RECEIVED 2024 MAR 8 12:48 PM (E)

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA
1325 G STREET, N.W., SUITE 800
WASHINGTON, D.C. 20005

SHOW CAUSE ORDER

March 8, 2024

FORMAL CASE NO. 1142, IN THE MATTER OF THE MERGER OF ALTAGAS LTD. AND WGL HOLDINGS, INC., Order No. 21966

I. INTRODUCTION

1. By this Order, the Public Service Commission of the District of Columbia ("Commission") denies AltaGas, Ltd.'s ("AltaGas") Motion for Adoption of AltaGas Ltd.'s Proposed Penalty for Breach of Term No. 5 ("AltaGas Motion")[1] and the District of Columbia Government's ("DCG") Proposed Term No. 5 Penalty and Cross-Motion for Imposition of Proposed Penalty ("DCG Comments").[2] The Commission directs AltaGas to show cause why the maximum daily penalty under D.C. Code § 34-706 should not be imposed for the breach of the Term No. 5 obligation. AltaGas' response to the Show Cause Order is due within 15 days of the date of this Order. Comments on AltaGas' filing are due within 10 days of the filing, with reply comments due 10 days after the filing of comments.

II. BACKGROUND

2. On June 29, 2018, the Commission approved a Settlement Agreement[3] regarding a proposed merger between AltaGas and WGL Holdings, Inc. (the parent company of the Washington Gas Light Company ("WGL").[4] In approving the Settlement Agreement, which contained 85 commitments, the Commission specifically considered the extent to which the proposed merger produced "a direct and tangible benefit to ratepayers."[5] One of those benefits was AltaGas' commitment under Term 5 that its shareholders would be responsible for developing

---

[1] *Formal Case No. 1142, In the Matter of the Merger of AltaGas, Ltd. and WGL Holdings, Inc. ("Formal Case No. 1142"),* Motion for Adoption of AltaGas Ltd.'s Proposed Penalty for Breach of Term No. 5, filed November 21, 2023 ("AltaGas Motion").

[2] *Formal Case No. 1142*, District of Columbia Government's Comments in Response to AltaGas Ltd.'s Motion for Adoption of Proposed Term No. 5 Penalty and Cross-Motion for Imposition of Proposed Penalty, filed December 19, 2023 ("DCG Comments").

[3] *Formal Case No. 1142*, Consent Motion to Reopen the Record in Formal Case No. 1142 to Allow for Consideration of Unanimous Full Settlement Agreement and Stipulation, and to Waive Hearing on Proposed Settlement, filed May 8, 2018 ("Settlement Agreement").

[4] *Formal Case No. 1142*, Order No. 19396, rel. June 29, 2018.

[5] Order No. 19396, ¶ 28.

or causing to be developed 10 MW of electric grid energy storage or Tier one renewable resources.[6] AltaGas agreed to fulfill that commitment within five (5) years after the close of the merger.

3. In Order No. 21890, the Commission credited AltaGas with developing 2.4 MW by the July 6, 2023, deadline and determined that AltaGas had breached Term No. 5 regarding the remaining 7.6 MW.[7] As such, AltaGas was subject to a penalty under Term No. 83 of the Settlement Agreement. The Commission directed AltaGas and DCG to attempt to reach a compromise on the penalty on their own and submit a proposed consent decree.[8] The parties were unable to reach a compromise.[9] On November 21, 2023, AltaGas filed a Motion proposing a penalty.

4. In response to a Public Notice released on November 28, 2023,[10] the Office of the People's Counsel for the District of Columbia ("OPC") and DCG filed comments on December 19, 2023.[11] AltaGas filed Reply Comments on January 11, 2024.[12] Additionally, on January 2, 2024, AltaGas filed its Fourth Quarter 2023 Compliance Report.[13]

III. DISCUSSION

A. AltaGas Motion

5. AltaGas proposes a penalty for its noncompliance with Term No. 5, which would result in quarterly noncompliance payments to compensate for the value of delayed environmental benefits that did not occur because of the breach.[14] Additionally, AltaGas commits to specific performance of the remaining 7.6 MW of the Term No. 5 obligation. AltaGas represents that the proposed quarterly noncompliance payments will total either $489,620.94 if AltaGas fulfills the

---

6 Order No. 19396, ¶ 30.

7 *Formal Case No. 1142*, Order No. 21890, ¶ 4, rel. August 9, 2023. *See also, Formal Case No. 1142*, Order No. 21603, rel. April 25, 2023.

8 Order No. 21890, ¶¶ 1, 7, 10.

9 *Formal Case No. 1142*, Letter to Brinda Westbrook-Sedgwick, Commission Secretary, from Brian Caldwell, Assistant Attorney General, filed November 14, 2023.

