

**Via Email**

August 10, 2016

DLA Piper (Canada) LLP

Bennett Jones LLP

**Attention: Peter S. Jull, Q.C.****Attention: Blake Williams**

Dear Mr. Jull and Mr. Williams,

**Re: Proceeding ID. 341  
Shell Canada Limited (Shell) Rocky 7 Pipeline Project  
Application Nos. 1823846 and PLA 150215 (Applications)  
Motion by O’Chiese First Nation Pursuant to Sections 14(2) and 44 of the Rules**

On July 29, 2016, O’Chiese First Nation (OCFN) filed a motion requesting that the Alberta Energy Regulator (AER) order Shell to provide further and better responses to certain information requests (IRs) made by OCFN (Motion) pursuant to sections 14(2) and 44 of the *Alberta Energy Regulator Rules of Practice* (Rules). In particular, OCFN requests that the AER order Shell to provide a substantive response to OCFN’s IRs 01, 02, 07, 08, 09 and 10 (questions 1, 4 and 5).

On August 4, 2016, the AER received Shell’s response to the Motion. On August 5, 2016, the AER received OCFN’s reply to Shell’s response.

The hearing panel has considered the parties submissions in relation to the Motion and asked that I communicate its decision to the parties. For the reasons that follow, the panel has decided to dismiss the Motion.

**Background**

After seeking feedback from the parties on the proposed scope of the hearing, the panel provided direction on the issues to be addressed in the hearing in a letter dated June 10, 2016 (Process Letter). The Process Letter advised the parties that the panel will consider and hear evidence and submissions on issues including:

- Potential impacts of the Applications, including impacts on OCFN and environmental and social impacts.

The Process Letter further directed that certain matters would not form part of the issues in the hearing and that the panel would not hear evidence or submissions in relation to them. These matters included:

- The adequacy of Crown consultation associated with the rights of aboriginal peoples (as provided in section 21 of the *Responsible Energy Development Act* (REDA));
- The Aboriginal Consultation Office (ACO) consultation process and requirements, including ACO consultation adequacy, and the operation of the ministerial order issued on October 31, 2014 (*Energy 105/2014* and *Environment and Sustainable Resource Development 53/2014*) (Ministerial Order);

- Compensation for impacts of the Applications on OCFN.

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The Process Letter also provided the parties with direction regarding deadlines for the exchange of IRs and responses. The resulting exchange of IRs and responses gave rise to this Motion.

Section 12(1) of the Rules sets out the purpose of the IR process:

**Information request**

12(1) If a notice of hearing contains a schedule referred to in section 8(3), or the Regulator has otherwise set out in writing a process for the filing and serving of information requests, a party may request another party, within the time limit set out by the Regulator, to provide information necessary

- (a) to clarify any documentary evidence filed by the other party,
- (b) to simplify the issues,
- (c) to permit a full and satisfactory understanding of the matters to be considered, or
- (d) to expedite the proceeding.

Information Requests 01 and 02

As provided above, the panel has decided to dismiss OCFN's motion for further and better responses to IRs 01 and 02. These IRs largely relate to material Shell prepared for the ACO, and information communicated between Shell and the ACO within the ACO's process.

The ACO and AER have distinct responsibilities and administer distinct processes to satisfy those responsibilities. This distinction is emphasized in section 21 of REDA, which expressly prohibits the AER from assessing the adequacy of Crown consultation associated with the rights of aboriginal peoples (i.e., the AER must not assess the work of or decisions made by the ACO). It is also highlighted by the Ministerial Order and the *Joint Operating Procedures for First Nations Consultation on Energy Resource Activities (Joint Operating Procedures)* which sets out the procedures to administer and coordinate the operations of the ACO and AER on matters relating to First Nations consultation.

The ACO is responsible for determining the need for and adequacy of First Nations consultation under the Government of Alberta's policy and guidelines. Under the *Joint Operating Procedures*, an ACO adequacy decision is required before the AER can render a decision on an application for a specified enactment approval (e.g., PLA 150215). The ACO may also provide advice to the AER on mitigating potential impacts on Treaty rights and traditional uses. This advice may be considered by the AER in its decision-making on an application for a specified enactment approval. In this case, the ACO's adequacy report assessed consultation as adequate and provided no advice on actions required to address potential impacts on OCFN's Treaty rights and traditional uses.

Information prepared for the ACO by a project proponent and the communications between those parties is intended for a specific purpose: to document the consultation that has occurred or needs to occur, in order to permit the Crown to make a decision on consultation adequacy. Information prepared or communicated for such a purpose is not intended for other purposes or to have universal application, and the panel is not satisfied that such information is relevant to or probative of the issues the panel must consider in this proceeding.

