

**TRANS MOUNTAIN PIPELINE ULC
SECTION 52 OF THE NATIONAL ENERGY BOARD ACT APPLICATION FOR
TRANS MOUNTAIN EXPANSION PROJECT
NEB FILE OF-FAC-OIL-T260
FILED November 23, 2014
OH-001-2014**

NOTICE OF MOTION 6

Name of Person Bringing Motion

This Motion by Intervenor, Robyn Allan, is made pursuant to Hearing Order OH-001-2014 (the "Hearing") and Section 35 of the National Energy Board Rules of Practice and Procedure, 1995. SOR 195-208.

Decision or Order Requested

This Motion requests that the National Energy Board order that:

- a) Trans Mountain's application be stayed until the Board has determined, under section 74 of the National Energy Board ACT, RSC 1985, c N-7 ("NEB Act") whether to grant leave for the transfer of ownership in Trans Mountain Pipeline LP, Trans Mountain Pipeline ULC, and Kinder Morgan Cochin ULC from Kinder Morgan Energy Partners LP to Kinder Morgan Inc.;
- b) section 52(5) of the NEB Act apply to exclude the time taken for the Board to consider the application for leave, and any additional applications triggered by it, from the calculation of the 15 month time limit;
- c) Trans Mountain's Hearing reconvene only if the Board determines that the change in ownership of Trans Mountain, and its related corporate entities, is in the public interest of Canadians and grants Trans Mountain leave to transfer the right of ownership in the Canadian pipeline transportation system from Kinder Morgan Energy Partners LP to Kinder Morgan Inc.;
- d) the cessation of any and all physical work and related activity on the Trans Mountain pipeline expansion route being undertaken by Kinder Morgan Canada Inc. (KMC) on behalf of Trans Mountain Pipeline ULC, until the requisite application for leave has been considered by the NEB. KMC's work only be continued if the Board determines it is in the public interest to grant leave; and
- e) other relief the Board may find appropriate under the circumstances.

Statement of Facts

1. The NEB Act states that a pipeline company shall not purchase, sell, amalgamate, transfer or lease its pipeline to any person without the leave of the Board:

Limitations on purchase and sale, etc.

74. (1) *A company shall not, without the leave of the Board,*

- (a) sell, transfer or lease to any person its pipeline, in whole or in part;*
- (b) purchase or lease any pipeline from any person;*
- (c) enter into an agreement for amalgamation with any other company; or*
- (d) abandon the operation of a pipeline.¹*

2. The NEB Filing Manual and Guide “R” explain that both companies involved in the transaction are required to apply to the Board for leave to proceed with the transaction.² In particular the Board requires that when a “transaction involving the sale, conveyance (transfer), lease, purchase or amalgamation of an NEB-regulated pipeline is to occur, the Board needs assurance that, notwithstanding any changes in operation or configuration that are expected to occur, it would continue to be in the public interest to operate the facilities.³
3. Kinder Morgan Energy Partners LP (KMP)—a Master Limited Partnership listed on the New York Stock Exchange—indirectly owns a 100% interest in Trans Mountain Pipeline. This pipeline system is regulated by the NEB and is subject to the NEB Act.
4. Kinder Morgan Inc.(KMI) holds the general partner interest and 8% of the limited partnership interests of KMP (as of August 10, 2014).
5. On August 10, 2014, KMI announced it would purchase KMP.⁴ The transaction is being undertaken at a significant premium price impacting asset valuation, requiring cross-guarantee of debt, and once the transaction is complete, KMI will have full ownership and control over the operated assets of KMP, including the Trans Mountain Pipeline system.⁵

¹ NEB Act, Section 74, <http://laws-lois.justice.gc.ca/eng/acts/n-7/FullText.html>

² NEB Filing Manual —Guide R— Transfer of Ownership, Lease, or Amalgamation, page 2, <https://www.neb-one.gc.ca/bts/ctrg/gnnb/flngmnl/fmgdr-eng.html>

³ Ibid.

⁴ KMI Press Release, <http://news.kindermorgan.com/press-release/all/kinder-morgan-inc-purchase-kmp-kmr-and-epb-2015-kmi-dividend-increase-2-share>

⁵ KMI Investor Presentation, August 10, 2014, page 18, http://www.kindermorgan.com/content/docs/KMI_Purch_MLPs_Investor_Presentation_vR.pdf

