Taylor Processing Inc.

Applications for Three Pipeline Licences and a Facility Licence Amendment Harmattan-Elkton Field

Cost Award

May 27, 2011

Energy Resources Conservation Board

ENERGY RESOURCES CONSERVATION BOARD
Energy Cost Order 2011-003: Taylor Processing Inc., Applications for three pipeline licences and a facility licence amendment, Harmattan-Elkton Field

May 27, 2011

Published by

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ENERGY RESOURCES CONSERVATION BOARD
Calgary Alberta

TAYLOR PROCESSING INC. **Energy Cost Order 2011-003**
APPLICATIONS FOR THREE PIPELINE LICENCES
AND A FACILITY LICENCE AMENDMENT **Applications No. 1612382 and 1618312**
HARMATTAN-ELKTON FIELD **Cost Application No. 1675759**

INTRODUCTION

Background

[1] Taylor Processing Inc. (Taylor) submitted Application No. 1612382, pursuant to Part 4 of the *Pipeline Act*, for approval to construct and operate two natural gas pipelines and one high vapour pressure pipeline and Application No. 1618312, pursuant to Section 39(1)(b) of the *Oil and Gas Conservation Act*, to amend Licence No. 4285 for its existing Harmattan-Elkton gas plant.

[2] These applications (the Applications) were the subject of a notice of hearing that was issued by the Board on June 25, 2010.

[3] Two area landowners, Deryl Mork and Chris Mork (Morks), objected to the Applications but withdrew their objections on July 27, 2011, after learning of a re-route of one of the proposed pipelines.

[4] The Energy Resources Conservation Board (ERCB/Board) held a public hearing in Calgary, Alberta before Vice-Chairman B. T. McManus, Q.C. (Presiding Member), Board Member G. Eynon, P.Geol, and Acting Board Member G. J. DeSorcy, P.Eng. The hearing commenced on August 31, 2010, and concluded on September 9, 2010. Mr. Deryl Mork, despite having withdrawn his objection, made a brief presentation at the hearing.

[5] The Board issued its decision on the Applications via Decision 2010-036 dated December 7, 2010.

Cost Claim

[6] On January 6, 2011, the ERCB received a cost claim from the Morks (the Cost Claim). On January 28, 2011, Taylor made submissions to the Board regarding the Cost Claim. On February 11, 2011, counsel for the Morks provided to the Board their response to Taylor's submission.

[7] The Board considers the cost process to have closed on February 11, 2011.

VIEWS OF THE BOARD—AUTHORITY TO AWARD COSTS

[8] In determining 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.

(2) On the claim of a local intervener or on the Board's own motion, the Board may, subject to terms and conditions it considers appropriate, make an award of costs to a local intervener.

[9] When assessing costs, the Board refers to Part 5 of the *Energy Resources Conservation Board Rules of Practice* (the *Rules*) and ERCB *Directive 031: Guidelines for Energy Proceeding Cost Claims (Directive 031)*.

[10] Subsection 57(1) of the *Rules* 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.

COST CLAIM OF THE MORKS

[11] The Morks were represented by Mr. Gavin Fitch of McLennan Ross LLP. On January 6, 2011, Mr. Fitch, on behalf of the Morks, filed a cost claim for legal fees in the amount of $3707.07.

Taylor Response

[12] In its January 28, 2011 submission, Taylor noted that the *Rules* require cost claims to be filed within 30 days after the "proceeding is closed" unless otherwise directed by the Board. It further submitted that for the purposes of the Board's cost claim procedure, *Directive 031* states that all cost claims must be filed with the Board within 30 days once a hearing is closed and a hearing is considered closed "…once final argument has been presented" (the Limitation Period).

[13] *Directive 031* states that cost claims submitted after the expiry of the Limitation Period will not be considered by the Board "…unless extraordinary circumstances prevented timely filing."

[14] Taylor submitted that in accordance with the *Rules* and *Directive 031*, the proceeding to which the Cost Claim relates closed on September 9, 2010 and consequently the Limitation Period expired on October 11, 2010. Taylor stated that in the absence of a Board direction, the Cost Claim is statute barred by the *Rules* as it was filed on January 6, 2011, some 87 days late. Taylor noted that the Cost Claim provides no explanation as to why it was filed late and does not provide any grounds for a Board direction varying the *Rules* so as to permit its late filing, and

therefore it should be dismissed. Taylor submitted that barring the Cost Claim is consistent with previous Board decisions.

[15] Taylor noted that the costs claimed relate solely to the fees incurred by the Morks to retain McLennan Ross LLP and that the time entries for counsel were initiated on July 28, 2009 and concluded on July 27, 2010.

[16] Taylor submitted that the Cost Claim should be denied in its entirety as *Directive 031* states that the Board's general rule is not to award costs incurred prior to the date upon which a notice of hearing is issued, but instead will only consider such costs on a case-by-case basis.

