



**BHEC-RES Alberta G.P. Inc.**

**Forty Mile Wind Power Project**

**Costs Award**

**October 26, 2018**

**Alberta Utilities Commission**

Decision 23787-D01-2018

BHEC-RES Alberta G.P. Inc.

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Proceeding 23787

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## Contents

<b>1</b>	<b>Introduction .....</b>	<b>1</b>
<b>2</b>	<b>The Commission’s authority to award costs and intervener eligibility .....</b>	<b>2</b>
<b>3</b>	<b>Commission findings on the cost claim of Ms. Anita Jenkins.....</b>	<b>2</b>
3.1	Ackroyd LLP.....	3
3.2	FDI Acoustics Inc. ....	5
3.3	Cottonwood Consultants Ltd. ....	6
3.4	Dr. Mariana Alves-Pereira .....	7
3.5	Ms. Anita Jenkins.....	8
<b>4</b>	<b>Order .....</b>	<b>9</b>

**Alberta Utilities Commission**  
**Calgary, Alberta**

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## **1 Introduction**

1. In this decision the Alberta Utilities Commission considers an application by Ackroyd LLP on behalf of Ms. Anita Jenkins (the costs claim application) for approval and payment of her costs of participation in Proceeding 22966<sup>1</sup> (the original proceeding). The following table sets out the costs claimed and the amounts awarded:

Claimant	Total Fees Claimed	Total Disbursements Claimed	Total GST Claimed	Total Amount Claimed	Total Fees Awarded	Total Disbursements Awarded	Total GST Awarded	Total Amount Awarded
Ms. Anita Jenkins								
Ackroyd LLP	\$69,699.00	\$4,592.06	\$3,700.76	\$77,991.82	\$69,699.00	\$4,317.17	\$3,700.72	\$77,716.89
FDI Acoustics Inc.	\$7,260.00	\$0.00	\$363.00	\$7,623.00	\$7,260.00	\$0.00	\$363.00	\$7,623.00
Cottonwood Consultants Ltd.	\$21,802.50	\$0.00	\$1,090.13	\$22,892.63	\$21,802.50	\$0.00	\$1,090.13	\$22,892.63
Mariana Alves-Pereira, PhD	\$6,615.00	\$0.00	\$0.00	\$6,615.00	\$3,307.50	\$0.00	\$0.00	\$3,307.50
Honorarium	\$300.00	\$1,256.55	\$35.45	\$1,592.00	\$300.00	\$1,021.98	\$35.13	\$1,357.11
<b>Total</b>	<b>\$105,676.50</b>	<b>\$5,848.61</b>	<b>\$5,189.34</b>	<b>\$116,714.45</b>	<b>\$102,369.00</b>	<b>\$5,339.15</b>	<b>\$5,188.98</b>	<b>\$112,897.13</b>

2. The Commission has awarded reduced costs to the applicant for the reasons set out below.

3. The original proceeding was convened by the Commission to consider the application filed by BHEC-RES Alberta G.P. Inc. (RES) for the construction and operation of a wind power project and a collector substation in the Bow Island area. It involved multiple rounds of information requests (IRs) and responses to IRs, written evidence and an oral hearing held from June 27 to June 29, 2018. The close of record for the original proceeding was June 29, 2018 and the Commission issued Decision 22966-D01-2018<sup>2</sup> on August 30, 2018.

4. Ms. Jenkins' costs claim application was submitted on July 27, 2018, within the 30 day timeline permitted by the Commission's rules, and was amended on August 3, 2018. The Commission assigned Proceeding 23787 and Application 23787-A001 to the costs application. On August 14, 2018, RES filed comments on Ms. Jenkins' costs claim.

5. On August 28, 2018, Ackroyd LLP (Ackroyd) filed Ms. Jenkins' response to the comments filed by RES. The Commission considers the close of record for this proceeding to be

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<sup>1</sup> Proceeding 22966: BHEC-RES Alberta G.P. Inc., Forty Mile Wind Power Project.

