

Via Email

March 21, 2022

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Attention: Martin Ignasiak

Attention: Karen A. Salmon

Dear Sir and Madam:

**RE: Stay Request - Request for Regulatory Appeal by TransAlta Corporation
Bonterra Energy Corporation
Licence Nos.: 0503320 and 0503321
Locations: 1-23-47-11W5, 1-24-47-11W5 and 9-24-47-11W5
Request for Regulatory Appeal No.: 1935997**

The Alberta Energy Regulator (AER) has considered the March 2, 2022, request of TransAlta Corporation (TransAlta), under section 39(2) of the *Responsible Energy Development Act (REDA)* for a stay of the AER's decision to issue Approval Nos. 0503320 and 0503321 (Well Licences) to Bonterra Energy Corporation (Bonterra) on February 10, 2022 (the Decision). The Decision is the subject of the above-noted request for regulatory appeal, filed by the TransAlta on March 2, 2022.

For the reasons that follow, the AER denies TransAlta's request for a stay of the Well Licences.

REASONS FOR DECISION

Under section 38(2) of *REDA*, the filing of a request for regulatory appeal does not operate to stay an appealable decision. The AER may, however, grant a stay on the request of a party to the regulatory appeal under section 39(2).

The AER's test for a stay is adopted from the Supreme Court of Canada's decision in *RJR MacDonald*.¹ The onus is on the applicant for the stay to demonstrate that they meet each of the following criteria:

1. Serious question to be tried – Based on a preliminary assessment of the merits of the case, they have an arguable issue to be decided at the requested appeal.
2. Irreparable harm – They will suffer irreparable harm if the stay is not granted.
3. Balance of convenience – The balance of convenience favours granting a stay.²

¹ *RJR MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 (*RJR MacDonald*).

² *Ibid* at 334.

1. Serious Question

The first step in the test requires the stay applicant to establish that there is a serious issue to be tried. The applicant has to demonstrate that there is some basis on which to present an argument on the requested appeal. This is a very low threshold. The stay applicant need only show that the requested appeal is not frivolous or vexatious.

TransAlta's Position

For this part of the test, the TransAlta has submitted that its request is not frivolous or vexatious and is consistent with its significant efforts to reduce seismicity as a result of hydraulic fracturing within the 10km Buffer Zone (the zone 5 to 10 km from the Brazeau dam). TransAlta submits that it requires producers to fully participate in the Monitoring Program and enter into the Agreement to mitigate risks from hydraulic fracturing within the zone. TransAlta submits that Bonterra has refused to do so in this case.

TransAlta submitted that Bonterra's compliance with Directive 083 and Subsurface Order 006 (SSO6) is not relevant to whether TransAlta may be directly and adversely affected by the Well Licences. TransAlta submits that Directive 083 does not address induced seismicity at all and the requirements in SSO6 do not apply to the proposed operations given where the subject wells would be located.

TransAlta submitted that Bonterra's failure to notify TransAlta prior to filing the well licence applications warrants suspension of the Well Licences. Given Bonterra's history of operations in the area, familiarity with SSO6 and the 10km Buffer Zone, it either knew or ought to have known that TransAlta has concerns related to fracking within 10km of the Brazeau dam. TransAlta stated that for the AER to deny its Stay Request would be rewarding Bonterra for negligently failing to notify TransAlta as a party that might have concerns about proposed hydraulic fracturing within 10km of the Brazeau dam. TransAlta also noted that the AER may cancel or suspend a licence under section 25(a) of the *Oil and Gas Conservation Act* if the AER determines that a contravention of the act, regulations, rules or order or direction of the AER has occurred with respect to the well to which the licence relates, and the AER has done so in the past.

Bonterra's Position

Bonterra submits that TransAlta's "serious issue" is that "TransAlta requires producers to fully participate in the Monitoring Program and enter into the Agreement to mitigate risks posed from hydraulic fracturing within the zone. Bonterra has refused to do so in this case, which has necessitated this request." [emphasis in original]

Bonterra further states that TransAlta describes how it enforces its requirements: "operators continue to sign onto and adhere to the protocol in exchange for TransAlta's commitment not to file SOC's with the AER." [emphasis in original].

