Alberta Energy Regulator

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By e-mail only

March 15, 2024

KMSC Law LLP

Attention: Kristian Toivonen

Veresen Midstream General Partner Inc.

Attention: Hart Proctor

Dear Parties:

RE: Stay Request and Request for Regulatory Appeal filed by Teresa & Peter von Tiesenhausen
Veresen Midstream General Partner Inc. (Veresen)
Application Nos.: 1948251 & 1948255
Licence Nos.: F21911 & F53592
Location: NE 17-074-12 W6M
Request for Regulatory Appeal No.: 1949934

The Alberta Energy Regulator (**AER**) has considered the February 7 and 15, request of Teresa & Peter von Tiesenhausen (**von Tiesenhausens**), under section 39(2) of the *Responsible Energy Development Act* (***REDA***) for a stay of the AER's decision to approve Application Nos. 1948251 & 1948255 (**Applications**) and issue the Facility Licence Nos.: F21911 & F53592 (**Licences**) to Veresen on January 9, 2024 **(**the **Decision**). The Decision is the subject of the above-noted request for regulatory appeal, filed by KSMC Law LLP on behalf of the von Tiesenhausens, on February 7, 2024.

For the following reasons, the AER denies the von Tiesenhausens' request for a stay of the 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] *RJR MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 (*RJR MacDonald*)

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. Serious Question

The threshold for establishing a serious issue to be tried is generally low. It requires a preliminary assessment of the merits. The issue must be neither frivolous nor vexatious.

The Von Tiesenhausens have submitted that the Noise Monitoring Survey (**NMS**), even prior to the construction of the Deep Cut Expansion and Debottleneck Project, is only 3.8dBA below the PSL. The Von Tiesenhausens cite Veresen's *Directive 056: Energy Applications and Schedules* **(D056**) letter to indicate that that expansion will result in an 81% increase in estimated current production. The Von Tiesenhausens also indicate that additional noise will interfere with their moral rights asserted in relation to the "Lifeline" art installation on the property.

Veresen argues that an operator's compliance with the regulatory requirements of *Directive 038: Noise Control* (**D038**) is sufficient to satisfy the AER, and that mere disagreement with the decision by the AER, which is made on the basis of credible and supporting evidence, does not give rise to a serious question. Veresen also indicates that the increase in throughput in the facility will only be 7.4%, not the 81% claimed.

Further, Veresen argues there is no explanation for how alleged noise will impact an artist's moral rights.

A preliminary assessment of the merits indicates the Von Tiesenhausens have established a serious triable issue of excessive noise based on logical inferences drawn from clear and non-speculative evidence. However, the Delegates find that the sole and exclusive forum for enforcing "moral rights" to art is in the federal court, which applies and interprets the *Copyright Act*, not the AER.[3]

The first part of the stay test is met in relation to the personal harms resulting from noise impacts, but not in relation to a violation of "moral rights" to an art installation. However, this preliminary assessment of merits in no way pre-determines the result of a regulatory appeal hearing, should one be granted.

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[2] *Ibid* at 334
[3] See, Alberta Energy and Utilities Board Decision 2003-009, January 28, 2003

2. Irreparable Harm

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. The test is whether "no fair and reasonable redress can be had in a court of law unless the injunction is granted and that its refusal would be a denial of justice." The question is adequacy of damages as compensation, not complete impossibility.[4]

The Von Tiesenhausens argue that because the nighttime comprehensive sound level approaches current allowances, it is likely that the permissible noise allowances under Directive 038 will be exceeded following construction. They argue loss of sleep over a protracted period amounts to irreparable harm.[5]

Veresen argues that its projected noise levels are in compliance with D038, and the additional mitigation measures should ensure that the noise allowances are not exceeded following construction. Further, Veresen argues that there is no evidence of additional construction noise, and that, as a result, the harm complained of is unlikely to materialize prior to the resolution of the regulatory appeal process.

The Von Tiesenhausens are unable to demonstrate that they will suffer irreparable harm if the stay is not granted. Construction noise is temporary in nature, should only occur during daytime hours, and is not regulated by the AER.

The Von Tiesenhausens have not been able to demonstrate irreparable harm from the denial of the stay that cannot be compensated in damages or additional mitigation, and therefore have not satisfied the second branch of the stay test.

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. The Von Tiesenhausens have failed to satisfy the second part of the test (demonstrating irreparable harm), so consideration of the third part of the test (balance of convenience) is, strictly speaking, unnecessary. Nevertheless, we will consider it for the sake of thoroughness.

The assessment of the balance of convenience requires the determination of which of the two parties will suffer the greater harm from the granting or refusal of the stay, pending a decision on the merits.

Veresen asks the Delegates to consider the impacts of project delays, which would impose significant costs and inconvenience. The delegates must then consider whether the Von Tiesenhausens will suffer any harm if the stay is not granted that could not be compensated in damages.

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[4] *May v 1986855 Alberta Ltd.*, 2018 ABCA 94, at para 14
[5] *Angerer v Cuthbert*, 2017 YKSC 41, at para 38

The Delegates consider the substantial cost and disruption to the construction schedule to be the greater harm when weighed against the absence of clear and non-speculative evidence of irreparable harm. Thus, the balance of convenience favours the denial of the stay of proceedings.

Consequently, the AER finds, in addition to failing to demonstrate irreparable harm, the Von Tiesenhausens have not established that the balance of convenience favours the AER granting the stay.

CONCLUSION

The Von Tiesenhausens have not satisfied the test for granting the stay request.

The Delegates also considered whether there was a lack of procedural fairness because the Noise Impact Assessment (**NIA**) was allegedly not provided to the Von Tiesenhausens. The NIA was filed as part of Veresen's application and was available to the Von Tiesenhausens through the information request (**IR**) process. The Delegates find that there was no breach of procedural fairness, or, in the alternative, there was no prejudice arising.

The AER will issue further correspondence regarding the process for filing submissions on the request for regulatory appeal in due course.

Sincerely,

<Original signed by>

Jeffrey Moore
Senior Advisor, Legal and Regulatory

<Original signed by>

Elizabeth Grilo
Senior Advisor, Regulatory

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Tyler Callicott
Director, Enforcement and Orphaning,
Regulatory Compliance