

Proceeding 417

November 30, 2022

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By email only

Bennett Jones LLP
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**RE: Regulatory Appeal of Pipeline Licence No. 62559
Proceeding 417
Regulatory Appeal 1935549
Application No. 31097955
Michael Judd
Pieridae Alberta Production Ltd. (Pieridae)
AER Regulatory Applications (Regulatory Applications)
(collectively, parties)
Stay Decision**

Dear Parties,

I am writing on behalf of the Alberta Energy Regulator (AER) panel of hearing commissioners presiding over Proceeding 417 (the panel) on the regulatory appeal of the decision to issue Pipeline Licence No. 62559 (Licence) to Pieridae. For the reasons set out below, the panel has decided to deny Mr. Judd's request for a stay of the decision to issue the Licence.

Background

On August 16, 2021, Regulatory Applications issued the Licence to Pieridae. The Licence permits Pieridae to construct and operate a pipeline from an existing wellsite at 10-07-006-02W5M to an existing pipeline tie-in point at 07-07-006-02W5M, near Beaver Mines, Alberta. The proposed pipeline would be approximately 0.64 km long and would transport sour natural gas with a hydrogen sulfide (H₂S) concentration of 320 mol/kmol (32%). Under the terms of the Licence, pipeline construction must commence on or before August 16, 2023. On January 19, 2022, the AER granted Mr. Judd's request for regulatory appeal of the AER's decision to issue the Licence.

On October 27, 2022, Mr. Judd requested a stay of the decision to issue the Licence (stay request). In his request, Mr. Judd stated that he had received correspondence from Pieridae dated October 18, 2022, which

stated that Pieridae intended to proceed with project preparation work on the pipeline right-of-way in Q4 2022. Pieridae's correspondence noted that while it "intends to complete construction of the [p]roject in Q2 2023, it does not intend to commence operation of the [p]roject until after the AER's decision on the Regulatory Appeal is issued in 2023". On November 7, 2022, the panel set a process for the stay request, providing Pieridae and Regulatory Applications the opportunity to make response submissions to the stay request, and Mr. Judd the opportunity to reply to Pieridae and Regulatory Applications. On November 14, 2022, Regulatory Applications wrote to the panel declining to make a submission in response to the stay request; later on November 14, 2022, Pieridae filed its response submission. Mr. Judd filed his reply to Pieridae on November 18, 2022.

On November 21, 2022, the panel provided Regulatory Applications the opportunity to provide comments in respect of Pieridae's response submission regarding a voluntary stay, and Regulatory Applications provided its comments later on November 21, 2022. On November 25, 2022, Pieridae filed a reply submission to Regulatory Applications' response.

AER's Authority Regarding Stays

As stated in section 38(2) of the *Responsible Energy Development Act (REDA)*, filing a request for regulatory appeal does not stay an appealable decision, such as the decision to issue the Licence. However, under section 39(2) of *REDA*, the AER may stay all or part of an appealable decision on any terms and conditions it determines, if requested by a party to a regulatory appeal.

When it considers a stay request, the AER applies the three-part test set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*.¹ The three parts of the test are:

1. Is there a serious question to be tried?
2. Will the stay requester suffer irreparable harm if the stay request is denied?
3. On a balance of inconvenience, which of the parties would suffer greater harm from the granting or denial of the stay request?

As the stay requester, Mr. Judd bears the burden of satisfying each part of the test for the requested stay to be granted.

¹ [1994] 1 SCR 311 (*RJR-MacDonald*).

Serious Question

The first part of the test for a stay is whether there is a serious question to be tried, or, in the context of a regulatory appeal, decided at the regulatory appeal. *RJR-MacDonald* requires that the panel make a preliminary assessment of the merits of Mr. Judd's regulatory appeal to determine whether there is an arguable issue for the panel to decide at the regulatory appeal. The threshold to be met is low and is satisfied if the panel finds that the questions at issue in the regulatory appeal are neither frivolous nor vexatious.

Mr. Judd indicated that he has raised serious matters and triable issues related to the pipeline, including the adequacy of the environmental impact assessment and cumulative effects assessment, concerns about bull trout, emergency response planning, and Pieridae's capability to ensure public safety in the event of a pipeline failure. In its response, Pieridae acknowledged that the threshold is low but submitted that Mr. Judd's concerns relate to "unsubstantiated criticisms" of Pieridae and the Licence application.

