

Proceeding ID 394

March 5, 2020

By email only

Bennett Jones LLP Bishop Law
Attention: Daron K. Naffin Attention: Debbie Bishop

**Re: Regulatory Appeal 1926438
 Request for Regulatory Appeals 1919768 and 1924228
 Regulatory Appeal of Approval of Applications 1914551, 1920992 and 338430
 Panel Decision on Ambroses Stay Request**

Dear Madam and Sirs:

I am writing to you on behalf of the Alberta Energy Regulator (AER) panel of hearing commissioners assigned to this proceeding (the panel). The panel has asked that I communicate the following decision to you.

Introduction

On February 15, 2019, the AER approved Application Nos. 1914500 and 1914551 submitted by Ovintiv Inc. (Ovintiv) (formerly Encana Corp.) for approval to construct two multi-well pads with eight horizontal sour gas wells each. The pad site for Application No. 1914500 is located at 13-27-072-09W6 and 14-27-072-09W6, and the pad site for Application No. 1914551 is located at 15-26-072-09W6. On March 15, 2019, Werner Ambros and Sharon Ambros (the Ambroses) filed Request for Regulatory Appeal No. 1919768 with respect to the AER's approval of those applications.

On August 6, 2019, and August 8, 2019, the AER approved Application No. 1920992 for another multi-well pad of 10 sour gas wells to be located at 15-27-072-09W6; Application No. 1199791 for a sour water pipeline and a

sweet gas pipeline; and, Application No. 338430 for a sour gas pipeline to be located at 14-28-072-09W6 to 15-30-072-09W6. The Ambroses filed Request for Regulatory Appeal No. 1924228 on September 4, 2019, with respect to the AER's approval of those applications.

On December 19, 2019, the AER granted a hearing of the Ambroses' regulatory appeals of the approvals of Application Nos. 1914551, 1920992, and 338430, but dismissed the Ambroses' regulatory appeals of the AER's approval of Application Nos. 1914500 and 1199791.

A hearing panel was appointed on January 15, 2020, to hear the regulatory appeals.

On February 4, 2020, the Ambroses submitted a request for a stay of the licences issued as a result of the approval of Application Nos. 1914500, 1914551, 1920992, 1199791, and 338430, pending a decision on the regulatory appeals.

Decision

Having considered the Ambroses' stay request, Ovintiv's response submitted on February 18, 2020, and the Ambroses' reply submitted on February 21, 2020, the panel has decided to deny the Ambroses' request for a stay.

As a preliminary matter, the panel agrees with Ovintiv that the request for a stay in respect of the AER's approval of Application Nos. 1914500 and 119791 is not properly before the panel, as the requests for regulatory appeal were dismissed with respect to the approval of those applications.

The panel agrees with the parties that the onus is on the Ambroses to demonstrate that a stay is warranted in the circumstances, by establishing that:

- 1) there is a serious issue to be tried;
- 2) they will suffer irreparable harm if the stay is not granted; and
- 3) the balance of convenience favours granting the stay.¹

To be eligible for a stay, the Ambroses must meet all three parts of the above test. In the panel's view, the Ambroses have failed to discharge that onus. Neither the stay request, nor the Ambroses' reply to Ovintiv's response, provided clear evidence or argument to demonstrate the Ambroses would suffer irreparable harm if the stay were not granted, or that the balance of convenience favours a stay.

¹ *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 335-343 (*RJR-MacDonald*).

Serious Issue to Be Tried

The Ambroses submitted that their concerns have been ignored by the AER and Ovintiv, and they have not had an opportunity to: know the case they have to meet due to Ovintiv's piecemeal approach to application for the development and the AER's undisclosed decision-making process; understand the scale of the development and make submissions on the development as a whole; understand the AER's reasoning in repeatedly dismissing their concerns; access the public funding procedures in accordance with AER *Directive 013: REDA Energy Cost Claims*; and, be heard in a timely manner by the AER.

In its response, Ovintiv submitted that the Ambroses' criticisms of the AER's process do not rise to the standard of a serious issue to be tried.

The threshold for the first part of the test is very low. Based on a preliminary assessment of the merits, the panel need only be satisfied that the regulatory appeal is neither frivolous nor vexatious.² The panel notes that, in granting the Ambroses' request for a regulatory appeal for these three applications, the AER determined that the Ambroses may be directly and adversely affected by the approvals. On this basis, the panel is of the view that the first part of the stay test has been met.

Irreparable Harm

The second part of the stay test requires the Ambroses to establish they will suffer irreparable harm if the stay is not granted. Irreparable harm will occur if a refusal to grant the stay would result in an adverse impact to the Ambroses that could not be remedied if they were ultimately successful on the appeal. "Irreparable" refers to harm that cannot be cured.³

In the panel's view, the Ambroses have failed to present any evidence or a coherent argument on the specific harm they would suffer if the stay was not granted, let alone how that harm would be irreparable. The only submission the Ambroses made with respect to this part of the test was that, as a result of the AER's delay in processing their requests for regulatory appeal, Ovintiv has acted on the licences without the Ambroses having had an opportunity to be heard. In the panel's view, this is insufficient to establish irreparable harm. As a result, the panel finds that the second part of the stay test has not been met.

² *Ibid* at 337.

³ *Ibid* at 341.

Balance of Convenience

The third part of the test looks at which of the parties would suffer greater harm from the granting or refusal of the stay application.⁴

Since the Ambroses failed to satisfy the second part of the test, the panel need not consider the third part of the test. Nonetheless, the panel notes that the Ambroses provided no evidence or argument as to why the balance of convenience would favour the panel granting the stay. Conversely, Ovintiv made submissions on the specific harms it and third parties would suffer if the stay were granted, including increased costs, lost revenues, production delays, and impacts to contractors and their employees. As a result, the panel finds the Ambroses failed to satisfy this part of the test as well.

Conclusion

The Ambroses have failed to demonstrate irreparable harm and that the balance of convenience favours granting a stay. Accordingly, the panel denies the stay request.

The Ambroses' regulatory appeals have been set down for a hearing, and the panel will consider all evidence and argument in deciding the appeals. Following the hearing of the regulatory appeals, the panel may confirm, vary, suspend or revoke the AER's decision to issue the licences.⁵ Thus, the Ambroses still have the opportunity, through the regulatory appeal process, to be heard and have their desired outcome be fully considered by the panel, whether or not Ovintiv has proceeded with construction pursuant to the licences under appeal.

Sincerely,



Alana Hall
Counsel

cc: T. Meyers, Bennett Jones LLP
K. Dumanovski, AER
T. Wheaton, AER

⁴ *Ibid* at 342.

⁵ *Responsible Energy Development Act*, RSA 2012, c R-17.3, s 41(2).