National Energy Board

Office national de l'énergie

File 3200-G49-1
18 October 2002

To All Parties to Hearing Order GH-4-2001

Hearing Order GH-4-2001 - Georgia Strait Crossing Pipeline Limited (GSX PL) - GSX Canada Pipeline Project

The Joint Review Panel (the Panel) received 15 motions asking the Panel to order GSX PL to answer outstanding information requests. In addition the Panel received 8 motions in relation to the setting of a date for the filing of intervenor evidence. On 26 September 2002, the Panel released its decisions in relation to these motions and advised at that time that reasons would be provided at a subsequent date. This letter sets out the Panel's reasons in relation to its decisions of 26 September 2002.

1.0 OUTSTANDING INFORMATION REQUESTS

By letter dated 27 June 2002, the Panel set a schedule for applications by intervenors to order the answers to over 100 questions contained in outstanding information requests (IRs). For reasons described in its correspondence of 12 July 2002, the Panel revised the schedule so that all motions were to be filed and served by 1 August 2002 and allowed all parties an opportunity to comment on all of the motions filed. The reply comments of the party filing the Notice of Motion were to be filed and served by 10 September 2002. This date was subsequently extended to accommodate parties who had not been served with the submissions of the Alberta Department of Energy. A list of the motions filed was provided in the Panel's correspondence of 26 September 2002 and will not be repeated here. As a result of this revised process, the Panel has had the benefit of the submissions of a number of parties on the issues to be determined by the Panel.

One of the primary issues of interest to the parties was the relevance of IRs related to the "purpose of", "need for" and "alternatives to" the proposed pipeline project. Another issue of interest was the relevance of questions related to the environmental effects of greenhouse gas emissions. These reasons provide the views of the Panel in relation to the relevance of IRs related to those issues. They also provide the views of the Panel on why no further response was required to other IRs.

Submissions of the Parties - "Alternatives to"

A number of parties argued that the Panel should require GSX PL to answer questions related to a broad range of alternatives to the proposed pipeline project, including "green" alternatives for the production of electricity such as solar, wind and tidal power. They submitted that these alternatives were relevant to the Panel's statutory mandate as the true purpose of the proposed pipeline project is to generate electricity. Others submitted that the relevance of this information should not be determined at this time but, rather, its relevance could be determined at a future date, once all the information is provided.

.../2

444 Seventh Avenue SW
Calgary, Alberta T2P 0X8

444, Septième Avenue S.-O.
Calgary (Alberta) T2P 0X8

Canada

Telephone/Téléphone : (403) 292-4800
Facsimile/Télécopieur : (403) 292-5503
http://www.neb-one.gc.ca

Another submitter suggested that the relevance of the outstanding questions was not the issue but, rather, their materiality should be considered.

Some suggested that the purposes of the *Canadian Environmental Assessment Act* (CEA Act) require the broad consideration of a project, including its environmental repercussions and alternatives. Similarly, they argued, there is a duty on the Panel under the *National Energy Board Act* (NEB Act) not to exclude evidence that might be relevant to the public interest. It was also pointed out that, from an economic perspective, without the need for electricity generation the GSX proposal would have no credible economic rationale. Some noted that the public statements of BC Hydro and GSX PL have created a legitimate expectation among the public that the Joint Panel Review will include a consideration of Vancouver Island's electricity demand and the retirement of part of the existing subsea cable system. It was also submitted that considerations around the price of electricity were necessary in order to assess the pipeline proposal in relation to its alternatives. Others submitted that there was an obligation to avoid or reduce interference with aboriginal rights under s. 35 of the *Constitution Act* which requires a broad and careful consideration of alternatives.

While acknowledging provincial jurisdiction over electricity generation, parties argued that a federal body making a decision within a proper sphere of federal jurisdiction may take into consideration matters of provincial jurisdiction. A number of intervenors submitted that they were not asking the Panel to conduct a wholesale review of provincial energy policy but merely to take provincial matters into consideration. One intervenor noted that there must, however, be rational limits to the Panel's review. The issue is where the line should be drawn. That intervenor went on to comment that the Panel should not allow the corporate proponent to use the corporate structure it has created as a vehicle to artificially limit the scope of the Panel's review.

