

Via Email

October 27, 2020

Calgary Head Office
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Werner Ambros & Sharon Ambros

Keyera Energy Ltd.

Attention: Werner Ambros

Attention: Scott Turner

Dear Sirs and Madam:

**RE: Request for Regulatory Appeal by Werner Ambros and Sharon Ambros (Ambroses)
Keyera Energy Ltd. (Keyera)
Application Nos.: 1772918 and 1772924; Licence Nos.: 61672 & 61673
Location: SW07-073-08-W6M
Request for Regulatory Appeal No.: 1928695**

The Alberta Energy Regulator (AER) has considered the Ambroses' request under section 38 of the *Responsible Energy Development Act* (REDA) for a regulatory appeal of the AER's decision to approve the Licences. The AER has reviewed the Ambroses' submissions and the submission made by Keyera.

For the reasons that follow, the AER has decided that the Ambroses are eligible to request a regulatory appeal in this matter. **Therefore, the AER has decided to conduct a Regulatory Appeal hearing.**

Background

Keyera submitted two applications under the *Pipeline Act* to construct and operate two pipelines for its Key Access Pipeline System project (Project). The Project includes a new 565-kilometre pipeline system to transport condensate and natural gas liquids (NGL). One of the pipelines will be a 12-inch Natural Gas Liquids (NGL) Pipeline, and the other will be a 16-inch condensate pipeline. Both pipelines will be dually designed and permitted for both HVP and LVP operation.

On February 29, 2020, the Ambroses filed a Statement of Concern (SOC No. 31716) regarding Keyera's Project (Application Nos. 1772918 & 1772924 - the Applications).

The nature of the concerns highlighted in the Ambroses' SOC related to:

- their residence being within the Emergency Planning Zone (EPZ) of the Project;
- their residence was already within several other EPZs; and
- there was a general proliferation of industrial activity in the area.

The Ambroses' SOC also noted that they are concerned about emissions, air pollution, noise pollution, wild life impacts, safety surrounding property devaluation, and end of life infrastructure considerations.

Keyera responded to the Ambroses' SOC No. 31716 on March 9, 2020, and requested that the AER dismiss SOC No. 31716 and proceed with the processing of the Applications, arguing that the Ambroses were not directly and adversely affected by the Project.

On April 7, 2020, the AER dispositioned SOC No. 31716, without a hearing, Keyera's Applications were granted, and the Project's licences were issued (Licence Nos. 61672 & 61673 – the Licences).

On May 4, 2020, the Ambroses filed a regulatory appeal of the AER's decision to issue Licence Nos. 61672 & 61673 to Keyera (the Request). The Ambroses' arguments were similar to the ones they made in their SOC, with the most notable argument being that they were in the pipelines' EPZ and that there was a potential for evacuation from their lands if the pipelines were built.

In the May 4, 2020 email attaching the Request, the Ambroses also indicated that they did not know the owners of the land on which the approved pipeline will be located, or their addresses, in order to meet the filing requirements under section 30(5) of the *Alberta Energy Regulator Rules of Practice (Rules)*, which states that a Request for Regulatory Appeal must be served on any registered owner of land on which the energy resource is located.

On May 20, 2020, the AER requested submissions on the merits of the Request. The AER also provided the Ambroses the opportunity to request that the AER dispense with or vary the requirement in section 30(5) of the *Rules*.

On May 27, 2020, the Ambroses asked by email that the AER exercise its authority under Section 42 of the *Rules*, to dispense with the requirement under section 30(5) of the *Rules*, noting the length of the relevant pipeline segment (74.99 km), and the fact they did not know the contact information for the other registered owners along the pipeline segment, made this requirement too onerous.

