CANADIAN ASSOCIATION
OF PETROLEUM PRODUCERS

February 2, 2006

Ms. Martine Dagenais
Competition Bureau
Place du Portage 1
50 Victoria Street
Gatineau, Québec K1A 0C9

Dear Ms. Martine:

Re: Competition Bureau Canada
Consultation on Draft "Technical Bulletin on "Regulated" Conduct" -
Submission of the Canadian Association of Petroleum Producers

The Canadian Association of Petroleum Producers hereby submits comments on the draft "Technical Bulletin on "Regulated" Conduct" in the attached document.

Yours sincerely,

Nikol J. Schultz
Vice President, Regulatory and Transportation Policy,
and General Counsel

Attachment

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Competition Bureau Canada

Consultation on Draft "Technical Bulletin on "Regulated" Conduct"

Submission of the Canadian Association of Petroleum Producers

Introduction

The Canadian Association of Petroleum Producers (CAPP) is pleased to have this opportunity to comment on this matter. The draft Technical Bulletin is plainly the product of much deep and good thought. This is, of course, appropriate for a technical bulletin. No doubt, others of a like inclination will engage at that level of depth. The approach CAPP will take in these comments is at a broader level.

There are essentially two main thoughts CAPP wishes to leave with the Bureau.

- First, there is no recognition in the draft of the basic right in a free society to make representations to government, to associate for that purpose, and for those involved with regulation to collaborate. This needs to be addressed both in regard to government generally and in the context of economic regulation in particular.
- Second, the draft places the *Competition Act* at its centre and is unnecessarily oblique in its treatment of a central matter, namely, regulation itself. The essential Constitutional reality, and the daily reality for many Canadian businesses, is that a significant amount of regulation does have the effect of restricting competition, it does demand compliance notwithstanding such restriction, and notwithstanding that effect it is fully lawful. Such restrictions are simply the consequence of governments – whether federal or provincial – deciding to regulate a matter within their legislative authority. The starting point from this perspective is the presence and nature of regulation. It would, therefore, be helpful to speak more clearly and more centrally on what regulation actually involves and why compliance with a scheme of regulation – provincial or federal – that restricts competition is as a general rule unequivocally lawful.

Context of CAPP's Comments

CAPP is an association representing oil and natural gas producers – the companies in the upstream that explore and produce. CAPP has some 150 producer members, from the largest to the smallest, who produce over 98% of Canada's oil and natural gas. CAPP also has a large number of associate members who provide services to the industry.

The upstream oil and natural gas industry is intensely competitive as the Bureau itself is aware from the many mergers and acquisitions that come to the Bureau's attention (a fact that has led CAPP in the past to question the need for and cost of the present level of merger notification and review).

The upstream oil and natural gas industry is, in regard to its exploration and production activities, regulated from cradle to grave. Contact with government is a daily occurrence across a range of issues. Consultation initiated by government on a host of issues, including this consultation by the Bureau, is also a daily occurrence.

Oil and natural gas as commodities trade in free, competitive markets. This is something of which the Bureau is aware from its involvement in regulatory proceeding to create frameworks compatible with the deregulation of natural gas pricing and trading.

Oil and natural gas move to markets by means of pipelines that are for the most part subject to active regulation. The Bureau has recognized and relied on the presence and nature of regulation by, for example, the National Energy Board (NEB) and Alberta Energy and Utilities Board (AEUB) when major natural gas pipelines such as TCPL and NOVA have merged.

When governments want to hear from the oil and gas industry or when industry wants to communicate a view to government, CAPP provides the industry voice. When regulated pipelines seek input on their regulated facilities, services, and rates, CAPP provides the industry voice.

CAPP exists as it does because of government and government regulation. Individual companies are of course free to speak for themselves on any matter and frequently do so. However, governments and regulators, as well as regulated pipelines, commonly seek the industry view and so CAPP is organized to provide that industry voice.

Hence there are two basic points that are fundamental for many people, including CAPP, who are engaged in governmental and regulatory processes.

- Making representations to government, including the various departments, branches, and agencies of government, and associating for that purpose is entirely proper and also consistent with competition law.
- When the decision, for example, on pipeline facilities, services, and rates rests with a regulator, such as the NEB and the AEUB, then it is also entirely proper and also consistent with competition law to make representations, and to associate for the purpose of making representations, to the regulator and also to the regulated entity, in this example the pipeline, in regard to those regulated decisions having regard to the objects and purposes of the regulatory legislation.

