section 7 of the *Canadian Charter of Rights and Freedoms*, section 1(a) of the *Alberta Bill of Rights* establishes the right to "due process of law", not only where "liberty" or "security of the person" is threatened, but also "enjoyment of property". In this regard, it parallels section 1 of the *Canadian Bill of Rights* applicable federally.

However, there is very little Alberta case law involving a challenge to regulatory action based on the due process protection from deprivations of the "enjoyment of property." A notable exception is the judgment of Wittmann ACJQB in *Lavallee v. Alberta (Securities Commission)*.⁶⁹ In the context of a challenge to provisions in the *Securities Act*,⁷⁰ Wittmann ACJQB held that enforcement proceedings possibly leading to administrative penalties of up to \$1,000,000 for each infraction engaged the "enjoyment of property" protection. He continued that, in such proceedings, a statutory direction that all relevant evidence had to be admitted could result in a denial of "due process of law". However, he then described due process as involving "at least a certain level of procedural fairness."⁷¹

On appeal to the Alberta Court of Appeal,⁷² the Court did not find it necessary to deal with this ground of challenge to the application of the legislation. It interpreted the statute as not

⁶⁷ *Ibid.*

⁶⁸ *Id.*, at para. 58.

⁶⁹ *Supra*, note 40.

⁷⁰ RSA 2000, c S-4.

⁷¹ *Id.*, at para. 199.

⁷² 2010 ABCA 48, application for leave to appeal to the Supreme Court of Canada refused: [2009] SCCA No. 172.

amounting to a without exception requirement that all relevant evidence be admitted. However, assuming that Wittmann ACJQB's judgment is authoritative on this point, two points should be made about its relevance to the procedure of the Commission in rate regulation proceedings.

First, it is somewhat of a stretch to regard the setting of utility rates as involving a deprivation of the "enjoyment of property",⁷³ and there does not appear to be any authority to that effect under either section 1(a) of the *Alberta Bill of Rights* or, its federal equivalent, section 1(a) of the *Canadian Bill of Rights*.

Secondly, Wittmann ACJQB's concept of what due process required was not universal, rigid adherence to "all the guarantees offered in a criminal setting."⁷⁴ Rather,⁷⁵ in administrative settings, the content of due process was situation specific and determined by reference to the five procedural fairness intensity criteria set out by L'Heureux-Dubé J in *Baker v. Canada (Minister of Citizenship and Immigration)*.⁷⁶ In other words, provided that the procedures followed by the decision-maker met the standards that the common law required, there was no basis for a challenge. Only where an agency's primary⁷⁷ legislation explicitly or by necessary implication overrode the common law would there be any need for invocation of the *Alberta Bill of Rights* "due process of law" protection.

3.1.2. Canadian Charter of Rights and Freedoms

Canadian courts have consistently held that "security of the person" whether under section 1(a) of the *Alberta Bill of Rights*, section 7 of the *Canadian Charter of Rights and Freedoms*, or, in the federal domain, section 1(a) of the *Canadian Bill of Rights*, does not include "purely economic rights."⁷⁸ Moreover, the Supreme Court has been reluctant to hold that section 7 is a source of positive rights.⁷⁹ As a consequence, it is very difficult to conceive of situations where utility rate-setting would amount to a potential deprivation of "security of the person" so as to engage either the right to "due process of law" under section 1(a) of the *Alberta Bill of Rights* or the "principles of fundamental justice" under section 7 of the *Canadian Charter of Rights and*

⁷³ Certainly, Wittman ACJQB, *supra*, note 40, at para. 178, defined "enjoyment of property" in terms of "enjoyment of land and money." However, it is another thing to see a regulatory agency setting "just and reasonable" rates for service provided as depriving those paying for that service of the enjoyment of property except perhaps in the instance of rates that are truly confiscatory in their impact.

⁷⁴ *Id.*, at para. 199.

⁷⁵ *Id.*, at para. 200.

⁷⁶ [1999] 2 SCR 817, at paras. 21-22.

⁷⁷ Relevant provisions in subordinate legislation and agency rules of procedure can generally be attacked as invalid by reference to common law principles without reliance on constitutional or *quasi*-constitutional due process protections.

⁷⁸ See e.g. *Lavallee (QB)*, *supra*, note 40, at para. 115, and *Lavallee (CA)*, *supra*, note 72, at para. 27, applied by the then Alberta Energy Resources Conservation Board in *Re Sarg Oils Ltd.*, 2011 LNAERCB 32, at paras. 120-21.

⁷⁹ See *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429, cited by Wittmann ACJQB in *Lavallee (QB)*, *ibid.*

Freedoms. The only possibility may rest in situations where the level of rates levied on individuals may have the effect of “preclud[ing them] from meeting their essential needs.”⁸⁰

Section 15, the equality or non-discrimination section of the *Canadian Charter of Rights and Freedoms*, is not seen commonly as a source of procedural (as opposed to substantive) protections for the victims of discrimination. Moreover, to the extent that the economic impact of utility rate-setting may have a disparate impact on the poor in society, in *Boulter v. Nova Scotia Power Inc.*,⁸¹ the Nova Scotia Court of Appeal held that “poverty” was not an analogous ground of discrimination to those listed specifically in section 15(1) and therefore could not be brought within the scope of that provision.

3.1.3. Indigenous Peoples – The Duty to Consult and Accommodate

Since the 2017 Supreme Court of Canada judgments in *Clyde River (Hamlet) v. Petroleum Geoservices Inc.*,⁸² and *Chippewas of the Thames First Nations v. Enbridge Pipelines Inc.*⁸³ cases involving the then National Energy Board, it is now clear that an otherwise independent regulatory agency responding to an application under its empowering statute is acting on behalf of the Crown so as to be engaging in Crown conduct when it responds to the application:

[O]nce it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its action and Crown action quickly falls away. In this context, the NEB is the vehicle through which the Crown acts.⁸⁴

As a consequence, one of the preconditions to the existence of a duty to consult and, where appropriate, accommodate Indigenous peoples is met simply by virtue of the legislative choice of a regulatory agency as the instrument for the fulfilment of a statutory mandate. The filing of an application gives rise to “contemplated Crown conduct.” The critical question then becomes whether that “contemplated Crown conduct” has the potential to affect adversely Indigenous

⁸⁰ *Ibid.*

⁸¹ 2009 NSCA 17, 275 NSR (2d) 294, application for leave to appeal to the Supreme Court of Canada refused: [2010] SCCA No. 119.

⁸² 2017 SCC 40, [2017] 1 SCR 1069.

⁸³ 2017 SCC 41, [2017] 1 SCR 1099. See also in relation to the Nova Scotia Utilities and Review Board: *Nova Scotia (Attorney General) v. Nova Scotia (Utility and Review Board)*, *supra*, note 60.

⁸⁴ *Id.*, at para. 29. This in effect rejects any statements to the contrary by the Commission panel in *Fort McMurray West 500-kV Transmission Project, Ruling on jurisdiction to determine the Notices of Questions of Constitutional Law*, AUC Proceeding 21030 (February 10, 2017), *sub nom. Re Alberta PowerLine General Partner Ltd. (Re)*, 2017 LNAUC 4, at paras. 103-119 (“*Alberta PowerLine*”), in holding that the Commission did not have jurisdiction to consider the adequacy of Crown consultation when the Crown was not before it as a party in the relevant proceedings. It also puts paid to the argument accepted in *Alberta PowerLine* that the Commission’s designation under the *Designation of Constitutional Decision Makers Regulation*, *supra*, note 35, as an authority with jurisdiction to consider all questions of constitutional law does not include the assessment of the adequacy of consultation and accommodation where Indigenous rights and claims are in play or, for that matter, the Commission’s own authority to engage in consultation and accommodation. The Commission (and the Alberta Government) accept that the ruling does implicate it in consultation and assessment of consultation responsibilities: see the first paragraph of [Bulletin 2020-22](#), *supra*, note 42.

rights and claims. In terms of the Committee's mandate, are there circumstances in which a rate or tariff application or other proceeding could have an impact on Indigenous rights and claims such as to give rise to a duty to consult and, where appropriate, accommodate Indigenous rights and interests?

While it is easy to see how Indigenous rights and claims will be affected by the Commission's exercise of its transmission siting jurisdiction (as in *Alberta PowerLine*⁸⁵), it is far less obvious that there will be situations where rate or tariff proceedings could have an adverse impact on Indigenous rights and claims.⁸⁶ However, if that threshold is crossed, it is now clear that the Commission should respond to any challenges by assessing the adequacy of consultations carried out by proponents and also conducting its own consultations as the vehicle through which the Crown is acting. Thus, in *Alberta PowerLine*,⁸⁷ the Commission acknowledged its obligation as part of its general jurisdiction to respond to claims of adverse impact on rights and interests asserted by Indigenous parties or interveners. For these purposes, it may be advisable to establish specific procedural rules.⁸⁸

3.2. Standard of Review

3.2.1. Substantive Issues

As already discussed, the *AUC Act* contains a very strong privative clause but provides for appeals (on permission being granted) to the Alberta Court of Appeal on a question of law or jurisdiction. With the Supreme Court's exiling of the concept of jurisdiction in *Canada (Minister of Citizenship and Immigration) v. Vavilov*,⁸⁹ it is probable that this ground of appeal has in effect been repealed by judicial fiat. However, there are possibly arguments that where specific statutory regimes make provision for review or appeal on that ground, the holding in *Vavilov* does not apply. As for questions of law, they are the subject of one of the most significant changes wrought by *Vavilov*. Previously the default standard of review for questions of law and in particular tribunal or agency interpretation of their home or frequently encountered statutes was the deferential standard of reasonableness, even where access to the court was by way of

⁸⁵ *Ibid.*

⁸⁶ This is not to say however that there will not be Indigenous issues arising out of the Commission's rate-setting jurisdiction. Very recently, the Manitoba Court of Appeal considered and rejected a Public Utilities Board directive which required a utility to create a First Nations On-Reserve Residential customer class for which there would be a zero per cent increase: *Manitoba (Hydro-Electric Board) v. Manitoba (Public Utilities Board)*, 2020 MBCA 80. (For forthcoming commentary in the *Energy Regulation Quarterly* see Patrick Duffy, "Manitoba Hydro v. Manitoba Public Utilities Board: Reduced Rates for Indigenous Peoples Overruled.")

⁸⁷ *Id.*, at para. 118.

⁸⁸ Even though it is directed towards project applications, it may well be that the final version of the Commission's Draft Indigenous consultation framework (see [Bulletin 2020-22](#), *supra*, note 42) will provide a partial template for such a policy in the domain of rate-setting.

