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29 June 2020

To: All parties to Detailed Route Hearing MH-023-2020

**Trans Mountain Pipeline ULC (Trans Mountain)
Trans Mountain Expansion Project (TMEP)
Detailed Route Hearing (Hearing) MH-023-2020
Ruling – Austeville Properties Ltd. (Austeville) application to review and vary
the Hearing scope, and motion to compel responses to Information Request
(IR) No. 1**

A. Background to scoping in Hearing MH-023-2020

On 19 July 2019, in its decisions on resuming the TMEP regulatory processes ([C00593](#)), the National Energy Board (NEB) indicated that filed Statements of Opposition (SOOs) must meet certain requirements in order to be accepted (Valid SOO). One of these requirements was that the objection identify a material change in circumstances related to at least one of three issues: the best possible detailed route of the pipeline, the most appropriate methods of constructing the pipeline, and/or the most appropriate timing of constructing the pipeline. Part F of the SOO form (attached to the NEB's letter) explicitly asked SOO Filers to describe circumstances that they believe have materially changed since 2017 in relation to each issue of concern to them.

Austeville filed a SOO on 19 September 2019 ([C01711](#)), and indicated that it did not file a SOO in the 2017 detailed route approval process. In its 2019 SOO, for each of the issues of pipeline route, methods of construction, and timing of construction, Austeville provided comments in an attached schedule for the Commission's consideration.

On 29 November 2019, in its SOO Decision No. 4 ([C03323](#)), the Commission of the Canada Energy Regulator (Commission) granted Austeville a Hearing. The Commission noted that:

... an individual's, group's, or people's detailed route hearing process may not consider all concerns raised in their SOO. The Commission may limit the scope of each hearing process to the matters that met its assessment criteria. The Commission will communicate the scope of the each [sic] detailed route hearing process in the Hearing Orders.

In Section 5.3.2 of the 31 January 2020 Hearing Order ([C04465](#)), the Commission reiterated its approach to determining the Hearing scope. It stated:

In making its decisions with respect to new SOOs, the Commission therefore considered whether each SOO Filer demonstrated a material change in circumstances and, if so, to which issue(s) any material change was related. In each Hearing, the Commission will only consider the issue(s) – of the three listed in Section 1 – for which the respective SOO met the Commission's assessment criteria.

In Appendix 2 of the Hearing Order, the Commission identified route location and the timing of construction as the scope of Austeville's evidence submissions in Hearing MH-023-2020.

B. Austeville's notice of motion

On 29 May 2020, Austeville filed a notice of motion ([C06557](#)) with the Commission, in which it requests:

- a) that the Commission reconsider the Hearing Order and order that methods of construction are within the scope of the Hearing (Review Application); and
- b) that the Commission require Trans Mountain to answer Austeville's Information Request (IR) Nos. 1.6 through 1.8 and 1.11 through 1.24 in relation to methods of construction (Motion to Compel).

For the Review Application, Austeville relies on subsection 69(1) of the *Canadian Energy Regulator Act* (CER Act), which provides:

The Commission may review, vary or rescind any decision or order it makes and, if applicable, may re-hear any application before deciding it.

Austeville's submissions in relation to the Review Application include the following:

- Trans Mountain served Austeville with a Notice of Proposed Detailed Route in March 2017, which did not provide information about the methods or timing of construction.
- Austeville and Trans Mountain engaged in discussions between 2016 and 2019 regarding the pipeline route and methods of construction. Some information was provided to Austeville about methods of construction, but it was not detailed.
- Trans Mountain served Austeville with a new Notice of Proposed Detailed Route on 20 August 2019, which also did not provide information about the methods or timing of construction.
- Following the 2019 notice, Trans Mountain disclosed detailed Engineered Plans, though minimal information on methods of construction was included. These plans were provided less than a week before Austeville's SOO was due; the deadline being 20 September 2019. Austeville did not have sufficient time to consult a pipeline construction expert before filing its SOO.
- In its SOO, regarding methods and timing of construction, Austeville stated:

Austeville has not been provided with sufficient information regarding either the proposed methods of construction of the [p]ipeline or proposed timing of construction of the [p]ipeline and is thus unable to assess whether circumstances have materially changed since 2017 in connection with those matters.

