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Canada Energy Regulator Reasons for Decision

Enbridge Pipelines Inc.
RH-001-2020

Canada

Canada Energy Regulator   Régie de l’énergie du Canada

Canada Energy Regulator Reasons for Decision

In the Matter of

Enbridge Pipelines Inc.

Application dated 19 December 2019 for Canadian Mainline Contracting

RH-001-2020
November 2021

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Glossary of Terms and Abbreviations

2019 Minister's Report	National Energy Board, *Optimizing Oil Pipeline and Rail Capacity out of Western Canada Advice to the Minister of Natural Resources* (March 2019)
adjusted CTS Exit Tolls	an estimate of the tolls that result from adjusting the CTS Exit Tolls to account for differences between surcharges embedded within those tolls and Enbridge's proposed Mainline Contracting tolls
Applicant	Enbridge Pipelines Inc.
Application or Mainline Contracting	the Canadian Mainline Contracting Application, submitted by Enbridge on 19 December 2019
BC	British Columbia
bbl	barrel
Brattle	The Brattle Group
BP	BP Products North America Inc.
Canadian Mainline	the Canadian portion of the Enbridge Mainline
CAPP	Canadian Association of Petroleum Producers
CCRL & FCL	Consumers' Cooperative Refineries Ltd. & Federated Cooperatives Limited
Cenovus	Cenovus Energy Inc.
CER	Canada Energy Regulator
CER Act	*Canadian Energy Regulator Act*
CLT	Canadian Local Tariff
Commission	Commission of the Canada Energy Regulator
common carriage	The obligation in subsection 239(1) of the CER Act is often referred to as common carriage. It requires an oil pipeline company to, "according to its powers, without delay and with due care and diligence, receive, transport and deliver all oil offered for transmission by means of its pipeline".
Concentric	Concentric Energy Advisors, Inc.

CSG	Canadian Shippers Group, which consists of Canadian Natural Resources Limited, MEG Energy Corp., Shell Canada Limited and Total E&P Canada Ltd.
CTS	Competitive Toll Settlement setting out tolls, tolling methodology and the terms and conditions of service on the Enbridge Canadian Mainline from 1 July 2011 to 30 June 2021
CTS Exit Tolls	an estimate of the tolls that would be in place on 30 June 2021 for service on the Canadian Mainline under the CTS
Drazen	Drazen Consulting Group, Inc.
DSV Procedure	Destination Verification Procedure, included as Appendix 41 of the Application
Earnest CAPP Forecast	the crude oil supply forecast filed in Appendix B of Neil Earnest's evidence on behalf of Enbridge
Earnest EF Evolving Forecast	the crude oil supply forecast filed in Neil Earnest's reply evidence
Enbridge Mainline	Enbridge's combined crude oil pipeline system through Canada and the US which consists of the Canadian Mainline and Lakehead System
Enbridge	Enbridge Pipelines Inc., the owner of the Canadian Mainline
EPAC	Explorers and Producers Association of Canada
Excused Event	an event as a result of which a committed shipper is relieved from its obligations to deliver its Monthly Volume Commitment or pay a Deficiency Payment under its TSA (as described in the pro-forma TSAs)
ex-Edmonton service	service from Edmonton, Alberta (as described in the pro-forma TSAs)
ex-Hardisty service	service from Hardisty, Alberta; Kerrobert, Saskatchewan; Regina, Saskatchewan; or Cromer, Manitoba (as described in the pro-forma TSAs)
Express	Express Pipeline
FERC	Federal Energy Regulatory Commission of the US
Flex Service Term	a service term that may be terminated by a committed shipper on 36 months' notice to Enbridge (as described in the pro-forma TSAs)
GDPP	the annual average Canada Gross Domestic Product at Market Prices Index provided by Statistics Canada

GDPP Index	the ratio of the annual change in GDPP over the GDPP for the prior year and is expressed as a percentage
IJT	International Joint Tariff
Imperial	Imperial Oil Limited
Inter Pipeline	Inter Pipeline Ltd.
IPL	Interprovincial Pipe Line Company
Keystone	Keystone Pipeline
KXL	Keystone XL Project
Lakehead System or Lakehead	the US portion of the Enbridge Mainline, operated by Enbridge Energy, Limited Partnership
Line 3 Replacement	Enbridge Pipelines Inc. Line 3 Replacement Program
Mb/d	thousand barrels per day
MEG	MEG Energy Corp.
MMb/d	million barrels per day
Motiva	Motiva Enterprises LLC
NEB	National Energy Board
NEB Act	*National Energy Board Act*
NGL	natural gas liquids
NGTL	NOVA Gas Transmission Ltd.
O&A	operating and administrative costs
Open Season Decision	the Commission's 27 September 2019 decision directing Enbridge to not offer firm service to prospective shippers on the Enbridge Mainline until such firm service, including all associated tolls and terms and conditions of service, has been approved by the Commission.
Open Season Procedures	the procedures governing an open season process on the Canadian Mainline, as described in Appendix 17 to the Application
OPUAR	*Oil Pipeline Uniform Accounting Regulations*
PADD	Petroleum Administration for Defense District(s)

ROE	Return on equity
Rules Tariffs	Pro-Forma Rules and Regulations Tariffs for Crude Petroleum, Natural Gas Liquids and Refined Petroleum Products included in the Application as Appendices 38-40
Suncor	Suncor Energy Inc.
SVP	Supply Verification Procedure
TMEP	Trans Mountain Expansion Project
Trans Mountain	Trans Mountain Pipeline
TSAs	the pro-forma Transportation Services Agreements which set out the terms and conditions, including tolls, upon which Enbridge proposes to contract the Canadian Mainline, included in the Application as Appendices 9-16
US	United States
URC	United Refining Company
US$	US dollars
Valero	Valero Energy Inc.
WCSB	Western Canadian Sedimentary Basin
Wood Mackenzie Revised Forecast	the crude oil supply forecast filed by Wood Mackenzie in an undertaking

Recital and Appearances

IN THE MATTER OF the *Canadian Energy Regulator Act* and the regulations made thereunder;

AND IN THE MATTER OF an application dated 19 December 2019 by Enbridge Pipelines Inc. pursuant to sections 32, 68, 226, 229, 230, 231, 235, and subsections 239(1) and 389(2) of the *Canadian Energy Regulator Act* filed with the Canada Energy Regulator under File OF-Tolls-Group1-E101-2019-02 02;

AND IN THE MATTER OF Canada Energy Regulator Hearing Order RH-001-2020, dated 22 May 2020;

HEARD in Calgary, Alberta on 19, 20, 21, 25, 26, 27, and 31 May; 1, 2, 3, 7, 8, 9, 10, 14, 16, 17, 21, 22, 23, 25, 28, and 29 June; 12, 13, 14, 15, and 16 July 2021.

BEFORE:

Stephania Luciuk	Presiding Commissioner
Trena Grimoldby	Commissioner
Wilma Jacknife	Commissioner

Participants	**Appearances**	**Witnesses**
Enbridge Pipelines Inc.	Kristi Millar Bernard Roth Don G. Davies, Q.C. Jennifer Nichols	Laszlo Varsanyi Marlon Samuel Brent Heinz Ranjana Martin John J. Reed Neil K. Earnest Dr. Jeffrey Church Greg Belyea Larry E. Kennedy James M. Coyne Mark Oberstoetter
Alberta Department of Energy	Colin King Joyce Amiwero	
Alberta Petroleum Marketing Commission	Colin King	
BP Products North America Inc.	John Cusano Michelle Voinorosky Laura McPhee Laura Estep	Edward Shahady Richard Clark
Canadian Natural Resources Limited	Martin Ignasiak John Gormley	Shonda Day Glenn Booth Mark Drazen Ron Mikkelsen Dr. Jeff D. Makholm Roland Priddle
Cenovus Energy Inc.	James H. Smellie Lorne Rollheiser	Geoffrey T. Murray Dr. Michael Webb

Participants	Appearances	Witnesses
ConocoPhillips Canada	Alan Ross, Q.C. Bradon Willms	
Consumers' Cooperative Refineries Ltd. & Federated Co-operatives Limited	Rangi Jeerakathil Jessica Buhler	Douglas Mah Warren Cross Gurpreet Bhatia
Ducere LLC	David Nelson	
Government of Saskatchewan	Jessica Kennedy Coleman Brinker Shawn Denstedt, Q.C.	Bruce Wilhelm Paul Wagner Dylan Gejdos
Imperial Oil Limited	Brad Gilmour Jessica Mercier Tim Myers	Jon Wetmore Paula O'Shaughnessy David Hirak Jim Falder
Inter Pipeline Ltd.	Sander Duncanson	Michelle Dawson Tara Gardner
MEG Energy Corp.	Keith Miller	Erik Alson Mark Drazen Ron Mikkelsen Dr. Jeff D. Makholm Roland Priddle
Motiva Enterprises LLC Phillips 66 Canada Ltd.	Gordon Nettleton Dennis P. Langen Larissa D. Lees	John McInnes
Shell Canada Limited	Evan W. Dixon Evan Dickinson Brendan Downey	Pauline Buitink Mark Drazen Ron Mikkelsen Dr. Jeff D. Makholm Roland Priddle
Suncor Energy Inc.	Katie Slipp Jay Headrick C. Kemm Yates, Q.C.	Mark Townley John Van Heyst Dr. Paul R. Carpenter Dr. Daniel S. Arthur Michael R. Tolleth
Explorers and Producers Association of Canada	Randall Block, Q.C. Laurie Ziola	Dr. Tristan Goodman Jackie Forrest
Total E&P Canada Ltd.	Ron Kruhlak, Q.C. Shawn Hinch Rusty Miller Michael Barbero	Shannon Hardy Gary M. Houston Mark Drazen Ron Mikkelsen Dr. Jeff D. Makholm Roland Priddle

Participants	Appearances	Witnesses
United Refining Company	Loyola G. Keough	Christopher C. Sparling David Wortman
Valero Energy Inc.	Dennis P. Langen Larissa D. Lees Nathan Murphy	Randy Hawkins
Vitol Inc.	Dennis P. Langen Larissa D. Lees	
Canada Energy Regulator	Carol Gagné Jessica Gill	

1 Overview of our decision

1.1 Summary

On 19 December 2019, Enbridge Pipelines Inc. (**Enbridge**) filed an application with the Canada Energy Regulator (**CER**) to introduce firm service on the Canadian Mainline (**Application** or **Mainline Contracting**). The Application had support from many shippers, but also faced substantial opposition from a diverse set of stakeholders, including many Canadian oil producers. The Application, by virtue of its temporal and volumetric scope, would cause a foundational shift in Canada's oil pipeline system – singlehandedly moving the transportation of oil by pipeline in Canada from predominantly uncommitted service, to mostly committed capacity.[1]

With Mainline Contracting, Enbridge sought to introduce firm service on 90 per cent of the capacity of the largest oil pipeline system in Canada. The Application proposed largely fixed tolls over the length of the agreement and contracts that would lock in volumes for up to 20 years. The proposed firm service offering included new types of contracts that would allow parties greater flexibility as compared to traditional take-or-pay contracts, including terms and conditions related to excused events and termination rights.

This Application comes at a time when oil pipeline capacity has, with the exception of periods in 2020, been heavily constrained out of western Canada for years, with significant competition amongst would-be shippers for access to scarce capacity. Concurrently, changes related to energy transition are affecting both pipelines and those who rely on pipelines for transportation of various petroleum products. This uncertain environment was highlighted as a significant consideration by Enbridge, which sought to introduce firm service, in part, to mitigate the various risks the Canadian Mainline was facing.

This Application marks the first time Enbridge has asked for approval for firm service on the Canadian Mainline, and the first time that approval has been requested for firm service on most of the capacity on a major Canadian oil pipeline in the absence of a major proposed investment. The Commission of the CER (**Commission**) is of the view that the Application has serious and broad-ranging implications for the oil industry, beyond the risks faced by the Canadian Mainline, both now and into the future. While the Commission finds that firm service on the Canadian Mainline is not, in and of itself, prohibited by the *Canadian Energy Regulator Act* (**CER Act**) or necessarily inconsistent with the principle of common carriage, Enbridge bears the onus of demonstrating that its proposed suite of services and contract terms comply with the CER Act, particularly sections 230, 235, and 239.

Both the importance of a pipeline to the market and the degree to which that pipeline can exercise market power are factors likely to influence the range and magnitude of impacts potentially affecting shippers and stakeholders when changes to pipeline access are proposed. This context can in turn affect the degree of regulatory scrutiny an application must withstand. To the extent that an oil pipeline proposes significant changes to its services,

[1] With Enbridge's Line 3 Replacement Program and Trans Mountain's Expansion Project in service, roughly 70 per cent of total ex-Western Canadian Sedimentary Basin oil pipeline capacity would be available on an uncommitted basis in the absence of Mainline Contracting. If Mainline Contracting were implemented, total uncommitted capacity would fall to below 20 per cent of the oil pipeline capacity exiting western Canada.

commercial arrangements and overall access to the pipeline system, the Commission will carefully evaluate the reasons for doing so as part of its statutory mandate.

In this case, the Commission is of the view that many Enbridge submissions had merit and that elements of the Application provided a strong justification for some firm service on the Canadian Mainline. At the same time, the Commission finds that the specific offering proposed by Enbridge, removing 90 per cent of uncommitted capacity for periods of up to 20 years, would have dramatically and suddenly changed, and likely diminished, overall access to the Canadian Mainline, without a compelling justification. Mainline Contracting risked potentially significant disruptions to the market of unknown duration without any reliable way to respond to and mitigate such impacts in a timely manner.

The Commission is mindful of the needs of the majority of shippers with refining capacity who support this Application as well as the operational and commercial challenges Enbridge must manage as a result of the configuration of the Enbridge Mainline and associated lack of liquid hub delivery points. The suite of service options proposed by Enbridge would undeniably meet the needs of many shippers of record. However, Mainline Contracting would potentially not provide sufficient access to spot capacity for shippers and prospective shippers who require or, for legitimate reasons, prefer to use uncommitted service. Overall, the Commission is persuaded that Mainline Contracting would likely reduce the access to pipeline capacity realistically available to certain shippers and that the package of tolls, terms, and conditions in the service offering would result in a distribution of benefits and negative impacts that is uneven and disproportionate.

For the reasons set out in this decision, the Commission finds that Mainline Contracting does not comply with subsection 239(1) of the CER Act and raises concerns in respect of sections 230 and 235 of the CER Act. The decision is structured in five parts.

Chapter 2

The unique context of the Canadian Mainline, including its market participants and its role in the Canadian crude oil transportation system, is critical to the assessment of Mainline Contracting. The Application and this context are described in Chapter 2.

Chapter 3

In Chapter 3, the Commission sets out and applies a framework for assessing the common carriage obligation. In brief, this obligation can be met where a pipeline company can establish:

- Fair and equal opportunity to access firm service is provided by the company, which has generally been achieved in past cases when an appropriate open season is (or will be) conducted.
- Sufficient access to capacity remains after firm service is implemented, which is most frequently demonstrated by the company making sufficient capacity available for uncommitted volumes (or when facilities are readily expandable).

These elements must be considered in light of the circumstances of each application, including the specific reasons for introducing firm service and other relevant contextual factors.

With respect to a fair and equal opportunity to access firm service, the proposed procedures for Enbridge's open season do not explicitly exclude any parties from submitting bids. The Commission is of the view that aspects of the Open Season Procedures could be appropriate in circumstances where the service terms being offered do not create barriers to access. However, the Commission is concerned that certain aspects of the offering would effectively limit some parties' ability to access firm service through the open season.

Regarding the sufficiency of access to capacity after firm service is implemented, the Commission finds that the proposed reservation of 10 per cent of capacity for uncommitted volumes is not likely to ensure meaningful and reliable access to pipeline capacity. With no new capacity being added as part of the Application, the Commission finds that reallocating capacity from 100 per cent uncommitted to 10 per cent uncommitted will likely lead to higher levels of apportionment on uncommitted volumes for material periods of time. Enbridge did not establish that a readily available expansion would reliably address these concerns regarding uncommitted capacity, nor did it provide a compelling justification for the negative impacts on pipeline access identified by the Commission.

In particular, the Commission acknowledges that Enbridge faces some volume risk, in the form of both supply risk and competitive risk. However, the available evidence regarding Enbridge's risk exposure, with other demonstrated needs for Mainline Contracting, does not outweigh the potential negative impacts and uneven distribution of benefits that may result.

While certain parties would benefit from increased certainty under Mainline Contracting, there is a modest risk that Mainline Contracting could introduce volatility or distort prices from the levels that market participants might otherwise expect. Moreover, while the Commission acknowledges that there is a reasonable likelihood of a variety of efficiency gains under Mainline Contracting, the magnitude or materiality of such gains was unclear and must be measured against other contextual considerations.

Unjust discrimination is addressed in Section 3.7. The Commission finds that Enbridge did not provide sufficient justification for the discriminatory aspects of Mainline Contracting. The Commission notes that many concerns related to discrimination are similar to concerns that arise regarding the common carriage obligation. Namely, the package did not balance the interests of all stakeholders, the benefits of Mainline Contracting do not clearly outweigh the potential negative impacts and there are concerns with barriers certain shippers or prospective shippers may face when seeking access to firm service through the open season.

Chapters 4 and 5

The proposed tolling methodology is considered in Chapter 4. Certain terms and conditions of service are considered in Chapter 5.

The Commission is of the view that a comparison of Enbridge's proposed tolls to illustrative cost of service tolls under the same 90 per cent contracted service structure, as well as projected returns on equity (**ROE**s) under the proposed methodology, are key to assessing whether Enbridge's proposed tolling methodology would yield just and reasonable tolls. To a significant extent, the combination of the proposed international joint tariff methodology, the uncertainty and disparity involving Lakehead local tolls and costs, and the long-term 20-year fixed toll approach obscured whether the proposed methodology would, considering costs, produce just and reasonable Canadian Mainline tolls. Nonetheless, the Commission is persuaded that the

available evidence indicates that the proposed tolls could produce unreasonable returns and unreasonably exceed cost of service tolls on a sustained basis on the Canadian Mainline.

Toll packages often reflect a complex suite of gives and takes that must be assessed not solely individually, but also collectively, to determine statutory compliance. In aggregate, the overall toll design, as well as a number of terms and conditions, excessively favour certain committed shippers positioned to access the full benefits attached to significant term and volume commitments. The Commission finds a lack of compelling reasons to incent long-term commitments to the degree proposed in this Application. Favouring committed shippers through the components embedded within the overall toll design and various terms and conditions was not justified and raises concerns about discrimination between the services.

Neither Chapter 4 (Tolling methodology) nor Chapter 5 (Terms and conditions of service) parse every element of the proposed tolling methodology, nor every term and condition, to provide comprehensive and definitive findings. Rather, these two chapters provide the Commission’s analysis on key areas of concern, which may inform future negotiations and regulatory steps by Enbridge regarding tolls and tariffs on the Canadian Mainline.

Chapter 6

The Commission completes its decision with a discussion of the exemption from the requirement to keep the system of accounts described by the *Oil Pipeline Uniform Accounting Regulations* (**OPUAR**) and the inclusion of the Destination Verification Procedure (**DSV Procedure**) in Enbridge’s Rules Tariff.

Conclusion

The Commission recognizes that Enbridge strived to put forward a commercial offering with innovative terms, to accommodate different types of shippers and to address the desire for firm service from an important shipper constituency. Ultimately, however, the Application is not compliant with subsection 239(1) of the CER Act and it raised a number of associated concerns in relation to sections 230 and 235 of the CER Act. The Commission does not consider the evidentiary record sufficient to order alternate relief, such as the alternate service and tolling design put forward by Suncor, particularly given Enbridge’s emphasis on the Mainline Contracting as one inextricable, negotiated package. While Mainline Contracting, as proposed in the Application, is denied, the Commission encourages Enbridge to continue to work with its stakeholders to develop new tools to address a changing industry.

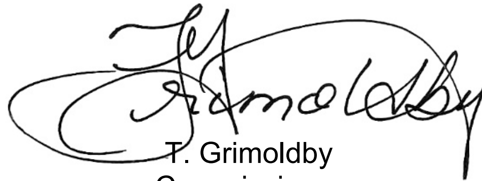
1.2 Relief granted

After careful consideration of all of the evidence and submissions, the Commission denies the implementation of Mainline Contracting and Enbridge’s proposed terms, conditions and tolls. Accordingly, the existing interim tolls and conditions of service remain in effect.

The Commission approves the continuation of Enbridge's exemption from the requirement to keep the system of accounts described by the OPUAR, but Enbridge must file its financial surveillance reports in full.

The Commission also approves adding the DSV Procedure to the Canadian Mainline tariffs. The Commission directs Enbridge to file its updated Rules Tariff and the DSV Procedure document with the CER. Enbridge must notify the CER and file amendments to these documents 90 days prior to the effective date of any future changes to these procedures.

S. Luciuk
Presiding Commissioner



T. Grimoldby
Commissioner

W. Jacknife
Commissioner

Calgary, Alberta

November 2021

2 Application and context

2.1 Application

Pursuant to Parts 1, 3 and 9 of the CER Act, Enbridge applied to the CER for approval of a new service and tolling framework for the Canadian Mainline. Specifically, Enbridge requested that the Commission:

- approve the implementation of firm service on 90 per cent of the available capacity of the Canadian Mainline to be provided in accordance with all terms and conditions, including the tolling methodology, contained in the pro-forma Transportation Services Agreements (**TSAs**) and the pro-forma Rules and Regulations Tariffs for Crude Petroleum, Natural Gas Liquids and Refined Petroleum Products (**Rules Tariffs**);
- approve the reservation of 10 per cent of the available capacity of the Canadian Mainline for uncommitted volumes and the implementation of uncommitted service in accordance with all terms and conditions, including the tolling methodology, contained in this Application, the TSAs, the Rules Tariffs and the illustrative Canadian Mainline Uncommitted Local and International Joint Tolls Tariffs;
- approve the methodologies to set the Canadian Mainline receipt and delivery tankage revenue requirement and receipt and delivery terminalling tolls as set out in the Application;
- find that the Open Season Procedures are appropriate and will lead to an open season that is fair, transparent and consistent with Enbridge's common carrier requirements;
- approve the continuation of Enbridge's exemption from the requirement to keep the system of accounts described by the OPUAR; and
- grant such further and other relief as Enbridge may request or the CER may consider appropriate.

In addition to Enbridge, 39 intervenors and 28 commenters participated in the hearing process. The hearing was conducted using written and oral processes. For the written process, the Commission received evidence, letters of comment, three rounds of intervenor information requests responded to by Enbridge, one round of information requests responded to by intervenors, reply evidence from Enbridge and written final argument. The oral portion of the hearing consisted of cross-examination and summary final argument, conducted virtually over 28 days.

The views of the parties summarized throughout this decision are selective and intended to highlight key submissions from an extensive record of evidence and argument. Certain intervenors were supportive of the Application as a whole and did not provide detailed submissions on every issue. While every submission is not summarized in this decision, the Commission carefully considered the entirety of the substantial record before it.

The List of Issues identified by the Commission, and a detailed description of how the Commission heard the Application, are set out in Appendices I and II to this decision, respectively.[2]

A list of the previous National Energy Board (**NEB**) and CER decisions referenced throughout this decision, along with links, is provided in Appendix III.

2.2 Context

2.2.1 Overview of the Canadian crude oil transportation system

The vast majority of Canada's crude oil is produced in western Canada from the Western Canadian Sedimentary Basin (**WCSB**). The WCSB spans the provinces of Manitoba, Saskatchewan, Alberta and British Columbia (**BC**). Crude oil must be processed in a refinery to produce useable products, such as gasoline, diesel, jet fuel and heating oil. While there is some local refining demand in BC, Alberta and Saskatchewan, most of the crude oil produced in western Canada is transported on pipelines to the United States (**US**) Midwest, Midcontinent, and Gulf Coast as well as Ontario and Quebec for refining. Refineries in the US Midwest and Gulf Coast are some of the largest markets for Canadian oil.

Western Canada's major export pipelines for crude oil originate from two main transportation hubs in Edmonton and Hardisty, Alberta. In recent years, four major pipelines, the Enbridge Mainline, the Trans Mountain Pipeline,[3] the Keystone Pipeline[4] (**Keystone**) and the Express Pipeline (**Express**), have carried more than 3.8 million barrels per day (**MMb/d**) from western Canada to serve markets throughout Canada, the US and beyond. Crude oil is also transported from western Canada by rail to markets throughout Canada and the US.[5]

While some major oil pipelines offer firm service, most of the total pipeline capacity out of the WCSB is currently uncommitted. Generally, for uncommitted capacity, shippers nominate volumes each month for delivery into the pipeline. If more volumes are nominated than the pipeline can transport, each shipper's nominated volume is apportioned or reduced by the same percentage. Apportionment can be driven by a variety of factors, including growing oil supply and reduced pipeline capacity due to scheduled maintenance or unplanned outages.

Prior to 2020 and the COVID-19 pandemic, which reduced global demand for crude oil, the major western Canadian crude oil pipelines were operating at or near capacity, as incremental

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[2] Note that, prior to filing this Application, Enbridge commenced an open season for firm service on the Canadian Mainline on 2 August 2019. In response to submissions from various parties, the Commission issued a decision on 27 September 2019 ordering that Enbridge may not offer firm service to prospective shippers on the Mainline until such firm service, including all associated tolls and terms and conditions of service, has been approved by the Commission. See CER, *Letter Decision - Complaints regarding Enbridge Pipelines Inc. Mainline Open Season*, Filing ID C01893-1 (27 September 2019) [**Open Season Decision**].

[3] The Trans Mountain Pipeline originates at Edmonton, Alberta and terminates in Burnaby, BC delivering crude oil to Canada's west coast. In 2019, the Trans Mountain Pipeline averaged throughput of 314 Mb/d. [CER, OpenGov Pipeline Throughput and Capacity Data]

[4] The Keystone Pipeline originates in Hardisty, Alberta and extends to the US Midwest and USGC. In 2019, throughput on the Keystone Pipeline averaged 552 Mb/d. [CER, OpenGov Pipeline Throughput and Capacity Data]

[5] Crude oil exports by rail reached a peak of roughly 412 Mb/d in February 2020. [CER, OpenGov Canadian Crude Oil Exports by Rail - Monthly Data]

pipeline additions had not kept pace with supply growth. As oil production was surpassing pipeline capacity, there were high levels of apportionment. Crude oil demand has largely recovered since the lows seen in the spring of 2020. By the summer of 2021, pipelines were operating at capacity with heavy volumes regularly apportioned on the Canadian Mainline.

In recent years, there have been some incremental pipeline capacity gains for egress out of the WCSB. Enbridge's Line 3 Replacement Program (**Line 3 Replacement**) and the Trans Mountain Expansion Project (**TMEP**), once in service, will add approximately 1 MMb/d of takeaway capacity.[6]

2.2.2 Overview of the Enbridge Mainline

The Enbridge Mainline is an integrated system comprised of the Canadian Mainline[7] in Canada and the Lakehead System[8] in the US. Figure 2.1 is a map of the Enbridge Mainline. The Canadian Mainline, which includes approximately 6,600 km of CER-regulated assets,[9] originates in Edmonton, Alberta, extends east across the Prairies, and crosses the Canada-US border near Gretna, Manitoba where it joins the Lakehead System.

At Superior, Wisconsin, the Lakehead System branches into two segments. The northern segment, Line 5, passes through northern Wisconsin and Michigan, before crossing into Ontario. The southern segment, consisting of Lines 6, 14 and 61, flows south along Lake Michigan, passing through the Chicago area en route to Flanagan, Illinois, where it interconnects with downstream pipelines and storage facilities. From Flanagan, Lines 78A and 78B flow northeast towards Canada.

Line 5 and 78B cross the Canada/US border in Ontario and terminate at Sarnia, Ontario. From Sarnia, the Canadian Mainline can transport crude oil to Westover, Ontario (via Line 7) and onwards to Nanticoke, Ontario (via Line 11).

The Enbridge Mainline also connects to a number of CER-regulated pipelines including Keystone, Express Pipeline, Wascana Pipeline, and Enbridge Line 9 as well as several US-regulated lines such as Spearhead, Flanagan South, Southern Access Extension, Mustang, and Toledo.[10] The connecting pipelines transport crude oil to refineries located in the US Midwest and Midcontinent, Ontario and Quebec, as well as to the major market and transportation hubs in Cushing, Oklahoma and Patoka, Illinois. A large number of refineries on the US Gulf Coast can be reached from Cushing and Patoka.

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6 TMEP is expected to add 590 Mb/d and Line 3 Replacement adds 370 Mb/d relative to Line 3 capacity when the Application was filed.

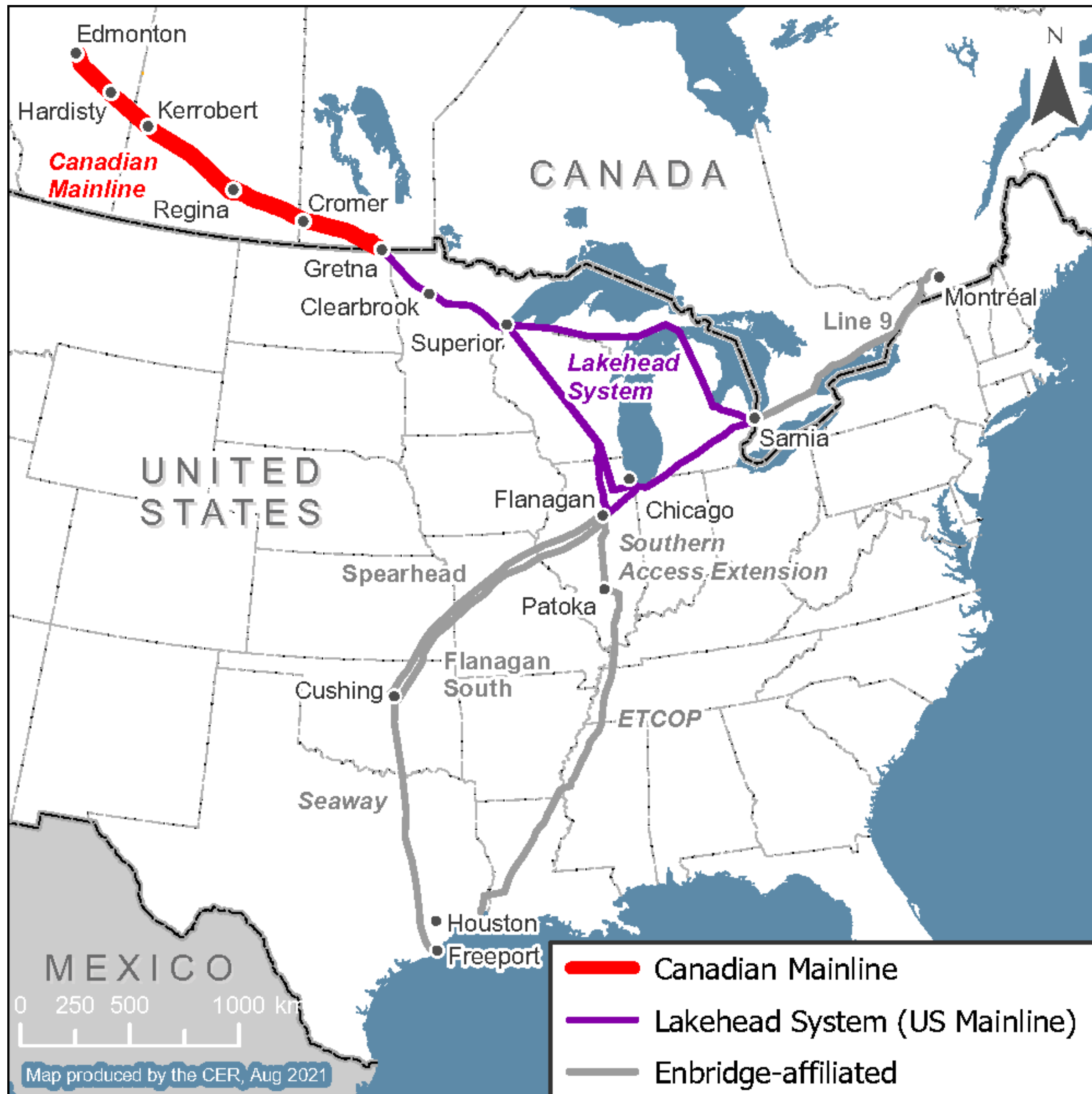
7 The Canadian Mainline includes the Canadian sections of Lines 1, 2, 3, 4, 5, 6B and 67 as well as Line 7 and 11.

8 The Lakehead System includes the US sections of Lines 1, 2, 3, 4, 5, 65, 67 and 78A, 78B as well as Line 6A, 14/64 and 61.

9 Includes operating pipeline and various auxiliary infrastructure [CER, Pipeline Profiles: Enbridge Mainline].

10 Spearhead and Flanagan South transport crude oil from the Flanagan, Illinois, area to Cushing, Oklahoma. Southern Access Extension transports crude oil from the Flanagan area to Patoka, Illinois. Mustang transports crude oil from the Chicago, Illinois, area to Patoka. Toledo Pipeline transports crude oil from Stockbridge, Michigan, to Toledo, Ohio.

Figure 2.1 – Map of the Enbridge Mainline



The Enbridge Mainline is capable of transporting over 3 MMb/d of petroleum products, including light crude oil, medium crude oil, heavy crude oil, refined petroleum products and natural gas liquids (**NGLs**).[11] The Enbridge Mainline has 12 receipt[12] and 18 delivery points[13], with direct

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[11] Enbridge indicated in its Application that in 2019, the Enbridge Mainline transported 42 distinct crude oil commodities, one NGL commodity and 19 refined petroleum product commodities.

[12] In its Application, Enbridge listed these locations as receipt points: Edmonton, Alberta; Hardisty, Alberta; Kerrobert, Saskatchewan; Regina, Saskatchewan; Cromer, Manitoba; Clearbrook, Minnesota; Mokena, Illinois; Griffith, Indiana; Stockbridge, Michigan; Lewiston, Michigan; Corunna or Sarnia; and Westover.

[13] In its Application, Enbridge listed these locations as delivery points: Hardisty; Kerrobert; Milden, Saskatchewan; Stony Beach, Saskatchewan; Regina; Gretna, Manitoba; Clearbrook; Superior, Wisconsin; Lockport, Illinois; Mokena; Flanagan, Illinois; Griffith; Stockbridge; Rapid River, Michigan; Marysville, Michigan; Corunna or Sarnia; Westover; and Nanticoke.

connections to 15 refineries. In addition, the Enbridge Mainline delivers to markets in Saskatchewan,[14] the US Midwest[15] (PADD II), Pennsylvania[16] (PADD I), and Ontario,[17] as well as to downstream pipelines that serve refining markets in the US Gulf Coast (PADD III). In total, the Enbridge Mainline can access approximately 12.7 MMb/d of refining capacity.

At the time of the Application, the Enbridge Mainline was transporting 1.9 MMb/d to directly connected refineries and more than 1.1 MMb/d for shippers with downstream take-or-pay commitments on pipelines that connect to broader refinery and export markets. These directly connected refineries and downstream pipelines provide a strong demand-pull for Enbridge Mainline's services.