Bonterra submits that these statements describe TransAlta's motivations for filing the RRA and Stay Request, but it does not explain how the RRA is any way meritorious. Bonterra submits that it is a responsible operator and complies with regulatory requirements, and specifically with SSO6 and Directive 083. These standards govern seismic monitoring and subsurface integrity matters relevant to

Well Licences. Bonterra further submits that TransAlta has not argued that Bonterra has or will be deficient in its duty to comply. Bonterra submits that TransAlta may disagree with aspects of SSO6 and Directive 83, but Bonterra is entitled to rely on the published directives, orders, and regulations; it is not required to comply with what TransAlta believes the regulations should be.

AER's Findings

Although the threshold for meeting this first test is low, TransAlta has not met this threshold as the requested relief is not within the AER's jurisdiction. It also appears that the substance of the request is a collateral attack on SSO6.

With respect to the first point, TransAlta's requested relief is that the AER impose a condition on the licences that requires Bonterra to "fully participate in the Monitoring Program and enter into the Agreement prior to commencing any hydraulic fracturing activities"³. Regarding the Monitoring Program, while the AER may impose monitoring conditions, it has no jurisdiction to require the use of a private monitoring system which has been developed by a third party private entity for its own use and outside of the AER's regulatory system. As well, with respect to the "Agreement", the AER cannot force a party to enter into a private contractual agreement. Therefore, the AER cannot grant the requested relief and there is no triable issue.

Regarding the second point, it appears to the AER that TransAlta is trying to impose its own regulatory scheme on operators, as it disagrees with the AER's decision to limit the application of SSO6 to wells within 5 km of the Brazeau dam. TransAlta's submissions frequently reference TransAlta's "requirements" for operators of wells within 5 to 10 km of the Brazeau dam. These are not regulatory requirements, but requirements that TransAlta has unilaterally, and as a private entity, been imposing on operators through the Monitoring Program and Agreement. TransAlta has no legislative authority to impose any such requirements. The AER is the technical expert that makes (Rules, Directives) and administers technical regulatory requirements, and the Government of Alberta is responsible for the overall policy and setting the requirements under the OGCA. As stated in the dismissal of TransAlta's request for regulatory appeal of SSO6: "[b]y TransAlta's own admission, SSO6 was issued in response to concerns raised by TransAlta regarding hydraulic fracturing operations within the vicinity of the Brazeau Infrastructure." The AER has considered induced seismicity around the Brazeau dam and exercised its regulatory authority to issue SSO6 to ensure protection of the environment and public safety (discussed further below). The decision to limit the application of SSO6 to a 5 km radius of the Brazeau dam was deliberate; this is not a situation where there is a hole in the regulatory requirements that needs to be addressed on a global basis, which is what TransAlta's "requirements" seek to do.

On this basis, the first part of the stay test has not been met.

The AER notes that TransAlta's submissions give rise to some concern that the AER's processes are being misused to force Bonterra to enter into a private contractual agreement. While the AER is not making a finding that the filing of the request was frivolous or vexatious based on the information before

³ TransAlta's request for regulatory appeal at page 8.

it, there is some merit to Bonterra's assertions in this regard. Not only was the relief requested limited to the imposition of a private contractual agreement and monitoring program, but TransAlta's submissions made repeated references to the communication to all operators in the area of its intent to file a SOC if operators refused to comply with TransAlta's "requirements". It is the AER – not TransAlta – that has the legal authority to impose requirements on hydraulic fracturing.

The AER takes compliance seriously, and as a result of TransAlta's submissions, an audit was conducted on Licence Nos. 0503320 and 0503321 by the AER's Application Integrity group. The audit was found satisfactory and met the Directive 056 Participant Involvement requirements. It was noted that the surface and bottomhole locations are outside the 10 km radius of the Brazeau dam. As this information was not before the parties, the AER did not rely on it in making this decision; however, given the nature of TransAlta's submissions, the AER is taking this opportunity to communicate the results of the audit to the parties.

2. Irreparable Harm

Although the AER has found that there is no triable issue, the AER considered the other two parts of the tripartite test. The second step in the test requires the applicant for the stay to establish that they will suffer irreparable harm if the stay is not granted. Irreparable harm will occur if the stay applicant will be adversely affected by the conduct the stay would prevent if the applicant ultimately prevails on the regulatory appeal. It is the nature of the harm and not its magnitude that is considered. The harm must be of the sort that cannot be remedied through damages (i.e., monetary terms) or otherwise cured.⁴ As noted by the Alberta Court of Appeal, irreparable harm is "of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the [stay] would be a denial of justice."⁵

The Federal Court of Canada has described the onus that rests upon the stay applicant to meet the irreparable harm test as follows:

The burden is on the party seeking the stay to adduce clear and non-speculative evidence that irreparable harm will follow if their motion is denied.

