



Shell Canada Limited

Applications for Pipeline and Facility Licences
Waterton Field

Costs Awards

November 18, 2013

ALBERTA ENERGY REGULATOR

AER Costs Order 2013-004: Shell Canada Limited, Applications for Pipeline and Facility Licences, Waterton Field

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ALBERTA ENERGY REGULATOR

Calgary, Alberta

**SHELL CANADA LIMITED
APPLICATIONS FOR PIPELINE
AND FACILITY LICENCES
WATERTON FIELD**

**AER Costs Order 2013-004
Applications No. 1726204, 1726205, and 1727102
Costs Application No. 1759648**

INTRODUCTION

Background

[1] Shell Canada Limited (Shell) applied to the Energy Resources Conservation Board (ERCB/Board), pursuant to part 4 of the *Pipeline Act*, for approvals to construct and operate two pipelines. One pipeline would transport sour natural gas with a maximum hydrogen sulphide (H₂S) concentration of 320 moles per kilomole (32 per cent) from Legal Subdivision (LSD) 10, Section 1, Township 6, Range 3, West of the 5th Meridian, to an end location at LSD 6-12-6-3W5M. This pipeline would be about 1.2 kilometres (km) long with a maximum outside diameter of 168.3 millimetres (mm) and would operate as a level-2 pipeline. The other pipeline would transport fuel gas with no H₂S from LSD 6-12-6-3W5M to LSD 10-1-6-3W5M, and would run parallel to the first line. The fuel gas pipeline would be about 1.2 km long with a maximum outside diameter of 60.3 mm.

[2] Shell also applied under section 7.001 of the *Oil and Gas Conservation Regulations* for approval to construct and operate a single well gas battery at LSD 10-1-6-3W5M, located about 5.8 km southwest of the hamlet of Beaver Mines. The battery would handle production from the existing Waterton 68 well at LSD 10-1-6-3W5M and would be licensed for a maximum H₂S concentration of 320 moles per kilomole (or 32 per cent).

[3] The ERCB held a hearing of the applications in Pincher Creek, Alberta, from March 12 to 15, 2013 (2013 hearing).

[4] The ERCB issued its decision approving the applications on May 28, 2013, in *Decision 2013 ABERCB 009: Shell Canada Limited, Applications for Pipeline and Facility Licences, Waterton Field*.

Costs Claim

[5] On April 15, 2013, Hayduke & Associates Ltd. (Hayduke) filed a costs claim on behalf of Mike Judd, in the amount of \$43 897.47. On April 30, 2013, Shell submitted comments on Mr. Judd's costs claim. On May 5, 2013, Hayduke submitted a response to Shell's comments.

[6] Additional information was provided by Hayduke on June 7, 2013, which the AER considers to be the close of the costs application process.

[7] On June 17, 2013, the *Responsible Energy Development Act (REDA)* came into force in Alberta. The *Energy Resources Conservation Act (ERCA)*, which established the ERCB, was repealed and the Alberta Energy Regulator (AER) was created. In accordance with the terms of *REDA*, the AER assumed all of the ERCB's powers, duties, and functions under Alberta's energy resource enactments, which includes those under the *Oil and Gas Conservation Act* and

the *Pipeline Act*. Throughout the transition from the ERCB to the AER, the authority of the AER continued without interruption in accordance with the *REDA Transition Regulation*. As a result, the ERCB/Board will hereinafter be referred to as the AER regardless of whether the organization was known at the time as the ERCB or the AER.

AER'S AUTHORITY TO AWARD COSTS

[8] In determining who is eligible to submit a claim for costs, the AER is guided by division 2 of part 5 of the *Alberta Energy Regulator Rules of Practice (Rules of Practice)*; in particular, sections 58 and 62, which state

58(c) "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, 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.

62(1) A participant may apply to the Regulator for an award of costs incurred in a proceeding by filing a costs claim in accordance with the Directive.

(2) A participant may claim costs only in accordance with the scale of costs.

(3) Unless otherwise directed by the Regulator, a participant shall

(a) file a claim for costs within 30 days after the hearing record is complete or as otherwise directed by the Regulator, and

(b) serve a copy of the claim on the other participants.

(4) After receipt of a claim for costs, the Regulator may direct a participant who filed the claim for costs to file additional information or documents with respect to the costs claimed.

(5) If a participant does not file the information or documents in the form and manner, and when directed to do so by the Regulator under subsection (4), the Regulator may dismiss the claim for costs.

[9] When determining whether to exercise its discretion to award costs, the AER is guided by the *Rules of Practice* and by appendix D, "Scale of Costs," of *AER Directive 031: REDA Energy Cost Claims*. Section 64(1) of the *Rules of Practice* states that

64(1) The Regulator may award costs to a participant if the Regulator 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 Regulator.

COSTS CLAIM OF MIKE JUDD

[10] Hayduke represented Mr. Judd at the hearing and filed a costs claim on his behalf on April 15, 2013. Mr. Judd claimed fees in the amount of \$38 236.13, honoraria in the amount of \$1100.00, expenses in the amount of \$2595.51, and GST in the amount of \$1965.83, for a total claim of \$43 897.47.

Views of Shell

[11] Shell provided its comments on the costs claim on April 30, 2013, and submitted that the costs claim should be reduced on the basis that it was excessive, given the scale of costs in

Directive 031 (scale of costs), and that it was unreasonable given the nature of Mr. Judd's intervention.

[12] Shell noted that *Directive 031* indicates that the scale of costs is to be used by the AER when assessing a claim for costs. The scale of costs details the fees and disbursements that are eligible for reimbursement in relation to a party's participation in a proceeding. Shell indicated that the scale of costs is intended to represent the AER's opinion as to what is a fair and reasonable tariff to enable an intervener to retain adequate, competent, and professional assistance in making an effective presentation before the AER. Shell submitted that the quantum of costs claimed by Mr. Judd must first be judged on the basis of the scale of costs in order to determine whether the costs claimed are reasonable.

[13] Shell pointed out that the AER specifically notes in *Directive 031* that it may deny costs claimed where it is not satisfied that the intervention in question was conducted economically.

[14] Shell stated that *Directive 031* and the *Rules of Practice* suggest that the AER will have regard to the nature and scope of a participant's involvement, as well as the substance of the information provided. The *Rules of Practice* lists a number of factors the AER may consider when evaluating a costs claim. Specifically, the AER may consider whether the participant seeking costs did one or more of the following:

- asked questions on cross-examination that were unduly repetitive of questions previously asked by another participant and answered by that participant's witness;
- made reasonable efforts to ensure that the participant's evidence was not unduly repetitive of evidence presented by another participant;
- made reasonable efforts to co-operate with other participants to reduce duplication of evidence and questions or to combine the participant's submission with that of similarly interested participants;
- presented significant new evidence in oral evidence that was available to the participant at the time the participant filed documentary evidence but was not filed at that time;
- failed to comply with a direction of the AER, including a direction on the filing of evidence;
- submitted evidence and argument on issues that were not relevant to the proceeding;
- needed legal or technical assistance to take part in the proceeding;
- engaged in conduct that unnecessarily lengthened the duration of the proceeding or resulted in unnecessary costs; or
- failed to comply with part 5 of the *Rules of Practice*.

[15] Further, *Directive 031* provides examples of costs claims that might not be considered reasonable, which include instances where a participant submitted

- evidence or argument about matters not being considered or not related to the application;
- arguments about matters already decided; or

- arguments about government policy or legislative changes that should more properly be placed before the government or a member of the legislative assembly.

[16] Shell stated that the reasonableness of Mr. Judd's costs claim must therefore be evaluated in light of the nature, scope, and substance of his submissions at the hearing and on the basis of the criteria set out in the *Rules of Practice* and *Directive 031*.

[17] Shell noted that two recent decisions, described below, are particularly relevant to a consideration of Mr. Judd's costs claim. In these decisions, different approaches were taken by the AER. Shell was of the view that either of these approaches represents an appropriate framework for determining the costs claim in this case since they apply a principled analysis to costs claims and would result in a similar costs award.

[18] In *ECO 2011-008: Shell Canada Limited, Applications for Well, Facility, and Pipeline Licences, Waterton Field*, the AER considered costs claims in relation to a 2010 hearing for Shell's Waterton 68 well applications (2010 hearing). With respect to the claim for Mr. Sawyer's professional fees, the AER reduced the total time claimed by him by 55 per cent (after certain specific reductions) based on an holistic review of

the nature and scope of the proceeding, the nature and scope of Mr. Judd's intervention, the evidence presented and whether it was of assistance to the AER in its decisions on the applications and the conduct of Mr. Sawyer throughout the proceeding. (at p. 37)

[19] In *ECO 2009-004: Highpine Oil & Gas Limited, Applications for Three Well Licences, Pembina Field, Tomahawk Area*, the AER reduced an intervener's representative's claim for preparation time by 50 per cent after determining that it was unreasonable when compared to the preparation time of other counsel in the proceeding and considering the limited nature of the evidence presented by the intervener. The AER then proceeded to reduce the total time by another 15 per cent because of what the AER viewed as disruptive behaviour and disregard for the AER's process on the part of the representative.

