



AltaGas Ltd.

Applications for Two Pipeline Licences,
An Amendment to a Facility Licence, and
Approval for an Acid Gas Disposal Scheme
Pouce Coupe Field

Cost Awards

February 4, 2010

ENERGY RESOURCES CONSERVATION BOARD

Energy Cost Order 2010-002: AltaGas Ltd., Applications for Two Pipeline Licences, an Amendment to a Facility Licence, and Approval for an Acid Gas Disposal Scheme, Pouce Coupe Field

February 4, 2010

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Energy Resources Conservation Board
640 – 5 Avenue SW
Calgary, Alberta
T2P 3G4

Telephone: 403-297-8311
Fax: 403-297-7040
E-mail: infoservices@ercb.ca
Web site: www.ercb.ca

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ENERGY RESOURCES CONSERVATION BOARD

Calgary Alberta

ALTAGAS LTD.

**APPLICATIONS FOR TWO PIPELINE LICENCES,
AN AMENDMENT TO A FACILITY LICENCE, AND
APPROVAL FOR AN ACID GAS DISPOSAL SCHEME
POUCE COUPE FIELD**

**Energy Cost Order 2010-002
Applications No. 1579080,
1579141, and 1580400
Cost Application No. 1623791**

1 INTRODUCTION

1.1 Background

AltaGas Ltd. (AltaGas) applied to the Energy Resources Conservation Board (ERCB) for two pipeline licences, an amendment to a facility (gas plant) licence, and approval for an acid gas disposal scheme.

A group of landowners filed an intervention regarding these applications. The principal concerns expressed were about compliance history and competence of AltaGas, human and animal health and safety, adequacy of emergency response planning, adequacy of public consultation, air and water contamination, and proliferation.

The Board held a public hearing in Bonanza, Alberta, from August 11 to 15, 2009, before Board Members J. D. Dilay, P.Eng. (Presiding Member) and J. D. Ebbels, LL.B., and Acting Board Member J. G. Gilmour, B.A., LL.B.

1.2 Cost Claim

On September 14, 2009, the interveners filed a cost claim in the amount of \$185 309.23. On September 28, 2009, AltaGas submitted comments regarding the interveners' cost claim. On October 7, 2009, the interveners filed a response to AltaGas's comments.

The Board considers the cost process to have closed on October 7, 2009.

2 VIEWS OF THE BOARD—AUTHORITY TO AWARD COSTS

In determining local intervener costs, the Board is guided by its enabling legislation, in particular by Section 28 of the *Energy Resources Conservation Act*, which reads as follows:

28(1) In this section, "local intervener" means a person or a group or association of persons who, in the opinion of the Board,

(a) has an interest in, or

(b) is in actual occupation of or is entitled to occupy

land that is or may be directly and adversely affected by a decision of the Board in or as a result of a proceeding before it, but, unless otherwise authorized by the Board, does not include a person or group or association of persons whose business includes the trading in or transportation or recovery of any energy resource.

It is the Board's position that a person claiming local intervenor costs must establish the requisite interest in land and provide reasonable grounds for believing that such an interest may be directly and adversely affected by the Board's decision on the application in question.

When assessing costs, the Board refers to Part 5 of the *Energy Resources Conservation Board Rules of Practice* and Appendix E: Scale of Costs in *ERCB Directive 031: Guidelines for Energy Proceeding Cost Claims*.

Subsection 57(1) of the *Rules of Practice* states:

57(1) The Board may award costs, in accordance with the scale of costs, to a participant if the Board is of the opinion that

- (a) the costs are reasonable and directly and necessarily related to the proceeding, and
- (b) the participant acted responsibly in the proceeding and contributed to a better understanding of the issues before the Board.

3 VIEWS OF THE PARTIES

On September 14, 2009, the interveners filed a cost claim for legal fees in the amount of \$73 912.50; expert fees in the amount of \$72 573.70, consisting of \$35 176.00 claimed on behalf of Dr. Du, \$19 570.95 claimed on behalf of Mr. McCutcheon, and \$16 929.00 claimed on behalf of Mr. Bessel; honoraria in the amount of \$11 800.00 for both preparation and attendance honoraria; expenses in the amount of \$18 928.15, and GST in the amount of \$8094.88, for a total claim of \$185 309.23.

3.1 Views of AltaGas

AltaGas submitted that it would pay the interveners' claim for honoraria and personal expenses as set out in their cost claim but subject to adjustments to reflect *Directive 031* guidelines.