In addition, CAPP members, like many Canadian businesses, are subject to and comply with many laws and orders of government bodies both federal and provincial. In some cases, those federal and provincial laws and orders do restrict competition. Those laws and orders are in general unquestionably within the competence of the relevant government. The validity of those laws and orders rests on the legislative authority to regulate in the area and the intention to exercise that authority. Those laws and orders must be and will be complied with. The draft should clearly recognize this simple Canadian Constitutional reality and reality of life for so many Canadian businesses.

The Right to Make Representations to Government and to Associate for that Purpose

The draft Technical Bulletin is silent on the basic right in a free society to make representations to government and to associate for that purpose. There is nothing in the *Competition Act* that has ever been thought to annul that right whether pre- or post-*Charter*. However, given the fact that the present draft finds it necessary to put parentheses around the word 'regulated' as if regulation was some unusual or questionable activity but, more importantly, given the very tentative tone of much of what is in the draft and also given that some of that language is directed to governments themselves (or at least the people appointed for the purpose of governing), this basic right should be explicitly affirmed.

It may be noted that this basic aspect of the relationship of the governed to those who govern in a free society is reflected in the role of the Commissioner under the *Competition Act* as an advocate of competition in regulatory proceedings. The Commissioner is in fact an active participant in proceedings across a wide range of government functions from the parliamentary to the regulatory tribunal. In those same proceedings, one finds individual persons as well as associations. One also finds, as the Bureau knows from its own advocacy activities, that the governmental body itself actively seeks not only the views of interested persons but also encourages and welcomes individual interests to form associations of one kind or another and so speak with a single voice. Both the governments that invite this and those who associate to speak to government are acting in an entirely proper manner and are also acting consistent with competition laws.

There could be a situation where conduct becomes unlawful by virtue of the pursuit of an unlawful purpose by means that would otherwise be lawful (as in the sham exception to *Noerr-Pennington* in US anti-trust doctrine). However, the possibility of exceptions to a rule and the rarity of such cases in fact do not justify the highly tentative character of much of what is in the technical bulletin and the complete silence on a fundamental right. A clear affirmation of this right should be contained in the Technical Bulletin so that people can proceed in confidence that the Bureau does not harbour any doubts on the subject.

Regulation and the Right to Make Representations to Regulators and to the Regulated Company and to Associate for that Purpose

Regulation occurs across multiple spectra: environmental, health, safety, land access, land use, acquisition of resource rights, resource access, resource development, fiscal regimes, consumer protection, etc. All have implications for markets if only though the cost of compliance with the law. The comments above on the right to make representations to government and to associate for that purpose cover much of what needs to be said for the purpose of the draft Technical Bulletin.

The specific focus of the comments in this section is on economic regulation such as the regulation of facilities, services, and rates by pipelines. It is in part a subset of the above point but has the added dimension that making representations to regulated entities, for example, pipelines in respect of regulated activities is an element of the regulatory dynamic. Sound regulatory outcomes depend on good communication and dialogue among the pipeline and its stakeholders. This is in fact encouraged by regulators.

It is the regulated pipelines that decide in the first instance whether or not to build facilities, what services to provide, what terms of service to establish, and what rates to charge. This is, of course, subject to the regulator approving what the pipeline requests. The regulated pipelines need stakeholder input and stakeholders need to have input to the pipelines decisions on maters that are subject to regulatory scrutiny.

For much the same reason that regulators seek representations from interested persons and encourage individual interests to coalesce into associations, regulated pipelines also seek input and associations contribute to that dialogue. The objective is the effective development of sound regulated outcomes with the regulated pipeline having the authority to propose and the regulator having the authority to disallow or approve.

There is also a right involved, namely, the right to make representations to the regulator and the duty of the regulator to seek representations before making decisions. The dialogue that occurs between the regulated pipelines and their stakeholders is supported by this legal right. The right to be heard before the regulator provides a powerful impetus for the regulated pipeline and its stakeholders to work out solutions to be presented to the regulator before the formal regulatory process is engaged.

CAPP understands that the Bureau has not had enforcement concerns with the approach to regulation of pipelines by the NEB or the AEUB to pick two agencies by way of example only. CAPP understands that the Bureau has had concerns with self-governing associations when they have, for example, strayed from their proper statutory purpose and objectives. CAPP also understands that what can be said to be regulated and what can be said to be unregulated is complicated when government seeks to create the conditions for competition as for example in the telephone industry or the electricity business. The latter hybrid competition by regulation has led the Bureau to memoranda of understanding with the CRTC and the OEB. However, there are still clear cut examples of regulation that do not raise the concerns that have arisen with other forms of regulation. There is a passing, although somewhat tentative, acknowledgement of this in the draft Technical Bulletin.

