Alberta Energy Regulator

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Via Email

April 25, 2018

Keyera Energy Ltd.

Attention: Suzanne Hathaway

Ackroyd Law

Attention: W.L. (Bill) McElhanney

Dear Sir/Madam:

RE: Request for Regulatory Appeal by NPS Farms Ltd.
Keyera Energy Ltd. (Keyera)
Application Nos.: 1894694 and 1896773 (Applications)
Licence Nos.: 58538 and 58539 (Licences)
Locations: 27-53-23W4M and 35-53-23W4M
Request for Regulatory Appeal No.: 1904667 (Request)

The Alberta Energy Regulator (AER) has considered NPS Farms Ltd.'s (NPS) request under section 38 of the *Responsible Energy Development Act (REDA)* for a regulatory appeal of the AER's decision to approve the above Licences. The AER has reviewed NPS' submissions and the submissions made by Keyera.

For the reasons that follow, the AER has decided that NPS is not eligible to request a regulatory appeal in this matter. Therefore, the request for a regulatory appeal is dismissed.

The applicable provision of *REDA* in regard to regulatory appeal, is section 38, which states:

> 38(1) An eligible person may request a regulatory appeal of an appealable decision by filing a request for regulatory appeal with the Regulator in accordance with the rules. [emphasis added]

The term "eligible person" is defined in section 36(b)(ii) of *REDA* to include:

> a person who is directly and adversely affected by a decision [that was made by the AER under an energy resource enactment, if that decision was made without a hearing].

The issue for the AER in determining NPS' eligibility to request a regulatory appeal is whether it is a person who is directly and adversely affected by the decision to issue the Licences.

Reasons for Decision

The AER notes that the request for regulatory appeal was filed within 30 days of the issuance of the Licences. The term "appealable decision" is defined in section 36 of *REDA.* Specifically relevant to this regulatory appeal request is section 36(a)(iv).The decision to issue the Licences is an appealable decision as the decision was made under the *Pipeline Act*, an energy resource enactment, without a hearing.

In order for the decision to issue the Licences to be an "appealable decision" under section 36(b)(ii) of the *REDA*, NPS must demonstrate that it is a person who is directly and adversely affected by the AER's decision to issue the Licences.

The Licences were issued to Keyera to convert existing hydrogen pipelines to high vapour pressure (HVP) butane pipelines. The Licences were for amendments that do not require any ground disturbance on NPS owned lands given that the pipelines are already in place (in situ) and the applications are only for a change of product in the pipelines.

In its request for the Regulatory Appeal, a number of concerns were raised by NPS which include:

- the evidence the AER relied upon to reach its conclusions;
- end of life of previous product in the existing lines;
- quantities of new product transported;
- effect that modified soil temperature has on existing pests and/or diseases, specifically issues that would be eradicated by the frost cycle;
- the AER has not fully addressed the potential risks associated with the change in product and not provided any substantiation for same;
- the AER has not addressed the lack of consultation between Keyera and NPS Farms prior to submission; and
- NPS has never been provided with a detailed analysis regarding the new product.

In response to the concerns, Keyera states that, regarding the evidence relied on by the AER prior to issuing its December 5, 2017 decision, on November 6, 2017 Keyera provided the AER with the third party geothermal report ("Technical Memo") prepared by CH2M. Keyera also responds that the analysis in the report determined that a nominal variation of temperature of the pipeline over its operating conditions would not have a negative impact within the root bearing zone of the upper topsoil of the NPS lands, and that butane operations would not prevent the topsoil layer of the NPS lands from freezing. Furthermore, potential soil temperature changes will not introduce bacterial ring rot, clubroot disease or potato cyst nematode. The introduction of such soil borne pathogens, diseases and organisms requires activities that occur on or disturb the soil. Keyera confirmed that it is not proposing any construction activities on NPS lands, that it does not need any access to NPS lands, and that it does not have any plans to cause soil disturbance on NPS lands. Keyera notes that changing the product in the existing pipeline cannot introduce soil borne pathogens, diseases or infestations.

In regards to NPS' concerns about quantities of new product versus old product transported, Keyera indicates that the relevance of quantity of product as an issue is not clear and the Technical Memo supports the conclusion that there will not be any direct and adverse impact on NPS' farming operations in any of the operating parameter scenarios. Keyera further responds to NPS' concern that it was led to understand that transportation of the previous product in the existing line was at or near the end of its productive life by noting that it had communicated with stakeholders that the pipeline is operational but that it would be temporarily taken out of service to facilitate integrity and maintenance activities. At no time was it conveyed to stakeholders that there would be a permanent discontinuance of use of the pipeline. Keyera notes that it completed an extensive public involvement campaign prior to submitting its applications non routine to the AER given NPS' refusal to provide its consent. Keyera further responds by providing its public involvement communication logs to demonstrate its consultation with NPS in an effort to resolve concerns and notes that it engaged in public involvement notifications under the AER's

Directive 56 requirements. In response to NPS' concern that it has not been provided with a detailed analysis regarding the introduction of new product, Keyera notes that on October 20, 2017 it provided NPS with the Technical Memo summarizing the results of the geothermal modeling assessment.

