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June 17, 2008

National Energy Board  
444 Seventh Avenue S.W.  
Calgary, Alberta  
T2P 0X8

Filed Electronically

**Attention: Claudine Dutil-Berry**

Dear Madam:

**Re: TransCanada PipeLines Limited (“TransCanada”)  
Application for Certificate of Public Convenience and Necessity and  
Related Approvals  
TransCanada Alberta System**

Enclosed for filing with the National Energy Board (“NEB” or “Board”) is TransCanada’s Application for a Certificate of Public Convenience and Necessity (“CPCN”) under section 52 of the *National Energy Board Act* and related approvals for TransCanada’s Alberta System.

The TransCanada Alberta System is an existing natural gas pipeline system comprised of approximately 23 500 km of pipeline and associated compression and other facilities located within Alberta. The TransCanada Alberta System is owned directly by NOVA Gas Transmission Ltd. (“NGTL”), which is a wholly-owned subsidiary of TransCanada, and is presently regulated under provincial legislation by the Alberta Utilities Commission.

The TransCanada Alberta System is part of an integrated pipeline network owned, managed and operated in common by TransCanada as a single inter-provincial undertaking used to transport natural gas to markets in Canada and the United States. The TransCanada Mainline and the TransCanada Foothills Systems, which are regulated by the Board and physically connected to the Alberta System, are the other works that collectively comprise this single enterprise.

TransCanada makes this Application to effect recognition that the TransCanada Alberta System is by law properly within Canadian federal jurisdiction and subject to regulation by the Board as part of a single federal undertaking. The requested approvals are required for the operation of the TransCanada Alberta System under NEB regulation.

Page 2  
June 17, 2008  
Ms. C. Dutil-Berry

The Application is comprised of two components. Phase I, Jurisdiction, addresses the constitutional question of whether the TransCanada Alberta System is properly within federal jurisdiction and subject to NEB regulation. Phase II, CPCN and Implementation, addresses whether the TransCanada Alberta System is required by the present and future public convenience and necessity and, if so, the ancillary approvals and process required to effect the transition from provincial to federal regulation. Phase II would proceed only if and after the Board determines in Phase I it has jurisdiction over the TransCanada Alberta System.

This Application marks a significant and historic event for the TransCanada Alberta System. TransCanada is confident the transition to federal regulatory oversight over the TransCanada Alberta System will ultimately benefit TransCanada, its customers, and Alberta System stakeholders.

TransCanada is filing this Application by placing it in the electronic filing repository of the Board. The system maps referred to as Exhibits B-1 to B-4 of the Application could not be filed electronically due to the size of the files, and are provided to the Board on a compact disk which accompanies the filed hard-copy of the Application.

If the Board has any questions about the Application, please contact me or TransCanada's representatives listed in the Application.

Yours truly,  
**TransCanada PipeLines Limited**

*[ORIGINAL SIGNED BY]*

Kristine Delkus  
Deputy General Counsel  
Pipelines and Regulatory Affairs

Encl.

# NATIONAL ENERGY BOARD

IN THE MATTER OF the National Energy Board Act, R.S.C. 1985, c. N-7,  
as amended, and the Regulations made thereunder; and

IN THE MATTER OF an Application by TransCanada PipeLines Limited for  
a Certificate of Public Convenience and Necessity and related approvals  
under the National Energy Board Act.

## TRANSCANADA PIPELINES LIMITED

APPLICATION  
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY  
TRANSCANADA ALBERTA SYSTEM

June 2008



## **NATIONAL ENERGY BOARD**

**IN THE MATTER OF** the *National Energy Board Act*, R.S.C. 1985, c. N-7, as amended, and the Regulations made thereunder; and

**IN THE MATTER OF** an Application by TransCanada PipeLines Limited for a Certificate of Public Convenience and Necessity and related approvals under the *National Energy Board Act*.

### **TRANSCANADA PIPELINES LIMITED**

#### **APPLICATION**

#### **CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY**

#### **TRANSCANADA ALBERTA SYSTEM**

**June 2008**

To: The Secretary  
National Energy Board  
444 Seventh Avenue S.W.  
Calgary, Alberta  
T2P 0X0

**TRANSCANADA PIPELINES LIMITED**  
**APPLICATION**  
**CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY**  
**TRANSCANADA ALBERTA SYSTEM**

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## 1.0 APPLICATION

1. TransCanada PipeLines Limited (“TransCanada”) applies to the National Energy Board (“NEB” or “Board”) pursuant to section 52 of Part III of the *National Energy Board Act* (“NEB Act”) for a certificate of public convenience and necessity (“CPCN”) and related approvals in respect of existing pipeline facilities located within the Province of Alberta (“TransCanada Alberta System”).
2. TransCanada is making this Application to effect recognition of the fact that by law the TransCanada Alberta System is now properly within Canadian federal jurisdiction and subject to regulation by the NEB. The requested approvals are required for the operation of the TransCanada Alberta System under NEB regulation.
3. Issuance of the CPCN and related approvals requires two primary determinations by the NEB. First, the Board must determine that the TransCanada Alberta System is now properly within federal jurisdiction and subject to regulation by the NEB. Second, the Board must be satisfied that the TransCanada Alberta System is required by the present and future public convenience and necessity. The second determination is required only if and when the first determination is made by the Board finding that it has jurisdiction over the TransCanada Alberta System.
4. Given the nature and interrelationship of the required approvals, TransCanada proposes that this Application be considered by the Board in two phases. Phase I (Jurisdiction Phase) would consider the constitutional question of whether the TransCanada Alberta System is now properly within federal jurisdiction and subject to regulation by the NEB. Phase II (Certificate and Implementation Phase) would consider whether the TransCanada Alberta System is required by the present and future public convenience and necessity and, if so, the ancillary approvals required to effect the transition to federal regulation. Phase II would not proceed unless and until the Board determines in Phase I that it has jurisdiction over the TransCanada Alberta System.

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## 2.0 PHASE I - JURISDICTION

5. TransCanada applies pursuant to subsection 12(2) of the NEB Act for a declaratory order of the Board that the TransCanada Alberta System is properly within federal jurisdiction and subject to regulation by the NEB. The Board has the statutory jurisdiction to determine all matters of law and fact for the purposes of the NEB Act. The Board has the regulatory background and expertise to determine the relevant constitutional facts in the context of the applicable law, and is the appropriate adjudicative body to make the jurisdictional determination.
6. TransCanada is a federally incorporated company continued under the *Canada Business Corporations Act* and is a “company” as that term is defined in the NEB Act.
7. TransCanada is the owner and operator of an interprovincial undertaking that is the transportation of natural gas to markets within Canada and the United States.
8. The TransCanada undertaking utilizes three major works – the TransCanada Mainline, the TransCanada Foothills System, and the TransCanada Alberta System.
9. The TransCanada Mainline is a large-diameter natural gas pipeline transmission system (approximately 15 000 km) extending from a point just inside the Alberta border through Saskatchewan, Manitoba, Ontario and into Québec, with various connections to domestic pipelines and at the international border. It serves markets in the Canadian provinces of Saskatchewan, Manitoba, Ontario and Québec, and in the United States Midwest and Northeast. The TransCanada Mainline is within federal jurisdiction and subject to regulation by the NEB.
10. TransCanada is the owner of the TransCanada Mainline.
11. The TransCanada Foothills System is a large-diameter natural gas pipeline transmission system (approximately 1240 km) extending from central Alberta (near Caroline) to the United States border near Monchy, Saskatchewan and Kingsgate, British Columbia (including what was formerly known as the TransCanada B.C. System), to serve markets

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- in the U.S. Midwest, Pacific Northwest, California and Nevada. The TransCanada Foothills System is within federal jurisdiction and subject to regulation by the NEB.
12. Foothills Pipe Lines Ltd. (“Foothills”) is a wholly-owned subsidiary of TransCanada. The TransCanada Foothills System is owned by three subsidiaries of Foothills - Foothills Pipe Lines (Alta.) Ltd., Foothills Pipe Lines (Sask.) Ltd. and Foothills Pipe Lines (South B.C.) Ltd. Foothills and its three subsidiaries are all corporations that fall within the definition of “company” in the NEB Act.
  13. TransCanada is the owner of Foothills.
  14. The TransCanada Alberta System is a natural gas pipeline system (approximately 23 500 km) located within Alberta that transports natural gas destined for markets within Alberta, within Canada outside Alberta, and in the United States. It connects with the TransCanada Mainline at Empress, Alberta and with the TransCanada Foothills System at Caroline, Crowsnest and McNeill, Alberta.
  15. The TransCanada Alberta System is owned by NOVA Gas Transmission Ltd. (“NGTL”) and is currently regulated by the Alberta Utilities Commission.
  16. NGTL is an Alberta corporation that is a wholly-owned subsidiary of TransCanada and a “company” within the definition of that term in the NEB Act.
  17. TransCanada is the owner of NGTL.
  18. TransCanada manages and operates the TransCanada Mainline, the TransCanada Alberta System and the TransCanada Foothills System in common as a single enterprise.
  19. The TransCanada Alberta System, the TransCanada Mainline, and the TransCanada Foothills System are now functionally integrated and share common ownership, management, control and direction. The TransCanada Alberta System is now part of or integral to the interprovincial undertaking of TransCanada that is the transportation of natural gas to markets within Canada and the United States using the works that are the



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TransCanada Alberta System, the TransCanada Mainline and the TransCanada Foothills System.

### **3.0 PHASE II - CERTIFICATE AND IMPLEMENTATION**

20. TransCanada applies pursuant to section 52 of the NEB Act for the issuance of a CPCN in respect of the TransCanada Alberta System, and for related approvals.
21. The TransCanada Alberta System is required by the present and future public convenience and necessity, having regard to the availability of gas, the existence of actual and potential markets, economic feasibility, the financial responsibility and financial structure of TransCanada and its affiliates, and any public interest that may be affected by the granting of this Application.
22. Issuance of a CPCN and related approvals in respect of the TransCanada Alberta System is required because it is now by law properly within federal jurisdiction. Such approvals will also facilitate the development, transportation and marketing of natural gas resources located within Alberta, and outside Alberta within Canada and the United States. The single federal regulatory regime that is now required by law to apply to the TransCanada Alberta System, the TransCanada Mainline and the TransCanada Foothills System will enhance regulatory and economic efficiency.
23. TransCanada, the owner and operator of the interprovincial undertaking that is subject to NEB regulation, requests that the CPCN and related approvals necessary to permit the operation of the TransCanada Alberta System within federal jurisdiction be issued to its wholly-owned subsidiary, NGTL, the owner of the TransCanada Alberta System.

### **4.0 TIMING OF APPROVALS**

24. TransCanada proposes that the jurisdictional declaratory order be made effective upon the issuance of the CPCN.

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25. TransCanada proposes that the CPCN be issued on a date certain to be fixed and determined by the Board in Phase II, such date to be a specified time following receipt of approval of the Governor in Council.

## **5.0 COMPONENTS OF APPLICATION**

26. TransCanada provides the following appendices in support of the Application:
- Appendix A: Executive Summary;
  - Appendix B: Constitutional Facts;
  - Appendix C: Regulatory Jurisdiction of the TransCanada Alberta System; and
  - Appendix D: Public Convenience and Necessity.