2.2.3 Overview of the unique context of the Canadian Mainline

The Canadian Mainline represents roughly 70 per cent of total oil pipeline capacity out of the WCSB. The Enbridge Mainline's primary upstream receipt points are at liquid hubs, in Edmonton and Hardisty, Alberta,[18] whereas downstream delivery points include a series of discrete facilities or other pipelines which primarily operate using firm contracts.

Due in part to this configuration and Enbridge's need to ensure that all product will be taken off at delivery points,[19] shippers of record have generally been parties with downstream facilities or holders of firm capacity on downstream pipelines. Producers have predominantly opted to sell their production to shippers upstream of the Enbridge Mainline at the Edmonton and Hardisty markets, rather than to use the Enbridge Mainline as shippers of record themselves.
This configuration is also relevant to the DSV Procedure, discussed further in Section 6.2 (Destination verification procedure).

Market participants in the crude oil supply chain include producers, transportation and storage companies, marketers and aggregators, as well as refiners. Integrated companies own both production and refinery assets. Producers that focus only on the production business are commonly referred to as "pure producers" and range in size from very small or junior companies to large multinational companies. Marketing aggregators[20] source production from producers for the purposes of marketing to downstream companies; small or mid-sized producers commonly

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[14] CCRL & FCL Co-op Refinery Complex in Regina, Saskatchewan.

[15] Marathon and Flint Hills Resources in Minnesota; Cenovus (formerly Husky) in Wisconsin; ExxonMobil and CITGO in Illinois; BP in Indiana; BP and PBF in Ohio; and Marathon in Michigan.

[16] United Refining in Warren, Pennsylvania.

[17] Ontario refineries include Imperial Oil in Nanticoke and Sarnia; Shell in Corunna; and Suncor in Sarnia.

[18] The Canadian Mainline also receives supply from receipt points in Saskatchewan (Kerrobert and Regina) as well as in Manitoba (Cromer).

[19] Enbridge has strict rules for the Enbridge Mainline because the pipeline is not a bullet pipeline to a flexible, liquid market receiving hub. Instead, oil that enters the inlet of the Enbridge Mainline must be shipped to a specific buyer and destination facility (a named refinery or downstream pipeline). As a result, on the Enbridge Mainline system the destination must be known precisely before the crude oil is accepted for transportation. Accordingly, if Mainline Contracting is approved, an upstream producer with firm service would first have to obtain verification from a downstream facility (typically a refiner) that they will receive the crude oil before the producer would be allowed to ship their volumes on the Canadian Mainline. If the upstream producer cannot obtain this verification from the refiner, they would not be able to utilize their firm transportation.

[20] Shell Trading Canada, Trafigura, Macquarie, and midstream entities such as Pembina Midstream, Inter Pipeline, Plains Midstream, Gibson Energy and Tidal (Enbridge) are examples of marketing aggregators active in the WCSB.

rely on aggregators to sell their production. Some larger producers may also participate in the marketing business. Parties involved throughout the crude oil supply chain, many of whom are not typically shippers of record on the Canadian Mainline, participated in this proceeding.

Parties in support of this Application were generally refiners and integrated companies that own refineries located in the US, the largest market for western Canadian crude oil.[21] As noted, these supporting refiners and integrated companies tend to be shippers of record on the Canadian Mainline, as they own refineries that are either directly or indirectly connected to the Enbridge Mainline.

Parties opposed to this Application represented a diverse set of stakeholders, including producers of various sizes, an industry association representing producers (Energy Producers Association of Canada, or **EPAC**), the Government of Saskatchewan, refiners and integrated companies, as well as a connected feeder pipeline company. While many of the opposing producers are not shippers of record, they rely on the Enbridge Mainline to transport their production to market, typically selling to refiners, integrated companies, and marketers upstream of the Canadian Mainline inlet. These parties represent the producers of the majority of the total volume of crude oil and liquids produced from western Canada.

Enbridge submitted that there was extensive support for the Application, which should be a "significant determining factor" in the consideration and ultimate approval of the Application. Enbridge provided support letters from 14 parties[22] that represent more than 75 per cent of the Canadian Mainline crude oil volumes. However, given the Canadian Mainline's position as Canada's largest oil export pipeline (by a wide margin) and unique configuration, a diverse suite of stakeholders are potentially impacted by changes to access, terms, conditions, and tolls on the Canadian Mainline, whether they are shippers of record or not. Importantly, while many producers may not be shippers of record, significant amounts of their production are transported on the system, and their interests are tied to future use of the system and potential market impacts. The importance of producer interests in the determination of the Canadian Mainline's tolls and tariffs is illustrated by the fact that the Canadian Association of Petroleum Producers (**CAPP**) was a counterparty to previous settlement agreements.[23]

2.3 Legislative framework

The Application requires the Commission to consider the following provisions of the CER Act: subsection 239(1) regarding common carriage, section 230 regarding just and reasonable tolls, and sections 235 and 236 regarding unjust discrimination. These provisions are repeated from the former *National Energy Board Act* (**NEB Act**), apart from minor changes to modernize language.[24]

The Traffic, Tolls and Tariffs section of Part III of the CER Act, previously Part IV of the NEB Act, grants the Commission broad authority regarding tolls and tariffs. In considering Part IV of

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21 Two supporting parties, Vermillion Energy and Connacher Oil and Gas Limited, do not own refining assets.

22 See *Shipper Support Letters*, Filing ID C03831-2 (19 December 2019) and *Connacher Oil and Gas Limited - Letter of Support*, Filing ID C09909-9 (26 November 2020).

23 For example, the previous Competitive Toll Settlement was negotiated and supported by CAPP, as well as Enbridge Mainline shippers.

24 See Part IV of the NEB Act, in particular: s. 59 for NEB authority, s. 62 regarding just and reasonable tolls, ss. 67 and 68 regarding unjust discrimination, and s. 71 regarding common carriage.

the NEB Act, the Federal Court of Appeal stated that the NEB was given "authority in the broadest possible terms to make orders with respect to all matters relating to [tolls and tariffs]."[25] The court went on to state that the NEB's power in respect of ensuring tolls are just and reasonable "is not trammelled or fettered by statutory rules or directions as to how that function is to be carried out or how the purpose is to be achieved."[26]

Regarding oil pipelines, subsection 239(1) of the CER Act states:

> Subject to any regulations that the Commission may prescribe and any exemptions or conditions it may impose, a company operating a pipeline for the transmission of oil must, according to its powers, without delay and with due care and diligence, receive, transport and deliver all oil offered for transmission by means of its pipeline.

This statutory requirement is often referred to as the common carrier or common carriage obligation. Notably absent from the CER Act is any express guidance regarding how specifically a company meets the common carriage requirement or the criteria the Commission should consider in prescribing any exemptions or conditions under this provision.[27] This obligation is discussed in detail in Section 3.1 (Defining the common carriage obligation and establishing a framework for assessment).

Section 230 of the CER Act states:

> All tolls must be just and reasonable, and must always, under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate.

This provision and related tolling principles are discussed in Chapter 4 (Tolling methodology), as part of the Commission's review of Enbridge's proposed tolling methodology.

Section 235 of the CER Act imposes a broad prohibition against unjust discrimination:

> A company must not make any unjust discrimination in tolls, service or facilities against any person or locality.

Section 236 of the CER Act places the burden of proving that discrimination is not unjust on the pipeline company. This requirement applies broadly to all aspects of the Application and is considered in each remaining chapter, including with respect to the request for firm service (Chapter 3), the proposed tolls (Chapter 4), the terms and conditions of service (Chapter 5), and the inclusion of the DSV Procedure in the Canadian Mainline tariff (Chapter 6).

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[25] British Columbia Hydro and Power Authority v Westcoast Transmission Limited, [1981] 2 FC 646 (Fed. Court of Canada – Appeal Division) at para 17 [BC Hydro]. See also: TransCanada Pipelines Ltd v Canada (National Energy Board), 2004 FCA 149 at para 30; and Flint Hills Resources Ltd v Canada (National Energy Board), 2006 FCA 320 at paras 10, 11.

[26] *Ibid*, BC Hydro at para 17.

[27] See NEB, *Reasons for Decision - Trans-Northern Pipelines Inc Suspension of Service*, MH-3-2000 (November 2000) at 7 (pdf 13) [MH-3-2000] and NEB, *Reasons for Decision - Trans Mountain Pipeline ULC Application for Firm Service to the Westridge Marine Terminal*, RH-2-2011 (December 2011) at 15 (pdf 27) [RH-2-2011].

The Commission considers the public interest as appropriate, including in traffic, tolls and tariffs matters.[28] In addition, the preamble to the CER Act states the commitment to enhance Canada's global competitiveness, including by providing certainty to investors and stakeholders, driving innovation and enabling the carrying out of sound projects that create jobs for Canadians.

The Commission emphasizes that these statutory provisions cannot be read in isolation from one another. A concern relating to compliance with the common carriage obligation often also raises concerns related to unjust discrimination or justness and reasonableness of tolls, or both. While the Commission is denying the implementation of Mainline Contracting, the decision is intended to provide reasoning and guidance that the parties may apply in future discussions, recognizing that the parties are best positioned to develop market-sensitive solutions that will address the needs, challenges and opportunities associated with the Canadian Mainline.

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[28] See for example: in NEB, *Reasons for Decision - Express Pipeline Ltd Facilities and Toll Methodology*, OH-1-95 (June 1996) at 27 (pdf 43) [OH-1-95], where NEB stated "…its statutory powers cannot be restrained by contracts and that it retains its jurisdiction to protect the public interest in future proceedings."; in NEB, *Reasons for Decision - TransCanada Keystone Pipeline GP Ltd*, OH-1-2009 (March 2010) at 44-45 (pdf 56-57) [OH-1-2009], where the NEB considered the public interest in determining the level of reserved uncommitted capacity that should be set aside; NEB, *Reasons for Decision – Enbridge Pipelines Inc Tolls*, RH-1-2005 (June 2005) at 18 (pdf 28) , where NEB stated "…when confronted with these innovative arrangements between pipeline companies and shippers, the Board must have regard to the public interest, the reasonableness and prudency of costs, and ensuring that there is no undue discrimination between shippers." ; and in NEB, *Reasons for Decision – TransCanada PipeLines Limited Tolls*, RH-1-88 Phase I (November 1988) at 20, where the NEB said "…In making determinations under its Part IV jurisdiction, the Board has given due weight to the overall public interest, while having regard to the specific requirements placed on it by the NEB Act."

3 Common carriage

Enbridge applied for firm service on 90 per cent of the available capacity of the Canadian Mainline. Enbridge also requested a declaration that its proposed Open Season Procedures are appropriate and will lead to an open season that is fair, transparent, and consistent with Enbridge's obligations pursuant to section 239 of the CER Act. In this chapter, the Commission considers the common carriage obligation and whether Mainline Contracting complies with subsection 239(1) of the CER Act.

As a preliminary matter, the Commission notes that parties varied in their use of terminology related to common carriage in this hearing. The Canadian Mainline currently offers uncommitted service on all of its capacity, meaning that shippers nominate volumes each month and do not have the ability to engage in longer-term shipping contracts. Some parties to this proceeding argued that 100 per cent uncommitted service is required to be a common carrier and to meet the common carriage obligation. The Commission does not agree with this characterization, as discussed in this chapter.

In the hearing, parties also used the terms firm, committed, contracted and priority service interchangeably, as the opposite of uncommitted service. The terms firm service and committed service are essentially interchangeable. Firm or committed service provides uninterruptible transportation and shippers often pay for the service, regardless of whether it is used. Contracted service is commonly used to refer to the provision of service pursuant to short- or long-term contracts (as opposed to walk-up or spot service) and is generally for firm service.[29] Priority service is a feature of firm service – specifically, firm shippers have priority over uncommitted service nominations. Priority service may also be a characteristic of some non-firm services (such as priority destinations), which were not at issue in this Application. As such, the Commission does not use the terms contracted or priority service interchangeably with firm and committed service. Throughout this decision, the views of the parties are summarized with the terminology used by them in their submissions.

3.1 Defining the common carriage obligation and establishing a framework for assessment

All parties agreed that Mainline Contracting must meet the common carriage obligation under the CER Act. However, the parties differed on what the obligation entails. In this section, the Commission defines the common carriage obligation and establishes a framework for assessment. The balance of this chapter applies the framework to Mainline Contracting.

Views of the parties

Enbridge

Enbridge argued that the common carriage obligation can be met by providing uncommitted or committed service. The concepts of common carriage and uncommitted service are not

[29] Note that some parties used the term "contract carriage" as the opposite of common carriage, or interchangeably with "firm service", which the Commission does not adopt in this decision.

interchangeable and there is no prohibition against providing committed service on existing oil pipeline capacity.

Citing past NEB decisions, Enbridge argued that the only criteria that have been consistently applied to determine whether an oil pipeline can offer contract service are whether an appropriate open season is conducted for new facilities or services and sufficient capacity is made available for uncommitted volumes.

Opposing intervenors

Suncor Energy Inc. (**Suncor**) argued that the common carriage obligation is informed by and operates in conjunction with the principle of open pipeline access which is a fundamental element of a competitive oil and natural gas market where pipelines are typically natural monopolies. While Suncor acknowledged that the common carriage obligation is not absolute, access remains a fundamental principle of oil pipeline regulation. Inter Pipeline Ltd. (**Inter Pipeline**) similarly argued that the purpose of the common carriage obligation is to ensure Canadian oil producers have fair and equal access to pipeline egress out of the WCSB.

The Canadian Shippers Group (**CSG**), which consists of Canadian Natural Resources Limited, MEG Energy Corp. (**MEG**), Shell Canada Limited and Total E&P Canada Ltd., argued that the starting point is that oil pipelines in Canada are common carriers, and that contract carriage should not impair or impinge the common carriage obligation. Contract carriage should be invoked where there is a general benefit, such as new markets, facilities, egress or capacity. The Government of Saskatchewan argued an applicant must demonstrate a need to depart from the common carriage obligations in the CER Act and justify any such departure.

The CSG reviewed cases where the NEB approved contract carriage on oil pipelines and identified the following four common markers which were present in almost all of the approvals:

- there was a linkage between the toll application and new facilities;
- the application would result in new markets being served;
- contract carriage was being requested to support new facilities construction; and
- the application for contract carriage was unopposed by oil producers.

Some intervenors agreed that section 239 of the CER Act does not absolutely preclude contracting capacity on an oil pipeline, even without an exemption. However, they took the position that the unique history and specific circumstances of the Canadian Mainline lead to the conclusion that it would be manifestly unjust and unreasonable and unjustly discriminatory to impose contract carriage on the Canadian Mainline. Other opposing intervenors argued that Enbridge requires an exemption from the CER in order to depart from its obligation to ship all oil delivered to it and offer firm service on the Canadian Mainline, which was not justified in the circumstances.

Additionally, the opposing intervenors urged the Commission to consider the public interest in assessing the Application's compliance with the common carriage obligation.

3.1.1 Legislative history

Subsection 239(1) of the CER Act states:

> Subject to any regulations that the Commission may prescribe and any exemptions or conditions it may impose, a company operating a pipeline for the transmission of oil must, according to its powers, without delay and with due care and diligence, receive, transport and deliver all oil offered for transmission by means of its pipeline.

This subsection (like its predecessor, subsection 71(1) of the NEB Act[30]) requires oil pipelines to be common carriers. This requirement can be traced to the original enactment of the NEB Act in 1959 and the 1949 *Pipe Lines Act*. The concept of common carriage also predates its application to oil pipelines. Common carriage has been applied to rail, motor and water carriers in Canada, the United Kingdom and the US in legislation and under common law.

Replete and textured evidence was submitted in this proceeding regarding the evolution of oil pipeline regulation and the common carriage requirement in the US and Canada, including evidence from Dr. Church on behalf of Enbridge, and Dr. Makholm and Roland Priddle on behalf of the CSG. Historically, both American and Canadian lawmakers recognized that oil pipelines shared some unique monopolistic characteristics and should therefore be regulated in the public interest. In passing the original NEB Act, Parliament stated that major oil companies were required to permit other shippers to use their pipelines in order to promote competition in the industry and lessen the great competitive advantages to an oil company owning a pipeline.[31]

When the common carriage obligation was first introduced in the *Pipe Lines Act*, Parliament pointed to the history of common carriage oil pipelines in the US, where the Hepburn amendment to the Interstate Commerce Act placed interstate oil pipelines, regarded as public transportation agencies, in the category of common carriers. Parliament noted "[t]his was done to promote competition in the oil industry by requiring the major oil companies to permit other shippers the use of their lines. Economic superiority of the pipe line as a means of transporting oil over long distances by land routes affords great competitive advantages to an oil company owning a pipe line, but if independent oil companies can use the pipe line as a common carrier this advantage is much lessened." While most US oil pipelines retained 100 per cent uncommitted service, they have used commercial structures, such as widespread vertical integration and joint ventures, as a method to support pipeline investment in the absence of contracting.

Common carriage has continued to evolve in Canada. Beginning in 1995, regulatory applications came forward for new pipelines (e.g., Express, Keystone) and for major investments in existing ones (e.g., TMEP). These proposals, underpinned by contracts for firm service on a large percentage of capacity, were approved by the NEB.[32] Common carriage compliance has also been considered when firm contracting was introduced on existing facilities

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[30] Subsection 71(1) of the NEB Act stated: "Subject to such exemptions, conditions or regulations as the Board may prescribe, a company operating a pipeline for the transmission of oil shall, according to its powers, without delay and with due care and diligence, receive, transport and deliver all oil offered for transmission by means of its pipeline."

[31] Bill C-49, An Act to provide for the Establishment of a National Energy Board", 2nd reading, *House of Commons Debates*, 20-5, (8 April 1949) at 2511.

[32] See Section 3.1.2 (Past decisions) for a detailed discussion of prior NEB decisions assessing proposals for firm or priority service on an oil pipeline.

without new investment.[33] The following section discusses prior NEB decisions for firm service on oil pipelines and the common carriage obligation.

3.1.2 Past decisions

As noted, the CER Act does not specify whether or how firm service may meet the common carriage obligation. However, previous NEB decisions have consistently affirmed an overarching approach to the interpretation and application of this statutory provision:

- The common carriage obligation is a relative concept and a test of reasonableness should be applied.[34]
- A direct corollary of this is that the regulator has broad authority and can tailor the common carriage obligation to fit unique circumstances.[35]

This approach is consistent with the courts' interpretation of statutory common carriage obligations beyond pipelines.[36]

The consistency with which firm service on an oil pipeline has been approved by the NEB in various scenarios, without granting any exemptions pursuant to subsection 71(1) of the NEB Act, confirms that the common carriage obligation can be met with service arrangements other than 100 per cent uncommitted capacity as long as access is sufficiently maintained. The importance of access to the pipeline applies equally to committed and uncommitted transportation capacity.[37] Whether uncommitted service or some combination of uncommitted and firm service meets the common carriage obligation must be assessed against the unique circumstances of each application before the Commission.

The NEB's treatment of the common carriage obligation demonstrates a pragmatic application of section 71 of the NEB Act. The Commission reviewed all the authorities tendered by parties and considers that the following cases are particularly useful in considering the current Application:

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[33] For example, in RH-2-2011, the NEB approved firm service on the Trans Mountain pipeline system with service to the Westridge Marine Terminal for a small portion of the total pipeline capacity (18%), with the majority of capacity remaining available for uncommitted service (82%).

[34] NEB, Reasons for Decision, PanCanadian Petroleum Limited, MH-4-96 (February 1997) at 11 [MH-4-96]. See also RH-2-2011 *supra* note 27.

[35] NEB, Reasons for Decision - Kinder Morgan Canada Company Windsor-Sarnia Pipeline Section 21 Review and Section 71 Applications, MH-1-2009 (April 2010); Reasons for Decision -Trans-Northern Pipelines Inc. Capacity Expansion and Line Reversal Facilities, OH-1-2003, (August 2003) [OH-1-2003]; MH-3-2000, supra note 29; Reasons for Decision - Interprovincial Pipe Line Inc, Line 9 Reversal Project and a United Refining Company Application for Designation of a Priority Destination on Interprovincial Pipe Line Inc, OH-2-97 (December 1997) [OH-2-97]; MH-4-96, supra note 35; RH-2-2011, supra note 27.

[36] See, for example, in MH-4-96, *supra* note 35 at 11 (pdf 21), where the NEB cited the Supreme Court of Canada's judgement in *Patchett & Sons Ltd. v Pacific Great Eastern Railway Co.* (1959), 78 C.R.T.C. 282, affirming that the obligations of a statutory carrier in respect of railway services and facilities are tempered by a test of reasonableness.

[37] NEB, *Reasons for Decision, TransCanada Keystone Pipeline GP Ltd*, OH-1-2007 (September 2007) at 20 (pdf 32) [OH-1-2007].

- In GHW-5-90 and RH-3-90, the Interprovincial Pipe Line Company (**IPL**) applied for an authorization to construct and operate facilities for the accumulation and subsequent injection of natural gas liquids into an IPL pipeline and for approval of the related proposed tolling methodology. IPL agreed to proceed with the project on the basis that prospective shippers enter into long-term contracts. The NEB found that the common carriage obligation was met, so long as a pipeline gives all parties the same opportunity, at the same time, to participate in a project or avail themselves of a particular service.[38] Notably, the facilities were readily expandable to accommodate any new shippers wanting priority access.
- In OH-2-97, the NEB considered whether priority service on a line reversal was consistent with common carriage, in a case where IPL applied for the approval of facilities to reverse Line 9 and a related tolling methodology. A number of refiners signed facilities support agreements and contracted for 100 per cent of the available capacity on the reversed line. The NEB affirmed that many different arrangements could be made to ensure that an oil pipeline is complying with its common carriage obligation.[39] Specifically, the NEB accepted that it was reasonable for those refiners accepting risk in backstopping the project to expect priority access as a counterpart to this risk, but also confirmed this arrangement could not override the rights of others to access the system. Accordingly, the NEB ordered 20 per cent of the capacity to be available for monthly nominations for IPL to meet its common carriage obligation. In that case, the NEB also emphasized the importance of the open season in ensuring all parties have the same opportunity to enter into contracts and receive priority access.
- The NEB extended this pragmatic approach when assessing the common carriage obligation in the context of firm service on existing oil pipeline capacity in RH-2-2011. In that case, the NEB approved an application by Trans Mountain for firm service on 18 per cent of the system's total existing capacity, with all firm service connected to the Westridge marine terminal.[40] The NEB reiterated that shippers do not have any acquired rights to previously uncommitted capacity by virtue of past use, with the corollary result that the NEB does not adhere to a "no harm" test.[41] After considering the context in which the pipeline was operating, the reasonableness of the proposal submitted and the unique features of the pipeline,[42] the NEB determined that the open season procedure and the amount of uncommitted capacity reserved ensured compliance with the common carriage obligation. Notably, in that case, given the capacity constraints on the pipeline, the NEB acknowledged that the imposition of firm service could lead to increased apportionment for spot shippers. However, the NEB balanced this burden to spot shippers against other benefits to Canadian producers, including the enhanced ability of Canadian producers to develop long-term relationships with buyers in new markets leading to increased acceptance and utilization of Canadian crude oil in non-traditional markets. The NEB also considered Trans Mountain's risks and its ability to compete.

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[38] NEB, *Reasons for Decision - Interprovincial Pipe Line Company, a division of Interhome Energy Inc*, GHW-5-90 and RH-3-90 (February 1991) at 31 (pdf 42).

[39] OH-2-97, *supra* note 35 at 53 (pdf 69).

[40] RH-2-2011, *supra* note 27.

[41] RH-2-2011, *supra* note 27 at 26-27 (pdf 38-39).

[42] RH-2-2011, *supra* note 27 at 25 (pdf 37), the unique features included the distinct allocation and apportionment methodology of Westridge dock and Land capacity; and the unique nature of Westridge dock shipments, which must be vessel-sized, and coordinated with marine transportation schedules.

In the result, the NEB found that the firm service was a reasonable method to balance the interests of all parties.

The preceding cases, and others submitted by parties,[43] have highlighted that to meet the common carriage obligation when an oil pipeline seeks to offer firm service: (1) an appropriate open season should be conducted; and (2) sufficient capacity should be made available for uncommitted volumes. These cases have also emphasized that the determination of whether the common carriage obligation is met involves judgement and careful analysis of all the circumstances of the specific case. Additional considerations or factors include:[44]

- whether new, expanded, or reversed capacity needs to be backstopped with contracts;
- availability of viable transportation alternatives;
- whether facilities are readily expandable to accommodate future shippers who may want access to pipeline capacity;
- whether consistent terms would be offered to parties that obtain firm service in the future;
- opposition, or lack thereof, to the open season or the capacity allocation;
- financial viability of the pipeline company being dependent on priority service and other risks to the pipeline company;
- unique operational/logistical concerns;
- access to new markets; and
- the importance of the pipeline to the market.

To some extent, all the foregoing contextual factors were raised by parties in this hearing.

Parties also cited the United States Federal Energy Regulatory Commission's (**FERC**) decision from 2014, *Colonial Pipeline Co*, 146 FERC 61 ¶ 206 (2014) [*Colonial*]. In that case, the FERC denied an application seeking priority service on existing capacity on an oil pipeline. While there is value in considering the broader regulatory context and history of common carriage, the Commission notes that the FERC's regulatory and legislative framework differs from the CER's. The FERC's findings in the *Colonial* decision are informed by the view that existing shippers acquire rights on a pipeline by virtue of past use. Conversely, and as noted above, the NEB previously stated that firm service may be offered on existing capacity, as shippers do not have any acquired rights to capacity by virtue of past use. Overall, the Commission considers that the *Colonial* decision has limited applicability in this Application.

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[43] NEB, *Reasons for Decision – Vantage Pipeline Canada ULC*, OH-3-2011 (January 2012) at 19 (pdf 31); CEAA & NEB Joint Review Panel, *Joint Review Panel Report - Northern Gateway Pipelines Inc., Enbridge Northern Gateway Pipeline Project*, OH-004-2011, (December 2013) at 351 (pdf 358); OH-1-2009, *supra* note 28 at 44 (pdf 56 NEB, *Reasons for Decision - TransCanada Keystone Pipeline GP Ltd*, OH-1-2008 (July 2008) at 15 (pdf 27) [OH-1-2008]; NEB, *Reasons for Decision - Enbridge Southern Lights GP*, OH-3-2007 (February 2008) at 52 (pdf 66); OH-1-2007, *supra* note 37 at 19 (pdf 31); OH-1-95, *supra* note 28 at 27 (pdf 43).

[44] OH-1-2009, *supra* note 28 at 44-45 (pdf 56-57); OH-1-2003, *supra* note 35 at 13-14 (pdf 25-26); OH-1-2007, *supra* note 37 at 19 (pdf 37); OH-1-2008, *supra* note 43 at 16 (pdf 28); RH-2-2011, *supra* note 27 at 25-27 (pdf 37-38); OH-2-97, *supra* note 35 at 52-53 (pdf 68-69).

3.1.3 Common carriage obligation and framework

The Commission finds that subsection 239(1) does not require that oil pipelines either maintain 100 per cent of their capacity for uncommitted service or necessarily seek an exemption to deviate from that service structure. Such an interpretation of the provision is not supported by a plain reading of its text. Although 100 per cent uncommitted service, commonly offered using monthly nominations, clearly provides access to capacity consistent with subsection 239(1), that provision does not explicitly adopt this as the only permissible service structure – nor did parties agree this was the optimal service structure. Such a narrow interpretation would introduce absolute and unintended regulatory constraints upon oil pipelines and limit the Commission's ability to provide pragmatic and reasonable oversight, as affirmed and encouraged in prior decisions.

An appropriately pragmatic and purposive approach to the common carriage obligation instead requires that the Commission ensure that access to oil pipelines be reasonably preserved at all times and allows the Commission to consider alternatives to 100 per cent uncommitted capacity both on new and existing infrastructure. The Commission considers this approach to be consistent with the principle that shippers do not have any acquired rights to a pipeline by virtue of past use. By extension, the Commission also confirms that it does not subscribe to a "no harm" test when considering the appropriateness of firm service.[45]

The Commission considers it well established that whether a particular service structure meets the common carriage obligation is a matter of judgement based on the circumstances of the case. Subsection 239(1) permits the Commission to consider any and all relevant factors in a particular case and tailor the common carriage obligation to the facts of the application before it. The Commission adopts the diverse contextual factors identified in its review of prior cases and notes that most require consideration in this Application. However, the Commission retains broad discretion in determining what additional factors may be relevant and what weight should be assigned to each factor in making its determination.

Given the contextual analysis required to determine whether a firm service arrangement meets the common carriage obligation, it is understandable that no single previous case provides a comprehensive test for determining how the common carriage obligation may be satisfied. The Commission is of the view, however, that prior cases consistently affirm two broad requirements. Namely, subsection 239(1) of the CER Act can be satisfied when a pipeline company establishes both of the following:

- Fair and equal opportunity to access firm service is provided by the company, which has generally been achieved in past cases when an appropriate open season is (or will be) conducted. The service offering must be appropriate in the circumstances, taking into consideration the reasonable needs of potential shippers.
- Sufficient access to capacity remains after firm service is implemented, which is most frequently demonstrated by the company making sufficient capacity available for uncommitted volumes (or when facilities are readily expandable). This expectation is critical to ensure that shippers or prospective shippers whose needs cannot be met by

[45] RH-2-2011, *supra* note 27 at 27 (pdf 39).

the firm service offered in the open season, such as shippers of smaller volumes, future shippers, and those whose needs change over time, have access to the pipeline.

These requirements do not form a new test, nor are they an exhaustive list of considerations. While the specific circumstances and considerations relevant to each individual application must be considered by the Commission, these two key expectations (fair and equal opportunity to access firm service and sufficiency of access after implementing firm service) ensure the core purpose of common carriage is achieved and provide a balance of regulatory certainty and flexibility to the application of subsection 239(1).

On a final note, the Commission also highlights that the importance of the pipeline to the market is likely to influence the range and magnitude of impacts potentially affecting shippers and stakeholders, which in turn can affect the degree of scrutiny an application must withstand. To the extent that access to the pipeline is being diminished or restricted, the Commission will carefully evaluate the reasons for doing so. For example, what constitutes sufficient access for common carriage may be different if a pipeline is at risk of not being able to offer any capacity if firm service is denied (for example, where a large capital expenditure is required) versus where committed service is introduced to address particular commercial interests.

In the remainder of this chapter, the Commission addresses the elements of the framework described above - the two key requirements as well as contextual considerations and factors - as follows:

- the degree to which the proposed open season would facilitate a fair and equal opportunity to access firm service;
- the extent to which there would be access to capacity after implementation of firm service, considering the proposed 10 per cent reservation for uncommitted capacity and whether Enbridge's facilities are readily expandable; and
- the contextual factors that inform whether sufficient access is maintained, such as the need for, benefits flowing from, and impacts of Mainline Contracting.

3.2 Fair and equal opportunity to access firm service - the open season

Enbridge intended to conduct an open season if the Commission approved the Application. To facilitate this, Enbridge submitted the Open Season Procedures for consideration and requested that the Commission find that the procedures would lead to a fair and transparent open season, consistent with Enbridge's common carriage obligations. While an open season for Mainline Contracting will not proceed, an appropriate open season is integral to consideration of the common carriage obligation.

Views of Enbridge

Enbridge submitted that the Open Season Procedures were established through negotiation with potential shippers and the negotiations were fair, balanced, and productive. As a result, the Open Season Procedures establish a fair, open and transparent process for offering contracts on the Canadian Mainline.

The open season process would be transparent because it would be run in strict accordance with the Open Season Procedures, which are documented in detail, would have been reviewed

and approved by the Commission, and would be available to all interested parties ahead of the open season.

The open season would be fair and open to potential shippers of all sizes and types, including producers, refiners, integrated companies and marketers. Furthermore, all contracts – regardless of petroleum type, volume, term, toll or whether they are a requirements or take-or-pay contract – would have equal access to committed capacity.

A fully or over-subscribed open season was not Enbridge's expectation at the time of the open season in September 2019 nor during the oral portion of this proceeding. However, the Open Season Procedures describe what happens in the event that capacity for a given service haul is oversubscribed:

- First, volumes are allocated to contracts that commence prior to 1 January 2022 that are not for Flex Service.
    - If there is over subscription within that category, volumes are next allocated on a pro-rata basis, that is, each shipper's request is decreased by the per cent by which total requests exceed available contractible capacity. If multiple requests end up at the minimum service volume after pro-rata allocation, they are allocated based on a lottery.
- Second, volumes are allocated to contracts which commence prior to 1 January 2022 to which a Flex Service Term applies.
    - Again, if oversubscribed within that category, volumes are allocated pro-rata and if there are resulting requests below the minimum service volume these are allocated using a lottery.
- Third, capacity is allocated to ramp-up volumes with ramp-up dates after 1 January 2022. This capacity would be allocated in chronological order from the earliest ramp-up commencement date.

The 13 supporting shippers would be able to request to subscribe for a maximum of 5.1 MMb/d (or 3.9 MMb/d in take-or-pay contracts alone), greater than the total capacity of the Canadian Mainline.

The offering of committed service does not represent unjust discrimination in any form, including the terms for the open season, the terms of service proposed in the TSAs, and the proposed tolling methodology. The opportunity to contract for committed service is available to all interested parties, with the same terms being offered to all potential shippers. The proposed TSAs are also equally available to all potential shippers with no undue preferences provided to any class of shippers or individual shipper.

Whether the provision of committed service is unjustly discriminatory is not a function of other pipelines that may or may not be in service. Rather, it is a function of whether the committed service has been offered to all prospective shippers, at the same time and on the same terms, through a fair, transparent and reasonably conducted open season. As Enbridge is committed to offering committed service to all shippers through such an open season, offering committed service would not be unjustly discriminatory, regardless of whether either the Keystone XL Project (**KXL**) or TMEP enters service.

When services are provided in a fair and transparent open season with an equal opportunity provided to shippers to contract for capacity at the same time, the NEB has previously concluded there is no unjust discrimination.

Views of other parties

Supporting parties

Supporting shippers submitted that the terms and conditions of the open season are acceptable. BP Products North America Inc (**BP**) noted that Enbridge's Open Season Procedures are open, fair and transparent, providing significant optionality and choice for shippers that operate their businesses in a variety of ways. Dr. Webb, for Cenovus Energy Inc. (**Cenovus**), stated it is important that regulators ensure open seasons are held in a non-discriminatory manner, and are open to all market participants to participate.

Supporting parties did not provide firm views as to whether they expected the open season to be over-subscribed, but some noted that oversubscription was not a meaningful concern and that they expected to get the amount of capacity they desired in the open season.[46] Cenovus stated that the likelihood of oversubscription in an open season is mitigated versus the status quo because prospective shippers must weigh the risks of making long-term commitments versus no risk in making monthly nominations under the status quo.

Opposing parties

EPAC stated that the allocation procedures discriminate against small producers producing less than 2,200 barrels per day because if the open season is over-subscribed, they face a lottery for obtaining contracted capacity.

