National Energy Board | Office national de l'énergie

Reasons for Decision

Coral Energy Canada Inc. and the Cogenerators Alliance

RH-R-2-2005

May 2005

Review of RH-2-2004 Phase I Decision

Canada

National Energy Board | Office national de l'énergie

File 4200-T001-19
6 May 2005

Mr. Richard J. King
Ogilvy Renault
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Dear Mr. King:

Coral Energy Canada Inc. (Coral) and the Cogenerators Alliance (CA)
Application to Review Board Decision RH-2-2004 Phase I – Reasons for Decision

The National Energy Board has completed its examination of the Coral and CA application for review and has considered the submissions received from the Canadian Association of Petroleum Producers, the Industrial Gas Users Association and TransCanada PipeLines Limited. The Board's Reasons for Decision are enclosed.

The Board is serving a copy of these Reasons for Decision on all parties to the RH-2-2004 Phase I Hearing.

Yours truly,

Michel L. Mantha
Secretary

c.c.: Parties to RH-2-2004 Phase I Hearing

National Energy Board

Reasons for Decision

In the Matter of

Coral Energy Canada Inc. and the Cogenerators Alliance

Application dated 11 January 2005 requesting a review of Board Decision RH-2-2004 Phase I

RH-R-2-2005

May 2005

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Chapter 1

Introduction

On 11 January 2005, Coral Energy Canada Inc. (Coral) and the Cogenerators Alliance (CA) applied for a review and variance of Board Decision RH-2-2004 Phase I[1] (Decision) on the grounds that the Board erred by inappropriately shifting the burden of proof onto intervenors and by failing to provide adequate reasons for its decisions.

By letter dated 20 January 2005, the Board set up a process to solicit comments on the threshold question of whether the burden of proof ground raised by Coral and CA raises a doubt as to the correctness of the Decision such that it ought to be reviewed. Comments in support of Coral and CA's application were received on 28 January 2005 from the Industrial Gas Users Association (IGUA) and on 31 January 2005 from the Canadian Association of Petroleum Producers (CAPP). Comments in opposition to the application were received from TransCanada PipeLines Limited (TransCanada) on 10 February 2005. On 22 February 2005, Coral and CA filed their reply comments.

At this point, the Board is required to make a determination pursuant to subsection 45(1) of the *National Energy Board Rules of Practice and Procedure, 1995* as to whether the Decision ought to be reviewed. The test is whether Coral and CA have raised a doubt as to the correctness of the Decision. Having considered the Coral and CA application and the submissions of IGUA, CAPP and TransCanada, the Board has reached the following decision on the review. Each of the grounds raised by Coral and CA will be examined in turn.

1 TransCanada PipeLines Limited, RH-2-2004, Phase I, Tolls and Tariff, September 2004.

Chapter 2

Burden of Proof

Coral and CA submit that the Board inappropriately shifted the burden of proof onto intervenors and that this rendered incorrect the Board's decisions with respect to the waste heat agreements and Compressor Operating Agreement (collectively, the Agreements), and TransCanada's Operations, Maintenance and Administration costs (OM&A costs).

2.1 Agreements

TransCanada has been selling waste heat in the form of compressor exhaust gases to cogeneration facilities pursuant to waste heat agreements since 1990. At the time of the Phase I Proceeding, TransCanada had five such agreements with its affiliate TransCanada Power L.P. (TCP LP). TransCanada also signed a Compressor Operating Agreement with TCP LP effective 6 October 2003 under which TransCanada agreed to make reasonable efforts to maximize operation of the compressors supplying the waste heat. In return, TCP LP agreed to pay the incremental costs of running these compressors at times when they might otherwise not be in operation. The revenue generated by the Agreements is credited to the Mainline revenue requirement.

At the hearing, TransCanada argued that the Agreements reflected fair market value. TransCanada submitted that the first waste heat agreement for the Potter station was negotiated with an arms-length third party and that it was only later that TCP LP Power bought the cogeneration facility. Other waste heat agreements were negotiated between TransCanada representatives and TCP LP representatives, resulting in amounts very similar to the Potter agreement. TransCanada further argued that there were no other parties willing to pay for access to exhaust gases.

Intervenors submitted that TransCanada had not received fair market value for the waste heat. Coral and CA stated that the fair market value of the transactions should be based on TCP LP's avoided cost for equivalent energy. A witness for Coral produced evidence that the avoided cost would be 40 to 50 times the current contracted amount. Coral and CA also argued that TransCanada is in a conflict of interest in relation to the amount paid for waste heat by TCP LP.

