



EB-2010-0324

IN THE MATTER OF the *Ontario Energy Board Act*
1998, S.O.1998, c.15, (Schedule B);

AND IN THE MATTER OF an application under section
60 of the Ontario Energy Board Act, 1998, S.O. 1998,
c. 15, Schedule B for an electricity transmission licence.

BOARD STAFF SUBMISSIONS

AFFILIATE RELATIONSHIPS CODE EXEMPTION REQUESTS

Background

TransCanada Power Transmission (Ontario) L.P. ("TransCanada Transmission") filed an application with the Ontario Energy Board, received on October 27, 2010, for an electricity transmission licence. TransCanada Transmission stated that it is making this application in order to participate in any upcoming Board transmitter designation process for new transmission investment in Ontario. As part of its licence application, TransCanada Transmission is also seeking exemptions from sections 2.2.2. and 2.2.3 of the *Affiliate Relationships Code for Electricity Distributors and Transmitters* (the "ARC").

Sections 2.2.2. and 2.2.3 of the ARC state the following:

- 2.2.2 Where a utility shares information services with an affiliate, all confidential information must be protected from access by the affiliate. Access to a utility's information services shall include appropriate computer data management and data access protocols as well as contractual provisions regarding the breach of any access protocols. A utility shall, if required to do so by the Board, conduct a review of the adequacy, implementation or operating effectiveness of the access protocols and associated contractual provisions which complies with the provisions of section 5970 of the CICA Handbook. A utility shall also conduct such a review when the utility considers that

there may have been a breach of the access protocols or associated contractual provisions and that such review is required to identify any corrective action that may be required to address the matter. The utility shall comply with such directions as may be given by the Board in relation to the terms of the section 5970 review. The results of any such review shall be made available to the Board.

- 2.2.3 A utility shall not share with an affiliate that is an energy service provider employees that are directly involved in collecting, or have access to, confidential information.

In the cover letter accompanying its application TransCanada Transmission states that it is part of a large family of energy companies, with TransCanada Corporation being the ultimate parent. The TransCanada family of companies contains both regulated and unregulated energy businesses. In response to Board Staff Interrogatory No. 2, TransCanada Transmission stated that TransCanada Corporation's current data management and access protocols are based on classifying TransCanada's personnel and electronic assets into three functional categories: (a) Regulated Business (i.e., the Canadian Mainline); (b) Non-Regulated Business; and (c) Shared Corporate Services. Under this system, TransCanada Transmission would be classified as a Regulated Business. TransCanada's personnel in its Regulated Business and Shared Corporate Services have access to information relating to all of TransCanada's Regulated Businesses and would therefore have access to TransCanada Transmission's confidential information. However, personnel in its Non-Regulated Business would not have access to TransCanada Transmission's confidential information.

The applicant states that in order to comply with section 2.2.2 of the ARC, TransCanada would be required to isolate TransCanada Transmission's confidential information, not only from personnel in its Non-Regulated business but also from all other Regulated Business and Shared Corporate Services personnel. TransCanada Transmission states that the cost of the changes required to isolate TransCanada Transmission's business in this manner would be significant.

With respect to compliance with section 2.2.3 of the ARC, the applicant has stated that the use of TransCanada's Shared Corporate Services provides significant cost efficiencies for its Regulated Businesses. In support of its exemption request, the applicant has stated that personnel in Shared Corporate Services are prohibited from: (a) providing any information about the Regulated Business to the Non-Regulated Business and personnel; and (b) having commercial or operational roles in TransCanada, eliminating the potential for any competitive advantage to accrue to Non-Regulated Business affiliates by virtue of the sharing of these personnel. If required to strictly comply with section 2.2.3 of the ARC, TransCanada would have to establish a duplicative structure of dedicated employees to provide those functions or a shifting of personnel in ways that may not be efficient.

STAFF SUBMISSIONS

In support of its exemption requests, TransCanada Transmission has provided information on its present data management and access protocols which, in its view, provide sufficient safeguards to prevent access to confidential information by the non-regulated businesses and that prohibit the sharing of employees with a non-regulated affiliate.

Based on the evidence presented by the applicant, Board staff does not support the requested exemption from section 2.2.2 of the ARC. As the applicant states, TransCanada Transmission is part of a large integrated organizational structure, which contains both regulated and unregulated energy businesses. The wording in sections 3.2.2 and 6.5 of the TransCanada Pipelines Limited ("TCPL") Canadian Mainline Code of Conduct appears to relate specifically to the treatment of TCPL's confidential information in relation to its unregulated and regulated affiliates. Board staff does not believe that these provisions offer the same degree of protection for the confidential information of TransCanada's other regulated affiliates, including TransCanada Transmission whose current data management and access protocols do allow the sharing of confidential information with TransCanada's other regulated affiliates. In staff's view, the evidence provided by TransCanada Transmission does not demonstrate that a regulated affiliate is prevented from sharing or using to its own advantage confidential information that it has obtained regarding another regulated affiliate. TransCanada Transmission does, in fact, acknowledge on page 5 of the cover letter accompanying the application, that not all of the regulated entities within the TransCanada group of companies are governed by similar inter-affiliate codes or standards of conduct, although TransCanada treats all regulated entities in a similar manner.

