

RP-2005-0022  
EB-2005-0441  
EB-2005-0442  
EB-2005-0443  
EB-2005-0473

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

**AND IN THE MATTER OF** an Application by Greenfield  
Energy Centre Limited Partnership for an Order or Orders  
pursuant to section 90 of the *Ontario Energy Board Act,*  
*1998* granting leave to construct a natural gas pipeline in the  
Township of St. Clair, Ontario;

**AND IN THE MATTER OF** an Application by Greenfield  
Energy Centre Limited Partnership for an Order or Orders  
pursuant to section 101 of the *Ontario Energy Board Act,*  
*1998* for authorization for certain road and utility crossings  
required for the proposed pipeline;

**AND IN THE MATTER OF** an Application by Greenfield  
Energy Centre Limited Partnership for a Certificate of public  
convenience and necessity, pursuant to section 8 of the  
*Municipal Franchises Act;*

**AND IN THE MATTER OF** an Application by Union Gas  
Limited for an Order or Orders pursuant to section 90 of the  
*Ontario Energy Board Act, 1998* granting leave to construct  
a natural gas pipeline in the Township of St. Clair, Ontario.

**BEFORE:** Paul Vlahos  
Presiding Member  
  
Cynthia Chaplin  
Member  
  
Ken Quesnelle  
Member

**DECISION AND ORDER**

**January 6, 2006**

## EXECUTIVE SUMMARY

On July 20, 2005, Greenfield Energy Centre Limited Partnership (“GEC”) filed an application with the Ontario Energy Board for leave to construct a natural gas pipeline to supply a 1005 MW gas-fired generating station in Courtright, south of Sarnia. GEC has entered into a 20-year Clean Energy Supply contract with the Ontario Power Authority. On August 30, 2005, Union Gas Limited (“Union”) also filed an application to build a pipeline to serve the GEC generating station. The Board combined the two competing applications in one proceeding.

The Board approves both applications. However, only one approval can proceed. The approval for Union’s application is non-operative if it does not have the GEC power plant as a customer. A key condition therefore for Union is that it must contract to provide service to the GEC plant whether owned by GEC or another entity, as long as the power plant is in the same location and requires the same proposed pipeline, both in terms of size and route.

The Board’s findings on the two applications can be summarized as follows. If a power generating station is built at the proposed location, there is clearly a need for a pipeline to serve the power plant. There are no negative rate implications for Union or its customers if Union builds the pipeline. There are no outstanding matters from the perspective of the Ontario Pipeline Coordination Committee with respect to the environmental reports commissioned by both applicants. The environmental impacts associated with the proposed competing pipelines are found by the Board to be acceptable and there are no outstanding landowner matters for each pipeline proposal. Union is known to be a competent builder and operator of gas pipelines. The Calpine companies that will be building and operating the GEC pipeline under contracts with GEC are also experienced builders and operators in many jurisdictions in the United States. Both applications, Union’s and GEC’s, are credible and in the public interest.

The Board accepts the evidence provided by GEC that the current financial difficulty being experienced by Calpine Corporation should not have a direct impact on the financial wherewithal of the applicant (GEC). However, should the entities that will construct and operate the pipeline be different from what has been presented in the proceeding, the Board finds that GEC must file with the Board, when its plans are finalized and before construction is commenced, appropriate information for the Board’s review.

With respect to the public interest considerations raised by GEC's application, the Board finds that the public interest would not be well served if GEC's application is denied. It is in the public interest for gas customers to have access to the services they require. In this case, GEC cannot currently access adequate services from Union. It is therefore in the public interest to allow GEC to pursue those services directly through the option of bypassing Union. At the same time, Union and other parties have not established that Union or its other customers would suffer direct harm in the event that GEC's application is approved. Moreover, GEC's application is credible. Therefore the Board finds GEC's application to be in the public interest.

The Board observes that it is possible for Union to develop a tariff solution for customers of the size and needs of GEC to permit the utility's offerings to be more robust against bypass. It is within the control of Union and the Board to manage the longer term, more speculative impacts arising from this transitional decision, beginning with the pending Natural Gas Electricity Interface Review proceeding. It is not in the public interest in this case however to require GEC to await the resolution of an appropriate tariff in the NGEIR proceeding.

The Board notes that it does not expect to decide any other bypass applications prior to the results of the NGEIR review.

The Board observes that it is appropriate for the applicants to consider any cumulative (either additive or interactive) effects between the pipeline construction and the construction and operation of the GEC generating station but in this case, the environmental effects of the power station that are raised by the Society of Energy Professionals and the Power Workers' Union, namely, air emissions, the taking and discharge of water into the St. Clair River, and the loss of jobs and other socio-economic impacts consequent on the closure of the Lambton generation station, cannot be tied back to some effect of pipeline construction. In the Board's view, the fact that the existence of the pipeline will enable a certain end use to occur does not mean that the environmental effects of that end use are within the realm of "cumulative effects" as contemplated in the Board's environmental guidelines. The Board is satisfied from the evidence before it that the effects from the pipeline are minimal and the cumulative effects from the construction of the generating station will only last for the duration of the construction phase of the pipeline. These effects are different from

the environmental effects related to the operation of a GEC gas-fired generating station, which are not cumulative with respect to the pipeline project in any respect.

Walpole Island First Nations asked the Board to start a process to develop a policy regarding consultation with First Nations. The Board agrees that the matter of creating a Board policy needs to be reviewed, and the Board will do so.

## **Chapter 1- The Applications and Process**

On July 20, 2005, Greenfield Energy Centre Limited Partnership (“GEC”) filed an application with the Ontario Energy Board. GEC has entered into a 20-year Clean Energy Supply (“CES”) contract with the Ontario Power Authority (“OPA”) to construct and operate a 1005 MW gas-fired generating station in Courtright, in the Township of St. Clair, south of Sarnia and requires the pipeline to supply natural gas to the generating station. GEC seeks leave to construct the pipeline, pursuant to section 90 of the *Ontario Energy Board Act*, 1998, S.O. 1998, c.15, Sched. B (“OEB Act”).

If leave to construct the pipeline is granted, GEC also seeks a Certificate of Public Convenience and Necessity, pursuant to section 8 of the *Municipal Franchises Act*, R.S.O. 1990, c. M.55 (“MFA”). GEC initially also sought an order pursuant to section 101 of the *Ontario Energy Board Act* because the proposed pipeline route crosses a municipal water main, runs along a road allowance, crosses an abandoned brine line and crosses gas pipelines belonging to Union Gas Limited and TransCanada PipeLines Limited. During the hearing, GEC asked the Board to stay the section 101 application to allow for negotiations with the affected landowners for crossing permits to be completed. GEC will either withdraw the section 101 application or ask the Board to review the section 101 application at a later time.

The Board issued a notice of GEC’s application on July 28, 2005. GEC served and published the notice as directed by the Board. In Procedural Order No. 1, dated August 24, 2005 the Board indicated it would proceed by way of oral hearing, set the scope of public interest factors related to bypass and set the schedule for the proceeding.

On August 30, 2005, Union Gas Limited (“Union”) also filed an application to construct a pipeline to serve the GEC generating station.

Due to the competing nature of the GEC and Union applications, the Board found it appropriate to combine, pursuant to section 21(5) of the OEB Act, the proceedings for GEC’s and Union’s applications. All intervenors of record in the GEC proceeding were considered intervenors in the joint proceeding. In addition, certain new parties were accepted by the Board and became intervenors in the joint proceeding.

In addition to the applicants and Board staff, 25 parties were given intervenor status and 5 parties were given observer status. A list of active participants and their counsel or representatives, and a list of witnesses who testified in the joint proceeding are attached as Appendix 1 to this decision. Intervenor evidence was filed by Union and Walpole Island First Nations (“WIFN”).

On October 4, 2005 the Board received certain material from the Society of Energy Professionals (“SEP”). On October 6, 2005 the Board received a Notice of Motion and Motion Record from GEC. In the Notice of Motion, GEC sought an order of the Board to exclude certain documents in the material filed by SEP. The Board dealt with the motion by way of a written process. On November 7, 2005 the Board issued its decision pursuant to which certain material filed by SEP was excluded. The Board’s decision on the Motion is attached as Appendix 2.

The oral hearing on the two applications commenced on November 14, 2005 and was completed with oral reply argument on December 1, 2005.

The Board has summarized the record in this decision only to the extent necessary to provide context to its findings.

Below in this chapter are particulars of the respective competing applications by GEC and Union. The Board’s findings are contained in the next chapter, Chapter 2.

### The Power Plant

Pursuant to the 20-year CES contract with the OPA, GEC will construct a 1005 MW gas-fired generating station in Courtright, in the Township of St. Clair, south of Sarnia and requires a pipeline to supply natural gas to the generating station. The demand for gas by the plant under peak winter operating conditions is estimated at 208,000 GJ per day and about 186,240 GJ per day under peak summer conditions. The plant would operate either as a baseload or an intermediate generating resource on the Ontario power grid. Total annual gas consumption at the plant, assuming an annual capacity factor between 40% and 70%, is estimated at between 28,000,000 GJ and 48,000,000 GJ. According to the CES contract, the plant is required to provide electricity to the grid no later than February 12, 2008. The generating plant is located on a property owned by Terra International (Canada) Inc. (“Terra”).

### The Partnership

The GEC project is being developed as a limited partnership between a Canadian subsidiary of Calpine Corporation of the U.S. ("Calpine Corporation") and a Canadian subsidiary of Mitsui & Co. Ltd of Japan ("Mitsui"). The partners are MIT Power Canada Investments Inc. which is a wholly owned subsidiary of Mitsui, and Calpine Energy Services Canada Ltd. which is wholly owned subsidiary of Calpine Corporation. CM Greenfield Power Corp., the general partner, holds 0.01% of the partnership. The limited partners, MIT Power Canada LP Inc. and Calpine Greenfield Commercial Trust, hold 49.995% interest each. According to the evidence, Greenfield Energy Centre LP, will raise financing on the project's own financial strength, not on the strength of its parents.

Calpine Corporation will act as the lead for the development of the GEC project. Specifically, Calpine Greenfield Partnership Limited will be the energy procurement construction contractor for the project, and Calpine Corporation O&M Affiliate will provide administrative services, environmental support, permitting support, environmental monitoring during the course of operations and engineering support to the project.

### The GEC Pipeline

The pipeline project proposed by GEC consists of a 16 inch diameter high pressure steel pipeline and related facilities, including a metering and control station, and an access tap to the Vector pipeline owned and operated by Vector Pipeline Limited Partnership. The Vector pipeline connects the Dawn Hub with United States markets. The proposed pipeline will be approximately 2 kilometers long and will connect the generating station to the Vector pipeline located to the north of the GEC plant. GEC plans to start construction of the pipeline and metering facilities in June 2006. GEC estimated the total capital cost of the pipeline and required facilities at \$4.9 million.

The proposed pipeline route leaves the generating station at a point north of the Bickford Line, runs easterly along an agricultural field owned by Terra, turns north and travels along the west side of Greenfield Road to connect with the Vector pipeline at the Vector Gate Station. A metering facility would be located south of the Pollard Plant access road south of the Vector Gate Station. GEC's proposed pipeline route is shown in Appendix 3.

Most of the proposed route is within the municipal road allowance. GEC filed a resolution by the Township of St. Clair supporting the use of the municipal road allowance of the Greenfield Road for the purpose of locating the pipeline. For the sections of the route on privately owned land, GEC is negotiating three permanent easement agreements and is in the process of obtaining a lease agreement for the tie-in to the power plant. GEC is also negotiating encroachment permits to cross a brine pipeline, three TCPL pipelines, Union's pipeline and Vector's facilities. GEC would obtain a number of temporary easements as required to construct the proposed facilities. GEC sought approval of the form of easement agreement offered to Terra and to the private landowners, pursuant to section 97 of the OEB Act. The proposed route crosses Wylie Drain and GEC would need a permit to cross from the Ministry of Natural Resources and from the Conservation Authority.

GEC confirmed that design, installation and testing specifications for the proposed pipeline would conform to the Canadian Standards Association ("CSA") Z662-03 Oil and Gas Pipeline Systems Code and the requirements of Ontario Regulation 210/01 under the Technical Standards and Safety Act, 2000. GEC confirmed that it would obtain a licence and pay the corresponding fee required to operate the proposed pipeline as required by section 18 of Ontario Regulation 210/01.

An Environmental Report was prepared by SENES Consultants for the proposed facilities which indicated that there will be minimal and temporary environmental impacts given the implementation of the mitigation measures that were recommended and accepted by GEC. The SENES Consultants report was reviewed by the Ontario Pipeline Coordinating Committee ("OPCC") in accordance with the process outlined in the Board's *Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario* ("Guideline"). The OPCC had no outstanding concerns with the project.

#### The Union Pipeline

Union, in its competing application, proposed to construct 2 km of 12 inch natural gas pipeline to supply gas to the generating station at an estimated cost of \$5.1 million. The proposed Union pipeline would originate at Union's Courtright Station which is connected to the Vector and TCPL pipelines. Union holds the municipal franchise and certificate rights to distribute natural gas in the Township of St. Clair. Construction would start in the spring of 2007.

Union's proposed route is similar to the route proposed by GEC except that it is somewhat shorter, runs on the east side of Greenfield Road and terminates at Union's Courtright Station. It does not cross any pipelines. The location of the proposed pipeline within the Greenfield Road allowance falls under Union's existing franchise agreement with the Township of St. Clair and an encroachment permit is not needed. The proposed route crosses Wylie Drain and Union would require a permit to cross from the Ministry of Natural Resources and the Conservation Authority. Union's proposed pipeline route is shown in Appendix 4.

The proposed pipeline will be installed in road allowance and on easement on privately owned lands. A previously Board-approved easement form was provided to the affected landowners.

The only permanent easement that may be required by Union would be an easement from Terra, the lessor of the GEC plant site. The easement may be needed to connect the pipeline to the power plant. In the hearing, Union explained that its industrial customers would typically either enter into an easement agreement or elect not to enter into an agreement. Should the easement agreement be requested, Union would offer to Terra a recently Board-approved form of easement agreement.

According to Union, design, installation and testing specifications for the proposed pipeline are in accordance with the CSA Z662-03 Oil and Gas Pipeline Systems Code and will conform to the requirements of Ontario Regulation 210/01 under the Technical Standards and Safety Act 2000.

An Environmental Report was prepared by Stantec Consulting for the proposed facilities which indicated that there will be minimal environmental impacts given Union's standard construction practices and the mitigation measures recommended in the report and accepted by Union. The Stantec Consulting report was reviewed by the Ontario Pipeline Coordinating Committee in accordance with the process outlined in the Board's Guideline. The OPCC had no outstanding concerns with the project.

## **Chapter 2 – Board Findings**

What we have before us are two competing applications to build and operate a gas pipeline to serve the GEC plant. There are certain standard issues that the Board considers in its review of applications for leave to construct a pipeline. We will look at those issues in this case. In addition, since the GEC application is an application for bypass, it invokes additional public interest issues beyond those which would be considered if the only applicant was Union. The Board will also assess GEC's competency to build and operate its own pipeline.

In our view, the issues before for the Panel are as follows:

- a) Is there a need for a pipeline?
- b) Are there any undue negative rate implications for Union's customers, if Union builds the pipeline?
- c) What are the environmental impacts associated with the proposed pipelines and are they acceptable?
- d) Are there any outstanding landowner matters for each pipeline proposal?
- e) Is GEC a competent builder and operator for the proposed pipeline?
- f) Is GEC's bypass application in the public interest?
- g) Should one or both applications be approved and what should the conditions of that approval be?
- h) Does GEC need a Certificate of Public Convenience and Necessity?

For the reasons set out below, the Board finds that both applications for leave to construct should be approved, subject to certain conditions.

### **a) Is there a need for a pipeline?**

The Board must be satisfied that there is a need for a proposed pipeline before approval is granted.

GEC has entered into a 20-year Clean Energy Supply contract with the Ontario Power Authority to construct and operate a new 1,005 Megawatt natural gas-fired power plant at Courtright, south of Sarnia. The power plant is scheduled to be completed in time to begin operating in December 2007. The purpose of the pipeline is to carry the natural gas to the GEC power plant. Should all approvals for the power plant be obtained and GEC proceeds to build the plant, there is clearly a need for a pipeline to carry natural

gas to the power plant. The approval of Union's application is conditional on Union having the GEC power plant as a customer.

