

Shell Canada Limited
Regulatory Appeal of Pipeline
Licence 23800-99
Carbondale Pipeline System

Costs Awards

February 26, 2021

Alberta Energy Regulator

Costs Order 2021-01: Shell Canada Limited, Regulatory Appeal of Pipeline Licence 23800-99

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Suite 1000, 250 – 5 Street SW

Calgary, Alberta

T2P 0R4

Telephone: 403-297-8311

Toll free: 1-855-297-8311

Email: inquiries@aer.ca

Website: www.aer.ca

Contents

Introduction.....	1
Background.....	1
Costs Claim	2
The AER's Authority to Award Costs	2
Costs Claim of Mr. Judd.....	3
Shell's Submission.....	3
Mr. Judd's Reply Submission	4
Panel Decision	4
Hayduke's Hourly Rate	5
Order	7
Appendix 1 Summary of Costs Claimed and Awarded	9

Shell Canada Limited

Regulatory Appeal of Pipeline Licence 23800-99 Carbondale Pipeline System

Costs Order 2021-01 Costs Application 1932013

Introduction

[1] On December 19, 2017, Shell Canada Limited (Shell) submitted application 159466 under the *Pipeline Act* to construct and operate a 638-metre-long sour gas pipeline about 20.7 kilometres (km) west of the town of Pincher Creek from existing wells at Legal Subdivision 10, Section 7, Township 6, Range 2, West of the 5th Meridian to LSD 07-07-006-02W5M. The Alberta Energy Regulator (AER) issued licence 23800-99 for this pipeline on November 5, 2018.

Background

[2] On November 27, 2018, M. Judd filed an application under Division 3 of the *Responsible Energy Development Act* and Part 3 of the *Alberta Energy Regulator Rules of Practice (Rules of Practice)* for a regulatory appeal of the AER decision to approve the pipeline. Mr. Judd was represented in the appeal by M. Sawyer of Hayduke & Associates. The AER granted the request for a regulatory appeal on May 21, 2019, and the hearing panel issued a notice of hearing for regulatory appeal 1921272 (proceeding 385) on August 26, 2019.

[3] On September 4, 2019, Shell filed a motion to adjourn the proceeding because it was applying to the AER for approval to transfer the pipeline licence to a third party as part of a larger transfer of its Foothills assets. The AER offered Hayduke the opportunity to comment on the motion to adjourn. No response was received. The panel granted the adjournment until March 31, 2020, and asked for an update on the transfer of the licence by that date. The panel subsequently granted a further adjournment until August 31, 2020, because the AER was still reviewing Shell's application for licence transfer.

[4] Shell advised the panel on August 14, 2020, that the AER had rejected all of the licence transfer applications of the Foothills assets, including the pipeline licence. It requested a further adjournment of the appeal to August 31, 2021, to allow time to refile the licence transfer application. Hayduke took no position on the request. The panel granted Shell's request, but only to October 31, 2020, because the pipeline licence contained a condition that required construction to commence on or before November 5, 2020.

[5] On October 9, 2020, Shell requested the discontinuation of the regulatory appeal of the pipeline licence. It advised that it had filed a pipeline licence amendment application for a not constructed pipeline 30 days before the pipeline licence expiry as required by *Directive 056: Energy Development*

Applications and Schedules. It argued that this application rendered the regulatory appeal of the pipeline licence moot.

[6] On October 15, 2020, Hayduke filed a response to Shell’s request for discontinuation requesting that it provide further submissions supporting why the regulatory appeal should be moot and discontinued. Shell replied on October 19, 2020, that the pipeline licence amendment application and expiry of the pipeline licence would have no impact on Mr. Judd’s interests and that, as a result, the regulatory appeal was moot and should be discontinued.

[7] On November 20, 2020, the panel issued a notice that the regulatory appeal was discontinued.

Costs Claim

[8] On December 10, 2020, Hayduke filed a cost claim on behalf of Mr. Judd in the amount of \$7938.52 in respect of work done on the regulatory appeal. To accommodate the December holidays, the panel gave Shell until January 8, 2021, to respond to the cost claim. Shell responded to the cost claim on January 5, 2021. Mr. Judd’s response deadline to Shell was January 22, 2021. On January 14, 2021, Mr. Judd replied to Shell’s comments.

