



File 4600-A000-3
12 June 2002

To: Group 1 Pipeline Companies

Guidelines for Negotiated Settlements of Traffic, Tolls and Tariffs (Guidelines)

On 30 January 2002 the National Energy Board (the Board) initiated a re-examination of its Guidelines which were last issued in August of 1994. The Panel in the RH-1-2001 hearing on TransCanada's application released in November 2001 recommended that the Board re-examine its Guidelines, in part to enable the Board to more effectively deal with applications based on contested settlements. The Board's existing Guidelines require that an application supported by a negotiated settlement be based on unanimous or unopposed support of the parties to the negotiation.

The Board initiated the re-examination of its Guidelines with the specific goal of providing flexibility to effectively address contested settlements. In addition, the Board proposed a change to the Guidelines to allow for Board Member or Board staff involvement in the tolls task force process. The Board received comments on the draft revised Guidelines from 25 interested parties with 7 parties filing reply comments. There were several common themes to the suggestions and comments received, some of which are discussed below.

Severing Dissenting Parties and Contentious Issues from a Proposed Settlement

Most submissions were opposed to severing contested issues or dissenting parties from the settlement and approving the settlement in whole or in part for the consenting parties. It was pointed out that the negotiation process is a "give-and-take" process in which a party might give on an otherwise important issue to gain a favorable overall outcome. Parties stated that it would be unfair to vary a negotiated settlement without the approval of all parties.

Although the Board is of the view that there could be some advantages to severing parties in certain circumstances, the Board is not inclined to adopt this approach without support from parties. The Board also understands parties' concerns about potential changes to a negotiated settlement and will not contemplate any changes to its practice of treating settlements as a package. In those cases in which it could be in the public interest to allow provisions of a contested settlement to take effect, the new Guidelines will provide for an option under which the tolls and tariffs resulting from a contested settlement could be approved on an interim basis while the Board convened a hearing to consider the settlement in its entirety. A diagram of the process which will be followed for dealing with contested settlements is attached to the revised Guidelines.

Overall Revenue Requirement Settlements

Several parties recommended that provision should be made for settlements in which the parties reach an equitable agreement on the overall revenue requirement without necessarily agreeing on all individual components of the revenue requirement. The Board notes that it has a requirement in law to satisfy itself that tolls and tariffs are just and reasonable and not unjustly discriminatory. Any process must not fetter the Board's discretion to take into account all aspects of the public interest and sufficient information must be provided so that this role can be performed effectively and efficiently. However, the Board recognizes that the requirement to provide a detailed breakdown of the revenue requirement may constrain the flexibility of parties in reaching a negotiated settlement and has therefore adopted more flexible wording for the requirement.

Option for an Expanded Role for Board Members and Board Staff in the Negotiation Process

While some parties were supportive of the option for Board Members or Board staff to take an expanded role in the negotiated settlement process, the majority did not support this option. The major reasons for concern were with respect to the Board not being staffed to perform the dual function as both participant in the negotiations and advisor to the Board. Concern was expressed with the separation of duties that would have to be vigorously enforced complete with a strict Code Of Conduct. At this time the Board does not propose to change its role in the settlement process beyond that which is provided for in the August 1994 Guidelines.

Alternate Dispute Resolution (ADR)

The response from interested parties to ADR as another alternative to the settlement or hearing options was generally positive. While there was widespread opposition to direct Board Member or Board staff involvement in settlement negotiations, there was a willingness to consider an ADR approach, provided there was an opportunity to comment on any process put forward by the Board. The general support for a more flexible, less prescriptive approach was combined with a desire to see more detail on the process and the timing of its use.

The Board anticipates releasing draft ADR Guidelines by the autumn of 2002. Through a consultation process, the Board will explore its role in creating or participating in any ADR processes, including those related to toll and tariff negotiations.

Reasons for Dissent

It was suggested in the draft Guidelines that a pipeline company, in submitting its negotiated settlement for approval, should provide reasons as to why agreement could not be reached with all parties on all issues. This was opposed in the majority of submissions. The view was that the dissenting party was best able to state its reasons before the Board. There was also concern that there could be a breach of confidentiality agreements should one party try to interpret the position of another party. This suggestion has been removed in the attached Guidelines.

Adequate Majority

The proposed Guidelines suggested that a pipeline could submit a contested settlement for Board approval when it felt that it had support from an adequate majority of parties. Parties making submissions were concerned about the interpretation of “adequate majority”. The Board has decided to remove references to a majority, or any other measure of adequacy, as a prerequisite for the filing of a settlement. Whether the settlement has sufficient support will be evident from the comments submitted by interested parties when such comments are solicited.