Suncor calculated that the open season could be oversubscribed by at least 23 per cent, and likely much more, based on conservative assumptions that:

- supporting shippers bid for the full amount of contractible capacity available (and no more);
- non-supporting, historical shippers bid their historical throughputs (and no more);
- no new shippers seek access to committed or uncommitted Mainline capacity; and
- there is no bidding to offset potential oversubscription impacts.

Other parties agreed that they expect the open season to be oversubscribed,[47] citing the following reasons:

- A high demand for pipeline capacity, particularly given the cancellation of the KXL project.
- Incentives for shippers to over-nominate similarly to the current monthly nomination process.

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46 Including BP, Motiva, URC, and Cenovus.

47 Including CCRL and FCL, the Government of Saskatchewan, the CSG, EPAC, Valero, and MEG.

- The ability of parties to nominate significant amounts of capacity (for example, three parties, Cenovus, BP, and Imperial Oil Limited (**Imperial**), could contract for over 2 MMb/d based on the limits set in the Open Season Procedures).

3.2.1 Commission analysis and findings

An open season is a commonly used process by which a pipeline company offers services on its pipeline and invites parties to submit bids to contract for those services. The process, timing, and details of the open season are communicated in advance and all parties and their bids are given equal consideration. After the close of the open season, firm capacity is awarded to shippers based on the allocation procedures that were outlined in advance to the participants.

The process used to conduct an open season is critical to ensuring that an oil pipeline company meets its common carriage obligations by providing interested parties with a fair opportunity to access all the services being offered. While the CER Act does not prescribe specific guidelines governing the open season process, the NEB has in the past determined an open season process to be appropriate if:

1. the process was communicated transparently and consulted on in advance;[48] and
2. all parties had fair and equal access to participate in the open season.[49]

The Commission agrees that these are minimum requirements for an appropriate open season, but its review of these requirements must be thorough and attentive to the access to services offered by the pipeline that could actually be realized by interested parties.

Transparency in an open season means that all potentially interested parties are aware of the opportunity to bid on the service being offered and informed of the specific terms and conditions attached to that service. In this case, the Commission notes that the hearing process assured a high degree of transparency. All interested parties had equal and abundant access to information regarding the service offering and the Open Season Procedures. The hearing process afforded an opportunity to ask questions, provide comments and raise concerns, which the Commission would similarly expect to occur were the open season conducted prior to a company filing its application.

Regarding access to the open season, the Commission observes that the Open Season Procedures do not explicitly exclude any parties from submitting bids during the open season. However, the Commission is concerned that certain aspects of the service offering described in the Open Season Procedures document would limit some parties' ability to practically access firm service. In particular, the Commission finds that the proposed term length and the financial assurances, discussed in Chapter 5 (Terms and conditions of service), present a barrier for some prospective shippers, particularly smaller shippers, seeking access to firm capacity through the open season process.

While Enbridge offered contract terms that could be terminated in as little as 36 months in the form of the Flex Service Term, parties requesting the service may not be allocated any

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[48] See NEB, *Reasons for Decision – Enbridge Pipelines Inc*, RH-3-2008 (April 2009) at 5-9 (pdf 13-17), where a lack of advance consultation led to a determination that the open season was not appropriate.

[49] OH-1-2009, *supra* note 28 at 44 (pdf 56).

committed capacity if the open season were to be oversubscribed. As such, the Flex Service Term may not, in practice, enhance or ensure access to committed capacity for some potential shippers.

The Commission is of the view that there is a reasonable likelihood that the open season for Mainline Contracting would be oversubscribed if it were to move forward, but finds the procedure for allocating firm capacity outlined in the Open Season Procedures appears in any event to be reasonable. In the past, the NEB gave broad discretion to companies to determine through negotiations what allocation methodology and terms and conditions were reasonable for a particular service offering. The Commission adopts the previously expressed view that "it would not be in industry's best interest for the Commission to dictate the terms and processes for open seasons," unless specific circumstances require this intervention.[50]

Finally, Enbridge argued that whether firm service represents unjust discrimination is a function of whether that service has been offered to all prospective shippers, at the same time and on the same terms, through a fair, transparent, and reasonably conducted open season. The Commission agrees that an open season that provides a fair and equal opportunity for all parties to access capacity, particularly when strongly and broadly supported by stakeholders, can help a pipeline company establish that any discrimination is justified. However, an open season cannot be expected to fully address discrimination that could be faced by future shippers who cannot participate in the open season, nor prospective shippers who face unreasonable barriers to accessing the offering. As such, the Commission was not persuaded that the open season would have fully addressed discrimination concerns related to the firm service offering.

3.3 Access to capacity after implementation of firm service

When determining whether an oil pipeline has met its common carriage obligation, the Commission considers whether there will be sufficient access to capacity after implementation of firm service. As part of this assessment, the Commission must consider not only the specific quantity of uncommitted capacity that is reserved, but also the broader justifications for implementing firm service and potential impacts on pipeline access, further discussed in Sections 3.4 (Need), 3.5 (Broader impacts) and 3.6 (Summary of Commission analysis and findings on the common carriage obligation).

Views of Enbridge

Enbridge proposed to reserve, at all times, 10 per cent of the available capacity of the Canadian Mainline, inclusive of the full Line 3 Replacement capacity, for monthly nominations of uncommitted volumes. The 10 per cent reservation would be a minimum and could be higher with unfilled committed capacity or any increases in available capacity arising from operational efficiencies. Uncommitted capacity would always be at least 10 per cent of *available* capacity. This would mean, for example, that if available capacity falls below contracted volumes, which

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[50] In its *Reasons of Decision – Canadian Association of Petroleum Producers*, GHW-R-1-2007 (January 2008) at 6 (pdf 12), the NEB stated that it "is of the view that, unless it is necessary in the circumstances, it would not be in industry's best interest for the Board [NEB] to dictate the terms and processes for open seasons, given that, as the Panel noted, an open season is a commercial process".

could result from planned maintenance or unplanned outages, committed volumes would be apportioned and uncommitted capacity would still be available.

The average effective amount of available capacity for uncommitted volumes could be in excess of 20 per cent at the commencement date and in excess of 17 per cent after 2025, considering committed ramp-up rights, committed shipper excused events, and supply performance and line space queue use.

In Enbridge's view, reserving 10 per cent of available capacity for uncommitted volumes strikes a balance between the interests of committed shippers that want priority access to more than 90 per cent of the capacity and uncommitted shippers that want month-to-month access to more than 10 per cent of the capacity. The proposed allocation also allows for a greater realization of the benefits of firm service, recognizing that 100 per cent firm service is the most economically efficient allocation.

Reed submitted that the 10 per cent reservation balances the market's expected demand for firm service with the ongoing demand for spot service and Enbridge's need to achieve an acceptable level of risk and return in the new service structure.

Enbridge argued that comparisons of the amounts of capacity reserved for uncommitted service on other pipelines relative to Enbridge's proposal are an appropriate means of examining whether one pipeline is being placed at a competitive disadvantage with regard to others in the same market. Such a comparison also ensures that the largest pipeline exiting the WCSB is not being competitively disadvantaged, which is especially important when issues of the Canadian public interest are evaluated. The proposed uncommitted volume reservation of 10 per cent would be within the range that has been approved by the NEB for other Group 1 pipelines, as summarized below in Table 3.1.

Table 3.1 – NEB-approved uncommitted capacity for Group 1 pipeline companies

Pipeline	Applied for	NEB decision
Trans-Northern	9 per cent	Approved
Keystone	6 per cent	Approved
Keystone Cushing Expansion	6 per cent	Approved
KXL	6 per cent	12 per cent
TMEP	20 per cent of entire pipeline system, once expanded	Approved
Enbridge Line 9B Reversal	8 per cent	Approved

The reservation of 10 per cent of capacity for uncommitted volumes is a fundamental component of the negotiated package. The only way greater spot capacity could be justified would be through a material increase to the negotiated committed and uncommitted tolls. Any changes would require further negotiations with shippers, which would take months and require a different application. In Enbridge's view, it is doubtful that supporting shippers would be prepared to negotiate a service offering to accommodate an increase in spot capacity, given their interest in having the Canadian Mainline meet their contracting requirements.

Enbridge submitted that the allocation of capacity between committed service and uncommitted service is reasonable to accommodate the requirements of the parties that actually ship on the Canadian Mainline. The magnitude of apportionment for uncommitted service under Mainline Contracting will depend on a number of factors. While Mainline Contracting may reduce the quality of service for certain shippers, it is expected to enhance the quality of service overall and enhance the economics of utilizing existing capacity through making this capacity more reliable, because 90 per cent of the capacity is under firm service contracts, and available to shippers that value it most highly.

Regarding whether facilities are readily expandable, Enbridge cited previous decisions where the NEB found that an oil pipeline acts in a manner consistent with its common carriage obligations when an open season is properly conducted and where capacity is left available for monthly nominations or where the facilities are readily expandable. Enbridge argued that the Canadian Mainline is readily expandable, pointing to its submissions that:

- Enbridge would go out for an expansion open season, and if accepted by the marketplace, then Enbridge would look to bring the expansions forward. Since at least a large subset of expansions would not require new pipe in the ground, but rather horsepower or drag-reducing agents, Enbridge would expect that those could be brought to the marketplace very quickly.
- The complexity of the Enbridge Mainline gives Enbridge opportunities to realize up to 200 Mb/d of incremental Canadian Mainline capacity. These projects could be used for either light crude oil or heavy crude oil service, would not involve any significant new pipe in Canada, would take place almost entirely on Enbridge-owned property, and are anticipated to take approximately 36 months from sanctioning to being put in service.

Views of other parties

Supporting parties

Supporting parties generally wanted greater certainty of access to Canadian Mainline capacity, which would be achieved by contracting for priority service through Mainline Contracting.

BP submitted that Enbridge believes the proposed allocation of capacity is needed to ensure a successful open season. If the 90 per cent level changes, it is possible that other elements of the offering could also change, and BP would need to consider the entirety of the terms and conditions of any new offering in determining whether it would still support contracting for firm capacity.

Cenovus submitted that setting aside 10 per cent of available capacity for uncommitted use is appropriate because access to egress pipeline capacity is fundamentally a scale of certainty and efficiency: 100 per cent contracted capacity provides the greatest certainty and efficiency; 100 per cent spot capacity provides the least efficient and least certain outcome. The Enbridge proposal situates the Canadian Mainline appropriately on that scale. Cenovus also stated that it may be willing to participate in an open season for a lesser amount of available Canadian Mainline capacity, and a greater amount of spot capacity, subject to its evaluation of changes to the package offering.

Imperial submitted that the proposed allocation of 10 per cent uncommitted capacity is well within the range of spot capacity available on other major Canadian pipelines regulated by the

CER. Provided the benefit of supply surety at a fair and reasonable toll is not impacted, Imperial may find an allocation of contracted capacity slightly below 90 per cent to be acceptable. However, increased uncommitted capacity may increase volume risk, resulting in changes to other terms and conditions that provide shipper flexibility and toll certainty.

Motiva Enterprises LLC (**Motiva**) stated that if some other level of contracted capacity below 90 per cent was adopted and it caused a reduction to Motiva's intended transportation commitment level, Motiva would consider all other available commercial options.

United Refining Company (**URC**) wanted to secure 100 per cent of its needs through firm service arrangements, and it believes that 90 per cent of Mainline Capacity reserved for that purpose is the best means to achieve that. It is not desirable for URC to contract where less than 90 per cent of Mainline space is allocated to firm service since this would lead to a reduced probability of achieving its supply objectives.

Opposing parties

Some opposing parties were opposed to any level of committed capacity on the Canadian Mainline.

The Consumers' Cooperative Refineries Ltd. & Federated Cooperatives Limited (**CCRL & FCL**) stated that the reservation of 10 per cent uncommitted capacity is not a meaningful option. If approved, the Application would leave only approximately 300,000 bpd of uncommitted capacity for the entire Canadian Mainline. This uncommitted capacity would be highly apportioned, leading to substantial uncertainty for uncommitted shippers. In CCRL & FCL's view, the offering amounts to a Hobson's choice. Any shipper that requires consistent access to the Canadian Mainline has no choice but to bid into the open season or risk losing access. To meet its business needs, only 100 per cent uncommitted capacity is acceptable.

The CSG submitted that apportionment on the 10 per cent of uncommitted capacity would significantly increase if overall pipeline egress remains constrained. Apportionment on uncommitted volumes could rise to 82 per cent, even with the increased capacity from Line 3 being in service, because the nominations would need to be pro-rated across a significantly smaller uncommitted capacity volume. There is no different level of uncommitted capacity on the Canadian Mainline that would be acceptable to the CSG because such change would not address the fundamental problem of a critical shortage of pipeline capacity out of the WCSB to incremental markets, and because the current proposal is priced at an exorbitant level.

EPAC submitted that 10 per cent is not sufficient uncommitted capacity. The Application would essentially shut small and medium producers out of spot pipeline transportation and the ability to market their production to North American markets. Apportionment of uncommitted volumes could reach 83 per cent, which would drastically exacerbate the disadvantages for WCSB producers associated with apportionment by taking away practically all of the spot capacity available on the Canadian Mainline. As such, now is not the right time for contracting any amount of the Canadian Mainline. Full certainty on export pipelines and Enbridge Mainline capacity, improved and proven verification procedures that allocate spot capacity fairly to all shippers, and an offering that does not discriminate against upstream Canadian producers are all factors that would need to exist before considering whether even a small level of contracting on the Canadian Mainline would be reasonable and consistent with the common carriage obligation.

Suncor stated that the applied-for allocation of available Canadian Mainline capacity between committed service and uncommitted service is not appropriate. Given its operational requirements and the fact that it would require nearly three-quarters of the 10 per cent uncommitted capacity to supply its refineries, Suncor could not rely only on uncommitted service and would be forced to enter into contracts if the Application were approved. The expected oversubscription of the open season would force parties to use uncommitted capacity, resulting in spot service apportionment. This means that very little, if any, uncommitted capacity would be available to accommodate new shippers and production. Given the wide range of possible oversubscription outcomes, it is difficult to assess what amount of uncommitted capacity would strike a more appropriate balance. Additional uncommitted capacity, beyond the 10 per cent proposed, is required to mitigate against contracting capacity shortfalls that are likely to arise due to oversubscription in the open season. From Suncor's perspective, this could be as much as 50 per cent uncommitted capacity but should be no less than 20 per cent.

Valero Energy Inc. (**Valero**) stated that if the Commission were to approve contracting, the proposed service design should be revised to provide substantially more uncommitted capacity, in an amount sufficient to preserve the rights and optionality of Valero and other similarly positioned shippers, in a manner that is substantially similar to how those rights and optionality exist today. Valero was not able to quantify a specific amount of uncommitted capacity that would preserve its rights and those of other shippers.

3.3.1 Commission analysis and findings

The Commission reaffirms the NEB's view that the determination of an appropriate amount of capacity to be set aside for uncommitted volumes is a matter of judgement and should be based on the circumstances of each specific application.[51] The Commission finds that after implementation of firm service, the proposed reservation of 10 per cent of capacity for uncommitted volumes on the Canadian Mainline is not likely to provide a meaningful option to access pipeline capacity. This finding is based on the ongoing level of demand which exceeds pipeline capacity and associated apportionment risks, the lack of transportation alternatives available to shippers and the failure to establish that facilities are readily expandable to address future demand.

Parties concurred that there have been high levels of apportionment on the Canadian Mainline in recent years. With no new capacity being added as part of the Application, the Commission finds that reallocating capacity from 100 per cent uncommitted to 10 per cent uncommitted will likely lead to higher levels of apportionment on uncommitted volumes for material periods of time. Multiple parties filed evidence that apportionment on uncommitted volumes is likely to increase as a result of Mainline Contracting, based on credible analyses of current and probable future pipeline usage. EPAC and the CSG predicted apportionment exceeding 80 per cent in the near-term, even with the increased capacity from the Line 3 Replacement being in service.

Accordingly, parties who prefer uncommitted capacity have indicated they could have little choice but to enter into committed service contracts that may not be commercially favourable for them. Considering the constrained pipeline egress out of the WCSB, the Commission is persuaded not only that uncommitted access available to parties who need or prefer that service

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[51] For example, see OH-1-2009, *supra* note 28 at 44 (pdf 56).

will be reduced quantitatively, but also that this will result in a diminished quality of service in the form of less certainty of access at a potentially higher cost.

The Commission does not adhere to a "no-harm" test[52] and accepts that any reallocation of highly utilized capacity will be expected to result in impacts to parties, both negative and positive. However, the potential levels of apportionment on uncommitted volumes represent an excessive reduction of service quality and access to capacity for uncommitted shippers, when considering other relevant needs, benefits and impacts.

As described in Section 3.6 (Summary of Commission analysis and findings on the common carriage obligation), the Commission also considered that the secondary market might provide another way for shippers to access the Canadian Mainline after implementation of firm service, but notes that the secondary market provides no assurance of access, or predictability of terms of access, and lacks the regulatory protections of the primary market. As such, the Commission did not put significant weight on the secondary market as it relates to Enbridge's uncommitted reservation proposal.

The Commission acknowledges that even with a fully subscribed open season, effective uncommitted capacity could be higher than 10 per cent, given ramp-up rights, committed shipper excused events, supply performance and line space queue use. The Commission considers the spot reservation based on available rather than nominal capacity to be a beneficial attribute of Mainline Contracting. However, the amount of additional capacity available through those situations is speculative. Accordingly, the Commission focused on the applied-for minimum level of uncommitted capacity of 10 per cent.

Finally, the Commission considered whether Enbridge's facilities were readily expandable. In the absence of clear evidence, the Commission is not persuaded that a material expansion is readily available or that the possibility of future expansions under contracting would reliably address concerns relating to uncommitted access to the Canadian Mainline. Notably, the Application did not identify any specific expansion proposal or plan for the Commission's consideration, nor did Enbridge commit to circumstances or criteria under which it would expand. As well, Enbridge did not set out specific terms of service or tolls for prospective expansions and, as a result, it may need to engage in negotiations with its shippers. This would be in addition to the time it would take for Enbridge to seek regulatory approval and complete other necessary steps to place expanded capacity into service, even for smaller-scale expansions.

Given these uncertainties, it is unclear: how much and how quickly capacity could be added to the Canadian Mainline; how much, if any, of the expanded capacity would be made available to uncommitted service; and what terms would apply to new capacity access. For these reasons, the Commission cannot conclude that the Canadian Mainline is readily expandable or that the prospect of expansion would adequately or reliably address its concerns regarding access to uncommitted capacity.

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[52] See RH-2-2011, *supra* note 27 at 27 (pdf 39).

3.4 Need

Enbridge argued that Mainline Contracting supports three key needs of Enbridge and the broader market: (i) the need to manage Enbridge's risk exposure, (ii) the potential need for additional pipeline capacity from the WCSB, and (iii) the need to respond to shippers' requests. Enbridge also argued that Mainline Contracting is a necessary tool for Enbridge to compete on a level playing field with other pipelines and is essential to achieving fairness in oil transportation markets. These factors informed the Commission's determination on whether Mainline Contracting meets the common carriage obligation, in particular whether pipeline access would be sufficiently maintained if Mainline Contracting was implemented.

3.4.1 Enbridge's risk exposure

Enbridge presented Mainline Contracting as a tool to address the volume risk that the Enbridge Mainline faces. Generally, Enbridge framed its volume risk as a function of supply risk, competitive risk, and market risk. Each of these risks, along with Enbridge's approach to managing these risks, is discussed in this section 3.4.1.

Views of Enbridge

Enbridge submitted that its desire is to retain volumes on the Enbridge Mainline and reduce its long-term volume risk. There are a host of risks facing the Enbridge Mainline that ultimately feed into volume risk, including:

- supply risk – whether there will be enough supply to fill the pipeline;
- competitive risk – competition with other pipelines to acquire supply; and
- market risk – whether the market the pipeline serves will continue to exist at a particular level over the longer term.

In addition, the Enbridge Mainline is impacted by decarbonization to the extent that it affects both producers and refiners. While Mainline Contracting would not impact decarbonization plans, it would allow the pipeline to take steps to mitigate that risk.

Supply risk

Enbridge submitted that there is uncertainty about future western Canadian crude oil supply, which translates to uncertainty about whether export pipeline capacity will be fully utilized. These uncertainties are demonstrated in the numerous supply forecasts filed on the record, including:

(a) The forecast appearing in Appendix B of Earnest's evidence (**Earnest CAPP Forecast**) was based on the CAPP 2019 supply forecast and Earnest's transportation capacity forecast. It showed net western Canadian supply available to ex-WCSB pipelines of 4.7 MMb/d in 2022, increasing to 5.8 MMb/d by 2035.[53] It showed total available ex-WCSB

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[53] Net western Canadian supply available to ex-WCSB pipelines was calculated by subtracting western Canadian demand of 0.5 MMb/d from total western Canadian supply.

pipeline capacity as high as 1.3 MMb/d in 2022 and declining to below 0.2 MMb/d in 2035, under the assumption that KXL would commence service. [54,55]

(b) The forecast appearing in Earnest's reply evidence (**Earnest EF Evolving Forecast**), was based on the CER's Energy Future 2020 Evolving Scenario's supply projection and Earnest's transportation capacity forecast. It showed net western Canadian supply available to ex-WCSB pipelines of 4.3 MMb/d in 2022, reaching 4.9 MMb/d by 2034/2035.[56] Using this supply projection, Earnest calculated total available ex-WCSB pipeline capacity as high as 0.8 MMb/d in 2023 when TMEP was assumed to commence service, and declining to as low as 0.2 MMb/d by 2034/2035.[57]

(c) Wood Mackenzie's revised forecast (**Wood Mackenzie Revised Forecast**) was adjusted from Wood Mackenzie's initial forecast to increase comparability with the Earnest CAPP Forecast and the Earnest EF Evolving Forecast.[58] It showed net western Canadian supply available to ex-WCSB pipelines of 4.3 MMb/d in 2022, reaching 5.0 MMb/d by 2035.[59] It showed total available ex-WCSB pipeline capacity as high as 0.3 MMb/d in 2024, the first full year when TMEP was assumed to be in-service, declining to below 0.1 MMb/d by 2028 through to 2035.[60]

Enbridge argued that the forecasts on the record all show excess ex-WCSB pipeline capacity after both the Line 3 Replacement and the TMEP are in service.[61] The extent and duration of the excess ex-WCSB pipeline capacity depends on the specific forecast of WCSB crude oil supply.[62]

Enbridge also pointed to the International Energy Agency's World Energy Outlook 2020 report. In the International Energy Agency's Stated Policies Scenario, Canadian bitumen production is projected to be about 500 thousand barrels per day (**Mb/d**) less than is projected in the Evolving Scenario in the Canada's Energy Future 2020 report by 2039, resulting in a greater amount of

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[54] Total available ex-WCSB pipeline capacity was calculated by subtracting total WCSB export pipeline capacity from net WCSB supply available to pipelines.

[55] Earnest assumed that no rail was used for the duration of the forecast period, and that KXL and TMEP would both commence service in 2022.

[56] Net western Canadian supply available to ex-WCSB pipelines was calculated by subtracting Earnest's assumed rail volume of 50 Mb/d (from the Gibson Energy/USD Group's diluent recovery unit) from the CER Energy Futures Evolving Scenario's total supply available for export (i.e., after reduction for western Canadian demand).

[57] Earnest excluded KXL from the projection.

[58] Wood Mackenzie's initial forecast was provided in response to a CER information request, and illustrated supply on an ex-Hardisty, rather than ex-Gretna, basis.

[59] Net western Canadian supply available to ex-WCSB pipelines was calculated by subtracting Wood Mackenzie's assumed rail volumes (ranging from 50 Mb/d in 2022 to 560 Mb/d in 2032) from its forecasted western Canadian supply net of western Canadian demand of 0.54 MMb/d.

[60] Wood Mackenzie assumed that TMEP would commence service in late 2023 and excluded KXL from the projection.

[61] The forecasts assumed that there would be no future export pipeline capacity additions beyond these two projects.

[62] According to Enbridge, the Earnest CAPP Forecast showed excess export pipeline capacity until approximately 2027, the Wood Mackenzie Revised Forecast showed excess export pipeline capacity until approximately 2028, and the CER's Energy Future 2020 Evolving Scenario projection showed be excess export pipeline capacity through to 2050.

excess ex-WCSB pipeline capacity. The International Energy Agency's Sustainable Development Scenario would result in even further excess pipeline capacity.

Enbridge did not suggest that any one forecast is correct. However, in Enbridge's view, it is inappropriate to assess Mainline Contracting based on a presumption that ex-WCSB pipeline capacity will be scarce in the future. The issue is not whether there will be excess capacity, but rather how much and for how long.

Market risk

Enbridge asserted that while the Enbridge Mainline has resilient demand-pull because it is connected to refineries that have made substantial investments to process Canadian crude oil, the demand-pull does not guarantee that the Enbridge Mainline will be full or utilized over the long term. In this regard, Enbridge provided views which included the following:

- The CSG estimate of the size of the Enbridge Mainline's captive refinery market of 1,763 Mb/d is inflated. Over the period January 2016 through December 2020, the captive refinery market ranged from 910 Mb/d to 1,094 Mb/d on an annual average basis, and from 573 Mb/d 1,252 Mb/d on a monthly basis.[63]
- There is potential for refinery closures in the captive refinery market, and this probability is significant if looked at over the long term.
- The CSG overstates the degree of volume assurance provided by the contract capacity on Enbridge Mainline-connected downstream pipelines. Some of the Flanagan South Pipeline contracts expire in 2024, and Line 9 and Spearhead pipeline contracts expire in 2025 and 2026, respectively. Although extensions are a possibility, none of the intervenors have offered assurances that they intend to extend their initial term for another 5 years.

Competitive risk

Enbridge asserted that competitive risk is affected by factors such as the size and timing of new entry by transportation alternatives serving the WCSB or the Enbridge Mainline's destination markets, differences between service offerings, competitive constraints such as existing contracts and regulatory policies, and pricing for competing services.

<u>Competition between pipelines</u>

Enbridge submitted that it faces competition from other ex-WCSB crude oil pipelines such as Trans Mountain, TMEP, Express, and Keystone (and that it would have faced competition from KXL). Enbridge presented these pipelines as competitors in both the WCSB and destination markets.

Enbridge argued that the Canadian Mainline has a structural competitive disadvantage relative to other ex-WCSB oil pipelines. Through commercial agreements for committed service and

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[63] Earnest's calculations were based on several assumptions, including the utilization of local crude oil supplies, full utilization of alternative pipelines that serve the captive refineries (such as Chicap, BP No. 1, Maumee, and the Enbridge North Dakota Pipeline), and utilization of alternative route rail capacity.

tolling, Enbridge's competitors have secured a more competitive position than the Canadian Mainline, even though the Canadian Mainline is the lowest-cost competitor.

According to Enbridge, it cannot effectively compete without the ability to offer firm service because: (i) it would not be providing shippers' preferred service, and (ii) firm service tolls on competitor pipelines are sunk, making them more economic for committed shippers than Enbridge's uncommitted toll. These competitor pipelines will seek to re-contract capacity when their existing contracts expire. Not allowing Enbridge to contract the Canadian Mainline in these circumstances would maintain the superior competitive position of these other pipelines well into the future.

In Enbridge's view, ex-WCSB pipeline competition, and the results of it, were displayed in 2020, when WCSB crude oil production declined due to the pandemic and the actions of OPEC. Actual throughput on the Enbridge Mainline ex-Gretna fell below expected throughput by approximately 400 Mb/d and 300 Mb/d in the second and third quarters of 2020, respectively. The preponderance of the ex-WCSB pipeline volume offloading occurred on the Enbridge Mainline, with little on Keystone, and essentially none on Trans Mountain. According to Enbridge, Trans Mountain will be in an even stronger position to attract WCSB supply once its expansion is completed and its contract service is provided.

Concentric Energy Advisors, Inc. (**Concentric**) submitted that the Enbridge Mainline has been relegated to being a swing pipeline because of its different contractual structure. In circumstances where there is excess export pipeline capacity, the Enbridge Mainline would bear the vast majority of this surplus capacity, just as it did in 2020.

Competition from rail

Rail can be an effective transportation mode for crude oil, as it can have advantages from a transit time and diluent cost perspective, as well as for niche markets that are not served by pipelines well or at all. According to Earnest, the oil industry has been using rail at scale in North America for about a decade, and the maximum amount of rail out of western Canada is in excess of 400 Mb/d. Enbridge argued that the Enbridge Mainline competes with rail, and that while rail has constraints, so do all forms of transportation, including pipelines.

Risk management

In general, Enbridge did not believe that any throughput losses that can be foreseen over the next several years would rise to the level of posing a significant threat to the economic viability of the Canadian Mainline. Reed acknowledged that rating agencies have not raised any concern about a potential toll spiral or emergence of fundamental risk for Enbridge. While Enbridge is not claiming that the manifestation of the Canadian Mainline's fundamental risk will occur in the foreseeable future, that does not mean the Canadian Mainline faces no volume risk.

Enbridge submitted that the Commission should be concerned about volume risk on the Canadian Mainline because without committed service, realization of the risk would result in either significantly reduced revenues for Enbridge or significantly higher tolls for Canadian Mainline shippers. Significantly reduced revenues for Enbridge could adversely impact Enbridge's access to and cost of capital and thereby jeopardize its ability to maintain its

infrastructure over the longer term.[64] Significantly higher tolls for shippers could result in decreased production and refining activity, with corresponding adverse impacts on other industry participants, provincial governments and the Canadian economy.

Pipeline companies have a responsibility to seek and use tools necessary to manage their risks and to mitigate against the realization of fundamental risk. Having the ability to provide firm service on the Canadian Mainline is one such tool. In Enbridge's view, implementation of Mainline Contracting would mitigate the risks associated with the potential for future uncompetitive toll levels, eliminate the structural competitive disadvantage that Enbridge currently faces as a result of not being able to provide long-term committed service, and lessen any likelihood of experiencing a tolling spiral or the materialization of fundamental risk.

Fairness in relation to other pipelines

Enbridge argued that it would be unfair to deny it the opportunity to respond to market requests for firm service on the Canadian Mainline when its competitors have been allowed to provide such service on the majority of their capacity.

Enbridge requests treatment consistent with NEB precedent and seeks to offer firm service in a manner that is consistent with how the NEB has approved offerings on other pipelines. None of the NEB decisions has ever denied the offering of firm service because of the presence of firm service on existing and proposed Canadian oil pipelines. The NEB has not intervened in the market in this way in any of its previous decisions.

Providing Enbridge with the tools to compete in a reformulated market, which has been transformed by contract service offerings of other pipelines that the NEB endorsed, is essential to achieving fairness in oil transportation markets. Fairness is essential to achieving the CER's mandate of establishing tolls and terms of service that are just and reasonable.

Enbridge argued that the Canadian Mainline is the last uncontracted major pipeline exiting the WCSB. Once TMEP comes into service, the Canadian Mainline's major competitors will offer firm service for the vast majority of their capacity. Enbridge and the supporting shippers should be allowed to make that choice, as have all other major ex-WCSB pipelines. Simply because it was the first pipeline in the game over 70 years ago does not mean the Canadian Mainline should be forced to remain the last uncontracted pipeline into the future.

Views of other parties

<u>Supporting parties</u>

Several parties supported the Application as a whole, and some provided detailed submissions on Enbridge's risk exposure. Dr. Webb, on behalf of Cenovus, submitted that Mainline Contracting would mitigate the volumetric risk Enbridge faces from competitive alternatives and

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[64] Concentric submitted that Enbridge is committed to investing in the Canadian Mainline to maintain its full capacity, as long as shippers are prepared to support the cost of these investments. On this basis, Enbridge expects to invest more than $25 billion in the Canadian Mainline from 2021 to 2041. Concentric asserted that providing a commercial framework that supports these investments and attracts the necessary capital on reasonable terms is just as important as attracting capital for a new pipeline. According to Concentric, existing pipelines facing the need to invest billions of dollars in projects to maintain existing capacity should not be relegated to second-class status as compared to the regulatory treatment of any other class of pipeline investment.

would enable Enbridge to compete with other pipelines offering firm service in the market. Further, it would provide Enbridge with a more certain level of volumes and revenues over the next 8 to 20 years.

In general, the supporting parties indicated that their demand for the Enbridge Mainline has not and will not likely shift in the foreseeable future, regardless of the cancellation of KXL and/or the prospect of TMEP commencing service.

Most supporting parties submitted that rail is a competitor to the Enbridge Mainline but presents potential challenges, including that rail is generally more expensive than pipeline options and takes time and effort to develop. While Imperial stated that rail is available to all market participants, Imperial also explained that in order for rail to compete, it must have: a volume capacity that is similar to the pipeline; be able to ship the different grades of crude oil that refiners need; and be cost competitive. Cenovus explained that rail can be competitive depending on when and how the contracts were structured.

Opposing parties

In general, the opposing parties were of the view that Enbridge faces little volume risk and therefore has no material need for contracting. They submitted that the Canadian Mainline is consistently over-nominated and subject to apportionment, reflecting its dominant position in the market for ex-WCSB crude oil transportation. They also submitted that while long-term contracting can be necessary to ensure commercial demand and viability when investments are being made in significant new facilities that involve considerable risk, there are no new facilities being proposed in this case.

Supply risk

Several opposing parties asserted that the forecasts on the record demonstrated limited supply risk. The forecasts showed growth in oil supply in western Canada between 2022 and 2035 (including by more than 20 per cent in the Earnest CAPP Forecast), and this increased production would rely on Enbridge Mainline transportation service to access markets. Further, the Earnest CAPP Forecast and Wood Mackenzie Revised Forecast showed all export pipelines would be virtually full within 3 years of TMEP expansion capacity commencing service. Even in the lower Earnest EF Evolving Forecast, spare ex-WCSB pipeline capacity would average 12 per cent from 2023 to 2030 and drop to 8 per cent spare capacity by 2030. In their view, this is a reasonable amount of spare capacity to keep the market functioning and to allow for planned and unplanned outages on the pipeline systems.

Opposing parties submitted that additional pipeline capacity, such as through TMEP, would likely have a positive impact on producers' willingness to invest in additional production capacity. Therefore, the available supply to the Enbridge Mainline could be larger than the amounts appearing in the forecasts. Producers in the WCSB have shown the ability to fill all new expansion capacity out of the WCSB within a matter of months as confidence in egress availability triggers renewed investment in new production.

Market risk

Several opposing parties expressed the view that there is strong demand-pull from Enbridge's core markets, particularly from captive refineries and Enbridge-affiliated downstream pipelines. Opposing parties' submissions included the following:

- Enbridge has confirmed that 1.9 MMb/d of Enbridge Mainline refining demand represents sole-sourced demand, meaning it is usually economically advantageous for these refineries to utilize the Enbridge Mainline rather than another source, and that there are approximately 1 MMb/d of downstream pipeline contracts served by the Enbridge Mainline.
- There are no known alternative economic sources of crude oil supply that could be readily connected to most of the refiners in PADD II, and those refiners that have made considerable investments in refining capacity to run western Canadian heavy crude oil are unlikely to switch to other sources over the next 20 years.
- Enbridge is forecasting growing heavy oil demand, and declining supply, in the US Gulf Coast as a result of loss of supply from Mexico and Venezuela, a market that is served by the Enbridge Mainline via Enbridge-affiliated downstream pipelines.
- Enbridge's assertions regarding the risk of Enbridge Mainline-connected refinery closures should be given little weight because supporting intervenors confirmed in the proceeding that their refineries continue to be viable with or without Mainline Contracting.