**b) Are there any undue negative rate implications for Union's customers, if Union builds the pipeline?**

Should it be the case that there is an agreement that Union will serve the GEC power plant, the economics of the pipeline project become a consideration as the costs will be borne by Union's ratepayers.

Based on Union's evidence, the overall profitability index for the pipeline project is estimated at over 10 assuming a revenue stream based on Union's firm T1 service. This evidence by Union was tested but not challenged. The Profitability Index is below one only in the first year of the project. We accept Union's estimates and are satisfied that there would not be undue adverse rate impacts on Union's ratepayers in the first year. Should Union build the pipeline as a result of a negotiated interruptible rate, or a combination of firm and interruptible service, Union must demonstrate at the time that it seeks to reflect the costs of this project in its rates that the project is economically feasible and that any adverse rate impacts are not undue.

**c) What are the environmental impacts associated with the proposed pipelines and are they acceptable?**

The pipelines proposed to be constructed by each applicant are similar in their routing. As required by the Board's Guideline, both applicants filed environmental reports undertaken by known consultants, who also testified at the hearing. Both reports concluded that there are only minimal and temporary effects associated with the building of the pipeline. Consideration was given to cumulative effects from other projects, including the construction of the GEC generating station, as confirmed in the answers to interrogatories and in the hearing, but because the environmental impacts of the pipeline itself were minor, any cumulative effects were considered insignificant. Both applicants stated that they will abide by the recommendations contained in their respective environmental reports.

## Cumulative Effects

### (i) Scope of Review

An issue arose during the hearing with respect to whether the applicants had appropriately abided by the Board's Guideline. The Guideline requires consideration of the environmental impacts of other projects within the area of pipeline construction under section 4.3.13 entitled "Cumulative Effects". That section states in part:

In many situations, individual projects produce impacts that are insignificant. However, when these are combined with the impacts of other existing or approved projects, they become important. Such cumulative effects may include both biophysical and socio-economic effects, and should be identified and discussed in the ER as an integral part of the environmental assessment.

The Guideline indicates that the consideration of cumulative effects should not be restricted to the immediate area of pipeline construction. The section relating to cumulative effects is a subsection of the Guideline relating to the identification of environmental impacts in the context of route and site selection. The relevant and operative portion of section 4.3.13 reads, in part:

The applicant is required to consider four distinctive cumulative effects pathways when delineating the study area and analysing and assessing the cumulative effects:

. . .

(g) additive effects of pipeline construction and other existing and future projects in the area (e.g. additive forest cover losses due to tree clearing for pipeline construction and subdivision development);

(h) interaction of pipeline construction with other existing and future projects in the area (e.g. cold stream fish habitat degradation as an interactive effect of increased erosion and sedimentation due to pipeline stream crossing and floodplain development downstream).

This excerpt from the Guideline indicates that the Board will have regard to the cumulative effects of the construction of the GEC generating station together with the pipeline. What is crucial to the review of cumulative effects, however, is to understand the scope of that review.

SEP and PWU, who adopted the same position in the proceeding, argued that there has not been a proper assessment before the Board of the cumulative environmental impacts of the proposed facilities and therefore, both applications should be denied.

In these parties' view, a proper assessment should involve examination of the environmental and socio-economic effects of the construction and operation of the GEC generating station in addition to the pipeline because the pipeline and the generating station are interconnected. In their view, the environmental effects of the station are "indistinguishable from the use and operation of the pipeline which serves it" such that the public interest test in section 96 of the OEB Act cannot be satisfied without a full consideration of the cumulative effects from construction of both the station and the pipeline. It is argued that there are adverse effects on air quality due to emissions from the generating station, on water quality associated with the discharge of heated water into the St. Clair River and adverse socio-economic impacts related to job and economic losses as a result of the construction of the GEC generating station and the potential subsequent closure of the Lambton generating station. They argue that these are environmental effects that the Board should consider in its environmental review of the proposal to construct a pipeline to serve the station. In support of their position, the two parties provided certain case law and referred to best environmental practice from other jurisdictions. They also argued that the Board's own Guideline confirms their position.

Both GEC and Union argued that the Province has an environmental assessment regime for natural gas-fired generation facilities and that this process was completed by the refusal of the Minister of the Environment to elevate the process to a full environmental assessment. A full assessment had been requested by SEP. The effect of the proposition by SEP and PWU is not only that the Board would second guess the Minister's discretion, but it would be erring in law. Both applicants argued that the cumulative effects provision in the Board's Guideline is for analysing the combined effects of the pipeline construction with the effects caused by the

construction of the power facility in such areas for example as noise and soil disruption. In their view, the cumulative effects section does not expand the review into any and all possible environmental and socio-economic effects of shutting down the Lambton coal-fired generation station due to the government's off-coal policy. GEC termed the intervention of SEP and PWU in this proceeding as forum shopping.

The Board disagrees with SEP and PWU.

In our view, this section of the Guideline requires an applicant to first identify the environmental (including socio-economic) effects of the project that is the subject of the application, in this case the construction of the pipeline. Once these effects are known, the applicant identifies whether there are any other existing or known future projects in the study area. If there are any such other projects, the applicant determines whether any of the effects from the construction of the pipeline will be made worse or act to increase the environmental damage caused by similar effects of other projects in the area. To be clear, only those effects that are additive or interact with the effects that have already been identified as resulting from the pipeline construction are to be considered under cumulative effects. If the environmental impacts are compounded, the applicant will, with the help of experts in the field, determine whether these effects warrant mitigation measures such as alterations in routing, timing of construction or other measures that can address the cumulative impacts and the Board will review the adequacy of those measures.

One of the examples provided in the Guideline is forest cover. If the clearing of a right-of-way for the pipeline involves the cutting of a few trees, this may be a minor overall effect on the environment. However, if the applicant is aware that a new subdivision is being developed in the same area and that for this purpose, significant forest cover would be removed, this could be an important consideration for the Board. The Board would expect that the applicant would propose mitigation measures, if, for instance, species of interest could be affected by cumulative impacts and this factor would, along with the applicant's proposed mitigation measures, weigh into the Board's determination of public interest. It is important to note, however, that the identification of a cumulative impact is not, in and of itself, necessarily fatal to an application. It would warrant further investigation by the Board so that the Board may satisfy itself

that all reasonable measures are being taken to minimize or avoid the impacts and it may lead to certain conditions being imposed upon an applicant during construction.

This is not to say that the cause of damaging effects of pipeline construction and the other projects must be identical to be considered cumulative. For example, a reduction in productivity of the soil can be caused by a number of factors such as compaction, disturbance of watercourses, mixing of soil layers and removal of vegetation. Each of these causes of soil degradation should be considered as cumulative impacts on the soil. However, there must be some effect caused by the pipeline construction itself to trigger an assessment of similar effects caused by other projects.

In this case, the applicants each identified minor and temporary environmental effects arising out of the construction of the pipeline. The only other project that was identified as being in the study area of the pipeline was the construction of the GEC generating station. Mr. Muraca of SENES Consultants testified for GEC that:

“The impacts of the pipeline, as stated in the report, are basically from construction impacts. They’re minor. They’re transitory, and, as I said in the interrogatories, again, the only interaction it could have is an overlap in construction time period between that and the proposed GEC.”

In respect of the cumulative effects of the pipeline and the GEC generating station, he indicated that:

“Once, again, the pipeline, once the pipeline is operating and is in the ground and has no air, land or water impacts. So the operation of the pipeline is not an issue to be taken in consideration with the operation of the GEC.”

It is appropriate for the applicants to consider any cumulative (either additive or interactive) effects between the pipeline construction and the construction and operation of the GEC generating station but in this case, the environmental effects of the power station that are raised by SEP and PWU, namely, air emissions, the taking and discharge of water into the St. Clair River, and the loss of jobs and other socio-economic impacts consequent on the closure of the Lambton generation station, cannot be tied back to some effect of pipeline construction. In our view, the fact that

the existence of the pipeline will enable a certain end use to occur does not mean that the environmental effects of that end use are within the realm of “cumulative effects” as contemplated in the Board’s Guideline. We are satisfied from the evidence before us that the effects from the pipeline are minimal and the cumulative effects from the construction of the generating station will only last for the duration of the construction phase of the pipeline. These effects are different from the environmental effects related to the operation of a GEC gas-fired generating station, which are not cumulative with respect to the pipeline project in any respect.

(ii) Jurisdiction to Review Environmental Effects of the GEC generation station

The Board’s jurisdiction over gas pipeline construction derives from the OEB Act and the *Municipal Franchises Act*. Both these Acts prescribe a public interest test, but do not provide criteria for assessing the public interest.

SEP and PWU cited case law from various Canadian jurisdictions that, in their view, demonstrate that a tribunal with a broad public interest mandate can and should look beyond the narrow scope of the specific environmental effects of the facility before it for approval, and consider the environmental effects of construction connected to or enabled by the facility under review: Bow Valley Naturalists Society v. Canada [2001] 2 F.C. 461 (C.A.); Friends of the West Country Assn v. Canada (Min. of Fisheries and Oceans) 31 C.E.L.R. (N.S.) 239 (Fed C.A.); Nakina (Township) v. Canadian National Railway Co. [1986] F.C.J. No. 426 (C.A.); Québec (A.G) v. Canada (N.E.B.) [1994] 1 S.C.R.159; Sumas Energy 2 Inc. v. National Energy Board (unrep.) Nov 9, 2005, Fed. C.A. In the Board’s view, and as discussed below, the cited cases are either distinguishable from the situation before the Board or make points that are instructive to the Board and are incorporated as indicated.

In Bow Valley Naturalists Society v. Canada, Canadian Pacific Hotels proposed to develop a meeting facility in Banff National Park and conducted an environmental screening that was reviewed and approved by Parks Canada. The Bow Valley Naturalists Society and Banff Environmental Action and Research Society launched a judicial review of the Parks Canada decision based on the failure of the proponent to include within the screening several future developments included in its Long Range Plan and related to the meeting facility. In reviewing the Parks Canada decision, the

Federal Court of Canada found that the Superintendent's assessment and inclusion of some of the aspects of the broader project within the cumulative effects analysis was reasonable. In the Board's view, this case takes a narrower view of cumulative effects than the Board in respect of the application of its Guideline. As previously indicated, the Board does require a consideration of the cumulative effects of the GEC generating station in the context of the impacts of the pipeline construction and is satisfied that the cumulative effects are minor or non-existent.

In Sumas Energy 2 Inc. v. National Energy Board a developer applied under provisions of the *National Energy Board Act* ("NEB Act") for a Certificate of Public Convenience and Necessity to construct an international power line connecting its proposed generation station located in the U.S. to a substation located in British Columbia. Ultimately, the Federal Court of Appeal did not interfere with the NEB's decision that it had the jurisdiction to consider the environmental impact in Canada of the power plant in the U.S. in the context of an application to construct the international power line. This case can be distinguished from the case before this Board.

Although the international power line itself would have been subject to an environmental assessment pursuant to the *Canadian Environmental Assessment Act* ("CEAA"), the power plant would not have undergone a similar assessment by a Canadian entity. The NEB did have before it testimony from the U.S. environmental review that concluded that the power plant was expected to emit more than 800 tons of pollutants annually into the Fraser Valley air shed. The Board identified the negative environmental impact in Canada stemming from the U.S. plant as a "relevant" consideration in its decision. In addition, the Federal Court of Appeal determined that although there was a U.S. environmental assessment the NEB "...had to consider the Canadian perspective. Both were seeking to advance their respective public interests, which in this case did not coincide." (at par. 27) This is important since in the present case an environmental review process has been conducted in accordance with the Ontario *Environmental Assessment Act* and has been reviewed by the Ministry of the Environment. It is appropriate for the Board to defer to that Minister's expertise and

legislative mandate in respect of the GEC generating station and the Board recognizes that the Minister has regard to the public interest in the province of Ontario.

The case of Quebec (A.G) v. Canada (N.E.B.) dealt with the grant of licenses for the export of electricity from Québec to New York and Vermont. The NEB granted the licences subject to the completion of environmental assessments of future generation facilities. The Supreme Court of Canada overturned the decision of the Federal Court of Appeal holding that the NEB acted within its jurisdiction by considering the environmental effects of the construction of future generating facilities. This case is distinguishable on the basis that the legislation provides expansive powers to the NEB in deciding whether or not to grant the licence. Specifically, the relevant section reads as follows:

119.06(2) In determining whether to make a recommendation, the Board shall seek to avoid the duplication of measures taken in respect of the exportation by the applicant and the government of the province from which the electricity is exported, and shall have regard to ***all considerations that appear to it to be relevant***, including

..

(b) ***the impact of the exportation on the environment***;

...

(d) such other consideration as may be specified in the regulations.

[Emphasis added]

It was, therefore, clearly within the NEB's jurisdiction to consider all relevant issues, including environmental issues in the context of the export licence application.

It should also be noted that the NEB imposed the environmental assessment conditions upon the licence because the environmental effects of the construction of the future facilities were not known with certainty at the time the decision was made. The Supreme Court of Canada went to some length to discuss the NEB's jurisdiction vis-à-vis that of provincial regulators in terms of the environmental assessments of the plants that would be built to export power. The court was careful to note that the provinces would have jurisdiction over the environmental assessment of the plants but that the NEB would still be concerned about the subset of environmental effects from the plant stemming from the power generated for export. The court found that there could be "co-existence of responsibility" for reviewing the environmental aspects of exports.

From this Board's perspective, this case is therefore, distinguishable because of the NEB's express jurisdiction to consider the environmental aspects of the exports and the fact that, although this is not expressly stated in the decision, it is implied that if an environmental assessment had been available from the relevant environmental assessment agency, the NEB would likely have used the conclusions of that assessment to assist it in making its determination. In this case this Board does have the results of a completed environmental review process and is without the jurisdiction or the desire to embark on a review of the process in relation to that assessment.

The case of Friends of the West Country Assn v. Canada (Min. of Fisheries and Oceans) is not on all fours factually with the case before the Board but is instructive to the present inquiry. The facts of the case involved a federal environmental assessment under the CEAA of two bridges proposed to be constructed by a forestry company. The federal environmental assessment was triggered as a result of water crossings requiring permits under the *Navigable Waters Protection Act*. The Coast Guard was the responsible authority for the purposes of advancing the environmental assessment. Part of the case revolved around the application of sections 15(1), 5(3) and 16(1) of the CEAA which read as follows:

15(1) The scope of the project in relation to which an environmental assessment is to be conducted shall be determined by

(a) the responsible authority; or...

15(3) Where a project is in relation to a physical work, an environmental assessment shall be conducted in respect of every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work that is proposed by the proponent...

16(1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

(a) the environmental effects of the project, including...any cumulative environmental effects that are likely to result from the

project in combination with other projects or activities that have been or will be carried out;

A lower court judge had determined that section 15(3) of the CEAA required the Coast Guard to include within the scope of the environmental assessment, the construction of a road associated with the bridges that had already been approved by the Province of Alberta Environmental Protection. On appeal, the Federal Court of Appeal determined that the road should not be included and stated as follows:

The words “in relation to” in subsection 15(3) might be read in the abstract to contemplate any construction, operation, modification, decommissioning, abandonment or other undertaking that has any connection, no matter how remote, to the physical work which is the focus of the project as scoped. However, such an interpretation would ignore the context of sections 15 and 16 and the logical reason for the words “in relation to” in subsection 15(3). The first contextual point is that the responsible authority is required to scope the project under subsection 15(1). This would be an unnecessary exercise if, under subsection 15(3) every other construction, operation, modification, decommissioning, abandonment or other undertaking that had even a remote connection to the project had to be the subject of the environmental assessment. Second, paragraph 16(1)(1) provides for a cumulative effects analysis taking account of the project as scoped under subsection 15(1) in combination with other projects or activities that have been or will be carried out. This portion of paragraph 16(1)(a) would be redundant if projects or activities outside the project scoped under subsection 15(1) had to be considered under subsection 15(3).

This finding is relevant to the Board’s inquiry for several reasons.

First, it is important to note that this appeal occurred entirely within the context of an environmental assessment conducted pursuant to the CEAA. There was no issue with an entity other than the entity charged with approving or rejecting environmental assessments conducting an environmental assessment for a project outside of its jurisdiction.

