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Annie Ruhlmann for / pour
REGISTRAR / REGISTRAIRE

File No. CT-2021-002

OTTAWA, ONT.

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THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF the acquisition by Secure Energy Services Inc. of all of the issued and outstanding shares of Tervita Corporation;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*.

B E T W E E N :

THE COMMISSIONER OF COMPETITION

Applicant

- and -

SECURE ENERGY SERVICES INC.

Respondent

COSTS SUBMISSIONS OF THE COMMISSIONER OF COMPETITION

Overview

1. On January 25, 2023, the Tribunal directed the parties to attempt to come to an agreement on costs related to the section 92 application and, if unable to come to an agreement, the Tribunal directed the parties to provide submissions. The parties have agreed that the winning party shall receive \$150,000 (inclusive of taxes) for legal fees. The parties were unable to come to an agreement for disbursement costs, therefore, the Commissioner is filing this written submission for consideration by the Tribunal in making its costs order.

The Commissioner should be awarded a lump sum cost award of \$2.5 million if he is successful¹

2. The Commissioner's Bill of Costs for disbursements in this matter is for \$2,591,343.14. The Bill of Costs provides detailed information and sufficient support to explain the disbursements incurred and the basis for the various claims which were reasonable, necessary, and justified.
3. The vast majority of the Commissioner's disbursements relate to expert fees, which were \$2,525,897.84. These expert fees are reasonable, even when compared to the expert fees charged by Secure's experts, because: (a) Dr. Miller constructed a data set from 24 market participants and performed substantial work to model the results,² (b) Dr. Miller also prepared market share analysis for 271 customer-based markets,³ and (c) the fees charged by Dr. Miller and Cornerstone were capped and well below market rates.

¹ The Tribunal has jurisdiction to award costs of proceedings before it pursuant to section 8.1 of the *Competition Tribunal Act* (RSC, 1985, c 19 (2nd Supp)), in accordance with the provisions governing costs in the *Federal Courts Rules*, SOR/98-106("Rules"). Subsection 400(1) of the *Rules* gives the Tribunal "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid". Subsection 400(3) of the *Rules* sets out a list of factors the Tribunal may consider in the exercise of its discretion. Subsection 400(4) of the *Rules* provides that costs may be assessed according to the tariff and/or by awarding a lump sum. An award of costs is intended to balance between compensating a successful party without unduly burdening the unsuccessful party. The purpose of costs is a reasonable contribution to legal costs, fairness, and predictability. *Commissioner of Competition v. Vancouver Airport Authority*, 2019 Comp Trib 6, ("VAA"), para 817.

² Exhibit CA-A-057, Miller Report, pgs 139-148, sections 7.7.3-7.7.4. By contrast, Brattle did not construct its own data set.

³ Exhibit CA-A-057, Miller Report, pg 54 Exhibit 9.

If the section 92 application is dismissed, the Tribunal should award no costs

4. The Tribunal should not order disbursement costs for two reasons: (1) there was a broad public interest in bringing this case; and (2) Secure provided efficiencies estimates during the injunction application that did not bear out in the evidence in the section 92 hearing.
5. There was a broad public interest in bringing this case.⁴ On its face, Secure's merger with Tervita, the first and second largest oilfield waste management companies in the WCSB, is a merger to monopoly in many local markets. Secure recognized that this application raised novel issues.⁵ The application will provide important guidance on many aspects of merger review including the anticompetitive effects and efficiencies arising from facility closures.
6. In addition to the important public interest dimensions of this case, the Tribunal should also decline to award costs because Secure did not provide the information necessary to properly assess the efficiencies defense until after the application was filed.
7. Just one month before it would close the merger, on June 3, 2021, in support of its efficiencies defense, Secure provided a report from Andrew Harington. Mr. Harington's report relied on numbers provided by Secure executives to "conservatively" estimate that the quantifiable efficiencies from the merger would be more than \$ [REDACTED] over 10 years.⁶
8. These overstated estimates were relied on by the Tribunal in deciding the injunction that allowed the Transaction to close, despite concluding that the Transaction caused irreparable harm to customers of oilfield waste services.⁷

⁴ One of the factors considered in awarding costs pursuant to Rule 400(3)(h) is whether the public interest in having the proceeding litigated justifies a particular award of costs.

⁵ *Commissioner of Competition v. Secure Energy Services Inc.*, Written Closing Submissions of the Respondent dated June 14, 2022, para. 4.

⁶ Affidavit of Andrew Harington, affirmed July 14, 2021, Exhibit C pg 121, Responding Record of Secure Energy Services Inc. (re: Commissioner's Application for an Interim Order).

⁷ *Commissioner of Competition v. Secure Energy Services Inc.*, Reasons for Order and Order Regarding the Commissioner's Request for an Interim Order, 2021 Comp Trib 7, paras 113-115.

9. Pursuant to the scheduling order, Secure provided its efficiencies estimate on April 11, 2022.⁸ Mr. Harington's revised "conservative" opinion was that the efficiencies from the merger were approximately \$ [REDACTED] over 10 years,⁹ which is nearly half the efficiencies that Secure claimed prior to the application being filed. The efficiencies that would likely be lost in the event of two different hypothetical divestiture orders were then estimated to be between \$ [REDACTED] and \$ [REDACTED] over 10 years – just one sixth of the amount claimed prior to filing the application.
10. As the section 92 hearing demonstrated, in its rush to close the Transaction, Secure provided unreliable efficiencies estimates that it claimed to be conservative, but ultimately proved to be hollow. The Tribunal should decline to award costs to Secure as a deterrent to allowing self-interested executives to inflate efficiencies estimates.