[20] Shell submitted that the circumstances of the present case warranted reducing the total time claimed by Hayduke for its fees by at least 55 per cent. Shell's reasons and argument for that are set out in the next section.

[21] Shell submitted that an assessment of Mr. Judd's claim requires evaluating the quantum and reasonableness of the claim considering the principles and factors set out above.

Professional Fees of Hayduke & Associates Ltd.

a) Hourly Rate and Time Spent

[22] Shell submitted that the \$150.00 hourly rate claimed by Mr. Sawyer for his services exceeds the \$125.00 per hour paid for his services in past proceedings and does not reflect the value of the intervention brought before the AER. Shell submitted that there is no new information to justify increasing Mr. Sawyer's hourly rate to \$150.00 per hour.

[23] Shell pointed out that in *ECO 2011-008*, the AER stated that Mr. Sawyer is not a lawyer and has no formal legal training. Although Mr. Sawyer claims to have 20 years of experience, it is in the environmental consulting field and "his experience as a lay representative of an intervener before administrative tribunals is much more limited." Mr. Sawyer did not appear for Mr. Judd as an expert witness but instead acted as Mr. Judd's lay representative.

[24] Shell noted that although *Directive 031* does not address this situation directly, the AER has in past decisions considered rates of \$50.00 to \$150.00 per hour to be appropriate for lay representatives.¹ The AER found such rates to be appropriate even where a lay representative had ten years of relevant experience and was recognized as having significant specialized knowledge on the AER's processes, practices, and procedures. While Mr. Sawyer has appeared before administrative tribunals in past proceedings, there were instances in the 2013 hearing that demonstrated his inexperience with practice and procedure before the AER. Shell submitted that there is no justification for a rate of \$150.00 per hour, which is the highest rate the AER considers appropriate for lay representatives.

[25] In a costs claim for a hearing held in 2007 to consider Shell's application for approval of the Waterton 68 well applications (2007 hearing), Mr. Sawyer requested and was provided \$125.00 per hour for his services. In a costs claim for the 2010 hearing, Mr. Sawyer requested \$250.00 per hour and the AER awarded an hourly rate of \$125.00 per hour. Based on the precedents and the fact that Mr. Sawyer did not provide new information to justify an increase in his hourly rate from the 2007 and 2010 proceedings to \$150.00 per hour, Shell submitted that an hourly rate of no more than \$125.00 per hour for Mr. Sawyer's fees is warranted.

[26] Shell noted that typically the hourly rates set out in the scale of costs increase as the experience held by a given representative increases. Shell submitted that as a representative becomes more experienced, he or she will take less time to prepare for a hearing and less time to conduct an intervention. Mr. Sawyer represented a party in the 2007 hearing and represented Mr. Judd in the 2010 hearing, and therefore was very familiar with the applications and related material. The applications considered in the 2013 hearing were much more limited in scope (essentially the 1.2 km pipeline), which in Shell's view should have resulted in a high degree of efficiency regarding the time to prepare the intervention.

[27] Shell noted that the 238.40 hours claimed for preparation time amounts to nearly thirty full 8-hour days. Shell viewed this as extreme and unreasonable, particularly given the limited nature of Mr. Judd's intervention and Mr. Sawyer's familiarity with the applications and associated issues. Shell submitted that a review of the time claimed and awarded in past hearings (i.e., *ECO 2011-008* and *ECO 2009-004*) further demonstrates that Mr. Sawyer's claim for preparation time in the present case is excessive and unreasonable.

[28] In *ECO 2011-008* the AER considered Mr. Sawyer's claim for what amounted to 494 hours of professional fees and 21.3 hours of travel time. That hearing was more than three times the length of the 2013 hearing and involved numerous experts and other witnesses retained by multiple interveners, including Mr. Judd.

[29] Based on the scope of the hearing, the nature of Mr. Judd's intervention and the usefulness of his evidence, and the conduct of Mr. Sawyer, the amount of time claimed by Mr. Sawyer was reduced by 55 per cent, resulting in a total award of \$28 386.56 for his fees. Based on the hourly rate of \$125.00 per hour, which the AER determined to be reasonable for Mr. Sawyer's fees, the total award amounts to about 216 hours for professional fees. Given that the AER determined in *ECO 2011-008* that 105 hours was a reasonable amount of time for attendance at the hearing, this leaves about 111 hours for hearing preparation and argument and reply. Shell noted that 111

¹ *Decision 2004-101: Review and Variance Application by Mitch Bronaugh of Energy Cost Order 2004-04* at p. 8 and 9, *Energy Cost Order 2009-003: Applications for Well, Pipeline, and Associated Facility Licences, Waterton Field*, at p. 7, and *ECO 2011-008: Applications for Well, Facility, and Pipeline Licences, Waterton Field*, at p. 37.

hours is more consistent with awards for preparation time claimed in past proceedings of a similar nature, rather than the 238.40 claimed in this proceeding.

[30] In *ECO 2009-004*, the AER concluded that the hours claimed were “extreme” compared to those claimed by other counsel involved in the proceeding. The AER also noted that Wilson Law Office submitted only one short expert report whereas other counsel submitted two binders of expert materials. The AER went on to reduce the preparation time claimed by Wilson Law Office by 50 per cent.

[31] Shell submitted that it may be useful to consider the number of hours claimed by other counsel in relation to *ECO 2009-004*. In that costs proceeding, the total time submitted by Klimek Law Office was 255 hours, of which about 120 hours were incurred during the course of the hearing. The remaining 135 hours presumably included preparation, argument, and reply. Notably, the intervention presented by Klimek Law included the presentation of expert evidence, whereas Mr. Judd did not present any expert evidence in the 2013 hearing. Considering the time that Klimek Law Office claimed for preparation and argument and reply in *ECO 2009-004*, Shell submits that Mr. Sawyer’s preparation time of 238.40 hours is excessive and warrants a reduction.

[32] Shell noted that in past decisions, the AER reduced allowable legal costs if the evidence presented was not technical or complex in nature and would have required little legal assistance for its preparation.² The written evidence submitted by Mr. Judd in the 2013 hearing consisted of an 8-page summary of Mr. Judd’s concerns as well as the full transcripts of the 2007 and 2010 hearings. The evidence was not technical or complex in nature, and it is arguable that very little assistance would have been required to prepare and present it.

[33] Pursuant to the AER’s ruling in *ECO 2011-008*, Shell submitted that this factor, taken in conjunction with the assessment of additional criteria, warranted a reduction of at least 55 per cent to the total time claimed by Mr. Sawyer. Alternatively, the excessive nature of the claim supports a minimum reduction of 50 per cent to Mr. Sawyer’s hours for preparation time, which is consistent with the AER’s ruling in *ECO 2009-004*.

b) Section 64 Criteria—Reasonableness of Mr. Judd’s Claim for Professional Fees

[34] Shell submitted that the AER must also scrutinize Mr. Judd’s costs claim based on the criteria set out in section 5.1 of *Directive 031* and section 64 of the *Rules of Practice*. These criteria represent the basis on which to assess whether an intervention was directly and necessarily related to issues before the AER, whether an intervention was conducted in an efficient and responsible manner, and whether the intervention was of assistance to the AER in determining the issues before it.

[35] Shell stated that a number of the criteria outlined in section 5.1 of *Directive 031* and section 64(2) of the *Rules of Practice* relate specifically to proceedings where there are two or more interveners or participants, and are therefore generally inapplicable to the hearing in this case. Considering the manner in which the intervention was conducted and in light of the criteria, Shell submitted that the part of Mr. Judd’s claim that related to costs associated with work performed by Mr. Sawyer should be further reduced as discussed below, with references to the relevant section 64 criteria.

² *Energy Cost Order 2003-09: In The Matter of Glacier Power Ltd. Application to Construct and Operate 80MW Hydro-Electric Project—Dunvegan Area* at p. 5.

i) Failed to Comply with a Direction of the AER

[36] Shell noted that Mr. Sawyer filed the full transcripts of the 2007 and 2010 hearings with Mr. Judd's submission, ignoring the direction of AER counsel that a request was to be made to the AER before doing so. The AER addressed Mr. Sawyer's actions in this regard in its March 4, 2013 correspondence, wherein the AER noted that Mr. Sawyer had not "provided any legal authority in support of the proposition that parties can ignore or disregard AER directions regarding filing of materials, such as directions to make requests of the AER prior to filing certain materials."

[37] Shell submitted that Mr. Sawyer's failure to respond to the AER's request is indicative of a pattern of disregard for the AER's process and procedures, which began primarily with respect to the AER's scoping decision. This was disruptive to the proceeding as the submission of the hearing transcripts resulted in considerable correspondence between the parties as well as time spent at the hearing discussing the issue. This led to the parties incurring unnecessary costs and warrants a further reduction in Mr. Sawyer's fees.

ii) Submitted Evidence and Argument on Issues that were not Relevant to the Proceeding

[38] Shell noted that the value of evidence submitted in a proceeding is generally measured by its usefulness in enhancing the understanding of the issues before the AER. In this case, the parties were all familiar with the contents of the transcripts of the previous hearings. Further, despite the fact that the AER noted on a number of occasions that Mr. Sawyer could use portions of the transcript if he could establish their relevance, Mr. Sawyer barely mentioned the transcripts in his cross-examination of Shell's witnesses or in his argument. Shell submitted that the 2007 and 2010 hearing transcripts were of limited use in understanding the issues before the AER and, in fact, resulted in unnecessary and unwanted distraction, delays, and increased costs to Shell.

