Alberta Energy Regulator

**Via Email**

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**Attention: Laura Estep**

Woodward & Company Lawyers LLP
200 – 1022 Government St.
Victoria BC V8W 1X7

**Attention: Eamon Murphy**

Dear Sirs:

**Re: Application to Make a Costs Claim by Athabasca Chipewyan First Nation**
**Mildred Lake Extension Project and Mildred Lake Tailings Management Plan**
**Costs Proceeding 361**

I am writing to advise you that the panel has determined that Athabasca Chipewyan First Nation (ACFN) will not be permitted to file a cost claim in this matter as it did not file its claim within the required time frame.

## Background

A public hearing was held in relation to Syncrude's Mildred Lake Extension project (the project) and the Mildred Lake Tailings Management Plan. The following applications were before the panel in this matter: *Oil Sands Conservation Act* application no. 1820856, *Environmental Protection and Enhancement Act* application no. 034-00000026, *Water Act* application nos. 005-00263298 and 001-00363203, and *Public Lands Act* application nos. MSL 352, MSL 170430 and MSL 170423 (collectively the Applications).

It is helpful in the context of this decision to set out a chronology of relevant dates and events:

- The panel was assigned to this hearing proceeding on March 1, 2018.
- A notice of hearing was issued by the panel on May 25, 2018.
- On July 11, 2018, ACFN's application to be a participant in the hearing proceeding was granted.
- The public hearing began on Tuesday, January 22, 2019, and was adjourned on January 29, 2019.The hearing report of the Government of Alberta's Aboriginal Consultation Office (ACO), which related to the Crown's consultation with ACFN about the project, was received February 28, 2019.The hearing resumed for closing arguments on March 27, 2019.

- On July 3, 2019, the panel wrote to the ACO requesting clarification on whether the ACO's February 28th hearing report contained the ACO's advice in relation to MSL 170430 and MSL 170423 (the MSL Applications).

- On July 8, 2019, the ACO responded to the panel's letter advising that the ACO would be determining the adequacy of the Crown's consultation for the MSL Applications once Syncrude submits a request for same and that the ACO's February 28th hearing report is part of the consultation record considered by the ACO in making an adequacy decision on the MSL Applications.

- On July 8, 2019, the panel requested submissions from Syncrude and ACFN on the content of the ACO's July 8th letter.

- On July 10, 2019, the panel received submissions from ACFN and Syncrude (the July 3, 8 and 10th correspondence will be collectively referred to as the July Correspondence).

- The panel received no further submissions from the parties and did not receive any requests from the parties to file further submissions.

- On July 16, 2019, the panel's hearing decision in relation to this matter, *Syncrude Canada Ltd. Mildred Lake Extension Project and Mildred Lake Tailings Management Plan, 2019 ABAER 006* (the Decision Report), was released. In the Decision Report, the panel did not make a decision on the MSL Applications. Instead, it remitted those applications back to the AER because an assessment of the adequacy of the Crown's consultation respecting the applications had not been provided to the panel.

- On July 26, 2019, the ACO issued its report in relation to the MSL Applications. The panel, having issued its final decision in proceeding 361, did not receive or consider this report. The parties, including ACFN, did not provide the ACO's MSL report to the panel nor did they ask the panel to consider the report or vary the Decision Report because of the ACO's July 26 report.

ACFN's costs claim in relation to the hearing was filed on August 24, 2019. On August 29, 2019, the panel provided Syncrude and ACFN the opportunity to make submissions on the timing of submission of ACFN's costs claim. Syncrude filed its submission on September 6, 2019 and ACFN filed a reply on September 12, 2019.

In making its decision in relation to this matter, the panel has considered all submissions from the parties and the regulatory framework set out below.

Division 2, Costs of the *AER Rules of Practice* (Rules) provides the procedural rules relating to costs claims.

Section 62(1) of the Rules permits a "participant" to apply for an award of costs in accordance with *Directive 031: REDA Energy Cost Claims* (Directive 031). A participant is defined in section 58(1)(c) as "...a person or a group or association of persons who have been permitted to participate in a hearing for which a notice of hearing is issued..."

Section 62(3) of the Rules indicates that:

> 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…

Directive 031 states:

> 6.5 Filing the Costs Claim
>
> Participants must file their costs claims within 30 days after the hearing record is complete unless otherwise directed by the AER. A hearing record is generally considered complete once final argument has been presented and the hearing has been closed. Costs claims not received within 30 days will not be considered and may be dismissed unless extraordinary circumstances prevented timely filing.