<sup>2</sup> Decision 22966-D01-2018: BHEC-RES Alberta G.P. Inc., Forty Mile Wind Power Project, Proceeding 22966, August 30, 2018.

August 28, 2018, the date upon which the final submissions on the cost claim application were received.

## **2 The Commission’s authority to award costs and intervenor eligibility**

6. Only “local interveners” are eligible to claim costs in facility related applications. The Commission’s authority to award costs for the participation of a local intervenor in a hearing or other proceeding on an application to construct or operate a hydro development, power plant or transmission line under the *Hydro and Electric Energy Act* or a gas utility pipeline under the *Gas Utilities Act* is found in Sections 21 and 22 of the *Alberta Utilities Commission Act*. When considering a claim for costs for a facilities proceeding, the Commission is also guided by the factors set out in Section 7 of Rule 009: *Rules on Intervenor Costs* and the Scale of Costs found in Appendix A of Rule 009.

7. Section 7 of Rule 009 provides that the Commission may award costs to a local intervenor, in accordance with the Scale of Costs, if the Commission is of the opinion that:

**7.1.1** the costs are reasonable and directly and necessarily related to the hearing or other proceeding, and

**7.1.2** the local intervenor acted responsibly in the hearing or other proceeding and contributed to a better understanding of the issues before the Commission.

8. Section 22 of the *Alberta Utilities Commission Act* defines what a “local intervenor” is and states:

22(1) For purposes of this section, “local intervenor” means a person or group or association of persons who, in the opinion of the Commission,

(a) has an interest in, and

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

land that is or may be directly and adversely affected by a decision or order of the Commission in or as a result of a hearing or other proceeding of the Commission on an application to construct or operate a hydro development, power plant or transmission line under the *Hydro and Electric Energy Act* or a gas utility pipeline under the *Gas Utilities Act*, but unless otherwise authorized by the Commission does not include a person or group or association of persons whose business interest may include a hydro development, power plant or transmission line or a gas utility pipeline.

## **3 Commission findings on the cost claim of Ms. Anita Jenkins**

9. Ms. Anita Jenkins owns land within 1,100 metres of the proposed project. Given the proximity of this property to the Forty Mile Wind Power Project, the Commission was satisfied that Ms. Jenkins had an interest in, and was entitled to occupy, land that may be directly and adversely affected by the Commission’s decision on RES’ application and granted Ms. Jenkins

standing.<sup>3</sup> For those same reasons, the Commission is satisfied that Ms. Jenkins is a local intervener within the meaning of Section 7 of Rule 009 and eligible for cost recovery.

10. The following table summarizes Ms. Jenkins' costs claimed in the original proceeding:

Claimant	Hours			Fees	Disbursements	GST	Total
	Preparation	Attendance	Argument				
Ms. Anita Jenkins							
Ackroyd LLP	202.40	41.70	3.80	\$69,699.00	\$4,592.06	\$3,700.76	\$77,991.82
FDI Acoustics Inc.	42.00	0.00	0.00	\$7,260.00	\$0.00	\$363.00	\$7,623.00
Cottonwood Consultants Ltd.	64.50	12.50	3.75	\$21,802.50	\$0.00	\$1,090.13	\$22,892.63
Mariana Alves-Pereira, PhD	18.00	2.50	4.00	\$6,615.00	\$0.00	\$0.00	\$6,615.00
Honorarium	0.00	0.00	0.00	\$300.00	\$1,256.55	\$35.45	\$1,592.00
Total	326.90	56.70	11.55	\$105,676.50	\$5,848.61	\$5,189.34	\$116,714.45

11. The Commission's findings in relation to each of the costs claimed are detailed in the sections that follow.

### 3.1 Ackroyd LLP

12. Ackroyd represented Ms. Jenkins in the original proceeding. The fees claimed by Ms. Jenkins for the legal services provided by Mr. Richard Secord and Ms. Ifeoma Okoye relate to reviewing the application, drafting IRs, corresponding with experts, reviewing responses to IRs, reviewing evidence, preparing cross-examination, preparing for and attending the hearing, and drafting argument.