With respect to the Agreements, the Board made the following statements:

> The Board is of the view that TransCanada should seek the higher of incremental costs or fair market value in all non-tariff transactions from parties wishing to contract with it. Further, fair market value is whatever a competitive market is willing to pay. The Board sees no evidence that there were other parties interested in waste heat from Mainline compressors at the time the Potter Agreement was signed. The Board also finds no persuasive evidence that at least incremental costs incurred by TransCanada are not being recovered through the

original waste heat agreements, or that at the time they were signed, the waste heat agreements were unreasonable.

Similarly, the Board finds that there is no persuasive evidence to suggest that the 6 October 2003 COA was imprudent and notes that TransCanada has committed to recover and credit to the Mainline Revenue Requirement all incremental costs related to the COA that can be identified and quantified.[2]

2.2 OM&A Costs

TransCanada applied for a total OM&A budget of $215.4 million. The budget was broken down into budget line items through cost schedules. On request, TransCanada provided explanations of individual line items.

At the hearing, Coral and CA submitted that TransCanada has a history of over-forecasting its OM&A costs, that TransCanada may be in a conflict of interest position when setting OM&A budgets, and that the reliability of TransCanada's forecasting methodology is questionable. Coral and CA proposed an alternate mechanism that would cap OM&A expenses at a level that reflects modest increases due to inflation, offset by a level of productivity improvement.

TransCanada responded that it provides the best estimates it can based on its knowledge at the time of forecasting. TransCanada stated that following a detailed budget determination for any test year, it strives to reduce and control costs for sustained cost reductions. TransCanada submitted that this is a fundamental incentive of fixed toll forward test year regulation and that intervenors and the Board have been supportive of such an incentive in the past because it motivates TransCanada to control and reduce OM&A costs over the long term. TransCanada also provided evidence that the cap approach proposed by Coral and CA would not be appropriate.

The Board ultimately approved TransCanada's applied-for OM&A costs and rejected the cap approach that Coral and CA proposed for the establishment of certain OM&A costs on the basis that it could be "unnecessarily arbitrary and inhibit TransCanada from responding appropriately to changing circumstances".[3]

2.3 Views of the Board

The burden of proof refers to the responsibility to adduce evidence to support an assertion put forward in a proceeding and to persuade the decision-maker of the truth of that assertion. The Board's approach to the burden of proof was most fully set out in the GH-2-87 Decision, where the Board commented on the concept as follows:

> "Burden of proof" is a fundamental concept in proceedings before a Court. If a party is unable to satisfy the burden

2 *Ibid.* at 38.

3 *Ibid.* at 11.

> cast upon it, the Court has no option but to deny the relief sought by that party, thereby ruling in favour of that party's adversary.
>
> Unlike a Court, the Board, in arriving at its decisions does not focus on the specific interests of two adversarial parties but must focus its attention on the wider public interest. It is therefore inappropriate to designate a burden of proof with respect to each of the issues before the Board in a public hearing. Were the Board to decide each issue on the basis of the strict rules pertaining to burden of proof, it would, in a situation wherein the applicant and an intervenor take opposite positions on a particular issue and provide equally unpersuasive evidence, be nonetheless obligated to adopt the position of the intervenor.
>
> Although the Board does not consider it appropriate to establish a burden of proof with respect to each issue in a public hearing, it nonetheless considers that an applicant has the burden of establishing on the balance of probability that the relief sought in its application should be granted …
>
> Whether or not the relief sought by an applicant involves a change in the status quo, the Board is of the view that with respect to such relief the initial burden of proof always lies with the applicant. If an applicant is unable to satisfy such burden, the particular relief sought will be denied. If, on the other hand, the applicant establishes a prima facie case, the burden shifts to those parties opposed to the applicant's position. Therefore, an intervenor which merely opposes the position of an applicant without proposing an alternate position of its own, has no burden of proof unless the applicant establishes a prima facie case. However, should an intervenor not merely oppose the position of an applicant, but propose its own alternative position, such intervenor has, with respect to its alternative position, a burden of proof identical to that of the applicant. Were this not the case, intervenors would have an unfair advantage over an applicant.[4]

From the GH-2-87 Decision, it can be seen that the Board need not designate a burden of proof with respect to each of the issues before it in a public proceeding. It is also apparent that the ultimate burden of proof on an issue, which remains with the applicant, must be distinguished from the

4 TransCanada PipeLines Limited, GH-2-87, Applications for Facilities and Approval of Toll Methodology and Related Tariff Matters, July 1988 at 80 to 81.

shifting burden of proof that occurs during the course of adducing evidence and argument on the issue. These principles have been affirmed in subsequent decisions of the Board, including the RH-1-92[5] and RH-1-2000[6] Decisions. Accordingly, an intervenor is properly assigned the burden of proof once the applicant establishes a *prima facie* case and with respect to alternate positions which the intervenor advances.

