



File OF-Tolls-Group1-T211-2013-02 01
26 August 2013

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Dear Mr. Rheume, Mr. Dunberry, Ms. Hivon, Mr. Reinisch, Mr. Smith, Mr. Pelletier,
Ms. Davis, Mr. Yates and Mr. Cameron:

**Application for Review and Variance of MH-002-2013 Hearing Process filed by
TransCanada PipeLines Limited on 12 August 2013 (Review Application)**

**Application by Union Gas Limited (Union) and Société en commandite Gaz Métro
(Gaz Métro) for orders directing TransCanada PipeLines Limited (TransCanada) to
provide adequate and suitable facilities for the junction of the Vaughan Pipeline
Project and TransCanada Mainline (the Junction Application)**

I. Overview

This letter provides the Board's reasons for its 19 August 2013 decision on the Review Application and for adjusting the timetable of events to allow for the start of the oral portion of the MH-002-2013 hearing, with cross-examination, on **Monday, 18 November 2013 at 1:00 p.m.** in the Board's hearing room on the 2nd Floor at 444 Seventh Avenue SW, Calgary, Alberta.

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II. Background

On 12 August 2013, TransCanada filed the Review Application seeking, among other things, an order rescinding the Board's MH-002-2013 Hearing Order (Hearing Order).

On 13 August 2013, the Board established a process to hear the Review Application. Union and Gaz Metro filed submissions in response to it and, on 16 August 2013, TransCanada replied to those submissions.

a. The Review Application

i. The duty to be fair

In the Review Application, TransCanada seeks immediate rescission of the Hearing Order. It submits that, in issuing the Hearing Order, the Board breached natural justice because the Board:

- did not notify TransCanada that the Board was planning to issue the Hearing Order;
- heard from Union and Gaz Métro on the process for hearing the Junction Application, and its sequencing relative to the LDC Complaint,¹ but did not provide TransCanada the same opportunity; and
- chose a process that denies TransCanada a fair opportunity to respond to the issues raised by the Junction Application.

TransCanada contends that the Board usually solicits comments from interested parties on the processes and schedule by which the record of a proceeding will be developed. It submits that parties are also usually invited to comment on the issues to be considered in a proceeding.

TransCanada contends that the Junction Application makes serious allegations of misconduct against TransCanada and that the relief applied for would, if granted, put TransCanada's shareholders at risk of losing hundreds of millions of dollars. In this context, and having heard from Union and Gaz Métro about the process to be followed to hear the Junction Application (and its sequencing relative to the LDC Complaint), TransCanada submits that it was incumbent upon the Board to hear from TransCanada.

ii. Process requested by TransCanada

TransCanada asks the Board to establish a process that would have an oral hearing, allowing for cross-examination, commencing 9 December 2013.

¹ The LDC Complaint is a complaint dated 10 July 2013 filed by Union, Gaz Métro and Enbridge Gas Distribution Inc. (Enbridge).

TransCanada acknowledges that participants in administrative proceedings do not have an absolute right to cross-examine and that in some cases the requirements of natural justice can be met by parties providing written responses to positions of others. However, TransCanada submits that cross-examination is necessary because of the factual matters in dispute and the legal matters raised by the Junction Application, which TransCanada asserts require a sound factual matrix. These include:

- credibility challenges that will be made about evidence filed supporting the Junction Application. These challenges include: (i) whether the Junction Application is urgent; (ii) whether Union and Gaz Métro would save the amount of money they claim by moving to short-haul service; (iii) the ability of Union and Gaz Métro to complete their projects in the timeframe they indicate and (iv) what additional facilities would be required;
- the quantum of the burden imposed on TransCanada if the Junction Application were approved, including whether lost revenues should be considered by the Board in deciding to grant the relief applied for in the Junction Application;
- complex jurisdictional and constitutional issues, such as (i) whether facilities that are regulated, or to be regulated, provincially fall within federal jurisdiction; (ii) whether the Board has authority to grant the relief applied for in the Junction Application; and (iii) whether the Junction Application will be required; and
- serious allegations of misconduct made in the Junction Application. TransCanada submits that it will be required to protect its reputation before the Board and more generally its business reputation.

In terms of timing, TransCanada claimed its proposed 9 December 2013 commencement date would allow for a fair determination of the issues raised by the Junction Application.

TransCanada claims that the Junction Application raises complex issues including: what tolling methodology should apply to volumes received by TransCanada at the Vaughan Interconnect and what additional facilities would be required to transport those volumes. TransCanada submitted that the process for considering these issues should be at a pace that allows TransCanada a full opportunity to respond to them and provides the Board with the best information available.

