

Via Email Only

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**March 16, 2017**

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**Attention: Sander Duncanson**

MLT AIKINS LLP  
**Attention: Meghan Conroy**

Fort McKay Métis Sustainability Centre  
**Attention: Eddison Lee Johnson**

Sunrope Consulting Services Ltd.  
**Attention: Cynthia Bertolin**

Fort Chipewyan Métis Local 125  
**Attention: President Jumbo Fraser**

Brion Energy Corporation  
**Attention: Devin Newman**

Olthius Kleer Townshend LLP  
**Attention: Larry Innes**

Prowse Chowne LLP  
**Attention: Debbie Bishop**

JFK Law  
**Attention: Mark Gustafson**

Athabasca Chipewyan First Nation Industry  
Relations Corporation  
**Attention: Doreen Sommers, A/Director**

Dear Sir/Madam:

**Re: Proceeding ID 350  
Prosper Petroleum Ltd (Prosper) Rigel Project**

This letter replaces the panel's letter dated March 15, 2017. That letter contained two errors. The first error was in the last paragraph under the heading "FM Métis" where reference is made to FMFN. That has been corrected to reference "FM Métis".

The second error was under the heading "FCML 125". The first paragraph under that heading indicated that Fort Chipewyan Métis Local 125, referred to as FCML 125, did not file a statement of concern in relation to Prosper's applications. That is incorrect and that paragraph has been replaced. For the reasons given below, the panel's decision that FCML 125 is not entitled to participate in the hearing remains unchanged.

### **Introduction**

On January 30, 2017 the AER issued a notice of hearing of three applications associated with Prosper's Rigel Project (an application under the *Oil Sands Conservation Act* – the *OSCA* application, an application under the *Environmental Protection and Enhancement Act* and an application under the *Water Act*). The notice of hearing explained how to file a request to participate in the hearing and set a deadline of February 14, 2017.

Fort McKay First Nation (FMFN), Fort McKay Métis (FM Métis), Brion Energy Corporation, Athabasca Chipewyan First Nation (ACFN) and Fort Chipewyan Métis Local 125 (FCML 125) filed requests to participate by the deadline. Fort McMurray Métis Local 1935 (FMML 1935) and Mikisew Cree First Nation (MCFN) filed requests to participate after the deadline time but on the deadline date. Prosper responded on February 21, 2017.

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The materials filed by ACFN and FMML 1935 did not contain a specific request to participate and did not comply with Rule 9 of the *AER Rules of Practice* in other ways. The AER gave both an extension till February 28, 2017 to file a request to participate that complied with the rules if their intention was to participate actively in the hearing. ACFN has filed nothing further. FMML 1935 filed a letter on February 28, 2017. Prosper responded to that letter on March 1, 2017 and FMML 1935 sent an email to provide further clarification of its request on March 1, 2017.

Prosper did not object to the participation of FMFN, FM Métis, MCFN, ACFN or Brion. Prosper did object to the participation of FCML 125 and FMML 1935.

The panel has considered the requests and Prosper's responses. The panel has decided that FMFN, FM Métis and MCFN may participate and that Brion, ACFN, FCML125 and FMML 1935 may not. Our reasons and specific findings relating to each request to participate follow.

#### **FMFN**

FMFN met the requirements in the *AER Rules of Practice* for filing a request to participate.

Section 34 of the *Responsible Energy Development Act (REDA)* says that "a person who may be directly and adversely affected by the application is entitled to be heard at the hearing". The panel is satisfied the proximity of the FMFN's Moose Lake Reserves to the Rigel Project leases, nearest well pad and central processing facility demonstrate that FMFN could be directly and adversely affected by the Rigel Project.

Subject to directions or rulings issued by the panel, FMFN may take part in the hearing as a full participant.

#### **FM Métis**

FM Métis met the requirements in the *AER Rules of Practice* for filing a request to participate.

FM Métis filed the affidavit of Ernest Tremblay with its statement of concern about the *OSCA* application as part of its request to participate. The information in Mr. Tremblay's affidavit and information in Prosper's application regarding potential impacts to trappers and trap lines persuades the panel that members of FM Métis conduct traditional activities in areas which may be impacted by the Rigel Project. As a result, the FM Métis may be directly and adversely affected.

Subject to directions or rulings issued by the panel, FM Métis may take part in the hearing as a full participant.

**MCFN**

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Except for the fact that it filed late, MCFN met the requirements in the *AER Rules of Practice* for filing a request to participate. Prosper did not raise any concerns caused by MCFN's late filing. The panel finds that the delay did not give rise to any prejudice to Prosper or unfairness in the process generally.

MCFN provided enough information in its submission to demonstrate that its use of and relationship to Moose Lake and immediate area may be directly and adversely affected by a decision to approve the applications. For example, MCFN says that there are family burial areas around Moose Lake. It also refers to Moose Lake as holding spiritual importance for the community and to Moose Lake being part of a traditional route for MCFN members.

In its request to participate MCFN raises issues about the development and effectiveness of the Lower Athabasca Regional Plan (LARP). For example, MCFN states that its participation will materially assist the panel in dealing with "matters that are the subject of the hearing, including: "... gaps in the Lower Athabasca Regional Plan with respect to Treaty rights and certain rare and sensitive wildlife species that may be impacted by the Project; ... the recently completed statutory review of LARP by an independent review panel and the relevance of that review process to the AER's consideration of the Applications...".

The Rigel project falls within the boundaries of the LARP. The AER must act in accordance with regional plans under the *Alberta Land Stewardship Act (ALSA)*.<sup>12</sup> That means that the AER must act in accordance with the LARP and consider and make decisions that are consistent with any LARP sub-plans. The AER has no jurisdiction over the LARP, its further development or over any sub plans. For that reason the panel will not consider submissions on deficiencies, problems or other issues with the LARP.

