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Alberta Utilities Commission

EPCOR Distribution & Transmission Inc.

Rossdale Substation Building Expansion

Costs Award

October 14, 2016

Alberta Utilities Commission

Decision 21544-D01-2016

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Published by

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1 Introduction

1. In this decision the Alberta Utilities Commission considers an application by Samson Cree Nation (Samson Cree) for approval and payment of their costs of participation in Proceeding 20581 (the costs claim application). The following table sets out the costs claimed and the amounts awarded:

Claimant	Total Fees Claimed	Total Disbursements Claimed	Total GST Claimed	Total Amount Claimed	Total Fees Awarded	Total Disbursements Awarded	Total GST Awarded	Total Amount Awarded
Samson Cree Nation								
Miller Thomson LLP	\$48,958.92 ¹	\$4,129.00	\$0.00	\$53,087.92	\$41,820.13	\$3,411.73	\$0.00	\$45,231.86
Maskwacis Museum and Archives	\$1,200.00	\$0.00	\$0.00	\$1,200.00	\$1,200.00	\$0.00	\$0.00	\$1,200.00
Kyra Northwest	\$50.00	\$0.00	\$0.00	\$50.00	\$50.00	\$0.00	\$0.00	\$50.00
Herbert Brian Lighting	\$50.00	\$0.00	\$0.00	\$50.00	\$50.00	\$0.00	\$0.00	\$50.00
Preparation Honoraria	\$2,000.00	\$0.00	\$0.00	\$2,000.00	\$2,000.00	\$0.00	\$0.00	\$2,000.00
Total	\$52,258.92	\$4,129.00	\$0.00	\$56,387.92	\$45,120.13	\$3,411.73	\$0.00	\$48,531.86
Advanced Costs Awarded								\$23,200
Total Amount Awarded								\$25,331.86

2. The Commission has awarded reduced costs to the Samson Cree because it found that the Samson Cree engaged in conduct that unnecessarily prolonged the duration of the proceeding and resulted in unwarranted costs. The Commission's reasons for this decision are set out below.

3. Proceeding 20581 (the original proceeding) was convened by the Commission to consider an application by EPCOR Distribution and Transmission Inc. (EDTI) to expand its existing Rossdale substation. The original proceeding involved information requests (IR) and IR responses, written evidence, an oral hearing, cross-examination and oral argument and reply argument. The close of record for the original proceeding was March 11, 2016 and the Commission issued Decision 20581-D02-2016² on May 13, 2016.

4. On October 23, 2015, the Commission issued Decision 20581-D01-2016³, in which it awarded the Samson Cree advance funding in the amount of \$23,200.00, composed of \$20,000.00 in legal fees, \$1,200.00 in consulting fees for the Maskwacis Museum and Archives and advanced preparation honoraria for four elders in the amount of \$2,000.00.

¹ The original application requested recovery of \$62,233.00 in legal fees.

² Decision 201581-D02-2016: EPCOR Distribution & Transmission Inc. Rossdale Substation Building Expansion, Proceeding 20581, Application 20581-A001, May 13, 2016.

³ Decision 20581-D01-2016: EPCOR Distribution & Transmission Inc. Application to Expand the Rossdale Substation Building Advance Funding Award, Proceeding 20581, October 23, 2015.

5. The Samson Cree provided a copy of its costs application to the Commission by email on April 6, 2016 within the 30 day timeline permitted by the Commission's rules. The Commission assigned Proceeding 21544 and Application 21544-A001 to the cost application. On June 8, 2016, the Samson Cree filed an updated cost claim in which the legal fees claimed for the preparation of argument had been substantially reduced.

6. On July 6, 2016, EDTI submitted comments regarding the costs claim application. On July 13, 2016, the Samson Cree filed its response to the comments filed by EDTI.

7. On September 19, the Commission issued an IR to the Samson Cree requesting confirmation that the Samson Cree was seeking final approval of the advance funding amounts awarded in Decision 20581-D01-2016. The Samson Cree submitted its response on September 28, 2016.

8. The Commission considers the close of record for this proceeding to be September 28, 2016, the date upon which the final submissions on the cost claim application were received.

