



File OF-Tolls-Group1-T211-2013-01 01
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Dear Mr. Pelletier, Ms. Davis and Mr. Yates:

1 May 2013 Application for Review and Variance Application (Review Application)

This letter provides the reasons for the National Energy Board's (Board) decision to dismiss the Review Application filed by TransCanada PipeLines Limited (TransCanada). The Board released its decision on 11 June 2013 and indicated that its reasons for doing so would follow.

I. Overview of reasons for dismissal

Primarily, TransCanada grounds its Review Application on the assertion that the Board did not treat it fairly in the proceeding that led to the RH-003-2011 Decision (Decision). Over 70 parties participated in that proceeding, which took place over approximately 16 months¹ and involved 72 oral hearing days. TransCanada asserts that the Board breached the duty to be fair² because the Board issued the Decision without providing TransCanada the opportunity to submit further and additional evidence on how the findings made in the Decision would affect TransCanada. TransCanada relied on *Flamborough (Town) v Canada (National Energy Board)*³ in support of this submission.

The Review Application fails because *Flamborough* does not require the Board to disclose its findings in advance of issuing a decision.

¹ Application filed: 1 September 2011. Argument completed: 5 December 2012.

² In these reasons, the Board refers to the "duty to be fair" or "procedural fairness" as an overarching term that incorporates all of the rules of natural justice that apply to administrative decision makers; See: David Philip Jones, Q.C. and Anne de Villars, Q.C., *Principles of Administrative Law*, 5th ed., (Toronto: Carswell, 2009) at p. 254.

³ *Flamborough (Town) v Canada (National Energy Board)*, (1987), 81 N.R. 229 (F.C.A.) [Flamborough].

The Decision is based on a toll proposal made by the Canadian Association of Petroleum Producers (CAPP). That proposal was disclosed on the record and TransCanada does not claim it was denied any procedural right with respect to it. Instead, TransCanada contends the Decision is different from CAPP's toll proposal because the Decision does not make identical assumptions as that proposal. In the Board's view, the singular fact that the Decision does not make identical assumptions as CAPP's toll proposal is not sufficient to trigger a breach of the duty to be fair. It was disclosed early in the proceeding that assumptions underlying CAPP's toll proposal could be changed, consistent with whatever findings the Board eventually made in the Decision. All findings made in the Decision, including findings that differ from the assumptions underlying CAPP's toll proposal, were based on the record.

A review of the record indicates that TransCanada had the opportunity: (i) to seek further disclosure from CAPP and other intervenors through written information requests (written interrogatories); (ii) to test CAPP's and other intervenors' evidence through cross-examination; (iii) to respond to that evidence by filing reply evidence – which TransCanada did twice, once before cross-examining the intervenors, and once after; and (iv) to argue against others in argument-in-chief and reply argument. TransCanada always had the final opportunity or the last word to respond to CAPP and other intervenors in evidence and argument.

In the Board's view, the RH-003-2011 proceeding was fair.

II. Background

On 1 September 2011, TransCanada and others applied to the Board for approvals required to implement a restructuring of services on TransCanada's Mainline pipeline system (Mainline) and for orders fixing tolls on that system (Restructuring Application). The Board set the Restructuring Application down for an oral public hearing. The hearing process gave TransCanada and intervenors the opportunity: (i) to solicit information in writing from other hearing participants; (ii) to file direct and reply evidence in writing; (iii) to cross-examine opposing parties; and (iv) to argue the merits of their cases.

TransCanada and some of the intervenors took advantage of each of these procedural steps. The process did not give TransCanada, or any of the intervenors, advance notice of the findings the Board intended to make in the Decision or the opportunity to file additional evidence and submit argument on how those findings would affect them.

On 27 March 2013, the Board released the Decision. The Decision:

- fixes the Mainline firm transportation service toll from Empress, Alberta (AB) to Dawn, Ontario (ON) at \$1.42/GJ for a four and a half year period. Tolls for nearly all other paths and services were derived from the Empress, AB to Dawn, ON toll;
- establishes a toll stabilization adjustment account. The toll stabilization adjustment account is a deferral account designed to capture differences between forecast Mainline costs and revenues during a four and a half year period. At the end of that period, the toll stabilization adjustment account balance is forecast to be zero;

- implements a long-term adjustment account and directs TransCanada to add fixed amounts annually to that account. The long-term adjustment account enables the toll stabilization adjustment account to zero out, on a forecast basis, at the end of the period during which tolls are fixed;
- confers greater pricing discretion on TransCanada for interruptible transportation service and short-term firm transportation service;
- awards TransCanada a return on equity of 11.5 per cent on a 40 per cent deemed equity thickness and applies this return to the equity portion of the toll stabilization adjustment account;
- awards TransCanada carrying charges on the toll stabilization adjustment account equal to the return on rate base, which reflects the Mainline's cost of capital; and
- directs TransCanada to implement the Decision by 1 July 2013.

