

Electronic Notification

August 15, 2008

To: Interested Parties

APPLICATION NO. 1513726
INQUIRY INTO NGL EXTRACTION MATTERS (INQUIRY)
RULING REGARDING MOTION AND NOTICE OF QUESTION OF
CONSTITUTIONAL LAW

On June 27, 2008, BP Canada Energy Company, Inter Pipeline Fund, Provident Energy Ltd., ATCO Midstream Ltd. and Spectra Energy Empress L.P. (the Applicants) filed a Motion and Notice of Question of Constitutional Law (Motion) with the Alberta Energy and Utilities Board (EUB or Board). The Motion was filed pursuant to section 12 of the *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3 (APJA) and sections 9 and 23.1 of the *Alberta Energy and Utilities Board Rules of Practice*, AR 101/2001.

The Motion requested:

...a determination that issues respecting NOVA Gas Transmission Limited's ("NGTL") tariffs, tolls, operations and practices, including any proposed change in contracting convention for natural gas liquids ("NGLs") extraction rights in the common stream on the NGTL system, are *ultra vires* the Board, as the NGTL system is an interprovincial undertaking. Accordingly, the Board is without jurisdiction to consider these issues in Application No. 1513726 (the "NGL Inquiry").

The Motion requested the following relief:

- a) An interim order staying or adjourning the within Inquiry until determination by this Board, the National Energy Board or a Court of competent jurisdiction of the question of whether NGTL's Alberta System is subject to exclusive federal jurisdiction as part of an interprovincial undertaking;
- b) An Order dismissing consideration of all issues concerning tariffs, tolls, operations and practices, including any proposed change in contracting convention for NGL extraction rights in respect of the common stream on the NGTL system;
- c) Alternatively, an Order staying consideration of all issues concerning tariffs, tolls, operations and practices including any proposed change in contracting convention for NGL extraction rights in respect of the common stream on the NGTL system pending the determination of Phase I of an Application before the National Energy Board for a Certificate of Public Convenience and Necessity and related Approvals for the TransCanada Alberta System dated June 17, 2008;

- d) In the further alternative, an Order referring the Question of Constitutional Law in the form of a special case to the Court of Queen's Bench of Alberta, pursuant to s. 13(1)(b) of the *Administrative Procedures and Jurisdiction Act*.

In a letter of July 2, 2008, the Board acknowledged receipt of the Motion and established a written process indicating that it would issue its ruling on the Motion following review of submissions from interested parties and the Applicants' reply.

A submission in favor of the Motion was received from the Western Export Group and Tenaska (WEG/Tenaska) on July 28, 2008.

Submissions opposed to the Motion were received from EnCana Corporation (EnCana); NOVA Gas Transmission Ltd. (NGTL); the Canadian Association of Petroleum Producers (CAPP); Shell Canada Energy, Shell Energy North America (Canada) Inc., Shell Canada Products, and Shell Chemicals Canada Ltd. (Shell); Alberta Department of Energy (ADOE); Imperial Oil Resources and ExxonMobil Canada Energy (Imperial/EMC); ConocoPhillips Canada (ConocoPhillips); NOVA Chemicals Corporation (NOVA Chemicals) and Taylor NGL Partnership Limited (Taylor) on July 28, 2008. (These parties are hereinafter referred to as the "Opposing Respondents").

A Reply Submission from the Applicants was received on August 7, 2008 (Applicants' Reply Submission).

Background

On June 4, 2007 the Board issued a Notice¹ which initiated the present inquiry into matters related to the extraction of natural gas liquids (NGL or NGLs). A Final Scoping Document² incorporated comments from interested parties and was issued by the Board on July 6, 2007. Evidence was filed by interested parties commencing in August, 2007, including evidence from the independent Inquiry Expert retained by the Board. Information Requests and Responses were filed by interested parties and the Inquiry Expert. The oral hearing portion of the Inquiry took place in two stages; the first addressed issues in the Inquiry Expert's evidence and occurred from February 5 to 12, 2008. The second phase of the oral hearing portion of the Inquiry took place from May 27 to July 18, 2008. In total 32 days were required to complete the oral portion of the Inquiry.

On June 17, 2008, during the second phase of the oral portion of the Inquiry, TransCanada PipeLines Limited (TransCanada) filed an application (NEB Application)³ with the National Energy Board (NEB) to bring the TransCanada Alberta System (NGTL System) owned by its wholly-owned subsidiary, NGTL, under the jurisdiction of the federal regulator. In the NEB Application, TransCanada applied for a certificate of public convenience and necessity (CPCN) with respect to the NGTL System and proposed that the application be considered in two phases. Phase I would consider the constitutional question of whether the NGTL System is now properly within federal jurisdiction and subject to regulation by the NEB. TransCanada requested that the NEB issue a declaratory order confirming NEB jurisdiction. Phase II would consider whether the NGTL System is required by the present and future public convenience and necessity and the

¹ Notice, Exhibit 001-01, is attached as Appendix 1

² Final Scoping Document, Exhibit 001-08, is attached as Appendix 2

³ Exhibit 053-58

request to issue a CPCN. Phase II would only proceed if the NEB determined the NGTL System to be within federal jurisdiction in Phase I. TransCanada requested that any jurisdictional declaratory order would be made effective upon the issuance of the CPCN.

At the request of certain of the participants, the Board set aside June 20, 2008 for oral argument on the impact on the Inquiry of the filing of the NEB Application. On June 21, 2008, the Board issued a procedural ruling (June Ruling)⁴ regarding the impact on the Inquiry of the NEB Application. In the June Ruling the Board determined:

The Board finds that it continues to have jurisdiction with respect to the NGTL System until such time as a competent authority determines otherwise. No authority has been provided to the Board which would suggest that the Board has lost its jurisdiction merely as a result of the filing of the Application, or based on the assertion of TransCanada in the Application that the NGTL System is by law properly within Canadian federal jurisdiction. To the contrary, the Board agrees with those parties that suggested that the Board and its successor tribunal, the Alberta Utilities Commission, have a statutory obligation to regulate NGTL and to do so in the Alberta public interest.

The Board agrees with parties that submitted that jurisdiction is a matter of law and until such time as a competent authority determines, as a matter of law, that jurisdiction over the NGTL System is properly vested in another tribunal, the Board will not abdicate its responsibilities by failing to carry out its statutory mandate to regulate the NGTL System.

Submissions in Favor of the Motion

The Applicants, supported by WEG/Tenaska, argued that the Board lacks the jurisdiction to proceed with the Inquiry insofar as it may relate to the tariffs, tolls, operations and practices, including any proposed change in convention for extraction rights to the NGLs entrained within the common stream on the NGTL System, as the NGTL System is an interprovincial undertaking. Among various submissions in support of the Motion, the Applicants submitted that the Board has an obligation to consider its jurisdiction with respect to these matters before continuing with the Inquiry process, a process that will involve a determination that the NGTL System is now a work or undertaking within federal jurisdiction. The Applicants further submitted that the Inquiry is in pith and substance dealing with matters properly under federal jurisdiction.⁵

The Applicants referred to the June Ruling which determined that the Board retains jurisdiction over the NGTL System until a contrary finding is made by a competent authority. The Applicants submitted that the Board is a competent authority under the APJA.⁶ Accordingly, the Board is able to make the determination that the NGTL System meets the criteria set out in *Westcoast Energy Inc. v. Canada*, [1998] 1 S.C.R. 322 at paragraph 65, and is thereby subject to exclusive federal jurisdiction pursuant to the effect of sections 91(29) and 92(10)(a) of the *Constitution Act, 1867*.⁷

⁴ June Ruling, Exhibit 053-63, is attached as Appendix 3

⁵ Applicants' Reply Submission, paragraph 43

⁶ Applicants' Reply Submission, paragraphs 7 and 71

⁷ Motion, paragraph 47, Applicants' Reply Submission, paragraphs 14 and 59

The Applicants further enumerated a number of “features” starting at paragraph 59 of the Motion in support of a request for a stay of all issues concerning tariffs, tolls, operations and practices on the NGTL System pending the determination of Phase I of the NEB Application.

Submissions Opposed to the Motion

Set out below are certain of the key submissions of the Opposing Respondents as well as the Reply comments by the Applicants.

Motion Is out of Time

NGTL suggested that the Motion was not properly before the Board for failure to meet the requirement of subsection 12(1)(a) of the APJA to provide notice “at least 14 days prior to the date of the proceeding”. Noting that the Notice was issued on June 4, 2007 and the oral hearing began on February 5, 2008, NGTL submitted that the Motion was out of time.⁸

The Applicants responded by suggesting that NGTL’s interpretation of the notice requirement was overly technical and that it should be interpreted as applying to the hearing of the Motion. The Applicants suggested that the legislative requirement was intended to ensure sufficient notice to the Attorney Generals for Alberta and Canada, neither of whom has complained of insufficient notice.

Is the Board Able to Make a Jurisdictional Determination with Respect to the NGTL System?