Coral and CA submit that the Decision demonstrates an inappropriate shifting of the burden of proof onto intervenors. With respect to the Agreements, the Board agrees that the statements in the Decision as to the lack of evidence of unreasonableness or imprudence demonstrate that an onus was placed on intervenors. However, this is not inappropriate so long as the original panel found that TransCanada had satisfied its initial burden of proof with respect to the prudence of the Agreements. In the Board's view, there was sufficient evidence on the Phase I record for the original panel to have made that determination. At that point, it was appropriate to shift the burden onto intervenors to refute or rebut TransCanada's position.

Similarly, the Board finds that Coral and CA properly had the burden of proof with respect to its avoided cost proposal for the Agreements and its cap approach to OM&A costs. As alternative positions, Coral and CA had a burden of proof identical to that of the applicant with respect to those proposals. In the Board's view, it was open to the original panel to have found that Coral and CA did not discharge their burden of proof and to reject the proposed avoided cost and cap methodologies.

The Board's Decision on OM&A costs does not indicate how the burden of proof was applied. This is consistent with the statement in the GH-2-87 Decision, quoted above, that it would be inappropriate for the Board to designate a burden of proof with respect to each issue before it. Further, as discussed more fully below, the Board is of the view that it was not required to specifically address the question of burden of proof in its reasons. Accordingly, the error alleged by Coral and CA appears to be solely that TransCanada did not discharge its burden of proof on the issue.

It is clear from the Decision that, with respect to both the Agreements and OM&A costs, the original panel determined that TransCanada had discharged its burden of proof. The Board is of the view that the decision as to whether an applicant has discharged its burden of proof is one that requires the exercise of the informed judgment and opinion of the panel hearing the matter. This view was recognized by the Board in the RH-1-92 Decision, when it stated, "[u]ltimately, it is for the Board to

5 Westcoast Energy Inc., RH-1-92, Application dated 12 December 1991 for New Tolls Effective 1 January 1992, August 1992 at 3 to 4.

6 Maritimes & Northeast Pipeline Management Ltd., RH-1-2000, Tolls, August 2000 at 37 to 38.

determine, on the totality of the evidence which is before it, whether the applicant has discharged its burden of proof".[7]

Further, the Board notes that its responsibility at this stage of the review is not to make a determination as to what it would have decided had it been charged with the original proceeding, but to determine whether Coral and CA have raised a doubt as to the correctness of the Decision. In the RH-R-1-2002 Decision,[8] the Board stated that the standard of review on the threshold question of review is correctness. However, the Board noted that the RH-4-2001 Decision,[9] which was the subject of review, dealt with what is a fair return on the Mainline, and that the determination of a fair return is a matter of balancing a number of factors and involves the application of judgment. Accordingly, while the standard of review is correctness, the Board recognized that what was being reviewed for correctness was largely a matter of informed judgment and opinion. It stated:

> As can be seen from the RH-4-2001 proceeding, and as recognized in the case law, informed and reasonable people can come to different opinions, based on the application of their own judgment and the weight they assign to the various factors that must be considered in coming to a determination of a fair rate of return for the Mainline. The Board's responsibility, at this stage of the Review Application, is not to re-weigh all the evidence and make its own assessment of it. Rather, the Board is to determine [whether a doubt has been raised as to the correctness of the decision].[10]

In this case, the original panel heard the totality of the evidence, weighed that evidence and determined that TransCanada had discharged its burden of proof. The Board is of the view that the record is capable of supporting the decisions on the Agreements and OM&A costs ultimately reached. At this point, the Board does not intend to re-weigh the evidence and make its own assessment of it. This is not the proper role for the Board on review. Further, the Board is of the view that the original panel that heard the evidence is in a better position to make an assessment of that evidence than is the reviewing panel.