### Comments from RES

13. RES submitted that the conduct of Ms. Jenkins' counsel unnecessarily lengthened the original proceeding through repetitive cross-examination and by not effectively acting as a gatekeeper with respect to the evidence submitted by expert witnesses and the brevity of direct evidence.

14. RES further submitted that counsel did not ensure that evidence presented by expert witnesses was relevant and helpful, arguing that counsel has a responsibility to guide experts to ensure that the evidence presented is relevant to the proceeding and helpful to the Commission.

15. RES also submitted that the attendance hours included in the costs claim for Ms. Jenkins' counsel were higher than the 20 hours of actual attendance at the hearing, with the remaining claimed time relating to hearing preparation or correspondence.

<sup>3</sup> Exhibit 22966-X0112, Ruling on standing.

## Reply from Ms. Jenkins

16. Ms. Jenkins submitted that her counsel's direct examination and cross examination were completed within the estimated time periods stated in her letter to the Commission regarding witnesses and timing estimates<sup>4</sup> and that the hearing concluded within the three day period scheduled.

17. Ms. Jenkins submitted there was no error in the summary of attendance hours for Ms. Okoye included on the costs claim. She explained that the attendance hours included time spent during the three day hearing but excluded time spent on final argument, and that Ackroyd has always presented its accounts in this manner.

## Commission findings

18. Counsel for a party has a role in ensuring that there is a connection between the issues of concern to the party and the evidence brought by expert witnesses on the party's behalf. There must be some relation between a party's objectives in participating in a proceeding and the evidence brought by expert witnesses and consultants, while ensuring that independent evidence is fair, objective and non-partisan. However, in the circumstances of the original proceeding, the role of counsel does not entail the level of control over the substance of an independent witness's testimony that appears to be contemplated by the arguments submitted by RES. While effective counsel can play a significant role in ensuring efficient regulatory processes, the Commission does not consider that the conduct of Ms. Jenkins' counsel in this proceeding forms a basis for disallowing all or part of the costs claimed by Ms. Jenkins' counsel.

19. The Commission further recognizes that the time Ackroyd claimed for "attendance" at the hearing included hours of preparation or correspondence in addition to the actual hours of hearing time which occurred. However, the Commission is satisfied that the additional hours claimed are consistent with Ackroyd's invoice and does not consider it unreasonable to include those hours under the heading of "attendance" and accordingly would not disallow costs on this basis.

20. For the reasons articulated above, the Commission finds that that the services performed by Ackroyd were directly and necessarily related to Ms. Jenkins' participation in the original proceeding, and that the fees claimed in accordance with the Scale of Costs for those services were reasonable.

21. The disbursements claimed for Ackroyd were not all claimed in accordance with the Scale of Costs. The claim made for Red Deer Husky receipt number 71628704 for items outside of the Scale of Costs is disallowed. The claim made for accommodation by Ackroyd is not in accordance with the rates permitted by the Scale of Costs. The Commission has therefore determined that a reduction in the daily rate for accommodation from the claimed rate of \$221.70 to \$140.00 for three days is warranted.

22. The Commission approves the remaining disbursements for meals, mileage, transcripts, courier fees, long distance phone calls, photocopying, scanning and corporate searches in the

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<sup>4</sup> Exhibit 22966-X0177, 2018 06 22 LT AUC - Witnesses and timing estimates.

amount of \$3,849.83. Consequently, the Commission approves total disbursements for Ackroyd in the amount of \$4,317.17 inclusive of the accommodation approved.

23. Accordingly, the Commission approves Ms. Jenkins' claim for legal fees for Ackroyd in the amount of \$69,699.00, disbursements of \$4,317.17 and GST of \$3,700.72 for a total of \$77,716.89.