10 *Formal Case No. 1142*, Public Notice, rel. November 28, 2023.

11 *Formal Case No. 1142*, Office of the People's Counsel for the District of Columbia's Comments on AltaGas Ltd. Motion for Adoption of its Proposed Penalty for Term No. 5, filed December 19, 2023 ("OPC Comments").

12 *Formal Case No. 1142*, Reply Comments of AltaGas Ltd. in Further Support of its Motion for Adoption of Proposed Penalty for Breach of Term No. 5 and Opposition To DCG's and OPC's Proposed Penalties, filed January 11, 2024 ("AltaGas Reply Comments").

13 *Formal Case No. 1142*, Letter to Brinda Westbrook-Sedgwick, Commission Secretary, from Katherine Wright Morrone, Counsel for AltaGas, filed January 2, 2024 ("AltaGas Fourth Quarter 2023 Term No. 5 Report").

14 AltaGas Motion at 1.

remainder of its Term No. 5 obligation (7.6 MW) by the end of 2024 or $635,682.49 if AltaGas completes the obligation in the first quarter of 2025. If noncompliance continues after the first quarter of 2025, AltaGas proposes an escalating quarterly penalty of 15% more than the previous quarter's penalty until AltaGas has fulfilled its obligation.[15]

6. AltaGas argues that it fully intends to fulfill the Term No. 5 obligation, even though the deadline for compliance has passed. AltaGas contends that it is aware that the Commission has stated that any penalty must be significant enough so that the penalty does not become a way to avoid compliance.[16]

7. AltaGas argues that its proposed quarterly noncompliance payments start by equaling the cost of carbon (CO2 emissions) that would have been displaced by the 7.6 MW of solar development.[17] AltaGas represents that the calculations are based on the Environmental Protection Agency's ("EPA") social cost of carbon of $51/ton of CO2.[18] AltaGas proposes that its quarterly penalty will increase 15% for each quarter after the Third Quarter of 2023 until AltaGas fulfills the commitment. AltaGas contends that the penalty formula is derived from the testimony of the WGL and AltaGas' (hereinafter, Joint Applicants) Witness Hibbard.[19] AltaGas argues that its proposed penalty is significant and reflects the seriousness of AltaGas' breach.[20]

8. AltaGas contends that its proposed penalty is consistent with D.C. Code § 34-706 and is supported by the criteria outlined in D.C. Code § 34-706. Thus, AltaGas contends that the proposed penalty is consistent with both Term No. 83 of the Settlement Agreement and D.C. Code § 34-706.[21]

9. Additionally, AltaGas argues that **[BEGIN CONFIDENTIAL INFORMATION]**

[redacted]

15 AltaGas Motion at 1, 6-7.

16 AltaGas Motion at 2.

17 AltaGas Motion at 6-7.

18 AltaGas Motion at 7.

19 AltaGas Motion at 7, citing *Formal Case No.* 1142, Exhibit JA (2Q) at 9-11 (Hibbard Settlement Testimony of Paul J. Hibbard at 9-11.

20 AltaGas Motion at 9.

21 AltaGas Motion at 8.

22 AltaGas Motion at 8.

[redacted][23] **[END CONFIDENTIAL INFORMATION]** AltaGas maintains that specific performance of the Term No. 5 obligation will ensure that District of Columbia residents will obtain the benefits of Term No. 5.[24] AltaGas also argues that its proposal for specific performance is consistent with 15 DCMR §§ 160.3 and 160.4.[25]

B. DCG Comments

10. DCG opposes AltaGas' proposed penalty, recommending a different penalty of $8.36 million. DCG argues that AltaGas' proposal is an attempt to modify the Settlement Agreement without the consent of the other parties to the Settlement Agreement. DCG argues that AltaGas' proposal is foreclosed by the plain language of Term No. 5 since AltaGas proposes to continue the development of the solar facilities after the compliance period.[26]

11. DGC has substantive questions regarding AltaGas' proposal for specific performance. DCG argues that **[BEGIN CONFIDENTIAL INFORMATION]** [redacted][27] **[END CONFIDENTIAL INFORMATION]** DCG contends that the Commission needs to investigate whether AltaGas' proposed method of specific performance is sufficiently similar to the method approved by the Commission in Order No. 21603 so that the Commission can determine that AltaGas' new proposal is developing or causing the development of the 7.6 MW.[28]

12. Further, DCG argues that AltaGas' proposed penalty amount is insufficient because it does not reflect the gravity of the breach. DCG argues that the proposed penalty amount is too low when compared to the $10 million value ascribed by the Commission. To DCG, the penalty amount proposed by AltaGas is lower than the cost of complying with Term No. 5, so acceptance of this proposed penalty amount would encourage non-compliance with other settlement agreements in the future.[29] **[BEGIN CONFIDENTIAL INFORMATION]** [redacted][30] **[END CONFIDENTIAL INFORMATION]**

