

Summary of Evidence of Dene Tha' First Nation

Re: Hearing Order GH-1-2004

**MACKENZIE GAS PROJECT
HEARING ORDER GH-1-2004**

Files: 3200-J205-1
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EVIDENCE OF SHAKIR ALWARID

1. Pursuant to Hearing Order GH-1-2004 (“the Hearing Order”) regarding various applications to the National Energy Board (“NEB”) for the Mackenzie Gas Project (“the Project”), the Intervenor, Dene Tha’ First Nation (“Dene Tha’”), will make submissions at the oral hearing concerning:
 - (a) Issue 7 at Appendix 1 to the Hearing Order, namely, the terms and conditions to be included in any approval the NEB may issue; and
 - (b) Issue 8 at Appendix 1 to the Hearing Order, namely, the appropriateness of the Applicant’s Public Consultation Program and the adequacy of aboriginal consultation.

Issue 7: Position of the Dene Tha’

2. Dene Tha’ takes the position that there are certain issues that must be addressed with respect to the enforceability of any terms and conditions which the NEB may place on any approval it may grant in respect of the application for the Project.
3. The position of Dene Tha’, which has previously been communicated to the NEB, is that absent an application from the Applicant for the whole of the Project, as the Project has been defined in both the *Terms of Reference* for preparation of the Environmental Impact Statement for the Project as well as in the *Joint*

Review Panel Agreement,¹ it is not clear whether any terms and conditions that the NEB may attach to the Project (as defined in the TOR and Joint Review Panel Agreement) will be enforceable in Alberta.

Issue 8: Position of the Dene Tha'

4. It is the position of Dene Tha' that the Applicant has failed to adequately consult with Dene Tha' in respect of the potential for the Project to infringe the Aboriginal and Treaty rights of Dene Tha' throughout the Traditional Territory of Dene Tha' in the Northwest Territories and Alberta, as shown in the map attached to this outline of Mr. Alwarid's evidence.

5. It is also the position of the Dene Tha' that the Applicant has failed to properly comply with the NEB's *Memorandum of Guidance Concerning Consultation with Aboriginal Peoples*, dated March 4, 2002. Finally, it is the position of the Dene Tha' that the federal Crown has also failed to properly consult with Dene Tha' in respect of the potential for the Project to infringe on Dene Tha's Aboriginal and Treaty rights throughout Dene Tha's Traditional Territory.

¹ Appendix 1 of the *Terms of Reference* and Annex 1 to the *Joint Review Panel Agreement* both state that the Project includes:

"Nova Gas Transmission Limited Facilities

- Dickins Lake Section - approximately 65 km of pipeline from the existing Bootis Hill junction on the NGTL Northwest Mainline to interconnection facilities with the natural gas transmission pipeline

- Northwest Mainline (Vardie River Section) - a loop of a portion of the existing Northwest Mainline. This loop will occur between the Bootis Hill junction and the existing Thunder Creek Compressor Station (a distance of approximately 35 km)" (hereinafter, "the Connecting Facilities").

Mr. Alwarid's Evidence

6. Mr. Shakir Alwarid will present evidence on behalf of Dene Tha' in relation to the above-mentioned issues. Mr. Alwarid is the Chief Negotiator for the Dene Tha' First Nation with respect to its consultations and negotiations with government and industry in respect of the Project. Mr. Alwarid has served in this position with Dene Tha' since November, 2002. He has worked closely with the Chief and Council of Dene Tha', with the Lands Department of the First Nation and with various community members concerning the impact of oil and gas, forestry and other activities on Dene Tha's ability to exercise their Aboriginal and Treaty rights.
7. Mr. Alwarid has worked closely with a number of other First Nation communities in British Columbia and Alberta on similar issues, particularly in relation to the impact of industry activities and the Crown's approval of same, and how these activities have the potential to infringe Aboriginal and Treaty rights.
8. Mr. Alwarid has both a Bachelor of Arts and a Master of Arts degree in economics from McMaster University and has undertaken PhD work at the University of Alberta in the field of economics. He has also taught undergraduate economics courses at both McMaster University and at the University of Alberta.
9. From July 1974 until December of 1993, Mr. Alwarid worked in various capacities with a number of governments in Canada in a variety of positions. Among other things, he has served as Assistant Deputy Minister ("ADM") with the Department of Northern Saskatchewan, with responsibility for mining development, as well as ADM of Energy and Mines with the Government of Saskatchewan. He was also Deputy Minister ("DM") of the Department of Economic Development, Mines and

Small Business with the Government of the Yukon and he was also President of the Yukon Energy Corporation. In addition, Mr. Alwarid held the following positions during this time period:

