



National Energy Board

---

## Reasons for Decision

**Interprovincial Pipe Line Inc.**

**MH-1-95**

**April 1995**

---

**Apportionment**

# National Energy Board

---

## Reasons for Decision

In the Matter of

## Interprovincial Pipe Line Inc.

Inquiry pursuant to subsection 24(3) of the  
*National Energy Board Act* into Apportionment  
on the Interprovincial Pipe Line Inc. system

**MH-1-95**

**April 1995**

© Her Majesty the Queen in Right of Canada 1995 as represented by the National Energy Board

Cat. No. NE22-1/1995-5E  
ISBN 0-662-23453-7

This report is published separately in both official languages.

**Copies are available on request from:**

Regulatory Support Office  
National Energy Board  
311 Sixth Avenue S.W.  
Calgary, Alberta  
T2P 3H2  
(403) 292-4800

**For pick-up at the NEB office:**

Library  
Ground Floor

Printed in Canada

© Sa Majesté la Reine du Chef du Canada 1995 représenté par l'Office national de l'énergie

N° de cat. NE22-1/1995-5F  
ISBN 0-662-80292-6

Ce rapport est publié séparément dans les deux langues officielles.

**Exemplaires disponibles sur demande auprès du:**

Bureau du soutien à la réglementation  
Office national de l'énergie  
311, sixième avenue s.-o.  
Calgary (Alberta)  
T2P 3H2  
(403) 292-4800

**En personne, au bureau de l'Office:**

Bibliothèque  
Rez-de-chaussée

Imprimé au Canada

## Table of Contents

<b>Recital and Appearances</b> .....	ii
<b>1. Background</b> .....	1
<b>2. Apportionment Proposals</b> .....	2
2.1 The CAPP/PSG Proposal .....	2
2.2 The Novacor Proposal .....	2
<b>3. Views of the Board</b> .....	4
3.1 The Proposals .....	4
3.2 Force Majeure .....	4
3.2.1 Definition .....	4
3.2.2 Resolution of Force Majeure Disputes .....	5
3.2.3 Publishing Force Majeure Claims .....	5
3.3 The Non-Performance Penalty .....	5
3.4 Other Issues .....	6
<b>4. Disposition</b> .....	7

## List of Appendices

<b>I Order TO-2-95</b> .....	8
------------------------------	---

## Recital and Appearances

IN THE MATTER OF the *National Energy Board Act* (“the Act”) and the regulations made thereunder; and

IN THE MATTER OF an inquiry pursuant to subsection 24(3) of the Act with respect to apportionment on the Interprovincial Pipe Line Inc. system; and

IN THE MATTER OF the National Energy Board Hearing Order MH-1-95, as amended;

HEARD in Calgary, Alberta on 11, 12, 13, 18 and 19 April 1995

BEFORE:

K. W. Vollman	Presiding Member
A. Côté-Verhaaf	Member
R. L. Andrew	Member

APPEARANCES:

W.M. Moreland G.M. Nettleton	Interprovincial Pipe Line Inc.
L.G. Keough	Canadian Association of Petroleum Producers
K.F. Miller	Petroleum Shippers Group; Koch Oil Co. Ltd.
K.S. Archibald	Chevron Canada Resources
S.R. Miller	Petro-Canada
P.H. Davies	Alberta Energy Company Ltd.
F. Foran	Amoco Canada Petroleum Company Ltd.
D.W. Rowbotham	Canadian Occidental Petroleum Ltd.
R. Cross	CANPET Energy Group Inc.
A. Labonté	Conoco Canada Limited
H. Huber	EOTT ENERGY Canada Limited Partnership
H. Warnock	H.A.W. Services Ltd.
C.I. MacLean	Home Oil Company Limited
J.B. Ballem, Q.C.	Imperial Oil Limited

H.R. Hansford	Murphy Oil Company Ltd.
C. Olson	Northridge Petroleum Marketing Inc.
P.M. Fettig	Novacor Chemicals (Canada) Ltd.
W.A. Jackson M. Zimmerman	O.R.I. Energy Inc.
A. S. Hollingworth	PanCanadian Petroleum Limited
J. Schlegel	Poco Petroleums Ltd.
D.R. Shantz	Rigel Oil & Gas Ltd.
C. Berry	Sceptre Resources Limited
J.W. Hocher	Suncor Inc.
F.C. Basham	Talisman Energy Inc.
M.W.P. Boyle	Trans Mountain Pipe Line Company Ltd.
G. Darcy	United Refining Company
J.T. Horte	Wascana Energy Inc.
M.A. Fowke C. Beauchemin	Board Counsel

## Chapter 1

# Background

---

Since 1985, IPL has apportioned available pipeline space to all shippers on a pro-rata basis according to Notices of Shipment submitted to IPL in the preceding month. IPL's current tariff states that if a shipper fails without reasonable cause, in the judgment of IPL, to ship its apportioned volume in any month, that shipper's entitlement to space in each of the next three months will be no more than the volume shipped in the month of non-performance. The tariff also allows IPL to require that a shipper provide written third party verification of its tender.

