



AltaLink Management Ltd.

500kV Transmission Line
Genesee to Lochend to Langdon

Interim Cost Awards

ALBERTA ENERGY AND UTILITIES BOARD

Energy Cost Order 2008-002: AltaLink Management Ltd.

500kV Transmission Line – Genesee to Lochend to Langdon

Application No. 1478550

Cost Application No. 1504491

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ALBERTA ENERGY AND UTILITIES BOARD

Calgary, Alberta

**AltaLink Management Ltd.
500kV Transmission Line (Genesee to Lochend)
Interim Funding**

**Energy Cost Order 2008-002
Application No. 1478550
Cost Application No. 1504491**

1 INTRODUCTION

On November 2, 2006 the Alberta Energy and Utilities Board (EUB or Board) commenced the AltaLink Management Ltd. (AltaLink) 500 kV proceeding (the Proceeding). The hearing involved 37 sitting days and the filing of extensive written argument and reply. On September 30, 2007 the Board issued Decision 2007-075 in which it declared that the Proceeding, and two related proceedings, were void on the ground of reasonable apprehension of bias.

On August 28, 2007 the EUB notified interested parties of the following process for the filing of cost claims.

The Following schedule sets out the process for the filing of intervener cost claims, comments, and responses. Cost claims are to be filed in accordance with Directive 031A, *Guidelines for Energy Cost Claims*. Intervenors are also reminded to ensure that they provide a full copy of their claim to the applicants.

Filing of Intervener Cost Claims September 25, 2007

Applicants' Comment to Cost Claims October 22, 2007

Intervenors' Response to Comments November 5, 2007

On September 25, 2007 it came to the EUB's attention that 26 participants did not receive the notice of August 28, 2007 as they do not have e-mail. The EUB provided these participants with an opportunity to file a cost claim by October 12, 2007. The EUB also revised the filing deadline for comments and responses to October 29, 2007 and November 9, 2007 respectively.

The Board received a number of cost claims totalling \$2,775,490.05.

On November 25, 2007 the Board received comments from Mr. Donald Bur regarding the Board's jurisdiction and authority to award costs. Mr. Bur noted the retirement of the three Panel Members that presided over the Proceeding and stated the following.

... The termination of the positions of Messrs. Douglas, Lock and Nichol, therefore, does not give the remaining Board any greater legitimacy than the panel had to compromise or reduce the claims for costs from the various intervenors.

To the best of my knowledge, Messrs. Douglas, Lock and Nichol do not have the authority to render a decision on the issue of costs now that they have left the Board. As the whole Board continues to be tainted with the apprehension of bias, and therefore there is no ability of the Board to rid itself of that taint by replacing the decision-makers on this issue, if the Board or any part of it takes over the task of awarding costs, they continue to

create an apprehension of bias. Further, since the remaining members of the Board did not sit during the hearings, they have even less authority or legitimacy to make any adjustments to the amounts claimed.

On January 4, 2008 the Board invited parties to respond to Mr. Bur's comments, specifically with respect to the Board's jurisdiction to scrutinize the costs claimed. On or about January 25, 2008 the following parties submitted a response in support of Mr. Bur's comments.

- Lavesta Area Group, as represented by Mr. Anglin and Mr. Bodnar
- Chinook Country Law Office
- Kevin and Marge Good
- Graves Engineering Corporation
- Donna McVittie

The following parties disagreed with the position set out by Mr. Bur.

- Mr. Gavin Fitch on behalf of The 566 Corridor Group, Larry and Janice Evans, the East and West Crossfield Groups, the B-H Group, the Knights, Matiisens and Mrs. McClung, the Pratt Group and the Kure Group.
- AltaLink Management Ltd.

Mr. Fitch contended that the Board retained jurisdiction to adjudicate on the cost claims and stated the following.

As pointed out by AltaLink in its submissions filed earlier today, that jurisdiction arises under s. 28 of the *Energy Resources Conservation Act*. By contrast, the Board's jurisdiction to consider the need for the transmission line and AltaLink's specific facilities application arose under sections of the *Electrical Utilities Act* and the *Hydro and Electric Energy Act*, respectively. In other words, the Board's jurisdiction to award costs arises under a completely separate statute and statutory provision. The jurisdiction to award costs is not in any way dependent upon the Board having retained jurisdiction in the applications made under the *Hydro and Electric Energy Act* and/or the *Electric Utility Act*. Accordingly, it follows in the submission of these Interveners that the Board has full power and jurisdiction to consider costs by way of a separate proceeding. Indeed, we note that in this case the Board has assigned Application No. 1504491 in respect of the costs claims filed arising out of the transmission line hearing. Simply put, it is a separate proceeding.

Further, these Interveners would point to sections 16 and 20 of the *Energy Resources Conservation Act*. These sections read:

Section 16

"The Board, in the performance of the duties and functions imposed by this Act and by any other Act, may do all things that are necessary for or incidental to the performance of any of those duties or functions."

Section 20

"The Board, with the approval of the Lieutenant Governor and Council, may take any action and may make any orders and directions that the Board considers necessary to effect the purposes of this act and that are not otherwise specifically authorized by this act."

