



Fogler, Rubinoff LLP

Lawyers

77 King Street West
Suite 3000, PO Box 95
TD Centre North Tower
Toronto, ON M5K 1G8

t: 416.864.9700 | f: 416.941.8852
foglers.com

December 4, 2014

Reply To: Thomas Brett
Direct Dial: 416.941.8861
E-mail: tbrett@foglers.com
Our File No. 134380

VIA RESS, EMAIL AND COURIER

Ontario Energy Board
2300 Yonge Street
Suite 2700
Toronto Ontario
M4P 1E4

Attention: Kirsten Walli,
Board Secretary

Dear Ms. Walli:

**Re: Suncor Energy Products Inc. ("Suncor") – Applicant's Written Submissions
Board File No. EB-2014-0022**

Please find enclosed Suncor's Written Submissions.

Yours sincerely,

FOGLER, RUBINOFF LLP

A handwritten signature in black ink, appearing to read "Thomas Brett", written over a horizontal line.

Thomas Brett

TB/dd

Encls.

CC: All Parties

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 Suncor Energy Products Inc. for an Order granting leave to construct a new transmission line and associated facilities.

APPLICANT'S WRITTEN SUBMISSIONS

December 4, 2014

1. Preliminary Issue

In Procedural Order No. 8, the Board was very clear that it wanted HONI to provide evidence on two subjects that relate to the identification of the incremental costs and operational impacts "in a leave to construct application".

The Board stated:

"Specifically, the Board is interested in evidence related to two areas. The first pertains to the costs of reconfiguration, replacement or relocation of existing infrastructure caused by the construction and existence of the proposed transmission facility. The second area pertains to the operational arrangements between Hydro One and Suncor that Hydro One argues are necessitated by the existence of proposed transmission facility. To be clear, the Board is interested in determining those impacts that arise as a result of the proposed transmission as they pertain to the existing infrastructure as opposed to impacts that may arise in relation to future distribution assets".

Despite this very clear direction, with respect to existing infrastructure, HONI proceeded to submit evidence through its examination in chief and the provision of a number of diagrams that focused almost entirely on the costs incurred by HONI and its customers with respect to new infrastructure, in other words, new distribution lines it wished to install to new customers after

Suncor's transmission line was built and in operation. That material and HONI's evidence in chief about that material was in clear violation of the Board's Procedural Order, and was a serious abuse of process. The Board Vice-Chair and Chair of the Panel, Mr. Quesnelle, had to repeatedly bring HONI back to the issue on which the Board requested information. In addition, the diagrams which were the core of the new evidence were not provided in advance to either the Board staff or Suncor. There was little opportunity to prepare objections or questions. Moreover, HONI's conduct throughout last week's hearing reflected a continued and flagrant disregard of the Board's instructions.

Given the misconduct on HONI's part, Suncor suggests that the Board give little or no weight to HONI's evidence with respect to an impact of the transmission line on the costs of future distribution infrastructure that may or may not be built.

The Board's current position on the matter of impacts on new and existing infrastructure is set out clearly in EB-2011-0063, by a panel on which Mr. Quesnelle sat. At page 11, the Board made the following comprehensive statement on this issue:

"In its assessment of impacts on prices, reliability and quality of electricity service the Board considers it appropriate that GRWLP be responsible to pay for any direct impacts its Project causes to the quality or reliability of the electricity service provided by HCHI's existing system. HCHI has made claims that both its current and future use of its system will (or may) be negatively impacted. In the context of the current proceeding, the Board does not consider it appropriate that GRWLP be held responsible for any alteration that HCHI may have to make to its future plans. This consideration would be beyond the scope of this proceeding and is not supported by any governing planning framework.

It is not necessary for the Board to make findings here as to the exact extent of what accommodation is required by GRWLP to mitigate any negative impacts that its project will have on the existing distribution system. The existence of applicable construction standards and/or codes as well as any requirements of the Electrical Safety Authority, in its role pursuant to Ontario Regulation 22/04, to ensure compliance of distributors in managing distribution systems in accordance with the noted regulation should serve to identify what accommodation is required.

