Bennett Jones LLP
3400 One First Canadian Place, PO Box 130
Toronto, Ontario, Canada M5X 1A4
Tel: 416.863.1200 Fax: 416.863.1716

Richard B. Swan
Partner and Co-Head, Litigation
Direct Line: 416.777.7479
e-mail: swanr@bennettjones.com

January 14, 2021

Via Email (registrar@oeb.ca)

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

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

We submit this letter on behalf of Lagasco Inc. ("**Lagasco**") in respect of the new evidence submission of the intervenor, Ontario Petroleum Institute ("**OPI**"), attaching the affidavit of Jim McIntosh sworn December 30, 2020 (the "**McIntosh Affidavit**"). Lagasco's position is that the McIntosh affidavit should be admitted as its contents are directly relevant to a key issue in this proceeding and should therefore be considered by the panel.

In this regard, a very important question before the Board is whether the pipelines at issue have been "designated by the owner" as required by s. 25(2) the *Assessment Act*. It is uncontradicted that neither Lagasco nor the previous owner, Dundee, made such a designation, and there is *no evidence* of a designation by *any* previous owner. MPAC's position that the pipelines qualify as "pipe lines" under the *Assessment Act* depends entirely on the proposition—forcefully submitted by MPAC's counsel at the hearing—that a previous owner of the pipelines *must* have made a designation at some point, because otherwise MPAC would not know about the pipelines. It was asserted by MPAC that the only way it would have the information on the pipelines, including the length, diameter and construction material, would have been through the owner designation to MPAC that the pipeline was a “pipe line” under s. 25(2). Although the burden of proof in respect of a "designation" must fall on MPAC (which it did not discharge), Lagasco was not in a position to contradict MPAC's unsubstantiated contention, as it could not prove that decades of previous pipeline owners had *not* made a designation.

The McIntosh Affidavit contains important new information regarding the above material issue, which issue was highlighted by the panel's questioning during the hearing of Lagasco's application. In the circumstances, permitting a more complete record in this respect for the panel to decide should not prejudice any of the parties. The Board's decision in this matter will have significant and potentially severe consequences for Ontario's oil and gas industry, and the interests of justice and procedural fairness require the Board to make its decision with the best possible appreciation of the relevant facts.

Mr. McIntosh has relevant and indeed important evidence on this issue: a company with which he is directly affiliated owns pipelines that have been assessed by MPAC, and because Mr. McIntosh has been involved in managing and operating these pipelines for over 28 years, dating back to their construction, he *is* in a position to state with certainty that *no* previous owner designated the pipelines under the *Assessment Act*, and to theorize that MPAC might have obtained the necessary information to assess the pipelines from MNRF. Not only did the company not designate the pipeline at any point, it specifically objected to MPAC's classification as a "pipe line," stating that it had never been designated and was ignored by MPAC. This directly contradicts MPAC's contention that it can only assess a pipeline which has been designated by its owner, and if that contention is incorrect, then it is impossible for the Board to conclude that the pipelines at issue were ever "designated by the owner". The legal and administrative concern expressed here appears to be that MPAC may actually be sourcing external information to make its own pipeline taxation assessments, and in some cases is not following the necessary statutory pipeline-owner designation process under section 25(2) of the *Assessment Act*, without notifying the pipeline owner. Such an approach and result would be fundamentally inconsistent with the s. 25(2) requirement under the *Act* that MPAC agreed it was obliged to follow.

The Board has broad discretion under its Rules to set and vary procedures "if it is satisfied that the circumstances of the proceeding so require, or it is in the public interest to do so" (rule 1.03). It is more important to achieve a just and correct outcome than to exclude the request of the OPI (an intervenor who was not represented by counsel at the time).

On the basis of Mr. McIntosh's affidavit, it appears that MPAC may have taken a position that was not fully accurate. If there is an inaccuracy in MPAC's position which has now been brought to the Board's attention, it should not be allowed to stand. Indeed, it is MPAC's obligation as a public body and under the Board's rules to correct the record, if it becomes aware that it requires correction.

Allowing an opportunity to correct the record before the Board makes its decision will ultimately be more efficient. If the Board makes its decision in this case in reliance on incorrect or incomplete facts, then the important issues raised by this case will remain incompletely resolved, and might have to be reconsidered with an appreciation of the correct facts.

Lagasco takes no position on MPAC's ability to file an evidentiary response.

Yours truly,

per

Richard B. Swan