



Government/Industry Relations

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Hearing Order GHW-001-2016

NATIONAL ENERGY BOARD

IN THE MATTER OF the *National Energy Board Act*, R.S.C. 1985, c. N-7 ("**NEB Act**"), as amended and the Regulations made thereunder;

IN THE MATTER OF an application by NOVA Gas Transmission Ltd. for leave of the National Energy Board to purchase certain assets from Suncor Energy Logistics Corporation and include the cost in the NGTL System rate base, pursuant to Parts IV and V of the NEB Act; and for a Certificate of Public Convenience and Necessity for the assets purchased by NGTL pursuant to Part III of the NEB Act, and related approvals under the NEB Act.

WRITTEN EVIDENCE OF BIGSTONE CREE NATION

January 17, 2016

To: The Secretary
National Energy Board
517 Tenth Avenue SW
Calgary, Alberta T2R 0A8

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Introduction

1. Bigstone is a First Nation people and government located in Wabasca, Alberta. Bigstone has a membership of approximately 7,752 individuals. Bigstone is a signatory to Treaty No. 8, which was entered into in 1899 and formalized the Crown-First Nation relationship for the purposes of shared use and management of the lands, waters and other resources within Treaty No. 8's geographic boundaries.
2. Bigstone possesses inherent Aboriginal rights in addition to existing Treaty No. 8 rights. Bigstone's Aboriginal rights exist throughout its entire traditional territory. These rights are constitutionally protected by section 35 of the *Constitution Act, 1982*. Bigstone's Treaty No. 8 rights expressly include the right to hunt, trap, fish and gather. Furthermore, Bigstone's Treaty No. 8 rights extend beyond its written terms of Treaty No. 8 and encompass rights that are incidental to the explicit rights granted by the treaty, including self-governance rights and the right to promote environmental conservation in order to ensure that Bigstone can continue to exercise its rights within its territory ("**Bigstone's s. 35 Rights**").
3. Bigstone continues to use and occupy Bigstone Territory to exercise Bigstone's s. 35 Rights. It relies upon the lands, waters and other resources within Bigstone Territory to promote its culture, advance its economies and preserve its way of life. Fundamental to the exercise of Bigstone's s. 35 Rights, Bigstone manages Bigstone Territory according to Bigstone laws and principles for the benefit of the collective including future generations of Bigstone citizens ("**Bigstone Territory**").
4. NGTL is proposing to purchase and operate the Albersun Pipeline, which consists of the purchase of 141 km of NPS 10 pipeline, 20.9 km of NPS 6 pipeline, 8 7 km of NPS 3 pipeline, 6.2 km of NPS 8 pipeline, less than 100 metres of NPS 6 pipeline and all

facilities attached to, and forming part of, these existing pipelines (the “**Proposed Purchase**”).

5. There was no participant funding available for this hearing for the Proposed Purchase. Bigstone faces capacity constraints which limit the consultation activities that can be undertaken without the support of capacity funding. Although limited by its capacity constraints, Bigstone is participating in this National Energy Board (the “**Board**”) hearing in order to inform the Board and NGTL about Bigstone’s concerns in respect of effects which may result from the Proposed Purchase to Bigstone’s s. 35 Rights.
6. These concerns are amplified by the level of NGTL and TransCanada’s existing activities within Bigstone Territory and the inadequate consultation that has been provided in respect of both the existing and prospective activities of both NGTL and TransCanada. As such, the Proposed Purchase must be considered within this context and the cumulative effects arising from the existing and proposed activities. Therefore, it is Bigstone’s position that the Proposed Purchase should be considered in the broader context of NGTL’s activities within Bigstone Territory, the cumulative effects of these activities on Bigstone’s s. 35 Rights, and NGTL’s past engagement with Bigstone.
7. Bigstone is owed a constitutional duty of consultation by the Crown. To date, NGTL and the Crown have not meaningfully engaged Bigstone in respect of the Proposed Purchase. It is Bigstone’s position that meaningful consultation on the Proposed Purchase is required.
8. If the Board recommends the Proposed Purchase for approval, Bigstone seeks that the Board place conditions on the approval in order to ensure that Bigstone’s s. 35 Rights are protected, preserved and advanced through appropriate avoidance, mitigation and accommodation measures.

