Alberta Utilities Commission takes aim at rules of practice and review proceedings

May 11, 2021

On April 27, 2021 and May 6, 2021, respectively, the Alberta Utilities Commission (the AUC) approved amendments to Rule 001: Rules of Practice and Rule 016: Review of Commission Decisions. These amendments are the latest in a series of changes reflecting the AUC's continuing efforts to streamline and increase process efficiencies.

Applicants will likely welcome many of the changes to Rule 001 as long overdue. Changes to limit the scope of review and variance (R&V) proceedings in Rule 016 may not, however, have the desired effect. Instead, they may lead to more appeals before the Alberta Court of Appeal, ultimately resulting in, from the applicant's perspective, a less efficient process.

Rule 001: Rules of Practice

Rule 001, which contains the omnibus Rules of Practice governing all proceedings before the AUC, has remained largely unchanged for many years. The amendments approved on April 27, 2021 are substantive, aiming to codify the AUC's standard procedures.

The revised Rule reinforces the AUC 's view that all parties have an obligation to promote regulatory efficiency, or the "fair, expeditious and efficient resolution" of proceedings before it, and the AUC's ability to control its own process in furtherance of this objective. Specific examples are referenced below. In general, s. 2.4 now authorizes the AUC to "dispense with, vary or supplement" any rule in Rule 001 "if it is satisfied that the circumstances of any proceeding, or the fair, expeditious and efficient resolution of any issue, require it."

Specific amendments directed to rate proceedings should significantly improve the efficiency of those proceedings. The notice of hearing will now include directions on procedure, which may include a process for establishing a list of issues (s. 14). Information Requests (IRs) must "directly relate" to the finalized issues list (s. 26.2(d)). By default, rate proceedings will be developed through a written process (s. 36.2). Any party seeking an oral hearing has the onus to establish "that the circumstances of the proceeding or the expeditious resolution of an issue require it" (s. 36.3). In the event an oral hearing occurs, a party must obtain advance approval before questioning a witness.

The request to question must identify how the questioning will assist the AUC (s. 36.8), and the questioning will be restricted to the witnesses, issues and time limits approved by the AUC in advance (s. 36.9).

The amendments include new rules for evidence, IRs and pre-hearing motions, applicable to all types of proceedings. Documentary evidence "must be directly relevant to the proceeding," and must be accompanied by a statement setting out both the qualifications of the person who prepared it and "an explanation of how such qualifications are directly relevant to the issues addressed in the evidence" (s. 20.2).

The AUC will remove from the record any documents filed late without its permission and will not consider them when reaching a decision (s. 32.3). Under s. 26.2(b), it is now required that an IR be directed to an unbiased party by the requesting party. Therefore, what are known as "sweetheart" IRs are no longer allowed. A party dissatisfied with an IR response must now attempt to resolve the matter prior to bringing a motion (s. 28.2) and must describe those attempts in its motion (s. 28.3).

Section 29 includes numerous amendments to the procedure for motions. There are now page limits on pre-hearing motions (10 pages), responses (10 pages) and replies (five pages). Responses and replies must be filed within three days of the motion or response, unless otherwise directed. Finally, Rule 001 now requires the AUC to rule on a written motion within 10 days from the end of the reply period (s. 29.9). The AUC also may rule on a pre-hearing motion without any process "if it determines that the fair, expeditious and efficient resolution of an issue requires it" (s. 29.10).

Finally, filing written argument will now be the exception. The new Rule directs that argument must be oral for all types of proceedings, unless otherwise directed. Written argument will only be allowed on request where the AUC is satisfied that it "will permit the proceeding to be resolved in a more fair, expeditious or efficient manner" (s. 48.2).

The amended Rule 001 applies to all proceedings commenced after May 17, 2021. Proceedings currently underway are technically not impacted; however, given the AUC's discretion to control its own process (including under the previous Rule 001), it would be expected that certain amendments may be implemented in current proceedings, where appropriate, to promote regulatory efficiency.

Rule 016: Review of Commission Decisions

On May 6, 2021, the AUC approved amendments to Rule 016. Among other changes, the new Rule eliminates errors of law or jurisdiction as grounds for R&V, and accelerates the deadline for filing an R&V application from 60 to 30 days.

The elimination of errors of law as grounds for R&V effectively requires parties who take legal issue with an AUC decision to apply directly to the Court of Appeal, under s. 29 of the *AUC Act* (which creates a right of appeal, with the Court's permission, on questions of law or jurisdiction). At first blush, this appears consistent with the Supreme Court of Canada's recent decision in *Vavilov*,[1] which interprets provisions like s. 29 as intending the Court, and not the AUC, to determine the correct interpretation of the law.[2]

However, it remains to be seen whether the Court, which traditionally defers to the AUC on questions of law, will be more ready to second-guess the AUC under the new framework. Even after *Vavilov*, at least one member of the Court has suggested that the AUC remains better placed than the Court to answer some questions of law.[3] By removing parties' ability to request the AUC to review and correct its own errors of law, the revisions to Rule 016 have the potential to result in weaker oversight of legal or jurisdictional aspects of AUC decisions.

This change is likely to lead to other practical difficulties. Under the new Rule, a person that considers the AUC to have committed an error of pure law may not apply to the AUC for R&V, but must apply to the Court for permission to appeal. But, if the Court of Appeal subsequently determines it is not an issue of pure law, the person may be out of time to apply for R&V. (The R&V and appeal deadlines are now the same – 30 days after the release of the decision.) Conversely, if a person applies for R&V and the AUC determines the issue to be an issue of pure law, the person may have missed the time window to apply for permission to appeal. In the face of this uncertainty, it is likely that the current practice of applying for both R&V and permission to appeal will continue.

The revised Rule could give rise to additional complications in light of the Court's practices. To the extent the Court refuses to hear interlocutory appeals, the AUC's decision to no longer review its own errors of law or jurisdiction could leave parties without effective and timely recourse against legal errors in the AUC's preliminary rulings. Where it is not clear whether an interlocutory error is legal or factual in nature, this could materially affect an aggrieved party's rights as described above.

The amended Rule 016 applies to all R&V applications filed after June 15, 2021. It is unknown whether eliminating errors of law and jurisdiction as grounds for R&V will lead to greater efficiencies in review proceedings. It will undoubtedly lead to more appeals, which is unlikely to increase efficiency from the applicant's perspective (or the Court's). Further, it remains to be seen whether the Court of Appeal will continue to expect appellants to exhaust all remedies before pursuing an appeal, given these amendments, in the face of a Rule eliminating one such remedy.

Reach out to any of the key contacts below if you have questions about the AUC's amendments to Rules 001 and 016.

[1] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

[2] *Ibid.* at paras. 36-52.

[3] *Dorin v. EPCOR Distribution & Transmission Inc.*, 2020 ABCA 391 at para. 24 *per* O'Ferrall JA concurring in the result.

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