

Practice note: aids to question a witness

Section 40 of Rule 001: *Rules of Practice* sets out the requirements for aids to question a witness in Alberta Utilities Commission (AUC) proceedings:

40.1 Unless otherwise directed, a party who intends to use a document that has not been filed in the proceeding as an aid to question a witness at an oral hearing must provide a copy of that aid to question a witness to the witness, or the witness's representative, no less than 24 hours before the witness is to be questioned on the aid.

40.2 If a document to be used as an aid to question a witness has five or more pages, the party providing the document must highlight all passages in the document that the party intends to question the witness on.

This practice direction sets out the AUC's expectations for aids to question and the potential consequences if those expectations are not met.

Purpose of aids to question

In AUC proceedings, questioning (or cross-examination) occurs when a party asks another party's witness questions in the hearing process. The Commission has the authority to determine whether to allow or limit the questioning of a witness.

An aid to question (or an aid to cross-examination) is a document that a party may use or refer to while questioning another party's witness. Examples of an aid to question can include pictures/photographs, charts, graphs, diagrams, maps, reports, articles and other documents.

The purpose of an aid to question is to assist the party questioning a witness about the evidence of that witness. An aid to question should only be used if it directly assists in the questioning of a witness. It can be used to clarify certain issues raised by the witness, highlight inconsistencies, or challenge the witness's credibility and/or reliability. The Commission may ask the party using an aid to explain its necessity or how it will assist in questioning.

Aids to question are not considered evidence

A document that is used as an aid to question is not evidence. The Commission will consider the witness's responses to the questions as evidence, but not the document itself. This is to avoid adding new documentary evidence at the oral hearing stage of a proceeding where other parties are prevented from adequately reviewing, testing or responding to that evidence.

An aid to question will only be assigned an exhibit number if the Commission authorizes its addition to the record as an "exhibit for identification" following its use in an oral hearing. An aid to question that is assigned an exhibit number is still not evidence and its content cannot be referenced in argument other than to address the witness's testimony on the aid. If parties later

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rely on an aid to question as evidence during argument, the Commission may strike that portion of the argument.

Example

An applicant is proposing a solar project in an area with known aquifers underground. The applicant intends to use concrete pilings in the foundation of the solar project. The applicant retained an independent geological expert to examine potential impacts. The expert report concluded that the concrete pilings will not be set deep enough in the ground to cause negative impacts to the aquifers.

The interveners use a newspaper article as an aid to question this expert. The article states that the construction of concrete pilings in large-scale industrial projects are known to negatively impact aquifers. The article also states that these construction activities result in noise impacts that can negatively impact local wildlife.

After providing the article to the expert 24 hours before questioning, the interveners ask the expert whether the proposed project will negatively impact the known aquifers. The expert responds that her analysis indicates that the proposed concrete pilings, as compared to those in large-scale industrial projects, will not be set deep enough in the ground to cause negative impacts to the aquifers. She also notes that she does not have the necessary expertise to comment on the noise impacts referenced in the article.

The interveners request to add the aid to question as an exhibit for identification, and the Commission grants the request. In final argument, the interveners cite the article to argue that the concrete pilings may impact aquifers. The interveners also cite the article to argue that noise will cause negative impacts. The applicant objects to the interveners' use of the article for these purposes and seeks to have that part of the argument struck.

In this example, the Commission could consider the expert's response to the question but not the article itself. While the article was added as an exhibit in the proceeding, it was not evidence. The use of the article during final argument was improper for two reasons. First, it relied on the contents of the article about concrete pilings instead of the expert's response that the proposed pilings will not be set deep enough in the ground to cause negative impacts. Second, it relied on the contents of the article about noise, which the expert was unable to respond to because she lacked the necessary expertise. Both parts of the interveners' argument could be struck.

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