Section 2.2.3 of the ARC does not permit the sharing of a utility's employees that are directly involved in collecting, or have access to, confidential information as defined by the ARC with an affiliate that is an **energy service provider** (emphasis added). The ARC does, however, permit the sharing of employees in other circumstances, with appropriate computer data management and data access protocols and contractual provisions. TransCanada Transmission has not indicated whether its regulated affiliates and Shared Corporate Services that would have access to confidential information meet the definition of an energy service provider within the ARC. While the applicant has argued that the cost to comply with section 2.2.3 of the ARC would be significant, it is not clear to Board staff that TransCanada Transmission has adequately examined the costs of establishing the appropriate protocols and procedures for the segregation of its confidential information and of its employees who have access to confidential information to enable it to comply with the ARC. Board staff is concerned that the exemption sought may give competitive advantage to TransCanada Transmission and its affiliates, the very reason for section 2.2.3 of the ARC. Board staff submits that cost efficiency alone is not a sound reason for the requested exemption and it is not an adequate reason to grant the requested exemption.

As well, it is not clear that other licensed transmitters or potential new market entrants will not be disadvantaged by the granting of the requested ARC exemptions as a licensed transmitter's market activities could change as the market develops.

Other Board decisions

Board staff notes that in an earlier decision of the Board¹ with respect an exemption sought by Natural Resource Gas Limited ("NRG") from a section of the Affiliate Relationships Code for Gas Utilities ("Gas ARC"), the Board granted a limited exemption from the requirement in the Gas ARC sections 2.2.2 and 2.2.3, among others. Those sections of the Gas ARC are virtually identical to sections 2.2.2 and 2.2.3 of the ARC for Electricity Distributors and Transmitters. In the NRG case, the exemption from section 2.2.3 was sought because the Financial Manager of NRG was also the Financial Manager for other affiliated companies of NRG and in that position had access to confidential information. The Board noted that it would be "prohibitively expensive" for NRG and its affiliates to hire separate Financial Managers.² The Board also noted that none of the other affiliates were energy services providers. In the specific circumstances of that case the Board granted the exemption "for the express purposes outlined in the application".³

Another decision of the Board granted an exemption to FortisOntario Inc. ("FTO") from sections 2.2.2 and 2.2.3 of the ARC, among other sections, thereby allowing FTO to share facilities, employees and information with two of its affiliates.⁴ However, the exemptions were subject to detailed conditions that stipulated, among other things, that the exemptions were limited to those facilities, services and confidential information set out in a Services Agreement between FTO and the affiliate, and that the Services Agreement could not be amended without the prior approval of the Board.

In the present case, TransCanada Transmission seeks a much broader, generic exemption from sections 2.2.2 and 2.2.3 of the ARC, rather than for a specific, limited purpose as in the NRG Exemption Decision or for specific facilities, employees and information set out in a Services Agreement, such as in the FTO Exemption Decision. Board staff submits that the Board should be very cautious about granting unlimited, generic exemptions from ARC, such

¹ Decision and Order in an Application by Natural Resource Gas Limited seeking an order granting an exemption from certain sections of the Affiliate Relationships Code for Gas Utilities (RP-2002-0147 / EB-2003-0117), August 4, 2004 ("NRG Exemption Decision"),

² Decision and Order re NRG Exemption at page 3

³ Decision and Order re NRG Exemption at page 3

⁴ Decision and Order in an Application by FortisOntario Inc. for exemptions from sections of the *Affiliate Relationships Code for Electricity Distributors and Transmitters*, (RP-2003-0254 / EB-2003-0318), August 31, 2004 ("FTO Exemption Decision")

as those sought by TransCanada Transmission in this application, that would apply to unknown future activities.

In another proceeding currently before the Board, Enbridge Gas has applied for a generic exemption from section 2.2.4 of the Gas ARC so that it may share operational employees and certain customer information with certain affiliates.⁵ In its submissions on the Enbridge Exemption Application, Board staff supported the generic exemption sought by Enbridge but only for the specific purposes of 1) sharing customer information with operational personnel of a Quebec affiliate specifically for the purposes of providing emergency on-call services and 2) the sharing of “control services” (SCADA monitoring, data recording, emergency shut-off procedures and communications to satisfy the requirements of the IESO) with respect to its wind farm generation affiliates and that any new affiliate sharing arrangement that is outside of “control services” for a generator should require formal application. Furthermore, with respect to both of the exemptions sought, Board staff submitted that Enbridge should be required to file on the public record the executed Intercompany Services Agreement (ISA) and that if there is any material change relating the exemption arrangement Enbridge should be required to make a formal application to the Board.⁶

Board staff notes that, unlike the NRG, FTO and Enbridge exemption applications, the present application seeks exemptions from ARC for all sharing of information among its *regulated* affiliates, without specific limitations or for specified purpose and that no Intercompany Services Agreement has been filed with this application. Accordingly, in Board staff’s submission the present application is distinguishable from the earlier decisions of the Board and Board staff submissions in exemption applications that have come before the Board.

The burden of proof rests with the party making the exemption requests, which in Board staff’s view, has not been satisfied in this case due to the lack of specificity as to the exemptions sought. Since TransCanada Transmission has no transmission operations in Ontario as of yet, perhaps it is not in a position to frame its exemption requests in terms of specific activities or to file Intercompany Services Agreements that set out the activities and information to be shared among its affiliates. In any event, TransCanada Transmission has not at this point in time provided sufficient evidence and therefore not discharged the burden of supporting its exemption requests,

Accordingly, in Board staff’s view, the exemption requests should be denied.

All of which is respectfully submitted.

February 16, 2011

⁵ Application by Enbridge Gas Distribution Inc. for an exemption from the Affiliate Relationships Code for Gas Utilities (EB-2010-0232) (“Enbridge Exemption Application”)

⁶ Board Staff Submissions in the Enbridge Exemption Application, filed January 20, 2011