

Proceeding 379

October 24, 2023

By email only

Stikeman Elliot
Attention: Dennis LangenWestbrick Energy Ltd.
Attention: Alana JensenBennett Jones LLP
Attention: Jessica KennedyDentons Canada LLP
Attention: Laura EstepRae and Company
Attention: Brooke Barrett**Re: Westbrick Energy Ltd. (“Westbrick”) and Saturn Oil & Gas Inc. (“Saturn”) Motion to Compel TransAlta Corporation (“TransAlta”) to Provide Full and Adequate Responses to Information Requests by Westbrick and Saturn**

Dear Representatives:

This is the decision of the panel of Alberta Energy Regulator (AER) hearing commissioners presiding over this proceeding (the panel), on the motion filed by Westbrick and Saturn (the Applicants) requesting that the panel direct TransAlta to provide a full and adequate response to an information request (IR) previously directed to TransAlta by the Applicants.

For the reasons that follow, we grant the Applicants’ motion.

Background

On July 23, 2020, the Applicants submitted information request IR1.12(f) to TransAlta requesting that TransAlta provide a copy of each of the following documents for the Brazeau dam and canal: any current emergency management plan; any current emergency preparedness plan; any emergency response plan; and any flood action plan, or similar purpose documents.

On August 13, 2020, TransAlta provided a response to the information request. TransAlta confirmed that it has prepared and maintains emergency management and response plans in relation to its operation of

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the Brazeau facility, but declined to provide the documents requested because, in TransAlta's view, the documents requested were not relevant to TransAlta's evidence or the issues in this proceeding.

On February 14, 2023, we granted the request of O'Chiese First Nation to fully participate in the proceeding because of the potential for O'Chiese First Nation to be directly and adversely affected in the event there was a failure of the Brazeau facility caused by the applied-for wells.

On September 22, 2023, the Applicants filed a motion requesting that the AER direct TransAlta to provide a full and adequate response to IR 1.12(f). O'Chiese First Nation and TransAlta filed responses to the motion on September 28, 2023. The Applicants filed a reply on September 29, 2023.

Regulatory Framework Under the *Responsible Energy Development Act*

Section 12(1) of the *Alberta Energy Regulator Rules of Practice (the Rules)* provides that:

[...] a party may request another party, within the time limit set out by the Regulator, to provide information necessary

- (a) to clarify any documentary evidence filed by the other party,
- (b) to simplify the issues,
- (c) to permit a full and satisfactory understanding of the matters to be considered, or
- (d) to expedite the proceeding.

Section 13(1) of *the Rules* provides that:

A party who is served with an information request under section 12 shall prepare a response that

[...]

(b) provides a full and adequate response to each question, and

[...]

Section 14(1) of *the Rules* states that if a party is not able or not willing to prepare a response in accordance with Section 13 of *the Rules*, they shall do one of the following:

- (a) if the party contends that the information request is not relevant, file and serve on the party making the request a response in writing that sets out the specific reasons in support of that contention;

(b) if the party contends that the information necessary to provide an answer is not available or cannot be provided with reasonable effort, file and serve on the party making the request a response in writing that

(i) sets out the specific reasons in support of that contention, and

(ii) contains any other information that the party considers would be of assistance

[...]

Section 14(2) of *the Rules*, states that a party who is not satisfied with a response to an information request made under Section 14(1) may file a motion under Section 44 requesting that the matter be settled by the Regulator.

Submissions of the Parties

Applicants' Motion

The Applicants submitted that because the panel has granted O'Chiese First Nation full participation rights in the proceeding, TransAlta's current emergency response documents are relevant and will inform the matters to be considered in the proceeding. The Applicants noted that the panel previously concluded that O'Chiese First Nation's concerns relating to emergency response fall within the hearing issues. TransAlta's emergency response documents will assist the O'Chiese First Nation in respect of its concerns surrounding emergency response and will assist the panel in adjudicating the applications and addressing those O'Chiese First Nation concerns.

In accordance with AER Subsurface Order No. 6, the Applicants have prepared and filed induced seismicity response plans which, in conjunction with their corporate level emergency response plans, will be initiated in the event of a seismic event during the hydraulic fracturing of the applied for wells. The induced seismicity response plans state that, in the event of a seismic event reaching a specified level, the Applicants will notify TransAlta via TransAlta's emergency response line. In keeping with their induced seismicity response plans and TransAlta's Traffic Light System Mitigation Protocol (the TransAlta protocol), once TransAlta is notified by the Applicants of a seismic event, TransAlta will presumably assess that event and whether that event has impacted its operations and the Brazeau facility and decide whether the TransAlta emergency response plans are to be initiated to protect the public.