Moreover, TransCanada points out that the process chosen by the Board overlaps with other regulatory processes. In particular, it points out that the process overlaps with the Board's RH-001-2013 process and a proceeding before a provincial regulator. TransCanada says that the same staff members are involved in each proceeding and therefore a delay is required because of the burden imposed upon it. TransCanada's proposed schedule mitigates the burden between the proceedings.

iii. No Urgency

TransCanada asserts that there is no urgency for the Board to hear the Junction Application. It contends that the markets proposed to be served by the facilities mentioned in the Junction Application are currently served through existing infrastructure. It further contends that no Mainline market will lose existing gas transportation capacity, or be denied access to incremental gas transportation capacity, if consideration of the Junction Application were delayed.

TransCanada notes that the worst that will happen is that Union and Gaz Métro will lose a short period of potential toll savings.

b. Union and Gaz Métro response to the Review Application

i. The duty to be fair

Gaz Métro and Union submit that the Board was entitled to issue the Hearing Order without notice to, and without hearing from, TransCanada. They contend that the Board does not need to invite and consider submissions from interested parties every time it issues a hearing order. They note that the NEB Act and the *National Energy Board Rules of Practice and Procedure, 1995* (Rules) provide the Board with broad discretion to determine the procedure to be adopted in a proceeding. They refer to:

- subsection 23(1) of the Rules – which allows for the issuance of hearing orders without prior notice. Pursuant to that subsection, the Board must (for oral hearings), or may (for written hearings), issue a hearing order containing the procedural details applicable to the hearing accompanied by a notice of public hearing;
- subsection 23(2) of the Rules – which directs the applicant to serve and publish notice of the hearing pursuant to Board direction; and
- subsection 22(1) of the Rules – which allows, but does not require, the Board to invite submissions from interested parties when deciding between an oral or written proceeding.

Union and Gaz Métro point to examples where the Board issued hearing orders without seeking or obtaining the input of parties.² Union and Gaz Métro note that when a party is concerned about the process or schedule set out in a hearing order, that party can apprise the Board of its concerns and the basis for them, and request the Board change the process or schedule.

Union and Gaz Métro note that the Hearing Order is a preliminary, procedural decision of the Board. They submit that preliminary decisions, in general, do not trigger a duty to act fairly and therefore, the Board was not required to provide TransCanada with notice of its intention to issue the Hearing Order or to invite submissions from TransCanada, or anyone else.

While Union and Gaz Métro recognize that the Board has, in some proceedings, accepted submissions from parties on matters dealt with in hearing orders, it cannot be said that the Board's normal practice is to do so. They note that the Board regularly issues hearing orders without providing notice of its intention to do so and without soliciting comments. Moreover, Union and Gas Métro note that the Board is master of its own process and has responded to urgent requests in the past on a timely basis without first canvassing parties on procedural matters.

² In particular, they refer to hearing orders MH-001-2013, OH-002-2013 and OH-001-2013.

ii. Process

Union and Gaz Métro contend that the Board has established a fair process for consideration of the Junction Application. They submit that the fairness of the procedure chosen must be assessed against matters actually raised in the Junction Application. In this regard, Union and Gaz Métro claim that it would be unfair to include many of the matters set out in the Review Application in the Board's proceeding considering the Junction Application. To Union and Gaz Métro, many issues raised in the Review Application are irrelevant or not complex. In particular they refer to:

- the Board's jurisdiction to grant the relief requested in the Junction Application;
- constitutional jurisdiction over provincially-regulated pipeline facilities;
- TransCanada's contractual issues with Enbridge; and
- matters relating to the LDC Complaint.

Union and Gaz Métro assert that including these issues in the MH-002-2013 proceeding infringes on their right to frame the Junction Application as they determine appropriate and to have it considered in a timely manner.

Union and Gaz Métro assert that the Junction Application seeks directions respecting physical interconnection facilities, transportation services and tolls on the Mainline. Union and Gaz Métro point out that the Hearing Order gives TransCanada an opportunity to pose written information requests and to adduce evidence. They submit that process is fair, reasonable and sufficient in the circumstances and that a written process offers the most efficient and effective way to probe the evidence.

