

Proceeding 379

February 14, 2023

By email onlyRae and Company
Attention: Brooke BarrettStikeman Elliot LLP
Attention: Dennis LangenBennett Jones LLP
Attention: Martin IgnasiakDentons Canada LLP
Attention: Laura Estep

Counsel:

Re: Proceeding ID 379**Ridgeback Resources Inc. and Westbrick Energy Ltd. (Applicants)
Well License Applications
Panel Decision on O'Chiese First Nation Request to Participate**

On January 30, 2023, we, the panel of Alberta Energy Regulator (AER) hearing commissioners presiding over this matter, received a request from O'Chiese First Nation to participate in this proceeding. We have decided to grant that request and permit O'Chiese First Nation to fully participate in this matter.

Background

The well applications (the Applications) forming the subject of this proceeding were originally filed in 2013. Public notice of the Applications was posted by the AER on its public website. Thereafter, a notice of hearing was posted on the AER website. Since that notice was issued, this matter has been repeatedly delayed and adjourned and many public notices related to this matter have been posted on the AER website, including a 2019 notice of hearing which set a December 9, 2019, deadline for filing requests to participate in the proceeding.

While a notice of scheduling has not been issued, the panel and parties have been preparing for a hearing to commence February 27, 2023.

Submissions*O'Chiese First Nation Request*

In its request to participate, O'Chiese First Nation indicated that it has Inherent and Treaty rights set out in Treaty No. 6 and protected by section 35, *Constitution Act, 1982*. The O'Chiese First Nation I.R. 203 is a townsite which is home to more than 1,500 people and contains numerous public buildings. The O'Chiese First Nation I.R. 203 is within 15 km of the Brazeau Dam. O'Chiese First Nation says its members regularly use the areas around the Brazeau Dam, the Nordegg River, and areas north of its reserve to practice their rights such as fishing. Referencing TransAlta's statement of concern filed in relation to the Applications and other evidence on the record of this matter, O'Chiese First Nation states that the proposed activities could harm the Brazeau Dam causing safety concerns to O'Chiese First Nation I.R. 203 and to the lands that support the exercise of O'Chiese First Nation's rights. Therefore,

Hearing Commissioners' OfficeSuite 1000, 250 - 5 Street SW
Calgary, Alberta T2P 0R4
Canadahearing.services@aer.ca

O'Chiese First Nation says its members are directly and adversely affected by the Applications. O'Chiese First Nation also says its participation will materially assist this panel.

Regarding the timing of its request to participate, O'Chiese First Nation states it only recently became aware of this hearing from a media report and upon becoming aware, immediately prepared a request to participate. O'Chiese First Nation says it receives hundreds of notifications annually of activities within its territories.

Applicants' response

The Applicants oppose O'Chiese First Nation's request. The Applicants point to the long history of this matter, including the many public notices issued by the AER and the Applicants' consultation with O'Chiese First Nation regarding the surface locations for the proposed wells that are the subject of the Applications. The Applicants say O'Chiese First Nation's request to participate is too late, particularly given that O'Chiese First Nation's participation would likely further delay the hearing of this matter.

The Applicants also say O'Chiese First Nation will not be directly and adversely affected by the Applications. They say the potential harm O'Chiese First Nation alleges is too general and not direct. According to the Applicants, any potential adverse effects from the failure of the Brazeau Dam are pre-existing and not caused by the proposed wells. The Applicants say the impacts O'Chiese First Nation alleges are not in the vicinity of the drilling locations or directly relating to these proposed operations. As well, various "topographical features" mean I.R. 203 and the O'Chiese First Nation community would not be affected by a failure of the Brazeau Dam. The Applicants suggest the fact O'Chiese First Nation is unaware of TransAlta's emergency response plan demonstrates O'Chiese First Nation is not adversely affected by any breach of the Brazeau Dam.

Cenovus Energy Inc.'s response

Cenovus also opposes the O'Chiese First Nation request. Cenovus submits that O'Chiese First Nation has not demonstrated it may be directly and adversely affected by the applications. Cenovus suggests that the information provided by O'Chiese First Nation regarding use of lands to practice rights does not provide sufficient connection between the proposed wells and impacts on O'Chiese First Nation Treaty rights; other O'Chiese First Nation concerns are too general. Finally, Cenovus says the request is too late.

