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Dear Eric Gillespie and Lee Nanos:

Ruling - Review and Variance Application of Gordon Woods Homeowners' Association Inc. Concerning the Credit River Pipeline Relocation

A. Background

On 26 June 2019, the National Energy Board (**NEB**) issued its decision (**Relocation Decision**) ([C00148-1](#)) to Trans-Northern Pipelines Inc. (**TNPI**) for the Credit River Pipeline Relocation (**Project**). The NEB issued Orders XO-T217-008-2019 and MO-027-2019 (**Orders**), pursuant to section 58 of the *National Energy Board Act* (**NEB Act**) and section 45.1 of the *National Energy Board Onshore Pipeline Regulations* (**OPR**), the effect of which was to approve the Project and authorize the construction of an above ground valve compound (**AGVC**), among other facilities. The purpose of the Project was to relocate facilities to enable the widening of the Queen Elizabeth Way bridge, at the request of the Ontario Minister of Transportation (**MTO**).

B. Gordon Woods Homeowners' Association application

On 10 March 2023, Gordon Woods Homeowners' Association Inc. (**GWHA**) filed an application requesting a review (**Review Application**) ([C23600](#)) under section 69 of the *Canadian Energy Regulator Act* (**CER Act**) of the Relocation Decision. The GWHA stated that its primary issue with the Project is the site location of the Credit River East AGVC.

GWHA's Review Application is based on two grounds:

1. Changed circumstances or new facts, as the City of Mississauga (**City**) no longer approves the location of the AGVC; and
2. Denial of natural justice, which is an error of law, as the residents of Dickson Park were provided insufficient notice of the location of the AGVC.

Specifically, the GWHA requests that the Commission of the Canada Energy Regulator withdraw its approval for the AGVC location noted in the Orders and require TNPI to relocate the AGVC structure to a more appropriate and safe location.

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C. Comment process

On 17 May 2023, the Commission issued a letter ([C24538](#)) inviting submissions on whether GWhA's Review Application had raised a doubt as to the correctness of the Relocation Decision.

On 31 May 2023, TNPI filed comments opposing the relief sought by GWhA and requesting that GWhA's Review Application be dismissed ([C24676](#)).

On 7 June 2023, GWhA filed reply comments disagreeing with the comments from TNPI and requesting that the Review Application be granted ([C24765](#)).

D. General principles on an application for review

Subsection 69(1) of the CER Act provides that the Commission may review, vary, or rescind any decision or order it makes and, if applicable, may re-hear any application before deciding it. There is no automatic right of review. The Commission has the discretion to determine whether circumstances exist to warrant the review of a decision. The Commission's power in this regard must be exercised sparingly and with caution.¹

The Commission considers applications for review through a two-step process. In step one, the Commission considers, as a threshold test, whether the applicant has raised a doubt on a *prima facie*² basis as to the correctness of the decision. Grounds for a review application can include an error of law or of jurisdiction, changed circumstances or new facts that have arisen since the close of the original proceeding, or facts that were not placed in evidence in the original proceeding because they were not then discoverable by reasonable diligence.³ Disagreement with a decision does not constitute sufficient grounds for a review.⁴ A review should not be used to re-argue a party's case.

At the conclusion of step one of the review process, the Commission may:

- find that the applicant has established a *prima facie* case and then proceed to step two of the review, in which the Commission considers the full Review Application on its merits; or
- find that the applicant has not established a *prima facie* case and dismiss the application for review or rehearing.

E. Commission analysis and findings

For the reasons below, the Commission finds that GWhA has not raised a doubt as to the correctness of the Relocation Decision in respect of either of the grounds of review.