On 1 May 2013, TransCanada filed the Review Application pursuant to subsection 21(1) of the *National Energy Board Act* and Part III of the *National Energy Board Rules of Practice and Procedure, 1995*.⁴ TransCanada requested that the Board review and then vary the Decision and Order TG-002-2013.

The Board considers applications for review and variance in two stages. At the first stage, the Board considers whether the applicant has raised a doubt as to the correctness of the Board's decision or order. If the applicant is successful at that stage, the Board then proceeds to the second stage, where it reviews the decision or order on its merits.

On 9 May 2013, the Board set out a process for how it would hear the threshold question of whether TransCanada raised a doubt as to the correctness of the Decision. A number of interested parties commented on whether the Review Application met that threshold. TransCanada responded to those comments on 31 May 2013.

On 11 June 2013, the Board issued a letter decision dismissing the Review Application and indicated that its reasons for doing so would follow.

III. Findings and analysis⁵

In the Review Application, TransCanada identified four grounds that it submitted raise a doubt as to the correctness of the Decision:⁶

1. the Board erred in law by denying TransCanada natural justice and procedural fairness;
2. there are facts that were not placed in evidence in the original proceeding, and that were not discoverable by reasonable diligence, because the Board denied TransCanada natural justice and procedural fairness;
3. the Board made incorrect findings of fact; and
4. circumstances have changed and new facts have arisen since the close of the original proceeding.

⁴ S.O.R./95-208.

⁵ For the purposes of these reasons, the Board has applied the standard of review proposed by TransCanada.

⁶ Review Application, paras. 19-22, 25-27, 52, 56-80.

These reasons examine each ground. They address Grounds #1 and #2 together. Ground #2 is subsumed in the first Ground because it depends on a breach of the duty to be fair.

A. GROUNDS #1 AND #2: THE BOARD BREACHED ITS DUTY TO BE FAIR

TransCanada acknowledges that most of the concepts that form part of the Decision were discussed on the record of the proceeding⁷ and that TransCanada was not procedurally prejudiced by CAPP's toll proposal.⁸ Rather, TransCanada submits that the Board breached its duty to be fair because the Decision implements a tolling model that in its totality was not disclosed on the record of the proceeding. In these circumstances, TransCanada contends that, to discharge its duty to be fair, the Board was required to disclose its intention to make the findings in the Decision in advance of issuing the Decision.

In support of this argument, TransCanada makes three submissions:

1. a component of the Decision was never discussed in the RH-003-2011 proceeding;⁹
2. the Decision is different from CAPP's toll proposal because the Decision does not replicate CAPP's assumptions;¹⁰ and
3. the Federal Court of Appeal's judgment in *Flamborough* compelled the Board to indicate its intention to make the findings in the Decision in advance of issuing the Decision.

1. A component of the Decision was not discussed during the proceeding

TransCanada identified a particular aspect of the Decision that it submitted "was never raised in the hearing by any intervenor or the Board and was never discussed on the record." TransCanada submitted it was never suggested a toll would be fixed on a single path at a competitive level and then used as the basis for tolls on all other paths of the system by adjusting the unit costs associated with it.¹¹

The Board is of the view that TransCanada's submission is inaccurate. In its direct written evidence filed on 9 March 2012, CAPP proposed setting a toll on one path (NOVA Inventory Transfer (NIT) to 3,000 km), which matched the toll level for that path in TransCanada's Restructuring Application.¹² CAPP's objective was for the toll levels in its proposal to match, or be similar to, the toll levels proposed by TransCanada in the Restructuring Application because

⁷ TransCanada Reply Submissions, p. 4.

⁸ TransCanada Reply Submissions, p. 4.

⁹ TransCanada Reply Submissions, p. 4.

¹⁰ TransCanada Reply Submissions, p. 4-5.

¹¹ TransCanada Reply Submissions, p. 4-5.