In the alternative, if the section 92 application is dismissed, the Tribunal should reduce the cost award to recognize any split success

11. In *VAA* and *P&H*, the Tribunal recognized that when success is divided the legal costs should be reduced.¹⁰ There are different permutations where success could be split. For example, Secure contested the Commissioner's SLC conclusion.¹¹ If the Tribunal concludes that the merger likely caused a SLC, then success on the issues in dispute has been divided. In this case, the Tribunal should reduce Secure's expert disbursements by 50% to recognize the Commissioner's success in establishing the merger likely caused a SLC.
12. Dr. Miller and the Commissioner's fact witnesses spent significant time providing evidence supporting the finding that the merger likely caused a SLC.¹² This, in turn,

⁸ *Commissioner of Competition v Secure Energy Services Inc*, Scheduling Order, 2021 Comp Trib 8.

⁹ Exhibit CA-R-886, Harington Report, Table 1, pg 15.

¹⁰ *VAA*, para. 819. In *VAA*, the Commissioner was successful in establishing the product and geographic markets leading to a reduction in legal costs of about a one-third. Product and geographic markets is one of the three element test under section 79 of the *Act*.

¹¹ *Commissioner of Competition v. Secure Energy Services Inc*, Written Closing Submissions of the Respondent dated June 14, 2022, paras 59-61.

¹² CA-A-057, Expert Report of Dr. Nathan Miller; CA-A-006, Witness statement of Mr. Cory Hall; CA-A-008, Witness statement of Mr. Joshua Ryan McSween; CA-A-012, Witness Statement of Mr. Paul Dziuba; CA-A-013, Reply witness Statement of Mr. Paul Dziuba; CA-A-021, Witness Statement of Mr. Geoffrey

was disputed by both Secure's fact witnesses and Dr. Duplantis in her responding expert report.¹³ Conceding that the merger likely caused a substantial lessening of competition would have greatly simplified the time and expense incurred to have the application heard.

In the further alternative, if the section 92 application is dismissed and the Tribunal awards costs without reduction to reflect split success, then a lump sum cost award of \$2 million to Secure is fair

13. Secure has filed a bill of costs claiming \$5,987,879.19. This amount is more than double the amount the Commissioner is seeking if the Tribunal orders Secure to pay costs and is more than four times larger than the previous largest cost awarded by the Tribunal in P&H.¹⁴
14. If the Tribunal is of the view that costs should be awarded to Secure, awarding a lump sum cost of \$2 million represents a fair settlement of costs particularly because of the public interest nature of the litigation, which is a factor recognized in Rule 400(3)(h) of the *Federal Courts Rules*¹⁵ to be considered in making an award of costs. As described above, there was a broad public interest in bringing this case.
15. The following costs claimed by Secure are unreasonable or unnecessary.
16. ***Document processing, management and review.*** Secure has unreasonably and unnecessarily claimed \$1,814,710.10 in document processing, management, and review provided by KLDiscovery. The invoices provided for this expense demonstrate that the majority of this expense was related to paying contract lawyers to review documents. Secure should not be permitted to claim for expenses for document review, which is an assessable service covered by the

Cain; CA-A-022, Witness Statement of Mr. James Taylor; CA-A-027, Witness Statement of Clean Harbors Canada Inc.; PA-A-029, Reply Witness Statement of Clean Harbors; CA-A-031, Witness Statement of Orphan Well Association; CA-A-034, Witness Statement of ConocoPhillips; CA-A-037, Witness Statement of Petronas Energy Canada; CA-A-040, Witness Statement of David Hart.

¹³ Exhibit CA-R-335 Updated Expert Report of Renee Duplantis, paras. 10-12.

¹⁴ *Commissioner of Competition v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18 ("*P&H*"), Reasons for Order and Order, para 800.

¹⁵ *Rules*, r 400(3)(h).

tariff. Secure cannot avoid the tariff by outsourcing this work. There is also an unfairness in allowing Secure to recover these costs because the Commissioner incurs these costs internally and does not claim them.

17. In VAA, the Tribunal recognized that fees incurred related to electronic discovery and document management should be recoverable in principle.¹⁶ However, VAA is distinguishable because VAA's disbursements related to "electronic discovery and document management" and does not state whether time incurred by contract lawyers reviewing documents for relevance is included.¹⁷
18. **Data processing.** Secure has unreasonably and unnecessarily claimed \$118,574.32 for data processing provided by Analysis Group. The data processing provided by Analysis Group was used by Mr. Harington to calculate transportation costs efficiencies in his report filed in response to the section 104 injunction, which was separate from the section 92 application. No costs were awarded in the section 104 injunction.¹⁸ In Mr. Harington's report dated March 25, 2022, which was provided in support of Secure's defense to the Commissioner's section 92 application, Mr. Harington relied on Dr. Duplantis for this information and did not cite any work performed by Analysis Group. No expert from Analysis Group testified during the hearing for the section 92 application.

¹⁶ VAA, para 823.

¹⁷ VAA, also demonstrates how excessive Secure's claim is as VAA's expenses related to electronic discovery and document management were \$291,290. VAA, para 820.

¹⁸ *Commissioner of Competition v. Secure Energy Services Inc*, Reasons for Order and Order Regarding the Commissioner's Request for an Interim Order, 2021 Comp Trib 7, para 131.

PUBLIC

DATED at Ottawa, Ontario on the 10th day of February, 2023.

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