The Licence allows Pieridae to construct and operate a pipeline that would transport natural sour gas at an H₂S concentration of 32%. Mr. Judd has raised concerns about emergency response planning and public safety if there is a pipeline failure. Additionally, the panel notes that a regulatory appeal is not conducted by the AER unless a request for regulatory appeal is granted. A request for regulatory appeal that satisfies the test set out in *REDA* may still be dismissed by the AER under section 39(4) of *REDA* if the AER "considers the request to be frivolous, vexatious or without merit", which was not done in this case. The panel finds, without making any determination on the matters or issues to be included in the hearing, that these concerns are serious questions to be considered in this regulatory appeal, and that they are neither frivolous nor vexatious. Mr. Judd has met the first part of the test for a stay.

Irreparable Harm

The second part of the test for a stay is whether Mr. Judd, as requester of the stay, will suffer irreparable harm if the stay is not granted. According to *RJR-MacDonald*, this requires the panel to determine whether Mr. Judd would be irreparably harmed by the conduct the stay would prevent if the regulatory appeal prevails. The type of harm and not the size of the harm must be considered. It must be harm that could not be remedied through damages (*i.e.*, quantified in monetary terms) or could not be cured. As noted in *Aventis Pharma S.A. v. Novopharm Ltd.*², the burden is on the party seeking the stay to adduce clear and non-speculative evidence that irreparable harm will follow if the stay is denied.

² 2005 FC 815, (2005), at para.59, aff'd 2005 FCA 390, 44 CPR (4th) 326.

Mr. Judd did not address or provide any information or evidence about what harm he would suffer if the stay request were not granted. Pieridae submitted that Mr. Judd had failed to show that he will suffer any harm if the stay request is not granted.

To meet this part of the test for a stay, Mr. Judd must provide clear, non-speculative evidence that he will suffer irreparable harm if the panel does not grant the stay request. He has not done so. The panel finds that Mr. Judd has not met the second part of the test for a stay.

Balance of Inconvenience

As explained above, the requester of a stay must satisfy each part of the three-part test for the stay to be granted. Having determined that Mr. Judd has not met the second part of the test, the panel does not need to decide whether Mr. Judd has met the third part of the test. However, the panel will still consider the parties' submissions on this part of the test.

The third part of the test for a stay requires the panel to determine, on a balance of inconvenience, which party would suffer greater harm from the granting or denial of the stay request. As with the first two parts of the test, Mr. Judd bears the burden of satisfying this part. While Mr. Judd's stay request spoke about construction timing restrictions related to wildlife protection and time otherwise available to Pieridae for construction, he did not address how granting or denying his stay request would impact or inconvenience him or address how granting or denying his stay request might or might not impact Pieridae.

In its response, Pieridae noted that it complied with all applicable legal and regulatory requirements in applying for and obtaining the Licence. Pieridae stated that it would incur significant costs and suffer considerable financial losses if a stay of the decision to issue the Licence were granted but did not file detailed evidence to support these statements. It also submitted that Mr. Judd has not demonstrated that he would suffer any harm and that the balance of inconvenience does not favor granting a stay.

As is the case with the other parts of the test for a stay, Mr. Judd must provide evidence to convince the panel that the balance of inconvenience weighs in favor of granting the stay. Mr. Judd has not filed evidence to show how he would be impacted or inconvenienced if a stay were not granted. He has not satisfied the third part of the test.

Decision on the Stay Request

While Mr. Judd has established that there is a serious question to be considered in this regulatory appeal, he has not satisfied either the irreparable harm or balance of inconvenience parts of the test for a stay. Given the reasons set out above, the panel denies Mr. Judd's request for a stay of the Licence.

Pieridae – Alternative Proposal

In its submission dated November 14, 2022, Pieridae suggested as an alternative approach that it would voluntarily stay acting on the Licence until the regulatory appeal is resolved if the AER were to grant a years' extension to the date by which construction of the pipeline must commence, which is a term of the Licence. The panel notes that, given the offer of a conditional voluntary stay was made as an alternative to addressing the stay application, there is no need for it to address this suggestion, as it has denied Mr. Judd's stay request. If Pieridae decides in the future that an extension is needed, it is open to Pieridae to seek such an extension at that time.

Sincerely,



Lindsey Mosher
AER Panel Counsel

cc: S. Fluker, Public Interest Law Clinic (University of Calgary)
T. Myers, Bennett Jones LLP
B. Kapel Holden, AER Panel Counsel
Hearing Services