⁸⁹ *Supra*, note 49, at paras. 65-68.

statutory appeal as opposed to judicial review.⁹⁰ Now, with *Vavilov*, that has changed.⁹¹ Unless the legislature has provided otherwise, correctness will henceforth be the standard of review for pure questions of law under the appeal provision in the *AUC Act*.

How aggressive the Alberta Court of Appeal will be in categorizing questions as ones of law subject to the appeal provision remains to be seen. Will it, for example, include questions of procedural fairness? How will it be applied to the Commission's exercise of its considerable discretionary powers with respect to both substance and procedure? What about situations where it is problematic to extricate a pure question of law from a mixed question of law and fact, not on its face subject to the appeal provision? For example, to revert to a matter raised previously, how far, if at all will the Alberta Court of Appeal go in treating scoping issues as essentially questions of law subject to correctness review?

3.2.2. Procedural Fairness

On any assessment of legal risk with respect to the Commission's rules and rulings on procedural issues, an obvious consideration is whether the reviewing court will deploy a standard of correctness or reasonableness.⁹²

At a general level, this has been a controversial issue, that controversy having been stoked in considerable measure by the judgment of LeBel J for the Supreme Court in *Mission Institution v. Khela*.⁹³ There, he asserted initially that the standard of review on issues of procedural fairness was that of correctness⁹⁴ but he then went on to state, in the context of a challenge by an offender to a penitentiary transfer decision, that there was an entitlement to a measure of deference to a denial of relevant information on the basis of a statutory provision that its release would jeopardize the "security" of the prison.⁹⁵

Seizing on the latter statement, some (but by no means all) Courts of Appeal held that a reasonableness standard applied to at least some issues of procedural fairness, particularly in situations where the entitlement asserted depended on an evaluation of relevant facts or where there was an express statutory discretion with respect to the procedural claim that was

⁹⁰ *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 SCR 293.

⁹¹ *Supra*, note 49, at paras. 36-52.

⁹² Or, whether standard of review selection has any purchase in cases involving allegations of denial of procedural fairness: see e.g. *Milner Power Inc. v. Alberta (Utilities Commission)*, *supra*, note 66, at para. 14. See also *Blair v. Alberta (Utilities Commission)*, 2018 ABCA 438, at para. 15, citing an argument relying on *Baker v. Canada (Minister of Citizenship and Immigration)*, *supra*, note 76, to the effect

... that issues of procedural fairness are not subject to a standard of review; the question is not whether the tribunal's decision was correct or reasonable but rather whether the procedure chosen was fair, given all the circumstances.

⁹³ 2014 SCC 24, [2014] 1 SCR 502.

⁹⁴ *Id.*, at para. 79.

⁹⁵ *Id.*, at para. 89.

in contention. Two judgments of Stratas JA for the Federal Court of Appeal provide illustrations. In *ForestEthics Advocacy Association v. National Energy Board*,⁹⁶ he applied the deferential standard of reasonableness in rejecting a challenge to a denial of participatory status at a NEB hearing by reference to a statutory provision setting out a discretionary test for standing or access to participatory rights. Subsequently, in *Bergeron v. Canada (Attorney General)*,⁹⁷ he applied the reasonableness standard with reference to an argument that the Canadian Human Rights Commission had denied the applicant procedural fairness by failing to conduct an adequate investigation of the applicant's discrimination complaint.⁹⁸

Since the Supreme Court's judgment in *Vavilov*, however, commentators have argued that the majority put paid to any possibility of arguing that there was room for deference on issues of procedural fairness.⁹⁹ Support for that position was found in the following statement by the majority:

When a court reviews the merits of an administrative decision (i.e., judicial review of an [sic] administrative decisions **other than a review related to a breach of natural justice and/or the duty of procedural fairness**) the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness [emphasis added].¹⁰⁰

It has been said that the only inference to be drawn from this statement is that the standard of review to be applied to procedural rules and rulings is that of correctness or, put another way, standard of review analysis has no purchase in the domain of procedural issues.

Nonetheless, another possible reading is that review for procedural fairness is constitutionally protected and that legislatures cannot override that protection, but leaving for another day the question of whether deference has any role to play in such a constitutionally protected domain.¹⁰¹ It might also be argued that the Court was not willing to accept a presumption of reasonableness review in the domain of procedural issues, and that the onus rested on the

⁹⁶ *Supra*, note 41. See the Commentary by C. Kemm Yates, Q.C. and Sarah Nykolaishen, "National Energy Board Procedural Reform – Round 2 Goes to the Regulator" (2015), 3(4) *Energy Regulation Quarterly* 37.

⁹⁷ 2015 FCA 160, at paras. 67-72.

⁹⁸ Subsequently, in delivering the judgment of a majority of the Federal Court of Appeal in *Vavilov*, 2017 FCA 132, [2018] 3 FCR 75, at paras. 11-14, he referred to *Bergeron* as an example of appropriate application of a deferential reasonableness review of a procedural fairness issue.

⁹⁹ See e.g. Paul Daly, "Unresolved Issues after *Vavilov* III: Procedural Fairness", *Administrative Law Matters Blog*, May 7, 2020.

¹⁰⁰ *Supra*, note 49, at para. 23.

¹⁰¹ Some support for this may be found earlier in the judgment, *id.*, at para. 13, where the majority seem to conceive the core role of the courts on judicial review as that of safeguarding "the legality, rationality and **fairness** of the administrative process [emphasis added]."

party seeking the application of reasonableness as opposed to correctness review to the determination of a procedural unfairness claim.

What is also clear is that the majority in *Vavilov* was not dismissing entirely deference as relevant to the determination of procedural fairness issues. In reaffirming¹⁰² *Baker v. Canada (Minister of Citizenship and Immigration)*¹⁰³ to the effect that procedural fairness was “eminently variable”, inherently flexible, and context-specific, the majority cited the five *Baker* procedural fairness intensity criteria. The fifth of those factors was and is “the choices of procedure made by the administrative decision-maker itself” or, as explained in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*,¹⁰⁴ also cited in *Vavilov*¹⁰⁵: “the nature of the deference accorded to the body.”¹⁰⁶ McLachlin CJ, delivering the judgment of the majority, elaborated further on the fifth criterion:

The fifth factor – the nature of the deference due to the decision-maker – calls upon the reviewing court to acknowledge that the public body may be better positioned than the judiciary in certain matters to render a decision and decide whether the decision in question falls within this realm.¹⁰⁷

Seemingly necessarily implicit in this is the very clear sense that, in certain situations, the decision-maker’s choice of procedures, as either rules or rulings, is entitled to deference or respect as a factor relevant in the assessment of whether the procedures followed have met the necessary degree of intensity. In another pre-*Vavilov* judgment, *Re Sound v. Fitness Industry Council of Canada*,¹⁰⁸ Evans JA captures it well when he states:

In short, whether an agency’s procedural arrangements, general or specific, comply with a duty of fairness is for a reviewing court to decide on a correctness standard, but in making that determination it must be respectful of the agency’s choices. It is thus appropriate for a reviewing court to give weight to the manner in which an agency has sought to balance maximum participation on the one hand, and efficient and effective decision making on the other. In recognition of the agency’s expertise, a degree of deference to an administrator’s procedural choice may be particularly important when the procedural model of the agency under review differs significantly from the judicial model with which courts are most familiar.

However, the resolution of this issue is further muddied by reason of the fact that judicial scrutiny of decision-making by the Commission will almost invariably take place in the context of section 29 of the *AUC Act*, and its creation of access to the courts by way of appeal on a

¹⁰² *Id.*, para. 77.

¹⁰³ *Supra*, note 76, at paras. 21-23.

¹⁰⁴ 2004 SCC 48, [2004] 2 SCR 650.

¹⁰⁵ *Supra*, note 49, at para. 77.

¹⁰⁶ *Supra*, note 104, at para. 5.

¹⁰⁷ *Id.*, at para. 11.

¹⁰⁸ 2014 FCA 48, [2015] 2 FCR 170, at para. 42.

question of law or jurisdiction to the Alberta Court of Appeal, permission to appeal having been granted by a judge of the Court of Appeal. In the aftermath of *Vavilov*, absent provisions to the contrary, the standard of review for questions of law and perforce jurisdiction will be that of correctness and, at first blush, that might appear to cover issues of procedural fairness, the reach of procedural fairness obligations being seen as questions of law.

Nonetheless, to the extent that the determination of the intensity of procedural fairness obligations will depend on the five *Baker* factors, that question of law has built into it consideration for the procedural choices of regulatory agencies or, in other words, elements of deference. It is also possible that the Court of Appeal may treat certain procedural fairness issues as inextricably intertwined with the particular facts out of which the challenge has arisen and therefore excluded from the appellate jurisdiction of the Court.¹⁰⁹ Finally, it also remains to be seen whether the Court will build a deference component into the determination of procedural fairness issues when they arise out of the exercise of an explicit discretionary power such as the determination of whether someone will be recognized as entitled to participate by way of intervention.

3.2.3. The Requirements of Procedural Fairness

There can be no doubting that the Commission is subject to a duty to act in a procedurally fair manner or, putting it another way, that some at least of its functions attract a duty of procedural fairness. Without more, rate-setting in a public utility context might be seen as a broad policy-making function not attracting a duty of procedural fairness. However, the legislative framework set out above (including the *AUC Act*) makes it clear that the Commission is obliged to hold hearings with at least some traditional adjudicative characteristics where a decision or order may directly affect the rights of a person when there is a request for a hearing in response to the filing of an application. Section 76 of the Act conferring authority on the Commission to make “rules of practice governing the Commission’s procedure and hearings” also speaks to the application of the rules of procedural fairness. Moreover, the existence and extent of that obligation (and, in particular, the duty to engage with the affected consumers) is underscored by the notice provisions for tariff approval proceedings found in section 121(1) of the *EU Act*, the explicit mandating of a hearing in both section 36 of the *GU Act* and section 89 of the *PU Act*, and the legislative creation of the Office of the UCA with standing as of right to represent the listed interests in “proceedings” of the Commission. Consequently, the significant threshold issue with respect to the Commission’s procedural obligations is not whether procedural fairness obligations attach generally to the decision-making functions of the Commission but rather the intensity of those obligations.

As just noted, in discussing the nature and extent of the duty to provide reasons for decisions, the majority of the Court in *Vavilov* reaffirms¹¹⁰ the five non-exhaustive criteria spelled out in

¹⁰⁹ See *Blair v. Alberta (Utilities Commission)*, *supra*, note 92

¹¹⁰ *Supra*, note 49, at para. 77.

