



ConocoPhillips Canada Operations Ltd.

**Application for Two Wells and a Multiwell Battery,
Willesden Green Field**

Costs Awards

April 22, 2014

ALBERTA ENERGY REGULATOR

Costs Order 2014-004: ConocoPhillips Canada Operations Ltd., Application for Two Wells and a Multiwell Battery, Willesden Green Field

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ALBERTA ENERGY REGULATOR

Calgary Alberta

CONOCOPHILLIPS CANADA OPERATIONS LTD.

Costs Order 2014-004

APPLICATION FOR TWO WELLS

AND A MULTIWELL BATTERY

Applications No. 1743497, 1743503, 1760257

WILLESDEN GREEN FIELD

Costs Application No. 1782378

1 Introduction

[1] On June 17, 2013, the *Responsible Energy Development Act (REDA)* came into force in Alberta. The *Energy Resources Conservation Act (ERCA)*, which established the Energy Resources Conservation Board (ERCB/Board), was repealed and the Alberta Energy Regulator (AER) was created. In accordance with the terms of *REDA*, the AER assumed all of the ERCB's powers, duties, and functions under Alberta's energy resource enactments, which includes the *Oil and Gas Conservation Act* and the *Pipeline Act*. Throughout this transition from the ERCB to the AER, the authority of the AER continued without interruption in accordance with the *REDA Transition Regulation*. As a result, the ERCB/Board will be referred to in this costs order as the AER regardless of whether the organization was known at the time as the ERCB or the AER.

1.1 Background

Applications No. 1743497 and 1743503

[2] ConocoPhillips Canada Operations Ltd. (ConocoPhillips) applied under section 2.020 of the *Oil and Gas Conservation Rules (OGCR)* for a licence to drill two horizontal wells at a surface location in Legal Subdivision (LSD) 14, Section 14, Township 41, Range 5, West of the 5th Meridian, to bottomhole locations at LSD 3-14-41-5W5M and LSD 4-14-41-5W5M.

Application No. 1760257

[3] ConocoPhillips applied under section 7.001 of the *OGCR* for a licence to construct and operate a multiwell battery at a surface location in LSD 14-14-41-5WM. The facility equipment at the well site would consist of two 3-phase separators, two fuel gas scrubbers, two water storage tanks, and two methanol tanks.

[4] The Alberta Energy Regulator (AER) received submissions from Mrs. M. O'Connor and Mr. P. Leopold and held a public hearing in Condor, Alberta, which started on November 13, 2013, and ended on November 14, 2013, before a panel comprising the following hearing commissioners: B. T. McManus, Q.C. (presiding), R. C. McManus, M.E.Des., and B. M. McNeil, C.Med.

[5] The AER issued its decision approving the applications on February 11, 2014, in *Decision 2014 ABAER 001*.

1.2 Costs Claim

[6] On November 28, 2013, Mrs. O'Connor filed a \$45 539.77 costs claim. On December 11, 2013, ConocoPhillips submitted, in response to the claim, comments that were subject to any

further reply it may have to new information regarding Don W. Hryhor and Howard M.W. Ames. On January 13, 2014, Mrs. O'Connor responded to ConocoPhillips's submissions, and on January 30, 2014, ConocoPhillips confirmed that it had no further costs submissions.

2 The AER's Authority to Award Costs

[7] In determining who is eligible to submit a claim for costs, the AER is guided by the *Alberta Energy Regulator Rules of Practice (Rules of Practice)*, in particular section 58(1)(c):

58(1)(c) "participant" means a person or a group or association of persons who have been permitted to participate in a hearing for which notice of hearing is issued or any other proceeding for which the Regulator has decided to conduct binding dispute resolution, but unless otherwise authorized by the Regulator, does not include a person or group or association of persons whose business includes the trading in or transportation or recovery of any energy resource.

[8] When assessing costs, the AER is also guided by part 5 of the *Rules of Practice* and by appendix D, "Scale of Costs," in AER *Directive 031: REDA Energy Cost Claims*. Section 64 of the *Rules of Practice* states that

64 The Regulator may award costs to a participant if it finds it appropriate to do so in the circumstances of a case, taking into account the factors listed in section 58.1.

[9] The panel notes that the *Rules of Practice* was amended on November 30, 2013. This amendment added section 58.1 and removed the considerations for cost awards previously provided in section 64 (see appendix A). The panel observes that most of the factors listed in section 58.1 are considerations previously provided in section 64. It is these considerations previously listed in section 64 that have been referred to in this cost proceeding.