In reply to Keyera's response, NPS states that it is directly and adversely affected by the AER's decision to approve Keyera's applications and issue the Licences. The pipeline is on its lands and therefore NPS is an eligible person pursuant to s. 36 of *REDA.* NPS states that the directly and adversely affected person test is a preliminary issue that does not warrant a discourse into the merits of NPS' claim or alleged harm. NPS submits that the onus on it is to prove a potential or reasonable probability for harm which it has done in its Request and its Statement of Concern. NPS references the *Dene Tha*[1] decision as the starting point for discussion regarding the legal standard of directly and adversely affected. The directly and adversely affected test has two branches with the first being a legal test and the second is a factual one. In regards to the first branch of the test, the legal test, NPS states that NPS owns and occupies the lands where the Keyera Pipeline is located and its right to use its lands is a right known and protected by law. As such, the first branch of the test asks whether the claim, right or interest being asserted by the person is one known to law and this must be answered in the affirmative.

With respect to the second branch of the test, the second branch asks whether the Regulator has information which shows that the application before it may directly and adversely affect those interests or rights. NPS states that it has identified the potential impacts of the application on its operations and that the impacts identified are reasonable and have the potential to occur. NPS notes that the Technical Memo concluded that "CH2M anticipates that potential impacts to seed potato operations should be negligible" and that the Technical Memo did not provide any support for its conclusion or information to assist with a determination as to what the scope and extent of "negligible" might be. NPS agrees that the onus is on NPS to present a prima facie case that it is directly affected and it submits it has discharged that onus. NPS submits that by identifying the potential impacts of the application and likelihood of occurrence it has discharged the onus on it and satisfied the second part of the directly and adversely affected person test; and, that Keyera's Technical memo is not sufficient proof that there will be no direct impact on NPS' seed potato operations.

Whether NPS is a person who is directly and adversely affected by the AER's decision to issue the Licences is the principal question to be decided in relation to NPS' request for regulatory appeal. Before examining that issue further, it is important to first make clear that the *Dene Tha* decision relates to the directly and adversely affected test in the context of section 26 of the *Energy Resources Conservation Act.* Section 26 set out the standing test for participatory rights in an Energy Resources Conservation Board proceeding. That section granted participation where: "an application may directly and adversely affect the rights of a person". This is why *Dene Tha* sets out the two part test: the determination of the existence of a right and the determination of whether that right might be directly harmed. Under *REDA* sections 38(1) and 36(b)(ii) there is no rights determination required. Therefore, the first part of the test in *Dene Tha* is irrelevant for the determining NPS' eligibility for a regulatory appeal.

Keyera states that the AER has adopted the Alberta Environmental Appeals Board ("EAB") test of "directly affected" which states; "The onus is on the appellant to present a prima facie case that he or she

[1] *Dene Tha' First Nation v. Alberta (Energy and Utilities Board),* 2005 ABCA 68 (CanLII) (*Dene Tha*)

is directly affected."[2] Keyera also submits that to meet the "directly and adversely affected" test, a person must provide information that demonstrates a degree of location or connection between a project or its effects and the person asserting that he is directly and adversely affected by the project[3] and that "A mere potential to be directly and adversely affected is not enough. Rather, reliable or 'hard information' must be provided to show where and how the anticipated impacts might occur, and 'an indication that a reasonable potential or probability exists that those impacts will occur.'"[4] NPS submits however, that the *Cheyne v. Alberta (Utilities Commission)* decision is instructive in regards to the interpretation of "prima facie case" in the context of directly affected person where the Alberta Court of Appeal stated:

> [20] In *Whitefish Lake First Nation v. Alberta (Energy and Utilities Board)*, 2004 ABCA 49 (CanLII), Wittmann J.A. (as he then was) stated that the test for standing under section 26 was a prima facie case of the possible infringement of a legal right. He went on to state that there was also authority to suggest that a prima facie case where aboriginal or treaty rights are asserted requires little more than the assertion of those rights.
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> [21] Even though a lower standard may be required for an aboriginal right, the prima facie burden is arguably low for all. Once evidence establishes a prima facie case that an applicant could possibly be directly adversely affected - that is all that is required at this stage, says the applicants. The AUC can, of course, look at such facts as location and connection of the property to the site of the proposed development, but that does not mean that an applicant must show more than a prima facie case of possible direct adverse affect before he or she is entitled to notice, information and a hearing. Indeed, it appears that notice and information were provided and Enmax was alive to the complaints and conversations that had occurred between Enmax and the applicants.[5]