Union and Gaz Métro note that the process chosen by the Board is almost identical to the contentious Line 9 reversal applications (OH-005-2011 and OH-002-2013). There, they point out, the Board recognized the ability to ask questions in writing through the information request process, which can provide parties a full and meaningful opportunity to test evidence. Union and Gaz Métro note that written information requests from the Board, TransCanada and others will provide a fair, reasonable and efficient means to address these issues raised by the Junction Application. Union and Gaz Métro note that these issues include, to the extent they are relevant to the Junction Application, technical information about facilities and capacities, and negative financial impacts on TransCanada if the relief applied-for were granted.

Union and Gaz Métro submit that they are not seeking to reopen the RH-003-2011 proceeding. They further submit that TransCanada's conduct before provincial regulators and its refusal to construct capacity for incremental short-haul service except on unreasonable terms is shown through documentation that speaks for itself and does not raise issues of credibility.

iii. Urgency

Gaz Métro and Union submit that consideration of the Junction Application is urgent because:

- they require certainty with respect to the Vaughan Interconnect,³ and Vaughan Transportation⁴ and Tolls;⁵
- TransCanada requires sufficient time to obtain regulatory approval and construct the Vaughan Interconnect for it to be in service by November 1, 2015;
- harm caused by delayed or frustrated access to diverse and reliable sources of supply will be mitigated; and
- regulatory steps and construction activities will need to be coordinated.

They indicate that they are willing to delay the commencement of oral argument until 12 November 2013 and require a decision of the Board at its earliest possible convenience. They further request that the Board confine the scope of the proceeding to the relief sought in the Junction Application.

c. TransCanada Reply

TransCanada recognizes that the NEB Act and Rules provide the Board with broad discretion to determine the procedures to be adopted in a proceeding and that the Board does not have an obligation to seek parties views on the process for a proceeding. In TransCanada's view, the Board's discretion does not extend to a denial of natural justice, such as hearing from one party about procedures for a proceeding and not from others adverse in interest. TransCanada notes that the Board received submissions on procedure from Union and Gaz Métro, and Enbridge, but not from anyone else. TransCanada contends that when an application is directed at another party, that party should, be given an opportunity to make submissions on matters dealt with in a hearing order.

TransCanada distinguishes the hearing orders referred to by Union and Gaz Métro (in which the Board did not solicit comments on procedure) on the basis that the timelines provided by those hearing orders was longer and that the hearings were not adversarial. TransCanada contends that the hearing orders referred to by Union and Gaz Métro prove TransCanada's point because if they establish a fair process then soliciting comments on process is unnecessary.

TransCanada recognizes that a preliminary decision, which gives rise to a more extensive proceeding in which the affected individual is given full opportunity to defend his or her

³ The junction of the Vaughan Pipeline Project (a pipeline proposed to be constructed by Union and Gaz Métro, or an entity related to them) with the TransCanada Mainline at a point on the Parkway to Maple segment of the TransCanada Mainline south/upstream of TransCanada's Maple Compressor Station near Vaughan, Ontario.

⁴ The receipt, transportation and delivery, on a firm basis, of 364,475 GJ/day of natural gas offered for transmission by Gaz Métro and Union at the Vaughan Receipt Point to the GMi EDA (239,148 GJ/day), the GMi NDA (15,327 GJ/day), the Union EDA (100,000 GJ/day) and the Union NDA (10,000 GJ/day), commencing 1 November 2015.

⁵ The tolls applicable to the Vaughan Transportation.

interests, does not attract the duty to be fair. It, however, contends that the Hearing Order does not give it a full opportunity to defend such interests.

TransCanada recognizes that the Board is the master of its own process and that parties do not have a right to cross-examine in proceedings before the Board. It, however, submits that cross-examination is required in this case. TransCanada submits that it faces serious losses and should therefore be allowed to cross-examine. It further notes that the following issues raised in the Junction Application require cross-examination:

- Union and Gaz Métro put TransCanada's and their own credibility in issue by basing their request for relief on an alleged pattern of untrustworthy and bad faith conduct by TransCanada;
- the Junction Application relies on the Union and Gaz Métro's interpretation of documents;
- the Junction Application makes defamatory allegations;
- there are complex and contentious issues surrounding toll methodology;
- additional downstream facilities may be needed to effect the transportation requested;
- TransCanada will dispute that alternatives to Western Canada Sedimentary Basin supply are needed; and
- the question of federal jurisdiction over the Vaughn Pipeline Project is relevant.

TransCanada submits that Union and Gaz Métro do not explain why the Board should consider the Application on an expedited basis. TransCanada submits that a delay of a few months would mean nothing more than potential toll savings. TransCanada also submits that the Board should allow appropriate timelines for the various steps in the MH-002-2013 process and for cross-examination to enable the Board to have the best information.

