

Proceeding 379

March 12, 2024

By email only

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Attention: Dennis LangenBennett Jones LLP
Attention: Jessica KennedyDentons Canada LLP
Attention: Laura EstepRae and Company
Attention: Brooke BarrettWestbrick Energy Ltd.
Attention: Alana Jensen

**Re: Saturn Oil & Gas Inc. and Westbrick Energy Ltd. (collectively the Applicants)
Well License Applications near the Brazeau Dam
Rescheduling of the Oral Hearing and O'Chiese First Nation's Request for a Formal
Consultation Process**

Dear Representatives:

This letter provides the decision of the Alberta Energy Regulator (AER) panel of hearing commissioners assigned to this proceeding (panel) regarding the rescheduling of the oral hearing and O'Chiese First Nation's request for a formal consultation process.

Background and Submissions

In its January 29, 2024, motion to adjourn and reschedule the oral hearing for this proceeding the Applicants proposed the following alternate procedural schedule and hearing start date:

December 9, 2024	Updated Alberta Written Statement
January 13, 2025	Applicant's Evidence Update
February 3, 2025	TransAlta and OCFN Evidence Updates
March 3, 2025	Applicant's Reply Submission
April 7, 2025	Hearing Start

On February 5, 2024, the panel sent a letter confirming it had no issues with the schedule or hearing start date proposed by the Applicants and requested comments from all parties and Alberta by February 12, 2024, and reply submissions by February 15, 2024.

Alberta provided comments on February 9, 2024, and Cenovus, TransAlta, the Applicants and O'Chiese First Nation provided comments on February 12, 2024. The Applicants and Alberta provided reply submissions on February 15, 2024.

Procedural Schedule and Hearing Dates

Submissions of the Parties and Alberta

Alberta stated it does not have any concerns with the schedule set out in the Applicants' January 29, 2024, motion. Further, Alberta confirmed that it does intend to file an 'Updated Alberta Written Statement,' based on expert evidence prepared in connection with Court of King's Bench Action 2201-10255 (KB Action).

Neither Cenovus nor the Applicants expressed any concerns with the proposed submission schedule or hearing dates. In its February 12th submission, TransAlta stated that one of its witnesses was not available April 7 to 11, 2025, and another witness was not available April 14 to 17, 2025. Given the length and technical nature of the record in this proceeding, TransAlta requested that the entirety of the hearing, including the presentation of evidence by other parties, be scheduled on dates when all its witnesses are available. TransAlta had no comments on the remainder of the submission schedule.

O'Chiese First Nation had no comments on the proposed submission schedule and hearing dates contained in the AER's February 5, 2024, letter; however, it stated that the procedural steps leading to the hearing should outline a meaningful consultation process beyond what is currently contemplated in the Applicants' proposed procedural schedule. This is discussed further below.

In its February 15, 2024, reply submission, the Applicants noted that TransAlta's witness panel will appear first and to the extent that TransAlta wishes to have its witnesses understand what occurred during the Applicants' appearance, those witnesses can rely on transcripts and/or the AER's live stream videocast. The Applicants stressed that historically the scheduling of oral hearings for this proceeding has been difficult given the availability of witnesses for all parties, so TransAlta's ask places a further and unnecessary restriction on the AER's attempt to schedule the oral hearing in April 2025. The Applicants submitted that the oral hearing should be scheduled to commence no later than the week of April 14, 2025, and that it should be set down for three weeks given the number of witnesses anticipated.

Panel Decision

We agree that having all witnesses available for the entire hearing is not a necessity and given past scheduling difficulties, may not be feasible. Those witnesses that cannot attend a portion of the hearing can rely on transcripts and/or the AER's live stream videocast. However, we will adjust the start date for the hearing from April 7th to April 14th and extend the time scheduled for the hearing from two to three weeks to better accommodate the participation of TransAlta's witnesses and to ensure all witnesses can be scheduled and the oral hearing completed during this time. Our intention is to schedule the direct evidence and cross examination of all participants and the Alberta Environment and Parks (AEP) 2021 report authors and contributors during the weeks of April 14th and April 21st, 2025, to the extent possible, utilizing the week of April 28th as necessary.

We accept the schedule for the other procedural steps as proposed by the Applicants in their January 29, 2024, motion.

Request for Formal Consultation Process

Submissions of the Parties and Alberta

O'Chiese First Nation requested that the AER implement a more formal consultation process leading up to the hearing. O'Chiese First Nation submitted that doing so will alleviate O'Chiese First Nation's uncertainty as to whether informal or formal requests for meetings are meant to form a "record of consultation" in the context of the proceeding and, if so, how the AER intends to incorporate this information as part of the hearing record. O'Chiese First Nation submitted that this would ensure that O'Chiese First Nation is aware of the purpose of any meetings with the Applicants or other parties going forward and that the meetings are fairly represented on the record before the AER.

O'Chiese First Nation submitted that the panel's decision on the Applicants' motion to adjourn the proceeding (exhibit 425.01) confirmed the matters that are part of the mediation process between TransAlta, Cenovus and Alberta, taking place in the context of the KB Action, are directly connected to the applications before the AER. O'Chiese First Nation stated that presently, O'Chiese First Nation and potentially no other First Nation or Metis government have been contacted by Alberta to engage in consultation and that O'Chiese First Nation has no indication from any party to the KB Action whether it will be asked to participate in the mediation. As such, O'Chiese First Nation argues that the only venue for it to be consulted with on potential adverse impacts of induced seismicity and dam safety remains in the context of this AER proceeding. It is O'Chiese First Nation's opinion that a broader duty to consult with other Indigenous governments who are also potentially impacted is also required.

