



LETTER DECISION

File OF-Tolls-Group1-T211-2011-04 04
5 September 2013

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Dear Mr. Smellie, Ms. Jamieson, Mr. Yates and Ms. Davis:

**Complaint by BP Canada Energy Company ULC (BP Canada) regarding
TransCanada PipeLines Limited (TransCanada) Daily Existing Capacity Open
Season for FT, FT-SN and FT-NR Services (BP Canada Complaint or the
Complaint)**

On 2 July 2013, BP Canada complained about a recent change that TransCanada made to the Canadian Mainline Gas Transportation Tariff (Mainline Tariff or Tariff) and, in particular, to the terms and conditions under which a shipper can access and contract for firm transportation (FT), firm transportation-short notice (FT-SN) and firm transportation non-renewable (FT-NR) service.

On 11 July 2013, the Board established a comment process to hear the BP Canada Complaint. Union Gas Limited (Union), Tenaska Marketing Canada, a division of TMV Corp. (Tenaska) and TransCanada provided comments pursuant to the Board's schedule.

Views of BP Canada

BP Canada complained that TransCanada, in its Daily Existing Capacity Open Season posting dated 14 June 2013, added specific end dates (31 October 2014 and 31 October 2015) as caveats to the minimum term under which FT service is offered on the TransCanada's mainline pipeline system (the Mainline). BP Canada submitted that prior to this change the only term requirement for qualifying bids was that they be for a minimum term of one year, and for terms greater than one year, be in full month increments. This term requirement is set out in section 4.2 of the Mainline Transportation Access Procedure (TAP). BP Canada noted that the addition of specific end dates forces a shipper requiring service for a period greater than one year to contract for a term in excess of its requirements. BP Canada noted that, in some cases, a shipper could be forced to contract for a minimum term of 23 months.

BP Canada contended that TransCanada is unilaterally changing the terms of Mainline FT service through its open season postings. The result, it submits, is that parties are denied recourse to FT service on the terms and conditions of the Tariff.

BP Canada asserted that changes to the term for FT service are beyond the scope of TransCanada's authority. BP Canada submitted that neither the Mainline Tariff nor the Board's RH-003-2011 Decision confer authority upon TransCanada to limit access to FT service by imposing commencement and end dates for FT service in its open seasons.¹ BP Canada submitted that, by changing the term requirements for FT service, TransCanada removed the safety net established by the Board in the RH-003-2011 Decision to protect shippers from the exercise of TransCanada's ability to set the bid floor for discretionary services. This, in BP Canada's submission, creates uncertainty in the secondary market.

In support of its complaint, BP Canada noted that the FT toll schedule and the Mainline TAP govern how TransCanada offers FT service. BP Canada pointed out that the FT toll schedule defines "Term" as a minimum of 1 year and does not reference specific end dates. In the TAP, BP Canada points out that "Term" is described as a minimum of one year and any bid in excess of one year is to be bid in full month increments. Like the FT toll schedule, the TAP does not reference specific start and end dates.

BP Canada acknowledged that TransCanada is permitted, under the TAP, to post the maximum term for or during which FT-NR service will be available. However, it notes that no such similar authority is conferred upon TransCanada for FT service. BP Canada submitted that if TransCanada had the same authority for FT service, then it would be expressly provided for in the Tariff.

BP Canada submitted that the result of the change in the term requirements is that a recourse rate for a minimum 12 month firm transportation term is currently unavailable. BP Canada noted that a bid for FT service in accordance with TransCanada's 24 June 2013 Daily Existing Capacity Open Season, for service commencing 1 July 2013, would only be successful (all other things being equal) if it was for the minimum 16 month term ending 31 October 2014.

BP Canada submitted that frequent and arbitrary changes have restricted access to FT service under the Tariff.

BP Canada requested that the Board pursuant to section 13(1) of the *National Energy Board Act* (NEB Act):

- Order TransCanada to remove the restrictions which require more than a one-year term, or prescribe specific commencement and end dates for FT service from its open season documentation; and
- Require TransCanada to ensure that its open season documentation is consistent with the NEB approved terms and conditions for FT service in the Tariff.

