



## LETTER DECISION

OF-Tolls-Group1-T211-2018-01 01  
4 December 2018

Mr. Alan L. Ross  
Borden Ladner Gervais LLP  
1900, 520 3<sup>rd</sup> Avenue SW  
Calgary, AB T2P 0R3  
[aross@blg.com](mailto:aross@blg.com)

Mr. Bernard Pelletier  
TransCanada PipeLines Limited  
450 1<sup>st</sup> Street SW  
Calgary, AB T2P 5H1  
[bernard\\_pelletier@transcanada.com](mailto:bernard_pelletier@transcanada.com)

Mr. Joshua Samuel  
Nipigon LNG Corporation  
150 Connie Crescent, Unit 4  
Concord, Ontario L4K 1L9  
[jsamuel@northeastmidstream.com](mailto:jsamuel@northeastmidstream.com)

Mr. Kevin Thrasher  
TransCanada PipeLines Limited  
450 1<sup>st</sup> Street SW  
Calgary, AB T2P 5H1  
[kevin\\_thrasher@transcanada.com](mailto:kevin_thrasher@transcanada.com)

Dear Mr. Pelletier, Mr. Thrasher, Mr. Ross and Mr. Samuel:

**Nipigon LNG Corporation (NLNG)  
Application pursuant to Section 12, Section 13, Section 59, Subsection 71(2),  
Subsection 71(3) and Part IV of the *National Energy Board Act* (NEB Act) in respect  
of TransCanada PipeLines Limited (TransCanada) and the TransCanada Mainline  
pipeline system (the TransCanada Mainline)**

### **The Application**

On 12 October 2018, the National Energy Board (Board) received an application from NLNG pursuant to sections 12, 13, 59 and 71 of the NEB Act requesting the Board direct TransCanada to provide facilities, and service under just and reasonable terms, to connect and transport gas from the TransCanada Mainline to its planned liquefied natural gas (LNG) project (the Application). In the Application, NLNG has requested the following relief (collectively, the Orders):

- a) for an Order, pursuant to subsection 71(3) of the NEB Act, directing TransCanada to provide adequate and suitable facilities for the interconnection of the Nipigon LNG Project (the Project) with the TransCanada Mainline at a point on the Northern Ontario Line (the NOL) segment of the TransCanada Mainline west/upstream of TransCanada's Nipigon Compressor Station in the unorganized Township of Ledger (the Ledger Interconnection) by 30 June 2020;

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- b) for an Order, pursuant to subsections 71(2) and (3) of the NEB Act, directing TransCanada to establish a new delivery point at or near that location of the Project by 30 June 2020;
- c) for an Order, pursuant to subsection 71(2) of the NEB Act, directing TransCanada to transport and deliver, on a firm basis, up to 7,200 GJ/day of natural gas to NLNG, commencing June 30, 2020, or so soon thereafter as is reasonably practical in the circumstances (Ledger Delivery); and,
- d) for an Order, pursuant to section 59, section 71 and Part IV of the NEB Act, prescribing just and reasonable terms for the Ledger Delivery, including:
  - i) service pursuant to terms consistent with TransCanada's standard renewable firm service agreement for an initial period of 10 years; and,
  - ii) just and reasonable tolls calculated in a manner determined by the Board.

NLNG submitted that it had been involved, for several months, in ongoing discussions with TransCanada, as it was seeking the Ledger Interconnection and Ledger Delivery on the TransCanada Mainline to deliver gas to the Project. NLNG noted it had applied to the Ontario Energy Board (OEB) for approval of the facilities needed to supply gas to the Project from the Ledger Interconnection.

However, according to the Application, despite the proposed Project not being located in a Local Distribution Company (LDC) franchise area, TransCanada would not proceed with the Ledger Interconnection without written confirmation from the LDCs – Union Gas Limited (Union) and Enbridge Gas Distribution Inc. (EGDI) – that Ledger “is not a current or potential franchise area”. According to the Application, TransCanada said that this requirement stemmed from the Mainline Settlement Agreement between TransCanada, Union, EGDI, and Énergir, L.P. (the Settlement) which contained a no-bypass provision whereby TransCanada would not construct facilities to directly serve LDC customers within the LDCs’ franchise areas. According to NLNG, TransCanada also noted it would not proceed with pre-work for the Ledger Interconnection until NLNG obtained all provincial approvals.