Accordingly, Austeville reserves all rights to oppose the proposed methods of construction of the [p]ipeline and/or proposed timing of construction of the [p]ipeline as Austeville is provided with further information.

- When granting Austeville a Hearing in SOO Decision No. 4, the Commission did not indicate that any aspect of the SOO was not accepted.
- In the Hearing Order, the in-scope evidence submissions are not limited for any other SOO Filers.

- Subsection 63(1) of the CER Act requires the Commission to issue written reasons for each decision or order it makes. The Commission did not issue reasons for excluding methods of construction as an issue.
- In Trans Mountain's 28 February 2020 written evidence ([C04884](#)), it did not indicate that it considered methods of construction to be excluded. Rather, it addressed the issue. It also attached a Detailed Construction Workplan that included information on methods of construction that was not previously provided to Austeville.
- Austeville's IR No. 1 included a number of questions about methods of construction, for which Trans Mountain refused to provide full answers, or any answers, on the basis that they were not within scope. If the Commission includes methods of construction as an in-scope issue, Austeville requests that Trans Mountain be compelled to answer these IRs.
- There is no reason to include timing of construction while excluding methods of construction. There has been a material change in circumstances in relation to the methods of construction. Austeville had limited information regarding methods of construction before filing its SOO, which is why it reserved its right to challenge methods of construction, but was not in a position to identify specific objections at that time. The information in the Detailed Construction Workplan that was not previously available to Austeville represents a material change since 2017.
- The issues of pipeline route and the timing and methods of construction are closely intertwined. It is impracticable to consider the first two without considering the third.
- A key issue in the Hearing is the proximity of the pipeline to Austeville's building, which influences the methods of construction used. This is reflected in Trans Mountain's written evidence. It also states that a purpose of its geotechnical exploration work is to assess impacts on the building that the current methodology would have. Construction timing is also impacted by methods of construction, as some methods may take longer or need to occur at different times of the year.
- Austeville intends to propose an alternate route in its written evidence. If the route is changed, the methods of construction may also need to be changed. Even if the route is not changed, Austeville has a strong interest in making submissions on the methods in order to minimize impacts.
- As Trans Mountain addresses methods of construction, for procedural fairness, Austeville is entitled and intends to respond to it. It has engaged an expert in environmental engineering for this purpose.
- The balance of prejudice favours granting the [Review Application]. Methods of construction are important to Austeville because of the potential impacts on its operations, as well as its tenant's operations and use of the lands as a film studio.
- Trans Mountain would not suffer prejudice as it already addressed methods of construction in its written evidence. If it needs to provide additional information, it can be done in reply evidence.
- The Commission's process would not be affected by the relief sought as Austeville intends to file its written evidence in accordance with the current deadlines regardless of the outcome of the [Review Application].

C. Comments received

On 2 June 2020, the Commission set out a comment process on Austeville's Review Application and Motion to Compel ([C06614](#)). The following is a summary of the parties' submissions.

Trans Mountain ([C06715](#))

Trans Mountain's submission consists of two letters; one pertaining to Austeville's Review Application and one pertaining to its Motion to Compel. Its submissions with respect to the Review Application include the following:

- Austeville has failed to raise a doubt as to the correctness of the decision, either by showing an error of law, changed circumstances or new facts since the time of the original decision, or new facts that were not placed in evidence in the original proceeding, as required by paragraph 44(2)(b) of the *National Energy Board Rules of Practice and Procedure, 1995* (Rules).
- In the NEB's July 2019 process resumption decisions, it stated that it would accept SOOs from landowners that had not previously filed one, provided that the SOOs met the requirements of a Valid SOO, which was defined as one that raises "a material change in circumstances related to the best possible detailed route of the pipeline, or the most appropriate methods or timing of constructing the pipeline."
- Austeville has not raised a material change in circumstances in relation to the most appropriate methods of construction in its SOO or its [Review Application]. Austeville cites a material change on account that (i) it had limited information about the methods of construction prior to filing its SOO; and (ii) it reserved the right to challenge the methods of construction in the SOO and Trans Mountain provided construction-related information in its written evidence.
- The methods of construction have not materially changed since 2017. As noted in its written evidence, Trans Mountain began engaging with Austeville in 2013. As Austeville notes, it has discussed methods of construction with Trans Mountain between 2016 and 2019.
- Austeville had sufficient information in relation to the methods of construction prior to the SOO deadline. Trans Mountain provided Austeville with the alignment sheet attached as Schedule 3 to its 2019 SOO.
- Austeville's argument as to a material change in circumstances is that it has more information now than it did at the time it filed its SOO. The alignment sheet provided Austeville with the necessary information to argue material change within its SOO. Austeville could have argued that, through the alignment sheet, it had gained greater knowledge than it had in 2017, but it did not make this argument, or any other argument, in its SOO in relation to the methods of construction.
- Austeville is a sophisticated party. The alignment sheet would have afforded any retained engineering expert the requisite information to provide Austeville with informed conclusions as to the likely details regarding methods of construction. Austeville's decision not to consult with an expert in advance of filing its SOO should not prejudice Trans Mountain.
- The NEB's July 2019 process resumption decisions and the CER Act do not afford SOO Filers the right to raise objections at a later time. To be a Valid SOO, a material change of circumstances is required to be raised within the 30-day deadline.

- In its written evidence, Trans Mountain provided a one-sentence summary of the methods of construction as background for the description of its rationale for the proposed route, which is required under the Hearing Order. The construction timing workplan attached as Appendix C gives each construction step's duration along the route, since routing and construction timing are within scope. Austeville may file evidence regarding construction timing. The Commission can apply the relevant weight to Trans Mountain's and Austeville's evidence based on the in-scope issues.
- Through its [Review Application], Austeville is attempting to bolster its SOO 252 days (approximately 8 months) after the statutory SOO deadline. Allowing it to succeed in this attempt would be unfair to other SOO Filers that had their issues limited by the Commission, or whose SOOs were rejected.
- In November 2019, the Commission stated that it could limit the scope of a Hearing to the matters in a SOO that met its assessment criteria, and that it would communicate the scope of the each Hearing in the Hearing Orders. It also stated that it declined to grant a Hearing where a SOO, among other things, "did not establish a material and relevant change in circumstances." The Commission limited the Hearing's scope in the 31 January 2020 Hearing Order.
- Austeville brought its [Review Application] 182 days after it was notified that the Hearing may be limited in scope, 119 days after being informed that the scope was limited, 91 days after Trans Mountain filed written evidence, 24 days after Austeville filed its Round 1 IRs, and 9 days after Trans Mountain filed its IR response. Austeville failed to file its application on a timely basis.

Austeville's reply (C06759)

Austeville's submissions include the following:

- Paragraph 44(2)(b) of the Rules distinguishes between reviews and rehearing, and establishes different requirements for each.
 - An applicant for a rehearing is required to establish 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 in evidence in the original proceeding and were not then discoverable by reasonable diligence.
 - An applicant for a review is only required to raise a doubt as to the correctness of the decision or order being reviewed.
- Section 44 of the Rules refers to subsection 21(1) of the *National Energy Board Act* (equivalent to subsection 69(1) of the CER Act). Subsection 69(1) sets out 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.
- The process for a review applies to any decision or order of the Commission, while the process of rehearing applies only to applications (e.g., for a certificate). Austeville's Review Application relates to an order, so a review is the correct procedure, not a rehearing. Austeville is only required to raise a doubt as to the correctness of the Hearing Order. The other requirements cited by Trans Mountain are not applicable.