**ACFN's Costs Claim**

In its costs claim, ACFN submits that the hearing record closed on July 26, 2019, when the ACO provided its July 26th report to the AER. To support its position, ACFN refers to correspondence and what it describes as supplemental submissions which included the July Correspondence, the Decision Report, a letter from ACFN to Alberta dated July 22, 2019, a letter from Syncrude to Alberta dated July 25, 2019 and the ACO's July 26th report. ACFN submits that this "supplemental hearing record" constituted an ongoing process in which the hearing record remained open, and in which the AER continued to accept submissions and reports related to the Applications.

In the alternative, ACFN takes the position that the incomplete consultation record from the ACO, the direction by the AER to provide submissions on the ACO's July 8th letter, the AER's decision to remit the MSL Applications back to the AER, and the ACO's July 26th report amount to "extraordinary circumstances" that allowed ACFN to submit its costs claim no later than August 26, 2019.

**Syncrude's Response Submission**

Syncrude submits that the cost's claim should have been filed no later than April 26, 2019, as the hearing record was complete and the hearing closed at the end of oral final argument on March 27, 2019. In support of this, Syncrude points to other decisions in which the AER confirmed that the hearing record was complete on the date when closing argument concluded.[1] Syncrude also points to the transcripts from closing argument on March 27, 2019, wherein the Panel Chair indicated in closing remarks that "the hearing is now closed", and the Panel's Decision Report which indicates that "[t]he hearing closed on [March 27, 2019]."

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[1] AER letter decision dated April 29, 2019 (Cost Application No. 1918076); AER letter decision dated May 9, 2019 (Costs Application No. 1918076).

Syncrude submits that ACFN's costs claim was filed 151 days after March 27th and 121 after the filing deadline of April 26th. Accordingly, the costs claim does not comply with the requirements of the Rules or Directive 031.

In relation to ACFN's submission that the hearing record remained open until July 26th, Syncrude submits that no precedent was provided to support this position. Further, the correspondence exchanged in July of 2019 was procedural in nature and did not contain evidence. It did not supplement or keep the hearing record open past March 27th. The correspondence in July of 2019 was not considered by the Panel in the Decision Report and, rather, formed part of the record of consultation considered by the ACO in making its adequacy decision in relation to the MSL Applications. The ACO's process is separate and did not extend the AER's hearing record or costs claim deadline.

In response to ACFN's position that extraordinary circumstances exist, Syncrude submits that no extraordinary circumstances have been provided or exist in the circumstances. ACFN's costs claim does not explain why ACFN did not file on April 26th, well before the correspondence in July was exchanged. Further, all ACFN's claimed costs were incurred prior to April 26th. In this case, ACFN simply missed the filing deadline.

**ACFN Reply Submission**

In its reply submission, ACFN stated that 1) the hearing record did not close until the ACO filed its final consultation report on July 26, 2019, and, alternatively, 2) extraordinary circumstances existed which allow the AER to consider its cost claim per section 6.5 of Directive 031.

ACFN submits that, as set out in *Energy Ministerial Order 105/2014* and the *Joint Operating Procedures for First Nations Consultation on Energy Resource Activities* between the AER and ACO (Joint Operating Procedures), the AER cannot make a decision on an energy application[2] until it receives the ACO report. It then follows that the hearing record is not complete until the ACO report is delivered.

ACFN noted that the record was not closed in March of 2019, because the AER accepted further submissions in July of 2019. ACFN states that if the hearing record were closed, the AER could not have accepted the ACO's July 26th report. Further, ACFN submits that the July submissions were not just procedural, but relate to a substantive matter—consultation with ACFN.

ACFN takes the position that Directive 031 is flexible and provides the AER with discretion to re-open the hearing record. Reasonable consideration of the steps taken by the parties, the ACO and the AER in July reflects that the record remained open, or was re-opened by the AER, when the AER accepted additional submissions from the parties and the ACO's July 26th report.

ACFN further submitted that "extraordinary circumstances" contemplated in section 6.5 of Directive 031 exist. ACFN says those extraordinary circumstances arose because the final ACO report on the MSL Applications was not issued until July 26, 2019, after final argument. Further,

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[2] As defined in *Energy Ministerial Order 105/2014,* an "energy application" is an "application" to the AER for an "energy resource activity" "approval" under the "specified enactments", all as defined in the *Responsible Energy Development Act*.

the Joint Operating Procedures prevent the AER from making a final decision on an application until the ACO provides its final report on Crown consultation. ACFN submits that, contrary to the Joint Operating Procedures, the ACO report was issued after the "AER decision". Neither of these anomalies has occurred before in an AER hearing. In ACFN's submission, these are "extraordinary circumstances".

ACFN states it should have been permitted to make a submission on the July 26th ACO report. Additionally, it says that the correspondence exchanged in July was not merely procedural; it was substantive in that it related to consultation adequacy, and was part of the record. It is also an extraordinary circumstance that consultation with ACFN was not completed at the time of closing argument and when the Hearing Decision was issued. The "re-opened hearing record was only completed with [issuance of] the ACO report on July 26, 2019." ACFN submits that following Directive 031, ACFN had 30 days from July 26, 2019 to file its costs claim.