[10] Given that the key events relating to an award of costs in this matter (hearing and submissions) all occurred prior to the November 30, 2013, amendment to the *Rules of Practice*, the panel, in making this cost decision, has had regard to those considerations existing before that date.

[11] The panel has read and thoroughly considered all of the submissions made in this cost process. The absence in this decision of a reference to a particular submission or aspect of a submission in no way indicates that the panel failed to consider the entire submission. All material filed with the AER has been carefully considered by the panel in coming to this decision.

3 Costs Claims of Ms. O'Connor

[12] Ms. Laura Snowball represented Mrs. O'Connor and Mr. Leopold at the hearing and filed a costs claim on their behalf claiming legal fees of \$31 377.50, disbursements of \$921.75, expert fees of \$11 100.00, and GST of \$2140.52, for a total claim of \$45 539.77.

[13] ConocoPhillips took issue with certain parts of the costs claim and pointed out that although *Directive 031* sets out a scale of costs for legal, consulting, and expert fees, the AER

does not award the maximum allowable hourly rates as a matter of course, but assesses each claim upon its individual merits.

[14] ConocoPhillips pointed out that the AER may award costs to a participant if the AER is of the opinion that the costs are reasonable and directly and necessarily related to the proceeding, and that the participant acted responsibly and contributed to a better understanding of the issues before the AER. The AER may also consider whether the participant failed to comply with a direction of the AER, engaged in conduct that unnecessarily lengthened the duration of the proceeding or resulted in unnecessary costs, took any step in the proceeding that was improper, vexatious, or unnecessary, or any other matter the AER considers appropriate.

[15] ConocoPhillips noted that the nature and scope of the applications is a relevant consideration in determining whether costs are reasonable. Although the materials in the hearing binders totalled about 750 pages, much of the material is duplicated, both wells target the same substance in the same formation, and the documentation related to the two well licence applications was substantially identical, except for the bottom hole location.

3.1 Legal Fees and Disbursements

[16] ConocoPhillips noted that Mrs. O'Connor's counsel indicated that she has 23 years of experience, and as a result she claimed fees at the maximum allowable hourly rate set out in *Directive 031*. ConocoPhillips submitted that counsel's conduct demonstrated a lack of experience with the AER, the AER's processes, and *Rules* that justify a lower hourly rate. Examples of this inexperience were evident in two preliminary matters raised by counsel at the start of the oral hearing. In the first, counsel objected to the submission of the CVs of ConocoPhillips's witnesses, and in the second, counsel objected to the admission of ConocoPhillips's prefiled documentary evidence for the truth of its contents.

[17] In addition to demonstrating her inexperience with the AER's process and rules, these preliminary applications unnecessarily lengthened the proceedings and resulted in unnecessary costs, both to Mrs. O'Connor and to ConocoPhillips.

[18] ConocoPhillips further submitted that counsel failed to comply with a direction of the AER when on October 18, 2013, she applied for and was granted a brief extension for filing Mrs. O'Connor's submission, but was clearly and unequivocally told by the AER, "[n]o further extension will be granted and the hearing date of November 13, 2013, will proceed." In spite of this clear direction, counsel for Mrs. O'Connor made two additional failed adjournment requests, and this failure to follow the AER's direction was further conduct that resulted in unnecessary costs.

[19] Given the above, ConocoPhillips submitted that a 10 per cent reduction in counsel's hourly rate is warranted.

[20] Ms. Snowball, however, pointed out that her objection to placing the ConocoPhillips CVs on the hearing record was twofold: the CVs of ConocoPhillips's company witnesses should not be placed on the record because of the risk of giving unfair weight to their presumably lay evidence; and, if they were presented as opinion witnesses, the substance of each witness's anticipated evidence had not been disclosed before the hearing.

[21] In regards to ConocoPhillips argument that the objection to the placing of its documentary evidence on the record for the truth of its contents was improper because it is an accepted practice, Ms. Snowball submitted that this practice may still violate the principles of natural justice and procedural fairness.

[22] Ms. Snowball also noted that ConocoPhillips failed to observe the requirements of Rule 53(2) in that none of its documentary evidence was delivered to the participant with notice of the corresponding authors or their credentials.

[23] In regards to adjournment applications, Ms. Snowball submitted that there were three post-October 22, 2013, adjournment requests, each in response to steps taken by ConocoPhillips after the October 22, 2013, decision. She argued that it follows that the AER could not have been aware of that subsequent conduct when it issued the October 22, 2013, decision.