Legislative and Regulatory Framework

9. NGTL applies to the Board for leave to purchase the Albersun Pipeline from Suncor, pursuant to subsection 74(1)(b) of the NEB Act; to issue a report recommending the issuance of a Certificate of Public Convenience and Necessity (“**CPCN**”), pursuant to section 52 of the NEB Act; to authorize NGTL, to include the purchase price of the Albersun Pipeline plus adjustments in the NGTL System rate base at closing, pursuant to section 59 of the NEB Act; to grant leave to NGTL to open the Albersun Pipeline pursuant to section 47 of the NEB Act; and to grant such further and other relief as NGTL may request or the Board may consider appropriate.
10. In light of this framework, the Board is required to:
 - provide a report to the Governor in Council recommending whether a CPCN and related approvals should be issued for the Proposed Purchase;
 - make a recommendation for whether or not the Proposed Purchase should be approved; and
 - set out any conditions that the Proposed Purchase would be subject to should it be recommended for approval.
11. Hearing Order GHW-001-2016 dated November 21, 2016, further sets out a list of issues that are to be considered by the Board in the assessment of the Proposed Purchase, which includes:
 - The potential environmental and socio-economic effects of the Proposed Purchase, including any cumulative environmental effects that are likely to result from the Proposed Purchase, including those required to be considered by the NEB’s Filing Manual;
 - Potential effects of the Proposed Purchase on Aboriginal interests; and
 - The terms and conditions to be included in any approval the Board may issue.

12. Bigstone submitted its Application to Participate on November 28, 2016 and indicated that it has information relating to the following:
- The potential environmental and socio-economic effects of the Proposed Purchase, including any cumulative environmental effects that are likely to result from the Proposed Purchase, including those required to be considered by the NEB's Filing Manual;
 - Potential effects of the Proposed Purchase on Aboriginal interests; and
 - The terms and conditions to be included in any approval the Board may issue.
13. More generally, it is Bigstone's position that the application triggers consultation and adequate consultation has not yet taken place regarding the Proposed Purchase.

Effects to Bigstone's Section 35 Rights

14. Bigstone's position on the Proposed Purchase is grounded in Bigstone's s. 35 Rights. As such, it is necessary to first discuss the nature and scope of Bigstone's s. 35 Rights. After which, Bigstone will explain how those rights may be effected if the Board recommends approval of the Proposed Purchase.

A. Overview of Bigstone's Aboriginal and Treaty No. 8 Rights

15. Bigstone has six communities on reserve lands for a total of 21,066.6 hectares. These include 166 A, 166 B, 166 C, 166 D, all in the vicinity of the Hamlet of Wabasca (also known as Wabasca-Desmarais), 166 south of the Hamlet of Sandy Lake, and Jean Baptiste Gambler Reserve 183 surrounded by the Hamlet of Calling Lake. In addition, and as a result of the 2010 Settlement Agreement, an additional 77,000 acres of land will be designated as new reserve lands within Bigstone Territory. Bigstone identifies as Woodland Cree and the families that comprise the Nation have been occupying Bigstone Territory since time immemorial. Woodland Cree peoples have a long-standing history, and associated cultural traditions, as hunters, gatherers and trappers.

16. Bigstone is a signatory of Treaty No. 8, which provides Bigstone the following rights:

Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefore by the said Government.¹

17. Treaty No. 8 protects Bigstone's right to hunt, trap and fish throughout all of Bigstone Territory. Bigstone has occupied, used and have maintained a substantial connection to Bigstone Territory where members exercise their treaty rights to fish, hunt, harvest and trap and further their culture and spiritual practices on the lands and waters.
18. Bigstone seeks to protect the ability of the Bigstone people to hunt, fish, trap, and gather within Bigstone Territory. The importance of Bigstone's s. 35 Rights transcends their actual practice. Bigstone Elders transfer their knowledge of Bigstone's values, laws, governance, identity, culture, spirituality and economic pursuits to Bigstone youth through the exercise of Bigstone's s. 35 Rights. Bigstone's way of life depends on the advancement and protection of Bigstone's s. 35 Rights and Bigstone Territory.
19. Bigstone has Treaty No. 8 rights that extend beyond just its written terms. The SCC in *R v Sioui*, [1990] 1 SCR 1025 enunciated that the terms of the Treaty extend beyond the written text of the document and requires an understanding of: (i) the historical, cultural and political context; (ii) oral histories of the Indigenous signatories; and (iii) Indigenous laws. These interpretative requirements were confirmed again by the SCC in its decision of *R v Marshall*, [1999] 3 SCR 356, by stating that simply looking at the written text gives "excessive weight to the concerns and perspective of the British, who held the

