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File OF-Tolls-Group1-T241-2019-01 01
16 March 2021

To: All Participants to AO-001-RH-005-2020

**Phillips 66 Canada Ltd. (Phillips Canada) Complaint Against TransCanada
Keystone Pipeline GP Ltd., as general partner on behalf of TransCanada
Keystone Pipeline Limited Partnership (Keystone) regarding Canada Energy
Regulator (CER) Tariff No. 44, filed on 29 November 2019, and the amended
and updated complaint regarding CER Tariff No. 50, filed on 29 December 2020
Amended Hearing Order AO-001-RH-005-2020
Keystone Notice of Motion for Confidentiality (Motion)
Ruling No. 3**

Ruling Summary

In ruling on the Motion, the Commission of the Canada Energy Regulator (Commission) has made the following determinations for the reasons below:

1. As a preliminary matter, the Commission notes that parties raised sufficiency of evidence matters when commenting on Keystone's Motion. While the sufficiency of Keystone's Written Evidence was not raised formally by those parties in a motion that would give notice to other hearing parties to allow them to comment, the Commission is of the view that there is an appropriate base of information on the record at this time to enable parties that seek more specific information to develop information requests.
2. The Commission denies Keystone's request for confidential treatment of the information that is already publicly available on the record of Hearing Order AO-001-RH-005-2020.
3. The Commission denies Keystone's request for confidential treatment of the remaining information (other than that which is publicly available on the record of this proceeding) because Keystone has not sufficiently demonstrated that the requirements of section 60 of the *Canadian Energy Regulator Act* (CER Act) are met.

Background

On 16 December 2020, the Commission issued Hearing Order RH-005-2020.¹ In the Commission's letter to the hearing order, Keystone was encouraged to file information in a manner not requiring confidential treatment and was advised that such an approach would allow the proceeding to move forward in a timely manner. The Commission further advised that if Keystone is of the view that confidential treatment is required for certain information, Keystone may file a motion with regard to confidential treatment in accordance with section 60 of the CER Act for the Commission to consider.

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¹ Amended Hearing Order AO-001-RH-005-2020 was issued 21 January 2021

On 22 January 2021, Keystone filed a Motion, pursuant to sections 32, 60, and 68 of the CER Act and section 35 of the *National Energy Board Rules of Practice and Procedure, 1995* to file, in confidence, information that discloses Keystone's variable costs associated with operating the Keystone Canada Pipeline (which Keystone describes as Confidential Information).

Keystone requested an order requiring:

- a) that the Confidential Information be filed in confidence with the CER for the Commission's consideration alone and that the Confidential Information not be made part of the public record;
- b) the Commission to take steps to restrict disclosure of the Confidential Information within the CER to select staff and members responsible for the consideration of the filing;
- c) that the Confidential Information be provided in confidence to other parties in this proceeding who execute an undertaking and provide an original thereof to each of the Commission and Keystone; and
- d) the Commission to take any other measure and make any other order that the Commission considers necessary to protect the Confidential Information.

Keystone stated that the grounds for the Motion are as follows:

- a) the Confidential Information is relevant and should be filed confidentially to complete the record before the Commission;
- b) pursuant to the CER Act, paragraph 60(a), disclosure of the Confidential Information could reasonably be expected to prejudice the competitive position of a person directly affected by the proceedings; and
- c) pursuant to the CER Act, paragraph 60(b), the Confidential Information is commercial and financial information that has consistently been treated as confidential information by the parties, the confidentiality of which outweighs the public interest in disclosing that information on the public record of this proceeding.

On 27 January 2021, the Commission issued a letter setting out a comment process on the Motion. Phillips Canada/Husky Oil Operations Limited (Phillips Canada/Husky) (a joint submission), Coffeyville Resources Refining-Marketing, LLC (CRRM), and Enbridge Pipelines Inc. (Enbridge) filed letters of comment on 1 February 2021. Keystone filed its reply on 4 February 2021.

