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September 27, 2013

Via RESS Electronic Filing and Regular Mail

Attention: Kirsten Walli, Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, Suite 2700
Toronto, ON M4P 1E4

Dear Madam Secretary:

RE: Review of Framework Governing the Participation of Intervenors in Board Proceedings
Consultation and Stakeholder Conference – EB-2013-0301
GAPLO/LCSA – Written Comments on OEB Questions

I am counsel to the Gas Pipeline Landowners of Ontario (GAPLO) and to the Lambton County Storage Association (LSCA). Please find enclosed the written comments of GAPLO and LCSA with respect to the questions posed by the Board in its letter dated August 22, 2013.

I trust this is satisfactory. If the Board requires any additional information, please do not hesitate to email me or call me at 519-433-5310, ext. 236.

Yours truly,
SCOTT PETRIE LLP
LAW FIRM

John D. Goudy

Encl.

GAPLO / LCSA COMMENTS ON ISSUES RELATED TO THE FRAMEWORK GOVERNING THE PARTICIPATION OF INTERVENORS IN BOARD PROCEEDINGS

INTRODUCTION

The Gas Pipeline Landowners of Ontario (GAPLO) and the Lambton County Storage Association (LCSA) are pleased to provide the following comments to the Board concerning its review of the framework governing the participation of intervenors in Board proceedings.

GAPLO and LCSA are both voluntary organizations of landowners directly affected by projects and facilities within the Board's jurisdiction. GAPLO has approximately 120 members whose lands are crossed by Union Gas Ltd. or related pipelines. LCSA has approximately 160 members whose lands fall within designated gas storage areas operated by Union Gas Ltd. Each organization has intervened in Board proceedings on multiple occasions to represent the interests of its landowner members[1].

The Board notes in its letter dated August 22, 2013 that the participation of many groups and associations, including those representing landowners, "has been facilitated by the Board's current approach to intervenor cost awards". Where GAPLO and LCSA landowners are concerned, the Board's observation is accurate, but understated. Landowners depend on the cost recovery mechanism for intervenors to allow them to participate fully and meaningfully in approvals processes without facing financial hardship. Landowners are directly and, for the most part, adversely affected by projects and facilities within the Board's jurisdiction; they do not stand to profit from the applications made by Board-regulated companies.

In the views of GAPLO, LCSA and their members, the Board's current approach to the determination of intervenor status, cost eligibility and cost awards is efficient, effective and appropriate. Insofar as it relates to landowners, the current approach should be maintained and, where possible, enhanced.

INTERVENOR STATUS

1. ***What factors should the Board consider in determining whether a person seeking intervenor status has a "substantial interest" in a particular proceeding before the Board? For instance, should the Board require a person seeking intervenor status to demonstrate consultation or engagement with a constituency directly affected by the application?***

Landowners always have substantial interest in applications before the Board that relate to their properties. Where Board-approved or Board-regulated facilities are located on privately-owned lands, the owner of those lands (and, in many cases, the owner of neighbouring lands) is directly affected by the facilities, and directly or indirectly affected by virtually every decision

[1] GAPLO interventions include EB-2010-0381, EB-2008-0411, EB-2005-0550; LCSA interventions and applications include EB-2011-0285, RP-2000-0005, RP-1999-0047.

made by the Board concerning those facilities. Therefore, ownership interest in affected lands should be an overriding factor in the Board's determination of "substantial interest".

This holds equally true for new project applications and for non-project applications such as those related to rate-setting or the sale of assets. And there is substantial interest irrespective of whether the landowner has entered into an agreement with the Board-regulated company (such as an easement agreement or gas storage lease) and whether the company has consulted with the landowner about a project or facility. The company does not represent the interests of the landowner.

The substantial interest of individual landowners extends directly to the landowner associations to which they belong. Landowner organizations like GAPLO and LCSA are often formed by a group of landowners facing a new project on their lands. Those landowners are, by and large, agricultural landowners; most of the facilities under the Board's jurisdiction are located outside urban areas. Landowners join together democratically in organizations like GAPLO and LCSA to share knowledge and to facilitate the protection of their individual properties and interests when dealing with Board-regulated companies. They appoint their organizations to represent them in Board proceedings.

Given the inherent substantial interest of landowners and their landowner organizations in Board proceedings related directly or indirectly to lands, the Board does not need to require landowners or their organizations "to demonstrate consultation or engagement with a constituency directly affected by the application". At least, nothing is required beyond the information already provided by landowners and landowner organizations pursuant to Rule 23.03 of the Board's Rules[2].

