

2015 ABAER 002

Pembina Pipeline Corporation Prehearing Meeting Applications for Two Pipelines Fox Creek to Namao Applications No. 1806873 etc.

Introduction

[1] The Alberta Energy Regulator (AER) held a prehearing meeting in Spruce Grove, Alberta, on May 14, 2015, before a panel comprising hearing commissioners R. C. McManus, M.E.Des. (presiding); C. A. Low, B.Sc., LL.B., LL.M.; and B. M. McNeil, B.Sc. (Ag.), C.Med.

[2] On May 25, 2015, the hearing panel sent a letter to all the parties that attended the meeting setting out the panel's decisions. The panel has determined that the information in the letter may be of value to other interested parties and has therefore decided to issue this decision report. This report contains the same information that was provided in the letter.

[3] The prehearing meeting addressed two issues of primary concern:

1. An adjournment of the hearing was requested and has been granted. The new hearing schedule appears on the last page of this decision.
2. Some parties requesting participation had signed confirmations of nonobjection. The panel has, however, confirmed their right to participate.

[4] The *Responsible Energy Development Act (REDA)* requires the AER to provide for the “efficient, safe, orderly and environmentally responsible development of energy resources in Alberta.”¹ It also states that the AER must consider the interests of landowners when reviewing applications.²

[5] When a matter is referred to hearing commissioners, a panel is appointed to establish a hearing process for the application. In determining procedural matters, the panel takes guidance from *REDA*, its regulations, and its rules. One of the panel's most important responsibilities is to ensure that the hearing process is fair. This includes ensuring that parties are provided with adequate notice of the hearing and application and that they have an opportunity to reply or to be heard.

¹ *REDA*, s. 2(1)(a).

² *REDA*, s. 15 and the *REDA General Regulation*, s. 3.

[6] The process established by the panel is intended to be fair, efficient, and effective for all concerned: for participants as well as the applicant.

[7] The following issues were considered at the prehearing meeting:

1. adjournment request;
2. timing and duration of the hearing, including estimates of witness numbers;
3. advance cost requests;
4. formal information request process;
5. collective participation opportunities;
6. signed confirmations of nonobjection by certain members of the Grassroots Alberta Landowner Association (Grassroots);
7. hearing structure (in the community); and
8. hearing schedule.

Adjournment Request

[8] On April 17, 2015, the AER issued a notice of hearing of the applications, setting July 13, 2015, as a hearing start date. At the prehearing meeting, participants expressed concerns about the hearing schedule and its impact on their ability to participate and be heard in a meaningful way.

[9] In response to the July 13 hearing schedule, Grassroots submitted a letter dated May 5, 2015, requesting that the hearing be adjourned to October 26, 2015, at which time farming and harvesting activities would be largely completed and their members would be able to fully and effectively participate.

[10] At the prehearing meeting, the panel heard submissions from all the parties about the Grassroots adjournment request. Other than the applicant, all parties spoke in favour of the adjournment.

[11] Grassroots noted that its more than forty members represent approximately a third of the lands (70 parcels) affected by the proposed Pembina project.³ They submitted that the current schedule would prevent them from attending to their farming businesses and engaging fully in the hearing process. Grassroots also stated that a shorter adjournment than requested, for example into August, would present even more difficulties for its members.

³ Transcript, p. 80, lines 1–3

[12] Through comments read into the record via the online audio webcast, Michael and Loreen Brenneis, also farm owners, compellingly supported the Grassroots adjournment proposal, saying that “the current scheduled time is economically detrimental to our farm operations and livelihood.”⁴

[13] The Brenneis also noted that farming landowners forego revenues and incur expenses if they are not available to work their lands during the times of the year that are operationally critical and have unpredictable weather.

[14] One Métis group and three First Nations, the Gunn Métis Local 55, the Driftpile First Nation, the Alexander First Nation, and the Alexis Nakota Sioux Nation, also spoke to the proposed adjournment. They advised that the July 13 hearing schedule would directly conflict with the annual Lac Ste. Anne pilgrimage, which takes place from July 18 to 23.

[15] The pilgrimage has been taking place for generations and includes weeks of advance preparation that would directly conflict with preparing submissions, providing direction to their experts, and participating in the hearing.

[16] Pembina opposed the adjournment request, submitting that the July 13, 2015, hearing start date is fair and reasonable.

[17] The decision to grant an adjournment is discretionary. The panel must balance fairness and prejudice to the parties. What is fair depends on the circumstances. In this instance relevant factors considered by the panel included the following questions:

[18] Q1. What is the nature of the application?

