Alberta Energy Regulator

Calgary Head Office
Suite 1000, 250 – 5 Street SW
Calgary, Alberta T2P 0R4
Canada

www.aer.ca

Via Email Only

November 26, 2015

MacPherson Leslie & Tyerman

Attention: John Gruber

TAQA North Ltd.

Attention: Michael Bolianatz

Dear Mr. Gruber and Mr. Bolianatz:

Re: Proceeding ID 337
Application by Roy and Melanie Schulze to Strike Parts of TAQA North Ltd.'s Submission to Participate

This letter is the decision of the hearing panel (the Panel) seized with Proceeding ID 337 (the Proceeding) on the application of Roy and Melanie Schulze (the Schulzes) to have portions of TAQA North Ltd.'s (TAQA) request to participate submission struck.

The Panel's decision is informed by the AER's recognition of the value of dispute settlement, where appropriate, outside the AER's hearing process. The dispute settlement may be informal and solely between the parties, or more structured with the assistance of private mediators or AER staff or hearing commissioner mediators. Settlements allow parties to reach mutually acceptable resolution of disputes without prolonging the expense, personal and public, and the time involved in going through the AER's hearing process. The public interest favours settlement.[1]

Having reviewed the materials, the Panel has decided that the whole of the "Chronology of Contact" submitted by TAQA with its request to participate will be struck from the record of the proceeding because it contains confidential and privileged settlement information, and because the information in it is irrelevant to the question for which the document was submitted, i.e., whether TAQA should be entitled to participate in the hearing of this matter.

On April 15, 2015, Melanie and Roy Schulze applied to the Alberta Energy Regulator for the removal of a portion of a pipeline licensed to TAQA pursuant to s. 33 of the *Pipeline Act* (the Removal Application). The Removal Application is the subject of the Proceeding.

On September 25, 2015, the Alberta Energy Regulator (AER) issued a Notice of Hearing in the Proceeding. The notice stated in regard to participation in the hearing:

> You must file a request to participate, even if you have already filed a statement of concern with the AER.
> A request to participate must be in writing and contain the information set out under section 9(2) of the *Alberta Energy Regulator Rules of Practice (Rules of Practice).*

On October 9, 2015, the AER received from TAQA its request to participate submission (the RTP). Forming part of the RTP was a document entitled "Chronology of Contact". A revised

[1] *Sable Offshore Energy Inc. v Ameron International Corp.*, 2013 SCC 37, paragraph 11.

submission was received on October 14, 2015, after the AER requested that TAQA remove references to financial information.

On October 23, 2015, the Schulzes' counsel submitted the application requesting that portions of the TAQA RTP be struck and not relied on by the AER in its decision, on the grounds that the RTP references without prejudice and confidential statements made within the AER's Alternative Dispute Resolution (ADR) process. In support of this application was submitted the affidavit of Roy Schulze. Attached as an exhibit to Mr. Schulze's affidavit was a copy of the TAQA RTP with the impugned sections of the Chronology of Contact (the Chronology) highlighted for reference.

Notably, Mr. Schulze attested to the following in paragraph five of his affidavit:

> It was my expectation that any substantive discussions or communications, whether in meetings or through correspondence or emails, towards resolution of the issues in the Application would be confidential.

In response to the Schulzes' motion, TAQA submitted on October 30, 2015 that:

> TAQA stands by its position that formal ADR has not occurred in accordance with AER regulations/principles.
> …
>
> The Schulze's [*sic*] freely engaged in the Site Meeting [on May 6, 2015] where there was no communication, written or verbal either preceding or at the [S]ite [*sic*] Meeting agreeing that it was an ADR and therefore, there is no requirement for confidentiality in TAQA's submission.

Two things are clear from the evidence provided to the Panel. First, Mr. Schulze expected that any substantive communications related to settlement of the issues in the Application would be confidential. Second, while a formal ADR meeting where a confidentiality agreement would be signed by the parties did not occur, the AER's ADR process was engaged by February 20, 2015, when its ADR staff began communicating with the parties about settlement of the issues between them.

In the circumstances, the AER finds Mr. Schulze's expectation to be a reasonable one given the involvement of AER ADR staff, the content of the AER EnerFAQ described below, and the fact that by the time the disputed Site Meeting occurred on May 6, 2015, the Schulzes had already filed the Removal Application.

AER EnerFAQ "All About Alternative Dispute Resolution (ADR)" addresses the confidential and without prejudice status of the AER's ADR process. It indicates that "ADR discussions" with the mediator and the parties are confidential and not to be shared outside the "ADR process" and that any admissions, concessions, offers to settle and related discussions made "during ADR" cannot be raised by the other party during a proceeding. TAQA urges the AER to take a very narrow view of the phrases "ADR discussions", "ADR process" and "during ADR" confining them so that confidentiality only applies to the discussions occurring at a formal ADR meeting. The Panel cannot accept this interpretation. The purpose of the confidentiality is to "encourage [parties] to make offers without fear of having to be held to them should the matter not be resolved through ADR". As noted in the EnerFAQ, "an atmosphere of open and free dialogue... enhances the chances of a successful [settlement] outcome." Parsing out the statements and offers made at a formal meeting from those made

during the overall ADR process and assigning confidentiality to only the former, would serve to limit the flow of information, diminish the opportunities for settlement and generally undermine the ADR process.