Most of the Opposing Respondents and the Applicants did not take issue with the proposition that the Board was a competent authority able to make a determination with respect to its continued jurisdiction over the NGTL System and to address a constitutional question. Reliance was placed on the APJA and the *Designation of Constitutional Decision Makers Regulation* AR 69/2006. Counsel for CAPP suggested that the “special situation” of NGTL forms an exception to the general powers of the Board in deciding constitutional questions.⁹

Insufficient Evidence

Certain Opposing Respondents submitted that there was insufficient evidence supplied with the Motion to permit the Board to undertake an examination of the jurisdiction over the NGTL System and therefore the Motion should be dismissed.

The Applicants and WEG/Tenaska responded by noting that an NGTL witness confirmed the facts and circumstances contained in the NEB Application in sworn evidence before the Board.¹⁰ Further, if the Board considers that there is insufficient evidence to determine a jurisdictional question, it is open to the Board to take steps to gather and test the evidence it may require.¹¹ Moreover, it is not open to the Board to avoid an examination of its jurisdiction. The Applicants referred¹² to the Alberta Court of Appeal decision in *ATCO Gas and Pipelines Limited v. Alberta (Energy and Utilities Board)*,¹³ wherein the Court vacated a portion of the Board’s decision on the basis that it had failed to determine if certain assets were “non utility” and to address the question of its jurisdiction in respect of such assets.

⁸ July 28, 2008 Submission of NGTL, paragraph 23

⁹ July 28, 2008 Submission of CAPP, pages 2-3

¹⁰ Applicants’ Reply Submission, paragraph 82; July 28, 2008 Submission of WEG/Tenaska, page 2

¹¹ Applicants’ Reply Submission, paragraph 86

¹² Applicants’ Reply Submission, paragraph 9

¹³ *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2004 ABCA 3

Stay

Certain Opposing Respondents submitted that the Applicants have failed to meet the requirements of an interlocutory stay application as described in a series of authorities including decisions of the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 (*Metropolitan Stores*) and *R.J.R. MacDonald Inc. v. Canada (A.G.)* (1994), 111 D.L.R. (4th) 385 (S.C.C.), (*R.J.R. MacDonald*).¹⁴ The Applicants submitted in reply that the tripartite test for a stay of proceedings is not the proper test to be applied in the present circumstances. A stay of the Inquiry process should be granted on the basis of the principles of comity and *forum non conveniens* in favor of the NEB process presently considering the NEB Application.

De facto Doctrine

Imperial/EMC and Shell submitted that the Board could proceed without dealing with the jurisdictional issues and that the *de facto* and/or necessity doctrines are principles that have been applied in situations where a finding of unconstitutionality has been made. Reliance was placed on the *Reference Re: Manitoba Language Rights*, [1985] 1 S.C.R. decision.¹⁵ The Applicants submitted in reply that the *de facto* doctrine is intended only to protect justified expectations of those parties that have relied upon the acts of those administering invalid laws.¹⁶

Reference to Alberta Court of Queen's Bench

NGTL submitted that the legal principle of comity should apply such that the Board should exercise forbearance in addressing the question of jurisdiction over the NGTL System in favor of the NEB which already is in the process of considering the appropriate regulatory jurisdiction.¹⁷ NGTL argued that the principle of comity suggests that qualified decision makers with concurrent jurisdiction over a particular matter should allow the decision to be addressed in the forum where it was first raised, thereby avoiding duplicative proceedings and potentially conflicting outcomes. In support of its position, NGTL referred to the *Cyanamid Reference Case*.¹⁸ In this decision the Ontario Court of Appeal deferred to the Federal Court of Appeal on a matter of jurisdiction over a proposed by-pass pipeline on the principle of comity declaring that “in the absence of special circumstances, priority should be given to the proceedings first commenced”.¹⁹

Other Opposing Respondents, including the ADOE²⁰ and Imperial/EMC²¹ supported the application of the principle of comity, regulatory forbearance or *forum conveniens*²² in rejecting the Applicants’ request to refer the question of jurisdiction over the NGTL System to the Alberta Court of Queen’s Bench. Some of these Opposing Respondents submitted that the application of these principles would direct the Board to defer the issue of regulatory jurisdiction to the NEB, rather than undertaking a jurisdictional process itself.

¹⁴ July 28, 2008 Submission of NGTL, paragraphs 73-79

¹⁵ July 28, 2008 Submission of Imperial/EMC, paragraph 9. July 28, 2008 Submission of Shell, page 5

¹⁶ Applicants’ Reply Submission, paragraph 54

¹⁷ July 28, 2008 Submission of NGTL, paragraph 85

¹⁸ *Reference re Legislative Authority over Bypass Pipelines*, (1988) 49 D.L.R. (4th) 566 (Ontario Court of Appeal), (*Cyanamid Reference Case*)

¹⁹ *Cyanamid Reference Case*, page 574

²⁰ July 28, 2008 Submission of ADOE, paragraph 24

²¹ July 28, 2008 Submission of Imperial/EMC, paragraph 5

²² July 18, 2008 Submission of ADOE, paragraph 28

The Applicants submitted in their Reply Submission that, should the Board accept the position of the Opposing Respondents and apply the principle of comity to the consideration of the appropriate regulatory jurisdiction over the NGTL System, then the entirety of the Inquiry should be deferred until the NEB's decision on the jurisdictional question is issued.²³

Recommendations vs. Decisions and Directions

Some Opposing Respondents have considered the appropriateness of the Board making recommendations, as opposed to directions or decisions as a result of the Inquiry.

While it appears that the Opposing Respondents considered that the Board had the ability to carry out all aspects of the initial scoping documents, including the issuance of decisions and directions if considered appropriate, NGTL submitted that the result of the Inquiry should be recommendations by the Board, not directions or decisions.²⁴

Inquiries May Consider Matters Incidental to Matters under Federal Jurisdiction

Some Opposing Respondents have considered the appropriateness of the Board making recommendations that may relate to the NGTL System, even if it were federally regulated in the future.

NGTL referred to *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 and the ability of one level of government to enact laws which may "affect" but do not "impair" the core constitutional competence of another level of government. NGTL submitted that because recommendations by the Board under its governing legislation cannot be imposed upon the NEB, there are no restrictions on the ability of the Board to issue recommendations that may "affect" NGTL or pipelines that are presently federally regulated.²⁵ NGTL submitted:

Even if the TransCanada Alberta System were federally regulated, the Board in this Inquiry would have jurisdiction to make recommendations concerning changes to the contracting convention, including the implementation of the NEXT Model. Such recommendations would not serve to "impair" or interfere with the regulation of the interprovincial transportation aspects of the TransCanada Alberta System by the NEB.²⁶

In its submission, Imperial/EMC argued that the Board has full jurisdiction to complete the NGL Inquiry, and in the alternative, it has the ability to make recommendations without regard to a future determination of the jurisdiction over NGTL. Imperial/EMC submitted:

If it is finally determined that NGTL is within the jurisdiction of the NEB, Imperial/EMC submit that the AEUB has the ability to issue recommendations in the NGL Inquiry even though they may have an incidental effect on NGTL. The Courts have recognized that provinces are able to create inquiries into those matters listed under Section 92 of the Constitution Act, 1867, even if the inquiry has an incidental effect on a federal matter.²⁷

In support of this position, Imperial/EMC referred to *Mercier v. Alberta (Attorney General)*, 183 A.R. 177 (A.B.Q.B.), aff'd [1977] 200 A.R. 41 (A.B.C.A.) leave to appeal refused, [1977] S.C.C.A. No. 333 (*Mercier Decision*).

²³ Applicants' Reply Submission, paragraph 45

²⁴ July 28, 2008 Submission of NGTL, paragraph 36

²⁵ July 28, 2008 Submission of NGTL, paragraphs 37-38

²⁶ July 28, 2008 Submission of NGTL, paragraph 37

²⁷ July 28, 2008 Submission of Imperial/EMC, paragraph 18

The Applicants refuted submissions by the Opposing Respondents which asserted that provincial inquiries may be conducted on matters which touch on matters of federal jurisdiction. In support of their position, the Applicants referred to a decision by the Supreme Court of Canada in *Starr v. Houlden*, [1990] 1 S.C.R. 1366 (S.C.C.) (*Starr Decision*). That decision stands for the proposition that an inquiry conducted under provincial legislation may incidentally touch on matters of federal jurisdiction but where the inquiry is predominantly concerned with a matter which is in “pith and substance” a federal matter, provincial jurisdiction is exceeded. The Applicants submitted that the Inquiry “has developed such that the predominant focus has clearly become the appropriate NGL extraction convention and the Alberta System tariff as they affect the reprocessing of the NGTL common stream”.²⁸

Ruling

The writer has been authorized by the Board to convey the within Ruling.

The Motion is dismissed. The Applicants have failed to establish to the satisfaction of the Board a sufficient basis for granting any of the requested forms of relief. Details of the Ruling are provided below and are organized by issue.

