



File OF-Tolls-Group1-N081-2011-01 01
24 August 2011

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Dear Ms. Shaw, Ms. Boucher-Chen, Ms. Stevens, and Ms. Jamieson:

NOVA Gas Transmission Ltd. (NGTL) Application for Final 2011 Tolls for the Alberta System and Implementation of Alberta System Integration dated 16 May 2011; and Application of BP Canada Energy Ltd (BP) for Review and Variance of Board Decision RHW-1-2010 and Order TG-04-2010 dated 6 June 2011

The Board issued Order TG-01-2011 on 19 August 2011 and is aware of one administrative error regarding the Order number. The correct Order number is **TG-05-2011**.

Please find attached **Order TG-05-2011**. The Board apologizes for any inconvenience caused by this matter.

NATIONAL ENERGY BOARD

Anne-Marie Erickson
Secretary of the Board

Attachment

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File OF-Tolls-Group1-N081-2011-01 01
19 August 2011

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NOVA Gas Transmission Ltd. (NGTL) Application for Final 2011 Tolls for the Alberta System and Implementation of Alberta System Integration dated 16 May 2011; and Application of BP Canada Energy Ltd (BP) for Review and Variance of Board Decision RHW-1-2010 and Order TG-04-2010 dated 6 June 2011

1. Introduction

NGTL filed an application, dated 16 May 2011, for Final 2011 Tolls for the Alberta System and Implementation of Alberta System Integration (NGTL Application). The NGTL Application follows up on the 2009 Application for Rate Design Methodology and Integration with ATCO Pipelines,¹ on which the National Energy Board (NEB or the Board) ruled in Decision RHW-1-2010, dated 12 August 2010. The Board sought comments on the NGTL Application.

During the comment process, BP filed an application, dated 6 June 2011, for Review and Variance of Board Decision RHW-1-2010 and Order TG-04-2010 pursuant to subsection 21(1)

¹ ATCO Pipelines is a tradename, used by ATCO Gas and Pipelines Limited, the corporation that owns the ATCO Pipelines System facilities.

of the *National Energy Board Act* (NEB Act) and Rule 44 of the *Rules of Practice and Procedure* (the Rules) (Review Application). This document contains the Board's decisions on these applications.

2. Background

NGTL is a wholly-owned subsidiary of TransCanada PipeLines Limited, which owns and operates the Alberta System, an extensive natural gas transmission system transporting gas produced in the Western Canadian Sedimentary Basin.

The Alberta System became subject to federal jurisdiction and regulation by the Board on 29 April 2009. Prior to that date, the Alberta System was under provincial jurisdiction and regulated by the Alberta Utilities Commission (AUC) and its predecessors.

On 7 April 2009, NGTL and ATCO Pipelines entered into the Alberta System Integration Agreement (Integration Agreement) to streamline the provision of natural gas transmission services and address competitive pipeline issues in Alberta. Among other features, the Integration Agreement committed to providing service under similar terms and conditions as exist pre-integration.

Since entering into the Integration Agreement, NGTL and ATCO Pipelines have proceeded with various filings and applications to implement the Integration Agreement involving approvals by the NEB, the AUC and a review by the Competition Bureau.

In its application for Rate Design Methodology and Integration filed with the NEB on 27 November 2009 under the Negotiated Settlement Guidelines, NGTL explained that the Rate Design and Services Review Settlement (the Settlement) was the culmination of a review of the Alberta System rate design methodology and terms and condition of services. This review was initiated by NGTL and members of the Tolls, Tariff, Facilities and Procedures Task Force in June 2008. NGTL stated that the Settlement represented an acceptable balance of interests amongst the parties and resulted from compromises in the diverse interests and positions of the parties. In some cases, parties made their support conditional upon the Settlement and the Integration Agreement being considered by the NEB as a consolidated package. In the RHW-1-2010 proceeding, the following issues were considered by the Board:

- Rate methodology, including the geographic footprint of the Alberta System and appropriate rate ceiling for FT-R service;
- Integration Agreement: commercial implications, including both duplicative tolling related to the Ventures Joffre Pipeline and title to natural gas liquids (NGLs) on the Alberta System; and
- Integration Agreement: asset swap.

No party to the RHW-1-2010 proceeding asked the Board to reject the Settlement or requested that the Board deny approval of the commercial integration.

In the RHW-1-2010 Decision, among other things, the Board approved the Alberta System rate design methodology, and terms and conditions of services, and the Settlement as presented in

NGTL's 2009 Application. The Board also approved the commercial integration of the Alberta System and the ATCO Pipeline system (Integration) pursuant to the provisions of the Integration Agreement. Regarding concerns raised about title to NGLs on the Alberta System, the Board was not persuaded by BP Canada to put the Integration Agreement on hold until an acceptable solution was found to the issue of passing title of NGLs to a holder of an agreement for Other Services (OS) Straddle Plant Delivery (SPD). Rather, the Board considered the Settlement and Integration Agreement as a consolidated package. The Board encouraged NGTL and holders of non-standard (NS) SPD agreements to continue to address and resolve extraction issues through the collaborative process established by NGTL.

3. The current NGTL Application

The current NGTL Application proposed an Integration Implementation Date of 1 August 2011. Service on the two systems (ATCO Pipelines System and the Alberta System) would be tolled on a combined basis, with rates based on the combined volume and revenue. Some rates are subject to transitional mechanisms over the first two years of integrated service.

If approved, service previously provided to ATCO Pipelines' customers would be provided by NGTL, post-Integration. As a result, service contracts with ATCO Pipelines would be transitioned to service agreements with NGTL, and certain adjustments made to the NGTL tariff.

According to NGTL, most of the ATCO Pipelines customers are expected to move to standard, existing service on the Integrated Alberta System, pursuant to a formal election process which began 2 June 2011. On ATCO Pipelines, there are nine NS agreements, plus four NS agreements for SPD. Many of the nine NS customers are expected to elect standard Alberta System service. The four ATCO Pipelines SPD agreements cover delivery at: Paddle River Plant; Villeneuve Ethane Extraction Plant; Fort Saskatchewan Ethane Extraction Plant; and Edmonton Ethane Extraction Plant (EEEP), owned 51 percent by ATCO Midstream and 49 percent by AltaGas Ltd. (AltaGas), and operated by AltaGas.