Subject to directions or rulings issued by the panel, MCFN may take part in the hearing as a full participant to address specific impacts of Prosper's Rigel Project on its aboriginal rights and traditional land use.

**ACFN**

ACFN filed submissions that they described as their "statement of concern". The cover letter for the submissions stated that ACFN was providing "a copy of the written Submissions" of the ACFN. The submissions were relatively comprehensive but nowhere in them did ACFN say that they wanted to participate in the hearing. Nor did ACFN describe the nature and scope of their intended participation. The AER contacted ACFN and advised, both by phone and in writing, that if ACFN intended to participate in the hearing it should refer to the *AER Rules of Practice* and file a request to participate by February 28, 2017.

<sup>1</sup> SA 2009, c A-26.8

<sup>2</sup> REDA, s. 20 requires the AER to act in accordance with any applicable ALSA regional plan.

ACFN filed nothing further. As a result, the panel concludes that ACFN has not met the requirements for filing a request to participate and may not participate in the hearing.

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### **Brion**

Brion did not file a statement of concern about Prosper's applications for the Rigel Project. Rule 9 (2) (a) of the *AER Rules of Practice* requires that a person who makes a request to participate but did not file a statement of concern must provide an explanation of why no statement of concern was filed. Brion did not provide any explanation for why it did not file a statement of concern.

Brion's request was a request to monitor, to receive all submissions and correspondence filed in the hearing and "to reserve the right to participate as it deems necessary in all matters related to the hearing (including its right to introduce direct evidence, direct information requests to Prosper and participants, conduct cross-examination and present final argument) as such matters relate to Brion's interests and concerns or have the possibility of impacting Brion's Dover project".

Brion's Dover project is immediately adjacent to Prosper's Rigel Project. Brion's request to participate makes clear it is concerned with:

- i) the possibility that the proposed Moose Lake Access Management Plan (MLAMP) may become an issue at the hearing and that hearing participants will have an opportunity to raise concerns and issues relating to MLAMP at the hearing; and
- ii) how the outcome of the hearing might impact the proposed Moose Lake Access Management Plan (MLAMP).

Once concluded MLAMP would be a sub-plan of the LARP. Both the Dover and Rigel projects are within an area which may be subject to MLAMP. The AER must act in accordance with regional plans under the ALSA. As noted above that means that the AER must act in accordance with LARP. It also means that the AER must consider and make decisions that are consistent with any LARP sub-plans. The AER has no jurisdiction over the development of LARP sub-plans. The LARP and sub-plans are expressions of government policy that the AER is required to follow. Matters relating to MLAMP and its negotiation and possible implementation are not within the panel's jurisdiction and so cannot be the subject of the hearing.

In addition, it would be unfair to other parties in the hearing to allow Brion to reserve the right to decide at any time that it will exercise the rights of a full participant.

Finally, this is a public proceeding and all submissions and evidence are on the public record. Brion can monitor hearing correspondence and submissions. It may also send representatives to observe the hearing in person.

**FCML 125**

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FCML 125 met the technical requirements in the *AER Rules of Practice* for filing a request to participate. Nonetheless, FCML 125 is not entitled to participate in this matter.

FCML 125 says that its traditional harvesting territory could be affected by the Rigel Project. As well, FCML 125 raises concerns with technical aspects of the Rigel Project. However, no maps, affidavits or descriptive detail is provided with regard to the location of FCML 125 member activities. The Rigel Project area is outside of the Government of Alberta 160 km harvesting radius for the FCML 125.

FCML 125 did not provide information to persuade the panel that there is a sufficient degree of connection between FCML 125's activities for the panel to conclude FCML 125 may be directly and adversely affected by an approval of the applications.

In addition, in its request to participate FCML 125 states it intends to file a question of constitutional law in this matter relating to FCML 125's assertion that the "duty to consult [was] not carried out by proponent or ACO". *REDA* section 21 says that the AER has no jurisdiction with respect to assessing the adequacy of Crown consultation. The type of constitutional question proposed by FCML 125 could not be considered by this panel. Granting FCML 125 the right to participate to pose such a question would be of no assistance to this panel and would only serve to delay the proceeding.

**FMML**

In its February 28, 2017 letter, FMML stated it is "not making a request to participate and become a 'participant' in the hearing". FMML requests the right to present a brief oral statement of 15 – 20 minutes and to file a brief written submission and traditional land use information. FMML said it could provide a written copy of the oral statement in advance of the hearing.

FMML's February 28<sup>th</sup> letter makes reference to two trappers but provides no information to establish where those trappers or other members of the FMML community carry out activities that might be affected by a decision on Prosper's applications.

FMML acknowledged that it has not complied with the rules governing requests to participate. It makes reference to the need to prioritize resources and in particular to deal with issues relating to the fire in Fort McMurray such as rebuilding their office. While the panel regrets the impacts FMML suffered as a result of the fire, FMML was given ample time and opportunity to provide some evidence in support of its request to participate. It has not provided any evidence to persuade the panel that it may be directly and adversely affected or that it has a tangible interest and will materially assist.

The February 28<sup>th</sup> request to provide a written and an oral submission is effectively a request to be a participant with limited participatory rights. For the reasons given above, FMML is not entitled to participate in the hearing, including on the limited basis proposed.

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Cecilia Low  
Presiding Hearing Commissioner

<Original signed by>

Christine Macken  
Hearing Commissioner

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Terry Engen  
Hearing Commissioner

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cc: Robert Kopecky, Melody Nice, ACO  
Susan Foisy, Sarabpreet Singh, Toni Hafso, ACO  
Barbara Kapel Holden, AER  
Tara Wheaton, AER