

October 26, 2018

By e-mail only

www.aer.ca

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

Re: Jurisdictional Questions Decision
Proceeding ID 359
Tykwesw Limited
Application 1869537 Common Carrier Order
Application 1869547 Common Processor Orders

The Alberta Energy Regulator (AER) hearing panel issued its pre-hearing decision on August 23, 2018. In that decision, the hearing panel sought submissions from each of the parties on whether the AER has jurisdiction on the following requests made by Tykwesw:

- a) To order Encana to provide firm service for Tykwesw's production from the 14-09 well that would be delivered for processing at the Sexsmith facility (should a common processor order be granted);
- b) To order Encana and Enbridge to provide firm uninterruptible service for Tykwesw's gas from the 14-09 well carried on the main pipeline (should a common carrier order be issued); and
- c) To order that the Tykwesw 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?

The hearing panel has decided that:

In issuing a common processor order, it has the jurisdiction to include terms regarding the proportion of production to be processed and the total amount of gas to be processed by a common processor from the pool or pools that are subject to the common processor declaration.

In issuing a common carrier order, the panel has authority to order the point of delivery of the production, and the proportion of production to be delivered on the pipeline. Further or additional terms being sought by Tykwesw should be made to the Alberta Utilities Commission in accordance with section 55(2) of the OGCA, or can be negotiated separately in private contractual agreements between the parties.

In its pre-hearing decision the panel decided that the issue of supply of fuel/blend gas is outside the scope of the panel's authority. Subsequently, Tykwesw has requested that the panel reconsider its decision.

Therefore, the panel reserves its decision relating to the third jurisdictional question until after it has decided on Tykewest's request for reconsideration.

The panel has also decided that Tykewest does not need to name all working interest owners of the Sexsmith facility as requested by Encana in their submission.

Background

On September 10, 2018, Tykewest submitted a request to amend its application for a common carrier order (amendment request #3) to clarify that Tykewest is no longer seeking "firm, uninterrupted service". Additionally, in its September 24, 2018, reply submission Tykewest clarified that it is no longer seeking a "firm" service order; but is continuing to seek a service order. On October 1, 2018, the panel decided to defer its consideration of amendment request #3, as issues raised within the request are similar to or connected with issues raised in Tykewest's request for reconsideration of the panel's August 23rd, 2018, decision. The panel will consider amendment request #3 after it has made a decision on the reconsideration request.

On September 16th, 2018, Tykewest made a request to amend its common processor application (amendment request #4) by filing a new page 8 in which the word "firm" is removed from its request for service. On October 1, 2018, the panel accepted amendment #4 to the common processor application.

In its September 17, 2018, submission Encana submitted that Tykewest needs to amend its common processor application to name all working interest owners of the Sexsmith facility.

Information Request to clarify "service"

On October 18, 2018, the panel, by way of information request (IR), asked Tykewest to provide the following:

1. Define the word "service" as used in Tykewest's application, its September 10, 2018, request for amendment, and its September 24, 2018, submission on jurisdictional questions.
2. What specific terms and conditions does Tykewest request be included in any orders for declarations under sections 48 and 53 of the OGCA that are required to support its request for "service"? Provide any authorities Tykewest is relying on in its request for "service".
3. Provide page numbers and paragraphs in the referenced authorities or decisions that Tykewest is relying on for its use of the term "service", and
4. What specific terms and conditions does Tykewest envision would be included in a declaration when referring to "uninterruptible" service, used in the same submissions noted above?

The other parties were also asked to provide their responses to the panel IR.

Having reviewed Tykewest's and the parties' responses to the IR, the panel notes that Tykewest has asked that all references to "uninterruptible service" be dropped from its applications. In its response, Tykewest also confirms that the terms, or "service", it is seeking is in line with the panel's authority under sections 48 and 53 of the OGCA. Tykewest is requesting:

- That the subject pipeline be declared a common carrier, and that the declaration include the point at which the carrier would take delivery of the gas to be transported, and the effective date of the order.
- That a common processor order, should it be granted, include the effective date of the order.

The Issues Decided by the Panel

1. Does the AER have jurisdiction to order Encana to provide firm service for Tykewest's production from the 14-09 well that would be delivered for processing at the Sexsmith facility (should a common processor order be granted)?

Tykewest submitted that Encana is inconsistent in its submissions about whether gas will continue to flow to Veresen's Hythe Plant (the Hythe Plant) rather than to the Sexsmith processing facility. It said that Encana has a history of frequently changing its operational conditions and in the future it may reverse the flow of gas from the Hythe Plant to the Sexsmith facility.

Encana argued that Tykewest's request for firm service is speculative and unnecessary given that Tykewest stated at the prehearing meeting that it had secured a gas processing agreement with Veresen Midstream General Partner Inc. (Veresen) for the Hythe Plant.