The Board conditions its granting of the leave to construct on GRWLP providing the financial contributions to HCHI necessary to accommodate any mitigation measures to existing distribution facilities deemed necessary to ensure compliance with any relevant code, standard or Electrical Safety Authority requirement."

2. The Agreements

As noted in its Reply Argument dated October 24, 2014 ("Reply"), Suncor is prepared to sign the Perpendicular Crossing Operational Agreement (the "Crossings Agreement") with Schedule A (the Emergency Services Agreement, referred to herein as "EMS Agreement") and the other references to the EMS Agreement removed, or, in the alternative, both the Crossings and the EMS Agreement if the indemnity clause (section 7) of the EMS Agreement were modified to remove its punitive and commercially unacceptable features.

Suncor is of the view, in part because of HONI's testimony in last week's proceeding, that the EMS Agreement is not required. There are two reasons for this.

First, the Crossings Agreement, in addition to dealing with the costs Suncor has agreed to pay HONI, contains many of the safeguards for HONI and its customers, both in the immediate vicinity and more broadly that will ensure continuation of the quality and reliability of the emergency service. Second, the Board can mandate any desirable protections whether provided by the Crossings Agreement or by the EMS Agreement, by way of conditions to the order granting Suncor Leave to Construct. Suncor discusses each of these reasons in more detail below.

3. Protections in the Crossings Agreement on operation matters can be delivered by conditions in the Leave to Construct

Subsection 5.1 of the Crossings Agreement states:

"Emergency calls received by a Party hereto must be responded to by said Party within 120 minutes. This service quality requirement shall be met by each Party at least 80 percent of the time on a yearly basis".

Emergency calls are defined to mean:

"a call when the urgent assistance of a Party hereto has been requested by any person in connection with the said Party's assets on the land".

Suncor understands these calls would include calls to either Suncor or HONI by anyone, including a HONI distribution customer, HONI, Suncor, police, fire, or other public safety authority.

The "120 minute test" is the same test used in the EMS Agreement, Schedule A, paragraph 1, which states:

"The Service Recipient (Suncor) shall respond to any such call (from HONI) and arrive at the relevant site within 120 minutes after the receipt of any such call".

An obligation on Suncor to respond in this fashion structured as a condition of the Leave to Construct would deal with several of the issues raised by Mr. Boldt in his discussion with the panel members last Thursday, including:

- In the event the emergency involved a Suncor asset, HONI personnel would not need to remain at the site for an undue amount of time; they would only have to secure the site until Suncor's arrival, and there would be no domino effect (Transcript, page 65).

- HONI testified that when they receive a call from either a customer, or public safety officer, they "roll a truck" (Transcript, page 61).
- If the call is from a customer that has lost power, upon arrival at the site, if HONI determines it is their asset that is out, and Suncor's asset is not, HONI will immediately work to restore power to the customer (Transcript, page 65).
- If it is a Suncor asset that is compromised (for example, a transmission line is down), or if both Suncor assets and HONI assets are compromised (in a storm), HONI will, in any event, secure the site until Suncor personnel arrive. While "securing the site" is one of the "emergency services" specified in Schedule A of the EMS Agreement, it is one that HONI would provide in any event. Once Suncor personnel arrive on site, they will be responsible, to the extent that a Suncor asset is compromised, for securing the site, and providing safe working conditions for HONI staff to allow them to turn to restoring power to any of their customers that may be out of power. If that is not required, HONI personnel are free to work elsewhere. Again, there is no "domino effect".
- The requirement for Suncor to be at the site within 120 minutes also allows the parties to use the process outlined in subsection 5.2 of the Crossings Agreement. Section 5 of the Crossings Agreement is entitled "Trouble Calls and Response Times". Subsection 5.2 provides that if either party's assets are compromised in a manner that causes the other parties' assets to malfunction, the party who owns the interfering assets must provide work protection to the affected party, to allow the affected party to re-energize its assets within four hours of the occurrence of the incident. This result would be achieved because, assuming for the moment that Suncor's asset was damaged and was interfering with a HONI asset, whether or not it actually caused a HONI outage, the obligation on

Suncor to have its people onsite within 120 minutes of receiving an emergency call would permit HONI to restore or safeguard its asset.

