NATIONAL ENERGY BOARD

IN THE MATTER OF the *National Energy Board Act* ("NEB Act"), being c. N-7 of the Revised Statutes of Canada 1985, as amended, and the Regulations made thereunder;

AND IN THE MATTER OF the *Canadian Environmental Assessment Act* ("CEAA") being c. 31 of the Statutes of Canada, 1992, as amended, and the Regulations made thereunder;

AND IN THE MATTER OF an Application dated 17 June 2008 by TransCanada PipeLines Limited ("TransCanada") for a Certificate of Public Convenience and Necessity for the TransCanada Alberta System subject to Hearing Order GH-5-2008.

WRITTEN EVIDENCE OF JIM NESS on behalf of the ALBERTA ASSOCIATION OF PIPELINE LANDOWNERS and the CANADIAN ALLIANCE OF PIPELINE LANDOWNERS' ASSOCIATIONS

1. My name is Jim Ness. I am President of the Alberta Association of Pipeline Landowners (**"AAPL"**), and a landowner directly affected by the TransCanada application for a Certificate of Public Convenience and Necessity for its Alberta System.

2. AAPL was formed as an organization by Alberta farmers in response to the TransCanada Keystone Project. AAPL currently represents 60 or more members who own or lease land (collectively, **"landowners"**) along the Right-of-Way (**"ROW"**) of the 18" diameter NOVA Gas Transmission Line constructed in or about 1958 (the **"NGTL line"**). That line is now fifty years old.

3. AAPL is a member organization of the Canadian Alliance of Pipeline Landowners' Associations (**"CAPLA"**), and has intervened jointly with CAPLA in this proceeding on behalf of the interests of agricultural land holders who will be affected by TransCanada's proposal to shift the TransCanada Alberta System, which includes the NGTL line, to the

jurisdiction of the National Energy Board (**"NEB"**) by obtaining a Certificate of Public Convenience and Necessity.

4. The members of AAPL and, I would suggest, the vast majority of landowners whose lands are affected by the TransCanada Alberta System, are farmers. We are grain farmers and we are ranchers. Our businesses are highly dependent upon the weather. We face tight schedules for planting and harvesting our crops. Delays in our agricultural operations can cause significant losses in production quality and quantity, which translates directly to our bottom line.

5. We are farmers by choice. We are not pipeline landowners by choice. Our lands happened to be chosen by pipeline companies as being the most convenient locations for their pipelines, and we are stuck with pipelines. We are also stuck with TransCanada's decision to apply to the NEB to transfer the Alberta System out of Alberta's regulatory regime and into the federal regime.

6. Most of us, me included, would prefer to ignore TransCanada's application. We have other business to take care of. However, the members of AAPL are concerned about the effects a change from provincial to federal jurisdiction are going to have on our operations and on our ability to protect our interests in the future. We are concerned about being forced out of a regulatory system that seems to give consideration to the interests of farmers and into a regulatory system that was designed without any regard for farmers.

7. In the materials that it has filed with the NEB in this proceeding, TransCanada has tried to put the concerns of landowners off until another day. TransCanada wants to obtain its Certificate now, and says that it will consult with landowners later. To date,

TransCanada confirms that it has given notice of its application to none of the individual landowners directly affected by the proposed transfer of jurisdiction (TransCanada Response to AAPL/CAPLA IR 1) and that it has not conducted a detailed comparison of provincial and federal regulatory regimes (TransCanada Response to AAPL/CAPLA IR 3).

8. The problem with TransCanada's suggested post-Certificate consultation program, however, is that it leaves landowners to depend on the goodwill and desire of TransCanada to self-impose measures to address the negative effects of the transfer from Alberta to federal jurisdiction. If we are unsatisfied by the consultation undertaken by TransCanada, all we will be able to do is complain to the NEB on our own time and with our own money.