Encana submitted that there were only two scenarios wherein Tykewest's gas could not be processed at the Hythe Plant; in the event of an Encana pipeline reversal or a disruption of service at the Hythe Plant. Encana added that on the segment of pipe that would transport Tykewest's gas, the direction of flow is to the Hythe facility and there is no foreseeable plan for a line reversal. Encana is not currently processing gas at its Sexsmith facility and stated it does not have any plans to make the Sexsmith plant operable again.

In the event of a disruption of service at the Hythe Plant, Encana said that it has a gas handling agreement with Tykewest dated December 1, 2010, the terms of which would allow Tykewest gas to flow to the Sexsmith facility. Encana noted that Tykewest would have to build the required measurement battery; since it plans to retire the current measurement battery. Failing that, Tykewest has the option to shut in its production.

Encana also pointed out that Tykewest did not make any submissions regarding a firm service order for the Sexsmith processing facility.

Enbridge submitted that it is not a party to Tykewest's application for a common processor order and does not take a position on this question.

In its reply submission, Tykewest asserted that the option to shut in its production is a moot point; since the point of its current application is to ensure that its production reaches a gas processing facility. Tykewest also claims that it is unaware of the existence of any gas handling agreement with Encana. It also argues that it should not be required to build another measurement battery because to do so would result in proliferation of facilities, which AER Directive 56 attempts to avoid.

Panel's Findings on Issue #1

The AER's jurisdiction to make a common processor declaration is found in Section 53 of the *Oil and Gas Conservation Act* (OGCA):

53(1) On application the Regulator may declare any person who is the owner or operator of a processing plant processing gas produced from a pool or pools in Alberta to be a common processor of gas from the pool or pools.

The panel also relies on section 53(5) of the OGCA, which states:

On application the Regulator, in order to give effect to a declaration under subsection (1), may direct

- (a) the proportion of production to be processed by the common processor from each producer or owner in the pool or pools, or
- (b) the total amount of gas to be processed by the common processor from the pool or pools subject to the common processor declaration.

Moreover, Section 55 (2) of the OGCA states that:

If the Regulator has declared a purchaser or processor of gas to be a common purchaser or a common processor and agreement cannot be reached between the common purchaser and a person desiring to sell the person's gas or have it processed, as the case may be, as to the price to be paid for the gas or the costs, charges or deductions for the processing of the gas, either party may, pursuant to the *Gas Utility Act*, apply to the Alberta Utilities Commission.

The panel will consider the issue of access to the Sexsmith processing plant in terms of its jurisdiction in the OGCA. Should a common processor order be declared, the panel may include terms regarding the proportion of production to be processed, and the total amount of the gas to be processed from the pool or pools that are subject to the declaration. Any additional terms regarding the costs, charges or deductions for the processing of the gas should be requested from the Alberta Utilities Commission if an agreement cannot be reached by the parties.

2. Does the AER have the jurisdiction to order Encana and Enbridge to provide firm uninterruptible service for Tykewest’s gas from the 14-09 well carried on the main pipeline (should a common carrier order be issued)?

On September 17, 2018, Tykewest submitted that the AER has jurisdiction to decide terms of service and capacity allocation for both a common carrier and common processor declaration. It also stated that there are existing agreements for service for the subject matter pipeline and the gas processing facilities that preclude priority of service and noted that all standard industry gathering and processing arrangements have varying limitations on service. Tykewest also argued that the AER has authority under Directive 56, Directive 65, and the OGCA to supersede those agreements.

As noted above, Tykewest submitted amendment request #3 to clarify that it is no longer seeking “firm, uninterruptible service” for the common carrier order. The panel has deferred its consideration of amendment #3, until after it has decided Tykewest’s request for reconsideration of the Panel’s August 28, 2018, pre-hearing decision.

Tykewest stated that Encana and Enbridge cannot agree on which company has the responsibility to provide it with a service arrangement. Tykewest disagreed with Encana’s submission that Enbridge offered interruptible service to Tykewest, and submitted that no documented offer or reasonable arrangement has been offered by Enbridge.

Tykewest also asserted that Encana was incorrect that the AER could not issue an order in the event of preferential service or capacity restraints or discrimination.

Encana submitted that based on statements made at the prehearing meeting it understood that Tykewest will secure an agreement with Enbridge for interruptible gas gathering for the Tykewest 14-09 well. Encana argued that Tykewest is seeking preferential terms and conditions of service and that there is no basis in the applicable legislation to grant a common carrier order which has the effect of providing such preferential service. Additionally, Encana stated that the specificity of a firm, uninterruptible service order requested by Tykewest is beyond the purpose of section 48 of the OGCA. In addition, Encana noted that Tykewest did not make any specific submissions for a firm, uninterruptible service order for the common carrier order.

