

Via Email

May 26, 2022

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TykeWest Limited

Tourmaline Oil Corp

**Attention: Tim Tycholis
Robyn Swanson**

Attention: Carmel Javos

Keyera Energy Ltd.

**Attention: Vicki Werner
Cindy Gerl**

Dear Sir and Mesdames:

**RE: Request for Regulatory Appeal by TykeWest Limited
Tourmaline Oil Corp.
Keyera Energy Ltd
Alberta Energy Regulator's Approval of Keyera's Licence Transfer Application No.
1934574 on November 17, 2021 (Approval)
Request for Regulatory Appeal No.: 1935183**

The Alberta Energy Regulator (AER) has considered TykeWest Limited's (TykeWest) request for a regulatory appeal (RRA) of the AER's decision to approve Licence Transfer Application No. 1934574 under sections 38 and 39 of the *Responsible Energy Development Act* (REDA). The AER has reviewed TykeWest's submissions and those made by Keyera Energy Ltd. (Keyera) and Tourmaline Oil Corp. (Tourmaline).

For the reasons that follow, the AER has decided that TykeWest's RRA is not properly before the Regulator. As a result, TykeWest's RRA is dismissed pursuant to subsection 39(4)(c) of REDA.

I. Legislation

Section 38 of REDA governs requests for regulatory appeal. It states that:

38(1) An eligible person may request a regulatory appeal of an appealable decision by filing a request for regulatory appeal with the Regulator in accordance with the rules.

Subsection 39(4) of REDA provides that the Regulator may dismiss all or part of a request for regulatory appeal:

- (a) if the Regulator considers the request to be frivolous, vexatious or without merit,
- (b) if the request is in respect of a decision on an application and the eligible person did not file a statement of concern in respect of the application in accordance with the rules, or
- (c) if for any other reason the Regulator considers that the request for regulatory appeal is not properly before it.

II. Background

On October 14, 2021, Keyera and Tourmaline applied to the AER requesting transfer of 1 Facility Licence and 7 Pipeline Licences from Keyera to Tourmaline. The application was registered by the AER as Application No. 1934574 (Application) and the AER issued a public notice of application (PNOA) for that Application No. on the same day with a deadline of November 13, 2021 for the filing of statements of concern.

On November 10, 2021, TykeWest submitted a statement of concern (SOC) referencing application No. 04304749 (a file number corresponding to a land transfer application between Keyera and Tourmaline) to the AER. On the same day it was received, the AER replied to TykeWest by email that this was not an appropriate file number and accordingly the SOC could not be registered. TykeWest was provided a link to the AER's PNOA site so that it could obtain the correct file number.

On November 17, 2021, the AER approved the Application and the Facility Licence No. 27618, and Pipeline Licence Nos. 46371, 47322, 52817, 52818, 52819, 62758 Line Segments 1 & 2¹, and 62759 Line Segment 1² (Licence Transfer Approval) were transferred to Tourmaline.

On December 3, 2021, the AER received an SOC from TykeWest for Application No. A10111582 (an application number related to the land transfer).

On December 5, 2021, the AER received an RRA from TykeWest, in relation to the AER's decision to approve the Application and issue the Licence Transfer Approval to Tourmaline. In its RRA TykeWest submitted that its SOC had not been properly considered by the AER due to a clerical error of the Keyera Application number in the SOC, which rendered the SOC as incomplete. In its RRA, TykeWest submitted

¹ Previously Licence No. 52820 Line Segments 1 and 2

² Previously Licence No. 52821 Line Segment 2

that the Application was approved by the AER on November 17, 2021, without due consideration to the numerous concerns regarding the Application that were outlined in the SOC. Further, TykeWest submitted that the AER did not properly advise TykeWest of the imminent approval of the Application prior to or on November 17, 2021, and that TykeWest was only advised of the disposition when checking on the status of the SOC from the AER on December 2, 2021.

TykeWest's RRA also included a request "to suspend the approval of Keyera Application 1934574 by the AER until the TykeWest SOC receives a fair hearing" (Stay Request).

By letter dated December 8, 2021, the AER advised TykeWest that it was unable to register its SOC received on December 3, 2021, because it was received after the Licence Transfer Approval.

On January 18, 2022, TykeWest submitted correspondence to Regulatory Appeals indicating that its RRA was specific to pipeline licences 52820 Line Segments 1 and 2 (post transfer licences 62758 Line Segments 1 and 2), and that it was not TykeWest's intention to suspend the approval for all licences in Application 1934574, pending the RRA. TykeWest requested that the AER proceed with the RRA and withdrew its Stay Request.