¹² Ex. C2-6-3, Evidence of Mark Drazen and Ron Mikkelsen, Drazen Consulting Group Inc. on behalf of CAPP, A63, p. 44; Evidence of Drazen Consulting Group, Inc. on behalf of the Canadian Association of Petroleum Producers, Ten Year Forecast of Cost Recovery Based Case, p. 4; Ex. C2-8-2, Ex. C2-8-2, Responses of the Canadian Association of Petroleum Producers to information requests from the National Energy Board, CAPP response to NEB-CAPP 1.15, p. 35; Ex. C2-8-2, Responses of the Canadian Association of Petroleum Producers to information requests from TransCanada PipeLines Limited, CAPP response to TCPL-CAPP 1.18, p. 87-88; 50 T 23803.

TransCanada considered those levels to be competitive.¹³ TransCanada had the opportunity to seek further information about this evidence and to test it by, among other things, submitting information requests (written interrogatories). TransCanada did solicit further information from CAPP, and in particular, information “to understand the toll calculations and toll impact of various paths from the CAPP Proposal.”¹⁴ In its response to TransCanada, CAPP made clear that it derived system-wide tolls from the toll on one path on the basis of unit costs associated with that reference path (NIT to 3,000 km).¹⁵

TransCanada did not challenge how CAPP derived system-wide tolls from the toll on a single path even though that information was disclosed to TransCanada in the proceeding. TransCanada chose not to pursue the matter in cross-examination, reply evidence and argument although it had the opportunity to do so.

The Decision uses the same toll fixing approach as CAPP, but with a different reference path. The Decision uses Empress, AB to Dawn, ON instead of CAPP’s chosen path of NIT to 3,000 km. The reasons for the different path are set out in the Decision.¹⁶ The following table illustrates the method proposed by CAPP to set tolls, compared to the method set out in the Decision.

Table 1: Firm transportation tolls, comparison of conceptual characteristics

Characteristic	CAPP Proposal	Decision
Reference Path	NIT to 3,000 km	Empress, AB to Dawn, ON ¹⁷
Rationale for toll level on reference path	Competitive, matching Restructuring Application tolls	Competitive
Derivation of system tolls	Yes	Yes
Mechanism of Derivation	Unit costs	Unit costs
Basis for system-wide tolls	Cost-based	Cost-based

Accordingly, in the Board’s view, TransCanada’s contention that a component of the Decision was never discussed on the record is inaccurate.

¹³ Ex. C2-6-2, Written Evidence of the Canadian Association of Petroleum Producers, A2, p. 4, lines 13-14, A4, p. 6, lines 19-21, A18, p. 24, lines 18-20, A25, p. 41, lines 26-28; Ex. C2-6-3, Evidence of Mark Drazen and Ron Mikkelsen, Drazen Consulting Group Inc. on behalf of CAPP, A7, p. 6, A79, p. 55 Ex. C2-6-11, Evidence of Drazen Consulting Group, Inc. on behalf of the Canadian Association of Petroleum Producers, Ten Year Forecast of Cost Recovery Based Case, p. 4; Ex. C2-6-15, Written Evidence of Ren Orans, Energy and Environmental Economics, Inc. on behalf of CAPP, A45, p. 38, lines 11-13; Ex. C2-8-2, Responses of the Canadian Association of Petroleum Producers to information requests from the National Energy Board, CAPP response to NEB-CAPP 1.15, p. 35.

¹⁴ Ex. B16-3, Applicants Information Requests to CAPP, TransCanada-CAPP 1.18, p. 12.

¹⁵ Ex. C2-8-2, Responses of the Canadian Association of Petroleum Producers to information requests from TransCanada PipeLines Limited, CAPP response to TCPL-CAPP 1.18, p. 87-88.

¹⁶ Decision, p. 222.

¹⁷ The distance between Empress, AB and Dawn, ON is 2613 km on the Mainline.

2. The Decision makes different assumptions than CAPP

TransCanada identifies two differences between findings made in the Decision and assumptions made in CAPP’s toll proposal. First, it says that the Decision gives TransCanada greater discretion to price interruptible transportation service and short-term firm transportation service than what CAPP proposed.¹⁸ Second, it submits that the Decision justified annual contributions to the long-term adjustment account differently than CAPP.¹⁹ Had the Decision made identical assumptions as CAPP’s toll proposal, TransCanada indicates that the Board would not have breached its duty to be fair.²⁰