## **6.0 RELIEF REQUESTED**

27. TransCanada respectfully requests that the Board:
- (a) pursuant to subsection 12(2) of the NEB Act, determine and issue a declaratory order that the TransCanada Alberta System is properly within federal jurisdiction and subject to regulation by the NEB;
  - (b) pursuant to section 57 of the *Federal Courts Act*, issue a Notice of Constitutional Question in respect of the requested declaratory order;
  - (c) pursuant to section 52 of the NEB Act, issue a certificate of public convenience and necessity to NGTL in respect of the TransCanada Alberta System;
  - (d) pursuant to subsection 19(1) of the NEB Act, direct that the Board determination and declaratory order made in (a) above shall come into force upon the issuance of the certificate of public convenience and necessity to NGTL in respect of the TransCanada Alberta System;

- (e) issue any ancillary approvals to NGTL that are required and that the NEB deems necessary to effect the transition of the TransCanada Alberta System from provincial regulation to federal regulation by the NEB; and
- (f) authorize such further and other relief as TransCanada may subsequently request or that the Board may consider appropriate.

June 17, 2008  
Calgary, Alberta

**TransCanada PipeLines Limited**

*[ORIGINAL SIGNED BY]*

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Per: Kristine Delkus  
Deputy General Counsel,  
Pipelines and Regulatory Affairs

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## **NATIONAL ENERGY BOARD**

**IN THE MATTER OF** the *National Energy Board Act*, R.S.C. 1985, c. N-7, as amended, and the Regulations made thereunder; and

**IN THE MATTER OF** an Application by TransCanada PipeLines Limited for a Certificate of Public Convenience and Necessity and related approvals under the *National Energy Board Act*.

### **APPENDIX A**

### **EXECUTIVE SUMMARY**

**June 2008**

## **1.0 EXECUTIVE SUMMARY**

### **1.1 NATURE OF THE APPLICATION**

1. TransCanada PipeLines Limited (“TransCanada”) is making this Application to effect recognition of the fact that by law the TransCanada Alberta System is now properly within Canadian federal jurisdiction and subject to regulation by the National Energy Board of Canada (“NEB” or “Board”). It is part of or integral to the federal undertaking of TransCanada that is the transportation of natural gas to markets within Canada and the United States, utilizing the TransCanada Alberta System, the TransCanada Mainline and the TransCanada Foothills System.
2. TransCanada applies to the NEB pursuant to section 52 of Part III of the *National Energy Board Act* (“NEB Act”) for issuance of a certificate of public convenience and necessity (“CPCN”) and related approvals in respect of the TransCanada Alberta System. The requested approvals are required for the operation of the TransCanada Alberta System under NEB regulation.
3. Recognition and implementation of federal jurisdiction over the TransCanada Alberta System will facilitate the development, transportation and marketing of natural gas resources located within Alberta, and outside Alberta within Canada and the United States. The single regulatory regime that is now required by law to apply to the TransCanada Alberta System, the TransCanada Mainline and the TransCanada Foothills System will enhance regulatory and economic efficiency.

### **1.2 PHASING OF THE APPLICATION**

4. Issuance of the CPCN and related approvals requires two primary determinations by the NEB. First, the Board must determine that the TransCanada Alberta System is now properly within federal jurisdiction and subject to regulation by the NEB. Second, the Board must be satisfied that the TransCanada Alberta System is required

- by the present and future public convenience and necessity. The second determination is required only if and when the first determination is made by the Board finding that it has jurisdiction over the TransCanada Alberta System.
5. TransCanada seeks the constitutional jurisdictional determination from the Board pursuant to subsection 12(2) of Part I of the NEB Act, on the basis of the constitutional facts (as set out in this Application) and the applicable law. The NEB has the statutory jurisdiction to determine all matters of law and fact for the purposes of the NEB Act. The Board has the regulatory background and expertise to determine the relevant constitutional facts in the context of the applicable law to make the jurisdictional determination.
  6. Issuance of the CPCN also requires that the Board be satisfied that the TransCanada Alberta System is and will be required by the present and future public convenience and necessity. To that end, this Application provides evidence to address the requirements of Section 52 of the NEB Act.
  7. TransCanada proposes that the Application be heard in two phases. Phase I (Jurisdiction Phase) would consider the question of the proper constitutional jurisdiction of the TransCanada Alberta System. Phase II (Certificate and Implementation Phase) would consider (a) whether the TransCanada Alberta System is required by the present and future public convenience and necessity, and, if so (b) ancillary approvals necessary to effect the transition to federal regulation. Given that the time, cost and effort required to complete and file the extensive evidence required for Phase II is dependent on the Board first determining that jurisdiction is properly federal, TransCanada will complete its Phase II evidence after the Board makes its Phase I decision.

### **1.3 COMPONENTS OF THE APPLICATION**

8. In support of its requests, TransCanada asserts and relies upon the written evidence, information and arguments filed as part of this Application. More specifically, the

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TransCanada evidentiary case is comprised of the Application, this Appendix A: Executive Summary, and the following additional appendices:

Appendix B: Constitutional Facts

This appendix provides the constitutional facts which demonstrate that the TransCanada Alberta System is now properly within federal jurisdiction and subject to regulation by the NEB.

Appendix C: Regulatory Jurisdiction of the TransCanada Alberta System

This appendix provides the law as applied to the constitutional facts set out in Appendix B, to demonstrate that the TransCanada Alberta System is properly within federal jurisdiction and subject to regulation by the NEB.

Appendix D: Public Convenience and Necessity

TransCanada provides information relating to certain of the requirements of Section 52 and describes the detailed evidence that will be filed in Phase II to demonstrate that the TransCanada Alberta System is required by the present and future public convenience and necessity such that a CPCN should be issued.

The Application does not include an environmental and socio-economic impact assessment (“ESA”) under the *Canadian Environmental Assessment Act*. NEB precedent has been that jurisdictional changes of existing facilities from provincial to federal jurisdiction have required an environmental screening of the operation of the facilities but not their construction. Upon a Phase I determination of federal jurisdiction over the TransCanada Alberta System, TransCanada will prepare and file an ESA. Future activities in respect of the TransCanada Alberta System, including operation, modifications, expansions or abandonment, will be subject to applicable federal environmental legislation.

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**1.4 TOLLS AND TARIFF**

9. This Application does not seek approval of tolls or a tariff for the TransCanada Alberta System. No material change to the tolls, tariff, services or terms and conditions of the TransCanada Alberta System is proposed as part of the change in regulatory jurisdiction. TransCanada intends to file the operative tolls and tariff with the NEB pursuant to paragraph 60(1)(a) of the NEB Act, to be effective upon issuance of the CPCN, so that operation of the TransCanada Alberta System may continue uninterrupted.

**1.5 RELIEF REQUESTED**

10. TransCanada asks the Board to:
- (a) issue a declaratory order pursuant to subsection 12(2) of the NEB Act that recognizes that the TransCanada Alberta System is part of or integral to the TransCanada interprovincial undertaking and therefore properly within federal jurisdiction and subject to regulation by the NEB;
  - (b) issue a certificate of public convenience and necessity to NGTL in respect of the TransCanada Alberta System; and
  - (c) issue the requisite ancillary approvals to NGTL.
11. TransCanada asks that the declaratory order be made effective upon the issuance of the CPCN and that the CPCN be issued on a specified date following receipt of Governor in Council approval.

**1.6 APPENDICES TO THE APPLICATION**

Appendix A: Executive Summary

Appendix B: Constitutional Facts



Appendix C: Regulatory Jurisdiction of the TransCanada Alberta System

Appendix D: Public Convenience and Necessity

## **NATIONAL ENERGY BOARD**

**IN THE MATTER OF** the *National Energy Board Act*, R.S.C. 1985, c. N-7, as amended, and the Regulations made thereunder; and

**IN THE MATTER OF** an Application by TransCanada PipeLines Limited for a Certificate of Public Convenience and Necessity and related approvals under the *National Energy Board Act*.

### **APPENDIX B**

#### **CONSTITUTIONAL FACTS**

**June 2008**

## **1.0 CONSTITUTIONAL FACTS**

1. Jurisdiction over the TransCanada Alberta System turns on whether the facilities are part of or integral to a federal work or undertaking. Factors to be considered include functional integration, common management, control and direction, ownership, physical connection, the purpose or object of the enterprise (undertaking), and the “essential” test (see Appendix C: Regulatory Jurisdiction of the TransCanada Alberta System). The jurisdictional determination is to be made on the basis of the “constitutional facts”—the particular facts of each situation that must be carefully reviewed.<sup>1</sup>

### **1.1 THE NATURAL GAS TRANSPORTATION FACILITIES**

2. TransCanada owns and operates pipeline facilities that are used for the transportation of natural gas to markets within Canada and in the United States.
3. The pipeline facilities that are utilized by TransCanada are the TransCanada Alberta System, the TransCanada Mainline and the TransCanada Foothills System which together comprise a single integrated operation.
4. A composite map of the TransCanada Alberta System, the TransCanada Mainline and the TransCanada Foothills System is attached as Appendix B-1.

#### The TransCanada Alberta System

5. The TransCanada Alberta System is a natural gas pipeline system (approximately 23 500 km) located within Alberta that is used to transport natural gas from receipt points to delivery points, including points of interconnection with ex-Alberta pipelines.

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<sup>1</sup> *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 per Iacobucci and Major, JJ. at 361.

6. A map of the TransCanada Alberta System is attached as Appendix B-2.
7. The facilities that currently comprise the TransCanada Alberta System have been designed, constructed and operated since 1954 to meet the needs of customers at the times of installation. The average investment base of the TransCanada Alberta System was \$4.224 billion in 2007.
8. The TransCanada Alberta System transports in excess of 10 Bcf of natural gas per day. Total 2007 throughput was in excess of 4.0 Tcf. The TransCanada Alberta System transports approximately 68 percent of the natural gas produced in western Canada (or 16 percent of total North American production) and delivers approximately 80 percent of its volumes to pipelines exporting the gas from Alberta.
9. The TransCanada Alberta System is currently regulated by the Alberta Utilities Commission.

#### The TransCanada Mainline

10. The TransCanada Mainline is a large diameter natural gas pipeline transmission system (approximately 15 000 km) extending from a point just inside the Alberta border through Saskatchewan, Manitoba, Ontario and into Québec, with various connections to domestic pipelines and at the international border. It serves markets in the Canadian provinces of Saskatchewan, Manitoba, Ontario and Québec, and in the United States Midwest and Northeast.
11. A current map of the TransCanada Mainline is attached as Appendix B-3.
12. The average investment base of the TransCanada Mainline was \$7.292 billion in 2007.
13. Total 2007 throughput of the Mainline was approximately 3.24 Tcf. Average daily throughput was approximately 8.9 Bcf. In 2007, approximately 87% of throughput

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on the Prairies Section of the TransCanada Mainline System was delivered from the TransCanada Alberta System.

14. The TransCanada Mainline is within federal jurisdiction and subject to regulation by the National Energy Board.

#### The TransCanada Foothills System

15. The TransCanada Foothills System is a large-diameter natural gas pipeline system (approximately 1240 km) extending from central Alberta (near Caroline) to the United States border near Monchy, Saskatchewan, and Kingsgate, British Columbia (“B.C.”) to serve markets in the United States Midwest, Pacific Northwest, California and Nevada. Three subsidiary companies of Foothills Pipe Lines Ltd. (“Foothills”), being Foothills Pipe Lines (Alta.) Ltd. (“Foothills Alta”), Foothills Pipe Lines (Sask.) Ltd. (“Foothills Sask”) and Foothills Pipe Lines (South B.C.) Ltd. (“Foothills South B.C.”) hold certificates of public convenience and necessity (“CPCNs”) in respect of the TransCanada Foothills System.
16. A map of the TransCanada Foothills System is attached as Appendix B-4.
17. The TransCanada Foothills System now includes the facilities that were previously known as the TransCanada B.C. System. In February 2007, the NEB approved an application by TransCanada, Foothills and Foothills South B.C. to transfer ownership of the TransCanada B.C. System from TransCanada to Foothills South B.C. which now holds the CPCNs for the TransCanada B.C. System.
18. The facilities that previously comprised the TransCanada B.C. System and now form part of the TransCanada Foothills System extend 201 km from the Alberta western border through B.C. to connect with the Gas Transmission Northwest System at the United States border near Kingsgate, B.C. serving markets in B.C. as well as the Pacific Northwest, California and Nevada.