[39] Shell submitted that Mr. Sawyer repeatedly introduced new evidence that was not on the record in his final argument. In doing so, Mr. Sawyer contravened section 24(5) of the *Rules of Practice*, which states that "no argument may be made by a party unless it is based on the evidence before the Regulator."

[40] Shell stated that Mr. Sawyer inappropriately led evidence on a number of occasions during his cross-examination of the Shell panel. Specific examples can be found in volume 2 of the hearing transcript at pages 331–332, 334–335, and 351. Notably, the AER addressed Mr. Sawyer's conduct in this regard on page 337, when the chair stated

But I would ask you to form your questions as questions because I do agree with Mr. Gilmour that you're providing – you're almost providing evidence or argument in the way you're asking your questions.

[41] Based on the foregoing, Shell submitted that a further reduction to Mr. Judd's costs claim was warranted.

iii) Needed Legal or Technical Assistance to Take Part in the Proceeding

[42] While Shell recognized that Mr. Judd would have required some minor assistance preparing his evidence and some assistance during argument and cross-examination of Shell's panel, Shell submitted that the AER should have regard to the limited nature of Mr. Judd's

evidence and written submission in determining whether Mr. Sawyer's hearing preparation time is reasonable.

iv) Engaged in Conduct that Unnecessarily Lengthened the Duration of the Proceeding or Resulted in Unnecessary Costs

[43] Shell submitted that Mr. Sawyer incurred fees on January 7 and 11 of 2013 to support Mr. Judd's application to adjourn the hearing in 90 days, which was unnecessary for Mr. Judd's intervention and did not result in a better understanding of the issues before the AER.

[44] On November 2, 2012, the AER contacted Shell's counsel and Mr. Sawyer and requested that the parties advise the AER by November 6, 2012, as to when their respective clients would not be available for a hearing in February or March 2013. Shell advised on November 6, 2012, that it preferred a hearing in late February or early March. On November 7, 2012, after further correspondence from the AER, Mr. Sawyer replied that Mr. Judd's preferred timing was mid to late March. The AER set down the hearing for March 12, 2013, which aligned with Mr. Judd's preference but not with Shell's preference.

[45] Mr. Sawyer's primary reason for adjourning was that he could not secure a pipeline integrity expert for the scheduled week of the hearing due to the NACE conference, notwithstanding that the NACE conference was in fact scheduled for the following week (as noted in Mr. Sawyer's adjournment request) and that Mr. Sawyer subsequently indicated in Mr. Judd's February 8, 2013, submission that he had retained Dr. Bavarian, a corrosion and metallurgical engineer, as an expert.

[46] A review of Mr. Sawyer's time entries shows that up to 11.5 hours were spent drafting and sending the adjournment request on January 7, and 2.4 hours on drafting the additional comments in support of the adjournment on January 11. The time entry for January 7 contains a number of activities, but the entry on January 11 relates only to drafting and sending Mr. Sawyer's January 11 correspondence to the AER. If 2.4 hours are assumed for drafting and sending each letter, which Shell submitted is conservative, the total is 4.8 hours. Shell submitted that these hours should be deducted from Mr. Sawyer's preparation time before any discount is applied.

[47] Shell also noted that in a number of instances, Mr. Sawyer asked irrelevant or repetitive questions during his cross-examinations of Shell's witnesses and of Mr. Duncan, which resulted in the duration of the proceeding being unnecessarily lengthened. Shell submitted that this conduct warrants a further reduction of Mr. Judd's costs claim.

v) Failed to Comply with Part 5 of the *Rules of Practice*

[48] Shell noted that during Mr. Sawyer's cross-examination of the Shell panel, he made misstatements that had the potential to misconstrue the facts in evidence and confuse the record.

[49] In volume 2 of the hearing transcript, after confirming that a Shell witness was not aware of the existence of a permanent tent camp on Mr. Judd's property, Mr. Sawyer stated on page 265, lines 11-13:

If I put it to you, sir, that this information is in the proceedings of the 2007 and 2010 hearing, would you have any reason to doubt me?

[50] Shell's witness reiterated that he was not aware of the existence of the camp. During Mr. Judd's direct examination, the following exchange occurred between Mr. Sawyer ("Q.") and Mr. Judd ("A.") on page 553 of volume 3 of the hearing transcript, lines 7–12:

Q. Now, you also mentioned your camp on your land and how you use it. Can you tell us: Have you told Shell of that camp prior and, if so, what kind of reaction did you get from them?

A. I'm not sure that I have told Shell about it. It may have come up in previous hearings. I'm not sure.

[51] Under cross-examination by Shell's counsel, Mr. Judd confirmed that he did not recall whether he ever told Shell about the tent camp and that Mr. Sawyer had not provided him with any references from the 2007 or 2010 hearings where the tent camp was discussed. A review of the transcripts of the 2007 and 2010 hearings reveals no mention of the so-called tent camp; one can therefore conclude that the statement Mr. Sawyer put to the Shell panel was inaccurate.

[52] Shell submitted that Mr. Sawyer's behaviour was questionable when he indicated in the submission that Mr. Judd had "retained a number of experts to assist in preparing cross-examination on matters relevant to the proceeding," including, at the time, Dr. Norman and Dr. Bavarian. Under cross-examination by AER counsel, Mr. Judd indicated that neither individual had in fact been retained nor had they assisted in preparing cross-examination questions. In response, Mr. Sawyer provided the following clarification at lines 21–24 on page 582 of volume 3 of the hearing transcript:

Madam Chairman, I rise to provide some clarification. At the time we filed this submission, it was the intention to have those people, and after it was filed, that was not the case.

[53] Further, Shell noted that Mr. Judd's submission states that Mr. Judd "has retained" experts to assist him, including Dr. Norman and Dr. Bavarian. Based on Mr. Judd's response to questions from AER counsel, as well as Mr. Sawyer's clarification, this was clearly not the case at the time that the submission was prepared. Shell contended that the statement is therefore inaccurate.

[54] Section 64(1) of the *Rules of Practice* indicates that an applicant will be expected to pay a participant's costs if the "participant acted responsibly in the proceeding and contributed to a better understanding of the issues before the AER." Whether the misstatements by Mr. Sawyer were made inadvertently or not, they were no doubt irresponsible and disruptive to the process. Not only did Mr. Sawyer's behaviour in this regard not contribute to a better understanding of the issues before the AER, but it was potentially misleading.

[55] Shell stated that in the AER's correspondence dated February 4, 2013, the AER specifically warned the parties, including Mr. Sawyer, against engaging in this sort of disruptive behavior:

Finally, while individuals generally have a right to be represented by legal counsel in AER proceedings involving or potentially impacting their rights or interests, they do not have a right to be represented by particular counsel, or by extension a particular individual who is not their legal counsel. The AER reminds Mr. Sawyer that in Hayduke's representation of and submissions on behalf of Mr. Judd he is expected to be mindful of the AER's directions and instructions. Counsel, other representatives, and the parties themselves (including witnesses) are expected to exhibit "good behaviour" in the hearing and be mindful of the AER's instructions and directions at all times. Failure to do so will not be tolerated by the AER at any time and will be dealt with as it sees fit under the circumstances.

[56] The AER's warning came after Mr. Sawyer, through correspondence dated January 11, 2013, deemed the AER's scoping decision of January 9, 2013, unacceptably "vague," and demanded that the AER clarify some of its directions. The AER responded to Mr. Sawyer's demands in its February 4 correspondence by noting that "AER directions and decisions are not generally subject to further clarification or debate from parties."

[57] Shell submitted that Mr. Sawyer's behaviour did not contribute to a better understanding of the issues before the AER and led to unnecessary costs that should be deducted from the final costs award.

c) Applicable Discounts

[58] Shell submitted that the AER should reduce the total time claimed by Mr. Sawyer for hearing preparation, attendance, and argument and reply by least 55 per cent, which would be consistent with the AER's ruling in *ECO 2011-008* with respect to Mr. Sawyer's fees. In applying the 55 per cent reduction in *ECO 2011-008*, the AER considered the scope of the proceeding, the nature of Mr. Judd's intervention, the usefulness of the evidence presented to the AER, and Mr. Sawyer's "noncompliant and inappropriate conduct at the hearing."

[59] Regarding Mr. Sawyer's conduct in the 2013 proceeding, Mr. Sawyer also exhibited particularly disruptive behaviour in making repeated references during final argument to information that was not in evidence, by leading evidence during his cross-examination, and in making misstatements of fact to the AER. Based on this and the AER's ruling in *ECO 2011-008*, Shell submitted that a reduction of at least 55 per cent is warranted.