*Baker v. Canada (Minister of Citizenship and Immigration)*¹¹¹ for determining the extent or intensity of a decision-maker's procedural fairness obligations:

Those factors include: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the decision-maker itself.¹¹²

In terms of those factors, the first points to a high level of procedural fairness the nearer the decision-making process is to traditional adversarial judicial decision-making. As already noted, rate-setting is not in its very nature a decision-making process that necessarily is adjudicative or judicial. It is very much a policy making function involving consideration of open-textured statutory objectives (such as "just and reasonable" and "unjustly discriminatory").

However, given the legislative setting in which the Commission functions and the contemplation of hearings involving both applicants and interveners, the second factor or criterion is more indicative of a significant level of procedural fairness than the first standing alone. This is further reinforced by the finality of the Commission's decision-making in such matters subject only to a constrained access by way of appeal to the Alberta Court of Appeal. Nevertheless, section 9(2) to the effect that there is no guarantee of a right to make oral submissions or to representation by counsel, and section 20 absolving the Commission from adherence to the rules of evidence applicable in "judicial" proceedings, are obvious indicators of legislative intention that Commission hearings may be less formal than the traditional adjudicative or adversarial model. More generally, provisions such as section 121(2) of the *EU Act*, which provides that the Commission "must ensure" that tariffs adhere to certain standards speak to a role that is not purely adjudicative. Rather, the Commission is obliged to take a proactive, near inquisitorial role in the discharge of its rate-setting mandate.

As for the third factor, achievement of an appropriate return on investment is of critical importance to those entities regulated by the Commission, and not having to bear excessive costs for utility service is a significant concern for both household consumers and also business and institutional interests.

Strictly speaking, it is hard to envisage much room for the Canadian version of the doctrine of legitimate expectations having purchase in this context unless changes to procedural practices take place in the context of a particular application without advance notice and provision of an opportunity to contest to those participating. To the extent that, in this exercise, the Committee is consulting with stakeholders and there will presumably be further notice and comment opportunities before any such changes in the *Rules of Practice*, or existing practices, it is hard to envisage the frustrating of any legitimate expectations that the existing order will not

¹¹¹ *Supra*, note 76, at paras. 23-27.

¹¹² *Per* the majority in *Vavilov*, *supra*, note 49, at para. 77, summarizing *Baker*.

be changed without an opportunity to comment. In short, legitimate expectations is a neutral or irrelevant factor in the determination of the required level of procedural fairness intensity.

Finally, when it comes to the procedural choices made by an expert, mature regulator such as the Commission, it is salient that the Commission has authority to dispense with some of the trappings of truly judicial proceedings and possesses a broad discretion to make its own rules of practice and procedure. In terms of *Baker*, the exercise of these powers will normally be deserving of considerable “respect”:

[I]mportant weight must be given to the choice of procedures made by the agency itself and its institutional constraints.¹¹³

There is no question as to the economic seriousness of utility rate regulation. There is also no doubt that the legislature has chosen to have these issues generally dealt with at hearings to which those consumers affected by the quantum of approved tariffs and rates have access. However, it is also clear that the Alberta legislature has not adopted a regime that requires the full panoply of procedural requirements or options that characterize traditional adjudicative processes. Rather, much of the primary responsibility with respect to the creation of rules and the making of specific rulings has been left to the Commission. Despite the Supreme Court’s general (though not necessarily consistent) position that issues of procedural rules and rulings attract correctness review, where the legislature has entrusted the crafting and application of procedural norms to the discretion of an administrative decision makers, there is an expectation that reviewing courts will, in the words of *Baker*, accord “respect” and give “important weight to the procedural choices made by such decision-makers.”

There are also at least three further considerations that provide support for this position.

First, in the context of regulatory proceedings, there will sometimes be overlap between issues of substance and issues of procedure. A good example highly relevant in the context of rate regulation is the issue of scoping: What issues are relevant to the particular application? In that context, Stratas JA of the Federal Court of Appeal in *ForestEthics Advocacy Association v. National Energy Board*,¹¹⁴ drew attention to the interconnectedness between procedure and substance¹¹⁵ on the issues of status to participate in the National Energy Board’s Line 9 Reversal hearings and the Board’s scoping of the parameters of those hearings. He then went on to give the Board a considerable margin of appreciation with respect to both elements.¹¹⁶

Secondly, it should be recalled that, as long ago as 1973, the Judicial Committee of the Privy Council in an appeal from New Zealand, in *Furnell v. Whangarei High Schools Board*,¹¹⁷ applied in effect a deferential standard of scrutiny to the alleged procedural deficiencies in a procedural

¹¹³ *Supra*, note 76, at para. 27.

¹¹⁴ *Supra*, note 41.

¹¹⁵ *Id.*, at paras. 61-62.

¹¹⁶ *Id.*, at paras. 68ff.

¹¹⁷ [1973] AC 660 (PC(NZ)).

code governing the dismissal of teachers contained in regulations. In doing so, the Judicial Committee emphasised among other matters that the code was not only detailed but had emerged from the cauldron of negotiations between labour and management.¹¹⁸ This judgment has been cited on a number of occasions by Canadian courts¹¹⁹ including an endorsement of this very point by Rothstein J (as he then was) in *Armstrong v. Canada (Commissioner of the RCMP)*.¹²⁰

Finally, but perhaps most importantly, the judgment of Karakatsanis J for the Supreme Court of Canada in *Hryniak v. Maudlin*¹²¹ heralded a new era of proportionality in the assessment of the procedural requirements of civil litigation:

[U]ndue process and protracted trials, with unnecessary expense and delay, can **prevent** the fair and just resolution of disputes [emphasis added].¹²²

She then articulated the three pillars of a properly functioning “civil justice system”.¹²³ It had to be accessible, and true accessibility required that the process be “proportionate, timely and affordable.”¹²⁴ In this context, a result would not be fair and just if the

... process is disproportionate to the nature of the dispute and the interest involved.¹²⁵

Where procedural rules are discretionary, that discretion

... includes an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timelines given the nature and complexity of the litigation.¹²⁶

While the context was the summary judgment jurisdiction of the Ontario Superior Court, it is obvious that these principles are transferrable to administrative decision-making,¹²⁷ and that a reviewing court would not readily interfere with procedural rules and rulings that were animated by such considerations. It is therefore noteworthy that there is reference to *Hryniak* and the proportionality principles in *Vavilov*, albeit in the minority judgment.¹²⁸ Thus, in terms of possibilities that are being considered by the Committee, Karakatsanis J’s conception of

¹¹⁸ *Id.*, at page 667.

¹¹⁹ See e.g. the judgment on which the modern Canadian approach to procedural fairness was built: *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 SCR 311.

¹²⁰ [1994] 2 FC 356, at para. 43.

¹²¹ 2014 SCC 7, [2014] 1 SCR 87.

¹²² *Id.*, at para. 24.

¹²³ *Id.*, at para. 23.

¹²⁴ *Id.*, at para. 28.

¹²⁵ *Id.*, at para. 29.

¹²⁶ *Id.*, at para. 31, quoting from the judgment of the Newfoundland and Labrador Court of Appeal in *Szeto v. Dwyer*, 2010 NLCA 36, at para. 53.

¹²⁷ See Michelle A. Alton, “Rethinking Fairness in Tribunal Adjudication to Best Promote Access to Justice” (2019), 32 *Canadian Journal of Administrative Law & Practice* 151, writing in the context of tribunal adjudication.

¹²⁸ *Supra*, note 49, at para. 242.

active case management animated by proportionality concerns has resonance in the domain with which we are concerned: utility rate or rate-related proceedings.

4. Legal Risk Assessment

4.1. General Overview

While section 9(2)(c) of the *AUC Act* obliges the Commission to hold a hearing where its proceedings have the potential to “directly and adversely affect the rights of a person”, as already described, the *AUC Act* and related statutes are sparse on what a hearing requires in any particular situation. To be sure, section 9(2)(b) imposes an obligation to provide “a reasonable opportunity of learning the facts bearing on the application” but leaves what precisely this involves to the discretion of the Commission. Section 9(4) then makes it clear that it is for the Commission to determine if an oral hearing or representation by counsel is necessary. Similarly, with respect to notice of any proceedings, section 9(2)(a) leaves the settling of the details of notice requirements to rules to be developed by the Commission. Section 20 provides the Commission with further discretion in stating that the Commission in its hearings is not bound by the rules of evidence “applicable to judicial proceedings.”

This sense of the Commission as being the master of its own proceedings is also evident in the process to be followed in Commission review of its decisions. By virtue of section 10, that too is left to development in the Commission’s rules of practice. In the *EU Act*, other procedural matters are left to be developed by the Commission acting in its rule-making capacity: the information that the Commission may require to be filed,¹²⁹ and, while the promulgation of such rules is mandatory, the procedures attendant on the Negotiated Settlement of an Issue.¹³⁰

Moreover, as far as the Commission’s rulemaking authority is concerned, section 76(1)(e) of the *AUC Act* is completely open-ended as to the content of any “rules of practice” issued by the Commission, save for section 75’s conferral of overriding regulation-making powers on the Cabinet.¹³¹

What emerges from these and other elements in the relevant legislation is that the Commission has been entrusted with broad discretion as to the processes that it will follow generally and in utility rate regulation proceedings in particular. In short, there are few, if any indicators that its processes must follow those of typical adjudicative proceedings, a consideration underscored by the common law procedural fairness intensity analysis outlined above. Moreover, even assuming that the Court of Appeal would accept the contention that the standard of review to be applied to the Commission’s procedural rules and rulings is that of correctness, that position is tempered by *Vavilov*’s explicit reaffirmation of *Baker* to the effect that, in assessing the intensity of a regulatory agency’s procedural fairness obligations, considerable respect should

¹²⁹ Section 118(2).

¹³⁰ Sections 132-33. See also section 28.51(1) of the *GU Act*.

¹³¹ Though see also section 8(4) of the *AUC Act*.

be accorded to the judgment of agencies that legislatively have a significant degree of discretion in the crafting of both procedural rules and rulings.

More generally, in terms of the Commission's fulfilment of its statutory mandate, the emergence of a principle of proportionality in process design is strongly indicative of a need for judicial respect for any judgments that the Commission may make in the balancing of procedural fairness arguments against the efficient discharge of its responsibilities in the broader public interest. Thus, for example, the Commission has recognized the legitimate demands of efficient process in Sections 2.2 and 2.3 of the *Rules of Practice*. The former calls for an interpretation of those Rules so as to further the cause of a "fair, expeditious and efficient determination on its merits of every proceeding." The latter then authorizes the Commission to issue directives during proceedings to promote the same ends.