Apportionment levels on the IPL pipeline system have increased dramatically in recent years and in April 1995 reached 71 percent on IPL's crude oil lines. It is widely accepted in the industry that the reasonable cause and tender verification provisions in IPL's tariff have not been effective in discouraging inflated nominations, and that in an effort to protect their own business interests, shippers have been overnominating.

On 17 February 1995, IPL filed a proposal pursuant to Part IV of the *National Energy Board Act* ("the Act") to address the ongoing high levels of apportionment. Notice of the filing by IPL prompted the submission of three alternative proposals by the Canadian Association of Petroleum Producers ("CAPP"), Novacor Chemicals (Canada) Ltd. ("Novacor") and the Petroleum Shippers Group ("PSG")<sup>1</sup>.

A Hearing was set down by the Board to commence 3 April 1995, but was postponed twice; first at the request of IPL, then at the request of the PSG, in order to give the PSG and CAPP additional time to reach a consensus and file joint evidence. On 5 April, CAPP and the PSG requested leave to withdraw their previous proposals and file joint evidence. On 6 April, IPL requested leave to withdraw its application, evidence and Information Request responses. The Board granted leave and made amendments to the Hearing Order in order that the hearing could proceed under subsection 24(3) of the Act. The Board conducted a public hearing on 11, 12, 13, 18 and 19 April to examine and hear evidence on the two proposals still before it: the joint proposal from CAPP/PSG and Novacor's proposal.

---

<sup>1</sup> The PSG consists of the following companies and partnerships: Chevron Canada Resources, Imperial Oil Limited, Koch Oil Co. Ltd., Murphy Oil Company Ltd., Petro-Canada and Shell Canada Limited.

## Chapter 2

# Apportionment Proposals

---

### 2.1 The CAPP/PSG Proposal

The CAPP/PSG proposal has two principal elements. The first is that the current reasonable cause provision in IPL's tariff be replaced with a force majeure provision that would excuse shipper non-performance only in the case of certain defined events. The second is that a monetary penalty be assessed in the event of non-performance.

CAPP and the PSG proposed that the Non-Performance Penalty be equivalent to the highest toll applicable for deliveries on IPL (currently approximately \$1.36 per barrel for heavy crude oil deliveries from Edmonton to Montreal East). The penalty would be assessed when deliveries fell below 95 percent of a shipper's allocated volume. The amount of the penalty would represent the opportunity lost by IPL to move oil on its system.

CAPP and the PSG proposed that a shipper would be excused from the Non-Performance Penalty when a shipper's non-delivery is caused by a recognized event of force majeure, when IPL imposes restrictions on feeder pipelines, or in the event of carry-over volume on the IPL system. CAPP and the PSG believe that in an event of force majeure, IPL should be notified within four business days. Shippers claiming force majeure would pay the Non-Performance Penalty to IPL. Any disputed portion would be held in an interest bearing account pending final determination. In the event that the shipper is successful, the disputed amount of the penalty plus accrued interest, would be paid to the shipper. In the event that the shipper is unsuccessful, the amount plus interest would be applied against IPL's subsequent year's revenue requirement. When IPL disputes all or a portion of a claim, it would recover its reasonable assessment and litigation costs and retain five percent of the portion of the Non-Performance Penalty for which it is successful. CAPP and the PSG recommended that all force majeure disputes should be resolved by arbitration under Alberta legislation.

The Alberta Department of Energy ("ADOE"), in a letter of comment, stated its strong support of the CAPP/PSG proposal and that it is currently exploring options that would assist in reducing artificial levels of apportionment. One option that it identified could involve shipping crude oil, on a temporary basis, to non-IPL markets. CAPP and the PSG submitted that the additional uncertainty created by such measures would complement the CAPP/PSG proposal and cause shippers to be more disciplined in their nominations. CAPP and the PSG stated that the involvement of the ADOE is not part of their proposal.

### 2.2 The Novacor Proposal

The Novacor proposal focuses on tender verification for deliveries into IPL's crude oil lines as a solution to eliminomination. Historical receipts at each receipt point would serve as the basis for establishing future acceptable receipts at these same points. In its proposal, Novacor used 1994 average receipts as an example but suggested other options could be considered such as a 12 month



rolling average or some other period that may be judged to reflect the most abuse free period in recent history.