[60] In the alternative, Shell submitted that the AER should follow the principles in *ECO 2009-004*. In that decision, the AER considered it a "consistent" failure on the part of intervenor counsel to file substantive submissions and documentary evidence in advance. The AER determined that this failure appeared to be deliberate and noted that it was disruptive to the hearing process. As a consequence, in addition to the 50 per cent reduction in preparation hours, the AER further reduced the total hours for intervenor counsel by 15 per cent. In making the reduction, the AER noted the disregard for clear AER direction. As noted in the preceding paragraph and as further set out above, Shell submitted that in the present case Mr. Sawyer has shown disregard for the AER's directions and has exhibited disruptive and irresponsible behaviour. Accordingly, if the AER deems it appropriate to follow the principles set out in *ECO 2009-004*, Shell submitted that Mr. Sawyer's total hours should be reduced by at least 15 per cent, in addition to the 50 per cent reduction of his preparation hours attributable to the extreme and excessive nature of this aspect of Mr. Judd's claim.

d) Specific Fees Incurred by Mr. Sawyer

[61] In addition to the above, Shell had concerns about time spent by Mr. Sawyer on a number of specific time charges outlined in his invoice to Mr. Judd and submitted that the associated charges should be reduced or denied altogether for the following reasons:

- Sixteen hours of time was accrued before the notice of hearing was issued on November 19, 2012. Shell submitted that there is no evidence that the costs incurred by Mr. Judd before the notice was issued were related to any of the forms of participation outlined in the definition of "intervention." Shell also submitted that the costs associated with time accrued before issuing of the notice are unreasonable or directly and necessarily related to Mr. Judd's intervention and they should therefore be disallowed.

- There were no fewer than 13 time entries related to Mr. Sawyer’s “search for a pipeline integrity expert,” which together total 70 hours. There was an additional time entry that indicated time spent “searching for an economic expert witness” that amounts to 8.5 hours. Shell noted that all subject time entries refer to other activities; however, assuming that only one hour was spent searching for an expert in relation to each of the time entries, the total is 14 hours. Mr. Judd did not present any expert evidence at the hearing, nor, as noted above, did he use any experts to assist with his preparation for the hearing, despite indicating in his submission that experts had been retained. Shell submitted that the costs incurred in this regard were not directly and necessarily related to the hearing and did not enhance the hearing process or contribute to a better understanding of the issues before the AER. Shell therefore submitted that Mr. Sawyer’s hearing preparation time should be reduced by 14 hours.

[62] Shell suggested that the time charges outlined above should be deducted from the 238.40 preparation hours claimed by Mr. Sawyer before applying any other discounts. With the deductions set out previously (4.8, 16, and 14 hours, respectively), Mr. Sawyer’s 238.40 hours of preparation time would be reduced to 203.60 hours.

e) Mr. Sawyer’s Disbursements

[63] Mr. Sawyer claimed a total of \$2294.11 for disbursements before GST. Shell submitted that the following two reductions should be applied to this claim:

- Mr. Sawyer claimed \$200 for meals. The scale of costs states that claims for meals are restricted to the hearing phase of a proceeding. The hearing took place from March 12 to 15, which is a total of 4 days. The maximum per diem claim for meals is \$40 and Mr. Sawyer’s claim in this regard should therefore be reduced to \$160.
- Mr. Sawyer claimed \$1515.00 for mileage. At the scale of costs rate of \$0.505/km, this amounts to 3000 km. Googlemaps.com indicates that the one-way travel distance from Smithers, British Columbia, to Calgary, Alberta, is 1156 km, and from Calgary to Pincher Creek it is 210 km. For a return trip, the total distance travelled is 2732 km. Therefore, Shell submitted that the claim for mileage should be limited to the travel distance on the return trip from Smithers to Pincher Creek through Calgary, which would reduce the mileage claim to \$1380.00.

[64] Shell does not take issue with Mr. Sawyer’s claim for accommodation but notes that no receipts were provided as is required pursuant to the scale of costs. Shell stated that it leaves it to the discretion of the AER to determine if it has sufficient information to award these disbursements.

[65] With the above reductions, Shell states that Mr. Sawyer’s claim for disbursements should total \$2119.11, before GST.

f) Shell’s Summary Comments on Mr. Sawyer’s Fees

[66] Shell submitted that the principles established through *Directive 031*, the *Rules of Practice*, and AER precedents, in addition to the specific deductions outlined above, should be applied to

Mr. Judd's claim for Mr. Sawyer's charges in accordance with one of the following two alternatives.

i) Alternative 1—*ECO 2011-008*

[67] Shell submitted that if the AER deems it appropriate to follow the precedent established in *ECO 2011-008*, Mr. Judd's claim for Mr. Sawyer's professional fees should be reduced as follows:

- Reduce the 238.40 hours claimed for preparation to 203.60 hours to account for unreasonable or unnecessary charges as outlined above. This results in a new maximum total of 235.10 hours (new maximum total hours = 203.60 [preparation] + 26.10 [attendance] + 5.40 [argument and reply] = 235.10 hours).
- Reduce the 235.10 total hours claimed by at least 55 per cent, consistent with *ECO 2011-008*. This reduction is warranted given the scope of the proceeding, the nature of Mr. Judd's intervention, the repetitiveness of Mr. Sawyer during the proceeding, the extreme and unreasonable nature of Mr. Sawyer's claim for professional fees, and Mr. Sawyer's irresponsible and disruptive conduct throughout the course of the proceeding. 235.10 hours reduced by 55 per cent would equal an award of fees for 105.80 hours.

[68] Shell stated that the total hours allotted for Mr. Sawyer's professional fees should not exceed 105.80 hours. Shell also stated that the maximum hourly rate Mr. Sawyer can claim is \$125.00 per hour. At this hourly rate, Mr. Sawyer's total fees would be reduced to \$9475.00 for 75.80 hours at the full rate, plus \$1875.00 for the 30 hours of travel time included in Mr. Sawyer's preparation hours, at \$62.50 per hour or half the full rate. The total award for Mr. Sawyer's professional fees would then be \$11 350.00.

[69] Shell was of the view that under this alternative, the maximum award claimed for Mr. Sawyer's professional fees should not exceed 14 142.57 (\$11 350.00 total fees + \$2 119.11 disbursements + \$673.46 GST = \$14 142.57).

ii) Alternative 2—*ECO 2009-004*

[70] Shell also stated that if the AER deems it appropriate to follow the precedent established in *ECO 2009-004*, Mr. Judd's claim for Mr. Sawyer's professional fees should be reduced as follows:

- Reduce 238.40 hours claimed for preparation to 203.60 hours, as noted above under alternative 1.
- Reduce the 203.60 hours for preparation further by 50 per cent to reflect the excessive nature of the claim, consistent with *ECO 2009-004*. Shell stated that time awarded for preparation should be consistent with what has been awarded to counsel in past proceedings of a similar nature. Considering the limited nature of Mr. Judd's intervention in the present case, a further reduction of 50 per cent, is warranted. Therefore, Mr. Sawyer's preparation hours should not exceed 101.80 hours, resulting in a new maximum total of 133.30 hours (new maximum total hours = 101.80 [preparation] + 26.10 [attendance] + 5.40 [argument and reply] = 133.30).
- Reduce the maximum total of 133.30 hours further by at least 15 per cent, consistent with *ECO 2009-004*, to account for Mr. Sawyer's clear disregard for AER directions, for unduly

repetitive conduct, irrelevant evidence and argument, and disruptive, irresponsible, and inappropriate behaviour. This results in a new maximum total of 113.30 hours.

[71] Shell was of the view that the total time awarded should not exceed 113.30 hours. At the hourly rate of \$125 per hour, the total fees for Mr. Sawyer would be reduced to \$10 412.50 for 83.30 hours at the full rate, plus \$1875.00 for the 30 hours of travel time at \$62.50 per hour or half the full rate. The total for Mr. Sawyer's professional fees would then be \$12 287.50.

[72] Shell was of the view that under this alternative, the maximum award for Mr. Sawyer's professional fees should not exceed 15 126.94 (\$12 287.50 total fees + \$2119.11 disbursements + \$720.33 GST = \$15 126.94).

Honoraria and Disbursements Claimed by Mr. Judd

[73] Mr. Judd claimed a total of \$1100 in honoraria for the hearing: a \$300 preparation honorarium and an \$800 attendance honorarium. Mr. Judd also requested a total of \$316.47 (inclusive of GST) for disbursements related to the 2013 hearing. Shell did not take issue with the honoraria requested or the disbursements claimed by Mr. Judd, and left it to the AER's discretion as to whether these should be awarded.

Views of Mike Judd

[74] Hayduke responded to Shell's comments on the costs claim in a letter dated May 5, 2013. It provided additional information on June 7, 2013. Hayduke disagreed with Shell's view that the amount claimed related to Hayduke's charges to Mr. Judd was excessive or unreasonable. Hayduke submitted that Shell's overall submission is a gross distortion of Mr. Judd's costs claim, of the manner in which the hearing unfolded, and Hayduke's role in the hearing.

[75] Hayduke stated that Shell cited two previous costs decisions in support of its arguments: one related to a previous hearing of Shell's 2013 hearing application and the other concerned with an unrelated proceeding in which neither Shell nor Hayduke participated. Hayduke submitted that each costs claim is unique and must be determined by the AER on facts that are relevant to the decision at hand.