[24] Ms. Snowball further pointed out that when an application is dismissed, it does not necessarily follow that the application was not arguable, or was unnecessary. Accordingly, the argument that the participant's applications were "frivolous and unnecessary" ought to be dismissed.

[25] The panel notes that Ms. Snowball began legal work in this matter at a later stage of the process and that her presentation was generally effective. However, the panel recognizes ConocoPhillips's argument that the objection to the CVs of its witnesses and to their giving of evidence was unnecessary and that a fee reduction was appropriate. The panel also finds that the additional adjournment requests that were made were unnecessary. Although these preliminary applications unnecessarily lengthened the duration of the proceeding, the inefficiencies were not significant. Therefore, on balance the panel finds that a minor reduction in the legal fees claimed by Ms. Snowball is warranted and awards 90 per cent of the costs claimed by Ms. Snowball for legal fees. This reduces the total legal fees claimed by Ms. Snowball from \$31 377.50 to \$28 239.75, plus disbursements of \$643.45 and GST of \$1444.16 for a total amount awarded of \$30 327.36.

3.2 Experts' Fees and Expenses

[26] ConocoPhillips noted that the costs claim includes fees and disbursements of \$6075.59 (excluding GST) for Mr. Hryhor and \$5302.71 (excluding GST) for Mr. Ames, and that these fees and disbursements should be disallowed in their entirety.

[27] ConocoPhillips noted that the costs claim did not provide any information about these individuals, their qualifications, the technical or expert assistance they provided, how that technical or expert assistance was related to their particular expertise, or why this expertise was necessary. Neither Mr. Hryhor nor Mr. Ames filed an expert report, and neither of them was called as a witness.

[28] ConocoPhillips noted that it appears from Mr. Hryhor's account that he conducted a geological review of the applications, but there is no evidence that he has the necessary qualifications to do so. With respect to Mr. Ames, his account does not indicate what qualifications or expertise he brought to bear, or why that undisclosed expertise was necessary.

[29] ConocoPhillips submitted that the costs claim contains insufficient information to permit the AER to conclude that these consultants were necessary, and therefore their costs should be disallowed entirely.

[30] Alternatively, ConocoPhillips argued that if the AER considers that the participation of Mr. Hryhor and Mr. Ames directly and necessarily related to the applications and their participation was of assistance to the AER, the time Mr. Hryhor spent reviewing should be reduced by at least 50 per cent, the time Mr. Hryhor and Mr. Ames spent consulting with each other and with Mrs. O'Connor's counsel should be reduced by at least 50 per cent, and the time they spent drafting the information request should be reduced by 25–50 per cent.

[31] ConocoPhillips pointed out that the costs claim included a \$230 disbursement for 23 land title searches with no explanation of what titles were searched or why title searches were directly and necessarily related to the applications.

[32] ConocoPhillips submitted that the applications clearly set out the proposed location of the applied-for facilities, that it is difficult to justify any land title searches, and that this disbursement should be disallowed.

[33] Ms. Snowball argued that the work done by both analysts in preparing counsel for the hearing appears on the face of their invoices. Appendix D (scale of costs) contemplates four kinds of professional fees: legal, consultants', analysts', and experts' fees. On the face of their invoicing, both individuals worked as analysts of the materials and subject matter.

[34] Ms. Snowball further argued that neither was retained as an expert witness because ConocoPhillips gave no notice of its intention to produce expert witnesses until November 11th and, even then, provided no disclosure of the intended testimony of those expert witnesses. She argued that had there been proper notice, the participant might well have retained one or more rebuttal experts.

[35] Ms. Snowball argued that since Mr. Ames's and Mr. Hryhor's hourly rates are substantially less than counsel's, the work those analysts provided should be considered costs savings given what the hourly rate would have been if counsel had performed the analytical work entirely on her own. In regards to review of hearing binders, Ms. Snowball argued that all of the materials had to be reviewed before a conclusion could be made.

[36] Ms. Snowball noted that, as documented, the participant's legal counsel and analysts invoiced the participant for substantially less time than was actually dedicated to the file, and that given these time reductions ConocoPhillips is arguing for compound discounts. Ms. Snowball submitted that ConocoPhillips is already the beneficiary of a discount in the fees and disbursements for which it is responsible under *Directive 031*. Accordingly, ConocoPhillips's demand for further concessions should be rejected in its entirety.

[37] In regard to the land title searches, Ms. Snowball argued that these were relevant and material because one of the fundamental questions was whether it was necessary to locate the wells and battery near Mrs. O'Connor's home.