In its February 15th reply, the Applicants submitted that it is not the role of the AER to conduct or implement a "formal consultation process" on the part of the Crown. Instead, the Applicants stated, the AER is obligated to hear evidence and adjudicate on the merits of the Applications based on the evidentiary record before it and in doing so the AER is obligated to consider the impacts of the Applications on the O'Chiese First Nation and to consider appropriate accommodation, if any. The Applicants noted that, in its January 19, 2024, ruling on the O'Chiese First Nation's Notice of Question of Constitutional Law (NQCL), the AER confirmed it was premature to rule on certain questions raised in the NQCL prior to the hearing on the merits of the applications. Given the constitutional questions before the AER, the Applicants submit that granting the O'Chiese First Nation's request would put the AER in an untenable position of both directing or influencing the implementation of Crown consultation while also subsequently adjudicating whether the Crown had fulfilled its duty to consult in respect of the Applications.

In its reply submission, Alberta reiterated that it relies on the AER regulatory process to address any related duty to consult or accommodate in respect of the well license applications that are the subject of Proceeding No. 379. Alberta noted that the AER determined on January 19, 2024, that it was unnecessary and premature to decide questions 1-4 in the NQCL as they should be decided following the hearing based on a complete record and argument. Alberta submitted that the adjournment of the proceedings should not impact the directed approach to the NQCL.

Alberta stated that the KB Action is a private law proceeding and the associated King's Bench mediation process (KB Mediation) is a private and confidential dispute resolution process involving the parties to the KB Action. Further, the O'Chiese First Nation is not a party to the KB Action, and the AER does not have jurisdiction over either the KB Action or the KB Mediation, or the processes leading thereto. Alberta stated that Alberta determines its consultation requirements in accordance with the *Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013* and the *Government of Alberta's Policy on Consultation with Metis Settlements on Land and Natural Resource Management, 2015*, and will be guided by that policy as the mediation discussions progress.

Alberta also noted the panel's February 2, 2024, decision letter granting the adjournment stated:

...the wells cannot be drilled without approval from the AER, regardless of the outcome of the mediation. The panel is still required to consider and decide the well licence applications filed under the *Oil and Gas Conservation Act* following the conclusion of the KB Parties' wider settlement discussions. The AER will still be required to hear and consider any issues that remain between the parties at the rescheduled April 2025 hearing.

Alberta submitted that to the extent that there is some overlap between the issues in the KB Action and Proceeding No. 379, the parties to the KB Action cannot usurp the AER's role in granting or withholding approval of the wells in question. The O'Chiese First Nation will continue to have recourse to Proceeding No. 379, irrespective of any resolution reached through the KB Mediation.

Panel Decision

We have considered O'Chiese First Nation's request to provide a formal consultation process beyond the hearing as part of these proceedings.

We previously determined that it was unnecessary and premature for us to rule on questions 1-4 of the NQCL, including whether the AER can make a determination that the constitutional duty to consult with O'Chiese First Nation has been triggered as a result of the Applications. We agree with the submissions of Alberta that the adjournment of the oral hearing should not impact the directed approach to the NQCL. We will rule on the questions in the NQCL after the oral hearing with the benefit of a full evidentiary record. O'Chiese is a full participant in this proceeding and will have an opportunity to call evidence, cross-examine witnesses, and make argument on the NQCL at the hearing.

We recognize that O'Chiese First Nation and the Applicants are not parties to the KB Action or KB Mediation. We cannot compel the parties to the KB Action to share the results of their confidential mediation efforts. However, we anticipate that the parties to the KB action may update their submissions in this proceeding based on those efforts.

As is the case in any matter before the AER, we encourage the participants in this proceeding to discuss concerns and share information amongst themselves to resolve matters. The participants will have an opportunity to provide updates on any discussions or resolutions that occur as part of their evidence updates.

Conclusion

For the reasons above, we have decided not to implement a formal consultation process leading up to the hearing and set the following submission schedule and hearing start date.

Deadline	Process Step
December 9, 2024	Updated Alberta Written Statement
January 13, 2025	Applicant’s Evidence Update
February 3, 2025	TransAlta and O’Chiese First Nation Evidence Updates
March 3, 2025	Applicant’s Reply Submission
April 14 through May 02, 2025	Hearing

Representatives and witnesses for all participants and the AEP 2021 report authors and contributors are expected to be available to appear at the hearing during the period of April 14 through May 02, 2025.

Sincerely,

Alex Bolton
 Presiding Member

cc: Martin Ignasiak, Erin Anderson, Bennett Jones LLP
 Sarah Orr, Stikeman Elliott LLP
 Oliver Jull, Shauna Gibbons, AER counsel for the panel
 Sara Loudon, Rae and Company
 Susan Foisy, Aboriginal Consultation Office
 Sean McDonough, Krista Epton, Angela Edington, Alberta Justice
 Candice Ross, Counsel for Todd Shipman
 Katherine Randon, AER
 Harley Carter, AER