

By electronic filing and e-mail

March 4, 2010

Kirsten Walli  
Board Secretary  
Ontario Energy Board  
27<sup>th</sup> floor – 2300 Yonge Street  
Toronto, ON M4P 1E4

Dear Ms Walli,

**Dawn Gateway Pipeline Limited Partnership ("DGLP")**  
**Leave to Construct – Bickford Dawn Pipeline**  
**Board File No.: EB-2009-0422**  
**Our File No.: 339583-000059**

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We are writing with a request that the submissions in this letter pertaining to the new material filed by counsel for DGLP in Reply Argument be considered along with the submissions filed by Board Staff late yesterday.

We have notified counsel for DGLP of our intent to make submissions on the new material in this letter and suggested that the reply to the submissions made by Board Staff be withheld so that it can include DGLP's response to the further submissions contained in this letter. We are sensitive to the timing constraints relating to the issuance of the Decision in this case and, by proceeding in this manner, we are attempting to assure that the Board can issue its Decision before the March 11, 2010 deadline DGLP faces.

In Reply Argument, counsel for DGLP appeared to be suggesting that there are a number of Group 2 National Energy Board ("NEB") pipelines that sell longer term firm transportation services under the auspices of range rates. We emphasize the phrase "longer term" because the situation for short term services can be more flexible, just as it is in the case of Union Gas Limited's ("Union") C1 service. Under Union's C1 rate schedule, the range rate only applies to short term deals of one (1) year or less. For terms above one (1) year, the transportation tolls are fixed and disclosed in the rate schedule. The C1 rate schedule does not justify the ceiling DGLP proposes for longer term transportation and the non-disclosure of pricing information and executed longer term contracts.

We checked some but not all of the Group 2 companies listed on the NEB's website referenced in DGLP's response to Board Staff Interrogatory No. 9 and, so far, the only one we can find that operates under the auspices of rates that sets a maximum ceiling for longer term firm transportation service is Vector. There may well be others but we have not yet been able to identify them.

Vector's toll schedule filed as part of K1.13 is the only NEB example we have of a Group 2 pipeline operating under the auspices of a rate that permits negotiated tolls up to a cap expressed in percentage terms of the posted cost based maximum 15 years long term transportation service toll. Insofar as Vector is concerned, and any other Group 2 pipeline companies operating under the auspices of such tolls, the question is not so much whether the contract prices are required to be posted by the NEB, but whether the contracts are either available for public scrutiny, or otherwise available to a prospective shipper seeking firm service on Vector for a term of less than ten (10) years as part of the information that Group 2 pipelines are obliged to provide to assist prospective shippers to evaluate the reasonableness of a proposed toll. We have spoken to Marjorie Fowke, counsel at the NEB, in an attempt to obtain an answer to that question. We will relay any information Ms Fowke provides to us on this point. If counsel for DGLP knows the



answer to the question, then we request that the answer be provided in DGLP's Reply to these further submissions. Ms Fowke advised that a check of the NEB's Repository will reveal whether the longer term firm contracts with Vector of ten (10) years or less are filed with the NEB.

The AEC toll in the case filed by counsel for DGLP is not a range rate toll but a fixed term differentiated toll. Every shipper that contracts for a five (5) year term pays the same toll. Every shipper that contracts for ten (10) years pays the same toll, albeit a toll that is slightly lower than the five (5) year toll. The 15 year and 20 year tolls are also fixed, again at slightly lower prices. This toll schedule is not analogous to the toll schedule DGLP proposes.

The other NEB case that was filed in Reply, being the Pipestone Pipelines Limited case, is also not a range rate toll but a fixed toll that was derived from the cost of the alternative of trucking oil and then discounted. If DGLP's long term tolls are determined using the approach followed in this case, then the longer term value of service comparison would be the longer term 10¢ to 15¢/GJ difference between commodity prices at Michigan and Dawn. One price within that range would be selected by DGLP, discounted, and then charged to all long term shippers. The Pipestone Pipelines Limited case does not support a conclusion that toll ceilings of 2,000% to 3,000% above a cost base are just and reasonable.

The Pipestone case, at page 10, does refer to the requirements that for NEB tolls to be just and reasonable, and that "they shall always under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate." Preventing unjust discrimination between shippers is a high priority for the NEB. Fixed toll pricing, or, in the alternative, pricing transparency in amounts charged to shippers is the key to achieving that objective.