Motion Is out of Time

With respect to the suggestion that the Motion is out of time, the Board agrees with the Applicants that in the circumstances of the present proceeding it would appear that the objectives of subsection 12(1)(a) of the APJA have been satisfied. These objectives appear to be to provide sufficient time for the Attorney General of Canada and the Minister of Justice and Attorney General of Alberta to review the question of constitutional law and to evaluate the need for participation. The filing of the NEB Application is a material event which supports the filing of the Motion at the stage in the Inquiry in which it was filed.

Is the Board Able to Make a Jurisdictional Determination with Respect to the NGTL System?

The Board agrees that it is a competent authority able to make a determination with respect to constitutional questions in the correct circumstances pursuant to the APJA and the *Designation of Constitutional Decision Makers Regulation*. However, for the reasons stated below, the Board finds it to be unnecessary to make a determination as to whether the present circumstances warrant a determination of jurisdiction over the NGTL System.

Insufficient Evidence

For the reasons stated below, the Board finds it to be unnecessary to make a determination on the sufficiency of the evidence before it with respect to determining jurisdiction over the NGTL System.

Stay

The Board agrees with the Opposing Respondents that the tripartite test described in the *Metropolitan Stores* and *R.J.R. MacDonald* decisions has not been satisfied by the Motion. The test requires a demonstration by the Applicants that a serious question requires determination by the decision maker and that an irreparable harm will result if the stay is not granted. The test further requires an assessment of the balance of convenience to the parties. The Applicants have

²⁸ Applicants' Reply Submission, paragraph 25

failed to establish to the satisfaction of the Board any of the three requirements necessary to grant a stay of matters before the Inquiry.

The “features” supporting a stay enumerated by the Applicants starting at paragraph 59 of the Motion do not establish the likelihood of irreparable harm if the Board continues to proceed to issue recommendations with respect to matters dealt with in the Inquiry. The Board continues to consider that the balance of convenience favors a continuation of the Inquiry process. As stated at page 3 in the June Ruling:

The Board has also considered that the Inquiry, in part, is dealing with a matter that has been at issue for at least a decade and several parties stated or implied that further delay would result in prejudice to them.

The Board agrees with those parties that submit the Board must deal with the facts as they exist today, and must carry out its public interest responsibilities as they exist today. The granting of the relief requested by TransCanada is uncertain. Further, a great deal of uncertainty was expressed by parties in relation to the timing of any approval. It is also unclear if references or appeals to the Courts would be required before matters are finally resolved. In light of these uncertainties, the Board considers it not only appropriate, but necessary in the public interest, to continue with the Inquiry process. ...

The Board considers it to be in the public interest to complete the Inquiry and to render a report, utilizing the substantial evidentiary record before it, a record which was accumulated with broad stakeholder participation and an independent Inquiry Expert. The Inquiry is a unique opportunity to consider, in a comprehensive fashion, various NGL and resource related issues directly relevant to the public interest. Further, it represents the culmination of a process reflecting issues and concerns that have been outstanding since before the 1996 Gulf Strachan Decision (Decision D96-07).

De facto Doctrine

For the reasons stated below, the Board finds it to be unnecessary to make a determination with respect to the applicability of the *de facto* doctrine.

Reference to Alberta Court of Queen’s Bench

The Board considers that the effect of a reference to the Court of Queen’s Bench would, in the circumstances, be the equivalent of granting a stay of the Inquiry proceeding. For the reasons referred to above with respect to the denial of a stay, and for the reasons stated below, the Board declines to refer a constitutional question to the Alberta Court of Queen’s Bench.

For the same reasons the Board is not required to review the applicability of the principles of comity or forum non conveniens. The Board observes however, that the NEB Application was filed with the NEB prior to the Motion being filed in the Inquiry.

The Board also notes the NEB’s letter dated July 18, 2008 which accompanied Hearing Order GH-5-2008 in respect of the NEB Application.²⁹ The NEB letter states that the NEB “is of the opinion that dealing with the application expeditiously would be in the public interest” and that “based on the information available at this time, it is expected that decisions on the application will be issued by early in the first quarter of 2009”. The NEB Hearing Order demonstrates that the NEB process is fully engaged, that it will be expeditious and that a result is anticipated within

²⁹ The Hearing Order is referred to in paragraph 72 of the Applicants’ Reply Submission.

a reasonable time frame. These observations reassure the Board of the appropriateness of its decision that an examination of the jurisdictional status of the NGTL System is neither required nor warranted in the circumstances. The Board also notes, from a practical perspective, that should the NEB be permitted to carry out its processes as planned without an intervening decision on jurisdiction by a competent authority the concerns raised by some parties would be alleviated with respect to the creation of a possible regulatory gap with respect to the NGTL System.

Recommendations vs. Decisions and Directions

The Board has noted the submissions by certain parties with respect to the original range of possible outcomes and objectives for the Inquiry, which included potential decisions or directions to parties with respect to pipeline tariff amendments. Another possible outcome was possible recommendations to the Government of Alberta on matters touched on by the Inquiry.

The possibility that the Board could issue decisions or directions relating to NGTL or the NGTL System appears to be generating much of the concern with respect to the Board's jurisdiction to continue with the Inquiry.

Although the division of the Board into two tribunals, the Energy Resources Conservation Board (ERCB) and the Alberta Utilities Commission (AUC), had been proposed at the time that the Inquiry commenced, the ultimate passage of legislation, the form that legislation might take and the timing of enactment were uncertain. The creation of the ERCB and the AUC as of January 1, 2008 clearly demonstrates the intention of the legislature to phase out any ongoing role for the Board. Accordingly, further proceedings or processes, including compliance filings that could result from directions of this Board would fall to these successor tribunals to consider. Although the Board remains able to issue decisions and directions as originally contemplated, from a practical perspective, the Board considers such measures in the circumstances to be inadvisable. Making recommendations to the applicable authority appears to be the most appropriate method of proceeding. Consequently the Board has determined that it will make recommendations only with respect to the matters dealt with in the Inquiry, rather than issue specific decisions or directions in relation to any such matters.

As noted in the following section, the Board considers that it has the ability in the Inquiry to address matters by way of recommendation that may have an incidental effect on matters under federal regulation. Given that the Board will not be issuing specific decisions or directions to particular parties as a result of the Inquiry and will only be issuing recommendations that may have an incidental effect, if any, on matters under federal regulation, the Board considers questions with respect to the jurisdiction over the NGTL System to be irrelevant. Accordingly, the Board sees no need to reexamine the June Ruling or to further consider the issue of jurisdiction with respect to NGTL or the NGTL System.

Inquiries May Consider Matters Incidental to Matters under Federal Jurisdiction

Parties have considered the ability of the Board to make recommendations that may relate to the NGTL System given the position of the Applicants that the NGTL System should be subject to federal regulation.

A review of the Notice dated June 4, 2007 initiating the Inquiry and of the Final Scoping Document attached to the Board's letter of July 6, 2007 confirms that the Board intended to pursue public interest matters related to NGL extraction that have been outstanding for many

years dating back prior to the 1996 *Gulf Strachan* decision.³⁰ The Inquiry was commenced under broad inquiry powers under several statutes and was stated to be for the purpose of examining issues related to NGL extraction from the perspective of providing for the economic, orderly and efficient development of Alberta's natural resources in the public interest. The Board indicated that:

...it intends to maintain a broad scope for the Inquiry so that the full range of complex and interrelated issues relating to resource development and NGL extraction can be examined and understood.³¹

The Board's jurisdiction to inquire into matters related to providing for the economic, orderly and efficient development of Alberta's oil and gas resources in the public interest³² has not been challenged by the Motion. Similarly, no parties challenged the scope of the Inquiry on jurisdictional grounds when it was first initiated. The Board agrees with Imperial/EMC when it stated:

...Imperial/EMC submit that the AEUB has full jurisdiction to complete the NGL Inquiry, regardless of the final determination of the jurisdiction of NGTL. The NGL Inquiry was called by the AEUB pursuant to its powers under Section 21 of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 and Section 46, as it then was, of the *Public Utilities Board Act*, R.S.A. 2000, c. P-45. The subject of the NGL Inquiry is natural gas liquids which are an important resource in the province of Alberta and which the AEUB and its successor are mandated to conserve. According to the scoping document issued by the AEUB at the beginning of the NGL Inquiry, "[t]he inquiry will examine issues related to NGL extraction from the perspective of maximizing economic, orderly and efficient development of Alberta's natural resources in the public interest". The issues listed in the scoping document are broad and deal with many facets of the Alberta public interest. Furthermore, a wide variety of industry participants have taken part in the NGL Inquiry, some of which are not regulated, some of which are regulated by the AEUB and some of which are regulated by the NEB. NGTL is but one party in the NGL Inquiry. The application of one participant to be regulated by the NEB does not change the AEUB's jurisdiction over the broad matters of Alberta public interest covered by the NGL Inquiry.³³