AltaGas took issue with the costs claimed with respect to legal and expert fees. Specifically, AltaGas said that it was not necessary to have two counsel assisting the interveners in this proceeding. AltaGas contended that the retention of two counsel caused the duplication of legal fees and travel time. It further argued that the issues raised could have been addressed through a single lawyer. AltaGas proposed a reduction of 50 per cent for the time incurred between July 27 and August 18, 2009. AltaGas believed that the hearing was unnecessarily prolonged due to the inefficiency of the interveners' counsel and the gathering of incident reports. AltaGas submitted that the legal fees in this matter should be reduced by 50 per cent. With respect to the gathering of compliance records, AltaGas also suggested that the \$1946.04 for photocopying and the \$1244.66 for ERCB invoices be reduced by at least 50 per cent and that the Board use discretion when awarding the remaining expenses claimed.

AltaGas did not believe that Ackroyd LLP acted responsibly when retaining expert witnesses. The witnesses were not chosen by the interveners but by Ackroyd LLP. In the opinion of AltaGas, as expressed in its letter of September 28, 2009, these experts did not provide any assistance to the panel but merely used the hearing as a "soapbox to propound views already considered and rejected by the Board, or to delve into unstudied general comments that were of

no assistance.” AltaGas submitted that the time entries noted by Ackroyd LLP pertaining to external experts should be either reduced by 50 per cent or denied entirely.

Regarding Ackroyd LLP’s choice to use the *Freedom of Information and Protection of Privacy Act (FOIPPA)* and the ERCB’s resources to extract thousands of pages of documentation, AltaGas said that this was unnecessary, and it used an entire day of hearing time and caused lengthy cross-examination. AltaGas said that it was unreasonable for Ackroyd LLP to use *FOIPPA* because AltaGas answered information requests during the proceeding. AltaGas requested that the cost for photocopies and invoice provided by the ERCB in relation to obtaining the *FOIPPA* documentation be reduced by at least 50 per cent.

AltaGas noted that the Ackroyd LLP cost submission did not reference Application No. 1567595 for an acid gas injection well and that the interveners paid little attention to the acid gas injection well at the hearing. Therefore, AltaGas submitted that since Ackroyd LLP had asked for an adjournment regarding Application No. 1567595, the scant attention paid to that application was not consistent with responsible participation in ERCB hearings.

AltaGas said that Dr. Du’s costs were not reasonable or directly and necessarily related to the proceeding. Dr. Du conducted a standalone CALPUFF dispersion model and recalculated the emergency planning zones (EPZs) based on his model, which took him 150 hours. Dr. Du did not compare the actual terrain at the Pouce Coupe plant in his dispersion modelling. AltaGas said that it was not necessary for Dr. Du to recreate the dispersion modelling and that AltaGas should not have to pay for it.

According to AltaGas, Dr. Du also ignored safety enhancements made by AltaGas and only acknowledged that fact under cross-examination. Dr. Du also appeared to use the hearing to express his views and reargue points previously dismissed by the Board. In AltaGas’s opinion, Dr. Du was acting more as an advocate than an expert.

AltaGas did not believe that Dr. Du should have spent more than 60 hours to review the application and prepare a report. AltaGas also submitted that the time Dr. Du incurred for appearing at the hearing, recorded at 21.38 hours, should be reduced by 50 per cent to reflect the unnecessary portions of his presentation.

AltaGas noted that Mr. McCutcheon admitted during cross-examination that his submission was aimed at persuading the ERCB to adopt a probabilistic risk assessment rather than the deterministic approach of *Directive 071: Emergency Preparedness and Response Requirements for the Petroleum Industry*. AltaGas said that Mr. McCutcheon’s interpretation of *Directive 071* was of no assistance to the proceeding and that much of Mr. McCutcheon’s presentation could not be regarded as reasonable and directly and necessarily related to the proceeding. AltaGas submitted that 72 hours for preparation and presentation was excessive and that Mr. McCutcheon should be awarded a maximum of 40 hours.

AltaGas submitted that Mr. Bessel’s claim should be denied entirely. Mr. Bessel was a new kind of expert who reviewed ERCB applications and suggested standard engineering construction and design features that should be included. All engineering matters raised by Mr. Bessel were or will be addressed by AltaGas. AltaGas said that Mr. Bessel added no value to the hearing and that many of his suggestions had already been addressed by AltaGas. Also, he failed to acknowledge the benefits that would result from the plant expansion. AltaGas submitted that Mr.