### **3.2 FDI Acoustics Inc.**

24. FDI Acoustics Inc. (FDI) was retained by Ms. Jenkins to perform consulting services in the original proceeding. The fees claimed by Ms. Jenkins for the consulting services provided by Mr. James Farquharson relate to reviewing the noise impact assessments filed by RES, drafting information requests, testing and verifying the accuracy of RES' noise modeling, conferring with counsel and assisting counsel with cross examination questions on audible noise.

### **Comments from RES**

25. RES submitted in its comments that the fees incurred by FDI are unreasonable because they did not directly contribute to improving the Commission's understanding of the issues in the proceeding, and without any evidence being filed, the Commission did not have an opportunity to directly review FDI's contribution to Ms. Jenkins' intervention. RES submitted that costs for consulting services and preparation time for Mr. Farquharson were excessive given their relative utility to the Commission's understanding of the issues and given the limited scope of the issues.

26. RES submitted that significant portions of the evidence presented by Ms. Jenkins' expert witnesses were of a general nature and did not directly relate to the Forty Mile Wind Power Project.

### **Reply from Ms. Jenkins**

27. Ms. Jenkins submitted that the expert witness evidence was relevant and contributed to an understanding of the issues and that the total amount of the cost claim is at the lower level of cost claims submitted to the Commission for a three day wind turbine hearing.

28. Although FDI did not file an report in the proceeding, Ms. Jenkins submitted in her costs claim that those services were related to preparation of IRs and cross-examination.

### **Commission findings**

29. Based on its review of the record of this proceeding and of Proceeding 22966, the Commission is satisfied that the costs incurred by FDI were directly and necessarily related to Ms. Jenkins' participation in Proceeding 22966, that they contributed to the Commission's understanding of the issues and that the fees which were claimed in accordance with the Scale of Costs for those services were reasonable. The Commission does not find that the lack of a report necessarily precludes recovery of the costs of a consultant's assistance in reviewing and understanding technical issues in the proceeding. The Commission considers that judicious use of consulting services by an intervener to gain an understanding of technical issues and determine the scope of their intervention, without necessarily producing a report, can be a reasonable approach. In the circumstances of the original proceeding, the Commission finds that

this approach likely contributed to the efficiency of the proceeding and is satisfied that FDI contributed to an understanding of noise issues in this proceeding.

30. Accordingly, the Commission approves Ms. Jenkins' claim for consulting fees for FDI in the amount of \$7,260.00 and GST of \$363.00 for a total of \$7,623.00.

### **3.3 Cottonwood Consultants Ltd.**

31. Cottonwood Consultants Ltd. was retained by Ms. Jenkins to perform consulting services in the original proceeding. The fees claimed by Ms. Jenkins for the consulting services provided by Mr. Cliff Wallis relate to preparing an expert report on environmental and biodiversity impacts of the proposed project, responding to IRs, assisting counsel with cross-examination, preparing an opening statement and presenting expert evidence at the hearing.

### **Comments from RES**

32. RES submitted that costs for consulting services and preparation time for Mr. Wallis were excessive given their relative utility to the Commission's understanding of the issues and the limited scope of the issues.

33. RES submitted that significant portions of the evidence presented by Ms. Jenkins' expert witnesses were of a general nature and did not directly relate to the Forty Mile Wind Power Project.

34. RES submitted that the 64.5 hours spent by Mr. Wallis for preparing evidence and for services leading up to the hearing are disproportionately high given the limited scope of the issues. Further, Mr. Wallis' five key recommendations appear to be substantially similar to those put forward in the Sharp Hills proceeding<sup>5</sup> currently before the Commission.

### **Reply from Ms. Jenkins**

35. Ms. Jenkins submitted that the independent witness evidence was relevant and contributed to an understanding of the issues and that the total amount of the cost claim is at the lower level of cost claims submitted to the Commission for a three day wind turbine hearing.