Another intervenor took a different perspective and stated that the real question was whether the intervenors have established that the proposed pipeline project is so completely integrated with the issue of the supply of electricity to Vancouver Island that it becomes relevant to the Panel's consideration. That intervenor submitted that the test had been met with the result that an examination of electricity demand and alternative means of meeting that demand have become relevant under both the CEA Act and the NEB Act. It was also submitted that the only practical reason why the Minister of Environment would have added "alternatives to the project" to the Terms of Reference as a factor for consideration would have been to ensure that the Panel would consider alternative methods of meeting electricity needs on Vancouver Island.

Some parties, particularly the provincial intervenors, argued for a limited jurisdiction in relation to a consideration of alternatives to the proposed pipeline project. It was submitted that even if the Panel did consider alternative ways of providing electricity to Vancouver Island, it would have no jurisdiction to implement its recommendations. As well, it was submitted that it was constitutionally inappropriate for the federal government to use a narrow ground of federal jurisdiction to conduct a far-ranging inquiry into matters that are exclusively within provincial jurisdiction. The consideration of alternatives, it was submitted, should be limited to other ways in which gas could be transported to Vancouver Island. To consider anything further would mean that there was no reasonable limit placed on what the responsible authority in any given case would have to consider.

.../3

An intervenor suggested that the broad examination of alternatives would result in a re-scoping of the proposed pipeline project. It was submitted, with respect to environmental considerations, that the CEA Act defines the limitations on public interest under the NEB Act. GSX PL noted that receiving some of the evidence suggested by the parties would expand the proceeding from a proceeding about a pipeline into a review of British Columbia energy strategy. Such a review, it suggested, would have no utility.

Submissions of the Parties - Greenhouse Gas Emissions

Some parties asked far-ranging questions in relation to greenhouse gas (GHG) emissions. A number of them submitted that these questions were necessary to adequately assess and consider those emissions and their effects, including the effects on aboriginals and their rights. Some parties sought a national or international measurement framework for GHG emissions.

Views of the Panel

The Panel has decided that it would be helpful to the parties to provide some guidance at this time in relation to the matters that it considers to be relevant to the applications under consideration. As a result, these reasons will provide guidance in relation to the mandate of the Panel to consider alternatives to the proposed pipeline project and the environmental effects of GHG emissions. In addition, the Panel will outline the other criteria it used when deciding whether it would direct GSX PL to respond to an outstanding information request.

Alternatives to the GSX Canada Pipeline Project

Parties relied on the NEB Act, the CEA Act and s. 35 of the *Constitution Act* as a basis for considering a wide variety of alternatives to the proposed pipeline project. Each of these statutory bases will be considered in turn, commencing with the NEB Act.

Section 52 of the National Energy Board Act

The Panel has considered its mandate under the NEB Act in order to determine what questions related to alternatives to the applied-for project should be answered as relevant to a consideration of GSX PL's application for a certificate of public convenience and necessity. Pursuant to s. 52 of the NEB Act, the Panel shall have regard to:

> all considerations that appear to it to be relevant, and may have regard to:
>
> - the existence of markets, actual or potential;
> - the economic feasibility of the pipeline;
> - the financial responsibility and financial structure of the application...;
> - and any public interest that in the [Panel's] opinion may be affected by the granting or refusing of the application.

.../4

The determination to be made by the Panel is whether or not the pipeline is or will be required by the present and future public convenience and necessity. Any consideration under the NEB Act of the alternatives to the applied-for project would come within the ambit of s. 52.