Preliminary Matter - Sufficiency of Information

In their letters, Phillips Canada/Husky and CRRM raised concerns as to whether Keystone's written evidence sufficiently addresses the Commission's 16 December 2020 direction for Keystone to file certain information as part of its written evidence. They submitted that if gaps exist in this information in the Commission's view, Keystone should be required to file additional evidence prior to parties issuing information requests to Keystone.

Keystone submitted that it has addressed all the issues set out by the Commission, and that to the extent that CRRM and Phillips Canada/Husky are not satisfied with the information it provided and have particular concerns with it, those concerns should be put in issue through their information requests.

Motion for Confidential Treatment of Information

Keystone's Comments in its Motion

Keystone asserted that the Commission's 16 December 2020 letter acknowledged that certain information may require confidential treatment. It stated that the evidence it had been directed to file by the Commission includes the Confidential Information and thus it is relevant and should be filed confidentially to complete the record.

Keystone stated that, pursuant to paragraph 60(a) of the CER Act, disclosure of the Confidential Information could reasonably be expected to negatively impact its ability to negotiate rates with new, third-party customers and shippers on the Keystone Pipeline System, thus prejudicing its competitive position. Disclosure of the Confidential Information could also be used by its competitors to compete for third party customers and shippers, further prejudicing its competitive position. Disclosure of the Confidential Information could also negatively impact the negotiations of third-party shippers with other suppliers as transportation costs are a key element of overall supply costs for products.

Keystone submitted that, pursuant to paragraph 60(b) of the CER Act, the Confidential Information is commercial and financial information that has consistently been treated as confidential by Keystone and the other parties. In accordance with the applicable Transportation Service Agreements (TSAs), shippers acknowledge that certain records relating to the calculations underlying the applicable flow-through variable toll may be highly confidential and specifically agree to retain an independent auditor to conduct any audit in respect of such highly confidential information. The Confidential Information has not been publicly disclosed in other regulatory filings, either in the U.S. or Canada.

Keystone submitted that the parties' interest in protecting the Confidential Information outweighs the public interest in disclosure of such information, particularly given the potential negative impacts on the companies' competitive positions.

Comments from Phillips Canada/Husky

Phillips Canada/Husky stated that contrary to Keystone's assertion, there has been no previous acknowledgement by the Commission that confidential treatment is required. The onus to establish the need for confidentiality rests with Keystone.

Keystone is a Group 1 company, albeit one that is regulated on a complaint basis. Group 1 companies are normally required to file toll information publicly. Confidentiality under section 60 of the CER Act is exceptional and must be justified by the party seeking confidentiality.

While Phillips Canada/Husky did not make submissions about the specific requirements of section 60, it pointed to the CER Filing Manual, which states:

A Group 1 pipeline company not regulated on a complaint basis...that has not reached a negotiated settlement with its interested parties is regulated on a cost-of-service basis and is required to provide the information outlined in the filing requirements within sections P.1 to P.5 of Guide P.

Phillips Canada/Husky stated that where a pipeline is regulated on a complaint-basis (like a Group 2 pipeline), these filing requirements can be made to apply in the event of a complaint. The Filing Manual states:

In this circumstance, the Commission may request additional information including some or all of the information required of Group 1 companies as specified in sections P.1 through P.5 in Guide P.

Phillips Canada/Husky also requested that the Commission follow its normal regulatory practice in having the pipeline file toll information publicly unless it can discharge the onus to establish confidential treatment.

Comments from CRRM

CRRM opposed Keystone's Motion relief. It asserted that the impugned information is directly related to the central issues in the Complaint and that Commission proceedings are intended to be open, accessible, and transparent. CRRM also asserted that Keystone did not provide adequate justification as to why the information is confidential and why non-disclosure would outweigh the public interests involved in a public hearing convened for the purpose of determining just and reasonable rates of a Group 1 Regulated Pipeline.

The lack of public dissemination of the impugned variable cost information by Keystone and its Shippers must be placed into context. Historically, information exchanged between Keystone and its Shippers has occurred outside of any formal regulatory proceeding. CRRM submitted that is a reasonable approach given the complaint-based nature of Keystone's toll regulation and the fact that exchanges of this sort are done to avoid the need for public hearing processes.

