National Energy Board | Office national de l'énergie

LETTER DECISION

File OF-Tolls-Group1-E101-2014-03 02
8 March 2018

To: All parties to Hearing Order RH-001-2017

Enbridge Pipelines Inc.
Application for Review and Variance of the National Energy Board 29 October 2015 Letter Decision regarding the Toll Principles Respecting the Line 3 Replacement Program - Hearing Order RH-001-2017

1. Background

On 13 May 2014, Enbridge Pipeline Inc. (Enbridge) filed an application for the approval of the Toll Principles respecting the proposed Line 3 Replacement Program (Toll Principles). The negotiated Toll Principles included the establishment of a Line 3 Surcharge for 15 years from the in-service date of the Line 3 Replacement Program (Project).

Included in the Toll Principles, as set out in the Issue Resolution Sheet (IRS), was the Capital Cost Risk Sharing (CCRS) provision, under which the proposed surcharge was to be adjusted to reflect any changes to the initial cost estimate of the Unclassified Total Capital Costs up until the Class IV cost estimate. This adjustment was based on an agreed capital cost risk sharing of 75 per cent to the shipper and 25 per cent to Enbridge for any costs in the Class IV cost estimate in excess of the Unclassified Total Capital Costs. The cost estimates contained costs in both Canadian dollars (CAD) and in United States dollars (USD).

On 25 August 2014, the National Energy Board (Board) approved the Toll Principles application as set out by Enbridge and found the Toll Principles an appropriate basis for the toll surcharge to be just and reasonable for the 15-year term.

On 25 November 2014, Suncor Energy Marketing Inc. (Suncor) filed a letter with the Board seeking direction and clarification of the Toll Principles, as approved by the Board on 25 August 2014, with respect to the calculation of the Class IV cost estimate for the Line 3 Replacement Program. Suncor stated its position that Enbridge did not apply the correct USD-CAD exchange rate in calculating the adjusted surcharge. Suncor stated that the IRS did not specify the exchange rate to be used; however, it appeared to Suncor that Enbridge had

…/2

Suite 210, 517 Tenth Avenue SW
Calgary, Alberta T2R 0A8

517, Dixième Avenue S.-O., bureau 210
Calgary (Alberta) T2R 0A8

Canada

Telephone/Téléphone : 403-292-4800
Facsimile/Télécopieur : 403-292-5503
www.neb-one.gc.ca
Telephone/Téléphone : 1-800-899-1265
Facsimile/Télécopieur : 1-877-288-8803

arbitrarily applied a par rate to both the Unclassified Total Capital Costs and the Class IV cost estimate.

Following a comment period and three rounds of Board Information Requests to both Suncor and Enbridge, the Board issued its Letter Decision on 29 October 2015 (Decision). The Board found that Enbridge had incorrectly applied the Toll Principles in its calculation of the total cost estimates. The Board was of the view that Enbridge's calculation method could result in costs being artificially inflated and an over-collection of funds.

In its Decision, the Board found that the inclusion of an appropriate exchange rate was necessary to meet the agreed-upon allocation of 75 per cent of capital cost risk to the shippers in the CCRS provision. The Board was of the view that the exchange rate to be used in the calculation of the Class IV cost estimate, or a mechanism to determine an exchange rate, would have ideally been agreed to by Enbridge and its shippers ahead of the Class IV cost estimate and then applied at the time when the forecast was made. The Board directed Enbridge to apply an exchange rate of 1.10 CAD = 1.00 USD in the calculation of the Canadian and United States (U.S.) portions of the Class IV cost estimate, as well as the Class IV total cost estimate. However, given the negotiated nature of the CCRS provision of the Toll Principles, the Board stated it would consider an application from Enbridge to adjust the exchange rate for the Class IV cost estimate should there be further negotiations with its Representative Shipper Group (RSG) on this matter.

On 26 February 2016, Enbridge filed an application for a review and variance (R&V) of the Board's Decision dated 29 October 2015 respecting the Toll Principles for the Line 3 Replacement Program (R&V Application). On 15 March 2016, the Board issued a letter inviting all interested parties to provide submissions on the review threshold question, raised by Enbridge in its R&V Application, including submissions on process (A4Y7F2). The Board received letters from Total EP Canada Ltd. and Total Trading and Marketing LP (TEPCA and TTMC) (A4Z0C5) and Suncor (A4Z0G3).

Suncor was of the view that the R&V Application should be dismissed as Enbridge had not met the threshold test for review because it had failed to establish any grounds that raise some doubt as to the correctness of the Board's Decision. Similarly, TEPCA and TTMC were of the view that Enbridge had not raised a doubt as to the correctness of the Board's Decision such that it ought to be reviewed. TEPCA and TTMC stated the interpretation that Enbridge posited was not apparent from, or consistent with, the wording chosen for the CCRS provision.