III. Reasons for Decision

1. The RRA Relief

The subject matter of this RRA is the approval of Licence Transfer Application No. 1934574.

The basis of TykeWest's RRA is that its SOC was not properly considered by the AER before the licence transfer was approved due to what it submits was a "clerical error" in the application number.

The relief that TykeWest seeks in its RRA is as follows:

- 1) To preclude the premature exclusion of the TykeWest SOC relating to the intended AER disposition of Keyera Application 1934574, so that the concerns of TykeWest may be properly considered,
- 2) To suspend approval of Keyera Application 1934574 by the AER until the TykeWest SOC receives a fair hearing.
- 3) To recognize that the SOC team incorrectly ignored the TykeWest request under SOC Section D for an extension and declare a retroactive update of the clerical error in the TykeWest SOC and approve same.

(Collectively, the RRA Relief)

Under subsection 41(2) of REDA, the Regulator, in its decision on a regulatory appeal, may confirm, vary, suspend, or revoke the appealable decision. In this case, as noted earlier, the appealable decision is the Licence Transfer Approval. Accordingly, the AER does not have the ability in a regulatory appeal to grant TykeWest all the relief it seeks in its RRA Relief. In particular, it does not have the ability to grant the relief sought in RRA Relief 1) and 3). Accordingly, this portion of the RRA is dismissed under subsection 39(4)(c) of REDA as not being properly before the AER.

We also note with regards to the procedural concerns that are raised in RRA Relief 1) and 3) that the onus is on TykeWest to file an SOC that complies with the *AER Rules of Practice* (the Rules), which includes under sections 6(2) and 47, the application number. Further, contrary to TykeWest's submissions, the correct application number for the licence transfer application was included on the PNOA issued on October 14, 2021 and was available on the AER's website. The AER's SOC Team directed TykeWest how to search the PNOAs to locate the correct file number.

In addition, TykeWest's SOC submitted to the AER on December 3, 2021, was received after the deadline specified for filing SOCs in the PNOA and after the Application was approved. Under subsections 6.2(1)(b) and (c) of the Rules the Regulator may disregard a statement of concern that is filed after the filing deadline and after decision on the application is made. Accordingly, the AER acted within the Rules in not registering this SOC.

With respect to RRA Relief 2), we note that while this request for a stay falls within subsection 41(2) of REDA and therefore within the relief the AER may grant on a regulatory appeal, TykeWest withdrew its Stay Request. Both Keyera and Tourmaline submitted that as the request for a stay had been withdrawn it could not be considered and as the balance of the request for relief in the RRA was outside the scope of subsection 41(2) of REDA, the RRA should be dismissed as not properly before the AER under subsection 39(4)(c) of REDA. While we could dismiss the RRA on that basis we note that the SOC was appended to the RRA and referenced throughout the RRA submission. Accordingly, we will also consider the substance of the concerns raised in the SOC with respect to the Licence Transfer Approval as part of the RRA.

2. SOC Concerns:

In its SOC TykeWest raised the following concerns regarding future activities that may apply to infrastructure within the areas:

- 1) discontinuance, suspension, abandonment or resumption of pipelines and facilities,
- 2) substance or pressure change
- 3) operating procedure modifications
- 4) changes to processing, gathering, and handling fees for Infrastructure

(Collectively, the SOC Concerns)

TykeWest Submissions:

In its reply submissions, TykeWest elaborated on the SOC Concerns and how in its submission the Licence Transfer Approval would affect its Cabin Creek Property. TykeWest's submissions did not lend themselves easily to summary, nevertheless, we have read the entirety of TykeWest's submissions.

TykeWest submitted that unless its request for the former status quo of the subject assets as they existed before the Licence Transfer Approval (meaning the same 52820 pipeline configuration that existed before the Licence Transfer Approval and implementation of the Keyera gathering and processing agreement (GHA)) is maintained by the AER, TykeWest shall be materially affected.

The main points raised by TykeWest are as follows:

