



**Enforcement Staff of the
Alberta Utilities Commission**

Settlement Agreement with Persist Oil & Gas Inc.

October 11, 2023

Alberta Utilities Commission

Decision 28370-D01-2023

Enforcement Staff of the Alberta Utilities Commission

Settlement Agreement with Persist Oil & Gas Inc.

Proceeding 28370

Application 28370-A001

October 11, 2023

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Alberta Utilities Commission

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The Commission may, no later than 60 days from the date of this decision and without notice, correct typographical, spelling and calculation errors and other similar types of errors and post the corrected decision on its website.

1 Decision summary

1. In this decision, the Alberta Utilities Commission approves the Settlement Agreement between AUC Enforcement staff and Persist Oil & Gas Inc. related to the operation of a power plant without the required approval and in exceedance of the noise levels permitted by Rule 012: *Noise Control* (contraventions). In accordance with the Settlement Agreement, the Commission imposes a total penalty in the amount of \$112,900, consisting of an administrative penalty in the amount of \$11,475, and disgorgement based on the gross economic benefits earned during the operating period in the amount of \$101,425.

2 Background and AUC Enforcement staff's application

2. Persist operated a power plant from September 15, 2021, to September 20, 2022, without an AUC approval contrary to the requirements of Sections 11 of the *Hydro and Electric Energy Act*, and Rule 007: *Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations, Hydro Developments and Gas Utility Pipelines*. The power plant includes two 765-kilowatt (kW) gas generators that make up the power plant's total combined capacity of 1.53 megawatts (MW) and provides electricity for Persist's crypto-mining operations. Persist has a third 765-kW gas generator at the site that is inoperable. Persist acknowledged that the energy generated was consumed for its own cryptocurrency mining operation. Consequently, Persist was consuming this energy solely for its own use.

3. On October 22, 2021, Enforcement staff received a complaint from a nearby resident concerning the power plant operations. Persist admitted it did not have Commission approval to operate the power plant and that the noise impact assessment (NIA) conducted in December 2021, after the power plant's commencement, found it emitted excessive noise violating Rule 012. In response to a request by Enforcement staff, on September 20, 2022, Persist voluntarily shut down the power plant. The power plant did not operate after that time, until Persist obtained Commission approval to operate the power plant on April 24, 2023.¹

4. Enforcement staff and Persist engaged in a discussion to resolve issues of fact, alleged contraventions, and penalties arising from Enforcement staff's investigation. Those discussions resulted in Enforcement staff's current enforcement application to the Commission, and the associated Settlement Agreement between Enforcement staff and Persist. The contraventions were described in the enforcement application as follows:

As set out in the Settlement Agreement, Persist admits that it operated the power plant from September 15, 2021 until September 20, 2022 (operating period):

¹ Power Plant Approval 28114-D02-2023, Proceeding 28114, Application 28114-A001, April 24, 2023.

- (a) Without an approval, contrary to Section 11 of the *Hydro and Electric Energy Act*, and Rule 007: *Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations, Hydro Developments and Gas Utility Pipelines*.
- (b) In contravention of Rule 012: *Noise Control*.

5. In the Settlement Agreement, Persist admitted to the contraventions and agreed to the imposition of an administrative penalty of \$11,475 and disgorgement based on the gross economic benefits earned during the operating period, in the amount of \$101,425. The parties noted that a 25 per cent reduction had been applied to the administrative penalty in recognition of Persist's admission of the contraventions, and that a reduction had been applied to the gross economic benefits for disgorgement in recognition of the admissions, disclosures and level of cooperation provided by Persist. Enforcement staff submitted that the Settlement Agreement is in the public interest because it advances the objectives of the Commission's sanctioning authority, reflects the seriousness of the contraventions, and gives due regard to mitigating circumstances, including Persist's degree of cooperation during the investigation.

6. In this proceeding, Persist filed a statement of intent to participate stating that no further process was necessary and that the Settlement Agreement between it and Enforcement staff should be approved. The Commission issued one round of information requests (IRs) to Enforcement staff, to which Enforcement staff responded on September 8, 2023.

