

January 8, 2021

Board Secretary/Registrar  
Ontario Energy Board  
P.O. Box 2319, 27th Floor  
2300 Yonge St.  
Toronto, ON M4P 1E4

Sent via email: [registrar@oeb.ca](mailto:registrar@oeb.ca)

Dear Ms. Long:

**Re: EB-2019-0166 – MPAC Response to OPI Request for New Evidence Submission**

Please accept this letter as MPAC's response to the Ontario Petroleum Institute (OPI)'s Request for New Evidence Submission, dated December 30, 2020.

MPAC's position is that OPI's request is improper, and it would be inappropriate for the Board to consider that evidence for the following reasons:

- 1) The information is not "new information" as required by Rule 11.02 of the *OEB Rules of Practice and Procedure*. In addition, this is not information OPI became aware of during the course of the proceeding. The Affidavit and Exhibits relate to correspondence between MPAC and Mr. McIntosh in early 2019.
- 2) The information was known and available over a year before these proceedings commenced, and there is no reason it could not have been placed on the record during the course of the proceeding.
- 3) OPI/Mr. McIntosh could have advanced this information at the outset of the hearing, but also had other opportunities to do so, in particular:
  - a) In response to Mr. Ford's Affidavit, sworn on July 29, 2020, which outlined MPAC's standard procedure for the designation of pipe lines and how it

becomes aware of the location, type, pipe diameter and length, and year installed of pipe lines.

- b) OPI could have addressed this in the interrogatory stage of the proceedings, but did not make any interrogatories of MPAC.
  - c) MPAC also provided a detailed response to the OEB staff interrogatories with respect to the designation of pipelines in its interrogatory responses filed September 17, 2020. Included in its responses to the OEB interrogatories was a statement that MPAC would have no way of knowing the location, age, length, or diameter of the pipe lines unless that information was provided by the pipe line company under s. 25 of the *Assessment Act*.
- 4) While it would also have been improper to raise new evidence during the oral submissions made by Mr. McIntosh on December 2, 2020, Mr. McIntosh did not make any mention of an issue with respect to the designation of pipelines in his summary of oral submissions, nor did he mention that any submissions “conflicted with his personal experience” at that time.
  - 5) OPI/Mr. McIntosh had notice of MPAC’s evidence with respect to the designation of pipelines in Mr. Ford’s Affidavit filed on July 29, 2020; in MPAC’s responses to interrogatories filed September 17, 2020; as part of MPAC’s written submissions filed on October 20, 2020; and as part of MPAC’s written summary of oral submissions filed November 25, 2020. No issue was raised by OPI with respect to how MPAC designates pipe lines in response to any of those materials.
  - 6) The OPI letter of intervention provided that the OPI “will participate in the proceeding, cross-examine, submit evidence and possibly advance witnesses, etc.” but it chose not to actively participate until the oral submissions phase of the proceeding had concluded.
  - 7) Procedural Order No. 5, issued by the OEB on November 13, 2020 specifically provided that the written summaries of oral submissions to be filed were to be “consistent with materials already filed with the OEB” – a clear directive that new materials were not to be introduced at that time. If new materials were not appropriate on November 25, 2020, they are certainly not appropriate on December 30, 2020.

- 8) The evidentiary portion of the proceeding has now concluded, and MPAC has not had an opportunity to challenge the information now being put forward by OPI, or to respond to it.
- 9) The Board has often refused to permit amendments to the evidentiary record where that evidence has not been tested on the record, or is submitted after the close of the evidentiary portion of the proceeding<sup>1</sup>. In *Horizon Utilities Corp. (Re)*, the Board specifically indicated as follows:

The Board cautions the parties about introducing new evidence in the submission phase of a proceeding. Such placing of new evidence could cause other parties to request, or the Board on its own motion, to re-open the record to allow for further testing of this evidence. This can lead to delays and added costs in the process.<sup>2</sup>

- 10) In this case, not only is OPI's evidence being advanced after the evidentiary portion of the proceeding has concluded, it is being advanced after written arguments have been filed, after written summaries of oral submissions have been filed, and almost a full month after the oral submissions were heard. This is significantly later than the reply submission phase referred to in the Board's caution in *Horizon Utilities Corp.*, and in the cases referred to in footnote 1 to this letter.
- 11) Permitting the submission of OPI's evidence will undoubtedly lead to requests to re-open the record to allow for reply and testing of the evidence, and to allow the parties to make submissions on the issues raised which may require amendments to the argument already submitted, and submissions with respect to its relevance to these proceedings. This would certainly lead to delays and added costs.

In short, OPI's information is not "new", and in spite of several opportunities during the course of these proceedings to raise it, it is being advanced well beyond the appropriate timeline. It is MPAC's position that the Board should refuse to consider it for the reasons outlined above.

---

<sup>1</sup> See e.g. *Horizon Utilities Corp. (Re)*, 2012 LNONOEB 199, at para 11; *Ontario Power Generation Inc (Re)*, 2014 LNONOEB 42 at para. 377; *Oshawa PUC Networks Inc. (Re)*, 2008 LNONOEB 29, at para. 111; and *Canadian Niagara Power Inc. (Re)*, 2009 LNONOEB 85 at para. 64.

<sup>2</sup> *Horizon Utilities Corp. (Re)*, 2012 LNONOEB 199, at para 11.

Should the Board agree to consider the new evidence, fairness dictates that MPAC should be granted the same opportunity to test OPI's evidence and respond to it that OPI had with respect to MPAC's. If necessary, MPAC intends to pursue the requests outlined in paragraph number 10, above.

Yours very truly,



Jennifer A. Barlow

JAB/ms