Second, there is no provision within the OEB Act or any regulation or guideline (including the Board's Environmental Guideline) made pursuant thereto, that is in any way similar to section 15(3) of the CEAA. Even with the existence of the requirements mandated by section 15(3) of the CEAA, in this case, the Federal Court of Appeal was not prepared to find that a project initiated by the same entity and linked to the project for which the environmental assessment was being sought, could be rolled-in to the larger project and require a broader environmental assessment. It is important to note that the Federal Court made this finding in spite of the fact that the regulator in this case clearly had the authority to conduct an assessment of the related project.

Finally, the Federal Court made reference to the cumulative effects provisions of CEAA and the interpretation and rationale for that section. Importantly, the Federal Court of Appeal later agreed with the lower court's decision that the Coast Guard had erred in excluding from its consideration the cumulative effects from other projects, including the road, in conducting its cumulative effects analysis.

This case, therefore, supports the Board's position that the applicants are required to conduct a cumulative effects analysis of other projects within the study area of the pipeline but that this analysis is not tantamount to conducting a new environmental assessment of those other projects and in no way confers upon the Board the jurisdiction to review any existing assessment.

The Board's mandate is set out in Section 96(1) of the OEB Act which provides that:

If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work.

In this case, the proposed work is the construction of a pipeline, not of an electricity generation station.

In the Board's view, the law is clear that jurisdiction on environmental matters associated with the power station falls under the *Environmental Assessment Act* administered by the Ministry of the Environment, and not with the Ontario Energy Board. The process under the provincial *Environmental Assessment Act* in relation to

the GEC generating station has been concluded. During the hearing, GEC filed a letter from the Minister declining the elevation request made by SEP and PWU. SEP and PWU argued that refusal by the Minister of the Environment to elevate the GEC generating station project from the requirements of an environmental screening to those of an individual environmental assessment means that there will have been no proper environmental assessment of the GEC generating plant and that this makes it even more incumbent on the Board to undertake such a review as it is now the only authority that could undertake or order the assessment. However, a denial of an elevation request to carry out a full environmental assessment does not confer jurisdiction in the Board to undertake a further environmental assessment of the station. For the Board to engage in the kind of review argued by SEP and PWU would be to exceed our jurisdiction.

The Board finds that an assessment of the environmental and socio-economic effects of the construction and operation of the GEC generating station are outside the scope of its jurisdiction, with the exception of the narrower issue of “cumulative effects” as outlined above.

The Guideline, as it is a statement of Board policy, does not prohibit the Board from looking into matters that may be relevant and practical under given circumstances. This does not mean however that the Board can consider matters that are clearly outside its jurisdiction.

SEP and PWU are in effect asking the Board to engage in an environmental review associated with the use of the energy or the product or service. In addition to the jurisdictional problems inherent in undertaking a review of the environmental effects of the end use of the gas flowing through a pipeline, there are practical problems.

In general, the gas pipeline construction proposals reviewed by the Board are not tied to a single end use. In some cases, the load which drives the initial need for a pipeline changes or disappears and other loads are served. It would be highly impractical for the Board to attempt to assess the environmental impacts of loads to be served by a gas pipeline. As a matter of general policy, it would be undesirable to find that the Board’s public interest mandate under section 96 of the OEB Act requires such an assessment. If the Board thought that cumulative impacts should involve the end-use of the energy, it would have said so in its Guideline or would have provided guidance

to address such complications and impracticalities that arise from that interpretation of cumulative impacts.

The proceeding revealed that the intervention and interests of SEP and PWU were out of scope.

### Conclusions

The environmental reports filed by the applicants identified some minor environmental effects along the construction corridor, and proposed measures for their mitigation. We find that the environmental reports, including their assessment of cumulative effects, are adequate, given the nature of the construction proposed. However, in future, the Board will require that applicants ensure that the consulting reports they sponsor also depict, or at least repeat or summarize, the analysis and findings on cumulative effects separately for an easier review by the Board and intervenors. The presentation of the cumulative impacts in the SENES Consultants report could have been better organized.

We find the environmental impacts associated with each of the proposed pipelines acceptable. The Board will require that GEC and Union comply with the recommendations for environmental protection and mitigation recommended by their respective environmental consultants. This condition is included in the respective Conditions of Approval for each applicant appended to this decision.

#### **d) Are there any outstanding landowner matters for each pipeline proposal?**

In a leave to construct application for a gas pipeline, the applicant must satisfy the Board that it has offered or will offer to each owner of land affected by the approved route or location an agreement in a form approved by the Board.

On the evidence, the Board approves the agreement forms that have been provided to the affected landowners by both applicants and finds that there are no outstanding matters in this regard, except as follows. GEC shall update the Board as to whether it intends to withdraw the stayed section 101 application or to reactivate it.

Walpole Island First Nation ("WIFN) intervened in these proceedings because it has four land claims that it asserts are affected by the proposed GEC generation station and by the gas pipelines proposed by the two applicants. It provided pre-filed and oral

evidence and made submissions. Walpole's intervention was driven by its concern about the consultation and accommodation process for matters affecting First Nations.

During its oral submission, WIFN advised that it had reached an agreement with GEC to address WIFN's concerns about the impacts of the proposed project; it did not disclose the nature of that agreement.

WIFN reported that Union indicated that it intends to reach agreement with WIFN over its concerns if Union is successful in its application. In that regard, WIFN asked that the Board impose a condition upon Union that in the event that Union receives leave to construct the pipeline, it must negotiate an agreement with WIFN to address the impacts of the pipeline on its land claims. Union responded that while it fully expects to reach an agreement with WIFN regarding the proposed pipeline, it viewed the condition as strict and unnecessary. Union noted that, should the Board find that such condition is necessary and order it, Union might have to come back to the Board for relief if there is no agreement reached.

We note that the first stage of the archaeological assessment indicated that there is a moderate possibility of archaeological sites that may be impacted by Union's proposed route and that therefore a stage 2 assessment will be conducted. Union stated that it would welcome participation from WIFN during that assessment. On the basis of the evidence and testimony, we find the language of the proposed condition to be too broad and strict, and, we believe, unnecessary. It would place Union in the difficult position of having to reach an agreement if it did not wish to risk a delay in the final determination of its application for leave to construct. This is not only a Union matter. It is also a public interest matter. In the result, rather than the proposed condition, the Board is prepared to impose a condition that Union shall involve a representative designated by the WIFN in the stage 2 archaeological assessment of the pipeline route. Union shall also provide to the Board the results of the stage 2 assessment and indicate whether there are outstanding matters in respect of that assessment. This condition is included in the Conditions of Approval appended to this decision.

A general issue raised by WIFN is that the Ontario Energy Board needs to put in place a policy to deal with situations where the Board's decisions could impact constitutionally-protected First Nations rights and for which consultation with First Nations is required. In support of its position, WIFN referred to findings of the courts

about the duty to consult and commented how these should be reflected in the Board's work.

In WIFN's view, while the Ontario Energy Board does not need to undertake direct consultation with First Nations in reviewing applications brought before it, the Board does have a responsibility to ensure that it receives the appropriate evidence that consultation has occurred. WIFN filed a public communiqué from the National Energy Board, dated August 3, 2005, in which the NEB acknowledged that the NEB's policy on consultation with First Nations needed to be revisited to reflect current law.

We note that WIFN is not asking the Board to put into place a new policy based on the record of this particular proceeding. Rather, WIFN is asking the Board to start a process to develop a policy regarding consultation with First Nations and to consult with First Nations as to what that consultation process ought to be. The Board agrees that the matter of creating a Board policy needs to be reviewed, and the Board will do so.

**e) Is GEC a competent builder and operator for the proposed pipeline?**

The Board has a responsibility to ensure applicants in leave to construct cases have the financial and operational ability to build and operate the proposed facilities in a safe and reliable manner.

Enbridge submitted that the Board should concern itself with a financial challenge that GEC may be facing. The purported challenge is based on a public report of the financial difficulties currently being experienced by Calpine Corporation.

Through its subsidiaries, Calpine Corporation will be acting as the lead in developing and operating the project. Evidence provided by GEC indicates that the current financial difficulty being experienced by Calpine Corporation should not have a direct impact on the financial wherewithal of GEC, the applicant. Testimony of Mr. Wendelgass, witness for GEC, under cross examination from Enbridge Gas Distribution, indicated that the financial challenges of Calpine Corporation had been considered by the partners in GEC.

“Calpine's financial troubles are Calpine's to resolve, but they're not necessarily of relevance to Greenfield Energy Centre because of the structures that Greenfield Energy Centre has in place to deal with those kinds of risks, which

the partners have recognized from very early on.”

Since the time of the hearing, it is on the public record that Calpine Corporation has filed for bankruptcy protection. This does not change the Board’s acceptance that GEC’s application should be assessed on the partnership’s own merits as testified by Mr. Wendelgass.

The Board’s interest in ensuring that GEC has the financial ability to build and operate the pipeline for which it is requesting leave to construct is also addressed in the single purpose nature of the pipeline. The reliance of the GEC generation facility on the pipeline for its operation marries the investment and risk mitigation objectives of the two projects. If the construction of the generation plant does not proceed, then the pipeline will not be built.

We do find however that there remains the issue of competency.

In seeking leave to construct a gas pipeline that will be a physical bypass of the distributor with a franchise in the territory, GEC has submitted evidence on its capabilities to build and operate the pipeline as well as procure and manage the supply of the gas to the GEC generation plant.

The supply of gas to the generating facility will be an ongoing concern of the generation plant operation regardless of ownership. If Calpine’s experience in procuring and managing gas supply is not available to the GEC partnership, the risk rests with the partnership. The price paid to GEC under the CES contract will not change. However, the safe and reliable operation and maintenance of the pipeline remains a public concern regardless of ownership and is therefore of importance to the Board.

Based on GEC’s submission, GEC has yet to identify the entity that it will engage for the pipeline operation and maintenance. Options cited were to use trained personnel from the GEC generation plant itself or contract for services with local experienced service providers. In any event, GEC recognized that it, as the applicant, is responsible for the ongoing operation and maintenance of the pipeline. In demonstrating its capacity to fulfil its responsibility, GEC relied on evidence pointing to

its relation to Calpine Corporation and the Calpine experience in these types of undertakings.

We find that the GEC partnership, as it existed at the time of the hearing, has demonstrated that it is competent to build and operate the proposed gas pipeline in a reliable and safe manner. However, Calpine's financial challenges, acknowledged by GEC at the hearing and confirmed since with Calpine's filing for bankruptcy protection, create a real possibility that the roles of the existing partners in GEC could change. We therefore find that it would be in the public interest to attach a condition to the approval of GEC's application that enables the Board to receive information and review the capabilities of any new participants in the project that will bear responsibility for the construction or operation of the pipeline. This is a Board matter and any material changes noted above shall be filed with the Board for its review and shall not necessarily constitute a re-opening of the hearing.

**f) Is GEC's bypass application in the public interest?**

Physical bypass in Ontario's natural gas sector refers to the construction and use of a facility other than that of the distributor with a franchise to distribute gas in the territory. This is distinguishable from economic bypass, a situation where a customer may seek and obtain a bypass competitive rate from the utility with the approval of the Board. GEC's application is for physical bypass.

Section 90 of the OEB Act, which deals with matters of leave to construct a hydrocarbon line, refers to a "person" that may seek an order of the Board. A person

may be other than a distributor. While the incumbent distributor may have a high expectation of being the only entity to construct and serve in its franchise area, it does not have an absolute right.

Over the years, the Board has dealt with many applicants seeking bypass status, mostly in pursuit of a bypass competitive rate. Some were successful, others were not. In all cases the Board considered these applications from a public interest perspective and will do so in this application.

The public interest issue before the Board is whether GEC should be allowed to build its own pipeline interconnection with Vector, thereby bypassing the Union distribution

system, giving consideration to the circumstances that apply in this specific case. In considering this issue the Board takes as its starting point its conclusion in EBRO 410-I/411-I/412-I, in which it stated:

The Board is of the opinion that a general policy opposing bypass is not in the public interest. The Board will consider each application for bypass on its individual merits. The Board does not consider it appropriate to limit its consideration of any specific application at this time. In reaching this conclusion, the Board relies on a very broad definition of the public interest.

In that Decision, the Board went on to identify a number of criteria to be considered in assessing applications for bypass. These criteria have been used in subsequent Board decisions dealing with applications for bypass since the EBRO 410-I/411-I/412-I Decision.

These criteria are:

1. Cost/economic factors related to the applicant, the utility, and the utility's other customers
2. The type of bypass (single or multiple customers; incremental or existing load)
3. The duration of the bypass (will the end-user return to the LDC)
4. Safety and environmental factors
5. Rate-making alternatives and other rate-making options
6. Public policy
7. Other factors relevant to the specific application

In our view, these criteria form a useful framework in which to consider the public interest aspects of GEC's application.

### **1. Cost/Economic Factors**

Under this criterion, we will consider the impact on GEC, the impact on Union and the impact on Union's ratepayers.

#### Impact on GEC

GEC claimed that through operating its own interconnection with Vector, it will be able to

- (i) pay a lower price than if it is served by Union; and

- (ii) have greater flexibility, control and more effective access to competitive upstream services than is available from Union, which would provide greater flexibility, and greater control over future costs.

With respect to price, GEC testified that Union's T1 firm service that would apply to GEC is more expensive than alternative services on Vector, but acknowledged that this comparison was illustrative only, and did not provide precise evidence as to the price differential or the precise services GEC will use. Union and others argued that there is not sufficient evidence to determine the price differential between the GEC proposal and service on Union. Many parties believed that this comparison was integral to establishing the credibility of GEC as a bypass candidate and that the lack of this evidence was grounds for denying the application.

Beyond direct cost comparisons of building the pipeline as opposed to being served by Union, GEC argued that building its pipeline will provide it with greater flexibility and greater control over its costs over the life of the overall project. GEC testified that it wants direct access to competitive services through operating in the wholesale market on its own in order to ensure the efficient operation of the plant, and that it values the ability to manage its own services and the flexibility to make changes over time. Union countered that as negotiations between it and GEC ended, the only disagreement was around price, not services or flexibility.

We find that it is not necessary for GEC to establish the cost differential precisely. GEC has provided credible evidence that the cost of transportation service to its facility will be less if it self-serves, and that it will have greater control over long term costs, flexibility and access to competitive upstream services than if it were to use Union's current firm service offerings. This does not mean that a cost comparison is not necessary in an application for physical bypass. To find so would mean that the Board was abrogating its responsibility to ensure that an application for physical bypass is economically rational. In the case of comparing service on Union and services on Vector, the precise cost differences can not be known until negotiations are complete and a contract (or contracts) is signed. This uncertainty is not a reason to deny GEC's application, because it does not give rise to the same adverse effect as in a bypass competitive rate application. In a bypass competitive rate application, the Board must ensure that the rate is no lower than necessary and must therefore have precise

information regarding the bypass alternative. The same risk does not arise in this application, because it is for physical bypass and not for a bypass competitive rate.

In the case of physical bypass, this risk is self-correcting. If the application is approved and GEC does bypass, then it will be because it is more cost effective to do so (in terms of price, flexibility, control and access to competitive upstream services) than to take service from Union. If GEC were to determine that bypass is not genuinely more cost effective than service from Union, given the possibility that Union may still be in a position to make further offers even if GEC's application is approved, then it is highly probable that GEC will instead negotiate for service from Union. To the extent that the service is negotiated within the parameters of Union's approved rates, then a special rate application will not be required.

Many parties criticized GEC's testimony that the GEC plant may not be built if the application is denied, as the project's partners will need to reassess the situation. Some parties characterized this as a threat and as disrespectful to the Board. They urged the Board to conclude that the threat was not credible. We note that GEC has not testified that the plant will not be built if the application is denied. The fact that there is a risk that the plant will not be built is not a reason to approve the application. However, even if we were certain that the plant would be built if the application were denied, that would not be a sufficient reason to deny the application. Consequently, the risk associated with the plant not being built has not influenced our conclusions on this application.

GEC testified that it had included the costs of connecting to and using Vector in its CES bid. Similarly, we do not find this factor directly determinative for the application. This was a risk which GEC took; it is not a reason to approve the application. We do observe, however, that this factor demonstrates GEC's commitment to attempt to meet the expected return it assumed in a competitive process, and enhances GEC's credibility that it in fact intends to construct the facilities.

#### Impact on Union

Union testified that approval of GEC's application could have adverse impacts on its long term planning and the rational development of the gas system and on its cost of capital and access to financing. If the GEC application is approved, Union will be deprived of the investment on which it would have had an opportunity to earn a return.

