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File No. 17909

July 14, 2006

ALBERTA ENERGY AND UTILITIES BOARD

640 - Fifth Avenue, S.W.

Calgary, AB

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Attention: Mr. P. Ferensowicz, Energy Team Secretariat

Dear Sirs:

**Re: Proceeding 1457147 (the "Proceeding")
Review and Variance Applications:
9500-1404564 (Carbon Development Partnership ("CDP")/
Fairborne Energy Ltd. ("Fairborne"))
9500-1456814 (CDP/Fairborne)**

We are in receipt of your letters seeking comments on whether the Alberta Energy and Utilities Board (the "Board") should grant the requests for intervener status in Phase 2 of the captioned hearing, which requests are contained in the letters described below:

- (a) a letter dated June 28, 2006 from ARC Resources Ltd. ("ARC");
- (b) a letter dated July 4, 2005 from Burnet Duckworth & Palmer LLP, on behalf of Canpar Holdings Ltd. ("Canpar");
- (c) a letter dated July 4, 2006 from Peacock Linder & Halt, LLP, as counsel for Centrica Canada Limited ("Centrica");
- (d) a letter dated July 4, 2006 from Macleod Dixon LLP, on behalf of Computershare Trust Company of Canada ("Computershare");
- (e) a letter dated July 4, 2006 from ConocoPhillips Canada Resources Corp. ("Conoco");

- (f) a letter dated July 4, 2006 from the Freehold Petroleum & Natural Gas Owners Association (the "Freehold Owners Association"); and
- (g) a letter dated July 4, 2006 from McLennan Ross LLP, as counsel for Quicksilver Resources Canada ("Quicksilver").

Non-Objection to ARC, Centrica, Quicksilver, Canpar and Computershare Applications

Each of ARC, Centrica and Quicksilver has indicated, either directly or through their respective counsel, that it has applications before the Board, the processing of which has been suspended pursuant to Bulletin 2006-19, pending the outcome of the Proceeding. CDP has previously stated that it acknowledges that the holding of the Proceeding has at least caused delay to Centrica and the outcome of the Proceeding may, therefore, directly and adversely impact Centrica's applications and interests. CDP sees no substantive difference in the positions placed on the record by ARC and Quicksilver from that presented by Centrica. CDP reiterates that it does not object to the Board granting intervener status to Centrica to participate in Phase 2 of the Proceeding and confirms that it does not object to the Board granting intervener status to either ARC or Quicksilver, for the same reasons.

Canpar has advised the Board that it disputes CDP's title to CBM, as a consequence of its ownership of natural gas rights (fee and/or freehold) and, further, by virtue of its interpretation of an agreement in 1982 pursuant to which Canpar sold and transferred its rights in certain relevant coal to TransAlta Utilities Corp., a predecessor in interest to CDP. Since these interests are both directly related to at least some of the lands which are the subject of the Proceeding, and are relevant to the disputed entitlement to CBM, CDP does not object to the Board granting intervener status to Canpar.

Computershare has advised the Board that it has an interest in royalties received from the production of CBM from Section 35-39-24, W4M pursuant to trust agreements entered into between the then owners of the natural gas and Montreal Trust Company, predecessor in interest to Computershare. Since those interests are directly related to lands which are subject to the Proceeding and are relevant to the disputed entitlement to CBM, CDP does not object to the Board granting intervener status to Computershare.

Objections to Conoco and Freehold Owners Association Applications

CDP opposes the applications for intervener status by Conoco and the Freehold Owners Association, for the reasons set out below. Comments in this letter are applicable to both requests, unless reference is made to a specific applicant or letter. For the purpose of this letter, CDP assumes that the Freehold Owners Association would be considered to be a person, for all relevant purposes.