Under the Novacor proposal “Tender Targets” would be established for each receipt point by calculating the relationship of total historical receipts to IPL’s projection of available monthly gross capacity. IPL would advise industry and the feeder pipelines in advance of the tendering period of the acceptable total receipt levels for each receipt point. The management of feeder pipelines would become responsible for equitable sharing among shippers of each feeder pipeline’s Tender Target. In the event that the aggregate of individual tenders to IPL for a given feeder pipeline exceed the Tender Target for that point, IPL would look to the feeder pipeline to advise of specific tender adjustments to cause the aggregate to equal the Tender Target. In the event the feeder pipeline was unable or unwilling to advise of specific tender adjustments as requested, IPL would prorate all tenders received on that system to equate, in aggregate, to the Tender Target for that receipt point. IPL would then advise individual shippers and the feeder pipeline of these adjustments. Once final acceptable shipper tenders are established by IPL, individual shippers may choose to substitute one stream for another providing the total of all their stream tenders does not exceed their aggregate volume on all streams originally established.

The Novacor proposal also includes the assessment of a Non-Performance Penalty of \$1.50 per barrel except in the case of defined force majeure events.

## Chapter 3

# Views of the Board

---

### 3.1 The Proposals

Having carefully considered the merits of the two proposals before it, the Board has concluded that the CAPP/PSG proposal is preferable. The Board has reached this conclusion on the basis of three principal considerations.

First, the Novacor proposal transfers the majority of the responsibility for dealing with the apportionment problem to the feeder pipelines. Novacor provided no evidence that shippers could expect to be treated equitably and consistently across feeder pipelines nor did Novacor demonstrate that feeder pipelines would be able to accommodate its proposal.

Secondly, the supporting data required to implement the Novacor proposal are deliveries over a certain historical period. Novacor was of the view that supply variations and new receipt points could be dealt with by application to the Board. The Board is of the view that notwithstanding that applications may be made to the Board, the flexibility of the proposal to adapt to changing market circumstances is limited. Furthermore, the proposal entrenches a principle that historical use of pipeline space results in some sort of priority to its use in the future.

Thirdly, the CAPP/PSG proposal enjoys a broad basis of support. The Board agrees with those parties who argued that, in the current environment, general acceptance of a proposal may be an important determinant of its success.

### 3.2 Force Majeure

#### 3.2.1 Definition

In its draft tariffs, IPL defined force majeure as follows:

“Force Majeure” means an event which is unforeseen and beyond the control of the Shipper that either prevents the Shipper from delivering the affected volume to Carrier or prevents the Shipper from accepting delivery of the affected volume from Carrier. The following are the only instances that will be recognized as Force Majeure events: Earthquakes; floods; landslides; civil disturbances; sabotage; acts of public enemies; war; blockades; insurrections; riots; epidemics; the act of any government or other authority or statutory undertaking; the inability to obtain or the curtailment of electric power, water or fuel; strikes, lockouts or other labour disruptions; fires; explosions; breakdowns or failure of pipe, plant, machinery or equipment; and contamination or poisoning of catalyst and/or solvent or biological treatment facilities. For greater certainty, a lack of funds; the availability of a more attractive market; Shipper’s inability to purchase Crude Petroleum; or inefficiencies in operations do not constitute events of Force Majeure.

Parties at the hearing proposed various modifications for the most part broadening the number of events that should be in the force majeure clause, such as other Acts of God, failure by a feeder pipeline to redeliver or accept delivery, road bans, delays in startup of process units and extended shutdowns. Other suggestions involved striking out “only instances” in the second sentence and deleting the last sentence.

The Board notes that the broader the force majeure clause, the closer it is to the reasonable cause provision which has proven to be ineffective. The Board is of the view that a more restrictive force majeure clause is more likely to assist in addressing the overnominations problem and accepts the clause proposed by IPL in its evidence.

### **3.2.2 Resolution of Force Majeure Disputes**

The Board asked parties to address the issue of whether the imposition of arbitration pursuant to Alberta legislation to resolve force majeure disputes might constitute an improper delegation of the Board’s authority. CAPP, the PSG and IPL stated that they preferred the most efficient resolution of disputes and while they expected this could normally best be accomplished by arbitration they recommended that nothing be inserted in IPL’s tariff which would specify a specific method of dispute resolution. It is open to parties to determine how to resolve disputes. As the Board has not been asked to include arbitration as a part of its decision the issue of improper delegation is not raised.

### **3.2.3 Publishing Force Majeure Claims**

CAPP and the PSG suggested that IPL should be required to publish on a monthly basis: a list of all force majeure claims, including the name of the shipper claiming force majeure and the volumes affected; the amount of Non-Performance Penalties related to all disputed and undisputed force majeure claims; and a status report of the disputed claims. This was supported by IPL. Only one party argued against the implementation of such a mechanism.