The ability of the Panel to consider the environmental effects of the combustion of the gas to be transported by the proposed pipeline was argued by the Parties in April 2002. Notice of a constitutional question was served by the Province of British Columbia and both written and oral arguments were received. In its reasons set out in its 31 May 2002 letter, the Panel undertook an analysis of its constitutional authority to consider matters within provincial jurisdiction and found it had that ability pursuant to s. 52 as part of its consideration of both the benefits and the burdens that could result from a pipeline approval. As a result, the Panel found that it could consider the environmental effects of the emissions resulting from the combustion of the gas at the proposed electrical generation facility at Duke Point. It did not determine how much weight would be given to that evidence. The analysis found in those 31 May 2002 reasons is relevant to the issue before this Panel. The conclusion was that:

> [f]rom the case law it is clear that when determining whether a pipeline is in the public convenience and necessity the Panel must, *bona fide* and without a colourable purpose, decide what it sees as relevant to its determination. It may consider matters that are within provincial regulatory jurisdiction if it *bona fide* considers them to be relevant to its determination. So long as it avoids colourability, such as the "wholesale review" warned against in *Québec*,[1] taking provincial matters into consideration is likely constitutionally appropriate.

The Panel has considered the ramifications of undertaking an assessment of the alternatives to the proposed pipeline project that have been suggested by some of the parties. An analysis of the "green" energy alternatives, the development of demand side management, the development of coalbed methane on Vancouver Island, the development of hydro electric or other sources of electricity on the mainland, the refurbishment or replacement of part of the existing subsea cable system and the other alternatives unrelated to the transportation of gas that have been suggested through the course of this hearing process would all lead to this Panel undertaking an assessment of the energy strategy of the Province of British Columbia. It is this Panel's view that undertaking such a broad assessment and analysis under the NEB Act would be constitutionally inappropriate and would constitute the very thing warned against in the *Québec* case.

In the alternative, even if such a review were constitutionally appropriate, this Panel must consider whether or not such a review is relevant to its mandate under the NEB Act. What would the Panel do with this information? The decision that must be made by this Panel under the NEB Act is whether or not the GSX Canada Pipeline Project is in the public convenience and necessity. The Panel may, subject to Governor in Council approval, issue a s. 52 certificate with appropriate terms and conditions or refuse to issue a certificate. There is no requirement under the legislation for the Panel to undertake a wide-ranging examination of possible alternatives to a project that will use the gas to be transported by the applied-for pipeline project. Apart from denying the project, the Panel has no authority to make a decision with respect to any of the alternatives proposed.

.../5

[1] *Québec (Attorney General)* v. *Canada (National Energy Board)*, [1994] 1 S.C.R. 159.

As the mandate of the National Energy Board (the Board) is to determine whether a project meets the public convenience and necessity test, the focus of the Board's examination has been on the benefits and burdens of an applied-for project, including its economic viability and robustness. Historically, in making such a determination, the Board has examined the need for a proposed project. In the course of considering the justification or need for a project, consideration has sometimes been given to alternatives related to the proposed pipeline project. This has involved, for example, a consideration of alternatives related to routing options and construction, engineering, operational and environmental techniques to mitigate impacts of the applied-for project.

The provision and use of energy is a part of virtually every new industrial proposal. However, this cannot mean that it would be appropriate for the regulator of the transportation system that will deliver the energy to regulate and control all proposed industrial development; such matters, the Panel notes, are usually subject to provincial and local control. By way of example, if the proposed pipeline project were an interprovincial gas pipeline that a proponent proposed to construct to bring gas to its plant that produces fertilizer for the local market, the Panel cannot direct the proponent to produce fertilizer at another location and ship it to the local market; or to reduce the local demand for fertilizer; or to develop and expand new technology for fertilizer production. This type of investigation would require the proponent to produce information on speculative projects that would not be relevant to the decision to be made by the Panel and are outside its mandate.

As the Panel noted in its letter of 31 May 2002, a consideration of the burdens and benefits of the applied-for project can include a consideration of relevant matters within provincial jurisdiction. That is very different from what some intervenors seek to include as relevant with their questions: the benefits and burdens of possible ways to reduce or meet the demand for electricity on Vancouver Island. There is a significant difference between the consideration of a specific matter clearly connected to the application before the Panel and an examination of speculative alternatives to the end use of the gas that would result in a review by this Panel of the energy strategy of the province. A consideration of new or different ways to generate or transport electricity to Vancouver Island, including coalbed methane; solar, wind, tidal or wave power; or the subsea cable system, is simply not relevant to the matters that must be considered by this Panel under the NEB Act and will not inform its decision. Furthermore, the time and effort required to undertake such a speculative exercise cannot be justified in light of this Panel's mandate. If this Panel should find that the proposed pipeline project is not in the public convenience and necessity, it remains to the Proponent to determine what, if anything, it will then do.