In the Board’s view, TransCanada’s submission fails because, as a matter of fact, it was never contemplated that the Board would replicate CAPP’s assumptions in the Decision. CAPP used specific assumptions to demonstrate proof of concept for its toll proposal. Differences between the findings in the Decision and the assumptions in CAPP’s toll proposal were based on the record.

i. CAPP’s proposal was a concept for toll setting; changes to it were disclosed

Early in the proceeding CAPP disclosed that its toll proposal was a “concept” for setting tolls and that specific assumptions were made – such as the \$100 million annual contribution to the long-term adjustment account – to demonstrate proof of concept. CAPP made clear that the assumptions could be changed, consistent with whatever findings the Board would ultimately make in the Decision.²¹

Compared to the assumptions in CAPP’s toll proposal, the findings in the Decision: (i) award TransCanada a higher return on equity, including higher carrying charges on amounts in the toll stabilization adjustment account; (ii) confer greater discretion for TransCanada to price interruptible transportation service and short-term firm transportation service; and (iii) require slightly lower annual contributions to the long-term adjustment account. A comparison between some of the assumptions used by CAPP and the findings made in the Decision is provided in the following table:

Table 2: Comparison of assumptions in CAPP’s toll proposal and findings in the Decision

Characteristic	CAPP Proposal	Decision
Multi-year fixed toll	Yes – 5 years	Yes – 4 ½ years
Allowed return on equity	9.5%	11.5% + x% ²²

¹⁸ TransCanada Reply Submissions, p. 5.

¹⁹ TransCanada Reply Submissions, p. 4-5.

²⁰ TransCanada Reply Submissions, p. 4.

²¹ Ex. C2-6-3, Evidence of Mark Drazen and Ron Mikkelsen, Drazen Consulting Group Inc. on behalf of CAPP, A7, p. 6, lines 9-16; Ex. C2-8-2, Responses of the Canadian Association of Petroleum Producers to information requests from TransCanada PipeLines Limited, CAPP Response to TCPL-CAPP 1.3, p. 49-50; 50 T 23780.

²² The +x% refers to the incentive mechanism established in the Decision.

Characteristic	CAPP Proposal	Decision
Carrying charges, TSA ²³	2.5%	9.0% ²⁴
Annual additions to the LTAA ²⁵	\$100 million	\$94.9 million
Discretion to price certain services	Same as Restructuring Application	More than Restructuring Application

ii. The potential for greater pricing discretion was disclosed

CAPP's evidence was that its proposal used the same assumptions as the Restructuring Application in respect of the discretion to price interruptible transportation service and short-term firm transportation service. The possibility for TransCanada to have greater discretion to price these services than what was proposed in the Restructuring Application was disclosed early on in the proceeding. For example, the Association of Power Producers of Ontario, in its 9 March 2012 written direct evidence, proposed that there be no boundaries on the pricing of interruptible transportation service and short-term firm transportation service.²⁶ After this disclosure, numerous procedural steps followed and there was much discussion on this topic on the record of the proceeding.²⁷

iii. The rationale for annual additions to the long-term adjustment account was disclosed

Part of CAPP's rationale for annual additions to the long-term adjustment account was that the revenue requirement impact of those additions would be similar to the revenue requirement impact of TransCanada's proposed reallocation of accumulated depreciation.

CAPP also explained that its proposed annual additions to the long-term adjustment account enable the toll stabilization adjustment account to reach a zero balance during the time period in which firm transportation tolls are fixed.²⁸ CAPP disclosed that the amount of annual additions to the long-term adjustment account could differ from what it suggested and that the precise amounts placed in that account would depend on the Board's ultimate findings in the Decision.²⁹ For example, if the Board adjusted TransCanada's return on equity above CAPP's recommended level, then the amount of the annual additions to the long-term adjustment account could be

²³ Throughout the proceeding, TSA was used to abbreviate "toll stabilization adjustment account."

²⁴ The Decision established carrying charges equal to the return on rate base which varies from 9.03% to 9.19% depending on the year.

²⁵ Throughout the proceeding, LTAA was used to abbreviate "long-term adjustment account."

²⁶ Ex. C1-7-2, Written Evidence of Dr. Andrew Safir on behalf of the Association of Power Producers of Ontario, A36, p. 22, lines 11-14.

²⁷ See, for example: 3 T2869-2880; 16 T18011-18057; 16 T18066-18084; 17 T18480-18498; 17 T18523-18538; and 34 T6534-6564.