Under the current ATCO Pipelines practice articulated in its tariff, title to the NGLs is deemed to have passed to ATCO Pipelines if those NGLs are not present in the gas delivered. Then, in ATCO Pipelines agreements with the straddle plant operators (such as AltaGas), ATCO Pipelines is able to pass and the customer is able to receive clear title to the NGLs. The straddle plant can then pass clear title to its customers, such as BP.²

The NGTL Application proposes that customers with NS SPD agreements may choose to transition to NGTL standard firm transportation extraction (FT-X) service or to a proposed OS SPD Agreement with NGTL.

Generally, in the NGTL tariff, and in its FT-X Agreements, there is no express title transfer of NGLs to NGTL or to its customers. In information request responses, NGTL indicated that under

² In its Decision 2011-160, the AUC has determined that ATCO Pipelines agreements, including its SPD agreement, will terminate upon the Integration Effective Date.

the current convention on the Alberta System, it does not take title to NGLs, and as a result, cannot pass title on to the straddle plants (who then are unable to pass it on to their customers). NGTL has proposed that it would treat the OS SPD contract as an exception to the current convention. With the proposed contract, OS SPD customers would continue to have gas delivered to the inlets of their plant for extraction purposes without having to purchase extraction rights from any other shipper on the Alberta System. The proposed OS SPD Agreement, at clause 5.1, states that the OS SPD customer “shall have the exclusive right to extract all Plant Liquids.”

Section 8 of the OS SPD Agreement sets out the term of the Agreement. Service shall terminate upon the earlier of 3 years from termination notice, or the effective date of any change to the extraction convention approved by the Board. In its Application, NGTL notes that the termination provisions incorporate recommendations by the AUC in its 2011-160 Decision. In information request responses, NGTL stated that it presently intends to file an application regarding the long term extraction model for the Alberta System later in 2011.

The proposed NGTL OS SPD Agreement on the Integrated Alberta System was the only agreement that elicited concern from parties during the comment process on the NGTL Application. BP and AltaGas raised concerns about the content of the proposed agreement and its impact on their business at EEEP, one of the four locations at which ATCO Pipelines currently provides SPD service. BP opposes the mechanism for transitioning ATCO Pipelines’ SPD agreements to the OS SPD Agreement as proposed by NGTL. BP alleges the proposed contract transition mechanisms eliminate title to NGLs and create uncertainty for SPD customers and the third parties they do business with, such as BP. AltaGas submitted that the proposed OS SPD Agreement has serious potential consequences to the way AltaGas carries on its NGLs extraction business, and requested that the Board approve three additional terms to NGTL’s proposed OS SPD Agreement.

Discussion of the positions of the parties on the NGTL Application, and the Board’s views, are contained in section 5 of this decision.

4. Application for Review and Variance of RHW-1-2010

BP requested the Board vary the Decision and Order by:

1. Suspending the approval, and the implementation and contract transition process, specifically as it relates to the transition of ATCO Pipelines SPD agreements to NGTL;
2. Directing ATCO Pipelines and NGTL to formally work with interested and affected parties in a Board directed process to explore solutions to permit the benefits of Integration to proceed, while accommodating and transitioning parties rights in relation to title to NGLs;
3. Imposing a condition on approval of Integration that SPD contract transition mechanisms, in relation to the transition from ATCO Pipelines SPD agreements, maintain and protect existing SPD customers’ rights and to ensure the protection of the rights of SPD customers and affected third parties; and
4. Suspending RHW-1-2010 and TG-04-2010, pending the above.

On 27 June 2011, the Board solicited comments from interested parties on whether BP had raised a doubt as to the correctness of the Decision such that it ought to be reviewed and varied. The Board received a submission from AltaGas in support of the Review Application and submissions from NGTL, ATCO Pipelines, the Canadian Association of Petroleum Producers (CAPP), Encana Corporation (Encana), and Utilities Consumer Advocate (UCA) opposing the Review Application. The Board received BP's reply submission on 14 July 2011.

4.1 Grounds for BP's Review Application

BP submitted that there are changed circumstances or new facts arising since the Decision in RHW-1-2010 or facts not placed in evidence in the proceeding that were not discoverable by reasonable diligence. Had those circumstances been different, and new facts been before the Board, the Decision may well have been different and thus there is a reasonable doubt as to the correctness of the Decision or Order approving the proposed Integration in principle, or that would have led the Board to impose conditions on its Decision and Order.

The grounds to support BP's submission are as follows.

Ground 1: The details of the proposed transition were not before the Board.

BP submitted that the details of the proposed NGTL OS SPD Agreement were unknown to the intervenors and were not placed in evidence before the Board at the time of the Decision. It was not until mid-way through the RHW-1-2010 proceeding (NGTL response to BP IR 1.5) that the issue of title, and NGTL's inability to acquire title under its existing tariff and agreements, were raised. The pro-forma NGTL OS SPD Agreement was not disclosed until ATCO Pipelines filed rebuttal evidence in the Contract Transition Phase of the AUC proceedings on 15 December 2010. There was no opportunity or process before the AUC to test or examine the proposed NGTL OS SPD Agreement, nor has there been before the NEB.

Ground 2: The Board appears to have been under the impression that the details would be worked out among the parties.

BP argues that one can reasonably infer from statements made by the Board in its Decision that the Board expected certain issues concerning liquids extraction to be resolved among NGTL and SPD Agreement holders. At least as between NGTL and AltaGas (and directly affected third parties such as BP), the issue has not been resolved.

Ground 3: Statements made by ATCO Pipelines and NGTL either directly committed to protecting the rights as reflected in the ATCO Pipelines SPD agreements, or inferred such a commitment. However, these statements have been demonstrated to be wrong.

The Board made note in the Decision of NGTL's statement that no ATCO Pipelines SPD agreement holder has raised any objections to the proposed Integration. BP indicated that in NGTL's written evidence, NGTL announced its intention to transition ATCO Pipelines SPD agreements to NGTL OS SPD Agreements with terms and conditions similar to existing ATCO Pipelines SPD service. In its original application to the AUC for Integration approvals, ATCO Pipelines also stated that "A customer transition mechanism ... is being developed by ATCO

Pipelines and NGTL ... to ensure that customer rights and obligations under ATCO Pipelines contracts will be carried forward in NGTL Alberta System contracts.” BP submits that given these statements, parties did not believe an objection or intervention were necessary. BP further notes that these commitments have not been met.