That is, it will not be enough for a party seeking a stay to show that irreparable harm *may arguably result* if the stay is not granted, and allegations of harm that are merely hypothetical will not suffice. Rather, the burden is on the party seeking the stay to show that irreparable harm *will result*.⁶

⁴ *Ibid* at 341.

⁵ *Ominayak v Norcen Energy Resources Ltd*, 1985 ABCA 12 at para 31, citing *High on The Law of Injunction*, 4th ed, vol 1 at 36.

⁶ *Canada (Attorney General) v Amnesty International Canada*, 2009 FC 426 at paras 29 and 30 [citations omitted] [emphasis in the original].

TransAlta's Position

For this part of the test, TransAlta submits that irreparable harm will occur if it will be adversely affected by the conduct. TransAlta submits that the harm flows from Bonterra being permitted to conduct hydraulic fracturing activities within the 10km Buffer Zone without agreeing to fully participate in the Monitoring Program and entering into the Agreement. TransAlta submits that this would impose an unacceptable level of risk for Brazeau dam, the environment, and the public, and it undermines the protocol that has been in place for years that allows for the safe development of resources within the 10 km Buffer Zone. TransAlta submits that the outcome cannot be measured in monetary terms and would risk undoing of years of regulatory process and negotiations between TransAlta, industry producers and government stakeholders.

In response to Bonterra's submission, TransAlta stated that the harm to it results from fracturing activities being carried out in a manner that fails to reduce the risks to the Brazeau dam, the public and the environment to as low as reasonably practicable (ALARP). For fracking within the 10km Buffer Zone, TransAlta considers that the ALARP standard required operators to participate in the Seismic Monitoring Program per terms of the Agreement. TransAlta submits that allowing Bonterra to proceed without entering into the Agreement or participating in the Seismic Monitoring Program would result in a situation where there was a failure to take basic and relatively inexpensive measures to mitigate risks to the Brazeau dam, and although an event is unlikely, the potential consequences are catastrophic, and as the owner and operator of the Brazeau dam it is TransAlta's duty to bring the Stay Request to prevent Bonterra from conducting its operations in a manner that poses an unacceptable risk to the Brazeau dam.

With respect to Bonterra's submission that TransAlta is seeking to financially benefit by requiring Bonterra to enter into and abide by the Agreement, TransAlta submitted that it has paid for the initial construction of the monitoring network and has continued to pay ongoing operating and maintenance costs, contributions from industry help to offset but do not fully cover these costs, and Bonterra's suggestions that TransAlta is seeking to benefit financially by requiring Bonterra to enter into and abide by the Agreement are false.

TransAlta submits that allowing Bonterra to conduct hydraulic fracturing outside of the Monitoring Program risks upsetting the agreement reached in 2013 for operations in the 10km Buffer, and as the AER is aware, over many years, AER Staff, AEP, TransAlta and numerous producers have devoted an immense amount of time and resources to assessing the seismic risk posed by fracking near the Brazeau dam.

Bonterra's Position

Bonterra submitted that as TransAlta has stated that it would abandon the stay application and request for regulatory appeal if Bonterra enters into the Agreement and compensates TransAlta, and since the Monitoring Program is already in place, the harm to TransAlta is financial, which can be addressed at a later time. Bonterra also stated that TransAlta does not appear to have any objection to the well licences *per se* so long as seismic activity is monitored adequately. Bonterra provided information respecting its monitoring, which it states complies with Directive 083.

Bonterra submitted that it is not aware of any instances of seismic events following hydraulic fracturing in the vicinity of the Wells, and that the risk of Bonterra's operations triggering an unobserved seismic event severe enough to harm the Brazeau dam is extremely low. Bonterra submitted that TransAlta has not produced clear and not speculative evidence.