Accordingly, the Board finds that the burden of proof ground has not raised a doubt as to the correctness of the Decision with respect to the Agreements and OM&A costs.

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7 *Supra* note 5 at 4.

8 TransCanada PipeLines Limited, RH-R-1-2002, Review of RH-4-2001 Cost of Capital Decision, February 2003.

9 TransCanada PipeLines Limited, RH-4-2001, Cost of Capital, June 2002.

10 *Supra* note 8 at 5.

Chapter 3

Adequacy of Reasons

Coral and CA submit that the Board erred by failing to provide adequate reasons for its Decision with respect to the Agreements, OM&A costs and TransCanada's management of excess capacity on the Great Lakes Gas Transmission (GLGT) system. In support of their position, Coral and CA reference Board precedent and case law with respect to the adequacy of reasons.

Citing the Board's RH-R-1-2002 Decision, Coral and CA submit that adequate reasons must "explain how the agency reached the decision it did" and must "show that due regard was had to the balance of the evidence and arguments advanced by the parties".[11] Coral and CA further cite the RH-2-92 Review Decision, where the Board stated that reasons "should be sufficiently detailed to assure parties that in reaching the decision, the decision-maker addressed its mind to the evidence and issues at play in the hearing and, in cases where there is a right to appeal, sufficiently detailed to enable parties to assess that option".[12]

Coral and CA state that the test to be applied in determining whether an administrative tribunal's reasons are adequate was summarized by the Federal Court of Appeal in *Via Rail Canada Inc. v. Canada (National Transportation Agency)* as follows:

> The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. [*Northwestern Utilities Ltd. v. Edmonton (City),* [1979] 1 S.C.R. 684 at 706, 89 D.L.R. (3d) 161] Rather, the decision-maker must set out its findings of fact and the principal evidence upon which those findings were based. [*Desai v. Brantford General Hospital* (1991), 87 D.L.R. (4th) 140 (Ont. Div. Ct.) at 148] The reasons must address the major points in issue. The reasoning process followed by the decision-maker must be set out [*Northwestern Utilities, supra* at 707] and must reflect consideration of the main relevant factors. [*Suresh v. Canada (Minister of Citizenship and Immigration),* [2000] 2 F.C. 592 at 637 and 687-688, 183 D.L.R. (4th) 629 (C.A.)][13]

The Board agrees with Coral and CA that when the Board provides reasons for its decisions, such reasons must be adequate. The Board also agrees that Board precedent and case law provide guidance as to what constitutes adequate reasons. However, the Board is of the view that what will be considered adequate for a particular decision is dependent on the circumstances and facts of that case. In that regard, the Board continues to ascribe to the following statements in its RH-R-1-2002 Decision:

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11 *Supra* note 8 at 31.

12 National Energy Board Letter Decision dated 28 June 1993, CAPP Application for Review of the RH-2-92 Decisions, File No. 4200-T001-7 at 7.

13 (2000), 193 D.L.R. (4th) 357 (C.A.) at 364.

> While there may be general guidance provided by the case law about what constitutes adequate reasons for decision, there is no template or universal standard which must be met. The Board recognizes that it has a duty of fairness and the provision of adequate reasons may be one aspect of the duty of fairness. However, what constitutes adequate reasons will vary with the nature of the decision to be made, the effect of the decision on the parties and the various other factors addressed above. The Board is of the view that a reviewing tribunal should look at the circumstances surrounding the provision of particular reasons, making a contextual analysis to determine whether the particular reasons are adequate on the facts of the case before it.[14]

Turning then to the Decision on review, Coral and CA submit that the Board's reasons with respect to the Agreements and GLGT capacity are inadequate because the Board did not discuss or analyse the Coral and CA evidence and did not address the submissions on burden of proof. The Board is of the view that reasons need not specifically address all evidence and argument presented at the hearing in order to be adequate. This view finds support in *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*[15] and has been expressed in previous Board decisions. In the RH-2-92 Review Decision, the Board stated:

> when an administrative tribunal does provide reasons, either by choice or because it is statutorily required to, it is not required to make an explicit written finding on each constituent element, however subordinate, leading to its final conclusion.[16]

Similarly, in the RH-R-1-2002 Decision, the Board stated:

> this does not mean that a decision maker is required to give reasons on each and every element of an argument presented, although those elements must be considered. Accordingly, the Board's reasons need not address each issue or sub-issue raised by each party in a proceeding; such reasons would be unnecessarily lengthy and time consuming to produce. The reasons must only make it clear that the Board considered and weighed all of the evidence and establish the grounds for the basis of the Board's findings.[17]

In the Views of Parties sections of its Decision, the Board set out Coral and CA's position with respect to the Agreements and GLGT capacity. It is clear that the original panel considered and weighed this evidence, as can be seen from the statements in the Decision noting the lack of evidence demonstrating the imprudence or unreasonableness of the Agreements and the inappropriateness of TransCanada's GLGT decisions. The panel was not required to specifically address each of the points raised, nor was it required to address the burden of proof on each issue.

