

Via Email

July 26, 2016

DLA Piper (Canada) LLP

Bennett Jones LLP

Attention: Peter S. Jull, Q.C.**Attention: Blake Williams**

Dear Mr. Jull and Mr. Williams,

**Re: Proceeding ID. 341
Shell Canada Limited (Shell) Rocky 7 Pipeline Project
Application Nos. 1823846 and PLA 150215 (Applications)
OCFN Application for Advance Funds**

On June 30, 2016, O’Chiese First Nation (OCFN) filed an application for an advance of funds in the amount of \$572,648.09. On July 15, 2016, the AER received Shell’s response to that application. On July 20, 2016, OCFN filed a response to Shell’s submission.

Having reviewed each of these submissions, the Panel has determined that it is appropriate in the circumstances to award an advance of funds to OCFN.

Awards of Advance Funds

The purpose of an advance of funds made under section 59 of the *Alberta Energy Regulator Rules of Practice* (the Rules) is to assist a party with its participation in a proceeding in circumstances where it requires financial assistance to allow it to make an effective submission in that proceeding. Advances are not provided to every participant in every proceeding; rather, they are only provided in exceptional circumstances where it is demonstrated that a participant could not otherwise effectively participate in a hearing because it would be unable to pay specific out of pocket expenses which it must incur and pay in advance of the hearing to allow it to participate in the hearing. Need must be established.

Advanced funding is not intended to provide an advance of all, or even the major portion, of the cost of a party’s participation in a proceeding. Advances are provided prior to expenses being incurred and paid and are speculative in nature. The amounts advanced are reviewed at the end of the proceeding to ensure that the costs for which amounts were advanced were actually and necessarily incurred for purposes directly related to the hearing. If it is determined the award was not appropriate, the advanced funds must be refunded in whole or in part to the payor, who is

typically the project proponent. Given the speculative nature of advances and the prospect of repayment, and the risks inherent with both of those aspects of advances, advances are only awarded if absolutely necessary and never for matters for which payment can or ought to wait until a final cost award is made at the end of the main proceeding. Advances respond to specific necessary pre-hearing expenses the participant must pay prior to the hearing so as to allow it to effectively participate in the hearing. An example of such an expense would be the retainer fee for an expert which must be paid before the expert will commence working on a matter.

A decision on costs, including an advance of funds, is in the discretion of the AER with reference to the factors set out in section 58.1 of the Rules. Those factors, which reflect the above general principles relating to advance funds, include:

- (a) whether there is a compelling reason why the participant should not bear its own costs;
- (b) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
- (c) in the case of advance funds, whether the submission of the participant will contribute to the binding dispute resolution meeting or hearing;
- ...
- (e) whether the participant has made an adequate attempt to use other funding sources;
- ...
- (h) whether the application for advance of funds or for interim or final costs was filed with the appropriate information;
- (i) whether the participant required financial resources to make an adequate submission;
- ...
- (k) whether the costs were reasonable and directly and necessarily related to matters contained in the notice of hearing on an application or regulatory appeal and the preparation and presentation of the participant's submission;
- ...
- (r) any other factor that the Regulator considers appropriate.

Directive 031: REDA Energy Cost Claims (Directive 031) prescribes what information must be included in a request for advance of funds. That information includes:

- a detailed and itemized budget that clearly outlines the direct expenses that the participant reasonably and necessarily expects to incur in the preparation and presentation of his or her participation;

- if a lawyer, expert, or consultant is a necessary component of the participation, a summary of the lawyer's, expert's, or consultant's expertise and a detailed description of the work they propose to do in support of their client's participation; and
- information addressing the factors listed in section 58.1 of the Rules.

Without this detailed information, it is not possible for the AER to apply the factors in section 58.1 of the Rules.

OCFN's Request for Advance Funds

As noted above, the purpose of advance funding is not to advance the estimated cost of participation in the entire proceeding. However, in this matter, OCFN has submitted a request for what appears to be its estimate of the possible cost of its entire participation in this proceeding. It includes significant witness, expert and lawyer time for pre-hearing matters and preparation, participation in the hearing, and even some post-hearing amounts. As well, disbursements for the entire proceeding are claimed. An advance funding claim of this nature is not appropriate. It asks for advance payment of costs that will not be incurred until or after the hearing itself.

Further, a claim for advance funding must contain sufficient detail to allow the AER to assess the factors in section 58.1 of the Rules and in particular the factor in section 58.1(k). This requirement is made clear in Directive 031 referred to above. Section 58.1(k) states:

whether the costs were reasonable and directly and necessarily related to matters contained in the notice of hearing on an application or regulatory appeal and the preparation and presentation of the participant's submission;

Without the detail referenced in Directive 031, it is impossible for the AER to assess whether the proposed expenses are necessary or reasonable.