4.2. Specific Issues – Mandate

4.2.1. Scoping of Issues and Scheduling – Assertive Case Management

One of the themes that underlies the Committee's specific subject matter mandate is that of case management. It is clearly discernible in the first two items in the list of procedural issues to be explored: scoping of issues and scheduling. Both speak to a consideration of the extent to which at the front end of any proceeding, there should be room for active shaping of the content and progress of the hearing of applications.

As described already, section 8(2) of the *AUC Act* confers broad powers on the Commission in support of the fulfilment of its statutory responsibilities including the power to "act on its own initiative or motion." On the procedural front, this conferral of discretionary authority is reinforced by section 76(1)(e) that provides the Commission with power to make "rules of practice governing the Commission's procedure and hearings." Also relevant are the provisions of both the *EU Act*¹³² and the *GU Act*¹³³ that impose on the Commission an obligation to make "rules, practices and procedures" that will facilitate the negotiated settlement of issues arising out of applications. While not bearing directly on the initial structuring of the processes by which an application will be governed, they do illustrate one of the common features of effective case management, and provide warrant for the Commission to exercise its discretionary powers in such a way as to implement case management at various other stages of the determination of applications.

Section 2.3 of the Commission's *Rules of Practice*, adopted under section 76(1)(e) of the *AUC Act*, confers on the Commission authority to "issue any directions that it considers necessary for the fair, expeditious and efficient determination of an issue", while Section 2.5 confers broad discretionary authority over time limits. The specific provisions of the *Rules of Practice* then establish some ground rules for the filing of applications and notices of intention to participate

¹³² Section 132(1).

¹³³ Section 28.51(1).

(“SIPs”), but not in such a way as to preclude the Commission from otherwise structuring the reach of what it requires the parties to address so as to enable it to fulfil its statutory responsibilities. Nor do the relevant rules governing the scheduling of an application (with one irrelevant exception¹³⁴) in any way limit the Commission’s Section 2.5 authority over time limits.

As a result, it is abundantly clear that, unless constrained by constitutional imperatives, the common law of procedural fairness, or other statutory provisions, the Commission has broad discretionary powers to adopt case management processes aimed at the front end at defining what issues it considers as relevant to the discharge of its mandate (“scoping”), and setting time limits within which various stages in the process must take place.

In this respect, it is difficult to conceive of situations (aside perhaps from the duty to consult Indigenous peoples) where constitutional requirements would bear upon such structuring and timetabling initiatives. It is similarly unlikely that other statutory provisions (save perhaps the responsibilities of the UCA under Schedule 13.1 of the *Government Organization Act*) would limit in significant ways the ability of the Commission to engage in case management with particular reference to scoping and scheduling.

As for the common law, as seen in *Tsleil-Waututh Nation v. Canada (Attorney General)*,¹³⁵ and *ForestEthics Advocacy Association v. Canada (National Energy Board)*,¹³⁶ there is always the possibility that a scoping exercise could be challenged on substantive grounds. However, that does not undercut the Commission’s engagement in such exercises. As for considerations of procedural fairness with scoping, and timetabling or scheduling, once again, there is the possibility of a challenge on the facts of a particular application. However, it is critical to keep in mind the extent to which the Court of Appeal will accord the Commission considerable room to maneuver in engaging in such exercises, a latitude that is dictated by the nature of the Commission’s mandate and the discretionary terms in which its structuring of procedures is couched both in the *AUC Act* and in Rule 001.

Certainly, the Commission should engage with both the applicant and those filing a SIP. However, beyond listening to and taking account of their positions on both the scope of the “hearing” on the application and the timing of various stages of the process, the Commission has little reason to be wary of such exercises except in the extreme case where its position would constitute a clear denial of procedural fairness rights such as a refusal in obvious circumstances to extend a time limit.

¹³⁴ Unless otherwise directed, the Commission cannot in its notice of hearing set an oral hearing date fewer than ten days after the date of the notice of hearing: Section 14.2.

¹³⁵ 2018 FCA 153, [2019] 2 FCR No. 3, at paras. 393-450.

¹³⁶ *Supra*, note 41.

4.2.2. Confidentiality

Section 28(7) of the *Rules of Practice* provides the Commission with authority to grant a motion for the confidential treatment of information “on any terms it considers reasonable or necessary.” The exercise of that authority depends on the Commission determining that granting the motion

- (a) is necessary to prevent a serious risk to an important public interest, including a commercial interest, because reasonable, alternative measures will not prevent the risk; and
- (b) the benefits of granting the request outweigh its harmful effects, including the effects on the public interest in open and accessible proceedings.

Section 28, amended on February 8, 2020, goes on to provide a detailed regime for the filing and determination of such motions.

Section 28(7) embodies the relevant common law procedural fairness principles on which issues of confidentiality are to be resolved in tribunal or agency proceedings.¹³⁷ During the consultation process, the Committee encountered only vague assertions that the Commission was too readily granting confidentiality motions on the basis that the relevant information was of a commercially sensitive nature. Obviously, if established in a particular proceeding, this would amount to a denial of procedural fairness though we would generally expect that a well-reasoned Commission justification of its position would attract considerable deference from the reviewing Court. That said, the Committee sees no reason for change to the considerations in Section 28(7) on which confidentiality motions must be determined.

Where the Committee did encounter concerns was with respect to the mechanics of resolving assertions of confidentiality. Commission panels were spending undue time on dealing with confidentiality motions often with respect to which there were ample precedents in the Commission’s past rulings. It was also said that there were problems with the exchange of confidential documents among participants who had clearance, on providing an undertaking, to access material accepted by the Commission as confidential.

The latter problem seems to have been rectified for the most part by the February 8 amendments to Rule 001 and associated enhancements to the Commission’s eFiling system.

As for the processing of confidentiality motions, there is room, without significant exposure to allegations of procedural unfairness, for case management processes that allow for pre-filing acceptance of confidentiality claims particularly for those categories of information for which precedents exist. The same could also hold for the automatic accepting of motions filed with an application or emerging from interrogatories with respect to information where confidentiality

¹³⁷ See Gordon Kaiser and Bob Heggie, “Developments in Public Utility Law” in Kaiser and Heggie (eds.), *Energy Law and Policy* (Carswell: Toronto, 2011), at pages 153-55.

protection is routinely denied or allowed. Implementation of this process might well require further adjustment to Section 28 of Rule 001.

4.2.3. Hearings

As already described, the *AUC Act* deals specifically with the issue of oral representations. Where the Commission is obliged to hold a hearing because its decision or order “may directly affect the rights of a person”,¹³⁸ by virtue of section 9(4), this does not include the right to make oral representations as long as the Commission “affords ... an adequate opportunity to make representations in writing.”

This provision is by no means an exemplar of clarity. Does the making of representations simply involve the making of submissions and arguments based on the evidence, or does it extend to the presentation of evidence and cross examination on that evidence? Even where the provision is triggered, does it still leave the Commission with a discretion to nonetheless allow oral “representations”? On its face, it also seems to be limited in its application to those affected directly by an application and not to the applicant in the proceedings. Does this mean it allows for a lack of symmetry as between applicants and those affected directly by that application, with the former entitled to make oral representations and the latter not? Does it by necessary inference exhaust the Commission’s capacity to proceed by written rather than oral processes, or do the Commission’s section 76 (1)(e) powers to make “rules of practice governing [its] procedure and hearings” include the capacity to deal further with the issue of written as opposed to oral hearings?

While there are no immediately obvious answers to any of these questions, it would be surprising if a reviewing court did not afford the Commission a margin of appreciation in determining whether an opportunity to make written submissions was an adequate vehicle for making representations. This likelihood increases where the Commission has been responsive to any contrary arguments that, in the circumstances, an oral hearing was required. In other words, the subsection would seem to admit of an element of discretion or judgment on the part of the Commission. It is also unlikely that a reviewing court would hold that the subsection by necessary implication exhausted the Commission’s rule-making capacities as to the use of written rather than oral processes. In fact, in crafting its *Rules of Practice*, the Commission has included a very general provision respecting oral and written hearings:

35.1 The Commission may conduct written hearings and oral hearings.

While this Section does not give any guidance as to the criteria on which a choice between written and oral hearings should be made, it is hard to conceive of a court striking such a provision down on the basis that it could be applied in such a manner as to violate the principles of procedural fairness.

¹³⁸ Section 9(2).

More generally, in a regulatory context somewhat removed from a truly adjudicative proceeding, it is highly likely that a reviewing court, confronted by a rule or ruling to the effect that proceedings be conducted in writing rather than orally, would apply the holding of the Supreme Court of Canada in *Baker*,¹³⁹ and rule that an oral hearing was not legally necessary. The only qualification would be that the rule or ruling should not be so absolute as to preclude access to an oral process, such as where it might be critical or essential to resolve issues of credibility,¹⁴⁰ or in situations of lack of participatory capacity with respect to written proceedings.

4.2.4. Interrogatories

Interrogatories or “Information requests” (as they are described in Section 24 of Rule 001), along with the Commission’s Minimum Filing Requirements, are an integral part of the Commission’s discovery or disclosure regime. Under Section 24.1, they may be used to

- (a) clarify any documentary evidence filed by the other party;
- (b) simplify the issues;
- (c) permit a full and satisfactory understanding of the matters to be considered; or
- (d) expedite the proceeding.

There is no doubt that the use of Information requests has been one of the major causes of delay in the processing of applications and, in many instances, “issue creep.”

Certainly, adequate disclosure of or access to relevant information is one of the most important underpinnings of the duty of procedural fairness, and is an accepted component of utilities regulation proceedings.¹⁴¹ Affected parties are entitled to access to the proofs and arguments being advanced against their position. However, it is not an absolute or unqualified right; the extent of the entitlement varies with context.¹⁴²

In our Report, the Committee makes several recommendations for changes with a view to narrowing the opportunities for Interrogatories - rigorous substantive scoping of applications at an early stage of the application process, active case management throughout the process, stricter enforcement of the bases for information requests set out in section 24, removal of

¹³⁹ *Supra*, note 76, at paras. 33-34.

¹⁴⁰ See e.g. *Khan v. University of Ottawa* (1997), 34 OR (3d) 535 (CA). In its representations to the Committee, ATCO listed a number of considerations that might be relevant to the determination of whether to allow an oral hearing or part of a hearing: the contents of the Issues List, the scope of the proceeding, materiality, complexity of the topic (such as where highly academic evidence was being introduced), the need to develop the record through oral testimony, or the level of public concern.

