Alberta Energy Regulator

Pembina Pipeline Corporation

Applications for Two Pipelines
Fox Creek to Namao Pipeline
Expansion Project

Costs Awards

July 29, 2016

Alberta Energy Regulator
Costs Order 2016-001: Pembina Pipeline Corporation, Applications for Two Pipelines, Fox Creek to Namao Pipeline Expansion Project

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1 Introduction

1.1 Background

[1] Pembina Pipeline Corporation (Pembina) filed Application No. 1806873 under the *Pipeline Act* for approval to construct and operate two pipelines. Pembina proposed to construct a 609.6 millimetre (24-inch) diameter pipeline and a 406.4 millimetre (16-inch) diameter pipeline that would run parallel to each other in a common ditch for about 268 kilometres. The pipelines are designed to transport high-vapour-pressure liquid hydrocarbons, low-vapour-pressure liquid hydrocarbons, and crude oil from Pembina's Fox Creek pump station at Legal Subdivision (LSD) 8, Section 36, Township 62, Range 20, West of the 5th Meridian, to its Namao Junction pump station at LSD 04-35-054-24W4M. The hydrogen sulphide concentration of the hydrocarbons would be zero moles per kilomole. The pipelines would cross both White and Green Areas of the province.

[2] Pembina also filed Applications No. PLA141460, PLA141465, PLA141468 to PLA141473, PLA141475 to PLA141480, and PLA141487 under the *Public Lands Act* for 15 pipeline agreements in the Green Area. The agreements would grant access to a permanent right-of-way with a width of 35 metres (m) and, during construction, an additional 10 m wide temporary workspace.

[3] Finally, Pembina filed EPEA Application No. 001-00356633 under the *Environmental Protection and Enhancement Act* for approval of a conservation and reclamation plan, which includes construction and post-construction reclamation of the portion of the project that is located within the White Area.

[4] Seventeen statements of concern were filed in response to the notice of application issued by the Alberta Energy Regulator (AER). Eleven of the statement-of-concern filers were advised that they were eligible to participate in the hearing under section 34(3) of the *Responsible Energy Development Act* (*REDA*). Eleven requests to participate were filed and all eleven were granted. The following ultimately participated in the hearing: Grassroots Alberta Landowners Association (Grassroots), representing 38 landowners; D. Nielsen; Alexander First Nation (Alexander); Driftpile First Nation (Driftpile); and Gunn Métis Local 55.

[5] The AER issued an initial notice of hearing on April 17, 2015. The hearing panel held a prehearing meeting in Spruce Grove on May 14, 2015. The AER held a 14-day public hearing of the applications in Edmonton, Alberta, beginning on October 26, 2015, and ending on December 18, 2015, before panel members R. C. McManus (presiding), C. A. Low, and B. M. McNeil.

[6] The AER issued its decision approving the applications on April 21, 2016, in *Decision 2016 ABAER 004: Pembina Pipeline Corporation, Applications for Two Pipelines, Fox Creek to Namao Pipeline Expansion Project*.

1.2 Costs Claims

[7] Grassroots, Mr. Nielsen, Alexander, and Driftpile submitted costs claims. Before the costs claims were considered, Pembina reached settlements on the claims filed by Mr. Nielsen and Driftpile. Alexander's costs claim is still being adjudicated, and a separate decision may be issued for that costs claim at a later date.

[8] On February 29, 2016, Grassroots filed a costs claim in the amount of $356 695.57. On March 14, 2016, Pembina submitted comments on the costs claim of Grassroots. Grassroots submitted a response to Pembina's comments on May 5, 2016. The AER considers the Grassroots costs process to have closed on May 5, 2016.

2 The AER's Authority to Award Costs

[9] 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 sections 58(1)(c) and 62:

> 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.
>
> 62(1) A participant may apply to the Regulator for an award of costs incurred in a proceeding by filing a costs claim in accordance with the Directive.
>
> (2) A participant may claim costs only in accordance with the scale of costs.
>
> (3) 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, and
>
> (b) serve a copy of the claim on the other participants.
>
> (4) After receipt of a claim for costs, the Regulator may direct a participant who filed the claim for costs to file additional information or documents with respect to the costs claimed.

> (5) If a participant does not file the information or documents in the form and manner, and when directed to do so by the Regulator under subsection (4), the Regulator may dismiss the claim for costs.