[76] Hayduke noted that in *ECO 2011-008* the AER applied a punitive 55 per cent reduction to Hayduke's claimed professional fees based on, among other things, its view that Mr. Sawyer's conduct during that hearing was unprofessional. Hayduke submitted that the 2010 hearing was an entirely different proceeding than the 2013 proceeding and that it had numerous interveners in addition to Judd. Notably, the 2010 hearing was emotionally charged and very adversarial, not only between the interveners and Shell but also between the interveners and the AER and its staff. Hayduke submitted that it was this atmosphere of mutual disrespect that gave rise to the disruptions that occurred at the 2010 hearing, not all of which were caused or even participated in by Hayduke or Mr. Judd. Secondly, the circumstances of the 2013 hearing were notably different than those of the 2010 hearing. In the 2013 hearing, Mr. Judd was the sole intervener, he presented no expert witnesses, and the hearing was only a few days in length, whereas the 2010 hearing lasted over two weeks. All of these differences make the applicability of *ECO 2011-008* to the current decision before the AER problematic.

[77] Hayduke stated that *ECO 2009-004* related to a hearing involving High Pine Oil & Gas Limited and that neither Shell nor Hayduke were participants in. Shell relied on aspects of *ECO 2009-004*, where the AER determined that a lawyer participating in that proceeding had both

over billed and been disruptive in the proceeding. Hayduke submitted that neither condition exists with the 2013 hearing and that those arguments of Shell's that rely on *ECO 2009-004* should be disregarded.

[78] Hayduke stated that any conclusions based on the costs decisions cited by Shell would require that the circumstances of the other hearings be similar to those of the 2013 hearing, which Hayduke submitted is not the case.

[79] Hayduke submitted that \$150 per hour is a fair and appropriate professional rate to be awarded for Mr. Sawyer's services, for the reasons that follow. Mr. Sawyer actually has more than 23 years of demonstrable professional experience, both as an environmental consultant to the oil and gas industry as well as a lay representative for interveners in oil and gas regulatory proceedings. Mr. Sawyer graduated in 1993 with a Masters degree from the University of Calgary in the Faculty of Environmental Design, and since that time has worked on many projects on behalf of both landowners and clients in industry, First Nations, and environmental non-governmental organizations. Starting with his participation in a 1993 AER hearing, over the past 20 years Mr. Sawyer has participated in many public hearings in front of the AER, the Natural Resources Conservation Board, the National Energy Board, and in regulatory proceedings in other jurisdictions. Much of this experience was as a lay representative for clients who were in a state of conflict with the oil and gas industry.

[80] Hayduke stated that Mr. Sawyer also has considerable industry experience and in the past has been retained by many oil and gas companies, including Shell, to conduct environmental studies and permitting activities on numerous well sites, large and small pipelines, gas plants, and other related facilities. With respect to his work for Shell, Mr. Sawyer prepared an environmental permitting application for sour gas pipelines, worked on the Caroline Sulphur Pipeline project, and has participated in environmental studies for both wells and pipelines in the Carbondale and Crowsnest Pass regions. Mr. Sawyer has, in recent years, been retained by several large oil and gas companies to provide strategic regulatory advice and by law firms to provide cross-examination training and conduct mock cross-examination exercises.

[81] Hayduke submitted that Mr. Sawyer's education and over 20 years of professional experience give him a unique ability to effectively and efficiently represent clients who find themselves in conflict with oil and gas development. In light of all of the foregoing, Hayduke also submitted that Mr. Sawyer's professional rate of \$150 per hour is appropriate and reasonable.

[82] Hayduke stated that Mr. Sawyer's professional rate is consistent with the scale of costs. Hayduke acknowledged that Mr. Sawyer is not a lawyer and stated that he does not claim to be one. Hayduke noted that the scale of costs rates for articling students and for inexperienced lawyers (1 to 4 years at the bar) ranges from \$140 per hour to \$240 per hour. In comparison, Mr. Sawyer, with over 20 years of professional experience, charges a professional rate that is only 7 per cent higher than what the scale of costs permits for articling students and is 38 per cent lower than scale of costs rates for an inexperienced lawyer. Hayduke submits that even when compared to the scale of costs rates for legal fees, Mr. Sawyer's professional rate is reasonable and results in cost effective representation for Mr. Judd when compared to retaining counsel.

[83] Hayduke also submits that Mr. Sawyer's rates are very reasonable when compared to the scale of costs rates for professional fees for consultants, analysts, and experts. In comparison, Mr. Sawyer's rate is less than the scale of costs rate for a consultant with 5 to 7 years of

experience. Based on the scale of costs, Mr. Sawyer's services could be charged at a much higher rate.

[84] Hayduke noted Shell's comments that *Directive 031* is silent with respect to an appropriate amount or range of costs for lay representatives and that the AER should instead rely on previous AER costs decisions to find whether Mr. Sawyer's claimed rate is reasonable.

[85] In *ECO 2009-003: Shell Canada Limited, Applications for Well, Pipeline, and Associated Facility Licences, Waterton Field*, the AER reduced the hourly rate of two persons who participated in the 2007 hearing as both lay representatives and consultants from \$250 per hour to \$150 per hour because the individuals were not professionals and did not have applicable academic qualifications. Hayduke noted that in the same decision, Shell took no issue with Mr. Sawyer's then rate of \$125 per hour and awarded Mr. Sawyer 100 per cent of his claimed professional fees, but reduced the professional fees of all other interveners' legal counsel and expert witnesses. Hayduke stated that this speaks to the inherent reasonableness of Mr. Sawyer's rate.

[86] In *ECO 2011-008*, the AER reduced Mr. Sawyer's rate from \$250 per hour to \$125 per hour, relying on the *ECO 2009-003* decision to support that decision. Hayduke stated that the 2010 hearing was very adversarial in nature and the AER's overall approach to costs awards for Hayduke and Mr. Sawyer was intended to be punitive. Hayduke believed that the circumstances of the 2013 hearing were significantly different than in 2010, and that therefore the rationale behind *ECO 2011-008* does not apply.

[87] Hayduke also submitted that since 2007, when the AER approved Mr. Sawyer's \$125 per hour rate, he has acquired an additional 6 years of professional experience—almost double the years of professional experience the scale of costs requires to warrant the highest consultant rate of \$270/hour. However, Mr. Sawyer's claimed rate remains at \$150 per hour, which is a full 45 per cent lower than what he is entitled to claim. In addition, if one simply applied the annual rate of inflation to Mr. Sawyer's 2007 rate, the inflation adjusted rate would be just below \$150 per hour. In essence, even though Mr. Sawyer could argue that he should be awarded a rate equal to the highest professional fee for consultants allowed under the scale of costs, he has only claimed an amount that would be marginally higher than the rate awarded for his services in 2007 once inflation is taken into account. Hayduke submitted that this demonstrates the reasonableness of Mr. Sawyer's current rate.

[88] Hayduke submitted that, in light of all of the above, there is no reasonable basis for the AER to not accept Mr. Sawyer's rate of \$150 per hour as being anything other than fair, reasonable, and appropriate.

[89] With respect to charges for time spent on the matter by Hayduke, Hayduke disagrees with Shell's argument that Mr. Sawyer's preparation time is unreasonable in the "extreme." Hayduke stated that as Mr. Judd's representative, Mr. Sawyer has an obligation to thoroughly review Shell's filed applications, to review all relevant past decisions as well as the transcripts of the 2007 and 2010 hearings, review e-mail and written communications from both the AER and Shell, and to manage Mr. Judd's intervention in his best interest. The application materials in this proceeding alone were thousands of pages of filed materials and did not include additional materials related to Shell's previous pipeline failures in the area. All of this must be done and then time must be allocated to identify areas where expert witnesses might assist in preparing Mr. Judd's intervention. Then one would actually have to identify and retain those experts.

Hayduke stated that in light of all of this, 30 days of preparation time is not at all surprising or unreasonable.

[90] Hayduke responded to Shell's comparison to the time spent in preparation by Klimek Law Office for the Highpine hearing by stating that no direct comparison can be made because the applications and proceedings were based on different facts.

[91] Hayduke addressed Shell's argument that because Hayduke did not present expert witnesses, Mr. Judd's costs award should be further reduced, as indicated in *ECO 2003-09: In The Matter of Glacier Power Ltd. Application to Construct and Operate 80MW Hydro-Electric Project–Dunvegan Area*. Hayduke submitted that Shell's arguments are off point and ought to be disregarded for a number of reasons. First, *ECO 2003-09* dealt with a complexity of submitted evidence and expert testimony. Hayduke stated that an intervener is not obligated to file any evidence and can rely entirely on cross-examination of the applicants' evidence and final argument. Hayduke argued that in law, and in practice, the onus clearly lies with the applicant to make its case. Therefore, Shell's argument that Mr. Sawyer's time should be reduced because he did not file complex evidence or present expert witnesses constitutes a reverse onus that is simply wrong and should be disregarded.

[92] Considering all of the above, Hayduke submitted that the time Mr. Sawyer used to prepare for the 2013 hearing was reasonable and appropriate, and that the AER should not reduce the time awarded.