Bessel's attendance was unnecessary and that nothing useful came from his presentation. AltaGas submitted that it should not have to pay for more than 21 hours claimed by Mr. Bessel, if any at all.

Finally, regarding the claim for honoraria, AltaGas submitted that it made a lot of effort to resolve the interveners' concerns outside of the hearing. AltaGas submitted that it was committed to work with the interveners going forward and would pay the honoraria and related disbursements claimed subject to *Directive 031*. AltaGas noted that Mr. Wilson charged \$1488.00 for lost wages, in addition to \$200.00 per day for an honorarium. AltaGas understood this claim for lost wages and an honorarium to be mutually exclusive.

AltaGas pointed out that Section 5.1.2 of *Directive 031* states that a preparation honorarium is not normally awarded if a lawyer is responsible for the preparation of the intervention. AltaGas noted that in this case there were two lawyers acting on behalf of the interveners. In addition, Section 5.1.2 states that a maximum of four people may claim for preparation honoraria. AltaGas submitted that it was prepared to pay honoraria in this case subject to the application by the Board of *Directive 031*.

3.2 Views of the Intervenors

The interveners submitted that their intervention was reasonable, directly and necessarily related to the proceeding, and efficient and cost effective.

The interveners stated that they chose common legal counsel and expert witnesses and that by forming a group and having only one firm represent them all, it was extremely cost effective.

The interveners provided a chart comparing their cost claim with other recent interventions where a group of interveners used expert evidence to address their concerns. The interveners compared their claim with *Energy Cost Order 2008-015: Highpine Oil & Gas Ltd.*, which awarded \$156 815.45 in costs; *Energy Cost Order 2009-004: Highpine Oil & Gas Ltd.*, which awarded \$208 122.01 in costs; and three other cost orders that awarded similar costs.

AltaGas asserted that the interveners presented too much evidence and therefore unnecessarily prolonged the hearing. The interveners submitted that they followed the procedures set out by the Board in the *Rules of Practice* and that during the proceeding neither the Board nor AltaGas objected to any evidence or procedures followed.

The interveners were of the view that they should not be penalized for obtaining the noncompliance records, since if they did not have them they would not have been able to ask AltaGas technical questions about them. The interveners were concerned about AltaGas's past performance, as well as its noncompliance record, and believed that it was necessary to obtain that information in order to understand the effect the applications could have on them. The interveners said that their presentation "crystallized" any concerns they had to the Board.

The interveners disagreed entirely that the use of two counsel was unnecessary. The interveners said that using two counsel reduced the amount of legal fees, since Ms. Bishop accomplished tasks such as hearing preparation, speaking with expert witnesses, arranging conferencing calls, and reviewing the *FOIPPA* documentation. Had this been completed by a more senior lawyer, the costs would have been much greater.

The interveners noted that in recent costs decisions the Board had recognized that the use of two counsel often led to cost savings by having a more junior lawyer complete time-consuming tasks.

Regarding the suggested inefficiency of the *FOIPPA* materials presented at the hearing, the interveners submitted that Ms. Bishop struggled with how to present the information in an organized manner due to the size of the materials. That is why Ms. Bishop presented a reduced hourly rate in her cost submission.

The interveners were confused by AltaGas's statement regarding the acid gas injection well. The interveners stated that this application was discussed at some length by Mr. Bessel, as well as Dr. Du. Ackroyd LLP also asked a series of questions regarding the acid gas injection well. The fact that the original correspondence from the interveners did not contain all four application numbers was merely an oversight.

The interveners dealt with the car rental receipt (not included in the expenses on the cost claim) and the minor meals issue of an expert witness.

The interveners noted that Dr. Du's account for 150 hours incurred for the preparation of his report outlined the tasks that were included in accumulating 150 hours. In addition, Dr. Du had to review and rewrite his report due to the addition of the acid gas injection well application. AltaGas was mistaken when it stated that Dr. Du did not compare actual terrain data at the Pouce Coupe plant in his dispersion modelling. In fact, it was Dr. Ramsey who assumed that the area was flat, not Dr. Du. The interveners said that Dr. Du did a very thorough analysis and they were confident that the ERCB recognized that.