In response to TransAlta's concerns around other stakeholders, Bonterra submitted that it is concerned that TransAlta is attempting to use AER procedures to advance its own private interests, which is inappropriate and does not constitute irreparable harm. There is no evidence that Bonterra's choices will impact any other stakeholder.

AER Findings

TransAlta has not demonstrated that it will suffer irreparable harm if the stay is not granted. In its request for regulatory appeal and stay of the decisions, TransAlta identified the harm as "flowing from Bonterra being permitted to conduct hydraulic fracturing activities within the 10 km Buffer Zone without first agreeing to fully participate in the Monitoring Program and entering into the Agreement". The specific harms alleged are an unacceptable risk to the Brazeau dam and risks to the protocol with other operators in the area (the protocol referring to TransAlta requiring participation and signing of the Agreement).

The AER is the technical expert; its directives and regulatory requirements such as SSO6 are protective in nature. A subsurface panel examined scientific evidence, and as a result of their findings, SSO6 was issued. Within this process, it was determined that additional monitoring requirements were only required where hydraulic fracturing was to be conducted within 5 km of the Brazeau dam. Instead of providing specific evidence in respect of the licences subject to the request for regulatory appeal, TransAlta appears to be alleging a general harm from existing regulatory requirements and is trying to substitute its own regulatory system for the regulatory requirements duly enacted and authorized pursuant to the OGCA. The only information provided is some information summarized from an AEP report that was not included in the submission, so is not on record in this matter. There is therefore no substantive evidence before the AER in this matter that allowing Bonterra to proceed in accordance with the regulatory requirements and well licence conditions would result in irreparable harm in terms of risk to the dam. The harm alleged is speculative at best.

The other harm that TransAlta alleges is upsetting the protocol it has established in the area by which it requires operators to participate in the Monitoring Program and signing the Agreement in exchange for not filing a SOC. TransAlta has no legal authority to impose regulatory requirements on operators; the AER is the technical expert and regulatory body that imposes and enforces requirements. TransAlta has no right or entitlement to impose this protocol, and the AER has no jurisdiction to force licence holders to sign a private contractual agreement. The requestor is asking the AER for relief it cannot grant, therefore, no irreparable harm can stem from a decision not to grant the stay.

Accordingly, TransAlta has not satisfied either the first or the second branch of the stay test and the request for a stay is denied.

3. Balance of Convenience

As explained above, an applicant for a stay must satisfy each element of the three-part test for the stay to be granted. Although it is not necessary for the AER to consider this part of the test, the AER provides the following reasons with respect to the balance of convenience.

The balance of convenience involves examining which party will suffer more harm from granting or refusing the stay. The Regulator must weigh the burden the stay would impose on Bonterra against the benefit TransAlta will receive from a stay.

TransAlta has stated that the balance of convenience does not favour Bonterra because they can avoid delay by entering into the Agreement with compensation to TransAlta. Bonterra countered that “[i]t is not fair and reasonable for Bonterra to be caught up in that dispute because it complied with the AER’s regulatory framework, rather than that “required” by TransAlta. Bonterra should be allowed to continue with its operations pursuant to the currently-applicable regulatory framework until such time as that framework changes”.

Bonterra has the right to rely on current regulatory requirements, and while TransAlta has stated that it “requires” industry to do certain things, TransAlta has no legal authority to impose any such “requirements”. Additionally, TransAlta’s challenges to the requirements (proceeding 379 and the litigation involving the request for regulatory appeal of SSO6) have been ongoing for a lengthy period of time, and there is no indication of when or if changes may be made to the current regulatory regime. It would be unreasonable and unfair under these circumstances for the AER to prevent Bonterra from acting on its licences, following all existing requirements, as there is no evidence that has been brought forward to suggest that there is something different about these licences that renders the existing regulatory requirements inadequate. Rather, TransAlta is asserting that additional requirements should be applied to any and all operators within the 5-10 km buffer zone. Consequently, the AER finds, in addition to failing to demonstrate irreparable harm, the balance of convenience favours Bonterra.

CONCLUSION

The stay request is dismissed because there is no triable issue, TransAlta has failed to demonstrate irreparable harm or that the balance of convenience favours granting the stay.

The AER will provide its decision on the request for regulatory appeal in due course.

Sincerely,

<Original signed by>

Jeffrey Moore
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Elizabeth Grilo
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cc: Andrea Sam, TransAlta
Logan Smith, Bonterra