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19. All capacity of the TransCanada Foothills System within Alberta is contracted by NOVA Gas Transmission Ltd. (“NGTL”) and used in the provision of service by the TransCanada Alberta System.
  20. The average investment base of the TransCanada Foothills System was \$794 million in 2007.
  21. In 2007, the TransCanada Foothills System moved approximately 4.0 Bcf/d and a total of 1.45 Tcf. Virtually all volumes were received from the TransCanada Alberta System.
  22. The TransCanada Foothills System is within federal jurisdiction and subject to regulation by the National Energy Board.

## **1.2 PHYSICAL CONNECTION**

23. The TransCanada Alberta System connects with the TransCanada Mainline at a point within Alberta near Empress.
24. The TransCanada Alberta System connects with the TransCanada Foothills System at points within Alberta near Caroline, Crowsnest and McNeill.
25. The TransCanada Alberta System is also connected with various gas processing and other gas pipeline supply facilities along the Alberta borders, owned and operated by various companies, at 23 locations. Approximately 7.5 percent of the gas transported by the TransCanada Alberta System within Alberta originates outside the Alberta borders.

## **1.3 OWNERSHIP**

26. TransCanada is a federally incorporated company continued under the *Canada Business Corporations Act*, and is a “company” as that term is defined in the *National Energy Board Act* (“NEB Act”).

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27. NGTL and Foothills are wholly owned subsidiaries of TransCanada.
  28. TransCanada is the owner of the facilities that comprise the TransCanada Mainline.
  29. NGTL is an Alberta corporation and is a “company” as that term is defined in the NEB Act.
  30. NGTL is the owner of the facilities that comprise the TransCanada Alberta System.
  31. NGTL was initially incorporated as The Alberta Gas Trunk Line Company Ltd. by special act of the Alberta legislature in 1954. On May 10, 1994, NGTL was established as a stand-alone wholly-owned subsidiary of NOVA Corporation (“NOVA”).
  32. Effective July 2, 1998, TransCanada entered into a business arrangement with NOVA. The businesses of NOVA then included gathering, transmission and marketing of natural gas and natural gas liquids, and production and marketing of commodity chemicals. Under the terms of a Plan of Arrangement, TransCanada and NOVA merged and then split off the commodity chemicals and gas processing businesses into separate companies which were later sold. As a consequence of the merger, NGTL became a wholly-owned subsidiary of TransCanada.
  33. Effective August 30, 1999, NGTL became a direct wholly-owned subsidiary of TransCanada.
  34. In March 1996, Alberta Natural Gas Company Ltd. (“ANG”) became a wholly-owned subsidiary of TransCanada and 530320 Alberta Ltd. (a wholly owned subsidiary of TransCanada). At the time, ANG was the owner and operator of the ANG Pipeline which was comprised of the facilities that later became the TransCanada B.C. System. In December 1998, the Board approved the amalgamation of TransCanada and ANG and directed that all certificates, approvals, orders and other Board directives affecting ANG were to apply post amalgamation to TransCanada in respect of the ANG Pipeline assets.

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35. In August 2003, TransCanada became the 100 percent owner of Foothills through the purchase of the interest previously held by Duke Energy Gas Transmission (“Duke”). Foothills is a wholly-owned subsidiary of TransCanada. Foothills Alta, Foothills Sask. and Foothills South B.C. are wholly-owned subsidiaries of Foothills.
36. Since 1998, the TransCanada Mainline and the TransCanada B.C. System have shared common ownership. Since 1999, the TransCanada Alberta System has shared common ownership with the TransCanada Mainline and the TransCanada B.C. System. Since 2003, all have shared common ownership with Foothills. Now, the TransCanada Alberta System, the TransCanada Mainline, and the TransCanada Foothills System all share common ownership by TransCanada.
37. A chart showing corporate ownership is attached as Appendix B-5.

#### **1.4 FUNCTIONAL AND OPERATIONAL INTEGRATION, AND COMMON MANAGEMENT, CONTROL AND DIRECTION**

38. The TransCanada Alberta System, the TransCanada Mainline and the TransCanada Foothills System are works that are now managed and operated together on an integrated basis by TransCanada as a single enterprise.
39. The overall management of the TransCanada Alberta System, the TransCanada Mainline, and the TransCanada Foothills System is now conducted by directors, officers and employees of TransCanada.
40. NGTL, Foothills, Foothills Alta, Foothills Sask. and Foothills South B.C. have no employees.
41. All head office functions of the TransCanada Alberta System, the TransCanada Mainline and the TransCanada Foothills System, including shared services, are conducted by TransCanada from the TransCanada PipeLines Tower, 450 1<sup>st</sup> Street S.W., Calgary, Alberta, Canada.



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42. All commercial and management decisions relating to the TransCanada Alberta System, the TransCanada Mainline and the TransCanada Foothills System are made through a single business group within the TransCanada Pipelines Division - Canadian and Eastern United States Pipelines.
  43. The physical operation of the TransCanada Alberta System, the TransCanada Mainline and the TransCanada Foothills System is conducted from a single operating centre located on the 4<sup>th</sup> floor of the TransCanada PipeLines Tower.
  44. Within Alberta, field operations of all facilities are conducted by the TransCanada Field Operations and Engineering unit.
  45. TransCanada operates the TransCanada Alberta System pursuant to an Operating Agreement between TransCanada and NGTL. A copy of the Operating Agreement is attached as Appendix B-6.
  46. Since the amalgamation of TransCanada and ANG in 1996, TransCanada has operated the facilities that comprised the TransCanada B.C. System.
  47. Since the purchase of the Duke interest in Foothills in 2003, TransCanada has operated the TransCanada Foothills System that now includes the TransCanada B.C. System.
  48. All capacity of the TransCanada Foothills System within Alberta is contracted by NGTL and used in the provision of service by the TransCanada Alberta System.
  49. Shippers contract for transportation service separately with NGTL, Foothills (for service outside Alberta) and TransCanada (for the TransCanada Mainline) and pay separate tolls for that service. The tolls and tariffs of the TransCanada Alberta System, the TransCanada Mainline and the TransCanada Foothills System are determined separately. The NGTL toll methodology for the TransCanada Alberta System (approved by the Alberta Energy and Utilities Board) differs from the methodologies of Foothills and the Mainline (approved by the National Energy

- Board) but the common basis for all three is the cost of providing transportation service.
50. Tolls and tariffs for the TransCanada Alberta System, the TransCanada Foothills System and the TransCanada Mainline are calculated and administered by a single group within the TransCanada Pipelines division—Canadian and Eastern United States Pipelines—that also bears responsibility for applications for regulatory approvals.

### **1.5 PURPOSE OR OBJECT OF THE ENTERPRISE**

51. The purpose or object of the enterprise that uses the TransCanada Alberta System, the TransCanada Mainline, and the TransCanada Foothills System is the transportation of natural gas destined for markets within Canada and in the United States.
52. The TransCanada Alberta System, the TransCanada Mainline and the TransCanada Foothills System all transport gas that is produced in Alberta, British Columbia, and the Northwest Territories, and that is destined for markets within Canada outside Alberta, and in the United States.
53. The TransCanada Alberta System also gathers gas destined for markets within Alberta, elsewhere in Canada, and in the United States.
54. TransCanada does not own the natural gas that it transports through the TransCanada Alberta System, the TransCanada Mainline and the TransCanada Foothills System, but receives and delivers gas that is owned by others.
55. The TransCanada Alberta System delivers gas within Alberta (approximately 20 percent of total volume transported) and to ex-Alberta pipelines (approximately 80 percent of total volume transported) including the TransCanada Mainline and the TransCanada Foothills System.

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## **1.6 THE “ESSENTIAL” TEST**

56. The TransCanada Mainline and the TransCanada Foothills System are federally regulated interprovincial works that are dependent on Western Canada Sedimentary Basin gas that is delivered to them by the TransCanada Alberta System. Without that gas, the TransCanada Foothills System would have virtually nothing to transport and the TransCanada Mainline would be left with a reduced throughput such that it would be completely uneconomic.

## **1.7 SUMMARY OF CONSTITUTIONAL FACTS**

57. The relevant constitutional facts are that the TransCanada Alberta System, the TransCanada Mainline and the TransCanada Foothills System are now functionally integrated and subject to common ownership, management, control and direction. They share the common purpose or object of transportation of natural gas to markets within Canada and the United States. The TransCanada Alberta System is physically connected to the TransCanada Mainline and the TransCanada Foothills System and is essential to both.

## **1.8 APPENDICES**

B-1: TransCanada PipeLines Limited System Map

B-2: TransCanada Alberta System Map

B-3: TransCanada Mainline Map

B-4: TransCanada Foothills System Map

B-5: TransCanada Corporate Ownership Chart

B-6: TransCanada/NGTL Operating Agreement dated January 1, 2005.

**APPENDIX B**  
**EXHIBITS**

**PLACEHOLDER**

**MAP EXHIBITS**

**Oversized Files Provided in Compact Disk Format**

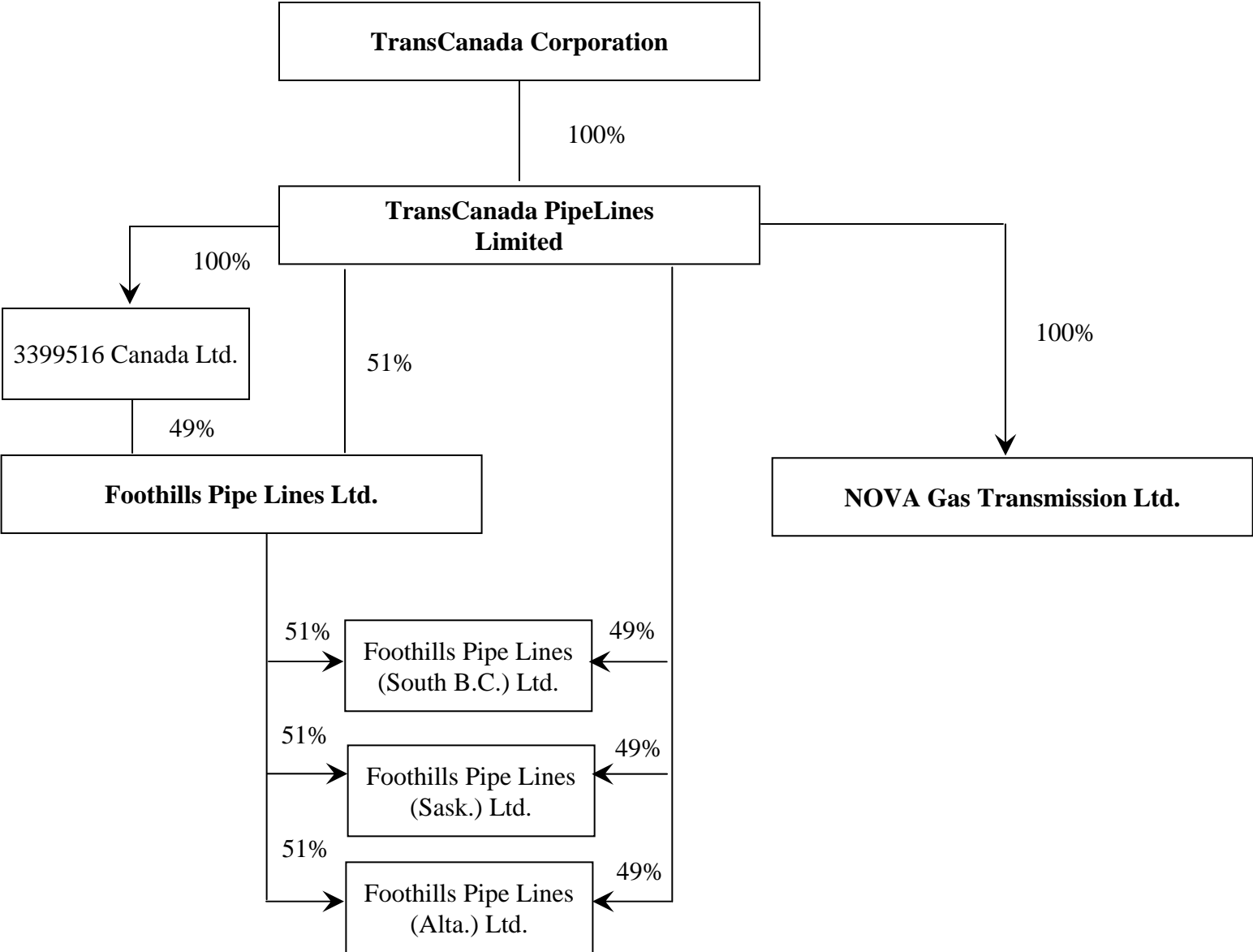
**B-1: TransCanada PipeLines Limited System Map**