9. That's the first major setback Alberta landowners face in this application. There is no jurisdiction in the NEB to award costs or to provide intervenor funding to landowners who wish to participate in regulatory proceedings that directly affect them. There can be no cost recovery for landowners in this proceeding. There can be no cost recovery for landowners in any Certificate hearing. There can be no cost recovery for landowners even in an application by a company to abandon its pipeline in place.

10. In Alberta, under the regulatory system that governs the TransCanada Alberta System at present, "local interveners" may be awarded costs of a proceeding and even an advance of funds during the course of a proceeding, payable by the applicant company. A "local intervener" can be a person or a group or association of persons who has an interest in and is in actual occupation or is entitled to occupy land that is or may be directly or adversely affected by a regulatory decision or order. Without any doubt, pipeline

landowners in the TransCanada Alberta System would be "local interveners" if TransCanada's application was being made to the Alberta regulator.

11. In a recent decision of the Alberta Energy Resources Conservation Board (**"ERCB"**), the ERCB awarded a team of two local citizen/landowner groups $260,000 in advance funding to take part in a public hearing on an application by Petro-Canada Oil Sands Inc. for approval to construct and operate an upgrader and associated infrastructure. This decision is attached to my statement as **Appendix "A"**.

12. If the NEB grants the Certificate requested by TransCanada, all landowners in the Alberta System will lose the opportunity they currently have to participate in regulatory proceedings that directly affect their interests with a right to seek recovery of the costs they incur in their participation. In the future, if TransCanada decides to construct additional pipelines or to abandon any of their pipelines in the Alberta System, landowners will have no right to costs or funding through the NEB process to enable them to participate fully and effectively in the process.

13. And, in response to TransCanada's suggestion that it will deal with landowner issues after the Certificate is granted, landowners will have no right to costs or funding if it is necessary to go back to the NEB to complain if/when TransCanada fails to address landowner concerns appropriately. That is why AAPL and CAPLA are involved in this proceeding. TransCanada and the NEB should be dealing with landowner concerns now.

14. The loss of the availability of costs or funding is not the only negative effect of the proposed change in jurisdiction for Alberta System landowners. Other differences in the NEB regulatory regime will result in the increased restriction of land use by farmers and

increased risk of operational delay and even regulatory penalties for landowners if the transfer to NEB jurisdiction takes place.

15. Firstly, while the Alberta legislation provides for a “controlled area” adjacent to a pipeline, this “controlled area” is significantly less onerous than the *NEB Act* “control zone”. It seems that this difference may in part result from the Alberta legislator’s consideration of agricultural practices in designing its legislation and regulations. For instance, a “ground disturbance” in Alberta does not include any cultivation not exceeding 45 centimetres (18 inches) in depth. Also, the “controlled area” extends either to the edge of the ROW or to a point 30 metres on each side of the pipeline itself, whichever is wider.

16. Under the *NEB Act* and regulations, the “control zone” automatically extends 30 metres out on each side of the pipeline ROW, and company permission must be obtained for any cultivation that exceeds 30 centimetres (12 inches) in depth (in order to relieve soil compaction, I am required to employ ripping practices to a depth of 24 inches). Also, where a landowner seeks permission from the NEB-regulated company, the company may prohibit any excavation (including cultivation) anywhere on the landowner’s property for up to three days.

17. If the NEB grants TransCanada the Certificate it seeks, Alberta System landowners will be subject to a significantly more onerous “control zone” that puts the decision-making power in the hands of the company. For most landowners, where the “controlled area” under the Alberta regulations was 60 metres in width, it will be that width plus the width of the ROW under the NEB regulations. Cultivation below one foot in depth will now require permission from the company. And while, as TransCanada notes in its response to BP IR 5,

the landowner can seek permission from the NEB if necessary, the landowner must do so at his or her own cost without any chance for cost recovery or funding.