[9] The AER considers the cost process to have closed on January 14, 2021.

The AER’s Authority to Award Costs

[10] In determining who is eligible to submit a claim for costs, the AER is guided by the *Rules of Practice* which provide that participants may be eligible to claim costs in a proceeding. Section 58(1)(c) states:

“participant” means a person or a group or association of persons who have been permitted to participate in a hearing for which notice of hearing is issued or any other proceeding for which the Regulator has decided to conduct binding dispute resolution, but unless otherwise authorized by the Regulator, 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.

[11] When assessing costs, the AER is guided by Part 5, Division 2, of the *Rules of Practice*, *Directive 031: REDA Energy Cost Claims*, and *AER Bulletin 2014-07: Considerations for Awarding Energy Costs Claims and Changes to the AER’s Process for Reviewing Energy Costs Claims*. *Bulletin 2014-07* states that parties and applicants are expected to try to resolve costs claims. Where costs are not resolved, costs submissions should address the factors from the *Rules of Practice* that appear relevant to the particular costs claim. The bulletin also advises that the AER will only review the aspects of a costs claim that are identified as being specifically in dispute. Costs not disputed may be awarded by the AER without further consideration.

[12] In exercising its discretion to make this order, the panel has read and thoroughly considered all of the submissions made during this costs process. The absence in this decision of a reference to a particular

submission or aspect of a submission in no way indicates that the panel failed to consider the entire submission.

[13] Appendix 1 summarizes the costs claimed by Mr. Judd and the amounts awarded by the AER.

Costs Claim of Mr. Judd

Shell's Submission

[14] Shell did not dispute Mr. Judd's eligibility to claim participant costs pursuant to section 62 of the *Rules of Practice*, nor did it dispute the number of hours of work recorded by Hayduke for Mr. Sawyer's services. It challenged Mr. Sawyer's travel and meal expenses and also disputed the hourly rate charged for the work of Mr. Sawyer as a lay representative.

[15] Shell maintained that Mr. Sawyer is not a lawyer or a subject matter expert with specific practical experience or training in any particular field relevant to the proceeding. However, Mr. Judd sought recovery for Mr. Sawyer's services at an hourly rate aligned with that of a lawyer of up to four years call, or alternatively, an expert with five to seven years of experience, as set out in *Directive 031*.

[16] Shell noted that *Directive 031* does not provide a scale of costs rate for lay representatives; however, in past decisions regarding hourly rates, the AER and its predecessor agencies have held that

- when interveners use such individuals as their representatives, they are not entitled to claim an hourly rate equal to what lawyers or expert witnesses are paid;
- rates of \$50.00 to \$150.00 per hour are appropriate for lay representatives, even where a lay representative had over ten years of relevant experience and was recognized as having significant specialized knowledge on the AER's processes, practices, and procedures, and
- \$150.00 per hour is the upper limit of rates to be awarded to lay representatives. In order to award the top rate for the services of a lay representative, the AER would need to be of the opinion that the services provided and the conduct of the representative during the proceeding demonstrate a high proficiency in and understanding of the AER's processes and functions during a proceeding.

[17] Shell argued that because the AER emphasizes that the maximum allowable hourly rates will not be awarded as a matter of course, the same principle should apply to rates for lay representatives. As such, there is no justification in this case for awarding costs at the upper limit. Shell cited a number of prior AER decisions, including AER *Costs Order 2013-004*, the most recent AER costs order awarding costs to Mr. Judd. In that order, Mr. Judd was awarded \$125.00 per hour for the services Hayduke provided through Mr. Sawyer. Shell noted that the cost claim in this appeal does not provide justification for the AER to depart from the hourly rate it awarded for services provided by Hayduke in prior proceedings.

Mr. Judd's Reply Submission

[18] In response to Shell's submission, Mr. Judd adjusted his initial cost claim to remove meal claims and reduce mileage expenses. The revised claim was for \$7512.98, calculated as follows:

- Hayduke's fees (44.3 hours x \$150 per hour) \$6,645.00
- Mr. Judd's honorarium \$300.00
- Expenses (mileage) (466.8 km x \$0.505 per km) \$235.73
- GST \$332.25

[19] Mr. Judd argued that Mr. Sawyer's rate is approximately 38 per cent less than that of a lawyer with up to four years at the bar and is only 7 per cent higher than that of an articling student. In contrast, Mr. Judd asserts that Mr. Sawyer has decades of experience as a lay representative in front of provincial, national, and international regulatory bodies, and that his academic, professional, and regulatory experience provides an effective and efficient multidisciplinary approach to representing his clients.