---

23 AltaGas Motion at 10, n. 34; Exhibit 2.

24 AltaGas Motion at 9.

25 AltaGas Motion at 10.

26 DCG Comments at 9.

27 DCG Comments at 9.

28 DCG Comments at 10-11, 13.

29 DCG Comments at 12, 13.

30 DCG Comments at 12-13.

13. DCG filed a cross-motion proposing an $8.36 million penalty on AltaGas for the Term No. 5 breach. DCG contends that since the Commission has determined that AltaGas breached Term No. 5, the remedy for that breach is found in Term No. 83, which refers to the Commission's penalty provisions in D.C. Code § 34-706.[31] DCG argues that the penalties in D.C. Code § 34-706 are inadequate since the Commission cannot calculate a per diem penalty due to its inability to extend the time period for compliance with Term No. 5. DCG agrees with the Commission's earlier statements about the computation of a penalty based on the monetized value of the 7.6 MW that AltaGas was unable to complete before the deadline. DCG claims that DOEE is currently paying an incentive amount of $1.10 for each kW of solar capacity developed. In exchange, DOEE receives the rights to the electricity generated by the solar facility for 15 years. DCG calculates the value of the 7.6 MW to be $8.36 million.[32]

14. Contrary to AltaGas' contentions, DCG argues that the Commission has the authority to assess the penalty for the lost value of the 7.6 MW. DCG argues that D.C. Code § 34-504 grants the Commission exclusive authority over approving utility mergers. While neither D.C. Code § 34-504 nor any other statutory provision expressly sets forth any penalties for failure to abide by the terms of the acquisition, DCG asserts that this authority is implied. According to DCG, D.C. Code § 34-403 provides the Commission with incidental powers necessary to carry out the Commission's explicit authority. In DCG's view, one such incidental power implied by D.C. Code §§ 34-403 and 34-504 would be to enforce written terms of an acquisition. Thus, DCG argues that pursuant to these provisions, the Commission has the authority to impose a penalty for the lost value of the uncompleted portion of the Term No. 5 obligation.[33]

C. OPC Comments

15. OPC argues that the Commission should reject AltaGas' proposed penalty to prevent further harm to the public interest. OPC contends that AltaGas' proposed penalty shows a "reckless disregard" for the process that resulted in the Settlement Agreement and for AltaGas' obligations under the Settlement Agreement and allows AltaGas to circumvent its obligations under the Settlement Agreement. OPC represents that the Commission is required to uphold the letter and intent of the Settlement Agreement and must not permit this circumvention of the Settlement Agreement to avoid breaches of future settlement agreements.[34]

16. OPC argues that AltaGas' noncompliance with Term No. 5 both fails to increase the amount of renewable energy in the District of Columbia and fails to create local jobs. OPC contends that since AltaGas has valued the noncompliance as at least $20 million, AltaGas'

---

31 DCG Comments at 14.

32 DGC Comments at 15.

33 DCG Comments at 15-16.

34 OPC Comments at 4.

proposed penalty of around half a million dollars is much too small for the Commission to accept.[35] To OPC, acceptance of AltaGas' proposed penalty would signal that noncompliance is "cheap and effective."[36] OPC supports the imposition of a penalty that is no less than $1.825 million per year that DCG proposed in earlier comments.[37] OPC argues that this penalty should be paid by September 30, 2024, and should not be collected through utility rates.[38]

D. AltaGas December 2023 Compliance Filing

17. In its December 2023 Compliance Filing regarding Term No. 5, AltaGas notes that to build out the remaining 7.6 MW, AltaGas **[BEGIN CONFIDENTIAL INFORMATION]** [redacted][39] **[END CONFIDENTIAL INFORMATION]** AltaGas argues that it is continuing to fulfill its Term No. 5 obligations and will continue to inform the Commission of future progress in its quarterly reports.[40]

E. AltaGas Reply Comments

18. AltaGas opposes DCG's and OPC's proposed penalties, arguing that, unlike their proposed penalties, AltaGas' proposal is consistent with the Settlement Agreement and the D.C. Code, is supported by the record in this proceeding, and is proportional to the gravity of the offense.[41] Additionally, AltaGas represents that its proposed penalty incentivizes AltaGas to complete its obligations as quickly as possible.[42] AltaGas argues that its quarterly noncompliance payments are equal to the value of the delayed environmental benefits for the failure to complete the Term No. 5 obligations within the timeframe set by Term No. 5.[43] AltaGas argues that its

---

35 OPC Comments at 5-6.

36 OPC Comments at 5.

37 OPC Comments at 1, n. 4, citing *Formal Case No. 1142,* District of Columbia Government's Response to AltaGas' Motion for Clarification at 24, filed July 10, 2023.