On 14 April 2016 Enbridge provided its responses to the comments (A4Z3C7). Enbridge was of the view that there was clearly a doubt as to the correctness of the Board's Decision and that the Board should proceed to the second step of the review process. Enbridge noted that Suncor in its submissions, took issue with some of the relevant facts. Enbridge was of the view that the facts in this case are important and requested that the second step of the process include the filing of written evidence and the opportunity to present information requests and conduct cross-examination to test the evidence.

On 27 January 2017 the Board decided that a doubt had been raised as to the correctness of the Board's 29 October 2015 Decision. Accordingly, the Board granted Enbridge a review of the

Decision. The Board set out a review process and a Timetable of Events, which included an application to participate process, the filing of evidence and the ability to ask information requests. An oral hearing, which allowed for cross-examination and final oral argument, was held in Calgary on 12-13 December 2017.

2. The Views of Parties

Views of Enbridge

In its R&V Application, Enbridge stated the Board had erred in making its 29 October 2015 Decision. Specifically, Enbridge identified:

- the Board failed to have regard for how the parties that negotiated the provision intended for it to be applied;
- the Board ignored the uncontested information presented to it about the intention of the parties that negotiated the agreement;
- the Board made findings about how the provision should be applied that are inconsistent with the parties that negotiated the provision; and
- the Board directed Enbridge to calculate the Class IV total capital costs in a manner that is contrary with what was intended by the parties that negotiated the provision and, in doing so, substituted its own view for the view of the parties that negotiated the provision.

During reply argument, Enbridge stated that while it did not agree with Suncor that the intention was entirely irrelevant, there was no need for the Board to make findings in this case just about what was intended. Enbridge stated that this is because the Board has before it uncontroverted evidence about how the surcharge adjustments were actually calculated and reflected in the surcharge adjustment tables. Enbridge pointed out that Suncor had not asked one question about that evidence.

It was Enbridge's view that the Board erred in its Decision in making the following findings and observations:

- Contrary to the Board's finding that the approach Enbridge had used with regard to exchange rates was inconsistent, Enbridge argued that there was no inconsistency. There was never any intention to develop a single capital cost estimate for the entire Project by converting the total capital costs of the Canadian and U.S. portions of the Project to a single currency. Enbridge argued that the capital cost estimates for each of the U.S. and Canadian portions of the Project were retained in their native currencies in calculating the surcharge adjustments.

- With regard to the Board's observation that while exchange rates were not mentioned in the IRS, this did not constrain the use of an exchange rate other than par in calculating the change in the estimates, Enbridge argued that the use of an exchange rate other than par would change the basis upon which the surcharge adjustments were calculated and reflected in the surcharge adjustment tables.

- Enbridge also argued that the surcharge adjustment of +0.095 USD per barrel is what is required to recover 75 per cent of the increased capital cost from the unclassified capital cost estimate to the Class IV capital cost estimate for the U.S. portion of the Project in accordance with the Federal Energy Regulatory Commission (FERC) cost-of-service methodology, and to recover 75 per cent of the increased capital cost from the unclassified capital cost estimate to the Class IV capital cost estimate for the Canadian portion of the Project based on a Return on Equity (ROE) of 11.9 per cent. Enbridge argued that with the 25 per cent of the increase in total capital costs being absorbed by Enbridge, the adjusted surcharge results in an ROE for the Canadian portion of the Project of 11.5 per cent. In Enbridge's view, there is no over-collection of funds, as the Board had stated in its Decision.

- Regarding the Board's finding that the inclusion of an appropriate exchange rate was necessary to meet the agreed-upon allocation of 75 per cent of capital cost risk to the shippers, Enbridge argued that the surcharge adjustments in the CCRS provision only recover 75 per cent of the capital cost changes for the U.S. portion in accordance with the FERC methodology, and 75 per cent of the capital cost changes on the Canadian side based on an ROE of 11.9 per cent if the total capital costs are determined by adding the Canadian and U.S. costs together without conversion to a single currency. Enbridge stated that this was the basis upon which the surcharge adjustment tables in the IRS were developed.

It was Enbridge's view that the Board simply did not have the evidence that it needed to make the findings that it did and the Board clearly misunderstood how the surcharge adjustments were calculated and reflected in the surcharge adjustment tables. Enbridge stated that the Board now has the evidence to show without a doubt that the surcharge adjustment was correctly calculated producing a result that is fair, reasonable and appropriate. For these reasons, Enbridge asked the Board to rescind its Decision in which it directed Enbridge to apply an exchange rate of 1.10 CAD = 1.00 USD in the calculation of the Canadian and U.S. portions of the Class IV cost estimate, as well as the Class IV total cost estimate.

Enbridge submitted that the issue in this proceeding is whether the Line 3 surcharge adjustment was calculated correctly under the CCRS provision in the IRS. Enbridge argued that the evidence shows that Enbridge did correctly calculate the surcharge adjustment.

