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Our Matter Number: 1119021

Joint Review Panel – Enbridge Northern Gateway Project
National Energy Board
444 – 7th Avenue SW, 2nd Floor Mailroom
Calgary, AB T2P 0X8

Attention: Ms. Anne-Marie Erickson,
Secretary to the Joint Review Panel

Dear Ms. Erickson:

Re: Northern Gateway Pipeline Project Application (the "Application")
File No. 158084-281
Northern Gateway Submission dated November 26, 2010

We are writing on behalf of Kinder Morgan Canada Inc. ("Kinder Morgan") in response to Northern Gateway Pipelines Limited Partnership's ("Northern Gateway") submission dated November 26, 2010.

Introduction

Kinder Morgan notes that Northern Gateway, under the heading of an "Update on Commercial Discussions" has provided a response to Kinder Morgan's submission of September 8, 2010. Northern Gateway's "Update" appears to indicate no change in circumstances with respect to commercial discussions, including the execution of any form of transportation agreement – precedent or final – justifying the underlying need for the applied-for facilities.

The purpose of Northern Gateway's submission appears to be an attempt to supplement its October 27, 2010 submission to the Panel. In that response, Northern Gateway addressed Kinder Morgan's two requests of the Panel to defer further consideration of the Application. Northern Gateway's October submission was made in accordance with the Panel's Procedural Direction dated July 5, 2010.

In respect of its most recent submissions, Northern Gateway has not provided the Panel any reasons why it should be afforded an additional opportunity to supplement its previously stated views. Since the preliminary matter was raised by Kinder Morgan, procedurally it should have a right of reply. There was nothing in Northern Gateway's

October submission that warranted a response from Kinder Morgan. To now permit Northern Gateway to make further submission on an issue, it had an opportunity to address and chose not to, is procedurally unfair. In particular when the Panel, on November 8, 2010, denied a First Nation the opportunity to make further submissions.

Given that Northern Gateway has proceeded in the manner it has, Kinder Morgan has no choice but to provide its reply submissions to the Panel. We believe this is appropriate particularly given that Kinder Morgan is the party seeking deferral relief from the Panel.

Mischaracterization of Kinder Morgan's Position

On page 2 of its November submission Northern Gateway states:

> *While acknowledging the purpose and need for the Northern Gateway Project, Kinder Morgan also admits that it is an incumbent competitor proposing additional pipeline capacity to compete with the services that Northern Gateway is offering. The basis for Kinder Morgan's objection is not that a project like Northern Gateway is not needed, but rather that the Application constitutes unfair "competition for incremental regulated services."*

Northern Gateway mischaracterizes Kinder Morgan's position. At no time has Kinder Morgan ever indicated that the Project is needed. Kinder Morgan's position is clear on the record. Evidence of need and justification for the Project is not included in the Application, in particular, demonstration of commercial support for the Project through the inclusion of any form of binding transportation service agreements.

National Energy Board Filing Requirements

Northern Gateway takes issue with Kinder Morgan's views that the Filing Manual requires applications to include evidence of binding transportation service agreements. It goes on to state that, "in any event," the Application describes a funding agreement and that a process is in place for the development of precedent agreements. In support of its argument Northern Gateway cites Board decisions, none of which were rendered in the last 15 years.

The precedents cited predate decisions of the NEB in both Express and Alliance and the guidance provided by those decisions. Further, the contractual support required for Keystone XL is a current and relevant precedent for the Panel.

We might also note that Trans Mountain's application dated November 29, 2010 included contractual support. The open season process for Firm transportation service agreements for pipeline capacity to Westridge Terminal was supported by 15,100m^3/d of *binding*

requests. If support exists for Northern Gateway, precedent agreements, with appropriate conditions to address the regulatory uncertainty Northern Gateway complains about, could easily be drafted and entered into. None exist.

The precedents cited by Northern Gateway are exceptions to the rule or predate the current rules. The facts and circumstances giving rise to the GH-1-76 proceeding are far from being "an example" of the NEB's usual practices when it comes to the inclusion of evidence to support the need for applied-for facilities. The GH-1-76 "decision" and the "need" for the facilities were based primarily on a determination by Government, evidenced by both treaty and statute, that the pipeline was needed.

The GH-4-94 Decision which Northern Gateway relies on was one where Foothills Pipe Lines Ltd. sought approval to construct approximately 215 km of pipeline facilities estimated to cost $136 million and which was designed to provide export capacity at the international border near Wild Horse, Alberta. The proposed Wild Horse Pipeline would interconnect upstream with NOVA Gas Transmission Ltd.'s ("NGTL's") North Lateral near NGTL's Princess Compressor Station and downstream at the Alberta/Montana border with Altamont Gas Transmission Company's ("Altamont's") proposed pipeline and access a natural gas marketing hub in Wyoming in order to connect and serve deregulated gas markets in the United States and northern Mexico.