This does not mean that in the circumstances of this case the Panel will not carefully examine the economic feasibility of the proposed pipeline project. Historically the Board has assessed the economic feasibility of a gas pipeline facility by determining the likelihood of the facilities being used at a reasonable level over their economic life and the likelihood of the demand charges being paid. In looking at economic feasibility in general, the Board has been concerned with the question of who is at risk if a pipeline is not used and useful over its economic life. In many cases evidence that shipper contracts exist for some or most of the capacity on a proposed pipeline has been seen as evidence of economic feasibility.

In the case of the proposed pipeline project, however, the owner, shipper and one of its larger customers are inter-related. In this case the pipeline is 50% owned by BC Hydro, the sole shipper (Powerex) is 100% owned by BC Hydro and one of the generation facilities is 100% owned by BC Hydro.

.../6

Furthermore, 100% of the electricity output of ICP is contracted to BC Hydro. In light of these inter-relationships and the fact that the generation facilities form the bulk of the demand for the gas proposed to be transported, the Panel has determined that a more wide-ranging inquiry into the economic justification for the proposed pipeline project is relevant to its ultimate determination under s. 52. Therefore, the Panel has decided to require a response to questions that seek to determine the continued viability of the generation facilities that will be the source of demand for most of the gas to be transported by the proposed pipeline project.

Canadian Environmental Assessment Act

The Panel turns next to the consideration of "alternatives to" under the CEA Act. The Agreement between the National Energy Board and the Minister of the Environment Concerning Review of the GSX Canada Pipeline Project Terms of Reference provide, in Part II, under "Factors to be Considered During Review", that the Panel consider the "purpose of" the project, the "need for" the project and the "alternatives to" the project. The latter two factors are not mandatory considerations under s. 16(1) of the CEA Act but can be included at the discretion of the Minister of the Environment after consultation with the responsible authorities.

In October 1998 the Canadian Environmental Assessment Agency released an Operational Policy Statement (OPS-EPO/2-1998) addressing the factors "need for", "purpose of", "alternatives to" and "alternative means" under the CEA Act. While the Panel recognizes that this is a policy document and is not binding upon it, it was referred to by a number of parties and the Panel found its guidance helpful. The Operational Policy Statement notes that the guidance is provided on the basis that environmental assessment is a decision-making planning tool rather than a project impact assessment tool. It states:

> The approach links considerations of "need for" the project, "purpose of" the project, "alternatives to" the project and "alternative means" of carrying out the project, in the early stages of project planning, and before irrevocable decisions on the project are made. In this way, the RA [Responsible Authority] and/or Proponent will be in a better position to define potential solutions to a problem, and to establish the viability of alternatives. **Importantly, their consideration will also help to establish the conditions under which certain effects may or may not be justified under the circumstances, should such a determination be subsequently required.** [emphasis added]

The Operational Policy Statement goes on to define the "need for" the project as the "problem or opportunity the project is intending to solve or satisfy." It establishes the "fundamental rationale for the project". The "purpose of" the project is defined as "what is to be achieved by carrying out the project". Both of these provide the context for the consideration of alternatives. "Alternatives to" the project are defined as "functionally different ways to meet the project need and achieve the project purpose".

Many parties argued that the "need for" and the "purpose of" the project were to address the demand for more electricity on Vancouver Island. Others took the view that the "need for" and "purpose of" were tied to the demand for more gas transportation to Vancouver Island. In light of the possible definitions of "need for" and "purpose of", the alternatives to be considered can range from other ways to meet the

.../7

increased demand for electricity on Vancouver Island to other ways to transport gas to Vancouver Island.