The Bureau has not been shy in the past in acknowledging that the classic form of regulation by active regulators such as the NEB and AEUB does not raise competition enforcement concerns. The Bureau has acknowledged and relied on the presence of these active regulators when addressing the TCPL and NOVA merger. The draft Technical Bulletin should not be so tentative its approach. A clearer recognition of this basic reality would be helpful.

Governments, in the Exercise of their Various Areas of Legislative Authority, may Act in a Manner that has the Effect of Restricting Competition and Compliance with Such Regulation is Lawful

There is a good reason why the Bureau has had a high comfort level with, for example, the NEB or AEUB type of regulation of pipelines. In both cases government – federal in one case and provincial in the other – has chosen to actively regulate a matter, pipelines, within their legislative authority.

The approach taken by each government requires regulatory approval of facilities to provide service, of the provision and terms of services, and of the rates to be charged for services. Freedom of action by the regulated company is tightly constrained. The pipeline is not free to regulate itself. Nor does the pipeline have the freedom of a market participant within a light or loose regulatory framework (but if it did then the point being made here might not hold).

The *Competition Act* relates to competition. Freedom is the essence of competition. Competition is about individual actors freely interacting. When, because of regulation, that freedom does not exist in any significant way, the effect is that competition has been constrained by government action. The *Competition Act* has no meaning in that state of affairs and the Bureau cannot have enforcement concerns. This is so regardless of whether the regulatory legislation is provincial or federal. It is so regardless of whether or not anyone in government or elsewhere actually paid any attention to the *Competition Act* when crafting the scheme of regulation.

The issue goes beyond reading the words of one statute, say the *Competition Act*, in light of the words in another statute, say the *NEB Act* or the *AEUB Act*, to interpret the intent. The issue at its most basic involves consideration of the authority to regulate and the effect regulation has on competition.

No case has ever suggested as a general rule that governments – whether federal or provincial – cannot legislate in a manner that by intention or effect restricts competition in areas of their legislative competence. Both the federal and provincial governments can and do lawfully restrict competition as an incident of the exercise of their various legislative powers. This legislative authority does not require for its exercise explicit words that reference the *Competition Act*. Nor does it require explicit permission under the *Competition Act*. No one in the legislative process need actually have even thought about the *Competition Act*. They need only have the authority in the subject matter and have decided to exercise that authority. Legislation authorizing regulation of prices, services, market entry, and many other such things long predates the *Competition Act* and predates as well modern economic theories on the utility of such regulation. Laws of this kind have existed since at least Roman times. (The point here to be clear is a purely legal point and not an argument for unneeded regulation.)

The possibility that a regulator such as the NEB or the AEUB might exceed its authority by approving a late payment charge in a regulated tariff that is at a criminal rate under the

Criminal Code does not in any way change the fundamental point. The concern with the *Garland* case is overstated. In regard to that case specifically, it may be noted that usury laws have a very long history. The *Constitution* also makes *Interest* a subject of federal authority. By contrast competition is not a listed head of legislative authority. *Garland* does not elevate the *Competition Act* to Constitutional status. In addition, if one turns the telescope around and looks from the end that rests on federal criminal law power, the focus is narrow in the grand scheme of legislative powers. It has long been settled that the criminal law power must be read, like any other power such a trade and commerce, in light of the complete set of legislative powers assigned to the federal and provincial governments. Hence the emphasis in the present submission on the simple reality that regulation finds its authority in the various subject matters assigned by the *Constitution* to the various governments and as an incident of the exercise of that authority regulation may by design or effect restrict competition.

The type of economic regulation engaged in by, for example the NEB or the AEUB, is of unquestionable validity and simply does not raise competition enforcement concerns. Where there is no significant scope for the freedom of action of a market participant in a free and open competitive market there can be no competition enforcement concerns. Freedom of action is the essence of competition. When freedom is constrained by government regulation, competition is constrained in like manner.

Of course if the legislature, federal or provincial, strays beyond its proper area of legislative competence or if the regulator strays beyond its proper legislative objects or if those involved in the regulatory process stray beyond the bounds of the regulatory forum, then the situation changes and the *Competition Act* may come into play. However, it is the presence and nature of regulation that is central in defining the boundary.

The general rule is that regulation and the compliance by people with regulation is unequivocally lawful. This is the simple Canadian Constitutional reality and the unavoidable reality for numerous Canadian businesses every day of every year. It should be made clear as a central point in the draft.

Conclusion

In conclusion, CAPP submits that the draft Technical Bulletin should:

- Recognize the basic right in a free society to make representations to government, to associate for that purpose, and for those involved with regulation to collaborate.
- Unequivocally acknowledge that regulation, whether federal or provincial, and compliance with regulatory laws and orders is, in general, lawful notwithstanding that the exercise of such legislative authority has the effect of restricting competition.