[93] Hayduke stated that Shell's characterization of Mr. Sawyer's participation in the hearing as failing to comply with the directions of the AER, introducing new evidence that was not on the record, leading evidence in final argument, engaging in conduct that unnecessarily lengthened the hearing, and displaying generally disruptive behaviour has little basis in fact and is designed to intentionally distort the reality of how the hearing was conducted and Mr. Sawyer's role in it. Hayduke submitted that Mr. Sawyer was respectful, courteous, and professional throughout the hearing. Hayduke acknowledges that certain issues were in dispute—notably the matter of placing the 2007 and 2010 hearings transcripts onto 2013 hearing record—but stated that these proceedings are inherently adversarial and such exchanges are to be expected. Hayduke summarized by stating that there is no basis upon which to support Shell's position that Mr. Judd's costs award should be reduced for Mr. Sawyer's disruptive behaviour.

[94] Further, with respect to Mr. Judd filing the entire 2007 and 2010 hearing transcripts, Hayduke stated that its prerogative is to use its evidence as it sees fit. Hayduke also stated that the filing and use of transcripts was an issue in the 2010 hearing where Shell argued repeatedly that the transcripts from the 2007 hearing had not been filed and therefore were not available for use as evidence in the 2010 hearing. Anticipating that Shell would take a similar position unless the 2007 and 2010 hearing transcripts were pre-filed as part of Mr. Judd's evidence, Hayduke stated that it filed those documents so that it could use them in cross-examination if the opportunity arose. The fact that Hayduke did not use the transcripts in its cross-examination in no way undermines its efforts to have the transcripts placed on the record.

[95] With respect to Shell's allegations about Hayduke leading new evidence in final argument, Hayduke encouraged the AER to review the transcript citations provided by Shell. Hayduke argued that the references were on matters of common knowledge, such as issues that had been discussed in the evidentiary portion of the proceeding or were referenced in the 2007 or 2010 hearing transcripts. Hayduke's view is that while practitioners must not introduce new evidence

into final argument, final argument has traditionally used rhetorical figures of speech such as allegory, hyperbole, and simile to communicate complex ideas. Hayduke does not believe that Mr. Sawyer submitted new evidence during final agreement, intentionally or otherwise, and urged the AER to disregard Shell's arguments on this point.

[96] With respect to Shell's position that Hayduke inappropriately led evidence during its cross-examination of the Shell panel, Hayduke submitted that it used legitimate and accepted aids in cross-examination and when cautioned by the Chair about forming questions, Mr. Sawyer politely accepted the Chair's direction and continued with his cross-examination. Hayduke submitted that there is nothing of substance to Shell's mischaracterization of Mr. Sawyer's cross-examination and that the AER should disregard Shell's arguments in their entirety.

[97] Hayduke also addressed Shell's contention that Hayduke engaged in conduct that unnecessarily lengthened the proceeding or that resulted in unnecessary costs, in particular the matter of Mr. Judd seeking a 90-day adjournment before the start of the hearing. Hayduke stated that it wished to clarify the circumstances that lead to the request for an adjournment.

[98] Hayduke noted that the AER generally does not allow costs incurred to be recovered before it issues a notice of hearing, as argued by Shell in its submission to this costs proceeding. Hayduke stated that in the spring of 2012, Shell communicated to Mr. Judd and others near the project that there would be a hearing. Between that time and when the AER issued its notice of hearing, there was a considerable exchange of arguments before the AER, primarily because Shell took issue with Mr. Judd's right to a hearing. Hayduke stated that, at the time the AER raised the question about timing of the hearing, Hayduke did not have the "latitude" to fully scope out the issues in play or to determine and engage expert witnesses because its fees for doing that could not be expected to be recoverable. If Hayduke had that opportunity before the AER had asked about the timing of the hearing, Hayduke may have been aware of the extreme difficulties that it would have finding and retaining a qualified pipeline corrosion expert to assist with Mr. Judd's intervention. Hayduke stated that it was only after the notice of hearing was issued that it became apparent it would be difficult and ultimately impossible to retain a qualified pipeline expert for the hearing. Hayduke submitted that this was a legitimate and entirely acceptable reason for Hayduke to bring a motion to adjourn the hearing.

[99] With respect to Shell's comments about the timing of the NACE conference and the hearing, Hayduke stated that it was unable to retain expert pipeline corrosion witness services because all potential experts that Hayduke contacted were either in a conflict of interest with respect to Shell or were unable to offer their services because of conflicts with the timing of the NACE conference. Notwithstanding that the conference was scheduled for the week following the hearing, all potential experts contacted by Hayduke, who were receptive to working with Hayduke in the 2013 hearing, were preparing presentations or travelling to a conference during the hearing. Additionally, it was impossible to accurately predict, in advance of the hearing, when the experts would be able to give their evidence.

[100] With respect to Dr. Bavarian, Hayduke stated that it had retained him to assist in reviewing documents related to Shell's chronic pipeline failures and its proposed mitigation efforts. At no time did Hayduke suggest that Dr. Bavarian would submit expert reports or attend the hearing to provide expert testimony. In fact, Dr. Bavarian had indicated that he could not do so because he was scheduled to give a talk at the NACE conference and had several meetings to attend before the start of the conference. Hayduke stated that for Shell to dispute Hayduke's motives because Dr. Bavarian did not attend the hearing was completely inappropriate. Hayduke stated that Mr.

Judd's response to a question from Shell, in which he indicated that he was unaware of Dr. Bavarian's involvement in assisting Hayduke, was a true statement. Hayduke advised that it contacted many potential experts in the course of preparing for the proceeding but only communicated summaries of the outcomes of those activities to Mr. Judd. Mr. Judd would not have been aware that although Dr. Bavarian was unable to be an expert witness, he was prepared to assist Hayduke in preparing hearing questions. Hayduke submitted that there is nothing improper or inappropriate about the arrangements it had with Dr. Bavarian and Dr. Norman who were only assisting in developing lines of cross-examination questions and had no intention of appearing as witnesses in the hearing. Hayduke further indicated that it was not obligated to inform Shell of the fact or degree of those experts' involvement in Mr. Judd's intervention.

[101] With respect to time spent before the AER issued the notice of hearing, Hayduke submitted that all its efforts on Mr. Judd's behalf were necessary to allow Mr. Judd to participate in the proceeding. As the AER is well aware, Shell took issue with Mr. Judd's standing and the need for a hearing, which required responses from Hayduke and ultimately legal counsel. The AER ruled that Mr. Judd was potentially directly and adversely affected and set the matter down for a hearing, but not before Shell's efforts wasted six months of time and caused unnecessary work for Hayduke. Hayduke submitted that the charges for the modest amount of time Mr. Sawyer spent before the release of notice of hearing are legitimate and necessary, were caused in part by Shell's efforts to avoid a hearing, and are within the ambit of the AER's discretion to award. Hayduke requested that this time be accepted as submitted.

[102] Hayduke submitted that its participation in the proceeding was appropriate and professional at all times, was respectful of Shell and Shell's staff, and of the AER and its staff and procedures, and that Hayduke accepted direction from the AER when it was offered. Hayduke stated that the inherently adversarial nature of the AER's proceedings make it nearly impossible to achieve a "perfect hearing." However, the hearing that unfolded came very close to that ideal. Hayduke noted that at the close of the hearing the Chair stated, "I want to thank all parties for a very efficient and respectful hearing. Thank you very much."

[103] With respect to the claim for Mr. Sawyer's disbursements, Hayduke stated that the time required to travel to a hearing should be considered a part of the hearing itself, particularly given that winter travel from Smithers to Pincher Creek takes up to two days each way. Hayduke also stated that it should be permitted to claim for meals and accommodation during those four travel days. Hayduke further stated that it only claimed for meals for one travel day and did not claim any accommodation related to the time Mr. Sawyer required to travel to participate in the hearing. Hayduke asked that the AER award costs for Mr. Sawyer's meals as set out in Mr. Judd's costs claim.

[104] With respect to mileage, Hayduke submitted that Googlemaps does not accurately reflect the true mileage from Smithers to Pincher Creek and does not reflect the mileage incurred travelling several times during the hearing between Mr. Judd's residence and the hearing venue in Pincher Creek. Hayduke stated that the mileage claim is reasonable and necessary to Mr. Judd's intervention and that it should be awarded as submitted.

[105] Hayduke acknowledged that it did not file receipts for costs claimed for accommodation but stated that the amount it claimed is modest and reasonable and noted that Shell takes no issue with that part of the claim. Hayduke requested that the AER waive the requirement for receipts to be provided in support of Hayduke's accommodation claim, or alternatively that it allow Hayduke to file the receipts as a late filing.

Views of the AER

[106] The AER has carefully considered the substantial submissions filed by Shell and Hayduke in this costs proceeding. The AER notes that the submissions primarily address the reasonableness of the costs claimed for services provided by Hayduke, which appear to have been supplied exclusively by Mr. Sawyer. Being disputed are what appropriate hourly rate, number of hours, and disbursements are to be awarded.

Professional Fees and Disbursements of Hayduke & Associates Ltd.

a) Hourly Rate

[107] Mr. Judd claimed for services provided by Hayduke at the rate of \$150 per hour. Hayduke's argument that the rate is both reasonable and fair was based, in part, on the rate Mr. Sawyer could claim as a consultant providing services to Mr. Judd. Under the scale of costs, a consultant, analyst, or expert with more than 12 years of experience in his or her profession or area of expertise can be awarded up to \$270 per hour. Hayduke also compared its rates to that of articling students and junior lawyers, although Hayduke acknowledged that Mr. Sawyer has no legal training or background. As a result, the AER cannot assess the reasonableness of Hayduke's hourly rate by comparing it to the scale of costs rates for legal professionals.