4.2 Positions of the Parties

AltaGas

AltaGas supports BP’s Review Application. AltaGas noted that it requested in the NGTL Application proceeding that the Board approve three additional terms to NGTL’s proposed OS SPD Agreement in order to protect the interests of AltaGas.

AltaGas also requested that the NEB establish an oral hearing process for the NGTL Application to allow AltaGas to present company and expert witnesses. An oral hearing process is necessary in order to allow AltaGas to correct and contradict the terms and conditions in NGTL’s proposed OS SPD Agreement prejudicial to the interests of AltaGas with respect to the EEEP facility, of which AltaGas is operator and part owner. AltaGas would not object if this oral hearing process were combined with the BP’s Review Application process.

NGTL

NGTL submitted that BP does not have standing to review the Decision on the grounds cited, or at all. In NGTL’s view, BP is not an SPD agreement holder, and as found by the Board in the Decision, the Board does not have jurisdiction over the commercial arrangements between SPD agreement holders and third parties.

The issues raised by BP are not new and there are no changed circumstances, new facts or errors of law that raise any doubt as to the correctness of the Decision and Order TG-04-2010.

Concerning BP’s first ground, NGTL had made several commitments and statements regarding the OS SPD Agreement in the RHW-1-2010 proceeding and committed to filing the OS SPD Agreement for approval once finalized. The proposed OS SPD Agreement before the Board in NGTL’s Application reflects the commitments and statements previously made by NGTL. NGTL clearly stated in the RHW-1-2010 proceeding that it could not provide a grant of title under its existing tariff provisions. In issuing its Decision, the Board was aware of BP’s concerns regarding title and NGTL’s position, and determined a delay to Integration was not required. NGTL’s position on title has remained unchanged, even as the OS SPD Agreement was revised throughout the course of the AUC Contract Transition Application proceeding. For all of these reasons, NGTL submitted that the Board had before it all of the information necessary to issue its Decision and Order TG-04-2010.

In response to BP’s second ground, NGTL noted that the Board’s expectation was that NGTL would continue to work with SPD agreements holders, *not* third parties such as BP, to resolve any issues with the transition of SPD agreements. NGTL continued discussions with SPD customers after the issuance of the Decision, but was unable to achieve resolution with AltaGas. This issue ultimately required a determination of the AUC as to the comparability of NGTL’s OS SPD Agreement to ATCO Pipelines’ NS agreement at EEEP. The AUC determined that the

OS SPD Agreement provided “sufficiently analogous commercial provisions to those contained in the SPD contracts, including the EEEP contract, such that straddle plant owners should be able to continue to extract and derive value from natural gas liquids pursuant to the OS SPD agreement after Integration”.

NGTL submitted that the assertion made in BP’s third ground, that statements made by ATCO Pipelines and NGTL that committed to preserving existing rights “have proved to be wrong”, is false. The commitments and statements made by NGTL in the RHW-1-2010 proceeding have been carried into the proposed OS SPD Agreement. Further, after a full process in which BP actively participated, the AUC determined that the proposed OS SPD Agreement provided comparable service to that under the EEEP agreement and effectively terminated the EEEP agreement, within its jurisdiction, on this basis. NGTL submitted that the Board’s jurisdiction in this matter is not to review claims about historical rights held by AltaGas on the ATCO Pipelines System, but rather, is to determine whether the service proposed by NGTL is reasonable on a go forward basis.

CAPP

CAPP continues to be supportive of Integration and urges the Board to allow ATCO Pipelines and NGTL to proceed with Integration as expeditiously as possible. Significant resources have already been expended on preparing for Integration. In CAPP’s view, any delay in implementation will only increase the costs and delay the savings and other benefits that will result from Integration

Encana

Encana submitted that while BP alleges changed circumstances or new facts arising since the issuance of the Decision, it remains the case that “BP is not a SPD contract holder with ATCO Pipelines and the Board has no jurisdiction over commercial arrangements between extraction plants and third parties such as BP”. There is still no basis for the Board to address BP’s concern about title to NGLs in the context of the Alberta System Integration proceeding. Encana submitted that many parties have expended significant time and effort in developing the Integration Agreement. It would be inappropriate to, at this late stage, put the Integration Agreement, or any part of it, on hold.

ATCO Pipelines

ATCO Pipelines indicated that while the terms of the NGTL OS SPD Agreement were still being developed at the time of the RHW-1-2010 proceeding (a fact understood by the Board) and are now finalized as set forth in the NGTL Application, no error results from this sequence of events. During the course of the RHW-1-2010 proceeding, NGTL’s basic commitments on the terms of the replacement OS SPD service, including the fact that no grant of title would be made by NGTL, were known. The concerns raised by BP that underlie BP’s Review Application were raised in the course of the RHW-1-2010 proceeding. While BP indicated that it was concerned that transitioning would alter AP’s existing extraction rights, BP did not identify any potential harm if ATCO Pipelines SPD agreements were replaced with NGTL OS SPD Agreement.

The suggestion that there was an inference in the Decision that terms of the NGTL OS SPD Agreement would be settled or resolved to the satisfaction of BP is contrary to the record. There was no such inference. BP's dissatisfaction was fully voiced in the course of the proceeding giving rise to the Decision and the Board concluded that this dissatisfaction was no reason for delaying Integration. It was not then, it is not now. ATCO Pipelines view is that the Board did note that further work was being done on the NGTL OS SPD Agreement, and that is in fact what happened. NGTL worked diligently to prepare terms that "reasonably preserve" the positions of parties.

UCA

UCA does not find any significant difference between the circumstances and facts set out in BP's Review Application and the Board's findings in the Decision.

The UCA considers that no further process is necessary. BP has introduced no change in circumstances or new facts that would require the Board to revisit its Decision.