O'Chiese First Nation Response

O'Chiese First Nation supports the motion. O'Chiese First Nation reiterated it has concerns about impacts to its inherent and treaty rights and the safety of its members in the context of hydraulic

fracturing activity in the vicinity of the Brazeau Dam. This includes concerns as to whether there are adequate safety measures in place should the Brazeau Dam be compromised because of the Applicants' proposed drilling activities. O'Chiese First Nation stated that currently there are limited evacuation routes available that do not involve river crossings and there are no specific emergency response plans in place for O'Chiese First Nation members living on Reserve.

O'Chiese First Nation requested that in the event that the AER grants the motion, and the TransAlta emergency response documents are disclosed after the October 31, 2023, filing deadline for O'Chiese First Nation's hearing submission, it be provided an opportunity to update its submissions.

TransAlta Response

TransAlta submits that the motion should be dismissed without further process. TransAlta noted that the adequacy of emergency response planning being considered by the hearing panel pertains to the adequacy of the Applicants' emergency response planning, not TransAlta's emergency response plans. TransAlta also noted that its emergency response plans are not specific to the applications. The plans provide information pertaining to TransAlta's internal responses to a broad range of potential incidents and are not specific to mitigating the risks from an induced seismic event caused by the proposed activities of the Applicants.

TransAlta submitted that, as the TransAlta emergency response plans are not specific to the applications and are not directly relevant to TransAlta's evidence or the issues in this proceeding, the information contained in the plans is unlikely to assist the hearing panel in deciding the central question before it, which is whether the applications are in the public interest. TransAlta suggested that this question must be addressed with due regard for the potential for fracking to induce seismic events and jeopardize the integrity of the Brazeau infrastructure and this assessment requires consideration of the consequence ratings of the infrastructure, the stringent Canadian and international dam safety requirements, and the perspectives of the dam safety regulator (Alberta Dam Safety), which has conducted technical work confirming that the proposed fracking is not safe. TransAlta submitted that examining the TransAlta emergency response plans – of which the AER has no oversight – will likely distract from and not assist in evaluating these matters.

TransAlta stated that Alberta Dam Safety, and not the AER, is the dam safety regulator and has responsibility for oversight of and regulation of TransAlta's operations. Alberta Dam Safety is responsible for the review and approval of TransAlta's emergency response plans and related documents. TransAlta confirmed that the information contained within TransAlta's emergency response plans is reviewed by independent professionals as part of the dam safety review process and is required to be provided or be

available to be provided by a dam owner to Alberta Dam Safety. If there are concerns with TransAlta's emergency response plans, including concerns by O'Chiese First Nation, it is TransAlta's imperative and within the mandate of Alberta Dam Safety to ensure those issues are resolved. Accordingly, TransAlta submitted that the TransAlta emergency response plans are outside the scope of this proceeding.

TransAlta further submitted that should the hearing panel find the applications to be in the public interest, any conditions or mitigation measures imposed by the AER can only be placed on the Applicants, not TransAlta. TransAlta argued that this proceeding is not – and should not become – a review or evaluation of the TransAlta emergency response plans.

Applicants' Reply

The Applicants submitted that throughout the proceeding it has been TransAlta's position that the Brazeau facility is susceptible to failure due to induced seismicity, primarily due to the power canal dykes forming part of the facility having a history of instability. Any impact to the Brazeau facility from any seismic event – natural or induced – and any related emergency response to protect the public will rely on the TransAlta emergency response documents. Those documents and their implementation are TransAlta's obligation as the owner and operator of the Brazeau facility. The TransAlta protocol – which was developed in direct response to the potential for induced seismicity from hydraulic fracturing – is clearly directed at TransAlta fulfilling this obligation. The Applicants do not own or operate the Brazeau facility and for this reason are not obligated nor in a position to commence emergency response in respect of a failure of the Brazeau facility. Instead, any incident that impacts the Brazeau facility – including one that may be initiated by induced seismicity – will rely on the TransAlta emergency response plans. The TransAlta emergency response plans are an extension of the TransAlta protocol, which TransAlta references and relies on in its evidence, and provide information pertaining to mitigating risks from a broad range of potential incidents, which would include any impact to the Brazeau facility from any induced seismicity.

The Applicants submitted that in previous responses to information requests directed to it by both the AER and the Applicants, TransAlta placed various inundation studies as well as certain Alberta Dam Safety reviews on the proceeding record without objection or asserting either a lack of relevance or pertinence and notwithstanding that these documents do not provide information that is specific to the applications. To the extent that the inundation studies inform the matters before the panel, including potential impacts from a breach of the Brazeau facility, then the TransAlta emergency response plan documents equally inform the matters before the panel as they outline mitigation in response to the impacts outlined in the inundation studies. The Applicants argued that TransAlta is wrong when it states that examining the TransAlta emergency response documents is outside the scope of this proceeding.