The only gap in the process, which is dealt with currently by section 1 of Schedule A to the EMS Agreement is to ensure that Suncor is always in a position to receive a call from HONI. Section 1 provides:

"Upon discovering or being notified by a third party that the Assets of the Services Recipient (Suncor) require emergency trouble work, the Services Provider (HONI) shall notify the Services Recipient by placing a telephone call to the Services Recipient's Emergency Line: (403) 807-9270. This Emergency Line shall be available for use 24 hours per day 7 days per week and the Services Recipient (Suncor) shall have someone available during such times to answer and respond to calls at this Emergency Line. The Services Recipient (Suncor) shall respond to any such call and arrive at the relevant site within 120 minutes after receipt of any such call".

The Board could make the section, or the part dealing with Suncor's obligation to have and staff an Emergency Line (everything but the first sentence), a condition to the Leave to Construct to be provided prior to commencement of construction or commercial operation.

As for the first sentence, HONI has testified that if it received a call, and it would receive most calls, it would immediately call Suncor if it believed that Suncor's asset required emergency trouble work. In any event, it would roll a truck and alert Suncor immediately upon arrival at the site, if it determined that a Suncor asset was compromised. If it received a call in circumstances when both HONI and Suncor assets would likely be compromised, such as during a major storm, it would call Suncor when it received the first trouble call.

In assessing the workability of these arrangements, the fact that HONI would expect about one call per year (Transcript, page 69) regarding a wind generator's transmission assets would be important.

With respect to the identification of ownership of assets, Section 10 of the Crossings Agreement requires Suncor, among other things, to provide HONI with "as built" maps of all of its overhead transmission poles that are located or will be located in, through, under, over, across, along and upon the relevant road allowances. This would allow HONI to identify, upon receipt of a call, whether the emergency possibly or likely involved the damage to a Suncor transmission asset. If it did, HONI would know to call Suncor immediately. HONI recognized the importance of this provision in the Crossings Agreement in its testimony last week (Transcript, page 73, line 21).

In subsection 10(2), Suncor agrees to become a member of Ontario One Call (ONICALL) within ninety days of the Commercial Operation Date of its Transmission Line.

All these provisions of the Crossings Agreement could also be structured as conditions to the Leave to Construct.

4. The Crossings Agreement protections for incremental costs for the relocation, replacement or reconfiguration of existing distribution infrastructure can be delivered through conditions on the Leave to Construct

The protection afforded HONI's distribution infrastructure in the Crossings Agreement deals, among other things, with six crossings of existing HONI distribution facilities. Five of these existing facilities are primary lines and one of them is a secondary line. The Crossings Agreements contain provisions that ensure that HONI's nearby distribution customers are not exposed to any degradation of the price, quality, or reliability of their utility service as a result of the construction of the Suncor line. In so doing, they provide assurance that the Board has had regard to the requirement of section 96(2) of the Ontario Energy Board Act in determining the public interest with respect to Suncor's Leave to Construct Application.

Subsection 4.1 of the Crossings Agreement, entitled "Existing Overhead HONI Secondary Lines" obligates Suncor to pay HONI's cost of relocating its secondary "bare neutral" line underground, so as to avoid a voltage surge if its transmission line were to fall on the secondary bare neutral line. Suncor cannot energize its transmission line until it pays HONI's invoice for relocating the line. HONI has estimated that cost to be \$7,300.00 (Transcript, page 29). Notably, HONI has not seen fit to relocate underground its own secondary "base neutral" lines that lie underneath its own 115 kV transmission lines along provincial road allowances, has no standard developed for clearances for secondary lines, and does not appear to be aware of how many such situations it has on its system (Transcript, page 29). Nonetheless, Suncor has agreed to pay the cost in question.

With respect to the five crossings of HONI's primary distribution lines by Suncor's transmission line, subsection 4.4(b) of the Crossings Agreement requires Suncor to observe HONI's clearances policy between transmission lines and primary distribution lines. Mr. Boldt confirmed in his testimony that Suncor's design complies with the clearances policy so there is no remaining issue with respect to the Suncor crossings of HONI's primary distribution lines (Transcript, page 60). Mr. Boldt stated, in response to a question by Mr. Brett:

"Correct, the clearances are definitely being dealt with".