BP's Reply

BP responded that it is not asking the Board to address the commercial arrangements between SPD agreements holders and third parties. BP is asking the Board to exercise properly its regulatory authority with respect to a regulated service offered by NGTL to EEEP. This service offering is intended to replace the existing regulated service offered by ATCO Pipelines, and is within the Board's regulatory authority. The Board can and should exercise its jurisdiction to carry forward the existing ATCO Pipelines SPD agreements. EEEP is primarily able to carry on its business because of the regulated service offering provided by ATCO Pipelines. BP submitted that for these reasons, and because BP is directly affected by the outcome of these proceedings because it buys NGLs from EEEP, it has standing.

Regarding ATCO Pipelines' submission that "NGTL's basic commitments regarding the terms of the replacement OS SPD service, including the fact that no grant of title would be made by NGTL, were known" - BP agrees that NGTL submitted on the record on 8 April 2010, that it could not acquire title in response to a BP information request and it was not until this time that NGTL acknowledged this fact. This, however, was the extent of the information on the record before the Board in the RHW-1-2010 proceeding in relation to the lack of title to NGLs.

4.3 Views of the Board

At issue is whether BP has raised a doubt as to the correctness of the Decision such that the Board should proceed to Phase 2 of a review, and establish a process to deal with the matter on its merits.

4.3.1 Review Process

Subsection 21(1) of the NEB Act provides that: "... the Board may review, vary or rescind any decision or order made by it or rehear any application before deciding it."

There is no automatic right of review under the NEB Act.³ As the Board has previously stated, an application for a review amounts to a request to the Board that it exercise a discretionary power that has been granted to it through its enabling legislation.

Procedural requirements for review applications are dealt with in the Rules. The review process typically entails a two-step approach: first, the Board must determine whether a doubt has been raised as to the correctness of the impugned Decision or Order (Phase 1), and then, if the applicant has met that test, the review proceeds to Phase 2, in which the application is considered on its merits.

4.3.2 Phase 1

In Phase 1, the Board determines whether the application for review meets the threshold requirement of raising a doubt as to the correctness of the Decision.

Subsection 44(2) of the Rules provides:

- (2) An application for review or rehearing shall contain...
 - (b) the grounds that the applicant considers sufficient, in the case of an application for review, to raise a doubt as to the correctness of the decision or order or, in the case of an application for rehearing, to establish the requirement for a rehearing, including
 - (i) any error of law or of jurisdiction,
 - (ii) changed circumstances or new facts that have arisen since the close of the original proceeding, or
 - (iii) facts that were not placed in evidence in the original proceeding and that were not then discoverable by reasonable diligence....

The Board's role is not to substitute their own views for those set out in the original Board decision. As stated by the Board previously: "at this stage of the Review Application [Phase 1]", the Board "is not to re-weigh all the evidence and make its own assessment of it."⁴ Rather, the Board must decide if the applicant on the review has raised a doubt as to the correctness of the decision.

BP has the burden to persuade the Board that there is a doubt as to the correctness of the Board's decision.

4.3.3 Standing

Neither section 21 of the Act nor s. 44 of the Rules set out a standing requirement. In the Board's view, BP has standing to bring the review, as it was accepted by the Board to be a participant to

³ See Reasons for Decision RH-R-1-2002 *TransCanada PipeLines Limited* Review of Cost of Capital Decision RH-4-2001.

⁴ See RH-R-1-2002 page 4 and 5.

the RHW-1-2010 proceeding and had an interest in the matters being determined. There is no restriction under Part IV that only parties that are in a direct contractual relationship with the regulated company are entitled to standing to be heard or to file a review.

4.3.4 Substantive Argument

BP is relying upon grounds set out in sub paragraph 44(2) (b) (ii) and (iii) of the Rules as the basis for its Review Application.

Ground 1 - details of the proposed transition were not before the Board.

In the Board's view, it was not necessary for the Board to have before it the proposed detailed provisions of the NGTL OS SPD Agreements for it to approve the Settlement and Integration Agreement in RHW-1-2010. The Board had before it BP's concerns regarding the issue of title to NGLs on the Alberta System, as well as NGTL's response to those concerns. NGTL had stated in the proceeding that it could not provide a grant of title under its existing tariff provisions and that providing service under the OS SPD Agreement did not necessarily extend to the granting of title to the commodity being transported. Parties made submissions on the issue of title to NGLs on the Alberta System in the RHW-1-2010 proceeding.

Accordingly, the actual provisions of the OS SPD Agreement were not required for the Decision, nor are the concerns and responses related to commercial integration and title to NGLs new to the Board. The Board had before it the underlying issue of concern raised by BP regarding Integration and its implications related to title to NGLs, as well as the response of NGTL and the information of the other participants. BP has not persuaded the Board that information it has put forward in its Review Application constitutes new facts or changed circumstances, or that this information is sufficient to raise a doubt as to the correctness of the Decision.

BP indicates that it was an error not to have conditioned the order on the filing of the acceptable terms and conditions of the transition agreements as they relate to reservation of title to NGLs.⁵ Under Part IV of the Act, NGTL is required to file the OS SPD Agreement. During the RHW-1-2010 proceeding, NGTL noted that it would be filing the agreement for approval. It is not necessary to require a company, through a condition to an order, to do what the Act requires. On any filing made pursuant to the Act, interested parties may make submissions to the Board for its consideration prior to making a decision, and in fact, that is what has happened in the current NGTL Application. BP has not persuaded the Board that it was an error not to have conditioned the Order, that this is a changed circumstance or new fact, or that it is sufficient to cast a doubt on the correctness of the Decision.

Ground 2 - the Board appears to have been under the impression that the details would be worked out among the parties, and that this did not occur.

The ground appears to be based on BP's speculation of what the Board might have expected from its encouragement to NGTL and SPD agreement holders to continue to address and resolve extraction issues through the collaborative process established by NGTL. The Board does not

⁵ It is noted that this ground is specified as one of BP Canada's alleged changed circumstances or new facts, although it is unclear how it meets those descriptions.

agree that the words in the Decision, read in the context of the Decision as a whole, support such a speculation.

An encouragement for NGTL and SPD agreement holders to continue to address and resolve issues cannot reasonably be inferred to be a requirement or direction to do so, and to do so within a certain period of time. If it were intended to be a requirement or a direction, the Board would have stated it to be one, using language that it is accustomed to using and had used for other requirements or directions in other portions of the Decision.