[20] Mr. Judd said that Shell made no submission about the quality of Mr. Sawyer's representation, nor did Shell allege that Mr. Sawyer's participation in the proceeding is not entirely aligned with the factors that the AER ought to consider when making cost award decisions. Mr. Judd submitted that Mr. Sawyer's participation in the proceeding was necessary, professional, and efficient in all respects and that he contributed significantly to the resolution of the proceeding.

[21] With respect to Shell's submissions that Mr. Sawyer was not participating in the role of an expert and therefore should not be entitled to hourly rates aligned with the scale of costs for consultants, analysts, and experts found in *Directive 031*, appendix D, section 1, Mr. Judd submitted that Mr. Sawyer's participation would properly fall under this scale of costs either as a consultant or an analyst. Mr. Judd noted that in addition to holding a relevant graduate degree, Mr. Sawyer has over 30 years of both professional consulting and regulatory experience in the capacity as both an expert witness and as a lay representative. Mr. Judd maintained that Mr. Sawyer's rate is reasonable because, according to the cost scale, it is in line with a lawyer with less than five years of experience. Discounting his hourly rate would be inappropriate given his relevant graduate degree, proven track record, over 30 years of professional consulting and regulatory experience and his demonstrated contribution to the orderly and efficient resolution of this proceeding.

Panel Decision

[22] Our starting point is *Bulletin 2014-07*, which states:

The AER will review only those aspects of a costs claim that a claimant or a responder to a claim identifies in its costs submission as being in dispute. As a result, if a party responding to a costs claim does not dispute a particular amount claimed by a costs applicant, the AER will presume that part of the claim is eligible for an award in the amount sought and that the costs payee does not object to the AER awarding the

amount claimed. Accordingly, going forward, only costs that a costs applicant or a responder to a costs application specifically dispute, with supporting information and reasons, will be scrutinized by the AER, and the rest of the claim may be granted without further review or intervention by the AER.

[23] Shell disputed Hayduke's mileage costs and meal claims but not the hours of work claimed. In his response, Mr. Judd agreed that he erred in his original claim and made corresponding adjustments. The parties' only remaining area of disagreement was the hourly rate of \$150.00 claimed for the services of Hayduke.

[24] Consistent with the *Rules of Practice*, the AER typically awards only those costs incurred after a notice of hearing has been issued. A portion of Mr. Judd's costs claim is for work done before the issuance of the notice of hearing on August 26, 2019. However, as Shell did not challenge the claim for costs incurred prior to the issuance of the notice of hearing, these costs are not in dispute. In accordance with *Bulletin 2014-07*, the panel will presume that, in the context of this proceeding, this part of the claim is eligible for an award in the amount sought and that Shell does not object to the AER awarding the costs for work prior to August 26, 2019.

Hayduke's Hourly Rate

[25] The AER has broad discretion in deciding whether and how to award costs to participants. Section 64 of the *Rules of Practice* states that the regulator may award costs to a participant if it finds it appropriate to do so in the circumstances of the case. Section 58.1 of the *Rule of Practice* sets out the considerations for awarding costs, and in the context of this proceeding the following provisions are relevant:

- whether the submission of the participant made a substantial contribution to the binding resolution meeting, hearing or regulatory appeal
- whether the costs were reasonable and directly and necessarily related to matters contained in the notice of hearing on an application or regulatory appeal and the preparation and presentation of the participant's submission
- whether the participant acted responsibly in the proceeding and contributed to a better understanding of the issues before the Regulator
- the conduct of any participant that tended to shorten or to unnecessarily lengthen the proceeding
- whether any step or stage in the proceedings was improper, vexatious or unnecessary, or taken through negligence, mistake or excessive caution
- any other factor that the Regulator considers appropriate

[26] The scale of costs provides a sliding scale for professional fees. The AER emphasizes that the maximum allowable hourly rates will not be awarded as a matter of course and that each claim is assessed upon its individual merits.