On June 8, 2020, Keyera argued that the Ambroses' Request should be denied as the Ambroses are not 'directly and adversely' affected by the pipeline and that the Request was frivolous and vexatious. Keyera submitted that the only relevant consideration in the Ambroses' Request was that the Ambroses lived within the Project's EPZ. However, citing a previous request for regulatory appeal that the AER rejected, Keyera argued that living within an EPZ, alone, did not establish that the Ambroses were directly and adversely affected, as the Ambroses were on the edge of the EPZ, so the possibility of the Ambroses having to evacuate from their home was extremely remote.

On July 16, 2020, the Ambroses noted that the fact they were within the EPZ of the Project is enough to establish that they are directly and adversely affected.

Reasons for Decision

The applicable provision of *REDA* in regard to regulatory appeals, section 38, states:

38(1) An eligible person may request a regulatory appeal of an appealable decision by filing a request for regulatory appeal with the Regulator in accordance with the rules. [emphasis added]

The term “eligible person” is defined in section 36(b)(ii) of *REDA* to include:

a person who is directly and adversely affected by a decision [made under an energy resource enactment]...

The term “appealable decision” is defined in section 36(a)(iv) of *REDA* to include:

a decision of the Regulator that was made under an energy resource enactment, if that decision was made without a hearing...

Section 38(1) creates a three-part test for a regulatory appeal. First, the requester must be an eligible person as defined in section 36(b) of *REDA*. Second, the decision from which the requester seeks regulatory appeal must be an “appealable decision” as defined in section 36(a) of *REDA*. Third, the request must have been filed in accordance with the *Alberta Energy Regulator Rules of Practice (Rules)*.

The Ambroses are eligible persons, requesting a regulatory appeal of an appealable decision, and their request is in accordance with the rules

1. Appealable Decision

The granting of the Project applications are appealable decisions, as the licences were issued under the *Oil and Gas Conservation Act* and the *Pipeline Act* – energy resource enactments – without a hearing.

2. Eligible Person

In order for the Ambroses to be eligible for regulatory appeal, they must demonstrate that they may be directly and adversely affected by the AER’s decision to issue the approvals. The AER is satisfied that the Ambroses have demonstrated they may be directly and adversely affected by the decisions to issue the approvals for applications 1772918 and 1772924, because their land is within the approvals’ EPZs.

In coming to their decision, the AER was primarily guided by a pair of Court of Appeal’s decisions.

In *Kelly #1*, the Court found that a residence in a protective action zone (PAZ) was sufficient evidence that a person may be directly and adversely affected as a result of a hazardous release.¹ In this case, the Appellant resided outside the boundaries of the EPZ, but within the boundaries of the PAZ.

In *Kelly #2*, the Court considered the position of landowners who resided in what it referred to as the “tertiary zone”, which is the area beyond the EPZ contemplated in Appendix 6 to *Directive 071*.² The landowners in question lived outside the 2.11 km EPZ, but inside the 9.25 km tertiary zone. The ERCB had denied the landowners’ standing, concluding that they had not demonstrated they would be adversely affected by the well. The Court overturned that decision and remitted the matter to the ERCB for reconsideration, finding that:

To say that emergency plans are precautionary and preparatory does not answer the question whether the appellants would be adversely impacted if the emergency ever did come to pass, and if so what the level of risk would be. It cannot be suggested that no one is adversely affected unless they can demonstrate with certainty that they will be exposed to sour gas.

...[T]he very fact that a plan is required which contemplates evacuation in some circumstances must demonstrate that there is some lurking risk. It is the lurking risk which is “adverse”, not the evacuation plan itself.³

The Court went on to say that:

At some point the Board must decide whether the magnitude of the risk is such that the applicant has become “directly and adversely affected”. But the applicant need not demonstrate that the perceived risk is a certainty, or even likely. Nor need the applicant prove an adverse effect greater than that suffered by the general public, nor that any adverse effect would be life-threatening. Those in the tertiary evacuation area may not have an absolute right to standing in all cases, but they have a strong *prima facie* case for standing.⁴ [emphasis added]

Clearly, the *Kelly* decisions apply equally or even more firmly to landowners and residents within an EPZ, given that both decisions involved landowners outside the EPZs and, therefore, were further away from potential exposure. *Directive 071* defines an EPZ as “a geographical area surrounding a well, pipeline, or facility containing hazardous product that requires specific emergency response planning by the licensee,”⁵ and states “the EPZ...reflects an area where significant exposure could result without

¹ *Kelly v Alberta (Energy Resources Conservation Board)*, 2009 ABCA 349 at para 40 [*Kelly #1*].

