Alberta Energy Regulator

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By e-mail only

Tim Tycholis	Shawn Munro	Robert Bourne
Tykewest Limited	Bennett Jones LLP	NorthRiver Midstream G and P Canada Inc.

Re: Decisions on Tykewest's Request for Reconsideration and Jurisdictional Question #3
Proceeding ID 359

Dear Sirs:

Background

The Alberta Energy Regulator (AER) hearing panel issued a prehearing decision on August 23, 2018. The panel decided that the issue of supply of fuel/blend gas is outside the scope of the hearing. Also in the decision, the panel invited the parties to make submissions on whether the AER has jurisdiction regarding four issues. One of those issues, Jurisdictional Question #3, was whether the AER has authority to order that the Tykewest 13-15-74-11W6 blending facility ancillary equipment, flare stack, associated pipeline, power supply and appurtenances remain at their existing location.

On September 10, 2018 Tykewest submitted a request for reconsideration of the panel's decision.

Tykewest's Reconsideration Request

Tykewest asked the panel to remove in its entirety, or vary, the section of the August 23rd, 2018, prehearing decision: "Issues outside of the scope of the hearing; (a) Supply of sweet dry gas and relicensing of the main pipeline". Tykewest also requested a variance of item (b) paragraph 10, page 4 of the panel's decision: "Issues outside of the Scope for the Hearing: (b) Commercial Arrangements on Tariffs and Price, Costs, Charges or Deductions for Processing".

Specifically, Tykewest asked for the prehearing decision to contain a declaration that "the carrier and Encana are common carriers" so that Tykewest can proceed to apply for commercial arrangements under section 55 of the *Oil and Gas Conservation Act (OGCA)* to the Alberta Utilities Commission.

The panel invited Encana and Enbridge to respond to Tykewest's request for reconsideration. Encana and Enbridge filed their responses on September 27, 2018. Tykewest filed a reply to those submissions on October 15, 2018.

On October 1, 2018 the panel deferred consideration of Jurisdictional Question #3, as issues raised by the question are similar to issues raised in Tykewest's reconsideration request. The panel notified the parties that it would address jurisdictional question #3 once it had decided the reconsideration request.

On October 23, 2018 Enbridge notified the AER of its new corporate name, NorthRiver Midstream G and P Canada Inc. (NorthRiver). In this decision, the entity is referred to as Enbridge because the submissions were provided under that name.

The Panel's Decision

The panel denies Tykewest's request for reconsideration of the prehearing decision because Tykewest has not demonstrated extraordinary circumstances exist that give rise to exceptional and compelling grounds for the panel to exercise its discretion to vary, suspend or revoke its decision.

The panel also finds there is no longer a need to decide Jurisdictional Question #3 given its findings in the decision on the request for reconsideration.

Tykewest's Submission

In its reconsideration request, Tykewest asked the panel to "recognize the absolute and essential need for fuel/blend gas" without which its well would be unable to produce in the future. Tykewest added:

(i) the well in-line heater cannot produce without fuel gas
(ii) the licence for the pipeline gathering system has recently been relicensed to 6.5% H_2S
(iii) the well cannot produce if its sour gas content exceeds 6.5% H_2S
(iv) the well has a number of sour gas tests that exceed 6.5% H_2S
(v) the well cannot produce without fuel/blend gas.

Fuel gas

Tykewest says that all sour gas wells producing into the pipeline between Hythe and Sexsmith are required to produce sour gas with an in-line heater at the wellhead. It added that failure on the part of the panel to include fuel gas requirements within the scope of the hearing renders its application for a common carrier to be obsolete as the well would not be able to produce without fuel gas.

Blend gas

Tykewest's position is that the panel's failure to include the supply of blend gas within the scope of the hearing, means that if Tykewest's well were to encounter gas above 6.5% H_2S in the future, the well would be unable to produce. In this regard, Tykewest filed a request to amend its application (Amendment Request #3) to include seven additional gas analyses from tests conducted in 2007 and 2008, three of which show H_2S concentrations of 6.51%, 7.1% and 7.7%.

Tykewest said it learned of the pipeline relicensing from 5% to 6.5% H_2S content on August 2, 2018, which did not allow time to provide additional evidence at the August 14, 2018 prehearing meeting.

Tykewest said that with the augmentation of the additional gas analyses data, the panel should recognize "the absolute and essential need for fuel/blend gas" as something that is not speculation but reality.

