



December 15, 2011

Ms. Kirsten Walli  
Board Secretary  
Ontario Energy Board  
P.O. Box 2319, 27th Floor  
2300 Yonge Street  
Toronto, ON M4P 1E4

Re: Goldcorp Application (EB-2011-0361)  
Langley Utilities Contracting Ltd. Application (EB-2011-0376)  
AMPCO Submissions on the Threshold Questions Re: Goldcorp Application

Dear Ms. Walli:

In accordance with Procedural Order No. 1 dated November 25, 2011, attached please find AMPCO's submissions in the above proceeding.

Please do not hesitate to contact me if you have any questions or require further information.

Sincerely yours,

*(ORIGINAL SIGNED BY)*

Adam White  
President  
Association of Major Power Consumers in Ontario

Copies to: Goldcorp Canada Ltd.  
Intervenors

**IN THE MATTER OF** the Ontario Energy Board Act, 1998, S.O. 1998, c. 15 (Schedule B);

**AND IN THE MATTER OF** an application by Goldcorp Canada Ltd. and Goldcorp Inc. for an order under section 19 of the Ontario Energy Board Act, 1998 declaring that certain provisions of the Ontario Energy Board's Transmission System Code are *ultra vires* the Ontario Energy Board Act, 1998 and certain other order.

**AND IN THE MATTER OF** an application by Langley Utilities Contracting Ltd. for a determination as to whether certain services are permitted business activities for an affiliate of a municipally owned electricity distributor under section 73 of the Ontario Energy Board Act, 1998.

**WRITTEN SUBMISSIONS OF THE ASSOCIATION OF MAJOR POWER  
CONSUMERS OF ONTARIO (“AMPCO”) - PRELIMINARY ISSUES  
 (“AMPCO’s Submissions”)**

1. These are AMPCO’s Submissions on threshold questions A1 and A2, as required by the *Notice of Combined Hearing and Procedural Order No. 1* in this proceeding (“**PO No. 1**”).

**BACKGROUND**

2. On November 4, 2011, Goldcorp Canada Ltd. and Goldcorp Inc. (together, “**Goldcorp**”) filed an application (“**Goldcorp’s Application**”) with the Ontario Energy Board (the “**Board**”) seeking the following:
  - (a) an order, under section 19 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B (the “**Act**”), declaring that sections 4.1.3, 6.7.6, 6.7.7 and 11.2 of the Transmission System Code (the “**TSC**”) are *ultra vires* the Act;

- (b) an order, under section 19 of the Act, declaring that Goldcorp is not under any legal obligation to pay bypass compensation to Hydro One Networks Inc. (“HONI”) and that HONI may not demand such compensation from Goldcorp;
  - (c) an interim order, under paragraph 7.1 of HONI’s Electricity Transmission Licence and under its implied obligation not to enforce any requirement contrary to the Act, that pending final determination of this application, HONI shall work cooperatively with Goldcorp in good faith and with all dispatch to complete all analyses and negotiations and to execute all required agreements, contracts or other instruments required in order to connect and energize GL-1 in Q1 2012.
  - (d) an order, under section 3.06 of the Board’s Practice Direction on Cost Awards and subs. 30(2) of the Act, granting Goldcorp all of its costs of this Application; and
  - (e) such further and other order as may be required.
3. On November 25, 2011, the Board issued PO No. 1 ordering a hearing on certain threshold issues, including the following two issues relevant to Goldcorp’s Application:
- A1 Does section 19 of the Act, in and of itself, provide a statutory basis for Goldcorp’s Application?
  - A2 If section 19 of the Act does not provide a statutory basis on which Goldcorp may bring its Application, should the Board nonetheless proceed, on its own motion, to hear and determine the matters raised by the Goldcorp Application under section 19(4) of the Act?
4. The relevant section of the Act for the purposes of the preliminary hearing on the above threshold issues are as follows:

**Power to determine law and fact**

19. (1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact.

**Order**

(2) The Board shall make any determination in a proceeding by order.

### **Reference**

(3) If a proceeding before the Board is commenced by a reference to the Board by the Minister of Natural Resources, the Board shall proceed in accordance with the reference.