[17] Taylor further asserted that on March 1, 2010, any chance of the Morks being eligible for local intervener status was eliminated when Taylor provided notification to the Board, and the Morks, that it was re-routing its pipeline around the Morks' real property. In Taylor's view, a notice of hearing would not have been issued had there not been other parties eligible for intervener status.

[18] Taylor submitted that the Board should not deviate from its general rule and should deny the costs that were incurred prior to June 25, 2010, given that the Cost Claim did not provide any reasons or grounds as to whether the costs claimed for this period were directly and necessarily related to the Morks' intervention.

[19] Taylor asserted that the Morks were no longer eligible for local intervener status and therefore became ineligible to claim for costs incurred beyond March 1, 2010, when Taylor re-routed the proposed pipeline around their property. Taylor submitted this is consistent with past Board decisions, notably Energy Cost Order 2005-001 where the Board stated:

> During the course of the Application the Board determined that the development of the access road, at the original suggested location, could cause Mr. and Mrs. Thomas to be directly and adversely affected by associated impacts…to their farming activities. In that regard the Board notes that the original location was amended by Burlington and by way of letter dated July 19, 2004 the Board issued a letter to Mr. Bodnar dismissing his clients' objection. Accordingly, the Board finds that Mr. and Mrs. Harvey do qualify as local interveners…up to July 19, 2004 and are therefore eligible to apply for cost recovery to this point.

[20] Finally, Taylor submitted that should the Board decide to award costs, the costs claimed for the following time entries should be denied:

- Three time entries for land title searches by Ms. Jahraus, a paralegal—*Directive 031* states that work performed by a paralegal will only be considered if it can be demonstrated that the work performed required the expertise of a paralegal and could not have been performed by a legal assistant.
- Time entries on July 28, 2009, and July 27, 2010, relate to communication with Mr. A. Hollingworth. Mr. Hollingworth was not counsel for either the Morks or Taylor, so there is no obvious reason why Mr. Fitch needed to correspond with Mr. Hollingworth.
- February 9, 2010, time entry by Mr. Fitch relates to correspondence between G. and A. McNabb. Taylor noted that the Cost Claim is made by the Morks and not G. and A. McNabb,

who were not local interveners in the Applications, and therefore the costs incurred (estimated to be 0.3 of an hour) should be denied.

- February 10, 2010 time entry by Mr. Fitch for his review of certain pipeline legislation. Taylor submitted that given Mr. Fitch's level of experience (19 years), the review of such legislation should not be necessary, or alternatively, should have been conducted by a lawyer with less experience at a lower hourly rate.

Morks' Response

[21] The Morks responded that Section 55(3) of the *Rules* states that (unless otherwise directed by the Board) a participant shall "file a claim for costs within 30 days after the proceeding is closed". Further, the definition of "proceeding" as stated in Section 2(p) of the *Rules* is a matter brought before the Board by application, by the Board on its own initiative, or through request of the Lieutenant Governor in Council. The Morks submitted that the "proceeding" commenced with the filing of the Applications by Taylor.

[22] The Morks also noted that the *Rules* define the term "hearing" to mean a "hearing before the Board." The terms "proceeding" and "hearing" are both defined terms, and a hearing is not the same as a proceeding. The Morks indicated that a hearing takes place in the context of a proceeding, and that in some proceedings there is no hearing.

[23] The Morks submitted that a proceeding closes with the Board's disposition of the application; in this case, the proceeding closed on December 7, 2010, with the release of Decision 2010-036 disposing of the Applications.

[24] The Morks noted that Taylor argued that although Section 55(3) of the *Rules* states that a participant shall file a claim for costs within 30 days of the close of the proceeding, *Directive 031* states that a landowner must file a cost claim within 30 days of the close of the hearing. The Morks submitted that contrary to Taylor's argument, basic principles of legislative interpretation tell us that the regulation takes precedence where there is a conflict.

[25] The Morks further submitted that they did not participate in the hearing because, prior to the hearing, Taylor re-routed its pipeline around their property such that they were no longer directly and adversely affected by it. In the Morks' view, it would be highly unfair and prejudicial for them to be held to a filing schedule with a deadline based on a hearing in which they did not participate. The Morks participated in the proceeding on the basis that they were potentially directly and adversely affected parties in the proceeding until the re-route of the pipeline.

[26] The Morks submitted that their cost claim is not out of time and therefore not statute-barred. The Morks also stated their disappointment that Taylor would object to costs of this magnitude.

[27] The Morks submitted that the portion of *Directive 031* that states that costs may not be awarded for work done prior to the issuance of a notice of hearing is a rule of thumb only, and that the Board retains complete discretion.

[28] The Morks noted that the Applications were highly controversial, and there was no doubt in the mind of the Morks or counsel that the Applications would go to hearing. The fact that legal

counsel was retained some three months after Taylor filed the Applications should not come as a surprise.