7. The Commission reviewed the application and Enforcement staff's responses to its IRs and found that no further process was required. As a result, the proceeding record was closed on September 13, 2023.

3 Should the Commission approve the settlement agreement?

8. The Commission's jurisdiction to consider and approve the Settlement Agreement is grounded in the Commission's general powers in sections 8 and 23 of the *Alberta Utilities Commission Act* and the administrative penalty section, Section 63. Based on information provided in the enforcement application and the Settlement Agreement, the Commission accepts that the contraventions occurred. The Commission will now consider whether to accept the Settlement Agreement as filed.

9. The Commission has consistently applied the "public interest test," which it has adopted from criminal law, to negotiated settlements in its enforcement proceedings.² The "public interest

² See Decision 27013-D01-2022: Enforcement Staff of the Alberta Utilities Commission - Allegations against ATCO Electric Ltd., Proceeding 27013, June 29, 2022, paragraphs 64-68; Decision 3110-D03-2015: Market Surveillance Administrator - Market Surveillance Administrator allegations against TransAlta et al., Phase 2 - request for consent order, Proceeding 3110, October 29, 2015, paragraphs 15-21; and Decision 26379-D02-2021: Enforcement staff of the Alberta Utilities Commission - Allegations against Green Block Mining Corp. (formerly Link Global Technologies Inc.), Westlock Power Plant Phase 1, Proceeding 26379, August 19, 2021, paragraphs 14-15; Decision 27391-D01-2023: Enforcement Staff of the Alberta Utilities Commission, Settlement Agreement with the City of Grande Prairie, Proceeding 27391, January 20, 2023, paragraphs 16-19; Decision 27948-D01-2023: Enforcement Staff of the Alberta Utilities Commission, Settlement Agreement with ATCO Gas and Pipelines Ltd, Proceeding 27948, March 7, 2023, paragraphs 17-20; Decision 27854-D01-2023: Enforcement Staff of the Alberta Utilities Commission, Settlement Agreement with the City of Calgary – Enforcement and Administrative Penalty, Proceeding 27854, March 14, 2023, paragraph 9. See also Bulletin 2016-10, Practices regarding enforcement proceedings and amendments to AUC Rule 001: Rules of Practice,

test” sets a high threshold for departing from a joint submission, such that “a trial judge should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.”³ The rationale for the high threshold for departing from joint submissions (or negotiated settlements in the regulatory context) is explained in detail in earlier Commission decisions that have decided whether to approve settlement agreements between Enforcement staff and contravening parties.⁴

10. The parties considered factors listed in Rule 013: *Criteria Relating to the Imposition of Administrative Penalties* when negotiating the Settlement Agreement. In assessing the seriousness of the contraventions (Section 4 of Rule 013), the parties highlighted the following information:

- (a) The harm that had been caused by Persist’s contraventions, including the failure of Persist to comply with legislation and associated regulatory requirement (Section 4(1)), as well as the harm to nearby residents that were subject to elevated noise levels following the commissioning of the power plant.
- (b) Persist materially benefitted from operating the power plant for approximately one year without approval (Section 4(8)).
- (c) The harm occurred for approximately one year (Section 4(17)). However, Persist worked to assess and resolve the noise problem from the time it became aware of the noise complaints filed with AUC Enforcement (Section 4(23)) and, on September 20, 2022, voluntarily shut down its operations, installed a noise deflection wall and remained shut down until it received Commission approval to operate.

11. The enforcement application notes that other factors enumerated in Section 4 of Rule 013 were not present. For example, there was no loss of life or endangerment of persons, there was no damage to property or the operation of the bulk electric system, and Persist did not engage in a cover-up, or resist or ignore Enforcement staff’s inquiry into the contraventions.

12. Enforcement staff also considered mitigating factors (Section 6 of Rule 013), noting that upon being made aware of the contraventions, Persist was responsive and co-operative. Enforcement staff submitted that taking these mitigating circumstances into account will incentivize respondents in future enforcement proceedings to take similar steps and co-operate with Enforcement staff.