2 Commission findings

2.1 The Samson Cree's local intervenor status

9. Only "local intervenors" are eligible to claim costs in facility related applications. The Commission's authority to award costs for the participation of a local intervenor in an application for transmission facilities under the *Hydro and Electric Energy Act* is found in sections 21 and 22 of the *Alberta Utilities Commission Act*. When considering a claim for costs for a facilities proceeding, the Commission is also guided by the factors set out in Section 7 of Rule 009: *Rules on Local Intervenor Costs* (Rule 009) and will consider whether an eligible participant's costs are reasonable and directly and necessarily related to the proceeding. The Commission will also consider whether the eligible participant acted responsibly in the proceeding and contributed to a better understanding of the issues before the Commission. Appendix A of Rule 009 prescribes a Scale of Costs applicable to all costs claimed.

10. Section 22 of the *Alberta Utilities Commission Act* defines what a "local intervenor" is and states:

22(1) For purposes of this section, "local intervenor" means a person or group or association of persons who, in the opinion of the Commission,

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

land that is or may be directly and adversely affected by a decision or order of the Commission in or as a result of a hearing or other proceeding of the Commission on an application to construct or operate a hydro development, power plant or transmission line under the *Hydro and Electric Energy Act* or a gas utility pipeline under the *Gas Utilities Act*, but unless otherwise authorized by the Commission does not include a person or group or association of persons whose business interest may include a hydro development, power plant or transmission line or a gas utility pipeline.

11. The Commission is satisfied that the Samson Cree are local interveners based on their historical and ceremonial interests in the Rossdale flats area, where the project is located.

2.2 The Samson Cree’s cost claim

12. In its original cost claim filed on April 6, 2016, the Samson Cree sought to recover \$62,233.00 in legal fees. On June 8, 2016, counsel for the Samson Cree, Miller Thomson, filed an updated cost claim. In the correspondence accompanying the update, Miller Thomson advised that it had written off some of the time on the file, resulting in a \$13,274.08 reduction in fees claimed. The following table summarizes the Samson Cree’s revised and updated cost claim for Proceeding 20581:

Claimant	Hours			Fees	Disbursements	GST	Total
	Preparation	Attendance	Argument				
Samson Cree Nation							
Miller Thomson LLP	125.20	32.80	51.20	\$48,958.92	\$4,129.00	\$0.00	\$53,087.92
Maskwacis Museum and Archives	0.00	0.00	0.00	\$1,200.00	\$0.00	\$0.00	\$1,200.00
Kyra Northwest	0.00	0.00	0.00	\$50.00	\$0.00	\$0.00	\$50.00
Herbert Brian Lighting	0.00	0.00	0.00	\$50.00	\$0.00	\$0.00	\$50.00
Preparation Honoraria	0.00	0.00	0.00	\$2,000.00	\$0.00	\$0.00	\$2,000.00
Total	125.20	32.80	51.20	\$52,258.92	\$4,129.00	\$0.00	\$56,387.92

2.3 EDTI comments

13. EDTI expressed concerns about the costs claimed by the Samson Cree and noted that their costs claim submission was inconsistent with both the Advance Funding Award and Rule 009.

14. EDTI noted that the legal fees sought by counsel exceed the amount typically awarded in a facility proceeding of this nature. EDTI further submitted that the advance funding amounts awarded in Decision 20581-D01-2016 for the Maskwacis Museum and Archives and preparation honoraria should be included in the costs claim.

15. EDTI observed that portions of the Samson Cree’s costs claim were not in accordance with Rule 009 and the Commission’s Scale of Costs, such as: the rates claimed for two of the Samson Cree’s lawyers exceeded the tariff set out in the Scale of Costs, and it was unclear if their rates for travel time were charged at one half of the hourly rate. Further, some of the disbursements claimed by Samson Cree Nation were in excess of the Scale of Costs. EDTI also noted that the Samson Cree had not advanced any arguments to justify that the fees provided for in Scale of Costs were inadequate in light of the complexity of the original proceeding.

16. EDTI further submitted that each of the intervener’s lawyers is seeking compensation for 16 hours of hearing time, but noted that hearing time consisted of slightly less than one and a half days.

17. Finally, EDTI argued that the legal counsel of the Samson Cree unnecessarily lengthened the duration of the proceeding with arguments related to constitutional issues.

2.4 The Samson Cree's response

18. The Samson Cree responded to EDTI's comments. It stated its costs claim was reasonable and that Samson Cree contributed to a better understanding of the issues before the Commission.

