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July 21, 2005

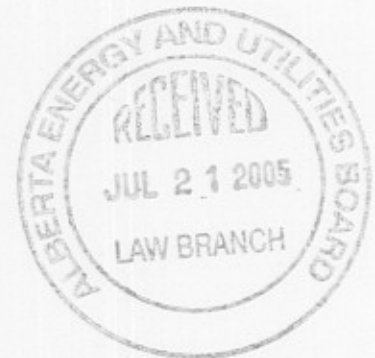
Alberta Energy and Utilities Board  
640 - 5 Avenue, SW  
Calgary, AB T2P 3G4

VIA FAX (403) 297-7031

Attention: Mr. Richard McKee, Board Counsel

Dear Sirs:

Re: Fairborne Energy Ltd. ("Fairborne")  
EUB Applications No. 1402289 and 1402290  
Approvals No. 0331663 and 0331714  
Section 35-39-24 W4M  
Applications for Review and Variance and for a Hearing



We have been provided with Mr. McLarty's letter dated July 15, 2005 on behalf of Fairborne responding to Luscar's application for review and variance and request for a hearing. This letter constitutes the reply submissions of Luscar Ltd. ("Luscar") in respect of the captioned applications. Capitalized terms used in this letter and not defined herein have the same meanings as were ascribed to them in Luscar's applications for review and variance dated June 27, 2005 (the "Luscar Applications").

1. In its response submissions, Fairborne appears to make much of the fact that Luscar has not contested that coalbed methane ("CBM") is gas. Fairborne is correct in one respect and one respect only. Luscar has not at any time contested that CBM is gas. However, Fairborne then attempts to characterize this election by Luscar as somehow conclusive in determining the matters before the Board. It does not. By way of analogy, nothing chemically distinguishes solution gas from gas cap gas. This "fact" did not preclude the courts from recognizing separate owners of the two types of natural gas, ultimately granting the first to the petroleum owner and the latter to the natural gas owner<sup>1</sup>. Neither should the fact that CBM and conventional natural gas are both comprised primarily of methane be determinative or even persuasive to the Board in this case. The fact is simply irrelevant to the Board's determination of the issues before it.
2. The first key issue in respect of Fairborne's applications is whether Fairborne, as the applicant, has satisfied its statutory obligation to its entitlement to both the conventional

<sup>1</sup> *Borys v. C.P.R. Co. et al* [1953] 2 DLR 65 (JCPC)

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natural gas and the CBM. Despite the statements made by Mr. McLarty on behalf of Fairborne, Fairborne has not provided evidence to the Board that Fairborne is the lessee pursuant to any natural gas leases. Fairborne suggests that Luscar has not disputed Fairborne's entitlement to produce "gas". To the contrary, the onus is on Fairborne, as the party who asserts that it is entitled to produce "gas"<sup>2</sup> to demonstrate that entitlement. Fairborne has produced no evidence to that effect, and has therefore not satisfied the statutory onus. On that basis, Luscar does dispute Fairborne's entitlement to produce gas of any kind.

3. Fairborne alleges that Luscar's submission that the Board is not the appropriate forum to resolve the issue of entitlement to CBM constitutes a complete answer to Luscar's request for a review. Fairborne further suggests it would not be helpful or useful for the Board to embark upon a review in these circumstances. To be clear, what Luscar seeks is the Board's determination that, because it is not the appropriate forum for determining fundamental property rights as between the natural gas owner and the coal owner, the Board erred in issuing approvals which, of necessity, relied upon such a *de facto* determination of right accruing to the natural gas owner. The question is not whether the Board ought to have effectively determined property rights. The question is whether the Board effectively did so and erred in so doing. This is both useful and a perfectly legitimate basis upon which the Board can and should review its earlier decision.
4. Luscar concurs with Fairborne's conclusion that the Alberta Court of Appeal in the *Dene Tha*<sup>3</sup> case determined that assessment of the degree of direct and adverse impact in any given circumstance is a question of fact. However, that simply precludes the Court of Appeal from reviewing the Board's determination of such a matter. Nothing prohibits the Board itself from reviewing its own decision, including, as necessary, the degree of adverse impact required to trigger the Board's protection. Further, and contrary to Fairborne's allegation, a review by the Board of its own earlier order, decision or direction pursuant to Section 46 of the Rules of Practice is not restricted solely to an error of law.
5. Luscar denies that Fairborne will be somehow frustrated if the Board does not allow it to pursue its reasonable business ventures. As stated in Luscar's application, if the CBM is not produced now, it will still be available for production later. The public interest repeatedly invoked by Fairborne will not be served by licences granted by the Board to drill wells in the face of ongoing prospect of litigation as to underlying entitlement to the substance to be produced.
6. Damages will not suffice. Even if they did, there is a fundamental problem with the proof of those damages in circumstances of the commingling of CBM with conventional gas production. These matters are specifically addressed in paragraphs 16 and 17 of the Luscar application.

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<sup>2</sup> *Freyberg v. Fletcher Challenge Oil and Gas Inc. et al*, 2005 ABCA 46 (Alta. CA)

<sup>3</sup> *Dene Tha' First Nation and Alberta Energy and Utilities Board et ux*, [2005] A.J. No. 158, 2005 ABCA 68

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7. Fairborne alleges that Luscar's request for a hearing should be dismissed because Luscar has not demonstrated a direct and material adverse effect. In reply, Luscar submits that, had the courts already quieted title in the hands of the coal owners, there could be no question that Fairborne's actions would directly and adversely affect Luscar and its property rights. Luscar is no less directly and adversely affected simply because the rights it claims are contingent upon a future event.

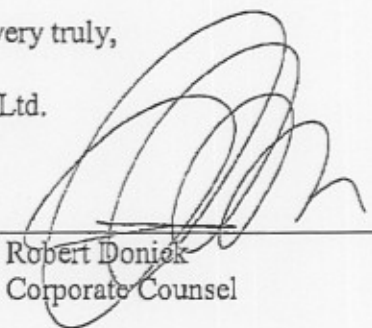
In summary, Luscar has been and will be directly and adversely affected by the Board's decisions in the captioned matter. The reasons set out above and in Luscar's June 27 application letter are valid and persuasive reasons for the Board to exercise its discretion to review its approvals issued to Fairborne and to hold a hearing in connection with the Fairborne Applications.

All of which is respectfully submitted.

Yours very truly,

Luscar Ltd.

Per:



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