- Chief Economist for the Heavy Oil Division of the Saskatchewan Oil and Gas Corporation;
 - Senior Industry Consultant and Director of Policy, Northern Affairs, for the Government of Manitoba; and
 - Chief of Business, Department of Economic Development and Tourism, for the Government of the Northwest Territories.
10. From January 1992 to December 1993, Mr. Alwarid served as the Deputy Minister/Chief Negotiator, Land Claims and Self-Government for the Yukon Government and he was responsible for finalizing the first four Land Claims and Self-Government Agreements with First Nations in the Yukon.
 11. Since 1993, Mr. Alwarid has worked as the Chief Negotiator and Management Consultant for a number of First Nations in British Columbia and Alberta on various issues related to oil and gas, pipelines, and other resource developments, as well as on other issues relating to Aboriginal and Treaty rights. In addition, Mr. Alwarid has assisted various First Nations in their negotiations with the Crown and industry on various resource-related issues.
 12. More recently, Mr. Alwarid also served as President and CEO of Qulliq Energy Corporation, for the Government of Nunavut.

Outline of Mr. Alwarid's Evidence

13. Mr. Alwarid's evidence will be focused on four primary issues:
- (i) Dene Tha's attempts to engage the Applicant in consultation;
 - (ii) Dene Tha's attempts to engage the Federal Crown in consultation;
 - (iii) Dene Tha's negotiations and consultations with TransCanada Pipelines Ltd./Nova Gas Transmission Ltd. ("TCPL/NGTL"); and
 - (iv) Dene Tha's concerns regarding jurisdictional matters.

Mr. Alwarid's oral evidence will be supported by documentary evidence that is being filed together with this outline of Mr. Alwarid's oral evidence. The documentary evidence will consist of correspondence in the form of letters, emails and other documents concerning Dene Tha's attempts to consult with the Applicant, the Crown and TCPL/NGTL.

(i) Dene Tha's Attempts to Engage the Applicant in Consultation

14. Mr. Alwarid's oral evidence, as well as related documentary evidence, will show that Dene Tha' has been attempting to meaningfully consult with the Applicant since late 2002 in respect of the Project. Mr. Alwarid's evidence will also explain why Dene Tha' has been attempting, since late 2002, to negotiate a consultation protocol with the Applicants, in order guide the parties' consultations with each other in respect of the Project and to ensure that such consultations are in compliance with the law. This evidence will show that Dene Tha' has consistently tried to move this process forward with very little success. Mr. Alwarid's evidence will also show that the Applicant, itself, has acknowledged in various documents the importance of negotiating such a protocol prior to consultations taking place, but has now taken the position that Dene Tha' is

somehow impeding consultation by asking that such a consultation protocol be in place.

15. Mr. Alwarid will also present evidence on the failure of the Applicant to work with Dene Tha' to produce traditional use studies and to gather other information that is critical to showing the potential for the Project to infringe Dene Tha's rights and interests.
16. Mr. Alwarid will also present evidence on the negative impact that the Applicant's conduct has had on Dene Tha's ability to meaningfully participate in the environmental and regulatory review of the Project.

(ii) Dene Tha's Attempts to Engage the Federal Crown in Consultation

17. Mr. Alwarid's evidence will show that on several occasions over the past two years, Dene Tha' has communicated to various departments of the Federal Crown, as well as with the NEB, its concerns that the Project has the potential to negatively impact and infringe its Aboriginal and Treaty rights. Mr. Alwarid's evidence will show that Dene Tha' has repeatedly asked the Crown to meaningfully consult with it and to accommodate Dene Tha's rights and interests in respect of the Project.
18. Mr. Alwarid's evidence will show that despite the fact that since 2002 (or earlier) various departments of the federal government have been involved in discussions and negotiations concerning the design of the environmental and regulatory review process for the Project, the federal government failed to consult with Dene Tha' in respect of those matters. Mr. Alwarid's evidence will also show how the federal government has treated Dene Tha' differently than other First Nations that will be affected by the Project, such as in relation to funding, to the establishment of and eligibility for various programs in respect of the Project, and

in respect of the design and implementation of the environmental and regulatory review process for the Project.

19. Mr. Alwarid's evidence will show that the Dene Tha' were not informed about, were not consulted about, were not involved in or even given observer status (such as was given to other groups) at any negotiations involving the various agreements that have constituted the environmental and regulatory review process for the Project and were not informed about the existence of such agreements by the federal Crown until the summer of 2004.
20. Furthermore, the evidence will show that the Dene Tha' were not given the opportunity to provide comments about these various agreements that have led to the regulatory and environment review process for the Project.
21. Mr. Alwarid's evidence will show that the Dene Tha' were not given the opportunity to explain their concerns about how the environmental and regulatory review for the Project might affect their rights and title, and they did not have any input on the design of such processes to ensure that their rights and interests will be properly dealt with.
22. Mr. Alwarid's evidence will show that the federal government has failed to consult with Dene Tha' in respect of the environmental and regulatory review of the process even though the federal government was well aware that scenarios concerning the routing of the Project would impact the Traditional Territory of Dene Tha' in the NWT and northern Alberta during the time period when the environmental and regulatory review for the Project was being designed. Mr. Alwarid's evidence will show that the failure to include Dene Tha' in consultations and negotiations concerning the design of this process has prejudiced the ability

of Dene Tha' to participate meaningfully in the environmental and regulatory review of the Project.