¹⁴¹ See Gordon Kaiser and Bob Heggie, “Developments in Public Utility Law”, *supra*, note 137, at pages 155-63.

¹⁴² *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 SCR 809, at para. 89, rejecting in a correctional setting, the application of the full disclosure regime applicable in criminal proceedings as established in *R. v. Stinchcombe*, [1991] 3 SCR 326.

multiple rounds of information requests, and, where appropriate, in-person, cross-examination as a surrogate.

Given the nature and complexity of rate-setting exercises, procedural design providing access to relevant information is itself a complex, situation sensitive exercise. In the face of a carefully considered Commission response to these recommendations and particularly having regard to the principles of proportionality, it is unlikely that the Alberta Court of Appeal would second-guess the Commission's adoption of a regime designed to avoid abuse, regulatory lag, and issue creep

4.2.5. Cross-Examination

Almost fifty years ago, in *Re County of Strathcona No. 20 and MacLab Enterprises*,¹⁴³ Johnson JA, of the Alberta Supreme Court, Appeal Division, held that an entitlement to cross-examine witnesses was not an immutable requirement of natural justice (now procedural fairness). Provided a party to administrative proceedings was "afforded an equally effective method of answering the case made against him, ... the requirements of natural justice will be met."¹⁴⁴ This statement was made in the context of an adjudicative tribunal as opposed to a regulatory agency such as the Commission. However, in the latter context, where a regulatory body "is more concerned with community interests at large, and with technical policy aspects of a specialized subject matter", Estey J, in delivering the 1981 judgment of the Supreme Court of Canada in *Inisfil Township v Vespra Township*,¹⁴⁵ was clear that the requirements of natural justice (including any claim to a right to cross-examine) were even more flexible and context sensitive.

Much more recently, in an energy regulation setting, Dawson JA, delivering the judgment of the Federal Court of Appeal in *Tsleil-Waututh Nation v. Canada (Attorney General)*,¹⁴⁶ affirmed this principle. In so doing, she rejected an argument that, in the context of the National Energy Board consideration of the Trans Mountain Pipeline ("TMP") application, the Board had violated the principles of procedural fairness by denying participants a right to cross-examine TMP's witnesses orally or in-person. Given a range of considerations, the rules of procedural fairness were met by the Board's process of Information Requests. The Federal Court of Appeal accepted that, on the facts, this written process provided the relevant parties with an adequate opportunity to contest the evidence that contradicted their case.

As was the case with the National Energy Board in *Tsleil-Waututh Nation*, as already outlined, both the *AUC Act*,¹⁴⁷ and the Commission's *Rules of Practice*,¹⁴⁸ contemplate the Commission

¹⁴³ (1971) 20 DLR (3d) 200 (Alta SC, AD).

¹⁴⁴ *Id.*, at pages 203-04.

¹⁴⁵ [1981] 2 SCR 145, at pages 167-68.

¹⁴⁶ *Supra*, note 135, at paras. 242-259.

¹⁴⁷ Section 9(4).

¹⁴⁸ Section 35.

proceeding orally, in writing, or by a combination of both. Certainly, Section 42.3 of the Rules provides as follows:

A witness may be questioned by or on behalf of a party, a member of the Commission staff or the Commission.

However, this does not necessarily imply that all those presenting evidence must do so and be available for questioning in person. Rather, the provision's operation could be restricted to situations where testimony is given in person, an interpretation informed by the other subsections of Section 42 – Presenting Evidence. Alternatively, the term “questioned” could be read as “questioned either in person or by writing.” Under either interpretation, the Commission has discretion as to the process it makes available to participants for contesting the evidence that contradicts their case.

Certainly, situations may arise, as also in the instance of the more general choice between oral and written hearings, where there is an issue of credibility that can be resolved only by testimony in person subject to testing by cross-examination. However, absent such considerations, as in *Tsleil-Waututh Nation*,¹⁴⁹ a reviewing court is very likely to be deferential to any Commission decision that the testing of evidence and submissions be in writing, and not in person by way of conventional cross-examination. This is especially so, where, as in *Tsleil-Waututh Nation*,¹⁵⁰ the regulator has provided reasons for its choice of process.

4.2.6. Motions

Whether as part of a regime of more active case management or under amendments to Section 38 of Rule 001,¹⁵¹ greater structuring of the motions process with a view to more efficient processing of motions is a matter primarily for the Commission. The Court of Appeal would almost certainly not want to micro-manage the rules further refining the process for the making and determining of motions. Here too, considerations of proportionality would support the entitlement of the Commission to allow, for example, for summary determination of motions for which there are ample Commission precedents or that could otherwise be resolved without a full process of written submissions and counter submissions.

4.2.7. Argument

The same considerations that apply to a revised Motions regime hold for concluding arguments. There are simply no common law procedural fairness requirements with respect to the details of closing arguments. Moreover, Section 47 of Rule 001 is even more sparse than Section 38 respecting Motions:

¹⁴⁹ *Supra*, note 135, at para. 255.

¹⁵⁰ *Id.*, at para. 248, for the National Energy Board's ruling and the reasons for it.

¹⁵¹ Puzzlingly, section 38 applies only to Motions made in an oral hearing.

- 47.1 Arguments must be in the form directed by the Commission.
- 47.2 No argument may be received by the Commission unless it is based on the evidence before the Commission.

It is open to the Commission to adopt whatever rules respecting argument that it considers appropriate, either in a more detailed Rule or in the application of the current discretion conferred by Section 47 on a case by case basis, ideally as part of the initial process of scheduling the progress of an application. Unless the Commission acts in such a way as to create inappropriate disparities as among the various parties to an application, judicial review on procedural fairness grounds would not be an option.

4.2.8. Adequacy of the Record

It is within the discretion of the Commission to determine whether it has sufficient information for its needs. In regulatory proceedings, the law of diminishing returns has considerable purchase. There comes a point where the cost of obtaining more information is more than the likely contributions of that information to a better decision. Ultimately, the pursuit of a perfect record is a snare and a delusion. The Commission and its Panels should take that admonition seriously secure in the confidence that unless it has failed to conduct any inquiry on a statutorily relevant criterion, its determination that the record is sufficiently complete will withstand judicial scrutiny.

4.2.9. Panel Assertiveness in the Hearing Room

Intemperate behaviour in the hearing room on the part of a decision-maker may give rise to a challenge based on a reasonable apprehension of bias. While Canadian examples are few,¹⁵² decision-makers, whether sitting alone or as a member of a panel, are expected to refrain from conduct that reveals antagonism towards a party, a party's witnesses, or a party's cause. These authorities should not, however, be read as limiting the extent to which the hearing members of a tribunal or agency can comfortably impose control on the conduct of proceedings as, for example, through a rigorous case management regime. This is especially so where an agency such as the Commission has inquisitorial characteristics and a statutory mandate that emphasises the regulator's own needs.¹⁵³ In such a context, the principles respecting unbiased decision-making do not require those members assigned to a proceeding to refrain from active intervention in the course of a hearing (and, for that matter, pre-hearing). Controlling the proceeding in such a way as to focus on what the Commission considers to be truly relevant to its mandated obligations and concerns is not just the prerogative of the panel members but

¹⁵² However, see e.g. *Canadian College of Business and Computers Inc. v. Ontario (Private Career Colleges)*, 2010 ONCA 856, and *Golomb v. Ontario (College of Physician and Surgeons)* (1976) 12 OR (2d) 73, 68 DLR (3d) 25 (Div. Ct.).

¹⁵³ The leading authority on the "relaxed" standards of bias that apply to utilities and regulators remains *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623.

their implicit obligation. Colloquially speaking, the panel members are not expected to rise totally above the fray.

4.2.10. Decisions

Nowhere in the applicable primary legislation or the Commission's *Rules of Practice* is there any specific provision requiring the AUC to provide reasons for its decisions.¹⁵⁴ Moreover, *Vavilov* has reaffirmed that, by reference to the principles of procedural fairness, "reasons are not required for all administrative decisions."¹⁵⁵ However, intuitively, it seems unlikely that a court would absolve the Commission from a duty to give reasons either generally or in the context of utility rate-setting proceedings.

There are also two provisions that provide some independent or, at least, supplemental support for a duty to give reasons in such proceedings. Section 29(10) of the *AUC Act* requires the Commission, in response to an application for leave to appeal, to forward to the Alberta Court of Appeal "its findings and reasons for the decision or order." Further, Section 48 of the Commission's *Rules of Practice* makes provision for the correction of errors "in any of its rulings, orders, decisions or directions." Nevertheless, it may well be that these are too slim a basis on which to construct an argument for a necessarily implicit obligation to give reasons. In that case, it will be necessary to consider whether this setting is one of those instances where the common law principles of procedural fairness serve to supply the omission of the legislature and, in the case of the *Rules of Practice*, the Commission itself.

An appropriate starting point for this common law analysis is the majority judgment in *Vavilov*. It details some of the situations in which at common law "written reasons" will be required:

... those in which the decision-making process gives the parties participatory rights, an adverse decision would have a significant impact on an individual or there is a right of appeal.¹⁵⁶

The majority also reiterates the justifications commonly advanced for the imposition of a duty to give reasons:

Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was

¹⁵⁴ Section 7 of the *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A.3, obliges designated decision-makers to provide the findings of fact on which they based their decisions and reasons for their decisions. However, as already noted, *supra*, note 34, the Commission is not one of the four remaining designated decision-makers. See *Authorities Designation Regulation*, AR 64/2003 (as amended). It might be argued that section 36 of the *GU Act* requiring the Commission to make its various range of orders under that provision "in writing" amounts to an implicit requirement of reasons but that would be a stretch.

¹⁵⁵ *Supra*, note 49, at para. 77.

¹⁵⁶ *Ibid.*

made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power.¹⁵⁷

Moreover, in terms of these rule of law considerations and the earlier recognition of the importance of reasons where there is a right of appeal to the courts (as under the *AUC Act*), “reasons facilitate meaningful judicial review”.¹⁵⁸

It therefore seems inescapable, if the question should ever arise, that the Alberta Court of Appeal would hold the Commission to its regular practice of providing reasons in its decisions and rulings in rate regulation proceedings. Even if there is no common law-imposed obligation to provide reasons for its decisions, there is now a further impetus for the provision of reasons. For the majority in *Vavilov*, and the minority certainly do not take issue with this:

[R]easons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one that puts those reasons first.¹⁵⁹

In other words, reasons provide the lens through which reasonableness review is conducted. When courts conduct reasonableness review, it is now not enough that the decision-maker has reached an outcome that is **justifiable**.

Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies.¹⁶⁰

In short, the reasons provided are the basis on which courts must now focus in conducting reasonableness review.

Of course, to the extent that rate regulation decisions reach the Alberta Court of Appeal by way of an appeal on law and jurisdiction following the granting of leave, the standard of review will be that of correctness for pure questions of law or questions of law that are readily extricable from findings of mixed fact and law.¹⁶¹ That suggests the possibility that reviewing courts will engage in wider ranging evaluation of the decision than would be the case under

¹⁵⁷ *Id.*, at para. 79.

¹⁵⁸ *Id.*, at para. 81.

¹⁵⁹ *Id.*, at para. 84.

¹⁶⁰ *Id.*, at para. 86.

¹⁶¹ Given the strength of the privative clause in section 30 of the *AUC Act* and the confining of access to the Court of Appeal to questions of law and jurisdiction, there would appear to be no other way of seeking judicial review on issues of fact or questions of mixed law and fact from which a pure question of law is not readily extricable. However, Professor Nigel Bankes in “Statutory Appeal Rights in Relation to Administrative Decision-Maker Now Attract an Appellate Standard of Review: A Possible Legislative Response”, January 20, 2020, online: http://ablawg.ca/wp-content/uploads/2020/01/Blog_NB_Vavilov.pdf, referencing both the majority (paras. 50-52) and minority (para. 252) judgments in *Vavilov*, posits situations where there can still be access to an application for judicial review even in the face of a statutory right of appeal thereby opening the possibility for fact and mixed law and fact-based review. Our sense is that such situations will be exceptionally rare especially given the palpable intention of section 30 to restrict access to judicial scrutiny to the statutory appeal route.

reasonableness review. If so, self-preservation would certainly counsel in favour of the Commission in its reasons taking the opportunity to provide the Court of Appeal with the clearest possible explanation of why it reached the various determinations on all questions of law that are the underpinnings of its overall conclusions in rate regulation proceedings.

More generally, *Vavilov* provides a road map for agencies on how to write reasons that will fulfill the objectives of that obligation. These lengthy portions of the judgment in *Vavilov* are very much a manual for good decision-writing. They should be compulsory reading for all administrative decision-makers. This includes the Commission given the criticism that some decisions are far too prolix and could be condensed without any sacrifice in terms of quality or the requirements of the common law. Of particular concern to some of those responding to our invitation for submissions is the detailed setting out of every argument made during a hearing and lengthy undigested recitations of the facts. The majority judgment in *Vavilov* shows full awareness of such an over-reaction to the existence of a duty to provide reasons:

Reviewing courts cannot expect administrative decision makers to “respond to every argument or line of possible analysis” ... or to “make an explicit finding on each constituent element, however subordinate, leading to its final conclusion”. To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice.¹⁶²

This should provide considerable reassurance for any agency or tribunal with an inclination to overreach in terms of what must be included in any set of reasons. What is to be guarded against is a

... failure to meaningfully grapple with key issues or central arguments raised by the parties.¹⁶³

4.3. Other Issues

4.3.1. Time Limits

The Commission’s ability to set time limits for the completion of an application or various components of the application process would likely come within either or both of the Commission’s “necessary” and “incidental” powers under section 8(2) of the *AUC Act*, or authority under section 76(1)(e) to make “rules of practice governing the Committee’s procedure and hearings.” The only potential source of legal challenge to Commission-imposed time limits would be in situations where the time limits were either too short generally or in a specific case as to amount to a denial of procedural fairness to the applicant or other

¹⁶² *Supra*, note 49, at para. 128, the quotes being from the judgment of the Court in *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, at paras. 25 and 16, respectively. See also the minority judgment in *Vavilov, id.*, at para. 301.

¹⁶³ *Ibid.*

participants. That means that any general Rule or schedule for a specific proceeding imposing time limits should include a sufficiently flexible dispensation power.

4.3.2. Participatory Rights and Intervention

The relevant legislation fails to elaborate in any detail as to who may be parties to or interveners in utility rate-setting or rate-related processes. The criterion in the *AUC Act* for participatory rights is whether the application “may directly and adversely affect the rights of a person.”¹⁶⁴ In the *EU Act*,¹⁶⁵ it is “interested parties”, while in the *GU Act*¹⁶⁶ and the *PU Act*,¹⁶⁷ it is “the parties interested”. None of these three terms is defined. However, sections 21 and 22 of the *AUC Act*, conferring authority on the Commission to make rules¹⁶⁸ respecting intervener costs, clearly contemplate the granting of intervener participation in the Commission’s proceedings. These provisions aside, the only specific recognition of a participatory right is in Schedule 13.1 to the *Government Organization Act*, and its conferral in section 3 of representative status on the UCA.

The Commission’s *Rules of Practice* are somewhat more expressive but, even then, not necessarily self-applying. Among those coming within the definition of “party” for the purposes of Rule 001 is

... a person, other than an applicant, with rights that may be directly and adversely affected by the Commission’s decision on an application, who participates in a hearing.¹⁶⁹

Section 1.1(k)(viii) also defines “party” to include “any other person whom the Commission determines to be a party.”

Over the years, there has been much litigation in Alberta (and elsewhere) as to the meaning of these terms and their equivalents in other regulatory agency statutes. As long ago as 1971, the Alberta Supreme Court, Appellate Division in *Consumers Gas Co. v. Alberta (Public Utilities Board)*,¹⁷⁰ held that access to the then Board for “interested parties” should be generously interpreted and not restricted to those with a “proprietary or contractual interest.”¹⁷¹ In the

¹⁶⁴ Section 9(2).

¹⁶⁵ Section 121(1).

¹⁶⁶ Section 36.

¹⁶⁷ Section 89.

¹⁶⁸ Neither the *AUC Act* nor [Rule 022: Rules on Costs in Utility Rate Proceedings](#) establishes further criteria on which the Commission is to determine applications for intervener status. However, Section 3.1 of Rule 022, does adopt a **costs eligibility** threshold:

... an intervener who has, or represents a group of utility customers that have, 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 proceedings.

¹⁶⁹ Section 1.1(k)(ii).

¹⁷⁰ (1971) 18 DLR (3d) 749.

¹⁷¹ *Id.*, at page 760.

same decade, the Court also recognized the value of interventions to the fulfilment of the Board's mandate.¹⁷² Nonetheless, litigation over the meaning and application of statutory standing or status provisions has persisted.

Earlier in this Appendix, on the standard of review for procedural fairness issues, there is an examination of one of the leading authorities on participatory claims in energy regulatory proceedings, the judgment of Stratas JA of the Federal Court of Appeal in *ForestEthics Advocacy Association v. National Energy Board*. There, he emphasized the need for a considerable¹⁷³ margin of appreciation for the then National Energy Board's interpretation and application of the statutory standards for participation in its proceedings as either an intervener or a commenter.¹⁷⁴

However, this is not necessarily reflective of the approach of the Alberta courts to the interpretation of such provisions in regulatory statutes, though it is noteworthy that, at times, the Alberta Court of Appeal has drawn a distinction between the attribution of meaning to standing provisions (appealable as questions of law), and the application of the chosen standard to the facts (not subject to appeal as primarily questions of fact or mixed law and fact).¹⁷⁵

To the extent that this bifurcation of the standing to participate issue will continue in the wake of *Vavilov*, it will presumably have the effect of subjecting the statutory interpretation aspects of standing or intervention decisions to appellate scrutiny on a correctness standard,¹⁷⁶ and rendering the application of the statutory provisions to the facts of the particular proceeding immune from judicial scrutiny as not coming within the scope of the appeal provision in the *AUC Act*.

As illustrated by *ForestEthics*, regulatory regimes respecting standing and intervener status might also differentiate in the level of permissible engagement. In that instance, the National Energy Board had established a process under which it allocated recognized participants into

¹⁷² See *Green, Michaels & Associates Ltd. v. Edmonton (City)* (1979) 94 DLR (3d) 641 (Alta. CA), at para. 25.

¹⁷³ *Supra*, note 41.

¹⁷⁴ Stratas JA, however, declined to deal with the argument that the National Energy Board intervener status regime was unconstitutional for violation of section 2(b) of the *Charter* and its guarantee of "freedom of expression." The applicants were precluded from seeking judicial review on that ground as they had not put their constitutional challenge to the NEB: *id.*, at para. 42.

¹⁷⁵ For discussion, see David J. Mullan, "Regulators and the Courts: A Ten Year Perspective" (2014) 1 *Energy Regulation Quarterly* 13, at pages 15-19.

¹⁷⁶ See also *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 SCR 6. There, despite what the majority characterized as a broad discretion as to who could make a "complaint", the Canadian Transportation Commission had made an unreasonable decision in subjecting the complainant to a status test that could never be met and by the automatic application in a regulatory setting of the test for public interest standing in judicial review proceedings. It now remains to be seen whether in a post-*Vavilov* world, the Alberta Court of Appeal would classify any such "error" on the part of the Commission as one of law subject to appeal or how, within any such appeal, supposedly on a correctness standard, the Court of Appeal would factor in the "discretionary" nature of the Commission's authority.

one of two categories – those with full intervener status, and those restricted to filing a comment. In the context of the Commission’s rate-setting authority, that would permit the Commission to differentiate between those whose rights may be directly and adversely affected, and other interveners as to the extent of their participation. What also seems clear (and is relevant to some of the criticisms coming from the regulated utilities) is that the Commission, as part of assertive case management, would be entitled to clamp down on repetitious representations from various interveners. In concrete terms, that would justify the Commission rejecting Consumers’ Coalition of Alberta and other intervener evidence and submissions addressing matters canvassed by the statutorily sanctioned UCA. More generally, the Commission would be legally justified in reining in any attempt on the part of any party (applicant, party as of right, or intervener) to insinuate issues that are outside the bounds of any scoping exercise.¹⁷⁷

4.3.3. Costs

4.3.3.1. Statutory Authority

Section 11 of the *AUC Act* confers on the Commission all the powers of a judge of the Court of Queen’s Bench with respect to “the payment of costs.” As well, section 21(1) expands on the Commission’s authority to order costs:

The Commission may order by whom and to whom its costs and any other costs of or incidental to any hearing or other proceeding of the Commission are to be paid.

Section 21(2) then authorizes the Commission to make rules respecting the payment of costs to an intervener other than a “local intervener” as defined in section 22. (Section 22 authorizes rules for intervener costs in facilities matters.)