- The issue of the methods of construction was much less important to Austeville in 2017 when it believed that the pipeline would be located further from its building.
- When Austeville learned in 2019 about the pipeline's close proximity, it filed its SOO in relation to all three issues, not only the route location. As a result of the material change in the pipeline location since 2017, the significance of the methods of construction to Austeville's interests materially changed.
- Trans Mountain submits that Austeville was not permitted to reserve the right to object to the methods of construction; however, the Commission accepted that Austeville reserved the right to object to the timing of construction. For the sake of consistency, methods of construction should be treated the same.
- In reviewing Trans Mountain's written evidence, Austeville believed that Trans Mountain considered methods of construction to be within scope. For that reason, it did not believe that the Hearing Order required varying, but considered it necessary when Trans Mountain took the position that methods of construction was not in scope in its response to the IRs, which was filed nine days prior to the filing of the Review Application.

D. The Commission's decision

General principles on an Application for Review

Subsection 69(1) of the CER Act states that the Commission may review, vary, or rescind any decision or order it makes.

The Commission, in its letter of 2 June 2020, set out the general principles for a review. Firstly, there is no automatic right of review of a decision. The Commission's power to review its decisions is discretionary and must be exercised sparingly and with caution.¹ Considerations that the Commission may take into account in exercising this discretion include the timeliness of the application for review.² The Commission indicated in Section 7.3 of the Hearing Order that "[i]f a notice of motion is not filed on a timely basis, the Commission may decide that it will **not** consider it."

Secondly, if the Commission decides to conduct a review, it does so through a two-step process, pursuant to Part III of the Rules. In the first step, the Commission considers the threshold question of whether the applicant has raised a doubt as to the correctness of the Commission's decision being challenged. If the Commission decides to review its decision, it proceeds to the second step where it reviews the decision on its merits.

¹ [Filing Manual](#), Guide O at page 50-2; MH-052-2018, TMEP (Reconsideration), NEB Ruling No. 22 at page 3 ([A96969](#)); and GH-002-2017, NOVA Gas Transmission Ltd. Application for the Sundre Crossover Project, NEB Ruling No. 3 at page 3 ([A87308](#)).

² NOVA Gas Transmission Ltd., Application for 2021 System Expansion Project, NEB Ruling No. 18 at page 2 ([C00854](#)); and Westcoast Transmission Company Ltd., NEB Reasons for Decision in the matter of applications for the review of Order TG-5-79 and for an order fixing interim tolls under Part IV of the *National Energy Board Act* (issued August 1980) at page 4.

Written reasons for scoping decision

As a preliminary matter, the Commission will address Austeville's contention that the Commission failed to provide written reasons, as required by subsection 63(1) of the *CER Act*, for its decision in the Hearing Order to exclude methods of construction from the scope of Hearing MH-023-2020.

The Commission notified SOO Filers in its 29 November 2019 SOO Decision No. 4 that it may limit the scope of each hearing process to the matters that met its assessment criteria. The assessment criteria were listed on page 2 and included whether "the objection identified a material change in circumstances related to the best possible detailed route of the pipeline, or the most appropriate methods or timing of constructing the pipeline." For a particular matter, or issue, to be considered in a Hearing, the SOO Filer was required to demonstrate a material change in circumstances related to that particular issue.

In the 31 January 2020 Hearing Order, the Commission reiterated this requirement under the heading "Scope," where it stated:

In making its decisions with respect to **new** SOOs, the Commission therefore considered whether each SOO Filer demonstrated a material change in circumstances and, if so, to which issue(s) any material change was related. In each Hearing, the Commission will only consider the issue(s) – of the three listed in Section 1 – for which the respective SOO met the Commission's assessment criteria.

In the Commission's view, this direction clearly states that the reason that it would not consider a particular issue in a Hearing is because the SOO Filer failed to demonstrate a material change of circumstances in relation to that issue.

Austeville's SOO was a new SOO since it was not in relation to an in-progress Hearing. The Commission confirms that it assessed Austeville's SOO against this criterion, and that it decided to exclude methods of construction as an issue to be considered in the Hearing on the basis that Austeville failed to demonstrate a material change of circumstances in relation to this particular issue.