[108] The AER acknowledges that Mr. Sawyer has extensive education and experience in matters related to the environment, and has less but still noteworthy experience in regulatory matters. Had he been providing services to Mr. Judd in these disciplines there would be greater merit to Hayduke's argument. However, Mr. Sawyer acted chiefly as Mr. Judd's lay representative and not in those other capacities for which he has a degree of expertise. Mr. Sawyer did not give evidence on environmental or regulatory matters. In fact, he did not give any evidence during the proceeding. It was clear that his role was to manage Mr. Judd's intervention from the outset of the proceeding through to the conclusion of the hearing. That included, but was not limited to making submissions on Mr. Judd's entitlement to a hearing, making submissions on the scope of the hearing, filing an adjournment request, conducting direct examination of Mr. Judd, and cross-examining Shell's witnesses and the independent witness Mr. Duncan, and making final argument. While Mr. Judd did retain legal counsel to file a notice of question of constitutional law and make written submissions in relation to that, in all other respects Mr. Sawyer appeared to be conducting Mr. Judd's intervention. The AER has decided that the services provided by Hayduke to Mr. Judd are to be characterized as those of a lay representative, and it will assess the reasonableness of the hourly rate claimed on that basis.

[109] In their submissions, the parties identified that *Directive 031* does not provide a scale of costs rate for lay representatives, however, the AER has stated in past costs awards that \$150 per hour is the upper limit of rates to be awarded to lay representatives. The AER adopts that statement for the purposes of this costs decision and will assess an appropriate rate for Hayduke's services accordingly.

[110] 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. This does not require perfection but it does prevent missteps, mistakes, or other conduct—intentional or inadvertent—that has a material adverse effect on the fairness, efficiency, or effectiveness of the AER's proceeding. The AER has decided that although Mr. Sawyer's conduct during the 2013 hearing was a marked improvement over what transpired in

the 2010 hearing, a number of the decisions he made and the judgment he exercised demonstrates a lack of understanding of or lack of willingness to abide by AER procedures and directions. The AER finds that Mr. Sawyer

- disregarded the AER's directions when he filed the entire 2007 and 2010 hearing transcripts as part of Mr. Judd's written hearing submission, despite contrary instructions from the AER. Doing so not only burdened the hearing record with a large amount of unnecessary information, it demonstrated a fundamental misunderstanding of the purpose and nature of a party's written hearing submission. More specifically, by filing the transcripts from a previous hearing as part of his own written submission, without qualification, Mr. Judd is considered to have adopted all the information in those transcripts as his own evidence. The difficulty with this is apparent when one considers that the 2010 hearing transcript included Shell's evidence that the two pipelines and facility applications that were considered in 2010, and were the focus of the 2013 hearing, were in the public interest and ought to be approved by the AER;
- failed to respond in a timely way to a request available hearing dates from the AER and then sought an adjournment of the hearing after it had been scheduled for a date that Hayduke had previously advised was acceptable to Mr. Judd; and
- asked Shell's witnesses (during cross-examination) to agree with him that, as a matter of fact, the existence of a tent camp on Mr. Judd's lands was put in evidence during the 2007 and 2010 hearings. Mr. Judd was subsequently unable to confirm, during direct examination by Mr. Sawyer, that he had advised Shell of the tent camp or that the matter came up during the previous hearings. To date, neither Mr. Judd nor Mr. Sawyer has identified where the tent camp is mentioned in the record of the 2007 or 2010 hearings. This kind of questioning threatens to undermine the entire hearing process and demonstrates recklessness, or at least a lack of preparation, that is far below what is expected of an experienced lay representative.

[111] Considering the foregoing examples and Mr. Sawyer's overall conduct during the hearing, the AER has decided that \$125 per hour is an appropriate rate to award Mr. Judd for the services provided by Hayduke.

b) Hours to be Awarded

[112] *Directive 031* states that when determining costs awards, the AER will recognize all those expenses incurred by a participant that it considers reasonable and directly and necessarily related to his or her participation in a proceeding. Section 64 of the *Rules of Practice* adds that costs may be awarded to a participant who acts responsibly during a proceeding and contributes to a better understanding of the issues. These principles, together with more specific direction in the *Rules of Practice* and *Directive 031*, guide the AER when considering costs claims.

[113] Shell submitted that the AER could assess Mr. Judd's costs claim in accordance with either *ECO 2011-008* or *ECO 2009-004*. Given that *ECO 2011-008* is related to the 2010 hearing and includes an award to Mr. Judd for Hayduke's representation of him in that proceeding, the AER believes it may be useful to refer to that order where particular circumstances of the 2010 proceeding or costs claim are consistent with circumstances of the 2013 hearing or this costs proceeding. The AER does not, however, see a direct correlation between this costs proceeding and *ECO 2009-004*.

[114] The AER has decided that not all of the costs claimed for Hayduke's services are reasonable and directly and necessarily related to Mr. Judd's participation in the proceeding. In addition, other costs claimed are not in accordance with the scale of costs, the AER's normal practices, or are not otherwise justified. The details and reasons for this decision follow.

[115] Mr. Judd claimed professional fees for Hayduke based, in part, on 238.40 hours of preparation time. Shell identified particular time entries that it stated should be reduced or not awarded at all. This included 4.8 hours for the adjournment request made in January, 2013; 16 hours that were incurred before the notice of hearing was issued on November 19, 2012; and 14 hours for Mr. Sawyer's search for a pipeline integrity expert.

[116] The AER agrees with Shell that the adjournment request was unreasonable, given that Hayduke was specifically consulted about available hearing dates and eventually indicated that mid to late March was acceptable. Hayduke has argued that it did not investigate the availability of a pipeline integrity expert until after the notice of hearing was issued because the AER's costs rules did not permit Mr. Judd to claim the costs of Mr. Sawyer doing so. The AER notes that Mr. Judd's costs claim includes time spent on other matters that were incurred before the notice of hearing was issued. More importantly, the AER is concerned that Hayduke would refuse to participate in an important step such as setting the dates for hearing due to the belief that the cost of doing so could not be recovered by Mr. Judd. The AER wishes to state, emphatically, that a person who takes it upon himself to represent an individual in an AER proceeding is bound to do so to the best of his ability and cannot neglect his duties simply because the costs of his representation may not be recoverable in an energy costs claim. This applies whether the representative is legal counsel or a lay person. No lesser standard of representation is acceptable or sufficiently protects of the rights and interests of the hearing participant. The AER will reduce the costs award for Hayduke's professional services by an amount equal to the 4.8 hours that appear to relate to the adjournment request.

[117] Shell correctly stated that the AER will not normally award costs for matters that arise before a notice of hearing is issued. As indicated by Hayduke, the parties knew—before the AER issued a notice of hearing—that Mr. Judd would be participating in a hearing of Shell's applications. In these circumstances, it is reasonable for the AER to award costs for matters that were directly related to the hearing that had not yet been scheduled, such as a submission on availability for the hearing. The Hayduke time entries that predate the issuance of the notice of hearing fall between May 9, 2012, and November 7, 2012. However, few details were provided to indicate if and how the entries relate to hearing matters. The AER believes that the parties clearly understood in September 2012 that Shell's applications were destined for a hearing. This is consistent with the time entry for August 10, 2012, which indicates that Hayduke was reviewing a letter from Shell related to Mr. Judd's standing and was drafting a response letter to the ERCB. The AER is therefore prepared to make an award for Hayduke's time entries from September 5, 2012, to November 7, 2012. It will not make an award for the entries that precede September 5, 2012, which total 11.6 hours.

[118] Shell submitted that no costs award should be made for Hayduke's search for a pipeline integrity expert or economic expert. Shell noted that Mr. Judd did not file any expert reports and did not present any such experts at the hearing. Hayduke stated that it was never Mr. Judd's intention that such an expert would give evidence at the hearing. Instead, Hayduke intended to draw on experts to help Mr. Sawyer craft cross-examination questions.

[119] In the AER's opinion, Mr. Judd's hearing submission is an eight-page clear, concise, and plainly worded statement of his concerns about the applications and Shell's operating history in the area. There is much to commend about the document as it effectively expresses Mr. Judd's position. However, nothing indicates that any pipeline or economic expert was involved in preparing it. No expert attended the hearing to assist Mr. Sawyer during his cross-examination or otherwise. The AER is therefore not prepared to make an award that relates to either the search for or provision of an expert's services. Shell noted that Hayduke's account included fourteen time entries that indicated time spent searching for an expert. Although the total time of those entries is 78.5 hours, Shell correctly indicated that the time entries include references to other billable activities. The AER agrees that it is not possible to discern from the information filed in the costs claim exactly what portion of Hayduke's fourteen time entries relate to Mr. Sawyer's search for experts. Shell proposed a total time deduction of 14 hours, based on one hour per time entry. In the absence of better information, the AER believes that this is a reasonable approach and will deduct an amount equal to 14 hours of services from the award for Hayduke's professional fees.