¹ "Treaty No. 8 Made June 21, 1899 and Adhesions, Reports, Etc.", online: Aboriginal Affairs and Northern Development Canada <<http://www.aadnc-aandc.gc.ca>> [emphasis added].

pen." Accordingly, Bigstone's perspective is required in order to conduct an assessment of potential adverse effects of the Proposed Purchase on Bigstone's s. 35 Rights.

20. Bigstone's Treaty No. 8 rights encompasses rights which are incidental to the rights granted by the Treaty, including environmental conservation required to ensure that Bigstone can continue to exercise its rights.²
21. As Bigstone's Treaty No. 8 rights are existing and established rights, the Crown is required to justify any potential infringement of that right. This is a heavy burden that rests with the Crown and which must be discharged. It has not been discharged.
22. Notwithstanding, Bigstone has participated in the hearing process for the Proposed Purchase in good faith and with capacity constraints in an effort to inform the Board and NGTL about Bigstone's concerns in respect of effects which may occur as a result of the Proposed Purchase to Bigstone's s. 35 Rights. These effects are set out below.

B. Effects to Bigstone's Section 35 Rights Arising From the Proposed Purchase

23. Bigstone has an extensive connection to the area adjacent to and encompassing the Proposed Purchase. As the Proposed Purchase may result in additional activity, taking into consideration NGTL's additional activities within Bigstone Territory and the cumulative effects of all of these activities, it necessarily leads to the conclusion that Bigstone's s. 35 Rights may be effected. In particular, the following evidence establishes the following adverse effects to Bigstone's s. 35 Rights:

- effects to Bigstone's Treaty No. 8 harvest rights including hunting, trapping, fishing, gathering; and

² *Simon v. The Queen*, [1985] 2 SCR 387.

- cumulative effects of past, present and reasonably foreseeable impacts to Bigstone's traditional territory and on Aboriginal and Treaty No. 3 rights to hunt, trap, fish and gather.
24. Bigstone was not consulted on the operation, maintenance, potential additional activities and potential for spill or other contamination resulting from the pipeline. These are concerns to Bigstone. In particular, Bigstone should have been consulted on the following ESA sections:
- 2 - Consultation and Engagement;
 - 5 - Environmental and Socio-Economic Setting;
 - 8 – Wildlife and Wildlife Habitat; and
 - 11 – Environmental Management Plans.

C. Bigstone's Specific Concerns Have Not Been Addressed

25. Bigstone does not agree with NGTL's finding that the Proposed Purchase and associated activities "are not expected to have a significant adverse effect on any biophysical or socio economic element." Bigstone has previously put its concerns about disruption to sensitive caribou habitat and migration paths. NGTL has indicated that approximately 74 kilometers of the pipeline are in caribou range but NGTL has not provided adequate information for how the caribou will be protected. NGTL has provided no information about the cumulative effects on caribou if the Proposed Purchase were to be approved and incorporated into the NGTL system. This is a significant concern and remains unanswered by NGTL.
26. NGTL has not meaningfully discussed the potential effects of the Proposed Purchase with Bigstone. NGTL is relying on the Environmental and Socio-Economic Assessment ("ESA") and the Environmental Protection Plan ("EPP"), which fail to consider any of

Bigstone's traditional evidence or other information which would assist NGTL in identifying concerns arising from the Proposed Purchase.