Further, the inability of NGTL and SPD agreement holders to address and resolve the matter prior to the current NGTL Application is not a changed circumstance or new fact that is sufficient to raise a doubt as to the correctness of the Decision.

Ground 3 - the statements made by ATCO Pipelines and NGTL either directly committed to protecting the rights as reflected in the ATCO Pipelines SPD agreements, or inferred such a commitment. These statements have been demonstrated to be wrong.

The Board notes that the Decision cited NGTL's position that providing service under OS Agreements did not necessarily extend to the granting of title to the commodity being transported. BP and all other affected parties had an opportunity to make submissions on the matter of title to NGLs on the Alberta System, including the opportunity to argue that providing service should extend to the granting of title to the commodity being transported. The Board was aware that any proposed OS SPD Agreements might not provide for a transfer of title to NGLs, as well as the concerns raised. The Board also had before it NGTL's position. NGTL consistently has taken the position that it could not transfer title. NGTL has also noted that it did not intend to change the current convention via the Integration Application. There is little basis to support BP's argument that NGTL committed in the RHW-1-2010 proceeding to doing otherwise. BP has not persuaded the Board that NGTL has breached a commitment. Accordingly, this is not a changed circumstance or new fact sufficient to raise a doubt as to the correctness of the Decision.

4.5 Disposition regarding Review Application

The Board concludes that BP has not raised a doubt as to the correctness of the Decision. The Review Application is dismissed.

5. NGTL Application

The NGTL Application seeks an order:

1. approving Alberta System OS Agreements as set out in Attachment 3, the executed Dow Chemical Canada Inc. OS Agreement, Attachment 4, the executed ATCO Power OS Agreement and Attachment 5, the NGTL Proposed OS SPD Agreement;
2. authorizing NGTL to charge, collect and remit ATCO Pipelines Franchise Fees as proposed in this Application and approving associated Tariff amendments as set out in Attachments 8 and 9;

3. establishing final 2011 rates, tolls and charges for the period of 1 January 2011 to the Integration Effective Date at the same level as the Interim 2011 Rates approved by the Board in Order TGI-04-2010;
4. establishing final 2011 rates, tolls and charges for the Integrated Alberta System as set out in Attachment 15 for the period from the Integration Effective Date to 31 December 2011; and
5. granting such further and other relief as NGTL may request or the Board may consider appropriate.

NGTL sought these approvals by 15 July 2011 to meet its proposed Integration Effective Date of 1 August 2011.

5.1 Positions of Parties

AltaGas

AltaGas filed concerns related to the terms and conditions for service to EEEP, explaining that the interests of AltaGas are not adequately protected by this aspect of the Integration. The proposed OS SPD Agreement has serious potential consequences to the way AltaGas carries on its NGLs extraction business. The harm would relate to the commercial interests and rights of AltaGas presently held under a longstanding commercial agreement among ATCO Pipelines, AltaGas and ATCO Midstream Ltd. Under NGTL's proposed OS SPD Agreement, AltaGas would no longer be entitled to:

- (a) take title to NGLs entrained in the processed gas stream;
- (b) rely on cost-based rates; and
- (c) maintain the benefit of having the energy content, delivery pressure and volumes of gas delivered to EEEP maximized.

AltaGas requested that the Board approve three additional terms to NGTL's proposed OS SPD Agreement in order to protect the interests of AltaGas. Its proposed Conditions 8 and 9 address concerns (b) and (c) respectively, and its condition proposed for the OS SPD Agreement section 5.4 addresses concern (a).⁶

The proposed OS SPD Agreement provides for initial cost-based rates but there is no assurance cost-based rates will be maintained. In addition, the commitments related to energy content, delivery pressure and volumes of gas delivered at EEEP are significantly watered down.

⁶ AltaGas's proposed conditions are:

8. The fixed charge and commodity charge effective on the Billing Commencement Date shall continue to be determined on the basis of cost of service principles without regard to any non cost-based components. In no event will non cost-based components be used for any surcharge.
9. Subject only to good utility practice, NGTL will maximize volume, heat content and pressure to Customer to the same extent as AltaGas received volumes, heat content and pressure under the EEEP Contract.

And the following to the end of section 5.4:

Customer shall in all events retain equivalent rights to natural gas at the Inlet of the Delivery Point for the purposes of extracting Plant Liquids as it did under the EEEP Contract.

Changing the title, covenants and terms upon which AltaGas carries on its business will have an irreparable impact on AltaGas.

The issues associated with changing the regime for NGLs extraction rights at the EEEP are complex and have not been tested at an oral hearing process before a regulator with full jurisdiction. As a result, the NEB should ensure a transparent, open and fair process to avoid undue negative consequences to investors in the petrochemical sector, Canadian business, and the Canadian economy as a whole.

BP

BP opposes the contract transition mechanism proposed in relation to SPD service. The details of NGTL's proposed OS SPD Agreement were not available previously. BP has an agreement with AltaGas for NGLs extracted at EEEP and is adversely affected by the contract transition to the OS SPD Agreement, which does not allow it to obtain explicit title to the NGLs. The transition fails to provide any certainty regarding legal title to the extracted NGLs. BP wants to explore how the benefits of Integration can proceed, while preserving title to NGLs. BP requests a full oral proceeding to allow all parties to gain an understanding of the implications of the contract transition.

Other Parties

CAPP, ATCO Pipelines and Gas Alberta provided letters supporting the NGTL Application. CAPP submits that the contractual proposals being put forward by NGTL are both reasonable and practical. Gas Alberta supports the NGTL Application because Integration will benefit shippers by eliminating multiple accounts and service on two systems. Gas Alberta suggests that, at most, a written proceeding is sufficient. As a signatory to the Integration Agreement, ATCO Pipelines supports the Application which ATCO Pipelines notes represents the collective time, effort and resources of a multitude of industry participants. ATCO Pipelines notes that, in AUC Decision 2011-160, the AUC approved the transitioning of contracts subject to approval from the NEB and the Competition Bureau. ATCO Pipelines submits that NGTL has adopted and incorporated into the proposed OS SPD Agreement the one transitioning recommendation made by the AUC.

5.2 Views of the Board

The Board has reviewed the NGTL Application, the submissions, the information responses and the argument submitted by all of the parties, including the information submitted as part of the Review Application, in reaching its decision. The Board's views on the various aspects of the NGTL Application are set out below.