18. Secondly, s. 112(2) of the *NEB Act* provides that landowners must obtain permission from the company before crossing any pipeline with vehicles or mobile equipment. In modern farming, nearly all field work is done with vehicles and mobile equipment. In Alberta, a similar rule exists, but specifically allows farmers to cross pipelines with vehicles or equipment used for farming operations. If the NEB grants a Certificate to TransCanada for the Alberta System, landowners will now be required to seek permission from TransCanada to carry out their farming operations over the pipeline.

19. In its response to AAPL/CAPLA IR 7, TransCanada says that it permits "normal farming operations" with "normal farm equipment" over its pipelines. Our question is who decides what is "normal" equipment and what are "normal" operations? If it is TransCanada, then our farming operations are at risk of being prohibited by the pipeline company. If it is to be left to landowners themselves to decide, then we are burdened with the responsibility of doing TransCanada's job while facing the risk of violating the *NEB Act* and the consequences of violating the Act. If the pipelines are safe, then landowners should have a blanket permission to cross such as that provided in the Alberta legislation.

20. The risks of regulatory penalties for violations of the NEB regulatory regime are far greater than the risks faced currently by Alberta System landowners under the provincial regime. The *NEB Act* provides for severe penalties for individuals and corporations. On a summary conviction offence alone, a landowner would face a fine of up to $100,000 and one

year’s imprisonment. Under the Alberta legislation, a landowner would face only a fine of up to $5,000 with no risk of imprisonment except in default of payment.

21. The land use restrictions and regulatory risks faced by landowners will be increased if the Board grants a Certificate to TransCanada for the Alberta System. How can this negative effect on landowners be avoided or mitigated? One possible solution is for the NEB to impose conditions on the Certificate that may be granted to TransCanada to counteract the negative changes that will be faced by landowners.

22. Several aspects of the settlement agreement (the **“Settlement Agreement”**) concluded between Enbridge Pipelines Inc. (“Enbridge”) and the Manitoba Pipeline Landowners Association (“MPLA”) and Saskatchewan Association of Pipeline Landowners (“SAPL”), which contains commitments by Enbridge that are conditions of its Certificates for the Alberta Clipper and Southern Lights pipeline projects, may be applied to the TransCanada Alberta System to mitigate the negative impact of the transfer of jurisdiction for landowners.

23. At Section 2.10 of the Settlement Agreement, Enbridge granted permission to landowners to cross all of its pipelines “at any time with all agricultural equipment to carry out cultivation of the lands, except as set out in Appendix “B” to the agreement (permission would be required for cultivation to a depth of more than 45 centimetres or the use of equipment in a manner exceeding manufacturers’ specified load limits). Enbridge would be required to respond to a request for permission within three business days, and if Enbridge determines that the landowner cannot cross any pipeline or pipelines with all agricultural equipment, Enbridge must specify the restricted practice or equipment; implement

mitigative measures to ensure the safe crossing of equipment and practices over the pipeline; or, where the landowner agrees, pay compensation for resulting crop loss or direct damages sustained because of any restriction. A copy of the Settlement Agreement, which has previously been filed with the NEB, is attached hereto as **Appendix "B"**.

24. This type of provision, while it is more restrictive than the Alberta regulatory regime currently applicable to Alberta System landowners, lessens the impact of the NEB regulations. It places the responsibility for deciding what is and what is not acceptable in the hands of the pipeline company, and shifts much of the risk for that determination away from the landowner. Again, we are farmers by choice. We are not pipeline landowners by choice and we should not be saddled with the regulatory risk created by pipelines.

25. There are other portions of the Enbridge Settlement Agreement and Certificate conditions that should also be applied to the Alberta System Certificate requested by TransCanada. NEB Certificate Condition 18 for the Alberta Clipper project requires a Pipeline Depth Monitoring Program to be filed for approval within 90 days of the commencement of operation of the pipeline. Landowners like me who have the fifty year old NGTL line have concerns about depth of cover and pipeline integrity. TransCanada should have to develop and implement a system-wide Pipeline Depth Monitoring Program as a condition of any Certificate that the NEB might grant. A copy of Enbridge's Alberta Clipper Expansion Project Table of Commitments is attached hereto as **Appendix "C"**.

