Alberta Energy Regulator

Bonavista Energy Corporation

Regulatory Appeal of Two Well Licences, and an Application for a Pipeline

Gilby Field

Costs Award

April 4, 2017

Alberta Energy Regulator

Costs Order 2017-01: Bonavista Energy Corporation, Regulatory Appeal of Two Well Licences, and an Application for a Pipeline – Gilby Field

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Published by
Alberta Energy Regulator
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Calgary, Alberta
T2P 0R4

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Contents

1 Introduction 1
1.1 Background 1
1.2 Costs Claims 2
2 The AER's Authority to Award Costs 2
3 Costs Claim of the Alexanders 3
3.1 Costs Relating to Alternative Dispute Resolution 3
3.2 Views of Bonavista – Why the Alexanders Should Bear Their Own Costs 5
3.3 Views of the Alexanders – Why They Should Not Bear Their Own Costs 5
3.4 Findings of the AER 6
4 Order 6
Appendix A Summary of Costs Claimed and Awarded 8

Bonavista Energy Corporation
Regulatory Appeal of Two Well Licences, and Application for a Pipeline
Gilby Field

Costs Order 2017-01
Regulatory Appeal 1857984
and Application 1833192

1 Introduction

1.1 Background

[1] Bonavista Energy Corporation (Bonavista) originally acquired licences for and developed two wells (the original wells) at Legal Subdivision (LSD) 15, Section 22, Township 41, Range 5, West of the 5th Meridian (15-22 site).

[2] On June 8, 2015, Bonavista submitted nonroutine applications for two additional horizontal gas wells to be drilled from the existing 15-22 site. The public notice of application period for the well applications expired on July 8, 2015. Because the applications met AER requirements and no statements of concern were received, the AER issued well licences 476069 and 476070 (the contested well licences) on July 10, 2015.

[3] On June 29, 2015, Bonavista applied under part 4 of the *Pipeline Act* for approval to construct and operate a pipeline to transport natural gas from the 15-22 site to an existing compressor station located in LSD 11-22-041-05W5M.

[4] On July 23, 2015, Patrick and Patricia Alexander and Evelyn Heringer (collectively the Alexanders) requested a regulatory appeal—under part 2, division 3, of the *Responsible Energy Development Act* (*REDA*) and part 3 of the *Alberta Energy Regulator Rules of Practice* (*Rules of Practice*)—of the AER's decision to issue the well licences to Bonavista.

[5] On July 26, 2015, the Alexanders registered a statement of concern against the pipeline application.

[6] On May 9, 2016, the AER granted the request for a regulatory appeal and decided to set the matter down for a hearing. The purpose of the hearing was to determine whether a hearing panel (the panel) should approve the pipeline, and whether the panel should confirm, vary, suspend, or revoke the AER's decision to issue the well licences.

[7] The AER held a public hearing of the applications in Red Deer, Alberta, on October 18 and 19, 2016, and ending in Calgary on October 27, 2016, before panel members B. M. McNeil (presiding), B. T. McManus, and J. Preugshas.

[8] The AER issued *Decision 2017 ABAER 001: Bonavista Energy Corporation, A Regulatory Appeal of Two Well Licences and an Application for a Pipeline* on January 23, 2017, confirming its

decision to issue Bonavista's well licences 476069 and 476070, which were the subject of the regulatory appeal proceeding. The decision denied Bonvista's application 1833192 for a pipeline.

1.2 Costs Claims

[9] The Alexanders and King and Sandra Manderville (the Mandervilles) submitted costs claims. Before the costs claims were considered, Bonavista reached a settlement on the claim filed by the Mandervilles.

[10] The Alexanders' costs claim, filed on November 24, 2016, was in the amount of $57 359.55. On December 19, 2016, Bonavista submitted comments on the costs claim of the Alexanders. The Alexanders submitted a response to Bonavista's comments on January 6, 2017. The AER considers the costs process to have closed on January 6, 2017.

2 The AER's Authority to Award Costs

[11] In determining who is eligible to submit a claim for costs, the AER is guided by the *Rules of Practice*, particularly 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.

[12] 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 the aspects of a costs claim that are specifically in dispute and may grant the rest of the claim without further review.

3 Costs Claim of the Alexanders

[13] The Alexanders' costs claim falls within the definition of "participant" in section 58(1)(c) of the *Rules of Practice*.