As noted in Chapter 8 of the Decision, prior to filing its application, Foothills had required prospective shippers to execute precedent agreements that set out certain terms and conditions that had to be fulfilled before transportation service agreements would be executed. Precedent agreements totalling 65% of the underlying capacity of the applied-for facilities were entered into and filed as part of the application. Given these steps, and the nature of the Project itself, which is to say a relatively small project serving well understood markets, the NEB afforded Foothills flexibility by exempting it from its standard practice of requiring binding transportation service contracts to be filed as part of the application:

> *The Board continues to believe that it should place considerable weight on the existence of binding and unconditional transportation service agreements for 100 percent of the applied-for capacity as a demonstration of shipper support for new gas pipeline facilities. To date, Foothills has not provided the Board with such agreements.*
>
> *However, in the case of this application, the Board is prepared to accord Foothills some flexibility by not making the filing of binding service agreements a prerequisite to the granting of an approval. The Board would do so to enable Foothills to advance the project in conjunction with Altamont without prejudicing the target in-service date, while still*

> *allowing prospective shippers, competing in an increasingly short-term natural gas market place, time-flexibility in finalizing their transportation agreements.*

The GH-4-94 Decision is in sharp contrast to the proposition that Northern Gateway suggests the case stands for. In GH-4-94 the proponents had taken steps to obtain contractual support (65% of capacity signed to precedent agreements) for the transportation service to be offered by the applied-for facilities in advance of the Board setting the application down for hearing. No similar steps have been taken in the present circumstances. As noted above, Northern Gateway's excuse for not doing so is "regulatory uncertainty". A matter which can (and often is) addressed in precedent agreements. Unlike GH-4-94, the Panel is dealing with one of the largest new greenfield contract carriage pipeline projects proposed to be constructed in Canada – one which is proposed to extend 1,172 km as opposed to 215 km and one in which not one shipper has provided any form of support for the underlying transportation service – whether in a binding unconditional form of agreement or a conditional or precedent form of agreement such as in GH-4-94.

Further, with the sole exception of the Mackenzie Valley Pipeline, none of the referenced decisions were made within the last 15 years (and no decision has been rendered on the Mackenzie Valley Pipeline). This is significant because these decisions pre-date the *Canadian Environmental Assessment Act* ("CEAA"), which came into force in 1995 and imposed additional obligations that this Panel is required to consider. Of particular importance is the CEAA requires, by law, evidence of need, purpose and rationale for all projects to ensure environmental effects can either be determined to be not significant or are justified in the circumstance.

Northern Gateway refers to Kinder Morgan's use of page 4A-59 of the National Energy Board ("NEB") Filing Manual as evidence that the NEB requires binding transportation service contracts, and argues that the summary table found on that page does not require the filing of binding transportation service contracts, particularly for oil pipelines. This is an inaccurate representation of what the table states. In fact, Table A-6: Overview of Supply, Transportation and Markets Filing Requirements specifically states "*For new pipeline (larger project), Pipelines with contracted capacity: a detailed description of the transportation contract arrangements underpinning the project throughput.*"

Kinder Morgan further notes that under Filing Requirements in Section A.3.1 of the Filing Manual, it states:

> *"[f]or pipelines with contracted capacity, a discussion of the contractual arrangements underpinning the supply."*

This provision goes on to state:

> *"For pipelines with contracted capacity, include a description of any relevant contractual arrangements underpinning the supply arrangements. Also include key contractual terms such as length of contract and volumes under contract, where available."*

In the present circumstances, Northern Gateway has made application as a contract pipeline not as a common carrier. As a contract carriage pipeline, the only reasonable interpretation one can take from the Filing Manual is that contractual arrangements underpinning the supply supporting the Northern Gateway Project must be included in the Application materials. The absence of this information means the application is deficient and without more, consideration should be deferred.

Policy Issues of Pipeline Competition

At page 5 of its submission Northern Gateway takes issue with Kinder Morgan's concern that the real purpose of the Application is to effect a race to obtain commercial support for new services, and using the regulatory process to effect a favourable commercial result. Northern Gateway claims that consideration of its Application is necessary to effect regulatory certainty in order to allow prospective shippers to enter into binding commercial agreements.

Kinder Morgan accepts that regulatory certainty is desirable for parties seeking to enter into long-term transportation service contracts. The way that certainty has been achieved in the past is through the use of conditional transportation service agreements. What Northern Gateway has not explained is why precedent forms of agreements, typically used during the Open Season process, have not been used for the purposes of this Project. This is a standard approach taken. It was done in GH-4-94 as well as other greenfield pipeline circumstances, including the Mackenzie, Express, Keystone and Alliance Projects. Where shipper support exists for the underlying transportation service, conditional agreements are entered into such that acceptable regulatory outcomes must first be obtained.

Northern Gateways only explanation is that "regulatory uncertainty" prevents them from doing so. No explanation has been provided as to why such an approach has not been followed by Northern Gateway.

If you have any questions regarding the foregoing, please do not hesitate to contact the undersigned.

Yours truly,

<original signed by>

Shawn H.T. Denstedt, Q.C.
SHTD:sln

c. R. Neufeld, Q.C., Fraser Milner Casgrain LLP
S. Stoness, Kinder Morgan Canada Inc.
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