

Practice note: direct evidence and opening statements

Section 43 of Rule 001: *Rules of Practice* allows parties to give direct evidence and opening statements during an Alberta Utilities Commission (AUC) oral hearing:

- 43 Presenting evidence
- 43.1 Unless otherwise directed, no documentary evidence may be presented at an oral hearing unless the evidence was filed in accordance with Section 17.
- 43.2 A witness of a party presenting evidence at an oral hearing shall,
- (a) confirm that the documentary evidence
 - (i) was prepared by the witness or under the witness's direction or control, and
 - (ii) is accurate to the best of the witness's knowledge or belief; and
 - (b) unless the Commission otherwise directs, confine the witness's testimony to matters set out in the documentary evidence or arising from evidence adduced in questioning.
- 43.3 A witness who intends to provide an opening statement as part of the evidence presented in an oral hearing must file a copy of the opening statement no less than 24 hours in advance of the witness being seated.

This practice direction sets out the AUC's expectations for parties' use of direct evidence and opening statements and the potential consequences if those expectations are not met.

In the interest of efficiency, AUC Rates proceedings typically do not involve any opening statements or direct evidence. For that reason, this practice note relates primarily to AUC Facilities proceedings.

Direct evidence

The AUC permits parties to provide direct evidence and opening statements as part of their evidence in a hearing. Direct evidence is a witness's oral testimony given in response to questions from the witness's own legal counsel.

Direct evidence should generally be limited to the witness adopting, and/or briefly summarizing, evidence that is already filed on the record of the proceeding; it may also include an opening statement.

This practice note is for information purposes only. The Commission retains discretion to issue any directions it considers necessary for the fair, expeditious and efficient determination of an issue in a proceeding.

Direct evidence should be brief and concise; it is not the Commission's practice for witnesses to repeat, at length, evidence already provided in their pre-filed documentary evidence.

Direct evidence should not be used to introduce new evidence that is not already filed on the record of a proceeding unless the Commission has given its permission. This is to limit the late introduction of new evidence that parties have not had a chance to review, test or respond to and avoid surprise and ambush during hearings. If a party introduces new evidence along with direct evidence without the Commission's permission, other parties may object to it, and the Commission may disregard it.

The Commission may allow new evidence to be introduced in limited exceptional circumstances. For instance, during direct evidence, if a witness provides updated information related to pre-filed submissions and such information was unavailable before the hearing, or where a witness introduces new evidence in response to cross-examination questions, the Commission may allow such new evidence, and the opposing side may be given an opportunity to respond if necessary to ensure a fair hearing.

Opening statements

An opening statement is part of a witness's testimony and forms part of direct evidence.

Generally, opening statements should be a high-level summary of the evidence already filed by a party on the record of the proceeding. It must be filed at least 24 hours in advance of when the witness is scheduled to provide direct evidence at the oral hearing.

Opening statements should not contain new evidence or be used to rebut the written or testimonial evidence of other parties to the proceeding, except to the extent such rebuttal is already set out in a party's pre-filed evidence. This is to ensure procedural fairness and allow other parties to the proceeding an opportunity to test, consider and respond to that evidence.

Opening statements containing new or improper rebuttal evidence may be objected to by other parties. The Commission may, at the request of a party or on its own motion, strike the opening statement or the objectionable portions of it from the record or give the new evidence no weight.

A witness's direct evidence and opening statement should generally be limited to 15 minutes or less. Parties cannot use direct evidence or opening statements to respond to pre-filed written evidence.

Examples

Example 1

An applicant plans to build and operate a solar and battery energy storage project in rural Alberta. When the application is filed, it includes evidence that fire and thermal runaway risks from the project are low. The interveners are concerned that the fire and thermal runaway risks from the project are higher than the applicant's evidence suggests, but do not file any evidence on the proceeding record to address these issues. The interveners would not be allowed to

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introduce new evidence during direct or cross examination to rebut the applicant's evidence about fire or thermal runaway risks, because they had the opportunity to file this evidence on the proceeding record earlier and did not do so.

Example 2

An applicant plans to build and operate a solar and battery energy storage project in rural Alberta. The interveners raise concerns about fire and thermal runaway risks in their filed evidence. The applicant responds by filing a publication on these risks and explains that an updated version of the publication is under review and will be filed when it is released. The revised publication is released three days before the oral hearing is scheduled to commence. The applicant may be permitted to refer to the revised publication because it is an update to its pre-filed evidence that was unavailable until shortly before the oral hearing, provided that this could be accommodated in a procedurally fair manner.