A. Proposed Interveners not “Directly and Adversely Affected”

1. Subsection 26(2) of the *Energy Resources Conservation Act* (RSA 2000, c. E-10) (the “ERC Act”) allows the Board to determine whether its decision on any application “may directly and adversely affect the rights of a person”.
2. The Alberta Court of Appeal has ruled, in *Dene Tha’ First Nation v. The Alberta Energy and Utilities Board and Penn West Petroleum Limited*¹, that this test for achievement of intervener status is twofold. The first part of the test is purely legal, that is, whether the claimed right or interest being asserted is one that is known to law. CDP acknowledges that the leasehold rights asserted by Conoco and the fee simple petroleum and natural gas ownership rights asserted by Conoco and the Freehold Owners Association on behalf of its membership would, if proved, constitute rights recognized by law in Alberta. The second branch of the test is whether the Board has information which demonstrates that the application(s) before the Board may directly and adversely affect those interests or rights. The Court of Appeal has determined that this branch of the test is purely factual, to be determined on the facts of each case.
3. The Board has also publicly pronounced its understanding of the effect of subsection 26(2) of the ERC Act on intervener standing and the rights which flow from that standing. In Decision 2002-107² (the “Manhattan Decision”), the Board stated at page 6:

“In identifying who may participate at a public hearing, the Board is governed, first, by Section 26 of the Energy Resources Conservation Act, which provides that those persons whose rights may be directly and adversely affected by the approval of an energy facility are entitled to an opportunity to lead evidence, cross examine, and give argument -- in short, full participation at a hearing or “standing”.

Others who may not be able to meet the standing test (for example, those persons who are not situated in close proximity to a proposed facility) are not afforded these participation rights by the statute.”

4. The requirement of direct and adverse effect is conjunctive. To achieve intervener status, the effect of the activity which is the subject of the application before the Board on the rights of a person must be both direct and adverse.
5. Neither Conoco nor the Freehold Owners Association has asserted any right of ownership (fee or leasehold) of or any other right in relation to any of the lands which are the subject of the Proceeding (the “Affected Lands”). As such, neither of these persons can be

¹ *Dene Tha’ First Nation v. Alberta* (Energy and Utilities Board), 2005 ABCA 68

² Memorandum of Decision Prehearing Meeting Manhattan Resources Ltd. Applications for Wells, Pipelines, and Facilities Licences and an Amendment to a Facility Fort Saskatchewan Field (December 6, 2002), p. 6.

directly affected by the decision of the Board in any of the applications which are comprised within the Proceeding.

B. Irrelevance of Commonality of Issues

6. Conoco and the Freehold Owners Association have expressed concern that a Board decision in the Proceeding may somehow adversely affect their legal ownership to CBM in properties other than the Affected Lands. Conoco concludes that the Board has advised that it will address “the ownership of natural gas from coal”. This is simply not the case. Firstly, all parties to the present Proceeding have acknowledged that legal ownership to CBM has not yet been determined by the courts and will not be finally settled unless and until a Court decision has been rendered. The Board’s examination of “entitlement” to CBM in the Proceeding (the phrase used by the Board in its Notice of Hearing issued June 23, 2006) is expressly and entirely within the context of the Board’s enabling statutes, insofar as they relate to the Board’s willingness (and jurisdiction) to grant well licences and holding orders to Fairborne, Devon Canada Corporation (“Devon”) and Bearspaw Petroleum Ltd. (“Bearspaw”). In other words, well licences (if any) will only grant operational entitlement to drill for CBM and holding orders (if any) will only grant operational entitlement to produce CBM. No decision of the Board in this Proceeding will affect the underlying ownership rights (contingent or otherwise) to CBM of any of the parties to the Proceeding, including any interveners. Consequently, no decision of this Board can possibly affect the underlying ownership rights of any of the proposed interveners.
7. Further, even if the Board’s decision in the Proceeding could affect underlying ownership rights of the parties to the Proceeding itself, the decision would still have no adverse effect on the interests of the proposed interveners. Unlike the courts, this Board is not bound by the principle of *stare decisis*. As the Board noted in Decision U990322³ (with reference to itself):

“...the Board notes the well-established principle that a panel of a board is not bound by a previous decision of the same board. Rather, decisions are made based on the merits of each application.”

Any decision made by the Board in the Proceeding will not bind the Board in its examination of any application which any of the proposed interveners may make in future relating to lands other than the Affected Lands. Each of those applications will be addressed and decided on the merits of such application.