This proceeding is the first time that the Commission has had to consider a contested rate matter involving the Keystone Pipeline System. Detailed information surrounding applied-for variable cost components would normally be expected to be filed publicly and as part of a rate application. The Commission's forum and principles governing the exchange of information in a public hearing must now be the focus.

The Complaint invites the Commission to exercise its rate-making powers, and that there is a general public interest in ensuring that the basis of any Commission decision is founded on evidence that is in the public domain, is open and accessible. Such public interest is reflected in the principles of natural just and procedural fairness.

CRRM provided three observations regarding Keystone's assertion of potential impacts to the negotiation positions of shippers and Keystone. First, it is unclear why or how dissemination of Keystone's historically incurred or forecast variable cost information would result in the disclosure of shipper specific financial or volumetric information and impact a negotiation position. Second, Keystone has not provided any evidence to support the assertion that disclosure causes prejudice to Keystone's negotiation position. Third, disclosure of variable cost information in this proceeding is not only relevant to the calculation of the tolls subject to confidential TSAs, but also Uncommitted Shipper tolls.

CRRM stated that it struggles to see how the variable toll costs can be viewed on the one hand to be commercially sensitive and confidential to Term Shippers, but on the other hand, these costs are contemplated to be part of and included in the non-confidential Uncommitted Toll used to fulfill Keystone's common carriage service obligations. CRRM submitted that it is unaware, from its review of the OH-1-2007 Reasons for Decision, of any suggestions that costs used to calculate the Uncommitted Toll were intended to be excluded from the Commission's normal practice of having this information publicly disseminated if and when a complaint arose.

Comments from Enbridge

Enbridge stated that while it has no interest in the variable cost information that Keystone is seeking to file confidentially, it does have an interest, as a Group 1 pipeline company, in the ruling on the Motion. Enbridge submitted that the Commission's ruling on the Motion should be made in a manner that is consistent with the Commission's treatment of cost information filed by other Group 1 pipelines in similar proceedings to ensure that all Group 1 pipelines are treated fairly and equitably. Enbridge did not make submissions about the specific requirements of section 60.

Reply from Keystone

Keystone stated that Enbridge's submission favouring similar treatment of cost information filed by Group 1 pipelines ignores the fact that the Keystone Pipeline is not like other Group 1 pipelines; that Keystone's tolls are determined with reference to confidential negotiated agreements and that these agreements may impose confidentiality obligations that do not exist in other cases. It asserted that each application for confidentiality should be determined based on the circumstances in each case.

Keystone stated that Phillips Canada/Husky's comments misinterpret the Filing Manual in that section 1.5 of Chapter 1 addresses confidentiality while sections P.1 to P.5 of Guide P concern cost-of-service and do not govern information to be provided for negotiated agreements that led to the toll structure applicable to Keystone. Phillips Canada's comments are inconsistent with its previous statements in both the original complaint and amended complaint that information regarding Keystone's variable costs is confidential and should be filed with the CER on a confidential basis pursuant to s.60 of the CER Act.

Keystone noted that CRRM had acknowledged that the impugned variable cost information has consistently been treated as confidential by Keystone and its shippers but then had suggested that this fact should be placed into context and that this information should be filed publicly, based on the Filing Manual and the principle that Commission proceedings should be open, accessible and transparent. Keystone stated that CRRM, in effect, seeks to re-write the statutory test for confidentiality.

Keystone submitted that the fact that there may now be a hearing process does not change the fact that up until now, the information has been treated as confidential. Keystone stated that where one or more of the tests for confidential treatment of information has been sufficiently met, confidential treatment has been granted.

In the case of this Motion, the unit costs for which it seeks confidential treatment are negotiated with shippers and consistently treated as confidential. Contrary to CRRM's suggestion, the context of the impugned variable cost information (specifically its determination with reference to confidential agreements negotiated with shippers) supports the confidential treatment of this information.