The proposed project is significant. The pipelines would extend approximately 270 kilometres through privately owned lands, much of which is farm land, and through public lands, which fall within the traditional territories of several First Nations and Métis communities.

[19] Q2. When was the request made, i.e., was it made well in advance of the hearing date or was it made on the opening day?

The panel established the original hearing schedule without consulting the parties, with a view to getting the matter to hearing in a timely manner. The request for an adjournment was made shortly thereafter, well in advance of the hearing date.

[20] Q3. Have there been any previous requests?

This was the first request for an adjournment. At this time, no submission of any party, including the applicant, raises a concern among the panel that the request is a mere attempt to delay the proceeding.

⁴ Transcript, p. 57, lines 23–25 & p. 58, lines 1–2

[21] Q4. Was the hearing schedule established through consultation with the parties?

The panel established the original hearing schedule, and the participants have demonstrated to the panel's satisfaction that keeping to the original schedule would be unfair and would make it difficult for them to effectively engage in the process. Specifically,

- the current timing conflicts with the business of the farming landowners;
- the current timing conflicts with the annual Lac Ste. Anne pilgrimage;
- many of the participants need to secure advance funding before they retain expert advisors; and
- the current timing would force the participants to rush to secure expert evidence and would make it more difficult to find ways to collaborate during the proceeding.

[22] Q5. Are there any concerns about an unnecessary or unjustified delay?

The applicant noted that the participants have known about the applications for over a year. However, no one could know that this application would be set down for a hearing until April 9, 2015, at the earliest, when the chief hearing commissioner wrote to the applicant and those who filed statements of concern to notify them of that fact. Comments from all parties, including the applicant, indicate to the panel that prior to and since receiving that notice, they have been and continue to be involved in genuine attempts to engage with each other in order to resolve concerns. Time does not appear to be wasted.

The panel accepts the submissions of the participants that they could not reasonably be expected to have started preparing for the hearing or retain experts before the notice of hearing was issued.

[23] Q6. What would be the prejudice to the participants if no adjournment is granted?

The panel is satisfied that prejudice to the participants resulting from the original hearing date outweighs any potential prejudice to the applicant of an adjournment. Participants provided specific examples of how they would be prejudiced, including

- being forced to choose between participating in traditional practices and gatherings, or participating in the hearing;
- being compromised in their ability to provide helpful submissions in the most efficient manner; and
- detrimental consequences to farm operations and livelihood.

[24] Q7. What would be the prejudice to the applicant if an adjournment is granted?

On the other hand, the applicant did not provide any specific examples of how it might be prejudiced. The applicant's submissions at the prehearing meeting focused on fairness. It submitted that to delay the

hearing and frustrate the applicant's expectation of a timely decision on its proposed project would be unfair.

[25] The applicant's desire for an expeditious process is understandable. Protracted hearing processes and unnecessary delays are to be avoided. However, in this case, the panel believes that the balance of fairness and potential prejudice weighs in favour of the adjournment.

[26] The panel acknowledges that a shorter extension to August or September would present more conflict with agricultural operations and traditional harvesting activities by the Métis and First Nations.

[27] The panel therefore accepts Grassroots' request for adjournment and will reissue a notice of hearing schedule with a hearing date of October 26, 2015. Parties should refer to the schedule at the end of this decision to inform themselves of other relevant timelines.

[28] Finally, the parties should understand that the panel's goal is to facilitate a fair and more effective and efficient hearing for all parties. In light of

- the participants' submissions that an adjournment would enable them to collaborate and
- the view expressed by all participants that avoiding duplication and overlap was desirable and more likely to be achieved with more time before the hearing start date,

the panel expects the participants to explore opportunities to collaborate and to make concerted efforts to avoid duplication and overlap.

Timing and Duration of the Hearing

[29] Section 19.1 of the *Alberta Energy Regulator Rules of Practice (Rules)* requires hearing panels to establish time limits for the presentation of evidence, questioning of witnesses, and argument, and possibly other procedural matters. Section 9.1(1) of the *Rules* requires the panel to specify the nature and scope of participants' permitted participation.

[30] Parties provided preliminary estimates of the types of expert witnesses they may require, the total number of witnesses they may seat, and the time they may require. However, it was clear that it is too early in this process to establish firm time limits for each participant relating to presenting evidence and questioning witnesses. The panel plans to establish such time limits after

1. providing direction on the issues to be addressed at the hearing, as required by section 9.1(1)(c) of the *Rules*;
2. providing parties the opportunity to exchange further information through the information request process; and

3. hearing more from the participants about timing either through counsel, another prehearing meeting, or both.