**B-2: TransCanada Alberta System Map**

**B-3: TransCanada Mainline Map**

**B-4: TransCanada Foothills System Map**

**Organization Chart for TransCanada Corporation  
and Specific Canadian Pipeline Subsidiaries**



COPY

## NOVA GAS TRANSMISSION LTD.

## OPERATING AGREEMENT

THIS AGREEMENT dated as of the 1st day of January, 2005, (the "Effective Date") by and between NOVA Gas Transmission Ltd., a corporation organized under the laws of Alberta (hereinafter referred to as "NGTL") and TransCanada PipeLines Limited, a corporation organized under the laws of Canada (hereinafter referred to as "TransCanada" or "Operator").

## WITNESSETH:

WHEREAS, NGTL owns a natural gas pipeline system which is regulated by the Alberta Energy and Utilities Board and which receives natural gas at points in the province of Alberta and delivers gas at points within Alberta and at points on the borders between Alberta and other jurisdictions (the "Facilities");

WHEREAS, TransCanada has provided all of the administration and operating services necessary to operate the Facilities since July 2, 1998, and TransCanada and NGTL wish to formalize the provision of those services;

NOW THEREFORE, in consideration of the representations, covenants and premises hereinafter set forth, the Parties agree as follows:

1. Definitions

The following capitalized terms shall have the meanings set forth below:

1.1. Affiliate. A Person shall be deemed to be affiliated with another Person if:

- a) it controls that person,
- b) it is controlled by that Person, or
- c) it is under common control with that Person.

For the purpose of this definition, "control" means direct or indirect control;

1.2. Day. A period of 24 consecutive hours commencing at 8:00 a.m. Eastern Standard Time;

1.3. Loss. With respect to any Person, means any loss, expense, injury, liability, death, damage, or claim to or against that Person;

1.4. Month. A period of time beginning on the first Day of a calendar month and ending at the same time on the first Day of the next succeeding calendar month;

- 1.5. NGTL Group. Collectively, NGTL, its Affiliates, subcontractors, directors, officers, servants, agents, employees and consultants, but not including TransCanada;
- 1.6. Operating Service. Any service provided by TransCanada pursuant to Section 3.1;
- 1.7. Party. TransCanada or NGTL and "Parties" shall mean TransCanada and NGTL;
- 1.8. Person. An individual, corporation, trust, limited or general partnership, or joint venture;
- 1.9. TransCanada Group. Collectively, TransCanada, its Affiliates, and its subcontractors, shareholders, directors, officers, servants, agents, employees and consultants, but not including NGTL;
- 1.10. TransCanada. TransCanada PipeLines Limited;
- 1.11. Year. Each 12 Month period beginning on January 1 of a calendar year and ending on December 31 of the same calendar year.

## 2. Relationship of the Parties

- 2.1. Appointment as Operator. TransCanada agrees to perform the Operating Services. The performance of TransCanada's obligations under this Agreement shall be subject to the general direction of NGTL through the direction of the executive officers and Board of Directors of NGTL.

## 3. Operator's Responsibilities

- 3.1. Operating Services. Operator shall be generally responsible for the matters set forth in this Agreement, including any matters which are not specifically set out in this Article 3 but which can reasonably be inferred to be part of the services generally required for the operation of the Facilities. TransCanada shall perform the following services for NGTL:
  - 3.1.1. provide the day-to-day management, supervision, operating, and marketing for the Facilities; identify market opportunities and services related to the Facilities and prepare and implement plans for the marketing of such services to shippers; act as administrative liaison and provide other related services, including, but not limited to, accounting, engineering, environmental, operational planning, public relations, budgeting, technical services, insurance administration, legal, and tax services;



- 3.1.2. provide any services related to the operation, maintenance or construction of the Facilities, including the planning and construction of any expansion of the Facilities;
- 3.1.3. procurement of any equipment or other property of any kind required for construction and operation of the Facilities;
- 3.1.4. prepare, file and prosecute applications for regulatory and governmental authorization, including any rate case applications and applications for the construction of facilities, make any other regulatory or governmental filings which are relevant to the operation of the Facilities, and make periodic filings to governmental or regulatory agencies having jurisdiction;
- 3.1.5. prepare financing plans and negotiate for financing commitments, if any;
- 3.1.6. maintain accurate and itemized accounting records in accordance with applicable accounting practices together with financial statements and any information reasonably required by NGTL or its Affiliates relating to such records;
- 3.1.7. prepare budgets and planning information;
- 3.1.8. pay and discharge promptly all costs and expenses incurred or required to be paid in connection with the Facilities;
- 3.1.9. cause the Facilities to be operated in accordance with the requirements of all federal, provincial or other government agencies having jurisdiction, and provide or cause to be provided such appropriate supervisory, audit, administrative, technical and other services as may be required;
- 3.1.10. prepare tax returns and pay taxes. This includes all taxes of every kind and nature assessed or levied upon or incurred by TransCanada arising from the administration, operation and maintenance of the Facilities;
- 3.1.11. maintain the corporate records of NGTL;
- 3.1.12. maintain custody of funds, notes, drafts, acceptances, commercial paper and other securities belonging to NGTL;
- 3.1.13. negotiate service agreements with legal counsel, certified public accountants and financial and other consultants to be retained by NGTL;
- 3.1.14. supervise and administer gas transportation contracts and other service contracts in accordance with NGTL's service agreements, including, but not limited to, preparation and collection of all invoices for service;

- 3.1.15. perform all measurement functions required in the operation of the Facilities, including the calculation of the volumes and heat content of gas consumed or lost in operations during the preceding Month and each shipper's proportionate share of all such volumes, together with all applicable gas volumes statements and heat content analyses;
  - 3.1.16. except as otherwise provided by applicable laws or governmental regulations, retain all charts, records, books of account, tax returns, plans, design, studies and reports and other documents related to the design, construction, operation, maintenance and administration of the Facilities for periods which are consistent with relevant limitation periods;
  - 3.1.17. manage any disputes, claims or litigation relating to the Facilities, including the settlement of any such disputes, claims or litigation;
  - 3.1.18. prepare and negotiate rights-of-way, other real estate agreements, permits and contracts necessary for the operation, certification and maintenance of the Facilities;
  - 3.1.19. perform gas control and dispatch responsibilities including, without limitation, monitoring meter stations, dispatching and allocating daily scheduled nominations for the natural gas quantities to be received, transported and redelivered, and responding to emergency conditions as necessary to assure safe operations; and
  - 3.1.20. administer any and all interconnect agreements between NGTL and any other Person with upstream or downstream facilities that interconnect with the Facilities.
4. TransCanada's Employees, Consultants and Subcontractors. TransCanada shall employ or retain and have supervision over the Persons (including TransCanada employees, subcontractors, consultants and professional service or other organizations) required by TransCanada to perform its duties and responsibilities hereunder in an efficient and prudent manner. TransCanada shall pay all related expenses, including compensation, salaries, wages, overhead and administrative expense incurred by TransCanada and, if applicable, social security taxes, workers' compensation insurance, retirement and insurance benefits and such other expenses.
5. Accounting and Reimbursement
    - 5.1.1. TransCanada shall keep a full and complete account of all of the costs, expenses and expenditures of NGTL. TransCanada shall satisfy, on behalf of NGTL, any of the obligations relating to the Facilities. Any payments of funds may be made from accounts maintained by TransCanada for NGTL or from TransCanada's own accounts.

- 5.1.2. NGTL shall compensate TransCanada for its performance of this Agreement, including any compensation where services or equipment or other property is owned by or procured by TransCanada but used by or transferred to NGTL, in accordance with TransCanada's inter-corporate policy for the allocation of costs between TransCanada and NGTL, and any applicable orders of the Alberta Energy and Utilities Board.
6. Code of Conduct. Notwithstanding any other provision of this Agreement, TransCanada shall in the performance of this Agreement comply with the applicable provisions of the NGTL Code of Conduct. Each Party agrees this Agreement complies with the NGTL Code of Conduct.
7. Inventions and Copyrights. Any (i) inventions, whether patentable or not, developed or invented, or (ii) copyrightable material, developed by TransCanada or its Affiliates or employees while engaged in the performance of services under this Agreement shall, unless otherwise directed, be assigned to TransCanada, which shall have the exclusive right to the exploitation thereof.
8. Indemnification, Litigation, and Liability
- 8.1. TransCanada's Indemnity. TransCanada shall indemnify, defend and hold the NGTL Group harmless from and against any claims by third parties for Losses against the NGTL Group resulting from TransCanada's gross negligence or wilful misconduct or both.
- 8.2. NGTL's Liability. Notwithstanding anything in this Agreement to the contrary, TransCanada shall not be liable to NGTL or its directors, officers, servants employees, consultants or any of them (collectively, the "Non-Operators") for Loss, whether contractual, extra-contractual (including based on negligence), by indemnity or otherwise, legally imposed, suffered or incurred by the Non-Operators resulting from or in any way attributable to or arising out of any act or omission, whether negligence or otherwise, of TransCanada in conducting or carrying out this Agreement.
- 8.3. NGTL's Indemnity. NGTL shall indemnify, defend and hold the TransCanada Group harmless from and against any Loss suffered or incurred by the TransCanada Group in conducting or carrying out this Agreement, including the TransCanada Group's own Loss, and whether the Loss results directly or indirectly from any act or omission by the TransCanada Group, including negligence.
- 8.4. Consequential Damages. TransCanada shall not be liable to NGTL, its directors, officers, employees and shareholders, for any special, indirect or consequential damages, including loss of profits, loss of revenues or loss of transportation capacity.

