ConocoPhillips Canada Operations Ltd.

Application for a Well Licence and Two Pipeline Licences – Pembina Field

Cost Awards

July 25, 2011

ENERGY RESOURCES CONSERVATION BOARD
Energy Cost Order 2011-006: ConocoPhillips Canada Operations Ltd., Application for a Well Licence and Two Pipeline Licences, Pembina Field

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ENERGY RESOURCES CONSERVATION BOARD

Calgary Alberta

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AND TWO PIPELINE LICENCES	**1641492, and 1642300**
PEMBINA FIELD	**Cost Application No. 1684597**

1 INTRODUCTION

1.1 Background

ConocoPhillips Canada Operations Ltd. (ConocoPhillips) submitted the following applications (referred to collectively as the Applications) to the Energy Resources Conservation Board (ERCB/Board):

- Application No. 1641488 for approval to construct and operate a pipeline for the purpose of transporting fuel gas from Legal Subdivision (LSD) 11, Section 14, Township 50, Range 8, West of the 5th Meridian, to a pipeline tie-in point at LSD 6-12-50-8W5M.

- Application No. 1641492 for approval to construct and operate a pipeline for the purpose of transporting oil effluent from LSD 6-12-50-8W5M to a pipeline tie-in point at LSD 11-14-50-8W5M with a maximum hydrogen sulphide (H_2S) concentration of 310.0 moles per kilomole (31.0 per cent). The proposed pipeline would be operated as a level-2 pipeline, with an emergency planning zone (EPZ) of 1.59 kilometres (km).

- Application No. 1643200 for a licence to drill a directional well from a surface location in LSD 6-12-50-8W5M with a maximum H_2S concentration of about 220.3 moles per kilomole (22.03 per cent), a cumulative drilling H_2S release rate of 2.8301 cubic metres per second, and an EPZ of 2.98 km. The purpose of the well would be to obtain oil production from the Nisku Formation. The proposed well would be located about 6.3 km northwest of the hamlet of Rocky Rapids, Alberta.

Don Drebert and Karen Drebert, Hertha Drebert, Cliff Smith and Jennifer Smith (referred to collectively as the Claimants) filed letters of objection to the Applications, dated January 13, 2010, and July 5, 2010.

ConocoPhillips withdrew the Applications on September 2, 2010.

1.2 Cost Claim

On September 24, 2010, counsel for the Claimants filed an application for a cost award in the amount of $3395.54 (the Cost Application). On October 7, 2010, ConocoPhillips submitted comments on the Cost Application. Counsel for the Claimants submitted a response to comments on October 18, 2010. On April 6, 2011, the ERCB received comments on the processing of the Cost Application from the parties.

2 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* (*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 E: Scale of Costs in ERCB *Directive 031: Guidelines for Energy Proceeding Cost Claims (March 2009).*

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.

The Board's practices, when exercising its discretion to award costs, are found in *Directive 031*. In particular, Sections 5.4, 6.3, and 6.4 of *Directive 031* are relevant to the Cost Application, where Section 5.4 reads

> The Board does not award compensation for participation in the Board's Appropriate Dispute Resolution (ADR) program. Costs for ADR are to be dealt with in the context of the negotiations themselves and not through the Board's cost recovery process. A cost regime exists for costs incurred for negotiations and facilitations, which is described in *Informational Letter (IL) 2001-01: Appropriate Dispute Resolution (ADR) Program and Guidelines for Energy Industry Disputes*:
>
> > For the Preliminary ADR Meeting, industry participants should be responsible for the costs, including the direct third-party costs of landowners and the public. Costs and payment for future ADR options should be discussed and agreed to at the Preliminary ADR Meeting.

Section 6.3 reads

> As there is no certainty that a hearing will be held until a notice of hearing is issued, the ERCB normally does not award costs incurred before notice is issued. However, the ERCB recognizes that local interveners may sometimes incur costs prior to the notice that are reasonable and directly and necessarily related to their intervention. Accordingly, the ERCB considers all claims for costs incurred prior to the notice of hearing on a case-by-case basis.

and Section 6.4 reads

> The decision to award local interveners costs when no public hearing is held is within the discretion of the Board. The Board considers each claim on its own merits. Some of the factors that it considers are
>
> - the nature of the disagreement or dispute between the applicant and the local intervener;
> - the nature of the applicant's public consultation process;
> - whether or not an application was filed for the proposed project;
> - whether the costs incurred by the local intervener were reasonable, given the nature of the project proposed; and
> - whether the costs incurred by the local intervener were directly and necessarily related to the issues in dispute.
>
> Claims for local intervener costs if no hearing is held should be filed with the ERCB as soon as possible. If such a claim is being made regarding an application that was withdrawn, the claim must be filed within 30 days of the date upon which the application was withdrawn. The ERCB will not consider claims received after the 30-day period unless extraordinary circumstances prevented timely filing.

3 COST CLAIM OF THE DREBERTS AND SMITHS

Debbie Bishop of Ackroyd LLP represented the Claimants and on September 24, 2010, she filed the Cost Application for legal fees in the amount of $2800.00, expenses in the amount of $353.85, and GST in the amount of $161.69, for a total claim of $3395.54.

3.1 Views of ConocoPhillips

ConocoPhillips noted that it was difficult to comment on the invoice attached to the claim as it did not indicate the hours spent performing each of the enumerated tasks, and that some of the time entries were too vague to determine the work that was performed. It noted that the entry for "phone calls to experts" did not provide any details about the number of experts that were contacted or the nature of the discussions.