Competitive risk

Several opposing parties noted:

- The cancellation of KXL eliminated the risk of it being in competition with Enbridge and reduced or eliminated Enbridge's need for contracting.
- TMEP serves different markets in comparison to the Enbridge Mainline, including US Northwest and Asian markets, and is already contracted. Therefore, it poses no new competitive risk to Enbridge or its sole-sourced refining markets.
- Major new pipelines are unlikely to come into service after TMEP, which makes the Enbridge Mainline's existing right of way a competitive advantage for Enbridge. High fixed costs and a high degree of difficulty for potential competitors limit the development of new pipelines.
- The Enbridge Mainline faces little competition from other pipelines for almost the entirety of its historical market. While Enbridge claimed there are pipelines that could provide alternative oil supply to these refiners, the alternative pipelines[65] are (i) too small to substitute for a significant percentage of the Enbridge Mainline's over 2 MMb/d market and (ii) not economically competitive.

The Government of Saskatchewan submitted that the vast majority of Saskatchewan's oil production is shipped on the Canadian Mainline and Saskatchewan's oil export optionality is limited because most regions of the province have no other direct access to pipeline egress, new or proposed.

Several parties opposing the Application shared the view that rail is not a competitor to the Enbridge Mainline. These parties submitted that rail involves complex logistics, has significant lead times to establish service, requires large investments, and is typically more expensive on a

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[65] Enbridge presented Express/Platte and Keystone Pipelines as having the ability to serve Enbridge Mainline markets via other pipelines such as Marathon, Chicap, Maumee, and Capline Reversal.

per barrel basis. Rail is only price competitive in limited circumstances and has historically been utilized or ramped up in circumstances of limited egress.

Risk management

Opposing parties asserted that the investor materials of Enbridge's parent company, Enbridge Inc., indicate that the Liquids Pipelines Division, of which the Enbridge Mainline is a material part, is a profitable, resilient, low-risk business that is well positioned for longevity in any energy future. They argued this undermined Enbridge's submissions regarding risk in this proceeding. In their view, Enbridge has failed to demonstrate volume risk and a potential toll spiral and associated stranded costs. Instead, Enbridge has consistently communicated to its investors that it faces very little risk of losing volumes off the Enbridge Mainline despite significant black swan events such as COVID-19.

The Government of Saskatchewan argued that to the extent that denying the Application limits Enbridge's ability to maximize profits and eliminate risks, it is important to recognize that the burden on a pipeline owner in operating a common carriage pipeline is but one relevant factor to be considered and balanced with any other existing public interest factors.

Some parties indicated that decarbonization is an industry wide risk, and there is no basis to transfer this risk to shippers, who must address their own decarbonization risks. Further, there is no clear indication of when and how the energy transition will happen.

Fairness in relation to other pipelines

In their submissions, parties opposed to the Application argued that prior decisions of the NEB were decided on facts distinguishable from the unique circumstances of the Enbridge Mainline.

3.4.1.1 Commission analysis and findings

Enbridge presented the Canadian Mainline's risk exposure as a key factor in justifying Mainline Contracting. In the Commission's view, pipeline risks are a factor to consider when assessing an application for contracting on an oil pipeline, but a specific threshold of material or imminent risk is not necessarily a prerequisite for contracting generally. Other needs and impacts must also be considered, as discussed in the subsections below.

The Commission finds that Enbridge faces some volume risk, in the form of both supply risk and competitive risk. However, the Commission does not find that this risk reasonably justifies the sudden and substantial changes to pipeline access and the other impacts that will potentially result from Mainline Contracting.

Supply risk

Enbridge submitted three crude oil supply forecasts and referred to the International Energy Agency's World Energy Outlook 2020 scenarios, each of which use different assumptions regarding decarbonization policies and actions. The Commission agrees that forecasts are inherently uncertain, and as a forecast period grows, so too do the uncertainties. The forecasts before the Commission show a wide variability in supply outlooks, illustrating the uncertainty in how decarbonization will materialize over the long term and affect western Canadian crude oil production. Nonetheless, an assessment of multiple scenarios provides a more complete picture of the risks facing the Canadian Mainline and the external environment in which Mainline Contracting would be applied.

The Commission is satisfied that the Canadian Mainline faces a degree of supply risk. This is demonstrated by the substantial differences in the supply outlooks appearing in Enbridge's forecasts and the potential for spare ex-WCSB pipeline capacity to appear and persist under these scenarios. Based on their supply projections, each of the forecasts shows that spare pipeline capacity exiting western Canada will emerge in the short term, with the Line 3 Replacement and TMEP in service. The magnitude and duration of the spare capacity varies based on each forecast's projections for future crude oil supply growth. The Commission notes, however, these forecasts show spare pipeline capacity that generally represents a small proportion of the Canadian Mainline's roughly 3 MMb/d total capacity, inclusive of the Line 3 Replacement.[66]

Competitive risk

If spare ex-WCSB oil pipeline capacity emerges, such as through the addition of pipeline capacity or a reduction in crude oil supply, the Commission agrees with Enbridge that the Canadian Mainline would face competitive risk.[67] Enbridge competes with other pipelines for supply, particularly the Trans Mountain and Keystone pipelines. Relative to competing pipelines, there is a possibility that the Canadian Mainline could bear a substantial portion of any spare ex-WCSB crude oil pipeline capacity that might emerge in the future. A similar situation occurred in 2020 when western Canadian crude oil supply fell below total oil pipeline capacity exiting western Canada.

The Canadian Mainline experienced more volume loss than both Keystone and Trans Mountain on an absolute and relative-to-capacity basis in 2020. However, the Commission notes that Keystone experienced volume loss despite its substantial committed capacity, whereas Trans Mountain did not experience any notable volume loss even though only a minority of its volumes are under contract at present.[68] In the Commission's view, various factors contribute to whether, and to what degree, each ex-WCSB pipeline may experience volume losses, including crude oil prices, netbacks, and differences in demand across the North American and global markets served by the pipelines. In their evidence, Enbridge's experts also observed that the Pan Asian markets had stronger netbacks relative to the Enbridge Mainline core markets during the COVID-19 pandemic.

Overall, the Commission acknowledges that the presence of committed capacity on a pipeline can, to some degree, increase its utilization while contracts are in place, since shippers' firm service fees are effectively a sunk cost for the life of the firm service contracts. Nonetheless, the Commission cannot conclude that the Canadian Mainline's volume losses in 2020 were predominantly influenced by the lack of committed capacity on the system. Similarly, given the dynamic market conditions and varied factors influencing pipeline usage, the Commission cannot predict what factors are likely to drive the distribution of spare capacity across ex-WCSB oil pipelines in the future.

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[66] For example, the Earnest EF Evolving Forecast, which projects the lowest crude oil supply growth of Enbridge's three forecasts, shows spare pipeline capacity peaking at 788.2 Mb/d in 2023 but falls to 225.4 Mb/d by 2035 (assuming that TMEP commences operation in 2023).

[67] Competitive risk was also addressed in RH-2-2011, *supra* note 27 at 22 (pdf 34). In that case, over 80% of the capacity of the Trans Mountain Pipeline remained available to uncommitted service.

[68] Keystone can contract up to 556 Mb/d of its estimated 591 Mb/d capacity. Trans Mountain can currently contract for up to 54 Mb/d of its estimated 300 Mb/d of capacity.

While it is not certain that the Canadian Mainline would bear most or all volume losses associated with spare ex-WCSB egress capacity, even if it did, Enbridge has confirmed that it does not believe that any throughput losses that can be foreseen over the next several years would rise to the level of significantly threatening the economic viability of the Canadian Mainline. The cancellation of KXL also suggests that Enbridge's competition is unlikely to grow significantly over the medium term.

With respect to rail, the Commission is of the view that Enbridge did not demonstrate that rail presents a significant competitive risk to the Canadian Mainline. In particular, Enbridge's evidence did not provide an assessment of the rail options available to shippers and why those options would be preferable to the Canadian Mainline. The Commission also notes that Enbridge did not present evidence from a dedicated rail expert. Based on the limited evidence available, the Commission is not persuaded that rail is preferable to the Canadian Mainline except in niche circumstances that involve relatively small volumes, such as when long-term investments have been made in diluent recovery units and other rail infrastructure.

Market risk

Should Enbridge's volume risk materialize on the Canadian Mainline, the Commission finds that the evidence on the record demonstrates that several features could reduce or limit volume losses.

The Enbridge Mainline serves many directly connected refineries that have few economically advantaged alternative crude oil supply sources. Moreover, most of the refineries that participated in the hearing indicated that they do not anticipate material shifts in demand. Many indicated that their demand for Enbridge Mainline-sourced crude oil is not expected to change in the foreseeable future, even in light of decarbonization, the cancellation of KXL, and the prospect of TMEP coming into service. The Commission also considers these submissions as indications that the Enbridge Mainline does not currently face an imminent threat related to refinery closures in the foreseeable future and notes expert evidence to the contrary was general and speculative.

In addition, the Enbridge Mainline is the sole source of supply for several Enbridge-affiliated downstream pipelines which currently provide approximately 1 MMb/d of committed service to shippers. The Commission views this as a substantial source of demand for the Enbridge Mainline in the future. While Enbridge indicated that many of these contracts expire over the next 5 years and that there is no guarantee they will be renewed, Enbridge confirmed that it is exploring expansion opportunities for these pipelines and that its expansion decisions are not contingent on Mainline Contracting. This suggests that there is some expectation for continued utilization of these pipelines and, by extension, the Enbridge Mainline in serving them. Further, some of the downstream pipelines can provide access to the US Gulf Coast, and Enbridge provided evidence that demand for Canadian heavy crude oil could grow in this region as global competing sources of heavy oil from regions like Mexico and Venezuela decline.

Given the captive demand, low likelihood of refinery closures, and growth opportunities described above, the Commission does not find that Enbridge faces material market risk.

Risk management

The Commission agrees with Enbridge that it is a pipeline company's responsibility to remain competitive and maintain the economic viability of its pipeline system. Previous NEB decisions have discussed this responsibility and explained the fairness of pipelines bearing fundamental

risk and its associated financial consequences.[69] In recognition that pipelines are exposed to business risks, the NEB and Commission have historically provided them the opportunity to earn a premium above a risk-free rate of return on their capital investments.

In general, the Commission supports Enbridge in mitigating its risk exposure through innovative and competitive service offerings. Enbridge is entitled to a reasonable risk allocation. However, the latitude given to Enbridge to mitigate its risk exposure must be carefully considered against the degree to which Enbridge faces risk, the potential impacts of the proposed mitigation efforts on stakeholders and applicable statutory requirements.

While it finds that Enbridge faces some volume risk that would be reduced under Mainline Contracting, the Commission is not persuaded that Enbridge's risk exposure justifies the changes to access that Mainline Contracting proposes. In reaching this conclusion, the Commission considered that:

- the Canadian Mainline remains in high demand with regular and significant apportionment;
- there is a substantial degree of demand-pull from delivery destinations and downstream pipeline commitments that have few alternative transportation options;
- Enbridge is not claiming that the manifestation of the Canadian Mainline's fundamental risk will occur in the foreseeable future absent Mainline Contracting;
- there is no new large capital investment that is tied to the contracting proposal that would present additional risk to Enbridge; and
- credit rating agencies and equity analysts do not appear to have raised concerns with the Canadian Mainline's competitive position.

In the context of these factors, Enbridge did not establish that, absent Mainline Contracting, there is a reasonable likelihood that future volume losses on the Canadian Mainline would result in significantly lower revenues for Enbridge or significantly higher tolls for shippers (i.e., a toll spiral) that would threaten the pipeline's ability to recover its costs, including the costs associated with maintaining existing infrastructure or the cost of capital. At this time, therefore, the Commission does not view Mainline Contracting as an essential tool to manage Enbridge's risk.

The NEB previously emphasized the need of pipeline companies to mitigate their risk by providing competitive services to prospective customers rather than relying on those shippers with few alternative options to bear the system's costs and risks. While the Commission has found that Enbridge may face competitive risk, Mainline Contracting does not necessarily represent a competitive outcome, given that it may compel shippers to sign long-term transportation agreements at a time when few alternative options are available.

Although the Commission was not persuaded that Enbridge should be able to further reduce its risk exposure through Mainline Contracting as proposed, Enbridge's volume risk will still need to be managed. Enbridge must compete for volumes, and it is Enbridge's responsibility to manage the pipeline and its risks. The Commission encourages Enbridge to continue to seek appropriate

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[69] For example: NEB, *Reasons for Decision – TransCanada, NOVA Gas and Foothills 2012 and 2013 Final Tolls*, RH-003-2011 (March 2013) [RH-003-2011].

measures to respond to its risks, recognizing that changes to the Canadian Mainline, and the associated consultations, negotiations, regulatory approvals, and implementation, can take time. The circumstances in which Enbridge operates and its risk exposure will change over time, and so too might the appropriate tools to respond.

Fairness in relation to other pipelines

The Commission seeks to provide fairness and regulatory certainty by applying substantively similar tests to applications before it. In previous cases, firm service was allowed on the basis of supporting evidence that demonstrated that a firm service offering would allow the pipeline company to meet its common carrier obligation.

To give significant weight to the fact that other pipeline companies have been allowed to offer firm service would eventually undermine the common carriage obligation. Each application must be assessed on its own merits. As discussed, the Commission's denial of the Application is not based on a finding or legal interpretation that would broadly preclude firm service on an existing pipeline, such as the Canadian Mainline. The denial of the Application rests on the absence of sufficient evidence to establish that a level of access commensurate with the common carriage obligation would be maintained under Mainline Contracting. The fairness concerns raised by Enbridge cannot displace or supersede its obligations to comply with the common carriage and other statutory obligations in the CER Act. Moreover, any proper consideration of the fairness of services offered across multiple pipelines would require a broader inquiry than an analysis of evidence available primarily in respect of a single pipeline or pipeline system.

3.4.2 Future Canadian Mainline expansion

Enbridge presented Mainline Contracting as the only means to facilitate future Canadian Mainline expansions, by providing valuable market signals for expansion and by providing assurance that existing capacity will continue to be utilized. The need for Mainline Contracting in facilitating future expansions is discussed below.

Views of Enbridge

Enbridge submitted that under 100 per cent uncommitted service, there are no price signals that directly measure the value of incremental pipeline capacity. In contrast, under Mainline Contracting, the secondary market prices, combined with analysts' assessment of longer-term future supply-demand trends, can provide a meaningful estimate of the value for pipeline expansions.

The results of the open season would determine if there is a demand for the suite of expansions that Enbridge would like to bring to the marketplace.[70] Enbridge asserted that with the stoppage of its prior open season, it had no basis to include any type of an expansion as part of this Application. Enbridge argued that it would bring expansions to the market in an expedited timeframe should Mainline Contracting proceed, and the open season be fully or over-subscribed. The results of the open season would provide Enbridge with valuable

[70] Enbridge indicated that one such opportunity includes 200 Mb/d of Enbridge Mainline enhancements that are possible from drag reducing agent and additional horsepower at pump stations.

information about where and how much capital to deploy based on where the demand for firm service is.

Enbridge argued that high levels of apportionment currently on the Canadian Mainline do not provide a strong signal for expansion, because expansions are not for a single year; rather, expansions are long-term investments. If Enbridge were to wait for apportionment to continue after the TMEP, it would be too late because of the lag between identification of market leader demand and being able to put the expansion into service.

Enbridge does not intend to invest additional capital to expand its system capacity in circumstances where it faces significant volume risk that could result in underutilization of its current facilities. Without assurance that the existing capacity is going to be used, Enbridge argued that there is no business case for an expansion. Mainline Contracting is the only way to move forward in terms of allowing Enbridge to provide additional pipeline capacity.

Concentric's evidence was that Mainline Contracting is an essential element of providing a basis for securing the financial commitments necessary to maintain and expand the capacity from the WCSB to key markets in North America. Dr. Church submitted that pipeline capital investment involves large sunk costs, with expected returns accrued over a long-time horizon. Such an investment is inherently risky, and without contractual assurances of long-term pipeline utilization at reasonable tolls, under-investment in pipeline infrastructure and capacity is likely. Under firm service, however, efficient long-term investment by shippers and the pipeline is more likely.

In response to Priddle, Concentric asserted that the binding constraints on new pipeline development in today's market relate to political policies that disfavour pipeline infrastructure and legal challenges to the permitting process. These hurdles translate into a higher risk for pipeline development, making it more difficult to attract capital. For example, financial support was needed from provincial and federal governments for the KXL and TMEP projects to move forward. Ultimately, while environmental, regulatory, and political actions affect the risk of a pipeline investment, it is the financial community that must be satisfied the risks are acceptable.

In argument, Enbridge requested that the Commission approve firm service on the Canadian Mainline and "count on Enbridge to bring forward expansions if they are required",[71] which would address many of the concerns raised by opposing parties.

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[71] CER, *Enbridge Canadian Mainline Contracting (RH-001-2020) - Transcript, Volume 24* Filing ID C14052-1 (12 July 2021) at para 24148. [Transcript Volume 24]

Views of other parties

Supporting parties

Supporting parties' views included the following:

- It is appropriate for Enbridge to seek a foundation for possible future expansion of Canadian Mainline capacity via the Application. Enbridge would be more likely to invest in enhancements on the system if it had more certainty that it would have future volumes moving on the line. Mainline Contracting would mitigate the risk for Enbridge of new projects, including those that improve market access for producers (*e.g.*, expansions of connected pipelines downstream of the Enbridge Mainline).
- Demonstrated shipper interest via the Mainline Contracting open season would provide support for incremental investments for further expansion of the Enbridge Mainline, to the benefit of all shippers.
- A cost of service tolling methodology may not provide sufficient incentives or support for incremental investments or further expansion of the Enbridge Mainline.
- Enbridge has identified opportunities to make certain investments to expand the Enbridge Mainline and in the past, such investments often required toll increases that were sometimes borne by shippers who did not specifically benefit from the expansion. Under Mainline Contracting, shippers would pay a fixed toll, part of which would cover expansions that would allow Canadian producers to penetrate new markets.

Opposing parties

Several opposing parties argued that expanded ex-WCSB pipeline capacity is needed, and that any Mainline Contracting proposal by Enbridge should provide new capacity expansion or new market access. Without such an expansion proposal, there is no need for Mainline Contracting.

Opposing parties asserted that rejecting Mainline Contracting would not prevent new capacity from coming on, and that Enbridge would continue to bring on new capacity if it is economically viable and supported by surcharges from the shippers. Enbridge has been able to pursue Enbridge Mainline expansion projects in the absence of contracting, expanding by over 1 MMb/d since 2010 and there is no indication that it cannot continue to do so.

Some opposing parties argued that tolling of future expansions on the Enbridge Mainline is unclear, and the intent of the TSAs is to protect signatories from toll escalation from future expansions. Therefore, approval of the Application could result in the implementation of incremental tolling for potential expansion in the future, with the likely effect of disincentivizing such expansion.

Some parties argued that while Enbridge stated that oversubscription of the open season would demonstrate a need for expansion, the Canadian Mainline is already experiencing high and sustained levels of apportionment. There is no certainty that Enbridge would expand the pipeline to meet demand if pipeline capacity remains scarce or when such expansions would come online, considering the challenging environment for pipeline expansions in North America today.

3.4.2.1 Commission analysis and findings

Enbridge argued that Mainline Contracting would facilitate future system expansions by providing valuable market signals and by reducing the volume risk associated with existing Canadian Mainline capacity. While Mainline Contracting may provide some information and risk mitigation for Enbridge, the Commission does not find that Mainline Contracting is a genuine prerequisite for Enbridge to pursue future expansion projects.

The Commission agrees with Enbridge that the proposed open season may provide information regarding the demand for specific services on the Canadian Mainline and that the secondary market may provide information on the value of incremental capacity. However, the Commission is not persuaded that this information is required by Enbridge in order to assess any expansion opportunities.

In reaching this conclusion, the Commission considered that the market signals provided by the open season may be obscured if prospective shippers alter their participation in the open season based on expectations of oversubscription or if some market participants feel they have no choice but to participate in the open season due to a lack of alternative transportation options. Moreover, the open season would demonstrate interest in existing capacity under the terms of service of this Application, but would not necessarily demonstrate interest in expansion opportunities that may be subject to different terms and tolls or that serve alternate delivery paths. Ultimately, open season results are but one of many factors that can be considered in assessing whether demand for expansion exists.

The Commission notes that Enbridge has access to existing and long-standing market signals, such as apportionment levels. Enbridge argued that apportionment does not provide a strong signal for expansion due to the disconnect between the monthly apportionment process and expansion as a long-term investment. The Commission, however, agrees with opposing parties that long-term apportionment could provide a reasonable signal that additional capacity would be utilized, particularly when combined with analysis of crude oil supply and markets carried out by Enbridge and industry associations, as discussed by Priddle. Enbridge has successfully expanded the Enbridge Mainline on numerous occasions using the same type of information that is available today in the absence of Mainline Contracting. In addition, Enbridge could employ a variety of different commercial processes to gather detailed information on the demand for, and desired design of, a future expansion, including consultations with interested stakeholders, expressions of interest, or open seasons for specific proposals.

Enbridge's argument that contracting must precede any commitment to expand the pipeline is relatively novel. In contrast, past cases have seen pipeline companies implement firm service concurrent with and in support of new pipeline projects, such as TMEP, Keystone, and Express. In light of the Commission's finding on Enbridge's risk exposure, Enbridge has not otherwise clearly or persuasively established why its new approach is necessary at this time, particularly given recent capacity expansions such as the multi-billion dollar Line 3 Replacement.

Enbridge would likely benefit from additional assurance that Canadian Mainline capacity will be adequately utilized when investing in an expansion, and Enbridge is best positioned to assess its opportunities and deploy capital as it sees fit. However, the Commission does not find that the weight of evidence supports that Mainline Contracting is "the only way forward."[72]

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[72] Transcript Volume 24, *supra* note 73 at para 24349.

3.4.3 Shipper need

Enbridge discussed the market need for Mainline Contracting, including the request from shippers for both capacity and toll certainty as well as locking in refinery demand for WCSB supply.

Views of Enbridge

Enbridge argued that offering firm service on the Canadian Mainline is consistent with the objective of allowing competitive forces to work and allowing the market to operate and evolve according to its own choices. Firm service gives each market participant the opportunity to make an economic choice as to whether it values access to pipeline capacity enough to make a long-term commitment.

Concentric was of the view that shippers have expressed a strong preference for stable, predictable tolls with guaranteed access to transportation capacity that can only be enabled by long-term contracts for service. Enbridge argued that firm service and the access certainty provided by Mainline Contracting would benefit not only firm shippers but all other market participants by minimizing the burdens of managing barrels post-apportionment, and would also reduce the risks associated with upstream and downstream investment decisions.

Further, having parties with refining interests make long-term capacity commitments on the Canadian Mainline would lock in markets to the benefit of western Canadian producers, by making the next best alternative more expensive.

In response to opposing parties' assertions that Mainline Contracting would cause a loss of flexibility and/or optionality in supply sources or downstream markets, Enbridge argued that opposing parties want the flexibility and optionality to ship volumes on the Canadian Mainline if they want, when they want, and to the extent they want. This expectation ignores the legitimate preferences of Enbridge and those supporting parties that ship over 75 per cent of the crude oil on the Canadian Mainline.

Refiners that are prepared to make long-term commitments to use the Canadian Mainline and to buy WCSB production to feed their refineries should not be denied the opportunity to do so just because Valero asserts that it would lose optionality or flexibility to either ship on Line 9 (and, by extension, the Canadian Mainline) or make Line 9 deficiency payments to utilize other sources of supply.

Enbridge was of the view that if producers were to decide not to contract on the Canadian Mainline, they would have the same options that they have today, including nominating for uncommitted service on the Canadian Mainline, selling to local refineries, selling to Canadian Mainline shippers, shipping on other export pipelines, selling to shippers on other export pipelines, transporting by rail, and storing their production. Additionally, contracting would offer another option of securing capacity through the secondary market.

In response to opposing parties' concerns regarding the impacts of Mainline Contracting on existing downstream commercial arrangements, Enbridge submitted that committed shippers on downstream pipelines already experience a mismatch between their downstream commitments and Canadian Mainline capacity due to apportionment, and therefore the potential for a capacity mismatch is not a creation of Mainline Contracting. In the event that apportionment persists, rather than perpetuating this mismatch, Mainline Contracting would provide committed shippers

with the opportunity to secure firm service on the Canadian Mainline to mitigate such mismatches. Additionally, under Mainline Contracting, shippers with a commitment on a downstream pipeline have a number of options available to ensure they do not incur a monthly shortfall payment, and under Mainline Contracting those shippers would have even more options.

Enbridge explained that opposing parties' concerns regarding contract term misalignment could be mitigated in two ways under Mainline Contracting. First, shippers holding take-or-pay commitments on downstream pipelines could extend their existing terms on those pipelines to align with a standard Canadian Mainline TSA term. Second, shippers could utilize a contract conversion clause[73] that is included in the proposed TSAs, which enables a party to convert all or a portion of its Canadian Mainline contract to a future downstream contract for the capacity it is awarded in a future downstream pipeline open season.

Views of other parties

Supporting parties

Most supporting parties indicated that under the current uncommitted service structure on the Canadian Mainline, capacity apportionment has had a material impact, both operationally and economically, on their refineries. Apportionment creates supply variability, which requires parties to make other arrangements for alternative supplies, such as finding suppliers and/or shippers who may have crude oil in the pipeline with nominated space.[74] In doing so, these parties pay significant premiums to pull those barrels away from other markets.

Further, apportionment has also resulted in the underutilization of firm commitments on downstream pipelines. These parties explained that to mitigate the risk of underutilized downstream contracted capacity, shippers must either backfill underutilized capacity with alternative supply sources or market underutilized capacity to others, where both options may result in additional costs.

Most supporting parties confirmed that they were able to meet their refining needs and minimum run rates under the existing 100 per cent uncommitted service structure and did not assert that their long-term economic viability was at risk if Mainline Contracting was not approved. However, they submitted that their past ability to manage these risks does not reduce the importance of future certainty of supply provided by Mainline Contracting.

Several supporting parties submitted that committed shippers would likely face less apportionment on the Canadian Mainline under Mainline Contracting, and that firm service is the best solution to current apportionment issues. Accordingly, under Mainline Contracting, shippers would be able to reduce or eliminate their monthly capacity uncertainties and apportionment-related costs, such as the costs associated with arranging alternative modes of transportation, including rail, or inline purchases on the Enbridge Mainline. Mainline Contracting would, therefore, result in lower overall costs for the crude oil supply delivered to refineries.

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[73] This provision is set out in TSA s. 16.5.

[74] Transactions with shippers who already have crude oil flowing in the pipeline are referred to as inline trades or swaps.

Several parties also submitted that under firm service, the risk of underutilized downstream commitments would be materially reduced or even eliminated depending on the results of the open season. This, in turn, would reduce exposure to, and the need for relief from, deficiency payments on downstream pipelines. Therefore, firm service would allow parties to adopt strategies where common transportation commitments can be obtained along full paths between the Enbridge Mainline and higher-value downstream markets such as the US Gulf Coast.

For those refineries that are heavily dependent on the Enbridge Mainline and have no feasible or economic crude oil supply alternatives, securing long-term priority access will mean surety of supply that refineries can operate efficiently and reliably to manufacture fuels and other products.

Some supporting parties asserted that they have made significant investments in their refineries in the US to process Canadian crude oil, and western Canada is a significant source of crude oil for their refineries. Dependent shippers that are willing to contract for long-term supply from the WCSB should be provided with the opportunity to do so.

In addition to providing access certainty, the supporting parties explained that the Application provides toll certainty through its fixed toll offering. A fixed toll mitigates the price risks associated with both increases in Enbridge Mainline costs and decreases in Enbridge Mainline volumes.

Opposing parties

Opposing parties did not view Canadian Mainline firm service as a need for the industry overall. In general, opposing parties did not oppose the concept of firm service, with some indicating that they would consider supporting future contracting on the Canadian Mainline under the right conditions, but they did not support contracting as set out in the Application.[75] Many provided detailed submissions highlighting their concerns, including negative impacts to their businesses that may result from Mainline Contracting.

Opposing parties asserted that Mainline Contracting would disproportionately benefit those that support the Application at the expense of other parties. They observed that many of the supporting parties are sole-sourced refiners that would ship on the Canadian Mainline with or without Mainline Contracting and asserted that a main driver for supporting Mainline Contracting is to reduce feedstock costs. Mainline Contracting would provide supporters with the opportunity to solidify capacity on a heavily apportioned pipeline, giving them long-term access to heavily discounted crude oil from the WCSB.

Several parties were of the view that Mainline Contracting is a zero-sum game, where any minor commercial benefits that would accrue to refiners, integrated Canadian producers, or Enbridge are far outweighed by the negative consequences to other Canadian producers. In contrast, there are no winners or losers under the current uncommitted service, as everyone has the same ability to bid and is apportioned the same. Therefore, producers and downstream interests are on a more equal footing. To the extent there are any losers in the current system, the

[75] Parties such as MEG and Suncor would consider supporting contracting if incremental capacity would be made available to access liquid markets and add/diversify options for export from the WCSB, and if the tolls, terms and conditions of contract service fairly and appropriately balanced the risk between the pipeline and shippers.

impacts last for one month, whereas under Mainline Contracting, the impacts would last for 8 to 20 years.

The Application does not provide additional capacity out of the WCSB, enhanced or additional access to liquid pricing points, enhanced flexibility to deliver crude oil to the best available markets, or just and reasonable tolls. Small producers need flexible, uncommitted access to pipelines and an efficient, well-functioning market that maximizes market options for producers, is not controlled by downstream crude oil buyers, and does not distort and weaken oil price. If these flexibility and value creation opportunities are lost, the significant economic contribution of entrepreneurs will diminish and disappear. Mainline Contracting does not provide value to a producer without the necessary downstream verification ability to nominate and ship on the capacity.

Having to make a commitment for a period of 8 to 20 years may limit producers' ability to support new egress (and possibly finding new markets and increasing their netback price), thereby inhibiting any pipeline competition, and would limit their ability to pursue other market transportation options. Committing to firm service would require producers to match commitments on a monthly basis with the market's needs, likely incurring financial penalties for under-utilizing contracted capacity.

Approval of the Application would effectively force non-supporting shippers with sunk investments in the form of TSAs on Enbridge-affiliated downstream pipelines supplied from the Enbridge Mainline to enter into long-term financial commitments for transportation service. This would unreasonably and unnecessarily expose them to significant financial costs and risks beyond their control, create a barrier to participation for many producers, dis-incentivize expansion, and deter investment in the Canadian petroleum industry.

Mainline Contracting could have detrimental impacts to marketing aggregators due to the high costs and risks associated with contracting for long terms. Many aggregators (in addition to many large producers) would be required to post additional credit, as they would not meet the investment grade threshold set out in the TSAs. The eventual costs would have to be passed onto the producer through a higher marketing margin, further eroding producer value.

Mainline Contracting would erode a refiner's optionality, flexibility to respond to seasonal fluctuations and ability to source the most economic supply for their needs by imposing an additional deficiency payment when committed shippers choose an alternative source of supply to the Enbridge Mainline. Further, a refiner solely reliant on the Enbridge Mainline may also be limited in its ability to pursue future expansions at its facility due to the additional cost of securing Canadian Mainline capacity in the secondary market, to which that refiner would necessarily have to turn in order to secure any incremental or additional crude oil supply.

Some opposing parties submitted that there are other solutions that can work instead, such as evidenced by the Competitive Toll Settlement (**CTS**), which arrived at just and reasonable tolls and risk-balanced agreements. Industry should have had a chance to explore the opportunity for a revised settlement with rebased tolls. This would provide a foundation for reaching an agreement that would work for all of industry and that would not rely on a firm service offering where there is a large imbalance regarding who can utilize, and who is best situated to respond to, the offering.

3.4.3.1 Commission analysis and findings

Shipper demand for Mainline Contracting

The proposed Mainline Contracting would provide clear benefits to many of the Canadian Mainline's largest shippers by mitigating apportionment-related issues that currently exist under the uncommitted service structure. There are operational challenges associated with supply unpredictability, and although companies confirmed that they were able to meet their refinery run rates, the Commission recognizes that at times they incurred additional costs to do so. The Commission considers these challenges to be compelling considerations in this Application and weighed them carefully against the absolute flexibility of 100 per cent uncommitted capacity preferred by some parties opposed to the Application.

Ultimately, however, the Commission notes that the benefits of Mainline Contracting primarily accrue to a distinct group of market participants and that these companies have successfully operated their facilities in the absence of firm service. No parties to the proceeding suggested that their economic viability would be threatened in the absence of Mainline Contracting. Conversely, there is evidence of serious impacts, including on potential viability, for some producers affected by the potential burdens of Mainline Contracting.

Constrained ex-WCSB pipeline capacity has negatively impacted many market participants throughout the crude oil value chain. Several of the refineries connected to the Enbridge Mainline have few alternative supply options or have invested heavily in the ability to process heavy Canadian crude oil. The Commission finds it compelling that variability in obtaining capacity on the Canadian Mainline each month has required these companies to obtain alternative crude oil supplies on short notice, including through inline purchases on the Enbridge Mainline from others that have obtained capacity. This unpredictability can increase refiners' operating costs, both through the acquisition of more expensive crude oil supplies and through dedicating internal resources to managing the monthly variability. Similarly, companies with downstream pipeline commitments have experienced underutilization of their committed capacity and have had to seek alternative supply arrangements or find buyers for the portions of their downstream capacity they cannot fill, at additional cost.

The Commission agrees that Mainline Contracting would likely relieve, in whole or in part, apportionment-related issues for these parties. It may also give parties the certainty to make longer-term business decisions, such as to invest in their facilities or enter into long-term business arrangements and downstream transportation commitments.

While certain parties would benefit from increased certainty under Mainline Contracting, the value of this certainty may depend on whether Canadian Mainline capacity remains scarce. For example, in circumstances of spare pipeline capacity, shippers on the Canadian Mainline could expect little crude oil supply variability, even without firm service being offered on the Canadian Mainline. In addition, Mainline Contracting is not the only method to achieve toll certainty for shippers, as demonstrated by the tolls under the CTS.

While Mainline Contracting would bring benefits to many supporting shippers, the Commission is mindful that other parties could face a significant reduction in the flexibility and optionality that benefits their operation (for example, incremental deficiency payments from Mainline Contracting could reduce the flexibility of some refiners, such as Valero and CCRL, to optimize their operations by using alternative supply sources, and a commitment to the Canadian Mainline could diminish producers' and aggregators' ability to sell into different markets and receive the highest prices for their products). While parties are normally able to freely weigh the

advantages and disadvantages of a given contract before entering into commitments, this case is unique. Given the importance of the Canadian Mainline and the lack of transportation alternatives, many industry participants feel they have no choice other than to contract for firm service. Therefore, some shippers would reluctantly contract for capacity and thereby incur negative impacts, while another subset of shippers would enthusiastically assume the same obligations and enjoy a greater suite of benefits.