[14] The Alexanders were represented by McLennan Ross LLP in the hearing process and claimed $51 100.00 in legal fees, $1200.00 in honoraria, $2404.28 in disbursements/expenses, and GST of $2655.27. The total amount claimed was $57 359.55.

3.1 Costs Relating to Alternative Dispute Resolution

[15] Bonavista points out that the Alexanders have claimed costs for the hearing process as well as for time spent in alternative dispute resolution (ADR). It notes that the Alexanders' counsel has already acknowledged that section 6.4 of *Directive 031* states the following:

> 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.

[16] Bonavista submits that all costs awards are discretionary, but the wording in section 6.4 of *Directive 031* does not allow the AER to exercise discretion with respect to costs for ADR participation. There is nothing to justify the departure from the plain reading of this section. Bonavista submits that section 6.4 is the reason for the common practice of negotiating responsibility and payment of costs before entering into ADR.

[17] The parties did not participate in binding dispute resolution by a hearing commissioner, and as such, the costs for the ADR were to be dealt with in the context of the negotiations themselves.

[18] Due to the confidentiality of the ADR process, Bonavista notes that it cannot disclose what was discussed during the ADR, except to say that the issues discussed were not limited to those addressed at the hearing. Bonavista submits that the AER does not have the evidence available to award costs related to the ADR, as it has no way of knowing what costs relate to what issues.

[19] Bonavista submits that, barring the Alexanders filing a costs claim that excludes items related to the ADR, the AER should exclude all costs from October 21, 2015 (commencement of the ADR process), through April 15, 2015 (conclusion of the ADR process).

[20] The Alexanders submit that their claim for costs should begin on July 23, 2015, when they filed the request for regulatory appeal (request), and they ask the AER to exercise its discretion and award their costs through the end of the hearing.

[21] The Alexanders submit that ADR was held in the context of the regulatory appeal, and that it was initiated by the AER. ADR was not presented as mandatory but was strongly encouraged.

[22] The Alexanders said that they "should not be held to be responsible for costs for the approximately four months of the 15 months spent in ADR." They submit that it would be "bizarre and unfair" to consider them eligible to claim costs for preparing and prosecuting the request, as well as for preparing and participating in the hearing, but not for their participation in the ADR.

[23] The Alexanders point out that section 58.1(p) of the *Rules of Practice* states that one of the factors the AER must consider when making a decision on an application for costs is "whether the participant refused to attend a dispute resolution meeting when required by the Regulator to do so." Section 58.1(q) sets out another factor, which is "the participant's efforts, if any, to resolve issues associated with the proceeding directly with the applicant through a dispute resolution meeting or otherwise."

[24] The Alexanders were not "required" to participate in ADR, but ADR was strongly encouraged by the AER. The Alexanders believe that participating in ADR was consistent with making good-faith efforts to resolve issues directly through the AER's dispute resolution process. Disallowing that part of the Alexanders' costs that relate to ADR will effectively penalize them for engaging in behaviour that the statutory scheme implicitly encourages and that the AER expressly encouraged.

[25] The Alexanders submit that the AER does have discretion to include ADR costs in a global award of costs for the Alexanders' participation and should exercise its discretion to do so.

[26] However, the panel finds that with respect to costs claimed for ADR, section 6.4 of *Directive 031* is clear and does not provide discretion to award costs except for binding dispute resolution:

> 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.

[27] The panel notes that *Directive 031* does not provide any rationale for section 6.4. The section requires that parties that want to address costs negotiate those costs between themselves. This would prevent situations in which ADR counsel charges legal fees with no chance of being paid. In regards to arguments about the unfairness of being unable to claim ADR costs, the panel respectfully notes that responding to those concerns is beyond its jurisdiction.

[28] The panel finds that until the regulatory appeal request was granted on May 9, 2016, there was no certainty from the Alexanders' standpoint that there would be a hearing. A notice of hearing had not been issued for the pipeline application, and a notice of hearing is normally the starting point for costs awards. The panel sees no reason to depart from this practice. Given the above, the panel finds that time claimed before the commencement of ADR and the 54.3 hours claimed between November 5, 2015, and April 15, 2016, for ADR are not entitled to compensation for a reduction of $19 005.00 from the total amount of costs claimed.

3.2 Views of Bonavista – Why the Alexanders Should Bear Their Own Costs

[29] Bonavista submits that the requirements set out in section 58.1 of the *Rules of Practice* list a number of factors to be considered in determining an award of costs, including whether there is "a compelling reason why the participant should not bear its own costs." It points out that rule 58.1(b) states that the AER considers the "shared responsibility of all Albertans."