Those opposing GEC's application supported Union's evidence on the adverse consequences of approving GEC's application. In our view, the approval of GEC's application will not significantly undermine Union's expectations regarding the likelihood of it serving customers in its franchise area. As Union itself acknowledged, it does not have an absolute right to serve. There is no evidence that the approval of one physical bypass application changes that presumption fundamentally.

With respect to system planning, Union maintained that it cannot plan the system rationally if it does not retain its high expectation that it will serve new loads in its franchise area. We observe that system expansions, if they are to serve one customer, are invariably supported by a contract, and if they are for general system growth, then they are not dependent upon a single customer.

With respect to cost of capital and access to financing, Union acknowledged that the impact will be a function of how capital markets interpret the Board's decision. We note that the GEC application is being considered within the traditional bypass framework, and the risk of physical bypass has always existed. That risk is being realized in this case, but there is no direct or immediate adverse impact on shareholders or investors, and there are no stranded assets.

We do agree that these long-term, indirect factors are potential concerns. However, these risks are more speculative than the assessment of the short term impact, which is limited to Union's foregone return on the assets that would be used to serve GEC. Also, these long-term risks arise from subsequent applications, not the GEC application itself. More importantly, though, the adverse impacts can largely be managed by the Board and the utilities. Specifically, as we will discuss further below, the Board concludes that it is in the public interest to allow GEC the opportunity to bypass Union's distribution service because the Board is not convinced that Union's distribution service, as presently structured, provides GEC with the control, flexibility and access to competitive upstream services that GEC requires. We believe that this case has not exhausted the review of the adequacy of distribution services in Ontario to meet the requirements of customers with requirements similar to GEC's. That review will be conducted in the Natural Gas Electricity Interface Review (or NGEIR) proceeding. Union (and Enbridge) will have the opportunity in that proceeding to propose alternative services to meet these requirements.

### Impact on Union Ratepayers

Two potential ratepayer impacts were identified. First, if GEC is allowed to bypass, then Union's other customers will not receive the benefit of GEC's contribution to system costs. Second, if GEC is allowed to bypass, then Union might lose \$29 million in existing margin if other similarly situated customers bypass or get bypass competitive rates.

GEC argued that there is no direct adverse impact on Union's ratepayers if GEC's application is granted. Union, and others, countered that the impact of lost revenues and the associated contribution to system costs, is an important consideration. If GEC took service from Union, it would lower rates for other Union customers. As a Union T1 customer, GEC would make a significant contribution to system costs - based on firm T1 rates, the Net Present Value of the pipeline project is over \$46 million and the Profitability Index is over 10. GEC characterized this as a cross-subsidy from GEC to Union's ratepayers; others characterized it as a contribution to system costs.

We agree that customers who are connected to the utility system should contribute to system costs. However, the rates must be just and reasonable. There would be a benefit to other ratepayers if GEC takes service from Union, but this benefit might be the result of providing a service which does not meet the needs of GEC. We note that if the application is approved, the indirect adverse impact on other ratepayers is balanced by a direct benefit to GEC. Rates for other customers will not increase as a result of approving GEC's application, but GEC's ability to control its costs, to operate flexibly and have more effective access to competitive upstream services will be enhanced. We find that the adverse impact of foregone revenues is not as great as the adverse impact of lost revenues, and that therefore this case can be distinguished from other potential applications by the fact that GEC is an incremental load.

With respect to the potential margin loss, Union identified \$29 million as the upper limit and was careful to acknowledge that it did not believe the full impact would come about. One approval to bypass does not necessarily result in a flood of similar applications. IGUA submitted that if GEC's application is approved, then all large volume gas users should be entitled to similar authorizations. We find that such a sweeping conclusion would be contrary to the Board's historic and continued approach to consider bypass on a case-by-case basis, considering all the circumstances. In the case of a bypass competitive rate application, the Board will have to carefully consider

the public interest issues with respect to a special rate in situations where the customer has been served on the posted rate, apparently satisfactorily, for some time.

## **2. Type of Bypass**

The issue arises as to whether there is duplication of facilities and/or stranded assets associated with granting the GEC application. The concern regarding stranded assets is primarily a financial one, while the concern about duplication of facilities is grounded in environmental and economic efficiency concerns. In this case, the issue of stranded assets does not arise.

On the issue of duplication of assets, Union took the position that there will be duplication because it already has an interconnection with Vector and that those facilities were constructed at least in part because of expected gas-fired power generation in the area. Union characterized it as a loss of efficiency. Union also suggested that there would be duplication of facilities if it were necessary to add facilities in the Sarnia area for future load growth, that might otherwise be unnecessary if Union were to build the GEC pipeline. GEC countered that Union's evidence is that

Union's interconnection with Vector was driven by issues of system stability in the area for all customers and that it might have been sized to accommodate some additional growth, but not the addition of a 1000 Megawatt plant in the area.

While we accept that there is a potential risk related to future duplication and reduced efficiency, it is speculative in nature, and not material. There is no evidence as to the timing and extent of future load growth in the area, nor is it certain that Union's proposed facilities to serve GEC would be sufficient to serve that future load. We conclude that any potential adverse impact is not of sufficient significance to deny GEC's application. With respect to the immediate duplication of facilities, this is limited to the Union-Vector interconnect and we are of the view that potential adverse impact in terms of environmental and economic efficiency concerns is not such that it would warrant denying the application.

The concerns of parties in respect of the impact of duplication on the rational development of the distribution system focused on the long term effect, not of the GEC application in isolation, but rather in combination with likely future applications. The Board must necessarily be cautious when arriving at conclusions regarding future

impacts – both positive and negative – of as yet unmade applications and possible developments. It is Union's and the Board's responsibility to ensure that these developments as they occur do not yield adverse outcomes.

Our conclusion on this issue is based on a case specific analysis. If other customers were to seek to bypass Union, the issues related to the duplication of facilities and the stranding of assets may be more significant.

### **3. Duration of the Bypass**

GEC has applied to build facilities dedicated for the plant, and the plant has a 20-year contract with the OPA. GEC may still contract for services on Union, which we note would mitigate the "notional" cost shifting associated with the bypass. No issues were raised in this area, and we conclude that there is no particular impact on the public interest related to this criterion.

### **4. Safety and Environmental Factors**

Elsewhere in this decision, we have addressed the safety and environmental concerns arising from the construction and operation of the GEC pipeline. We do not need to consider those issues further here.

### **5. Rate-making alternatives to bypass and other rate-making options**

The Board described the significance of this criterion in its decision in EBRO 410-1/411-1/412-1 as follows: "Bypass is a question of competing economic benefits. Potential rate-making solutions must be considered as alternatives to ensure that the public interest is fully protected." In coming to this conclusion, the Board made the following observation:

The major question that underlies the entire discussion on bypass is how well is regulation working in determining utility prices that are appropriate for the changing circumstances in Ontario. Bypass as a circumstance is economically motivated and likely unnecessary if rates are properly determined using sound regulatory principles.

The evidence is that GEC has undertaken negotiations with Union for both T1 firm and T1 interruptible services. However, a mutually acceptable arrangement has not been achieved. GEC has indicated that even if its application is approved, it will make its

decision on commercial grounds and is prepared to continue discussions with Union in this regard. Union testified that it offered GEC the lowest unitized rate on its system and submitted that to go lower would have compromised its principles and would not be consistent with its practices. Union did not provide evidence as to the specific rate offered to GEC. Rather, it relied on qualitative descriptions of the factors surrounding negotiations.

There was much discussion in the hearing and in the submissions on the issue of postage stamp rates. Union's position is that bypass is completely antithetical to postage stamp rates. The Board continues to support the principle of postage stamp rates, but does not conclude that the approval of GEC's application would undermine that principle. An important foundation for postage stamp rates is the appropriate determination of a class and the accurate allocation of costs to that class. An equally

important consideration is that customers should be entitled to receive the services they require and the tariff should reflect those services appropriately.

We find that the evidence and submissions in this case suggest that loads such as GEC (in terms of size and requirements for flexibility) may warrant a different class, or different set of services, than the T1 rate class as currently structured. This is supported by recent developments as well as parties' submissions in this proceeding. Specifically,

- The Board directed Union to investigate this possibility in RP-2003-0063, and although in this proceeding Union filed the report prepared pursuant to that Board directive, this hearing was not constituted to address that issue directly, and the report was not tested.
- Board staff, in its report on the Natural Gas Electricity Interface Review has recommended that the Board examine services provided to power generators and similar gas consumers. The Board has subsequently confirmed that this issue will be addressed.
- Enbridge submitted that consideration should be given to developing new more flexible services for power generation customers and argued that ratemaking responses are the best response to changing market conditions, noting that this reflected the Board's comments in EBRO 410-I/411-I/412-I.

- VECC submitted that Union should be ordered to negotiate a more flexible rate with GEC and that new rate class options for both Union and Enbridge should be examined in the Natural Gas Electricity Interface Review.
- CCC opposed GEC's application, but it was not entirely satisfied with Union's approach in administering the T1 rate in that it in effect acts as a gatekeeper for investments in the electricity sector.
- Union, in its reply argument, acknowledged that there should be a tariff solution as an alternative to bypass.

We believe there may be a ratemaking alternative to GEC's bypass solution, one that is grounded in class-based postage stamp ratemaking. The public interest would be served if Union were able to negotiate a just and reasonable rate and package of services which met the needs of GEC. However, Union was not able to bring forward an alternative which was acceptable to GEC at this time. The issue is whether there is an onus on GEC to put forward a tariff alternative. We do not think so. Such an approach would be burdensome and costly for a non-utility applicant. Union itself acknowledged its responsibility for ensuring that its tariff meets its customer needs.

Enbridge took the position that new types of services may be needed, but suggested that this should be pursued through the Natural Gas Electricity Interface Review and that this application should not pre-empt that consideration. We agree with Enbridge that other gas-fired power generators (and other gas consumers with similar requirements) may well require flexibility regardless of location and that a tariff review is appropriate. We note that the Board has confirmed already that the Natural Gas Electricity Interface Review will address this issue. The question is whether GEC should be required to await that review. We think not. We remain satisfied that GEC's application must be decided now on its own merits, and we find that it is in the public interest to approve it. However, now that the scope of the Natural Gas Electricity Interface Review proceeding is better defined, the Board does not expect to decide any other bypass applications prior to the results of that proceeding. It must be emphasized that the approval of GEC's by-pass is being granted in a transitional state. Following the Natural Gas Electricity Interface Review, we expect distributors' tariffs to be more robust against bypass. The Board intends to bring this transition to a close as soon as possible.

## **6. Public policy**

Two areas of public and regulatory policy were raised during the proceeding:

- the regulatory compact
- energy markets, in particular the electricity market

### The Regulatory Compact

Union argued that the regulatory compact consists of the following components:

- the utility's obligation to serve
- the high expectation of the right to serve
- the opportunity to earn a fair return

We note that Union agreed that a utility does not have an absolute right to serve all customers in its franchise area. Likewise, the obligation to serve is not absolute, but is subject to economic feasibility. The main factor, though, is that whatever the balance between the right to serve and the obligation to serve, the utility is afforded the opportunity to earn a fair return on its existing investments. There has been no suggestion in this proceeding that that fundamental tenet will be compromised.

While Union acknowledged that it does not have an absolute right to serve, its position is that it should serve in all but the most exceptional circumstances. For Union, the standard or threshold for allowing bypass should be "special harm" or "exceptional circumstances", mainly associated with the customer having to cancel a project or shutting an existing facility. GEC, on the other hand, argued that Union's position regarding the threshold is not correct as the concepts of "special harm" or "exceptional circumstances" are not supported by the legislation. In particular, GEC pointed out that section 90 of the OEB Act refers to "person", not gas distributor, and section 96 refers to public interest, not special circumstances.

We do not agree completely with GEC in this regard. Given the history and development of the natural gas distribution system, there is a high burden of proof for a customer to bypass the distribution system. That being said, we do not agree with Union that GEC must demonstrate a "special harm" in order to qualify for bypass. Rather, the case to be met, as in all physical bypass or bypass competitive rate applications is the public interest under the given circumstances. We would also note that Union does not have a right to monopoly protection for competitive services. In other words, GEC's evidence is that the key concern it has with Union's T1 service is that it impedes access to competitive upstream services, especially storage and load

balancing services. Customers on Union's T1 service have less effective access to those services than do customers directly served by Vector. It is in the public interest for customers to have access to the services they require. In this case, GEC cannot currently access adequate services from Union. It is therefore in the public interest to allow GEC to pursue those services directly through the option of bypassing Union. Appropriately designed distribution services can be designed to be robust against bypass. The same cannot be said about competitive services that are bundled with distribution services.

We must still consider whether the granting of GEC's application is contrary to the regulatory compact. We think not, given that all parties recognize that the right to

serve is not absolute. The Board has always indicated that bypass was a possibility. Does the fact that one has been granted somehow make others more likely? Again, we think not. Union has some control given its ability to develop rates which address the economic drivers for bypass. We note that if Union developed suitable services, it would reduce the economic incentive to seek bypass and enhance Union's position in asserting its right to serve, thereby reducing the likelihood of the Board approving a bypass or bypass competitive rate. The Board retains ultimate control through the exercise of its jurisdictions regarding bypass and rate setting.

Given the continued practice of case-by-case decision making for bypass, we conclude that the regulatory compact is not adversely affected by the granting of this application.

### Energy Markets

Union, VECC and Enbridge argued that the Board's legislated electricity objectives are not relevant to this application and only the gas objectives are relevant. CCC on the other hand submitted that the Board must take account of the impact on electricity. GEC argued that the Board can take account of its electricity objectives in gas matters. In its view, the list of objectives for gas matters would not have been intended to result in the Board ignoring other relevant considerations.

Bypass cases have always been case specific examinations, involving an enquiry into the specific circumstances of the customer in question and a broad assessment of the public interest. In this case the customer is an electricity generator. Some parties

suggested that the Board should examine only the economic circumstances of the customer, but not the broader circumstances related to its end use.

Our decision to grant GEC's application is based on the requirements which GEC has demonstrated it requires and our finding that Union's current services do not meet those requirements. No special consideration has been given to GEC because it is an electricity generator. We did not also need to assess GEC's applications within the Board's electricity objectives. The Board is concerned with ensuring all gas customers have the opportunity to receive services which they require and which allow them to operate as cost effectively as possible. While the integration of the gas and electricity markets makes it particularly important for generators to be able to control transportation and related service costs over the long term, there may be other customers who require the same type of control, flexibility and access to competitive upstream services.

We therefore conclude that it is in the public interest to allow GEC the option to operate as economically efficiently and cost effectively as possible by having as much flexibility, control, and access to competitive upstream services as possible. This consideration is important given the uncertainty of future market conditions and uncertainty regarding operating parameters. This conclusion is grounded in GEC's status as a potential gas consumer and market participant, not on the basis that it is a generator in the Ontario electricity market.

Some parties noted that if the GEC application were granted, this might represent discrimination against other power generators or would create a precedent for other power generators. Similarly, IGUA submitted that there should be no special regulatory treatment for a large volume customer on the basis of end use as this would be discriminatory. The principle of case-by-case consideration of bypass and bypass competitive rate applications has always allowed for the potential for discrimination; the issue is whether the result is undue discrimination and therefore not in the public interest. Determination of that requires individual assessment of each applicant, again on a case-by-case basis. We conclude from the evidence and testimony that not all generators, or large volume customers, will necessarily have the same level of economic motivation as GEC and that if Union develops a rate and services which meet their needs, the motivation to bypass will be addressed. We note that to the extent that a new tariff is developed, customers will be eligible based on their load

characteristics, not their end use. No other generators, or large volume customers, have pursued a bypass application to the same degree as GEC. We cannot conclude now that there would be undue discrimination.

### **7. Other factors relevant to the specific application**

There was some discussion during the proceeding regarding the potential analogy between gas bypass and electricity bypass. GEC raised this analogy in support of its application, but Union submitted that the evidence was not sufficient for the Board to conclude that the analogy was valid and that therefore consistent treatment was warranted. We note that Union did not address in any detail why the analogy is not appropriate. In any event, we do not have the evidence necessary to make a conclusion on this point, and therefore it has not been considered in the overall determination of the application.

### **Conclusions**

We find that the public interest would not be well served if we deny GEC's application. It is in the public interest for gas customers to have access to the services they require. In this case, GEC cannot currently access adequate services from Union. It is therefore in the public interest to allow GEC to pursue those services directly through the option of bypassing Union. At the same time, Union and other parties have not established that Union or its other customers would suffer direct harm in the event that GEC's application is approved. Moreover, GEC's application is credible. Therefore we find GEC's application to be in the public interest and will approve it.