Enbridge submitted that it had calculated the surcharge adjustment in the way that Enbridge and the RSG agreed that the surcharge adjustment should be calculated, using the same basic practice that is used under the Competitive Toll Settlement (CTS) to split International Joint Toll (IJT) revenue between the Enbridge Mainline in Canada and the Enbridge Lakehead system in the United States. Enbridge submitted that an RSG commercial negotiating team was formed in accordance with Section 16.3 of the CTS, which provides that Enbridge and the RSG will negotiate adjustments to the IJT and the Canadian Local Toll to allow Enbridge to recover the capital expenditures of a major Enbridge Mainline expansion. It was Enbridge's view that it had calculated the surcharge adjustment in a manner that produces a result that is appropriate, and is fair and reasonable.

Enbridge indicated that the negotiations with the RSG commercial negotiating committee were extensive and lasted for months. Enbridge submitted that both Enbridge and Suncor witnesses had testified that the RSG process was followed and that Suncor attended the necessary RSG meetings. Enbridge stated that the RSG agreement has a clause that requires representatives to be well-versed in the matters of the Enbridge Mainline and the CTS. Enbridge was of the view that it was negotiating with sophisticated parties that have been through a lot of similar processes in the past.

Enbridge stated that the draft IRS was circulated to the members of the RSG and they were given an opportunity to make comments and ask questions about it. Enbridge asserted that Suncor participated and provided comment about the determination of the total capital costs for the purpose of the CCRS provision. However, Suncor's comments did not form part of the consensus view of the RSG. The IRS was finalized and approved by a vote of the RSG on 26 February 2014.

Enbridge argued that it was clear to the members of the IRS, perhaps with one exception, that the surcharge adjustment under the CCRS provision would be determined without converting the total capital costs to a single currency. Enbridge asked the Board to take note that the total capital costs for which the RSG commercial sub-committee had regard for in negotiating the surcharge amounts and in determining the surcharge adjustment amounts are expressed in dollars, not in CAD and not in USD.

Enbridge stated that it is important to note that Enbridge did not determine an ROE for the entire Project in Canada and the United States. The U.S. investment will earn a return based on the U.S. capital costs and on the tolling methodology applied by the FERC. The Canadian investment earns a return based on the residual revenue and on the Canadian capital costs. Enbridge submitted that the CTS has been in effect for over six years and the RSG understands very well how it operates. Capital investments are made by Enbridge in Canada and in the U.S., and there is no interaction between the two capital investments.

Enbridge submitted that one of the basic principles underlying the CTS was to provide toll certainty and stability to shippers and if something subsequently changes in terms of one of the financial assumptions or the capital costs change such that the actual ROE is different, that is the risk that Enbridge assumed. Enbridge argued that this same basic principle also applied to the negotiation of the IRS, and that this is why the IRS fixes the surcharge initially and fixes an adjustment to that surcharge to reflect capital cost risk sharing - to provide toll certainty and stability. Enbridge asserted that, at the end of the day, the initial Line 3 surcharge was a negotiated amount and was not determined on a cost-of-service basis.

Enbridge submitted that when the IRS was developed, the parties only had the unclassified capital cost estimates for each of the Canadian and U.S. portions of the Project. The Class IV cost estimates were still to come. Enbridge submitted, for that reason, the IRS contained a CCRS provision in which the parties agreed to share the capital cost increases or decreases from the unclassified capital costs to the Class IV capital with 75 per cent to shippers and 25 per cent

to Enbridge, and the parties also agreed to adjust the initial Line 3 surcharge to reflect this capital cost risk sharing.

Enbridge stated that the adjustments are set out in tables within the IRS, in the CCRS provision and in Appendix C. Enbridge submitted that a five step calculation method by which the toll surcharge adjustment was calculated, which it described in its opening statement, was uncontroverted. Enbridge argued that these steps represent how the surcharge adjustment was actually calculated and how the adjustments were actually reflected in the tables. Enbridge argued that the IRS is not a commercial contract; it is a toll settlement that was approved by the Board as an uncontested settlement. Enbridge continued that if the IRS were a commercial contract it would probably have been hundreds of pages long and appended to it would have been all of the detailed surcharge adjustment calculations that were made in numbered paragraph 2 of Enbridge's opening statement.

Enbridge explained how the IJT revenue is split between the Canadian Mainline and the Lakehead system under the CTS. First, the IJT revenue is allocated to the U.S. investment through tolls set by the FERC using a cost-of-service methodology. The revenue requirement for the U.S. portion is deducted from the total initial Line 3 surcharge revenue; this leaves the residual revenue for the Canadian portion of the Project. The ROE for the Canadian portion of the Project is then calculated based on the residual revenue and the unclassified capital cost of the Canadian portion of the Project. The ROE for the Canadian portion was determined to be 11.9 per cent. Enbridge stated that this ROE is based on volume assumptions from an Enbridge internal forecast at that time and on assumptions made for other financial parameters (depreciation, debt/equity ratio, operating expenses, income taxes, etc.).