- 8.5. TransCanada's Liability Limit. Notwithstanding anything in this Agreement to the contrary, if TransCanada is liable for damages pursuant to the provisions of this Agreement, TransCanada's liability or responsibility for such damages or obligations shall be reduced to the extent that such costs and damages are recoverable by NGTL from any third party, any insurance policy, or through any tolls charged pursuant to the NGTL Gas Transmission Tariff or other order of the Alberta Energy and Utilities Board.
9. Term. This Agreement shall be effective as of January 1, 2005 and, shall continue until December 31, 2006 (the "Original Term") and will be renewable from Year to Year effective on that date subject to termination in accordance with this Section. This Agreement and its Term shall continue to be automatically renewed beyond the Original Term provided that either Party may terminate on any date on or after December 31, 2006 by providing 180 days advance written notice of termination.
10. Survival of Obligations. The termination of this Agreement shall not discharge either Party from any obligation which it owes to the other Party by reason of any transaction, commitment or agreement entered into, or any loss, cost, damage, expense or liability which shall occur or arise (or the circumstances, events or basis of which shall occur or arise) prior to such termination.
11. Law of the Contract. This Agreement shall be construed and interpreted under the laws of the Province of Alberta, without regard to the principles of conflicts of laws.
12. Force Majeure.
- 12.1. Effect of Force Majeure. In the event that TransCanada is rendered unable, by reason of any event of force majeure, as defined herein, to perform, wholly or in part, any obligation or commitment set forth in this Agreement, then upon such Party's giving notice and full particulars of such event as soon as practicable after the occurrence thereof, the obligations of both Parties, except for unpaid financial obligations arising prior to such event of force majeure, shall be suspended to the extent and for the period of such force majeure condition.
- 12.2. Nature of Force Majeure. The term "force majeure" as used in this Agreement shall mean acts of God, strikes, lockouts, or industrial disputes or disturbances, civil disturbances, arrests and restraint from rulers of people, interruptions by government or court orders, present and future valid orders, decisions or rulings of any government or regulatory entity having proper jurisdiction, temporary failure of gas supply, acts of the public enemy, wars, riots, blockades, insurrections, inability to secure labor or inability to secure materials, including inability to secure materials by reason of allocations promulgated by authorized governmental agencies, epidemics, landslides, lightning, earthquakes, fire, storms, floods, washouts, inclement weather which necessitates extraordinary measures

and expense to construct facilities and/or maintain operations, explosions, breakage or accident to machinery or lines of pipe, freezing of pipelines, inability to obtain or delays in obtaining easements or rights-of-way, the making of repairs or alterations to pipelines or plants, or any other cause, whether of the kind herein enumerated or otherwise, not reasonably within the control of the Party claiming force majeure.

12.3. Non-Force Majeure Situations. Neither TransCanada nor NGTL shall be entitled to the benefit of the provisions of Section 12.1 of this Agreement under the following circumstances:

12.3.1. To the extent that the failure was caused by the Party claiming suspension having failed to remedy the condition by taking all reasonable acts, short of litigation, if such remedy requires litigation, and having failed to resume performance of such commitments or obligations with reasonable dispatch;

12.3.2. If the failure was caused by failure of the Party claiming suspension to request or pay necessary funds in a timely manner, or with respect to the payment of any amounts then due hereunder;

12.3.3. To the extent that the failure was caused or contributed to by the gross negligence or wilful misconduct of the Party claiming suspension.

12.4. Resumption of Normal Performance. Should there be an event of force majeure affecting performance hereunder, the Parties shall co-operate to take all reasonable steps to remedy such event with all reasonable dispatch to insure resumption of normal performance.

12.5. Strikes and Lockouts. Settlement of strikes and lockouts shall be entirely within the discretion of the Party affected, and the requirement in Section 12.3.1 and Section 12.4 of this Agreement that any event of force majeure shall be remedied with all reasonable dispatch shall not require the settlement of strikes or lockouts by acceding to the demands of the parties directly or indirectly involved in such strikes or lockouts when such course is inadvisable in the discretion of the Party having such difficulty.

13. General

13.1. Effect of Agreement. This Agreement reflects the whole and entire agreement among the Parties with respect to its subject matter and supersedes all prior agreements and understandings, oral or written, among the Parties with respect to its subject matter.

13.2. Notices. Unless otherwise specifically provided in this Agreement, any written notice or other communication shall be sufficiently given or shall be deemed

given on the fifth business day following the date on which the same is mailed by registered or certified mail, postage prepaid, or on the next business day following the date on which the same is sent via a nationally recognized courier service or by telecommunication, in each case addressed:

13.2.1. If to TransCanada, to:

Executive Vice President, Operations & Engineering  
TransCanada PipeLines Limited  
450 – 1 Street S.W.  
Calgary, Alberta T2P 5H1

or such other person or address as may be designated from time to time by written notice to NGTL.

13.2.2. If to NGTL, to:

President  
NOVA Gas Transmission Ltd.  
450 – 1 Street S.W.  
Calgary, Alberta T2P 5H1

or such other positions or address as may be designated from time to time by written notice to TransCanada.

- 13.3. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.
- 13.4. Headings. The headings contained in this Agreement are for reference purposes only and shall not affect the meaning or interpretation of this Agreement.
- 13.5. Waiver. No waiver by any Party of any default by any other Party in the performance of any provision, condition or requirement herein shall be deemed to be a waiver of, or in any manner release the other Party from, performance of any other provision, condition or requirements herein, nor shall such waiver be deemed to be a waiver of, or in any manner a release of, the other Party from future performance of the same provision, condition or requirement. Any delay or omission of any Party to exercise any right hereunder shall not impair the exercise of any such right, or any like right, accruing to it thereafter. No waiver of a right created by this Agreement by one Party shall constitute a waiver of such right by the other Party except as may otherwise be required by law with respect to

Persons not parties hereto. The failure of one Party to perform its obligations shall not release the other Party from the performance of such obligations.

- 13.6. Assignability. This Agreement may not be assigned by TransCanada or NGTL except as otherwise expressly permitted or contemplated hereby, without the prior written consent of the non-assigning party, which consent may not be unreasonably withheld. Any assignment hereunder shall be effective on the first Day of the Month following the Month during which the Assignment is complete. In the event of an assignment of this Agreement by either Party, the assignor shall have no further rights, liability or obligations hereunder; provided, however, that the assignor shall not be discharged from any obligation which it owes to the other Party by reason of any loss, cost, damage, expense or liability which shall occur or arise (or the circumstances, events or basis of which shall occur or arise) prior to the effective date of such assignment. This Agreement and all of the obligations and rights herein established shall extend to and be binding upon and shall inure to the benefit of the respective successors and permitted assigns of the respective Parties hereto.
- 13.7. References to Money. All references in this Agreement to money shall be to or in currency of Canada.
- 13.8. Severability. Should any provision of this Agreement be deemed in contradiction with the laws of any jurisdiction in which it is to be performed or unenforceable for any reason, such provision shall be deemed null and void, but this Agreement shall remain in force in all other respects. Should any provision of this Agreement be or become ineffective because of changes in applicable laws or interpretations thereof or should this Agreement fail to include a provision that is required as a matter of law, the validity of the other provisions of this Agreement shall not be affected thereby. If such circumstances arise, the Parties hereto shall negotiate in good faith appropriate modifications to this Agreement to reflect those changes that are required by law.
- 13.9. Laws and Regulatory Bodies. This Agreement and the obligations of the Parties hereunder are subject to all applicable laws, rules, orders and regulations of governmental authorities having jurisdiction and, in the event of conflict, such laws, rules, orders and regulations of governmental authorities having jurisdiction shall control.
- 13.10. Remedies Cumulative. Remedies provided under the provisions of this Agreement shall be cumulative and shall be in addition to the remedies provided by law or in equity.
- 13.11. Section Numbers. Unless otherwise indicated, references to Section numbers are to Sections of this Agreement.

## **NATIONAL ENERGY BOARD**

**IN THE MATTER OF** the *National Energy Board Act*, R.S.C. 1985, c. N-7, as amended, and the Regulations made thereunder; and

**IN THE MATTER OF** an Application by TransCanada PipeLines Limited for a Certificate of Public Convenience and Necessity and related approvals under the *National Energy Board Act*.

### **APPENDIX C**

## **REGULATORY JURISDICTION OF THE TRANSCANADA ALBERTA SYSTEM**

**June 2008**



## 1.0 TRANSCANADA POSITION

1. The TransCanada Alberta System is now properly within federal jurisdiction and subject to regulation by the National Energy Board since it is part of or integral to the interprovincial undertaking of TransCanada. The interprovincial undertaking of TransCanada is the transportation of natural gas to markets within Canada and the United States, using the works that are the TransCanada Alberta System, the TransCanada Mainline and the TransCanada Foothills System.

## 2.0 SUMMARY OF THE LAW

2. The issue of regulatory jurisdiction over pipelines has been litigated numerous times in Canadian courts, including the Supreme Court of Canada. The law now is that a pipeline will be within federal jurisdiction and subject to regulation by the National Energy Board (“NEB” or “Board”) if it is itself a federal "work or undertaking", or is integral to a federal "work or undertaking".<sup>1</sup>
3. A federal “work or undertaking” is one that is *interprovincial* or *international*--it crosses a provincial or national boundary. A pipeline that is *intraprovincial*, i.e. that is located entirely within a province, is *prima facie* within provincial jurisdiction. It will only become subject to federal regulation if it is determined to be *part of* a federal “work or undertaking” or *integral to* a federal “work or undertaking”.
4. Jurisdiction depends on what are known as the “constitutional facts”—the particular facts of each situation that must be carefully reviewed.<sup>2</sup> While many factors may be considered in determining the “part of” or “integral to” jurisdictional question, the

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<sup>1</sup> *United Transportation Union et al. v. Central Western Railway Corporation*, [1990] 3 S.C.R. 1112 (“*Central Western Railway*”), per Dickson, C.J.C. at 1124-1125.

<sup>2</sup> *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 (“*Westcoast*”) per Iacobucci and Major, JJ., at 361.

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Supreme Court of Canada has held that the primary factor is functional integration and common management, control and direction.<sup>3</sup>

### 3.0 DISCUSSION OF THE LAW

5. The jurisdictional issue arises out of the provisions of sections 91 and 92 of the *Constitution Act, 1867* of Canada (“Constitution Act”). Specifically, subsection 91(29) of the Constitution Act sets out that one of the matters within the exclusive legislative authority of the Parliament of Canada is:

“Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.”

6. Paragraph 92(10)(a) of the Constitution Act provides that, in each province, the Legislature may exclusively make laws in relation to:

“Local Works and Undertakings other than such as are of the following Classes:

Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;”

7. The combined effect of subsection 91(29) and paragraph 92(10)(a) is to grant exclusive jurisdiction over local (*intraprovincial*) “works and undertakings” to the provinces, while *interprovincial* and international “works and undertakings” are, by exception, within federal jurisdiction.

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<sup>3</sup> *Westcoast* at 368.

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8. Pipelines that are within federal jurisdiction are subject to regulation by the National Energy Board by virtue of the provisions of the *National Energy Board Act* (“NEB Act”). The definition of “pipeline” in section 2 of the NEB Act is:

“pipeline” means a line that is used or to be used for the transmission of oil, gas, or any other commodity and that connects a province with any other province or provinces or extends beyond the limits of a province or the offshore area as defined in section 123, and includes all branches, extensions, tanks, reservoirs, storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio and real and personal property and works connected therewith, but does not include a sewer or water pipeline that is used or proposed to be used solely for municipal purposes.”<sup>4</sup>

9. Various provisions of the NEB Act deal with the regulation by the NEB of the construction, operation and tolls of a “pipeline” that is operated by a “company”.
10. A “work” has been defined as a “physical thing” while an “undertaking” has been said to be “not a physical thing, but an arrangement under which physical things are used” or an “enterprise” or “organization”<sup>5</sup>.
11. A “work or undertaking” can come within federal jurisdiction in one of two ways: (1) if it is itself a federal “work or undertaking” or, (2) if it is integral to an existing federal “work or undertaking”. The classic statement of this test was by Dickson, C.J.C. in *United Transportation Union et al. v. Central Western Railway Corporation*. The Central Western Railway (“Central Western”) was a railway located entirely within Alberta but connected to the interprovincial Canadian National

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<sup>4</sup> *National Energy Board Act*, R.S., c. N-6, s. 2, as amended.