NLNG submitted that TransCanada’s request for NLNG to obtain approval from the LDCs is unreasonable, discriminatory, and contrary to the NEB Act and TransCanada’s common law obligations as a common carrier. NLNG submitted that it is not in the public interest for TransCanada to require a new shipper to obtain approval from other shippers to access natural gas from the TransCanada Mainline. NLNG submitted that TransCanada’s obstruction had contributed to a delay in the commercial operation date of the LNG plant from October 2019 to October 2020.

NLNG submitted that the Board should find it in the public interest to issue the Orders pursuant to subsections 71(2) and 71(3) of the NEB Act. Requiring TransCanada to provide the interconnection facilities per subsection 71(3), in NLNG’s view, will not cause TransCanada undue burden.

## **Comment Process**

On 16 October 2018, the Board solicited comments on the Application and on any further process the Board may hold to consider the Application. The Board requested that interested parties file comments by 24 October 2018, TransCanada file comments by 31 October 2018, and NLNG file any reply comments with the Board by 7 November 2018. The Board noted in its letter that it was particularly interested in comments from TransCanada and any LDCs regarding NLNG's submission that "the proposed LNG Plant is not within any LDC's franchise area". The Board stated that it may issue its ruling on this matter or set out further process to deal with the Application.

## **Submissions from Interested Parties**

The Board received comments from the North Shore Municipalities group on 23 October 2018. The North Shore Municipalities Group, composed of Schreiber, Terrace Bay, Marathon, Manitouwadge, and Wawa, indicated that the Nipigon LNG Project is an essential element of the North Shore Project<sup>1</sup> and is critical to its development.

The Board received comments from Union and EGDI on 24 October 2018. Both Union and EGDI confirmed that the Township of Ledger is not covered by a franchise agreement held by their respective companies. Union noted that as Ledger is an unorganized township, franchise rights cannot be established for the area. Union noted that it does not have plans to expand in this area but may in the future, including the area of the proposed plant.

The Board also received comments from the Canadian Association of Petroleum Producers (CAPP), Centra Gas Manitoba (Centra), and a joint submission from Red Rock Indian Band (RRIB), the Bingwi Neyaashi Anishinaabek (BWA), and the Biinjitiwaabik Zaaging Anishinaabek (BZA) (collectively, the First Nations Group) on 24 October 2018.

The First Nations Group submitted that the RRIB, BWA and BZA have been in consultation with NLNG, and that RRIB, BWA and BZA have a significant interest in realizing both direct economic benefits and community development opportunities from the Project.

CAPP submitted that the Settlement should not be used as a mechanism to allow the eastern LDC's to delay development of natural gas infrastructure in areas that may be of future interest to their businesses, and that the no-bypass provision made by TransCanada and the LDCs should not impede other industry participants from conducting normal business on a federally regulated open access pipeline. CAPP requested the Board grant the relief requested by NLNG.

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<sup>1</sup> The North Shore Municipalities Group filed a copy of the North Shore Natural Gas Project Plan with the Board. The filing describes the plan to source LNG from a regional facility, and deliver the LNG to the Municipalities via truck. When there is demand, locally stored LNG will be converted to natural gas and delivered through distribution systems to homes and businesses at the Municipalities.

Centra noted that TransCanada's reliance on the Settlement to deny timely access on the Mainline is unfair, discriminatory, and should not be endorsed by the Board. Centra supported the Board granting the relief requested by NLNG.

### **TransCanada's Submissions**

TransCanada filed its comments with the Board on 31 October 2018. TransCanada submitted that it has always been willing to serve the Project. Contrary to NLNG's submissions, TransCanada is not a common carrier pipeline – which is a designation that only applies to oil pipelines under subsection 71(1) of the NEB Act. TransCanada noted that the Board does have the jurisdiction to order TransCanada to construct facilities, but only if the Board determines that to do so would not cause undue harm to TransCanada.