The Commission was not persuaded by arguments related to capacity mismatches on downstream pipeline commitments, as the situation is not likely to be meaningfully worse than the one facing shippers presently. However, the Commission recognizes that the proposed 8-year minimum contract term length could, in some instances, create term mismatches with downstream pipeline commitments. The term mismatches may create challenges that could only be resolved through additional downstream contracting decisions (e.g., renewals, extensions, or participation in new open seasons) that shippers may not have otherwise chosen.

Locking in refinery demand for WCSB supply

Enbridge asserted that long-term capacity commitments under the proposed Mainline Contracting would lock in refinery demand for WCSB crude oil production. Despite being presented as a key benefit of the Application, Enbridge and supporting parties provided limited evidence in support of this argument over the course of the proceeding. Accordingly, the Commission was not persuaded that this would provide a significant benefit to western Canadian producers.

The Commission agrees with Enbridge that Mainline Contracting, and the associated sunk toll obligations, would create an incentive for committed shippers to utilize WCSB production, as opposed to other supply sources, for the length of their contract terms. However, the Commission is not convinced that this incentive would have a material practical impact on the demand for western Canadian crude oil. Specifically, western Canadian producers appear to have a degree of assurance in long-term demand for their production with or without contracting, as discussed in Section 3.4.1 (Enbridge's risk exposure).

Several supporting parties suggested that they could potentially explore alternative supply options for some of their crude oil requirements if firm service was not introduced on the Canadian Mainline. The Commission does not find these statements to detract materially from the finding that western Canadian producers appear to have reasonable assurance of demand for their supply. The submissions of supporting parties did not state with certainty or precision the extent to which they would substitute away from the Canadian Mainline and WCSB crude oil in favour of supply alternatives, and several other supporting parties indicated that they would not cease to ship on the Canadian Mainline regardless of the Commission's decision on the Application. A number of refiners have made significant investments to process heavy Canadian crude oil and may not be able to easily substitute away from WCSB supply without making substantial investments in alternative options. Accordingly, the Commission cannot conclude with sufficient certainty that existing demand for WCSB crude oil would fall if the Application is not approved.

Further, if spare ex-WCSB oil pipeline capacity should emerge and persist, as discussed in Section 3.4.1 (Enbridge's risk exposure), western Canadian crude oil could see increased accessibility to markets, and downstream refiners could more easily access western Canadian crude oil, reducing the need to utilize alternative supplies. This may further increase WCSB producers' assurance of demand for their production.

3.5 Broader impacts

Parties discussed various impacts of the proposed Mainline Contracting on producers, marketing aggregators, the province of Saskatchewan, eastern Canadian refineries, upstream pipelines, and shippers of refined products and natural gas liquids. The Commission has not addressed all of these impacts below, due to the number raised and the limited evidence available on many of the asserted impacts. However, the Commission provides views on the following potential impacts that received substantial discussion on the record: economic efficiency; impacts to commodity pricing; and geographic redistribution of Canadian Mainline receipts.

3.5.1 Economic efficiency

The Commission considered the potential for Mainline Contracting to result in economic efficiency gains and better reflect the result that would be achieved in a workably competitive market by:

- increasing the allocation of Canadian Mainline capacity to those who value it most;
- leading to the development of a secondary market for Mainline capacity (an unregulated market whereby shippers can buy and sell pipeline capacity among themselves);
- more closely aligning the quality and nature of services provided with the preferences of shippers;
- promoting more efficient investment in the Mainline, and in upstream and downstream facilities; and
- increasing the efficiency of risk allocation and reducing the costs of risk.

Views of Enbridge

Enbridge's experts, Dr. Church and Reed stated that there will not only be enhancements in allocative efficiency in the primary market (Canadian Mainline capacity that is awarded by Enbridge through the open season), but also in the secondary market (capacity that is sold among parties after the open season).

Increasing allocation of Canadian Mainline capacity to those who value it most

Enbridge expects that, through both the primary market and the secondary market, capacity will be reallocated based on the value it unlocks for shippers. Firm service will result in a more efficient allocation of Canadian Mainline capacity, which will reflect which shippers can make the best use of capacity. This will help maximize the aggregate profits from the production, transportation, and refining of crude oil from the WCSB. However, neither Enbridge nor its consultants undertook any modeling or analysis to quantify the maximized aggregate profits.

Dr. Church submitted that if an outcome is economically efficient, then it promotes the public interest. Economic efficiency means higher productivity, incomes, and standard of living, and thus economic efficiency is an important determinant of the public interest.

Secondary market

In Enbridge's view, a secondary market, whereby firm shippers can assign or contract their firm capacity to another shipper, is more likely to exist and be more liquid under firm service than under uncommitted service, since property rights in scheduled capacity are much more likely to be sufficiently well defined such that firm capacity contracts can trade independent of oil. The trades that occur today on the Mainline, referred to as swaps or inline trades whereby uncommitted service oil and scheduled capacity rights are traded as a bundle, do not constitute a secondary capacity market. The nature of trades resulting from contract rights, who benefits, and by how much is difficult to predict.

Enbridge submitted the following regarding secondary market:

- The secondary market better allocates capacity based on its value to shippers.
- Scarcity value in the secondary market can be positive or negative. If capacity is scarce, the contract holder will capture scarcity rents because the value of capacity (what it could be sold at in the secondary market) is higher than the toll. If egress capacity out of the WCSB turns out not to be scarce, then the value of the capacity will be less than the toll and contract holders would sell capacity at a discount. Failure of prices to incorporate scarcity rents means that they are not allocatively efficient.
- The opportunity to benefit from transactions in the secondary market, such as by potentially reselling capacity for prices that are materially higher than the regulated tolls does not undermine the allocative efficiency of the open season process; in fact, this enhances the allocative efficiency.
- The efficiency gain from introducing Mainline Contracting and a more liquid secondary market relative to pro rata apportionment and 100 per cent uncommitted service does not depend on the secondary market being efficient or perfectly competitive. How the secondary market or markets will evolve is less important than that trades will be possible, and, if those trades create economic value, market participants will be trying to lower the transaction costs to realize those trades and unlock economic value.
- Pricing transparency in the secondary market will be achieved though transactions between buyers and sellers.
- Given the competitive WCSB crude oil market and the existence of a liquid pricing hub at the inlet to the Canadian Mainline, what is really required for a robust secondary market is that that the pipeline capacity be substitutable and hence there is competition between firm service shippers in the secondary market.
- The approach used by Enbridge to assess the competitiveness of a market is based on assessing the extent of the market power present. The following assumptions determine that the suppliers and buyers do not have market power: that buyers are well-informed, that output is homogenous, and that there are relatively small and numerous suppliers and buyers.
- The key to a well-functioning secondary market is that it is competitive. A number of factors determine whether there will be a competitive secondary market in capacity on the Canadian Mainline, including a minimum number of suppliers of capacity for effective competition, which facilitates a robust and efficient secondary market, and a minimum amount of committed capacity. However, Enbridge has not conducted studies of the expected secondary market.

Primary market

Enbridge submitted the following regarding efficient allocation in the primary market:[76]

- The Mainline Contract Offering is expected to result in a major improvement in allocative efficiency in the primary market since shippers would be able to express a preference for the type or mix of service that best meets their individual needs. With this more customized approach to contracting, capacity is more likely to be allocated based on the value of transportation to a shipper and is expected to produce significantly more efficient use of the Mainline as compared to the current single product offering.
- While alternative approaches to terms of service may have produced greater allocative efficiency, these alternative approaches were rejected through the negotiation process. The terms that were adopted were the result of a market-based process of refining the service offering and Open Season Procedures through extensive negotiations with shippers, and reflect, in aggregate, the preferences of the market.
- The proposed Open Season Procedures have enough features linking capacity awards in the primary market to the underlying value that the shippers place on firm capacity to represent a major improvement in allocative efficiency from the current status quo.
- The three assumptions to determine that suppliers and buyers don't have market power are: well-informed buyers; homogeneous output; and relatively small and numerous suppliers and buyers. In the primary market, buyers are well informed, given that many are relatively large, sophisticated market participants and the product market is characterized as having relatively homogenous output. However, the primary market cannot be characterized as having relatively small and numerous suppliers and buyers.
- Long-term capacity allocation in the primary market provides the opportunity for a secondary market to develop and further enhance allocative efficiency.
- Although producers have the same opportunity to contract on the Canadian Mainline as refiners, with perhaps a few exceptions, pure producers can be expected to continue to do what they have always done, which is to sell their crude oil production in the liquid markets upstream of the Mainline, or to ship on transportation alternatives. The same shippers that are using the Mainline today, will most likely be the ones using it in the future.

Enbridge submitted the following regarding Mainline Contracting more closely aligning the quality and nature of services provided with the preferences of shippers:

- In the long run, firm service leads to a more efficient matching of service to the needs of individual shippers.
- Under firm service, shippers that would like to contract for better service may do so if they are willing to pay the cost of additional capacity. Therefore, the costs and benefits of more reliable and more adequate service are internalized by a shipper.

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[76] The primary market refers to the negotiations that occur between the pipeline and shippers to establish the terms and conditions offered to shippers in the open season and the open season itself. It occurs prior to the open season, and the open season fixes the obligations between Enbridge and the shippers that get the original contracts. After that point, the secondary market allocates capacity.

- Shippers may select the service offering, path, term, product mix, and contract quantity that best meets their preferences.

Enbridge submitted the following regarding Mainline Contracting increasing the efficiency of risk allocation and reducing the costs of risk:

- In the primary market, an initial allocation of capacity is established, but more fundamentally it allocates risk and financial obligation.
- These financial obligations are larger the greater the volume and the longer the term of the contractual commitment of a shipper. Hence, along with the financial obligation, the primary market is also allocating the risk associated with those financial obligations. Capacity is allocated to shippers who are most willing to bear volume risk.

Enbridge submitted the following regarding Mainline Contracting increasing the efficiency of investments in the Enbridge Mainline, and in upstream and downstream facilities:

- Firm service will provide shippers with long-term certainty of capacity and tolls, which will promote efficient investment in upstream and downstream facilities. Enbridge further states that, as described above in Section 3.4.2 (Future Canadian Mainline expansion), by providing more certainty regarding volumes, firm service will promote more efficient investment in the Enbridge Mainline, and the secondary market will provide appropriate price signals regarding if, and when, to expand the Enbridge Mainline.
- Firm service would reduce the risk of large investments that are sunk with long lives.

Dr. Church submitted that:

- Under 100 per cent uncommitted service, pipelines typically cannot enter into contracts with shippers that discriminate on the terms of access and price. This makes it difficult for pipelines and their shippers to agree to terms that commit them to a trading relationship and support investments in trade-specific assets. The inability of participants to secure contractual obligations to ensure pipeline access or utilization increases the risk associated with long-term investment, thereby reducing the incentives to undertake large, durable, and sunk capital investment projects in oil pipelines, field development, oil sands facilities, and refineries.
- Inefficient outcomes arise from 100 per cent uncommitted service because of the negative effects on investment for both the service provider and shippers. The service provider is reluctant to make investments if shippers can easily reduce their demand for the service after the investment has been made.
- Capacity in the long run is not fixed and allocative efficiency requires investment in capacity to match the efficient level of output. Contracting rights under Mainline Contracting reduces the risks associated with investments that are durable and sunk, including pipeline capacity and thus provides a rational financial basis for maintaining existing capacity and facilitating capacity expansion in the future.
- Enbridge's current model of 100 per cent uncommitted service is inefficient because pro-rata apportionment does not allocate capacity to shippers that value it the most. When there is apportionment, every shipper receives a share of pipeline capacity proportionate to the volume that it nominated to ship. This allocation system does not account for the

fact that some parties would have been willing to pay more for the capacity than others. Because this will lead to some cases where the party who was willing to pay the most to ship the oil will not ship the oil, the delivered cost of oil at a destination is not minimized.

Views of other parties

Supporting parties

Cenovus submitted expert evidence from Dr. Webb to support its views on efficiency. Dr. Webb submitted that the secondary market creates a more efficient use of pipeline capacity in the following ways: It ensures Mainline capacity is put to its best use when committed shippers have unutilized space, the market becomes more responsive to fluctuations in supply, pricing becomes more optimal, it lowers risk for market participants, and decreases overall market concentration.

Another advantage of TSAs over other ratemaking methodologies is that they may create capacity rights for committed shippers. As a result, TSAs can create the conditions that allow for the emergence of a secondary market for committed capacity. Dr. Webb submitted that the current apportionment levels cause uncertainty and inefficiency for Enbridge and its shippers and submits that the current framework is inefficient because capacity may be allocated to a party that values it less than another party.

Further, Mainline Contracting increases efficiency because there is no need to adjudicate rates for at least two decades. Resources that would otherwise be devoted to a rate case can be devoted elsewhere, increasing efficiency. Contracting provides Enbridge with an incentive to behave more efficiently, because Enbridge is provided a fixed rate, it has an incentive to provide the same service at a lower cost, representing an increase in efficiency.

Opposing parties

Secondary market

Opposing parties submitted that a secondary market for Mainline capacity currently does not exist and it is unlikely that one will develop under Mainline Contracting.

Due to the scarce capacity out of the WCSB, firm capacity is so valuable that it would be unlikely that shippers would be willing to sell it to the secondary market. There is no guarantee of capacity in the secondary market. Secondary market capacity will fluctuate from month to month, if any is available at all. Also, prices in a secondary market, should it develop, would be unknown with no cost certainty or transparency.

On behalf of the CSG, Dr. Makholm submitted that:

- Robust and commercially viable secondary markets exist for gas pipelines, but they do not exist for oil pipelines, either in North America or the world. As such, Enbridge's entire discussion of secondary markets has no practical substance to it, only abstract speculation.
- Secondary markets do not happen by themselves. They require purposeful definition, aggressive transparency, exacting regulation of the actual market logistics, and careful regulatory follow-up to prevent abuse, as demonstrated by the successful secondary market in US interstate gas transportation capacity on the FERC-regulated pipeline

> system. There is no possibility that a workable secondary market in Mainline capacity will follow the Application. In the event that a secondary market develops, there will be a similar problem to the primary market, in that only parties with the ability to provide downstream verification will participate.

Valero and CCRL & FCL submitted that, even if a secondary market develops, it would be impossible to determine whether any additional capacity will actually be available in a given month on the short and medium haul segments of the Canadian Mainline that they rely on. Valero submitted that it is very unlikely that a secondary market will develop at Sarnia as there are currently only a handful of shippers who ship to Sarnia.

Other factors influencing efficiency

Opposing parties submitted that Enbridge's claims of increased efficiency are highly theoretical and lacking evidentiary foundation.

The CSG submitted that:

- The productive and allocative efficiency claims are without substance. The evidence filed by Enbridge's experts is highly abstract and was filed completely without regard for the essential and highly unusual context within which the Mainline operates.
- There is no direct link between common carriage, apportionment and the ability of Enbridge to provide additional capacity. Enbridge (and its predecessor IPL) have been able to efficiently expand capacity for seven decades while operating under a common carriage model.
- Mainline Contracting will not result in improved economic efficiency, and Enbridge's experts ignored the efficiency impacts it will have on the crude oil producing sector. The requirement to commit to specific receipt points in long-term contracts would result in inefficient economic distortions as to where to invest in production.

Suncor submitted that, despite Enbridge's assertions that firm service will result in a more efficient allocation of Canadian Mainline capacity, the allocation methodology presented in the Application is the same pro rata methodology currently used to award capacity on the Canadian Mainline on a month-to-month basis. However, in the context of Mainline Contracting, pro rata allocations awarded in the open season will apply for a minimum of eight years, rather than one month as is currently the case, meaning that shippers will be locked into pro-rated capacity for the long term. EPAC argued that in this case, a large number of shippers who do not have the capacity they require, combined with no secondary market, would result in inefficiency, the exact opposite of what Enbridge and its experts claim.

3.5.1.1 Commission analysis and findings

The Commission considers economic efficiency gains to include optimization of system use[77] and improvements to the functioning of a market. The market in this case is for pipeline capacity on the Canadian Mainline. The Commission encourages pipeline companies to pursue economic efficiency as an objective in their service offerings.

The Commission finds that there is a reasonable likelihood of a variety of efficiency gains under the Mainline Contracting proposal. However, the magnitude or materiality of such gains is uncertain and must be measured against other contextual considerations.

Secondary market

Intervenors provided varying descriptions of what a secondary market is as well as assessments of whether a secondary market[78] currently exists or would exist under Mainline Contracting. The Commission agrees with Enbridge that some form of secondary capacity market involving transactions for committed capacity could develop under Mainline Contracting, as it is reasonable to expect that firm capacity holders would find an avenue to sell their firm capacity to other shippers in times where the firm capacity did not suit their needs (for example, when alternative, less expensive supplies are available or during refinery turnarounds). Such a secondary market might provide incremental efficiency benefits which correspond to how much capacity gets re-allocated from a party that values it less to a party that values it more. However, due to the theoretical nature of the discussion of the secondary market, some practical concerns about the likely competitiveness of the secondary market, and the absence of direct oversight by the Commission, there are limitations on findings the Commission can make that would support Mainline Contracting.

The Commission notes that characteristics and benefits of such a secondary market are highly uncertain. While the Commission acknowledges that the secondary market need not be perfectly competitive to provide incremental improvements in efficiency, the Commission agrees with Enbridge that: "the key to a *well-functioning* secondary market is that it is competitive [emphasis added]."[79] The Commission is of the view that Enbridge has not demonstrated that the secondary market would meet the first and third of the three assumptions it provided regarding a competitive market, which are:

1. well-informed buyers;
2. homogeneous output or product; and
3. relatively small and numerous suppliers and buyers.

First, there is a lack of transparency in the secondary market with regards to price and availability of capacity, which does not indicate that buyers would be well-informed.
The transactions are described by Enbridge as happening between two parties on a bilateral basis, without any price transparency to outside parties. Further, it is unclear how, in a given

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[77] CER, Reasons for Decision - NOVA Gas Transmission Ltd Application for Approval of Amendments to the NGTL Gas Transportation, Tariff - Temporary Service Protocol, Filing ID C02965-1 (13 November 2019) at 6.

[78] For the purposes of this decision, the Commission is referring to the secondary market as including any short- or long-term transaction of committed capacity; the Commission is not referring to inline trades and swaps which currently occur on the Canadian Mainline.

[79] Enbridge, *Response to Valero Information Request 2.22*, Filing ID C08995-2 (19 December 2019) at 47 (g)-(l).

month, a party looking to purchase capacity off of the secondary market would know how much capacity is available, if any, or the number and identities of parties selling capacity.

Second, the number of parties participating in such a secondary capacity market may be limited. Participation as a seller would be limited to parties that obtained capacity through the open season (or through subsequent transactions on the secondary market). The record indicates that buyers in the secondary market are also expected to be limited to the same shippers that have traditionally shipped on the Canadian Mainline. This is particularly the case in the shorter and medium service hauls, where there are generally only a small number of shippers of record at present. Hence committed capacity would likely similarly be in the hands of a small number of parties.

Primary market

The Commission agrees with Enbridge that the existing system of pro-rata allocation does not allocate capacity to those who value it the most when capacity is scarce. The Commission further accepts that allocating capacity through a primary market where shippers could bid for the capacity and term that best suits their needs and risk profiles would lead to a more efficient outcome. However, the Commission also finds that Enbridge has not demonstrated that this efficiency improvement is likely to be material. In particular, Enbridge expects that the shippers who use the Canadian Mainline will likely remain the same after contracting. To the extent that the allocation of capacity remains similar to the existing allocation, any gains in efficiency are likely to be minimal.

Further, as noted earlier, the present situation of scarce capacity out of the WCSB indicates some likelihood of over-subscription in the open season. The efficiency of the primary market allocation would be limited by the extent to which the open season is over-subscribed and committed capacity is allocated on a pro-rata basis.

Regarding more closely aligning services with shipper preferences, the Commission accepts Enbridge's submission that the level of flexibility and customization of services in the Application may result in a more efficient matching of services to shipper needs. Enbridge demonstrated that the service offering largely meets the needs of many of its current shippers of record. Those same shippers were expected to be its shippers under Mainline Contracting. Depending on subscription levels, however, capacity could be allocated on a pro-rata basis and parties may not receive the level of service they need. Further, parties interested in Flex Service or ramp-up volumes have some risk of not obtaining the nature of service they desire at all. While actual subscription levels cannot be determined at this time, there is a significant risk of over-subscription which calls into question whether significant alignment between shipper needs and pipeline capacity and services can be achieved.

The Commission accepts that economic efficiency can be enhanced by allowing shippers to choose and pay for the level of risk they are prepared to accept and acknowledges that Mainline Contracting may have accomplished this. However, it is unclear that any such efficiency gain is material in this instance, given Enbridge's demonstrated level of risk, as described in Section 3.4.1 (Enbridge's risk exposure).

Regarding increasing the efficiency of investments in the Canadian Mainline and in upstream and downstream facilities, the Commission accepts that, theoretically, investments in upstream and downstream facilities would likely be better supported with firm service than 100 per cent uncommitted service. Generally, firm service is an effective tool to backstop future investments. However, in this Application, intervenors possessing only upstream facilities did not confirm that

firm service would lead to increased investment in their production facilities. In fact, some suggested that the terms of firm service for parties with upstream facilities, such as the requirement to commit to a specific receipt point, may result in inefficient economic distortions as to where to invest in production, particularly given the specific circumstances of the Canadian Mainline and its dominant role in the scarce ex-WCSB capacity market. On the downstream side, the Commission accepts that a firm contract for oil supply transportation could potentially support investment in downstream facilities if the investments were otherwise economic. Overall, the Commission finds net benefits related to investment are not well supported by evidence.

3.5.2 Commodity prices

Parties presented their views on the potential impacts that Mainline Contracting may have on commodity prices, and crude oil prices in particular. Several opposing parties were of the view that crude oil prices would likely face downward pressure and that Enbridge may not be able to foresee such impacts, similar to the experience of Enbridge's 2018 Supply Verification Procedure[80] (**SVP**). This section discusses those views, including the uncertainties and complexities around crude oil prices in western Canada.

Views of Enbridge

Enbridge argued that Mainline Contracting would maintain or increase the price of crude oil in western Canada. While there is no guarantee of an outcome in which prices would increase as a result of fully subscribed contracted volumes, there is no price-setting mechanism by which prices would be lower. Enbridge's expert, Earnest, made the following conclusions:

- When there is sufficient export pipeline capacity and committed pipeline capacity is acting to establish the price of western Canadian crude oil, which will only be the case if firm service is implemented on the Canadian Mainline, the price of western Canadian crude oil will increase.
- When there is sufficient export pipeline capacity and uncommitted pipeline capacity is acting to establish the price of western Canadian crude oil, implementation of firm service on the Canadian Mainline will not decrease the price of western Canadian crude oil.
- When there is insufficient export pipeline capacity and rail is acting to establish the price of western Canadian crude oil, implementation of firm service on the Canadian Mainline will not decrease the price of western Canadian crude oil.
- Mainline Contracting will not change the price-setting mechanism and, accordingly, Mainline Contracting will not lower western Canadian crude oil prices.

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[80] On 24 May 2018, Enbridge issued a notice to its shippers regarding a new SVP to be effective 1 June 2018. The SVP was to introduce, for each shipper, a limit on the amount of petroleum nominations that could be verified and thereby accepted by the Enbridge Mainline each month. The limit was based on a shipper's prior 12 months' actual receipts into the Enbridge Mainline plus an allowance for supply variability. According to Enbridge, it made these changes "to ensure the integrity of its nomination process and to ensure that once it allocates pipeline space to a shipper, that capacity is utilized", as excessive nominations have led to underutilization of the Mainline. On 4 June 2018, three days after its implementation, Enbridge cancelled the SVP in response to feedback from shippers and others that the introduction of the SVP had resulted in unforeseen price impacts and financial harms.

Earnest submitted that the price of western Canadian crude oil at Edmonton equals its value at the market-clearing point less the cost of transportation. In general, the current market-clearing point for western Canadian heavy crude oil is the US Gulf Coast, and the incremental transportation mode by which western Canadian crude oil is shipped to the Gulf Coast is currently relatively high-cost rail.

Earnest asserted that the opposing parties' claim of relative bargaining power has no empirical basis and is not a useful concept for quantifiably analyzing the pricing dynamics of the Canadian crude oil markets. The seemingly poor relative bargaining power of producers versus buyers, as demonstrated by the purportedly unfair low price, has no unfair element; it is a reflection of the market fundamentals. Further, opposing parties did not demonstrate how relative bargaining power shifts on a month-to-month basis and acts to influence prices.

Dr. Church submitted that the options available to producers under Mainline Contracting will be the same as under 100 per cent uncommitted service. Competitive supply and competitive demand interact to determine the price of crude oil at the inlet, and there is no evidence of market power attributable to Mainline Contracting. Therefore, expectations under Mainline Contracting are that the competitive equilibrium for crude oil would be exactly the same at the inlet.

Enbridge submitted that the existence of a difference in the price between pre- and post-nomination markets is consistent with a competitive market and reflects the relationship between the extent of the supply imbalance to be resolved in the post-nomination market and the capacity of the price-setting alternatives for resolving that supply imbalance.[81] Therefore, the difference between pre-nomination and post-nomination crude oil prices do not demonstrate that buyers with downstream assets have bargaining power over producers. Otherwise, one would expect that the price of crude oil in the post-nomination market would always be lower than the price in the pre-nomination market, which is not the case.

In response to opposing parties' views regarding the 2018 SVP, Enbridge submitted:

- The introduction of the SVP did not result in significant market price impacts; rather, it was only one of many market factors at that time.[82]
- The SVP was a sudden change that was implemented with minimal notice in an already stressed market. By the time Mainline Contracting is implemented, the market will have been aware of the coming change for more than three years and market participants would have ample time to adjust their buying and selling strategies.
- Enbridge retracted the SVP before the market could adjust to the change in rules. Had the procedure remained in place, market participants would have adapted, and the market would have returned to its state prior to the introduction of the SVP.

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[81] The pre-nomination period, commonly known as the pre-notice of shipment, refers to the trading period in the first part of each month prior to the deadline for submitting nominations to Enbridge for the following month's deliveries. This is often referred to as the trading cycle. After nominations are submitted, apportionment is calculated, and shippers are notified. The trading period that follows is referred to as the post-nomination market, or post-notice of shipment period.

[82] Enbridge asserted that such factors included: the significant growth in WCSB supply that began in late 2017, a Keystone Pipeline leak and a subsequent prolonged de-rating of its capacity that was not lifted until May 2018, and a CP rail strike in late May 2018.

- Under Mainline Contracting, parties that are currently not shippers on the Canadian Mainline would have the option to secure capacity, which was not the case with the SVP. In addition, unlike the SVP, Mainline Contracting would not constrain current shippers' Canadian Mainline nominations since Enbridge does not propose to change any of the current verification procedures.

Enbridge argued that there is no potential for Mainline Contracting to lower western Canadian crude oil prices because Mainline Contracting would not change:

- the physical supply of WCSB crude oil;
- the demand for WCSB crude oil at all the refineries directly or indirectly connected to the Enbridge Mainline;
- the number and composition of the buyers and sellers;
- the capacity and capabilities of the various pipeline, rail, and storage facilities in the WCSB; or
- the price-setting mechanism for WCSB crude oil.

Views of other parties

Supporting parties

Most supporting parties indicated that they had not undertaken analysis of the potential impacts of Mainline Contracting on western Canadian crude oil prices and that any potential impact on prices was not a material consideration in their decision to support contracting. Some noted generally that the rationale for falling prices advanced by opposing parties is fundamentally flawed and does not follow the basic economic principles of supply and demand, given that both of these variables will be unchanged as a result of Mainline Contracting.

Supporting parties also agreed that no party could predict these impacts with certainty for various reasons. Parties suggested that a multitude of factors can impact price, including but not limited to: (a) supply, demand, and inventory levels; (b) transportation availability and alternatives; (c) seasonality, production and refinery maintenance, turnarounds and upsets; and (d) government and political factors and actions. If Mainline Contracting were to cause prices to fluctuate, over a short period of time prices would normalize to historical levels.

Several parties argued that Mainline Contracting would not result in price impacts analogous to the SVP. They asserted that the SVP was implemented on relatively short notice without adequate industry consultation and that its reversal during the trading cycle introduced uncertainty into the market. They also submitted that the SVP limited the aggregate volume that could be nominated to the Canadian Mainline. In contrast, Mainline Contracting would permit all participants an opportunity to participate and would provide ample time for parties to plan ahead.

Opposing parties

Several opposing parties submitted that no one, including Enbridge and other market experts, can predict for certain what the price impacts would be of such a fundamental change. However, opposing intervenors generally asserted that Mainline Contracting would almost certainly result in market distortions that would negatively impact netbacks to producers and result in a transfer of the available economic rents from the sale of crude oil to certain shippers, primarily PADD II refiners. This transfer of rents would result in lower royalties and tax revenues for Canadian governments. Price impacts could not be reversed and would effectively be locked in for 8 to 20 years.

Opposing parties agreed with Enbridge that prices in western Canada are, in general, set by the prices in the destination market minus the marginal transportation differential. However, they asserted that the price-setting mechanism under pipeline-constrained egress is not always set by rail. Access to rail is not unlimited. Further, not all parties have equal access to the same transportation and storage options, which can influence their willingness to buy and sell at a certain price. The western Canadian crude oil market and the price-setting mechanisms are very complex when takeaway capacity is short. Prices are influenced by numerous factors, including supply, demand, pipeline rules, pipeline over-nominations, relative bargaining power of buyers and sellers, ability to access rail and storage assets, as well as the marginal transportation cost to the clearing market.

According to several opposing parties, under 100 per cent uncommitted service, refiners and downstream shippers must verify crude oil purchased and nominated to their respective facilities on a monthly basis. This verification requirement forces participants to acquire crude oil during the trading cycle, ensuring demand for supply and transport on Enbridge is reflected in the price. In times of constrained Canadian Mainline capacity, downstream buyers must compete with each other to acquire crude oil supply and Canadian Mainline capacity. This results in a new allocation of Canadian Mainline capacity monthly and helps mitigate refiners' buying power. The current balance of negotiating positions that exists as a result of uncommitted service would be completely upset under Mainline Contracting, where shippers with guaranteed access to the pipeline on a monthly basis would have reduced buying pressure during the trading cycle, therefore reducing demand at the origin market.

Several opposing parties asserted that Mainline Contracting would have a similar effect on crude oil prices as the implementation of Enbridge's 2018 SVP. They argued that the SVP effectively granted downstream refiners "firm capacity", as they were historically the shippers of record on the Canadian Mainline and the SVP verified shippers' nominations based on past usage. This significantly reduced downstream refiners' buying pressure during the trading cycle. According to opposing parties, this resulted in an immediate fall in the price of crude oil and a subsequent recovery immediately after Enbridge revoked the SVP.

According to opposing parties, the SVP was implemented without adequate consultation and resulted in unintended and unforeseen consequences. If approved, Enbridge could not readily reverse Mainline Contracting as it did with the 2018 SVP. Rather, the impacts would be locked in for a minimum period of 8 years.

Some opposing parties were of the view that downstream buyers' market or bargaining power is evidenced in the crude oil price discount between the post-nomination and pre-nomination

trading periods.[83] The barrels that were returned to upstream producers as a result of their cancelled supply contracts due to apportionment would otherwise be stranded if producers were unable to find a buyer, necessitating sales at discounted prices in the post-apportionment market. In addition, the parties argued that with significant apportionment expected on uncommitted capacity and the inability to differentiate whether a buyer has committed or uncommitted capacity, the post-nomination period price discount may still apply to a wide breadth of barrels under Mainline Contracting. Further, it is uncertain what would happen with the supply turnback provisions that exist in commercial contracts today.

Some opposing parties submitted that if producers were to instead contract for Canadian Mainline capacity rather than sell at the inlet to the pipeline, they may still face an imbalance in bargaining power. Under Mainline Contracting, producers that obtain committed capacity would need to find a buyer with downstream verification capability. A refiner could take advantage and offer a much lower price, knowing that the producer would face a fee equivalent to 90 per cent of the firm service toll if they could not arrange a downstream buyer in time.

Some opposing parties asserted that the new pricing and marketing challenges that would be created for small producers under Mainline Contracting would act as a large deterrent for ongoing investment by existing producers and a deterrent to entry by potential new companies. Paying premiums for Canadian Mainline access or accepting lower prices for their oil production would reduce netback prices and lead to the shut-in of some production, push out existing small producers and deter others from entering or expanding their position. Parties noted that the ‘junior’ oil industry has been a dynamic element in the WCSB, with many innovative approaches often being introduced by new start-ups. This group of industry participants play an important role in the efficient development of provincial natural resources, as they typically explore and develop resources that larger producers may not, thereby maximizing the overall value of the resource and generating jobs, new investment, and economic benefits for Canadians.

The Government of Saskatchewan said that it is not aware of any reasonable comprehensive mitigation measures that could offset the potential risk of the market price impacts if the Application is approved.

3.5.2.1 Commission analysis and findings

The Commission does not regulate commodity prices and does not exercise its decision-making powers in order to increase, decrease, or maintain commodity prices at any level or to the benefit of any market participant. Rather, the Commission considers whether pipeline companies’ potential actions or lack of action could result in commodity price distortions or unreasonable volatility, such that prices can no longer be relied upon to provide reliable signals to market participants or to facilitate efficient transactions in commodity markets. The Commission finds that there is a modest risk that Mainline Contracting could introduce volatility or distort prices from the levels that market participants might otherwise expect and that any harms would primarily accrue to one group of market participants.

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[83] The CSG and EPAC submitted that in recent years, the prices in the period after Canadian Mainline apportionment is announced each month have been lower than the prices in the period before shippers have to submit their nominations to the pipeline. While there is some price variation, from 2018 to 2020 there were 25 months where prices were discounted, with an average discount amount of $3.77, and only five months where prices were higher than in the pre-nomination period, with an average premium of only $0.88. Moreover, these numbers do not account for bilateral trades in the post-nomination market, where prices are typically further distressed.

In noting this risk of volatility, the Commission agrees with parties that it is not possible to predict the impacts of Mainline Contracting on western Canadian crude oil prices with certainty. This is largely due to the diverse factors that can affect prices and the complexity of the market dynamics that interact within a system as large as the WCSB logistics network. Neither Enbridge nor any other party provided a price forecast or probabilities or any pricing outcomes as a result of Mainline Contracting.

While the evidence does not clearly demonstrate that price distortions or unreasonable volatility are a probable impact of Mainline Contracting, the following key factors indicate that volatility and general interference with the efficient operation of commodity markets are possible:

- The impacts of Mainline Contracting on the relative negotiating positions of sellers of crude oil are unclear. Even if the usership of the pipeline is not expected to change dramatically under contracting, different sellers may be affected differently based on the timing, method, or type of transaction in which they engage.
- The SVP illustrates that changing even selected elements of Canadian Mainline practices or services can create material and unforeseeable price volatility. This is particularly the case when ex-WCSB oil pipeline capacity is constrained. Given Enbridge's prior submissions to the NEB[84] and the fact that prices immediately increased following the revocation of the SVP, the Commission finds it reasonable to conclude that the SVP had an effect on crude oil prices, even if the longevity of the potential impacts remains speculative, given its prompt revocation.