[38] The panel agrees with ConocoPhillips that the time the consultants spent in this matter was excessive considering the nature and scope of the applications. The panel notes that the

applications contained no overly complex issues and that neither Mr. Hryhor nor Mr. Ames filed expert reports or were called as witnesses. In addition, time was spent on sour gas issues which had little to no relevance in this particular matter and this should have been obvious to the consultants. Overall, while it was not apparent to the panel what assistance was provided by Mr. Hryhor and Mr. Ames to Ms. Snowball, to a certain extent the panel accepts Ms. Snowball's submission that they did assist her with preparation and analytical work. The panel also notes that Mr. Hryhor was in attendance with Ms. Snowball at the hearing and accepts that he assisted her during this time. In regards to the curricula vitae of the experts, the panel finds that Mr. Hryhor's lists a more comprehensive description of the assistance he provided when compared to Mr. Ames's curriculum vitae.

[39] With respect to the land title searches disbursement, the panel agrees with Ms. Snowball's comments and finds that the searches were related to the applications and contributed to a better understanding. The panel allows this \$230 disbursement.

[40] Given the above, the panel awards all of Mr. Hryhor's nine hours of hearing attendance time and 25 per cent of his remaining claimed time for a total award including expenses and GST of \$2835.62. With respect to Mr. Ames, the panel awards 25 per cent of his entire claimed time for a total amount including expenses and GST of \$1433.47.

4 Order

[41] The AER hereby orders that ConocoPhillips pay costs to Mrs. O'Connor in the amount of \$32 949.00 and GST in the amount of \$1647.45 for a total of \$34 596.45. This amount must be paid within 30 days from issuance of this order to

Mrs. Melanie O'Connor
Box 146
Leslieville, AB T0M 1H0

Dated in Calgary, Alberta, on April 22, 2014.

ALBERTA ENERGY REGULATOR

<original signed by>

B.T. McManus, Q.C.
Presiding Hearing Commissioner

<original signed by>

R.C. McManus, M.E.Des.
Hearing Commissioner

<original signed by>

B.M. McNeil, C.Med.
Hearing Commissioner

Appendix A Section 64 of the *AER Rules of Practice* prior to November 30, 2013, Amendment

The *AER Rules of Practice* was amended on November 30, 2013, in accordance with the *Alberta Energy Regulator Rules of Practice Amendment Regulation* (AR 203/2013). The excerpt below is from the *Rules of Practice* prior to that amendment.

Costs awarded

64(1) The Regulator may award costs to a participant if the Regulator is of the opinion that

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

(2) In determining the amount of costs to be awarded to a participant, the Regulator may consider whether the participant did one or more of the following:

- (a) asked questions on cross-examination that were unduly repetitive of questions previously asked by another participant and answered by that participant's witness;
- (b) made reasonable efforts to ensure that the participant's evidence was not unduly repetitive of evidence presented by another participant;
- (c) made reasonable efforts to co-operate with other participants to reduce the duplication of evidence and questions or to combine the participant's statement of concern with that of similarly interested participants;
- (d) presented in oral evidence significant new evidence that was available to the participant at the time the participant filed documentary evidence but was not filed at that time;
- (e) failed to comply with a direction of the Regulator, including a direction on the filing of evidence;
- (f) submitted evidence and argument on issues that were not relevant to the proceeding;
- (g) needed legal or technical assistance to take part in the proceeding;
- (h) engaged in conduct that unnecessarily lengthened the duration of the proceeding or resulted in unnecessary costs;
- (i) denied or refused to admit anything that should have been admitted;
- (j) took any step or stage in the proceeding that was
 - (i) improper, vexatious or unnecessary, or
 - (ii) taken through negligence, mistake or excessive caution;
- (k) failed to comply with this Part;
- (l) any other matter the Regulator considers appropriate.

Appendix B Summary of Costs Claimed and Awarded

	Total fees/ honoraria claimed	Total expenses claimed	Total GST claimed	Total amount claimed	Total fees/ honoraria awarded	Total expenses awarded	Total GST awarded	Total amount awarded
Laura Snowball	\$31 377.50	\$643.45	\$1575.88	\$33 596.83	\$28 239.75	\$643.45	\$1444.16	\$30 327.36
Don Hryhor	\$5 850.00	\$225.59	\$299.50	\$6 375.09	\$2 475.00	\$225.59	\$135.03	\$2 835.62
Howard Ames	\$5 250.00	\$52.71	\$265.14	\$5 567.85	\$1 312.50	\$52.71	\$68.26	\$1 433.47
	\$42 477.50	\$921.75	\$2140.52	\$45 539.77	\$32 027.25	\$921.75	\$1647.45	\$34 596.45