Views of Tenaska and Union

On 19 July 2013, Tenaska filed comments in support of the BP Canada Complaint. Tenaska is concerned with TransCanada's disregard for the terms and conditions of the Mainline Tariff. Tenaska submits that the Tariff is what the market relies on for accessing service on the Mainline and that the properly functioning competitive natural gas market is threatened by unilateral alterations to the terms and conditions of the Mainline Tariff.

¹ BP Canada recognized that firm transportation non-renewable service is an exception.

Tenaska's contended that TransCanada was not granted authority to unilaterally and without notice change the major terms and conditions of FT service. Tenaska noted that TransCanada must not be allowed to continually vary the terms and conditions of service on the Mainline and force shippers to file complaints with the Board to secure TransCanada's compliance with the Mainline Tariff.

Union supported the Complaint. Union submitted that TransCanada is attempting to do something that it does not have the authority to do. It noted that the Mainline Tariff does not permit TransCanada the unilateral ability to impose a specific end date for FT service offered in a Daily Existing Capacity Open Season. Union contended that TransCanada is preventing shippers from contracting for a one-year FT rate by forcing them to contract for a term in excess of the minimum 365 day period provided for in the Mainline Tariff.

TransCanada response

TransCanada requested that the BP Canada Complaint be dismissed. It submitted that its Daily Existing Capacity Open Seasons were conducted in accordance with the RH-003-2011 Decision, the NEB Act and the applicable provisions of the Mainline Tariff.

In TransCanada's view, the essential question is whether the terms of its Daily Existing Capacity Open Seasons were consistent with the RH-003-2011 Decision. It submitted that the terms of its Daily Existing Capacity Open Seasons facilitate achievement of the objectives of the RH-003-2011 Decision and results in the equitable allocation of capacity.

TransCanada pointed out that it is a private company and is permitted to do what it wants, subject to constraints imposed by the provisions of the NEB Act, the approved Mainline Tariff, or Board rulings.

TransCanada submitted that the Complaint relates to an open season and that the NEB Act does not define or refer to the term "open season". It noted that the Board did not prescribe guidelines governing the conduct or process of open seasons. It noted that there is no requirement for the open season process to be optimal to any individual party or parties that may consider purchasing capacity from a pipeline, nor is it the Board's mandate to protect any individual's commercial positions. TransCanada noted that it is the responsibility of the pipeline to develop terms and conditions for any potential service offering. On an ongoing basis, the pipeline is expected to evaluate changes in commercial circumstances, assess the appropriateness of its service offerings, and make changes that are market responsive.

TransCanada submitted that the mandate of the Board is to ensure that open seasons, if conducted, involved consultation among parties in a transparent and fair manner. In this case, it contends that there is no allegation that its Daily Existing Capacity Open Seasons are being conducted in a manner that is not transparent or that the open season process is unfair. It noted the Complaint is with two specific terms of its Daily Existing Capacity Open Seasons. TransCanada submitted that the TAP in the Mainline Tariff is a mechanism that allows for the equitable allocation of Mainline capacity. It notes that the Mainline's TAP predates the RH-003-2011 Decision. It submitted that there is nothing in its Daily Existing Capacity Open Seasons that is contrary to the terms of the TAP. In TransCanada's view, it must now administer the TAP in a manner that facilitates the implementation of terms and objectives of the RH-003-2011 Decision.

TransCanada contended that the Board said in the RH-003-2011 Decision that it is imperative that TransCanada effectively maximize revenues and limit costs in every circumstance, or face the prospect of cost disallowance. It also found that it is just and reasonable for FT shippers to pay the annual costs related to the capacity that they need. Moreover, in TransCanada's view, the

Board specifically denied a seasonal firm service because it could prevent FT capacity from being sold on an annual basis.