Keystone also noted that CRRM had commented that the disclosure of variable cost information in this proceeding is relevant to the calculation of the Uncommitted Shipper toll, which is not confidential. Keystone submitted that information related to the Uncommitted Shipper toll is irrelevant to this proceeding as the issues are related to the committed variable toll for 2020 and 2021.

Views of the Commission

Preliminary Matter - Sufficiency of Information

The Commission notes that certain parties raised sufficiency of evidence matters when commenting on Keystone's Motion. While the sufficiency of Keystone's Written Evidence was not raised formally by those parties in a motion that would give notice to other hearing parties to allow them to comment, the Commission is of the view that there is an appropriate base of information on the record at this time to enable parties that seek more specific information to develop information requests.

Legal Framework for Confidentiality Requests

Application filings are public unless the Commission grants confidential treatment. If the Commission is satisfied that a filing meets the conditions set out in section 60 of the CER Act, it may take any measures and make any order that it considers necessary to ensure confidentiality.

Section 60 of the CER Act states:

60 The Commission or a designated officer may take any measures and make any order that the Commission or designated officer considers necessary to ensure the confidentiality of any information likely to be disclosed in any proceedings under this Act if the Commission or designated officer is satisfied that

- (a) disclosure of the information could reasonably be expected to result in a material loss or gain to a person directly affected by the proceedings, or could reasonably be expected to prejudice the person's competitive position;
 - (b) the information is financial, commercial, scientific or technical information that is confidential information provided to the Regulator and
 - (i) the information has been consistently treated as confidential information by a person directly affected by the proceedings, and
 - (ii) the Commission or designated officer considers that the person's interest in confidentiality outweighs the public interest in disclosure of the proceedings;
- ...

Keystone has applied under paragraphs (a) and (b) of section 60 for confidential treatment of the redacted portions of its Written Evidence. Keystone has the onus of demonstrating that confidentiality is made out under one of these paragraphs. Keystone's Motion for confidential treatment is opposed.

As the National Energy Board previously stated regarding confidentiality provisions in the *National Energy Board Act* (NEB Act) that are similar to confidentiality provisions in the CER Act:

This section provides an exception to the fundamental principle that the [NEB's] proceedings are to be open, accessible and transparent. As an exception, the onus is not upon the parties opposing confidentiality to show why the information should be public; rather those seeking a confidentiality order have the onus to show why this

extraordinary order should be granted to keep information in a public proceeding confidential.²

The NEB further stated with respect to paragraph 16.1(b) of the NEB Act that “there is a general public interest in ensuring that the...evidence upon which the [NEB] relies to come to a decision is open and accessible”.³

Issues Arising from the Motion

Publicly Available Information

The Commission first considered whether there were any specific materials within the request that were clearly not confidential.

Keystone submitted that the information for which it seeks confidential treatment has not been publicly disclosed in other regulatory filings, either in the U.S. or Canada.⁴ However, the Commission has verified that the following information for which Keystone has requested confidential treatment has already been provided publicly in Tariff Nos. 44⁵ and 50⁶ for, respectively, 2020 and 2021 tolls:

- Power costs
- Property tax
- Total OM&A costs
- Light volume forecast
- Heavy volume forecast
- Total volume forecast
- Weighted m³-kms
- Unit costs (\$/m³-km)
- Heavy variable toll
- Light variable toll

Paragraph 60(a) requires a demonstration of material loss to a person directly affected by the proceedings or a reasonable expectation of prejudice to the person's competitive position. The above-described information has previously been filed on the CER's public record, including being filed on the CER's electronic repository that is available to the public. In addition, the information filed on the public record is the same information, not merely the same type or category of information. As a result, there could not be a reasonable expectation of material loss or prejudice to a competitive position by making public information that is already public.

Paragraph 60(b) requires that the information be confidential information that has been consistently treated as confidential information by a person directly affected by the proceedings. As the above-described information is publicly available, Keystone's Motion fails the paragraph 60(b) requirements that the information be confidential information and that the information be consistently treated as confidential.