Responses from the Parties

Encana's position is that the reconsideration request is an attempt by Tykewest, without justification, to relitigate matters already properly decided by the AER in the prehearing decision. It said Tykewest did not establish "the most extraordinary circumstances" required for the panel to reconsider its decision. Additionally, Encana reiterated its August 7, 2018 prehearing submission in support of its position that the AER has no authority to compel one party to supply gas to another party.

Referring to section 42 of *REDA*, Encana said Tykewest failed to present any information to demonstrate that:

- The AER had erred, in fact, law or jurisdiction, in rendering the prehearing decision
- That the process followed by the AER was obviously unfair or unjust, or
- That relevant information which was not available to Tykewest prior to the AER issuing its decision has since become available.

Encana asserts that such information would be required to satisfy the threshold of "the most extraordinary circumstances" to grant the reconsideration request.

Encana pointed out that the prehearing decision accurately notes that "Tykewest said in its application that a preferred option would be for Encana to re-licence the pipeline to accept gas with 6.5% H_2S concentration, thus alleviating the need for blending".

With regard to the additional gas analyses that Tykewest wants to add to its application, Encana noted that the three analyses showing H_2S concentrations above 6.5% were available to Tykewest nearly a decade before filing its application and its jurisdictional submissions for the prehearing meeting.

For the above reasons, Encana said that the reconsideration request should not be granted.

Enbridge's position is that Tykewest provided neither the extraordinary circumstances nor compelling grounds to justify the exercise of the AER's discretion to reconsider its decision. In support of its position Enbridge, among other things, noted the following:

- Tykewest said in its application its preferred option would be for Encana to relicense the pipeline to accept gas with up to 6.5% H_2S content.
- The amount of time between learning of the relicensing of the pipeline and the date of the prehearing is irrelevant as the relicensing is consistent with Tykewest's preferred option.
- The additional gas analysis is not "new" evidence that was unavailable to Tykewest prior to the prehearing meeting or even prior to filing its application.
- Tykewest was provided sufficient opportunity to make submissions to the AER to order Encana to supply dry blend/fuel gas.

- That the AER is empowered under section 51(1) of the *OGCA* to order one party to purchase gas from another party, however, there is no corresponding provision allowing for the ordering of a party to supply or sell gas to another party.

The Panel's Findings

Section 42 of the *Responsible Energy Development Act (REDA),* states that: 'The Regulator may, in its sole discretion, reconsider a decision made by it and may confirm, vary, suspend or revoke the decision.'

The AER has stated in previous decisions[1] in relation to requests to conduct a reconsideration, that it will so only when compelling circumstances warrant:

> As indicated in section 42, it is at the AER's sole discretion whether to reconsider a decision made by it. That section does not provide an appeal mechanism to be utilized by industry or members of the public. Other provisions of *REDA* are available for that purpose. Given the appeal processes available under *REDA*, and the need for finality and certainty in its decisions, the AER will only exercise its discretion to reconsider a decision in extraordinary circumstances and where it is satisfied that there are exceptional and compelling grounds to do so. Mere disagreement with a decision is not sufficient.[2]

The question the panel must answer is whether Tykewest demonstrated extraordinary circumstances exist to give rise to exceptional and compelling grounds for the panel to exercise its discretion to vary or revoke its decision.

1. The need for fuel gas.

The panel does not dispute that Tykewest may need fuel gas for its in-line heater. The issue the panel must decide is whether it has authority to order a supplier of gas to supply their gas to another party.

Tykewest did not present evidence, previous decisions or references to any AER legislation or directive, to show that the AER has such authority. The panel agrees with Encana and Enbridge that the AER does not have jurisdiction to compel a party to supply gas to another party.

The panel notes also that pursuant to section 1.3.4 of Directive 65, one of the criteria for the issuance of a common carrier order is that "producible reserves are available for transportation through an existing pipeline". No evidence was submitted that Tykewest has a sweet gas stream available to put onto the fuel gas supply line and Tykewest has not demonstrated a current need for the proposed common carrier order to include the fuel gas line.

[1] AER Reconsideration Application No.1903669, letter decision dated January 29, 2018.
[2] AER Reconsideration Application No.1905404, letter decision dated January 24, 2018.

The panel disagrees with Tykewest that the common carrier application is rendered moot by the exclusion of the supply of sweet gas from the scope of the hearing since Tykewest has the option to pursue commercial arrangements with Encana or another supplier to acquire fuel gas. In fact, in its reply submission, Tykewest acknowledged that Encana and Tykewest had an agreement for delivery of sweet gas in 2007, that there is a sweet gas supply line along the Hythe-Sexsmith corridor, and that the line supplies sweet gas to third party operators.