Based on the evidence before it, the Commission cannot discount the possibility of unforeseen impacts arising from Mainline Contracting. The Commission notes that Enbridge is not required to prove that crude oil price impacts will not result from the Application, but Enbridge must nonetheless consider potential market consequences. For example, the risk of price distortion or volatility could be acceptable if sufficient need for and benefits from Mainline Contracting had persuasively been demonstrated by Enbridge or supporting parties, as discussed in Sections 3.4 (Need) and 3.5.1 (Economic efficiency).

In this case, concerns about potential price impacts have been raised by parties representing a majority of western Canadian crude oil production and there is at least some risk of high-magnitude price impacts that would harm these producers. The evidence indicates that potential upward price impacts would be expected to be limited. No party presented evidence to support the possibility of a large increase in crude oil prices. Notably parties who would most likely be negatively impacted by higher crude oil prices (such as refiners) did not raise concerns. The Commission also notes that a portion of the demand for western Canadian crude oil is in markets where crude oil buyers are capable of substituting to supply alternatives if Canadian crude oil prices increase dramatically, potentially limiting upward price pressure.

[84] See, for example, Enbridge's letter to the NEB dated 11 June 2018 (Filing ID A92409-1) which confirmed that Enbridge would not apply the SVP. In this letter, Enbridge indicated that it had conducted industry meetings regarding the SVP, but "no one had a full understanding of potential pricing impacts, and there was no suggestion of the magnitude of the price changes to come". Enbridge explained that as early trading began for July nominations, "shippers began to provide feedback that behaviours by a number of market participants – such as diverting historical supply to other markets, dramatically increasing/decreasing prices offered for the purchase/sale of crude oil, and rumoured contract cancellations – were causing significant unforeseen and unforeseeable financial harm for many of Enbridge's customers".

Downward price distortions, on the other hand, could be more substantial, particularly in the current circumstances of constrained ex-WCSB pipeline capacity. As noted above, parties representing the majority of western Canadian crude oil production oppose the Application, in part, on the basis of its potential negative price impacts. The SVP, while not fully predictive of how Mainline Contracting may specifically impact parties, nonetheless illustrates the potential downside impacts that can occur from changing transportation service on a pipeline as large and important as the Canadian Mainline. Further, in contrast to buyers of western Canadian crude oil, western Canadian supply currently has few market or transportation alternatives which would serve to limit downward pressure on prices.

The Commission also notes that the harms from potential downward price distortions or volatility under Mainline Contracting would likely be experienced primarily by one group of market participants, namely pure producers, in the form of reduced netbacks. The Commission accepts that long-term price distortions or volatility could jeopardize the ongoing viability of some of these companies. Pure producers, unlike many integrated producers, do not have refining operations that could experience counterbalancing benefits from price distortions and they may not have the financial resources to weather long-term distortions or volatility. The Commission notes that even short-term impacts could cause meaningful financial harm to producers and the governments that rely on them for royalties and tax revenues.

Finally, the Commission is of the view that there would be little recourse if the transition to primarily committed service, with contract terms up to 20 years long, resulted in harmful price distortions or unreasonable volatility. In response to a Commission information request for potential solutions to mitigate negative impacts that could materialize under Mainline Contracting, Enbridge identified two potential mitigations. First, Enbridge indicated that the Commission could revisit the Canadian Mainline's tolls and tariffs. Second, Enbridge noted that approval of the Application could lead to subsequent open seasons on the pipeline. While these measures could theoretically address the "generational"[85] impacts of potential market distortions warned of by some opposing intervenors, Enbridge did not satisfactorily explain how a future regulatory process would in fact come about and effect changes to Mainline Contracting once approved. Enbridge also failed to detail how future open seasons would effectively mitigate price distortions from Mainline Contracting once implemented. Neither option is likely to provide mitigation in a timely manner.

3.5.3 Geographic redistribution of Canadian Mainline receipts

Parties raised a concern that Mainline Contracting may impact receipts at various injection points along the Canadian Mainline differently, to the disadvantage of Saskatchewan receipt points in particular.

Views of Enbridge

Enbridge submitted that ultimately, the market decides which barrels get sourced and from where, and the role of the carrier is to let the market work. Mainline Contracting would facilitate the right selection of oil between that which gets shipped on the pipeline and that which gets

[85] CER, *Enbridge Canadian Mainline Contracting (RH-001-2020)* Transcript, Volume 17, Filing ID C13605-1 (17 June 2021) at para 17717; and Valero and Phillips 66 Canada Ltd, *Final Written Argument*, Filing ID C13950-2 (7 July 2021) at paras 20-21.

temporarily shut in. Earnest suggested that if purchases for Saskatchewan crude oil were to drop relative to Alberta crude oil, the price for Saskatchewan oil would fall. As a result, refiners would buy barrels in Saskatchewan before barrels in Alberta. In this way, the system would rebalance automatically.

Enbridge did not see any economic rationale for the contract offering to change the market dynamics of the relative volumes received onto the Canadian Mainline at various receipt points or terminals. Mainline Contracting would not impact the distribution of receipts on the Canadian Mainline because receipts are dictated by demand, pricing, other available transportation options, the location of the system bottleneck point, and the location and extent of supply.

Enbridge did not complete a specific study on the impact of Mainline Contracting on the usage of different Enbridge Mainline segments and/or receipt points. Enbridge asserted that while a study may be possible, such a study would be highly speculative, and Enbridge did not believe it would be useful given that Mainline Contracting is not expected to impact any factors that affect the usage of different Enbridge Mainline segments and/or receipts points.

Saskatchewan producers, with only a couple of exceptions, sell their production upstream of the Canadian Mainline, primarily to the integrated companies and refiners that then ship it on the Canadian Mainline. Mainline Contracting would not result in Canadian Mainline capacity being taken away from producers and given to companies with refining interests. If Mainline Contracting is approved, it is possible that primarily parties with refining interests and parties that have downstream pipeline capacity will contract for service on the Canadian Mainline. However, this would not be a “redistribution of the pie;”[86] it would be entirely consistent with the current and past usage of the Canadian Mainline under the 100 per cent uncommitted service structure.

Views of other parties

Opposing parties

Inter Pipeline observed that one of the fundamental premises of the Application is that Mainline Contracting would give priority access to “higher value” barrels and effectively push out “lower value” barrels, resulting in a shift in supply from locations producing “lower value” barrels to locations producing “higher value” barrels.[87] In Inter Pipeline’s view, the “highest value” barrels from the perspective of a Canadian Mainline shipper with its own production in the WCSB will almost always be the barrels that it produces itself. For Canadian Mainline shippers without their own production, “highest value” barrels will be the barrels that meet their downstream quality requirements at the lowest overall cost and risk. Such a supply re-distribution could affect overall production levels in certain areas, as well as the associated jobs, taxes, royalties and community investment in those areas.

Inter Pipeline asserted that Enbridge has not conducted any assessment that would allow the Commission to weigh these impacts against the benefits of the Application. Enbridge could have performed a supply assessment based on a range of assumptions by looking into where the

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[86] Government of Saskatchewan, *Written Evidence*, Filing ID C10235-2 (7 December 2020) at para 81.

[87] Inter Pipeline Ltd, *Final Written Argument*, Filing ID C13942-2 (7 July 2021) at paras 18-19.

existing Canadian Mainline shippers have their own proprietary supply in the WCSB and whether that supply is concentrated geographically.

According to the Government of Saskatchewan, Mainline Contracting is an attempt to 'redistribute the pie' that would primarily advantage Enbridge and companies with refining assets in the US and disadvantage the majority of western Canadian producers that rely on access to the Canadian Mainline and have built their business operations upon the basis of open, equal and consistent access to the Canadian Mainline.

3.5.3.1 Commission analysis and findings

Based on the limited evidence available, the risk of geographic redistribution is unclear. While the Commission recognizes that there is some potential that Saskatchewan producers could be adversely affected through fewer sales or lower prices, the Commission cannot make any firm conclusions regarding geographic redistribution of Canadian Mainline receipts. A finding on this issue was not, in any event, necessary for the Commission to reach its final conclusion as to compliance with the common carriage obligation.

3.6 Summary of Commission analysis and findings on the common carriage obligation

The Commission finds that firm service under Mainline Contracting, as currently structured, does not meet Enbridge's common carriage obligations. Having considered the relevant factors for the common carriage framework described in Section 3.1 (Defining the common carriage obligation and establishing a framework for assessment), the Commission has made the following findings:

Access to committed service through the open season

- The open season for the applied-for firm service offering would have been sufficiently transparent and would not have explicitly excluded any party.
- However, there would have been barriers to meaningfully accessing committed service for some shippers, notably the proposed minimum term length and the financial assurances.

Access to capacity after implementation of firm service

- The proposed reservation of 10 per cent of capacity for uncommitted volumes is not likely to provide a meaningful option to access pipeline capacity, considering the overall service design.
- Reallocating capacity from 100 per cent uncommitted to 10 per cent uncommitted would likely lead to higher levels of apportionment and less certainty for uncommitted volumes for material periods of time. The potential levels of apportionment on uncommitted volumes represent an excessive reduction of service quality and access to capacity for uncommitted shippers.
- The prospect of expansion would not adequately or reliably address concerns regarding access to uncommitted capacity, nor does potential access gained in the secondary market alleviate these concerns.

The assessment of what constitutes sufficient access to capacity after implementation of firm service is informed by a wide range of factors specific to the circumstances of each application. Overall, Enbridge did not establish a basis for the resulting uneven distribution of access to the Canadian Mainline, unlike other cases where needs or benefits clearly justified some diminishment in overall access to an oil pipeline seeking to implement firm service.

Potential benefits of Mainline Contracting

- For many of the Canadian Mainline's largest shippers, Mainline Contracting would mitigate apportionment-related issues and create long-term toll certainty.
- The long-term contracts would result in some reduced volume risk for Enbridge.
- The level of subscription could provide market signals to inform potential expansions of the Enbridge Mainline – although the evidence does not support that Mainline Contracting is a genuine prerequisite to expansion.
- Contracting could lead to improvements in economic efficiency – but the magnitude or materiality of any gain is uncertain.

Potential negative impacts of Mainline Contracting

- Although there is significant uncertainty regarding the potential impacts on crude oil prices, there is a modest risk that Mainline Contracting could introduce volatility or distort prices from the levels that market participants might otherwise expect, with no reliable means to mitigate distortions. Any harms would primarily accrue to one group of market participants.
- Parties other than the supporting shippers face a reduction in their flexibility and optionality if they sign up for Mainline Contracting, and many industry participants have no choice but to enter into commitments regardless of the burdens associated with Mainline Contracting.

The Commission finds that the benefits of Mainline Contracting would accrue primarily to Enbridge and a distinct subset of current shippers of record on the Enbridge Mainline, while the adverse effects would be concentrated among a different subset of shippers and stakeholders, primarily those without significant refining interests. Some of the potential benefits are also either speculative or are not necessarily material.

Considering all available forecasts, the Commission sees a considerable likelihood of constrained egress, such that apportionment issues will persist for some time and likely worsen for uncommitted shippers under Mainline Contracting. While there may be some spare capacity once TMEP comes online, the duration and magnitude of the surplus is uncertain. The Commission is particularly concerned about the degree to which Mainline Contracting could reduce access to the pipeline system and therefore to ex-WCSB oil transportation capacity in general, considering the relative size and importance of the Canadian Mainline and the current context of the transportation market.

Given the level of opposition from diverse stakeholders and the wide-ranging impacts of the Canadian Mainline operations and toll and tariff practices, the Commission finds that the support from a majority of shippers of record does not constitute a significant determining factor in the assessment of the Application.

Considering all of the above, the Commission finds Mainline Contracting does not lead to access that complies with the common carriage obligation, given:

- the diminished ability for shippers to access capacity through only 10 per cent reserved for uncommitted service;
- the barriers to contracting for committed service for some shippers and prospective shippers; and
- the balancing of the need for firm service highlighted by Enbridge and supporting shippers, the benefits that would flow primarily to Enbridge and a subset of shippers, the burdens likely to be borne by other shippers, and the broader impacts to stakeholders.

As a result, taking into consideration all of the factors relevant to the common carriage obligation, the Commission finds that Mainline Contracting does not meet the requirements of subsection 239(1) of the CER Act.

Alternative proposals

With the exception of Suncor, parties did not provide evidence on other potentially appropriate uncommitted reservation amounts or approaches to implementation of firm service, despite several rounds of information requests from the Commission. The responses provided little in the way of what parties viewed as acceptable alternatives to Enbridge's proposals. As a result, the record on firm service alternatives to Mainline Contracting is not robust.

The Commission declines to make a finding on a specific level of uncommitted capacity that would be appropriate to reserve or other changes that may have resulted in compliance with the common carriage obligation and notes:

- there is limited evidence before the Commission regarding the appropriateness of alternative percentages of uncommitted capacity;
- Enbridge and other parties described the uncommitted reservation amount as a fundamental component of the Application. Adjustments to the uncommitted reservation by the Commission would upset other gives and takes in the terms and conditions of service and the tolls; and
- the Enbridge Mainline is a complex system, as reflected in the extensive and detailed negotiations preceding this Application, and it would be inadvisable for the Commission to order an alternative outcome without providing an opportunity for the parties to revisit next steps.

While the Commission recognizes that only some of a pipeline's shippers may be interested in contracting for firm service, the Commission reiterates that the suite of services offered should reflect a balancing of the needs of all stakeholders and that there are no acquired rights to 100 per cent uncommitted service. When better balancing the interests of all parties in a future application, Enbridge should give significant consideration to how access to pipeline capacity, for each of its services, will be maximized and should seek to reasonably minimize and avoid concentration of negative impacts.

3.7 Unjust discrimination

Although the common carriage and unjust discrimination assessments involve separate statutory obligations, many considerations related to the common carriage obligation in subsection 239(1) of the CER Act overlap with considerations relevant to unjust discrimination and sections 235 and 236 of the CER Act:

> 235. A company must not make any unjust discrimination in tolls, service or facilities against any person or locality.
>
> 236. If it is shown that a company makes any discrimination in tolls, service or facilities against any person or locality, the burden of proving that the discrimination is not unjust lies on the company.

As described in the following section, the Commission considered any discrimination that would have resulted from the Application's firm service proposal in the aggregate. The Commission discusses specific toll attributes and terms and conditions in Chapters 4 (Tolling methodology) and 5 (Terms and conditions of service).

Views of Enbridge

Enbridge expressed the following views:

- Each of the proposed services is a distinct service offering whereby the volumes transported under each service would not be traffic of the same description as volumes transported under another service. Enbridge has designed the services and tolls in conjunction with its shippers and in consideration of the prohibition on unjust discrimination set forth in the CER Act.
- The Commission has concluded in numerous previous cases that establishing differences in tolls or terms of service for services that are sufficiently different from one another is not unjustly discriminatory.
- Consistent with NEB precedent, a differentiation between service offerings can be as a result of distance travelled, crude oil type, different contract term lengths, access to the pipeline on a priority or non-priority basis, type of contract and the flexibility allowed in the contracts as well as other terms. Because these service offerings are distinctly different, shippers electing one service versus another will not be similarly situated. On the basis of their different attributes, these service offerings warrant differentiated tolls throughout the term of Mainline Contracting, which is not unjust discrimination.
- None of the benefits associated with Mainline Contracting are being offered as justification for discrimination, but rather as support that Mainline Contracting would be in the public interest based on a consideration of the balance of the benefits and burdens.
- Shippers that agree to contract for committed service take on many risks. The receipt of committed service in exchange for an agreement to bear these risks is not in any manner unjustly discriminatory; it is simply the result of the terms of an agreed-upon transaction. The same opportunity exists for all market participants.

Views of other parties

Opposing parties

Multiple parties indicated that the Application has the effect of treating current and prospective shippers on the Canadian Mainline differently on the basis of the size of the company and their asset holdings. It favours large companies with bigger balance sheets over small producers and shippers, even where these companies use the same receipt and delivery points, and ship oil produced from the same geographic areas.

The Government of Saskatchewan stated that even where shippers or producers do not share all circumstances in common, should a company treat them differently, there must be some fair and equitable basis for doing so. Distinction in treatment among shippers and producers must align with accepted principles of cost-based and user-pay, economic efficiency, and no acquired rights, and with considerations of fairness and equity.

3.7.1 Commission analysis and findings

The Commission notes that many of its concerns related to unjust discrimination, discussed below, are similar to the concerns with the Application's failure to meet the common carriage obligation.

Priority service is inherently discriminatory, conferring a lower priority to uncommitted service as compared to committed service. In addition, the Commission has found other aspects of the Application to be discriminatory against certain shippers:

- The proposed reservation of 10 per cent of capacity for uncommitted volumes is not likely to provide a meaningful option to access pipeline capacity, as discussed in Section 3.3 (Access to capacity after implementation of firm service).
- The eight-year minimum term and financial assurances requirements for committed service, while applied equally, would disproportionately impact the ability of some parties to contract for committed service, as discussed in Chapter 5 (Terms and conditions of service).
- Taking into account the various tolling and service attributes, the overall toll design heavily favours committed shippers, as discussed in Section 4.5 (Toll design).
- The full application of toll discounts is likely to only be available to a small number of larger shippers, as discussed in Section 4.5 (Toll design).

The NEB has previously concluded in numerous cases that establishing different tolls or terms and conditions for services that are sufficiently different from one another is not unjustly discriminatory. However, the prohibition against unjust discrimination requires the Commission to assess whether the differences between the services are sufficient to justify the discrimination that is likely to be experienced by some parties.

Enbridge offered three broad justifications for why the discrimination arising from Mainline Contracting was not unjust:

- an overall "package deal" approach was negotiated with interested parties and that Mainline Contracting would be in the public interest;

- where services are substantively different, discrimination is not unjust; and
- a fair and transparent open season means there is no unjust discrimination.

The Commission finds that Enbridge did not provide sufficient justification, pursuant to section 236 of the CER Act, for certain discriminatory aspects of the Application. In particular:

- the package did not balance the interests of all stakeholders;
- the benefits of Mainline Contracting do not outweigh the potential negative impacts;
- Enbridge did not provide compelling evidence or argument that the differences between services were sufficient to justify the proportion of discrimination present between the services; and
- there are concerns with barriers to accessing the offering through the open season.

As a result, the Commission finds that the Application, inclusive of the package of tolls, terms, and conditions, would result in a concentration of benefits that is uneven and disproportionate.

4 Tolling methodology

Enbridge's proposed tolling methodology is subject to the CER Act, including sections 230 and 235. Section 230 of the CER Act states:

> All tolls must be just and reasonable, and must always, under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate.

Having denied Mainline Contracting for the reasons articulated in Chapter 3 (Common carriage), the Commission nonetheless considers analysis and findings related to the tolling methodology, as well as terms and conditions of service (addressed in Chapter 5), important to its overall decision.

The Commission notes that toll packages often reflect a complex suite of gives and takes that must be assessed not solely individually, but also collectively, to determine statutory compliance. As such, neither Chapter 4 (Tolling methodology) nor 5 (Terms and conditions of service) parse every element of the proposed tolling methodology, nor every term and condition, to provide comprehensive and definitive findings regarding sections 230 and 235. Rather, these two chapters provide the Commission's analysis on key areas of concern, which may inform future negotiations and regulatory steps by Enbridge regarding tolls and tariffs on the Canadian Mainline.

Enbridge's proposed tolling methodology included committed, uncommitted, receipt and delivery tankage, and receipt and delivery terminalling tolls. Ultimately, the Commission had significant concerns regarding the likelihood that the Mainline Contracting tolling methodology would reliably lead to just and reasonable tolls, when considering the following topics, each addressed in this chapter:

- the proposed method of establishing tolls;
- a comparison of the proposed tolls to cost of service tolls, and projections of ROEs under the proposed methodology;
- the international joint tariff methodology;
- specific attributes of the proposed toll design, including the base toll design and the toll premiums, discounts, surcharges, and adjustments; and
- the potential for abuse of market power.

In previous decisions,[88] the NEB and CER articulated tolling principles that assist in the interpretation and application of statutory provisions in respect of traffic, tolls and tariff matters. These fundamental tolling principles include cost-based/user-pay, economic efficiency, and no acquired rights:

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[88] A summary is found in the NEB, *Reasons for Decision – TransCanada PipeLines Limited Gros Cacouna Receipt Point*, RH-1-2007 (July 2007) at 21-23 (pdf 33-35) [RH-1-2007]; CER, *Letter Decision - NOVA Gas Transmission Ltd Transportation Temporary Service Protocol Extension*, Filing ID C12183-1 (30 March 2021) at 8.

- The cost-based/user-pay principle means that tolls should be, to the greatest extent possible, cost based and that users of a pipeline system should bear the financial responsibility for the costs caused by the transportation of their product through the pipeline without unjustified cross subsidization by other toll payers.[89]
- In the context of regulated tolls, economic efficiency generally means that tolls should promote proper price signals, in order to maximize the utilization of the pipeline system and thus lower costs.[90] However, the NEB has stated that there would have to be strong reasons for departing from the principle of cost-based/user-pay tolls in order to set tolls which would encourage economic efficiency.[91]
- The no acquired rights principle means that payment of tolls in the past confers no benefit on toll payers beyond the provision of service at that time.[92]

The NEB also identified objectives such as administrative simplicity, toll stability and toll predictability. The Commission agrees that while desirable, these objectives should not be accommodated at the expense of the overriding principles.[93]

4.1 Overview of Mainline Contracting tolls

Enbridge's proposed tolls for committed and uncommitted service are not cost-based, but rather are the product of negotiations. The committed base toll of US$5.70[94] was informed by the tolls charged pursuant to the negotiated CTS that was in effect from 2011-2021. Enbridge calculated corresponding committed base tolls on a system-wide distance basis for all other receipt and delivery point pairings on the Enbridge Mainline. Committed tolls were also adjusted based on commodity type. The committed tolls would be escalated annually by 65 per cent of the GDPP Index,[95] commencing on 1 July 2022.

Committed tolls include charges and discounts which are discussed further in Section 4.5 (Toll design). Taken together, the committed toll discounts could decrease the base toll to US$5.11/bbl, a US$0.59/bbl discount (-10.4 per cent). Enbridge's proposal included a Flex Service Term committed toll, which was set at a US$0.40/bbl premium to the base toll and a US$0.11/bbl premium to the uncommitted base toll. The Flex Service Term toll is subject to different surcharges and adjustments which are discussed further in Section 4.5 (Toll design).

Uncommitted tolls would be determined based on a premium of US$0.29 to the committed base toll, for an uncommitted base toll of US$5.99/bbl. They would be escalated annually by 65 per cent of the GDPP Index, as proposed for committed tolls. They would also be subject to

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89 Which the NEB had viewed as a single tolling principle, and had also referred to it as the cost-causation principle. [*Ibid* RH-1-2007 at 21 (pdf 33)]

90 *Ibid* RH-1-2007 at 22 (pdf 34)

91 NEB, *Reasons for Decision – Interprovincial Pipe Line Inc*, RH-2-91 (June 1992) at 61-62 (pdf 77-78).

92 NEB, *Reasons for Decision, Part 1 – TransCanada PipeLines Limited,* GH-5-89 (November 1990) at 21.

93 NEB, Reasons for Decision – Interprovincial Pipe Line Limited Application for New Tolls effective January 1987, RH-4-86 at 48 (pdf 68).

94 The committed base toll of US$5.70/bbl for a Hardisty to Chicago (Lockport, Mokena, Griffith and Flanagan) heavy crude oil movement is the basis for calculating tolls for other committed receipt-delivery point pairings, and for other products and services subject to surcharges, adjustments and discounts.

95 The GDPP Index is defined in TSA Section 1.1.

surcharges for changes in applicable law, abandonment and decommissioning, Line 5 and future Mainline expansions, as well as an adjustment of Canadian local transportation toll to the border and failure to tender charges.

Table 4.1 below summarizes the proposed base tolls for committed service, flex term committed service, and uncommitted service.

Table 4.1 – Base tolls for proposed services

Service-specific base toll	**Toll ($US/bbl)**
Flex Service Term committed base toll	6.10
Uncommitted base toll	5.99
Committed base toll	5.70
Minimum committed base toll, incorporating all discounts	*5.11*

Enbridge also proposed methodologies for receipt and delivery tankage tolls, and receipt and delivery terminalling tolls. The methodology that would be used to calculate the Canadian Mainline receipt and delivery tankage tolls following the expiration of the CTS would be virtually the same as currently used. A summary is found in Section 7 of Enbridge's Application.

4.2 Method of establishing tolls

Tolls can be determined or calculated in a variety of ways. Enbridge proposed to use negotiated tolls. Parties disagreed on whether the proposed methodology would be appropriate.

Views of Enbridge

The committed base toll of US$5.70/bbl was proposed as a starting point for negotiations because it was similar to the toll that would be in effect on 1 July 2021 if the CTS was extended.[96]

Enbridge submitted that the use of a negotiated result for a 20-year tolling methodology was necessary to provide long-term toll stability and predictability to shippers who expressed strong support for such an offering. Strictly cost-based tolls would have been difficult for a tolling methodology intended to provide toll certainty for up to 20 years, given uncertain costs and throughput over that period. Instead, the proposed tolls rely on extensive negotiations with interested parties, and are built on the series of negotiated service and tolling packages that have been in place on the Canadian Mainline for decades.

Enbridge argued that a negotiated tolling methodology need not be cost-based, and noted that its competitors, Keystone and Trans Mountain, have NEB-approved negotiated tolls for service up to 20 years, none of which were established on a cost of service basis. Nonetheless, the evidence in this proceeding demonstrates the proposed negotiated tolling methodology would result in cost-reflective tolls.

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[96] The CTS termination date is 30 June 2021 unless terminated earlier or extended pursuant to Section 5.2 of the CTS.

Where long-term tolling methodologies have been proposed, the NEB recognized that negotiated agreements that have received a high level of support from shippers are an effective means of ensuring that the tolls reflect market forces and can achieve a risk allocation that is integral to the proposed service.

Reed submitted that the primary reason for departing from cost-based tolls is that there is a negotiated result that better matches the commercial framework and risk allocation of Mainline Contracting than a test year cost of service methodology would. Reed stated that the tolls were the product of extensive, active, and effective negotiations with over 130 shippers. In Reed's view, the tolls are a contractual arrangement agreeable to both the shippers that select firm service and Enbridge.

Enbridge stated that its extensive negotiation process provided all stakeholders many opportunities to negotiate and provide input into the terms and conditions of the TSAs. The numerous changes Enbridge made to Mainline Contracting demonstrate how extensive and productive the negotiations were. Enbridge did not engage in negotiations in a group setting with a view to reaching an agreement with 130+ stakeholders because that would not have been practical given the diverse and often competing interests amongst stakeholders. While negotiations were conducted individually, every stakeholder could participate, and all changes were communicated to all stakeholders. Enbridge argued that Mainline Contracting was negotiated between Enbridge and shippers as a package and should be approved as such. Enbridge further argued that while not a negotiated settlement under the *Revised Guidelines for Negotiated Settlements of Traffic, Tolls and Tariffs*, the fact that there were gives and takes on both sides in reaching agreement on the offering means that the Commission should be reluctant to modify individual elements of the Application.

In reply to assertions that it did not provide requested cost information during negotiations, Enbridge submitted that the CSG did not provide the specific requests for cost information being referred to that CSG referenced generally. Regarding the requests from CAPP, Enbridge stated that it provided cost of service information in response to CAPP's May 2018 letter and responded to requests for different information in July 2018. Enbridge did not receive additional requests for information from CAPP subsequent to the July 2018 communication.

In reply to intervenor submissions regarding the committed toll negotiations, Enbridge submitted that it made numerous concessions on tolling by introducing a number of toll discounts that saved shippers hundreds of millions of dollars, in aggregate, nearly every year. As well, many terms and conditions were changed for the benefit of shippers, which impacted the level of toll potential shippers were willing to pay.

Views of other parties

<u>*Supporting parties*</u>

Supporting intervenors were supportive of the Application as a whole, and generally did not provide detailed submissions on the method of establishing tolls. Those intervenors indicated that the negotiations were conducted in a commercially reasonable manner and resulted in a mutually acceptable agreement, including the tolling methodology.

Dr. Webb, on behalf of Cenovus, submitted that cost-based ratemaking may introduce additional inefficiencies into the price setting process, such as reducing the incentive for regulated companies to vigorously cut costs as they would in a competitive industry. Dr. Webb

stated that given the operational, jurisdictional, and commercial challenges of designing cost-based rates on the Enbridge Mainline, it is not surprising that rates on the Enbridge Mainline have not been set on the basis of cost of service in decades.

Opposing parties

Opposing intervenors raised concerns that Enbridge's proposed tolls were not based upon or reflective of costs and instead were determined through negotiation and eventual agreement with select shippers. Opposing intervenors argued that negotiations were not full and fair, including that:

- Negotiating parties were not provided the information required to assess the reasonableness of the proposed tolls and the negotiation process was unfair and opaque.
- The committed base toll was established unilaterally by Enbridge at US$5.70/bbl, and Enbridge refused to consider any other base toll, while the uncommitted toll was increased from US$5.80/bbl to US$5.99/bbl.
- More group discussions would have been preferred and may have resulted in a more balanced and better outcome.
- Enbridge's description of Mainline Contracting as a negotiated package is a gross mischaracterization and should not be allowed to minimize consideration of the critical interests and concerns of a significant number of impacted stakeholders. Enbridge striking a bargain with a limited number of interested parties is not proof that the proposed tolls are just and reasonable.

Opposing intervenors also were of the view that the tolls should reflect the cost of providing service, including that:

- The tolls proposed by Enbridge significantly exceed cost of service tolls, are not based upon an analogous toll, are not derived as a result of an objective determination, and they were not developed in response to a revenue requirement.
- A just and reasonable toll for contract carriage on the Enbridge Mainline is one that reflects the cost of providing that service and the Commission should use a cost-based analysis to determine the reasonableness of the tolls.
- Departing from cost of service regulation requires deep and broad agreement throughout industry. If agreement is not deep and broad, then the regulator should be very careful about what it approves.
- The Application is not a negotiated settlement pursuant to the *Revised Guidelines for Negotiated Settlements of Traffic, Tolls and Tariffs*, therefore the Canadian Mainline must be regulated on a cost of service basis.

CAPP, in a letter of comment, submitted that:

- In October 2017, Enbridge presented very aggressive timelines for completion of post-CTS commercial negotiations. The Enbridge Representative Shipper Group members communicated to Enbridge that they were not prepared to discuss post-CTS

negotiations until industry had some time to develop a tolls model and a consensus amongst shippers about what they would like to achieve in a post-CTS agreement.

- In May 2018, CAPP created a working group that identified and requested specific information from Enbridge which was necessary for transparency and inclusion in the tolls model. Enbridge provided some general information to shippers and later indicated that it was pursuing contract carriage discussions with individual shippers and therefore would not provide any further detailed information.
- In October 2018, CAPP communicated to Enbridge that the producer community would like Enbridge to consider alternatives to contract carriage in the nature of a new competitive toll settlement. Enbridge responded that it would only pursue contract carriage discussions at that time. As a result, the CAPP working group was disbanded.

4.2.1 Commission analysis and findings

It is well established that the Commission has broad discretion, as the NEB had, to determine just and reasonable tolls. The NEB and CER have accepted many tolling methodologies that differed from a traditional cost of service model, with varying degrees of cost-reflectivity.[97] On one end, tolls can be established with a traditional cost of service approach. On the other end, tolls can be established that have little or no relation to the costs of providing service and instead favour other attributes, generally through agreement with stakeholders. In between, there are various approaches and degrees to which tolls can be reflective of costs, such as through cost-based tolls with any combination of fixed and variable components and incentive mechanisms. While Enbridge ultimately submitted that the evidence showed its proposed tolling methodology would result in cost-reflective or cost-informed tolls, Enbridge's proposal leans away from the strict cost of service end of this spectrum:

- the US$5.70/bbl base toll was determined based on the toll that would have resulted from continuation of the CTS (negotiated and agreed to by parties over 10 years ago), rather than by current costs;
- committed service tolls would largely be fixed over as much as a 20-year period;
- there are limited opportunities to adjust tolls as circumstances and costs may change; and
- detailed cost information was not shared as part of the negotiations.

The CER's role in tolls often includes balancing the interests of a pipeline company and its shippers and other interested parties. While the interests of a pipeline company and its shippers can sometimes align, in the most basic terms, a higher toll may often serve the interests of a pipeline company while a lower toll would serve the interests of shippers. While a cost of service

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[97] For example, CER, *Letter Decision* - TransCanada PipeLines Limited Mainline 2021-2026 Settlement Letter Decision, Filing ID C05780 (17 April 2020); OH-1-95, *supra* note 28; OH-1-2007, *supra* note 37; OH-1-2009, *supra* note 28; NEB, *Reasons for Decision - Trans Mountain Pipeline ULC, Part IV Application regarding Transportation Service and Toll Methodology*, RH-001-2012 (May 2013) [RH-001-2012]; NEB, *Reasons for Decision - Alliance Pipeline Ltd., Application for New Services and related Tolls and Tariffs for Service on the Alliance Pipeline*, RH-002-2014 (July 2015).

tolling methodology has often been used successfully to balance various interests, no methodology is perfect.

In terms of both tolling methodology and service offerings, pipeline companies and shippers may work together to come up with innovative solutions such as fixed or market-based tolls, enhanced services, differing term lengths, or other features that are desirable in a given market. The pipeline company and its shippers may value these attributes and the resulting risk allocation even without the transparency of a traditional cost of service toll calculation. Innovative offerings that respond to the needs of market participants may warrant a departure from a cost of service regime.

Where substantial and broad support is demonstrated for a tolling methodology, the Commission can often rely on the commercial discretion and preferences of stakeholders as a strong signal that the resulting tolls would be just and reasonable. As Enbridge submitted, the NEB recognized – and the Commission agrees – that negotiated agreements that have received a high level of support can be an effective means of ensuring that tolls reflect market forces and achieve a risk allocation that is integral to the proposed service.

However, in this Application, the Commission is not persuaded that there is a sufficiently high level of support to strongly suggest a reasonable risk allocation. The Commission acknowledges that Enbridge and shippers of record representing approximately 75 per cent of existing volumes have agreed to the proposed tolling methodology and its allocation of risks. However, there is also substantial opposition to the proposed tolling methodology from diverse stakeholders impacted by Canadian Mainline tolls, including from parties that are not necessarily shippers of record. As a result of this level of opposition, the Commission could not rely on many, if any, positive inferences that arise where more substantial and broader stakeholder support exists, to conclude that the tolling methodology would result in tolls that are just and reasonable.