4.3.3.2. Rule 022

In Rule 022, the Commission has established a costs regime for utility rate proceedings. Section 21(2) of the *AUC Act* is the primary statutory basis for this Rule. However, to the extent that Rule 022 provides in Section 3.3 that an “applicant can claim costs”, that “participant” is defined to include “an applicant”, and that the costs criteria in Section 11 apply not just to interveners but “eligible participants”,¹⁷⁸ the Rule is not confined to intervener costs as seemingly required by the terms of section 21(2).¹⁷⁹ If so, Rule 022 must find justification, not

¹⁷⁷ Subject, of course, to exceptional circumstances in which the Commission determines that its own needs require an expansion in the scope of its consideration of an application.

¹⁷⁸ For example, Section 8 allowing for interim costs is expressed in terms of “an eligible intervener” while the general cost provision is expressed as applicable to “an eligible participant.”

¹⁷⁹ This interpretation finds support in the name change to Rule 022 from *Rules on Intervener Costs in Utility Rate Matters* to *Rules on Costs in Utility Rate Proceedings*. It is also acknowledged by the Commission in [Bulletin 2008-16](#): Draft Revised Rule 022, *Rules on Intervener Costs in Utility Rate Matters* (July 31, 2008), explaining proposed changes to Rule 022. At page 4, it is stated that section 3.3 stating that applicants are eligible to claim costs

just in section 21 but also in section 76(1)(e) and the Commission's ability to make rules governing its "procedure and hearings."¹⁸⁰

4.3.3.3. Applicant Costs under Rule 022

The question of when under Rule 022, an applicant can claim costs and against whom must take into account Section 12, Liability for costs. It provides that, in an application by a utility, the utility is to pay the costs awarded to an eligible intervener. Where the hearing or proceeding is Commission initiated and is generic in character, the Commission may pay the costs of an eligible participant or direct that the costs awarded be shared by one or more utilities. There is no mention of liability for costs where a utility as applicant makes a claim for costs.

However, the answer to this question is apparently to be found in Section 13.4 of Rule 022 to the effect that the Commission "may state" in a cost order

... whether an applicant named in the order is authorized to record the costs in its hearing costs reserve account.¹⁸¹

In other words, applicants may be allowed to recover any costs assessed in their favour through the rates that they charge their customers.

That seemingly leaves as an open question whether this represents the only vehicle through which applicants can recover their costs. More particularly, do Sections 12 and 13.4 of Rule 022, when read together, have that effect? Or, does the Commission still possess an overriding discretion, by virtue of sections 11 and 21(2) of the *AUC Act*, to respond to an applicant or even an intervener for costs outside the regime established by Rule 022? This question is returned to below.

4.3.3.4. Intervener Costs under Rule 022

As far as interveners are concerned, under section 3.1, general eligibility is contingent on the intervener being or representing a "group of utility customers" that have

... a substantial interest in the subject matter of a hearing or other proceeding and 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.¹⁸²

reflected the Commission's position that it "will continue to allow the prudent costs of a utility to be recovered through rates."

¹⁸⁰ [Rule 001, the Commission's Rules of Practice](#), does not contain any provision respecting costs.

¹⁸¹ See also Section 5.2, dealing with costs on applications for review and variance under [Rule 016: Review of Commission Decisions](#).

¹⁸² The effect of this is to leave cost ineligible interveners completely out of the costs regime established by Rule 022.

4.3.3.5. Costs Criteria Applicable to Eligible Interveners and Utilities

Section 11.1, which applies to all eligible participants, conditions the award of costs on their being “in the opinion of the Commission ... reasonable and directly and necessarily related to the hearing or other proceedings.” As well, the eligible participant must in the opinion of the Commission have

... acted reasonably in the hearing or other proceeding and contributed to a better understanding of the issues before the Commission.

Section 11.2 then goes on to list nine factors that the Commission “may consider” in “determining the amount of costs” including undue repetition of questions and evidence coming from other participants and a failure to cooperate with other participants in guarding against duplication of questions and evidence. More generally, the Commission is entitled to consider whether the eligible participant

... engaged in conduct that unnecessarily lengthened the duration of the hearing or other proceeding or resulted in unnecessary costs to the applicant or other participants.

As for the quantum of costs, Section 9.2 of Rule 022 states:

An eligible participant may only claim costs in accordance with the scale of costs.

That scale of costs is found in Appendix A to Rule 022 and is based on categories and maximum amounts. However, it does provide for the award of greater amounts where

... an eligible participant can advance persuasive argument that the scale is inadequate given the complexity of the case.

4.3.3.6. Efficiency Concerns with Existing Costs Regime

Several utilities that made submissions to the Committee expressed concerns about the involvement of interveners in the Commission’s hearings. It was asserted that there are inadequate disincentives to dragging out the hearing of applications. However, the Committee believes that generally the discipline available to the Commission through diminution in intervener costs awards on the basis of the criteria spelled out in Section 11, and more assertive case management should coalesce to provide a basis on which the Commission’s hearings can become more focused on what is truly in scope.

4.3.3.7. Recovery of Full Legal or Regulatory Costs Outside the Scale of Costs Against Another Participant

There remains the question, anticipated above, of whether under Rule 022 or otherwise, the Commission, in addition to reducing or even denying an eligible intervenor's or an applicant's costs claim, can also order an intervenor or an applicant to pay some or even all of the other's legal or regulatory costs.

Some guidance on this question comes from the 2014 judgment of Fraser CJA in *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*,¹⁸³ though it is by no means clear that the other majority justice of appeal or the dissenting justice of appeal supported these elements of her analysis. This case involved appeals from the failure of the Commission to award ATCO the full legal costs of its participation in two generic Commission hearings: Utilities Assets Disposition and Performance Based Reform. In other words, ATCO argued that it was not confined to the Scale of costs established in Appendix A of Rule 022. Rather, the Commission had authority, indeed the obligation to award its full legal costs on the basis of the Commission's costs powers in sections 11 and 21(1) of the *AUC Act*, and a utility's entitlement to recover legal and other regulatory costs that it had prudently incurred.

Fraser CJA held that general authority for Rule 022, as a structuring exercise of the Commission's discretionary powers over costs in rates matters, existed under sections 11, 21, and 76(1)(e) of the *AUC Act*. In doing so, she rejected arguments by ATCO that section 21 applied only to the recovery of costs by the Commission or intervenors. It was clear to Fraser CJA that section 21(1) authorized and Rule 022 covered the award of costs to participants as defined to include applicants. Moreover, Section 9.2 of Rule 022 meant that it was a complete code for the recovery of costs:

An eligible participant may only claim costs in accordance with the scale of costs.

In other words, cost claims by applicants as well as intervenors were constrained by the Scale of costs set out in Appendix A in Rule 022. There was no at large residual authority under section 11, section 21(1), or on the basis of an asserted right to recover all of its prudently incurred costs, to award costs to a utility on some other basis or at higher levels than permitted under the Scale of costs.

All this led Fraser CJA to the conclusion that the Commission was not acting unreasonably or, for that matter, incorrectly when it held that Rule 022 provided the framework and the criteria on which the Commission was entitled to base its consideration of ATCO's costs claims in these two generic proceedings. More particularly, it meant that ATCO had no independent entitlement to an award of costs that reflected its full legal and other regulatory costs.

¹⁸³ 2014 ABCA 397, 588 AR 134.

In so ruling, Fraser CJA took care to point out that the issue of who should be responsible for costs that the Commission had awarded to ATCO was not before the Court, nor did her judgment in any way speak to the principles on which the Commission should exercise its authority over costs in rate-setting applications as opposed to generic hearings. In other words, she did not deal with the question whether the Commission's authority under Section 13.1 of Rule 022, to order "by whom" costs should be paid, extended to allowing an order that an intervener pay costs to either an applicant or other participant.

In the legislative history of Rule 022, there are indicators that the Commission did not intend that it be available for costs claims by applicants against interveners. In Bulletin 2008-16, it is stated that 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.¹⁸⁴

The Bulletin goes on to explain that Section 3.3 of Rule 022 providing that "an applicant is eligible to obtain costs" should be read in the context of the Commission continuing "to allow the prudent costs of a utility to be recovered through rates."¹⁸⁵ From this, it could be inferred that, when Section 12 on Liability for costs addresses only the payment of eligible intervener costs by an applicant utility, and the payment of participant costs by the Commission (or other utilities) in generic hearings, it must be taken to be excluding the possibility of applicants seeking application costs against interveners. This is further underscored by Section 13.4 and its provision for the Commission to allow applicants to record the costs awarded to them in their hearing costs reserve account.

In sum, it is highly likely that for costs to be recovered by an applicant or an intervener against the other, Rule 022 would have to be amended. That, we do not recommend.

4.3.4. Consolidated-Bathurst Discussions

In *Vavilov*, the Court rejected an argument to the effect that the time had come to recognize that inconsistency could under certain circumstances constitute a free-standing ground of judicial review on a correctness standard.¹⁸⁶ This was so even in the case of "persistent discord and internal disagreement"¹⁸⁷ on an issue in the jurisprudence of an administrative decision-maker. The majority did, however, concede that the existence of internal conflicts could be a factor in the application of "the more robust form of reasonableness review" to be elaborated later in the judgment.¹⁸⁸ In so doing, they acknowledged that a failure on the part of an

¹⁸⁴ [Draft Revised Rule 022, Rules on Intervener Costs in Utility Rate Matters](#) (July 31, 2008), at page 1.

¹⁸⁵ *Ibid.*, page 4.

¹⁸⁶ *Supra*, note 49, at paras. 71-72.

¹⁸⁷ *Id.*, at para. 71.

¹⁸⁸ *Id.*, at para. 72.

administrative tribunal or agency to resolve inconsistencies in its decision-making could represent a threat to the rule of law.¹⁸⁹ This could give rise to arbitrariness and presumably judicial review in certain situations on the basis of unreasonableness. However, the majority also put the onus on the “internal administrative processes” of agencies as the primary vehicle for the promotion of consistency.¹⁹⁰

Once again, this gives legitimacy to various devices that agencies deploy to encourage consistency in the treatment of issues that are material to their mandate. Outside of the context of particular applications or hearings, full board (or institutionalized) meetings to discuss material issues of substance or procedure on which panels have differed, with a view to finding common ground, provide one such mechanism. Chair-issued Guidelines are also, within limits, a permissible device.¹⁹¹

Moreover, even in the context of an already filed application, such discussions are permissible within the constraints recognized in *IWA v. Consolidated-Bathurst Packaging Ltd.*¹⁹² and *Tremblay v. Québec (Commission des affaires sociales)*.¹⁹³ Prominent among those constraints is the admonition that the initiative should come from the sitting member or panel, and not be dictated by the Chair or other members. At such meetings, it is also recognized that the insinuation of new evidence is impermissible and that there should be no interference with the sitting panel’s or member’s fact-finding. As for matters of policy and law, they are legitimate matters for discussion provided that

... the parties are given a reasonable opportunity to respond to any new ground arising from such a meeting.¹⁹⁴

Provided, however, that the Commission operates within those constraints, as the majority judgment of Gonthier J in *Consolidated-Bathurst* makes clear, significant operational advantages can result from internal consultations of this kind:

The institutionalization of the consultation process adopted by the Board provides a framework within which the experience of the chairman, vice-chairmen and members of the Board can be shared to improve the overall quality of its decisions. Although respect for the judicial independence of Board members will impede total coherence in decision-making, the Board through this consultation process seeks to avoid inadvertent contradictory results and to achieve the highest degree of coherence possible under these circumstances. An institutionalized consultation process will not necessarily lead

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Tharmotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, [2008] 1 FCR 385.