### **Additional powers and duties**

(4) The Board of its own motion may, and if so directed by the Minister under section 28 or otherwise shall, determine any matter that under this Act or the regulations it may upon an application determine and in so doing the Board has and may exercise the same powers as upon an application.

### **Exception**

(5) Unless specifically provided otherwise, subsection (4) does not apply to any application under the *Electricity Act, 1998* or any other Act.

### **Jurisdiction exclusive**

(6) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act.

## **ISSUE I - Board Issue A1**

### **Does section 19 of the Act, in and of itself, provide a statutory basis for Goldcorp's Application?**

5. AMPCO submits that the answer to question A1 is yes, section 19 of the Act does, in and of itself, provide a statutory basis for Goldcorp's Application.
6. Section 19 provides the Board with the power to determine all questions of law and of fact, for all matters within its jurisdiction. As is indicated in Goldcorp's Submissions, the authority bestowed by language substantially similar to that of subsections 19(1) and 19(6) of the Act has been discussed extensively in the jurisprudence. For the reasons presented in Goldcorp's Submissions, section 19 of the Act should be interpreted as providing the Board with the authority to make declarations or issue orders of whatever

type the Board deems necessary or appropriate, on all matters within the jurisdiction of the Board.

7. As such, section 19 of the Act provides a statutory basis for Goldcorp's Application if the core subject matter of the application falls within the Board's jurisdiction. The crux of Goldcorp's Application is whether certain sections of the TSC are *ultra vires* the Act; all declarations and orders requested within Goldcorp's Application fall from this issue. The question before the Board, then, is whether this issue is properly within its jurisdiction. In *Enbridge Gas Distribution Inc. (Re)*, 2007, No. EB-2006-0034, (hereafter, "*Enbridge*"), the Board explained that the appropriate way of determining its jurisdiction is to look to a source in the Act, stating, at paragraph 16, as follows:

[t]he Board exercises its jurisdiction within the legislative framework established by Government. The *Ontario Energy Board Act, 1998* provides the objectives that govern the Board in its activities. The objectives and the statute as a whole are the sole reference for the determination of jurisdiction...

8. The Board's general jurisdiction with respect to the TSC is grounded in subsection 1(1) of the Act generally, and section 70.1 of the Act specifically. Subsection 1(1) of the Act, which sets out the objectives of the Board, to which reference is made in the above quotation from *Enbridge*, states at paragraph 2 that one objective is to "[t]o promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry." In setting out minimum standards and technical requirements for the transmission system, the TSC, as a document, aims to promote efficiency and cost effectiveness in the transmission of electricity and facilitate the

maintenance of a financially viable electricity industry. Furthermore, section 70.1 of the Act specifically bestows on the Board the power to draft codes including the TSC. This power to draft codes provided to the Board under section 70.1 of the Act, necessarily implies that the Board must also have the jurisdiction to determine how those codes should be interpreted and applied.

**The Board's jurisdiction should be broadly applied**

9. The case law suggest that the Board's jurisdiction should be construed broadly and suggests that the Board should be afforded significant breadth in its ability to consider issues and make decisions with respect to matters arising out of sections over which its jurisdiction has been established by the Act.
10. This expansive approach to determining questions of the Board's jurisdiction was recently demonstrated in the 2010 Court of Appeal decision in *Snopko v. Union Gas Ltd.*, 317 D.L.R. (4<sup>th</sup>) 719, (hereafter, "*Snopko*"), involving lands, owned by the Plaintiffs, that were part of a natural gas storage pool operated by the Defendants. The Plaintiffs brought tort and contract claims in Superior Court against the Defendants, which were dismissed by summary judgment after the Court found that the matter was entirely within the Board's exclusive jurisdiction. The Plaintiffs appealed. The Court of Appeal found that the power afforded to the Board under section 38 of the Act to make determinations about appropriate compensation in respect to gas storage operations generally, included the jurisdiction for the Board to make all decisions in respect of issues reflecting the substance of section 38 of the Act. Although the Act did not explicitly provide the Board with jurisdiction relating to tort and contract claims, as the claims were for compensation,

they properly fell within the jurisdiction of the Board. The Court ruled, at paragraph 24, that “it is the substance not the legal form of the claim that should determine the issue of jurisdiction”.