TransCanada submitted that its open season was successful. It noted that since 10 June 2013, when the FT contract dates were stipulated, TransCanada signed 30 new FT and FT-NR contracts, including 25 contracts with end dates of 31 October 2014 and two contracts with end dates of 31 October 2015. It noted that seven contracts are with BP Canada.

TransCanada submitted that there are two basic reasons for the 31 October end dates. First, they require that shippers contracting for FT service pay for the annual costs related to that capacity. Second, the chosen end dates prevent “cherry picking” of capacity. That is, reserving capacity for seasonal periods when demand is high and leaving TransCanada with the difficult if not impossible task of marketing capacity for the seasonal periods when demand is lower.

TransCanada submitted that requiring FT contracts to expire on 31 October ensures that contracts align with the gas year and that the capacity, if not renewed, will be available to serve the needs of other customers for the following gas year. The prevention of seasonal cherry picking while avoiding the obligation to pay full annual costs of that capacity is not only reasonable but necessary for TransCanada to require that the users of FT service pay the annual costs of that service, and those who acquire FT service for a fraction of a year do not impede the ability of TransCanada to market that capacity.

TransCanada referred to examples from its May 2013 Existing Capacity Open Season where bidders secured winter capacity for two or three seasons, but contracted only for 17 month or 29 month terms. It contended that efficient management of the Mainline requires it to respond to commercial circumstances by amendment of the terms of subsequent open season to prevent cost avoidance by certain FT shippers.

TransCanada contended that the terms of its Daily Existing Capacity Open Seasons that BP Canada finds objectionable are justified by the RH-003-2011 Decision and are necessary to implement its objectives. TransCanada submitted that the imposition of end dates for FT service is not precluded by the Tariff or the TAP. It submitted that if the Board agrees with the Complaint, then the Board should formally approve the amendments to the Tariff and the TAP, to enable it to put end dates on FT service.

Findings and analysis

The Board orders TransCanada to remove the reference to specific end dates for FT service in its Daily Existing Capacity Open Season documentation for the reasons that follow.

Natural gas transportation on the Mainline is regulated by the Board. The terms and conditions of access to Mainline service are set out in the Mainline Tariff, which includes the TAP. Subsection 4.6(a) of the TAP requires TransCanada to make Mainline capacity available through a Daily Existing Capacity Open Season for FT service, and other services, if not all capacity is allocated under an Existing Capacity Open Season.²

FT service is a service offered by the Mainline for a minimum term of one year.³ FT service does not have a fixed end date.⁴ This is in marked contrast to FT-NR service, which is offered with a fixed end date.⁵

² Mainline Tariff, Transportation Access Procedure, subsection 4.6(a)

³ Mainline Tariff, FT Toll Schedule, subsection 1.1(a); A helpful table showing service attributes of FT service can be found in National Energy Board Reasons for Decision RH-1-2006, TransCanada PipeLines Limited, Tolls and Services (November 2006), Table 2.1, at p. 20.

By requiring an end date for FT service in its Daily Existing Capacity Open Season documentation, TransCanada did not offer Mainline capacity pursuant to subsection 4.6(a) of the TAP. In the Board's opinion, subsection 4.6(a) of the TAP requires TransCanada to offer existing capacity for FT service, which means a service for a minimum term of one year, with no specific end date.

In the Board's opinion, TransCanada's argument that the Mainline Tariff does not expressly preclude TransCanada from offering FT service with a specific end dates fails because it is based on an incorrect premise. The language in the Tariff prescribes how TransCanada must offer Mainline natural gas transportation service. Insofar as a service offering is not expressly authorized by the Mainline Tariff, then it is unauthorized and requires Board approval if it is to be offered.