8. Commonality of issues which are presently before the Board in the Proceeding with issues which might or would be relevant to future applications, which future applications might directly and adversely affect either of Conoco or the Freehold Owners Association is simply not a justification for the Board to grant intervener status to either of these

³ Decision U99032 The Small Explorers and Producers Association of Canada (SEPAC) Application for Review and Variance of Board Decision U96001, 1 April 1999.

applicants. There are many issues and matters which are common and relevant to different, discrete applications before the Board. By way of example, Directive 56 lists a large number of requirements (such as the location of the proposed well or facility, the degree of public consultation which is required depending upon the percentage of H₂S, the type and amount of emergency planning), all of which must be addressed in each application for a sour gas well. However, the fact that each of these issues must be addressed in other, subsequent applications, does not elevate them to any special status in these separate and distinct applications which are already before the Board. The Proceeding has been called to deal with distinct applications before the Board, relating to the Affected Lands (and no other lands) and the rights and entitlements of the particular parties already named in the Proceeding.

C. Value of Information to be Provided by Applicants for Intervener Status

9. The three gas producers, Fairborne, Devon and Bearspaw, who are already involved in the Proceeding as applicants, as well as the other natural gas producers whom CDP expects will be granted intervener status by the Board and in respect of whose participation CDP does not object, are sophisticated corporations, with highly competent counsel. It is hard to imagine that any issue which might be addressed by either Conoco or the Freehold Owners Association will not already be placed before the Board in the Proceeding by one or more of these parties. As such, with respect, the value of repetition by these proposed interveners of submissions which will inevitably be addressed by one or more of Fairborne, Devon and Bearspaw (as well as ARC, Centrica and Quicksilver) is extremely limited at best and, arguably, *de minimis*.

D. The Proceeding is not Industry Wide

10. As identified above, the Proceeding relates to specific applications made by individual natural gas lessees for well licences and holding orders relating exclusively to the particular Affected Lands and the opposition to those applications by the owners of the coal underlying and within those same Affected Lands. It is not, and should not become, an omnibus hearing to address what is, admittedly, an issue of importance to a large number of persons who are involved in the natural gas industry, conventional natural gas owners and coal owners. It can be concluded, however, that the issue may not be as critical to most of the natural gas industry as might be thought, because relatively few gas producers have attempted to intervene in the Proceeding. CDP reiterates its earlier submission that, should the Board determine that the issues which are involved in the Proceeding are of sufficient importance and breadth of impact, then, separately and apart from the Proceeding, the Board should call an omnibus inquiry into the matter of CBM entitlement and related operational issues. The Board called just such an inquiry in respect of the gas over bitumen conflict in Alberta. Such an inquiry would be preceded by wide advertisement by the Board, to ensure that all parties who were potentially affected could pursue their respective interests and place their positions before the Board. With respect, this Proceeding is not the appropriate time or place for such an inquiry.

11. For the reasons set out above, CDP submits that neither Conoco nor the Freehold Owners Association is and neither will be directly and adversely affected by the decision of the Board in the Proceeding. Consequently, CDP urges the Board to deny each of those two applicants the status that full interveners enjoy under the ERC Act.

E. Inclusive Board Practice

12. Notwithstanding the foregoing, CDP recognizes that it has long been the Board's practice to allow limited participation by persons who do not qualify as interveners. This principle was expressed by the Board at page 7 of the Manhattan Decision⁴, as follows:

"Others who may not be able to meet the standing test (for example, persons who are not situated in close proximity to a proposed facility) are not afforded these participation rights by the statute. However, it is the long-standing practice of the Board to allow those persons who would otherwise not have standing to participate to some extent at a public hearing provided they offer relevant information."

13. CDP would not object to limited participation of Conoco or the Freehold Owners Association, the proposed interveners, through presentation of a short statement of their position, without full rights of participation (such as leading evidence, cross-examination of witnesses or giving final argument), akin to that limited participation which was determined to be appropriate by the Board in the Manhattan Decision.⁴

All of which is respectfully submitted.

Yours truly,

CARSCALLEN LOCKWOOD LLP

(original signed by B. Robinson on behalf of:)

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⁴ Manhattan Decision, p. 7.

Alberta Energy and Utilities Board

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