¹ *Filing Manual*, Guide N. See also, for example, MH-052-2018, Trans Mountain Expansion Project (TMEP) Reconsideration, NEB Ruling No. 22 at page 3 ([A96969](#)), GH-002-2017, NOVA Gas Transmission Ltd. Application for the Sunde Crossover Project, NEB Ruling No. 3 at page 3 ([A87308](#)), MH-023-2020, TMEP detailed route hearing, Commission ruling at page 6 ([C07025](#)), Kingston Midstream Westspur Ltd. Variance Decision on the Abandonment Cost Estimate of the Westspur Pipeline ([C21596](#)) 24 October 2022 at page 4.

² *Prima facie* means "on the surface", referring to a case that is made out on first impression. In this step, in order to find that a review or rehearing is required, the Commission must be satisfied that an applicant has met its onus to raise a doubt as to the correctness of the determination.

³ *National Energy Board Rules of Practice and Procedure*, 1995, s.44.

⁴ See Commission Ruling on the Burnaby Residents' application for rehearing, 12 April 2021, at page 8 ([C12350](#)).

Therefore, the Commission finds that GWHA did not meet the Step 1 threshold test, and GWHA's Application for review is dismissed without further process.

1. Changed circumstances or new facts, as the City no longer approves the location of the project

To raise a doubt as to the correctness of the Relocation Decision on this ground, GWHA must show that, on a *prima facie* basis, a change in circumstances or new facts that would affect the decision have arisen since the initial decision was made.

GWHA asserts that, while the City initially approved the siting of the AGVC, through its sale of lands, the City has since become aware of the actual size, configuration and safety issues of the AGVC and has changed its decision. GWHA's submission includes description of the following:

- **Location of the AGVC:** GWHA states that its primary issue with the AGVC is the site location, at the northeast corner of the Dickson Road and Premium Way intersection. GWHA states that the Relocation Decision contemplated a location at the northwest corner of this intersection.
- **Safety of the AGVC:** GWHA raises a number of concerns relating to safety, including:
 - Restrictions to visual sightlines at the intersection;
 - Impacts on potential multi-use pathway constructions;
 - Location of a school bus stop in front of the AGVC;
 - Potential for ignition sources close to the AGVC;
 - Spatial constraints, as the intersection where the AGVC is located is the sole access to the Dickson Park area, so any incident involving the AGVC could result in an inability for emergency vehicles to access the community. Dickson Park residents have not been provided any information regarding TNPI's Emergency Management Program that would address these constraints;
 - Issues relating to snow and ice in the area, which increases the likelihood of a vehicle accident; and
 - Potential for a valve failure, which could have significant consequences at that intersection, including the limited access for emergency vehicles to the Dickson Park community if this occurred.
- **Provincial and local processes:** GWHA describes how the City process relating to the purchase of land from the City to TNPI for the location of the AGVC did not include notice to the local residents, but that, following actual construction of the AGVC and letters from GWHA about the facility, the City passed resolutions objecting to the location of the AGVC.

TNPI submits that the Review Application provides new arguments that could have been raised previously and that the portions of the factual record raised were discoverable through reasonable diligence. In response to the submissions on changed circumstances or new facts, TNPI's submission includes:

- The GWHA is mistaken and the AGVC is indeed located in the northwest corner of the Premium Way and Dickson Road intersection;
- GWHA residents were in fact notified of TNPI's land rights acquisition for the Project;

- The design, construction, and operation of the AGVC complies with all applicable acts, codes, and regulations;
- TNPI notified the Canadian Transportation Agency, the Ontario Ministry of Transportation, and the City's Transportation & Works Department and none of these authorities raised any concerns with the location of the AGVC;
- TNPI specifically incorporated feedback from the City and MTO regarding the sightlines;
- To protect against collisions, TNPI installed bollards to protect the AGVC piping;
- No authorities raised concerns regarding access of emergency vehicles and there is ample room in the intersection and adjacent areas for emergency vehicles;
- GWhA did not provide any evidence to support the claims of safety concerns relating to the bus stop, snow buildup, nor driver sightlines;
- The signage relating to ignition sources being a minimum of six metres from the fence line is an added precaution and there is no unreasonable safety risk to the public; and
- TNPI's Emergency Response Plan is readily available on its website and TNPI circulates a mailout including emergency information to residents within 200 metres of its facilities, most recently in December 2021.