We are aware of the Vector tolls that set the ceiling for firm transportation contracts of ten (10) years or less at no more than 300% above the cost base toll. What we attempted to show in our analysis is a ceiling of 15¢/DTH per day or \$4.50/DTH per month, DGLP's proposed toll would range between 350% to 500% above the cost of service toll benchmark. The monthly and daily charge ceilings DGLP propose are some 2,000% to 3,000% above a cost base. There is no NEB Group 2 pipeline which we are aware that has such ceilings in their toll schedules.

We did e-mail counsel for DGLP on Tuesday, March 2, about the mischaracterization at page 87 of the Reply Argument where it was asserted that we argued that the NEB regulates Group 2 pipelines on a cost of service basis. Our argument was not that the ceilings are set on a cost of service basis, but that they are linked to a cost of service base. Obviously, capped tolls that allow pricing at a level of 300% of a cost base toll, as in the case of Vector, or, in the proposals we suggested for DGLP at 350% to 500% above estimates of DGLP's cost base for firm service and even higher for interruptible service, cannot reasonably be characterized as regulation on a cost of service basis.

We submit that in exercising its jurisdiction in this fashion, the NEB balances the interests of pipeline companies and shippers. This type of balancing function is described in the AEC case at pages 13 and 14, and is reflected in the statement under the heading "Toll Regulation" in Exhibit K2.2 filed by counsel for DGLP in Reply as follows:

*"Toll Regulation aims to strike a balance between the interests of shippers and the pipeline companies."*

One Group 2 pipeline with which we have some familiarity is Emera Brunswick Pipeline Company Limited. DGLP includes this company in the schedule of examples it attached to one of your interrogatories. The Decision with Reasons in the Emera Brunswick Pipeline case, GH-1-2006, dated May 2007 and the discussion of tolls, tariffs and financial matters with respect to that

company, starts at page 76 of the Decision. In that case, our client, Repsol, as the sole shipper on the Brunswick Pipeline, reached a negotiated toll agreement which obliged Repsol to pay tolls that covered all the fixed charges of the pipeline over a 25 year period.

An issue in that case was whether additional shippers on the Brunswick Pipeline could expect to pay the same tolls Repsol pays. With respect to that issue, the Board stated at page 78 as follows:

*"The Board is of the view that two or more shippers could use the Brunswick Pipeline under different circumstances; for example, they could have different transportation distances, different contract terms, or different types of services. As such, the Board recognizes that different shippers could face different tolls on the Brunswick Pipeline. However, tolls to be paid by third parties on the Brunswick Pipeline would have to be filed, or approved, by the Board before they could be charged."* (emphasis added)

We interpret this decision to mean that where the prices in contracts with Group 2 pipelines are not prices set out in approved tolls, then the contracts are to be filed and available on the public record if requested. This would be the situation in a case where there is departure from a fixed toll but not necessarily the situation in the case of Vector where contracts for services of ten (10) years or less are priced below the ceiling the approved toll allows.

Our understanding of the NEB's approach to confidentiality, which counsel for DGLP raised in Reply, is that, generally speaking, it will not be granted where pipelines have direct dealings with multiple third parties. There is a statement to that effect in the NEB's Group 2 Guidelines and at page 11 of Exhibit K2.1 filed in Reply Argument. There, in dealing with the possibility of a Group 2 pipeline obtaining an exemption from filing the financial information that is to be made available to prospective shippers for the purposes of addressing toll concerns, the Board states as follows:

*"These instances have primarily concerned small shipper owned pipelines with no direct dealings with third parties."* (emphasis added)

Again, preventing unjust discrimination between multiple shippers appears to be the concern. In the case of DGLP, which already has five (5) longer term third party shippers and is likely to have more, we think it unlikely that the NEB would ascribe confidential protection to the shipper contracts. It is worthy of note that there is no confidentiality clause in the Precedent Agreements between DGLP and the five (5) committed shippers.

For these reasons, we submit that the additional materials counsel for DGLP filed in Reply do not justify either the level of caps proposed in the toll schedules, or DGLP's reluctance to file the shipper contracts with the OEB so that they can be made available to prospective shippers, if requested.

We hope these further submissions will be of some assistance to the Board.

Yours very truly,



Peter C.P. Thompson, Q.C.

PCT\slc

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