Enbridge stated that the calculation was then made of the adjustment to the initial Line 3 surcharge that would be required to recover 75 per cent of changes in the unclassified capital cost estimates and maintain the 11.9 per cent Canadian ROE for 75 per cent of those changed capital costs of the Project. Enbridge submitted that this calculation starts again with the U.S. side because FERC sets the revenue requirement. Enbridge explained that the adjusted Line 3 surcharge was determined so that it would recover the changed capital costs and, after taking into account the revised residual revenues for the Canadian portion of the Project, still maintain an ROE of 11.9 per cent. Enbridge stated that this meant that if the capital cost of the U.S. portion of the Project were to increase, the revenue requirement in the U.S. would increase, and the residual revenue from the initial Line 3 surcharge available for the Canadian portion of the Project would decrease.

Enbridge stated that in calculating the surcharge adjustment to reflect the capital cost risk sharing, the unclassified capital cost estimates for each of the U.S. and Canadian portions of the Project were retained in their native currencies. Enbridge submitted that there are two separate commercial regimes, one in Canada and one in the U.S., and that the U.S. costs are recovered in USD and the Canadian costs are recovered in CAD. Enbridge argued that there was no inconsistency in its approach of applying an exchange rate other than par to the individual cost

components priced in USD contained within the Canadian portion of the Class IV cost estimate. Enbridge stated there was never any intention to develop a single capital cost estimate for the Project by converting the total capital costs of the Canadian and U.S. portions of the Project to a single currency.

Enbridge submitted that had one currency been converted to the other at an exchange rate other than par, different adjustments to the Line 3 surcharge would have been required in order to maintain the 11.9 per cent Canadian ROE in recovering 75 per cent of the changed capital costs for the Project.

Enbridge submitted that it would not be reasonable to apply an exchange rate of par to calculate the total Unclassified capital cost estimate and an exchange rate of 1.10 CAD = 1.00 USD to calculate the total Class IV capital cost estimate, and then use the same surcharge adjustment tables contained within the CCRS provision and Appendix C to calculate the Line 3 Surcharge adjustment. In Enbridge's view, this was not the way that the surcharge adjustment amounts corresponding to the percentage increases/decreases in the total capital costs in the tables were calculated and would result in an ROE for the Canadian portion of the Project of only 9.3 per cent, which in its view, was not what the shippers and Enbridge had agreed to do.

Further, Enbridge submitted that the Unclassified Total Capital Costs changed many times during the period of negotiations as the Project scope changed and were not finalized until February 2014 when the exchange rate was approximately 1.00 CAD = 0.905 USD. Enbridge submitted that the value of the Canadian dollar was actually lower at that time, than at the time that the Class IV cost estimates were prepared. Enbridge asserted that this would have resulted in an adjustment to the Line 3 surcharge that would be greater than the U.S. 9.5 cents.

Enbridge stated that the surcharge adjustments corresponding to the percentage changes recover 75 per cent of the capital cost changes in both the U.S. and Canada based on the FERC cost-of-service methodology and an ROE of 11.9 per cent respectively. Enbridge asserted that the surcharge adjustments only do this if the capital costs are determined by adding the Canadian and U.S. costs together at par. Enbridge submitted that it made no sense to calculate the Line 3 surcharge adjustment based on the exchange rates in effect at the time the estimates were created and therefore, this should have resulted in a dismissal of Suncor's 25 November 2014 complaint but it instead led to the Board's 29 October 2015 Decision.

Enbridge asked the Board to rescind its Decision as Enbridge argued that it was an error of the Board to have directed that Enbridge apply an exchange rate other than par in calculating the total Class IV capital costs for the purposes of applying the surcharge adjustments tables in the IRS. If the Board did not agree with Enbridge's request, Enbridge asked that the Board direct that the total Class IV costs be calculated in Canadian dollars.

Views of Suncor

Suncor submitted that there is sufficient evidence on this record to show that the Board did not err in its 29 October 2015 Decision. Suncor stated that Enbridge, as Applicant to this R&V Application, has the burden of proving that the Board was incorrect in its Decision. Suncor was of the view that Enbridge did not meet this burden.

Suncor stated that Enbridge's position rested on its argument that the intent of the commercial negotiating committee binds all RSG members and grounds the interpretation that it urges on the Board. Suncor argued that intent was entirely irrelevant. Suncor submitted that this matter is not one of an agreement negotiated between two parties that are now seeking a court's assistance in resolving an ambiguity; instead it was a multi-party negotiation, which, by agreement, resulted in an IRS by virtue of a vote.

Suncor stated that the RSG Agreement allows any party recourse to the regulator to have its concerns addressed. Suncor argued that this is a shipper's right and it is not encumbered in any way. Suncor was of the view that if an aggrieved party were to avail itself of the right it is given under the RSG Agreement, and all that Enbridge needed to do is raise the type of arguments it has made in this proceeding, then the remedy of bringing concerns to the Board for assistance is rendered meaningless.

Suncor argued that the debate of what was said and when it was said and how forcefully it was said and how many issues were raised and over what period of time is absolutely beside the point. In Suncor's view, the point is that Suncor is entitled to seek relief from the Board, and it did so in this case. Suncor argued that it would be absurd if such an intent was used to impose a term on the RSG which Enbridge, in Suncor's view, failed to show was properly debated or communicated. Suncor also argued that Enbridge failed to answer Board counsel's question regarding how Enbridge's proposed calculation for the total Class IV cost estimate was communicated to the RSG.