Coral and CA also submit that the Board's reasons are deficient because there is no discussion of the applicable prudence standard. In the context of the Agreements, Coral and CA state that the

14 *Supra* note 8 at 32 to 33.

15 [1975] 1 S.C.R. 382.

16 *Supra* note 12 at 7.

17 *Supra* note 8 at 31.

Board did not indicate whether TransCanada is required to "obtain fair market value or incremental cost, or what the proper approach to determining fair market value would be".[18] The Board stated that "TransCanada should seek the higher of incremental costs or fair market value" and that fair market value "is whatever a competitive market is willing to pay".[19] In the Board's view, these statements address precisely the question Coral and CA submit has not been addressed. With respect to GLGT capacity, Coral and CA submit that the Board stated its expectation that TransCanada manage its GLGT contracts in the best interests of all of its shippers but did not state that TransCanada has an obligation to do so. While Coral and CA may have preferred that the Board frame its reasons in terms of an obligation rather than an expectation, this submission does not disclose any inadequacy in the Board's reasons.

Coral and CA state that the Views of the Board on the Agreements and GLGT capacity consist of a series of unrelated statements followed by a bare conclusion, that they do not set out the Board's reasoning process and are not responsive to the evidence and arguments advanced by the parties. In the Board's view, the reasons disclose that the Board had regard to the evidence and arguments presented at the hearing and sufficiently explain how the decision was reached.

Coral and CA further take issue with the reasons on the Agreements and GLGT capacity because the Board did not explicitly find prudence. Similarly, Coral and CA submit that the OM&A cost reasons are deficient because the Board did not specifically address the reasonableness of TransCanada's forecasting methodology. By approving the Agreements and OM&A cost forecast, the Board impliedly accepted the prudence of the Agreements and the reasonableness of the OM&A cost forecasting methodology.

With respect to OM&A costs, Coral and CA submit that the Board's reasons are deficient because the Board did not adequately explain its rejection of the cap approach proposed by Coral and CA. The Board considers that the statement that "such an approach can be unnecessarily arbitrary and inhibit TransCanada from responding appropriately to changing circumstances"[20] constitutes a sufficient explanation for rejecting the cap approach. Coral and CA also submit that the reasons were directed to dismissing an argument that was not made at the hearing, namely that the efficiency incentives created by the cap approach would be greater than the incentives created by TransCanada's proposal. The Board is of the view that reasons for decision need not be limited to addressing arguments made at the hearing. In fact, reasons that provide an indication of matters which parties could have raised and that the Board considered relevant may be more helpful than reasons that do not. Accordingly, this submission does not disclose any inadequacy in the Board's reasons.

Accordingly, the Board finds that adequate reasons were given in the Decision with respect to the Agreements, OM&A costs and excess GLGT capacity. The Coral and CA ground of review relating to the adequacy of reasons has not, therefore, raised a doubt as to the correctness of the Decision.

18 Coral and CA Review Application at 19.

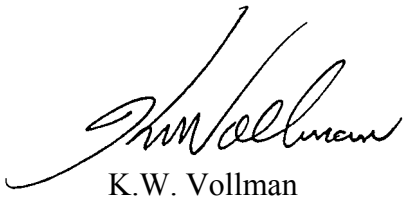
19 Decision at 38.

20 Decision at 11.

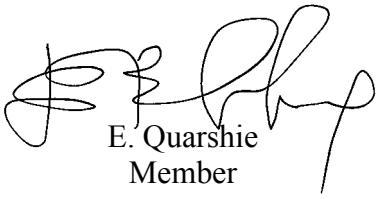
Chapter 4

Disposition

In light of the foregoing, the Board dismisses the Coral and CA application for review on the basis that no doubt as to the correctness of the Board's Decision has been raised.



K.W. Vollman
Presiding Member



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Calgary, Alberta
May 2005