[120] In summary, the AER has decided that 30.4 hours of the 238.4 hours claimed for preparation time by Mr. Sawyer were not directly and necessarily incurred because of the hearing. As a result, the AER will consider whether the remaining 208 preparation hours are reasonable under the circumstances of the proceeding.

[121] In addition to the time deductions for the particular entries described above, the AER agrees with Shell that the time claimed for Hayduke's hearing preparation is excessive, given the scope of the hearing and Mr. Judd's participation in it. The AER believes that it is appropriate to refer to the preparation fees awarded to Mr. Judd in *ECO 2011-008*, as the 2010 hearing considered the very same pipeline and facility applications that were the subject of the 2013 hearing, but also included Shell's Waterton 68 well application and the participation of numerous other interveners. Mr. Judd's participation and position in the 2010 hearing, as well as his representation in it by Mr. Sawyer of Hayduke, is entirely consistent with what transpired in the 2013 hearing, even though the 2013 hearing was a much smaller event given that Mr. Judd was the only intervener and there was no well licence application being considered.

[122] As previously stated, Mr. Judd's written hearing submission is eight pages long and contains no expert reports or opinions. The bulk of the submission restates Mr. Judd's long-standing concerns about Shell's operational history in the area. These are essentially the same concerns he raised in the 2010 hearing. The submission includes, however, statements from *Decision 2011 ABERCB 007: Shell Canada Limited, Applications for Well, Facility, and Pipeline Licences, Waterton Field*, and relates those statements to Mr. Judd's concerns. It is also clear from Hayduke's account that Mr. Sawyer reviewed the material provided by Mr. Duncan, the independent witness. Both those aspects of the submission represent new information, i.e., analysis and material that did not exist or could not have existed at the time of the 2010 hearing. The other written material filed during the proceeding by Hayduke on Mr. Judd's behalf, after the notice of hearing was issued, related either to Mr. Judd's adjournment request (which the AER has determined was unnecessary) or Hayduke's response to Shell's concern about Mr. Judd filing the 2007 and 2010 hearing transcripts, which the AER has indicated was an unnecessary and ill-conceived effort.

[123] In the AER's opinion, a substantial portion of Mr. Judd's hearing submission and evidence restated or relied on information that was previously compiled for or provided at the 2010 hearing, and even previous hearings on Shell's Carbondale system. Given that the 2013 hearing

was essentially a reconsideration of the same pipeline and facility applications that were included in the 2010 hearing, with the added benefit of *Decision 2011 ABERCB 007* and Mr. Duncan's independent review of Shell's operations, it is difficult to conceive how a reasonable award for Hayduke's hearing preparation costs could possibly exceed the corresponding amount that was awarded in *ECO 2011-008*.

[124] In *ECO 2011-008*, the AER awarded Mr. Judd \$28 386.56 for Hayduke's professional fees, at the rate of \$125 per hour. After deducting an amount equal to the fees awarded for hearing attendance (i.e., 105 hours, including argument), the award represents about 122 hours of preparation and travel time. Assuming that travel time was 30 hours (the claim in this costs proceeding) at \$62.50 per hour, the award for actual preparation time equals about \$13 400 or 107 hours. The AER has determined that an award for preparation costs equal to 100 hours is reasonable in the circumstances and considering the scope and complexity of the 2013 proceeding, in particular that Shell's application was essentially a refiling of the 2010 pipeline and battery applications and that Mr. Judd filed a relatively limited intervention.

[125] Shell submitted that the costs awarded to Mr. Judd should be reduced substantially to account for Mr. Sawyer's "clear disregard for AER directions . . . unduly repetitive conduct, irrelevant evidence and argument, and disruptive, irresponsible and inappropriate behaviour." Hayduke acknowledged that Mr. Judd's costs award for the 2010 hearing was reduced as a result of Mr. Sawyer's conduct during the proceeding. Hayduke characterized those reductions as punitive, and explained that the conduct was the product of a hearing process that is inherently adversarial.

[126] The AER does not regard such reductions as being punitive in nature, although it is correct to say that costs awards are intended to encourage conduct that enhances the fairness, efficiency, and effectiveness of an AER proceeding and discourage behaviour that has the opposite effect. In *ECO 2011-008*, the AER was critical of Mr. Sawyer's conduct in the 2010 hearing, which was reflected in the costs awarded to Mr. Judd. Shell argued for similar reductions in this costs proceeding on the basis that Mr. Sawyer's conduct during the 2010 hearing was repeated during the 2013 hearing. The AER does not share this view and is encouraged that Mr. Sawyer's demeanor and treatment of other participants during the 2013 hearing was an improvement over that of the 2010 hearing. However, this does not suggest that there is no room or need for more improvement in this regard. While it is true that AER hearings are adversarial, it does not mean that proceedings must be acrimonious, which unfortunately seems to be the result when Mr. Sawyer participates with his full vigour and conviction.

[127] Considering the factors listed in section 64(2) of the *Rules of Practice*, the AER has decided that a further reduction in the costs awarded to Mr. Judd is not warranted in relation to Mr. Sawyer's conduct of Mr. Judd's intervention in the proceeding. The AER will therefore award Mr. Judd the following amounts for the services provided by Hayduke:

- 100 preparation hours at \$125 per hour,
- 31.5 hearing attendance hours (including argument and reply) at \$125 per hour, and
- 30 travel hours at \$62.50 per hour.

c) Disbursements to be Awarded

[128] Shell correctly indicated that the AER only awards costs for meals required during the hearing itself. Hayduke submitted that the cost of meals taken while travelling to a hearing should also be recoverable. The costs rules are quite clear on this point: that only meals purchased during the hearing itself are eligible for recovery. The AER will therefore award a meal *per diem* equivalent to the four days of the hearing, or \$160.00.

[129] Shell stated that Hayduke's claim for mileage from Smithers to Pincher Creek should be based on a return trip of 2732 km. Hayduke submitted that Googlemaps.com, which Shell relied upon for its distances, does not accurately reflect actual travel distances. Hayduke also stated that the mileage claim included trips between the hearing venue in Pincher Creek and Mr. Judd's residence.

[130] Hayduke did not indicate the basis for its belief that actual travel distance between Smithers and Pincher Creek was greater than the distance indicated by Shell. In fact, Hayduke did not specify what that greater travel distance was in its opinion. As a result, the best information before the AER is that the return trip is 2732 km. In addition, based upon receipts for accommodation that were ultimately provided by Hayduke, it is apparent that Mr. Sawyer stayed in Pincher Creek during the hearing. The scale of costs also states that mileage claims are restricted to intercity travel distances of 50 km or more. Therefore, the AER will award mileage for Hayduke's disbursements at the scale of costs rate of \$0.505/km for 2732 km.

[131] Initially, Hayduke did not provide receipts supporting its costs claim for accommodation. Shell noted that *Directive 031* requires receipts to be provided as part of a costs claim but did not take issue with the amount of the claim. Hayduke subsequently provided a receipt to the AER for three nights of accommodation during the hearing. Based upon that receipt and the fact that Shell took no issue with the reasonableness of this part of the claim, the AER has decided to award Hayduke's costs for accommodation in the amount claimed by Mr. Judd.

[132] Shell did not take issue with Hayduke's remaining disbursement items. The AER has reviewed these and finds them to be reasonable and within what is permitted under the scale of costs.

[133] The AER therefore awards Mr. Judd the total amount of \$2118.78 for the claim for Hayduke's disbursements.

Mike Judd's Honoraria and Disbursements

[134] Mr. Judd claimed preparation and attendance honoraria, a meal per diem for each of the four hearing days, and vehicle travel mileage. Shell did not take issue with any of Mr. Judd's claim. The AER has decided that Mr. Judd qualifies for honoraria and will award those as claimed.

[135] The AER notes that Mr. Judd's mileage claim equals 280 km of travel between the hearing and his start and end point. However, the AER has no other information about the vehicle trips on which the claim is based. As stated above, the scale of costs permits mileage claims for intercity trips of 50 km or more. Without knowing how many vehicle trips Mr. Judd's mileage claim is based upon, or the beginning and end points of Mr. Judd's travel (depending on whether it was travel to or from the hearing venue), the AER is unable to decide if the scale of costs requirement has been met. Considering the fact that Shell does not take issue with this part of the claim, and considering that Shell may have better information about Mr. Judd's vehicle travel

during the hearing, the AER will award Mr. Judd for disbursements in the amounts claimed in his costs claim.

ORDER

[136] The AER hereby orders that Shell Canada Limited pay local intervener costs to Mike Judd in the amount of \$21 832.68 and GST in the amount \$1036.63 for a total of \$22 869.31. This amount must be paid to the order of Hayduke & Associates Ltd. as the submitter of the claim at

Hayduke & Associates Ltd.
PO Box 5184
Smithers BC V0J 2N0

Dated in Calgary, Alberta, on November 18, 2013.

ALBERTA ENERGY REGULATOR

<original signed by>

A. H. Bolton, P. Geo.
AER Hearing Commissioner

APPENDIX A SUMMARY OF COSTS CLAIMED AND AWARDED

This appendix is not available on the AER's website. To order a copy of this appendix, contact AER Information Product Services toll free at 1-855-297-8311.