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BARRISTERS AND SOLICITORS

September 4, 2015

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National Energy Board
517 10th Avenue SW
Calgary, AB
T2R 0A8

Attn: Sheri Young
Secretary of the Board

Dear Ms. Young:

Re: Trans Mountain Pipeline ULC – Trans Mountain Expansion Pipeline
File No. OF-Fac-Oil-T260-2013-03 02
Hearing Order OH-001-2014

I represent Pro-Information Pro-Environment United People Network (“PIPE UP”) in this proceeding. I write in response to the Panel’s postponement of the hearing process and invitation to provide comments regarding next steps for the Trans Mountain Expansion Project (the “Project”) following the appointment of Steven Kelly to the NEB on July 31, 2015.

PIPE UP notes that Mr. Kelly’s evidence deals in reply to the Goodman and Rowan Report filed by PIPEUP (filing A2S7J9).

PIPE UP recognizes that expunging Mr. Kelly’s evidence from the evidentiary record causes prejudice to Trans Mountain Pipeline ULC. However, the appropriate remedy for this prejudice should not be the degradation of the adjudicative process.

The Consequences of Expunging the Kelly Evidence

The consequences of expunging the evidence of Mr. Kelly from the evidentiary record are profound. The economic value of TMEP to Canadians is one of only a small number of issues at the heart of the public interest that the NEB is required to adjudicate. The economic issues are complex, broad and expansive. Appendix A to Trans Mountain's letter dated August 28, 2015 lists the following issues to which Mr. Kelly's evidence relates:

- Netbacks; Rail Alternatives; Excess Transportation Capacity; Market Need; Market Diversification; Asian Premium; International Demand for Oil; Input-Output Analysis; Crude Oil by Rail; Netback Benefits (incl. Heavy Crude); Project Capital Cost; Oil Price Forecasting; Supply and Demand; Markets; Oil Sands Crude Density and Type; Gross Benefit vs. Cost Benefit analysis; Forecasting; Project Need; Current Market; Impact on Energy Prices for Local Communities; Impact of Oil Prices on Economic Feasibility; Western Canada Supply; Rail Capacity; California Markets.

In his letter dated August 28, 2015, counsel for Trans Mountain characterizes the task before the Panel, after expunging the contribution of Mr. Kelly from the evidentiary record, as a simple matter of "re-filing evidence on a narrow issue". With respect, this mischaracterizes the effect of expunging Mr. Kelly's evidence. It is more apt to say that expunging Mr. Kelly's direct evidence and his response to Information Requests from the evidentiary record brings this process **back to square one** in respect of each issue with which Mr. Kelly's evidence deals.

Furthermore, the Panel should consider that there have been relevant economic changes since Mr. Kelly's Direct Written Evidence dated November 30, 2013 was filed: OPEC has increased the supply of light crude, which has depressed oil prices globally, including the price of heavy oil; economic sanctions against Iran are set to end, which is anticipated to further increase the world supply of oil; and the United States has changed its policies towards climate change, which is anticipated to depress the demand for combustible fuels. These recent economic changes prompted a dramatic collapse in capital expenditures on tar sands projects.

Economic changes present a challenge to much of Mr. Kelly's evidence. For instance, the IHS forecast of 3.0 % compound annual average growth in production is likely to be affected by the decrease in capital expenditures due to lower forecast prices. Transportation need and increased marginal netbacks from pipeline shipping cost advantages over rail turn on production. Increased netbacks realized through higher offshore pricing also depend in part on domestic and foreign production levels. Underutilized term commitments could result in ship-or-pay penalties. Trans Mountain's burden is greater than merely "re-filing" Mr. Kelly's evidence under a new consultant's name.

Characterizing Procedural Fairness

Counsel for Trans Mountain makes the following statement in his letter of August 28, 2015: “Fairness demands an expeditious conclusion to this proceeding”. With respect, this is an oversimplification of the demands of fairness.

The legal concept of procedural fairness includes a number of considerations that are weightier in this context than the sheer speed of the process. Of greater importance in this context than the speed of adjudication is the principle *audi alteram partem* – that the NEB hear the other side of the evidence. Absent an overriding reason, the Panel should prioritize the quality of the evidence and the integrity of the process over sheer speed. A “quick and dirty” process is not an appropriate procedural response to expunging the evidence of Mr. Kelly.

The Appropriate Remedy

PIPE UP concurs with Living Oceans Society and Ecojustice that the Panel should establish two rounds of information requests (and related process), permit interveners to file new, additional or updated evidence to respond to the replacement evidence, and provide funding for expert reports that respond to the replacement evidence.

Transparency and Accountability

The appointment of Mr. Kelly to the NEB in the midst of a prominent case in which he is a key witness raises questions of institutional transparency and accountability.

I note that, according to the “Accountability Profile” of the Chair and CEO of the National Energy Board, the role of the Chair includes the following:

SPECIFIC ACCOUNTABILITIES:

AS CHAIRPERSON/CEO [...]

3) Provides leadership to Board Members by setting and managing the Board's agenda, directing the assignment of responsibilities to Board Members for particular files and projects, and **participating in the selection process for Board Members to ensure the Board encompasses a broad base of knowledge and skills.**

[emphasis added]

PIPE UP respectfully requests that the Panel advise when the Chair of the NEB first learned that Mr. Kelly was being considered for appointment to the NEB. Further, PIPE UP requests that the Panel advise when each of its members learned that Mr. Kelly was being considered for appointment to the NEB.


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Furthermore, while it is true that Trans Mountain did not appoint Mr. Kelly, and in this sense Trans Mountain is not the cause of the delay occasioned by expunging Mr. Kelly's evidence, PIPE UP questions whether Trans Mountain failed to take steps to mitigate, minimize or reduce the delay.

PIPE UP believes that Mr. Kelly would have had a duty to advise Trans Mountain that he was being considered for appointment to the NEB. PIPE UP requests that Trans Mountain disclose when it first learned that Mr. Kelly was being considered for appointment to the NEB. Trans Mountain in turn would have a duty to the Panel and the participants to disclose that Mr. Kelly was being considered for appointment, so that a remedy could be sought at the earliest opportunity. The question of whether Trans Mountain took timely steps to mitigate the prejudice to itself and other participants is relevant to the integrity of the process and the weight that should be attached to Trans Mountain's request to expedite.

Thank you for your attention.

Sincerely,



Jason Gratl*

JBG/tim