As a statutory decision-maker, the AER is confined to the powers and responsibilities conferred on it by legislation. The legislation requires the AER, when it makes a decision on the Applications, to take into account the potential impacts of the Applications on OCFN members, and on the lands and natural resources they commonly use. The AER does not have or share the Crown's duty to consult and has no jurisdiction to assess the adequacy of Crown consultation. Accordingly, the ACO and the AER require different information when they undertake their respective responsibilities.

The panel understands that through IRs 01 and 02, OCFN is seeking information relating to:

- the steps Shell took and methodology Shell used to identify and assess the potential impacts of the Applications on OCFN and to determine possible mitigation measures; and
- Shell's conclusions on or analysis of the potential impacts of the Applications on OCFN.

The panel is satisfied that Shell has filed information in relation to these matters on the record of this proceeding. OCFN can pursue any deficiencies in this information in the course of filing its own evidence and cross-examining Shell's witnesses at the hearing. The panel is satisfied that OCFN is in a position to make an informed response to the Applications, and in particular, to adequately respond to the question of the potential impacts of the Applications on OCFN. Accordingly, the panel finds that the information requested in IRs 01 and 02 is not necessary to achieve the purposes set out under section 12(1) of the Rules.

The panel notes that IRs 01 and 02 are framed in such a way that they require the disclosure of information prepared for or communicated within the context of the ACO's process. In the panel's view, this information is not necessary in order to understand the potential impacts of the Applications on OCFN members, and on the lands and natural resources they commonly use. OCFN has the opportunity to file direct evidence regarding such impacts and to test the evidence already filed in this regard by examining Shell during the oral portion of the hearing. In the panel's view, direct evidence on the issues before the panel is far more reliable and useful than indirect information that was prepared for another purpose (i.e., ACO directed consultation).

Furthermore, the panel notes that the ACO may still provide advice to the panel on mitigating potential impacts on OCFN's Treaty rights and traditional uses. On August 3, 2016, the ACO advised the AER and the parties that it will be attending the hearing. As provided in the *Joint Operating Procedures*, "the ACO may observe the hearing and may provide an ACO hearing report containing advice on any impacts on Treaty rights and traditional uses that were raised during the hearing and not previously addressed by the consultation process." The panel will make a request for this advice before closing the evidentiary portion of the hearing.

Finally, despite OCFN's assertion that the purpose behind the information requested in IRs 01 and 02 is not to challenge the ACO's finding on consultation adequacy or the ACO's process, the panel is concerned that compelling Shell to provide that information would very likely lead to that issue being canvassed in evidence in the hearing. As directed in the Process Letter, these matters are outside the scope of this proceeding. The panel is not prepared to open the door to that risk. The panel reminds the parties that an AER hearing is not the proper venue in which to examine or challenge the ACO's process or the resulting adequacy decision.

Information Requests 07, 08, 09 and 10 (Questions 1, 4 and 5)

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As provided above, the Panel has decided to dismiss OCFN's motion for further and better responses to IRs 07, 08, 09 and 10 (questions 1, 4 and 5). These IRs relate to the process Shell followed to determine and assess the potential impact of the Applications on other rights holders within or in proximity to the project right-of-way, including Grazing Lease, Forestry Management Agreement and Registered Fur Management Agreement holders, and to determine mitigation for the same, including compensation, if any, paid or payable to those rights holders.

The AER does not have jurisdiction to address matters related to compensation, including compensation for land use and potential impacts of the Applications. The Process Letter excluded "Compensation for impacts of the Applications on OCFN" from the scope of this hearing.

The panel is satisfied that it has sufficient information in relation to the potential impacts of the Applications on the other rights holders referenced by OCFN to proceed to a fair hearing of the Applications. Moreover, the panel is not persuaded that such information is relevant to the question of potential impacts of the Applications on OCFN or appropriate mitigation measures for any such impacts. The panel does not find that the information requested in IRs 07, 08, 09 and 10 (questions 1, 4 and 5) is necessary to achieve the purposes set out under section 12(1) of the Rules. As provided above, the panel is satisfied that OCFN is in a position to make an informed response to the Applications, and in particular, is in a position to adequately respond to the question of the potential impacts of the Applications on OCFN members, and on the lands and natural resources they commonly use.

Sincerely,

*<original signed by>*

**Alison Koper**

Legal Counsel

cc: Sharilyn Nagina, DLA Piper (Canada) LLP  
Tim Myers, Bennett Jones LLP  
Meighan LaCasse, AER  
Greg McLean, AER