²⁸ Ex. C2-8-2, Responses of the Canadian Association of Petroleum Producers to information requests from TransCanada PipeLines Limited, CAPP Response to TCPL-CAPP 1.3, p. 49-50. See also: Ex. C2-6-2, Written Direct Evidence of the Canadian Association of Petroleum Producers, p. 7; and 50 T 23780.

²⁹ Ex. C2-8-2, Responses of the Canadian Association of Petroleum Producers to information requests from TransCanada PipeLines Limited, CAPP response to TransCanada-CAPP 1.3 p. 49-50; 50 T23782ff.

increased.³⁰ To that end, CAPP made available a mathematical model that demonstrated how its proposal functioned.³¹

Accordingly, the Board does not view the Decision as different from CAPP's proposal simply because the Decision did not justify annual additions to the long-term adjustment account as a direct substitute for TransCanada's proposed reallocation of accumulated depreciation. CAPP's justification for annual additions to that account included it being used as a mechanism to zero the toll stabilization adjustment account during the time period in which firm transportation tolls are fixed, which was the rationale for annual additions to that account adopted in the Decision.

3. *Flamborough* requires the Board to disclose its findings in advance of issuing a decision

TransCanada contends that the Board erred in law by not providing it with the opportunity to respond to the totality of the Decision by submitting additional evidence on how the findings made in the Decision affect TransCanada.³² TransCanada relied on *Flamborough* in support of this proposition. Other than *Flamborough*, TransCanada did not submit any authority or perform any analysis to support its argument that the content of the duty to be fair required the Board to disclose its intention to make the findings in the Decision in advance.

Many parties in the review proceeding asserted that *Flamborough* is inapplicable and does not stand for the proposition TransCanada asserted.

The Board agrees with these parties. *Flamborough* does not require the Board to disclose its intention to make findings in a decision, in advance of issuing the decision, to discharge the duty to be fair.

Flamborough involved an appeal of a review application dealing with an earlier Board authorization that determined the location of certain facilities. During the course of the review proceeding, the pipeline company indicated that a separate process should be held to consider conditions that would attach to the Board's authorization. The Board rejected this approach. The Board said it would impose any such conditions as it felt appropriate, without the input of the parties. In its order disposing of the review application, the Board imposed conditions that amended the original authorization. The appellant was affected by some of the conditions. It did not have a chance to provide input on what conditions should be imposed.

Flamborough requires that parties be given an opportunity to be heard on relevant matters. In *Flamborough*, both the pipeline company and an intervenor were denied the opportunity to be heard on what conditions ought to attach to a Board authorization even though both were affected by those conditions. The Court submitted the matter back to the Board to hold a fair hearing.

³⁰ Ex. C2-8-2, Responses of the Canadian Association of Petroleum Producers to information requests from the National Energy Board, CAPP response to TransCanada-NEB 1.19 p. 40-42; 50 T 23797.

³¹ Ex.C2-6-1, CAPP Cover Letter to Written Evidence March 9, 2012; 50 T 23791.

³² Review Application, paras. 63-65, 68-72, 74; TransCanada reply submissions p. 4.

The Board did not constrain TransCanada's opportunity to be heard in the RH-003-2011 proceeding. The Board did not limit TransCanada's opportunity to submit evidence or information requests, conduct cross-examination or argue. The central issue in the proceeding was how to set Mainline tolls. Unlike *Flamborough*, all had an opportunity to be heard on all matters relevant to the Decision. Indeed, TransCanada appears to admit that it was given such an opportunity insofar as it recognizes that most of the components of the Decision were discussed on the record.³³ Accordingly, in the Board's view, *Flamborough* is distinguishable from the Decision and the proceeding leading to it.

Nothing in *Flamborough* requires findings in a decision to be circulated before the decision is pronounced. *Flamborough* specifically allows the Board, as master of its own procedure, to determine how to give parties a fair hearing, and, in the Board's view, the process in RH-003-2011 constituted a fair hearing.

TransCanada's *Flamborough* interpretation is problematic for at least two additional reasons.

First, TransCanada's *Flamborough* interpretation does not promote efficiency, timeliness or finality in administrative decision making. Under TransCanada's approach, if the Board were to grant relief that were slightly different from what parties to the proceeding proposed, then the Board would be required to circulate potential findings to all the parties and receive additional evidence on those findings. If, after receiving additional evidence and hearing additional argument, the Board decided to modify its initial findings, and those modified findings did not accord with a party's supplemental evidence and submissions, then the Board would be required to circulate a second set of initial findings. The cycle has the potential to be unending.