[10] When assessing costs, the AER is guided by Division 2 of Part 5 of the *Rules of Practice*, *Directive 031: REDA Energy Cost Claims*, and *AER Bulletin 2014-07: Considerations for Awarding Energy Costs Claims and Changes to the AER's Process for Reviewing Energy Costs Claims*. *Bulletin 2014-07* advises that costs submissions are to address the factors from the *Rules of Practice* that appear relevant to the particular costs claim. The bulletin also advises that the AER will only review aspects of a costs claim that are specifically in dispute and may grant the rest of the claim without further review. Section 64 of the *Rules of Practice* states the following:

> 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.

3 Costs Claim of Grassroots

[11] Grassroots falls within the definition of participant in section 58(1)(c) of the *Rules of Practice*.

[12] Grassroots was represented by Prowse Chowne LLP in the hearing process and claimed $157 872.00 in legal fees, $86 030.00 in expert fees, $81 406.58 in honoraria, $18 288.34 in disbursements/expenses, and GST in the amount of $13 098.65. The total amount claimed was $356 695.57.

[13] On May 5, 2016, the AER was advised that Grassroots and Pembina had reached an agreement in principle on the costs claim, with the exception of the Serecon Inc. and Shaske Appraisals portions of the claim. On June 1, 2016, counsel for Grassroots confirmed that the agreement had been reached with the exception of these items. Counsel for Pembina further confirmed this on June 10, 2016. This costs order will only address these outstanding items.

3.1 Shaske & Zeiner Appraisal Consultants Ltd.

[14] Grassroots claims a total of $5250.00 for Shaske & Zeiner Appraisal Consultants Ltd. (Shaske). The invoice included with the costs claim states that this amount is for a "Preliminary Analysis for the Grassroots / Pembina Pipeline properties." Pembina notes that no narrative is provided to justify the claim for $5000, including disbursement and excluding GST, for Shaske to conduct this analysis. Pembina points out that the invoice indicates this work was done before August 27, 2014 (the date of the invoice), and before Pembina's application was filed on September 14, 2014. Grassroots did not file the "Preliminary Analysis" as evidence in the hearing, nor did a representative appear at the hearing to speak to it. Pembina submits that consulting fees spent before an application is filed should be denied.

[15] Grassroots did not respond to Pembina's submission about the expenses submitted for Shaske.

[16] The panel has considered the claim made for costs related to Shaske and has also considered the submissions of the parties. The panel notes that, as a general rule, costs that precede a notice of hearing are not awarded. In this case, the costs claimed precede not only the notice but also the applications. In such a case, the party claiming such costs would have to provide a compelling reason why they ought to be awarded. Grassroots, however, has provided no justification for why the panel ought to award costs that were incurred. In addition, since the "Preliminary Analysis" was neither filed as evidence nor addressed during the hearing process, it neither contributed to the hearing nor contributed to a better understanding of the issues before the AER. Therefore, no costs are awarded for the Shaske claim.

3.2 Serecon Inc.

[17] Grassroots is seeking to recover $14 500, including disbursements and excluding GST, for the costs of Serecon Inc. (Serecon). Mr. Glen Doll, a Serecon employee, prepared a report that was filed as evidence in the hearing, and he participated as a witness for Grassroots in the hearing. The Serecon invoice lists general tasks performed and gives the dates and hours these were done.

[18] In its costs claim, Grassroots submits that its members rely on the environmental integrity of their lands for their livelihood. Grassroots notes that unless there is record keeping and preconstruction surveying practices, a failure to detect invasive weeds or agricultural diseases such as clubroot "could wreak havoc on their farms." Grassroots submits that "the assessment and evaluation of Pembina's environmental protection plan (EPP) required specialized agrological knowledge and expertise to assess the interaction between pipeline construction and farming practices." Grassroots says this is particularly the case with threats to agricultural operations and the potential economic impacts of construction. With Mr. Doll's expertise, he was able to show weaknesses in the plan and make recommendations for how the Grassroots members' lands could be better protected. The Grassroots members lacked the expertise to analyze Pembina's construction practices from a critical agrological perspective in order to minimize the impacts on the productivity of their land.

[19] Grassroots further submits that the expenses sought for Serecon are more than reasonable considering the insight Mr. Doll provided about biosecurity and the agricultural impacts of implementing Pembina's proposed EPP. Grassroots submits that Pembina seeks to draw a distinction between "farm and agri-business management" and the "physical aspects of farming." Grassroots submits the distinction is artificial and in no way derogates from the usefulness of Mr. Doll's opinion. Pembina elected not to cross-examine Mr. Doll on his evidence. Grassroots submits that his evidence was succinct, efficient, and directly on point. Mr. Doll also helped Grassroots' counsel with cross-examination of Pembina's experts.