TransAlta Corporation's response

TransAlta supports O'Chiese First Nation's request to participate. TransAlta says it is not aware of any notification or consultation with O'Chiese First Nation by the Applicants or the Crown related to induced seismicity and fracking near the Brazeau dam and the AER public notices related to this matter did not discuss that issue.

O'Chiese First Nation reply

O'Chiese First Nation takes issue with the suggestion that it should have been aware or sufficiently aware of this proceeding to attempt to participate in it sooner than when it filed its request to participate. O'Chiese First Nation says it should be permitted to test the Applicants' position that the relevant topography is such that I.R. 203 will not be impacted by any failure of the Brazeau Dam. O'Chiese First Nation says it is unaware of any consideration of Indigenous interests in relation to potential induced seismic activity or dam safety related to the Applications, including by the Government of Alberta's Aboriginal Consultation Office.

Requirements Regarding Requests to Participate in Hearings

The *Responsible Energy Development Act* (REDA) indicates that persons who may be directly and adversely affected by an application to be considered at a hearing are entitled to be heard at the hearing.¹ Section 9 of the *Alberta Energy Regulator Rules of Practice (Rules of Practice)* explains the requirements to request participation in an AER hearing and the considerations applied when deciding such a request.² A written request is to be filed within the time set out in the notice of hearing. The request is to attach the requester's statement of concern or explain why one was not filed. The request must also explain why and how the requester may be directly affected by the decision of the AER on the application, or what the requester's interest in the matter is and why they should be permitted to participate.

If the requester will not be directly and adversely affected by the decision, the request must explain how the requester's participation will materially assist the AER; the requester's tangible interest in the hearing; how their participation will not unnecessarily delay the hearing; and, that they will not duplicate evidence of other participants.

These requirements form some of the bases on which a request to participate may be refused. The AER may also refuse a request for any reason it considers appropriate.

The AER can also dispense with or vary the *Rules of Practice*, including in relation to hearing participation requests, where it considers it appropriate.³

O'Chiese First Nation May Be Directly and Adversely Affected

At the core of this proceeding is the issue of what impact the proposed wells will have on the Brazeau hydroelectric facility, which includes the Brazeau dam. TransAlta has filed extensive evidence which it says demonstrates the development as proposed will harm the Brazeau hydroelectric facility and that harm could lead to the facility's failure. TransAlta asserts the consequences of such a failure could be catastrophic and extend for a very large distance along the Brazeau and North Saskatchewan river valleys downstream of the Brazeau dam and infrastructure. The Applicants have also filed extensive evidence which they rely on to support their position that the scenario put forward by TransAlta is not accurate; the wells will not cause the harm described by TransAlta. Cenovus agrees with the Applicants. None of this evidence has yet been tested and we have reached no conclusions regarding it.

However, we are satisfied that the information provided about O'Chiese First Nation's rights and its members' uses of the lands in areas that TransAlta says could be affected by a facility failure caused by the proposed wells, is sufficient for us to conclude that O'Chiese First Nation could be directly and adversely affected by our decision on the Applications. While the topographical evidence suggests that it

¹ Section 34(3) of the *REDA*

² Section 9 *Rules of Practice*

³ Section 42 *Rules of Practice*

is less likely that a facility failure would affect the I.R. 203 community infrastructure, we still consider that direct and adverse impacts related thereto are possible. We also accept that O'Chiese First Nation members may use areas outside of I.R. 203 for practicing its rights that could be impacted in event of a facility failure.

The fact the wells might be characterized as not being proximate to the O'Chiese First Nation reserve lands does not change our conclusions. The unique circumstances of this matter, including the potential for the proposed activities to result in induced seismicity and its impact on major utility infrastructure, make the usual consideration of participant proximity to the proposed development far less significant for our determination of possible direct and adverse impact.

O'Chiese First Nation's Participation Will Materially Assist

O'Chiese First Nation's participation will materially assist us in deciding this matter. Receiving evidence from O'Chiese First Nation will assist us in considering factors set out in section 3 of the *Responsible Energy Development Act General Regulation* and allow us to consider potential impacts to O'Chiese First Nation's rights. The submissions demonstrate O'Chiese First Nation has a tangible interest in these matters and is in the best, if not only, position to describe its rights, how they are exercised and how these rights, their exercise and O'Chiese First Nation's members may be impacted by our decision in this matter. O'Chiese First Nation's participation will also assist us in considering any proposed mitigations.