<sup>5</sup> See *City of Montreal v. Montreal Street Railway*, [1912] A.C. 333, (J.C.P.C.) at 342; *In Re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304, (J.C.P.C.) at 315; *Commission du Salaire Minimum v. The Bell Telephone Company of Canada*, [1966] S.C.R. 767; *Attorney-General for Ontario v. Israel Winner*, [1954] A.C. 541, (J.C.P.C.), (“Winner”) at 580; *Westcoast* at 358 citing Hogg, *Constitutional Law of Canada*, Carswell, 1992, updated 1997 at 22-24.

Railway (which had previously owned and operated Central Western). In finding that Central Western was properly within provincial jurisdiction, Dickson, C.J.C. stated:

“There are two ways in which Central Western may be found to fall within federal jurisdiction and thus be subject to the Canada Labour Code. First, it may be seen as an interprovincial railway and therefore come under s.92(10)(a) as a federal work or undertaking. Second, if the appellant [Central Western] can be properly viewed as integral to an existing federal work or undertaking it would be subject to federal jurisdiction under s. 92(10)(a). For clarity, I should point out that these two approaches, though not unrelated, are distinct from one another. For the former, the emphasis must be on determining whether the railway is itself an interprovincial work or undertaking. Under the latter, however, jurisdiction is dependent upon a finding that regulation of the subject matter in question is integral to a core federal work or undertaking.”<sup>6</sup>

12. The first *Central Western Railway* test has come to be known as “primary instance federal jurisdiction,” and the second test as “secondary instance federal jurisdiction.”<sup>7</sup>
13. The 1998 decision of the Supreme Court of Canada in *Westcoast Energy Inc. v. Canada (National Energy Board)* revisited the jurisdiction issue in the specific context of pipelines and purported to apply the tests established in *Central Western Railway*. The issue was whether the gathering and processing operations of Westcoast Energy Inc. (“Westcoast”) were properly within federal jurisdiction and subject to regulation by the NEB because of being integral to the interprovincial pipeline of Westcoast. In a judgment written by Iacobucci and Major, JJ., the majority of the Court (6:1) held for federal jurisdiction, stating that the primary factor to be considered in determining whether a “work or undertaking” is *part of or integral*

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<sup>6</sup> *Central Western Railway*, *supra*, footnote 1, pages 1124-1125.

- to a federal “work or undertaking” is “functional integration and common management, control and direction”.<sup>8</sup> The majority of the Court concluded that the gathering pipelines, processing plants and mainline transmission pipeline of Westcoast constituted a single federal undertaking for the purposes of s. 92(10)(a) (i.e. primary instance federal jurisdiction—the first of the *Central Western Railway* tests) such that it was not necessary to consider whether the proposed facilities would be “essential, vital and integral to the mainline transmission pipeline” under the second *Central Western Railway* test.<sup>9</sup>
14. The sole dissenting judge was McLachlin J. (as she then was--now the Chief Justice of Canada) who took the position that the majority judges misunderstood the *Central Western Railway* tests.<sup>10</sup> In her view, the first *Central Western Railway* test is not whether the work or undertaking at issue is *part of* an existing federal work or undertaking. Rather, the first test is whether that work or undertaking is *itself* an interprovincial work or undertaking. An *interprovincial* pipeline, viewed by itself, is an interprovincial work. An *intraprovincial* pipeline, viewed by itself, is not an interprovincial work, because it does not extend beyond the province or connect the province with any others. In the view of McLachlin, J., an intraprovincial pipeline can only fall under federal jurisdiction under the second aspect of the *Central Western Railway* case, i.e. by virtue of its relationship to an interprovincial work or undertaking. McLachlin, J. stated that to inquire (as the majority judges did) whether a work or undertaking is “*part of*” an interprovincial work or undertaking, or is “*integral to*” an interprovincial work or undertaking, amounts to the same thing. In either case, the inquiry is whether the work or undertaking is part of an integrated scheme.
15. While the majority judges in *Westcoast* opted for “functional integration and common management, control and direction” as the primary factor to be considered, they went

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<sup>7</sup> See, e.g. *The Consumers' Gas Company Ltd. v. National Energy Board*, (1996) 195 N.R. 150 at 154.

<sup>8</sup> *Westcoast*, *supra* footnote 2, at 359.

<sup>9</sup> *Westcoast*, at 374-375.

<sup>10</sup> *Westcoast*, at 392-393.

- on to state that there is no single comprehensive test which will be useful in all cases to determine federal or provincial jurisdiction. The court must be guided by the particular facts in each situation. The jurisdictional determination is one that will turn on the constitutional facts.
16. Other judicial authorities have held that various factors are relevant in determining whether the "work or undertaking" in question is *integral to* an existing federal "work or undertaking". Functional and operational integration was identified as a factor in various cases before *Westcoast*.<sup>11</sup> Other factors include physical connection, the purpose or object which is sought to be achieved by the undertaking, and ownership.<sup>12</sup>
  17. Physical connection is an important factor in the characterization of a "work or undertaking", although it is not determinative in itself.<sup>13</sup>
  18. Regard must be had to the purpose or object which is sought to be achieved through the enterprise.<sup>14</sup>
  19. Ownership is a factor but is not determinative.<sup>15</sup>
  20. A single corporation can carry on more than one undertaking,<sup>16</sup> while several corporate entities can collectively operate a single undertaking.<sup>17</sup>

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<sup>11</sup> See, e.g. *Central Western Railway; Luscar Collieries, Limited v. McDonald and Others*, [1927] A.C. 925, (J.C.P.C.) ("*Luscar*"); *Reference Re National Energy Board Act* (1987), 48 D.L.R. (4<sup>th</sup>) 596 (F.C.A.) ("*Cyanamid*").

<sup>12</sup> See, e.g., *Luscar; Winner; Capital Cities Communications Inc., et al. v. Canadian Radio-television Commission*, [1978] 2 S.C.R. 141; *The Public Service Board et al. v. Francois Dionne et al.*, [1978] 2 S.C.R. 191.

<sup>13</sup> See *Luscar; The British Columbia Electric Railway Company Limited et al. v. Canadian National Railway Company et al.*, [1932] S.C.R. 161; *Fulton et al. v. Energy Resources Conservation Board and Calgary Power Ltd.*, [1981] 1 S.C.R. 153 ("*Fulton*").

<sup>14</sup> See *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 2 S.C.R. 225; (1989) 61 D.L.R. (4<sup>th</sup>) 193 ("*AGT*"); *Flamborough, Corporation of the Township of v. National Energy Board and Interprovincial Pipe Line Ltd.*, (1985) 55 N.R. 95, (F.C.A.); *Fulton; Winner*.

<sup>15</sup> See *Westcoast; AGT; Luscar; Dome Petroleum Ltd. v. National Energy Board*, (1987) 73 N.R. 135, (F.C.A.) ("*Dome Petroleum*"); *Northern Telecom Limited v. Communication Workers of Canada*, [1980] 1 S.C.R. 115; *In Re Validity of the Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529, (the Stevedoring Reference case).

<sup>16</sup> See *Canadian Pacific Railway v. Attorney General of British Columbia*, [1950] A.C. 122 (the *Empress Hotel* case).

<sup>17</sup> See, e.g., *AGT*.

21. The “essential test” has found favour with some courts. The Federal Court of Appeal in *In re the National Energy Board Act (Jurisdiction over Cyanamid Canada Pipeline Inc.’s Bypass Pipeline)*,<sup>18</sup> held that the “essential test” was determinative<sup>19</sup> and that secondary instance federal jurisdiction required a “necessary nexus”. If an intraprovincial facility is “essential” to a federal pipeline work or undertaking (rather than being merely helpful or beneficial), it will be deemed to have the “necessary nexus” with that work or undertaking and to be an integral part of it.
22. There are no “constitutional squatters’ rights”,<sup>20</sup> meaning that the fact that the federal jurisdiction has not been exercised over certain pipeline facilities in the past does not preclude it from being exercised over such facilities in the future.
23. The NEB has itself dealt with the jurisdictional issue on many occasions, including the applications that ultimately led to the *Westcoast* and *Cyanamid* judicial decisions. After *Westcoast* and an *ex parte* decision of the Federal Court of Appeal in *Canadian Hunter Exploration v. Canada (National Energy Board)*,<sup>21</sup> the NEB issued a letter that sought to provide clarification of the circumstances under which upstream facilities would come under its jurisdiction.<sup>22</sup> The letter clarified the policy position of the Board in respect of upstream production facilities, and confirmed that federal jurisdiction does not come from “mere connection” but requires that facilities be “integral”.

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<sup>18</sup> [1988] 2 F.C. 196, 81 N.R. 241, 48 D.L.R. (4<sup>th</sup>) 596 (F.C.A.) (*Cyanamid*).

<sup>19</sup> Citing *In the Matter of a Reference as to the Validity of the Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529, [1955] 3 D.L.R. 721 (S.C.C.); *The Letter Carriers Union of Canada v. Canadian Union of Postal Workers et al*, [1975] 1 S.C.R. 178, 40 D.L.R. (3d) 105, [1974] 1 W.W.R. 452 (S.C.C.); [1973] 1 W.W.R. 254, 31 D.L.R. (3d) 508 (Sask. C.A.); *Re Cannet Freight Cartage Ltd. and Teamsters Local 419* (1975), 11 N.R. 606, 60 D.L.R. (3d) 473 (F.C.A.); *Canadian National Railway v. Nor-Min Supplies Limited*, [1977] 1 S.C.R. 322, 66 D.L.R. (3d) 366 (S.C.C.); *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754; [1976] R.D.T. 347 (Que. C.A.); [1975] C.A. 675; *Northern Telecom Ltd. v. Communications Workers of Canada et al*, (Telecom I) [1980] 1 S.C.R. 115; [1977] 2 F.C. 406 (F.C.A.); (Telecom II), [1983] 1 S.C.R. 733; [1982] 1 F.C. 191 (F.C.A.).

<sup>20</sup> *Alberta Government Telephones v. C.R.T.C.* (1984), 15 D.L.R. (4<sup>th</sup>) 515 (F.C.A.), per Reed J. at 538, aff’d [1989] 2 S.C.R. 225; *Dome Petroleum*.

<sup>21</sup> (1999), 240 N.R. 186.

<sup>22</sup> *National Energy Board Letter to Pipeline Companies Subject to the Jurisdiction of the National Energy Board re: Upstream Jurisdictional Issues*, September 17, 1999.