The Commission further notes that it applied this assessment criterion to each SOO independently of other SOOs in determining the scope of submissions in each Hearing, while recognizing that SOO Filers participating in Hearings with overlapping geographic focuses (whether new or resumed) may not all be entitled to submit evidence with respect to all three issues.

With respect to the issues of timing and methods of construction, the Commission confirms that it considered Austeville's argument in the SOO that Trans Mountain had not provided sufficient information to enable Austeville to determine if there was a material change in circumstances. In its response to the SOO, Trans Mountain stated that the methods of construction had not materially changed since 2017, but was silent on the issue of timing of construction. The Commission included the issue of timing of construction in the Hearing on the basis that Trans Mountain did not confirm that the timing of construction had not changed since 2017. Contrary to Austeville's contention, the Commission's decision to include timing of construction as an in-scope issue was not an acceptance of Austeville's assertion of a right to oppose the issue of timing of construction at a later date.

Timeliness of the Review Application

Before considering the Review Application itself, the Commission must first determine the issue of Austeville's timeliness in bringing the application. For the reasons that follow, the Commission has decided to deny the Review Application on the basis that it was not filed in a timely manner.

The Commission notified Austeville and other SOO Filers in its 29 November 2019 SOO Decision No. 4 that it may limit the issues to be considered in each Hearing. The 31 January 2020 Hearing Order confirmed that Hearing MH-023-2020 was limited in scope to two issues: the best possible route and the most appropriate timing of construction. Appendix 2 of the Hearing Order clearly indicates that methods of construction are not considered in-scope for Austeville's evidence submissions, as Austeville acknowledges in its Review Application. Accordingly, the Commission is of the view that Austeville was or should have been aware on 31 January 2020 that methods of construction were not an in-scope issue in the Hearing, and that this is the relevant date against which to assess the timeliness of the Review Application.

Austeville waited until almost four months after the Commission issued the Hearing Order to file its Review Application. During that time, as Trans Mountain argues, a number of hearing steps were completed, including Trans Mountain's filing of written evidence, Austeville's filing of Round 1 IRs, and Trans Mountain's response to the IRs.

Austeville argues in its reply submissions that it did not consider it necessary for the Hearing Order to be varied to include methods of construction until Trans Mountain refused to respond to Austeville's IRs regarding that topic. Austeville argues that it believed up until that point that Trans Mountain considered methods of construction to be in scope.

The Commission does not find this argument persuasive for two reasons. First, the Commission has clearly communicated since the 29 November 2019 SOO Decision No. 4 that the Commission, and not Trans Mountain, would decide the scope of the Hearing. As Austeville acknowledges, it was notified by the Commission of the scoping decision in the Hearing Order dated 31 January 2020. In the Commission's view, it was unreasonable for Austeville to rely on Trans Mountain's evidence as authority that methods of construction was an in-scope issue.

Second, Austeville does not explain in its submissions why it did not file its Review Application *before* Trans Mountain filed its evidence on 28 February 2020. Twenty-eight days passed between the date the Commission issued the Hearing Order and the date that Trans Mountain filed its evidence. In the Commission's view, and in the absence of any evidence to the contrary, it would have been reasonable for Austeville to file the Review Application during this 28-day period. It was unreasonable for Austeville to wait until almost four months after learning that the scope was limited, and after additional hearing steps had been completed, to file the Review Application.

In the Commission's view, Austeville's failure to bring the Review Application in a timely manner is sufficient to dispose of the matter. Accordingly, the Commission declines to exercise its discretion to review its scoping decision in the Hearing Order.

Motion to Compel

Austeville's Motion to Compel is dependent on the Commission including methods of construction as an in-scope issue in the Hearing. Given that the Commission has denied the Review Application, the Motion to Compel is moot.

For any questions, please contact a Process Advisor by phone at 403-560-7323 or 1-800-899-1265 (toll-free), or by email at TMX.ProcessHelp@cer-rec.gc.ca.

Yours sincerely,

Original signed by

Jean-Denis Charlebois
Secretary of the Commission

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