The interveners noted that the safety enhancements that AltaGas referred to were not included in its applications but were submitted to the Board just prior to the beginning of the hearing. Dr. Du reviewed the material that was filed late on short notice and addressed it in his direct evidence.

Dr. Du assisted the interveners in understanding the applications and also in presenting their concerns to the Board.

The interveners submitted that Mr. McCutcheon provided his opinion that the risks of the project were not within an acceptable range. Although the Board did not agree that AltaGas should be ordered to provide a risk assessment, the Board did not say that it would not be relevant. The interveners said that just because the Board does not require certain evidence to be presented, it does not mean that that evidence did not help the Board understand the concerns of the interveners.

The interveners disagreed with the suggestion that Mr. Bessel's evidence was not helpful to the panel. Mr. Bessel assisted the interveners and their counsel in understanding the applications at issue and thoroughly addressed the issue regarding the acid gas injection well.

The interveners submitted that the Board has a broad discretion when awarding honoraria to hearing participants and asked that it use its discretion in this instance. The interveners also acknowledged the oversight in the claim of Mr. Wilson where a claim for both an honorarium and lost wages was claimed and submitted that Mr. Wilson's claim should be reduced by \$900.00 to address the error.

3.3 Views of the Board

Legal Fees

The Board does not in every case award costs for attendance of two counsel at a hearing, but in this case the Board finds that the retention and attendance of two counsel were appropriate. The Board notes that the hourly rate sought by Ms. Bishop is roughly one-half of that charged by the more senior Mr. Secord. So to the extent tasks were delegated and duties were divided, those tasks and duties were performed by more junior counsel at a savings. Based upon the hearing and upon a review of the statement of account of interveners' counsel, the Board is satisfied that there was largely a division of work to avoid duplication by counsel and in fees in this case. Further, the interveners formed a group and retained a single law firm, which increase efficiency and savings. The Board does not accept the assertion of AltaGas that inefficiencies were exhibited by counsel in the conduct of the intervention in the matter.

There were four applications under consideration by the Board in this matter. In the view of the Board, while not overly complex, there was sufficient complexity for the retention of two counsel to be appropriate. In addition, there were numerous witnesses to assist in preparation and organization for the hearing.

The Board does have concerns about the somewhat cumbersome totality of the documentation gathered by the *FOIPPA* process in relation to the compliance record of AltaGas over the last decade and whether the process employed and related expenses were commensurate with the benefit to the Board of exploring an applicant's compliance record. The Board believes that a document search over a shorter time period might have been beneficial. Nonetheless, the Board does not believe that an inordinate amount of hearing time was spent on the issue of compliance by AltaGas and reiterates that the compliance record of an applicant is important to it.

On balance, the Board is satisfied that the legal fees claimed in the amount of \$73 912.50 are reasonable, and the Board declines to discount those fees. In summary, the Board approves legal fees in the amount of \$73 912.50, expenses in the amount of \$12 646.50, and related GST in the amount of \$4214.06, for an overall award to Ackroyd LLP of \$90 773.06.

Dr. Shuming Du

The Board notes that much of the time spent by Dr. Du involved additional air dispersion modelling with the CALPUFF model to examine air quality impacts and possibly larger EPZs over and above the modelling conducted by AltaGas. The Board did not ascribe much weight to the evidence of Dr. Du on these subjects.

The cost claim for Dr. Du is for fees for over 150 hours of work for a total of \$35 176.00. In its decision in this particular matter, the Board took the view that ERCB hearings are not the appropriate forum in which to debate the relative merits of different dispersion models. The Board in this instance did not accept the claims of Dr. Du that its model, ERCBH2S, does not adequately determine EPZs. The Board believes that its model provides a reasonable estimate of the hazard from a sour gas release in the case of the application by AltaGas. The Board accepted that the size of the EPZ determined by AltaGas was accurate and appropriately calculated.

Irrespective of whether or not an expert's evidence is accepted or not, in the final result fees claimed must be reasonable. In this particular case, the Board has decided that the cost claim on behalf of Dr. Du is excessive and that an inordinate amount of time was spent by Dr. Du in alternative modelling and preparation of his evidence.

The Board exercises its discretion to reduce the account of Dr. Du for fees by 50 per cent for a total of \$17 588.00 in fees. Disbursements claimed by or on behalf of Dr. Du will be allowed in full.