As there is an alternative remedy available to Tykewest, and because the AER does not have the authority to require a supplier to supply gas to another party, the panel finds there are no extraordinary circumstances that give rise to exceptional and compelling grounds for the panel to vary or revoke its decision that the supply of fuel gas is outside of the scope of the hearing.

2. The need for blend gas

Tykewest contends that the additional gas analyses data demonstrates the absolute and essential need for blend gas in event its well produces at above 6.5% H_2S concentration. The availability of this additional data does not change the Panel's determination on the exclusion of sweet gas for blending purposes from the scope of the hearing.

At the time of the application Tykewest either had, or should have had, knowledge of the 2007 and 2008 gas sample results. The sour gas tests were conducted during its ownership of the well. These test results are public information available through the AER or through a third party vendor, such as Accumap. The fact that Tykewest was not aware of this data does not constitute extraordinary circumstances that would cause the Panel to revoke or vary its decision. Additionally, Tykewest said in its application that its preferred option to get its gas onto the pipeline would be for the pipeline to be relicensed to 6.5% H_2S.

Alternative remedies are available to Tykewest. If its gas exceeds 6.5% H_2S it can, as noted above for fuel gas, make commercial arrangements to acquire sweet gas for blend purposes. Tykewest owns the necessary blending facility which is connected to a sweet gas supply line. Another option would be for Tykewest to discuss reclassification of the pipeline with Encana.

Given that the gas analysis data was available to Tykewest and remedies exist in the event Tykewest's 14-09 well were to produce above 6.5% H_2S content, the panel finds there are no extraordinary circumstances that give rise to exceptional and compelling grounds for the panel to vary or revoke its decision on the exclusion of supply of blend gas from the prehearing decision.

3. Request for Variance of Item (b) Commercial Arrangements

Tykewest asked the panel to vary its prehearing decision that Commercial arrangements are outside of the scope of the hearing to "explicitly declare that the carrier and Encana are common carriers". Tykewest said this would allow it to proceed to make commercial arrangements under section 55 of *OGCA* to the Alberta Utilities Commission.

The panel denies this request. In the prehearing decision, the panel decided the application for a common carrier order is properly within scope. The panel agrees with Encana that this is a substantive issue to be determined in this proceeding. Moreover, it would be unfair to make such a determination without full opportunity for the parties to make their submissions and be heard on this issue.

Jurisdictional Question #3
Does the AER have the jurisdiction to order that the Tykewest 13-15-74-11 W6 blending facility ancillary equipment, flare stack, associated pipeline, power supply and appurtenances remain at its existing location? What effect, if any, does the fact that the blending facility is part of the common carrier ordered in Decision 2009-13 have on the issue?

In amendment request #3, Tykewest seeks a declaration that Encana restore the power supply to the Tykewest 13-15-74-11W6 blending facility. Tykewest also wants the blending facility and associated ancillary equipment to remain at the existing location. Tykewest takes the position that Encana has violated the terms of the original AER 2009-13 Decision, Directive 56, section 6.9.28 and agreements with Encana in 2007. Tykewest did not address the effect, if any, of the fact that the blending facility is part of the common carrier order issued in the AER 2009-13 Decision.

Encana submitted that since the AER generally excluded matters relating to the blending of Tykewest's gas from the scope of the hearing, remaining aspects of Tykewest's application regarding the blending facility are no longer relevant. Encana asserted that it would be inappropriate to use a common carrier order to require a blending facility that is no longer in operation to be placed back into operation. Encana did not make any submissions about the effect, if any, of the fact that the blending facility is part of the AER 2009-13 Decision.

Enbridge chose not to make any submissions on this question but reserved the right to take a position on this matter in the future, should it remain in scope in the hearing.

The panel notes that the blending facility ancillary equipment, flare stack, associated pipeline, power supply and appurtenances are necessary for the supply and blending of sweet gas. Given the panel's decision that the supply of fuel/blend gas is outside AER jurisdiction and therefore outside of the scope of the hearing, the blending facility and ancillary equipment described in Jurisdictional Question #3 is also outside of the scope for the hearing. Therefore, the panel also finds that there is no need to answer Jurisdictional Question #3.

Yours truly,

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Presiding Hearing Commissioner

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