### **Commission findings**

36. The Commission finds that the services performed by Cottonwood Consultants Ltd. were directly and necessarily related to Ms. Jenkins' participation in the original proceeding, and that the fees which were claimed in accordance with the Scale of Costs for those services, were reasonable. The Commission considers that Mr. Wallis contributed to a better understanding of the environmental issues related to the project proposed in the original proceeding. Further, RES has failed to satisfy the Commission that Mr. Wallis did not perform an analysis specific to the project that was under review in the original proceeding. Accordingly, the Commission approves Ms. Jenkins' claim for consulting fees for Cottonwood Consultants Ltd. in the amount of \$21,802.50 and GST of \$1,090.13 for a total of \$22,892.63.

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<sup>5</sup> Exhibit 22966-X0141 at page 2 ("Executive Summary") and Exhibit 22665-X0140 at page 3 ("Executive Summary").

### **3.4 Dr. Mariana Alves-Pereira**

37. Dr. Mariana Alves-Pereira was retained by Ms. Jenkins to perform consulting services in the original proceeding. The fees claimed for the consulting services provided by Dr. Alves-Pereira relate to preparing an independent report on the human health impacts of low frequency noise and infrasound exposure arising from the proposed project, responding to IRs, assisting counsel with cross-examination and presenting evidence at the oral hearing. The claim for Dr. Alves-Pereira's services was in accordance with the Scale of Costs.

#### **Comments from RES**

38. RES submitted that the independent evidence provided by Dr. Alves-Pereira contained significant inaccuracies or was not applicable to the Forty Mile Wind Power Project and did not lead to a better understanding of the issues. RES also submitted that the professional fees claim for Dr. Alves-Pereira failed to provide a sufficiently detailed statement of account.

#### **Reply from Ms. Jenkins**

39. Ms. Jenkins submitted that the expert witness evidence was relevant and contributed to an understanding of the issues and that the total amount of the cost claim is at the lower level of cost claims submitted to the Commission for a three day wind turbine hearing.

#### **Commission findings**

40. In its decision in the original proceeding, the Commission found as follows with respect to the evidence adduced by Dr. Alves-Pereira:

... the Commission does not find that there is sufficient evidence on the record to demonstrate that the requirements of Rule 012 are inadequate to protect against adverse health effects associated with exposure to low frequency noise and infrasound. The Commission finds that there is no persuasive evidence that residents at Ms. Jenkins' dwelling are highly likely to experience symptoms that Dr. Alves-Pereira related to VAD.

Dr. Alves-Pereira testified that her submission that residents of Ms. Jenkins' home are "highly likely" to develop the symptoms she associates with VAD is based on her experience in collecting data from individuals living in various countries in varying conditions. The Commission does not consider that this anecdotal evidence can support the conclusion that Ms. Jenkins is "highly likely" to experience the symptoms identified by Dr. Alves-Pereira as a result of exposure to the levels of low frequency noise and infrasound expected to result from the project's operation.

The evidence before the Commission, as adduced in Dr. Alves-Pereira's testimony, is that even if low frequency noise were measured at Ms. Jenkins' residence, using the methodology described by Dr. Alves-Pereira, there is no scientifically established threshold of exposure to low frequency noise at which adverse impacts to human health are likely to result. Absent such evidence, and in consideration of the evidence given by Dr. Knopper that the Health Canada study results indicated no adverse effects to human health below the threshold of 46 dBA, the Commission cannot reasonably conclude that the requirements of Rule 012 are inadequate to protect human health.

Moreover, the Commission finds that there is insufficient evidence to support Dr. Alves-Pereira's opinion that persons living in the Jenkins home are likely to develop the symptoms she described.