[31] When setting time limits, one of the things that the panel will take into account is the practice of pre-filing written evidence, in particular pre-filed written expert evidence, to ensure that oral evidence in chief is not lengthy.

[32] The panel will provide direction on the issues to be addressed by participants at the hearing as soon as possible. Directions will be based on materials on the record to date, including requests to participate, statements of concern, or both; the application; and submissions made at the prehearing meeting.

Advance Cost Requests

[33] Gunn Métis Local 55 indicated that they have already requested interim or advance costs from the applicant. Other parties indicated that they plan to make such requests once they have identified their requirements for expert evidence and developed budgets for the cost of the necessary experts.

[34] The parties agreed that they have been dealing effectively with the issue of advance costs among themselves. The panel encourages them to continue to do so.

[35] If an issue arises about advance costs requiring a decision of the panel, parties may file a motion in accordance with the *Rules* at any time on or before June 26, 2015. Pembina will have five business days from receipt of the motion to file a written response. The participant bringing the motion will then have three business days to file any reply. The panel will issue a decision on the request or further directions as soon as practicable.

Formal Information Request Process

[36] All parties at the prehearing meeting stated that the applicant has been responsive to requests for information from participants.⁵ A number of participants suggested that deadlines be set for information requests (IR), or at least a final date for IRs, to help facilitate an efficient and timely process. August 17, 2015, will be the final date for parties to submit IRs and August 31, 2015, will be the deadline for responses to requests filed on August 17.

[37] The applicant requested a reciprocal IR process. Pembina may submit IRs to participants with the final date for submissions being August 17, 2015, and the final date for responses being August 31, 2015.

[38] This IR process is not mandatory. Parties should submit IRs only if they genuinely require specific information that is not available on the record of this proceeding or otherwise.

⁵ Pembina has not yet provided a requested biohazard review because it has not been able to access all the relevant lands.

[39] In keeping with the suggested “hybrid” IR process—an informal approach to IRs with time limits—the panel encourages parties to continue to exchange IRs and responses as early as possible. The panel’s expectation is that a party will receive a response to an IR within two weeks of receipt. Parties may ask for the panel’s direction regarding outstanding IR responses on or before September 4, 2015.

[40] Finally, the panel confirms that IRs and responses should be sent to all hearing participants and the AER and will be put on the public hearing record.

Collective Preparation and Participation Opportunities

[41] The panel encourages the participants to consolidate common issues and or resources where reasonable and practicable.

[42] Sharing experts and collective preparation and participation amongst the participants can enhance the effectiveness of the hearing process. Counsel indicated that the participants were open to this concept but will require additional time to participate collectively. While the panel acknowledges that each participant has unique needs and considerations, the panel would like to see participants identify common issues and shared concerns and address these jointly where possible.

[43] Counsel indicated that forming groups and preparing joint submissions requires more time. Accordingly, in the hearing schedule set out at the end of this letter, the panel has allowed an optional extended timeframe for parties choosing to file joint submissions.

[44] The panel expects counsel for the participants to update the AER on their plans for joint submissions or for consolidating common issues and or resources by June 26, 2015.

Grassroots and the Issue of Signed Confirmations of Nonobjection

[45] In a letter dated April 21, 2015, the panel granted preliminary participation to most of the members of Grassroots, excepting Larry Hickie, Gene and Jeannette Brown, and Rick and Lorette Nadon. In Pembina’s response submission dated May 8, 2015, Pembina stated that it did not understand that the panel meant to extend such entitlement to any Grassroots member who had previously confirmed nonobjection to the project. Pembina submitted that, under section 9(3)(a) of the *Rules*, the AER should refuse to allow those parties to participate in the hearing.

[46] The AER’s participant involvement requirements are outlined in *Directive 056: Energy Development Applications and Schedules*. This directive requires applicants to obtain confirmation of nonobjection from parties that may be directly and adversely impacted by a proposed project. *Directive 056*, *REDA*, and the *Rules* do not preclude parties who have previously signed confirmations of nonobjection from participating in a hearing. Grassroots confirmed its intention to participate as a group and as a result any increase in the number of individual members of the group should have a negligible effect on the hearing.

[47] Members of Grassroots who previously signed confirmations of nonobjection may participate in the hearing as part of the Grassroots group.

[48] Finally, the intent of *Directive 056* is to foster cooperative relationships between parties that lead to the resolution of concerns. Furthermore, the panel accepts the submission of Pembina that costs of participation are an issue should there be participation that, having been granted despite a confirmation of nonobjection, adds little to no value and may in fact be wasteful.