27. If approved, the Proposed Purchase would be incorporated into the NGTL system and would be required to ensure that the operation, maintenance, and upgrading of the pipeline would be in accordance with OPR, CSA Z662-15, TransCanada Operating Procedures and all applicable federal regulatory requirements. NGTL has not provided adequate information as to what changes will be required in order to ensure that the pipeline operation, maintenance, and upgrading meets these standards. Additional activity may be required to make the pipeline meet these standards, we are concerned that the additional activity will compound the effects of the land and increase the cumulative effects of NGTL's activities within Bigstone Territory.
28. In addition, since Bigstone has not been engaged by NGTL's, Bigstone has not had opportunity to meaningfully discuss the cumulative effects of NGTL's activities within Bigstone Territory. This is a significant concern and one which has not been addressed to date. Based on evidence gathered from Bigstone members, Bigstone has already identified various cumulative effects, which include: decrease of clean water for animals, contamination of animals, increase human activity, inability to find certain animals and distress from the irreversible changes to the land and the ability of Bigstone members, currently and in the future, to use the land for harvesting and other cultural purposes.
29. NGTL has not provided the Board with an adequate or reliable cumulative effects assessment. The assessment included in the ESA falls far short of what ought to be undertaken, especially in light of NGTL's significant footprint and various activities within Bigstone Territory.
30. NGTL has indicated that TransCanada is responsible for emergency management of the NGTL system. NGTL has stated that "before the Albersun Pipeline components are put

into operation, TransCanada will develop new emergency management plans or update existing emergency management plans”. Neither NGTL or TransCanada have approached Bigstone to discuss emergency management plans for the Proposed Purchase. As Bigstone’s s. 35 Rights are tied to the land and resources within Bigstone Territory the omission of our input would result in our concerns being ignored and potentiall for Bigstone’s s. 35 Rights to be adversely effected.

Bigstone Has Not Been Meaningfully Consulted on the Purchase

31. The Crown must meaningfully consult and accommodate whenever contemplating a decision that has the potential to adversely affect Aboriginal or treaty rights. Consultation must occur in a manner that is consistent with the Honour of the Crown.
32. Bigstone was not identified as an Aboriginal group requiring consultation on the Proposed Purchase. NGTL’s Proposed Purchase application states that “no issues or concerns about the purchase were raised by Aboriginal communities during the engagement process conducted to date.” Bigstone was not approached by NGTL regarding the Proposed Purchase and was not provided with the opportunity to raise specific concerns directly with NGTL.
33. In addition, no Traditional Land Use (“**TLU**”) or Traditional Ecological Knowledge (“**TEK**”) was gathered or relied upon by NGTL. NGTL states that the decision not to use TLU or TEK was based on no new facilities or ground disturbance being anticipated. However, these are not the only factors which benefit from TLU or TEK, for example impacts to animals, plants, and the cumulative effects may still be affected by the Proposed Purchase.
34. Bigstone submits that it has not been provided with a consultation process that is accessible and adequate and one that provides an opportunity to meaningfully

participate. Bigstone requests that if the NEB chooses to approve the Proposed Purchase that a meaningful consultation process take place.

Proposed Conditions

35. Should the Board recommend the Proposed Purchase for approval, Bigstone provides the Board with the following conditions which may be placed on the Proposed Purchase approval.
36. Bigstone should be identified as being required to be consulted with on the Proposed Purchase. A framework for meaningful discussion should be required. Bigstone was not involved in creating the ESA or the EPP and has not been able to verify the information contained in these reports. Bigstone should be provided with the opportunity to conduct their own studies or independently verify the information contained in the ESA and EPP.
37. Bigstone requests that requirements be put in place to establish capacity funding for Bigstone with respect to the consultation requirements which are mandated in any conditions of the NEB. Additionally, standards should be established in the conditions which will allow the NEB to assess whether NGTL has sought to meaningfully engage with Bigstone and substantially resolve the concerns which may be raised by Bigstone throughout this consultation.

Conclusion

38. Bigstone submits that the Board should recommend meaningful consultation on the Proposed Purchase. Without consultation the Board cannot reasonably determine that the Proposed Purchase is not likely to cause significant adverse effects, or that any significant adverse effects can be justified in the circumstances. The following factors support the need for consultation on the Proposed Purchase:

- the Proposed Purchase may have adverse effects to Bigstone's established Treaty No. 8 rights and constitutionally-protected Aboriginal rights;
- the information in the ESA and EPP was generated without the knowledge and experience of Bigstone and has not been verified by Bigstone;
- there is insufficient information provided in the Proposed Purchase application, ESA, and EPP for the Board to determine whether the adverse effects to Bigstone's s. 35 Rights can be justified, or to determine whether the Proposed Purchase is in the public interest.

39. Bigstone has presented evidence which demonstrated that should the Proposed Purchase be approved, it may have adverse effects on Bigstone's s. 35 Rights and Bigstone Territory.