Alberta Energy Regulator

December 12, 2017

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By Email

Boughton Law Corporation
Attention: James Coady Q.C.
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Attention: Sander Duncanson

MLT Aikins LLP
Attention: Meghan Conroy

Dear Sir/Madam:

Re: Proceeding ID 350
Prosper Petroleum Ltd (Prosper) Rigel Project
Motion of Prosper for Direction or Order re: Scope of Direct Evidence

Introduction

On November 22, 2017 Prosper filed a Notice of Motion pursuant to section 44 of the *Alberta Energy Regulator Rules of Practice* (Rules) requesting a procedural direction or order from the panel in the following terms:

> *With the exception of oral traditional evidence that cannot be easily reduced to writing, intervenor witnesses shall only be permitted to give testimony during direct examination that consists of highlighting or summarizing evidence that has already been filed by the intervenor. Intervenor witnesses shall not use direct examination to provide new information or testimony in reply to Prosper's evidence.*

Prosper asked the panel to schedule an oral hearing of the Motion.

Fort McKay First Nation responded on November 28, 2017 to the Motion and Fort McKay Métis responded on November 29, 2017. Both participants said that an oral hearing of the Motion should not be necessary. Prosper filed a single reply to both participants on December 4, 2017. In its reply Prosper asked for the opportunity to make submissions on the Motion in person at an oral hearing. In the alternative, Prosper submitted that the Motion should be granted on the basis of the written record before the panel.

The panel considers that in light of the written record and the relief requested it does not need to hear oral submissions from the parties on the Motion.

The panel has decided not to grant the order requested by Prosper. The panel has asked me to convey its reasons on the Motion and its further guidance on the issue of the scope of evidence in direct examination at the hearing.

Reasons

As a point of clarification, the panel notes that under the *Responsible Energy Development Act* (REDA) persons who are granted the right to participate in a hearing are participants and not intervenors.

Prosper says that the participants in this proceeding, Fort McKay First Nation and Fort McKay Métis, plan to present new evidence as part of their direct evidence in the oral hearing. Prosper asks the panel to set strict limits in advance of the hearing on the evidence the participants' witnesses may present during their direct examination.

Prosper also says that it agrees with the proposition that participants' witnesses may highlight portions of their pre-filed evidence to respond to aspects of Prosper's rebuttal evidence when they are giving their evidence in the oral hearing.

Prosper and Fort McKay First Nation base much of their argument on the Motion in terms of the rules of evidence, rights of reply and rebuttal etc. that apply in adversarial court processes. The panel does not find it useful to characterize the potential evidence in question as reply, rebuttal, surrebuttal or some other category in order to determine whether a party ought to be permitted to present the evidence.

Hearings must be procedurally fair. Hearing panels require some flexibility in dealing with matters of evidence to ensure a full and satisfactory understanding of the issues. Section 47 of REDA provides hearing panels with this flexibility. It says that the AER is not bound by the rules of law respecting evidence when conducting hearings: having said that, panels are guided by REDA and the Rules and the over-arching requirement for fairness which informs the Rules.

Fairness requires participants have enough information to identify potential direct and adverse effects and to decide what information and evidence they need to put before the decision maker to establish the facts that support the outcome they seek. Fairness also requires that the applicant has an opportunity to know what facts participants intend to show and the nature and extent of participants' testimony going into the oral hearing. Sections of the Rules such as 3(1), 9(2), 9.1(2) and 9.2(1) and (2) reflect these requirements. Prehearing processes, specifically including information requests, are intended to ensure efficiency and fairness for all of the parties. [1]

Implicit in the sections of the Rules dealing with evidence is the idea that parties should not abuse the opportunity to provide direct evidence at the hearing to introduce new documentary or oral evidence. Such evidence would include:

- submissions that raise a fact not previously in issue, and
- a report not previously filed

where allowing such evidence would create unfairness.

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[1] Section 12 of the Rules

The ultimate question here is what is fair and appropriate in the circumstances. This panel established a schedule for submitting written evidence in advance of the oral hearing. Each party had the opportunity to make submissions including presenting evidence and describing the facts their evidence is intended to show. As Fort McKay Métis says in its submissions, the purpose of having the parties pre-file evidence is to avoid surprise. A primary purpose of the oral hearing is to test and clarify that evidence. Unless otherwise determined by the panel, the oral hearing is not the time for parties to introduce new evidence as described above regardless of how it might be categorized.

The panel has previously expressed the view that questions about the admissibility of specific evidence are best dealt with in the context of the oral hearing. The panel continues to be of that view. The panel will be guided by relevant sections of the Rules such as sections 24 and 53 when making determinations on the admissibility of evidence. When the prehearing process includes opportunities for the parties to pre-file written evidence, as is the case here, parties should only be allowed to introduce new evidence at the oral hearing (whether that evidence is written or oral) if the panel determines that would be fair and appropriate in the circumstances and in light of the relevant factors.

Sincerely.

<original signed by>

Barbara Kapel Holden
Legal Counsel

cc: R. Kopecky, V. Biamonte, C Richards, ACO
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