The parties are agreed on that, and have been agreed for some time.

However, Suncor has gone further to accommodate HONI. Subsection 4(2) states that:

"New HONI Primary Lines – Where the Proponent (Suncor) has existing Proponent Overhead Transmission Poles on, upon or over Lands and HONI wishes to either install a new primary electricity distribution line (i.e. 600V and over) to feed individual electricity distribution customers or upgrade an existing primary electricity distribution line to feed

individual electricity distribution customers (either line hereinafter referred to as a "HONI Primary Line") on, upon or over the Lands such that it will cross the Proponent Overhead Transmission Poles, HONI shall notify the Proponent thereof in writing and the Proponent shall, in order to accommodate the HONI Primary Line and at its sole risk and expense, elect by notice in writing either to:

- (a) replace the poles that are part of the Proponent Overhead Transmission Poles with a pole(s) sufficient in height to accommodate the HONI Primary Line;
- (b) interspace a new pole in between existing poles that are part of the Proponent Overhead Transmission Poles to accommodate the HONI Primary Line; or
- (c) request HONI to install the HONI Primary Line under the Lands at the point of crossing.

If Proponent fails to make such election within five (5) Business Days of delivery of the notice given by HONI, then HONI may undertake the work described in subparagraph 4.2(c)" (our emphasis).

Suncor has confirmed, and HONI has agreed, that given Suncor's policy of installing all its transmission poles to a height that would comply with HONI's tolerances, this section would likely not become operational; nevertheless, Suncor has made the commitment, in this case, to pay for the relocation of its poles, if necessary, to accommodate HONI's future infrastructure, in the case of new HONI assets constructed after Suncor's transmission line is in place (our emphasis).

Moreover, in subsection 4.5 of the Crossings Agreement, Suncor agrees that, where HONI wishes to install a new secondary distribution line (up to 600 kV) to feed individual electricity distribution customers or a new primary line, which cross an existing Suncor transmission line, to pay, per subsection 4.5(a), HONI's incremental cost of locating that new secondary or primary line underground, and per subsection 4.5(b), the incremental costs of any HONI new customers to connect to the new secondary or primary distribution line. Pursuant to HONI's Conditions of Service, new customers must pay part of HONI's costs of providing distribution service connections beyond HONI's basic "connection service".

Finally, pursuant to subsection 4.8 of the Crossings Agreement, Suncor has agreed to pay their incremental costs, whether incurred by HONI or by its new customers as a requirement of HONI's connection policy for a period of ten years (Transcript, page 69). The draft of the Agreement, which HONI has filed in this proceeding and spoke to last Thursday, provides that Suncor has this obligation for the entire period of the FIT contract, until December 31, 2025, but Mr. Boldt testified that the terms of Suncor's commitment is actually ten years from the effective date (Transcript, page 69).

To summarize, Suncor's commitments to HONI in subsections 4.2, 4.3, 4.5, 4.6, and 4.8 of the Crossings Agreement, go well beyond what the Board's current policy with respect to generators' reimbursing HONI for the impacts of its transmission line on HONI's existing distribution infrastructure (see pages 2-3 above).

Suncor has gone beyond the requirements of current Board policy and the sums of money are not trivial.

Subsections 5.3 and 5.4 of the Crossings Agreement provide a protocol for HONI and Suncor to deal with one another in respect of their planned emergency maintenance work on their respective assets.

Subsection 5.3 provides for, among other things, notice periods for de-energization of assets to allow one party to proceed with emergency maintenance, including any reimbursement of any costs of the party which de-energizes its assets, due diligence in doing the required repairs.

Subsections 5.4 (i) and (ii) detail on how the two parties will collaborate if one party has to do work on its assets while the other party's assets remain energized to ensure safety for workers and customers.

As noted above in respect of the operational matters, all of these cost reimbursement commitments can be achieved through conditions to the Leave to Construct.