26. As TransCanada's Alberta System ages, the frequency of integrity and maintenance digs on landowners' properties is likely to increase. In order to protect the interests of landowners and to standardize how landowners are to be notified and compensated for

intrusive integrity and maintenance work on their properties, Enbridge committed to Alberta Clipper and Southern Lights pipeline landowners to apply a standard Integrity Dig Procedure which will be the subject of regular review by Enbridge and its landowners in the future. This was a commitment made by Enbridge that constitutes a condition of its Certificates for those projects and the same condition should apply to any Certificate granted to TransCanada for the Alberta System.

27. Another condition of the Certificates granted to Enbridge dealing with the fair and consistent treatment of landowners was the establishment of a landowner complaints tracking system (NEB Condition 7). TransCanada should be required to implement such a system as a condition of any Certificate granted for the Alberta System.

28. Enbridge also committed to new pipeline abandonment-related language in its standard form easement agreement which is a condition of the Alberta Clipper and Southern Lights pipeline Certificates. Whereas under the Alberta Pipeline and regulations a company remains responsible for its pipeline after abandonment, and this obligation may be enforced by the provincial regulator, the NEB loses its jurisdiction over a pipeline once it makes an abandonment order in favour of a company (following a process in which landowners have no access to costs awards or funding to participate). In order to provide some degree of protection for landowners, the Board should impose the abandonment language from the Enbridge Settlement Agreement as a condition of any Certificate that it grants TransCanada for the Alberta System.

29. It should also be noted that TransCanada declined to provide AAPL and CAPLA with a copy of its Discontinuation or Abandonment of Pipelines Procedure in response to IR

10. In the absence of any information for landowners regarding the abandonment procedures employed by TransCanada, it is imperative that landowners be given the option of having abandoned pipelines removed from the ground where the company will no longer maintain the pipeline in its operating condition.

30. Finally, as TransCanada confirms in its response to AAPL/CAPLA IR 11, while many Alberta System landowners have easement agreements that provide for the payment of annual compensation in respect of the ongoing impacts of having pipelines on our land, none of TransCanada's own pipeline landowners with federally-regulated pipelines are entitled to similar annual compensation. In fact, as set out in the decision of the Federal Court in *Bue* v. *Alliance Pipeline Ltd.* attached hereto as **Appendix "D"**, annual compensation in form we have in our Alberta System contracts is not available in the *NEB Act* system.

31. In the future, should TransCanada choose to expand the Alberta System on our lands, we will no longer be entitled to annual payments that effectively compensate landowners for the ongoing impact of the operation of pipelines on our properties. This is another negative impact on landowners of the transfer of jurisdiction that is not being addressed by TransCanada. The NEB should make it a condition of any Certificate it grants to TransCanada for the Alberta System that landowners must be offered annual compensation in respect of any new facilities related to the Alberta System that compensates landowners for the ongoing impacts of pipeline operation and is indefinite in duration, of the nature of the annual compensation set out in the standard NOVA Gas agreements such as the form included in TransCanada's response to AAPL/CAPLA IR 4.

32. In this evidence, I have attempted to identify the implications of a change in jurisdiction of the TransCanada Alberta System for landowners. However, as noted above, TransCanada has declined to notify individual landowners of this proceeding, and has neglected to conduct a detailed comparison of provincial and federal regulatory regimes. There may be other negative impacts faced by Alberta System landowners as a result of TransCanada's application.

33. TransCanada should have consulted with landowners, and should have conducted a full investigation into the effects its transfer application will have on pipeline landowners if approved by the NEB. However, TransCanada did not do this, and its application is deficient. Given TransCanada's attitude regarding landowner concerns to this point, how can Alberta System landowners expect that TransCanada will address their concerns after it gets what it wants from the Board?