The Board recognizes that TransCanada is a private corporation and may undertake activities that are not subject to regulation. However, insofar as TransCanada undertakes the activity of interprovincial or international natural gas transportation on the Mainline, then the terms and conditions of that service are regulated by the Board. Section 58.5 of the NEB Act defines the term "tariff" as "a schedule of tolls, terms and conditions, classifications, practices or rules and regulations applicable to the provision of a service by a company and includes rules respecting the calculation of tolls." In the Board's view, it is manifest that the terms and conditions of access to existing Mainline capacity fall within the regulated activity – that is, interprovincial and international gas transportation on the Mainline – undertaken by TransCanada.

There is an overriding public interest for clarity and certainty about the terms and conditions of access to a pipeline. If pipeline companies were allowed to offer services not expressly precluded by a tariff, then term and conditions of access to the pipeline would be uncertain, and subject to frequent and unilateral change. This, as noted by Tenaska would threaten the properly functioning competitive natural gas market. The Board, in its GH-2-87 Decision, noted the importance of having clear terms of access to a pipeline. There, the Board stated:⁶

The Board, however, considers it essential that all terms and conditions of access to a pipeline be clearly reflected in the tariff in order to ensure that there are **no undue service restrictions imposed by pipeline companies involved in the marketing or producing sectors of the natural gas sector**. In the Board's view, prospective shippers are entitled to know the conditions of access to a pipeline system in advance of contract negotiations, **as this knowledge will allow market participants to make informed supply and market decisions thereby contributing to the efficient functioning of the natural gas market**. [Emphasis Added]

The importance of clarity and certainty about the terms of access to the Mainline is elevated for FT service. Customers on the Mainline have access to that service as recourse from TransCanada's discretion to set the minimum bid floors for interruptible transportation service and short-term firm transportation service. If terms of access to FT service are changed or subject to change without notice, then the effectiveness of FT service as recourse from TransCanada's pricing discretion is jeopardized.

⁴ *Ibid.*

⁵ Mainline Tariff, FT-NR Toll Schedule, subsection 1.1(a) and 1.2; A discussion of the service attributes of FT-NR service can be found in National Energy Board Reasons for Decision RH-2-2004 Phase I, TransCanada PipeLines Limited, Tolls and Tariff (September 2004), at p. 25-29; c.f. National Energy Board Reasons for Decision RH-R-1-2005, Canadian Association of Petroleum Producers, Review of RH-2-2004 Phase I Decision (May 2005).

⁶ National Energy Board Reasons for Decision GH-2-87, (tolls) See also, National Energy Board, Reasons for Decision OH-1-2007 at p. 20

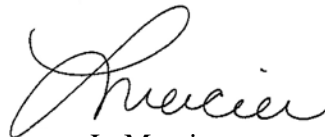
The Board does not find TransCanada's open season consistent with the Board's RH-003-2011 Decision. That decision approved the current provisions of the Mainline Tariff and continued the terms and conditions of access to FT service. It is not consistent with the RH-003-2011 Decision to modify the terms and conditions of access to FT service, without Board approval, by altering documents offering that Mainline service in a Daily Existing Capacity Open Season.

If TransCanada wishes to change how FT service on the Mainline is offered, then it must apply to the Board for approval. In this regard, the Board notes that in the RH-003-2011 Decision it made available a streamlined process to consider proposed changes to Mainline service offerings.


Remedy

The Board orders TransCanada to remove restrictions from its Daily Existing Capacity Open Season which require more than a one-year term, or prescribe specific commencement and end dates for FT service.

The Board declines to approve the amendments to the Tariff proposed by TransCanada in its response submissions and also declines to grant BP Canada the relief it requested for the first time in its reply submissions.⁷ In both cases, the Board does not have a record that allows it to order the relief requested.



L. Mercier
Presiding Member



R.R. George
Member



J. Gauthier
Member

cc. Mr. Warren Reinisch, Union Gas Limited, Facsimile 519-436-4643
Mr. Tomasz Lange, Tenaska Marketing Canada, Facsimile 403-716-1375

⁷ There, it submitted that BP Canada and others who committed to a term of more than 12 months be permitted, but not required, to amend their FT commitment such that the service ends 12 months after the commencement date of the service.