



**EB-2009-0422**

**IN THE MATTER OF** the *Ontario Energy Board Act*,  
1998, S.O. 1998, c. 15, (Schedule B);

**AND IN THE MATTER OF** an Application by Dawn  
Gateway Pipeline Limited Partnership for an Order or  
Orders granting leave to construct a natural gas  
pipeline and ancillary facilities in the Townships of  
St. Clair and Dawn-Euphemia, all in the County of  
Lambton, and approving the regulatory framework  
and the tariff for the transmission of gas on the  
Ontario portion of the Dawn Gateway Pipeline.

**BOARD STAFF  
SUR-REPLY**

**March 3, 2010**

In response to some of the issues raised in Dawn Gateway's reply argument, delivered orally on March 2, 2010, Board staff wishes to make some observations and comments to assist the panel.

**Whether the NEB requires Group 2 companies to file tolls?**

In its Reply argument, Dawn Gateway referred to the NEB's Filing Manual – Guide P – Tolls and Tariffs (Part IV of the NEB Act)<sup>1</sup> Section P.6 of the NEB Filing Manual titled "Regulation of the Traffic, Tolls and Tariffs of Group 2 Companies". Under the section "Tolls and Tariffs", the NEB Filing Manual states that there is a "consequent reduction in financial reporting requirements" for Group 2 companies but the section does not exempt Group 2 companies from filing their actual tolls.

The next part of Section P.6 titled "Accounting Requirements and Financial Reporting" states, in the 3<sup>rd</sup> paragraph, that the NEB has exempted Group 2 companies from the *Toll Information Regulations*<sup>2</sup> which otherwise require filing of periodic financial information. This part of the NEB Filing Manual also does not exempt Group 2 companies from filing the actual tolls.

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<sup>1</sup> Exhibit K2.1

<sup>2</sup> Regulations Respecting Information to be Furnished by Companies that Charge Tolls (SOR/79-319)

The excerpt from the NEB's "Regulation of Traffic, Tolls and Tariffs"<sup>3</sup>, also produced in Reply Argument, states:

**Tariffs**

***A pipeline company cannot charge a toll unless it is included in a tariff filed with the Board or approved by an order of the Board.*** This tariff may also include terms and conditions with respect to a shipper's access to the pipeline, as well as the rights and responsibilities of both the pipeline company and shipper once service begins.

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**Complaint-based Regulation**

The Board uses a complaint approach for the financial regulation of Group 2 companies. This method of regulation is described in each company's tariff. The pipeline company is responsible for providing shippers and other interested persons with sufficient information to enable them to determine whether the tolls are reasonable. ***Once filed with the Board, the tariffs containing new tolls automatically become effective.*** If a complaint is filed, the Board may establish a procedure to examine tolls. In the absence of a complaint, the Board may presume that the filed tolls are just and reasonable. Overall, this approach has resulted in few complaints." (emphasis added)

Implicit in the above-quoted sections is that actual tolls are included in the tariff filed with the NEB. Accordingly, Board Staff submits that, as a general rule, it appears that the NEB requires Group 2 companies to file the actual tolls and terms of service so shippers and interested parties can determine that the actual tolls and terms of service are just and reasonable; not a maximum rate. Board Staff submits that the information provided in Reply argument in Exhibits K2.1 and K2.2 do not indicate that Group 2 companies are exempt from filing their tolls with the NEB, but only that they are subject to less strict *financial* regulation.

The *NEB Act* states:

- 60(1) A company shall not charge any tolls except tolls that are
- a) specified in a tariff that has been filed with the Board and is in effect; or
  - b) approved by an order of the Board.

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<sup>3</sup> Exhibit K 2.2

It should be noted that subsection 60(1)(a) does not require Board approval of the tolls if included in a tariff filed with the Board. Otherwise the Board would have to approve the tolls, as per subsection 60(1)(b) of the *NEB Act*.

In its Reply argument Dawn Gateway did not present any cases in which a Group 2 company was not required to file its actual tolls but that such tolls were approved by the NEB under subsection 60(1)(b). Instead, the cases presented in Reply argument are examples of the NEB applying subsection 60(1)(a) of the *NEB Act*.