We believe that it is possible for Union to develop a tariff solution for customers of the size and needs of GEC to permit the utility's offerings to be more robust against bypass. It is within the control of Union and the Board to manage the longer term, more speculative impacts arising from this transitional decision, beginning with the pending Natural Gas Electricity Interface Review proceeding. It is not in the public interest in this case however to require GEC to await the resolution of an appropriate tariff in the NGEIR proceeding.

### **g) Should one or both applications be approved and what should the conditions of approval be?**

The competing applications are for a natural gas pipeline to serve the same potential load. Our findings on the two applications can be summarized as follows. If a power

generating station is built at the proposed location, there is clearly a need for a pipeline to serve the power plant. There are no negative rate implications for Union's customers, if Union builds the pipeline. There are no outstanding matters from the perspective of the Ontario Pipeline Coordination Committee with respect to the environmental reports commissioned by both applicants. The environmental impacts associated with the proposed competing pipelines are found by the Board to be acceptable and there are no outstanding landowner matters for either pipeline proposal. Union is known to be a competent builder and operator of gas pipelines. The Calpine group of companies that will be building and operating the GEC pipeline under contracts with GEC are also experienced builders and operators of pipelines in many jurisdictions in the United States. The applications of Union and GEC are credible and in the public interest.

Whether there is a high or low probability that GEC and Union will come to an arrangement whereby the power plant may become Union's customer, we must allow for that. We conclude therefore that it is in the public interest to approve both applications, subject to the normal conditions the Board imposes for such applications and certain other specific conditions in the case of GEC that flow from our findings in this decision. These conditions are attached as appendix 5 and 6 for GEC and Union, respectively.

Naturally, the approval for Union's application is non-operative if it does not have the GEC power plant as a customer. A key condition therefore for Union is that it must contract to provide service to the GEC plant whether owned by GEC or another entity, as long as the power plant is in the same location and requires the same proposed pipeline, both in terms of size and route.

With respect to the approval of GEC's application, as noted earlier, should there be any new participants in the project that will bear responsibility for the construction or operation of the pipeline, GEC must submit the relevant information to the Board.

**h) Does GEC need a Certificate of Public Convenience and Necessity?**

In addition to its application for leave to construct a hydrocarbon pipeline, GEC applied for a Certificate of Public Convenience and Necessity (or "Certificate") under section 8(1) of the *Municipal Franchises Act* (MFA). That subsection reads:

8.(1) Despite any other provision in this Act or any other general or special Act, no person shall construct any works to supply,

- (a) natural gas in any municipality in which such person was not on the 1<sup>st</sup> day of April, 1933, supplying gas; or
- (b) gas in any municipality in which such person was not on the 1<sup>st</sup> day of April, 1933, supplying gas and in which gas was being supplied, without the approval of the Ontario Energy Board, and such approval shall not be given
- (c) unless public convenience and necessity appear to require that such approval be given.

There was some debate at the hearing as to whether GEC needed a certificate to build the pipeline, as no person other than the GEC facility would be supplied with gas through the pipeline. Counsel addressed some remarks on the question of whether the word “supply” in section 8 included the situation where the builder and operator of the pipeline was the same entity that received the gas.

In addition, GEC took the position that it would not be a gas distributor within the meaning of section 3 of the OEB Act. “Gas distributor” is defined as follows:

“gas distributor” means a person who delivers gas to a consumer, and “distribute” and “distribution” have corresponding meanings;

The question of whether the recipient of a Certificate under the MFA could be exempt from regulation as a distributor under the OEB Act was not addressed at the hearing.

As GEC has applied for a Certificate, and has thereby acknowledged the jurisdiction of the Board to grant a Certificate in this situation, the question is not squarely before us. However, it may be of some use to future proponents to have some indication of the Board’s views on this issue.

First, it is clear from the MFA that the application of section 8 is not restricted to utilities or gas distributors. The need for pre-approval applies to all persons.

Secondly, it appears that the purpose of section 8 of the MFA is to deal with construction of works to supply gas, not the supply of gas itself. The first part of section 8 of the MFA, before an amendment in 1998, read:

- 8.(1) Despite any other provision in this Act or any other general or special Act, no person shall construct any works to supply, **or supply**
- (a) natural gas in any municipality...
- (emphasis added)*

The amendment reduced the scope of section 8 of the MFA such that it is the construction of works that is addressed by the section.

The Board finds that a purposive interpretation of the MFA suggests that all persons who wish to construct pipelines to supply natural gas need a Certificate, unless such persons are exempted by the words in the section that relate to supply before 1933. The Board is of the view that the section applies even where the recipient of the gas is identical with the constructor of the pipeline. We find that the word “supply” should be interpreted to include supplying oneself.

It is important that the Board retain oversight of the construction of hydrocarbon pipelines in Ontario for reasons including safety, regulatory policy and the avoidance of the unnecessary proliferation of gas works. As pointed out in the hearing, not every gas pipeline is subject to approval under the leave to construct provisions of the OEB Act. The need for a Certificate under the MFA provides the Board with the opportunity to assess the need for a gas pipeline and the competency of the proponent to construct the line safely.

In contrast, the definition of “gas distributor” under the OEB Act addresses the delivery of gas to a consumer. Many of the provisions relating to gas regulation in the OEB Act, such as the rate setting provision, deal with the relationship between the distributor and the consumers it serves. In the case before us, there is no relationship to regulate, as the consumer of the gas is the same as the person who is delivering the gas. We find that it is not inconsistent to require a person to obtain a Certificate under the MFA, while finding that the person is not a gas distributor within the meaning of the OEB Act.

The Board finds that the applicant GEC should be required to obtain, and should be granted a Certificate of Public Convenience and Necessity under section 8 of the MFA. GEC has satisfied us of the need for the pipeline and that it is competent to undertake

construction and operation of the line. However, as indicated elsewhere in this decision, if the project partner Calpine is not overseeing construction, the Board will require GEC to provide the Board with information as to the entity supervising construction of the line and its competence in gas pipeline construction.

GEC indicated that it would not object to a geographic restriction of the Certificate to the area needed to construct and operate the pipeline. The Board finds that it would be appropriate to so restrict the Certificate. The certificate that it will be issued to GEC will be for the sole purpose of building the pipeline to supply gas to the GEC generating station. The area of the certificate shall cover only the area necessary for the construction of the pipeline including permanent and temporary workspace.

Union has a Certificate for the municipality, and those rights remain in effect.

Counsel for Union raised the question of whether Vector would need a Certificate for the facilities that will connect the GEC line to the Vector transmission line. However, Counsel for GEC made it clear in his reply submissions that Vector is not undertaking any construction of facilities. Section 8 of the MFA applies only to persons constructing works to supply gas. It therefore appears that Vector will not require a Certificate.

### **Board Order and Cost Awards**

Pursuant to section 90 and 96 of the *Ontario Energy Board Act*, 1998 the Board grants GEC leave to construct the pipeline and associated equipment as applied for, subject to the conditions attached in Appendix 5. Pursuant to section 8 of the *Municipal Franchises Act*, the Board grants GEC a Certificate for Public Convenience and Necessity, which shall be issued to GEC in due course.

Pursuant to section 90 and 96 of the *Ontario Energy Board Act*, 1998 the Board grants Union leave to construct the pipeline and associated equipment as applied for, subject to the conditions attached in Appendix 6. Union's rights in its existing Certificate for the municipality remain in effect.

GEC and Union shall pay in equal shares intervenor cost awards. GEC and Union shall also pay in equal shares the Board's costs, if any. Intervenors eligible for cost awards shall file their cost statements with the Board, GEC and Union by January 16,

2006, in which they must indicate the requested percentage of cost recovery. GEC and Union may respond by January 31, 2006, and intervenors may reply by February 15, 2006.

Dated at Toronto, January 6, 2006

*Original signed by*

John Zych  
Board Secretary

## Appendix 1

### Active Participants and Witnesses RP-2005-0022

<b>Applicants</b>	<b>Counsel or Representative</b>
Greenfield Energy Centre Limited Partnership ("GEC")	Patrick Moran Ogilvy Renault LLP
Union Gas Limited	Gordon Cameron Blake, Cassels & Graydon LLP
<b>Active Intervenors</b>	<b>Counsel or Representative</b>
Aiken & Associates	Randy Aiken
Canadian Manufactures & Exporters ("CME")	Brian Dingwall Barrister & Solicitor
Consumers Council of Canada ("CCC")	Robert Warren Weir Foulds LLP
Enbridge Gas Distribution	Helen Newland Fraser Milner Casgrain LLP
Federation of Northern Ontario Municipalities ("FONOM")	Peter Scully
Industrial Gas Users Association ("IGUA")	Vincent DeRose Borden Ladner Gervais LLP
Power Workers' Union ("PWU")	Andrew Lokan Paliare Roland Rosenberg Rothstein LLP
Society of Energy Professionals ("SEP")	Paul Manning Willms and Shier Environmental Lawyers LLP
TransCanada Energy ("TCE")	David M. Brown Stikeman Elliott LLP

Walpole Island First Nation  
("WIFN")

Lorraine Land  
Olthuis Kleer Townshend  
Barristers and Solicitors

Vulnerable Energy Consumers  
Coalition ("VECC")

Michael Janigan  
Public Interest Advocacy Centre

**Witnesses for GEC**

Paul Wendelgass

Director, Business Development  
Calpine Corporation

John Rozenkranz

Director, Gas Marketing  
Calpine Corporation

Lyle Fedje

Director, Pipeline Operations  
Calpine Corporation

Kristy Snarey

Senior Archaeological Field Director  
Mayer Heritage Consultants Inc.

Joe Muraca

Environmental Scientist  
SENES Consultants Limited

**Witnesses for Union**

Laura Callingham

Team Leader, Financial Analysis  
Union

Larry Hyatt

Manager, System Planning  
Union

David Wesenger

Senior Project Manager  
Stantec Consulting Ltd.

Douglas Schmidt

Principal Technical Specialist, Construction  
Permitting, Union

Gerard Mallette

Project Manager, Union

Beverly Wilton

Manager, Lands Department  
Union

Jeff Wesley	Manager, Franchise, Municipal & Aboriginal Relations Union
David Simpson	Director, Acquisitions, Union
David Dent	Strategic Manager, Retail Energy Marketers & Power Markets Union
Mark Kitchen	Manager, Rates and Pricing Union
Richard Birmingham	Vice President, Regulatory Affairs & Economic Development, Union

**Witnesses for SEP**

Matthew Kellway	Staff Specialist, Policy Society of Energy Professionals
-----------------	---

**Witnesses for WFIN**

Dean Jacobs	Chief of the Walpole Island First Nation
David White	Acting Director, Heritage Centre Walpole Island First Nation

**Appendix 2**

**Decision On Motion  
RP-2005-0022**



RP-2005-0022  
EB-2005-0441  
EB-2005-0442  
EB-2005-0443  
EB-2005-0473

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

**AND IN THE MATTER OF** an Application by GEC Energy Centre Limited Partnership for an Order or Orders pursuant to section 90 of the *Ontario Energy Board Act, 1998* granting leave to construct a natural gas pipeline in the Township of St. Clair, Ontario;

**AND IN THE MATTER OF** an Application by GEC Energy Centre Limited Partnership for an Order or Orders pursuant to section 101 of the *Ontario Energy Board Act, 1998* for authorization for certain road and utility crossings required for the proposed pipeline;

**AND IN THE MATTER OF** an Application by GEC Energy Centre Limited Partnership for a Certificate of public convenience and necessity, pursuant to section 8 of the *Municipal Franchises Act*;

**AND IN THE MATTER OF** an Application by Union Gas Limited for an Order or Orders pursuant to section 90 of the *Ontario Energy Board Act, 1998* granting leave to construct a natural gas pipeline in the Township of St. Clair, Ontario.

BEFORE: Paul Vlahos  
Presiding Member

Cynthia Chaplin  
Member

Ken Quesnelle  
Member

DECISION ON MOTION

November 7, 2005

### **The Proceeding**

An application, dated July 20, 2005, was filed by the GEC Energy Centre Limited Partnership (“GEC”) with the Ontario Energy Board under section 90 of the *Ontario Energy Board Act, 1998* for leave to construct a 2 km natural gas pipeline. GEC plans to construct a 1005 MW gas-fired generating station in Courtright, in the Township of St. Clair, south of Sarnia, and the application requests approval for the construction of a pipeline to serve the generating station which is located in the franchise of Union Gas Ltd. (“Union”).

If leave to construct the pipeline is granted, GEC also seeks an order authorizing the crossing of public roads and utilities pursuant to section 101 of the Act and a certificate of public convenience and necessity, pursuant to section 8 of the *Municipal Franchises Act*. The Board assigned File Nos. RP-2005-0022/EB-2005-0441/EB-2005-0442/EB-2005-0443 to GEC’s application. The Board issued a notice of GEC’s application on July 28, 2005.

Union filed an application, dated August 30, 2005, with the Board under section 90 of the Act for leave to construct a 2 km natural gas pipeline to supply gas to the generating station. Union’s application represents a competing proposal to GEC’s application. The Board has assigned File No. EB-2005-0473 to Union’s application.

In Procedural Order No. 2, issued September 9, 2005, the Board ordered that the proceeding for GEC’s application (RP-2005-0022/EB-2005-0441) and Union’s application (EB-2005-0473) be combined and heard together in a joint proceeding.

On October 6, 2005, the Board received a Notice of Motion and Motion Record from GEC. The Notice of Motion and Motion Record were served on all the parties in the proceeding by e-mail on October 6, 2005. In the Notice of Motion, GEC seeks an order of the Board to exclude certain evidence filed on October 4, 2005, by the Society of Energy Professionals (“the Society”).

In Procedural Order No. 3, issued October 12, 2005, the Board established a written process to deal with the motion and set dates for the filing of submissions by parties in the joint proceeding and the filing of reply submissions by GEC. On October 20, 2005, the Society, the Power Workers Union (“PWU”), and Union Gas Limited filed submissions on the motion. On October 24, 2005, GEC filed its reply submissions.

### **The Motion**

In its Notice of Motion, GEC asked the Board to exclude the following documents from the Society’s evidence:

- Tab 1: “Ontario Supply Mix into the Future-proposals from the Society of Energy Professionals, August 26, 2005”
- Tab 2: “Submissions Re The OPA Procurement Process. Submitted by The Society of Energy Professionals, July 29, 2005”
- Tab 3: “Letter to Mr. James O’Mara, Director, Environmental Assessment and Approvals Branch, MOE re: The Society of Energy Professionals Environmental Assessment Elevation Request, July 8, 2005”
- Tab 4: “Excerpts from GEC Energy Centre LP Environmental Review report, June 2005”
- Tab 5: “Canadian Energy Research Institute Levelized Unit Electricity Cost Comparison of Alternate Technologies for base-load generation in Ontario report, August 2004”
- Tab 7: “Canadian Council of Ministries of the Environment-Canada-Wide Standards for Particulate Matter (PM) and Ozone, June 5-6, 2000”

GEC submitted that this material is inadmissible because it is irrelevant to the proceeding and the Board’s decision on the GEC application. In GEC’s view the scope of the proceeding set by the Board in Procedural Order No. 1 does not

include the issues addressed by the evidence filed by the Society.

The Society also included in its evidence the Board document entitled “*OEB Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario, Fifth Edition, May 2003*” (the “Environmental Guidelines”). This evidence was not challenged by GEC, but the Board invited submissions on whether it needed to be filed as evidence, as it is a publicly available Board document.

### **Board Findings**

In the Board’s view, the issues it needs to address are the following:

1. Procedural decisions to date
2. The Board’s consideration of the public interest
3. Cumulative environmental impacts

#### Procedural decisions to date

The Society argues that previous procedural documents issued by the Board on this application have already decided the issues brought forward in the Motion and that the Motion is duplicative and ought to be dismissed. The Board does not agree that the granting of intervenor status to the Society removed GEC’s right as an applicant to challenge the relevance of the Society’s evidence. In its letter of September 9, 2005 granting intervenor status to the Society, the Board did not address the request made by GEC in its letter of September 6, 2005 to limit the Society’s intervention. The Board did not limit the Society’s intervention or make an advance ruling on any evidence the Society might bring forward in part because the Society’s letter of September 1, 2005 stated that the precise nature and extent of its participation was not yet determined.