Clearly, the Board has broad, residual jurisdiction to do all things necessary to the proper carrying out of its statutory duties under the legislation. Having received Local Intervener Cost Claims from the various Interveners who participated in the AltaLink transmission line proceeding, the Board is under a statutory duty to consider and adjudicate those claims. The Board clearly has the necessary power to do that.

Finally, these Interveners submit that a failure by the Board to consider and award costs to the Interveners who have filed cost claims in respect of the AltaLink proceeding would constitute a breach by the Board of its duty of fairness. Specifically, these Interveners state that they (and indeed all the other Interveners) had (and continue to have) a legitimate expectation that the Board would consider and award costs in respect of claims validly submitted under s. 28 of the *Energy Resources Conservation Act*.

2 HEARING COSTS PANEL

The Board considered the comments received at a meeting on March 12, 2008. The Board established a division of the Board consisting of Acting Board Members (the Hearing Costs Panel) appointed after the issuance of EUB Decision 2007-075 who have had no involvement whatsoever with any matter related to the 500 kV proceeding to consider the following 2 matters.

1. Does the Board have the authority to scrutinize the costs claimed given the circumstances surrounding the 500 kV proceeding?
2. If the Board has the necessary jurisdiction to scrutinize the costs claimed, what costs should be awarded to the claimants?

3 JURISDICTION TO SCRUTINIZE COSTS

The Hearing Costs Panel is satisfied that it has the necessary jurisdiction to deliberate and decide upon the costs claimed. It derives its authority to scrutinize the costs claimed in this Proceeding pursuant to Section 28 of the *Energy Resources Conservation Act*, Part 5 of the EUB's *Rules of Practice*, and EUB Directive 31A. Essentially these provisions establish a separate proceeding for the approval of costs initiated by an application for costs that is procedurally fair and in accordance with the rules of natural justice. This separate process allows local interveners to file submissions justifying the costs claimed and to respond to any concerns raised by the applicant with respect to those costs. Section 28 refers to the Board and not specifically to the division of the Board that considered the application that triggered the cost claim. In this respect, the Hearing Costs Panel finds that consideration of the 500 kV cost claim may be made by the Board as a whole or a division of the Board.

The Hearing Costs Panel also notes that the Supreme Court of Canada has recognized a "doctrine of necessity" that may also be applicable in this case. The following passage from a decision of the High Court of Australia was adopted by the SCC in *Reference re: Remuneration of Judges of the Provincial Court* [1998] S.C.J. No. 10.

... the rule of necessity is, in an appropriate case, applicable to a statutory administrative tribunal, as it is to a court, to prevent a failure of justice or a frustration of statutory provisions. That rule operates to qualify the effect of what would otherwise be actual or ostensible disqualifying bias so as to enable the discharge of public functions in

circumstances where, but for its operation, the discharge of those functions would be frustrated with consequent public or private detriment. There are, however, two *prima facie* qualifications of the rule. First, the rule will not apply in circumstances where its application would involve positive and substantial injustice since it cannot be presumed that the policy of either the legislature or the law is that the rule of necessity should represent an instrument of such injustice. Secondly, when the rule does apply, it applies only to the extent that necessity justifies.

The Hearing Costs Panel observes that it is the ratepayers of Alberta that will ultimately be responsible for the costs approved for the Proceeding. In this respect, the Hearing Costs Panel considers that failure to scrutinize the costs claimed in accordance the legislated criteria could result in public detriment. Section 57 of the EUB's *Rules of Practice* provides criteria for the Board's consideration of hearing costs and states as follows.

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

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

The Hearing Costs Panel understands that this provision was enacted to ensure that the party paying the costs, whether it be a private interest or, as in this case, Alberta ratepayers, is required to cover only those costs adjudged by the Board to be reasonably incurred.

4 INTERIM COST ORDER

The Hearing Costs Panel recognizes that considerable time has elapsed since the Proceeding concluded and that it would be appropriate to make interim awards.

The Hearing Costs Panel has not scrutinized or otherwise evaluated the costs claimed by participants for the purposes of this Order, the Hearing Costs Panel will, however, do so in the final Cost Order.

This interim cost award will address local intervener claims for attendance honoraria and legal and consulting fees only. All other fees and honoraria claimed will be addressed in the final cost order for this proceeding. However, the costs awarded in this Order have been adjusted to ensure compliance with the Scale of Costs, Directive 31A, and previous EUB cost decisions.

If parties requested an award of fees or honoraria that exceed those prescribed by the Scale of Costs and Directive 31A, the Hearing Costs Panel will consider those requests in its final Cost Order.

5 PREVIOUS INTERIM AND ADVANCE FUNDING AWARDS

The Hearing Costs Panel recognizes that interim and advance funding awards were previously approved for the following parties.

- Ackroyd LLP, William McElhanney (June 20, 2007)
- Chinook County Law Office, Brett Barclay (June 11, 2007)
- Julian Bodnar, Barrister and Solicitor (July 23, 2007)
- Carscallen Lockwood LLP, Michael Niven, Q.C. (March 16, 2007)

The Hearing Costs Panel has taken into account these previous awards in its determination of this interim award.