The place to start, in the Panel's view, is with the project that is subject to assessment. The Panel considered and determined what constituted the "project" in its letter of 31 May 2002 at pages 13 to 16. The Panel has already made it clear that the project is the pipeline, a transportation undertaking that will move gas from one point to another, i.e. from an interconnection with the United States pipeline to an interconnection with the provincial pipeline. At page 18 the Panel stated:

> The scope of the project does not include the generation facilities nor any other facilities for the combustion of gas.

The gas transportation undertaking will primarily provide fuel for two electricity generating facilities: an existing generation facility at Campbell River (ICP) and a proposed generation facility at Duke Point. In addition the pipeline will meet the increasing demand for gas on Vancouver Island. In light of the project that is before this Panel for its consideration, an international gas transportation undertaking, the "need for" and "purpose of" that project relate to the increasing demand for gas on Vancouver Island, most of which demand comes from the aforementioned electrical generation facilities.

As noted in the Operational Policy Statement, the "need for" and "purpose of" provide the context for the determination of "alternatives to" the project. In most situations the "alternatives to" a transportation undertaking would be different routes or methods of transporting the commodity in question. For example, an alternative to the movement of a good by railway could be its transportation by a pipeline or by trucking on new or existing roadways. In the case of a gas pipeline, due to the nature of the commodity, alternatives to the transportation of gas by pipeline are somewhat circumscribed. Practically, alternatives considered typically entail different routes for the proposed pipeline project or, in some circumstances, the movement of liquified natural gas (LNG) or compressed natural gas (CNG) by other transportation options such as tanker, truck or railway car. GSX PL has provided information on the kinds of alternatives that are usually considered in relation to a transportation undertaking of this type.

The Panel has considered the submissions of a number of parties that, on the facts in this case, the consideration of "alternatives to" under the CEA Act should be expanded to include other ways of meeting or reducing the demand for electricity on Vancouver Island. These would include demand side management, "green" generation alternatives and methods to transmit electricity to Vancouver Island from the mainland.

In the Panel's view, it is useful to first consider the rationale for including in an environmental assessment a consideration of the alternatives to a proposed project. As the Panel has noted in the past, the CEA Act does not require it to select the best alternative to the applied-for project. Rather, the CEA Act requires a consideration of alternatives so that solutions to problems or obstacles can be discussed. The provision of information in relation to the different alternatives to the transportation of gas by the proposed pipeline project, for example other possible pipeline routes, should be sufficient to allow this to occur.

However, it is also important that the record reflect a consideration of alternatives to the applied-for project so that appropriate decisions can be made under s. 37 of the CEA Act. After this Panel

.../8

completes the Joint Panel report, it will be sent to the Minister of the Environment and a response to the report will be prepared by the responsible authorities and must be approved by the Governor in Council. If it is found by this Panel that the project is likely to cause significant adverse environmental effects, consideration may need to be given to the question of whether those effects can be justified in the circumstances. A consideration of that issue could be included in the responsible authorities' response to the Joint Panel Report and would be subject to approval by the Governor in Council.[2] To ensure that this can occur, information in relation to the "purpose of", "need for" and "alternatives to" the project should be on the record and available for consideration.

Taking into consideration the limited purpose under the CEA Act for the examination of "alternatives to" and taking into account the "purpose of" and "need for" the proposed project, the Panel has determined that, in the particular and unique circumstances of this case, the consideration of "alternatives to" the project should not be limited to alternatives related to the transportation of gas to Vancouver Island. This will ensure that there is sufficient information available on the record to make the decision required under s. 37 if there is a likelihood of significant adverse environmental effects of the proposed pipeline project. The Panel notes that it is left to the responsible authorities and the Governor in Council to decide what, if any, use they will make of this information. The Panel is the body that can ensure that there is sufficient information available on the record to assist those who may need to determine if the project is "justified in the circumstances". On this basis what this Panel must decide is which of the many suggested "alternatives to" merit exploration.