² *Kelly v Alberta (Energy Resources Conservation Board)*, 2011 ABCA 325 [*Kelly #2*].

³ *Ibid* at paras 23-24 [citations omitted].

⁴ *Ibid* at para 26

⁵ *Directive 071* at 54, s 12.1.

prompt action.”⁶ As a result, residents within an EPZ will likely be required to shelter if there is a release.⁷ Thus, based on the *Kelly* decisions, the AER considers residents in an EPZ may be directly and adversely affected by an oil and gas project, absent demonstrable evidence otherwise.

While Keyera relied on a previous decision of the AER to argue that “...reliable or hard information must be provided to show where and how the anticipated impacts might occur, and ‘an indication that a reasonable potential or probability exists that those impacts will occur’,” the AER finds that the previous decision was distinguishable. The decision cited above, denied a request for a regulatory hearing, finding that the applicant did not “... provide hard information that establishes a ... presence at a particular location in some ascertainable proximity to Project infrastructure or activities.”⁸ This is in contrast to the Ambroses’ situation, where they are, by definition, in proximity to the Project.

Finally, the AER also highlights that while Keyera argued that the need for evacuation was extremely remote, they did not provide any substantive evidence to support this assertion.

3. In Accordance with The Rules

The requests for regulatory appeal were filed in accordance with the time requirements under the rules.

The Ambroses asked that the AER, pursuant to section 42 of the *Rules*, dispense with the requirement under section 30(5)(a) to serve the registered owners of land on which the energy resource activity is located. The Ambroses argued that given the length of segment 1 (74.99 km), and the fact that Keyera did not provide a list of the registered landowners along segment 1, that they are unable to comply with this condition. Keyera did not take a position on this issue.

The AER has decided to dispense with this requirement. In the AER’s view, the onus that section 30(5)(a) would put on the Ambroses is significant in these circumstances. In addition, other landowners will have an opportunity to request participation in a hearing on the regulatory appeal.

The Ambroses’ Request is not Frivolous and Without Merit

Keyera also argued that the Ambroses requests were frivolous and without merit. Under section 39(4)(a) of *REDA*, the AER has discretion to dismiss all or part of a request for regulatory appeal if it considers the request to be frivolous, vexatious, or without merit. The AER treats these as high standards for the party

⁶ *Ibid*, s 12.2.

⁷ *Ibid* at 60, s 14.3.4.

⁸ AER, Decision, *Samson Cree Nation Request for Regulatory Appeal, Encana Corporation Project*, Application Nos. 1802269, 00347134-001, and 001-354353 (July 22, 2016) at pg 5.

alleging the deficiency to meet, much less in situations where the AER has found that a party is directly and adversely affected by an appealable decision.

The AER is satisfied that the Ambroses' requests are not frivolous, nor without merit. While the Ambroses raises a number of issues, the Ambroses' safety concerns about living within the EPZs of the HVP pipelines raise an arguable issue that justifies a hearing.

Conclusion

In conclusion, the AER grants the requests for regulatory appeal as they relate to the AER's approval of Application Nos. 1772918 and 1772924. Accordingly, the AER will request the Chief Hearing Commissioner to appoint a panel of hearing commissioners to conduct a hearing.

Sincerely,

<Original signed by>

Blair Reilly
Director, Enforcement & Emergency Management

<Original signed by>

Steve Thomas
Director, Oil & Gas Subsurface, Waste & Storage

<Original signed by>

Gary Neilson
Senior Advisor, Crown Liaison