19. In response to EDTI's comment that the legal fees claimed exceed the amount typically awarded, the Samson Cree noted that Rule 009 did not include a cap in the amount of legal fees the Commission can award, provided it found the claim to be reasonable.

20. The Samson Cree argued that while the oral hearing was short, the issues raised within the original proceeding were of a complex and unsettled nature, and that the Samson Cree was entitled to raise these issues.

21. The Samson Cree confirmed that the travel time reflected in the costs claim was charged at half of counsel's hourly rates. They also confirmed that the 16 hours claimed for hearing attendance time included preparing for the hearing.

22. The Samson Cree submitted that the timing of the filing of the Notice of Constitutional Question did not unnecessarily lengthen the proceeding. They argued that if the notice had been filed prior to the proceeding, the same steps taken subsequent to the oral hearing would have been done prior to it instead. Samson Cree further submitted that even if the Commission had declined jurisdiction to hear the constitutional question prior to the hearing, Samson Cree would still have participated, cross-examined EDTI's witnesses and made closing submissions, and that the result in terms of costs claimed would have been the same.

2.5 Commission findings

23. The Commission finds that Samson Cree Nation contributed to the Commission's understanding of relevant issues in the original proceeding. However, the Commission is unable to approve the full amount of the costs claimed in respect of the services performed by Miller Thomson for the reasons set out below.

Miller Thomson LLP

24. The Samson Cree sought to recover legal fees for four lawyers and two students at Miller Thomson: Mr. Aryn Lalji, Mr. Kennedy Bear Robe, Ms. Robin Dean, Mr. Saul Joseph, Ms. Emily McClintock and Ms. Erika Lai. Fees were charged for: reviewing the application, assisting in the preparation of written evidence, drafting IR responses, reviewing EPCOR's rebuttal evidence, drafting cross-examination, and preparing for and attending the hearing. The Commission finds that the use of these lawyers and students was reasonable in the circumstances. The vast majority of the work on the file was performed by Mr. Bear Robe and Ms. Dean, who have three and two years of experience respectively. Mr. Lalji supervised their work and the hours claimed for that work was reasonable. Mr. Joseph, also a junior lawyer, provided some initial assistance and the two students undertook research.

25. The fees claimed by Mr. Lalji and Ms. Dean exceed the amounts allowable under the Scale of Costs. Mr. Lalji charged an hourly rate of \$365.00 and Ms. Dean charged hourly rates of \$274.39 to \$295.00. The Scale of Costs allows lawyers with more than 12 years of experience, like Mr. Lalji, to recover costs up to \$350.00 an hour, and allows lawyers with one to four years of experience, like Ms. Dean, to recover costs of up to \$240.00 an hour. The Commission finds

that the Samson Cree did not provide persuasive rationale for recovering fees in excess of those provided for in the Scale of Costs. Accordingly, the fees for Mr. Lalji and Ms. Dean have been adjusted to comply with the Scale of Costs. This adjustment decreases the amount claimed by \$4,485.45 and results in a new total of \$44,473.47 in fees for services provided.

26. The Commission also notes that 2.20 hours claimed by Mr. Bear Robe relate to the preparation of the costs claim. The Commission does not award costs for the preparation of cost claims and disallows the 2.20 hours and associated fees of \$452.67.

27. Having regard to the above adjustments to achieve compliance with the Scale of Costs, the total legal fees eligible for recovery on behalf of Miller Thomson are \$44,020.79.

28. The Commission finds that a further reduction to the fees claimed on behalf of Miller Thomson is warranted because of conduct that unnecessarily prolonged the duration of the proceeding and resulted in unwarranted costs. Specifically, the Samson Cree, through its counsel Miller Thomson, raised a constitutional question, as that term is defined in the *Administrative Procedures and Jurisdiction Act*, during argument and without providing the notice required under that act.

29. To address this defect, the Commission required the Samson Cree to provide notice to the Crown and then sought submissions from all parties on the constitutional question. This resulted in a considerable delay in the completion of the hearing and additional costs for all of the parties. The Commission found as follows in its ruling on the constitutional question:

36. ...it was evident to the Commission that the Samson Cree had concerns regarding Crown consultation prior to the commencement of the hearing but, for reasons unknown, chose not to share those concerns with the applicant or the Commission or to give the notice required to have those concerns considered by the Commission.