The Broader Regulatory Framework

For clarity, Suncor agrees that the Board has the jurisdiction in a Leave to Construct proceeding to consider the impact of the transmission line on price, quality and reliability of electrical service which the distributor's existing infrastructure affords that distributor's customers, whether proximate or otherwise (see, for example, EB-2011-0063 Decision, page 11). However, that is not the issue in either the mini proceeding held last week or the current proceeding as a whole. The issue is what are the incremental costs and operational impacts of the transmission line being built and coexisting in certain places with an existing distribution system, has Suncor made reasonable commitments to reimburse HONI for the incremental costs, and what protocols need to be put in place, and by what method, to ensure the parties work together effectively to deal with any issues that arise, including emergencies.

Conclusion

In part because of the questions asked by the Board in last week's proceeding, Suncor has spent considerable effort in this argument, in exploring the feasibility of the Board dealing with the price, reliability and quality issues covered in the Crossings Agreement and EMS Agreement through conditions on the Leave to Construct granted Suncor. Suncor believes it is not only

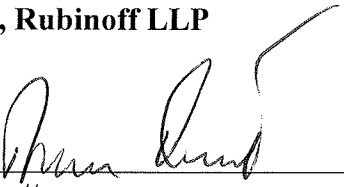
feasible, but desirable to proceed in this way, rather than conditioning approval on Suncor signing the Agreements.

All of which is respectfully submitted, this 4th day of December, 2014.

SUNCOR ENERGY PRODUCTS INC.

By its counsel,

Fogler, Rubinoff LLP



Tom Brett

Postscript

Given the fact that Mr. Boldt made several references in his testimony to the fact that HONI merely asks Suncor to "insure" or "indemnify" HONI for its work in securing a site in response to a trouble call, Suncor wishes to briefly restate its concern with HONI's proposed indemnity clause which is found in section 7 of the proposed EMS Agreement.

As noted in Suncor's Reply Agreement, Suncor's issue is not with a normal indemnity clause. Suncor is familiar with such clauses which are common in commercial agreements. HONI has such a clause in its Conditions of Service, which is reproduced in Suncor's Reply Agreement (at page 5). The purpose of an indemnity clause is for one party to a transaction or project to hold the other party to the transaction or the project harmless in the event a third party makes a claim against the second party, that arises out of the project or contractual relationship and is found by the Court to have been the fault of the first (indemnifying) party. However, HONI's proposed clause would not only do that, but also require Suncor to pay damages awarded against HONI, even when those damages resulted from HONI's own incompetence, negligence or breach of contract with Suncor or a third party, in the course of securing the site. In plain language, if HONI performs poorly and is successfully sued as a result, Suncor must pay the claim. Moreover, the amount that Suncor must pay, according to section 7 of the EMS Agreement, is not limited to the normal direct damages, but extends to all other types of losses, including economic loss, loss of goodwill, loss of profit, or any special indirect or consequential damages. These categories of damages are almost never indemnified against.

HONI argued in its Reply that Suncor should pay even if HONI's negligence or breach of contract is the cause of the damages, because it has the opportunity to use a third party, it does

not need to use HONI (see HONI's Submission dated October 17, 2014 at page 4). Unfortunately, HONI is wrong on that point. Mr. Boldt's testimony is that the Agreements are one (Transcript, page 56) as the EMS Agreement is a Schedule to the Crossings Agreement. (For further details of the melding of the two Agreements, see Suncor's Reply, at page 3).

HONI also testified that, in the event of the trouble call, it secure the area, but does not work on the damaged transmission line. It states that it does not touch Suncor's asset (Transcript, page 75).

HONI also testified that it will be there, as it will "roll a truck" whenever a call comes in, and, because of its presence throughout rural Ontario, it will almost certainly receive the first call.

Finally, it is highly unlikely that HONI ask its own transmission division, another LDC, a telephone company, or a cable company, with whom it has joint use agreements or analogous kinds of agreements, to reimburse it for damages that were the result of its incompetence.

For all these reasons, the indemnity clause, as written, is unacceptable and Suncor believes it is more than justified in refusing to sign the Agreements in their current form, or for the Board to condition a Leave to Construct on Suncor doing so, especially when alternatives are available, such as those described above.

SUNCOR ENERGY PRODUCTS INC.
By its counsel,
Fogler, Rubinoff LLP



Tom Brett