[20] Pembina points out that *Directive 031* states that a consultant's invoices must provide "sufficient detail to demonstrate that all items billed were necessary and related to the application or proceeding." Pembina argues that Mr. Doll did not provide sufficient detail to determine whether the time entries billed were necessary and related to the application or proceeding.

[21] The panel agrees that Mr. Doll's invoices lack sufficient detail to fully assess the accuracy of the Serecon costs claims. Nevertheless, the panel finds that Mr. Doll's evidence and participation in the hearing contributed to the panel's understanding of the issues from a landowner perspective, and therefore the panel chooses to exercise its discretion and consider his claim despite this lack of detail.

3.2.1 Alternative Dispute Resolution Costs Previously Paid

[22] Mr. Doll has invoiced for "pre-mediation meeting" and "AER mediation" during the June–October timeframe. Without an explanation of what he did on June 22, June 26, July 16, and July 30 (a total of four hours), Pembina assumed that this was time spent with alternative dispute resolution (ADR), which was ongoing at that time, and submits that such costs should not be borne by Pembina.

[23] The panel agrees with Pembina that the invoice provided by Serecon does not contain the detail required by section 4 of *Directive 031*, which requires, "if a lawyer, expert, or consultant was a necessary component of the participation, a summary of the lawyer's, expert's, or consultant's expertise and a detailed description of the work they did in support of their client's participation." Since no detail has been provided, it is not possible to determine whether the time that has been claimed by Serecon is reasonable and related to matters that would provide the panel with a better understanding of the issues.

[24] The panel also notes that there is no indication of whether the time claimed for the June–October timeframe is related to Mr. Doll's preparation for the hearing or to ADR, which was ongoing at that time. As outlined in section 6.4 of *Directive 031*, "With the exception of binding dispute resolution by a hearing commissioner, the AER does not award compensation for participation in the AER's alternative dispute resolution (ADR) program. In all other cases, costs for ADR are to be dealt with in the context of the negotiations themselves and not through the AER's costs recovery process."

[25] The panel finds that insufficient justification has been provided for Mr. Doll's invoiced time in June and July 2015, and it accepts Pembina's argument that the Grassroots costs claim should be reduced by 4.0 hours for the work done by Mr. Doll.

3.2.2 Hourly Rate

[26] Pembina notes that the purpose of Mr. Doll's written evidence is described in that evidence as follows:

> The purpose of this review is to determine what steps are being taken to **minimize impacts and protect landowners from potential scenarios both during and after construction that may adversely affect the way agricultural producers use their land and the productivity of that land**. Much of the south eastern portion of the proposed route runs directly through productive agricultural lands which will be disturbed for the purpose of constructing the proposed pipeline with the ultimate goal of returning the land to an equally productive capacity after construction and throughout the duration of the pipeline. [Emphasis added]

[27] In oral direct evidence, Mr. Doll's response when questioned on the subject matter of his written evidence was as follows:

> Yeah, so what I was asked to do was to do a review of Pembina's AER application for this proposed project. The review was kind of limited to agricultural-related issues or **any issues that may pose a potential agricultural impact**, specifically I looked at the EPP, as well as other documents within the application. [Emphasis added.]

[28] Pembina submits that Mr. Doll's written evidence does not include economic impacts, but only the physical impacts of the pipeline construction.

[29] Mr. Doll has invoiced at a rate of $250/hour. According to Mr. Doll's curriculum vitae, he received his bachelor of science degree in agriculture in 2005 and his professional agrologist designation in 2009. Pembina submits that under *Directive 031*, Mr. Doll should only be allowed to charge a rate of $160 per hour, based on his years of experience. Alternatively, Pembina argues that Mr. Doll should not be able to charge a rate exceeding $230/hour when he only received his bachelor of science in agriculture ten years ago. Under *Directive 031*, consultants and experts with 8–12 years of experience may claim a maximum of $230/hour. Pembina submits that Mr. Doll should not be permitted to charge a rate that does not concur with his level of experience and with the evidence that he submitted to the AER.

[30] As stated in section 5.2.1 of *Directive 031*, the scale of costs provides a sliding scale for professionals on the basis that a professional's fees increase as he or she gains expertise. The AER emphasizes that the maximum allowable hourly rates are not awarded as a matter of course; rather, the AER assesses each claim on its individual merits and only approves the maximum fee when the participant has demonstrated that such a fee is warranted by the work performed.