Enbridge submitted that neither section 48 of the OGCA nor any other legislative provisions confer to the AER the power to order the preferential service requested by Tykewest. It states that Tykewest’s request for firm service and priority service in the event of capacity restraints are matters falling with the traffic, tolls and tariffs for the pipeline. To the extent those matters are regulated, they are the exclusive jurisdiction of the Alberta Utilities Commission, subject to the powers and restrictions set out in the *Gas Utilities Act*. Enbridge did not comment on any potential for an agreement with Tykewest, as noted by Encana.

Panel's Findings on Issue #2:

Section 48 of the OGCA states:

48(1) On application the Regulator may from time to time declare each proprietor of a pipeline in any designated part of Alberta or the proprietor of any designated pipeline to be a common carrier as and from a date fixed by the order for that purpose, and on the making of the approved declaration the proprietor is a common carrier of oil, gas or synthetic crude oil or any 2 or all of them in accordance with the declaration.

(2) No proprietor of a pipeline who is a common carrier shall directly or indirectly make or cause to be made or suffer or allow to be made any discrimination of any kind as between any of the persons for whom any oil, gas or synthetic crude oil is gathered, transported, handled or delivered by means of the pipeline.

(4) On application the Regulator, in order to give effect to a declaration under subsection (1), may direct

(a) the point at which the common carrier shall take delivery of any production to be gathered, transported, handled or delivered by means of the pipeline, or

(b) the proportion of production to be taken by the common carrier from each producer or owner offering production to be gathered, transported, handled or delivered by means of the pipeline.

From its review of Tykewest's submissions and its response to the panel's IR, the panel understands that Tykewest has amended its application to delete the words "firm" and "uninterruptible" from its application for a common carrier order.

The panel finds with regard to a common carrier declaration, its authority is restricted to ordering the point of delivery of any production, and also the proportion of production to be taken from a producer. Further or additional terms being sought by Tykewest should be made to the Alberta Utilities Commission in accordance with section 55(2) of the OGCA if an agreement cannot be reached by the parties.

In response to statements in Tykewest's submissions that the AER has jurisdiction to decide terms of service or to supersede existing agreements for service, the Panel draws attention to section 48(2) of the OGCA which applies to circumstances where a common carrier declaration has already been issued. If a common carrier order were to be issued in these circumstances, and should Tykewest believe that it is being discriminated against as outlined in section 48(2), Tykewest may bring this to the attention of the AER.

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 13-15-74-11 W6 blending facility. Tykewest also wants the blending facility and associated ancillary equipment to remain at its 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 that it had with Encana in 2007. In its submission, Tykewest did not address the effect, if any, of the fact that the blending facility is part of the common carrier order issued in Decision 2009-13. (Please note a new version of Directive 56 was released October 18, 2018, and the section referenced above is now 6.6.28).

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. Finally, Encana said the blending facility is no longer required based on the relicensing of the subject pipeline to a higher H₂S content. Encana did not make any submissions about the effect, if any, of the fact that the blending facility is part of the Decision 2009-13 order.

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

Panel's Findings on Issue #3:

In its prehearing decision dated August 23, 2018, the panel decided that the issue of fuel/blend gas is outside the scope of the hearing. Tykewest has since requested that the panel reconsider its decision. Therefore, the panel reserves its decision relating to this jurisdictional question until such time as it has decided Tykewest's reconsideration request.

4. Naming of all working interest owners in Tykewest's common processor application

Encana stated in its submissions that all working interest owners of the Sexsmith facility must be named in the Tykewest application for a common processor order.

Enbridge did not make any submissions on this point.

Tykewest disagreed with Encana's submission based on the terms of the construction, ownership and operation agreement for the Sexsmith facility. Tykewest argued that Encana as the operator has the

authority to do certain things on behalf of the owners and thus the owners need not be named in its application.

Panel's Findings on Issue #4:

The Panel refers to section 53(1) of the OGCA, referenced above which states:

The Regulator may declare any person who is the owner or operator of a processing plant processing gas produced from a pool or pools in Alberta to be a common processor of gas from the pool or pools (emphasis added).

Based on section 53(1), the panel finds that either an operator or the working interest owners of the Sexsmith plant must be named in the Tykewest application for a common processor order. In its Statement of Concern dated November 3, 2016, Encana confirmed it was the 60% owner and operator of the Sexsmith processing plant. As Encana was named in the application as the operator there is no need to name all of the owners of the Sexsmith processing facility in the application.

Yours truly,

<original signed by>

C. Macken
Presiding Hearing Commissioner

<original signed by>

H. Kennedy
Hearing Commissioner

<original signed by>

J. Daniels
Hearing Commissioner

cc: R. Dhaliwal, Encana
J. Laing, Veresen Midstream
J. Morales, NorthRiver
C. Prentice, Pembina Pipeline Corporation
L. Estep, Dentons
M. Schuster, AER
B. Kapel Holden, AER
B. Prenevost, AER