ERCB

OMERS Energy Inc.

Section 39 Review of Well Licences No. 036235 and No. 0392996 Warwick Field

Cost Awards

August 11, 2009

ENERGY RESOURCES CONSERVATION BOARD
Energy Cost Order 2009-008: OMERS Energy Inc., Section 39 Review of Well Licences No. 0336235 and No. 0392996, Warwick Field

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CONTENTS

ENERGY RESOURCES CONSERVATION BOARD
Calgary Alberta

OMERS ENERGY INC.
SECTION 39 REVIEW OF WELL LICENCES NO. 0336235 AND NO. 0392996
WARWICK FIELD

Energy Cost Order 2009-008
Application No. 1584140
Cost Application No. 1609707

1 INTRODUCTION

1.1 Background

On August 11, 2005, the Alberta Energy and Utilities Board (predecessor to the Energy Resources Conservation Board [ERCB/Board]) approved Application No. 1413237 and issued Well Licence No. 0336235 to OMERS Energy Inc. (OMERS), in accordance with Section 2.020 of the *Oil and Gas Conservation Regulations* (*OGCR*), for a single well to obtain gas with 0 per cent hydrogen sulphide (H_2S) from the Colony Formation from a surface location at Legal Subdivision (LSD) 5, Section 4, Township 54, Range 14, West of the 4th Meridian (100/5-4 well).

On January 25, 2008, the ERCB approved routine Application No. 1557313 and issued Well Licence No. 0392996 to OMERS, in accordance with Section 2.020 of the *OGCR*, for a single well to obtain gas with 0 per cent H_2S from the Colony Formation from a surface location at LSD 5-4-54-14W4M (102/5-4 well).

On June 20, 2008, the ERCB received a letter from Montane Resources Ltd. (Montane) requesting a review hearing relating to Well Licence No. 0392996, pursuant to Section 39 of the *Energy Resources Conservation Act* (*ERCA*). The request for review was based on whether OMERS held a valid and subsisting lease for the purpose of issuance of well licences. The ERCB registered the review request as Application No. 1577443.

On August 15, 2008, the ERCB granted the request for review and registered the review hearing as Proceeding No. 1584140. Prior to the hearing, the Freehold Petroleum & Natural Gas Owners Association (FHOA) advised the Board that it wished to participate in the hearing and that it was authorized to represent the interests of Eva Cymbaluk who is the Freehold owner and lessor of mineral rights in the northwest quarter of Section 4-54-14W4M (Section 4). The Board indicated that the FHOA could participate in the hearing, but also stated that it had not made a decision under Section 26(2) of the *ERCA* on whether the FHOA or Ms. Cymbaluk may be directly and adversely affected by the Board's decision in the proceeding.

The Board held a public hearing in Calgary, Alberta, which commenced on February 10, 2009, and concluded on February 12, 2009, before Board Members M. J. Bruni, Q.C. (Presiding Member), J. D. Ebbels, and B. T. McManus, Q.C. On May 12, 2009, the Board issued *Decision 2009-037: OMERS Energy Inc., Section 39 Review of Well Licences No. 0336235 and No. 0392996*, which held that OMERS did not have an interest in the mines and minerals underlying the whole of Section 4 and was thereby in violation of the requirement in Section 5.005(2) of the *OGCR* for common ownership within the drilling spacing unit. The Board ordered the well

licences, already suspended on an interim basis, to remain suspended until OMERS was in compliance with Section 5.005(2).

1.2 Cost Claim

On March 12, 2009, the FHOA filed a cost claim totalling $46 512.48. On March 30, 2009, OMERS submitted its comments on the cost claim. On April 14, 2009, FHOA submitted a response.

The Board considers the cost process to have closed on April 14, 2009.

2 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 *ERCA*, 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.

3 FHOA

The FHOA submitted a cost claim that included legal fees in the amount of $39 914.50, preparation and attendance honoraria in the amount of $600.00, expenses of $3839.40, and GST of $2158.58, for a total claim of $46 512.48.

3.1 Views of OMERS

OMERS stated that the costs claimed by the FHOA should not be awarded because the claim did not meet the requirements of Section 28 of the *ERCA*, Part 5 of the *Rules of Practice* and *Directive 031A*. OMERS further submitted that should the Board decide to award costs, the costs should be significantly reduced, and the Board should exercise its discretion based on Section 56(5) of the *Rules of Practice* to divide responsibility for any cost award equally between Montane and OMERS.

Standing

OMERS submitted that Board counsel indicated that the FHOA did not have standing but did have the right to participate in the proceeding as though it had standing. At the conclusion of the hearing, the Board had yet to make a decision regarding Ms. Cymbaluk's standing under Section 26(2) of the *ERCA*. The FHOA had permission to act on Ms. Cymbaluk's behalf, but she herself did not file any direct evidence addressing her concerns. OMERS was of the view that the evidence submitted by the FHOA was hearsay.