The Board always retains the authority to govern its own process, including making rulings at any point during the proceeding as to the relevance of questions asked or evidence offered. The scope of evidence the Board will hear on a matter remains within its control throughout the hearing process. Once the evidence of the Society was filed, the Board was in a better position to assess the scope of the Society's intervention. The Board will not dismiss the motion on the ground that it has already determined the issue.

The Board's consideration of the public interest

The Society's assertion that its evidence is relevant is based, to a great degree, on its interpretation of the Board's responsibilities with respect to the "public interest" and the Board's statutory objectives under the Act. In the Society's view, the Board's public interest responsibilities in this proceeding should include scrutiny of the generating station being served. The Society argued that GEC itself relies on the public interest aspect of the generating station in its evidence.

Similarly, the PWU submitted that GEC's own evidence relies on claimed electricity and environmental policy benefits and that therefore the Society's evidence should be admitted as an appropriate challenge to those claims. In the PWU's view, the proposed pipeline should not be considered in isolation from the energy and environmental policy issues that relate to the GEC project as a whole.

GEC argued in its reply submissions that the issues covered in the Society's evidence were beyond Board's jurisdiction under sections 90 and 96 of the Act, and that the use of the phrase "public interest" does not broaden the Board's jurisdiction to include an assessment of the environmental or economic impact of the use of the gas flowing through the pipeline.

The Board does not agree with the Society's view as to how the objectives contained in the Act govern the Board's consideration of leave to construct

applications. The Board agrees with GEC's submission that section 96 does not create jurisdiction but rather relates to how the Board's jurisdiction is to be exercised. In determining whether to grant a leave to construct, the Board must determine whether the pipeline itself is in the public interest, not whether facilities connected to it will be in the public interest. There are other processes in place related to the generating station, including an environmental assessment process. In considering the leave to construct application, it is not within the Board's jurisdiction to determine whether the generating station is in the public interest. For these reasons, the material at tabs 1, 2 and 5 of the Society's material is not relevant and will be excluded from the record of this proceeding.

#### Cumulative environmental impacts

The Society also argued that there are cumulative environmental impacts related to the pipeline and the generating station and that therefore the evidence of the station's environmental and socio-economic impacts are relevant to the proceeding. The section on cumulative effects in the Board's Environmental Guidelines refers to the additive effects of pipeline construction and other existing and future projects in the area and the interaction of pipeline construction with these projects. The Guidelines include projects beyond just pipeline projects, as demonstrated by the reference at page 38 to subdivision development, and the instruction to not restrict the study area to the pipeline easement and related work areas. However, the examples in section 4.3.13 of the Guidelines indicate that the type of cumulative impacts considered are quite narrow; largely soil, water and vegetation impacts directly resulting from construction. The materials filed by the Society at tabs 3, 4 and 7 address matters that have not yet been considered by the Board in assessing the cumulative effects of pipeline construction, such as the effect on the airshed of the activities of the end user of the gas that will flow through the pipeline. The Board has yet to be persuaded that such matters are relevant to the pipeline applications in this case.

The Board notes that the environmental report filed by the applicant Union, at page 52, refers to the cumulative effects of the construction of the power station. It appears that the scope of the Board's consideration of cumulative impacts is unclear to both applicants and intervenors. The Board will not exclude the material filed by the Society at tabs 3, 4 and 7 on the basis of the motion record. However, it remains an open question as to the appropriate use and weight to be accorded to this material during the hearing.

#### Conclusion and Order

The Board grants the motion from GEC to the extent of excluding the materials filed by the Society at tabs 1, 2 and 5. The material found at the remaining tabs is not excluded from the record. The use to be made of and the weight to be given to the Society's material remains an open question in the hearing.

DATED at Toronto, November 7, 2005

ONTARIO ENERGY BOARD

Signed on behalf of the Panel

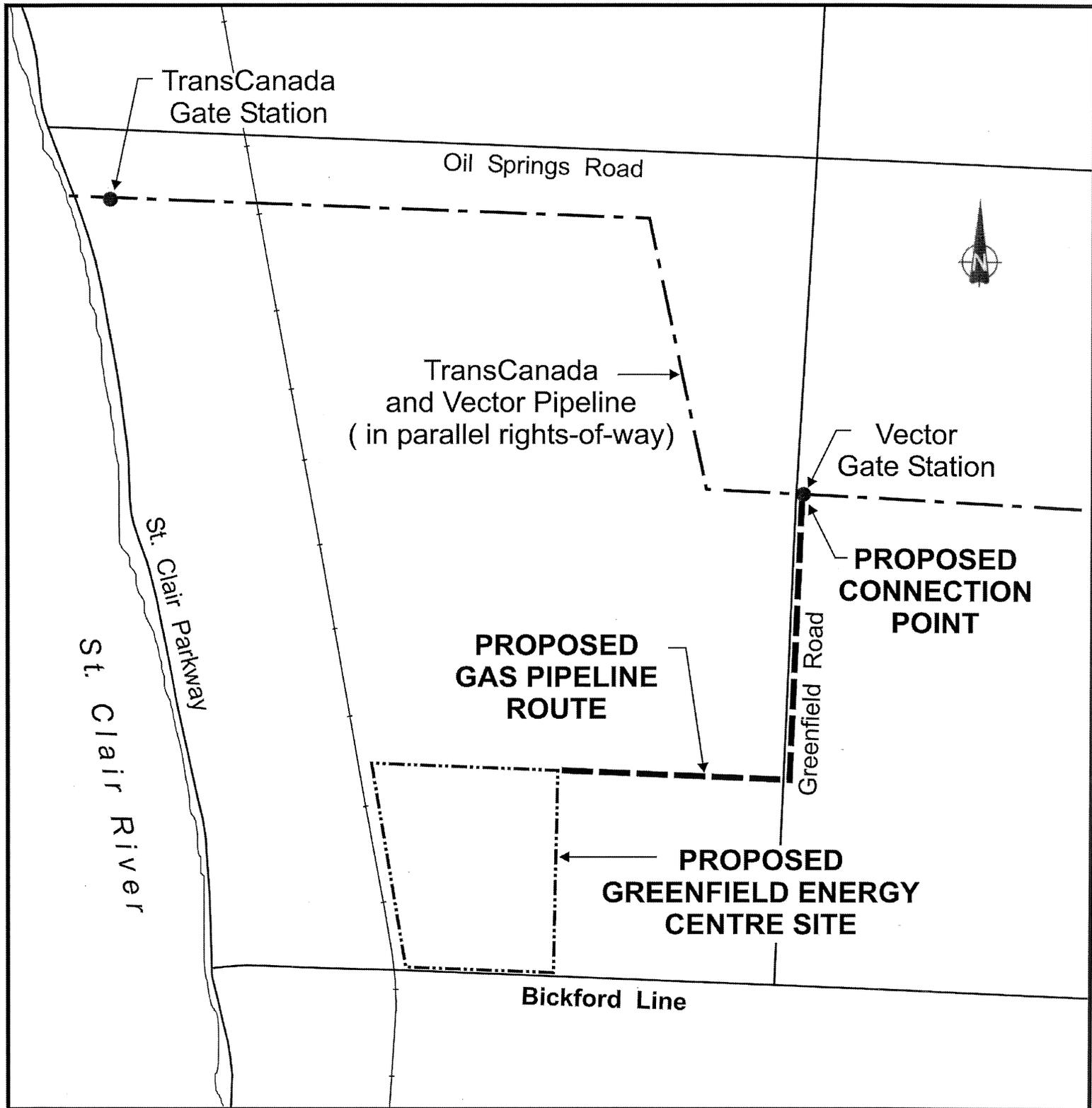
*Original signed by*

Paul Vlahos

Presiding Member

**Appendix 3**

**GEC – Proposed Route  
RP-2005-0022**



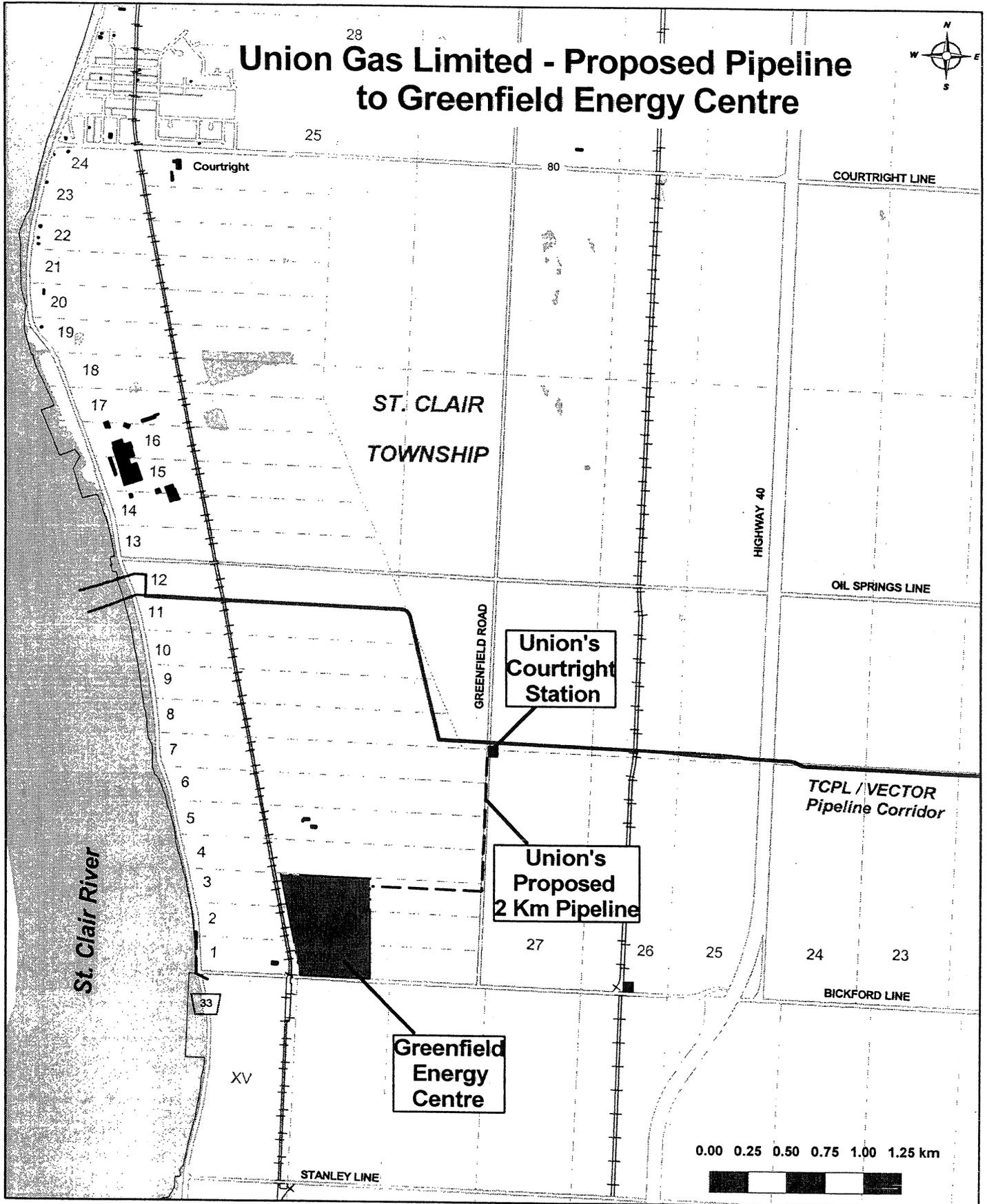
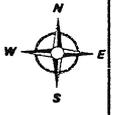
# Greenfield Energy Centre LP Proposed Pipeline Route

Not To Scale

**Appendix 4**

**Union – Proposed Route  
RP-2005-0022**

# Union Gas Limited - Proposed Pipeline to Greenfield Energy Centre



## Appendix 5

### CONDITIONS OF APPROVAL Leave to Construct Greenfield Energy Centre LP RP-2005-0022

#### **1 General Requirements**

- 1.1 Greenfield Energy Centre LP shall construct the facilities and restore the land in accordance with its application and evidence, except as modified by this Order and these Conditions of Approval.
- 1.2 Unless otherwise ordered by the Board, authorization for Leave to Construct shall terminate December 31, 2007, unless construction has commenced prior to then.
- 1.3 Except as modified by this Order, Greenfield Energy Centre LP shall implement all the recommendations of the Environmental Study Report filed in the evidence, and all the recommendations and directives identified by the Ontario Pipeline Coordinating Committee ("OPCC") review.
- 1.4 Greenfield Energy Centre LP shall advise the Board's designated representative of any proposed material change in construction or restoration procedures and, except in an emergency, Greenfield Energy Centre LP shall not make such change without prior approval of the Board or its designated representative. In the event of an emergency, the Board shall be informed immediately after the fact.
- 1.5 A survey of water wells shall be conducted along and within 100 m adjacent to the preferred route. Water samples should be analyzed for parameters agreed with the MOE Regional Office. Monitoring of the water wells must be carried out where dewatering or work below the water table is required. Permanent water service must be restored to landowners who experience any interference or interruption to water supply due to pipeline construction.
- 1.6 Blasting will not be permitted.

#### **2 Project and Communications Requirements**

- 2.1 The Board's designated representative for the purpose of these Conditions of Approval shall be the Manager, Facilities.
- 2.2 Greenfield Energy Centre LP shall designate a person as project engineer and shall provide the name of the individual to the Board's designated representative. The project engineer will be responsible for the fulfilment of the Conditions of

Approval on the construction site. Greenfield Energy Centre LP shall provide a copy of the Order and Conditions of Approval to the project engineer, within seven days of the Board's Order being issued.

- 2.3 Greenfield Energy Centre LP shall give the Board's designated representative and the Chair of the OPCC ten days written notice, in advance of the commencement of the construction.
- 2.4 Greenfield Energy Centre LP shall furnish the Board's designated representative with all reasonable assistance for ascertaining whether the work is being or has been performed in accordance with the Board's Order.
- 2.5 Greenfield Energy Centre LP shall file with the Board's designated representative notice of the date on which the installed pipelines were tested, within one month after the final test date.
- 2.6 Greenfield Energy Centre LP shall furnish the Board's designated representative with five copies of written confirmation of the completion of construction. A copy of the confirmation shall be provided to the Chair of the OPCC.

### **3 Monitoring and Reporting Requirements**

- 3.1 Both during and after construction, Greenfield Energy Centre LP shall monitor the impacts of construction, and shall file four copies of both an interim and a final monitoring report with the Board. The interim monitoring report shall be filed within six months of the in-service date, and the final monitoring report shall be filed within eighteen months of the in-service date. Greenfield Energy Centre LP shall attach a log of all complaints that have been received to the interim and final monitoring reports. The log shall record the times of all complaints received, the substance of each complaint, the actions taken in response, and the reasons underlying such actions.
- 3.2 The interim monitoring report shall confirm Greenfield Energy Centre LP's adherence to Condition 1.1 and shall include a description of the impacts noted during construction and the actions taken or to be taken to prevent or mitigate the long-term effects of the impacts of construction. This report shall describe any outstanding concerns identified during construction.
- 3.3 The final monitoring report shall describe the condition of the rehabilitated land and the effectiveness of the mitigation measures undertaken. The results of the monitoring programs and analysis shall be included and recommendations made as appropriate. Any deficiency in compliance with any of the Conditions of Approval shall be explained.

#### **4 Other Approvals**

- 4.1 Greenfield Energy Centre LP shall obtain all other approvals, permits, licences, and certificates required to construct, operate and maintain the proposed project, shall provide a list thereof, and shall provide copies of all such written approvals, permits, licences, and certificates upon the Board's request.

#### **5 Project Specific Conditions**

- 5.1. In the event that Calpine Corporation and its subsidiaries will not be constructing and operating the proposed pipeline, Greenfield Energy Centre LP must file with the Board, when its plans are finalized and before construction is commenced, the name and description of the entity or entities that will construct and operate the pipeline, including the provision of emergency services. The description must be sufficient for the Board to properly assess the competence of the entities to undertake their role in the pipeline project.