6. KMI is a corporation, and KMP is a limited partnership. “Ownership interests in a limited partnership are fundamentally different from ownership interests in a corporation. The rights of KMI’s stockholders are governed by KMI’s certificate of incorporation and bylaws of the General Corporation Law of the State of Delaware...The rights of KMP unitholders are governed by the KMP partnership agreement and the Delaware Revised Uniform Limited Partnership Act.”⁶
7. Trans Mountain was owned 100% by KMI as a result of KMI’s purchase of Terasen Inc. on November 30, 2005. On February 21, 2007, Terasen Inc. on behalf of KMI, Trans Mountain Pipeline Inc. (now Trans Mountain Pipeline ULC) and Trans Mountain Pipeline LP, applied to the National Energy for approval under section 74 (1) (a) and (b) granting leave for a corporate transfer that resulted in Trans Mountain being “dropped-down” from KMI to KMP.⁷
8. The NEB examined the application and determined that leave would be granted because it considered “it to be in the public interest to grant leave with respect to the transfer”.⁸
9. The Board was informed in the application that the shares in the general and limited partner would be contributed to KMEP Canada ULC, an indirect wholly owned subsidiary of KMP. KMEP Canada ULC has since been amalgamated into Kinder Morgan Canada Company, a ULC registered in Nova Scotia.

Corporate Structure

10. KMP is engaged in a transaction that would see Trans Mountain “stepped-up” to KMI—in essence a reversal of the transactions that gave rise to the NEB application for leave in 2007.
11. Trans Mountain Pipeline ULC has not made the Board and Participants at this Hearing aware of the new corporate structure whereby KMI becomes the owner of regulated assets and how that structure impacts Kinder Morgan’s liability, particularly in the event of an oil spill. Neither has the Board been informed as to how the transaction impacts Trans Mountain’s ability to minimize tax, take advantage of accounting measures to maximize US cash flow distribution or other matters germane to the Hearing and

⁶ KMP Proxy Statement Prospectus, page 166, http://www.kindermorgan.com/content/docs/KMP_Proxy_Statement_Prospectus.pdf

⁷ https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/454627/454628/454096/A0X8Z4_%2D_NEB_Application.pdf?nodeid=454100&vernum=-2

⁸ Order MO-04-2007, page 2, https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/454627/454628/456756/A0Y2L2_%2D_Board_letter_and_Order_MO_%2D04%2D2007_re_sale_of_facilities_%2D_Trans_Mountain_Pipeline_System.pdf?nodeid=456757&vernum=-2

regulation of Canadian based transportation facilities, including the determination of toll rates.

12. The corporate structure of Trans Mountain's ownership and control is complex. However, through a number of inter-related companies, it is owned and controlled 100% by KMP. The acquisition of KMP by KMI will alter the ownership.
13. Paragraphs 14 - 23 below explain the relationships between KMP and Trans Mountain Pipeline ULC, Trans Mountain Pipeline LP, Kinder Morgan Cochin ULC and Kinder Morgan Canada Inc. When the acquisition of KMP by KMI is complete, KMP will no longer exist.
14. KMP owns, controls and conducts its Canadian operations through two US operating limited partnerships that have a direct relationship with Trans Mountain: Kinder Morgan Operating LP "A" and Kinder Morgan Operating LP "D".⁹ KMP and its operating partners are registered as Delaware limited partnerships with KMP's head office in Houston, Texas.
15. Kinder Morgan Operating LP "A" owns 100% interest in Kinder Morgan Canada Company, an Unlimited Liability Company (ULC) registered in Nova Scotia, Registry ID 3268897.
16. Kinder Morgan Canada Company owns 100% interest in Trans Mountain Pipeline ULC, the general partner of Trans Mountain Pipeline LP. The NEB certificates of public convenience and necessity (CPCN) related to the Trans Mountain pipeline system are held by Trans Mountain Pipeline ULC. Trans Mountain Pipeline ULC is regulated by the National Energy Board and subject to the NEB Act.
17. Trans Mountain Pipeline ULC holds a 0.01% General Partner interest in Trans Mountain Pipeline LP. The assets of the Trans Mountain system are held in the limited partner Trans Mountain Pipeline LP. Typically the general partner is responsible for operating the limited partner, however Trans Mountain Pipeline ULC has entered into an agreement with Kinder Morgan Canada Inc. (KMC) for KMC to operate the Trans Mountain pipeline system.
18. Kinder Morgan Canada Company—the Nova Scotia registered ULC—owns 100% interest of Kinder Morgan Canada Inc., (KMC)—the operator of Trans Mountain pipeline. KMC does not hold any ownership interests in Trans Mountain Pipeline ULC, Trans Mountain Pipeline LP, or Kinder Morgan Cochin ULC. The only shares held by KMC are its 25% interest in Western Canadian Spill Services Ltd.