TransCanada noted that in its view, it was reasonable for it to have regard for its obligations under the Settlement – as the Settlement ended litigation between it and the LDCs, and it was considered by the Board in establishing the Mainline's tolling framework. TransCanada submitted that it was reasonable to seek assurances that the Project did not fall within an LDC's franchise area, but that confidentiality concerns expressed by NLNG prevented it from doing so.

TransCanada noted that if the applied-for Certificate of Public Convenience and Necessity sought by NLNG is granted by the OEB, NLNG will be able to receive gas from the Mainline, regardless of whether Union or EGDI seek to establish a franchise in Ledger in the future. TransCanada submitted that because of the confirmations by Union and EGDI that they do not hold franchise agreements with Ledger, the Orders are not required. Given these confirmations, TransCanada concluded that it could provide the requested service without bypassing Union or EGDI for the sole purpose of serving a customer base of these LDCs. TransCanada indicated it would be prepared to proceed with NLNG's request for service under the normal course of business, which would entail:

- i. NLNG's execution of a standard backstopping agreement regarding development costs for the proposed meter station that commits NLNG to execute a firm transportation service agreement;
- ii. the addition of a new Distributor Delivery Area (DDA) within Ledger that includes only the new delivery point; and
- iii. all necessary regulatory approvals of the Proposed Meter Station and any related facilities, once applied for.

TransCanada added that requiring it to proceed with the interconnection, without sufficient financial backstopping and contractual underpinning for the proposed meter station would place an undue burden on TransCanada and other Mainline shippers. It added that should NLNG execute a backstopping agreement by early 2019, this would provide sufficient time to meet the requested in-service date of June 2020, subject to regulatory approvals.

## **NLNG's Reply**

NLNG submitted its reply comments on 7 November 2018. In its reply, it noted that despite TransCanada's submissions, the orders sought are still required. NLNG stated that the orders sought are still necessary for the Project to proceed on a timely and efficient manner, and that the basis of TransCanada's argument does not resolve all of the issues raised in the Application.

NLNG cited multiple reasons the Orders should still be granted, including:

- There are no objections to the Project;
- A majority of interested parties support the Project;
- The Project is not in a Franchise area, and does not result in a bypass;
- The Settlement or DDA Agreements cannot be used to secure a "maybe" business opportunity for another shipper on a federally-regulated pipeline;
- The Project benefits the Mainline shippers and TransCanada;
- The Project benefits industry, First Nations and other communities; and
- The Project is in the public interest.

NLNG submitted that the only basis for TransCanada's submission is that it has now obtained written confirmation from the LDCs, via this proceeding, that the Township of Ledger is not in a current or potential franchise area. However, NLNG submitted that without the Orders:

- a) TransCanada will continue its discriminatory and anti-competitive behaviour;
- b) TransCanada will potentially seek to delay or frustrate the Project through other means. Under the Settlement Agreement, TransCanada, Enbridge, and their affiliates have the capacity to work to build competitive threats to the Project;
- c) NLNG will potentially refile this Application on some or all of the issues, if denied;
- d) The Project cannot proceed. An Order is a requirement for project financing generally, and construction funds in particular.

## **Subsequent (Unsolicited) Filings**

On 8 November 2018, TransCanada provided an additional letter, "limited to matters necessary to complete the record of this proceeding". It noted that regarding its intervention in the OEB process, it submitted it was willing to provide service to the Project in accordance with the Mainline Tariff, and advised of its intention to monitor the OEB proceeding.

On 23 November 2018, NLNG provided the Board with a copy of the OEB's decision regarding works needed to supply the Project. In the decision, the OEB approved a Certificate of Public Convenience and Necessity for the facilities required – approximately 500 meters of 8 inch pipeline - to connect the project to the TransCanada Mainline.