38 OPC Comments at 6-7.

39 AltaGas December 2023 Compliance Filing at 2-3.

40 AltaGas December 2023 Compliance Filing at 2-3.

41 AltaGas Reply Comments at 1.

42 AltaGas Reply Comments at 4.

43 AltaGas Reply Comments at 1-2.

proposed penalties equal $1,085 per day, assuming that AltaGas completes the projects by December 31, 2024,[44] which is within the penalty range included in D.C. Code § 34-706.[45]

19. AltaGas argues that DCG's and OPC's proposed penalties are contrary to the Settlement Agreement and the D.C. Code. AltaGas contends that nothing in the Settlement Agreement contemplates the imposition of a penalty in lieu of specific performance. AltaGas also claims that neither Term No. 83 nor the D.C. Code permits the Commission to award contract damages in lieu of specific performance of Term No. 5. Moreover, AltaGas argues that DCG cannot seek other penalties outside of the Settlement Agreement because DCG finds the penalty provisions in the Settlement Agreement inadequate.[46]

20. AltaGas contends that DCG's proposed penalty of $18,536 a day far exceeds the penalty amount included in D.C. Code § 34-706. Additionally, AltaGas argues that DCG's penalty is a lump sum payment that is not tied to any end date, which is required by D.C. Code § 34-706(a) and D.C. Code § 34-708.[47] AltaGas also argues that DCG's penalty is not linked to compliance with the Settlement Agreement.[48]

21. In AltaGas' view, DCG's and OPC's penalties are disproportionately punitive.[49] While AltaGas recognizes the gravity of its violation, AltaGas contends that DCG has not identified the specific harm that would warrant a deviation from D.C. Code § 34-706. AltaGas represents that DCG and OPC have not shown any willfulness or intent on AltaGas' part that would justify imposing their proposed penalties. AltaGas argues that DCG requests the Commission to ignore AltaGas' good faith efforts to remedy the breach, which would be contrary to D.C. Code § 34-706.[50]

22. AltaGas argues that the statutory factors in D.C. Code § 34-706 support AltaGas' proposed penalty. AltaGas contends that the penalty should be mitigated because AltaGas immediately took action to remedy its breach on an accelerated basis as soon as the Commission indicated that AltaGas was in breach of Term No. 5. To AltaGas, these actions demonstrate good faith. AltaGas also represents that its proposed penalty would be the largest civil penalty assessed by the Commission in recent history, recognizing the gravity of AltaGas' offense.[51]

---

44 AltaGas Reply Comments at 2.

45 AltaGas Reply Comments at 6.

46 AltaGas Reply Comments at 8.

47 AltaGas Reply Comments at 6, n.22.

48 AltaGas Reply Comments at 6.

49 AltaGas Reply Comments at 6.

50 AltaGas Reply Comments at 7-8.

51 AltaGas Reply Comments at 7.

23. Contrary to DCG's argument, AltaGas contends that the Commission cannot use its implied powers to assess DCG's proposed penalty. However, AltaGas contends that DCG is seeking to have the Commission use implied powers to override explicit powers included in the D.C. Code, which AltaGas asserts the Commission cannot do.[52]

24. AltaGas argues that Term No. 83 is intended to enhance the enforcement of the Settlement Agreement, not to relieve AltaGas (in this instance) from non-compliance with the Settlement Agreement.[53] AltaGas claims that the Settlement Agreement does not permit AltaGas to pay a penalty to avoid its obligations under the Settlement Agreement. AltaGas contends that DCG's current position seeking a penalty in lieu of specific performance of the obligation contradicts its earlier position that AltaGas should pay a penalty and complete the obligation.[54] Contrary to DCG's contentions, AltaGas' proposal is not an extension request seeking to avoid a penalty; instead, AltaGas has proposed a penalty in addition to fulfilling its obligation.[55]

25. Further, AltaGas claims that its penalty is consistent with the evidentiary record, while DCG's and OPC's proposed penalties are not.[56] AltaGas explains that its penalty is based on the testimony of its Witness Hibbard regarding the environmental benefits of Term No. 5. AltaGas contends that it calculated its penalty based on the delayed environmental benefits that the Commission understood that Term No. 5 would provide when it approved the Settlement Agreement.[57] In contrast, AltaGas argues that DCG's proposed penalty is based on DOEE's cost of developing 7.6 MW, not the environmental benefit provided by the 7.6 MW. AltaGas contends that the cost to develop is not interchangeable with the environmental benefit of the 7.6 MW.[58]