5.2.1 Alberta System Other Services Agreements

Straddle Plant Delivery Agreement

Among other things, the Board has before it the OS SPD Agreement. The NGTL OS SPD Agreement is proposed to be part of NGTL's proposed tariff, as it sets out the service Agreement between NGTL and straddle plant operators.⁷

The OS SPD Agreement provides customers with the right to extract NGLs. In the Board's view, it also offers service under comparable terms and conditions offered under the ATCO Pipelines SPD agreements. The Board finds that the service will be operationally and functionally similar to that which SPD customers received previously, with the exception of the receiving title to NGLs.

While service under the OS SPD Agreement is an exception to the current convention on the Alberta System, the OS SPD Agreement is time-limited. That is, it is a temporary solution that will expire on its own terms on the earlier of three years from termination notice, or the effective date of any change to the extraction convention approved by the Board. NGTL has indicated that an application related to the long term extraction model will be filed by the end of 2011. The Board recognizes the time-limited nature of the OS SPD Agreement, that NGTL is anticipating filing an extraction model application this year, and that there has been no complaint from other parties who might have considered they were disadvantaged by any differences between FT-X and OS SPD service agreements. The Board anticipates that extraction rights will be fully explored by parties to that forthcoming long term extraction model application.

Concerns Related to Title to NGLs

BP and AltaGas raised concerns about the impact on their legal position with respect to NGLs as a result of the inclusion of the OS SPD Agreement in NGTL's tariff. Their concerns are due to the uncertainty created about legal title to NGLs, and the legal and commercial risk to which they will be subject because of this uncertainty.

In considering whether the OS SPD Agreement complies with the NEB Act and may be included in NGTL's tariff, it is important to understand the powers pursuant to which the Board is acting. The Board's mandate is set out in the NEB Act, and, in this case, in Part IV. The Board recognizes that it has broad powers under Part IV of the NEB Act, and especially s. 59 and s. 65. However, these powers are constrained by the provisions of the NEB Act (such as s. 62 and s. 67), as well as the provisions of the *Constitution Act*.⁸ While the Board's decision in this matter may have an impact, commercially and legally, on BP and AltaGas, the Board cannot exceed its jurisdiction set out in the NEB Act and the *Constitution Act*.

Under Part IV of the NEB Act, "all tolls shall be just and reasonable, and shall always, under substantially similar circumstances and conditions with respect to all traffic of the same

⁷ Section 58.5 states: In this Part, "tariff" means a schedule of tolls, terms and conditions, classifications, practices or rules and regulations applicable to the provision of a service by a company and includes rules respecting the calculation of tolls.

⁸ *Constitution Act, 1982*, as enacted by Canada Act 1982 (U.K.), 1982, c.11. See *Flint Hills Resources Ltd. v. Canada (NEB)*, 2006 FCA 320.

description carried over the same route, be charged equally to all persons at the same rate” (s. 62). In addition, “a company shall not make any unjust discrimination in tolls, service or facilities against any person or locality” (s. 67). Under Part IV, the Board is tasked with determining, as a question of fact, whether the circumstances and tests in s. 62 and s. 67 are met (s. 63). If a toll is filed and the Board decides it is not a just and reasonable toll, the Board cannot approve the toll, as this would be contrary to the Act. If a tariff or any portions of it are contrary to the NEB Act or to any order of the Board, the Board may disallow it or any portion of it, and may require a company to file a satisfactory tariff, or prescribe a tariff in lieu or the disallowed tariff or portion (s. 65).

If a tariff or contract filed with the Board contains a provision that is not incidental (that is, not related nor linked) to the Board’s mandate under Part IV of the NEB Act or some other part of the NEB Act, the Board has no authority with respect to that provision.⁹ Likewise, if a party to a proceeding advocates for the inclusion of a provision unrelated to the Board’s mandate in that proceeding, the Board is constrained from including such a provision.

Neither BP nor AltaGas provided information or argument that the issue of title to NGLs is incidental (related) to the decision the Board has to make in this case on the implementation of the Board-approved Integration and for establishing rates on the Integrated Alberta System. Neither BP nor AltaGas argued that the lack of transfer of title to NGLs by NGTL to a straddle plant operator (for example, AltaGas) results in tolls that are not just and reasonable, or tolls, services or facilities that are unjustly discriminatory, or that in some other manner contravenes the provisions of Part IV, or the NEB Act.

In addition, there is no link discernible on the Board’s examination of the record that would support an argument that the absence of NGTL passing title to NGLs to AltaGas in the OS SPD Agreement results in tolls that are not just and reasonable, or tolls, services or facilities that are unjustly discriminatory, or some other result that contravenes the NEB Act or an order of the Board.

Accordingly, the Board is not persuaded that the issue of title to NGLs in this case is incidental to the decision the Board has to make on NGTL’s Application for the implementation of commercial integration and for rates for the Integrated Alberta System.

AltaGas’s Requests for Additional Provisions to the OS SPD Agreement

AltaGas asked the Board to add the following provision to the proposed OS SPD Agreement: “Customer shall in all events retain equivalent rights to natural gas at the Inlet of the Delivery

Point for the purposes of extracting Plant Liquids as it did under the EEEP Contract”. Given the Board’s findings above, the Board denies AltaGas’ request to add this provision to the OS SPD Agreement.

⁹ *Saskatchewan Power Corporation et al. v. TransCanada PipeLines Ltd. et al.*, [1981] 2 SCR 688. See also *TransCanada PipeLines Ltd. v. Canada (NEB)*, [1986] FCJ No. 733 (FCA).

AltaGas expressed concerns regarding section 5.2 of the OS SPD Agreement, giving NGTL the sole authority to operate its facilities in accordance with good utility practice in the best interest of all its customers. In order to maintain adequate energy content and volumes in order to effectively and efficiently process NGLs, AltaGas proposed a condition stating “Subject only to good utility practice, NGTL will maximize volume, heat content and pressure to Customer to the same extent as AltaGas received volumes, heat content and pressure under the EEEP Contract.”