6 HONORARIA CLAIMS

This Interim Cost Order will not address honoraria claims for the forming of a group or preparation for the proceeding. Those honoraria will be addressed in the final Cost Order for this proceeding.

The Hearing Costs Panel is only considering attendance honoraria in this Interim Order based upon the Board's approved rate of \$50.00 per half day of attendance¹.

7 PROFESSIONAL FEES

The Hearing Costs Panel notes that interveners were either self represented, or represented by legal counsel, or a representative/agent.

With respect to intervener groups who hire representatives/agents, the following passage in Energy Cost Order 2006-002, is instructive.

It is the Board's practice to allow those who do not hold a law degree to appear before it as an agent or representative of an intervener. As noted in [Decision 2004-101](#), this custom is consistent with the principles of openness and flexibility that characterize administrative tribunals and in the Board's view the hiring of an agent generally provides for a more efficient and effective intervention. In that regard the Board expects that all agents who represent interveners at a Board proceeding are knowledgeable about the industry and fully understand the Board's governing legislation, *Rules of Practice*, and Directive 031A.

Joseph Anglin acted as representative/agent for a number of interveners; however the Hearing Costs Panel notes that Mr. Anglin claims the maximum hourly rate of \$250.00 prescribed in the Scale of Costs for lawyers, analysts, consultants, and experts². In previous Cost Orders³, the Board approved professional fees for a representative/agent in the range of \$65.00 - \$125.00. The Hearing Costs Panel finds the maximum amount approved for a representative/agent to date

¹ Directive 031A, Part 6.1.2, page 8

² Directive 031A, Appendix D *Scale of Costs*, page 27

³ ECO 2002-009, ECO 2003-05, ECO 2004-04, 2005-009, ECO 2005-013, ECO 2006-002

is appropriate for the purposes of this interim cost award. Therefore, Mr. Anglin's interim cost award is based on an hourly rate of \$125.00.

Donna McVitte acted as representative/agent for Josephine Romaine and claims fees at various hourly rates (\$35.00 - \$85.00). The Hearing Costs Panel notes that Ms. McVitte submitted the required energy cost claim forms and detailed accounting. However, The Hearing Costs Panel finds that it has insufficient information to assess Ms. McVitte's role as representative/agent, and associated hourly rates. The Hearing Costs Panel asks Ms. McVitte to submit her Curriculum Vitae together with any other information which may assist in understanding her knowledge and experience with industry, the relevant legislation, the Board's *Rules of Practice*, and Directive 031A. Accordingly Ms. McVitte's claim for representative fees will be assessed in its entirety in the final Cost Order. However, the Hearing Costs Panel does recognize the attendance time is claimed in accordance with Directive 031A, and therefore has made an interim award for this portion of the claim.

Finally, the Hearing Costs Panel notes that significant concerns were raised by Altalink in its letter to the Board dated October 29, 2007 with respect to fees claimed by Rein Mattisen for work performed by Insignis Strategic Research. Given the concerns raised, interim funding for this expert will not be awarded and the Hearing Costs Panel will consider the entirety of the claim in the final Cost Order.

8 INTERIM COST AWARDS

When making interim cost awards under section 52 of the *Rules of Practice*, the practice is to award only a percentage of the costs claimed exclusive of GST. In this instance, the Hearing Costs Panel considers that it would be reasonable to allow parties to receive interim funding of 50% of their legal/representative/agent and consulting costs up to a maximum of \$70,000.00. For example, if an intervener claimed legal fees of \$180,000.00 and consulting fees of \$100,000.00, the interim order would grant legal fees of \$70,000.00 and consulting fees of \$50,000.00 for a total of \$120,000.00.

In addition, for those interveners who claimed attendance honoraria, the Hearing Costs Panel approves on an interim basis, attendance honoraria calculated at \$50 per half day of attendance.

In giving this interim funding, the Hearing Costs Panel makes no determination respecting the value of any intervener's participation.

Any intervener that accepts interim funding pursuant to this Interim Order accepts the risk that, if its final cost award relating to the proceedings is less than the amount of the interim funding advanced pursuant to this Interim Order, it will be required to repay the difference.

9 ORDER

IT IS HEREBY ORDERED:

1. AltaLink Management Ltd. shall pay interim funding in the amount of \$766,810.78, on an interim refundable basis.

2. AltaLink Management Ltd. shall record the interim funding approved in the amount of \$766,810.78 in its Hearing Cost Reserve Account. The amount should be identified as an advance, pending final determination and award of costs.

Dated in Calgary, Alberta on this 21st day of April, 2008.

ALBERTA ENERGY AND UTILITIES BOARD

(Original signed by)

John F. Curran, Q.C.

Acting Member (Presiding Member)

(Original signed by)

Donna Tingley

Acting Member

(Original signed by)

Donald James Turner

Acting Member

APPENDIX A – SUMMARY OF COSTS CLAIMED AND AWARDED



Appendix A