[29] The Morks acknowledged that the Board does not typically allow costs for paralegals and did not object to the Board disallowing these amounts, which total $19.50 plus GST.

[30] With respect to communications with Mr. Hollingworth, the Morks advised that on two occasions Mr. Hollingworth, as counsel for one of the other parties in the proceeding, contacted Mr. Fitch to discuss the proceeding. The total amount of time for these telephone calls was 0.2 to 0.3 of an hour.

[31] Mr. Fitch noted that his correspondence with Mr. and Mrs. McNabb occurred in the context of the McNabbs being landowners and neighbours of the Morks.

[32] Mr. Fitch noted that even with his experience, occasionally there is a need to review legislation.

Findings of the Board

[33] As outlined above, the Board is aware of and has considered the extensive submissions made by the parties regarding the time within which a party seeking costs must make a cost claim to the Board. The Board recognizes that with respect to the Cost Claim, whether the Morks filed that claim in time is a disputed issue. However, in the circumstances and given the unique history of this matter, the Board considers it appropriate to exercise its discretion and award costs to the Morks irrespective of the timing of the Cost Claim. In regard to whether the Morks can receive costs as local interveners, the Board notes that Taylor put forward three different routes for one of the subject pipelines over the course of the pre-hearing application process. The first of these routes would have resulted in the Mork lands being crossed by a Taylor pipeline. The next route, submitted in March 2010, contemplated that same pipeline being adjacent to the Mork lands so that those lands were subject to a set back associated with the pipeline. The final route, which was submitted after the Notice of Hearing was issued, moved the pipeline farther from the Mork lands and resulted in there being no possibility of impact upon those lands from the pipeline. As a result of this last re-routing of the pipeline, the Morks withdrew their objection to the Applications.

[34] The Board notes that the costs claimed were primarily incurred before the final re-route and thus when there was a possibility that the Mork lands could be directly and adversely affected by the Board's decision on the Applications. As such, the Cost Claim relates to costs incurred at a time when the Morks were local interveners or immediately after they learned of the re-route and would have been considering the significance of the re-route in relation to their participation in the hearing and their status as local interveners. In these circumstances, the Board, in exercising its discretion, considers that the Morks are entitled to receive costs for the whole of the time claimed.

[35] Also, with regard to the Morks' entitlement to claim for costs incurred prior to the issuance of the Notice of Hearing, the Board notes that this matter related to earlier applications made by Taylor in 2006 for essentially the same approvals as were granted in the present matter. The 2006 applications were closed at the Board's direction and many of the issues raised in them

were subsequently considered in an inquiry[1]. Given this history and the fact the Applications were the first applications of this type following that inquiry, it was a reasonable expectation on the part of Morks from a very early stage that the Applications would go to hearing. It was therefore reasonable for the Morks to obtain counsel from an early stage.

[36] The Board is also satisfied that, while the Morks were not interveners at the hearing, the expense they incurred in retaining counsel when they did helped achieve a pipeline route that did not impact the Mork lands. In the result, the issues at the hearing were narrowed and the Morks were not required to participate in the hearing. In this sense, the fact the Morks had counsel contributed to the efficient conduct of the hearing as it was shorter than what it would have been had the Morks continued to be interveners. For the same reason, it is to be expected that the costs associated with the hearing were less because of the involvement of the Morks' counsel prior to the hearing. It is the Board's view that in these circumstances it was reasonable and necessary for the Morks to retain counsel at a very early stage and incur the costs associated with that counsel.

[37] The Board considers that the Morks should receive the full amount of the limited costs they have claimed. The Board has considered the concerns raised by Taylor and described in paragraph 20 above; however, the Board is not convinced those matters merit a reduction in the cost award. The Board is satisfied those costs and all others claimed by the Morks are modest, reasonable and directly and necessarily related to the proceeding. When the Morks incurred the costs claimed, they benefitted not just themselves but all of the participants in the proceeding by narrowing the issues and creating a more efficient hearing.

[1] EUB Decision 2009-009 *Inquiry into Natural Gas Liquids (NGL) Extraction Matters*

ORDER

It is hereby ordered that Taylor shall pay intervener costs totalling $3707.07, and payment shall be made to McLennan Ross LLP, 1600 Stock Exchange Tower, 300 – 5th Avenue SW, Calgary AB T2P 3C4.

Dated in Calgary, Alberta, on May 27, 2011.

ENERGY RESOURCES CONSERVATION BOARD

<original signed by>

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

<original signed by>

G. Eynon, P.Geol.
Board Member

<original signed by>

G. J. DeSorcy, P.Eng.
Acting Board Member

APPENDIX A SUMMARY OF COSTS CLAIMED AND AWARDED

This appendix is unavailable on the ERCB website. To order a copy of this appendix, contact ERCB Information Services toll-free at 1-855-297-8311.