⁹ KMP 10-K Annual Report 2013, SEC filing, <http://phx.corporate-ir.net/phoenix.zhtml?c=119776&p=irol-SECtext&TEXT=aHR0cDovL2FwaS50ZW5rd2l6YXJkLmNvbS9maWxpbmcueG1sP2lwYWdlPTk0MDIwMDAmRfNFUT0wJINFUT0wJINRREVTQz1TRUNUSU9OX0VOVEISRZzdWJzaWQ9NTc%3d>

19. The remaining 99.99% units of Trans Mountain Pipeline LP not held by its general partner, Trans Mountain Pipeline ULC, are held by Kinder Morgan Cochin ULC. Kinder Morgan Cochin ULC is registered in Nova Scotia. Kinder Morgan Cochin ULC is the owner and operator of the Cochin pipeline system. Kinder Morgan Cochin is also a pipeline system regulated by the NEB.
20. Kinder Morgan Cochin ULC also owns 77% of the limited partnership units of Kinder Morgan Canada Terminals LP. Kinder Morgan Canada Terminals LP owns Vancouver Wharves and the North Forty Terminal which provides storage and blending services for crude oil and refined products.¹⁰ KM Canada Terminals ULC is the general partner of Kinder Morgan Canada Terminals LP holding 23% of the partnership units.
21. Kinder Morgan Cochin ULC is owned by Kinder Morgan Canada Company (Common, Class A, Class C, Class E and Class F shares), KM Canada Terminals ULC (Common and Class B shares) and Trans Mountain Jet Fuel (Class D shares).
22. Trans Mountain Jet Fuel is 100% owned by Kinder Morgan Canada Company, ULC.
23. KM Canada Terminals ULC—the general partner of Kinder Morgan Canada Terminals LP and common and Class B shareholder of Kinder Morgan Cochin ULC—is 100% owned by Kinder Morgan Operating LP “D”. Kinder Morgan Operating LP “D” is 100% owned by KMP.

Acquisition of Kinder Morgan Energy Partners LP

24. On August 10, 2014 Kinder Morgan Inc. announced it would purchase Kinder Morgan Energy Partners LP (KMP), Kinder Morgan Management LLC (KMR) and El Paso Pipeline Partners LP (EPB).¹¹
25. When Kinder Morgan Inc. purchases Kinder Morgan Energy Partners LP, it also purchases the NEB regulated Trans Mountain and Cochin pipelines. The transaction is scheduled to close November 26, 2014.¹² When the purchase is complete Kinder Morgan Energy Partner shares will cease being traded on the New York Stock Exchange. The Trans Mountain Pipeline system will have a new 100% owner.

¹⁰ http://www.kindermorgan.com/business/canada/terminal_business.cfm

¹¹ Press Release, August 10, 2014, <http://phx.corporate-ir.net/phoenix.zhtml?c=119776&p=irol-newsArticle&ID=1957205>

¹² Press Release, November 20, 2014, <http://phx.corporate-ir.net/phoenix.zhtml?c=119776&p=irol-newsArticle&ID=1991760>

26. Pursuant to section 74 of the NEB Act, whenever a company takes over, acquires, merges, or otherwise gains control of regulated assets the transaction requires leave from the Board. An application must be filed by both parties to the transactions.¹³
27. Richard Kinder, Chair and CEO of KMI has explained that the transaction is to “consolidate all of the Kinder Morgan assets under one company.”¹⁴ The C-corporation company will be called Kinder Morgan Inc., (KMI). The purchase of KMP’s outstanding units will be facilitated by a combination of shares and cash.
28. It is imperative that the NEB protect the public interest of Canadians through its obligation under Section 74 of the NEB Act. The Board must determine if the transaction contemplated by KMP and KMI is in the public interest.

Public Interest Considerations

29. There are a number of reasons why the KMI purchase of KMP may not be in the Canadian public interest.
30. Trans Mountain has not made the Board and Participants at this Hearing aware of the new corporate structure whereby KMI becomes the owner of regulated assets and how that structure impacts Kinder Morgan’s liability, particularly in the event of an oil spill.
31. The \$73 billion transaction will result in an increase in the value of the underlying assets now owned by KMP which impacts depreciation rates of Canadian based assets and taxes payable to the Canadian treasury.
32. The purchase price for the acquired assets is at a premium and as a result, according to Richard Kinder, “the purchase price alone, including the “step-up”, will result in a \$20 billion tax saving over 14 years.” Mr. Kinder, in discussions with investor analysts, referred to the KMI purchase transaction as a “tax shelter”. The transaction is intended to protect KMI from corporate taxes which would be payable if KMP were not purchased by KMI, but continued under its current ownership structure.
33. The KMI transaction will impact tolls charged shippers under the current Incentive Toll Settlement (ITS) agreement which remains effective until 2015. The agreement has provisions that could extend the agreement to 2017.
34. The asset appreciation imbedded into the transaction needs to be explored and understood by the NEB not only in terms of how it might affect depreciation, but also its impact on regulated pipeline capital and maintenance expenditures in the future.