It has been noted by the Panel in its letter of 31 May 2002 that there is an overall plan by BC Hydro, through various corporate relationships and partnerships with others, to construct and operate the proposed pipeline project, to purchase gas, and to transport and to use it to generate electricity which electricity it will then sell. At the same time it intends to retire a portion of the existing subsea cable system which provides electricity to Vancouver Island. This planned retirement is referred to in the materials filed by GSX PL as part of its application.[3] Questions have been asked by some parties about the possibility of refurbishing or replacing the portion of the existing cable system to be retired.

In light of the corporate interrelationships that link the applied-for project to the existing and proposed electricity generation facilities and the use by the Applicant of the planned retirement of a portion of the existing subsea cable system as a justification for the proposed project, and in order to ensure that sufficient information is on the record to enable decisions to be taken pursuant to s. 37 of the CEA Act, the Panel will consider the refurbishment or replacement of the existing subsea cable system as an alternative to the applied-for project. As a result, the Panel has decided that GSX PL will be required to answer information requests related to the consideration of the subsea cable system "alternative to" the applied-for project. However, in light of the limited purpose for which the "alternatives to" will be explored, the Panel will not examine the subsea cable system to the same degree as the applied-for project.

.../9

[2]Pursuant to s. 5(2)(b)(ii) of the CEA Act the Board is not a responsible authority in this case for the purposes of s. 37.

[3]See GSX Project Communication Materials and Project Notifications, Volume III, Appendix B.

The other "alternatives to" suggested by parties for consideration, such as demand side management and wind, tidal, coal bed methane, solar or other developing technologies are not alternatives that can be usefully explored in light of the nature of the project before this Panel and its mandate. Furthermore, in light of the limited purpose for which "alternatives to" will be examined, the effort required to adequately explore these more speculative alternatives cannot be justified. It would entail, in essence, an exploration and examination of British Columbia energy policy. Such a review is not within the mandate of this Panel and, even for the limited purpose described here, may be constitutionally inappropriate. Furthermore, such an examination is, by indirect means, an expansion of the scope of the terms of reference, which terms were set by the Minister of Environment. The Minister set the scope of the project in the Terms of Reference and did not include the electrical generation facilities or the combustion of the gas to be transported.

The Constitution Act

The final basis argued for allowing questions tied to a broad consideration of "alternatives to" the applied-for project relates to s. 35 of the *Constitution Act*. The disallowed IRs posed by the Cowichan Tribes and the Sencot'en Alliance relate to purpose, need and alternatives to the project. With the exception of a refurbishment or replacement of the existing subsea cable system, the Panel has determined that alternatives that are unrelated to the transportation of gas are not relevant or are not within its mandate to consider. The parties to the consultations may find the decision of the Panel to be of assistance in setting the parameters of the consultation, but the Panel notes that the scope of consultations between the Crown and Aboriginal groups is a matter for those participants, not the Panel, to define. The participants may decide to discuss or resolve other matters in consultations but the Panel will only admit evidence that is relevant to the application before it. Evidence must therefore pertain to the applied-for project and mitigation or accommodation related to the project. Evidence that is not relevant to the matter before the Panel will not be admitted to the record.

Greenhouse Gas Emissions

A number of parties posed questions in relation to GHG emissions. Questions related to localized impacts as a result of climate change and global warming attributed to the project, GHG prevention possibilities from alternatives to the project, cumulative effects resulting from GHG emissions, and prices for GHG offsets. Some parties sought a broad-ranging examination of these matters and the potential effects. The Panel considers it helpful to provide some guidance on matters it considers relevant to this issue.

In its letter of 31 May 2002, the Panel determined that, under the NEB Act, it would consider the environmental effects of the combustion of the gas to be burned at the proposed Duke Point generation facility. As the burning of natural gas results in carbon dioxide, a GHG, consideration of the environmental effects of this emission should occur as part of the consideration of the environmental effects of the emissions from combustion. However, in the Panel's view, this does not realistically lead to a requirement that the project proponent undertake comparisons that would be of little use such as world-wide or continent-wide comparisons.