The AER recognizes that an application for advance funding, which is a prospective claim, cannot be expected to include invoices relating to the payment of the amounts claimed. The work has not been done and the expenses have not been paid. Nonetheless, the information provided by OCFN is, for the most part, insufficient to allow the panel to adequately assess the request for funds. OCFN's submission provides a budget and addresses some of the factors listed in section 58.1 of the Rules. However, most of the detail necessary for the panel to determine if the amounts sought are reasonable and necessarily related to the hearing is missing.

For example, the information provided does not adequately explain why over 800 hours of legal counsel services are required for the hearing of an application for approval of a 7 kilometre pipeline, or why OCFN requires funds to cover the fees and disbursements for its counsel in advance of the hearing taking place.

With regard to OCFN's in-house counsel, no specific pre-hearing expenditures are identified. OCFN does reference the need to retain outside counsel to deal with some of its in-house counsel's duties while she is occupied with this matter; however, no particulars are provided. Typically, the AER does not award costs for in-house counsel as such services are considered to be in the normal course of that counsel's services to his or her employer. This is particularly so when outside counsel have been retained to provide the bulk of services in relation to the hearing, as appears to be the case with OCFN's participation in this proceeding.

Only a very short description of the third report being prepared by the Calliou Group is provided and no explanation of Calliou's fees for hearing preparation or attendance is provided. No information is provided as to why OCFN must receive all of the fees and expenses associated with Calliou's services in advance of the hearing.

Insufficient information is provided regarding what work the unnamed experts may do; in fact it is not clear that they will do any work.

The information provided regarding Andrew Nanooch's qualifications and what services he will provide is insufficient to allow the panel to assess the necessity or reasonableness of the amounts claimed in relation to him. Further, no explanation is given as to why OCFN requires the fees and expenses associated with Mr. Nanooch's services in advance of the hearing.

With regard to OCFN members who will testify in the hearing, insufficient information is provided as to why an advance relating to the members' participation in the hearing is required. In addition, as a matter of AER practice, community witnesses who do not give evidence as experts qualified in a particular field that is related to issues arising in the proceeding are not awarded fees; they are awarded honoraria following the conclusion of the cost process.¹

Decision

¹ *Energy Cost Order 2014-002*, at paras. 119-129.

In light of the above, the Panel considers it inappropriate to award advance funding for legal fees and disbursements for in-house or external counsel; for any amounts claimed for hearing participation or post-hearing matters; for the unidentified and un-retained experts; or for Mr. Nanooch.

Despite the deficiencies in the information provided by OCFN in its request for advance funding, based on the information provided thus far the Panel believes that OCFN will make a contribution to the hearing of this matter and that OCFN has demonstrated some need for advance funds. It appears that the third report to be prepared by Calliou and the preparation of community members' testimony are costs that will be reasonably and necessarily incurred for the purposes of the hearing. For that reason, the Panel considers that an advance of \$25,000.00 is appropriate. The AER directs Shell to provide these funds to OCFN by no later than August 2, 2016.

The AER is not prescribing how OCFN chooses to allocate the advance of funds. However, this advance of funds is subject to a redetermination in a final award of costs. Following the hearing, the AER will require OCFN to provide a full accounting of how the advanced funds were spent by way of a cost application that complies with Directive 031 (cost application). The cost application must be supported by invoices and detailed descriptions of services rendered on OCFN's behalf and all information required by Directive 031 for costs applications submitted under the AER's cost process. This information must be submitted thirty (30) days following the close of the hearing, unless otherwise directed by the Panel.

In OCFN's cost application, OCFN may request amounts beyond the amounts received pursuant to this advance of funds. To be recoverable, those amounts must comply with the requirements set out in the Rules and Directive 031.

This advance of funds in no way guarantees that the AER will make a final cost order in the amount of this advance of funds or amounts beyond the advance award. OCFN assumes the risk that if the AER is not satisfied that the amounts claimed by OCFN in its cost claim meet the requirements set out in the Rules and Directive 031, **OCFN may be required to re-pay all or a specified portion of the advance payment made by Shell pursuant to this award of advance of funds.**

The Panel reminds OCFN that the final costs recoverable in relation to any proceeding are weighed against the factors listed in section 58.1. This means that amongst other considerations,

the AER will be assessing whether any costs claimed by OCFN in this proceeding are reasonable and necessary relative to the subject matter, scope, complexity and length of this matter.

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Yours truly,



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