## Appendix 6

### CONDITIONS OF APPROVAL Leave to Construct Union Gas Limited RP-2005-0022

#### 1 General Requirements

- 1.1 Union Gas Limited shall construct the facilities and restore the land in accordance with its application and evidence, except as modified by this Order and these Conditions of Approval.
- 1.2 Unless otherwise ordered by the Board, authorization for Leave to Construct shall terminate December 31, 2007, unless construction has commenced prior to then.
- 1.3 Except as modified by this Order, Union Gas Limited shall implement all the recommendations of the Environmental Study Report filed in the evidence, and all the recommendations and directives identified by the Ontario Pipeline Coordinating Committee ("OPCC") review.
- 1.4 Union Gas Limited shall advise the Board's designated representative of any proposed material change in construction or restoration procedures and, except in an emergency, Union Gas Limited shall not make such change without prior approval of the Board or its designated representative. In the event of an emergency, the Board shall be informed immediately after the fact.
- 1.5 A survey of water wells shall be conducted along and within 100 m adjacent to the preferred route. Water samples should be analyzed for parameters agreed with the MOE Regional Office. Monitoring of the water wells must be carried out where dewatering or work below the water table is required. Permanent water service must be restored to landowners who experience any interference or interruption to water supply due to pipeline construction.
- 1.6 Blasting will not be permitted.
- 1.7 Union Gas Limited shall involve a representative designated by the Walpole Island First Nation in the stage 2 archaeological assessment of the pipeline route. Union Gas Limited shall also provide to the Board the results of the stage 2 assessment and indicate that there are no outstanding matters in respect of that assessment.

## **2 Project and Communications Requirements**

- 2.1 The Board's designated representative for the purpose of these Conditions of Approval shall be the Manager, Facilities.
- 2.2 Union Gas Limited shall designate a person as project engineer and shall provide the name of the individual to the Board's designated representative. The project engineer will be responsible for the fulfilment of the Conditions of Approval on the construction site. Union Gas Limited shall provide a copy of the Order and Conditions of Approval to the project engineer, within seven days of the Board's Order being issued.
- 2.3 Union Gas Limited shall give the Board's designated representative and the Chair of the OPCC ten days written notice, in advance of the commencement of the construction.
- 2.4 Union Gas Limited shall furnish the Board's designated representative with all reasonable assistance for ascertaining whether the work is being or has been performed in accordance with the Board's Order.
- 2.5 Union Gas Limited shall file with the Board's designated representative notice of the date on which the installed pipelines were tested, within one month after the final test date.
- 2.6 Union Gas Limited shall furnish the Board's designated representative with five copies of written confirmation of the completion of construction. A copy of the confirmation shall be provided to the Chair of the OPCC.

## **3 Monitoring and Reporting Requirements**

- 3.1 Both during and after construction, Union Gas Limited shall monitor the impacts of construction, and shall file four copies of both an interim and a final monitoring report with the Board. The interim monitoring report shall be filed within six months of the in-service date, and the final monitoring report shall be filed within eighteen months of the in-service date. Union Gas Limited shall attach a log of all complaints that have been received to the interim and final monitoring reports. The log shall record the times of all complaints received, the substance of each complaint, the actions taken in response, and the reasons underlying such actions.
- 3.2 The interim monitoring report shall confirm Union Gas Limited's adherence to Condition 1.1 and shall include a description of the impacts noted during construction and the actions taken or to be taken to prevent or mitigate the

long-term effects of the impacts of construction. This report shall describe any outstanding concerns identified during construction.

- 3.3 The final monitoring report shall describe the condition of the rehabilitated land and the effectiveness of the mitigation measures undertaken. The results of the monitoring programs and analysis shall be included and recommendations made as appropriate. Any deficiency in compliance with any of the Conditions of Approval shall be explained.

#### **4 Other Approvals**

- 4.1 Union Gas Limited shall obtain all other approvals, permits, licences, and certificates required to construct, operate and maintain the proposed project, shall provide a list thereof, and shall provide copies of all such written approvals, permits, licences, and certificates upon the Board's request.

#### **5. Project Specific Conditions**

- 5.1 Union Gas Limited must be under contract to provide service to the GEC plant whether owned by GEC or another entity, and the power plant must be in the same location and require the same proposed pipeline, both in terms of size and route. Union Gas Limited shall file with the Board a copy of the contract as soon as it becomes available.

## Appendix 1

### Active Participants and Witnesses RP-2005-0022

#### Applicants

#### Counsel or Representative

Greenfield Energy Centre Limited  
Partnership ("GEC")

Patrick Moran  
Ogilvy Renault LLP

Union Gas Limited

Gordon Cameron  
Blake, Cassels & Graydon LLP

#### Active Intervenors

#### Counsel or Representative

Aiken & Associates

Randy Aiken

Canadian Manufactures &  
Exporters ("CME")

Brian Dingwall  
Barrister & Solicitor

Consumers Council of Canada  
("CCC")

Robert Warren  
Weir Foulds LLP

Enbridge Gas Distribution

Helen Newland  
Fraser Milner Casgrain LLP

Federation of Northern Ontario  
Municipalities ("FONOM")

Peter Scully

Industrial Gas Users Association  
("IGUA")

Vincent DeRose  
Borden Ladner Gervais LLP

Power Workers' Union ("PWU")

Andrew Lokan  
Paliare Roland Rosenberg Rothstein LLP

Society of Energy Professionals  
("SEP")

Paul Manning  
Willms and Shier Environmental Lawyers  
LLP

TransCanada Energy ("TCE")

David Brown  
Stikeman Elliott LLP

Walpole Island First Nation  
("WIFN")

Lorraine Land  
Olthuis Kleer Townshend  
Barristers and Solicitors

Vulnerable Energy Consumers  
Coalition ("VECC")

Michael Janigan  
Public Interest Advocacy Centre

**Witnesses for GEC**

Paul Wendelgass

Director, Business Development  
Calpine Corporation

John Rozenkranz

Director, Gas Marketing  
Calpine Corporation

Lyle Fedje

Director, Pipeline Operations  
Calpine Corporation

Kristy Snarey

Senior Archaeological Field Director  
Mayer Heritage Consultants Inc.

Joe Muraca

Environmental Scientist  
SENES Consultants Limited

**Witnesses for Union**

Laura Callingham

Team Leader, Financial Analysis  
Union

Larry Hyatt

Manager, System Planning  
Union

David Wesenger

Senior Project Manager  
Stantec Consulting Ltd.

Douglas Schmidt

Principal Technical Specialist, Construction  
Permitting, Union

Gerard Mallette

Project Manager, Union

Beverly Wilton

Manager, Lands Department  
Union

Jeff Wesley	Manager, Franchise, Municipal & Aboriginal Relations Union
David Simpson	Director, Acquisitions, Union
David Dent	Strategic Manager, Retail Energy Marketers & Power Markets Union
Mark Kitchen	Manager, Rates and Pricing Union
Richard Birmingham	Vice President, Regulatory Affairs & Economic Development, Union

**Witnesses for SEP**

Matthew Kellway	Staff Specialist, Policy Society of Energy Professionals
-----------------	--

**Witnesses for WFIN**

Dean Jacobs	Chief of the Walpole Island First Nation
David White	Acting Director, Heritage Centre Walpole Island First Nation

**Appendix 2**

**Decision On Motion  
RP-2005-0022**



RP-2005-0022  
EB-2005-0441  
EB-2005-0442  
EB-2005-0443  
EB-2005-0473

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

**AND IN THE MATTER OF** an Application by GEC Energy Centre Limited Partnership for an Order or Orders pursuant to section 90 of the *Ontario Energy Board Act, 1998* granting leave to construct a natural gas pipeline in the Township of St. Clair, Ontario;

**AND IN THE MATTER OF** an Application by GEC Energy Centre Limited Partnership for an Order or Orders pursuant to section 101 of the *Ontario Energy Board Act, 1998* for authorization for certain road and utility crossings required for the proposed pipeline;

**AND IN THE MATTER OF** an Application by GEC Energy Centre Limited Partnership for a Certificate of public convenience and necessity, pursuant to section 8 of the *Municipal Franchises Act*;

**AND IN THE MATTER OF** an Application by Union Gas Limited for an Order or Orders pursuant to section 90 of the *Ontario Energy Board Act, 1998* granting leave to construct a natural gas pipeline in the Township of St. Clair, Ontario.

BEFORE: Paul Vlahos  
Presiding Member

Cynthia Chaplin  
Member

Ken Quesnelle  
Member

DECISION ON MOTION

November 7, 2005

### **The Proceeding**

An application, dated July 20, 2005, was filed by the GEC Energy Centre Limited Partnership (“GEC”) with the Ontario Energy Board under section 90 of the *Ontario Energy Board Act, 1998* for leave to construct a 2 km natural gas pipeline. GEC plans to construct a 1005 MW gas-fired generating station in Courtright, in the Township of St. Clair, south of Sarnia, and the application requests approval for the construction of a pipeline to serve the generating station which is located in the franchise of Union Gas Ltd. (“Union”).

If leave to construct the pipeline is granted, GEC also seeks an order authorizing the crossing of public roads and utilities pursuant to section 101 of the Act and a certificate of public convenience and necessity, pursuant to section 8 of the *Municipal Franchises Act*. The Board assigned File Nos. RP-2005-0022/EB-2005-0441/EB-2005-0442/EB-2005-0443 to GEC’s application. The Board issued a notice of GEC’s application on July 28, 2005.

Union filed an application, dated August 30, 2005, with the Board under section 90 of the Act for leave to construct a 2 km natural gas pipeline to supply gas to the generating station. Union’s application represents a competing proposal to GEC’s application. The Board has assigned File No. EB-2005-0473 to Union’s application.

In Procedural Order No. 2, issued September 9, 2005, the Board ordered that the proceeding for GEC’s application (RP-2005-0022/EB-2005-0441) and Union’s application (EB-2005-0473) be combined and heard together in a joint proceeding.

On October 6, 2005, the Board received a Notice of Motion and Motion Record from GEC. The Notice of Motion and Motion Record were served on all the parties in the proceeding by e-mail on October 6, 2005. In the Notice of Motion, GEC seeks an order of the Board to exclude certain evidence filed on October 4, 2005, by the Society of Energy Professionals (“the Society”).

In Procedural Order No. 3, issued October 12, 2005, the Board established a written process to deal with the motion and set dates for the filing of submissions by parties in the joint proceeding and the filing of reply submissions by GEC. On October 20, 2005, the Society, the Power Workers Union (“PWU”), and Union Gas Limited filed submissions on the motion. On October 24, 2005, GEC filed its reply submissions.

### **The Motion**

In its Notice of Motion, GEC asked the Board to exclude the following documents from the Society’s evidence:

- Tab 1: “Ontario Supply Mix into the Future-proposals from the Society of Energy Professionals, August 26, 2005”
- Tab 2: “Submissions Re The OPA Procurement Process. Submitted by The Society of Energy Professionals, July 29, 2005”
- Tab 3: “Letter to Mr. James O’Mara, Director, Environmental Assessment and Approvals Branch, MOE re: The Society of Energy Professionals Environmental Assessment Elevation Request, July 8, 2005”
- Tab 4: “Excerpts from GEC Energy Centre LP Environmental Review report, June 2005”
- Tab 5: “Canadian Energy Research Institute Levelized Unit Electricity Cost Comparison of Alternate Technologies for base-load generation in Ontario report, August 2004”
- Tab 7: “Canadian Council of Ministries of the Environment-Canada-Wide Standards for Particulate Matter (PM) and Ozone, June 5-6, 2000”

GEC submitted that this material is inadmissible because it is irrelevant to the proceeding and the Board’s decision on the GEC application. In GEC’s view the scope of the proceeding set by the Board in Procedural Order No. 1 does not

include the issues addressed by the evidence filed by the Society.

The Society also included in its evidence the Board document entitled “*OEB Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario, Fifth Edition, May 2003*” (the “Environmental Guidelines”). This evidence was not challenged by GEC, but the Board invited submissions on whether it needed to be filed as evidence, as it is a publicly available Board document.

### **Board Findings**

In the Board’s view, the issues it needs to address are the following:

1. Procedural decisions to date
2. The Board’s consideration of the public interest
3. Cumulative environmental impacts

#### Procedural decisions to date

The Society argues that previous procedural documents issued by the Board on this application have already decided the issues brought forward in the Motion and that the Motion is duplicative and ought to be dismissed. The Board does not agree that the granting of intervenor status to the Society removed GEC’s right as an applicant to challenge the relevance of the Society’s evidence. In its letter of September 9, 2005 granting intervenor status to the Society, the Board did not address the request made by GEC in its letter of September 6, 2005 to limit the Society’s intervention. The Board did not limit the Society’s intervention or make an advance ruling on any evidence the Society might bring forward in part because the Society’s letter of September 1, 2005 stated that the precise nature and extent of its participation was not yet determined.

The Board always retains the authority to govern its own process, including making rulings at any point during the proceeding as to the relevance of questions asked or evidence offered. The scope of evidence the Board will hear on a matter remains within its control throughout the hearing process. Once the evidence of the Society was filed, the Board was in a better position to assess the scope of the Society's intervention. The Board will not dismiss the motion on the ground that it has already determined the issue.

The Board's consideration of the public interest

The Society's assertion that its evidence is relevant is based, to a great degree, on its interpretation of the Board's responsibilities with respect to the "public interest" and the Board's statutory objectives under the Act. In the Society's view, the Board's public interest responsibilities in this proceeding should include scrutiny of the generating station being served. The Society argued that GEC itself relies on the public interest aspect of the generating station in its evidence.

Similarly, the PWU submitted that GEC's own evidence relies on claimed electricity and environmental policy benefits and that therefore the Society's evidence should be admitted as an appropriate challenge to those claims. In the PWU's view, the proposed pipeline should not be considered in isolation from the energy and environmental policy issues that relate to the GEC project as a whole.

GEC argued in its reply submissions that the issues covered in the Society's evidence were beyond Board's jurisdiction under sections 90 and 96 of the Act, and that the use of the phrase "public interest" does not broaden the Board's jurisdiction to include an assessment of the environmental or economic impact of the use of the gas flowing through the pipeline.

The Board does not agree with the Society's view as to how the objectives contained in the Act govern the Board's consideration of leave to construct

applications. The Board agrees with GEC's submission that section 96 does not create jurisdiction but rather relates to how the Board's jurisdiction is to be exercised. In determining whether to grant a leave to construct, the Board must determine whether the pipeline itself is in the public interest, not whether facilities connected to it will be in the public interest. There are other processes in place related to the generating station, including an environmental assessment process. In considering the leave to construct application, it is not within the Board's jurisdiction to determine whether the generating station is in the public interest. For these reasons, the material at tabs 1, 2 and 5 of the Society's material is not relevant and will be excluded from the record of this proceeding.

#### Cumulative environmental impacts

The Society also argued that there are cumulative environmental impacts related to the pipeline and the generating station and that therefore the evidence of the station's environmental and socio-economic impacts are relevant to the proceeding. The section on cumulative effects in the Board's Environmental Guidelines refers to the additive effects of pipeline construction and other existing and future projects in the area and the interaction of pipeline construction with these projects. The Guidelines include projects beyond just pipeline projects, as demonstrated by the reference at page 38 to subdivision development, and the instruction to not restrict the study area to the pipeline easement and related work areas. However, the examples in section 4.3.13 of the Guidelines indicate that the type of cumulative impacts considered are quite narrow; largely soil, water and vegetation impacts directly resulting from construction. The materials filed by the Society at tabs 3, 4 and 7 address matters that have not yet been considered by the Board in assessing the cumulative effects of pipeline construction, such as the effect on the airshed of the activities of the end user of the gas that will flow through the pipeline. The Board has yet to be persuaded that such matters are relevant to the pipeline applications in this case.

The Board notes that the environmental report filed by the applicant Union, at page 52, refers to the cumulative effects of the construction of the power station. It appears that the scope of the Board's consideration of cumulative impacts is unclear to both applicants and intervenors. The Board will not exclude the material filed by the Society at tabs 3, 4 and 7 on the basis of the motion record. However, it remains an open question as to the appropriate use and weight to be accorded to this material during the hearing.

#### Conclusion and Order

The Board grants the motion from GEC to the extent of excluding the materials filed by the Society at tabs 1, 2 and 5. The material found at the remaining tabs is not excluded from the record. The use to be made of and the weight to be given to the Society's material remains an open question in the hearing.