Hearing Structure, Including Traditional Knowledge in the Community

[49] At the prehearing meeting, participants expressed various concerns about their ability to take part in a meaningful way in the hearing process as originally proposed. The panel has two main goals in setting the hearing structure: ensuring a fair and efficient process and positioning itself to make a well-informed decision on these applications at the close of the hearing. To that end, the panel canvassed participants at the prehearing meeting about ideas relating to hearing structure. The specific ideas were as follows:

- consolidating common issues and resources;
- scheduling witnesses based on thematic areas; and
- travelling to the communities of the First Nations and Métis participants to hear oral evidence on traditional knowledge.

[50] The panel's views on collective preparation and participation are set out above. The matter is also dealt with specifically in the new hearing schedule issued with this prehearing decision.

[51] On the topic of a hearing structure based on themes, the panel heard a number of suggestions from participants. Possible themes included environmental impacts, engineering, and community health and safety.

[52] The panel is open to considering how witnesses might be scheduled to address concerns expressed about the burden on participants resulting from the need to be present for indeterminate periods of time to deal with issues as they arise in the course of the hearing. However, the panel is not convinced at this time that scheduling the hearing based on themes would effectively address those concerns. The panel welcomes further suggestions from participants and will revisit the issue closer to the hearing date in October.

[53] Counsel for each of the First Nations and Métis participants said that oral evidence of traditional knowledge given by community elders would form an important part of their presentation. They also noted that the demands of travelling to and attending a hearing can be difficult for community elders. The panel wants to minimize barriers to parties' ability to fully engage in the hearing process where it is

practicable to do so. If practicable, it would have to be done in a way that ensures that legislative requirements are met and procedural fairness is maintained for the applicant and other parties.

[54] To that end, the possibility of receiving oral evidence of traditional knowledge in the community was raised by the panel in the course of the prehearing meeting. As a result, counsel were not able to give more than a general indication of what their clients' views might be except for Pembina, the Alexander First Nation, and Mr. and Mrs. Brenneis. Pembina is not opposed to the idea as long as the evidence forms part of the public record. Counsel for the Alexander First Nation, who was accompanied by representatives of the Alexander First Nation⁶ expressed enthusiastic support for such an approach. Mr. and Mrs. Brenneis said that oral evidence of traditional knowledge heard in the community should be captured as part of the public record. Counsel for the Driftpile First Nation, the Alexis Nakota Sioux Nation, and the Gunn Métis all expressed interest in the idea.

[55] In light of the comments received at the prehearing meeting, the panel would like to further explore the idea of receiving oral evidence of traditional knowledge in the community. There are a number of procedural processes and logistics that would have to be worked out. The panel would have to ensure that oral evidence of traditional knowledge is gathered and included on the record in a manner that is respectful and fair for all parties.

[56] The panel asks counsel for the Alexander First Nation, the Driftpile First Nation, the Alexis Nakota Sioux Nation, and the Gunn Métis to advise the panel as soon as possible whether their clients are receptive to the idea. The panel also invites those parties to suggest dates that would work for them and express their views on how much time might be required for the panel to receive oral traditional evidence in their community.

[57] The panel heard that the annual Lac Ste. Anne pilgrimage, traditional harvesting, and other traditional activities occupy the First Nations and Métis participants from early July through September. The panel did not specifically ask about June availability of the First Nations and Métis participants. However, the panel is available in June and asks that the Alexander First Nation, the Driftpile First Nation, the Alexis Nakota Sioux, and the Gunn Métis consider that as a possibility when providing their suggestions.

[58] If counsel indicates that the idea of receiving oral evidence of traditional knowledge in the community is worth pursuing, the AER will follow up with each of the communities through counsel and AER stakeholder engagement staff. If the panel decides to proceed with receiving the oral evidence in the community, we will provide all parties with an outline of the plan and an opportunity to comment before a final determination is made to proceed in that manner.

⁶ C. Arcand, and R. Arcand, transcript, p. 16

Hearing Schedule

[59] After considering the views expressed by the parties about potential hearing dates and timelines for preparation of expert reports and for the reasons set out above, the hearing schedule is revised as follows:

Table 1. Hearing Schedule

Date	Action
To be determined	If decision is made to proceed – Oral evidence of traditional knowledge in communities
June 26, 2015	Collective submission update and advance of funds request
August 17, 2015	Final date for submitting IRs
August 31, 2015	IR process complete
September 11, 2015	First submission date
September 25, 2015	Submission date for joint submissions and for notice of questions of constitutional law
October 9, 2015	Applicant response deadline
October 12, 2015	Deadline for any preliminary motions
October 26, 2015	Hearing commences

Dated in Calgary, Alberta, on May 29, 2015.

Alberta Energy Regulator

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