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**4.0 APPLICATION OF THE LAW TO THE CONSTITUTIONAL FACTS**

24. The judicial decisions establish that the determination of jurisdiction is always very fact specific.
25. The constitutional facts relating to the TransCanada Alberta System have been set out in Appendix B. Those constitutional facts show that the TransCanada Alberta System has become part of or integral to the interprovincial undertaking of TransCanada and is therefore now properly within federal jurisdiction and subject to regulation by the NEB.
26. More specifically:
- (1) The purpose or object of the interprovincial undertaking of TransCanada that uses the works of the TransCanada Alberta System, the TransCanada Mainline and the TransCanada Foothills System is the transportation of natural gas to markets within Canada and in the United States.
  - (2) The TransCanada Alberta System is physically connected to the TransCanada Mainline and the TransCanada Foothills System;
  - (3) The TransCanada Alberta System is now functionally and operationally integrated with the TransCanada Mainline and the TransCanada Foothills System;
  - (4) The TransCanada Alberta System now shares common ownership with the TransCanada Mainline and the TransCanada Foothills System;
  - (5) The TransCanada Alberta System, the TransCanada Mainline and the TransCanada Foothills System now share common management, control and direction;



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- (6) The TransCanada Alberta System is essential to the interprovincial enterprise of TransCanada. The TransCanada Mainline and the TransCanada Foothills System are dependent on natural gas received from the TransCanada Alberta System.
27. The fact that the TransCanada Alberta System performs a gathering function as well as a transmission function is not a relevant consideration. The *Westcoast* case establishes that the provincial/federal jurisdictional demarcation should not be made on the basis of “gathering system” versus “mainline transmission”.
28. The fact that the TransCanada Alberta System was initially established for a provincial purpose and has been subject to provincial regulation is not a relevant consideration since there are no “constitutional squatters’ rights”. The issue is the present purpose and characterization of the enterprise.
29. Application of the majority opinion in *Westcoast* to the constitutional facts results in the conclusion that the TransCanada Alberta System is properly within federal jurisdiction under the first *Central Western Railway* test. On the facts, the TransCanada Alberta System is part of or integral to a single federal undertaking for the transportation of natural gas using the works that are the TransCanada Alberta System, the TransCanada Mainline, and the TransCanada Foothills System.
30. Alternatively, application of the dissenting view of McLachlin, J. (now CJC) in *Westcoast* to the constitutional facts results in the conclusion that the TransCanada Alberta System is properly within federal jurisdiction under the second *Central Western Railway* test. On the facts, the TransCanada Alberta System is vital, essential or integral to the TransCanada federal undertaking for the transportation of natural gas that uses the TransCanada Mainline and the TransCanada Foothills System.

**5.0 CONCLUSION ON REGULATORY JURISDICTION OF THE  
TRANSCANADA ALBERTA SYSTEM**

31. On the law and the facts, the TransCanada Alberta System is now properly within federal jurisdiction and subject to regulation by the NEB.

## **NATIONAL ENERGY BOARD**

**IN THE MATTER OF** the *National Energy Board Act*, R.S.C. 1985, c. N-7, as amended, and the Regulations made thereunder; and

**IN THE MATTER OF** an Application by TransCanada PipeLines Limited for a Certificate of Public Convenience and Necessity and related approvals under the *National Energy Board Act*.

### **APPENDIX D**

#### **PUBLIC CONVENIENCE AND NECESSITY**

**June 2008**

## 1.0 BACKGROUND AND APPROACH TO SECTION 52 REQUIREMENTS

1. Section 52 of the *National Energy Board Act* (“NEB Act”) empowers the National Energy Board (“Board” or “NEB”) to issue a Certificate of Public Convenience and Necessity (“CPCN”) if it is satisfied that a pipeline is and will be required by the present and future public convenience and necessity. The statute sets out the matters to which the Board must have regard in considering an application for a certificate—supply, markets, economic feasibility, financing considerations/Canadian content, and any public interest that may be affected.<sup>1</sup>
2. The *National Energy Board Filing Manual* (“Filing Manual”) provides guidance in respect of the information needed for applications within the jurisdiction of the Board. Chapter 3 of the Filing Manual, entitled “Common Information Requirements”, itemizes common elements that the Board expects to see in all applications. Chapter 4 of the Filing Manual, entitled “Physical Projects”, includes Guide A—Facilities Applications (NEB Act s. 52 and s. 58). Guide A indicates that, in a section 52 application, the Board may consider information relating to engineering, environment and socio-economics, economics and financial matters, lands and “any public interest that may be affected.”<sup>2</sup>
3. The wording of Chapter 4 of the Filing Manual indicates clearly that it is intended to apply to new facilities to be constructed, rather than to existing facilities that have been built and are being operated pursuant to approvals lawfully obtained from a regulator other than the NEB. There is much in the Filing Manual, therefore, that is inapplicable to this TransCanada application. The Board has, however, dealt on at least three previous occasions with circumstances where pipelines had been approved and constructed pursuant to provincial regulation and were, for various reasons, to be transferred to federal jurisdiction and NEB regulation. In those cases, the Board looked specifically at

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<sup>1</sup> *National Energy Board Act* R.S.C. 1985, c. N-7, section 52.

<sup>2</sup> *National Energy Board Filing Manual*, page 4A-1.

economic feasibility, financial viability, potential environmental effects, safety of design and operation, and toll methodology.<sup>3</sup>

4. Issuance of the CPCN and related approvals requires two primary determinations by the NEB. First, the Board must determine that the TransCanada Alberta System is now properly within federal jurisdiction and subject to regulation by the NEB. Second, the Board must be satisfied that the TransCanada Alberta System is required by the present and future public convenience and necessity. The second determination is required only if and when the first determination is made by the Board finding that it has jurisdiction over the TransCanada Alberta System.
5. Given the nature and interrelationship of the required approvals, TransCanada proposes that this Application be considered by the Board in two phases. Phase I (Jurisdiction Phase) would consider the constitutional question of whether the TransCanada Alberta System is now properly within federal jurisdiction and subject to regulation by the NEB. Phase II (Certificate and Implementation Phase) would address the requirements of section 52 of the NEB Act and consider whether the TransCanada Alberta System is required by the present and future public convenience and necessity and, if so, the ancillary approvals required to effect the transition to federal regulation. Phase II would not proceed unless and until the Board determines in Phase I that it has jurisdiction over the TransCanada Alberta System.
6. Given that the time, cost and effort required to complete and file the extensive evidence required for Phase II is dependent on the Board first determining that jurisdiction is properly federal, TransCanada is not providing the Board with all the requisite evidence for Phase II at this time. Rather, TransCanada is providing available evidence that goes to certain aspects of the requirements of section 52, and will complete its Phase II evidence after the Board makes its Phase I decision. This Appendix D provides evidence

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<sup>3</sup> See *National Energy Board Reasons for Decision Westcoast Energy Inc. MH-2-96, Facilities and Toll Methodology* July 1996 (Helmet/Peggo Facilities); *National Energy Board Reasons for Decision, Pipestone Pipeline Ltd. OHW-1-99 Operation of Pipeline Facilities*, February 2000, and *National Energy Board Reasons for Decision Westcoast Energy Inc. GHW-3-2000 Purchase and Operation of Pipeline Facilities*, March 2001 (Maxhamish Pipeline Purchase).

that is currently available, and indicates what further evidence will be adduced in Phase II of the proceeding. It generally follows the relevant sections of the Filing Manual.

## **2.0 FILING MANUAL CHAPTER 3 - COMMON INFORMATION REQUIREMENTS**

### **2.1 Action Sought**

7. TransCanada applies to the NEB pursuant to section 52 of Part III of the NEB Act for issuance of a CPCN and related approvals in respect of the TransCanada Alberta System. The requested approvals are required for the operation of the TransCanada Alberta System under NEB regulation.
8. The TransCanada Alberta System is an existing natural gas pipeline system (approximately 23 500 km) located within Alberta that transports natural gas destined for markets within Alberta, within Canada outside Alberta, and in the United States (“U.S.”). The TransCanada Alberta System connects with the TransCanada Mainline at Empress, Alberta and with the TransCanada Foothills System at Caroline, Crowsnest and McNeill, Alberta.

### **2.2 Application Purpose**

9. The Application is being made to effect recognition of the fact that by law the TransCanada Alberta System is now properly within Canadian federal jurisdiction and subject to regulation by the NEB. The TransCanada Alberta System was authorized, constructed and is operated pursuant to Alberta provincial regulation but is now part of or integral to the federal undertaking of TransCanada that is the transportation of natural gas to markets within Canada and the United States, utilizing the TransCanada Alberta System, the TransCanada Mainline and the TransCanada Foothills System.
10. Recognition and implementation of federal jurisdiction over the TransCanada Alberta System will facilitate the development, transportation and marketing of natural gas resources located outside Alberta and within Canada and the United States. The single

regulatory regime that is now required by law to apply to the TransCanada Alberta System, the TransCanada Mainline and the TransCanada Foothills System will enhance regulatory and economic efficiency.

### **2.3 Consultation/3.4 Notification of Commercial Third Parties**

11. The Application relates solely to a change from provincial to federal jurisdiction. No new facilities will be constructed or operated. There will be no change in ownership, control or operation of the existing facilities. No new land rights are required. No change in toll methodology or tolls is proposed as part of the change in jurisdiction. Approval of the Application will result in a single change with respect to the TransCanada Alberta System – the primary regulator will become the National Energy Board.
12. At the time of approval and construction under provincial regulation, the facilities making up the TransCanada Alberta System were subject to and complied with the applicable consultation requirements. Additionally, a stakeholder relations program is part of the ongoing operation of the TransCanada Alberta System, with the intention to facilitate and maintain stakeholder relations and to address and resolve stakeholder concerns with respect to the facilities.
13. Given the unique circumstances of this case, TransCanada has not consulted with landowners or aboriginal groups since their rights are unaffected by the relief requested in the Application. It has, however, conducted extensive consultation with governments, regulators and commercial third parties, including stakeholders on the TransCanada Alberta System, the Canadian Association of Petroleum Producers and the Industrial Gas Consumers Association of Alberta. The goal of the consultation process, which is ongoing, is to provide clear, relevant and timely information and to give consideration to the positions of potentially affected persons, groups and governments.
14. The extensive consultation conducted by TransCanada has not given rise to any expressed opposition to the Application.

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### **3.0 FILING MANUAL CHAPTER 4: PHYSICAL PROJECTS**

#### **3.1 Project Description**

15. TransCanada seeks a CPCN in respect of the existing TransCanada Alberta System to effect recognition of the fact that by law that system is now properly within Canadian federal jurisdiction and subject to regulation by the NEB. The requested approvals are required for the operation of the TransCanada Alberta System under NEB regulation.

#### **3.2 Economic Feasibility, Alternatives and Justification**

16. Economic feasibility is considered by the Board in the context of the likelihood of the facilities being used at a reasonable level over their economic life and the likelihood of the demand charges being paid.<sup>4</sup>
17. Supply and markets for TransCanada's Alberta System are well established, as evidenced by the ongoing operation of the TransCanada undertaking and its historical operations for over fifty years. As the TransCanada Alberta System is integral to the continued flow of gas from the Western Canada Sedimentary Basin ("WCSB") to markets within Canada and the United States, there is a very strong likelihood that the facilities will continue to be used at a reasonable level over their economic life and that demand charges will continue to be paid.
18. Sections A.3.1 Supply, A.3.2 Transportation Matters/Throughput and A.3.3 Markets below provide an overview of the supply and markets for the TransCanada Alberta System and evidence respecting its existing and future economic feasibility.

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<sup>4</sup> *National Energy Board Reasons for Decision GH-5-89* Volume 1, page 26.



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### 3.3 Guide A - A.1 Engineering

19. The TransCanada Alberta System is a natural gas pipeline system which consists of existing pipelines and associated facilities transporting natural gas from receipt points to delivery points, including points of interconnection with ex-Alberta pipelines.
20. The TransCanada Alberta System consists of approximately 23 500 kilometres of pipe ranging in diameter from nominal pipe size (“NPS”) of 2 to 48 inches. Additionally, the system has approximately:
  - a. 49 compressor stations containing 101 units ranging in size from 540 to 30 700 total KW;
  - b. 1200 metering stations; and
  - c. 1000 receipt points and 200 delivery points.

TransCanada will provide a comprehensive list of existing TransCanada Alberta System facilities as part of its additional evidence in Phase II.