One of the NEB decisions referred to in Reply argument, *AEC Suffield Gas Pipeline Inc.*<sup>4</sup> (“*AEC Suffield*”), stated:

**“As it is the Board’s normal practice to deal with the tolls and tariffs of Group 2 companies under paragraph 60(1)(a) of the NEB Act**, the Board does not consider it necessary to issue an order approving AEC Suffield’s proposed tolls and tariffs. AEC Suffield will be required to file its tolls and tariff with the Board prior to the commencement of operation and will be required to file annual audited financial statements in accordance with paragraph 5(2)(b) of the *Gas Pipeline Uniform Accounting Regulations*.”<sup>5</sup> (emphasis added)

In another case submitted in Reply argument, *Pipestone Pipelines*<sup>6</sup>, the NEB also stated,

“Pursuant to paragraph 60(1)(a) of the Act, Pipestone will be required to file its final tolls and tariffs with the Board prior to commencement of operation under any certificate issued by the Board. **As is the Board’s normal practice for Group 2 companies**, it will not be necessary for the Board to issue an order approving Pipestone’s proposed tolls and tariffs under paragraph 60(1)(b) of the Act.”<sup>7</sup>

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<sup>4</sup> NEB Decision GH-2-98 (July 1998) (“*AEC Suffield*”)

<sup>5</sup> *AEC Suffield* at page 14

<sup>6</sup> NEB Decision OHW-1-99 (February 2000) (“*Pipestone*”), Exhibit K2.4

<sup>7</sup> *Pipestone*, at page 12

Board Staff points out that both the *AEC Suffield* and the *Pipestone* cases indicate that the NEB's 'normal practice' in respect of Group 2 companies is to require the tolls to be filed although the tolls do not need to be approved by the NEB. While there may be cases where Group 2 companies are not required to file tolls with the NEB, no such cases were presented by Dawn Gateway to assist this Board.

**Whether filing tolls is required by the NEB Act and whether the OEB Act contains similar requirements?**

While the *OEB Act* does not contain the same provision as Section 60 of the *NEB Act*, Board Staff points out that this Board has not yet dealt with the regulation of a Group 2 type pipeline. The Board's governing legislation is not designed to specifically address the alternative regulatory regime considered in this proceeding.

The *OEB Act* states:

**Order of Board required**

**36.** (1) No gas transmitter, gas distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract. 1998, c. 15, Sched. B, s. 36 (1).

**Order re: rates**

(2) The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas. 1998, c. 15, Sched. B, s. 36 (2).

Dawn Gateway is seeking that this Board approve the estimated, maximum rates set out in its application (e.g., the maximum rate of \$1.00 USD per Dth (per day)

for firm transportation).<sup>8</sup> However, in the absence of price disclosure (i.e., the actual tolls), it is difficult to determine whether the rates are ‘just and reasonable’ in order for the Board to approve the tolls in accordance with section 36 of the *OEB Act*.

**Whether an ‘at-risk’ pipeline with market-based tolls for transmission should be exempt from the requirement to file its tolls with the regulator?**

Dawn Gateway has argued throughout that, because the Dawn Gateway pipeline will be an at-risk pipeline and the tolls to be paid by shippers were negotiated, this Board’s approval of the actual negotiated rates is not required and therefore Dawn Gateway should not be required to file its actual tolls with this Board.

Board Staff points out that this position appears to be inconsistent with how the NEB regulates Group 2 pipelines, including those that are commercially at-risk and whose proposed tolls are negotiated with shippers. The *AEC Suffield* case, referred to in Reply argument, indicates that, under the NEB jurisdiction, a pipeline can be a commercially at-risk pipeline with market-based tolls<sup>9</sup> and still require the applicant to file the proposed tolls and a finding by the NEB that the proposed tolls are ‘just and reasonable’.<sup>10</sup>

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<sup>8</sup> Section 4, page 11, paragraph 29 and Section 4 – Schedule 3 – Statement of Toll – Firm Transportation Service Tolls

<sup>9</sup> *AEC Suffield* at page 12 : “AEC Suffield proposes to be a commercially at-risk pipeline with market-based tolls for transmission services.”

<sup>10</sup> *AEC Suffield* at page 14 : “...it is the Board’s view that the tolls on the AEC Suffield pipeline would be just and reasonable. Therefore, the Board accepts the Firm Service tolls proposed by AEC Suffield.”

Hence, in Board Staff's submission, the fact that a pipeline is 'at-risk' would not, absent other reasons, be a justification for not requiring the filing of actual tolls or dispense with the Board's review of such tolls and finding that they are just and reasonable.