26. AltaGas argues that DCG and OPC misinterpret the approximately $20 million purchase price of SRECs under the original SREC Purchase Agreement with NCS. AltaGas contends that the $20 million cost to purchase SRECs is not related to the lost value or benefits of the Term No. 5 obligation, which were quantified at a different value in Witness Hibbard's testimony. Neither does the cost to purchase SRECs equate to the cost of building 10 MW in renewable Tier One generation. AltaGas argues that neither DCG nor the Commission has lost $20 million through AltaGas' noncompliance with Term No. 5.[59] AltaGas argues that the penalty

---

[52] AltaGas Reply Comments at 9, citing *Washington Gas Light Co. v. Pub. Serv. Comm'n of D.C.*, 982 A.2d 691, 718 (D.C. 2009) (the Commission's inherent and incidental authority extends only to executing those statutory powers that already are expressly granted; the Commission only has "ancillary powers to execute [its statutory] *powers*, not ancillary powers to execute *goals*," and the "incidental power the Commission seeks must therefore be instrumental to the exercise of a legitimate power the statute explicitly gives it.") (emphasis in original).

[53] AltaGas Reply Comments at 3.

[54] AltaGas Reply Comments at 9-10.

[55] AltaGas Reply Comments at 10.

[56] AltaGas Reply Comments at 4.

[57] AltaGas Reply Comments at 11.

[58] AltaGas Reply Comments at 11.

[59] AltaGas Reply Comments at 12.

should not be computed on an erroneous cost basis as a one-time payment, but instead incentivize compliance to ensure that the District obtains the benefit contained in the Settlement Agreement.[60]

27. AltaGas contends that it is not seeking approval from the Commission of its new method of compliance with Term No. 5.[61] Contrary to DCG's contentions, **[BEGIN CONFIDENTIAL INFORMATION]** [redacted][63] **[END CONFIDENTIAL INFORMATION]**

28. Finally, AltaGas disagrees with DCG's and OPC's assertions that AltaGas "blatantly" and "recklessly disregard[ed]" its Term No. 5 obligations. To the contrary, AltaGas argues that it has been open and transparent about its efforts to comply with Term No. 5.[66]

IV. DECISION

29. It is uncontested that AltaGas failed to meet the obligations of Term No. 5[67] of the Settlement Agreement, which is a violation of Order No. 19396. The issue now before the

---

60 AltaGas Reply Comments at 13.

61 AltaGas Reply Comments at 4.

62 AltaGas Reply Comments at 13.

63 AltaGas Reply Comments at 14, citing AltaGas Motion, Exhibit 2.

64 AltaGas Reply Comments at 14.

65 AltaGas Reply Comments at 15.

66 AltaGas Reply Comments at 15-16.

67 Term No. 5 reads:

> AltaGas shall, within five years after Merger Close, develop or cause to be developed 10MW of either electric grid energy storage or Tier one renewable resources in Washington, D.C. If AltaGas or one of its affiliates develops the project, the construction of the project shall be competitively bid. AltaGas may retain the renewable energy certificates ("RECs") and tax attributes for the Tier one resource. AltaGas will use reasonable best efforts to ensure at least twenty percent of the operational jobs for the 10MW are sourced from the local workforce. The costs of this project shall not be recovered through Washington Gas's utility rates. AltaGas shall use best efforts to target this project in capacity-constrained electric distribution areas. The Joint Applicants shall file its plan for the

Commission is the penalty to be imposed on AltaGas for this breach of the Commission order that approved the Settlement Agreement. In the Settlement Agreement, the parties agreed to a general penalty provision, Term No. 83, if there is not a specific penalty provision in a particular Term.[68] Term No. 83 states:

> AltaGas, Washington Gas, and WGL agree that each of them are subject to D.C. Code § 34-706, in addition to any other penalties provided by law, to enforce the provisions of any order approving this Settlement Agreement. Payment of any penalties will be made by the entity, or entities, upon which compliance responsibility falls under this Settlement Agreement. No payments under this paragraph shall be recovered in rates.

30. D.C. Code § 34-706 provides in relevant part:

> (a) If any public utility shall violate any provision of this subtitle, or shall do any act herein prohibited, or shall fail or refuse to perform any duty enjoined upon it for which a penalty has not been provided, or shall fail, neglect, or refuse to obey any lawful requirement or order made by the Commission, or any judgment or decree made by any court upon its application, for every such violation, failure, or refusal such public utility shall forfeit and pay to the District of Columbia the sum of $5,000 for each such offense…
>
> (c) Notwithstanding any other provision of law, the Commission may adjudicate the occurrence of a violation under this section and impose sanctions in accordance with its regulations. Any such civil penalty may be compromised by the Commission. In determining the amount of such penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the person charged, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance, after notification of a violation, shall be considered. The amount of such penalty when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the District of Columbia to the person charged or may be recovered in a civil action in the District of Columbia courts.

D.C. Code § 34-708 counts each day's noncompliance as a separate offense subject to the same penalty. Thus, the Commission can impose a $5,000 daily penalty until there is compliance.

