Alberta Energy Regulator

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November 17, 2019

By email only

Lawson Lundell LLP
Attention: Shailaz Dhalla

Dentons LLP
Attention: Bernard Roth

Alberta Justice
Attention: Vivienne Ball

Counsel:

Re: Proceeding 384
Pure Environmental Waste Management Ltd. Additional Filing

This letter is further to my letter of November 15, 2019 which provided the hearing commissioner panel's decision not to permit Pure Environmental Waste Management Ltd. (Pure) to file on the record of Proceeding 384 the documents it submitted to the Alberta Energy Regulator (AER) on Thursday, November 14, 2019. This letter contains the panel's reasons for that decision.

Background

On October 7, 2019, the panel issued a letter setting out deadlines for filing hearing submissions in this matter. That letter indicated that hearing submission deadlines in proceeding 384 were as follow: Pure - October 22, 2019; Suncor Energy Inc. (Suncor) and Alberta Agriculture and Forestry (AAF) – November 1, 2019; and, Pure Reply – November 8, 2019. The letter also confirmed that the hearing was to commence on November 18, 2019.

In accordance with the panel's direction, Pure filed its submission on October 22, 2019. The document was entitled Hearing Submission of Pure Environmental Waste Management Ltd. Proceeding 384. It was comprised of 6 tabs. Tab 1 was listed in the document as Overview of the Application. Tab 2 was listed as *Curriculum Vitae* Pure Witnesses. Tabs 3 to 6 were listed as 4 expert reports, including those of Darrell Cotterill and Ken Glover.

Suncor and AAF each filed their submissions on November 1, 2019, and Pure took advantage of its opportunity to file a reply submission on November 8, 2019.

Pure provided no indication that it intended to file further materials in this proceeding.

On November 14, 2019 at about 5:15 pm, Pure's counsel submitted a letter to the AER with enclosed documents for filing. Those documents (the additional documents) were listed in the letter as:

1.Revised Reply Expert Report of Darrell Cotterill (Errata).pdf (originally filed as Tab 1 to Exhibit 18.01)

2. Revised Expert Report of Ken Glover (Errata).pdf (originally filed as Tab 6 to Exhibit 13.02)

3. Portions of Suncor's Meadow Creek East (MCE) application materials filed with the AER:

a. MCE Application.pdf

b. MCE Baseline Report for Hydrology.pdf

c. MCE Impact Assessment Report for Hydrogeology.pdf

4. Portions of Suncor's Meadow Creek West (MCW) application materials filed with the AER:

a. MCW Application.pdf

b. MCW Impact Assessment Report for Hydrogeology.pdf

The panel offered the parties an opportunity to provide, by noon on November 15, 2019, comments on whether these documents should be accepted for filing.

Suncor's Submissions

Suncor provided its comments indicating it objected to the filing of the additional documents. It noted that because the additional documents were inaccessible as originally provided, it had only received the documents on the morning of the 15th. Suncor further noted that the first two additional documents, titled "errata" to the reports of Mr. Glover and Mr. Cotterill, contained new information, not contained in the original reports. It further noted that errata filings are not an opportunity to file fresh evidence and that this new evidence should have been introduced in an earlier submission. Suncor stated that to respond to this additional information, which is fracturing-related evidence, Suncor's witnesses

would have to physically re-examine the core and Suncor might have to add another witness panel.

Suncor also submitted that within the additional documents, Pure is attempting to file the entirety of Volume 1 of the Meadow Creek East (MCE) and Meadow Creek West (MCW) applications, along with the entire Hydrology study for MCE and the entire Hydrogeology study for MCW. Together, these documents contain several thousand pages of material. Suncor objected to the MC application material being filed as Pure's evidence on the basis that it was late and that filing it would be unfair to Suncor. Suncor stated that Pure's witnesses had no role in authoring these materials and therefore cannot adopt them as evidence. While Suncor's witnesses are prepared to speak to specific portions of the MC applications that are expressly referenced in the written submissions in Proceedings 384 and 386, Suncor submitted that those witnesses were not involved in developing the MC applications beyond the specific references in the submissions.

Finally, Suncor observed that the proceedings are being carried out on an expedited basis at Pure's request and that the oral hearing will commence on November 18, so that it is not possible for Suncor's witnesses to review and be prepared to speak to the MC application materials Pure seeks to file.

No other parties commented on Pure's additional documents.

Pure's Submissions

Pure provided a response to Suncor's comments on the additional documents. Pure submitted that the panel's October 22, 2019 deadline for filing hearing submissions did not establish a deadline for filing all documentary evidence and while Pure did attach most of its documentary evidence to its submissions, that fact does not oust Pure's right to file additional documentary evidence in accordance with the *Alberta Energy Regulator Rules of Practice* (the Rules of Practice). Pure submitted that section 53 of the Rules of Practice allows filing of documentary evidence before the commencement of the hearing and allows Pure to file the additional documents.