OMERS submitted that the general rule for standing that a person, group, or association whose business includes the trading in or transportation or recovery of any energy resource is not entitled to local intervener costs should apply to the FHOA's cost claim. In OMERS's opinion, the evidence presented on behalf of Ms. Cymbaluk confirmed that her business includes the trading in or recovery of an energy resource. According to OMERS, it is obvious that Ms. Cymbaluk's interests are commercial and business related and therefore neither she nor the FHOA should be considered a local intervener.

OMERS was also of the opinion that although Ms. Cymbaluk is a person affected by the review decision, the FHOA failed to demonstrate that Ms. Cymbaluk's mineral interests would be directly and adversely affected by the Board's decision on the issues in the review hearing. OMERS submitted that the evidence presented on her behalf should be given no weight since Ms. Cymbaluk was not present to support the submission and OMERS had no opportunity to cross-examine her.

Legal Fees

OMERS submitted that the claim submitted by the FHOA for legal fees incurred by Rae and Company was excessive and indicated duplication of work and inefficiencies.

OMERS took issue with the hourly rate claimed for each of the four lawyers from Rae and Company as they were in excess of the *Scale of Costs*. L. Douglas Rae claimed an hourly rate of $325.00; W. Tibor Osvath claimed an hourly rate of $290.00; and Caroline O'Driscoll and Oliver W. MacLaren each claimed an hourly rate of $175.00. OMERS submitted that each of the hourly rates claimed should be reduced to reflect the maximum allowable rates set out in the *Scale of Costs*. Therefore, Mr. Rae's and Mr. Osvath's claims should be reduced to reflect an hourly rate of $250.00, and Ms. O'Driscoll's and Mr. MacLaren's claims should be reduced to reflect an hourly rate of $140.00.

In addition to the hourly rates claimed, OMERS took issue with an apparent duplication of work recorded by three of the legal counsel. On January 9, 2009, both Mr. MacLaren and Mr. Osvath,

recorded time for review of research. On January 11, 2009, Mr. Rae, Mr. Osvath, and Mr. MacLaren all recorded time for reviewing research and drafting submissions. On January 12, 2009, Mr. Rae and Mr. Osvath both recorded time for a conference with David Spiers of the FHOA. Finally, on January 19, 2009, Mr. MacLaren and Mr. Osvath both recorded time for reviewing OMERS's submission. In addition to these entries, there were time entries that appeared to indicate duplicated work on January 21 and 23, 2009, and on February 6, 9 and 10, 2009. Based on the foregoing, OMERS submitted that the costs claimed by Mr. MacLaren, totalling 66.7 hours, should be disallowed entirely due to duplication of effort. OMERS stated that this was the minimum that should be disallowed by the Board.

OMERS referred to *Energy Cost Order 2008-005: Highpine Oil & Gas Limited,* wherein the Board stated:

> The Board does not generally award costs for the attendance of two counsel at a hearing, in the circumstances of this hearing, the Board finds that the retention and attendance of two counsel is appropriate. Numerous witnesses and experts had to be organized. The hearing did have some complexity and dealt with two wells.

In the current instance, OMERS believed that it was not necessary for four counsel to be used.

OMERS also took issue with the fact that Rae and Company charged an hourly rate for the use of a legal secretary. In accordance with *Directive 031A*, this cost should have been included in the overhead of Rae and Company and, therefore, should be denied.

Expenses

With respect to the expenses claimed, OMERS took issue with the total transcript costs claimed in the amount of $3263.30. OMERS was of the view that it was not necessary for the FHOA to obtain drafts as well as final copies of the transcripts for the hearing sessions on February 10 and 11, 2009. OMERS submitted that the final argument of the FHOA did not contribute to a better understanding of the issues before the Board.

Honoraria

OMERS submitted that the evidence and participation of Mr. Spiers was not directly and necessarily related to the proceeding and did not contribute to a better understanding of the issues before the Board, and therefore he should not be awarded an honorarium.

3.2 Views of the FHOA

Standing

The FHOA referred to the Board's correspondence dated February 6, 2009, wherein it was stated that the FHOA "may not satisfy the criteria as set out in section 26(2) of the ERCA to attain standing at the hearing." The Board did state, however, that "the FHOA and its members may have extensive and perhaps unique experience on the principal issues arising in this proceeding," and based on the foregoing, the Board granted the FHOA full participating rights. The FHOA also noted that the Board issued a correction to its correspondence of February 6, 2009, stating that the Board had received correspondence advising that the FHOA was authorized to act as Ms. Cymbaluk's representative in the review hearing.