**Whether only 'fixed' tolls are required to be filed with the regulator?**

Dawn Gateway stated in reply that it does not dispute that pipelines with 'fixed' tolls are required to file them with their tariff but that is not the case with 'range' tolls such as those proposed by Dawn Gateway.<sup>11</sup>

Firstly, Board staff points out that Dawn Gateway has not filed any cases or examples of NEB decisions involving such 'range rates' where the actual tolls did not have to be filed with the NEB, although there was reference in Reply argument to a TransCanada toll design schedule that apparently contained a 'range' of tolls.<sup>12</sup> Board staff is unable to comment on the TCPL schedule as there was insufficient information about the NEB decision and order in which the TCPL tolls were approved nor was there sufficient reasoning in the Reply to explain or justify how the TCPL toll design schedule was comparable to Dawn Gateway's proposed maximum rate of \$1.00/ Dth / day.

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<sup>11</sup> Tr. Vol 2, p 81-82

<sup>12</sup> Transcript Vol. 2., page 93 and Exhibit K2.5

Also, Board Staff points out that TCPL is a Group 1 company under NEB jurisdiction and Group 1 companies are required to provide more detailed information about the applied-for-toll design.<sup>13</sup> Hence, it may be that the reason the TCPL schedule contains ‘ranges’ is because its toll design is quite complex which is the opposite of the capped toll proposed in Dawn Gateway’s application. In any event, Board Staff is not aware of any precedent where the ‘range’ rates were a simple ‘cap’, as Dawn Gateway is proposing..

Board Staff does not agree with Dawn Gateway’s characterization of its negotiated tolls as not being ‘fixed’. Board Staff’s understanding of ‘fixed’ tolls is that they are for fixed contract terms and, unlike traditional cost of service tolls, they do not vary during the contract term. This view seems to be consistent with the NEB’s discussion in the *AEC Suffield* decision:

“ The proposed Firm Service tolls, fixed for contract terms of 5, 10, 15 and 20 years. These tolls would not vary over their term and in contrast to traditional cost-of-service tolls, they are for longer contract terms.

.....

Fixed tolls would involve a different sharing of risks and rewards between the pipeline company and its shippers than would the sharing under cost-of-service regulation.

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AEC Suffield’s proposed Firm Service tolls would insulate shippers from changes in transportation cost and some of the risks associated with more traditional tolling methodologies. The pipeline company would assume those risks but in turn may be able to earn a return that would appropriately compensate it. The Board believes that a sharing of risks and rewards that is agreed to by a pipeline company and its shippers would be an appropriate way to achieve the goals of regulation without the direct involvement of the regulator...

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...In light of the foregoing, it is the Board’s view that the tolls on the AEC Suffield pipeline would be just and reasonable. Therefore, the Board accepts the Firm Service tolls proposed by AEC Suffield.”<sup>14</sup>

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<sup>13</sup> NEB Filing Manual, Exhibit K2.1, Section P.5 (“Filing Requirements”, #2)

<sup>14</sup> *AEC Suffield* at pages 13-14



It would appear to Board Staff that Dawn Gateway is proposing *fixed* tolls in that each shipper has entered into a Precedent Agreement for a certain term and during that contract term the toll will not be varied. However, it seeks to not file those actual, fixed tolls but a toll that is just a price cap for FT service of \$1.00 USD per Dth per day. Board Staff is concerned that this may be an irregular approach and Dawn Gateway has not filed any evidence on the record to demonstrate that there is a precedent for such an approach, either at the NEB or other regulators.

**The need for price transparency for an effective complaint-based regulatory regime**

In the application before this Board, Dawn Gateway is seeking 'light-handed', that is complaint-based regulation, comparable to Group 2 type regulation by the NEB.

While 'light-handed' regulation may be in order and the actual tolls themselves may not need to be approved by the regulator, the complaint mechanism is an important element. Board staff is concerned that, if the market lacks the information to determine whether a complaint is warranted, thereby triggering some kind of review, there is in effect no regulation of the subject pipeline apart from the reporting requirements. Disclosure with respect to actual pricing and

contract length would provide transparency and ensure that the complaint based mechanism is effective.

Board staff notes that there is still unsubscribed capacity that may be sold through direct negotiations. Dawn Gateway has indicated that its preference is to negotiate long-term FT contracts for this capacity<sup>15</sup>. Board staff is concerned that, without price disclosure there is no reference point for future economic decisions by current or prospective shippers. Price is one of the key aspects of most transactions between buyers and sellers and historical pricing information may be necessary for bidding in future open seasons, direct negotiations or secondary transactions.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

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<sup>15</sup> Tr Vol 2, Mar 2 2010, p 98