The Board disagrees with the Applicants when they submitted that the Inquiry would not be able to consider matters that could relate to the NGTL System on the basis that the Inquiry "has developed such that the predominant focus has clearly become the appropriate NGL extraction convention and the Alberta System tariff as they affect the reprocessing of the NGTL common stream".³⁴ Rather, it is the Board's stated intention to consider NGL extraction issues from the perspective of providing for the economic, orderly and efficient development of Alberta's natural resources in the public interest that forms the dominate purpose of the Inquiry and which demonstrates that the "pith and substance" of the Inquiry is "firmly anchored to a provincial head of power".³⁵ To the extent any recommendations made by the Board as a result of the Inquiry

³⁰ Decision D 96-07, *Gulf Canada Resources Limited, Strachan Gas Plant Approval Amendment, NGTL Gas Sidestreaming Application*, dated September 26, 1996, Exhibit 001-08-03

³¹ Board letter of July 6, 2007, page 2

³² *Oil and Gas Conservation Act*, R.S.A. 2000, c. 0-6, Sections 4, 7 and 94; *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, Sections 2, 3, 20 and 21

³³ July 28, 2008 Submission of Imperial/EMC, paragraph 17

³⁴ Applicants' Reply Submission, paragraph 25

³⁵ *Starr Decision*, page 1401

may have any impact on matters under federal regulation, any such impact would be incidental, a consequence which has been “consistently upheld” by the Supreme Court of Canada.³⁶

The Board agrees with the following submissions of Imperial/EMC in respect of the implications of the *Mercier Decision*:

Imperial/EMC submit that the purpose of the NGL Inquiry is to “examine issues related to NGL extraction from the perspective of maximizing economic, orderly and efficient development of Alberta’s natural resources in the public interest.” Similar to the inquiry in *Mercier*, the dominant purpose of the NGL Inquiry is a matter which is under provincial jurisdiction, namely the management of the province’s natural resources. As a result, regardless of whether NGTL is under federal jurisdiction, the AEUB has the right to investigate and make recommendations regarding the extraction of NGLs and the NGL convention in the Province of Alberta even if such decisions may have an incidental effect on NGTL.³⁷

The Board considers that its clear jurisdiction with respect to providing for the economic, orderly and efficient development of Alberta’s natural resources and the interests of those that depend on those resources in the public interest is a sufficient basis for the Board to continue with the Inquiry which will result in the Board, in due course, considering possible recommendations relating to the matters dealt with in the Inquiry.

Conclusion

For the reasons stated above the Motion is dismissed.

Next Steps

The Board will shortly issue a draft outline for written Argument and Reply Argument. Argument must be filed by noon, September 5, 2008. Reply Argument must be filed by noon, September 26, 2008.

Yours truly,

(sent by email)

Brian C. McNulty
Board Counsel

³⁶ *Starr Decision*, pages 1390-1391

³⁷ July 28, 2008 Submission of Imperial/EMC, paragraph 19

Appendix 1
Inquiry Notice



Notice

Appendix 2
July 6, 2007 Final Scoping Letter



Final Scoping Letter
July 6 2007

Appendix 3
June 21, 2008 Procedural Ruling



Procedural Ruling
June 21 2008

Notice

NOTICE OF BOARD INITIATED PROCEEDING APPLICATION NO. 1513726 INQUIRY INTO NGL EXTRACTION MATTERS

WHEREAS:

- (a) the Alberta Ethane Policy¹ will expire on June 30, 2008;
- (b) there has been significant evolution of the Alberta natural gas, pipeline, extraction and petrochemical industries and the related gas, transportation and natural gas liquids (NGL) markets since the implementation of the Alberta Ethane Policy in July 1990;
- (c) in Decision 2004-006² the Board requested parties to work with NOVA Gas Transmission Ltd. (NGTL) to review the current conventions and practices for extraction for NGLs off the NGTL system which resulted in the *NGL Extraction Convention Task Force Report* dated September 2005 (the Task Force Report); and
- (d) the Board in a letter dated July 24, 2006 reluctantly accepted the Task Force Report despite concerns that many of the key issues and perceived inequities relating to extraction remained unresolved and indicated that it would consider further processes to address these issues,

Take Notice that The Alberta Energy and Utilities Board (EUB or Board) pursuant to Section 21 of the *Energy Resources Conservation Act* RSA 2000, c. E-10, Section 94 of the *Oil and Gas Conservation Act* RSA 2000, c. O-6 and Section 46(1) of the *Public Utilities Board Act* RSA 2000, c. P-45 will hold an inquiry into matters related to NGL extraction from the common natural gas stream transported through pipeline transmission systems or processed by facilities that are regulated by the EUB (the Inquiry).

The Inquiry will examine issues related to NGL extraction from the perspective of maximizing the economic, orderly and efficient development of Alberta's natural resources in the public interest. The issues that the Inquiry will examine include, without limitation:

- existing extraction conventions
- potential dilution of the common stream energy content by lean gas associated with Coal Bed Methane (CBM)
- growing intra-Alberta consumption demand for natural gas
- potential for northern gas; and
- Alberta regulated Straddle facilities on NEB regulated pipelines.

¹ As reflected in IL 90-09 dated July 16, 1990, Section 35 of the *Oil and Gas Conservation Act* RSA 2000, c. O-6 and Part 9.1 of the *Oil and Gas Conservation Regulations* AR 151/71

² Decision 2004-006 – Solex Gas Processing Corp. Application to Amend a Gas Processing Scheme and for Natural Gas Pipelines, dated January 27, 2004.

Purpose of the Inquiry

The evolution of the Alberta natural gas, pipeline, extraction and petrochemical industries and the related gas, transportation and NGL markets since the implementation of the Alberta Ethane Policy in July 1990 (set to expire June 30, 2008) have convinced the Board that there is a need for a timely and comprehensive re-examination of historical conventions and practices with respect to the extraction of NGLs on EUB regulated pipelines and facilities. The need for such a review is made further apparent in light of anticipated future developments including the use of EUB regulated pipelines to transport increased amounts of gas sourced outside of Alberta, development of sources of CBM and the growing market for gas within the Province. This Inquiry will consider these conventions and practices to determine if changes are required in the public interest.

Particulars of the Inquiry

A Preliminary Scoping Document and a Preliminary List of Issues to be addressed by the Inquiry and a Tentative Procedural Schedule have been documented and are available for review on the Board's website through IAR Query by selecting Application No. 1513726. The Board requests that parties express their intent to participate in this Inquiry by submitting their intention to participate and comments on the Preliminary Scoping Document and a Preliminary List of Issues.

Please note that neither the EUB cost claim nor intervener funding process will apply to this matter and that all costs incurred by parties will be of their own account. Despite this, the Board is hopeful that parties representing all affected business areas will participate in this Inquiry including:

- Producing companies
- Midstream companies
- Aggregators
- Straddle plant owners and operators including proponents of EUB regulated facilities on NEB regulated pipelines
- Gas transmission pipeline owners and operators
- Shippers on gas transmission pipelines
- Liquids pipeline operators
- Field plant operators with interests in NGLs
- Alberta based Petrochemical plant owners and operators
- Industry groups including IGCAA, CAPP, SEPAC, Canadian Society for Unconventional Gas
- Propane plus market stakeholders
- Consumer groups
- Alberta Government Ministries including those responsible for energy and industry related matters; and
- The Governments, producers, pipeline operators in British Columbia, the Northwest Territories, Yukon and Alaska to the extent they have interests in the transportation of natural gas through EUB regulated facilities.

To File an Intention to Participate

Any party (Participant) wishing to register their intention to participate and submit comments on the Preliminary Scoping Document and a Preliminary List of Issues should submit a letter (Participation Letter) setting out their interest in the Inquiry and contact information by **June 15, 2007**. Each Participant should include with the Participation Letter any comments it wishes to make on the Preliminary Scoping Document, the Preliminary List of Issues or the Tentative Procedural Schedule. Following submissions, the Board will communicate the Final Scoping Document and a Final List of Issues for the Inquiry. Please submit the Participation Letter and comments on the Preliminary Scoping Document and a Preliminary List of Issues electronically to the Board at EUB.UTL@eub.ca. Notification regarding further scheduling or process will only be provided to registered parties.

Process

The Tentative Process Schedule stipulates the filing of Direct Evidence by Participants on matters identified within the Final List of Issues by July 23, 2007. Participant submissions will be followed by Information Requests and Responses, Rebuttal Evidence and an oral hearing anticipated to be held in November 2007. The Board anticipates engaging the services of an independent consultant whose Report would be filed in the Inquiry. Direct Evidence submissions by Participants should address all matters on the Final List of Issues on which the Participant has a position (supporting or opposing) utilizing, where possible, the format employed in the Preliminary List of Issues.

Parties to this proceeding should comply with the Board's general electronic filing guidelines, which require that all e-mails clearly indicate in the "subject" line, the relevant application number, the date, the nature of the submission and the party making the submission. The Board further requests the cooperation of parties by submitting any documents in either Microsoft Word format or an OCR version of any PDF documents.