Based on the above comments, the Board has decided to issue the attached revised Guidelines for Negotiated Settlements of Traffic, Tolls and Tariffs.

The Board directs all Group 1 companies to serve a copy of this letter and its attachment on their shippers and interested parties.

Yours truly,

A handwritten signature in black ink, appearing to read "Mantha", with a long horizontal flourish extending to the right.

Michel L. Mantha
Secretary

Attachment

Revised Guidelines for Negotiated Settlements of Traffic, Tolls and Tariffs

Negotiated settlements are regarded by the Board as an opportunity for interested parties to resolve issues without resorting to a hearing process. An acceptable settlement process should satisfy the following criteria:

- (i) All parties having an interest in a pipeline company's traffic, tolls and tariffs should have a fair opportunity to participate and have their interests recognized and appropriately weighed in a negotiated settlement. The settlement process should be open and all interested parties should be invited to participate in the settlement negotiations. While the process may vary according to the specific circumstances of each pipeline, the process should be clearly understood and agreed upon by all interested parties.
- (ii) While the Board believes that a negotiated settlement that involves a full range of interested parties will normally reflect the public interest, a settlement must not fetter the Board's ability and discretion to take into account any public interest considerations which may extend beyond the immediate concerns of the negotiating parties. The Board will not accept any settlement that contains provisions which are illegal or contrary to the *National Energy Board Act*, or that are otherwise contrary to the public interest.
- (iii) The settlement process must produce adequate information on the public record for the Board to understand the basis for the agreement, assess its reasonableness, and to be able to determine that the resulting tolls are just and reasonable and not unjustly discriminatory.

For any settlement, whether it covers all elements of a pipeline's tolls and tariffs or only certain elements, the applicant must provide a summary of the process by which the settlement was obtained and an explanation of the support for the settlement.

For settlements that address all elements of a pipeline company's tolls application, the applicant will provide the following information:

- an explanation of how the agreed-upon revenue requirement is determined
- the resulting tolls
- an explanation of the derivation of these tolls
- any toll design or tariff changes, accompanied by:
 - a concise description of each issue;
 - a clear and concise statement of the resolution for each issue; and
 - a brief rationale for each resolution.

Once the requisite information is filed, the Board will invite interested parties to comment on the settlement.

For the resolution of individual toll design, tariff or other matters, the applicant will provide the following information:

- a concise description of each issue
- a clear statement of the resolution for each issue, and
- a brief rationale for each resolution

Once the requisite information is filed, the Board may invite interested parties to comment on the settlement.

Should the settlement not be opposed by any party, the Board would normally be able to conclude that the resultant tolls were just and reasonable and a public hearing would not be required. Only in unusual circumstances, such as in cases where the Board was concerned that there was a broader public interest consideration, would the Board require further evidence and seek to evaluate a proposed settlement in more detail.

- (iv) **Contested Settlements:** A pipeline company may decide to file an application for approval when it has not obtained an agreement with all of its shippers but, in its judgement, believes it has an agreement which justifies filing the settlement for Board approval. In such cases the company shall provide to the Board a submission as to why the settlement should be accepted by the Board. All interested parties shall be served with the application for approval at the same time as the Board.

Upon receipt of an application based on a contested settlement, the Board will invite comments on the application. Any interested party that wishes to oppose the application shall serve notice of its opposition with the Board within the timelines established by the Board. The notice of opposition should contain the following information:

- the grounds for the opposition to the settlement
- a statement of facts that support the opposition
- the nature of the prejudice or damage that will be suffered if the settlement were approved by the Board
- the nature of the relief sought

Upon receipt of a notice of opposition, the pipeline company and any parties who support the settlement may, within the prescribed timelines, file a response to the notice of opposition. Unless a further process were established, no further submissions will be accepted by the Board following the receipt of the reply submissions.

Following the receipt of the above-noted submissions, the Board will consider all the evidence before it, including the expected benefits to be gained by the consenting parties and the expected costs to the dissenting parties. The Board will then make one of the following determinations:

- Dismiss the objections and approve the settlement.
- Deny the settlement and refer the matter for hearing.
- Approve the terms of the settlement on an interim basis for all parties and hold a hearing to deal with the issues raised by the dissenting parties. At the end of the hearing the Board will issue its decision on all matters considered in the hearing.

See diagram attached for an illustration of this process.

- (v) Board staff may attend task force meetings upon invitation and solely for the purposes of information exchange and discussion of procedural matters.

Negotiated Settlements Process