Doug McCutcheon & Associates

The Board is in partial agreement with counsel for AltaGas that the evidence of Mr. McCutcheon was not particularly helpful to it. Given the Board's policies and requirements that are in place, risk-based land-use planning evidence does not generally assist the Board in determining the issues before it. The Board has decided to reduce the fees claimed by this expert witness by 30 per cent partly on the basis that his contention that the Board should adopt a probabilistic risk approach based upon the MIACC principles was not helpful to the Board. The Board decided in advance of this particular hearing that it did not require such a risk assessment given its requirements. In addition, 72 hours claimed appears to the Board to be somewhat excessive in the circumstances.

As such, the Board awards fees on the account of Mr. McCutcheon in the amount of \$13 699.70, together with disbursements as claimed.

Mr. Al Bessel

In this case, AltaGas was required to meet all applicable regulatory and Canadian Standards Association standards in the proposed method of constructing, operating, and maintaining its proposed facilities. As such, the Board did not find it particularly helpful to have an expert engineering witness review those requirements and standards. The Board does note from the account of Mr. Bessel that time was spent in reviewing the application materials, formulating questions and requests for information, discussing the proposal with counsel and interveners, and making recommendations and reporting on discrepancies that required clarification. As such, some benefit was obtained in the proceedings and the hearing from this work. It is important that interveners and their counsel understand these requirements. However, the Board questions the total time spent in the exercise.

The Board holds that the fees claimed by Mr. Bessel should be reduced by 50 per cent to \$8464.50.

Honoraria

While the Board notes that honoraria for interveners on account of preparation are generally not awarded in instances where counsel prepare the intervention, the Board is prepared in this case to recognize the efforts put forth by the individual interveners towards preparation. The Board notes that these individuals assisted in the compilation of their evidence and spent time with counsel in preparation for the hearing. However, the Board holds that the \$1200.00 claimed by five of the interveners should be reduced to \$800.00, for a total reduction of \$2000.00 in honoraria claimed.

Further, the Board notes duplication in the case of Bruce Wilson by his claim for a \$900.00 honorarium for attendance at the hearing in addition to a lost wages claim of \$1488.00. The Board notes that Section 5.1.3 of *Directive 031* allows the Board to consider a lost wages claim as an alternative to an attendance honorarium on a claim-by-claim basis. The Board accepts as appropriate a wage loss claim by Mr. Wilson in lieu of an honorarium and reduces the honoraria claim by \$900.00.

Finally, as it relates to honoraria claimed by the interveners, the Board is prepared to make a single award of \$500.00 for the formation of a group instead of the \$1000.00 claimed on behalf of two interveners. Accordingly, the honoraria claims are reduced by an additional \$500.00.

In total, the Board reduces honoraria claimed by a total of \$3400.00.

Disbursements

The most significant point of contention between the parties in relation to out-of-pocket expenses is the photocopying of and cost of obtaining the compliance records of AltaGas via the *FOIPPA* process. The Board has already questioned whether the costs associated with this exercise (\$1946.05 for photocopying and \$1244.66 payable to the ERCB) was commensurate with the benefit gained in having these records adduced in evidence at the hearing and whether the interveners could have been more efficient in bringing the compliance record of AltaGas to the attention of the Board. In addition, the Board questioned the efficacy of obtaining a decade's worth of compliance records. The Board does not want to dissuade participants in hearings from availing themselves of statutory remedies provided to secure access to documentation but believes a more incisive and discriminatory approach to document gathering could be adopted.

In the end result, however, the Board is prepared in this instance to award the amounts claimed.

4 ORDER

It is hereby ordered that

- 1) AltaGas Ltd. shall pay intervener costs in the amount of \$147 496.01, and
- 2) payment shall be made to the offices of Ackroyd LLP, 1500, 10665 Jasper Avenue, Edmonton AB T5J 3S9.

Dated in Calgary, Alberta, on February 4, 2010.

ENERGY RESOURCES CONSERVATION BOARD

“Original Signed by J. D. Dilay, P.Eng.”

J. D. Dilay, P.Eng.
Presiding Board Member

“Original Signed by J. D. Ebbels, LL.B.”

J. D. Ebbels, LL.B.
Board Member

“Original Signed by J. G. Gilmour, B.A., LL.B.”

J. G. Gilmour, B.A., LL.B.
Acting Board Member

APPENDIX A SUMMARY OF COSTS CLAIMED AND AWARDED



Appendix A