23. Mr. Alwarid's evidence will also show that in a meeting with Dene Tha' in July, 2004, representatives of the recently established Crown Consultation Unit ("CCU") told Dene Tha' that the CCU would be assuming the federal government's consultation obligations with Dene Tha'. Mr. Alwarid's evidence will show that no such consultation has taken place and that the Crown has failed to take the necessary steps to fulfill its legal and constitutional duties to Dene Tha'; namely, to consult with respect to potential infringements of Dene Tha's rights throughout the whole of Dene Tha's Traditional Territory in relation to the Project, as defined in the TOR and in the Joint Review Panel Agreement.

(iii) Dene Tha's Attempts to Engage TCPL/NGTL in Consultation

24. Mr. Alwarid's evidence will show that Dene Tha' has expended a great deal of time and resources in concluding a consultation protocol with TCPL/NGTL. His evidence will show that during the discussions and negotiations with TCPL/NGTL leading to the conclusion of this protocol, Dene Tha' was not told that the Applicant intended split the Project for purposes of seeking regulatory approval, between the NEB and an application to be made by TCPL/NGTL with respect to the Connecting Facilities.
25. Mr. Alwarid's evidence will show that Dene Tha' first became aware of the issue of project splitting in the fall of 2003, when it received a letter from the Applicant to that effect and that until that time, Dene Tha' had always understood that the Project included the Connecting Facilities and that there was to be a single application made to the NEB for regulatory approval of the whole of the Project, including the Connecting Facilities.

26. Mr. Alwarid's evidence will show that Dene Tha' and TCPL/NGTL entered into a consultation protocol on January 1, 2004 and that the various negotiations leading to the protocol were designed to deal with TCPL/NGTL's existing operations within Dene Tha's Traditional Territory, and that the protocol has since been used to guide consultations between TCPL/NGTL and Dene Tha' concerning the Connecting Facilities but that those negotiations have not dealt with the portions of the Project for which the Applicant has made an Application to the NEB.

27. Mr. Alwarid will outline the scope of the consultation and discussions that have taken place between Dene Tha' and TCPL/NGTL with respect to Connecting Facilities. In particular, Mr. Alwarid will discuss some of the information gaps that remain in respect of information about technical and other aspects of the Connecting Facilities and his evidence will also show that Dene Tha' has consistently taken the position with TCPL/NGTL that the entire Project as defined in the TOR and the Joint Review Panel Agreement ought to be regulated by the NEB.

(iv) Concerns Regarding Jurisdictional Matters

28. Mr. Alwarid will present evidence on certain concerns that Dene Tha' has with respect to the splitting of the Project for purposes of seeking regulatory approval, including its concerns with respect to:

- (a) what the legal obligation of the federal Crown is to consult with Dene Tha' in respect of the Project, as defined in the TOR and Joint Review Panel Agreement, and how project splitting affects the scope and extent of that consultation;

- (b) the application of the TOR and the Joint Review Panel Agreement in respect of the Connecting Facilities, including how splitting the Project for regulatory approval affects the consultation that is required to be undertaken by the Applicant with Dene Tha’;
 - (c) the issue of the legal enforceability of any terms and conditions that the JRP, NEB or other responsible authorities may place on the Connecting Facilities, due to the Project splitting; and
 - (d) the failure of the Government of Alberta to consult with Dene Tha’ in respect of the Connecting Facilities despite Dene Tha’s request that it do so, and the failure of the Alberta Energy and Utilities Commission (“AEUB”) to respond to various questions raised by Dene Tha’ in respect of the AEUB’s regulation of the Connecting Facilities, and the relationship, if any, between the role of the AEUB, and the existing environmental and regulatory review of the Project, as the Project is defined in the TOR and Joint Review Panel Agreement.
29. More particularly, Mr. Alwarid will show that Dene Tha’ has raised with the NEB, the federal government, the Applicant, TCPL/NGTL, the Government of Alberta and the AEUB, Dene Tha’s concern about Project approval being split between the NEB and the AEUB, based on Dene Tha’ having been told by TCPL/NGTL that a separate application will soon be filed with the AEUB with respect to the Connecting Facilities. Mr. Alwarid’s evidence will show that neither the federal government, the NEB, the Applicant, TCPL/NGTL, the Government of Alberta nor the AEUB have addressed those concerns, despite the definition of the Project in the TOR and Joint Review Panel Agreement as including the Connecting Facilities.