Suncor submitted that Enbridge offered no objective evidence in support of its position that the parties intended the IRS to work as Enbridge said it should. Suncor stated that there is nothing in the IRS to support Enbridge's approach that changes in capital due to a currency exchange should be treated differently than other changes in capital costs. Suncor argued that a matter of such importance and one that runs contrary to reasonable business expectations cried out for memorialization.

Suncor argued that if regard is given to the objective evidence that is available in the form of the surrounding circumstances in which the IRS arose, using the principles in Sattva [1], the IRS is clear and unambiguous. Suncor submitted that there can be only one conclusion: that the Class IV cost estimate must be determined in USD using an appropriate exchange rate. Suncor further submitted that commercial contracts are to be interpreted in accordance with sound commercial principles, good business sense, and avoid commercially absurd results. Suncor

[1] Sattva Capital Corp v Creston Moly Corp, 2014 SCC 53

argued that Enbridge's proposition that currency is not a consideration is effectively asserting that value is irrelevant in a contract and would go against these fundamental principles.

Suncor submitted that in Sattva, the Supreme Court of Canada recognized that the surrounding circumstances used to interpret a contract should consist only of objective facts known or that ought to have been known by all parties at or before the date of contracting. Suncor continued that in the Taggart[2] case out of the British Columbia Court of Appeal, the Court held that the factual matrix used to interpret a contract should only consist of what is common to both parties and not be based on a version of the factual matrix that is particular to only one of the contracting parties.

Suncor also submitted that the law recognizes that surrounding circumstances include the object and purpose the parties were seeking to obtain to attain by their agreement, such as the commercial purpose of the contract, which in turn presupposes knowledge of the genesis of the transaction, the background, the context and the market in which the parties are operating.[3]

Suncor was of the view that, in this case, the following surrounding circumstances as of the date the IRS was agreed to on 26 February 2014 are relevant to interpreting the CCRS provision in the IRS:

- The purpose or genesis of the IRS was to provide Enbridge recovery, plus a reasonable rate of return, of its investment in the replacement of Line 3 of the Enbridge Mainline.
- Both Enbridge and Suncor are sophisticated parties that have been party to toll agreements similar to the IRS in the past that have included a capital cost sharing provision.
- The parties understood that an equity return embedded in a capital cost risk sharing provision, by definition, connects the investor's investment to the investment's cash flows through a surcharge on a toll.
- Both parties understood from past agreements that risks are assumed under a capital cost sharing provision. In the past, Enbridge has prescribed what capital cost risk elements it would assume in an agreement. This was the case in the Alberta Clipper Canada Settlement.
- Both parties are aware of exchange rate risk. For instance, Enbridge is active in the exchange rate trading market.

Suncor, in reference to some presentations that Enbridge provided to the RSG, submitted that the evidence of Enbridge does not provide consistent messaging to the RSG. Suncor pointed to the Enbridge argument that the word "dollar" does not denote a specific currency. This was inconsistent with what Enbridge said to Suncor in the letter dated 30 September 2014 where Enbridge stated it was treating the USD and CAD at par for calculating the total Class IV cost estimate. Suncor submitted that currency mattered then but somehow did not matter now.

[2] Taggart v McLay, [1998] BCJ No 3079

[3] Canada Deposit Insurance Corp v Commonwealth Trust Co (in Liquidation), [1997] BCJ No 2302, [1998] 1 WW4 484 at para 10 (BCCA); Reardon Smith Line Ltd v Hansen Tangen, [1976] All ER 570 (HL) at 574, as cited in Sattva, supra, at para 47

Suncor stated that Enbridge had argued that exchange rate risk was not intended to be part of the CCRS provision, nor a risk Enbridge was requested to accept. Suncor asserted that this intent did not match up with what Enbridge is actually doing by choosing to fix the exchange rate between the Unclassified and Class IV cost estimates. Suncor argued that Enbridge has, in fact, taken on 100 per cent of the exchange rate risk.

Suncor was of the view that Enbridge had no basis to make a distinction between changes in capital due to exchange rate fluctuations and changes due to other capital costs. Suncor stated that such an approach is a new and novel ratemaking premise. Suncor stated that, in the past, Enbridge has prescribed what capital cost risk elements it would assume. Suncor provided for an example, the Alberta Clipper Canada Settlement from 2007 where in Section 7, Capital Cost Risk Sharing[4], Enbridge differentiated between controllable costs and uncontrollable costs. Suncor stated that Enbridge assumed partial exposure to capital cost risk to only the controllable costs. However, with respect to the Line 3 Surcharge, no exceptions to, or specific provisions of, capital cost risk were defined in the IRS.

Suncor submitted that Enbridge argued that had the negotiating parties intended that the total estimates would be calculated by converting the Canadian and U.S. costs to a single currency, it would have been necessary for them to specify the currency, Canadian or U.S., and the exchange rate to be used in making the conversion in the IRS. In Suncor's view, this is essentially arguing that the silence of the IRS on this point should favour Enbridge's view. Suncor argued that there is no basis for such an argument, grounded either in the relevant documents and information filed on this record or the law.