Second, TransCanada's *Flamborough* interpretation does not incent parties to fully take advantage of their opportunity to be heard. Parties would not be encouraged to tender their best evidence responding to opposing positions until after the Board circulated its initial findings. There are potentially few consequences for parties that fail to respond to opposing positions. Parties would have an opportunity to provide further evidence and submissions at a later date, after initial findings were circulated for further evidence and submissions.

Based on the foregoing, in the Board's view, *Flamborough* does not require the Board to supply the findings made in its decisions in advance.

³³ TransCanada reply submission, p. 4.

B. GROUND #3: INCORRECT FINDINGS OF FACT

TransCanada submitted that the Board made the following two incorrect findings of fact in the Decision:³⁴

1. The Board incorrectly found that multi-year tolls resulting from the parts of the Restructuring Application that the Board approved in the Decision would not result in competitive multi-year tolls; and
2. The Board incorrectly found that a fixed long-haul toll of \$1.42/GJ together with other tolls derived from that toll, and increased pricing discretion for interruptible transportation service and short-term firm transportation service, would result in the recovery of Mainline costs over the multi-year fixed toll period in light of the magnitude of deferrals in the toll stabilization adjustment account and the long-term adjustment account.

1. Multi-year tolls resulting from the approved parts of the Restructuring Application would not result in competitive multi-year tolls

In the Decision, the Board did not implement firm transportation tolls that resulted from the elements of the Restructuring Application that the Board approved. The Board estimated that resulting toll to be \$1.86/GJ from NIT to Dawn, ON. It found that toll was not just and reasonable on a stand-alone basis, that is, without using the multi-year approach disclosed in CAPP's toll proposal. Once that finding was made, the Board found it necessary to implement a multi-year approach to reduce the long-haul firm transportation toll. This, as TransCanada notes, lowers the firm transportation toll by taking advantage of the forecast increase in throughput and the lower amount of forecast rate base.

The Decision found that a toll of \$1.42/GJ would be at the reasonable upper limit of what could be considered a competitive multi-year fixed toll for the Empress, AB to Dawn, ON path. In the Decision, the Board considered multi-year fixed tolls higher than \$1.42/GJ for the Empress, AB to Dawn, ON path. In its opinion, those tolls would exceed what it considered the reasonable upper limit of what was competitive. By necessary implication, this includes a multi-year fixed toll of \$1.52/GJ for the Empress, AB to Dawn, ON³⁵ path resulting from the aspects of the Restructuring Application that the Board approved, which TransCanada asserts the Decision never considered.

2. Multi-year fixed tolls would not result in cost recovery due to the magnitude of the deferrals

In the Board's view, TransCanada misstates the Decision's finding. The Board did not find, as a matter of fact, that the Decision would necessarily result in TransCanada recovering all of the

³⁴ Review Application, paras. 77-78.

³⁵ In the Review Application, TransCanada implements multi-year fixed tolls to lower the \$1.86/GJ toll to \$1.52/GJ. However, TransCanada arrives at the \$1.52/GJ toll by, among other things, removing from recovery in that toll \$50 million in costs associated with pipeline abandonment. TransCanada proposes to recover these costs, starting in 2015, through the use of a surcharge. Accordingly, the toll proposed in the Review Application is a multi-year fixed toll of \$1.52 + x, where x is the toll surcharge associated with recovering abandonment costs.

Mainline's costs. Rather, it was the Board's opinion that the tolls resulting from the Decision would provide TransCanada with a reasonable opportunity to recover Mainline costs.³⁶

In the Board's view, whether the Decision provides TransCanada a reasonable opportunity to recover costs is a question of opinion. Disagreement with that opinion is not a fact. The Board's opinion that TransCanada has a reasonable opportunity to recover costs was based on a combination of factors, including but not limited to:³⁷ (i) the expected rise in throughput, (ii) the specific toll levels approved, and (iii) the pricing flexibility for discretionary services. Disagreement with the Board's opinion is not sufficient to raise a doubt as to the correctness of the Decision. As discussed in the following section of these reasons, the Board was aware of the magnitude of the deferrals and found them to be necessary and appropriate.