13. In response to an information request from the Commission, Enforcement staff submitted that a reduction to the amount of disgorgement of economic benefits proposed in the Settlement Agreement was in the public interest, and that settlement agreements allow the parties to arrive at a resolution that can address harm in a creative and responsive manner, with guidance from Rule 013.

March 29, 2016, paragraph 13, which sets out the obligation for Enforcement staff to safeguard the public interest in pursuing the mandate to bring forward, and in appropriate cases to settle, enforcement proceedings.

³ *R v Anthony-Cook*, 2016 SCC 43, paragraphs 32 and 44.

⁴ See footnote 2.

14. Having considered the circumstances surrounding the contraventions and the agreement reached between the parties, the Commission is satisfied that the circumstances do not warrant a departure from the Settlement Agreement. The Commission concludes that the Settlement Agreement is in the public interest and approves it as filed.

4 Order

15. It is hereby ordered that:

- (1) The Settlement Agreement between AUC Enforcement staff and Persist Oil & Gas Inc., attached as Appendix 2 to this decision, is approved, as filed.
- (2) Persist Oil & Gas Inc., shall pay a total penalty in the amount of one hundred and twelve thousand, 900 hundred dollars (\$112,900), pursuant to sections 63(1)(b) and 63(3) of the *Alberta Utilities Commission Act*. The payment may be made via cheque or bank draft made out to the General Revenue Fund of Alberta and delivered to the AUC within 30 business days of the date of the Order. This payment is comprised of:
 - a. An administrative penalty in the amount of \$11,475, pursuant to sections 63(1)(a) and 63(2)(a) of the *Alberta Utilities Commission Act*; and
 - b. Disgorgement in the amount of \$101,425 to nullify, in part, the value of gains acquired from the unlawful operation of the power plant by Persist Oil and Gas Inc. during the operating period, pursuant to Section 63(2)(b) of the *Alberta Utilities Commission Act*.

Dated on October 11, 2023.

Alberta Utilities Commission

(original signed by)

Renée Marx
Commission Member

Appendix 1 – Proceeding participants

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| Name of organization (abbreviation) Company name of counsel or representative |
| Enforcement Staff of the Alberta Utilities Commission |
| Persist Oil & Gas Inc. |

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|--|
| Alberta Utilities Commission |
| Commission panel R. Marx, Commission Member |
| Commission staff N. Fitz-Simon (Commission counsel) M. Khan K. Surgenor G. Harasym |

Appendix 2 – Settlement agreement between AUC Enforcement staff and Persist Oil & Gas Inc.



28370_X0002_Settlement Agreement - AU

ALBERTA UTILITIES COMMISSION

IN THE MATTER OF the *Alberta Utilities Commission Act*, SA 2007, c A-37.2 and the regulations made thereunder;

AND IN THE MATTER OF the Alberta Utilities Commission Rule 001: *Rules of Practice*;

BETWEEN:

Alberta Utilities Commission Enforcement Staff

Applicant

-and-

Persist Oil & Gas Inc.

Respondents

Settlement Agreement

I Introduction and executive summary

1. In August 2022, Alberta Utilities Commission Enforcement staff (Enforcement staff) commenced an investigation in response to a complaint received concerning the operation of two generators with a total name plate capacity of 1.53 megawatts (MW) (the power plant) owned and operated by Persist Oil & Gas Inc. (Persist) in Rocky View County. Persist was notified of the investigation by letter dated August 16, 2022. The investigation concluded on October 25, 2022.

2. The investigation confirmed and, for the purposes of this settlement agreement, Persist admits that from September 15, 2021 until September 20, 2022 (operating period) it operated a power plant:

(a) Without an approval contrary to Section 11 of the *Hydro and Electric Energy Act*, and Rule 007: *Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations, Hydro Developments and Gas Utility Pipelines*.

(b) In contravention of Rule 012: *Noise Control*.