Further, Suncor submitted that the IRS is silent on converting U.S. costs in the Canadian portion of the Class IV cost estimate into Canadian dollars, and silent on the exchange rate to use, yet Enbridge performed this conversion. It was Suncor's view that silence didn't seem to influence its approach in relation to the very first calculation needed to allow it to do a meaningful comparison of the unclassified estimate when it converted some USD components of the Class IV estimate into CAD. No guidance was needed then to make that conversion. Suncor argued that Enbridge's approach to this issue has been inconsistent from the outset.

Suncor submitted that at a high level, Enbridge had argued that the surcharge amounts outlined in Appendix C of the IRS in USD were negotiated amounts and therefore have no connection to the currencies used or actually used for the two cost estimates. Suncor stated that Enbridge is a sophisticated party with extensive experience in the negotiation of tolls. Suncor argued that, from this, it is reasonable to conclude that had there been an understanding, as Enbridge alleges, as to how the total Class IV cost estimate was to be calculated in terms of not applying an exchange rate, there should have been some documentation of that understanding. Suncor submitted that the one document that does exist, the IRS, says nothing of Enbridge's approach.

Suncor argued that when it decided to seek relief from this Board is beside the point. What matters is whether Enbridge's approach to calculating the surcharge is just and reasonable. Suncor stated that the Board cannot lose sight of the fact that its overriding jurisdiction and

[4] Alberta Clipper Canada Settlement Part 1 of 2, Section 7,A1R8Q2

obligation is to ensure that tolls are just and reasonable pursuant to section 62 of the *National Energy Board Act*. Suncor submitted that Enbridge's approach leads to a toll that is not just and reasonable, because it fails to respect two fundamental principles: that currencies matter, as they impart economic value in any commercial discussion or arrangement; and second, that revenues must match costs such that the Line 3 surcharge must be based on expected actual costs and not some inflated value.

Suncor asserted that one cannot add two amounts together that are expressed in different currencies without first converting one to the currency of the other. Suncor argued that to do so would not be commercially sensible, or reasonable. Suncor indicated that this applies whether Enbridge adds the Canadian segment capital cost to the U.S. segment capital cost without conversion, or determines the Canadian segment surcharge based on a total surcharge in USD without conversion. Suncor argued that both approaches were plagued by the same difficulty. Suncor argued that simply because Canada and the U.S. both use the word "dollar" for their currencies doesn't mean amounts in the two currencies can be combined without conversation.

Suncor's position is that to apply the adjustments in Appendix C of the IRS, the total Class IV cost estimate must be calculated in USD. This matches the currency of the surcharge, which is the only way for revenues in the form of the Line 3 surcharge to give effect to the 75/25 per cent allocation of capital cost risk in the IRS. Suncor submitted that whatever approach Enbridge has applied, the lower cost of the Canadian portion of the Project due to currency exchange is not passed on to shippers and will lead Enbridge to over-collect approximately $60 million per year against the actual expected costs of the Canadian portion of the Project. Suncor argued that this is not just and reasonable, and should be sufficient grounds on its own to dismiss Enbridge’s application.

Suncor argued that what is important is a meaningful comparison of estimates and a surcharge which is reflective of the expected actual costs. Suncor submitted that currency underscores that principle in that currency places a value on the cost to be capitalized and the surcharge to be applied in the case of a difference between the two cost estimates. Suncor argued that this is the purpose of the surcharge.

Suncor invited the Board to refer to Suncor’s 5 April 2017 evidence which illustrates how revenues do not match costs. Suncor was of the view that Enbridge’s approach does not consider actual expected capital costs. The impact of the lower cost of the Canadian portion of the Project is not reflected in the surcharge such that revenues do not match costs. Suncor submitted that the purpose of the examples it had provided in its evidence was to make sure the relationship between the variables of revenue and costs is correct, and the surcharge is reflecting the proper change in capital costs.

Suncor submitted that Enbridge originally argued that the intent of the parties was that an exchange rate would not be applied when adding the Canadian portion of the Class IV estimate in CAD to the U.S. portion of the Class IV estimate in USD. Suncor argued that Enbridge, in its opening statement, then shifted the focus and adopted the five step calculation contained therein. Suncor argued that Enbridge had failed to offer any objective evidence of intention in support of

its new or old approach, despite repeated requests for such evidence from the Board.

Suncor argued that the multi-step process to determine the Line 3 adjusted surcharge provided by Enbridge in its opening statement suffers from the same fundamental flaw that exists in Enbridge's approach of combining the Canadian portion and U.S. portion of the Class IV cost estimate together without conversion. Suncor submitted that Enbridge's approach ignores currency, and therefore value. Suncor submitted that this is evident in the five step calculation in Enbridge's opening statement.

