



OMERS Energy Inc.

Application for a Pipeline Licence
Royal Field

Cost Awards

January 15, 2009

ENERGY RESOURCES CONSERVATION BOARD

Energy Cost Order 2009-002: OMERS Energy Inc., Application for a Pipeline Licence,
Royal Field

January 15, 2009

Published by

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ENERGY RESOURCES CONSERVATION BOARD

Calgary Alberta

**OMERS ENERGY INC.
APPLICATION FOR A PIPELINE LICENCE
ROYAL FIELD**

**Energy Cost Order 2009-002
Application No. 1519973
Cost Application No. 1584231**

DECISION

The Energy Resources Conservation Board has considered the findings and recommendation set out in the following examiner report, adopts the recommendations, and directs that Cost Application No. 1584231 be approved.

Dated in Calgary, Alberta, on January 15, 2009.

ENERGY RESOURCES CONSERVATION BOARD

“Original Signed by M. J. Bruni, Q.C.”

M. J. Bruni, Q.C.
Board Member

ENERGY RESOURCES CONSERVATION BOARD

Calgary Alberta

**EXAMINER REPORT RESPECTING
OMERS ENERGY INC.
APPLICATION FOR A PIPELINE LICENCE
ROYAL FIELD**

**Energy Cost Order 2009-002
Application No. 1519973
Cost Application No. 1584231**

1 RECOMMENDATION

Having carefully considered all of the submissions, the examiners recommend that the Energy Resources Conservation Board (ERCB/Board) approve Cost Application No. 1584231 as set out below.

2 INTRODUCTION

2.1 Background

OMERS Energy Inc. (OMERS) applied to the Energy Resources Conservation Board (ERCB/Board), in accordance with Part 4 of the *Pipeline Act*, for approval to construct and operate a pipeline for the purpose of transporting natural gas containing no hydrogen sulphide from an existing well at Legal Subdivision (LSD) 5, Section 17, Township 53, Range 16, West of the 4th Meridian (the 5-17 well) to the Haight Mundare compressor station at LSD 6-8-53-16W4M (the 6-8 compressor). The proposed pipeline would tie the 5-17 well directly to the 6-8 compressor and would be located about 1.1 kilometres southeast of Mundare.

Rod Vinnish and Janny Vinnish (the Vinnishes) are the landowners of the south half of the southwest quarter of Section 17-53-16W4M, on which a portion of the proposed pipeline would be located. The Vinnishes filed an intervention in opposition to the subject application, raising concern regarding public consultation, land value, future development, and routing of the proposed pipeline.

The Board held a public hearing in Vegreville, Alberta, which commenced and concluded on July 29, 2008, before Board-appointed examiners, T. J. Pesta, P.Eng. (Presiding Member), L. P. Touchette, and D. L. Schafer. The examiners and ERCB staff conducted a site visit of the general area on July 28, 2008.

In the time between OMERS's initial consultation and the commencement of the hearing, Paramount Energy Trust purchased Dominion Exploration Canada Ltd. (Dominion) and took over the operation of all of Dominion's facilities. OMERS discussed three alternative pipeline routes that would tie into an existing Paramount pipeline at slightly different locations but all within LSD 7-17-53-16W4M (the 7-17 tie-in location).

The Vinnishes did not dispute OMERS's need to transport its gas production from the 5-17 well to a processing facility but argued that OMERS had shown that it was not necessary to locate the proposed pipeline on their land. The Vinnishes contended that OMERS had demonstrated that it

did not need to pursue the applied-for route to construct a pipeline and bring its gas to market, as more economic, orderly, and efficient routes were readily available.

The Board denied OMERS's application for the pipeline.

2.2 Cost Claim

On August 25, 2008, counsel for the Vinnishes filed a cost claim totalling \$17 637.19. On September 8, 2008, counsel for OMERS submitted comments regarding the cost claim. On September 11, 2008, counsel for the Vinnishes submitted a response.

The Board considers the cost process to have closed on September 11, 2008.

3 VIEWS OF THE BOARD—AUTHORITY TO AWARD COSTS

In determining local intervener costs, the Board is guided by its enabling legislation, in particular by Section 28 of the *Energy Resources Conservation Act*, which reads as follows:

28(1) In this section, “local intervener” means a person or a group or association of persons who, in the opinion of the Board,

- (a) has an interest in, or
- (b) is in actual occupation of or is entitled to occupy

land that is or may be directly and adversely affected by a decision of the Board in or as a result of a proceeding before it, but, unless otherwise authorized by the Board, 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.

It is the Board's position that a person claiming local intervener costs must establish the requisite interest in land and provide reasonable grounds for believing that such an interest may be directly and adversely affected by the Board's decision on the application in question.

When assessing costs, the Board refers to Part 5 of the *Energy Resources Conservation Board Rules of Practice* and Appendix D: *Scale of Costs* in *ERCB Directive 031A: Guidelines for Energy Costs Claims*.

Subsection 57(1) of the *Rules of Practice* states:

57(1) The Board may award costs, in accordance with the scale of costs, to a participant if the Board 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 Board.

4 VIEWS OF THE PARTIES

4.1 Views of OMERS

On September 8, 2008, counsel for OMERS submitted comments regarding the cost claim filed by the Vinnishes. OMERS objected to the legal costs being claimed in the amount of \$17 105.19. OMERS did not comment on the honoraria claimed by the Vinnishes.

OMERS was of the view that the use of two counsel in this matter was duplicative and unreasonable given the fact that this matter was not complex: it related only to the routing of one nonsour pipeline, it did not have numerous witnesses and experts to organize and prepare, and it involved only two interveners.