(Contraventions)

3. On September 20, 2022, at Enforcement staff's request, Persist voluntarily shutdown the power plant. The power plant did not operate after that time, until Persist obtained Commission

approval to operate the power plant on April 24, 2023. A copy of the power plant approval is attached as Appendix A.¹

4. Enforcement staff have entered into a settlement agreement with Persist to address the admitted Contraventions (Settlement Agreement). Persist was cooperative, forthright and responsive concerning all aspects of Enforcement staff's investigation. For the reasons set out in further detail below, the settlement includes an administrative penalty of \$11,475 and disgorgement based on the gross economic benefits earned during the operating period, in the amount of \$101,425. The amount of the administrative penalty and the amount of economic benefits to be disgorged reflect the settlement reached and the cooperation provided by Persist.

5. Enforcement staff consider that the Settlement Agreement fosters public protection, encourages compliance with the legislation and serves as a deterrent, and is therefore in the public interest. Enforcement staff and Persist therefore jointly request that the Commission approve the Settlement Agreement without variation.

II Agreed Facts

6. On September 15, 2021, Persist commenced operations. These operations included running two 765-kilowatt (kW) gas generators with a total combined capacity of 1.53 MW (power plant) to provide electricity generated from the power plant to its crypto-mining operations. Persist has a third 765-kW gas power plant at the site that is inoperable.

7. Prior to commencing operations, Persist did not:

- (a) Apply to the AUC for approval to operate the power plant;
- (b) Conduct a noise impact assessment (NIA) as required by Rule 012; or
- (c) Receive an approval under the *Environmental Protection and Enhancement Act*.

8. There are nine dwellings located within 1.5 kilometres (km) of the power plant. Prior to commencing operations, Persist did not consult with the residents of those dwellings and did not confirm whether there were persons directly or adversely affected by the power plant.

9. On October 22, 2021, Enforcement staff received a complaint from a nearby resident concerning the power plant operations. A copy of the complaint is provided as Appendix B.²

10. On December 20, 2021, FDI Acoustics Inc. issued a draft NIA for the site, which concluded that predicted cumulative sound levels exceed the nighttime permitted sound levels at seven of the nine assessed points of reception. That document also stated that the two operable Caterpillar Gensets that comprise the Persist power plant are the major noise contributors to the most affected dwelling.³

11. On June 29, 2022, an air quality assessment was completed which predicted that the crypto-mining operation's cumulative impacts would be less than the applicable air quality standards for all modelling averaging periods. However the maximum predicted cumulative

¹ Appendix A - AUC Approval, April 24, 2023.

² Appendix B - Complaint form.

³ Appendix C - Draft NIA dated December 20, 2021.

concentration for hourly and annual NO₂ and 24-hour PM_{2.5} were predicted to exceed the respective standards.⁴

12. In response to a request by Enforcement staff, on September 20, 2022, Persist voluntarily shutdown the power plant.

13. On November 18, 2022, Persist provided a photo of a noise deflection wall that had been installed at the site.⁵ Persist also provided a summary of the income from the bitcoin mining operation.

14. On February 17, 2023, FDI Acoustics issued a second NIA report which predicted that, with the addition of the noise deflection wall, the power plant and bitcoin mining operation would comply with the permissible sound levels specified in Rule 012.⁶

15. On March 9, 2023, Persist provided Enforcement staff with a copy of a notice dated February 22, 2023, and stated that the notice was issued to residents within 1.5 km of the site. The notice states Persist's intent to install generators and related equipment at the site, and that the site will operate within permissible noise levels.⁷

16. As of the date of this Settlement Agreement, the power plant is operating with proper approval from the Commission.

III Regulatory framework and governing legislation

17. Section 11 of the *Hydro and Electric Energy Act* states that no person shall construct or operate a power plant unless the Commission, by order, has approved its construction and operation. Section 13 of that act states that Section 11 does not apply to a person generating or proposing to generate electricity solely for the person's own use, unless the Commission otherwise directs.

