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January 31, 2024

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Canada Energy Regulator
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Via Email: rppr@cer-rec.gc.ca

Attention: Rumu Sen, Regulatory Policy

Dear Ms. Sen:

Re: Letter of Comment on Phase I, Rules of Practice and Procedure Review

We write to note our support of the Canada Energy Regulator's ("CER") efforts to modernize the *National Energy Board Rules of Practice and Procedure, 1995* (the "Rules") to align with the *Canadian Energy Regulator Act* and to enhance the fairness and efficiency of the CER's procedures.

Our legal practice group frequently represents parties in proceedings before the Commission of the CER. Our comments below are informed by this experience, and represent our views as practitioners. Our comments should not be taken as representing the views of our clients.

The Rules serve to protect procedural fairness, predictability and efficiency in the CER's processes. In this review, we recommend that these core purposes remain the focus and touchpoint when considering amendments and updates to the Rules. In particular, changes to the Rules should protect procedural fairness, including ensuring that processes before the Commission are predictable and timely, that intervenors establish their interest in participating in hearing processes, and that applicants are entitled to review and test all evidence presented in a hearing.

With respect to the topics identified in the CER's Discussion Paper, we welcome efforts to modernize the Rules, including moving to electronic filing and service and reviewing what notice requirements are appropriate. Removing requirements to file hard copies will increase efficiency and reduce costs for all participants. Similarly, notices published in local print newspapers may no longer be the most effective method of providing notice to stakeholders. Where appropriate digital alternatives exist, digital notices will often be more effective and less costly.

We are also supportive of the CER considering changes to the Rules to reflect hearings pursuant to the *Canada Oil and Gas Operations Act*. In particular, expanding the application of Part I of the Rules to proceedings referred to in section 383 of the *Canadian Energy Regulator Act* would promote predictability and provide procedural safeguards, including rules respecting evidence and clarity around when affidavits are required, in these processes.

We also consider that the Rules Review may provide an appropriate opportunity to establish procedures for the Crown Consultation Coordinator's ("CCC") participation in hearing processes. This may include specifying when and how the CCC will participate in hearings and how the CCC will engage with applicants and intervenors to ensure the CCC is upholding the honour of the Crown while also preserving procedural fairness.

In our experience, the CCC's participation and role in the CER's process is often unclear to both the applicant and Indigenous groups. In some instances, the CCC's involvement in CER hearings has led Indigenous groups to refrain from participating directly in the CER process, with the CCC instead acting as an advocate for those Indigenous groups in the hearing process. This approach can make it difficult for the proponent and the Commission to understand the source of the CCC's submissions (i.e., Is the CCC acting as a conduit to relay Indigenous feedback to the Commission? Or is it making its own independent submissions?). This approach also creates multiple, parallel processes to address the same Indigenous concerns (i.e., through the CER hearing process and through the CCC consultation process), which creates legal risks regarding the integrity of both the Crown consultation process and the CER hearing process.

While the CCC's role in CER hearings is beyond the scope of the Rules Review, the Rules could include requirements that the CCC identify the source of any submissions it makes in CER hearings, and be subject to the same manner of questioning as other hearing participants (i.e., written information requests and cross-examination, as applicable). These requirements would help ensure procedural fairness in CER hearings. Outside of the Rules Review, the CER may also wish to consider setting out that the CCC will participate in hearings as directed by the Commission, or set procedures for how the CCC will be engaged in hearing processes, to provide clarity and predictability for hearing participants.

Finally, while we consider the Rules to generally remain appropriate and aligned with regulatory best practices, we have a few observations from recent hearings that may warrant consideration in the Rules Review:

- First, in our experience it has become relatively common for hearing participants in oral hearings to be required to file a list of evidentiary references for their cross-examinations one to two weeks in advance of the oral hearing. We understand that this requirement is intended to give the hearing officer time to locate the

evidentiary references in advance of the hearing so they can be accessed quickly during the hearing. However, this requirement creates two procedural difficulties. First, cross-examination is often developed shortly prior to the oral hearing and is not finalized one to two weeks in advance. Second, if parties are required to file their evidentiary references for cross-examination in advance of the hearing, the party being cross-examined will be effectively given a roadmap to the cross-examination. In our view, this undermines the function and value of cross-examination in oral hearings. For these reasons, we recommend requiring parties to provide a list of their evidentiary references to the hearing officer only, one clear business day in advance of the start of the hearing.

- Second, in one recent hearing, the proponent was directed to provide affidavits adopting their written evidence as part of its additional written evidence/supplemental evidence submission. This submission is typically filed early in the hearing process, roughly 6-9 months in advance of the oral hearing. While pipeline companies often have dozens of individuals involved in the preparation of their written evidence, the company will typically execute a single affidavit adopting that evidence by a senior member of the project team with overall direction and control of the file. If this affidavit is required 6-9 months in advance of the oral hearing, there is a risk that the individual who executes the affidavit leaves the company or their role within the company prior to the oral hearing. This would mean that the individual who executed the affidavit would not be available for cross-examination at the oral hearing (which could create procedural and legal challenges). For these reasons, we recommend that the Rules require that affidavits adopting written evidence be filed shortly prior to the oral hearing and not earlier in the hearing process.

We are grateful for this opportunity to participate in Phase I of the CER's Rules Review engagement, and will participate as appropriate in future phases.

Yours truly,



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