When asked by the Commission about the basis for her opinion, Dr. Alves-Pereira explained that this was based on her experience and on the data she had collected in relation to industrial activities, including wind turbines, located within five kilometres of a dwelling. In the Commission's view, this evidence was anecdotal in nature, was unsupported by peer-reviewed studies and inconsistent with the weight of evidence found in peer reviewed studies, including the Health Canada study.<sup>6</sup>

[references omitted]

41. The evidence of Dr. Alves-Pereira was directed at issues of great concern to Ms. Jenkins namely, infrasound and low frequency noise issues. To that extent, the Commission is satisfied that the services performed by Dr. Alves-Pereira were directly related to Ms. Jenkins' participation in the original proceeding. However, for the cost of those services to be recoverable, Rule 009 requires that the services also contribute to a better understanding of the issues before the Commission. Based on a review of the report filed by Dr. Alves-Pereira and her testimony during the oral hearing, and having regard to the Commission's findings reproduced above, the Commission considers that a significant portion of the evidence adduced by Dr. Alves-Pereira in the original proceeding did not contribute to the Commission's understanding of the issues. As noted above, much of the evidence adduced by Dr. Alves-Pereira was anecdotal in nature and unsupported by peer-reviewed studies.<sup>7</sup> As a result, the Commission does not consider that her evidence contributed significantly to its understanding of the key issues raised with respect to low frequency noise and infrasound potentially generated by the project. For these reasons, the Commission approves Ms. Jenkins' claim for consulting fees for Dr. Mariana Alves-Pereira with a reduction of 50 per cent, for a total of \$3,307.50.

### **3.5 Ms. Anita Jenkins**

42. The cost claim application included a claim for attendance honorarium for Ms. Jenkins in the amount of \$300.00, disbursements of \$1,256.55 and GST of \$35.45.

#### **Comments from RES**

43. RES did not take issue with the costs claimed by Ms. Jenkins in relation to her personal participation in the original proceeding.

#### **Reply from Ms. Jenkins**

44. Ms. Jenkins submitted that all of her costs were reasonable and directly and necessarily related to the hearing. As the only intervener present at the hearing, Ms. Jenkins submitted that her intervention contributed to a better understanding of the issues.

#### **Commission findings**

45. The Commission finds that, as a local intervener participating in three full hearing days, Ms. Jenkins' claim for attendance honorarium is within the Scale of Costs and is approved.

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<sup>6</sup> Decision 22966-D01-2018: BHEC-RES Alberta G.P. Inc., Forty Mile Wind Power Project, Proceeding 22966, August 30, 2018, paragraphs 226-229.

<sup>7</sup> See e.g. Proceeding 22966, Transcript, Volume 3, pages 563-571.

46. The Commission reviewed Ms. Jenkins' claimed disbursements and finds the claim for accommodation exceeds the approved rate in the Scale of Costs. As a consequence, the Commission reduces the applied for daily rate from \$227.80 to \$140.00. In addition, the claim for parking indicates a daily rate of \$44.10 before GST for three days. A review of the parking receipt shows GST to be included in the daily rate. As a result, the total amount of \$132.30 has been approved for parking.

47. The remaining claims for disbursements for meals and mileage are within the Scale of Costs and are approved. Consequently, the Commission approves Ms. Jenkins' claim for honorarium in the amount of \$300.00, disbursements of \$1,021.98, and GST of \$35.13 for a total of \$1,357.11.

#### **Total amount awarded**

48. The Commission approves Ms. Jenkins' claim for recovery of costs in the total amount of \$112,897.13. This amount is composed of legal fees of \$69,699.00, consulting fees of \$32,370.00, honorarium of \$300.00, disbursements of \$5,339.15 and GST of \$5,188.98.

#### **4 Order**

49. It is hereby ordered that:

- 1) BHEC-RES Alberta G.P. Inc. shall pay intervener costs to Ms. Jenkins in the amount of \$112,897.13. Payment shall be made to Ackroyd LLP.

Dated on October 26, 2018.

#### **Alberta Utilities Commission**

*(original signed by)*

Anne Michaud  
Vice-Chair

*(original signed by)*

Carolyn Hutniak  
Commission Member

*(original signed by)*

Neil Jamieson  
Commission Member