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The Duty of a Regulated Pipeline to Provide Facilities

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Case Commented On: National Energy Board, Letter Decision, 4 December 2018, 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).

Public utility statutes typically require a public utility to provide service on a non-discriminatory basis to persons within its exclusive franchise area. This is also the common law duty of a common carrier. But what if a regulated utility does not have a franchise area (e.g. TransCanada PipeLines, see for example the comments of the National Energy Board in its TCPL Restructuring Decision RH-003-2011, at 38); and what if the utility is not a common carrier (e.g. a federally regulated natural gas pipeline)?

It is possible that the relevant statute may still impose some sort of contingent duty to provide or extend service to a new customer. Such is the case for example with respect to federally regulated natural gas pipelines. This contingent statutory duty may provide leverage to a party seeking to negotiate access to a monopoly infrastructure (i.e. TPA or third-party access). In this recent decision the NEB declined to grant the order that Nipigon LNG sought but merely bringing the application seems to have stirred TCPL to action.

The relevant statutory provision in this case is section 71 of the *National Energy Board Act*, RSC 1985, c N-7:

> **71 (1)** Subject to such exemptions, conditions or regulations as the Board may prescribe, a company operating a pipeline for the transmission of oil shall, according to its powers, without delay and with due care and diligence, receive, transport and deliver all oil offered for transmission by means of its pipeline.
>
> **(2)** The Board may, by order, on such terms and conditions as it may specify in the order, require the following companies to receive, transport and deliver, according to their powers, a commodity offered for transmission by means of a pipeline:
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> **(a)** a company operating a pipeline for the transmission of gas; and
>
> **(b)** a company that has been issued a certificate under Part III authorizing the transmission of a commodity other than oil.
>
> **(3)** The Board may, if it considers it necessary or desirable to do so in the public interest, require a company operating a pipeline for the transmission of

> hydrocarbons, or for the transmission of any other commodity authorized by a certificate issued under Part III, to provide adequate and suitable facilities for
>
> **(a)** the receiving, transmission and delivering of the hydrocarbons or other commodity offered for transmission by means of its pipeline,
>
> **(b)** the storage of the hydrocarbons or other commodity, and
>
> **(c)** the junction of its pipeline with other facilities for the transmission of the hydrocarbons or other commodity,
>
> if the Board finds that no undue burden will be placed on the company by requiring the company to do so.

Subsection (1) deals with oil pipelines and effectively establishes that interprovincial oil pipelines in Canada have the duties of a common carrier (subject to such exemptions as the Board may prescribe). Natural gas pipelines are not common carriers. They are contract carriers but may, under subsection (2), be required to "receive, transport and deliver" the commodity for which they are licensed. While this would most frequently apply to natural gas it would also apply to other commodity pipelines such as a pipeline licensed to carry carbon dioxide (e.g. the Souris Valley Pipeline). Subsection (3) applies to all categories of pipeline (i.e. a "pipeline for the transmission of hydrocarbons, or for the transmission of any other commodity"). Under subsection (3) the pipeline may be required "to provide adequate and suitable facilities" for receipt and transmission, for storage, or to facilitate a junction provided that the Board is able to conclude "that no undue burden will be placed on the company by requiring the company to do so."

The proponent in this case describes the Nipigon Gas project as follows:

> The Project involves the construction and operation of a liquefied natural gas ("LNG") production plant (the "LNG Plant") in the unorganized Township of Ledger, approximately 22 kilometres north of Nipigon, Ontario. The Project includes a proposal to construct a connecting pipeline approximately 500 metres in length and up to NPS 8 inches in diameter (the "Connecting Pipeline") to obtain natural gas from the nearby TransCanada Mainline for liquefication at the LNG Plant. The sole purpose of the Connecting Pipeline is for the LNG Plant to access natural gas from the TransCanada Mainline as a direct-connection customer of TransCanada. Construction is expected to begin in the Fall of 2019 and be complete by the end of 2020.

To that end Nipigon had been attempting to negotiate with TransCanada but had experienced some difficulties as reported in the Letter Decision as follows:

> … 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.

Accordingly, Nipigon brought this application seeking Orders under both sections 71(2) and (3). Each of Union and EGDI in response confirmed that the Township of Ledger was not covered by a franchise agreement held by their respective companies. In its comments on the application TransCanada argued that this confirmation made the Orders unnecessary and that TransCanada 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.

In the Board's view this resolved the matter and accordingly it declined to grant the Orders sought. It did however observe that "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." On the record as it stood however there was no such evidence. The Board concluded by expressing the expectation "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."

Applications under section 71 of *NEBA* are not common but the potential availability of a section 71 order may offer important strategic assistance in appropriate cases. For another example illustrating the strategic use of section 71, this time involving an oil pipeline, see NEB Letter Decision, May 26, 2011, Hearing Order MHW-1-2010 Cenovus Energy Inc. (Cenovus), Application Regarding the Express Pipelines Ltd (Express) Husky Lateral Pursuant to Sections 71(3), 59 and Part IV of the National Energy Board Act (NEB Act).

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