In its reply submissions, GWhA argued that any "new" arguments are simply a reflection of the information that has come to light once the actual location was known and GWhA, other residents, and elected officials began to comment on the true impacts of the AGVC. As a result, much of the necessary information to assess the AGVC has also not been known or reviewed. On the question of the location of the AGVC, GWhA indicates in reply that there was a teleconference initiated by the MTO in July of 2020 where there was an oral acknowledgement from TNPI that its May 2019 letter to stakeholders about the location (found at Tab 3 of the Review Application) identified the location as being in the NW corner of the intersection when it "should instead have identified it as being on the "NE" or north-east corner". The community and elected officials "undoubtedly" understood it to be planned for the "NW" corner and they had very serious concerns once "the actual location" became known.

Having considered the Review Application and the response and reply submissions, the Commission finds that GWhA has not shown, on a *prima facie* basis, that there are changed circumstances or new facts that raise a doubt as to the correctness of the Relocation Decision. The primary issue underlying GWhA's concerns is that the location of the AGVC has changed, but the Review Application does not support this assertion. The Orders issued by the NEB require the Project, including the AGVC, to be constructed in accordance with the information provided in the original application, which contemplated an AGVC site at the northwest corner of the Premium Way and Dickson Road intersection. The maps provided by both parties show that this is the actual location where the AGVC was constructed.

GWhA argues that the City has changed its decision to approve the location of the AGVC, now that it is aware of the actual size, configuration, and safety issues. However, whether the City or other authorities support the Project subsequent to its approval is not a changed circumstance or a new fact that raises a doubt as to the correctness of the Relocation Decision. At the time of the Relocation Decision, the NEB had regard to all relevant considerations, including safety concerns. The Project, including the AGVC, was built according to the specifications authorized in the Relocation Decision, so the City's understanding of the AGVC is not a changed circumstance. Where the City has concerns with safety issues, it may choose to take steps to enforce municipal legislation, but this is beyond the jurisdiction of the CER.

Given that there was no change in the location of the AGVC, there is no doubt raised as to whether the Relocation Decision properly considered the safety of the Project and the AGVC. Arguments that the location and design of the AGVC would raise safety concerns could have been raised at the time of the Relocation Decision, but were not. Therefore, these are not changed circumstances nor new facts. As a lifecycle regulator, the CER continues to monitor TNPI's compliance with the OPR, which requires an emergency management program that includes continuing education regarding emergency procedures. No change in circumstances or new facts relating to compliance with safety requirements is apparent from the Review Application.

Since the Project and the AGVC were assessed, by the NEB and other authorities, based on the location where it was ultimately constructed, there is no change in circumstances or new facts that would raise a doubt as to the correctness of the Relocation Decision on a *prima facie* basis.

2. Denial of natural justice, as the residents of Dickson Park were provided inadequate notice of the location of the AGVC.

To raise a doubt as to the correctness of the Relocation Decision on this ground, GWHA must show, on a *prima facie* basis, an error of law based on denial of natural justice as a result of inadequate notice of the description and location of the AGVC.

GWHA outlines several issues related to inadequate notice, specifically with respect to the residents in the Dickson Park area, including:

- **TNPI Application for the Project** (found at Tab 1 of the Review Application and [A96967](#)): GWHA does not agree with TNPI's statement in its original application for the AGVC that all residents were consulted and that there are no potentially affected landowners. They state that the residents of the Dickson Park area were not consulted and that they are particularly impacted since the intersection where the AGVC is located is the only access to their community. Additionally, GWHA states that the impacts from the AGVC, including the safety impacts described above, have not been addressed, contrary to what is stated in the original application;
- **TNPI's Environmental Protection Plan (EPP)**: the EPP contains virtually no information on the AGVC and its effects, so the EPP itself was not complete. The EPP indicates the AGVC was to be located on the NW corner of Dickson Road and Premium Way and instead it was constructed on the NE corner, which means the EPP is completely invalid;
- **TNPI's Notice to Residents**: TNPI sent a letter dated 9 May 2019 (found at Tab 3 of the Review Application) to Project stakeholders, stating that the AGVC would be "two valves in a fenced area compound", but did not provide any further description nor diagram showing what this would look like. The letter stated that the AGVC would be in the northwest corner of the intersection, not the northeast corner. Further, the letter did not indicate that there would be a purchase of land from the City; and
- **Location of the AGVC**: GWHA suggested there were other locations available that would have been better.