III. Board findings and ruling

In the Review Application, TransCanada claims that the Board breached the duty to be fair because the Board issued the Hearing Order without notice to TransCanada and without the opportunity for TransCanada to comment on matters therein. These issues are discussed in the following two subsections of this letter.

(i) Issuing hearing orders without notice

The Board is not required to provide advance notice of its intention to issue a hearing order. A hearing order is a preliminary, procedural decision of the Board and, as discussed in more detail below, is a decision that does not attract the duty to be fair.

Interested parties are notified after the Board issues a hearing order. The Board issues hearing orders to applicants. The Board then directs applicants to serve notice of the hearing on parties who may be interested in participating in the hearing. This procedure is provided for in the Rules⁶ and it is the procedure that the Board followed with the Junction Application.

⁶ Rules, s. 23

(ii) The opportunity to comment on matters in hearing orders

Union and Gaz Métro, and TransCanada appear to agree that: (i) the Board is master of its own procedure; (ii) the NEB Act and Rules provide the Board with broad discretion to determine the procedures to be adopted in a proceeding; and (iii) procedural decisions are preliminary in nature and do not (usually) attract the duty to be fair.⁷

Union and Gaz Métro, and TransCanada disagree whether, in the context of the Hearing Order, the Board was required to seek comments from TransCanada on the matters raised therein. TransCanada submits that the Board was required to obtain its views because, among other reasons: (i) the Board's choice of procedure does not result in a fair hearing and (ii) Union and Gaz Métro, and Enbridge, made comments about procedure.

The Board does not owe TransCanada or others a duty to be fair when issuing a hearing order. A hearing order sets an application down for a more extensive examination. The Board agrees with the excerpt from the legal text supplied by Union and Gaz Métro:⁸

A merely preliminary decision (such as a decision to remit a matter to hearing) only gives rise to a more extensive proceeding in which the affected individual is given full opportunity to defend his or her interests. Thus, the impact of the decision on the individual interest is not sufficient to trigger any need for procedural protections in its making. The interest may be protected fully later.

TransCanada does not disagree with this principle but disputes that it applies to the Hearing Order. In TransCanada's view, the Hearing Order does not give TransCanada a full opportunity to defend its interests.⁹ In TransCanada's view, the Board owed TransCanada a duty to be fair in choosing the procedure because the procedure chosen by the Board was unfair.

In the Board's view, TransCanada's argument is flawed. Either the nature of a preliminary decision – in this case, a choice in procedure – triggers the duty to be fair or it does not. How that preliminary decision is actually made, that is, whether the procedure chosen allows for cross-examination, has no effect on whether the duty to be fair is owed in the first place.

The Board was not required to seek TransCanada's comments on procedure even though Union and Gaz Métro made unsolicited comments on that topic in the Junction Application. The Board is master of its own procedure and whatever process is chosen by the Board must comply with the duty to be fair.

In the Board's view, if it were required to request comments on very preliminary decisions, such as a choice in a hearing or motion procedure, then the Board would be hampered in its ability to make those preliminary decisions, including with respect to urgent matters, expeditiously. It would also burden the Board with procedure on procedure. The better approach, in the Board's

⁷ Reply Submissions, paras. 14-18 and 22.

⁸ Macaulay & Sprague, *Practice and Procedure Before Administrative Tribunals*, Volume 2 (Carswell: Toronto, Looseleaf current to 2013), at 9-20.16(11)-(13).

⁹ Reply submission, paras. 18-20

view, is for participants that have a serious objection with the procedure chosen by the Board to raise concerns about the procedure and ask the Board to exercise its discretion to change it or make some other accommodation.¹⁰

For the foregoing reasons the Review Application fails.

Even though the Review Application fails, the Board will consider the request made therein as a request for the Board to exercise its discretion to change the procedure established by the Hearing Order. TransCanada asks that the Board:

1. start of the oral hearing on 9 December 2013, as opposed to 25 October 2013; and
2. allow for cross-examination.

These requests are discussed in the following subsections of this letter.

(iii) The start of the oral hearing

Union and Gaz Métro assert that the oral hearing should commence no later than 12 November 2013. They make that assertion on the assumption that the oral hearing would involve only oral argument and that the Board would release its decision as soon as possible thereafter. TransCanada asserts that the oral hearing should commence no earlier than 9 December 2013 and that the oral hearing should include cross-examination.