[27] In addition to the provisions in the *Rules of Practice* and *Bulletin 2014-07*, the panel considered the previous cost decisions cited by Shell, in particular *Costs Order 2013-004*. In that decision, the AER

determined that the services provided by Mr. Sawyer were those of a lay representative and awarded \$125 per hour. Shell asked the AER to award the same hourly rate in this appeal.

[28] We find that in this proceeding Mr. Sawyer was not acting as a lawyer or an expert witness, but as a lay representative assisting Mr. Judd. The directive makes it clear that the complexity of the case may be a factor to consider in determining where, on the scale of costs, to set fees. In addition, to award the top rate for the services of a lay representative, the services provided and the conduct of the representative during the proceeding should demonstrate a high proficiency in and understanding of the AER's processes and functions. Missteps, mistakes, or other conduct that have a material adverse effect on the fairness, efficiency, or effectiveness of the AER's proceeding would be evidence of a lower level of proficiency.

[29] This proceeding was not complex. Mr. Judd did not take any unnecessary or improper steps. The disputed costs are directly related to the matters contained in the regulatory appeal and the presentation of Mr. Judd's submissions. At the same time, the appeal was adjourned just over a week after the notice of hearing was issued, and the work required of Hayduke was minimal and not procedurally complex. It consisted primarily of responding to Shell's motions for adjournment and a submission on the eventual dismissal of the appeal for mootness.

[30] On two occasions, Hayduke, on behalf of Mr. Judd, failed to respond to communications from the panel on procedural matters. For example, Hayduke did not respond to Shell's first request for an adjournment. Further, on October 30, 2020, the panel sent a letter to Hayduke outlining the advice provided by the AER about the probable changes to the status of the pipeline licence. The panel suggested that Mr. Judd may withdraw his request for regulatory appeal or, alternatively, the panel may dismiss the appeal. A response was requested by November 2, 2020, but none was received. The panel communicated again with Mr. Judd, through Hayduke, reiterating the information provided in the letter, and requested a response by November 16, 2020. Again, no response was received.

[31] Mr. Judd referred us to the 2020 Grassy Mountain Coal Project Joint Review Panel proceeding, in which the panel's chair commented to Mr. Sawyer that he had used time efficiently in a cross examination. This point is not sufficient to persuade us that Mr. Sawyer has brought to bear a level of experience in this matter that merits the highest hourly rate for a lay representative. That is especially the case considering the abbreviated nature of this hearing process.

[32] Mr. Judd argued that Mr. Sawyer's decades of experience provide a multidisciplinary approach for effective and efficient representation of his client. Mr. Sawyer's particular expertise could be helpful in a proceeding where evidence is filed and there is cross examination. However, in this case Mr. Judd was not required to file evidence, cross examine witnesses, or make arguments to the panel. This proceeding resolved because Shell filed an application for a not constructed pipeline, which rendered the

appeal moot. The panel cannot conclude that Hayduke, on behalf of Mr. Judd, made a significant contribution to the resolution of the proceeding.

[33] Given the limited scope of this proceeding and the failure to respond to the panel on two occasions, we are unable to conclude that Mr. Sawyer's hourly rate as a lay representative should be at the top of the scale as Mr. Judd has requested. We are not persuaded that, in the context of this proceeding, the rate for Mr. Sawyer's services should be more than the \$125.00 per hour that he was previously awarded by the AER.

Order

[34] The AER hereby orders that Shell pay Mr. Judd costs in the amount of \$6350.11 as shown in appendix 1.

[35] This amount must be paid within 30 days from issuance of this order.

Dated in Calgary, Alberta, on February 26, 2021.

Alberta Energy Regulator

Cecilia Low, BSc., LL.B., LL.M.
Presiding Hearing Commissioner

Claire McKinnon, LL.B.
Hearing Commissioner

Elizabeth McNaughtan, MBA, P.Ag.
Hearing Commissioner

Appendix 1 Summary of Costs Claimed and Awarded

	Total Fees/ Honoraria Claimed	Total Expenses Claimed	Total GST Claimed	Total Amount Claimed	Total Fees/ Honoraria Awarded	Total Expenses Awarded	Total GST Awarded	Total Amount Awarded	Reduction
M. Judd/Hayduke & Associates									
Total	\$6945.00	\$235.73	\$332.25	\$7,512.98	\$5837.50	\$235.73	\$276.88	\$6,350.11	\$1,162.87