- **Restriction of Access – Tourmaline Redirect and Pipeline Substance Changes** – The Licence Transfer Approval created infrastructure modifications which caused and increased the risk of stranded reserves, and of restricted access of production which in its submission would cause premature abandonments of its wells and infrastructure. In particular, Tourmaline's plan to deliver sweet gas to its Wrethaven Plant by implementing a substance change from sour to sweet gas service and by redirecting 52820 Line Segment 2 (one of the transferred assets) would mean that TykeWest could no longer use the 52820 Line Segments 1 and 2 to deliver its sour gas to the Keyera Gas Plant. Consequently, without infrastructure build, certain of TykeWest's reserves would be stranded. TykeWest further submitted that given a prescribed decline rate at the Edson Gas Plant (the Keyera Gas Plant has none) and high operating costs, the reserve life of TykeWest wells processing gas at Edson would be shortened, and suspension and abandonment accelerated, relative to the Keyera Gas Plant.
- **Natural Gas Liquids and SCADA** – The Licence Transfer Approval permitted oppressive operating requirements. As examples of operating requirements that were changed, TykeWest submitted that in potentially restricting TykeWest's access to infrastructure Tourmaline has unilaterally prevented TykeWest's free access to natural gas liquids transportation markets at lower cost and discriminated against TykeWest contrary to subsection 48(2) of the *Oil and Gas Conservation Act* (OGCA). Further, Tourmaline unilaterally changed the trucking company for natural gas liquids in the Cabin Creek area and unnecessarily and unilaterally changed the SCADA (Supervisory Control and Data Acquisition) Pipeline Communications and in so doing discriminated against TykeWest contrary to subsection 48(2) of the OGCA.
- **Elimination of Competitive Environment** – The Licence Transfer Approval substantially detracted from a healthy, competitive environment for access to infrastructure and for the development of hydrocarbon reserves at Cabin Creek and other Foothills areas, near certain and potentially all the Transferred Assets. TykeWest submitted that the approved licence transfer resulted in three processing facilities accessible by Tourmaline (Wrethaven Gas Plant, and back-ups Keyera Gas Plant and Edson Gas Plant) while TykeWest and other industry would only have access to the high cost, antiquated Edson Gas Plant, and no back-up.

- **Breach of Contractual Agreement and Defeat of Industry and Public Interest** – Keyera unilaterally breached the GHA with the operator (Northrock Resources Partnership Ltd.) and TykeWest by transferring the transferred assets to Tourmaline.
- **Regulations have been compromised** – Keyera and Tourmaline as pipeline owners and operators are in effect common carriers and as such have not treated TykeWest consistently with the standard set out in section 48 of the OGCA.
- **Proliferation in Face of the Redirect** – Sour gas assets would either be stranded because of the Licence Transfer Approval as processing at the Edson Plant was not optimal or new pipelines would need to be built for TykeWest to access the Keyera Plant. This potential for a proliferation of pipelines would not be in the public interest and would be contrary to section 48 of the OGCA and *Directive 056: Energy Development Applications and Schedules* (Directive 56).
- **Commercial Terms** – The Licence Transfer Approval and Tourmaline’s operating practices have reduced the profitability of TykeWest’s existing producing oil and gas assets in the Foothills area.

Keyera and Tourmaline’s Submissions

Keyera submitted that TykeWest’s RRA was not properly before the AER as the concerns raised were either outside of the AER’s jurisdiction or addressed by other regulatory obligations. Keyera submitted that the SOC Concerns fell into two categories: i) matters of a commercial nature, and ii) matters concerning potential operational changes. As such, Keyera submitted that matters of a commercial nature were outside of the AER’s jurisdiction and were properly addressed through private negotiations and arrangements, if and when appropriate. It also submitted that Keyera did not have a contractual arrangement with TykeWest prior to the transfer to Tourmaline. Further, matters concerning operational changes would be addressed through other AER processes and regulatory obligations (e.g., Directive 056 notification procedures), if and when appropriate and were outside of the scope of the RRA process for the Licence Transfer Approval. Accordingly, Keyera submitted that the RRA was not properly before the AER.

Tourmaline submitted that three out of the four of the SOC Concerns related to possible future business and operations decisions by Tourmaline (substance and pressure changes, operating procedures, and fees). It submitted that these concerns were frivolous, vexatious, and without merit because they disclosed no details or supporting evidence such that Tourmaline could properly respond to them, or the AER could properly assess them. It submitted that there was no reasonable basis for the concerns regarding any of the listed business and operational matters. Tourmaline submitted that sour gas transportation and processing options continue to be available to TykeWest following the Licence Transfer Approval. Tourmaline submitted that it determined that certain operational changes were required when it took over ownership and operatorship of the subject infrastructure. Tourmaline submitted that TykeWest failed to cite any evidence that Tourmaline would not operate its facilities in accordance with applicable requirements, to engage the AER's jurisdiction to regulate matters under the *Pipeline Act* or OGCA. Tourmaline submitted that concerns about how Tourmaline chose to operate the subject infrastructure and whether it might

depart from Keyera's past practices in the future were wholly speculative and without foundation, and as such beyond the scope of the Application. Further Tourmaline submitted that because there was no evidentiary basis for the concerns regarding Tourmaline's ability to meet any discontinuance, suspension, or abandonment obligations TykeWest's other concerns were frivolous, vexatious, and without merit.