37. The Samson Cree provided no rationale for its failure to give the required notice other than to submit, in response to a question from the Chair, that it was asking the Commission to rule on the duty to consult as a common law obligation rather than as a constitutional duty. However, in making this assertion, counsel for the Samson Cree affirmed that the duty to consult has both a common law and a constitutional aspect. Under the circumstances, the Commission finds that the Samson Cree, through its counsel, knew or should have reasonably known that it was required to give notice under the *Administrative Procedures and Jurisdiction Act* as a precondition to the Commission commencing its consideration of this issue.

30. The Commission finds that a further reduction of 20 per cent, or \$2,200.66, to the argument fees claimed on behalf of Miller Thomson is warranted in the circumstances. In making this decision the Commission took into account the reduction that Miller Thomson made to the fees claimed for argument when it submitted its revised cost claim. Having regard to the foregoing, the total legal fees approved for Miller Thomson LLP are \$41,820.13.

31. The Commission has reviewed the disbursements claimed by Miller Thompson and finds that not all the amounts claimed for disbursements are in accordance with the Scale of Costs.

32. Appendix A of Rule 009 states that disbursements for airfare and travel are limited to oral hearings. The claim of \$596.66 made for airfare by Mr. Bear Robe falls outside of the hearing dates and has been disallowed. Mr. Bear Robe claimed for travel on November 16 and 17, 2015,

while the hearing was held on December 9 and 10, 2015. Similarly, the claim for car rental of \$71.07 has been disallowed as it is outside of the hearing dates.

33. Mr. Bear Robe's claim for meals exceeds the amounts permitted by the Scale of Costs. Appendix A allows for a claim of \$40.00 per day for meals, for the duration of an oral hearing. Accordingly, the Commission awards \$80.00 for Mr. Bear Robe. Further, Ms. Dean and Mr. Bear Robe's claims for taxi fare include tip amounts of \$13.56 which are not claimable under the Scale of Costs and have therefore been disallowed.

34. The Commission approves the remaining claims for disbursements for Quicklaw research, internal photocopying, phone charges, courier fees, airfare, meals, taxi fare and accommodation in the total amount of \$3,411.73.

35. Accordingly, the Commission approves Samson Cree's claim for legal fees for Miller Thompson in the amount of \$41,820.13 and disbursements of \$3,411.73 for a total of \$45,231.86.

Maskwacis Museum and Archives

36. In their response to the Commission IR, Samson Cree confirmed they were seeking approval of the \$1,200.00 awarded in advance funding for the consulting fees for the Maskwacis Museum & Archives.

37. The Commission understands that the information provided by the Maskwacis Museum & Archives was incorporated into the written submissions of the Samson Cree. The Commission found this information to be helpful in understanding the Samson Cree's interest in the Rossdale Flats area and its concerns about the proposed substation expansion. The Commission finds that the fees claimed for this work were reasonable and in accordance with the Scale of Costs and awards them in full.

Intervener costs

38. The Samson Cree's costs claim included a claim for attendance honoraria for Ms. Kyra Northwest and Mr. Herbert Brian Lighting totalling \$100.00. Samson Cree also confirmed they were seeking final approval for the \$2,000.00 awarded as advance preparation honoraria for the Elders.

39. The Commission finds that the claims for attendance honoraria for Ms. Northwest and Mr. Lighting and the claims for the preparation honoraria for the Samson Elders are reasonable and in accordance with the Scale of Costs and are approved by the Commission.

Total costs awarded

40. Accordingly, the Commission approves Samson Cree's claim for recovery of costs in the total amount of \$48,531.86. This amount is composed of legal fees of \$41,820.13, consulting fees of \$1,200, disbursements of \$3,411.73 and honoraria of \$2,100.00, less the \$23,200.00 awarded as advance funding in Decision 20581-D01-2016 leaving an unpaid balance of \$25,331.86.

3 Order

41. It is hereby ordered that:

- 1) EPCOR Distribution & Transmission Inc. shall pay intervener costs to Miller Thomson LLP on behalf of the Samson Cree Nation in the amount of \$48,531.86, less \$23,200 awarded as advance funding in Decision 20581-D01-2016, leaving a balance of \$25,331.86.

Dated on October 14, 2016.

Alberta Utilities Commission

(original signed by)

Neil Jamieson
Panel Chair

(original signed by)

Patrick Brennan
Acting Commission Member