31. DCG argues that AltaGas can no longer complete Term No. 5 obligation since the time to complete it has expired and the parties do not agree to an extension of the obligation. However, the inability of AltaGas to complete the Term in the time allotted does not negate the obligation to complete it; instead, the failure leads to the continued obligation to perform and a penalty. To rule otherwise would permit parties to settlement agreements to evade responsibility

---

10MW project for approval by the Commission within 180 days of Merger Close and an annual progress report following approval of this plan.

[68] Order No. 19396, ¶ 37, AAAAA.

for completing obligations by paying penalties instead of complying. Because there is no adequate remedy at law to repair the breach of Term No. 5, specific performance of the Term No. 5 obligation is required by AltaGas.[69]

32. DCG also argues that AltaGas should pay a one-time penalty of $8.36 million, which is derived from the cost to DOEE of developing Solar for All projects based on the incentive amount that DOEE currently provides developers to construct solar facilities and for DOEE to receive electricity from these projects for 15 years. However, Term No. 5 does not impose these same conditions on AltaGas' development of the 10 MW commitment that DOEE uses to develop Solar for All projects. Therefore, the Commission cannot rewrite the Settlement Agreement to impose a penalty based on DOEE's costs of development. Additionally, DCG's proposed penalty amount is clearly inconsistent with D.C. Code § 34-706, which authorizes a maximum $5,000 penalty for each offense. DCG does not propose a time period during which a $5,000 daily penalty would apply, so the Commission cannot calculate an alternative.

33. To justify its proposed penalty, DCG argues that the Commission has implicit authority provided by D.C. Code §§ 34-403 to impose a larger penalty than is permitted by D.C. Code § 34-706. D.C. Code § 34-403 grants the Commission "all additional, implied, and incidental power which may be proper and necessary to effect and carry out, perform, and execute all the said powers herein specified, mentioned, and indicated."[70] To DCG, this language means that the Commission can enforce the terms of the acquisition so that the parties receive the benefit that they bargained for in the Settlement Agreement, which DCG quantifies as $8.36 million. The Commission agrees with DCG that it has implied authority to enforce the obligations under the Settlement Agreement, but DCG has not identified a specific penalty provision that would permit the application of a higher penalty outside the Settlement Agreement, and the Commission cannot find one since the Commission lacks authority to assess damages.[71] Thus the Commission cannot use implied authority to override the explicit provisions in D.C. Code § 34-706.[72]

---

[69] The elements necessary to require specific performance are: (1) a valid binding contract; (2) definite and certain terms; (3) mutuality of obligation and remedy; (4) freedom from fraud and overreaching; and (5) lack of remedy at law. *See, Wilson v. Hayes*, 77 A.3d 392, 405 (D.C. Ct. App. 2013); *Stanford Hotels Corp. v. Potomac Creek Associates, L.P.,* 18 A.3d 725, 739 (D.C. Ct. App. 2011). In this circumstance, it is the party that breached the Settlement Agreement that is seeking specific performance of its remaining obligations under Term No. 5, which is part of a contract with certain terms. The Settlement Agreement contains mutual promises. The parties do not allege any fraud or overreaching. Additionally, as stated above, there is no adequate remedy at law to remedy the breach. For these reasons, the Commission finds that specific performance is appropriate.

[70] D.C. Code § 34-403.

[71] *In the Matter of the Complaint of Ora Jackson v. The Washington Gas Light Company. CC No. 8602289*. Order No. 9438 at 5, n.2, rel. February 14, 1990. ("The Commission is a creature of statute and has only those powers given to it by the legislature. *Chesapeake and Potomac Telephone Company v. Public Service Commission*, 378 A. 2d 1085, 1089 (D.C. 1977), Although the Commission may compel utilities doing business in the District of Columbia to comply with the law governing their service and rates, only the courts may provide consequential damage relief. The Commission's enabling statute does not allow it to limit, take away or restrict the jurisdiction of the courts"). *See* D.C. Code § 43-503 (1986)).

[72] *See Office of People's Counsel v. Public Service Com'n*, 477 A.2d 1079, 1084 (D.C. Ct. App. 1984).