If you have any questions regarding this matter, please contact either Kim Eastlick by email at kim.eastlick@eub.ca or (403) 297-4325 or Heather Gnenz by e-mail at heather.gnenz@eub.ca or by telephone at (403) 297-3539.

Issued at Calgary, Alberta on June 4, 2007.

ALBERTA ENERGY AND UTILITIES BOARD
Douglas A. Larder, Q.C., General Counsel

Electronic Notification

July 6, 2007

**APPLICATION NO. 1513726
INQUIRY INTO NGL EXTRACTION MATTERS**

On June 4, 2007, the Alberta Energy and Utilities Board (the Board or EUB) issued a Notice with respect to an Inquiry into Natural Gas Liquids¹ Extraction Matters (the Inquiry). Attached to the Notice were a Preliminary Scoping Document, a Preliminary List of Issues and a Tentative Procedural Schedule. Interested parties were requested to submit a Participation Letter accompanied by comments on the attachments by June 15, 2007. Participation Letters, with or without comments on the attachments to the notice, were received from parties (Parties), all of whom are listed in Attachment 1.

On June 27, 2007, the Board issued a letter informing Parties of a change to the date for evidentiary submissions and the decision of the Board not to hold a pre-hearing conference.

The purposes of this letter are to respond to the comments from Parties and to finalize the Preliminary Scoping Document and the Preliminary List of Issues, describe the role of the independent expert to be engaged by the Board (the Inquiry Expert) and to revise the Procedural Schedule for the Inquiry.

Scope*Preliminary Scoping Document*

Although some Parties questioned the meaning of several of the Board's assumptions and pointed out the Board's recognition of the possible conflict among assumptions, in general, the Preliminary Scoping Document received little comment. Parties also requested clarification on the intended outcomes of the Inquiry.

With respect to the intended outcomes of the Inquiry, the Board addressed these in Section 4 of the Preliminary Scoping Document. For greater clarity, however, the Board anticipates that the outcomes of the Inquiry may include any of the following:

- A description of current or proposed NGL extraction conventions on EUB regulated pipelines and EUB regulated straddle facilities on NEB regulated pipelines (NGL Extraction Conventions), current issues and trends in gas supply, composition and NGL recovery;

¹ For the purposes of the Inquiry, "Natural Gas Liquids" or "NGLs" means ethane, propane, butane and pentanes plus derived from natural gas.

- Findings as to entitlement to NGL extraction rights with respect to the common stream of EUB regulated pipelines;
- Direction to parties to implement changes to NGL Extraction Conventions including tariff amendments;
- Guidelines or other criteria to assist industry with respect to the economic, orderly and efficient development of Alberta's natural resources as it may relate to NGL extraction rights and facilities development including matters related to sidestreaming² and co-streaming;³
- The identification of new conditions for new facility licenses, permits or approvals; and
- Potential recommendations to the Government of Alberta on policy matters beyond the mandate of the Board.

In light of the absence of significant comment from Parties, the Board does not believe a change is required to the Preliminary Scoping Document other than with respect to the timing of a Board decision. The Board now anticipates an Inquiry Decision mid-year 2008. Attachment 2 is the Final Scoping Document for the Inquiry.

Preliminary List of Issues

Comments received from Parties on the Preliminary List of Issues fall generally into three principal categories:

- The scope is overly broad and should be focused in two general areas:
 - NGL Extraction Conventions
 - Efficient resource development and gas composition issues
- Consideration of the Ethane Policy should be removed from the scope of the Inquiry; and
- The need to consider the impact to existing contractual arrangements and infrastructure investments from any change to the NGL Extraction Conventions.

The Board intends to maintain a broad scope for the Inquiry so that the full range of complex and interrelated issues relating to resource development and NGL extraction can be examined and understood. However, the Board agrees that the issues identified in the Preliminary List of Issues can be grouped to achieve a clearer focus for the Inquiry. This grouping of issues should assist parties and address the three general areas on which Parties commented.

The focus of the Inquiry is on three interrelated principal issues (the Inquiry Principal Issues), each of which may be stated in terms of a question for the Board to address. Each of the Inquiry Principal Issues requires consideration of several interrelated sub-issues:

² The Board has refined the definition of "Sidestreaming" that was referred to in the Preliminary List of Issues. "Sidestreaming" refers to new or existing gas processing facilities that would access gas from an EUB rate regulated natural gas transmission pipeline to extract NGLs and then reinject the processed gas into the commingled stream upstream of existing straddle plant facilities thereby reducing the NGL content of the gas (richness of the gas) that would otherwise have been available for processing at the downstream straddle plant facilities.

³ Co-streaming refers to new or existing gas processing facilities that would access gas from an EUB rate regulated natural gas transmission pipeline to extract NGLs and then reinject the processed gas into the commingled stream downstream of existing straddle plant facilities thereby reducing the volume of gas that would otherwise have been available for processing at those straddle plant facilities.

1. Do the existing NGL Extraction Conventions need to be changed in order to address perceived inequities in the existing conventions, thereby promoting the economic, orderly and efficient development of Alberta's natural resources? If they need to be changed, how should they be changed to deal with these inequities?

In addressing this issue the Board must consider:

- (a) What are the NGL Extraction Conventions and how are they documented or otherwise established?
- (b) Who has the legal entitlement to NGL extraction rights from the common stream?
- (c) Are the NGL Extraction Conventions consistent with the legal entitlement to NGL extraction rights?
- (d) What inequities result from application of the NGL Extraction Conventions?
- (e) What options (and the pros and cons of each), including without limitation those considered in the NGL Extraction Convention Task Force (NECTF) Report, are available to address these inequities?
- (f) What are the potential impacts to all stakeholders of suggested changes to the NGL Extraction Conventions?

This question relates in whole or in part to Issues 1, 3, 7, 8, 9, 10 and 11 on the Preliminary List of Issues.

2. In addressing the perceived inequities with the NGL Extraction Conventions, does the Board need to consider if further modifications to these conventions and/or the development of other rules and guidelines are required in the interest of:

- promoting the economic, orderly and efficient development of Alberta's natural resources; and/or
- sustaining and developing the natural gas industry, Alberta's pipeline, extraction and petrochemical industries?

If modifications to the NGL Extraction Conventions or new rules and guidelines are required, what should they be?

In addressing this issue the Board must consider:

- (a) What are the relevant forecasts to consider?
- (b) How can the development of Alberta's gas resources, both NGL rich gas and lean gas, be encouraged without creating inequities with respect to NGL extraction rights, impacting efficiencies and the sustainability of the extraction and petrochemical industries or causing undue impact to ratepayers?
- (c) How can the extraction and upgrading of NGLs within the Province of Alberta be encouraged to the maximum extent practical while providing the owners of NGL extraction rights with fair compensation?
- (d) Should sidestreaming, co-streaming, or the ability to by-pass extraction be restricted?

- (e) If the answer to (2d) is “yes”, what restrictions are appropriate and what are the rules and criterion to be applied in assessing when a restriction is to be applied and in determining what the nature of the restriction will be?
- (f) Do NGL extraction conventions as they apply to all EUB regulated pipelines and EUB regulated straddle facilities on NEB regulated pipelines need to be consistent in order to avoid unfair competitive advantages or unfairness to shippers, pipeline/facility owners or buyers of natural gas or NGLs?
- (g) Are modifications desirable in order to encourage the use of Alberta pipeline and extraction facilities by gas sourced from outside of Alberta?
- (h) What are the potential impacts to all stakeholders of suggested modifications to the NGL Extraction Conventions and from any new rules or guidelines?

This question relates in whole or in part to Issues 1, 2, 4, 5, 6, 8, 9, 10 and 11 on the Preliminary List of Issues.

3. In the event that any changes to the existing NGL Extraction Conventions result from the Inquiry or in the event that the Board provides for the development of new rules or guidelines relating to NGL extraction matters, how should these changes be implemented?

In addressing this question the Board must consider:

- (a) What action is required and by whom in order to implement changes to the NGL Extraction Conventions and/or new rules or guidelines and over what period of time?
- (b) Who should bear any associated costs?
- (c) Do any existing arrangements need to be grandfathered?
- (d) Do these new conventions, rules and guidelines require periodic reconsideration?

In considering the Inquiry Principle Issues the Board will, as requested by many parties, have regard for the impact on existing contracts and existing infrastructure investment.

The Board does not intend to review the new Incremental Ethane Extraction Program policy announced by Alberta Energy on September 29, 2006, nor does it intend to undertake a review of the terms and conditions of the existing Ethane Policy. However, the Board may, in the interest of the economic, orderly and efficient development of Alberta’s natural resources, consider matters relevant to the public interest principles behind the Ethane Policy and may direct measures or make recommendations directed at continuing a sustainable extraction and petrochemical industry in the Province.

With the above focus, the Board trusts that the context, relevance and interdependence of the issues outlined in the Preliminary List of Issues have been clarified. This additional focus is sufficient, in the Board’s view, to proceed to the submission of evidence by parties without holding a pre-hearing conference and with minimal change to the Preliminary List of Issues. Attachment 3 is the Final List of Issues for the Inquiry.