ConocoPhillips disagreed that *Energy Cost Order (ECO) 2008-008: Berkley Resources Inc., Application for a Well Licence, Crossfield Field*, was authority for the Board awarding costs in situations such as this one. ConocoPhillips observed that the Board disallowed costs related to consultation and negotiation and allowed costs for preparation for either a prehearing meeting or a hearing before the Board. ConocoPhillips submitted that this Cost Application presents facts virtually identical to those within *ECO 2008-008*. ConocoPhillips applied for the facilities and the parties undertook consultation and negotiation (January to May). It appeared that a hearing

would likely be held and that some prehearing work had been completed (June), but ConocoPhillips subsequently withdrew the application. ConocoPhillips submitted that in applying the cost recovery principles set out in *ECO 2008-008*, Ms. Bishop's fees should be payable only from mid-June onward.

ConocoPhillips took the position that the pre-June discussions did not contribute to a better understanding of the issues and that in its July 8, 2010, letter to the ERCB, it was still seeking additional information about the specific nature of the landowners' concerns in order to participate in a more efficient ADR process. ConocoPhillips also submitted a copy of a letter sent to the Claimants dated June 7, 2010, in which it responded to the Claimants' ADR proposal, proposed a set of terms for ADR, and advised that it would be able to meet in the latter half of July for ADR. ConocoPhillips argued that it was premature to engage legal counsel before any discussions could be scheduled between the parties. Therefore, it did not believe that the pre-June costs meet the requirements of the *Rules of Practice*. ConocoPhillips stated that it had offered to reimburse three hours of the Claimants' counsel's time and disbursements and that this would be an appropriate cost award under the circumstances.

3.2 Views of the Dreberts and Smiths

In their cost application, the Claimants argued that they are landowners that would be directly and adversely affected by the Applications as the Dreberts' land was in the setback for the Applications and the Smiths' residence was within a few hundred metres of the proposed critical sour gas well. Although the Board had not issued a Notice of Hearing, ConocoPhillips had filed an application, and the Claimants believed that a hearing was imminent and expected in the fall of 2010. Therefore, the Claimants submit that they had no choice but to begin preparation for the hearing into this matter. Additionally, both the ERCB and ConocoPhillips sent correspondence requesting additional information that was time sensitive and required a response.

Ms. Bishop submitted that she spent her time, primarily, as follows:

- Meeting with clients (4 hours)
- Gathering information from clients (4 hours)
- Reviewing the application (1 hour)
- Speaking with consultants and potential experts (1 hour)
- Correspondence (2 hours)

Ms. Bishop submitted that she spent time responding to correspondence initiated by the ERCB and ConocoPhillips and discussing with her clients the correspondence that was requested.

Ms. Bishop said that it seemed disingenuous of ConocoPhillips to have requested information from her and then suggest that the work was unnecessary after it withdrew the Applications without notice.

3.3 Views of the Panel

In order to be eligible for costs, as stated above, the Claimants must be local interveners, as defined under Section 28 of the *ERCA*. The Panel notes that ConocoPhillips did not raise the Claimants' status as local interveners as an issue. According to the information submitted with

the Applications, the Claimants own land that would have been within a setback; however, further information regarding this potential impact was not provided to the Panel as the matter did not proceed to a hearing. Based on the foregoing, the Panel is prepared to find that the Claimants are local interveners for the purposes of Section 28 and are eligible for costs.

In reviewing the correspondence between the ERCB and the parties leading up to ConocoPhillips' decision to withdraw the Applications on September 2, 2010, it is evident that the focus of the parties at this time was to initiate consultation and negotiations to clarify issues and commence an ADR process to resolve them and, therefore, avoid proceeding to a hearing. Under *Directive 031*, ADR costs are to be dealt with in the context of the negotiations themselves and not through the Board's cost recovery process. With respect to costs incurred prior to mid-June, the Panel notes that the ERCB was in the process of gathering information to fully understand the Claimants' objection and had not determined if a hearing would be held. It had not issued a Notice of Hearing and, as stated in *Directive 031*, it is not the Board's usual practice to award costs incurred before issuing a Notice of Hearing. The Panel is of the view that there was no reasonable expectation that a hearing would be held. Further, it is not apparent that the costs incurred prior to mid-June are reasonably and necessarily related to the intervention given the vagueness of the cost submissions. The Panel hereby declines awarding claimed costs incurred prior to mid-June.

The Panel also notes that legal counsel, when agreeing to represent parties such as the Claimants, is responsible for informing these parties of the Board's requirements and practices on awarding costs associated with such representation, as set out in *Directive 031*. The Panel notes that Ackroyd LLP has previously participated in a number of Board's proceedings and should be familiar with its practices in such matters.

The Panel notes ConocoPhillips' offer to reimburse the three hours of Ms. Bishop's time she spent on this matter after mid-June. Accordingly, the Panel is prepared to award costs for three hours of Ms. Bishop's time plus disbursements for a total amount of $1073.85, excluding GST.

4 ORDER

It is hereby ordered that ConocoPhillips pay intervener costs totaling $1127.54 to Ackroyd LLP. Payment shall be made to Ackroyd LLP, 1500 First Edmonton Place, 10665 Jasper Avenue, Edmonton, Alberta, T5J 3S9.

Dated in Calgary, Alberta, on July 25, 2011.

ENERGY RESOURCES CONSERVATION BOARD

<original signed by>

J. D. Dilay, P.Eng.
Presiding Board Member

<original signed by>

R. C. McManus, M.E.Des, B.A.
Board Member

<original signed by>

A. Bolton, B.Sc., P.Geol.
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.