34. DCG also cites the Commission's authority to approve mergers in D.C. Code § 34-504 as implying that the Commission has authority to enforce the provisions of merger agreements. The Commission agrees that it has the authority granted by D.C. Code §§ 34-504 and 34-1001 to approve mergers and enforce the provisions of the merger. The Commission is enforcing the Settlement Agreement merger provisions using authority in D.C. Code § 34-504 in this Order. Again, it is unclear how the Commission's merger authority authorizes the Commission to impose a penalty greater than that in D.C. Code § 34-706, particularly when the parties to the Settlement Agreement agreed that D.C. Code § 34-706 would be the penalty provision.[73]

35. In addition to completing the remaining 7.6 MW obligation, AltaGas proposes an escalating quarterly penalty for its noncompliance beginning July 7, 2023. Assuming that AltaGas completes its obligation by December 31, 2024,[74] the penalty would be $489,620.94, which is equivalent to $1,085 a day, based on Witness Hibbard's testimony.[75] AltaGas contends that this penalty reflects the gravity of the breach. The Commission disagrees. As noted before, the Commission finds that the breach of Term No. 5 is material because this failure deprived District residents of a fundamentally important environmental benefit and the penalty in D.C. Code § 34-706 does not provide an adequate remedy at law. The Commission also notes that AltaGas does not anticipate fully complying with Term No. 5 until December 31, 2024, which is nearly a year and a half after the timeframe set in Term No. 5.[76] Thus, the Commission finds that the penalty proposed by AltaGas is insufficient to match the gravity and duration of the breach.

---

[73] Although the Commission does not counsel the DCG or OPC, the Commission also notes that D.C. Code § 34-706(c) does not preclude DCG or OPC from seeking damages against AltaGas in court.

[74] As noted before, if AltaGas does not complete the obligation by December 31, 2024, the quarterly penalty escalates by 15% for each quarter of noncompliance until the obligation is complete.

[75] AltaGas bases its proposed penalty on the social cost of carbon to estimate the environmental benefit lost as a result of the breach. While AltaGas included a $20 million SREC purchase cost in its filings, that figure represented the cost to buy SRECs, which AltaGas contends differs from the lost environmental benefit.

[76] *See America v. Mills,* 714 F.Supp.2d 88, 100 (D.D.C. 2010). *See also,* Restatement (Second) of Contracts § 241 (1981), which reads:

In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

- (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
- (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
- (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

The Commission notes that AltaGas is attempting to cure the breach, but the delay in doing so will deprive District residents of the benefit for a substantial time until AltaGas completes the obligation.

36. Accordingly, the Commission directs AltaGas to show cause why it should not be assessed the maximum penalty of $5,000 per day under D.C. Code § 34-706 from July 7, 2023, through the completion of the obligation through specific performance.[77] AltaGas' response to the Show Cause Order is due within 15 days of the date of this Order. Comments on AltaGas' filing are due within 10 days of their filing, with reply comments due 10 days after the filing of comments.

THEREFORE, IT IS ORDERED THAT:

37. AltaGas, Ltd.'s Motion for Adoption of AltaGas Ltd.'s Proposed Penalty for Breach of Term No. 5 is **DENIED**;

38. The District of Columbia Government's Proposed Term No. 5 Penalty and Cross-Motion for Imposition of Proposed Penalty is **DENIED**;

39. AltaGas, Ltd. is **DIRECTED** to respond to this Show Cause Order within 15 days of the date of this Order;

40. Comments on AltaGas, Ltd.'s filing are due within 10 days of the filing; and

41. Reply comments are due 10 days after the filing of comments.

A TRUE COPY: **BY DIRECTION OF THE COMMISSION:**

CHIEF CLERK: **BRINDA WESTBROOK-SEDGWICK**
COMMISSION SECRETARY

[77] The Commission notes that OPC proposes a $5,000 daily penalty to be paid by September 30, 2024. However, the first end date that AltaGas proposed is December 30, 2024, so the Commission believes that any penalty should extend until AltaGas completes its obligation and not end on September 30, 2024.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA
1325 G STREET, N.W., SUITE 800
WASHINGTON, D.C. 20005

FORMAL CASE NO. 1142, IN THE MATTER OF THE MERGER OF ALTAGAS LTD. AND WGL HOLDINGS, INC.

DISSENT OF COMMISSIONER BEVERLY

1. I respectfully dissent from the majority opinion.

2. In Order No. 21890, the Commission credited AltaGas with developing 2.4 MW by the July 6, 2023, deadline and determined that AltaGas had breached Term No. 5 regarding the remaining 7.6 MW. As such, the other parties were entitled to an appropriate remedy for breach of the Settlement Agreement.

3. The majority opinion relies on Term No. 83 of the Agreement and interprets it as the parties' agreement that the only penalty for breach is to apply the penalties under D.C. Code §34-706. However, that's not exactly what Term No. 83 says. Term No. 83 says that "AltaGas, Washington Gas, and WGL agree that each of them *are subject* to D.C. Code §34-706, *in addition to any other penalties provided by law*, to enforce the provisions of any order approving this Settlement Agreement." A related provision is found under Term No. 19 which states "AltaGas, its affiliates and its subsidiaries all agree to submit to the jurisdiction of the Commission for: (1) all matters related to the Merger and the enforcement of the conditions set forth herein . . ." The inclusion of this language is because AltaGas is not a public utility otherwise subject to our general jurisdiction or a public utility subject to penalties under D.C. Code §34-706.