The Board is of the view that publishing these data will assist in assessing the effectiveness of the new apportionment procedures. IPL shall provide this information to the Board and upon request to shippers and interested persons.

## **3.3 The Non-Performance Penalty**

The Board questioned parties on the appropriateness of relating this amount to the opportunity lost by IPL to move oil on its system. In order to ensure that the penalty will act as a greater deterrent to overnominations, an alternative basis could be to set a penalty of at least the maximum discount a shipper might experience as a result of having to sell its oil into a non-IPL market. This value was estimated by industry witnesses on certain occasions to be as much as \$2.50 per barrel. CAPP argued that this would not be workable because the market differential varies over time and among shippers.

The Board is aware that the majority of parties who supported a Non-Performance Penalty favoured the lower dollar amount. However, the Board was not persuaded by their supporting rationale, nor was it persuaded that the amount would be a sufficient deterrent. Accordingly, the Non-Performance Penalty will be set at \$17.00 per cubic metre (approximately \$2.70 per barrel).

The Board approves the establishment of a Non-Performance Penalty deferral account. The account will operate in the manner set out by IPL in its evidence. A carrying charge will be allowed on deferral account balances at the most recently available Bank of Canada average monthly rate, as published in the Bank of Canada Statistical Review, plus 50 basis points (not compounded).

### **3.4 Other Issues**

Currently, IPL apportions line 1 separately from lines 2, 3 and 13. Parties agreed that if post-apportionment capacity becomes available on line 1, it should be offered first to shippers of natural gas liquids and refined petroleum products and then to all crude oil shippers. The Board concurs with this recommendation.

Parties were asked whether the Non-Performance Penalty constitutes a toll within the definition of the Act and if so, did it comply with the requirements of sections 62 and 67 of the Act. Only IPL addressed this issue. The Board is of the view that the penalty is a toll, and that it is just and reasonable. Further, the tariff will require the penalty to be charged equally to all parties found to be in non-performance. The penalty by itself does not create unjust discrimination.

The Board questioned parties on the benefit of publishing on a monthly basis, by shipper, total nominations, allocated volume and actual shipments. Certain parties indicated that this may have a positive effect on nomination behaviour. Therefore, the Board requires IPL to publish this information until such time as it directs otherwise. The information shall be published in an aggregate form to address confidentiality and shall not include injection or delivery points. This information will be provided to the Board and, upon request, to shippers and interested persons.

The Board notes that CAPP and the PSG proposed that a joint industry task force be formed to review the effectiveness of their proposal in reducing apportionment on IPL and to ascertain if additional measures are required. This review would be forwarded to the Board no later than 1 October 1995. CAPP and the PSG requested that the Board tentatively schedule a hearing for November 1995 to consider the issues raised in the task force report and submissions by other parties. The Board, at this time, does not see the necessity to set a hearing date to examine the task force report. It is always open to any party to request a hearing.

The Board requested parties to address in final argument, whether there were any concerns with respect to the role of the ADOE under the *Competition Act*. The Board agrees with those parties who argued that there is no evidence on the record that would raise competition law issues.

Finally, the Board has decided to approve the proposed apportionment procedures submitted by IPL dated 6 April 1995 in Draft 2 of Tariffs 187, 188, 189 and 190 effective 27 April 1995 with the modifications described in this Decision.

## Chapter 4

# Disposition

---

The foregoing, together with Order TO-2-95, constitute our Decision and Reasons for Decision on this matter.

K.W. Vollman  
Presiding Member

A. Côté-Verhaaf  
Member

R.L. Andrew  
Member

Calgary, Alberta  
April 1995

## Appendix I

### Order TO-2-95

---

IN THE MATTER OF the *National Energy Board Act* (the “Act”) and the regulations made thereunder; and

IN THE MATTER OF an inquiry pursuant to subsection 24(3) of the Act into apportionment on the Interprovincial Pipe Line Inc. (“IPL”) system.

Before the Board on 21 April 1995.

AND WHEREAS on 6 April 1995, the Board issued Hearing Order MH-1-95, as amended, setting out the Directions on Procedure to govern the hearing;

AND WHEREAS the Board has considered the submissions of all parties to the hearing;

IT IS ORDERED THAT:

1. IPL shall amend the draft tariffs attached to its written direct evidence dated 6 April 1995 to state that the Non-Performance Penalty shall be set at \$17.00 per cubic metre;
2. IPL shall establish a Non-Performance Penalty deferral account;
3. IPL shall file with the Board and serve on interested parties by 27 April 1995 copies of the revised tariffs referred to in paragraph 1 above; and
4. The revised tariffs shall be in effect from 27 April 1995.

NATIONAL ENERGY BOARD

J. S. Richardson  
Secretary