The AER notes however that NPS quoted from the Court of Appeal of Alberta's leave decision in *Cheyne v. Alberta (Utilities Commission)*[6], citing it as authority that the test for direct and adverse effect only requires that a *prima facie* case be made for the possible infringement of a legal right. However, in the full appeal decision[7] in that action the court substantially discounted both that argument and the leave court's reliance on a previous leave decision. The court stated:

> [3] The *prima facie* argument is based upon a passage in a memorandum of decision 5 years ago in another case. In it, one Justice of Appeal gave leave to appeal from the Commission's predecessor, the A.E.U.B. The issues there were quite different from the present issues. But there is one brief passage reciting a proposition not argued there, and merely conceded:
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> > "that the test for standing under section 26 of the *ERCA* requires that the applicant establish a *prima facie* case of the probable infringement of a legal right."
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> > ***Whitefish L. F.N. v. A.E.U.B.***, 2004 ABCA 49, 12 Admin. L.R. (4th) 295 (para. 22)

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[2] *Tomlinson v Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development, re: Evergreen Regional Waste Management Services Commission* (03 April 2013), Appeal No. 12-033-ID l (AEAB)
[3] *Dene Tha' First Nation v Alberta (Energy Utilities Board),* 2005 ABCA 68
[4] AER letter decision re Samson Cree Nation Request for Regulatory Appeal, Encana Corporation Project, Application Nos. 1802269, 00347134-001, and 001-354353 (July 22, 2016) at 6-7 (*Samson Cree*)
[5] *Cheyne v. Alberta (Utilities Commission),* 2009 ABCA 94 (*Cheyne*)
[6] *Cheyne* supra
[7] *Cheyne v. Alberta (Utilities Commission),* 2009 ABCA 348

> [4] That decision does not expand upon that position, and did not have to in that case. Nor is a statement of a conceded proposition, recited after no argument, of much precedential value.
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> [5] In any event, the phrase "*prima facie* case" is at best ambiguous.
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> [6] On the one hand, it is clear from the legislation (such as the *Alberta Utilities Commission Act*, s. 9(2)) that the issue at these early stages is whether the applicant neighbours' rights may be adversely affected, not whether it is certain that they will be affected. And "*prima facie*", when used loosely, more or less conveys that meaning. So used, it refers more or less to *standard* of proof.
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> [7] On the other hand, "*prima facie* case" or "evidence" has another more technical meaning in the law of evidence or civil procedure. It refers to enough evidence to avoid a nonsuit, or maybe enough evidence to win, if no one leads any other evidence and if that evidence (said to be *prima facie*) is believed. This refers to the *burden* of proof, indeed strictly to the burden of leading some evidence, not to the ultimate or persuasive burden.
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> [8] In our view, the latter meaning of *prima facie* is not appropriate to this legislation, and the ***Whitefish L. F.N.*** decision, *supra*, was not using it in this more technical sense.
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> [9] In any event, the phrase "*prima facie*" is not in the relevant legislation, and we should interpret the actual words of the Legislature, not a brief paraphrase in a tentative unargued decision.

NPS further submits that the directly and adversely affected person test is a preliminary issue that does not warrant a discourse into the merits of NPS' claim or alleged harm[8] and that the onus on NPS Farms is to prove a potential or reasonable probability for harm[9] which it has done in its Request and its Statement of Concern. However, the AER must have regard for all submissions made to it, not just those made by NPS, in deciding if NPS may be directly and adversely affected by it.

The AER notes the reasoning from the *Samson Cree*[10] decision as being applicable in that the phrases "is directly and adversely affected" or "is directly affected" do not require certain proof that the person will be affected. What is required is "…reliable information that demonstrates a reasonable potential or probability that the person asserting the impact will be affected."[11] Although NPS states that it has discharged the onus on it and has satisfied the second part of the directly and adversely affected person test, the AER finds that NPS has not identified any reliable information which shows any potential impacts of Keyera's operations on NPS' farming operation. In its submissions, NPS asserts that the Technical Memo confirms that there will be changes in temperature from the application and that there may be potential impacts and NPS references a portion of the Technical Memo that "CH2M anticipates that potential impacts to seed potato operations should be negligible." However, the AER finds that this one sentence of the report cannot be read in isolation from the remaining part of the paragraph it is part of which states "…Potential soil temperature changes will not introduce bacterial ring rot, clubroot disease or potato cyst nematode. The introduction of such soil-borne pathogens, diseases and organisms requires