2. *What conditions might the Board appropriately impose when granting intervenor status to a party? For instance, should the Board also require an intervenor to demonstrate how the intervening group or association governs the participation by its legal counsel and other representatives in the application?*

Two related but separate concerns appear to underlie this question: first, there appears to be concern with ensuring that representatives have authority from the individuals, groups or associations they represent; second, there appears to be concern about the control of the conduct of those representatives. GAPLO and LCSA submit that neither of these concerns warrants the imposition of conditions when granting intervenor status to landowners or landowner organizations.

Where an individual landowner or landowner association is represented by counsel or another external representative, the assertion by counsel or the representative that he or she represents the individual or the group should be sufficient evidence of the authority to represent and of the oversight by the landowner or landowner association of the representative's participation in the application.

To the extent that the Board has any concern about the authority of a proposed representative, the Board has the ability to request additional information from the intervenor and its representative. However, that concern will only arise on a case-specific basis, if at all, and

[2] Rule 23.03(a) requires that a letter of intervention shall contain "a description of the intervenor, its membership, if any, the interest of the intervenor in the proceeding and the grounds for the intervention".

should not require generic conditions to be imposed on landowner interventions as a matter of general practice.

Likewise, no conditions on landowner interventions are necessary to address any concern the Board may have about the conduct of the representatives of landowners and landowner associations in Board proceedings. Parties to Board proceedings are eligible to recover only their reasonable costs of participation, meaning that cost recovery depends on the reasonable conduct of intervenors and their representatives. Since landowner participation in Board proceedings is dependent upon cost recovery, it is imperative that the representatives of landowners and landowner associations participate reasonably in proceedings. No further condition is required to ensure oversight by the landowner or landowner association of its representative.

COST ELIGIBILITY

1. ***What factors should the Board consider in determining whether a party primarily represents the direct interests of consumers (e.g. ratepayers) in relation to services that are regulated by the Board? For instance, should the Board require the party to demonstrate consultation or engagement with a class of consumers directly affected by the application?***

Although individual GAPLO and LCSA members are also ratepayers and consumers in Ontario, GAPLO and LCSA are not providing comments on this question.

2. ***What factors should the Board consider in determining whether a party primarily represents a public interest relevant to the Board's mandate?***

As discussed above, landowners have a substantial interest in all proceedings before the Board that affect their properties. Pursuant to the *Ontario Energy Board Act, 1998* (the "Act"), the Board authorizes the expropriation of property and the construction and operation of energy facilities, and may determine compensation payable to landowners in gas storage areas. Board decisions related to projects and facilities often result in significant environmental and socio-economic impacts on landowners, their lands and their businesses.

Although the Act is for landowners an expropriation statute with considerable consequences, it makes no mention of landowners in its statements of the Board's objectives. Nevertheless, GAPLO and LCSA submit that the Board's mandate does include the protection of the environment and the fair treatment of landowners. This is reflected in Section 3.03(c) of the Board's Practice Direction on Cost Awards, which provides that a party is eligible to apply for a cost award where the party is a person with an interest in land that is affected by the process.

3. ***What conditions might the Board appropriately impose when determining the eligibility of a party for costs? For instance, what efforts should the Board reasonably expect a party to take to combine its intervention with that of one or more similarly situated parties? Should the Board reasonably expect parties representing different consumer interests to combine their interventions on issues relating to revenue requirement (as opposed to cost allocation)?***

Ownership interest in land that is affected by a Board proceeding establishes eligibility for cost recovery. Since individual landowners are individually eligible to recover their costs of

participation, there should be no requirement that landowners combine interventions or consolidate efforts with other similarly situated parties. That said, landowners often choose voluntarily to participate as part of group interventions, including under the umbrella of a landowner organization like GAPLO or LCSA.

There should likewise be no requirement for different landowner organizations to combine interventions. Landowner organizations are made up of individual landowners, each eligible for cost recovery. The Board should continue to encourage parties with similar interests consolidate their efforts, but in the case of landowners and landowner organizations there is no need to impose conditions.

4. ***Should the Board consider different approaches to administering cost awards in adjudicative proceedings? For instance, should the Board consider adopting an approach that provides for pre-approved budgets, pre-established amounts for each hearing activity (similar to the approach for policy consultations), and pre-established amounts for disbursements?***

As stated above, landowners depend upon the Board's cost recovery mechanism to participate in Board proceedings. GAPLO, LCSA and their landowner members would urge the Board not to consider different approaches to administering cost awards in adjudicative proceedings that affect landowners. The current approach succeeds in facilitating landowner participation; a change in approach is likely only to limit landowner participation.