[31] The panel finds that the evidence Mr. Doll submitted and his participation contributed to the hearing and to a better understanding of the issues before the panel. However, the panel acknowledges that Mr. Doll has claimed nearly the maximum allowable hourly rate for experts under *Directive 031*. In its reply submission of May 5, 2016, Grassroots states that the Serecon expenses are more than reasonable. However, Grassroots provides no additional evidence in response to Pembina's submission about the appropriate professional fee that Mr. Doll should be awarded. Nor does Mr. Doll's résumé help in this regard. It is unclear how many years Mr. Doll has worked with Serecon. From his résumé, it appears that this experience is most relevant to his contribution in this hearing. The panel has chosen the date when he received his professional agrologist designation as the most appropriate determinant of fees and therefore awards $160/hour for Mr. Doll.

3.2.3 Docketed Hours – Attendance at the Hearing

[32] Grassroots claims 21.5 hours for Serecon's hearing attendance. Mr. Doll appeared as a witness for Grassroots at the hearing on November 3, 2015. Pembina points out that Mr. Doll has invoiced a total of 8.5 hours for October 26, 28, and 29, 2015, but there is no mention of his involvement in the hearing in

any capacity on these days, and no mention that he helped counsel in cross-examination on October 26. Counsel for Grassroots did not cross-examine on October 28 or 29.

[33] Pembina points out that counsel had at least two days' notice of when Grassroots witnesses would need to appear at the hearing. Since Mr. Doll is located in Edmonton, Pembina argues there was no need for him to appear on any day other than November 3. Accordingly, Pembina submits that the costs claim for Serecon should be reduced by 8.5 hours for hearing attendance.

[34] The panel recognizes the challenge for hearing participants to strike a balance between the need to have witnesses available at the appropriate time and the desire to not have them sit idle unnecessarily during the hearing. The panel expects parties to be reasonable in their decisions about arrangements they make for witnesses to attend the hearing, especially at a hearing like this one, where great efforts were made to create a detailed schedule and update it as efficiently with as much advance notice to and input from parties as possible. The panel agrees with Pembina that there was no need for Mr. Doll to attend the hearing on dates when Grassroots counsel was not engaged in cross-examination (October 28 and 29). Therefore, Serecon's hours claimed for October 28 (4.5 hours) and 29 (2.5 hours) are deducted. The panel accepts Grassroots' submission that Mr. Doll assisted Grassroots' counsel with cross-examination on October 26.

[35] The panel also notes that Serecon has claimed 1.5 hours for attendance at the hearing on November 4, 2015. On this date, Grassroots witnesses did not participate, nor did Grassroots counsel conduct any cross-examination. Therefore, 1.5 hours claimed for November 4 are also deducted.

[36] According to the panel's findings, Serecon's claim should be reduced by a total of 4 prehearing hours plus 8.5 hours for a total of 12.5 hours. The hourly rate for Mr. Doll should be $160. Including GST and disbursements claimed ($375), the total amount awarded for Serecon is $7767.00.

4 Order

[37] The AER hereby orders that Pembina pay costs to Grassroots in the amount of $7415.00 and GST in the amount of $352.00, for a total of $7767.00. This amount must be paid within 30 days of issuance of this order to

Prowse Chowne LLP
1300 – 10020 101A Avenue
Edmonton, AB T5J 3G2

[38] Costs recipients should be aware that despite the above order, in accordance with *Bulletin 2014-07* the AER may, at its sole discretion, audit a costs claim for compliance with the *Rules of Practice* and *Directive 031* any time after it is filed, including after the AER has issued a costs award. Any noncompliance identified during such an audit may result in a decision by the AER to rescind all or part

of the costs award. Recurring or persistent noncompliance with AER costs requirements may result in the AER auditing that party's costs applications more frequently.

Dated in Calgary, Alberta, on July 29, 2016.

Alberta Energy Regulator

<original signed by>

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

<original signed by>

C. A. Low, B.Sc., LL.B., LL.M.
Hearing Commissioner

<original signed by>

B. M. McNeil, B.Sc. (Ag.), C.Med.
Hearing Commissioner

Appendix A 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
Glen Doll, Serecon Inc.	$14 125.00	$375.00	$725.00	$15 225.00	$7040.00	$375.00	$352.00	$7767.00
Shaske & Zeiner Appraisal	$4 820.00	$180.00	$250.00	$5 250.00	$0.00	$0.00	$0.00	$0.00
	$18 945.00	**$555.00**	**$975.00**	**$20 475.00**	**$7040.00**	**$375.00**	**$352.00**	**$7767.00**