.../10

In that GHG emissions are a global issue, many sources from around the world contribute to these emissions. To predict environmental change from a single project of this kind on a global scale and determine its significance, would be impractical and of little utility. However, the use of offsets or other mitigative measures to effectively reduce the overall GHG emissions from a project can be a more tangible method of mitigating or managing the effects of emissions once the offsets are realized. GSX PL is required to establish reasonable spatial and temporal boundaries for its environmental and cumulative effects assessment. It must consider cumulative effects, which can include a consideration of the effects of other projects if those effects act cumulatively with the effects from the emissions being considered by the Panel within those spatial and temporal boundaries. However, carrying out a project-specific cumulative effects assessment for GHG emissions would necessitate a consideration of all other existing and planned projects that produce global emissions. Considering the scale, cost, resources, timing, availability of data, and the questionable conclusiveness of global scale modeling, it is arguable whether any benefits could be realized by undertaking these types of assessments on a project-specific basis. Since global modeling is not feasible in this instance, the imposition of reasonable spatial and temporal boundaries can be used to provide a context for the consideration of GHG emissions from a point source.

A number of questions asked by intervenors went beyond what the Panel views as relevant to its mandate and exceeded what can reasonably be expected from the Proponent. The questions related to GHG emissions were examined with this framework in mind.

Summary

Under the CEA Act, the Panel has allowed questions relating to the refurbishment or replacement of the existing subsea cable system. This "alternative to" the applied-for project will be considered for the purpose of ensuring there is information on the record that could be used, if necessary, to ascertain under s. 37 of the CEA Act whether the project is justified in the circumstances. Alternatives that are not related to the transportation of gas, but to the transmission or generation of electricity, will not be considered under the NEB Act as such an examination is both constitutionally inappropriate and not relevant to the mandate of this Panel. Questions in relation to GHG emissions were allowed where they were found to be relevant to its consideration of emissions from the applied-for project and the proposed Duke Point electrical generation facility.

The Panel has provided the above guidance to parties in relation to "need for", "purpose of", and "alternatives to" the proposed pipeline project. It has also provided guidance on the scope of the assessment of the environmental effects of GHG emissions. It was within this framework that the Panel determined which IRs were relevant and should be answered by GSX PL. The Panel notes that a further response was not required to a number of IRs for other reasons. In some instances the question was unclear to the extent that a response could not reasonably be expected. In other instances the level of detail sought by an intervenor was so extensive as to be either irrelevant or unduly burdensome. In relation to some outstanding IRs, there was no apparent relevance of the information sought or its provision would require the expenditure of a degree of effort, money or time that could not be justified by its very marginal connection to the issues under consideration in this hearing. In other cases, GSX PL had adequately responded to the question posed or the question was so broad that it became irrelevant.

.../11

2.0 FILING OF INTERVENOR EVIDENCE

The Panel received motions to delay the date for the filing of evidence from the Cowichan Tribes, the Sencot'en Alliance, the GSX Concerned Citizens Coalition (GSXCCC), Mairi McLennan, and Saturna Island Community Club (SICC). On 12 July 2002, the Panel stated that it would set a date in late September or early October 2002 for the filing of intervenor evidence unless it was persuaded by the arguments of parties that a later date is appropriate. The Panel also advised intervenors to continue to prepare their evidence.

The Cowichan Tribes and Sencot'en Alliance Motions

On 1 August 2002 the Panel received a motion from the Cowichan Tribes to adjourn the deadline for filing their intervenor evidence until aboriginal consultation has been satisfactorily concluded. The Cowichan Tribes submitted that substantial accommodation could, and very likely will, result in changes to the project and changes to the nature of the Cowichan Tribes' concerns. The Cowichan Tribes submitted that it cannot prepare its evidence until the Crown consultation process is complete, or has very substantially progressed, and that it cannot reasonably estimate the time it will take to properly prepare its written evidence. As such, the Cowichan Tribes argued that it is not appropriate or reasonable to reschedule the date for the filing of evidence but that, if a date must be set, it should not be until February 2003.