The FHOA noted that the Board made the following distinction on page 20, line 12, of the hearing transcript in relation to Section 26 standing of the FHOA and Ms. Cymbaluk:

> With respect to the intervener status vis-à-vis costs...we in no way are making any determination of that at this point in time.

The FHOA stated that it is a federally incorporated, not-for-profit corporation with over 4000 individuals and family corporations as members. Ms. Cymbaluk is a Freehold owner of the mines and minerals that were the subject matter of this proceeding. Ms. Cymbaluk authorized the FHOA to represent her interests in this matter.

During direct examination by the FHOA's counsel, Mr. Spiers responded that Ms. Cymbaluk would be directly and adversely affected by the Board's decision because the royalty rate under the Montane lease was 16 per cent, while the royalty payable under the "existing" lease, which the Board understood to be the OMERS lease, was 15 per cent. Mr. Spiers also indicated that a bonus payment was due if the OMERS lease was "removed." Finally, Mr. Spiers stated that Ms. Cymbaluk had ongoing concerns with what she perceived to be OMERS's failure to conduct its operations in a diligent, careful, and workmanlike manner that complied with all rules and regulations.

The FHOA took issue with the comments made by OMERS in relation to its apparent "commercial concerns" that Ms. Cymbaluk was involved in the business of trading or transportation or recovery of an energy resource. The FHOA submitted that there was uncontested evidence submitted by the FHOA's witness, as stated on page 617, line 5 of the transcript:

> On the one hand you typically have an individual owner of the resource. He is generally just an ordinary citizen, doesn't understand the oil and gas exploration development, doesn't have a lot of legal training or anything, and certainly doesn't have the capital necessary to develop his own resource, but he owns the property. On the other hand, you have an oil and gas company in the business of finding oil and gas.
>
> So the fundamental bargain that's entered into, basically, involves the oil and gas company paying significantly less for a lease than they would have to pay for a fee simple interest in the same and, essentially, acquiring the right – and it's a right; it's not an obligation – the right to explore for the leased substances during the primary term of the lease.

Based on the foregoing, the FHOA submitted that OMERS's argument regarding Ms. Cymbaluk's interests was not supported as she is merely a person who has an interest in land that may be directly and adversely affected by the Board's decision in this matter.

Legal Fees

The FHOA submitted that the use of four legal counsel in this matter with varying degrees of expertise and experience was based on cost effectiveness and that the majority of the preparation costs claimed were for work undertaken by junior counsel.

According to the FHOA, overlaps were to be expected given that all the work done related to the same proceeding. The FHOA maintained its position that the approach was very cost effective and that the cost claim contained no suggestion that work conducted on certain dates was duplicated.

The FHOA stated that Mr. Osvath was the only counsel that attended the hearing and that the tasks performed by Mr. Rae and Mr. MacLaren on the dates of the hearing were performed subsequent to the close of hearing on each day.

With respect to OMERS's comments that the hourly rates claimed were excessive, the FHOA referred back to its initial correspondence, wherein it stated that it

> has submitted costs in excess of the Board's Scale of Costs. FHOA submits that these amounts are necessary in light of OMERS' failure to advise Ms. Cymbaluk in any manner whatsoever, let alone a timely one, of the ongoing proceedings before the Board in respect of her lands, an omission acknowledged by OMERS at page 309, line 1 of the Hearing transcript.

Expenses

Regarding the cost for obtaining the draft transcripts, the FHOA explained that because final arguments were to be done the day after the conclusion of the evidentiary portion of the hearing, the transcripts were necessary in order to prepare the FHOA's final argument. The FHOA was of the view that neither it nor Ms. Cymbaluk should be penalized for responding this way to the scheduling of final arguments, which was advocated by the other parties to the proceeding.

Honoraria

The FHOA did not respond to comments in relation to preparation and attendance honoraria.

Finally, the FHOA submitted that should the Board find that any of the costs contained in the claim were excessive that the Board should still award costs but in accordance with the Board's *Scale of Costs*. The FHOA submitted that the costs claimed were reasonable and were incurred in a cost-effective and efficient way.

3.3 Views of the Board

Standing and Local Intervener Status

Both OMERS and the FHOA made submissions during the hearing and in their respective cost claims pertaining to the question of the FHOA's standing under subsection 26(2) of the *ERCA*. The Board ruled prior to and confirmed during the hearing that the FHOA would be entitled to participate in the hearing regardless of its standing. The question of the FHOA's entitlement to participate in the review hearing does not bear on the question of the FHOA's status as a local intervener under Section 28 of the *ERCA*. They are different tests that address different rights and processes. In that regard, the Board was clear during the hearing, as the FHOA itself stated in its cost submissions, that the Board had not made any decision concerning the FHOA's status as a local intervener.