TNPI submits that the Review Application fails to raise a doubt regarding the correctness of the Orders based on any reasonably applicable grounds. Specifically with respect to the submissions on inadequate notice, TNPI submits that consultation met or exceeded all legislative requirements and states that:

- The current Review Application, as with GWHA's 2020 request for review ([C08316](#)), fails to describe or demonstrate any direct and adverse impact on the residents of the Gordon Woods community and the AGVC's location, in a transportation and utility corridor, complies with all requirements and does not materially impact the residents of this community in any manner uniquely different from other users of the public road intersection;
- The application for the Project ([A96967, p.2 of 3](#)) accurately describes the location of the AGVC at the "NW corner of the Dickson Road and Premium Way intersection". The City also submitted a letter with the Project application that expressly referenced the City's intent to transfer lands at the intersection of Dickson Road and Premium Way for the AGVC ([A96967-16](#));
- TNPI's Environmental and Socio-Economic Assessment (**ESA**) of the Project sufficiently detailed the appropriateness of the AGVC location, which is in a transportation and utility corridor outside of the communities within the purview of the GWHA;
- With respect to the location of the AGVC, the GWHA is mistaken since the AGVC is indeed located in the NW corner of the Premium Way-Dickson Road intersection since Premium Way is aligned along a N-NE by S-SW axis. The AGVC itself is located to the NW of the intersection with Dickson Road and TNPI suggests that GWHA may have misunderstood the precise cardinal directions of the road in the area;
- TNPI's acquisition of land for the Project is of no legal interest to GWHA and in any event, the information about it was available with reasonable due diligence. The 2019 notification letter that GWHA residents received contained further contact information for TNPI for follow up questions and provided links to the application documents. GWHA residents were in fact notified of TNPI's land rights acquisition for the Project; and
- TNPI's efforts complied with all requirements and its consultation and engagement record was filed with the NEB/CER. GWHA's concerns about MTO's engagement and approach should not be raised in this venue. TNPI points to additional notification that MTO undertook which included public information sessions and notices placed in relevant newspapers. No issue was raised during the Project application about consultation requirements.

After considering all of the submissions received, the Commission finds that GWHA has not raised a doubt as to the correctness of the Relocation Decision based on inadequate notice. The notice that TNPI sent to the Dickson Park residents on 9 May 2019 did not contain any inaccurate information. The notice accurately described the AGVC as "two new valves in a fenced area compound located in the NW corner of the Premium Way-Dickson Road intersection." Contact information for TNPI was included on the notice and any interested person could have followed up if they were unclear as to the location or appearance of the facilities being constructed. The information in the notice was adequate.

Further, the impacts of the Project were assessed when the Relocation Decision was made. The ESA and the EPP were prepared and submitted based on the actual location of the AGVC. The application for the Project also included a consultation log that described the engagement undertaken with stakeholders particularly impacted by the Project. GWHA has not raised a doubt as to the correctness of the Relocation Decision based on a denial of natural justice in this respect.

F. Conclusion

For all of these reasons, the Commission finds that GWHA has not raised a doubt as to the correctness of the Relocation Decision on either of the grounds alleged. Therefore, the Commission finds that GWHA did not meet the Step 1 threshold test, and the Review Application is dismissed without further process.

Yours sincerely,

Signed by

Ramona Sladic
Secretary of the Commission