11. The Board’s authority to make decisions specifically with respect to the interpretation and application of codes is further supported by the Court of Appeal’s decision in *Graywood Investments Ltd. v. Toronto Hydro-Electric System Ltd.* (2004) 181 O.A.C. 265, (hereafter, “*Graywood*”). In this case, the Court of Appeal considered the Board’s jurisdiction to hear a dispute centering on whether the Defendant had breached its license by failing to apply the Distribution System Code. The Court found that this question fell within the Board’s jurisdiction under the old subsection 75(1) of the Act, which simply provided that if the Board was satisfied that a licensee was contravening or was likely to contravene its license, the Board was able to order the licensee to comply with its license. Upon finding the Board had general jurisdiction with respect to the Distribution System Code, the Court of Appeal concluded that subsection 19(1) of the Act afforded the Board the authority to make any determination with respect to the interpretation of the Distribution System Code.
12. Applied to the instant case, the Court of Appeal’s findings in *Snopko* and *Graywood* support the position that subsection 1(1) and section 70.1 of the Act provide the Board with not only the jurisdiction to create and apply the TSC, but more broadly to deal with any matters arising out of the Board’s general authority over the TSC, including questions of whether section 70.1 authorizes the impugned provisions of the TSC.

13. Furthermore, the jurisprudence indicates that in the absence of a clear statutory intent to restrict the Board's jurisdiction in some way, it is inappropriate to apply a narrow scope of jurisdiction. In *Enbridge Gas Distribution Inc. v. Ontario (Energy Board)*, 193 O.A.C. 180, it was argued that subsection 44(1)(b) of the Act, which explicitly entitled the Board to make rules governing the conduct of a gas distributor as such conduct relates to any gas vendor, did not bestow the Board with the jurisdiction to create rules governing gas vendors in and of themselves. In rejecting such an interpretation, the Court of Appeal, at paragraph 28, stated:

there is nothing in either the language of s.44(1)(b) or its statutory context to suggest such a narrow interpretation. The subsection does not say that the conduct of the gas distributor governed by a rule must relate to the gas vendor by being a part of a direct business relationship between the two and that in no other sense can the conduct be related to the business of the gas vendor. Moreover, such a narrow reading would be inconsistent with the broad purpose of the Act, which is to regulate all aspects of the gas distribution business, not simply those aspects that involve a direct business relationship with gas vendors.

14. Similarly, in this case, to narrow the scope of the Board's jurisdiction to determine matters relating to the scope and application of the TSC without any indication in the language of the Act that the legislature intended such narrowing, would be inappropriate and contrary to the clear intention of the Act, which is to allow the Board to regulate all aspects of the energy distribution business, including the content and application of codes created under section 70.1 of the Act.

#### **The Board may review its own decisions**

15. To the extent that Goldcorp's Application requires the Board to review its own decision (insofar as the drafting of the TSC may represent an exercise of decision-making



authority of the Board), such internal review is clearly contemplated and provided for in the Board's Rules of Practice and Procedure (the "**Rules**"). Rules 42 to 45 of the Rules provide the Board with the authority to review its own decisions. Specifically, Rule 43.01 states:

The Board may at any time indicate its intention to review all or part of any order or decision and may confirm, vary, suspend or cancel the order or decision by serving a letter on all parties to the proceeding.

The powers of the Board reflected in these rules arises from subsection 21.1(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, s S.22 (the "**SPPA**"), which provides that:

A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or any part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order.

16. In *Ontario (Energy Board) Re*, 2007, Nos. EB-2006-0322, EB-2006-0338, EB-2006-0340, the Board considered the extent of the review powers afforded under the Rules. Counsel for the Board argued that grounds for review must be among those listed in Rule 42.01 of the Rules and that any review not rooted in the listed factors was outside the Board's jurisdiction. The Board ultimately rejected this position, however, finding that the list of grounds for review was not exhaustive and that the Board had the jurisdiction to consider a motion based on alleged errors of mixed fact and law. The important element of this decision for the purposes of the Goldcorp Application and this preliminary hearing is that, in reaching this decision, the Board put particular emphasis on the importance of considering the SPPA and the Rules in their entirety and considering the intent of both the legislature and the Board in creating these governing frameworks.