The Board's authority to award local intervener costs is derived from Section 28 of the *ERCA*. The Board notes that, pursuant to Section 28, 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 in the proceeding. In addition, the cost claim must not relate to the claimant's business of trading in or the transportation or recovery of any energy resource unless the Board expressly authorizes the claim.

It is clear to the Board that the FHOA does not itself have an interest in land that may be directly and adversely affected by the Board's decision. The Board considers the principal issue in this cost proceeding to be whether Ms. Cymbaluk has such an interest and, if so, whether that interest falls within the business of trading in an energy resource.

The evidence before the Board is that Ms. Cymbaluk is the Freehold owner of the mines and minerals underlying the northwest quarter of Section 4 and has made a disposition of her interests to both OMERS and Montane. In return for each of those dispositions, Ms. Cymbaluk retained a right to a royalty on produced substances, a suspended well payment in the case of the OMERS lease, and possibly an entitlement to other compensation for the rights granted by her to the lessees. In particular, it appears that she is entitled to a bonus payment under the Montane lease if and when the OMERS lease is "removed," which the Board interprets to mean if and when Montane is finally confirmed to be the lessee of Ms. Cymbaluk's land.

For the purposes of deciding whether Ms. Cymbaluk qualifies as a local intervener, the Board must assess whether its decision in the review hearing may have a direct and adverse effect on Ms. Cymbaluk's rights as a Freehold mineral owner. The impacts on Ms. Cymbaluk's interests that were identified by the FHOA concerned potential consequences to Ms. Cymbaluk's entitlement under the mineral lease agreements that she had entered into with OMERS and Montane. The Board notes that those impacts concern her rights under contract and not her rights in the land and that no evidence was provided to indicate that any of Ms. Cymbaluk's rights as an owner of the minerals underlying her land may be directly affected as a result of the Board's decision.

In *Energy Cost Order 2007-001: Suncor Energy Inc.*, the Board stated that local intervener cost awards are intended to benefit persons who choose to participate in a Board hearing in order to safeguard the benefits they are entitled to enjoy by virtue of their ownership of those interests. The element of protecting or preserving one's right to have and enjoy land and the benefits flowing from it is commonly what distinguishes a local intervener from others who may take an interest in the Board's decision but do not qualify as local interveners. In Ms. Cymbaluk's case, her rights as Freehold mineral owner remain as they were before the Board's decision. While there may be consequences for her under the OMERS or Montane mineral leases as a result of the Board deciding that the OMERS lease had ended, her interest as owner of the resource remains unaffected. She was the Freehold mineral owner before the Board's decision and she remains the owner afterwards.

The Board distinguishes the FHOA's and Ms. Cymbaluk's positions in this cost claim from the position of the Freehold owner and FHOA member who was awarded local intervener costs in *Energy Cost Order 2007-006: Bearspaw Petroleum Ltd.* That cost decision related to a proceeding in which the Board considered whether coal owners or, alternatively, petroleum and natural gas owners (which included the cost claimant) were legally entitled to produce coalbed methane (CBM). The Board's decision had the potential to directly and adversely affect the Freehold mineral owner's interests in the land because it would define the extent of her rights in and to the resources underlying her lands; i.e., it would determine if she did or did not own CBM under her mineral title.

In conclusion, the FHOA has not provided any evidence upon which the Board can conclude that Ms. Cymbaluk's interests in the land in Section 4 may be directly and adversely affected by the

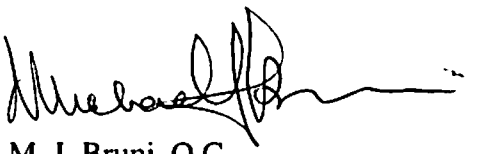
Board's decision in Proceeding No. 1584140. The Board, therefore, does not need to consider OMERS's assertion that Ms. Cymbaluk's interests in Section 4 relate to the recovery of an energy resource. For the foregoing reasons, the Board has determined that the FHOA, which includes Ms. Cymbaluk, is not a local intervener as set out in Section 28 of the *ERCA*. Consequently, the Board does not have the authority to award the FHOA local intervener costs and thereby dismisses the FHOA's cost claim.

4 ORDER

It is hereby ordered that the cost claim made by the FHOA be dismissed.

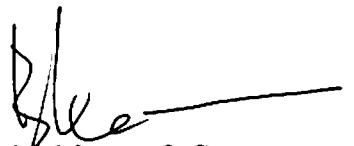
Dated in Calgary, Alberta, on August 11, 2009.

ENERGY RESOURCES CONSERVATION BOARD



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

J. D. Ebbels
Board Member



B. T. McManus, Q.C.
Board Member