ACFN also submits:

- Syncrude will not be unduly prejudiced by this cost application. Syncrude is a multi-billion dollar company and will recover billions from these operations. ACFN is a nation of 1200 people. While $400,000.00 is not a significant amount of money to Syncrude, it is to ACFN.

- ACFN does not participate in environmental assessments of oil sands mines to earn money. It submits claims to avoid a financial impact associated with its participation. Even a successful cost claim does not cover all of ACFN's costs.

- Syncrude's "annual capacity funding and MLX Project-specific funding" provided to ACFN does not cover the cost of ACFN's participation in the hearing.

- Syncrude would have expected to cover ACFN's costs because they are reasonable, necessary, and direct costs of participating in a hearing. ACFN worked to minimize its costs.

- ACFN's participation was relevant to the hearing and useful to the Panel.

**Panel Decision**

Once all evidence was submitted in the winter of 2019 and closing argument was provided on March 27, 2019, the record of the proceeding was closed and complete for the purposes of Directive 031. As such, and in accordance with section 62 (3) of the Rules and Directive 031, ACFN should have filed a cost claim on or before April 26, 2019.

The panel recognizes that there is a case to be made that when the panel asked for and accepted correspondence from the ACO and the parties between July 3 and 10, 2019, the record of proceeding 361 was re-opened. The panel did consider the content of the information received in early July in making its decision in the proceeding.

However, there is no question that when the last submissions were received on July 10 and certainly when the panel issued its final decision in the proceeding on July 16, the record of

proceeding 361 was closed and complete. Proceeding 361 ended on July 16 and the panel had no further role in relation to the hearing proceeding. Any correspondence submitted after July 16, 2019 to the AER or to any other entity or person in relation to the matters considered in proceeding 361 was not provided to nor considered by the panel and could not form part of the record for hearing proceeding 361. As such, the report of the ACO, which ACFN advises was issued on July 26, 2019, could not form part of the record of proceeding 361. In the Hearing Decision, the panel remitted the MSL applications back to the AER. The fact the AER, as an administrative agency, received the ACO MSL report after the hearing proceeding was concluded does not alter the record for the hearing.

In short, even if the record of proceeding 361 did re-open in early July 2019, the parties could have reasonably expected the hearing record to be completed on July 10th when the last submissions were filed. However, even if this was unclear, the record could not have remained incomplete following July 16th when the Panel's Decision Report was issued.

ACFN did not file its costs claim within 30 days of the completion of the record, whether that was on March 27 or July 10, 2019, or otherwise provide any notice to the panel indicating an intention to file a costs claim until August 24th. Accordingly, ACFN's costs claim was filed late.

The panel notes that if ACFN was unclear on the date the hearing record was completed, it would have been prudent for ACFN to have made inquiries of the panel to confirm the costs claim filing deadline. This is particularly so given that the record is generally considered complete once final argument has been presented and the hearing has been closed. Both of these events occurred on March 27th, well before the July Correspondence or the date ACFN's costs claim was filed.

The panel does not agree that the circumstances of this matter amount to "extraordinary circumstances" contemplated in section 6.5 of Directive 031 which prevented ACFN from filing its claim prior to the 30-day filing deadline for a costs claim. Re-opening a record does not extend the filing deadline beyond 30 days from completion of the proceeding record. Records are sometimes reopened and that may reset the clock for filing a costs claim, but reopening does not by itself present "extraordinary circumstances".

The panel recognizes that it is unusual for an AER hearing panel to not have a final ACO report at the time it must issue its decision. It places a panel in the unfortunate situation where it cannot make a decision on matters for which a report is required and none is provided. That is what happened here. However, this anomaly does not affect when the record for proceeding 361 was complete or provide circumstances so remarkable that they provide an explanation for why the costs claim could not be filed on time. The "extraordinary circumstances" contemplated in Directive 031 must be highly unusual and explain why the cost applicant could not meet the filing deadline. The circumstances of this matter do not explain why ACFN could not file its cost claim on time.

Given that ACFN's costs claim is inexcusably late, the panel does not need to consider the submissions regarding the merits of the claim.

In making this decision, the panel notes that Syncrude will pay the preparation and attendance honoraria and disbursements claimed for ACFN's community witnesses and elders. The panel

also notes that there may be alternative means available to ACFN to recover any outstanding amounts incurred.

Yours truly,

Meighan G. LaCasse

Counsel

cc: Matt Hulse
Bernard Roth
Alison Doebele, AER
Pam Tongsrinark, AER