TAQA suggests that as the issue of the confidential nature of the discussions was not specifically addressed, it must be presumed the discussions were not confidential. That suggestion is refuted by the passages from the EnerFAQ cited above. Further, Mr. Schulze's evidence is to the contrary. In the Panel's view, where the AER ADR process has commenced, and the issue of confidentiality has not been specifically discussed or agreed to by the parties, any communications in or related to that process are presumed to be confidential.

Even if the discussions between the Schulzes and TAQA did not fall under the AER's ADR process, they are still not properly before this Panel as they relate to "without prejudice" settlement discussions and offers. The legal concept of settlement privilege applies to matters before the AER. Settlement communications, with some exceptions, are privileged from disclosure to the decision maker and are inadmissible in an AER proceeding. The purpose in granting this status to communications made in the furtherance of settlement is to encourage settlement. The privilege allows candour in settlement discussions without fear that the comments made will be held against the parties at a later date.

For the settlement privilege to apply, a formal or "litigious" dispute must exist or be in contemplation and the communication in question must be made in furtherance of settlement and be intended not to be disclosed. The Panel is satisfied that a dispute existed or was contemplated; the Schulzes filed their removal application with the AER on April 15, 2015. TAQA cannot say the communications, including the Site Meeting, were not for the purpose of settlement as it claims an agreement was reached. Further, Mr. Schulze's evidence is that he believed the communications were confidential. TAQA has not persuaded the panel that was not the case. Given the value in having disputes resolved between the parties and the resultant need to have settlement communications privileged, where there is doubt the AER must err in favour of protecting the privileged nature of without prejudice settlement communications between the parties.

TAQA suggests its position is supported by the fact that none of the correspondence between the Schulzes and TAQA was marked "without prejudice". In the face of Mr. Schulze's evidence that he intended the settlement discussions between TAQA and him to be confidential, the absence of the words "without prejudice" does not determine the issue. The presence or absence of the words "without prejudice" on a document does not change the document's actual character from being subject or not to the privilege that attaches to a settlement communication. This is particularly so when one of the parties (in this case, the Schulzes) does not have legal counsel at the time the communication occurs.

Further, the approach that TAQA urges on the AER could lead to the very real harm of parties using settlement discussions, within or outside the AER ADR process, as a fishing expedition to obtain information from the other party to either embarrass that party or to utilize in the AER's decision making process. Those who genuinely want to negotiate in good faith in an attempt to resolve issues should not run the risk that their words will be used against them in a hearing.

In any event, the Panel considers that most of the content of the Chronology is irrelevant to the fundamental question of whether TAQA may be directly and adversely affected by the application or, if it will not be so affected, whether there is some other reason it should be

inquiries 1-855-297-8311
24-hour emergency 1-800-222-6514

allowed to participate. While there is a requirement in s. 9(2)(h) of the *Rules of Practice* to list the efforts to resolve the issues directly with the applicant, that requirement is intended to illicit a summary only, the purpose of which is to demonstrate that settlement attempts were made. Section 9(2) (h) of the *Rules of Practice* does not require disclosure of what would otherwise be confidential or privileged without prejudice settlement communications. Were it otherwise, the *Rules of Practice* would require requesters to submit to hearing panels information that panels are unable to consider because of the information's confidential and privileged nature. Further, disclosing such communications would discourage settlement and that is never the intent of the AER or its legislation, rules, directives or other instruments.

Finally, the information included in the Chronology appears, based on the information available to the Panel at this time, to be irrelevant to the ultimate issue raised by the Removal Application, i.e., whether it is in the public interest to direct TAQA to remove the pipeline. The Panel makes this observation recognizing that what is relevant in a proceeding will ultimately be determined at the hearing.

In summary, the Panel has determined that the impugned portions of TAQA's RTP are confidential and privileged in nature. It has also determined that other than the dates of communications, the Chronology is irrelevant to the issue of whether TAQA is entitled to participate in the hearing and to the issues to be determined in the hearing. For these reasons, the Panel directs TAQA to withdraw the RTP and resubmit it with a new chronology of attempts to resolve issues with the Schulzes that does not reveal any substantive details of those communications. TAQA should submit this document by 1:00 p.m. on December 2, 2015 and the Schulzes may submit any response this new RTP by 1:00 p.m. on December 9, 2015.

Sincerely,

Meighan G. LaCasse
Counsel

cc: Jennifer Koppe, AER
Lonny Olson, AER
Billie Fortier, MLT