Suncor, in walking through the five steps of the calculation, highlighted that Enbridge claimed that the revenue for the Canadian portion of the Project is collected in CAD. Suncor argued that this requires that the revenue from the Line 3 surcharge remaining after applying the FERC methodology to the U.S. portion must be converted to Canadian currency. Suncor asserted that Enbridge also suggests that this exchange rate should be par. Suncor also submitted that at the time of the Class IV cost estimate Enbridge's own calculations used an exchange rate of 1.10 CAD = 1.00 USD for the U.S. costs in the Canadian portion. Suncor argued that it simply cannot be one rate for one purpose and another for a different purpose.

Suncor argued that revenues must match costs because there is a relationship between return, capital costs for which the shippers are exposed, and the surcharge. Suncor stated that Enbridge agreed with this proposition in its testimony and also agreed that for an ROE to have a meaningful value, the net income and shareholder equity components would need to be in the same currency.

Suncor stated that its concern is that Enbridge's ROE for the Project is actually increasing because of the approach and methodology that Enbridge has employed in calculating the change in capital costs. Suncor argued that Enbridge calculates a toll in USD that is intended to provide a defined return on costs. Suncor argued that, importantly, some of these costs incurred are in CAD and are devalued relative to the USD but not converted to USD, which will lead Enbridge to recover an artificially high return relative to the actual costs incurred. Suncor submitted that this is not logical or reasonable.

Suncor argued that the surcharge must reflect the actual change in capital costs and that in either approach advocated by Enbridge revenues do not match costs and, therefore, the 75/25 allocation in the CCRS provision is not respected. Suncor stated its view that this is not just and reasonable or commercially sensible. On this basis alone, Suncor argued that Enbridge's R&V Application should be dismissed.

Suncor requested that the Board dismiss Enbridge's application and asked the Board to direct Enbridge to calculate the Class IV cost estimates in USD in order to match the currency of the Line 3 surcharge to ensure that tolls are just and reasonable.

3. Views of the Board

The Board finds that it erred in its 29 October 2015 Decision and has decided to rescind it in its entirety.

The Board is of the view that the process that led to its 29 October 2015 Decision did not provide sufficient opportunities for evidence to be filed and tested by parties. It is the Board's view that the process should have allowed for the filing of evidence, the asking of information requests by parties, potential cross-examination and final argument. By not allowing for these steps and by not actively seeking additional information, the Board did not have the complete evidentiary record required to make its Decision. The process lacked the thoroughness and fairness required for the Board to make a clear and informed decision. The Board did not have a full understanding of the issues when it made its findings which led to its Decision and the direction to Enbridge to recalculate the surcharge adjustment. The Board should have allowed for a process to gather evidence to have an understanding of the issues. However, in making the findings it did, and in directing Enbridge as it did, without having the evidentiary record necessary to support those findings and direction, the Board erred.

Of note is that when the Board decided and directed Enbridge as it did in its Decision, the Board did not impose the direction to make the tolls just and reasonable. The Board always maintained that the Toll Principles, as approved in August 2014, were an appropriate basis for the toll surcharge to be just and reasonable for the 15-year term. The Board's concerns lay in the manner in which Enbridge had calculated the cost estimates. The Board did not understand how these costs had been calculated and should have sought evidence to get this understanding. With the evidence that has been provided during the review and variance proceeding, the Board now understands how the surcharge and its adjustment were calculated and finds that the negotiations that led to these calculations produces a result that is fair, reasonable, and appropriate.

Therefore, after considering the evidence provided by both parties in this review and variance application, the Board finds it erred in its 29 October 2015 Decision in making the findings it did and in consequently directing Enbridge to recalculate as it did. Consequently, the Board has decided to rescind its Decision in its entirety.

The Board is persuaded by submissions regarding the negotiation process for the IRS. The evidence shows that the RSG consists of sophisticated parties with familiarity of the Enbridge system, the RSG Agreement, and the CTS, which has been in effect since 2011. Both Suncor and Enbridge agreed that the negotiation process by which the IRS was arrived at complied with the terms of the CTS and RSG Agreement, although some timelines were shortened as agreed to by the RSG and Enbridge.

The Board notes that no party raised any issue in this proceeding with the process that led to the approval of the Toll Principles by the RSG on 26 February 2014 and the approval by the Board on 25 August 2014. The Board accepts that the parties negotiated in good faith in the attempt to reach a mutually satisfactory resolution. Therefore, the Board finds that the process by which the IRS was approved was fair and met the requirements of the CTS and RSG Agreement.

The Board understands that the purpose of a long-term settlement such as this one is to share risk. Enbridge and the RSG entered into the negotiation of the IRS with a goal of meeting their own self-interests. Both came prepared to negotiate and were knowledgeable of the process. This was not a new process. RSG members were given the opportunity to ask questions and to provide input into the terms of the IRS, and, as mentioned earlier, there was an element of give and take, as there is with any negotiation. In this case, the RSG members' goal was to achieve toll certainty and toll stability for the term of the IRS, and Enbridge's goal was to earn an ROE that compensated it against the risks it took on.