The Board should be guided by the principle applicable to expropriation authorities that landowners should be made whole[3]. Landowners do not stand to profit from the projects and facilities at issue in Board proceedings. It is only fair and just, therefore, that landowners be entitled to recover their full reasonable costs of responding to project and facility applications in the context of adjudicative proceedings. That is the Board's current approach.

To adopt an approach that would set limits for landowner hearing activities would be an unfortunate and unnecessary step away from making landowners whole. Limiting cost recovery would, in effect, limit landowner participation. The content and quality of the case to be put forward by landowners in a particular Board proceeding would depend upon the cost recovery limits set in advance. Landowners might have to choose to put forward evidence and argument on certain issues to the exclusion of other equally important issues. Limits on cost recovery might also dissuade landowner participation in Board processes in the first place.

GAPLO and LCSA landowners are grateful that they are not faced with adjudicative proceedings before the Board where they must participate at their own expense without the opportunity to recover their costs. That is the situation faced by Ontario landowners whose lands are affected by projects and facilities under the jurisdiction of the National Energy Board ("NEB").

[3] The Supreme Court of Canada has confirmed that expropriation statutes “should be read in a broad and purposive manner in order to comply with the aim of the Act to fully compensate a land owner whose property has been taken.” See *Toronto Area Transit Operating Authority v. Dell Holdings Ltd*., [1997] 1 S.C.R. 32, [1997] S.C.J. No. 6 at para. 23.

The NEB takes the position that it does not generally have legal authority to award costs to landowners who participate in NEB proceedings[4]. Not even a landowner facing the expropriation of his or her property by way of a Right of Entry Order is entitled to an order of the NEB allowing reimbursement of the landowner's costs of responding to the expropriation application. The expropriated landowner in the NEB context is not made whole.

Landowner organizations representing NEB-regulated landowners have for many years pressed the NEB and the federal Department of Natural Resources to implement a cost recovery mechanism for landowners. In 1996, the NEB released a report on "Intervenor Funding Options", but the funding mechanism proposed (not a cost recovery mechanism) was not implemented. In the late 2000s in response to growing landowner concerns, the NEB initiated its Land Matters Consultation Initiative ("LMCI"), which included consideration of funding options for landowners.

Ironically, there was no funding available and no cost recovery for landowners to participate in the LMCI. The NEB has since introduced a "Participant Funding Program" that provides a limited amount of funding to intervenors in facilities projects classified as "major". Overall funding is dependent upon the amounts allocated by the federal government; the amount of funding available for a specific proceeding is set by the NEB in advance and is divided up amongst all intervenors who apply successfully for funding. There is no minimum amount set aside for landowners.

The NEB Participant Funding Program improves upon the prior situation for landowners faced with certain NEB-regulated projects, but it still leaves even those landowners at a severe disadvantage in comparison with provincially-regulated landowners under the Board's jurisdiction. In the majority of projects faced by NEB-regulated landowners, no funding is available and if landowners wish to participate in NEB proceedings, they must do so entirely at their own cost. This situation works an injustice.

GAPLO, LCSA and their landowner members urge the Board to maintain its current cost recovery mechanism for landowners.

RECOMMENDED MODIFICATIONS

1. *Are there modifications that the Board should consider making to the Rules and the Practice Direction?*

The sole modification to the Rules and Practice Direction that GAPLO and LCSA would propose is to introduce automatic intervenor status for landowners whose interests in land are directly affected by a Board proceeding. Directly affected landowners have a substantial interest in Board proceedings and should be made parties to the proceeding, with the right to participate and eligibility for cost recovery[5].

[4] The exceptions are detailed route hearings (NEB Act, s.39), relocation or diversion of facilities (NEB Act, s. 46(5) and s.58.32(6), and possession or occupation of land without the consent of the Yukon first nation or Gwich'in Tribal Council (NEB Act, s. 78.1(3)(iii)).

[5] This is the standard practice of the Agriculture, Food and Rural Affairs Appeal Tribunal in appeals under the *Drainage Act*, R.S.O. 1990, c. D-17, s.51(2). The Board has also adopted this approach in Section 99 expropriation proceedings such as EB-2010-0023 (Hydro One Networks Inc. Bruce to Milton Transmission Reinforcement Project).

This proposed modification to the Rules would ensure that all affected landowners would receive notice of steps in the proceeding and have the opportunity to participate actively when necessary. At present, landowners generally have only 10 days in which to apply for intervenor status after the issuance of the Board's Notice of Application. Given the special interest of landowners in Board proceedings that affect their lands, they should not be faced with such a tight timeframe (which often falls within holiday periods or busy farming seasons).

Landowners' "substantial interest" is clear; they should be granted intervenor status as a matter of course.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at London, Ontario this 27th day of September, 2013.

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