[30] Bonavista points to AER *Costs Order 2014-005*, noting that costs awards are not intended to fully indemnify or relieve a participant of the financial burden. The costs process is intended to encourage participants to advance legitimate points of view in a responsible and respectful manner, and in this way it provides incentive for all parties to be reasonable in their approach to the hearing and in attempting to resolve issues outside the hearing.

[31] Bonavista recognizes that section 58.1(a) of the *Rules of Practice* is not a threshold test. It notes that the Alexanders have not provided any reason why they should not bear their own costs, or some part thereof.

[32] Bonavista submits that the AER should deny the costs claim or reduce the claim from a full indemnity basis.

3.3 Views of the Alexanders – Why They Should Not Bear Their Own Costs

[33] The Alexanders respond that paragraph 14 of *Costs Order 2014-005* says the following:

> As stated in the introduction paragraph of *Directive 031,* the purpose of awarding costs is to reduce the financial strain on participants who attend and participate in a hearing. Reducing financial strain does not necessarily mean eliminating financial burden or providing full indemnity for hearing costs. [emphasis added]

[34] The Alexanders submit that in *Costs Order 2014-005* the AER was dealing with a costs claim in the amount of $1.26 million, and it would have been surprising if the AER had awarded full indemnity costs given the magnitude of the costs being claimed.

[35] The Alexanders compare their situation to the considerations in *Costs Order 2016-002* where in paragraph 46 the panel said the following:

> The panel notes that the decision arising from this proceeding had the potential to greatly impact the landowners. Directly at issue in the hearing was the intended use of the landowners' lands and whether the lands were in a state that was consistent with the land management objectives of the landowners. The landowners had a direct interest in the outcome of the proceeding, which justified full participation. This in itself is a compelling reason why the landowners should not bear their own costs. Also, the landowners' submission made a substantial contribution to the hearing, particularly in respect of the history and use of the lands and the intended land management objectives of the landowners. This in turn contributed to a better understanding of the issues before the regulator. [emphasis added]

[36] Similar to the landowners in *Costs Order 2016-002*, there is a potential that the Alexanders will be greatly impacted by the decision resulting from this hearing.

[37] The Alexanders submit that the factor set out in section 58.1(a) of the *Rules of Practice* is not relevant in this case. The factors they consider relevant are set out in sections 58.1(j), (k), (l), and (m). The Alexanders say that their participation made a substantial contribution to the hearing; that their costs are reasonable and directly and necessarily related to matters contained in the notice of hearing; that they acted responsibly in the hearing and contributed to a better understanding of the issues before the AER; and that their conduct (by sticking to relevant issues) tended to shorten the hearing and certainly did not unnecessarily lengthen it.

[38] The Alexanders submit that they are entitled to a full reimbursement of their costs.

3.4 Findings of the AER

[39] The panel has reviewed the submissions of Bonavista and the Alexanders and finds that the Alexanders made a substantial contribution to the hearing and, other than the deductions noted above, are entitled to all of their costs after the ADR was completed because these were reasonable and directly and necessarily related to the matters contained in the notice of hearing. The Alexanders acted responsibly in the hearing and contributed to a better understanding of the issues. Importantly too, with the exception of the exclusion for any disbursement items related to the ADR process, Bonavista does not take issue with expenses or honoraria claimed. As a result, the panel finds that the full $1200 honorarium amount claimed by the Alexanders is also allowed.

4 Order

[40] The AER hereby orders that Bonavista pay costs to Patrick and Patricia Alexander in the amount of $35 699.28 and GST in the amount of $1701.77, for a total of $37 401.05. This amount must be paid, within 30 days of issuance of this order, to

McLennan Ross LLP
1000 First Canadian Centre
350 – 7 Avenue SW
Calgary, AB T2P 3N9

[41] 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 April 4, 2017.

Alberta Energy Regulator

<original signed by>

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

<original signed by>

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

<original signed by>

J. Preugschas
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
McLennan Ross LLP	$51 100.00	$1903.15	$2650.16	$55 653.31	$32 095.00	$1903.15	$1696.66	$35 694.81
Patricia and Patrick Alexander	$1 200.00	$501.13	$5.11	$1 706.24	$1 200.00	$501.13	$5.11	$1 706.24
	$52 300.00	**$2 404.28**	**$2655.27**	**$57 359.55**	**$33 295.00**	**$2404.28**	**$1701.77**	**$37 401.05**