² Emera, [GH-1-2006](#), page 112

³ *Ibid*, at 113

⁴ Motion paragraph 15

⁵ Tariff No. 44 ([C03322-1](#))

⁶ Tariff No. 50 ([C10072-1](#))

Consequently, the Commission denies Keystone's request for confidential treatment of the above-described information that is already publicly available in Tariff Nos. 44 and 50 for, respectively, 2020 and 2021 tolls.

Other Information

Information for which Keystone requests confidential treatment that is not provided publicly in Tariff Nos. 44 and 50 for, respectively, 2020 and 2021 tolls, includes:

- Operational Programs Costs
- Non-Operational Costs
- Maintenance Capital
- Non-Routine Adjustments (NRAs)
- Drag Reducing Agent (DRA)
- Incident Costs
- Insurance Proceeds
- Graph of Estimated Unit Costs⁷
- Certain information provided in section 4.3 "Treatment of DRA in the 2020 and 2021 Toll Filings" of Keystone's Written Evidence

While certain information represented in the Graph of Estimated Unit Costs is comprised of information provided in Tariff Nos. 44 and 50, other information in the graph is comprised of information not provided in Tariff Nos. 44 and 50. Having already addressed the publicly available information in this Ruling, this portion of the Commission's decision concerns the information in the graph that is not provided in Tariff Nos. 44 and 50.

Paragraph 60(a) requires a demonstration that the disclosure of the information could reasonably be expected to result in a material loss or gain to a person directly affected by the proceedings, or could reasonably be expected to prejudice the person's competitive position. Keystone's submissions focus on the second part of the provision: "*could reasonably be expected to prejudice the person's competitive position*".

Paragraph 60(b) requires a demonstration that the information is confidential information; that it is financial, commercial, scientific or technical information; and that it has been provided to the Regulator. It must also be shown that the information has been consistently treated as confidential information by a person directly affected by the proceedings. Lastly, the Commission must consider whether the person's interest in confidentiality outweighs the public interest in disclosure of the proceedings.

With respect to subparagraph 60(b)(i), the Commission is satisfied that the information provided to the Commission about operational programs costs, non-operational costs, maintenance capital, NRAs, DRA, incident costs, insurance proceeds, the graph of estimated unit costs, and certain information provided in section 4.3 of Keystone's Written Evidence, is financial and commercial information. Further, the Commission accepts Keystone's submissions that, except for the information that is publicly available in Tariff Nos. 44 and 50 for, respectively, 2020 and 2021 tolls, Keystone has consistently treated the information as confidential. The Commission notes that while past treatment of financial and commercial information by Keystone and its shippers in contracts or other agreements is a factor for it to consider when assessing a request for confidential treatment under paragraph 60(b), it is not

⁷ Graph of estimated unit cost of the 2020 and 2021 Toll Filings broken out by DRA, Operating & Maintenance, Power and Property Tax. The graph also indicates the estimated and final costs by category in 2018 and 2019; and also indicates initial estimated throughput for 2018-2021 and actual throughput for 2018 and 2019.

the only factor to be considered, nor is it on its own dispositive of the treatment of the information in the context of a public proceeding.

With respect to the requirements of paragraph 60(a) regarding prejudice to a person's competitive position and the requirements of subparagraph 60(b)(ii), the Commission is of the view that Keystone has not provided sufficient information to support granting confidential treatment for the various categories of information it requested. Keystone did not demonstrate in sufficient detail or depth how disclosure of the information could reasonably be expected to prejudice a person's competitive position nor how a person's interest in confidentiality outweighs the public interest in disclosure.

Conclusion

In light of the Commission's decision to deny confidential treatment to certain information, as described above, the Commission directs Keystone to file with the CER its Written Evidence without redactions no later than **noon, Calgary time, on 23 March 2021**.

COVID-19 Update

The CER is dedicated to the safety and well-being of its staff, Indigenous communities, the public, and all those with whom we work closely. For more information on how the CER is continuing its regulatory oversight during the COVID-19 pandemic, please refer to the following update issued 11 December 2020: www.cer-rec.gc.ca/CovidProcessUpdate.

Yours sincerely,

Signed by

Jean-Denis Charlebois
Secretary of the Commission