In the statement of account submitted by Ackroyd LLP, there were entries for conferences where both counsel attended, such as client conferences on June 13, 2008, and July 15, 2008. OMERS was of the view that it was neither reasonable nor appropriate for both counsel to incur fees for similar preparation activities.

OMERS referred to *Energy Cost Order 2004-004: Polaris Resources Ltd.*, wherein the Board stated:

The Board does not generally award costs for the attendance of two counsel at a hearing. It is only in exceptional circumstances, such as where issues and the intervention are complex will the Board find it necessary for two counsel to have been in attendance at a hearing.

Based on the foregoing, OMERS submitted that the legal fees submitted by Ackroyd LLP should be either significantly reduced or disallowed entirely. At a minimum, given that Mr. Secord conducted the cross-examination and direct examination and presented the final argument at the hearing, the 19.0 hours claimed by Ms. Chipiuk from July 28 to July 29, 2008, which included activities such as travel, site tours, and attendance at the hearing in Vegreville, should be disallowed.

4.2 Views of the Vinnishes

On September 11, 2008, counsel for the Vinnishes submitted a response containing their clients' views with respect to OMERS's comments. Counsel for the Vinnishes stated that this hearing was not in fact straightforward, as suggested by counsel for OMERS. It involved a comparison of pipeline route 4 and four other alternative routes, as set out in the Vinnishes submission.

With respect to the position taken by OMERS regarding the use of two counsel in this matter, counsel for the Vinnishes argued that Ms. Chipiuk dedicated 30.0 hours of her time to assisting Mr. Secord in the preparation and review of this matter. Being that Ms. Chipiuk was junior counsel and had an hourly rate that was half that of Mr. Secord's, counsel for the Vinnishes felt that it was a better use of time and costs to use a junior counsel rather than a senior counsel. The same was true for Ms. Chipiuk's attendance at the hearing. Counsel for the Vinnishes felt that her presence there greatly assisted the matter in that she was able to take extremely detailed notes during the one-day, twelve-hour hearing in order for Mr. Secord to prepare a detailed and accurate final argument.

The Vinnishes were of the view that the use of two counsel in this matter was necessary and allowed for the hearing to be run very efficiently and to cover a lot of ground.

Counsel for the Vinnishes referred to *Energy Cost Order 2007-007: Bearspaw Petroleum Ltd.* wherein the Board stated:

The Board recognizes that this intervening ground consisted of eight members, which the majority of, are one family, with one set of issues. While the Board does not consider the sheer numbers of the group to warrant the need for second counsel, the Board does find that Mr. Secord's argument, as summarized on page 3 above, does justify the need for second counsel, **and agrees that it ultimately reduced the costs that senior counsel could have otherwise incurred.** [Emphasis added.]

Therefore, based on the above, the counsel submitted that the costs claimed by the Vinnishes were reasonable and that the interveners made a significant and positive contribution to the hearing process and should be awarded their cost claim in full.

5 VIEWS OF THE BOARD

As all the parties are aware, the Board does not generally award costs for the attendance of two counsel at a hearing. It is only in exceptional circumstances, such as when the intervention and issues are complex and the group consists of a large number of members, that the Board finds it necessary for two counsel to attend a hearing.

As Mr. Secord pointed out, in *Energy Cost Order 2007-007* the Board found it appropriate to award costs for two counsel although the intervening group consisted mainly of one family due to the fact that the costs were ultimately reduced by using junior counsel. This Board panel notes that the hearing addressed in that order lasted a total of three days, there were eight members in intervening group, experts were called to present evidence, and the organization of such experts was conducted by junior counsel.

In this instance, the two counsel represented only two interveners of the same family, the hearing lasted one day, no experts were present at the hearing, and there were no consultations. The Board is of the view that in this case, the use of two counsel was not reasonable; therefore, it is disallowing the 19.0 hours claimed by Ms. Chipiuk from July 28 to July 29, 2008, related to attendance at the hearing totalling \$2493.75 inclusive of GST, plus 2.0 hours travel time to the hearing totalling \$131.25 inclusive of GST. In addition, costs incurred by Ms. Chipiuk for attendance at client meetings with Mr. Secord on June 13, 2008, and July 15, 2008, will not be allowed, for a reduction of 6.5 hours totalling \$853.13 inclusive of GST. The Board acknowledges that some of the preparation conducted by Ms. Chipiuk, including drafting and reviewing, reduced the time and costs associated with senior counsel conducting those activities and therefore allows 16.5 hours of Ms. Chipiuk's time totalling \$2165.63 inclusive of GST.

The Board notes that Mr. Secord claimed 1.0 hour for activities after the hearing, including removing the file from the hearing room, debriefing with clients, organizing the file, and preparing a memo to Nicole Mah. The Board refers to Section 6.3.1 of *Directive 031A*, wherein it states:

The Board will consider only those fees and disbursements claimed by the lawyer that are determined to be reasonable and directly and necessarily related to the presentation and preparation of the intervention.

In this instance, the Board is of the view that the organizational activities claimed for after the hearing did not assist the Board in making its decision. Therefore, the Board will not allow the 1.0 hour claimed by Mr. Secord, reducing his fees by \$262.50 inclusive of GST.

6 ORDER

It is hereby ordered that

- 1) The Board approves intervener costs in the amount of \$13 896.56.
- 2) Payment shall be made to Ackroyd LLP, Barristers & Solicitors, 1500, 10655 Jasper Avenue, Edmonton, Alberta T5J 3S9.

Dated in Calgary, Alberta, on January 15, 2009.

ENERGY RESOURCES CONSERVATION BOARD

“Original Signed by T. J. Pesta”

T. J. Pesta, P.Eng.
Presiding Member

“Original Signed by L. P. Touchette”

L. P. Touchette
Examiner

“Original Signed by D. L. Schafer”

D. L. Schafer
Examiner