As such, the Commission must consider other factors to determine whether the tolling methodology would result in just and reasonable tolls. Tolls that reflect the costs of providing service can generally be relied upon to provide an objective, transparent and fair outcome for shippers and pipeline companies. Absent substantial and broad agreement or other compelling reasons to set tolls in another manner, the degree to which the proposed tolls are established or informed by costs can be a persuasive measure of whether they would be just and reasonable. The Commission also considers this approach to be consistent with the cost-based/user-pay principle that has often been applied in the context of fairly allocating a revenue requirement under a cost of service methodology, particularly among different services and different distances, to minimize cross-subsidization among users of a system. The Commission's analysis of remaining tolling methodology issues, including projected ROEs, continues in Section 4.3 (Cost of service toll comparison and projected returns).

Before leaving the topic of toll methodologies, the Commission notes that, while Enbridge did not apply pursuant to the *Revised Guidelines for Negotiated Settlements of Traffic, Tolls and Tariffs*, Enbridge repeatedly emphasized that its Application represented a "negotiated package" and that its negotiations led to a balanced outcome. These assertions invite the Commission to provide comments regarding the negotiations that resulted in Mainline Contracting, beyond just the proposed tolling methodology. Overall, the Commission acknowledges that Enbridge undertook an extensive and lengthy negotiation process, which was conducted over almost two years. The early stages of the negotiation process were open and accessible to all interested parties.

However, the Commission is concerned that Enbridge's ultimate strategy to maximize support from shippers of record for Mainline Contracting did not appropriately include or balance the interests of all impacted stakeholders. The Commission acknowledges that significant opposition and potential intransigence of some parties in relation to the Application, particularly regarding the concept of contracting, may have delayed negotiations and achievement of greater support for Enbridge's eventual application. Nonetheless, for toll and service offerings that rely on negotiations and affect a wide range of stakeholders, it is the Commission's expectation that pipeline companies seriously engage and negotiate on key issues raised by concerned stakeholders and consult and share relevant information and updates throughout the process.

In this context, the Commission has the following concerns as it relates to the Mainline Contracting negotiations:

- There was a lack of or limited evolution on key terms such as the base toll and the uncommitted reservation amount. In contrast, movement was seen favouring requests from refiners who supported the Application, such as longer term lengths and greater associated toll discounts.
- The Commission is persuaded that cost information was requested by interested parties and not shared by Enbridge in a timely manner. While Enbridge's proposed tolling methodology was not established based on costs, the Commission expects Enbridge to provide cost information to stakeholders during negotiations, at a level commensurate with Guide P of the CER's Filing Manual, to allow parties to assess the reasonableness of tolls. While this information was eventually shared as part of this hearing, the Commission notes that information symmetry is an important element of efficient, effective and fair negotiations prior to any regulatory proceedings.
- While Enbridge may have achieved support for the proposed tolls from a majority of shippers of record at a certain point during the negotiations, continual and robust engagement and information sharing did not appear to substantively continue with other stakeholders. As well, the Commission's Open Season Decision in 2019, requiring Enbridge to stop its open season process, presented an opportunity for Enbridge to re-evaluate its package and further engage with stakeholders, which was not meaningfully pursued.
- Parties generally concurred that negotiations require an appropriate balance of bilateral and multilateral discussions, on timelines that allow for meaningful negotiations and deliberations. Unlike discussions that preceded the CTS, multilateral discussions appear to have been limited in this instance, particularly after Enbridge decided to pursue a firm service offering.

Finally, the Commission notes that pipeline companies can submit contested settlements for approval. As the Commission has noted, a negotiated settlement for the Canadian Mainline is likely to produce the most market-sensitive outcome for all interested parties, assuming effective participation by all parties in the negotiation. However, a negotiated settlement may or may not be a realistic possibility for the Canadian Mainline and is not the only regulatory pathway for approval of Enbridge's toll and tariff matters.

4.3 Cost of service toll comparison and projected returns

4.3.1 Cost of service toll comparison

4.3.1.1 Cost of service methodology and results

Under a cost of service methodology, a pipeline company's tolls are set so investors can recover costs, including a reasonable return (or opportunity cost) on their investment. In this proceeding, cost of service tolls were estimated by Concentric (on behalf of Enbridge), Dr. Webb (on behalf of Cenovus), Drazen Consulting Group, Inc. (**Drazen**) (on behalf of the CSG), and The Brattle Group (**Brattle**) (on behalf of Suncor) in order to provide a benchmark to the proposed Mainline Contracting tolls. The parties submitted detailed evidence on how a cost of service toll comparison should be conducted and the conclusions to be drawn from such a comparison.

Views of Enbridge

Reed stated that the level of risk that Enbridge is accepting in the negotiated package does not lend itself to a standard cost of service review. When one is considering the appropriateness of a negotiated tolling methodology that would apply for 20 years, it is not possible to develop a reliable test year comparison. This is because costs and other factors will change dramatically over the 20-year period, and because any evaluation of the risk premium needed to compensate for the inability to access traditional ratemaking relief is highly speculative. Rather than attempting to determine the appropriate cost-based toll, these values are better determined through negotiations involving sophisticated and knowledgeable parties.

Concentric provided analysis that compared the range of proposed Mainline Contracting tolls to Enbridge Mainline cost of service tolls over the 20-year period between 2022 and 2041. The Concentric analysis provided a range and probability distribution of illustrative cost of service tolls. These illustrative tolls were the product of many assumptions regarding cost levels, future demand for service on the Enbridge Mainline, current and future regulatory policies, and future financial market conditions. Enbridge also stated that 10 or more years of future cost of service tolls can only be meaningfully represented as a probabilistic distribution of future tolls.

Enbridge provided two different sets of projected cost of service tolls, as shown in Figures 4.1 and 4.2 below. One was provided under a 90 per cent contracted service structure, that assumed an economic planning horizon, used for depreciation rates, of 30 years. Another projection was provided under a 100 per cent uncommitted service structure that used a shorter economic planning horizon of 20 years and assumed that certain capital expenditures were expensed rather than capitalized to reflect the greater cost recovery risk of a fully uncommitted structure.

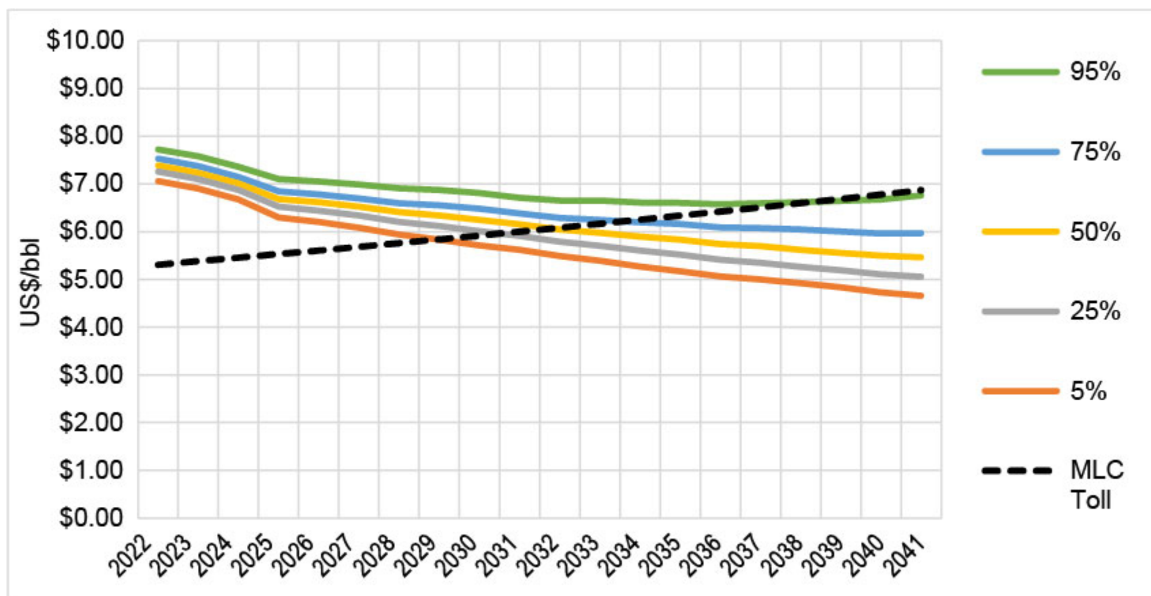
In its cost of service analysis, Concentric:

- Assumed an ROE of 13.5 per cent and an equity thickness of 50 per cent for the Canadian Mainline and 55 per cent for the Lakehead System. In Concentric’s view, Enbridge’s risk profile is above the average risk for a North American pipeline company if it is required to operate under a 100 per cent uncommitted service structure, and the 13.5 per cent allowed ROE is considered the minimum appropriate for the Enbridge Mainline in review of Concentric’s cost of capital analysis.

- Used the 2011-2019 period to calculate the Enbridge Mainline's long-run baseline capital expenditures and possible outcomes.
- Used 2018/2019 average operating and administrative costs (**O&A**) to forecast possible outcomes of O&A.
- Included Market Access Revenue Adjustments which relate to Market Access Discounts offered to shippers representing concessions compared to full tariffed tolls, but produced a net benefit for the system through the addition of incremental markets and increased volumes on the Enbridge Mainline.
- Included foreign exchange hedging costs. Enbridge submitted it was prudent to enter into a foreign exchange hedging program during the CTS term to lock in a predictable conversion rate on a large anticipated US dollar revenue, including several expansion surcharges that were denominated in US dollars.

Concentric stated that over the course of the 20-year evaluation period, the proposed tolls were, on average, projected to be materially below the level of projected cost of service tolls. The projected Mainline Contracting weighted average toll[98] is below the entire range of expected 100 per cent uncommitted service cost of service tolls in some years and is in the lower half of the expected range of cost of service tolls in many other simulations.

Figure 4.1
Concentric 100 per cent uncommitted service structure projected Hardisty to Chicago heavy cost of service tolls with assumed 3,055 Mb/d throughput, nominal US$/bbl



Enbridge also provided lower throughput scenarios of 2,850 Mb/d and 2,250 Mb/d. In both of the lower throughput scenarios, the probability that projected cost of service tolls would be higher than the negotiated committed Mainline Contracting tolls increases.

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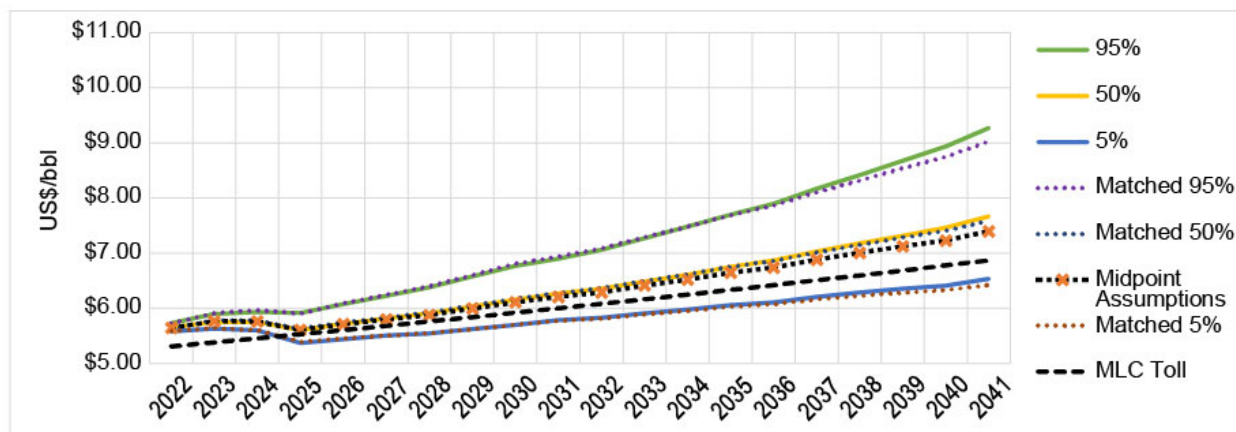
[98] Concentric used a system-wide weighted average base toll of US$5.36/bbl for 2022, which incorporated 355 Mb/d of uncommitted volumes at US$5.99/bbl and 2,700 Mb/d of committed volumes with all relevant discounts applied.

Enbridge stated that in the 90 per cent contracted capacity scenario, the projected cost of service tolls in the best-case throughput scenario are expected to be higher than the negotiated Mainline Contracting weighted average committed tolls in the majority of outcomes in all years.

Figure 4.2
Concentric 90 per cent contracted service structure projected Hardisty to Chicago heavy cost of service tolls with assumed 3,055 Mb/d throughput, nominal US$/bbl



In Concentric's view, the proposed Mainline Contracting tolling methodology is expected to produce a reasonable range of tolls and earned returns for Enbridge over the 20-year period it examined, when it is evaluated in the context of the risks that Enbridge would be bearing.

Views of other parties

Supporting parties

Only Cenovus, with expert evidence from Dr. Webb, provided detailed submissions on the cost of service toll comparison.

Dr. Webb, given the uncertainty inherent in long-term projections, recommended to look at a probabilistic range of outcomes. Because both the Mainline Contracting rate and the cost-based rate are projected to increase over time, Dr. Webb proposed averaging and comparing the averaged rates over the 20-year period.

Dr. Webb projected that the average Mainline Contracting rate for heavy crude oil from Hardisty, Alberta to Flanagan, Illinois would be US$6.06/bbl and the average cost-based rate would be US$6.24/bbl, meaning that on average the Mainline Contracting rate is expected to generate slightly lower rates for shippers compared to what they would expect under cost-based rates. At lower volumes, the Mainline Contracting toll could be as much as US$0.30/bbl higher due to loss of volume discounts, but the cost-based toll would be even higher.

Cenovus submitted that Dr. Webb's investigation and analysis reached much the same conclusions about the proposed Enbridge tolls as Concentric did. Namely, in the majority of scenarios, the proposed Mainline Contracting firm service tolls are superior to a weighted average cost-based toll. As such, the Enbridge Mainline Contracting proposal, including the proposed tolls, is not unreasonable and is in the Canadian public interest.

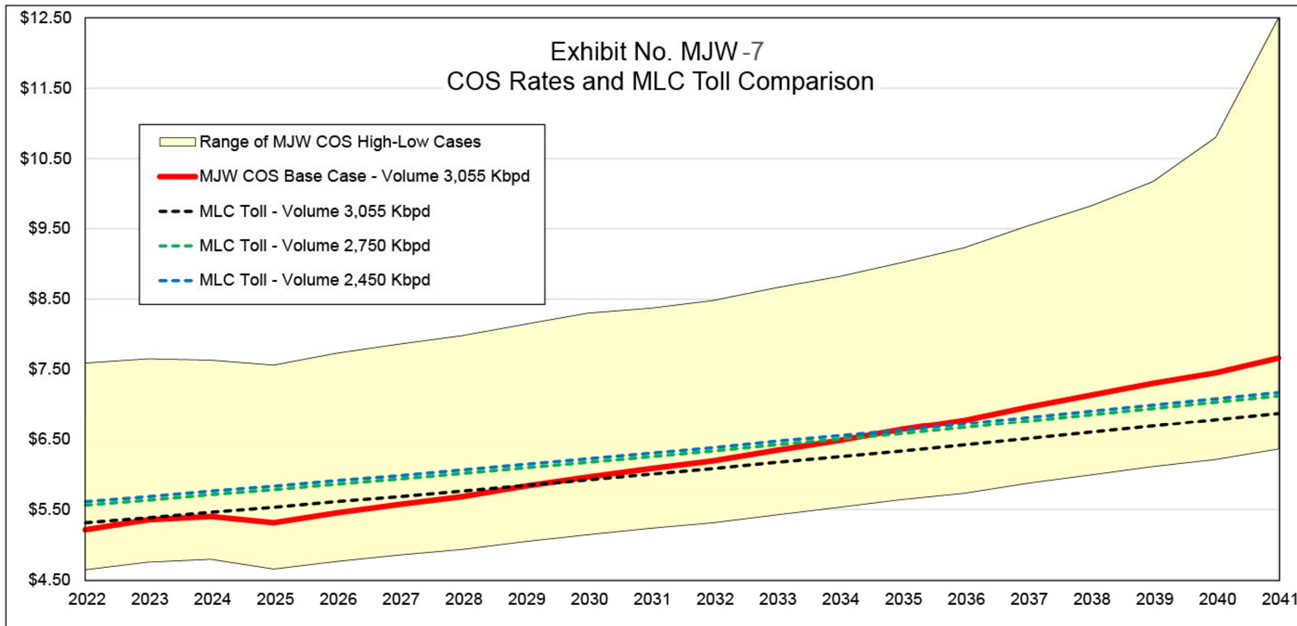
In Dr. Webb’s opinion, the fact that in the majority of simulations the cost-based rate exceeds the Mainline Contracting rate provides an obvious explanation of the reasons shippers want to sign up for Mainline Contracting. They expect Mainline Contracting would result in lower rates compared to the alternatives. This fact provides further evidence that Enbridge is not exercising market power, meaning that the Mainline Contracting tolls are within the zone of reasonableness.

Dr. Webb relied on the data and assumptions presented by Enbridge but made revisions to sustainment capital, carrier property in service, fuel and power costs, receipt and delivery terminalling revenue and the cost of debt. The cumulative impact of these changes was to reduce the average cost of service rate by US$.04/bbl to US$.05/bbl.

Dr. Webb established a high cost of service case and a low cost of service case based on the combination of different sensitivities that produced either the highest or lowest cost of service result. These results set the overall minimum and maximum bounds for Dr. Webb’s rate sensitivity analysis. In most cases, the cost-based rates exceed the Mainline Contracting toll.

In Dr. Webb’s analysis, in the vast majority of scenarios, the Mainline Contracting toll is lower than the cost-based toll as illustrated in Figure 4.3. Dr. Webb’s probability analysis showed that in 83 per cent of the simulations, the Mainline Contracting toll would be lower than the cost-based toll. In other words, there are only a narrow set of circumstances in which the cost-based toll would be lower than the Mainline Contracting toll.

Figure 4.3
Dr. Webb comparison of cost of service rates and Mainline Contracting tolls



		2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2033	2034	2035	2036	2037	2038	2039	2040	2041	Avg Rate	Avg Rate Discounted @ 10%
1	MLC Toll - Volume 3,055 Kbpd	$5.31	$5.38	$5.46	$5.53	$5.61	$5.68	$5.76	$5.84	$5.92	$6.00	$6.08	$6.17	$6.25	$6.33	$6.42	$6.51	$6.60	$6.69	$6.78	$6.87	$6.06	$2.29
2	MLC Toll - Volume 2,750 Kbpd	$5.56	$5.63	$5.71	$5.78	$5.86	$5.93	$6.01	$6.09	$6.17	$6.25	$6.33	$6.42	$6.50	$6.58	$6.67	$6.76	$6.85	$6.94	$7.03	$7.12	$6.31	$2.39
3	MLC Toll - Volume 2,450 Kbpd	$5.61	$5.68	$5.76	$5.83	$5.91	$5.98	$6.06	$6.14	$6.22	$6.30	$6.38	$6.47	$6.55	$6.63	$6.72	$6.81	$6.90	$6.99	$7.08	$7.17	$6.36	$2.41
4	MJW COS Base Case - Volume 3,055 Kbpd	$5.21	$5.35	$5.40	$5.31	$5.45	$5.57	$5.68	$5.83	$5.96	$6.08	$6.19	$6.34	$6.48	$6.64	$6.77	$6.96	$7.13	$7.30	$7.45	$7.66	$6.24	$2.30
5	MJW COS High Case	$7.59	$7.65	$7.63	$7.56	$7.73	$7.86	$7.98	$8.14	$8.30	$8.37	$8.48	$8.66	$8.82	$9.02	$9.23	$9.54	$9.8	$10.2	$10.8	$12.5	$8.79	$3.25
6	MJW COS Low Case	$4.64	$4.75	$4.79	$4.65	$4.76	$4.85	$4.93	$5.04	$5.14	$5.23	$5.31	$5.42	$5.53	$5.64	$5.73	$5.87	$5.99	$6.11	$6.21	$6.36	$5.35	$2.00

Opposing parties

The CSG

Drazen submitted that per its analysis, the cost of the benchmark International Joint Tariff **(IJT)** service for Hardisty to Chicago is approximately US$4.23/bbl in 2022, which is substantially lower than Enbridge's proposed average toll of US$5.40/bbl.[99] In Drazen's view, the magnitude of the difference between the proposed tolls and cost of service means that the proposed tolls cannot be accepted as just and reasonable.

Drazen identified three main steps for deriving the cost-based toll for Hardisty-to-Chicago IJT service:

1. calculate the Canadian Mainline total cost of service;
2. calculate the per-barrel cost of Hardisty-to-International Border transport; and
3. add the Lakehead Local toll for International Border-to-Chicago transport.

From the Concentric US$5.65/bbl cost of service benchmark toll, Drazen made adjustments to cost of service inputs to derive its US$4.23/bbl toll. Drazen submitted that the cost of service studies provided by Concentric overstate the cost of service of the Canadian Mainline and are inconsistent with the existing Mainline-Lakehead financial arrangement as well as Enbridge's costing agreements with CAPP which fix ROE, equity ratio and depreciation lives.

Drazen also presented the cost of service toll at throughput levels representative of the CSG forecast for the years 2022 through 2030, which showed the average proposed toll exceeding the cost of service toll between US$0.93 to US$1.36. Using the CSG throughput forecast of 3,055 Mb/d without KXL in service, the average proposed toll exceeds the cost of service toll between US$1.16 and US$1.36 for the years 2022 to 2030. Drazen also submitted that the throughput would have to drop to 2,250 Mb/d (75 per cent of capacity) for the cost of service toll to increase to the level of the proposed contract tolls.

In its cost of service analysis, Drazen:

- Used an 11.5 per cent ROE on a 45 per cent equity ratio in its cost of service analysis. Drazen submitted that the 13.5 per cent ROE assumed by Enbridge is considerably higher than the roughly 10 per cent to 11 per cent ROEs other major Group 1 pipelines have earned over the last five years.
- Removed costs of the PipeLink project in developing a forecast of capital expenditures, which Drazen submitted is double counting the same project.
- Removed costs related to the sale of Line 10, which Drazen submitted is a non-recurring item and therefore should not be reflected in a forecast of future costs.

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[99] Drazen's comparison to a US$5.40/bbl average toll is outlined in its written evidence, and is based upon an average contract toll of US$5.30/bbl for 2,700 Mb/d of committed volumes and US$6.07/bbl for 355 Mb/d of uncommitted volumes in 2022.

- Noted that its proposed adjustments to the cost of service reduce both Lakehead and Canadian Mainline costs to the point that the Market Access Revenue Adjustments becomes zero.
- Eliminated costs related to foreign exchange hedging transactions. In Drazen's view, it is difficult to see how costs related to past hedging decisions are relevant for future shippers on the Canadian Mainline.

Dr. Makholm asserted that the illustrative uncommitted tolls Concentric provided bear no relationship to any accepted Canadian or US cost of service methodology based on objective, known and measurable evidence. Rather, their computations proceed solely from a collection of subjective Enbridge assumptions populating a multi-year income capitalization model. Neither the CER nor the FERC, nor other utility regulator in North America, makes rates/tolls based on such a method. In Dr. Makholm's view, the essential problem with the Concentric analysis is that it is purely subjective.

The CSG submitted that Enbridge should be required to submit a cost of service application to rebase tolls. In addition to the results of the Drazen analysis, a cost of service application is necessary because the Canadian Mainline has not had a cost of service evaluation for 26 years, there is insufficient rate-case-quality information on the record, and Enbridge's returns under the CTS have been excessive.

Suncor

Brattle submitted that the Canadian Mainline tolls embedded in Enbridge's Application are greatly in excess of a reasonable cost-based toll level, as shown in Figure 4.4 below. Brattle submitted that:

- its estimate of a cost-based toll from Hardisty to the border is C$2.16/bbl in 2021, which is less than half of the C$4.39/bbl benchmark residual toll;[100] and
- Enbridge's own unadjusted cost of service toll (C$3.00/bbl) is substantially lower than the Canadian Mainline residual benchmark toll embedded in Enbridge's application.

Consequently, in Brattle's view, Enbridge's proposed committed and uncommitted IJT tolls are not appropriate, and Enbridge's proposal to charge them as part of the service offering in its Application constitutes an abuse of its market power over the oil transportation service provided by the Canadian Mainline.

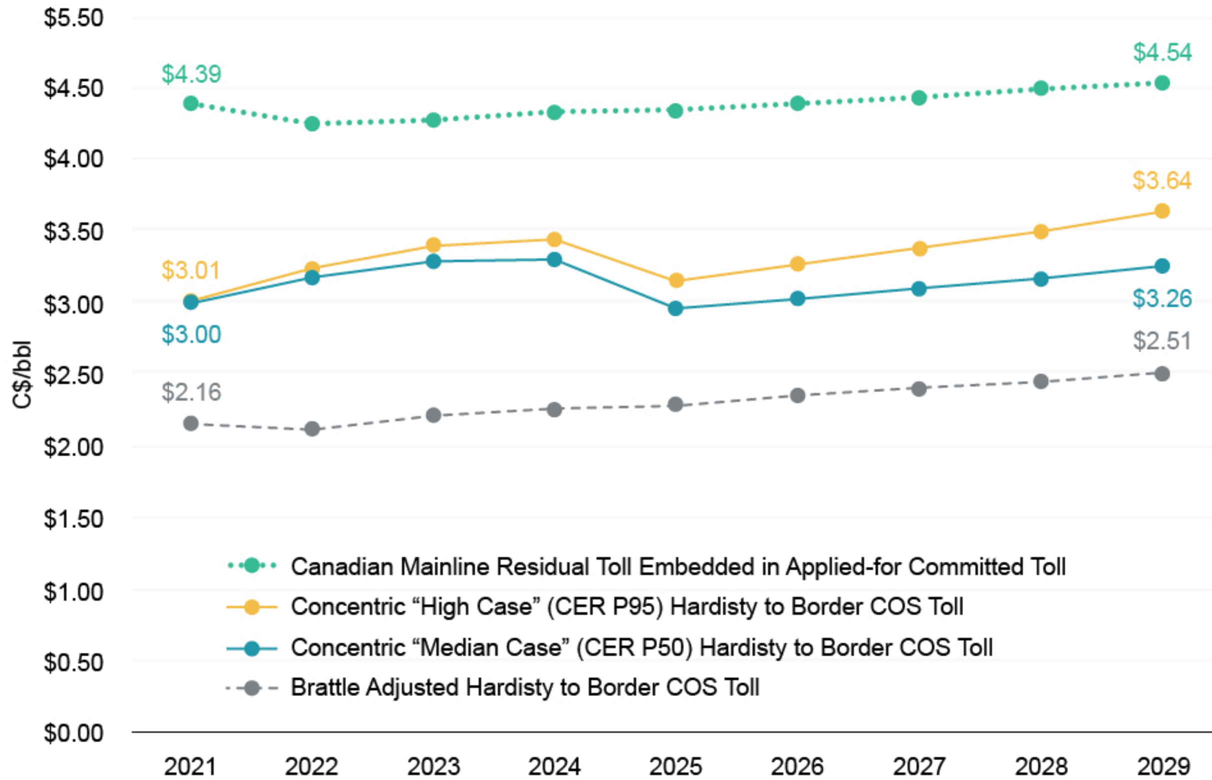
Brattle submitted that the reasonableness of tolls and service terms on the Canadian Mainline, and not the combined Enbridge Mainline inclusive of Lakehead, is within the jurisdictional purview of the CER. In order to evaluate the Canadian Mainline portion of Enbridge's base toll in relation to a corresponding Canadian Mainline stand-alone cost of service toll, the component of the benchmark IJT toll that is attributable to the Canadian Mainline movement from Hardisty to the US-Canadian border near Gretna, Manitoba must be isolated.

From its cost of service analysis, based on information provided by Enbridge, Brattle derived a range of reasonable cost-based toll estimates for Canadian Mainline transportation movements

[100] The residual toll is the component of the IJT toll that is attributable to the Canadian Mainline movement, which is calculated by subtracting the Lakehead System local toll from the applied-for base toll.

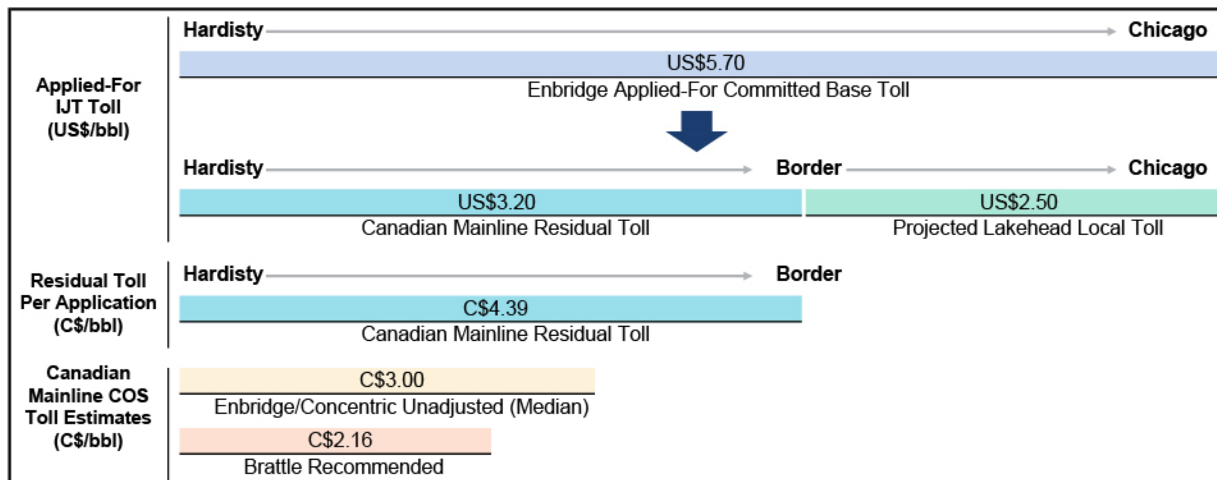
over the forecast period 2021-2029. The range corresponds to the shortest-term commitment shipper contract available under Enbridge's proposed 90 per cent contracted capacity service structure and relied on a throughput of 3,055 Mb/d.

Figure 4.4
Brattle comparison of applied-for Canadian Mainline residual tolls with Brattle adjusted cost of service tolls



Suncor and Brattle submitted that they do not consider it appropriate to compare Enbridge's proposed tolls to cost of service tolls estimated for a 100 per cent uncommitted service structure, as such an analysis could constitute an apples-to-oranges comparison.

Figure 4.5
Illustration of Brattle framework



Brattle submitted that even the high-end estimates of cost-based tolls are significantly lower than the Canadian Mainline tolls embedded in Enbridge's application, which provides strong evidence that the applied-for tolls are inappropriate.

Brattle focused on an eight-year forecast horizon for its analysis of cost-based Canadian Mainline tolls, in which there is a high degree of certainty that Enbridge would receive toll revenue on at least 90 per cent of Mainline capacity due to shippers making volume commitments for terms of at least eight years. However, Brattle submitted that its calculations also extend to 2041.

Under a scenario with throughput of 2,750 Mb/d, Brattle submitted that the applied-for Canadian Mainline residual benchmark toll exceeds Brattle's cost of service toll estimates by 58 per cent and 75 per cent during the years 2022–2029, and Enbridge's own cost of service estimates by 12 per cent and 24 per cent.

In its adjusted cost of service analysis, Brattle:

- used a 13.5 per cent ROE on a 40 per cent equity ratio. In Brattle's view, Enbridge is reducing its business risk, and relevant NEB decisions have consistently determined that deemed equity ratios of 40 per cent or less, paired with allowed ROEs lower than Concentric's 13.5 per cent assumption, provide appropriate compensation for contract carriage pipelines;
- excluded sustainment capital costs in certain years due to anomalous capital additions in those years;
- attributed cost synergy savings resulting from the Spectra merger and other announced cost reductions which lowered Canadian Mainline O&A costs;
- removed the Market Access Revenue Adjustments, which in Brattle's view artificially inflates the cost of providing service; and
- excluded foreign exchange hedging costs, which in Brattle's view are a financial decision made by Enbridge and should not be imposed on shippers.

In Suncor's view, the IJT toll should reflect a combination of a cost-based toll for the Canadian Mainline and the FERC-approved toll for the Lakehead System. Suncor urged the Commission to find that the just and reasonable cost-based toll for the Canadian Mainline is at or near the lower end of the range of reasonable estimates derived in the Brattle Evidence: C$2.16/bbl.

4.3.1.2 Lakehead System

Enbridge's proposed tolling methodology applied to the entire Enbridge Mainline, inclusive of the US Lakehead System. As such, the parties disputed whether Enbridge's projected Lakehead cost of service or the FERC-approved Lakehead local toll should be used in the cost analysis.

Views of Enbridge

Concentric emphasized that the Mainline Contracting tolling methodology applies to the entirety of the Enbridge Mainline, across both the Canadian Mainline and Lakehead systems. Concentric submitted that it is essential that any cost of service analysis focus on the totality of the costs compared to the totality of the revenue to be derived from the proposed tolling methodology.

Submissions of Enbridge and Concentric included:

- Assuming that current Lakehead rates represent Lakehead's full costs is an error, so the resulting calculations are unreliable.
- The Lakehead toll cannot be used as a proxy for the Lakehead System cost of service because the current Lakehead tolls are not established on a cost of service basis. Enbridge reported a US$444 million underearning in 2019, and a US$696 million underearning in 2020, for the Lakehead System in its FERC filings.
- Lakehead rates can and will be changed over the next 20 years, and Lakehead's current rates have been allowed to drift away from the current cost of service because those rates have not been a constraint on the IJT, which is what determines actual tolls charged for Enbridge Mainline service.
- The Lakehead local rate is now projected to be approximately US$3.05/bbl in 2022.
- The approaches of opposing intervenors did not test the probabilistic range of tolls or earned returns over the matching span of time for the commercial model.

The current Lakehead toll structure consists of the index rate and the facilities surcharge on all barrels moved. The index rate component of Lakehead's tolls allows oil pipelines to change their rates through use of an index system that establishes ceiling levels for such rates. The facilities surcharge mechanism allows costs associated with certain shipper-supported projects to be recovered through a surcharge to the indexed rate. The costs for each project that is subject to the facilities surcharge mechanism and parameters pursuant to which those costs can be recovered in the Lakehead tolls are established through negotiation between Enbridge and CAPP. In Enbridge's view, to characterize the facilities surcharge as a rate that is "directly linked to specific costs" or one "based on contractual cost-based agreements" does not reflect the fact that costs that are recoverable under the facilities surcharge often differ from the costs that would be recoverable through a cost of service rate case.

Views of other parties

Supporting parties

Dr. Webb, on behalf of Cenovus, calculated a toll based on cost of service for the Lakehead System rather than using the toll already established by FERC. In Dr. Webb's view, it makes no sense from an economic standpoint to calculate the toll based on a cost of service confined to Canada. There is no economic value for transportation service to the Canadian border, shippers cannot sell their crude oil at the border, and no shipper pays the tolls to the border.

Dr. Webb stated that Enbridge is not applying for a service to the Canadian border. Part of the value of the service provided by Enbridge is the transportation from Canada to the US where shippers can bring their crude oil to market. Additionally, Enbridge is currently vastly under recovering on the Lakehead portion of the Enbridge Mainline, and it could file a rate increase at any point in time over the term of the Mainline Contracting agreement.