Parties are invited, but not required, to organize their evidence submissions, information requests and argument by addressing the Inquiry Principal Issues and sub-issues. In following this format, Parties are not restricted to the above list of sub-issues in making their submissions and may

address other sub-issues within the scope of the proceeding. This suggestion is intended to ensure that the respective positions of Parties on the issues before the Inquiry are organized, clearly presented and easily contrasted which should lead to a more efficient process overall.

Role of Inquiry Expert

In preparing the initial scope for the Inquiry it became evident that the assistance of a recognized industry consulting firm with expertise in matters before the Inquiry, independent of all Parties and the Board, would be of assistance when considering the various issues to be examined by the Inquiry. The Board has engaged Ziff Energy Group as the Inquiry Expert. The Inquiry Expert will have the responsibilities outlined below.

1. The Inquiry Expert will consider the submissions from Parties to determine which areas require clarification and to identify any informational gaps in the evidence before the Board. The Inquiry Expert will submit information requests to try and achieve clarification and to fill in information gaps. Where it is unable to obtain missing information from parties it will attempt to provide the necessary information in a report (Report) to be filed with the Inquiry. Missing information to be supplied by the Inquiry Expert will primarily be with respect to providing data and forecasting information as well as completing background information from Alberta and other relevant jurisdictions.
2. The Inquiry Expert will conduct an analysis of the evidence of each Party and where the evidence is in significant conflict, the Inquiry Expert will comment in the Report on the points of conflict and highlight the strengths and weaknesses of the positions of the respective Parties.
3. The Inquiry Expert may also identify and assess in the Report one or more possible alternative approaches (or modifications to proposals put forward by Parties) to the matters before the Inquiry. The Inquiry Expert will advance an alternative approach(s) if it is of the opinion that such an alternative approach(s) would likely align with the overall Alberta public interest to a greater extent than any of the approaches suggested by the Parties. The Report will also assess the benefits, limitations and market impacts of any suggested alternative approach(s).

Dealings between the Board and the Inquiry Expert will be limited to administrative and financial matters. Neither the Board nor Board staff will have contact with the Inquiry Expert or review any drafts of the Report.

The Report will be made available to Parties and the Board at the same time. The Board and Parties will have the opportunity to ask the Inquiry Expert information requests and to cross-examine the Inquiry Expert at the hearing. In addition, Parties will be given the opportunity to file written rebuttal evidence in response to the Report.

The Inquiry Expert will not cross-examine Parties and will not provide final argument in the proceedings.

In its deliberations, the Board will consider the Report, information request responses and testimony of the Inquiry Expert as additional evidence for its consideration bearing in mind the independent nature of that evidence.

Procedural Schedule

In light of the Board's June 27, 2007 letter extending the date for filing of evidentiary submissions the Board has modified the procedural schedule. The Revised Procedural Schedule is provided in Attachment 4. The Board has revised the Procedural Schedule at this time to allow parties sufficient time to plan for critical dates and to arrange for the appearance of witness at the hearing. Given the number of parties to the Inquiry and the need to coordinate the schedules of many witnesses, the Board anticipates that it will be difficult to provide for further extensions to the commencement date of the hearing.

As stated in the Board's June 27, 2007 letter, the Board is optimistic that Parties with like interests will now have the opportunity to work together to present joint submissions and seat joint panels for the oral portion of the Inquiry. This would assist all Parties by improving efficiency of the process.

Inquiry Background Documentation

The Board has added the following materials to the record of this proceeding as background documentation which may be of assistance to Parties in the preparation of their submissions.

[ERCB Report D88-D: Alberta Ethane Policy, Report on Implementation \(April 1988\)](#)

[NGL Extraction Convention Task Force \(NECTF\) Report \(September 28, 2005\)](#)

[Decision D 96-07 Gulf Canada Resources Limited - Strachan Gas Plant Approval Amendment NGTL Gas Sidestreaming Application \(September 26, 1996\)](#)

[Decision 2004-006 Solex Gas Processing Corp. - Application to Amend a Gas Processing Scheme and for Natural Gas Pipelines \(January 27, 2004\)](#)

[Information Letter IL 90-09 Government of Alberta Ethane Policy Implementation Procedures \(July 16, 1990\)](#)

[Board Letter to Interested Parties in Response to NGL NECTF Report \(July 24, 2006\)](#)

If you have any questions regarding this matter, please contact either Kim Eastlick by email at kim.eastlick@eub.ca or (403) 297-4325 or Heather Gnenz by e-mail at heather.gnenz@eub.ca or by telephone at (403) 297-3539.

Yours truly,

(sent via email)

Heather Gnenz and Kim Eastlick
Application Officers

cc. Interested Parties

Attachments

Attachment 1 – List of Parties

Alberta Department of Energy (ADOE)
Alberta Envirofuels Inc. (AEF)
Alberta Ethane Gathering System, L.P. (AEGS)
Alliance Pipeline Ltd. (Alliance)
AltaGas Ltd. (AltaGas)
AltaGas Utilities Inc. (AUI)
ATCO Midstream Ltd.
ATCO Pipelines (AP)
Aux Sable
BP Canada Energy Company (BP)
Canadian Association of Petroleum Producers (CAPP)
Canadian Chemical Producers' Association (CCPA)
Cargill Limited (Cargill)
ConocoPhillips Canada Limited (ConocoPhillips)
Coral Energy Canada Inc. (Coral)
Devon Canada Corporation (Devon)
Direct Energy Marketing Limited (DEML)
Dow Chemical Canada Inc. (Dow)
EnCana Corporation (EnCana)
Export Users Group (EUG)
FB Energy Canada Corp.
Gaz Métro Limited Partnership (Gaz Métro)
Government of the Northwest Territories (GNWT)
Granite Gas Products Inc.
Husky Energy Marketing Inc. (Husky)
Imperial Oil Resources & ExxonMobil Canada Energy (the Companies)
Industrial Gas Consumers Association of Alberta (IGCAA)
Inter Pipeline Fund (Inter Pipeline)
Keyera Energy Partnership (Keyera)
Kinder Morgan Cochin ULC (Cochin)
Nexen Inc. (Nexen)
NOVA Gas Transmission Ltd. (NGTL)
NOVA Chemicals Corporation (NOVA Chemicals)
Pacific Gas and Electric Company (PG&E)
Pembina Pipeline Corporation (Pembina)
Provident Energy Ltd.
Quicksilver Resources Canada Inc. (QRCI)
Shell Canada Limited (Shell)
Spectra Energy Empress L.P. (Spectra)
State of Alaska
Straddle Plant Group
Talisman Energy Inc. (Talisman)
Tenaska Marketing Canada, a division of TMV Corp. (Tenaska)
Taylor NGL Limited Partnership
Terasen Gas Inc. (TGI)
Utilities Consumer Advocate (UCA)
Union Gas Limited (Union)

Attachment 2 EUB INQUIRY INTO NGL EXTRACTION MATTERS

FINAL SCOPING DOCUMENT

1. Introduction

The Alberta Energy and Utilities Board (EUB or Board) has undertaken to conduct an inquiry into matters related to natural gas liquids (NGL) extraction from the common natural gas stream transported through pipeline transmission systems or processed by facilities that are regulated by the EUB (the Inquiry).

The Inquiry will examine issues related to NGL extraction from the perspective of maximizing the economic, orderly and efficient development of Alberta's natural resources in the public interest. The issues that the Inquiry will examine include, without limitation:

- existing extraction conventions
- potential dilution of the common stream energy content by lean gas associated with Coal Bed Methane (CBM)
- growing intra-Alberta consumption demand for natural gas
- potential for northern gas; and
- Alberta regulated Straddle facilities on NEB regulated pipelines.

2. Purpose of the Inquiry

The evolution of the Alberta natural gas, pipeline, extraction and petrochemical industries and related gas, transportation and NGL markets since the implementation of the Alberta Ethane Policy¹ in July 1990 (set to expire June 30, 2008) have convinced the Board that there is a need for a timely and comprehensive reexamination of existing rules, contractual arrangements and practices with respect to the extraction of NGLs from the common natural gas stream transported through pipeline transmission systems or processed by facilities that are regulated by the EUB (NGL Extraction Conventions). The need for such a review is made further apparent in light of anticipated future developments including potential use of EUB regulated pipelines to transport increased amounts of gas sourced outside of Alberta, increasing development of CBM and the growing market for gas within the Province. This Inquiry will consider the NGL Extraction Conventions to determine if changes are required in the public interest.

3. Assumptions

The Board considers that it would be beneficial for parties to understand the general assumptions that the Board has relied upon in scoping the issues for the Inquiry. Accordingly, the Board has listed below the assumptions that it has relied upon in preparing this Final Scoping Document. The Board recognizes that these assumptions can sometimes be in conflict.

- (a) In providing for the economic, orderly and efficient development of Alberta's natural resources it is in the Alberta public interest to encourage to the maximum extent practical, the extraction of NGLs within the Province of Alberta, for use, upgrading or sale within Alberta while providing the NGLs owners with fair compensation.