In concluding that the Board was authorized to reconsider decisions beyond the scope elucidated in Rule 42.01 of the Rules, the Board acknowledged the intention of the legislature and the Board to create a scheme that allowed the Board general powers to reconsider past decisions where it was determined that the situation merited such consideration and that it is in the public interest to do so.

### **Conclusion on Issue I**

17. AMPCO submits that subsection 19(1) of the Act provides the Board with the ability to hear and determine any questions of law or fact on matters within its jurisdiction. The critical consideration for the Board in answering question A1 is whether the substance of Goldcorp's Application is within its jurisdiction. The crux of Goldcorp's Application lies in a question of the permissible application and scope of section 70.1 of the Act, as it authorizes the creation and use of the TSC. The key question for the Board in answering question A1 is thus whether they have the jurisdiction to interpret and determine the Act as it applies to the TSC.
18. Sections 1.1 and 70.1 of the Act both bestow on the Board the jurisdiction to draft and apply the TSC. The case law establishes that the Board's jurisdiction, where established generally, should be broadly recognized in order to ensure the Board's ability to properly and fully address any questions relating to the substance of the matter and that the jurisdiction of the Board should explicitly not be narrowed in the absence of a clear indication that such narrowing was the intent of the legislature.

19. Furthermore, both the Rules and the SPPA explicitly provide for the Board to review its own decisions. The jurisprudence on these provisions establishes that the goal of the Rules and SPPA is to ensure the Board has broad enough jurisdiction to deal with matters as necessary, when a review of a prior decision is appropriate.
20. In light of the forgoing, AMPCO submits that section 19 of the Act, in granting the Board with the statutory basis to hear and decide anything within its jurisdiction, provides the basis for the Board to hear Goldcorp's Application, as the substance of the application is within the jurisdiction of the Board.

## **ISSUE 2 - Board Issue A2**

**If section 19 of the Act does not provide a statutory basis on which Goldcorp may bring its Application, should the Board nonetheless proceed, on its own motion, to hear and determine the matters raised by the Goldcorp Application under section 19(4) of the Act?**

21. AMPCO submits that the answer to question A2 is yes, should the Board find that section 19 of the Act does not provide a statutory basis on which Goldcorp may bring its Application, then the Board should, nonetheless proceed, on its own motion, to hear and determine the matters raised by the Goldcorp Application under section 19(4) of the Act.
22. There is clear precedent for the Board to exercise its authority under subsection 19(4) of the Act to consider matters relating to the TSC. In *Hydro One Networks Inc. (Re)*, 2004, No. RP-2002-0120, the Board undertook a review of the TSC, in part under the authority of subsection 19(4) of the Act.
23. The Board should proceed to hear and determine the matters raised by the Goldcorp Application as it is the most appropriate and capable forum for determining the matters

contained in the application. As discussed in respect to question A1, at its core, the matters raised by the Goldcorp Application turn on the scope of authority provided by section 70.1 of the Act. This is a matter of statutory interpretation of the Act; an area of expertise for which the Board has been widely recognized in the jurisprudence. In *Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)* (2010), 99 O.R. (3d) 481, the Court of Appeal reiterated its earlier position in *Natural Resource Gas Ltd. v. Ontario (Energy Board)* (2006), 214 O.A.C. 236, when, at paragraph 12, it recognized the Board as “a highly specialized expert tribunal with broad authority to regulate the energy sector in Ontario”. Section 19(4) of the Act is one section among several in the Act, as well as the Rules and the SPPA intended to ensure that the Board has all the ability it requires to undertake appropriately this regulation of the energy sector.

24. It would be counter to the very purpose in creating an administrative tribunal such as the Board to require that matters of the fundamental interpretation of the Act be dealt with in an alternative forum lacking such expertise. The Goldcorp Application raises fundamental questions about the interpretation and application of the Act, which is a matter that falls squarely within the expertise of the Board and as such, should be dealt with by the Board.