The Board has decided to commence the oral hearing on 18 November 2013. In the Board's view, this date provides for fairness while recognizing urgency. It is the Board's opinion, based on the record of this proceeding to date, that the matters raised by the Junction Application are urgent. It appears to the Board that there is market uncertainty about the terms and conditions of access to incremental Mainline firm transportation short-haul service and that service requests have been outstanding for quite sometime. It is the Board's opinion that its ultimate decision on the Junction Application may facilitate market certainty. In considering the urgency of the Junction Application, the Board has had regard to the following:

- requests were made for incremental Mainline short-haul service in early 2012;¹¹
- precedent agreements for incremental short-haul service were later executed;¹²
- the precedent agreements were for service that was to commence in 1 November 2014;¹³
- service will not commence on 1 November 2014;¹⁴ and

¹⁰ An example of an "other accommodation" is Nexen Energy ULC's (Nexen) application to participate in the MH-002-2013 proceeding. That application was submitted after the deadline to file such applications had lapsed. Nexen recognized the deadline had passed and asked the Board to exercise its discretion to allow it to participate. The result was the Board allowed Nexen to participate.

¹¹ Junction Application paras.14-16 and Attachment 3.

¹² Junction Application para.17 and Attachment 4 to 7.

¹³ Junction Application, 3rd recital, Attachment 4 to 7.

¹⁴ Junction Application, para. 29.

- if the Board were to grant the applied-for relief there would be delay between the date of the Board's order and the date service could be provided.¹⁵

It is the Board's opinion that a hearing commencing 18 November 2013 allows for full, fair and meaningful participation. The Board recognizes that the process will move quickly because of the urgency of the issues raised in the Junction Application. However, there is sufficient time for TransCanada and others to think through the matters raised in the Junction Application, seek disclosure from Union and Gaz Métro through the information request process, and prepare their evidence. It is the Board's view, that the fairness of the MH-002-2013 process must be considered in light of the procedural rights of all parties, including the applicant's right to have its application processed in a timely manner.

The Board recognizes that some of the participants may have other commitments. However, participants in Board proceedings always have other commitments, regulatory or otherwise. Given the number of participants in the Board's processes, it is very difficult for the Board to accommodate each and every participant's commitments. With that said, the Board notes that the change in start date of the oral hearing, minimizes overlap with the Board's RH-001-2013 proceeding and will alleviate some of the burden that TransCanada notes in its submissions.

(iv) Cross-examination

The Board decided to include cross-examination as part of the MH-002-2013 process. The Board is of the view that it would benefit from having cross-examination on the issues raised by the Junction Application and in particular:

- whether any Mainline facilities, in addition to the proposed Vaughan Interconnect, would be required to effect the Vaughan Transportation; and
- whether TransCanada would bear an undue burden if the relief applied-for were granted.

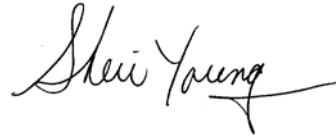
(v) List of issues

The Board has decided to issue a list of issues pursuant to Rule 25(1). The Board recognizes that some parties have offered suggestions on what should be included in the list of issues. The issues on the attached Appendix I to this letter arise from the Board's review of the material filed in this proceeding to date and are the issues that the Board sees as relevant at this time. The Board will not solicit comments from any party on the list of issues pursuant to Rule 25(2). The Board recognizes that further identification and refinement of issues will occur in the normal course as the hearing process unfolds.

¹⁵ Junction Application, para. 57.

If you have any questions regarding this letter, please contact Parvez Khan, Board Counsel at 403-299-3933 (Parvez.Khan@neb-one.gc.ca) or toll free at 1-800-899-1265.

Yours truly,

A handwritten signature in black ink that reads "Sheri Young". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Sheri Young
Secretary of the Board

Attachment

List of Issues for MH-002-2013 Hearing

The Board has identified but does not limit itself to the following issues for discussion in the proceeding.

1. Whether the Board should order TransCanada to establish Vaughan as a new receipt point on the TransCanada Mainline system.
2. Whether the Board should order TransCanada to provide service from the Vaughan receipt point to downstream markets, including, but not limited to, a description of:
 - a. other economically viable options for the provision of service,
 - b. the potential commercial impact of the service requested, and
 - c. any other relevant matters.
3. The adequate and suitable facilities that would be required for the Vaughan Interconnect and their cost.
4. Whether there would be an undue burden on TransCanada should it be required to provide adequate and suitable facilities for the receiving, transmission and delivery of natural gas on the TransCanada Mainline, and the source or scope of that burden.
5. The appropriate tolling methodology and tariff provisions, and other terms and conditions of service, should the Board grant the request to compel service.