The Board finds that imposing this condition could cause AltaGas’ interests at EEEP to take precedence over NGTL’s obligation to operate in accordance with the interests of all NGTL customers. A clause of the nature proposed by NGTL is a standard clause in transmission service contracts, and reflects NGTL’s responsibility to ensure the effective operation of the full Alberta System, which at times, may require the balancing of interests. AltaGas’ proposal could result in NGTL being unable to take a system-wide approach, which would not be in the best interests of the Alberta System as a whole. The Board does not find it appropriate to insert AltaGas’ proposed condition.

Finally, AltaGas asked the Board to add a condition that the rates will continue to be determined on the basis of cost of service principles without regard to any non cost-based components. Current rates are cost-based, and shippers will have the opportunity to address any future changes in basis for rates at the time those rates are filed with the Board. As a result, the Board does not accept this request.

Requests for Further Process

AltaGas and BP requested additional opportunity to explore the issue of title to NGLs, the impact of the OS SPD Agreement and the alternatives NGTL or ATCO Pipelines could establish to mitigate these impacts. In the course of the Board’s consideration of the NGTL Application, there has been a written comment process on the NGTL Application, a written comment process on the Review Application, and responses to Board information requests, through which the parties have had the opportunity to discuss the implications of the NGTL Application, including the implications related to title to NGLs.

Further, the current NGTL Application builds upon NGTL’s prior application concerning NGTL and ATCO Pipelines Integration and the Rate Design Methodology. The consideration of the NGTL and ATCO Pipelines Integration and Rate Design Methodology was a written hearing process, RHW-1-2010, through which parties also had the opportunity to discuss this issue.

The issue of title to NGLs has not been demonstrated to be incidental (related) to the Board’s decision on the implementation of Integration and the rates for the Integrated Alberta System, as applied for in the NGTL Application. Given this, the Board is of the view that further process to explore this issue for this NGTL Application is not warranted.

Disposition Regarding the Straddle Plant Delivery Agreement

In summary, the Board finds that there has been sufficient opportunity to hear relevant issues related to the current NGTL Application. The Board notes that NGTL has indicated that an application dealing with the long term extract model will be forthcoming in 2011, and anticipates that the issue of extraction rights will be explored in that application.

There is no link demonstrated by BP or AltaGas, or discernable on the Board's own examination of the record, that would support an argument that the absence of NGTL passing title to NGLs to AltaGas in the OS SPD contract results in tolls that are not just and reasonable, or tolls, services or facilities that are unjustly discriminatory, or some other result that contravenes the NEB Act or an order of the Board. The Board finds that the issue of title to the NGLs is not incidental to its decision on the NGTL Application.

The Board declines to impose AltaGas' proposed provision regarding "equivalent rights". The Board has also rejected AltaGas's two proposed provisions regarding cost-based tolls and operating criteria on NGTL.

The Board reviewed the OS SPD Agreement and finds that it meets the requirements of Part IV of the NEB Act. The proposed OS SPD Agreement will result in just and reasonable tolls, and tolls, service and facilities that are not unjustly discriminatory. Accordingly, NGTL is authorized to include the OS SPD Agreement as part of its tariff.

Other Services Agreements

In addition to the NS agreements for SPD discussed above, there are nine other NS agreements on ATCO Pipelines. One will terminate on the Integration Effective Date and for several others, the NS contract holders have indicated they will choose standard contracts with NGTL.

The remaining NS agreements are proposed to transition to two OS Agreements. These executed OS Agreements are between NGTL and Dow Chemicals Canada Inc. and ATCO Power respectively, and are filed as Attachment 3 and 4 to the NGTL Application.

The contract election process began before the completion of comment solicitation on the NGTL Application and no parties expressed any concerns to the NEB regarding any contracts other than the OS SPD (and the objections to the OS SPD Agreement were only as it related to EEEP).

The Board has examined the OS Agreements and finds that they comply with Part IV of the NEB Act, in that they will result in just and reasonable tolls; and tolls, services and facilities that are not unjustly discriminatory. As a result, the NGTL is authorized to include the signed OS Agreements, filed as Attachments 3 and 4 to the NGTL Application, as part of its tariff.

5.2.2 Municipal Franchise Fees and Surcharge

ATCO Pipelines has agreements with several Alberta municipalities for the collection of Municipal Franchise Fees. The fees are approved by the AUC. NGTL filed a Supplemental Amending Agreement to the Integration Agreement between NGTL and ATCO Pipelines, which provides for the collection of ATCO Pipelines Franchise Fees by NGTL on behalf of ATCO Pipelines. It sets out how the fees would be collected, the delivery points at which the fees would be collected, and the process and timing by which changes would be incorporated. In 2010, Municipal Franchise Fees charged for ATCO Pipelines totalled \$1.4 million. Other Municipal Franchise Fees continue to be charged for ATCO Gas services.

No party objected to the collection of Municipal Franchise Fees by NGTL on behalf of ATCO Pipelines.

The fees would form part of a surcharge applicable to certain delivery points on the Integrated Alberta System. The tariff allows for other elements to be included in the surcharge in addition to the Municipal Franchise Fees. AltaGas expressed concern about elements of the surcharge that would not be cost-based. NGTL clarified that the surcharge currently includes no additional components other than the Municipal Franchise Fees, which are based on costs to ATCO Pipelines, approved by the AUC. Any future proposed components would be filed with the NEB.

The Board has considered whether the collection of the Municipal Franchise Fees complies with the NEB Act, and in the Board's view, it does. The collection of these fees through the rates charged by NGTL results in tolls that are just and reasonable, and not unjustly discriminatory. Accordingly, the Board authorizes the proposed collection of Municipal Franchise Fees by NGTL on behalf of ATCO Pipelines at certain intra-Alberta delivery points and approves the associated amendments to the Tariff as necessary to give effect to this process.

5.2.3 Interim and Final Tolls for 2011

NGTL submitted a combined revenue requirement for 2011 on an annualized basis, showing its own revenue requirement of \$1082.9 million¹⁰ and ATCO Pipelines revenue requirement of \$193.8 million combined for ATCO Pipe North and ATCO Pipe South. This latter amount differs from that approved by the AUC in Decision 2010-228 partly because of deferral account surplus balances as explained in AUC 2010-613.

Currently, NGTL tolls for the Alberta System are interim, as approved by the Board in Order TGI-04-2010. Revisions to some OS fees were filed 9 February 2011 for an effective date of 1 March 2011.