In examining the evidence on this record, the Board notes that at the time the RSG voted to approve the IRS, the Unclassified Total Capital Costs were estimated for the Canadian portion of the costs in CAD and for the U.S. portion of the costs in USD. This approach was known to all parties. The Board also notes that parties were aware of how the surcharge would be adjusted within a range, as set out in Appendix C of the IRS, once the change in capital costs between the Unclassified and the Class IV cost estimates was known. The exchange rates were fluctuating at the time that the RSG was first presented with the Unclassified total capital cost estimate and further fluctuations in the exchange rate would not have been unforeseen by the sophisticated parties involved.

The Board recognizes that there may be different approaches proposed by parties when negotiating a settlement. The Board notes that, in this case, the method for assigning revenues to the Canadian portion was not novel to the RSG members as it has been used for over six years under the CTS. What is important to the Board is whether the settlement, as a whole, provides a basis for the surcharge to be just and reasonable.

The Board is persuaded by Enbridge's evidence of assigning revenue first to the U.S. portion of the Line 3 system and then applying the residual revenue to the Canadian portion of the costs. The Board notes Suncor's argument that revenues must match costs and that currency matters. However, in this case, the surcharge was not based on cost-of-service but rather it was negotiated.

Based on the evidentiary record that is now before it, the Board finds that the approach taken by Enbridge in calculating the surcharge adjustment does not contravene the terms as set out in the IRS. The RSG voted on the IRS, which contained the CCRS provision, and in the Board's assessment of the initial Toll Principles application, it was found that the Toll Principles would result in just and reasonable tolls. With the conclusion of this review and variance process, and the evidence gathered, the Board finds that the evidence does not demonstrate that the adjusted surcharge, as calculated by Enbridge, would result in unjust or unreasonable tolls.

Timing to make a complaint

The Board was not convinced by Enbridge's argument that Suncor's complaint should be given less weight or dismissed because it did not file its complaint earlier (in a timely manner according to Enbridge). The Board is of the view that a shipper has the right to raise an issue at any time if it has concerns that tolls are not just and reasonable, even if that concern is not timely or is in relation to a negotiated settlement. In RH-1-2011, the Board stated:

> The Board is of the view that any differences of opinion that may arise in respect of proposed changes can best be resolved through mutual discussion and negotiation among all persons with an interest in the outcome. The Board expects that all interested persons will work diligently to reach agreement. However, should agreement not be reached, persons with outstanding issues have the option to seek resolution by the Board.[5]

Level of detail required for settlements

Enbridge contended in its final argument that the IRS is a multi-party settlement and not a contract. Had it been a contract, Enbridge explained that it would have been hundreds of pages long with appendices to spell out all the details to help prevent any ambiguity on any issue. While the Board acknowledges this level of detail could be burdensome to include in a toll settlement and would actually not necessarily be desirable, the Board is of the view that key points to a settlement that underpin the calculation of tolls, as well as novel approaches to the calculation of tolls, revenue, or costs, should be outlined in sufficient detail to ensure that all parties involved are aware of the terms and how they impact tolls. What is a "key point" or a "novel approach" in a given settlement can depend on various circumstances that may surround the settlement. The Board notes that the Guidelines for Negotiated Settlements of Traffic, Tolls and Tariffs require that a settlement provide sufficient detail such that the Board is able to independently assess the justness and reasonableness of a settlement, regardless of whether or not the settlement is opposed.

Direction

The Board acknowledges Suncor's concerns that Enbridge's ROE for the Project may increase because of the approach that Enbridge has employed in calculating the change in capital costs. The Board is of the view that oversight and transparency are required because of the uniqueness and possible financial implications of Enbridge's approach to calculating the change in total capital costs. Further, the Board is of the view that the availability of reliable, transparent information contributes to an efficient, well-functioning market.

Therefore, the Board directs Enbridge to provide its shippers, within 90 days of the end of Enbridge's fiscal year, on an annual basis, the ROE applicable to the Canadian portion of Line 3, including the data and calculations required to determine the ROE. The information should indicate the currency and any exchange rates used in the ROE's calculation. The information should also show, if possible, the formula and relevant calculations used, including any relevant information regarding the exchange rates used to convert revenue and costs in those calculations.

Should any member of the RSG or shipper on Line 3 be concerned that the toll surcharge is not just and reasonable in the future, that person may come before the Board to express its concerns and seek a resolution of these concerns. The Board is not making any determination at this time as to the level the ROE would have to reach for the surcharge to no longer be just and reasonable. The onus would be on the person coming before the Board to demonstrate that the surcharge is no longer just and reasonable.

[5] 9 February 2012 Reasons for Decision, Enbridge Southern Lights GP Inc. RH-1-2011. PDF page 45 [A2Q0E0]

The Board directs Enbridge to serve a copy of this letter on Mainline shippers and interested parties.

4. Disposition

The foregoing constitutes our Reason's for Decision in respect of the R&V Application heard by the Board in the RH-001-2017 proceeding.

L. Mercier
Presiding Member

R.R. George
Member

S. Parrish
Member