### *Decision of the Board*

Oil pipelines are required to operate on a common carrier basis, under subsection 71(1) of the NEB Act. The same is not true for pipelines transporting gas, but the NEB Act gives the Board the discretion to:

- order a company operating a gas pipeline to provide gas transportation service (paragraph 71(2)(a)); and/or
- require a company operating a gas pipeline to provide facilities required for gas transportation service, gas storage, or the junction of the gas pipeline with other transmission facilities (subsection 71(3)).

The Board's *Filing Manual* provides some guidance for applications under these provisions of the NEB Act:

*“The Board expects that the applicant under subsection 71(2) or (3) would have requested the subject pipeline operator to provide access or adequate and suitable facilities and that request would have been rejected prior to filing an application.”*

Upon receipt of the initial Application, there was a live question as to whether this had been demonstrated. NLNG had requested service, and that request had been held up primarily due to the concern about potential conflict with the no-bypass provision in the Settlement.

However, in the Board's view, several of the issues that were raised in NLNG's initial application have since been dealt with in subsequent filings from TransCanada, Union and EGDI. Given the confirmation from Union and EGDI that the Project is not within either of their existing franchise areas, TransCanada said that it “could provide the requested service without bypassing Union or EGDI for the sole purpose of serving a customer base of these LDCs”. TransCanada also said that it would proceed with the interconnection of the Project through its normal course of business, via the execution of a backstopping agreement with NLNG, the addition of a new DDA within Ledger, and application for regulatory approvals. In the Board's view, this is the most appropriate way to advance the Project at this time.

The reasons provided by NLNG to grant the Orders despite TransCanada's commitment to proceed with the Ledger Interconnection, and the recent developments related to the CPCN granted by the OEB, are not compelling.

NLNG listed several reasons why it believes the Project is in the public interest, and noted the support for the project and lack of opposition. The Board does not find these reasons relevant to whether it should exercise its discretion to issue the Orders, in light of TransCanada's commitment to take the necessary steps – including executing a standard backstopping agreement with NLNG, the addition of a new DDA for Ledger, and seeking regulatory approvals – to provide service to the Project. NLNG has not demonstrated – as noted in the *Filing Manual* – that its request for service has been rejected. Nor has NLNG established that TransCanada has unreasonably refused to build any needed facilities. In the absence of any refusal by

TransCanada to provide service or build needed facilities, the Board does not find there is any need or public interest served by issuing the Orders.

NLNG further said that TransCanada will continue its discriminatory and anti-competitive behaviour, but provided no evidence to support this claim. NLNG cited TransCanada's intervention in the OEB process where NLNG was seeking a CPCN regarding the facilities required to connect the Project to the Mainline. Despite this intervention, on 22 November 2018, the OEB granted the applied-for connecting facilities a Certificate of Public Convenience and Necessity. NLNG claimed that TransCanada will seek to delay or frustrate the project, but provided no evidence to support this claim. Should TransCanada seek to frustrate the Project for the benefit of itself, Union, or EGDI, the Board would consider such circumstances on a future application with supporting evidence.

Finally, NLNG asserted that "granting the orders would satisfy conditions precedent to obtain project financing." This, in and of itself, does not constitute justification for granting the Orders. It would be unfair to TransCanada, its shippers and potential shippers to grant the requested Orders for NLNG to satisfy financing conditions – the details of which NLNG did not provide. NLNG has not provided any compelling evidence in terms of why its unique financing circumstances warrant the relief requested. In any event, the Board agrees with the submission of TransCanada that to require it to build interconnection facilities without a financial backstop in place would place an undue burden on the company, and place risk on the Mainline and its shippers.

No party requested further process, and the Board finds no further process is necessary to address the Application. For all of the above reasons, the Board has determined that it will not exercise its discretion to grant the Orders requested by NLNG.

The Board expects that TransCanada will uphold its commitment to advance discussions with NLNG as it would normally do with any other party seeking service requiring additional facilities on the Mainline in accordance with its tariff.

**Direction to Serve Notice**

The Board directs TransCanada to serve a copy of this letter on all TransCanada shippers, all members of its Tolls Task Force, and other interested persons.



P. Davies  
Presiding Member



S. Parrish  
Member



S. Kelly  
Member

December 2018  
Calgary, Alberta