C. GROUND #4: CHANGED CIRCUMSTANCES OR NEW FACTS

TransCanada submitted that the following changed circumstances or new facts raise a doubt as to the correctness of the Decision:

1. The magnitude of the deferrals in the toll stabilization adjustment account and long-term adjustment account;³⁸
2. The level of estimated pipeline abandonment costs;³⁹ and
3. The strength of the Eastern Triangle, including the competitiveness of eastern short-haul tolls, strength of short-haul contracting and current requests for further capacity.⁴⁰

1. Magnitude of the deferrals

The potential amount of deferrals was discussed at length on the record of the RH-003-2011 proceeding. It was one of the concerns that TransCanada had with CAPP's toll proposal.⁴¹ The Board was aware of the magnitude of the forecast deferrals under the Decision.⁴² The Board tested how different assumptions about TransCanada's revenue requirement would affect toll and deferral levels under CAPP's toll proposal.⁴³ CAPP also provided a mathematical model that allows the amount of expected deferrals to be computed. The amount of forecast deferrals provided by TransCanada in the Review Application does not raise a doubt as to the correctness of the Decision. The Board considered and anticipated the amount of deferrals in the Decision.

³⁶ Decision, p. 222-223 and 233.

³⁷ Decision, p. 233.

³⁸ Review Application, para. 79.

³⁹ Review Application, para. 79.

⁴⁰ TransCanada Reply Submissions, p. 8.

⁴¹ See, for example, Ex. B21-2, Written Reply Evidence of TransCanada, p. 20, line 14ff.

⁴² Decision, p. 237.

⁴³ Ex. C2-8-2, Responses of the Canadian Association of Petroleum Producers to information requests from the National Energy Board, NEB-CAPP 1.19 p. 40-42.

2. The estimated level of pipeline abandonment costs

TransCanada submitted that the amount of estimated pipeline abandonment costs for the Mainline had changed since the RH-003-2011 proceeding closed. It submitted that its new estimate for pipeline abandonment costs raises a doubt as to the correctness of the Decision and that the Decision should be varied to account for this changed circumstance or new fact.⁴⁴

It is the Board's view that TransCanada's request is premature. While TransCanada's overall abandonment cost estimate for Mainline facilities may have increased, the amount that TransCanada will be required to set aside and collect each year from natural gas shippers remains uncertain. The annual amount will be determined pursuant to the Board's MH-001-2013 proceeding, which is ongoing. That proceeding will establish, among other things, the time period during which TransCanada must collect funds to abandon Mainline facilities, which can affect the amount that TransCanada must collect annually.

Circumstances may materially change before TransCanada is required to start setting aside funds for Mainline abandonment in 2015. It is possible that throughput, discretionary revenues, or firm transportation contracts will be well above or below forecast levels. It is also possible that TransCanada may apply to the Board to convert some of the Mainline to oil service. If it is successful in such an application, then the amount that TransCanada must collect annually from gas shippers for Mainline abandonment may be affected.

Based on the foregoing, TransCanada has failed to raise a doubt as to the correctness of the Decision as it relates to the estimated level of pipeline abandonment costs. It is not clear that the annual amount that TransCanada must collect for pipeline abandonment, starting in 2015, will be materially different from what it forecast during the RH-003-2011 proceeding.

TransCanada also asked the Board to confirm the use of a surcharge to collect funds for abandonment. The Board declines to do so. It is premature to confirm that a surcharge should be imposed to collect funds. The specific collection mechanism to be used by TransCanada to collect funds will be determined by the Board in the MH-001-2013 proceeding.

3. The strength of the Eastern Triangle

TransCanada submitted that new information about the Eastern Triangle raises a doubt as to the correctness of the Decision. The new information is in respect of the strength of demand for transportation service on that segment of the Mainline. In the Board's view, the information provided does not raise a doubt as to the correctness of the Decision. The Decision recognized that the Eastern Triangle is the strongest segment of the Mainline. This is reflected in the approved economic planning horizon for the eastern triangle (2050) as compared to the economic planning horizons for the Prairies (2036) and Northern Ontario Line (2020) segments.⁴⁵ The information provided by TransCanada in respect of the Eastern Triangle segment does not raise a doubt as to the correctness of the Decision; it confirms the findings made therein.

⁴⁴ Review Application, paras. 210-217.

⁴⁵ Decision, p. 54.

D. OTHER MATTERS

1. Arbitrary tolls

TransCanada contended that system-wide firm transportation tolls resulting from the Decision were arbitrary because the tolls would neither be cost-based nor competition based.⁴⁶

System wide firm transportation tolls remain cost based although they are determined with reference to the competitive toll level of the Empress, AB to Dawn, ON path.⁴⁷ Annual additions to the long-term adjustment account lower the Mainline's revenue requirement to enable the system wide firm transportation toll, combined with tolls for other services, to recover the multi-year revenue requirement on a forecast basis during the time period in which tolls are fixed.⁴⁸ The firm transportation toll level for each Mainline path is set by using the adjusted unit costs method set out in the Decision, which reflects the approved Mainline cost allocation.