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[8] *Court v. Alberta Environmental Appeal Board*, 2003 ABQB 456 (CanLll, para 67; Zajes v Leduc (County) 1987 ABCA 172 (CanLll), paras. 11-12
[9] *Court v. Alberta Environmental Appeal Board*, supra para. 71
[10] Samson Cree supra
[11] Samson Cree supra page 5

activities that occur on or disturb the soil. The prevention of the introduction or spread of soil-borne diseases and pathogens is based on good farming and vehicle/equipment hygiene."[12]

The AER finds that, based on the Technical Memo, the evidence confirms that without any ground disturbance there are no impacts or potential impacts to NPS Farms as a result of the product change from hydrogen to butane in the pipelines. The AER finds that NPS is not directly and adversely affected by any of the Applications for which the Licences were issued.

Other Issues: Demand for "Compensation" and Video Evidence as "New" Information

In its response to the regulatory appeal request, Keyera raises the issue of compensation and makes certain submissions regarding same. In its reply, NPS makes submissions in contrast to those presented by Keyera. However, the AER notes that issues of compensation and monetary considerations are considered confidential matters between the parties, and the AER confirms that it has not considered those respective submissions in this matter.

In regards to the video evidence which was included in the January 4, 2018 NPS request for regulatory appeal, NPS submits that the video was of the temperature effects of pipelines and it was prepared to present same at a hearing if that issue was in question. NPS indicates that the video is of the Enbridge pipeline and that the pipeline in question regarding this matter is six pipelines to the right (West) of the identified Enbridge Pipeline. Furthermore, the video was prepared on October 17, 2016. In its response, Keyera submits that the video has not been previously provided and it should not be accepted in connection with the request for regulatory appeal as it is inherently unfair and prejudicial to Keyera to introduce new information at the appeal stage. Keyera states that the AER has confirmed that it is improper to provide new information at the regulatory appeal stage in the *Fort McMurray Metis Local 1935* decision[13] where the AER held that:

> FMML acknowledges that it did not provide this information to the AER until it applied for reconsideration and regulatory appeal, though it had the information prior to the making of the decisions which it now asks the AER to review. Those seeking to participate in the AER's consideration of applications should file a Statement of Concern (SOC) and support that SOC with any information they possesses relevant to the issues in the SOC including information that demonstrates they may be directly and adversely affected by the subject energy developments. While the AER may consider new information at the regulatory appeal stage, it is improper to save such information for the regulatory appeal process. To do otherwise creates a situation unfair to project proponents, an abuse of the AER's regulatory appeal provisions and a waste of the AER's resources in considering information that should have been provided at the SOC stage. (emphasis added) p.1.

In its reply, NPS submits that the *Fort McMurray Metis Local 1935* decision is distinguishable from the current matter as that decision dealt specifically with issues regarding matters that had been the subject of ongoing discussions between the parties. NPS submits that the video was presented to illustrate NPS Farms' experience with other pipelines on the Lands carrying similar products as proposed by Keyera.

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[12] See page 2 of Technical Memorandum - Keyera South Butane Conversion Project (NPS 8) Geothermal Modelling prepared by CH2M Hill Energy Canada, Ltd.

[13] AER decision dated March 31, 2016 regarding the Fort McMurray Metis Local 1935's request for Regulatory Appeal No. 1826564 (Appeal Dismissed).

The AER finds that, as noted in the *Fort McMurray Local 1935* decision, it is improper to hold back otherwise available information and introduce it later in the process. No reason is given by NPS as to why the video, which was prepared on October 17, 2016, was not provided earlier.

In the circumstances of this matter, the AER finds the submission of the video evidence at this stage to be improper. Furthermore, the video does not provide any assistance in understanding the pipelines that are the subject of the above Licences as it demonstrates different pipelines which appear to have ground disturbance associated with them. As noted, the Licences in this matter were for amendments that do not require any ground disturbance on NPS lands.

Based upon the submissions provided by NPS and Keyera, the AER finds that NPS is not directly and adversely affected by the decision to issue the Licences. NPS is therefore not an “eligible person” under section 36(b)(ii) of the REDA. Therefore, the AER has dismissed the request for a regulatory appeal in accordance with Section 39(4) of REDA.

Sincerely,

<*original signed by*>

Renee Marx
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<*original signed by*>

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