4. Furthermore, the language of Term No. 83 ("in addition to any other penalties provided by law") specifically recognizes that the Commission has enforcement options other than D.C. Code §34-706.[1] Stuffing a breach of the Settlement into the penalty structure of D.C. Code §34-706 is an awkward fit, especially since the penalty structure obviously isn't designed to accommodate this situation and could result in a penalty so low that AltaGas is incentivized to actually breach the contract rather than fulfill its contractual obligation. I've already addressed this concern in my prior dissents, so I won't re-plough the same ground here.

5. D.C. Code §34-504 is the statutory authority under which we approved this merger, and its related provisions apply whether the settlement agreement mentions them or not.[2] DCG notes that D.C. Code § 34-504 grants the Commission explicit authority over approving utility

[1] During negotiations, AltaGas recognized some flexibility in enforcement. *See* Formal Case No. 1142, Reply Brief of the Applicants, filed February 7, 2018. Pg. 144-146.

[2] Although AltaGas is free to voluntarily submit to the jurisdiction of the Commission, neither AltaGas nor the parties have the power to negotiate terms that limit the applicability of statutes. That power resides exclusively in the legislature.

mergers. Although D.C. Code § 34-504 doesn't set forth any specific penalties for failure to abide by the terms of the acquisition, DCG asserts that this authority is implied and that D.C. Code § 34-403 provides the Commission with incidental powers necessary to carry out the Commission's explicit authority. In this case, DCG argues that the Commission has the authority to provide a remedy for the lost value of the uncompleted portion of AltaGas's commitment under Term No. 5. D.C. Code §§34-504 and 34-403 are standalone provisions relating to mergers and don't depend on D.C. Code § 34-706 to determine a remedy for breach of a merger commitment.[3]

6. Normally, there are two remedies for breach of contract: specific performance (i.e. the breaching party is compelled to fulfill the commitment) or monetary damages to the party injured by the breach. Specific performance is generally disfavored by the courts and utilized only when monetary damages will not adequately compensate the party seeking relief. The Settlement Agreement doesn't contain a provision for specific performance and DCG doesn't want it because the SREC scheme offered by AltaGas and approved by the majority is, in DCG's opinion, of no benefit to DCG at all. Instead, DCG wants to be awarded the monetized value of the 7.6 MW commitment that remains unfulfilled.

7. We got to this point because the majority interpreted the "cause to be developed" language under Term No. 5 so broadly that it endorsed AltaGas's financial SREC scheme that the parties had not previously considered and, in DCG's view, deprived the District of the benefit it obtained through negotiation. Now, the majority is interpreting Term No. 83 so narrowly that AltaGas's penalty is far below the $20 million that AltaGas itself estimated was the value of its commitment. To me, this is inequitable, and I decline to make the situation worse for DCG by ordering specific performance as a remedy. I agree with DCG that its proposed $8.36 million figure is reasonable under the circumstances.[4]

8. Although we could use the penalties under D.C. Code §34-706 to compel WGL to comply with a remedy for breach imposed under D.C. Code §34-504, we had another option. I previously pointed out that WGL's rate case was before us and nobody argued that WGL, as a merged company, doesn't share responsibility for AltaGas's breach of the Settlement. I saw no reason why ratepayers should pay a rate increase while AltaGas owes ratepayers money for breach of Term No. 5. We could have either deducted the amount from the rate increase or delayed implementation of the rates until the District is compensated for breach of contract (or an arrangement for payment is made). Neither option was taken so, unfortunately, an effective enforcement tool was lost.

---

[3] The majority opinion seems to rely on an unstated assumption that we would have no enforcement authority at all (other than unwinding the merger), if AltaGas had not voluntarily agreed to be subject to D.C. Code §34-706. I don't share that view.

[4] This figure should be adopted as the reasonable value of the commitment if, for some reason, we cannot impose monetary damages and DCG (or another party) decides to pursue a remedy in court for breach of contract.

COMMISSION ACTION

FORMAL CASE NO. 1142, IN THE MATTER OF THE MERGER OF ALTAGAS LTD. AND WGL HOLDINGS, INC.,

Date 3/8/24 **Formal Case Nos.** 1142 **Tariff No.** _____ **Order No.** 21966

	Approved by Roll Call Vote	Disapprove Initial & Date	Abstain Initial & Date
Chairman Emile Thompson	ET/CL 3/8/24		
Commissioner Richard A. Beverly		RAB/CL 3/8/24	
Commissioner Ted Trabue	TT/CL 3/8/24		

Certification of Action

C. Lipscombe
General/Deputy General Counsel

Lara Walt
OGC Counsel/Staff