The Applicants submitted that the test for whether or not TransAlta should be directed to file the TransAlta emergency response documents on the proceeding record turns not on whether the AER has jurisdiction over TransAlta or the subject matter of those documents, but on whether those documents are relevant to the hearing issues and the matters before the panel and whether those documents will inform the panel when it assesses whether approving the applications is in the public interest. The fact that the AER cannot impose conditions or mitigations on TransAlta does not mean that this evidence is not relevant or pertinent and that the panel will not be informed by or should not consider this evidence in adjudicating the applications. The Applicants argued that this evidence, like all the evidence placed on the proceeding record, should be reviewed, evaluated, and weighed by the panel in reaching its decision.

Panel Reasons and Decision

In reaching our decision to grant the motion, we considered whether the information requested by the Applicants is relevant and material to the issues before us, including whether approval of the applications would be in the public interest. We also considered the AER's jurisdiction related to the applications and this proceeding, the Brazeau facility and TransAlta's emergency response documents.

Alberta Dam Safety, not the AER, regulates the Brazeau facility and is responsible for oversight of TransAlta's emergency response plans. TransAlta is required to have emergency response plans for the Brazeau facility that meet the requirements of Alberta Dam Safety. As such, this proceeding is not the appropriate forum to assess the adequacy of TransAlta's emergency response plans or address any perceived shortcomings in the plans or the engagement or consultation activities related to their development and implementation.

However, the AER's lack of jurisdiction over the Brazeau facility and TransAlta's emergency response plans and inability to impose conditions on TransAlta, does not mean that the information in TransAlta's emergency response plans is not relevant and material to the hearing issues or will not assist us in adjudicating the applications.

In this proceeding, we must determine whether the applications satisfy the AER's regulatory requirements, are in the public interest, and should be approved. This requires us to consider the potential for hydraulic fracturing associated with the well applications to induce seismic events that could jeopardize the integrity of the Brazeau infrastructure. It also requires us to understand the potential consequences of impacts to the Brazeau infrastructure that could result from the proposed activities, and the extent to which these impacts could be mitigated, should the applications be approved. This includes potential impacts to downstream infrastructure and communities, including the O'Chiese First Nation,

which has raised concerns about whether there are adequate safety measures in place should the Brazeau Dam be compromised because of the Applicants' proposed drilling activities.

The onus for demonstrating that the applications satisfy the AER's regulatory requirements and should be approved lies with the Applicants. While the adequacy of the Applicants' emergency response plans will be an important consideration in our decision, the Applicants' emergency response plans do not provide a complete response to an emergency event that involves the Brazeau facility. TransAlta, as dam operator, would be responsible for responding to any emergency resulting from a failure of the Brazeau infrastructure and would presumably rely on its emergency response plans. To the extent that TransAlta's emergency response plans include information that helps us understand the consequences of a potential emergency event that could result from an induced seismic event, and the extent to which these consequences could or could not be mitigated by TransAlta's actions, the emergency response plans will help inform the panel's understanding of the potential risks posed by the applications. We understand the emergency response plans are not specific to mitigating the risks from an induced seismic event resulting from the applications, however we expect that an emergency response to a failure of the Brazeau infrastructure (particularly the power canals) would share some similarities regardless of whether the failure is caused by an induced seismic event, a natural seismic event or other cause.

We acknowledge that some of the information contained in TransAlta's emergency response plans – such as details related to internal communication protocols and emergency response procedures and mitigation measures unrelated to seismic events – would not be relevant to or likely assist us in adjudicating the applications. However, a review of the aspects of TransAlta's emergency response plans that relate to its response to a failure or breach of the power canal dykes will assist us and proceeding participants in understanding the extent to which TransAlta's emergency response plans could mitigate the consequences of such a failure. The AER has a mandate to provide for the efficient, safe, orderly, and environmentally responsible development of energy resources in Alberta. A review of TransAlta's emergency response plans would assist us in satisfying the AER's mandate by providing a more complete understanding of the risks and potential adverse effects that could result from approval of the applications, including potential adverse effects to the public and O'Chiese First Nation resulting from impacts to the Brazeau facility.

We therefore find that the information requested by the Applicants is relevant and material to the issues in this hearing, specifically whether there are additional measures that could be implemented to mitigate any risks from an induced seismic event and whether approving the applications is in the public interest, having regard for the social, economic and environmental impacts of the projects and the requirements provided in the *Responsible Energy Development Act* and the relevant regulatory framework.

We grant the Applicant's motion and direct TransAlta to file the information requested in IR IR1.12(f) on the record of Proceeding 379 to hearing.services@aer.ca, by 4 pm on November 2, 2023.

To the extent that the plans contain sensitive information, TransAlta may request that the information be treated as confidential and subject to confidentiality undertakings.

If after receiving the additional information filed by TransAlta, O'Chiese First Nation would like an opportunity to update its submissions, it may submit a request to the panel.

Alex Bolton

Presiding Member

Meg Barker

Panel Member

Brian Zaitlin

Panel Member

cc: Martin Ignasiak, Bennet Jones LLP
Sarah Orr, Stikeman Elliot
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