¹ As reflected in IL 90-09 dated July 16, 1990, Section 35 of the *Oil and Gas Conservation Act* RSA 2000, c. 0-6 and Part 9.1 of the *Oil and Gas Conservation Regulations* AR 151/71

- (b) Clear rules and procedures with respect to NGL ownership and extraction are in the public interest.
- (c) Unless the public interest otherwise requires, producers may extract NGLs from their own production, at the field plant upstream of injection into an EUB regulated pipeline.
- (d) It is in the public interest to minimize proliferation of NGL extraction facilities where proliferation may result in decreased net NGL extraction within Alberta, increased net energy use per unit of NGL extracted within Alberta and/or result in greater land use or environmental impact than is necessary.
- (e) It is in the public interest to optimize the energy efficiency of NGL extraction.
- (f) It is in the public interest to maintain a viable extraction and petrochemical industry in the Province.
- (g) It is in the public interest to maximize efficient use of EUB regulated transmission pipeline infrastructure.
- (h) It is in the public interest to maintain liquid and efficient markets for natural gas.
- (i) NGL Extraction Conventions and the Alberta Ethane Policy have historically worked in the general public interest but require review at this time.
- (j) Presently the owner of the natural gas being transported on EUB regulated pipelines has the right to sell its equivalent energy value of the natural gas from the common stream or to take redelivery at an existing point of delivery of its equivalent energy value of the natural gas from the common stream
- (k) Absent a public interest reason to differentiate among EUB regulated pipelines, Producer/Receipt shipper rights with respect to NGL ownership should be equivalent.

4. Objectives

The Board has established the following objectives for the Inquiry:

- (a) Obtain comprehensive stakeholder participation in the Inquiry.
- (b) Generate an Inquiry Decision in mid year 2008 which will:
 - i. Articulate clear principles relating to NGL extraction aimed at codifying appropriate extraction conventions with specific directions, if required, to EUB regulated pipelines with respect to tariff amendments and other directions to reflect the findings of the Board.
 - ii. Identify new conditions, if any, required when issuing facility licenses, permits or approvals, to reflect the findings of the Board.
 - iii. Identify any future steps that are required in order to complete implementation of Inquiry principles, findings and directions.

5. Preliminary List of Inquiry Issues

See attached Attachment 3.

6. Tentative Procedural Schedule

See attached Attachment 4.

Attachment 3

EUB INQUIRY INTO NGL EXTRACTION MATTERS

FINAL LIST OF ISSUES

1. Overview of NGL Extraction Conventions and Markets in Alberta
 - a. Existing Pipeline and Straddle plant NGL extraction rights, conventions and practices on the following EUB regulated pipelines:
 - i. NGTL
 - ii. ATCO Pipelines
 - iii. AltaGas Utilities Inc. (AUI)
 - b. NGL Extraction Conventions, current and proposed for other EUB regulated facilities on non EUB regulated pipelines (i.e. Aux Sable Canada Ltd. North Sable Extraction Plant - Fort Saskatchewan)
 - c. Alberta NGL short and long term supply forecasts and short and long term Alberta NGL Market forecasts
 - d. Straddle plant capacities and utilization (existing and forecasted)
 - e. NGL field extraction capacities and utilization (existing and forecasted)
 - f. Timing and anticipated NGL content of gas presently sourced and forecasted to be sourced, from outside Alberta to be transported utilizing EUB regulated pipelines.
 - g. Existing and forecast quantity of gas consumed within Alberta, exported from Alberta without NGL extraction, and off-gases from oilsands upgrading
2. In light of the June 30, 2008 expiry of the existing Alberta Ethane Policy, is it necessary, for the economic, orderly and efficient development of Alberta's natural resources, or other public interest reasons to implement measures to ensure a sustainable extraction and petrochemical industry in the Province?
3. Perceived inequities with Present NGL Extraction Conventions on NGTL:
 - a. Producer/Receipt shippers delivering gas with below common stream NGL content into NGTL who also hold export delivery service receive benefit of common stream NGL content.
 - b. Producer/Receipt shippers delivering gas with above common stream NGL content into NGTL who also hold export delivery service only receive benefit of common stream NGL content.
 - c. Producer/Receipt shippers with production that enters the NGTL system downstream of extraction plants who also hold export delivery service obtain value for NGL in the common stream even though their gas cannot be processed physically.
 - d. Producer/Receipt shippers with production that enters the NGTL system that is delivered upstream of an extraction facility may lose the benefit of NGL extraction.

- e. Double Dipping: Producer/Receipt shippers who extract (NGLs) in the field who also hold export delivery service obtain value for NGL in the common stream.
 - f. Producer/Receipt shippers who do not hold export delivery service cannot obtain direct access to the NGLs in the gas stream once the gas enters the NGTL system.
 - g. Producers who do not hold export delivery service and therefore do not share in value of NGL in the common stream are non-the-less responsible for NGL royalty payments.
4. Clarification of public interest criteria related to “sidestreaming”¹ and “co-streaming”² projects with respect to matters such as overall energy efficiency, impact of facilities proliferation, NGL entitlement, equity (fairness) and optimization of resource value.
 5. Potential dilution of the common stream energy content as a result of the increasing importance of Coal Bed Methane (CBM) and potential solutions including alternative lean gas facilities design criteria.
 6. Consideration of Issues related to NGL extraction from gas sourced from outside of Alberta that is transported on EUB regulated pipelines, including understanding positions of:
 - a. Ex-Alberta producers, shippers, governments, connecting pipelines, and capital markets; and
 - b. Alberta producers, shippers, pipelines, extraction industry, petrochemical industry and government
 7. Consideration of *NGL Extraction Convention Task Force* Report alternatives, or other alternatives, including financial impact to gas and NGL market participants, and impacts to existing contracting practices, NIT transactions, storage arrangements, ex-Alberta (upstream and downstream) implications and NGTL rate implications.
 - a. Status Quo
 - b. Equalization
 - c. Single Value Bucket
 - d. Receipt Contracting
 - e. Producer Directed
 - f. Regulated Business
 - g. Other
 8. Entitlement to NGL Value on ATCO Pipelines system

¹ The Board has refined the definition of “Sidestreaming” that was referred to in the Preliminary List of Issues. “Sidestreaming” refers to new or existing gas processing facilities that would access gas from an EUB rate regulated natural gas transmission pipeline to extract NGLs and then reinject the processed gas into the commingled stream upstream of existing straddle plant facilities thereby reducing the NGL content of the gas (richness of the gas) that would otherwise have been available for processing at the downstream straddle plant facilities.

² Co-streaming refers to new or existing gas processing facilities that would access gas from an EUB rate regulated natural gas transmission pipeline to extract NGLs and then reinject the processed gas into the commingled stream downstream of existing straddle plant facilities thereby reducing the volume of gas that would otherwise have been available for processing at those straddle plant facilities.

- a. Review of existing practices, any perceived inequities and opportunities for NGL extraction
 - b. Consideration of *NGL Extraction Convention Task Force* Report alternatives, or other alternatives, as they may apply
 - c. Consideration of pipeline interconnection issues
 - d. Tariff and rate implications of changes
9. Entitlement to NGL Value on AUI's system
- a. Review of existing practices, any perceived inequities and opportunities for NGL extraction
 - b. Consideration of *NGL Extraction Convention Task Force* Report alternatives, or other alternatives, as they may apply
 - c. Consideration of pipeline interconnection issues
 - d. Rate implications of changes
10. Is it desirable to implement NGL component tracking gas on transmission pipelines?
Exploration of potential means and methodologies to be used to implement component measurement and tracking?
11. Consideration of NGL Extraction Conventions with respect to EUB regulated facilities on non EUB regulated pipelines including the form of licenses, permits or approvals.

Attachment 4

**EUB INQUIRY INTO NGL EXTRACTION MATTERS
Procedural Schedule**

Step	Tentative Date(s) (2007)	Revised Date(s) (2007 unless specified)
Inquiry Notice and Scope Submission Request	June 1	June 4
Scope Submissions Due	June 15	June 15
Inquiry Scope Finalized	July 6	July 6
Parties Submissions (simultaneous)	July 23	August 28
Information Requests to Parties	August 7	September 18
Information Responses	August 20	October 9
Rebuttal Submissions	September 10	October 23
Inquiry Expert Submission	September 24	November 6
Information Requests to Inquiry Expert	October 2	November 20
Information Responses	October 9	December 4
Rebuttal to Inquiry Expert Evidence	October 23	December 18
Inquiry	November 5-30 (as required)	January 29 - February 29, 2008
Argument		To be determined
Reply Argument		To be determined

Electronic Notification

June 21, 2008

To: Interested Parties

APPLICATION NO. 1513726

INQUIRY INTO NGL EXTRACTION MATTERS (INQUIRY)

**BOARD PROCEDURAL RULING REGARDING IMPACT OF THE APPLICATION BY
TRANSCANADA PIPELINES LIMITED TO THE NATIONAL ENERGY BOARD**

Introduction

On June 17, 2008, TransCanada PipeLines Limited (TransCanada) filed an application (Application) with the National Energy Board (NEB) to bring the TransCanada Alberta System (NGTL System) owned by its wholly-owned subsidiary NOVA Gas Transmission Ltd. (NGTL) under the jurisdiction of the federal regulator. In the Application, TransCanada applied for a certificate of public convenience and necessity (CPCN) with respect to the Alberta System and proposed that the Application be considered in two phases. Phase I would consider the constitutional question of whether the NGTL System is now properly within federal jurisdiction and subject to regulation by the NEB. TransCanada requested that the NEB issue a declaratory order confirming NEB jurisdiction. Phase II would consider whether the NGTL System is required by the present and future public convenience and necessity with a request to issue a CPCN. Phase II would only proceed if the NEB determined the NGTL System to be within federal jurisdiction in Phase I. TransCanada requested that any jurisdictional declaratory order would be made effective upon the issuance of the CPCN.