1 January 2011 to 31 July 2011

NGTL requested that the Board establish final tolls for 2011, applicable to the Alberta System from 1 January 2011 to 31 July 2011, at the level charged as interim as approved by the Board in Order TGI-04-2010. No party has expressed concerns about the finalization of these tolls. The Board finds the tolls to be just and reasonable and not unjustly discriminatory and approves these tolls as final.

1 August 2011 to Integration Effective Date

In the NGTL Application, 1 August 2011 was proposed as the Integration Effective Date and NGTL calculated its tolls based on that date. Given that this date has passed, the Board will maintain the Alberta System tolls as interim from 1 August 2011 until another date is proposed by NGTL as the Integration Effective Date. The Board recognizes that in the current NGTL Application, NGTL asked that a Board decision on the approvals be made fifteen days in advance of 1 August 2011 in order for NGTL to meet the proposed Integration Effective Date. It is expected that any proposal for a new date would incorporate a similar approach, thereby ensuring an appropriate timeframe for processing.

¹⁰ After removal of the Transportation by Others contract with AP.

Integration Effective Date for the Remainder of the 2011

The Board has reviewed the allocation of revenue to service categories to derive the fully transitioned rates as set out in Attachment 13 of the NGTL Application as well as the rates based on the transition mechanism, as set out in Attachment 14. As the proposed Implementation Effective Date is in 2011, transition rates are computed at the 40 percent mark between actual 2010 rates and the fully transitioned rate.

NGTL requested that the Board establish final tolls for 2011, applicable to the Integrated Alberta System from the Integration Effective Date to 31 December 2011. NGTL is required to identify for the Board a new Integration Effective Date. When the new Integration Effective Date is set, the Board will set as interim, the 2011 rates, tolls and charges for the Integrated Alberta System as set out in Attachment 15 of the NGTL Application for the period from the Integration Effective Date to 31 December 2011.

Then, in order for the Board to consider finalizing tolls for 2011, NGTL will need to clarify whether any revisions to the tolls are required as a result of the change in Integration Effective Date.

6. Disposition on the NGTL Application

For the reasons set out above, and subject to the directions noted and terms and conditions of the attached order, the Board finds that the NGTL Application and associated filings comply with the NEB Act and any prior Board orders. Accordingly, the Board grants the NGTL Application subject to the directions noted above and as set out in the attached order.

The Board directs NGTL to serve a copy of this decision on its shippers, interested persons and on all additional parties included in the comment periods.

Yours truly,



Anne-Marie Erickson
Secretary of the Board

Attachment

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ORDER TG-05-2011

IN THE MATTER OF the *National Energy Board Act* (NEB Act) and the regulations made thereunder; and

IN THE MATTER OF an Application dated 16 May 2011 by NOVA Gas Transmission Ltd. (NGTL) for approvals required to implement the Integration of the ATCO Pipelines System and the Alberta System and for approval of final rates, tolls and charges for Alberta System services for 2011 under File OF-Tolls-Group1-N081-2011-01 01.

BEFORE the Board on 11 August 2011.

WHEREAS in RHW-1-2010, the Board approved the Alberta System rate design methodology and terms and conditions of services in accordance with the provisions of the Rate Design and Services Review Settlement and the commercial integration of the Alberta System and the ATCO Pipeline system pursuant to the provisions of the Alberta System Integration Agreement between ATCO Gas and Pipelines Ltd. and NGTL dated 7 April 2009;

AND WHEREAS in Order TGI-04-2010, 22 December 2010, the Board approved interim rates tolls and charges for the Alberta System for 2011, and revisions were filed by NGTL on 9 February 2011, 31 May 2011 and 6 July 2011 (Interim 2011 Rates);

AND WHEREAS NGTL filed an application dated 16 May 2011 for the approvals required to implement the commercial integration and for approval of final rates, tolls and charges for the Alberta System services for 2011 (the NGTL Application);

AND WHEREAS the Board by letter dated 30 May 2011 invited interested parties to provide their positions with respect to the NGTL Application and views on what further process, if any, the Board should adopt to consider the NGTL Application;

AND WHEREAS the Board received letters in support of the NGTL Application from ATCO Pipelines, Encana Corporation, Gas Alberta, the Utilities Consumer Advocate Office and the Canadian Association of Petroleum Producers;

AND WHEREAS the Board received letters opposing the NGTL Application from AltaGas Ltd. and BP Canada Energy Ltd.;

AND WHEREAS on 13 June 2011, NGTL filed a reply to the comments received;

.../2

AND WHEREAS the Board has considered the submissions and the arguments submitted by all of the parties including the information submitted as part of the Board process established for BP Canada Energy Ltd.'s Application dated 6 June 2011 for Review and Variance of Board Decision RHW-1-2010;

AND WHEREAS the Board finds the tolls calculated in accordance with the rate methodology and the transition mechanism to be just and reasonable, and not unjustly discriminatory;

AND WHEREAS the Board finds the Alberta System Other Services (OS) Agreements included in the NGTL Application comply with the NEB Act, and has decided to grant in part the relief sought by NGTL;

AND WHEREAS the Board considers it appropriate to issue directions to NGTL for the purposes of continued implementation of the commercial integration of the Alberta System;

THEREFORE, IT IS ORDERED, pursuant to Parts I and IV of the NEB Act that:

Other Services Agreements

1. The Alberta System OS agreements as set out in Attachments 3, 4 and 5 to the NGTL Application are approved for incorporation into NGTL's tariff;

Municipal Franchise Fees

2. NGTL is authorized to charge, collect and remit ATCO Pipelines Franchise Fees as proposed in the NGTL Application and to amend the associated tariff as set out in Attachments 8 and 9 to the NGTL Application;

Final Tolls for 1 January 2011 to 31 July 2011

3. For the period of 1 January 2011 to 31 July 2011, the rates, tolls and charges at the same level as the Interim 2011 Rates are approved as final;

Tolls for remainder of 2011

4. For the period commencing 1 August 2011, the rates, tolls and charges on the Alberta System continue as the Interim 2011 Rates; and
5. NGTL must file with the Board a proposal that identifies a new date as the Integration Effective Date.

NATIONAL ENERGY BOARD



Anne-Marie Erickson
Secretary of the Board