DATED at Toronto, November 7, 2005

ONTARIO ENERGY BOARD

Signed on behalf of the Panel

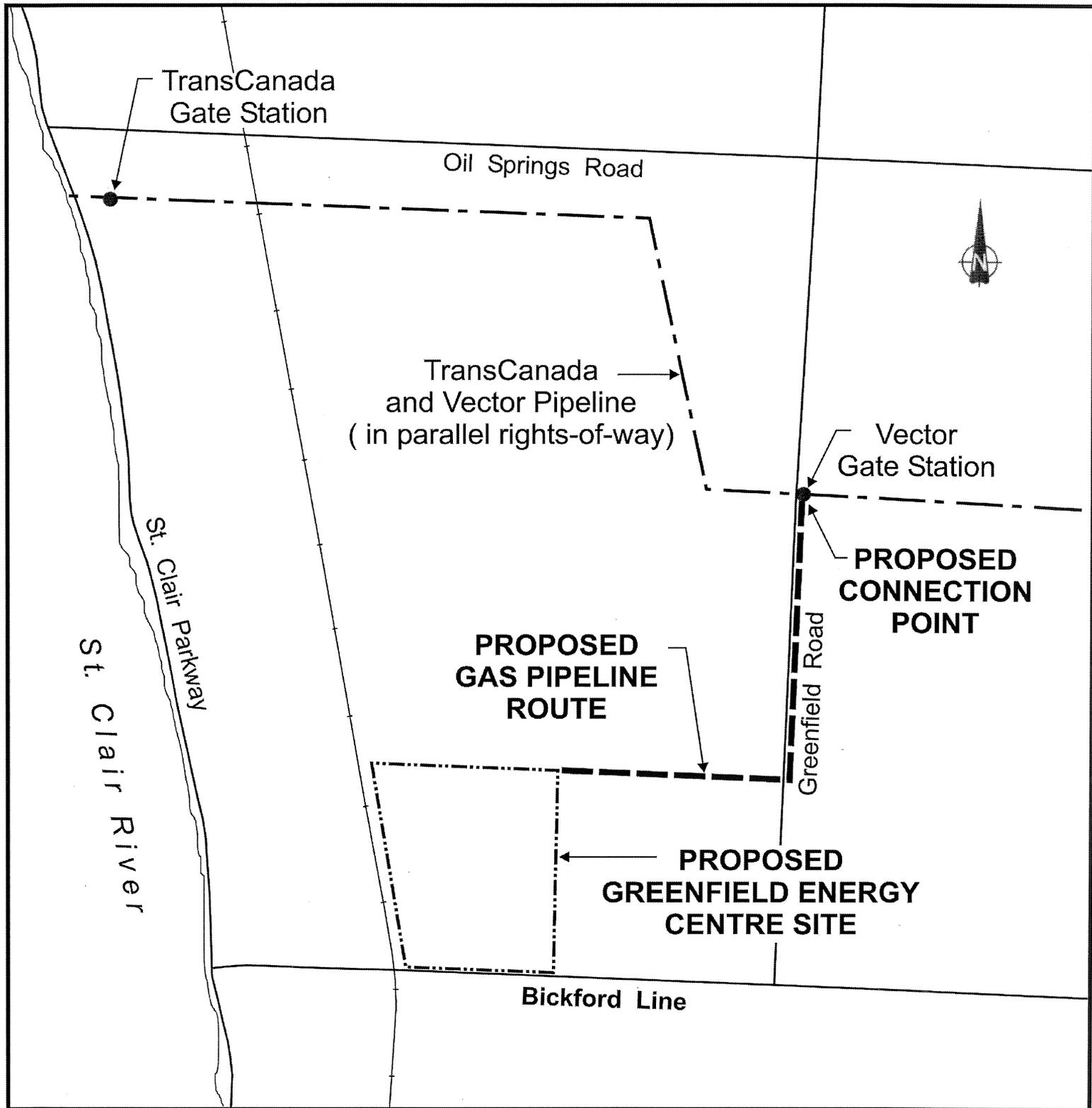
*Original signed by*

Paul Vlahos

Presiding Member

**Appendix 3**

**GEC – Proposed Route  
RP-2005-0022**



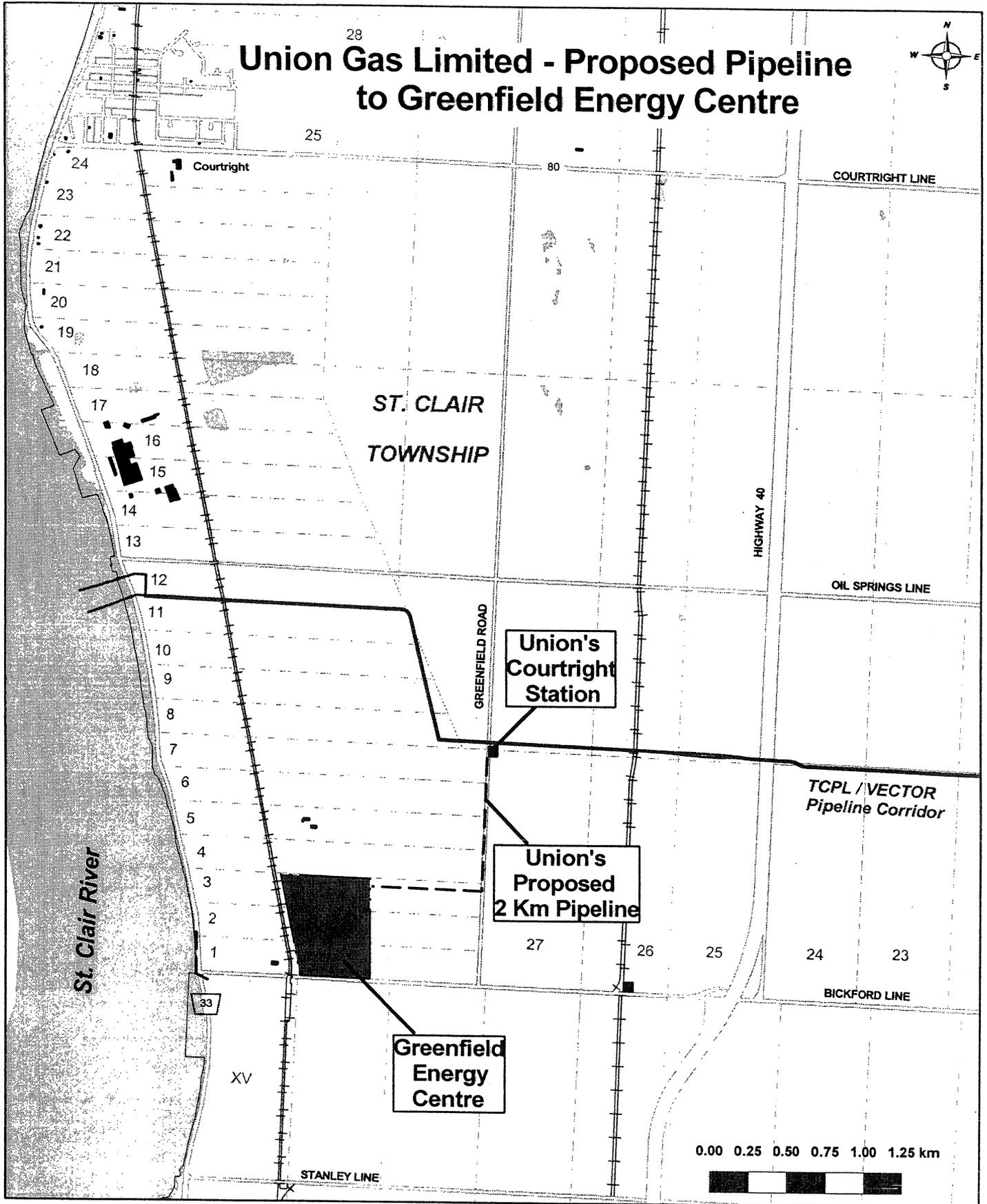
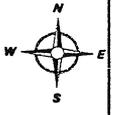
# Greenfield Energy Centre LP Proposed Pipeline Route

Not To Scale

**Appendix 4**

**Union – Proposed Route  
RP-2005-0022**

# Union Gas Limited - Proposed Pipeline to Greenfield Energy Centre



## Appendix 5

### CONDITIONS OF APPROVAL Leave to Construct Greenfield Energy Centre LP RP-2005-0022

#### **1 General Requirements**

- 1.1 Greenfield Energy Centre LP shall construct the facilities and restore the land in accordance with its application and evidence, except as modified by this Order and these Conditions of Approval.
- 1.2 Unless otherwise ordered by the Board, authorization for Leave to Construct shall terminate December 31, 2007, unless construction has commenced prior to then.
- 1.3 Except as modified by this Order, Greenfield Energy Centre LP shall implement all the recommendations of the Environmental Study Report filed in the evidence, and all the recommendations and directives identified by the Ontario Pipeline Coordinating Committee ("OPCC") review.
- 1.4 Greenfield Energy Centre LP shall advise the Board's designated representative of any proposed material change in construction or restoration procedures and, except in an emergency, Greenfield Energy Centre LP shall not make such change without prior approval of the Board or its designated representative. In the event of an emergency, the Board shall be informed immediately after the fact.
- 1.5 A survey of water wells shall be conducted along and within 100 m adjacent to the preferred route. Water samples should be analyzed for parameters agreed with the MOE Regional Office. Monitoring of the water wells must be carried out where dewatering or work below the water table is required. Permanent water service must be restored to landowners who experience any interference or interruption to water supply due to pipeline construction.
- 1.6 Blasting will not be permitted.

#### **2 Project and Communications Requirements**

- 2.1 The Board's designated representative for the purpose of these Conditions of Approval shall be the Manager, Facilities.
- 2.2 Greenfield Energy Centre LP shall designate a person as project engineer and shall provide the name of the individual to the Board's designated representative. The project engineer will be responsible for the fulfilment of the Conditions of

Approval on the construction site. Greenfield Energy Centre LP shall provide a copy of the Order and Conditions of Approval to the project engineer, within seven days of the Board's Order being issued.

- 2.3 Greenfield Energy Centre LP shall give the Board's designated representative and the Chair of the OPCC ten days written notice, in advance of the commencement of the construction.
- 2.4 Greenfield Energy Centre LP shall furnish the Board's designated representative with all reasonable assistance for ascertaining whether the work is being or has been performed in accordance with the Board's Order.
- 2.5 Greenfield Energy Centre LP shall file with the Board's designated representative notice of the date on which the installed pipelines were tested, within one month after the final test date.
- 2.6 Greenfield Energy Centre LP shall furnish the Board's designated representative with five copies of written confirmation of the completion of construction. A copy of the confirmation shall be provided to the Chair of the OPCC.

### **3 Monitoring and Reporting Requirements**

- 3.1 Both during and after construction, Greenfield Energy Centre LP shall monitor the impacts of construction, and shall file four copies of both an interim and a final monitoring report with the Board. The interim monitoring report shall be filed within six months of the in-service date, and the final monitoring report shall be filed within eighteen months of the in-service date. Greenfield Energy Centre LP shall attach a log of all complaints that have been received to the interim and final monitoring reports. The log shall record the times of all complaints received, the substance of each complaint, the actions taken in response, and the reasons underlying such actions.
- 3.2 The interim monitoring report shall confirm Greenfield Energy Centre LP's adherence to Condition 1.1 and shall include a description of the impacts noted during construction and the actions taken or to be taken to prevent or mitigate the long-term effects of the impacts of construction. This report shall describe any outstanding concerns identified during construction.
- 3.3 The final monitoring report shall describe the condition of the rehabilitated land and the effectiveness of the mitigation measures undertaken. The results of the monitoring programs and analysis shall be included and recommendations made as appropriate. Any deficiency in compliance with any of the Conditions of Approval shall be explained.

#### **4 Other Approvals**

- 4.1 Greenfield Energy Centre LP shall obtain all other approvals, permits, licences, and certificates required to construct, operate and maintain the proposed project, shall provide a list thereof, and shall provide copies of all such written approvals, permits, licences, and certificates upon the Board's request.

#### **5 Project Specific Conditions**

- 5.1. In the event that Calpine Corporation and its subsidiaries will not be constructing and operating the proposed pipeline, Greenfield Energy Centre LP must file with the Board, when its plans are finalized and before construction is commenced, the name and description of the entity or entities that will construct and operate the pipeline, including the provision of emergency services. The description must be sufficient for the Board to properly assess the competence of the entities to undertake their role in the pipeline project.

## Appendix 6

### CONDITIONS OF APPROVAL Leave to Construct Union Gas Limited RP-2005-0022

#### 1 General Requirements

- 1.1 Union Gas Limited shall construct the facilities and restore the land in accordance with its application and evidence, except as modified by this Order and these Conditions of Approval.
- 1.2 Unless otherwise ordered by the Board, authorization for Leave to Construct shall terminate December 31, 2007, unless construction has commenced prior to then.
- 1.3 Except as modified by this Order, Union Gas Limited shall implement all the recommendations of the Environmental Study Report filed in the evidence, and all the recommendations and directives identified by the Ontario Pipeline Coordinating Committee ("OPCC") review.
- 1.4 Union Gas Limited shall advise the Board's designated representative of any proposed material change in construction or restoration procedures and, except in an emergency, Union Gas Limited shall not make such change without prior approval of the Board or its designated representative. In the event of an emergency, the Board shall be informed immediately after the fact.
- 1.5 A survey of water wells shall be conducted along and within 100 m adjacent to the preferred route. Water samples should be analyzed for parameters agreed with the MOE Regional Office. Monitoring of the water wells must be carried out where dewatering or work below the water table is required. Permanent water service must be restored to landowners who experience any interference or interruption to water supply due to pipeline construction.
- 1.6 Blasting will not be permitted.
- 1.7 Union Gas Limited shall involve a representative designated by the Walpole Island First Nation in the stage 2 archaeological assessment of the pipeline route. Union Gas Limited shall also provide to the Board the results of the stage 2 assessment and indicate that there are no outstanding matters in respect of that assessment.

## **2 Project and Communications Requirements**

- 2.1 The Board's designated representative for the purpose of these Conditions of Approval shall be the Manager, Facilities.
- 2.2 Union Gas Limited shall designate a person as project engineer and shall provide the name of the individual to the Board's designated representative. The project engineer will be responsible for the fulfilment of the Conditions of Approval on the construction site. Union Gas Limited shall provide a copy of the Order and Conditions of Approval to the project engineer, within seven days of the Board's Order being issued.
- 2.3 Union Gas Limited shall give the Board's designated representative and the Chair of the OPCC ten days written notice, in advance of the commencement of the construction.
- 2.4 Union Gas Limited shall furnish the Board's designated representative with all reasonable assistance for ascertaining whether the work is being or has been performed in accordance with the Board's Order.
- 2.5 Union Gas Limited shall file with the Board's designated representative notice of the date on which the installed pipelines were tested, within one month after the final test date.
- 2.6 Union Gas Limited shall furnish the Board's designated representative with five copies of written confirmation of the completion of construction. A copy of the confirmation shall be provided to the Chair of the OPCC.

## **3 Monitoring and Reporting Requirements**

- 3.1 Both during and after construction, Union Gas Limited shall monitor the impacts of construction, and shall file four copies of both an interim and a final monitoring report with the Board. The interim monitoring report shall be filed within six months of the in-service date, and the final monitoring report shall be filed within eighteen months of the in-service date. Union Gas Limited shall attach a log of all complaints that have been received to the interim and final monitoring reports. The log shall record the times of all complaints received, the substance of each complaint, the actions taken in response, and the reasons underlying such actions.
- 3.2 The interim monitoring report shall confirm Union Gas Limited's adherence to Condition 1.1 and shall include a description of the impacts noted during construction and the actions taken or to be taken to prevent or mitigate the

long-term effects of the impacts of construction. This report shall describe any outstanding concerns identified during construction.

- 3.3 The final monitoring report shall describe the condition of the rehabilitated land and the effectiveness of the mitigation measures undertaken. The results of the monitoring programs and analysis shall be included and recommendations made as appropriate. Any deficiency in compliance with any of the Conditions of Approval shall be explained.

#### **4 Other Approvals**

- 4.1 Union Gas Limited shall obtain all other approvals, permits, licences, and certificates required to construct, operate and maintain the proposed project, shall provide a list thereof, and shall provide copies of all such written approvals, permits, licences, and certificates upon the Board's request.

#### **5. Project Specific Conditions**

- 5.1 Union Gas Limited must be under contract to provide service to the GEC plant whether owned by GEC or another entity, and the power plant must be in the same location and require the same proposed pipeline, both in terms of size and route. Union Gas Limited shall file with the Board a copy of the contract as soon as it becomes available.