Pure also provided a description of the additional documents. The additions to the expert reports of Mr. Glover and Mr. Cotterill include core photographs and a re-interpretation of a figure from Suncor's submission and additional text in relation

to the re-interpretation. Pure asserted that this material is within the scope of the two original expert reports and does not introduce new areas of inquiry. It stated that Suncor is aware of the issues to which the additions to the two expert reports relate.

With regard to MC materials, Pure submitted that since its experts reference the MC applications throughout their reports, and Suncor did not object to these references, these documents would be filed for convenience and completeness of the evidentiary record. Pure further asserted that Suncor must have intended the AER to rely on the MC applications because it submitted them when it applied for its development in that area. Pure also suggested that Suncor should know the portions of the MC applications that may be raised by Pure from the references to those materials in Pure's submissions.

Pure further submitted that even if the additional documents are being submitted late, the panel should permit them to be filed using its discretion under sections 45 and 55 of the Rules of Practice because this additional information is necessary to permit a full and satisfactory understanding of the issues in this matter.

Panel Reasons

The panel has the discretion under section 45 of the Rules of Practice to permit the late filing of material in its proceedings. In the present situation, the panel does not grant its permission to Pure to do so.

The panel rejects Pure's position that the deadlines set in the October 7 letter for "submissions" did not set a deadline for all documentary evidence. It did. Pure seems to be suggesting that written submissions are not evidence. They are. The term "hearing submissions" refers to the documentary evidence that the applicant intends to rely upon in the hearing, beyond what is contained in its application. Any other interpretation would potentially lead to a free-for-all where parties could, after filing their submissions as per the deadlines set by the AER, continuously file additional evidence. That is clearly not the intent of the Rules of Practice. The guiding principle for the AER's procedures is fairness. It is that principle that must be applied when interpreting the Rules of Practice. Allowing parties to surprise one another by filing documentary evidence at any time they choose leading up to the start of the hearing would create unfairness for all the parties and a profoundly unfair and chaotic proceeding.

The panel also rejects Pure's submission that section 53(1) of the Rules of Practice permits its attempted late filing. That section states:

> 53(1) Unless the Regulator otherwise directs, if a party intends to present documentary evidence in an oral hearing, or is directed to do so by the Regulator, the party shall file the documentary evidence and serve a copy of it on the other parties before the hearing takes place and in accordance with any time limits set out by the Regulator. [underlining added]

Contrary to Pure's suggestion, this section does not allow documentary evidence to be filed at any time by a party, so long as it is filed before the commencement of the hearing. What this section, along with section 24, does indicate is that if a party intends to rely on documentary evidence in the oral hearing, that evidence must be: 1) filed prior to the start of the hearing; 2) served on the other parties at the same time it is filed; and, 3) filed in accordance with any deadlines for filing set out by the panel. In this case, the filing deadlines were clearly set out in the October 7 letter. The implication of this section for Pure is that it should have filed all of its documentary evidence in either its October 22 submission or its November 8 reply submission. The additional documentation was filed in a manner that did not comply with the October 7 direction and did not comply with section 53.

While Pure did not directly speak to the suggestion that the additional information relating to the reports of Mr. Grover and Mr. Cotterill were merely "errata", the panel does note that this additional information was identified in the November 14 letter as "Errata". Filing errata, a clerical or administrative correction to evidence, is permitted after the filing deadline. However, the additional information relating to the reports of Mr. Grover and Mr. Cotterill is a substantive addition to and not a clerical or administrative correction of the reports of those witnesses and therefore is not admissible as errata. It is not an answer for Pure to say that this additional information does not open new areas of inquiry. Expert reports are not "living trees" which are constantly growing as parties continuously add to the reports. It makes no difference if the additions do not introduce new areas of inquiry. It would be unfair to other parties to allow a party to continuously make substantive changes or additions to their written expert evidence.

Even if this panel were to accept Pure's novel interpretation of the Rules of Practice and the panel's October 7, 2019 letter, it would still not exercise its

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discretion under section 45 of the Rules of Practice and allow the additional materials to be filed because it would be unfair to do so. It is unfair to other parties to allow Pure to file further evidence, particularly when there is so much of it, 3 days before the commencement of the hearing. The panel must weigh the value of the proffered evidence against the unfairness to other parties. Pure is correct that the panel may, per section 55 of the Rules of Practice, direct a party to file materials where it considers the material necessary to permit a full and satisfactory understanding of an issue. However, in this case the panel is satisfied that it already has sufficient documentary information to proceed to a fair hearing and that the additional information, including the MC application documents, is not necessary. In light of this conclusion and the unfairness to other parties if Pure were permitted to file the material, the panel cannot permit the late filing of the additional documents. Pure may choose to use select portions of the additional information as aids to its cross-examination of Suncor.

Section 51(1) allows the panel to permit the revision of a document. However, that section is not relevant as Pure was clear that it is not seeking to amend its hearing or reply submissions.

When considering an application for the late filing of evidence, a relevant consideration is also the reason why the material was not filed within the required time-frame. In this case, Pure has provided no explanation for the late filing.

Sincerely,

Meighan G. LaCasse
Counsel

cc: F. DeLuca, AER
T. Turner, AER
K. Dumanovski