18. Under Section 11 of the *Hydro and Electric Energy Act* and Section 1.4.3⁸ Rule 007 (former), a person may construct and operate a power plant without prior approval from the Commission provided that:

- (a) The person is generating electric energy solely for that person's own use.
- (b) The person is able to demonstrate that three conditions are satisfied before constructing or operating that power plant. Namely, that (1) the power plant complies with Rule 012, (2) there is no adverse effect on the environment and (3) no person is directly and adversely affected.
- (c) The power plant has a capacity of less than 10 MW.

⁴ Appendix D - Persist August 29, 2022 response to Enforcement staff, Draft Air Quality Assessment.

⁵ Appendix E – Photo of noise deflection wall.

⁶ Appendix F – Final Noise Assessment dated February 17, 2023.

⁷ Appendix G – Notice to landowners dated February 22, 2023.

⁸ Rule 007 was amended April 25, 2022. Section 4.2 sets out a checklist application that requires an applicant to confirm the same requirements as those in the former Section 1.4.3.

IV Admitted Contraventions:

19. For the purposes of the Settlement Agreement, Persist admits and agrees to the following contraventions:

- (a) *Contravention 1*: Persist constructed and operated the power plant from September 15, 2021 to September 20, 2022, without an approval contrary to the requirements of Section 11 of the *Hydro and Electric Energy Act* and Rule 007.
- (b) *Contravention 2*: Persist operated the power plant from September 15, 2021 to September 20, 2022, in contravention of Rule 012.

20. Persist admits that prior to commissioning the power plant, it did not:

- (a) Conduct a NIA as required by Section 3 of Rule 012 prior to commencing operations.
- (b) Determine whether any person would be directly or adversely affected by the power plant.
- (c) Apply for or receive approval under the *Environmental Protection and Enhancement Act* or determine whether the power plant meets the *Alberta Air Emission Standards for Electricity Generation* and the *Alberta Air Emission Guidelines for Electricity Generation*.

21. Persist further admits that the results of the NIA completed in December of 2021 revealed that the power plant was predicted to, and did, emit cumulative sound levels in excess of the permissible sound levels established under Rule 012. In November of 2022, Persist constructed a noise deflection wall, and an NIA completed on February 17, 2023, predicted that the power plant would comply with the permissible sound levels specified in Rule 012.

V Agreed terms and conditions of settlement

22. Section 63 of the *Alberta Utilities Commission Act* states, *inter alia*, that if the Commission determines in a hearing or other proceeding that a person has contravened or failed to comply with any provision of that act or any other enactment under the jurisdiction of the Commission or any Commission rule, it can impose an administrative penalty and any terms or conditions considered appropriate. The Commission has found that the reference to “other proceeding” includes a settlement process.⁹ The purpose of the Commission’s sanctioning authority is to achieve general and specific deterrence, encourage compliance and protect the public. As well, while sanctions are intended to be protective and preventative, they are not to be punitive.

23. The Commission makes enforcement decisions based on the relevant factors of the case before it and has enacted Rule 013: *Criteria Relating to the Imposition of Administrative Penalties*, to provide guidance when considering the imposition of an administrative penalty under the *Alberta Utilities Commission Act*. Section 4 of Rule 013 lists factors to be considered

⁹ See for example Decision 23013-D01-2018 (Errata): Application for Approval of a Settlement Agreement Between the Market Surveillance Administrator, TransAlta Corporation and Capital Power Generation Services Inc., Proceeding 23013, Application 23013-A001, August 24, 2018, paragraph 20.

in determining the seriousness of the offence and Section 6 lists mitigation factors to be considered.

24. Substantively, the Contraventions admitted to by Persist are:

- (a) Failure to obtain Commission approval for the power plant or meet the legislative requirements to commence operation of the power plant without prior approval;
- (b) Operating the power plant in contravention of Rule 012.