On 4 July 2002 the Sencot'en Alliance submitted a letter requesting that a date be set for the filing of their evidence only after the consultation process has been agreed to, consultations are well underway, and the parties have agreed to a realistic time frame in which consultation will be completed. The Panel, by way of a letter dated 12 July 2002, accepted the letter as a motion. On 1 August 2002 the Sencot'en Alliance filed a Supplemental Notice of Motion providing additional grounds in support of its motion. The Sencot'en Alliance submitted in the alternative that the Panel could set a date far enough in the future to allow consultations to be well underway and suggested the end of November 2002.

The GSX Concerned Citizens Coalition

On 9 July 2002, the Panel received a motion in letter format from GSXCCC to suspend the timetable for the review until its IRs were answered. This motion supplemented GSXCCC's 25 June 2002 letter to the Panel and was followed by GSXCCC's 1 August 2002 submissions. GSXCCC submitted that the information it sought is extensive and technical, and may be difficult to analyze. Further, GSXCCC submitted that the information sought is critical to the evidence it intends to file. GSXCCC proposed that, once aboriginal consultation is complete, the date for filing intervenors' evidence should be six weeks after answers to IRs are filed.

.../12

Mairi McLennan

On 8 July 2002, the Panel received a motion from Mairi McLennan asking that the Panel defer the deadline for the filing of intervenors' evidence by at least two months plus any further time lost while the Panel addresses the motions concerning IRs. In her 1 August 2002 submissions, Ms. McLennan submits that the earliest deadline should be 15 November 2002, preferably the end of November, provided that aboriginal consultation is adequate and concerns specific to the Marine Coalition are resolved.

Saturna Island Community Club

By letter dated 26 June 2002, the Panel received a letter - which the Panel accepted as a motion - from SICC asking that the Panel postpone the submission of written evidence with respect to the marine environment until after the marine conference. SICC prefers that the marine conference take place in late October or in November, but does not indicate a specific date for the filing of written evidence concerning the marine environment.

GSX PL

By letter dated 29 August 2002, GSX PL replied to these motions, submitting that intervenors have had ample time to assess their interests and study their concerns. GSX PL noted that the application was filed in April 2001 and much other evidence was filed in the same year. Additional evidence and responses to IRs were filed in March and June, 2002, respectively. GSX PL is of the view that the duration and extent of the present record cannot give reasonable cause for further delay in the filing of intervenors' evidence on issues relevant to this proceeding. GSX PL submitted that the intervenors have not made persuasive arguments to cause the Panel to further delay the filing of intervenor evidence.

Views of the Panel

In the procedure established for this hearing, most of the evidence is filed in writing in advance of the hearing. However, it is important to note that pre-filed evidence does not necessarily constitute a party's final position on the application. Should circumstances change, intervenors have the ability to ask the Panel for leave to withdraw or amend their evidence. In the hearing, parties have the opportunity to cross-examine the Applicant, answer questions on their own evidence and raise concerns about the project or oppose it outright in final argument. All of the evidence, including pre-hearing filings and all of the evidence in the hearing itself, is considered by the Panel.

The Cowichan Tribes and Sencot'en Alliance can file their evidence based on their current positions in regard to the project. Parties to the consultations may decide that they wish to continue their discussions while the hearing is ongoing or even after the decision of the Panel has been rendered. If things change as a result of consultations, their evidence can be withdrawn or amended, with leave of the Panel. If the consultations result in changes to the project itself, it will be up to GSX PL to amend its application.

.../13

In the Directions on Procedure, the date for the filing of intervenor evidence was initially set at 9 May 2002. The Panel issued a revised timetable on 31 May 2002 and, at that time, the date for the filing of evidence was set as 8 August 2002. On 12 July 2002, the Panel suspended the date for the filing of evidence in order to consider the motions regarding the date for the filing of evidence. The Panel has considered the submissions of the Parties and has decided that the deadline for the filing of intervenor evidence will be 28 November 2002. The Panel is of the view that the date set for the filing of the evidence allows sufficient time for these parties to prepare their evidence. The new schedule, which was attached to the Panel's 26 September 2002 letter, is attached to this letter.

Yours truly,

Michel L. Mantha
Secretary to the Joint Review Panel
GSX Canada Pipeline Project

Attachment