¹³ Change in Ownership Application, NEB, www.neb-one.gc.ca/pplctnflng/sbmt/chngwnrshp-eng.doc

¹⁴ Rich Kinder Transaction Overview, http://www.kindermorgan.com/investor/km_transaction_video.cfm

35. Trans Mountain's corporate tax payable to the federal and selected provincial governments in Canada must also be canvassed, particularly if Trans Mountain is credited by the NEB in the ITS arrangements for taxes Trans Mountain collects but will never pay.
36. The recently approved NEB Act Part IV Toll Methodology and Rate decision granted Trans Mountain a methodology and related toll rates that would be applicable if Trans Mountain's expansion is approved.¹⁵ Canadian shippers negotiated in good faith that Trans Mountain's required rate of return was 12-15% based on its cost of capital under its then corporate structure.
37. KMI's new structure results in a cost of capital, according to Mr. Kinder, of less than 4.5%. In assessing Trans Mountain's application for leave the Board should review approval of the Part IV Application and Reasons for Decision with an understanding of the market realities that will exist under KMI's new 100% ownership of Trans Mountain and Cochin. Twenty year take-or-pay contracts that do not recognize KMI's lower cost of capital will result in toll rates that are unduly onerous for Canadian based shippers. As these higher costs are passed onto the Canadian economy, they have a negative impact on consumers and businesses placing the Canadian economy at a competitive disadvantage for decades to come.
38. As the Board notes in its Filing Manual—Guide R—Transfer of Ownership, “an application filed pursuant to paragraph 74(1) is usually followed by one or more of the following applications: review or amend a decision, pursuant to section 21 of the NEB Act; leave to open, pursuant to section 47 of the NEB Act; addition to or modifications of facilities, pursuant to sections 52 or 58 of the NEB Act; or tolls and tariffs, pursuant to Part IV of the NEB Act.”¹⁶
39. On August 10, 2014, Richard Kinder confirmed that the transaction would be “subject to customary regulatory approvals”¹⁷ On November 22, 2014, he informed investors that, “all regulatory approvals have been received”.¹⁸ Neither KMP as the acquired entity, directly or through its subsidiaries, or KMI, the acquiring entity, sought the required approval under the NEB Act from the Canadian regulator.
40. Trans Mountain must fulfill its statutory obligation and seek leave from NEB under section 74 of the NEB Act. The NEB must determine whether it is in the public interest to

¹⁵ Application for Approval of the Transportation Service and Toll Methodology for the Expanded Trans Mountain Pipeline System (RH-001-2012) <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=828580&objAction=browse&viewType=1>

¹⁶ NEB Filing Manual—Guide R, op. cit.

¹⁷ Investor Presentation, August 10, 2014, page 16, http://www.kindermorgan.com/investor/presentations/KMI_Purch_MLPs_Investor_Presentation_vR.pdf

¹⁸ Investor Presentation November 22, 2014, page 20 http://www.kindermorgan.com/investor/1022_investor_pres.pdf

grant leave for the purchase, sale, transfer or merger of ownership rights of the Trans Mountain pipeline system it regulates on behalf of the Canadian public interest.

Decision or Order Requested

This Motion requests that the National Energy Board order that:

- a) Trans Mountain's application be stayed until the Board has determined, under section 74 of the National Energy Board ACT, RSC 1985, c N-7 ("NEB Act") whether to grant leave for the transfer of ownership in Trans Mountain Pipeline LP, Trans Mountain Pipeline ULC, and Kinder Morgan Cochin ULC from Kinder Morgan Energy Partners LP to Kinder Morgan Inc.;
- b) section 52(5) of the NEB Act, RSC 1985, c N-7 apply to exclude the time taken for the Board to consider the application for leave, and any additional applications triggered by it, from the calculation of the 15 month time limit;
- c) Trans Mountain's Hearing reconvene only if the Board determines that the change in ownership of Trans Mountain, and its related corporate entities, is in the public interest of Canadians and grants Trans Mountain leave to transfer the right of ownership in the Canadian pipeline transportation system from Kinder Morgan Energy Partners LP to Kinder Morgan Inc.;
- d) the cessation of any and all physical work and related activity on the Trans Mountain pipeline expansion route being undertaken by Kinder Morgan Canada Inc. (KMC) on behalf of Trans Mountain Pipeline ULC, until the requisite application for leave has been considered by the NEB. KMC's work only be continued if the Board determines it is in the public interest to grant leave; and
- e) other relief the Board may find appropriate under the circumstances.

All which is respectfully submitted on this 23rd day of November, 2014.

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