21. A map of the TransCanada Alberta System is included as Appendix B-2 of this Application.
22. The facilities that currently comprise the TransCanada Alberta System have been designed, constructed and operated since 1954 to meet the needs of customers at the times of installation and thereafter. The average investment base of the TransCanada Alberta System was \$4.224 billion in 2007.
23. At the time of construction, the facilities making up the TransCanada Alberta System were constructed and tested (e.g. non-destructive testing and hydro-testing) by NOVA Gas Transmission Ltd. (“NGTL”) or its predecessors in accordance with all of the applicable engineering codes, standards and specifications (e.g. *Canadian Standards Association Standard Z662, Oil and Gas Pipeline Systems*) and applicable provincial regulatory requirements.

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24. Having met the applicable engineering and regulatory requirements at the time of construction, some of the facilities making up the TransCanada Alberta System do not currently meet the latest version of the *Canadian Standards Association Standard Z662, Oil and Gas Pipeline Systems (CSA Z662)*.
25. NGTL does not intend to modify any of the TransCanada Alberta System to meet the latest version of CSA Z662. Like the TransCanada Mainline and the TransCanada Foothills System, the TransCanada Alberta System facilities were designed and constructed in accordance with the engineering and regulatory requirements applicable at the time of construction; the facilities making up the system have a long history of safe and efficient operation; and there is in place a maintenance and integrity program that has ensured and will ensure continued safe and efficient operation. Modification of facilities is not required for safety or operational purposes, nor would it be practical from the standpoints of construction, engineering and economic feasibility.
26. Pursuant to sections 2 and 3 of the *Onshore Pipeline Regulations, 1999*<sup>5</sup> (“OPR”) Parts 1 to 5 of the OPR do not apply to facilities within the TransCanada Alberta System that were in existence and provincially authorized to be constructed and operated prior to the OPR coming into force in 1999. To the extent that any facilities within the TransCanada Alberta System were constructed following the coming into force of the OPR and those facilities comply with Parts 1 to 5 of the OPR, TransCanada will seek an exemption to the requirements of Parts 1 to 5 of the OPR as may be required.
27. The TransCanada Alberta System is currently, and will continue to be, operated and maintained in accordance with various NGTL operating procedures, programs, specifications and manuals (Operating Procedures), as amended.

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<sup>5</sup> SOR/99-294.

### **3.4 Guide A - A.2 Environment and Socio-Economic Assessment**

28. The Application does not include an environmental and socio-economic impact assessment (“ESA”) under the *Canadian Environmental Assessment Act*. NEB precedent has been that jurisdictional changes of existing facilities from provincial to federal jurisdiction have required an environmental screening of the operation of the facilities but not their construction. Upon a Phase I determination of federal jurisdiction over the TransCanada Alberta System, TransCanada will prepare and file an ESA. Future activities in respect of the TransCanada Alberta System, including operation, modifications, expansions or abandonment, will be subject to applicable federal environmental legislation.

### **3.5 Guide A - A.3 Economics**

#### **A.3.1 Supply**

29. The existing TransCanada Alberta System is located within Alberta and is used to transport natural gas from receipt points to delivery points, including points of interconnection with ex-Alberta pipelines.
30. In 2007 the TransCanada Alberta System transported in excess of 10 Bcf of natural gas per day, and total throughput in 2007 was in excess of 4.0 Tcf.
31. The 2007 throughput of the TransCanada Alberta System represented 68 percent of total Western Canadian production, and 16 percent of total North American production.
32. The TransCanada Alberta System transports both conventional and unconventional natural gas production. Alberta’s conventional natural gas production is approximately 77 percent of WCSB production.<sup>6</sup>

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<sup>6</sup> Alberta Energy and Utilities Board Statistical Series 2007-98: Alberta’s Reserves 2004 and Supply/Demand Outlook 2005-2014

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33. TransCanada's view of future WCSB supply, and in particular the supply available to the TransCanada Alberta System, is based on an economic model that considers resource estimates, supply costs, gas price, activity level and the pool discovery process to generate forecasts.
  34. Conventional natural gas production from the WCSB is forecast by TransCanada to be declining in the next decade. However, notwithstanding forecast decline in conventional production, the conventional WCSB resource continues to represent a large resource base, with an ultimate potential estimated by TransCanada to be in the range of 300 Tcf. The Alberta System will transport supplies that originate in Alberta, British Columbia ("B.C.") and Northwest Territories/Yukon Territory, and TransCanada's long-term forecast of flows on the TransCanada Alberta System is based on receipt of natural gas from each of these regions.
  35. TransCanada forecasts conventional supply decline being moderated in the mid to longer term by growing contributions from unconventional supply and the connection of Mackenzie Delta and potentially Alaskan supply.
  36. Unconventional production currently includes coal bed methane ("CBM") and tight gas. CBM is produced from methane which is bonded to coal surfaces.<sup>7</sup> Tight gas is gas produced from fields not producible using conventional drilling and completion technology and having low reservoir permeability characteristics. In addition to the current sources of unconventional production being transported by the TransCanada Alberta System, TransCanada forecasts a contribution from shale gas in the longer term.
  37. Supply from unconventional sources is expected to grow annually, and Mackenzie Delta gas is forecast to flow into the TransCanada Alberta System within 10 years.
  38. Total combined supply available to flow on the TransCanada Alberta System is forecast to remain in the range of approximately 10 to 11 Bcf per day to the end of the forecast period in 2020.

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<sup>7</sup> NEB Report: *Canadian Energy Overview 2006, An Energy Market Assessment*, May 2007, page 36.

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39. Upon a Phase I determination of federal jurisdiction over the TransCanada Alberta System, TransCanada will provide detailed information on current and forecast natural gas supply for the TransCanada Alberta System.

### **A.3.2 Transportation Matters/Throughput**

40. NGTL offers firm transportation service to customers under two primary rate schedules, FT-R and FT-D. Service under rate schedule FT-R provides for the receipt of gas within Alberta while service under rate schedule FT-D provides for the delivery of gas at export delivery points. Revenues received under these two rate schedules account for approximately 70% of NGTL's total revenues.
41. The 2008 average Receipt Point Contract Demand, which includes all Firm Services contracted at receipt points, is forecast to be  $257.1 \times 10^6 \text{ m}^3/\text{d}$  (9.1 Bcf/d). The 2008 average Export Delivery Point Contract Demand, which includes all Firm Services contracted at export delivery points, is forecast to be 8.46 PJ/d (7.95 Bcf/d).
42. NGTL also provides Interruptible Transportation with average daily volumes of approximately 1.9 Bcf/d for receipt service ("IT-R") and 0.5 Bcf/d for delivery service ("IT-D"). In 2007, flows under the IT-R service were in excess of 17% of NGTL's 11.2 Bcf/d of billed receipts and flows under IT-D service represented approximately 5.5% of NGTL's 9.1 Bcf/d of deliveries to export points.
43. The 2008 average Annual Throughput for the TransCanada Alberta System, which is comprised of the Firm Transportation Contract Demand and Interruptible Transportation, is forecast to be  $297.3 \times 10^6 \text{ m}^3/\text{d}$  (10.55 Bcf/d).

### **A.3.3 Markets**

44. Markets for natural gas originating on the TransCanada Alberta System include markets both in Canada and the United States.

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45. End use Western Canadian markets for natural gas that are served by deliveries from the TransCanada Alberta System include residential/commercial, electric generation, mineable and in-situ oil sands production, other industrial applications and pipeline fuel sectors.
  46. Demand in the Western Canadian market in 2007 was approximately 4.8 Bcf per day, and is forecast by TransCanada to increase to approximately 6.6 Bcf per day by 2015, driven largely by oil sands production requirements. TransCanada expects technological advances will occur that will reduce the amount of gas required per unit of oil sands production relative to today, and has accounted for this reduction in its forecast. However, should forecast gas intensity reduction technologies not come to pass or be delayed, Western Canadian demand will be even greater than that forecast by TransCanada.
  47. Non-Western Canadian markets for gas originating on the TransCanada Alberta System include markets in Canada and the U.S. served by the TransCanada Mainline and the TransCanada Foothills System and their interconnected downstream pipelines.
  48. The TransCanada Mainline extends from an interconnection with the Alberta System just inside the Alberta border through Saskatchewan, Manitoba, Ontario and into Quebec, with various connections to U.S. pipelines at the international border. The TransCanada Mainline serves markets in Saskatchewan, Manitoba, Ontario and Quebec and in the U.S. Midwest and Northeast.
  49. End use natural gas markets served via the TransCanada Alberta System and the TransCanada Mainline include electric generation, residential/commercial and industrial sectors. Demand in central Canada (Manitoba, Ontario and Quebec) is expected to grow from 1240 Bcf in 2007 to 1450 Bcf in 2025. Demand in the U.S. Midwest is expected to grow from 4750 Bcf in 2007 to 5190 Bcf in 2025.
  50. Total 2007 throughput of the Mainline was 3.24 Tcf. Average daily throughput was 8.9 Bcf. In 2007, approximately 87% of throughput on the Prairies Section of the TransCanada Mainline System was delivered from the TransCanada Alberta System.

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51. The western segment of TransCanada Foothills System connects with the TransCanada Alberta System and extends west from central Alberta to a point near Kingsgate, B.C., where it connects with the GTN system at the international border. The eastern segment of the TransCanada Foothills System connects with the TransCanada Alberta System and extends from central Alberta to a point near Monchy, Saskatchewan at the international border where it connects with the Northern Border system. Virtually all of the throughput on the TransCanada Foothills System is delivered from the TransCanada Alberta System.
  52. The western segment of the TransCanada Foothills System serves markets in B.C., the Pacific Northwest, California and Nevada while the eastern segment serves markets in the U.S. Midwest.
  53. Natural gas markets served via the TransCanada Alberta System and the TransCanada Foothills System include electric generation, residential/commercial and industrial sectors in the U.S. West and U.S. Midwest. Demand in the U.S. West is expected to grow from 2640 Bcf in 2007 to 3360 Bcf in 2025. Demand in the U.S. Midwest is expected to grow from 4750 Bcf in 2007 to 5190 Bcf in 2025.
  54. Total 2007 throughput on the TransCanada Foothills System was approximately 760 Bcf at the ABC border and 680 Bcf at the McNeill border, virtually all of which was received from the TransCanada Alberta System.
  55. Upon a Phase I determination of federal jurisdiction over the TransCanada Alberta System, TransCanada will provide a throughput study that details current and forecast natural gas supply and intra-Alberta and ex-Alberta deliveries to market.

#### **A.3.4 Financing**

56. The existing TransCanada Alberta System has been financed by debt and equity. Since 1998, the financing requirements for the TransCanada Alberta System have been met by TransCanada which has the ability to finance future financial requirements.

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### **A.3.5 Non-NEB Regulatory Approvals**

57. The TransCanada Alberta System has been built and is currently being operated in accordance with regulatory approvals received from Alberta, federal and municipal regulatory bodies.
58. The facilities that currently comprise the TransCanada Alberta System have been designed, constructed and operated since 1954 to meet the needs of customers at the times of installation.
59. Upon a Phase I determination of federal jurisdiction over the TransCanada Alberta System, TransCanada will provide evidence of the provincial and other regulatory approvals.

### **3.6 Guide A - A.4 Lands Information**

60. The TransCanada Alberta System is an existing pipeline system for which NGTL holds valid and subsisting land rights, acquired either through agreement or by regulatory orders.
61. The Application does not require construction or operation of any new facilities, nor does it require the acquisition of any new land rights. Landowner notification relating to acquisition of lands under section 87 of the NEB Act is not required.
62. Upon a Phase I determination of federal jurisdiction over the TransCanada Alberta System, TransCanada will prepare and file information relating to existing land rights.