25. In assessing the seriousness of these Contraventions, of the 23 factors listed in Section 4 of Rule 13, the following matters are of note:

- (a) The harm caused by the Contraventions was the failure to comply with the legislation and associated regulatory requirements as well as the impact that the failure to comply, specifically the noise from the power plant, had on nearby residents (s. 4(1)). The December 2021 NIA concluded that the cumulative noise from the power plant operations was predicted to exceed the nighttime permissible sound levels at seven of the nine assessed points of reception.
- (b) Persist materially benefitted from operating the power plant for approximately one year without approval (s. 4(8)).
- (c) The harm occurred for approximately one year (September 15, 2021 to September 20, 2022) (s. 4(17)), however, Persist has worked to assess and resolve the noise problem (s. 4(23)). On September 20, 2022, it voluntarily shut down its operations and has installed a noise deflection wall.
- (d) Many of the other factors enumerated in Section 4 of Rule 013 are not present. For example: there was no loss of life or endangerment of persons, there was no damage to property or the operation of the bulk electric system, there was no fraudulent conduct or misrepresentation of material facts, the respondents did not engage in a cover up, resist or ignore Enforcement Staff's inquiry into the contraventions.

26. As noted, Section 6 of Rule 013 details factors to be considered in determining if any mitigation is warranted in the amount of the administrative penalty to be imposed. Many of those factors relate to the presence, strength, integrity and success of an existing compliance system; which, in the circumstances of these contraventions, are not applicable. However, mitigation factors such as the response and cooperation of Persist when made aware of the Contraventions do apply.

27. In view of Persist having:

- (a) Ceased operations in September 2022, after becoming aware of the complaint and investigation,
- (b) Taken steps to put in place sound attenuating measures to address the noise exceedance, and
- (c) Cooperated fully with Enforcement staff in the investigation,

the parties jointly request that the Commission issue an order requiring Persist to pay a total penalty of \$112,900 comprised of :

- (a) An administrative penalty in the amount of \$11,475 pursuant to sections 63(1)(a) and 63(2)(a) of the *Alberta Utilities Commission Act*; and
- (b) Disgorgement in the amount of \$101,425 to nullify, in part, the value of gains acquired from the unlawful operation of its power plant during the operating period pursuant to Section 63(2)(b) of the *Alberta Utilities Commission Act* and Section 7 of Rule 013.

28. The penalty amount includes a reduction of 25 per cent in recognition of Persist's admissions of the contraventions which avoids a protracted hearing and facilitates a timely resolution of this matter. The parties agree that the proposed penalty reflects the seriousness of the contraventions and achieves the public interest objectives of public protection, encouraging compliance as well as general and specific deterrence.

29. In addition, Enforcement staff have reviewed the financial documents provided by Persist concerning the gross economic benefits earned by Persist through its unlawful operation of the power plant. After applying a reduction to these gross economic benefits in recognition of the admissions, disclosure and level of cooperation provided by Persist, the parties agree that \$101,475 should be disgorged by Persist to nullify, in part, the economic benefits it received.

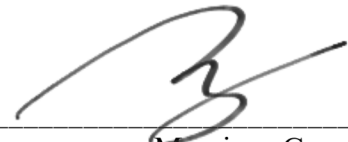
30. Sections 63(1)(b) and 63(3) of the *Alberta Utilities Commission Act*, authorize the Commission to direct any action specified in the order. Pursuant to this authority, the parties jointly request that the Commission issue an order requiring Persist to pay the \$112,900 penalty, payable to the General Revenue Fund within 30 business days of the date of the order.

VI General

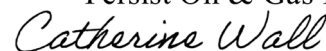
31. This Settlement Agreement includes facts admitted for the purpose of dispensing with formal proof thereof. Persist's agreement to the terms and conditions of this Settlement Agreement does not constitute an admission as to the facts or findings in any other civil or criminal proceedings.

32. Subject to the Commission's approval of this Settlement Agreement, execution and fulfillment of the terms of this Settlement Agreement by Persist resolves all issues relating to the conduct described above, and Enforcement staff will take no further steps against Persist arising from these facts.

AGREED TO THIS 31ST DAY OF JULY, 2023.



Massimo Geremia
Chief Executive Officer
Persist Oil & Gas Inc.



Catherine M. Wall
Counsel, Enforcement Staff
Alberta Utilities Commission