Findings:

To determine whether the SOC Concerns are properly before the AER, it is necessary to consider the scope of the licence transfer application that is the subject matter of the RRA. Under section 24 of the OGCA, the AER retains its discretion on licence transfer applications. In approving the Application on November 17, 2021, an assessment was made by the AER under *Directive 006: Licensee Liability (LLR Program) and Licence Transfer* using the Licensee Liability Rating Program to ensure that end of life obligations of both the transferor and transferee would not be negatively affected by the licence transfers. In making this determination, the AER considered how the Liability Management Rating, which is the ratio between the aggregate value attributed by the Regulator to a company's deemed licenced assets and deemed liability attributed by the Regulator to the eventual cost of abandoning and reclaiming those assets of both the transferor and transferee, would be impacted by the licence transfer. The AER also considered the compliance history of the transferor and the transferee. Accordingly, the scope of the Licence Transfer Approval is the ability of the transferor and transferee to meet their respective end of life obligations post-transfer and includes consideration of their respective compliance histories.

In considering TykeWest's SOC Concerns, we find they are not properly before the AER as they raise matters that are outside the scope of the Licence Transfer Approval. TykeWest's SOC Concerns fall into two broad categories: commercial and operational concerns.

In the first category, TykeWest raises concerns that relate to the competitive environment, alleged breach of a contractual agreement and a reduction in profitability of Cabin Creek. However, these considerations lie outside of the scope of the Licence Transfer Approval. As we described earlier the licence transfer approval process focuses on the impact of a transfer on the ability of both the transferor and transferee to meet their abandonment and reclamation obligations. It does not extend to the impact to third parties whose commercial interests may be impacted by the licence transfer. Accordingly, there is no basis for proceeding to regulatory appeal of the licence transfer to consider the first category of concerns.

The second category of concerns raised by TykeWest relate to operational changes including Tourmaline's intention to make a change in substance and direction of the 52820 Line Segment 2 that TykeWest submits will leave some of its reserves stranded thereby accelerating the suspension and abandonment of its wells or necessitate an additional infrastructure build that will, it submits, lead to a proliferation of pipelines. However, these operational changes are speculative as they have not been implemented to date and fall outside of the scope of this RRA as they do not form part of the Application. Changes in the substance and direction of a pipeline would require a separate application and approval by the AER and any concerns related to these changes could be raised as part of that application process.

To the extent that TykeWest raises operational changes that have occurred such as a change to the trucking company and SCADA communication used, these also fall outside of the scope of the considerations in the Licence Transfer Approval. Further, the only regulatory issue that is raised by TykeWest in relation to these changes is the alleged breach of subsection 48(2) of the OGCA. Section 48 of the OGCA concerns a declaration of common carrier made by the Regulator. Contrary to the submissions of TykeWest, it is not the case that all prospective pipeline owners and operators are in effect common carriers as soon as the infrastructure as approved by the AER is constructed and operated. Rather, section 48 of OGCA requires an application for a declaration of a common carrier and a subsequent order to that effect by the AER.

An application for common carrier is outside the scope of the Application. Consideration as to whether a common carrier declaration should be made would require a separate application under subsection 48(1) of the OGCA and there has been no such application made. As a consequence, section 48 of the OGCA has no application to this RRA. If TykeWest wishes to bring an application for a common carrier declaration for these pipelines it may do so as a separate application to the AER.

3. Remaining Matters

There is no dispute that the Licence Transfer Approval under section 24 of the OGCA and section 18 of the *Pipeline Act* is an appealable decision as defined in subsection 36(a)(iv) of REDA as it is a decision of the Regulator made under an energy resource enactment without a hearing.

Given our determination that the RRA is to be dismissed as it is not properly before the Regulator, it is not necessary to decide whether TykeWest has demonstrated it is an ‘eligible person’ within the meaning of subsection 36(b) of REDA. In its RRA, TykeWest submits that it is directly affected when the existing economics of TykeWest Cabin Creek Property deteriorated in proportion to the incremental costs associated with the Tourmaline redirect, including the Edson Gas Plant fees, the oppressive operating requirements, and the implementation of the SCADA communications with new incremental costs. Keyera and Tourmaline both disagree that TykeWest is an ‘eligible’ person. They submit that the information provided in the TykeWest’s submissions is general and speculative and does not provide sufficient explanation as to how the impacts to TykeWest relate to the Licence Transfer Approval.

It is also not necessary to determine whether the form of the RRA meets the requirements in section 30 of the Rules. Both Keyera and Tourmaline took issue with the form of TykeWest’s RRA.

Sincerely,

<Original signed by>

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