The Application and an accompanying press release were added by Board staff to the record of the Inquiry as Exhibits 053-58 and 053-57, respectively, on June 17, 2008, being the 23rd day of the oral phase of the Inquiry. The Board set aside Friday, June 20, 2008 to allow all interested parties to make submissions on the implications of the Application to the Inquiry, to the filed evidence and with respect to the appropriateness of continuing with the oral phase of the Inquiry at this time.

The Board heard seven hours of submissions from nineteen parties. Positions of the parties varied significantly on a number of issues.

The writer has been authorized by the Board to convey the within Ruling.

Issues

The Board considers that a ruling is required on the following matters.

1. Does the Board have the jurisdiction to continue with the Inquiry insofar as it may relate to the NGTL System?

2. In the event the Board has the jurisdiction to proceed with the Inquiry, should the Board proceed in light of the Application?
3. If the Board proceeds, are there any process adjustments required? In particular:
 - a. should NGTL be asked to present a panel knowledgeable as to both the Application and NGTL's evidence in this Inquiry? and
 - b. should parties who wish to supplement their pre-filed evidence be allowed to do so in order to address any substantive changes that may be required as a result of the filing of the Application?

Ruling Synopsis

The Board finds that it continues to have jurisdiction with respect to the NGTL System until such time as a competent authority determines otherwise. The Board sees no reason to terminate the Inquiry or to adjourn it pending an NEB decision on the Application. Further, the Board is not convinced that amendments to the scope or to the objectives of the Inquiry are necessary.

NGTL will be required to present a panel knowledgeable with respect to the Application and the NGTL evidence filed in this Inquiry on Tuesday, June 24, 2008. Following the NGTL panel, the Taylor NGL Limited Partnership (Taylor) panel may be seated. Any party that has not yet appeared will have the option of proceeding following the Taylor panel.

Upon completion of cross-examination of the Taylor panel and any other panel that wishes to proceed, the Inquiry will be adjourned, if necessary, until July 7, 2008 to provide an opportunity to file supplemental submissions to those parties who wish to do so. Supplemental submissions shall be solely for the purpose of amending or supplementing pre-filed evidence to reflect substantive changes necessitated by the filing of the Application. Supplemental submissions must be filed prior to 3:00 p.m. July 3, 2008.

Detailed Ruling

1. Does the Board have the jurisdiction to continue with the Inquiry insofar as it may relate to the NGTL System?

The Board finds that it continues to have jurisdiction with respect to the NGTL System until such time as a competent authority determines otherwise. No authority has been provided to the Board which would suggest that the Board has lost its jurisdiction merely as a result of the filing of the Application, or based on the assertion of TransCanada in the Application that the NGTL System is by law properly within Canadian federal jurisdiction. To the contrary, the Board agrees with those parties that suggested that the Board and its successor tribunal, the Alberta Utilities Commission, have a statutory obligation to regulate NGTL and to do so in the Alberta public interest.

The Board agrees with parties that submitted that jurisdiction is a matter of law and until such time as a competent authority determines, as a matter of law, that jurisdiction over the NGTL System is properly vested in another tribunal, the Board will not abdicate its responsibilities by failing to carry out its statutory mandate to regulate the NGTL System.

2. In the event the Board has the jurisdiction to proceed with the Inquiry, should the Board proceed in light of the Application?

Some parties suggested that jurisdiction to continue with the Inquiry is not the issue, rather, the appropriate questions to consider are whether, or to what extent, the Board should continue with the Inquiry in the circumstances. The Board has carefully considered this issue. In particular, the Board has considered the potential for partial duplication of proceedings before a different regulator; the potential that any change to an extraction convention directed by the Board may not be fully implemented at the time a future regulator may assume jurisdiction over the NGTL System; and the heavy demands on the time and resources of the parties to the Inquiry. The Board has also considered that the Inquiry, in part, is dealing with a matter that has been at issue for at least a decade and several parties stated or implied that further delay would result in prejudice to them.

The Board agrees with those parties that submit the Board must deal with the facts as they exist today, and must carry out its public interest responsibilities as they exist today. The granting of the relief requested by TransCanada is uncertain. Further, a great deal of uncertainty was expressed by parties in relation to the timing of any approval. It is also unclear if references or appeals to the Courts would be required before matters are finally resolved. In light of these uncertainties, the Board considers it not only appropriate, but necessary in the public interest, to continue with the Inquiry process.

Although the Board recognizes the concerns expressed by some parties to the hearing that decisions of the Board relating to the NGL extraction convention as it applies to NGTL could potentially be overturned or amended in some fashion by a successor regulator, the Board does not consider this to be sufficient reason to unduly adjourn, delay the Inquiry or to amend its scope.

The Board considers it to be in the public interest to complete the Inquiry and to render a report, utilizing the substantial evidentiary record before it, a record which was accumulated with broad stakeholder participation and an independent Inquiry Expert. The Inquiry is a unique opportunity to consider, in a comprehensive fashion, various NGL and resource related issues directly relevant to the public interest. Further, it represents the culmination of a process reflecting issues and concerns that have been outstanding since before the 1996 Gulf Strachan Decision (Decision D96-07).

Accordingly, the Board does not consider it appropriate to terminate the Inquiry or to adjourn it pending an NEB decision on the Application. Further, the Board is not convinced that amendments to the scope or to the objectives of the Inquiry are necessary.

3. *If the Board proceeds, are there any process adjustments required? In particular:*
- a. *should NGTL be asked to present a panel knowledgeable as to both the Application and NGTL's evidence in this Inquiry?; and*
 - b. *should parties who wish to supplement their pre-filed evidence be allowed to do so in order to address any substantive changes that may be required as a result of the filing of the Application?*

The Board considers that it would assist the Board and parties if NGTL provides a panel for cross-examination, exclusively for the purposes of addressing changes, amendments or corrections, if any, to NGTL's pre-filed evidence and testimony necessitated by and related to the filing of the Application. The Board does not consider it appropriate that NGTL witnesses be

questioned with respect to any aspect of the Application not directly related to a matter before the Board in this Inquiry.

Accordingly, the Board directs NGTL to provide a witness panel for cross-examination on Tuesday, **June 24, 2008 at 9:00 a.m.** The panel should be prepared to address the issues outlined above.

Given the submissions by counsel for Taylor that Taylor had no requirement to supplement its evidence in light of the Application, and recognizing Taylor's desire to ensure the Inquiry proceeds in a timely manner, the Board assumes that the Taylor panel would be prepared to be seated for cross-examination immediately following the NGTL panel. The Board asks Taylor to advise the Board by **3:00 p.m. on Monday June 23, 2008** if that panel wishes to proceed following the appearance by NGTL.

The Board has carefully considered representations by counsel for certain parties that pre-filed evidence may have been different had the Application been filed prior to the submission of this evidence. The Board agrees that the filing of the Application is a material event. The Board notes that the parties that have raised the above concern have not, as of yet, completed their appearances at the Inquiry. The Board offers these parties the option of proceeding with their appearances following the Taylor panel and addressing any changes in position at that time. In the alternative these parties may file supplemental submissions and appear at a later date. Such supplemental submissions must relate to a substantive change in policy position or supporting evidence which is a direct consequence of the filing of the Application, and must be filed by **3:00 p.m. on July 3, 2008**. Panels would be seated to address all evidence including the supplemental submissions commencing **Monday July 7, 2008**.

The Board asks any party that has not completed its appearance, to advise the Board by **3:00 p.m. on Monday June 23, 2008** whether that party wishes to proceed following the Taylor panel or following the filing of supplemental submissions.

All submissions and correspondence should be sent via electronic mail to filings@auc.ab.ca. If you have any questions, please contact either Kim Eastlick by email at kim.eastlick@ercb.ca or (403) 297-4325 or Heather Gnenz by e-mail at heather.gnenz@auc.ab.ca or by telephone at (403) 592-4419.

Yours truly,

Brian C. McNulty
Board Counsel