¹⁹² [1990] 1 SCR 282.

¹⁹³ [1992] 1 SCR 752.

¹⁹⁴ *Supra*, note 192, at p. 339.

Board members to reach a consensus but it provides a forum where such a consensus can be reached freely as a result of thoughtful discussion of the issues at hand.¹⁹⁵

Given *Vavilov*'s placing of trust in regulatory agencies for the elimination of internal inconsistencies, both procedural and substantive, this statement provides a legally appropriate methodology for the fulfilment of that responsibility. This is underscored by the fact that the majority in *Vavilov* specifically acknowledged *Consolidated-Bathurst* plenary meetings as one of several effective tools in the fostering of coherence and avoiding conflicting results.¹⁹⁶

4.3.5. Member Training

Mandatory training for members of the Commission would not give rise to any legal issues. Section 8(2) of the *AUC Act* and its conferring of “necessary” and “incidental” powers on the Commission provides clear warrant for the adoption of such a regime. There is no credible argument that making participation mandatory would impinge on the independence of members.

¹⁹⁵ *Id.*, at page 340.

¹⁹⁶ *Supra*, note 49, at para. 131, citing *Consolidated-Bathurst, id.*, at pages 324-28.

Appendix IV

Recommendations of the AUC Committee on Procedures and Processes

Assertive Case Management

Recommendation #1

The Committee recommends that the AUC apply an overarching, assertive case management approach to the development and implementation of the Commission's procedures and processes and to the implementation of the Committee's specific recommendations.

Recommendation #2

In the context of specific proceedings before the Commission, it should be recognized that responsibility for implementing assertive case management, particularly with respect to Scoping and Scheduling, rests with the Commission members assigned to process the relevant application, led by the Panel Chair and assisted as appropriate by Commission staff.

Scoping

Recommendation #3

The Committee recommends that the Commission issue Directions on Procedure for each application that include a preliminary List of Issues, and that a date for filing written comments on the List of Issues be fixed in the Schedule for that proceeding. Thereafter, there should be an onus on the parties to persuade the Commission that there are exigent circumstances that make it appropriate to vary the List of Issues, based on the record to date in the particular proceeding.

Recommendation #4

The Committee recommends that the Commission apply the List of Issues as the framework for assessing the relevance of subsequent steps in each proceeding, such as interrogatories and motions to amend or expand the List of Issues.

Scheduling

Recommendation #5

The Committee recommends that the Commission formalize the issuance of Directions on Procedure, including a schedule that establishes dates for each step of the proceeding.

Time Limits

Recommendation #6

The Committee is not recommending that there be legislative change to implement time limits. However, the Committee recommends that the Commission retain its current performance standards for record development (e.g. 143-205 days for Full Process; 80% of the time) and disposition documents (90 days from close of the record; 100% of the time), and strictly adhere to them.

Recommendation #7

The Commission's commitment in Section 2.2 of Rule 001 to the "expeditious and efficient determination on the merits of every proceeding" is more appropriately achieved through a rigorous scoping of issues and scheduling of proceedings as recommended in Sections 5.3 and 5.4 of this Report than by the imposition of statutory time limits.

Confidentiality

Recommendation #8

The Commission should build on its proactive resolution of the confidentiality issue and aggressively apply case management to enhance the efficiency of its processes in this respect.

Hearings

Recommendation #9

There should be a strong presumption that all Commission rate-setting hearings be conducted in writing, subject to the applicant or a party demonstrating to the satisfaction of the Commission, or the Commission determining in view of its own needs, that a hearing or part thereof be oral.

Recommendation #10

Issues as to whether a hearing should be written, oral, or partly oral and partly written should be determined in the context of the recommended scoping of issues (Recommendation #3) and scheduling (Recommendation #5), within an assertive case management process.

Interrogatories

Recommendation #11

The Committee recommends that the Commission:

1. Strictly limit interrogatories to matters within the List of Issues as settled by the Commission for each specific proceeding (Recommendation #3).
2. Include in the schedule for each proceeding (Recommendation #5) fixed dates for filing interrogatories, responses to interrogatories, motions to compel further and better responses, and the issuance of Commission rulings on such motions.
3. Adopt the practice of other regulators of processing motions relating to interrogatories in writing, using a Word document template.
4. Not permit interrogatories to parties that are not adverse in interest to the requesting party.

5. Hold technical meetings, including AUC staff or Commission members, to discuss potential interrogatory questions (particularly on technical issues), including relevance, materiality, and proportionality, to reduce the number and expanse of interrogatories.
6. Enforce the interrogatory parameters established in the ATCO Gas 2008 IR Ruling. Each interrogatory must contain justification of the value of the requested information to the Commission Panel in considering the particular application, including:
 - a. Implementing a materiality filter: what is the amount in question on the issue, and what will it cost to deal with it?
 - b. Applying a proportionality test: is the effort involved in the preparation of a “full and adequate response” to the interrogatory, and in dealing with the response in evidence, justified by the probative value of the information that is requested?
7. In written hearings, permit additional rounds of IRs only where determined to be absolutely necessary, and consider permitting oral cross-examination on IR responses where it appears to be more expeditious than additional rounds of IRs.
8. In oral hearings, establish a presumption that there will be only one round of Interrogatories, with follow up questions as necessary in cross-examination.
9. Penalize abuse or inefficient use of the interrogatory process through reduction of costs allowed to utilities and eligible interveners.

Cross-Examination

Recommendation #12

The Committee recommends that the Commission maintain and increase its focus on reduction of regulatory burden in determining whether to allow cross-examination.

Recommendation #13

The Commission should provide for cross-examination only where, in its considered view, it would be necessary or worthwhile in the circumstances of the case. An opportunity for cross-examination should only be provided when the Commission determines that it is necessary for it to discharge its mandate. It should limit cross-examination to specific evidence. Most importantly, however, the Commission should engage in assertive case management in the hearing room (see Recommendation #21). Cross-examination should be limited to areas and issues that the Commission considers to be necessary to inform its judgment on the application before it.

Recommendation #14

Aids to cross-examination should be strictly controlled in accordance with the Commission's *Rules of Practice* and stated policies.

Recommendation #15

Non-expert opinion evidence should be discouraged through reduction of costs allowed to utilities and eligible interveners.

Motions

Recommendation #16

The Commission should establish a schedule for written motions in the Directions on Procedure (Recommendation #5), including dates by which the decisions on the motions are to be issued.

Recommendation #17

The Commission should enforce the ATCO Gas 2008 IR Ruling and implement materiality and proportionality standards for requested information. Parties requesting information, and bringing motions for further and better responses to such requests, bear the onus of persuading the Commission that the information requested is not only relevant but material, and that the time required to generate the response does not exceed the probative value of the information requested.

Recommendation #18

The Commission should implement a rebuttable presumption of *stare decisis* in respect of previous rulings on similar motions.

Argument

Recommendation #19

The Committee recommends that the Commission adopt a presumption for efficient and expeditious oral argument to be delivered within 3 business days of the close of the hearing record, using the top down/bottom up format. This presumption should be varied only in exceptional circumstances with appropriate justification.

Recommendation #20

The Committee recommends that the Commission adopt an assertive approach to management of oral argument including utilization of time limits, stipulation of topics on which it will hear argument, or other measures as it deems necessary or advisable in pursuit of the goal of improving efficiency and expedition.

Adequacy of the Record

Recommendation #21

The Committee recommends that the Commission assess the adequacy of the record in each proceeding by reference to the List of Issues (Recommendation #3) and that it resist attempts to persuade it that more information is necessarily better.

Assertiveness

Recommendation #22

The Committee recommends, consistent with the focus of this Report on assertive case management, that the Commission endorse assertiveness not only in the hearing room but generally throughout the process as a virtue that should inform all rate-setting and rate-related proceedings.

Decisions

Recommendation #23

The Commission should adopt a template for decision-writing that is issue-driven.

Recommendation #24

The Commission should provide appropriate training to its members and staff on issue-driven decision-writing.

Member Training

Recommendation #25

The Committee recommends that members of the AUC be provided with training on the nature of the Commission's role as a quasi-judicial tribunal and on the principles of procedural fairness and the elements of conducting a quasi-judicial process, particularly with respect to balancing procedural requirements with the need to conduct an effective and efficient process intended to enable the Commission to fulfil its mandated responsibilities. "Refresher" training programs for members should also be available periodically. Such training should include reference to Appendix III: Legal Framework and Risk Assessment, particularly as it relates to the minimal legal risks of assertive case management.

Plenary Meetings

Recommendation #26

The Commission should formally recognize the benefits of plenary meetings to discuss generic issues that arise in proceedings before individual Panels, within the terms of the guidance on such meetings provided by the Supreme Court of Canada in the *Consolidated-Bathurst* and *Vavilov* decisions.

Intervention

Recommendation #27

The Committee recommends that the Commission should, through its case management powers, more assertively hold all parties to the scoped issues and guard against repetitious evidence and submissions.

Recommendation #28

The Committee recommends that the Commission should, in appropriate cases, continue to recognize and apply the extensive discretionary authority that it possesses under Section 11 of Rule 022, *Rules on Costs in Utility Rate Proceedings*, to deny or reduce the cost claims of both utilities and eligible interveners.

Costs

Recommendation #29

The Committee recommends that the Commission rigorously apply to costs claims in rate-setting and rate-related proceedings the considerations governing eligibility and quantum of recovery set out in Section 11 of Rule 022, *Rules on Costs in Utility Rate Proceedings*.

Rules Review

Recommendation #30

The Committee recommends that the Commission review Rule 001: *Rules of Practice* with a view to supporting implementation of the Committee's recommendations, as the Commission may deem appropriate.