Adherence to Deadlines

It is not necessary for us to decide if O'Chiese First Nation could have or should have attempted to intervene in this proceeding sooner, as we have the authority to waive the deadline for filing a request to participate. We do note that O'Chiese First Nation says the Applicants did not consult with it regarding the possible seismic risk the Applications create for the Brazeau Dam. None of the submissions refute that statement.

Given the significance of the matters at stake, we do not view O'Chiese First Nation's statement that this proceeding is the most important matter it has ever dealt with as hyperbole. While adherence to timelines is very important for a fair and efficient regulatory and hearing process, there are circumstances where the failure to adhere to them should not be fatal to a party's ability to participate in a hearing. This is such a circumstance. We do not consider O'Chiese First Nation's failure to file a statement of concern in relation to the Applications, or to file a request to participate earlier than it did, to be sufficient reason to reject the request to participate. The nature of the alleged impacts to O'Chiese First Nation justifies us exercising our discretion and granting the request despite O'Chiese First Nation's failure to comply with filing deadlines.

We are loathe to introduce additional delay into this protracted matter. However, the prejudice, largely economic, to the Applicants and Cenovus from any further delay associated with O'Chiese First Nation's participation in this matter does not outweigh the impact if O'Chiese First Nation is not permitted to participate and we do not have information that allows us to understand how O'Chiese First Nation's constitutional rights and the safety of its members might be impacted by our decision on the Applications.

Crown Consultation

The submissions addressed the Crown's consultation with O'Chiese First Nation. The duty to consult is Alberta's, not the AER's, and this panel has no authority to assess the adequacy of the Crown's consultation with O'Chiese First Nation.⁴ We recognize that a decision made where the duty to consult has not been satisfied would not be in the public interest. However, concerns with the adequacy of consultation must be addressed with the Government of Alberta.

Next Steps

O'Chiese First Nation has indicated that its intention in intervening in this matter is not to create delay. However, as a practical matter and as acknowledged by the Applicants and Cenovus, the participation of O'Chiese First Nation makes delay of the hearing likely. In fact, we are satisfied that it is not possible to allow O'Chiese First Nation to participate in an adequate manner in this complex matter and allow the other parties to respond to that participation if the hearing starts on February 27, 2023. For this reason, the hearing will not proceed on February 27, 2023.

We have not yet decided TransAlta's February 3, 2023, request that we adjourn the hearing process. Our decision on that request may have significant effects on the next steps in this matter. However, given the long history of this proceeding, the panel and the parties need to continue to move this matter forward, until we advise otherwise. Therefore, we require the Applicants, Cenovus and TransAlta to advise us by Friday, February 17, 2023, when and on what basis they will provide to O'Chiese First Nation the portion of the record of this proceeding that is confidential and not publicly available. Once the confidential portion of the record has been provided to O'Chiese First Nation, the panel must be advised by the other participants this has occurred.

Hearing Services will provide O'Chiese First Nation with access to the SharePoint folder containing the portion of the record filed publicly by Wednesday, February 15, 2023.

Within two weeks of receipt of the confidential information, O'Chiese First Nation must provide the time it believes it requires to file its written submissions. We will consider O'Chiese First Nation's time estimate and then work with the parties to establish a revised schedule for submissions and the hearing. These requirements are subject to any additional rulings we may make regarding TransAlta's adjournment request or any other matter.

⁴ Section 21 of the *REDA*

The additional delay that is being introduced in this matter is very regrettable. However, it is necessary in the present circumstances.

Alex Bolton

Brian Zaitlin

Meg Barker

cc: Jessica Kennedy, Bennett Jones LLP
Larissa Lees, Stikeman Elliott LLP
Claire Sario, Rae and Company
Dave Ardell, Alberta Agriculture and Irrigation
Susan Foisy, Aboriginal Consultation Office
Meighan LaCasse, Scott Poitras, AER counsel for the panel
Candice Ross, William McClary, AER counsel