The long-term adjustment account contemplates recovery of current costs in future periods through amortization of amounts therein. Because amounts in the long-term adjustment account earn the allowed rate of return on rate base, TransCanada has the opportunity to recover its cost of capital associated with the deferred recovery of its Mainline investment and to be kept whole from a cost perspective.

Based on the foregoing, TransCanada has failed to raise a doubt as to the correctness of the Decision on the basis that the tolls are arbitrary.

2. Pricing of certain services

TransCanada contended that the Board erred in setting the tolls for the following services offered on the Mainline: (i) firm transportation-short notice service and short notice balancing service (ii) Union Dawn to Dawn service and (iii) delivery pressure service.⁴⁹

In the Board's view, TransCanada has not raised a doubt as to the correctness of the Decision as it applies to pricing these services. The Decision emphasizes that predictability and stability were key objectives in adopting the fixed toll approach. The methodology prescribed by the Decision for these services is consistent with those objectives. As Tenaska Marketing Canada noted in its submissions on the Review Application, the fact that tolls were calculated in a different manner before the Decision is not sufficient justification to maintain the pre-Decision approach.

⁴⁶ Review Application, paras. 108-110.

⁴⁷ Reasons for (i) using competitiveness as a criterion to set just and reasonable Mainline firm transportation tolls and (ii) deferring recovery of a portion of the Mainline's multi-year revenue requirement and (iii) the importance of the Empress, AB to Dawn, ON path are set out at length in the Decision.

⁴⁸ During the term of the multi-year fixed tolls, annual revenue surpluses or deficits would be placed in the toll stabilization adjustment account. The balance in this account is expected to be zero at the end of the multi-year fixed toll period.

⁴⁹ Review Application, paras. 178-207.

3. Miscellaneous surcharges for other mandates

TransCanada asked the Board to impose surcharges to collect funds for mandates that are outside of TransCanada's control.⁵⁰

In the Board's view, it is premature to designate surcharges to collect funds for (unspecified) mandates outside of TransCanada's control. It remains to be seen (i) what, if any, mandated costs will be imposed on TransCanada during the time period in which tolls are fixed, (ii) whether those costs and their magnitude were contemplated when the Decision was issued and (iii) whether an additional mechanism for recovery of those costs will be required.

4. Alternative tolls

As the Board found that TransCanada has not raised a doubt as to the correctness of the Decision, it is not necessary to rule on the alternative tolls proposed in the Review Application.

5. Implementation date

TransCanada requested that the Board change the implementation date of the Decision from 1 July 2013 to 1 November 2013. It submitted that 1 November 2013 best meets the intent of the Decision and will better match the timing of the commencement of reduced firm transportation revenues with the timing of marketing opportunities.⁵¹

In the Board's view, the intent of the Decision includes setting just and reasonable firm transportation tolls. TransCanada's proposed implementation date would allow it to charge tolls that are higher than what the Board determined to be just and reasonable. Delayed implementation of firm transportation tolls would be contrary to the Decision's intent. Insofar as marketing opportunities are concerned, the Decision provides TransCanada with the ability to capture market opportunities year-round, including any that may take place in the summer months. Accordingly, the Board denies TransCanada's request.

6. Tariff amendments

TransCanada proposed a number of tariff amendments in the Review Application.⁵² TransCanada did not suggest any of the tariff amendments proposed in the Review Application during the RH-003-2011 proceeding. The proposed tariff amendments are better characterized as amendments to an existing service, and therefore the Board has decided to hear TransCanada's proposed tariff amendments pursuant to the streamlined process set out in the Decision and to modify that process to allow for cross-examination.

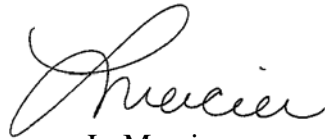
⁵⁰ Review Application, paras. 208-209, 218.

⁵¹ Review Application, paras. 219-223.

⁵² Review Application, paras. 124-176.

E. DISPOSITION

The foregoing constitutes our Reasons for Decision in dismissing TransCanada's Review Application.



L. Mercier
Presiding Member



R.R. George
Member



J. Gauthier
Member

Calgary, Alberta
July 2013