Opposing parties

The CSG

Drazen submitted that Concentric's cost of service analysis ignored the fact that Lakehead is paid its local toll for IJT service and instead calculated a hypothetical higher payment to Lakehead. Drazen stated that overall, Concentric calculated payments to Lakehead to be $3,343 million which is about $600 million more than Enbridge's forecast of Lakehead local toll charges in 2022. Reflecting the actual Lakehead local toll, rather than Concentric's calculated cost of service reduces the cost-based toll by US$0.91/bbl in 2022.

Incorporating the existing Lakehead local toll and using Enbridge's own cost of service Canadian Mainline toll, an IJT toll would accordingly be US$4.75/bbl in 2022, which compares to a weighted average contract toll of US$5.40.

Drazen submitted that the payment to Lakehead is in effect a cost to the Canadian Mainline. In Drazen's view, it is what some other pipelines would call a charge for "Transportation by Others". Drazen submitted that overstating the Lakehead cost would exaggerate the Canadian Mainline-plus-Lakehead toll and lead to the combined cost appearing to be higher than the proposed contract toll. As well, if payments to Lakehead are overstated, revenues to the Canadian Mainline are understated and the apparent ROE is lower.

In Drazen's view, it is irrelevant for the purposes of this proceeding whether Lakehead is "under-earning" or "over-earning". Under the current Canadian Mainline-Lakehead arrangement, Lakehead gets paid according to its local tolls for the volumes that travel on its system. About one-half of Lakehead's toll is based on contractual cost-based agreements with shippers. The balance of the toll is based on an indexed per-barrel toll. If Enbridge thinks Lakehead is under-earning, it can apply to the FERC for higher tolls.

Drazen submitted that Lakehead's toll is based on a combination of an indexed toll plus a facilities surcharge mechanism charge derived from several costing agreements between Lakehead and shippers which specify depreciation lives and ROE. In Drazen's view, in any assessment of cost-based tolls, shippers would expect that these agreements will be respected. However, these agreements have been ignored in the Concentric evaluation resulting in inaccurate Lakehead toll treatment and therefore artificially high Mainline costs.

Suncor

Brattle noted that Enbridge purports to calculate cost of service on a combined system basis for the Enbridge Mainline, inclusive of both the Canadian Mainline and Lakehead systems. To the extent Enbridge seeks approval of tolls for international movements, Brattle submitted that only the Canadian portion of those tolls can be deemed just and reasonable on the basis of cost, or any other basis, by the CER.

Brattle stated that Concentric created a *de novo* stand-alone revenue requirement for the Lakehead System, which bears no relationship to how Enbridge's affiliate (Enbridge Energy, Limited Partnership) actually establishes tolls and receives revenues for service on the US Lakehead System pursuant to the FERC-approved tolling mechanisms. Brattle stated that this ignores established practices for the allocation of IJT toll revenue between the Canadian Mainline and Lakehead systems, wherein the revenue attributed to Lakehead is properly determined by the Lakehead local toll component of the international movement.

Brattle submitted that under Enbridge's total system toll design, the resulting "cost-based" IJT tolls imply recovery of Lakehead System costs beyond the level provided by the current FERC-approved tolling mechanisms. Decoupling the IJT from its Canadian local toll and Lakehead components implicitly requires the CER to adjudicate the appropriateness of Enbridge's proposed combined Mainline system toll design, including its *de novo* counterfactual Lakehead cost of service calculations. In doing so, the CER would be forced to opine on the reasonableness of FERC's decisions regarding the basis of cost recovery on the Lakehead system. Brattle submitted that this raises the potential for conflict in the determinations of two different regulators with respect to the just and reasonable toll to recover costs on the same system.

Enbridge's *de novo* counterfactual "Lakehead cost of service tolls" are 16 and 23 per cent greater than the collected Lakehead local tolls as specified in Enbridge Energy, Limited Partnership's FERC local rates tariffs in 2019 and 2020, respectively. Further, Brattle stated that its calculations for the 2021-2029 contract term indicate that Enbridge's projected "Lakehead cost of service tolls" are nine per cent greater than the projected local tolls for 2021 and 22-24 per cent greater in the years 2022-2029.

To assess the Canadian Mainline tolls and IJT toll components that are included in Enbridge's Application, Brattle compared the Canadian Mainline residual toll level, equal to Enbridge's proposed IJT tolls less Lakehead local tolls per prevailing tolling methodologies, to cost-based toll levels derived from stand-alone Canadian Mainline revenue requirement and tolling calculations.

To derive the Canadian Mainline residual toll from Hardisty to the border, first, Brattle projected the Lakehead local rate from the border to Chicago. The Lakehead local toll from the border to Chicago was projected to be US$2.50/bbl in 2021. Second, Brattle subtracted the projected Lakehead local rate from the applied-for base toll to arrive at an estimate of the Canadian Mainline component of the applied-for IJT base toll. In 2021, the resulting Canadian Mainline component of the applied-for IJT is C$4.39, which compares to a cost-based Canadian Mainline toll in the range of C$2.16/bbl to C$3.00/bbl.

Incorporating the existing Lakehead local toll and using Enbridge's own unadjusted cost of service Canadian Mainline toll, an IJT toll would accordingly be US$4.69/bbl in 2021, which compares to the proposed committed base toll of US$5.70. Brattle submitted Enbridge's projection of a US$3.05/bbl Lakehead local toll in 2022 is speculative and would assume that EELP would receive all of the rate relief it has sought in its contested 2021 FERC rate applications, even though these applications have yet to be adjudicated before the FERC.

4.3.2 Return on equity projections

The parties disagreed on whether the proposed tolls would result in reasonable ROEs.

Views of Enbridge

In Concentric's view, Enbridge's risk under Mainline Contracting is most appropriately quantified by estimating the distribution of Enbridge's after-tax ROE for the Enbridge Mainline under the potential range of Mainline Contracting tolls that could result from the proposed tolling methodology, and the range of costs and risks Enbridge is expected to face over the term of this commercial framework.

Concentric submitted that although it is impossible to know what Enbridge's actual after-tax ROE would be in any single year under the proposed Mainline Contracting tolling methodology, its analysis indicates that Enbridge is assuming a significant level of risk under this commercial framework. The distribution of projected after-tax annual ROEs is commensurate with those risks, based on Concentric's high level review of recent estimates of the cost of capital for oil and gas pipelines. The appropriate measure of risk balancing between shippers and Enbridge would be the extent of outcomes where Enbridge exceeds or falls below its cost of capital, which Concentric estimated at 13.5 per cent.

Concentric submitted that it jointly developed with Enbridge a Simplified Mainline Contracting Earnings Model to estimate, at a high level, how Enbridge's projected after-tax earnings would change over the Mainline Contracting term under different realizations of the risks. The Simplified Mainline Contracting Earnings Model and the Simplified 100 per cent Uncommitted Cost of Service Model, with the exception of ROE, economic planning horizons and capitalization policy as discussed in Section 4.3.1 (Cost of service toll comparison), used the same risk assumptions regarding costs, capital expenditures, financial assumptions and taxes, and the same illustrative throughput decrements were also modelled.

Concentric projected that Enbridge's after-tax ROE for the Enbridge Mainline (Canadian Mainline & Lakehead) under the "best-case" volumetric scenario could range between approximately 2 per cent and 17 per cent over the next 20 years. Under the two lower levels of throughput presented below, the analysis shows that Enbridge's earned ROE could range from -2 per cent to 15 per cent for the Enbridge Mainline. Concentric concluded that given the spread of possible returns, there is a much higher likelihood of achieving below market returns than of achieving above market returns.

Enbridge also provided projected ROEs for the Canadian Mainline only. The possible Canadian Mainline ROEs, under the best-case 3,055 Mb/d throughput scenario, could range from -13.41 per cent to 19.13 per cent. Under the 2,250 Mb/d throughput scenario, Canadian Mainline ROE could range from -19.75 per cent to 8.67 per cent.

Enbridge submitted that it is appropriate to take into account the risks borne by Enbridge for the Enbridge Mainline, which includes both the Canadian Mainline and Lakehead systems, including the ROE on the Lakehead System, when projecting the range of potential ROEs that could be achieved by Enbridge. The proposed tolling methodology is for the entire Enbridge Mainline, and in order to evaluate the appropriateness of that proposal it is necessary to consider the earned returns and risks of the entire Enbridge Mainline.

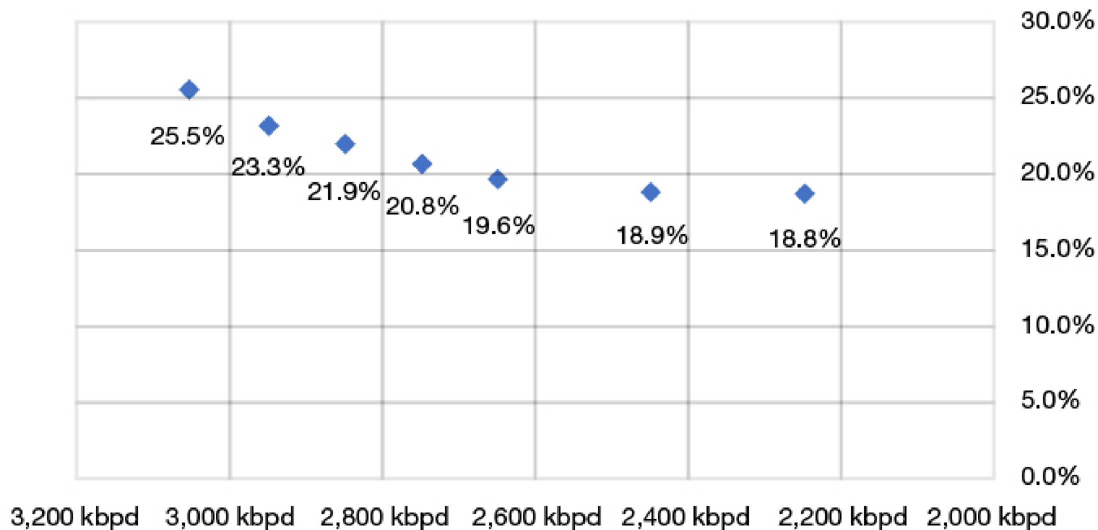
Views of other parties

Opposing parties

Drazen, on behalf of the CSG, stated that Concentric's analysis included an evaluation of the ROE that the Canadian Mainline can expect under Mainline Contracting. In this analysis, the proposed contract toll is the input, and the resulting return (revenue minus expenses) and ROE are the result. The Canadian Mainline revenue is the net revenue after payments to Lakehead are subtracted from the contract revenue. Drazen submitted that if payments to Lakehead are overstated, revenues to the Canadian Mainline are understated and the apparent ROE is lower.

Drazen submitted that Enbridge would be expected to earn an ROE of 25.5 per cent on the Canadian Mainline in 2022 with a throughput of 3,055 Mb/d. Under a throughput scenario of approximately 2,200 Mb/d, Drazen submitted that the ROE for the Canadian Mainline would be approximately 18.8 per cent. In Drazen's view, Enbridge is insulated from downside risk while retaining upside for throughput exceeding the contract volume.

Figure 4.6
Drazen Canadian Mainline ROE vs. Throughput Assuming Proposed Contracted Tolls



Drazen estimated that the Canadian Mainline ROE could range between 22 per cent and 30 per cent between 2022 and 2030, using the CSG's throughput forecast, and between 25.5 per cent to 30 per cent using that forecast without KXL in service. Those returns compared to the 11.5 per cent ROE that Drazen deemed to be reasonable in its cost of service analysis.
Dr. Makholm submitted that in Canada, the legal precedential standard emanating from the Northwest Utilities decision defines the fair return standard as "a return on other enterprises of corresponding risk".

As summarized in Section 4.3.1.2 (Lakehead System), Drazen submitted that Concentric ignored the fact that Lakehead is paid its local toll for IJT service. Instead, Concentric calculated a hypothetical, higher payment to Lakehead. This artificially decreased the residual revenue to the Canadian Mainline and, with it, the calculated ROE for the Canadian Mainline.

Drazen also submitted that Enbridge's existing tolls under the CTS regime greatly exceed cost of service and, as such, are not the appropriate basis for beginning a new incentive tolling regime. Drazen submitted that by removing the effects of including Line 3 Replacement equity in the denominator and the effects of realized hedging losses demonstrates that the tolls under the CTS were sufficient to provide an ROE of 25 per cent in the period 2017 through 2019. The value in 2019 was 31 per cent.

4.3.3 Applicability of alternative toll assessment benchmarks

Some parties suggested that the Commission should consider other benchmarks such as the tolls under the CTS, or the competitiveness of tolls in the market, to support an assessment of whether Enbridge's proposed tolls are just and reasonable. Other parties disputed the applicability of these other benchmarks.

4.3.3.1 CTS toll comparison

Views of Enbridge

Enbridge submitted that the CTS was a 10-year negotiated tolling framework for the Canadian Mainline that set tolls for transportation that are adjusted each year by 75 per cent of the GDPP Index, and that other than this adjustment factor, the CTS provided limited circumstances under which the tolls could be changed.

Enbridge estimated the Hardisty to Chicago heavy CTS Exit Toll (the CTS toll in place 30 June 2021) to be US$5.346/bbl, which compares to the applied-for tolls as follows: US$5.70/bbl base toll, US$5.11/bbl for the lowest discounted committed toll, US$5.99/bbl for uncommitted tolls, and $US5.237/bbl average Mainline Contracting toll.

Enbridge stated that the adjusted CTS Exit Tolls represent a different commercial structure, foreign exchange structure, set of service offerings, capacity expansion terms, toll design, surcharge structure, and risk/reward relationship. Enbridge believes that any comparison of these tolls to Mainline Contracting tolls, which are point estimates and do not reflect the range of uncertainty that exists under Mainline Contracting, must be done with utmost care.

In response to the CSG's submissions that the ROE on the Canadian Mainline was excessive under the CTS, Enbridge submitted that a proper assessment cannot be made by looking at the returns for the Canadian Mainline alone, since the CTS set tolls for the entire Enbridge Mainline over a 10-year timeframe. In Enbridge's view, the equity returns earned for the entire Enbridge Mainline under the CTS have not been excessive. The Enbridge Mainline adjusted lifecycle-to-date average ROE under the CTS as of 2020 is 10.82 per cent. Concentric submitted that the reported earned ROE on the Canadian Mainline for the past several years may appear to be higher than reasonably expected, but that is only because the IJT revenue allocated to Lakehead is artificially suppressed by the fact that the Lakehead rate has been allowed to deviate from the cost-based level.

Views of other parties

Supporting parties

Dr. Webb, on behalf of Cenovus, submitted that the comparison to CTS tolls should be given the greatest weight between potential toll comparison benchmarks, because it is the current agreed upon negotiated agreement in place. Dr. Webb submitted that the Mainline Contracting tolls are similar to the tolls that were being charged under the CTS and the CTS tolls were agreed to by all shippers.

Opposing parties

The CSG submitted that the tolls on the Mainline appear to have yielded what must be assessed as a high rate of return for a regulated entity during most of the term of the CTS and that they have become divorced from the cost of service and the fair return principles which should apply to regulated monopolies. Enbridge has been riding a highly profitable wave upward by applying 2011-based CTS tolls to volumes that have risen steadily higher than at the time of that settlement.

The CSG argued that Enbridge's reliance on the end of CTS tolls as being the justification for the base toll is inappropriate because the evidence regarding the current returns under the CTS demonstrates that Enbridge's returns on the Canadian Mainline, at 25 to 30 per cent, are excessive and out of step with regulated pipeline returns.

CCRL & FCL submitted that Enbridge's statement that tolls under Mainline Contracting would only increase by 13 per cent over the first ten years is inaccurate[101] and appears to exclude the initial year of Mainline Contracting which itself represents a significant increase over existing CTS tolls. CCRL & FCL submitted that it would see toll increases of up to nearly 50 per cent from its current rates[102] and that even in relation to the expected CTS Exit Tolls, it would see toll increases of up to as much as 31 per cent.

4.3.3.2 Competitiveness of tolls

Views of Enbridge

Enbridge developed Mainline Contracting with an understanding that both the NEB and CER have directed that pipelines are responsible for managing fundamental risk and avoiding stranded costs. Enbridge submitted that it would be illogical for it to offer tolls, terms and conditions under Mainline Contracting that Enbridge did not believe were competitive with available alternatives. Similarly, the shippers that engaged in negotiations and voluntarily chose to support the Application before the CER would not have done so if they thought the proposed tolls, terms and conditions were not competitive with alternatives.

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[101] CCRL & FCL submitted that Enbridge's statement and example in response to CER Information Request 4.4(d) that tolls under Mainline Contracting will only increase by 13 per cent over the first ten years is inaccurate, and Attachment 4.4(d) to that response appears to exclude the initial year of Mainline Contracting which itself represents a significant increase over existing CTS tolls.

[102] CCRL & FCL submitted that, under Mainline Contracting, it is forecasting an increase in its tolls for crude oil of up to 46 per cent.

With the applied-for tolls, Enbridge would provide the lowest cost route for both uncommitted and committed service to Chicago for heavy and light crude oil. For heavy crude oil transportation to the Gulf Coast, the Enbridge–Flanagan South route is the lowest cost route using committed tolls. Its degree of competitiveness using uncommitted tolls depends upon where Keystone elects to set its market-based toll.

Views of other parties

Supporting parties

Dr. Webb, on behalf of Cenovus, submitted that a comparison to the other tolls in the market would be appropriate since this provides evidence of the competitive level of rates. Dr. Webb submitted that the Mainline Contracting tolls are lower than the tolls charged by competing pipelines such as Keystone for delivery to the Midwest.

Opposing parties

In Suncor's view, the base toll is not a competitive toll. Therefore, none of the other tolls that are derived from the base toll are competitive tolls. The fact that the tolls proposed by Enbridge are lower than those currently offered by other pipelines in the concentrated market for ex-WCSB crude oil transportation service, in which Enbridge admits it holds a dominant position, does not make those tolls "competitive" as defined by the NEB in RH-003-2011.

Suncor argued that the mere fact that competing pipelines have to charge a significantly higher toll to recover the costs of providing service does not entitle Enbridge to raise its tolls above its own cost of service and call them "competitive" because they are less than the tolls charged by the competition. Suncor is not aware of any authority for the proposition that a competitive toll can be one that is greater than the cost of providing the service.

4.3.4 Commission analysis and findings

Pursuant to section 230 of the CER Act, all tolls must be just and reasonable. Without being able to draw reliable signals for Enbridge's tolling methodology from substantial and broad stakeholder support in this proceeding, the Commission has focused on the available cost information to assess whether Enbridge's proposed tolling methodology would result in just and reasonable tolls. Cost information was used by parties in this proceeding to derive and compare illustrative cost of service tolls to the proposed Mainline Contracting tolls. In assessing illustrative cost of service tolls, the Commission looked at all costs, such as ROE, depreciation expense and O&A costs, and examined throughput assumptions. Similar information was also used by parties to project possible ROEs earned by Enbridge under the proposed toll methodology.

In the Application, the proposed tolling methodology would largely fix committed tolls for up to 20 years, which requires many assumptions to forecast potential costs and outcomes over a long period of time. As well, Enbridge's tolling methodology would apply to the entire Enbridge Mainline, inclusive of the US Lakehead System, which involved additional complexity in assessing tolls, revenue and costs in respect of the Canadian Mainline, the only facilities under the CER's jurisdiction.

In the context of assessing a long-term tolling methodology, the Commission does not have significant concerns with examining the probabilistic distribution of expected returns and cost of

service tolls, despite the limitation of this analysis over a 20-year period. The Commission's concerns arise primarily as a result of Enbridge's proposed tolling methodology applying to the entire Enbridge Mainline, inclusive of the US Lakehead System, without establishing or adjusting tolls with any meaningful connection to any local tolls – Canadian or US. Using either Lakehead System's projected costs or local tolls has a significant impact on the cost of service toll comparison and projected ROEs. Overall, revenue and cost considerations related to the Lakehead System and their implications for the Canadian Mainline, as explained below, raise concerns for the Commission as to whether the proposed tolls would produce reasonable returns and not unreasonably exceed cost of service tolls on a sustained basis on the Canadian Mainline. While other cost assumptions were also examined by the Commission, its most significant concerns in the Application relate largely to issues arising from Lakehead System assumptions.

As a preliminary matter, the Commission notes that it rejected certain toll benchmarks in its assessment, including:

- A comparison benchmark between Enbridge's proposed tolls to the tolls under the CTS - the CTS tolls were negotiated tolls agreed to by parties more than ten years ago and putting weight on a comparison to the CTS tolls would effectively mean that what parties agreed to in the CTS would extend beyond expiry of the CTS. In addition, the terms of the CTS specifically state that the rate design and rates in the CTS are without prejudice to any positions that parties may take after the expiration of the CTS.
- A comparison benchmark between Enbridge's proposed tolls and the tolls on competing pipelines - the Commission is not of the view that Enbridge should be able to charge a toll at any rate up to that charged by competing pipelines, whether adjusted for quality and other characteristics, or otherwise. It would not be reasonable for Enbridge to charge tolls that significantly exceed its cost of service, even if those tolls were competitive with other pipelines.

Regarding the various cost models provided in this proceeding, the Commission is of the view that a comparison of Enbridge's proposed tolls to illustrative cost of service tolls under the same 90 per cent contracted service structure, as well as projected ROEs under the proposed methodology, are key to assessing whether Enbridge's proposed tolling methodology would yield just and reasonable tolls. This analysis can provide an objective, fair and transparent way of testing the degree to which the tolling methodology would yield a balanced outcome for Enbridge and shippers as well as other impacted parties.

The Commission is not persuaded that comparing the proposed Mainline Contracting tolls to cost of service tolls under a different commercial model of 100 per cent uncommitted volumes, in which Enbridge made significantly different assumptions relating to the economic planning horizon (and resulting depreciation rates) and capitalization policy, is helpful as a comparator. Further, the Commission is not persuaded that Enbridge's economic planning horizon (and resulting depreciation rates) and capitalization policy assumptions are warranted within its 100 per cent uncommitted service structure cost of service model. Enbridge's risks have been examined in detail in this proceeding and discussed in Section 3.4.1 (Enbridge's risk exposure). While Enbridge faces some volume risk as it relates to competitor pipelines and decarbonization, the evidence, at this time, does not substantiate material throughput declines that would support an economic planning horizon of 20 years for capital recovery purposes or necessitate a major shift to expensing capital maintenance and integrity expenditures.

Regarding the cost information provided in this proceeding, the Concentric and Dr. Webb analyses, on behalf of Enbridge and Cenovus, respectively, projected possible outcomes of costs on the Lakehead System that would be significantly higher than the revenue generated under existing FERC-authorized Lakehead local tolls. Drazen, on behalf of the CSG, estimated the difference to be US$637 million in 2022.[103] Brattle, on behalf of Suncor, indicated that Enbridge's projected illustrative Lakehead cost of service tolls would be between 22-24 per cent greater than projected Lakehead local tolls in the years 2022 to 2029. Enbridge responded that Lakehead local tolls are not relevant to a cost of service assessment, as those tolls are not reflective of current costs.

In the Commission's view, Lakehead local tolls are an essential factor to consider in assessing the IJT toll levels. The Commission finds the Brattle and Drazen analyses to be persuasive because they illustrated that, even accepting Enbridge's own Canadian Mainline cost assumptions, adding a cost-based Canadian Mainline toll to the existing Lakehead local toll would result in an IJT toll meaningfully lower than the proposed base toll or weighted average contracting toll. While the revenue generated under FERC Lakehead local tolls may differ from the costs potentially recoverable through a cost of service proceeding, these are not appropriate matters for the Commission to assess. The Commission declines to presume that Lakehead local tolls are significantly different (namely, lower) than cost of service tolls given that the Lakehead System is not regulated by the Commission. Further, the Concentric projections of possible ROEs assume costs significantly higher than revenue recoverable under Lakehead local tolls. While Enbridge has applied to the FERC for higher Lakehead local tolls that better align with the Concentric projections of costs, those tolls are subject to protests and intervention, and the FERC had not ruled on the matters by the close of the RH-001-2020 hearing record.

Given the current Lakehead local toll levels, Enbridge's existing approach for allocating IJT revenue between both parts of the Enbridge Mainline, whereby revenue generated by IJT tolls greater than generated by Lakehead local tolls would be allocated to the Canadian Mainline, raises concerns for the Commission that returns on the Canadian Mainline could be consistently above reasonable levels.[104] The Commission acknowledges Enbridge's view that the entire Enbridge Mainline returns should be considered, rather than as it relates to notional local tolls. However, the Commission's responsibility is to ensure that Canadian Mainline tolls, and returns on the Canadian Mainline, will be just and reasonable. The Commission is of the view that Enbridge's full path approach, and the resulting opacity related to facilities under the CER's jurisdiction, are problematic in the context of this highly contested Application.

The Commission took a cautious approach to considering the fixing of tolls over a 20-year period, especially given the opposition to the proposal and the lack of inclusion of variable toll components, periodic toll rebases or other such mechanisms. Concentric modelled the long-term uncertainty of costs in a probabilistic analysis of cost of service tolls and return outcomes, under several throughput scenarios. The probabilistic analysis is helpful in assessing the proposed methodology compared to a single-year analysis, but that analysis has limitations over a 20-year period, given the significant uncertainty over such a lengthy period.

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[103] Drazen estimated that the cost-based toll would be reduced by US$0.91/bbl by reflecting the actual Lakehead local toll rather than Concentric's calculated cost of service in 2022.

[104] Enbridge's view was, given the Enbridge Mainline's risk profile, a reasonable ROE would be 13.5 per cent for the entire system.

To a significant extent, the combination of the proposed IJT methodology, the uncertainty and disparity involving Lakehead local tolls and costs, and the long-term 20-year fixed toll approach obscure whether the proposed methodology would, considering costs, produce just and reasonable Canadian Mainline tolls. Nonetheless, the Commission is persuaded that the available evidence indicates that the proposed tolls could produce unreasonable returns and unreasonably exceed cost of service tolls on a sustained basis on the Canadian Mainline.

At this time, the Commission is not requiring Enbridge to submit a cost of service application subsequent to this decision. The Commission acknowledges that such an application is likely burdensome and that cost of service tolling may not be optimal for parties, including as it relates to driving innovation, allocating and sharing risks, and incenting cost reductions. The Commission is providing parties the opportunity to negotiate tolls subsequent to, and in the context of, the Commission's decision on Mainline Contracting. While certain parties requested a rebasing of Canadian Mainline tolls to costs, the Commission notes that such a rebasing can be appropriately pursued as part of negotiations and not solely through a rate case quality cost of service application. In the Commission's view, Enbridge, its shippers and its stakeholders are best positioned to develop solutions on Canadian Mainline tolling moving forward. Should negotiations not be successful, cost of service tolling is a methodology available to Enbridge, and a potential recourse for stakeholders seeking relief from the Commission.

4.4 International Joint Tariff methodology

An IJT provides one toll that is charged for transportation across international pipelines. IJTs are not unique to the Enbridge Mainline and may be calculated in a variety of ways, such as by adding two approved tolls together and charging them in a single currency. Such an approach may be helpful to streamline tolling on an international pipeline. As noted in Section 2.2.2 (Overview of the Enbridge Mainline), the Enbridge Mainline consists of the CER-regulated Canadian Mainline and the FERC-regulated Lakehead System. The local tolls on each portion are approved by the respective regulator, but shippers are generally interested in the total toll they will pay rather than two portions of tolls.

Certain intervenors questioned the appropriateness of Enbridge's proposed IJT methodology and the Commission's jurisdiction to approve such an IJT methodology.

Views of Enbridge

Enbridge requested Commission approval for a tolling methodology that would establish IJT tolls for the Enbridge Mainline, and Canada Local Tariff (**CLT**) tolls. The FERC maintains a policy that IJT tolls cannot, absent special permission from the FERC, exceed the sum of the local intermediate tolls for the same movement. This was also referred to in the proceeding as the FERC sum-of-the-parts test. To ensure that the uncommitted IJT is maintained in accordance with requirements of the FERC, Enbridge would adjust the uncommitted CLT tolls from receipt points in Canada to the international border, near Gretna, Manitoba in the future in the event that the sum of the uncommitted CLT and Lakehead local rates is not greater than or equal to the uncommitted IJT tolls in effect in any given year. Enbridge submitted that it characterizes the tolls that would result from these adjustments as being notional tolls because no service is provided to the border, no shipper pays this toll, and it is used solely for administrative purposes.

FERC Lakehead local tolls would have no impact on the IJT tolls, as the total amount billed for cross-border service would be established by the proposed IJT tolls. Rather, FERC's determinations on Lakehead local tolls would establish the portion of the IJT toll attributable to the Lakehead System, with the balance attributable to the Canadian system.

Enbridge argued that the Commission is only being asked to approve the basis on which the tolls on the Canadian Mainline would be established, which would be consistent with the IJT tolls and would include the notional toll to the border that is necessary to administer the IJT tolls. Establishing tolls that are subject to the CER's jurisdiction but based on the entirety of the Enbridge Mainline is the same approach used in the CTS and the Line 3 Replacement surcharge. Enbridge argued that it has requested approval of the tolling methodology in the TSAs, which are contracts between Enbridge Pipelines Inc. (the owner of the Canadian Mainline) and shippers on the Canadian Mainline for service on the Canadian Mainline itself. Enbridge further argued that approval of its proposed IJT structure does not cause the CER to usurp any jurisdiction that is rightfully held by the FERC.

In Enbridge's view, the Mainline Contracting tolling methodology does not create any opportunity for cross-subsidization from one side of the international border to the other, because the total amount billed to shippers for service would be independent of the separate local tolls on the Lakehead System and the Canadian Mainline. The total amount billed for cross-border service would be established by the IJT, and the use of distance-adjusted tolls derived from the IJT ensures that there would be no cross-subsidization for service based on geography or jurisdiction.

The revenue allocation process under the IJT agreements, which currently allocates the difference of revenue between the IJT toll and the Lakehead local toll to the Canadian Mainline, has been in use for as long as the Enbridge Mainline IJTs have been in place. The result of this structure is that reported returns on the Canadian Mainline may fluctuate depending on the level of Lakehead's approved rates, despite the Lakehead rate having no bearing on the amount actually charged for full path cross-border service.

Views of other parties

Opposing parties

Suncor and the CSG submitted that the proposed IJT methodology is not appropriate, and that the Commission does not have the jurisdiction to approve the proposed IJT methodology.

Suncor submitted that the Commission should limit its approval to tolls for the Canadian Mainline in Canadian dollars, or, if an IJT is offered, that the IJT toll should be constrained to be less than, or equal to, the sum of the Canadian and US Lakehead jurisdictional tolls and adjusted periodically to account for any significant changes in foreign exchange rates that may affect the sum. Suncor and Brattle's submissions included:

- Enbridge's IJT tolls are constrained by FERC regulations to be no higher than the sum of the local tolls for the Canadian Mainline (upstream-to-border) and Lakehead (downstream-from-border), expressed mathematically as:

  IJT Toll ≤ Canadian Local Toll + Lakehead Local Toll

- Given this "sum of the parts" constraint imposed on IJT tolls by FERC's regulations, the maximum allowable level of an IJT toll should be determined as the sum of:

1. the just and reasonable level for the CLT to the border as determined by the CER; and
2. the level of the Lakehead local toll from the border as determined according to FERC-approved tolling methodologies for the Lakehead system.

- Enbridge achieves nominal compliance with the FERC sum-of-the-parts requirement without having to actually justify the level of its IJT toll in relation to any CER and FERC-approved local toll components.
- The proposed IJT tolls would evolve independently of any changes in the regulator-approved just and reasonable tolls for the separate Canadian Mainline and Lakehead components.
- Suncor has concerns with the CER approving an IJT toll that would alter the manner and degree of cost recovery of Lakehead system costs based on to how cost recovery is determined by FERC for that system.
- The Commission does not have the jurisdiction to approve full path tolls from Hardisty, Alberta to Chicago, Illinois and other destinations in the US. Enbridge asks the Commission to look at the full path cost of service in order to make a judgement on the tolling methodology. However, approval of full path tolls necessarily requires the Commission to make a judgement on the justness and reasonableness, not just of the toll from Hardisty to the Canada/US border, but of the toll on Lakehead in the US from the border to Chicago and other destinations.
- The CER does not have jurisdiction to approve tolls on the Lakehead System, nor does it have the jurisdiction to approve any tolling methodology that produces tolls on Lakehead.

The CSG’s submissions included:

- The current IJT is an administrative tool developed for the CTS as a result of an agreement between a broad base of affected parties, which is not the case in the current Application. An IJT should not be imposed at the expense of ensuring tolls on the Canadian Mainline are just and reasonable. The use of Enbridge’s proposed residual methodology may have been accepted under the CTS, but the CTS was very different in that it was a cost-based, broadly supported, uncontested Negotiated Settlement which the NEB approved.
- The proposed tolling framework is based on a benchmark IJT toll under a single US currency and sets the Canadian Mainline revenue as the difference between the IJT revenue and the costs to operate the Lakehead system. Enbridge depends on this ‘residual’ approach to set a CLT at the International Border to meet the FERC ‘sum of the parts’ test. Enbridge’s requested tolling methodology is inconsistent with this FERC requirement. Using the ‘residual’ approach creates an inter-dependence in which the Canadian Mainline revenue fluctuates based on US law, foreign exchange and business conditions in the US as they impact the FERC-approved Lakehead local tolls.
- The proposed residual methodology for allocating toll revenue to the Canadian Mainline would mean that the Canadian Mainline toll would effectively be determined by US law, precedent and business considerations, leaving the Commission unable to satisfy its statutory duty to set just and reasonable tolls.

- The proposed IJT methodology also gives rise to variable, ad hoc tolls provisional upon any variation in the Lakehead toll as may be established by the FERC from time to time. Enbridge acknowledges that the rationale for the 'sum of the parts' test is predicated in the FERC presumption that each of the component tolls is just and reasonable in its own right, hence the sum of the two, or anything less than that sum, is acceptable. This points directly to the CER's ability to assess the Canadian Mainline tolls on a stand-alone basis; however, Enbridge insists that the CER should not assess the Canadian Mainline tolls independently from the IJT, and has only provided costs for the full flow system.

4.4.1 Commission analysis and findings

The Commission has the discretion and jurisdiction to approve IJT methodologies that take a variety of forms, in order to achieve single tolls that cover shipments that cross borders. However, the Commission always retains responsibility for oversight of the Canadian toll component to which the Commission's mandate applies under the CER Act and does not assert authority over facilities in other jurisdictions.

In this instance, to achieve fixed long-term IJT tolls while accounting for potentially changing Lakehead local tolls and the FERC 'sum of the parts' test, Enbridge proposed automatic adjustments to the CLT to-the-border tolls. Accordingly, the Canadian Mainline tolls that would be established would give effect to the full-path international tolls (e.g., from Hardisty to Chicago), inclusive of transportation on the US Lakehead System. That is, future changes to Lakehead's FERC-approved local tolls would have no impact on the proposed international tolls because automatic changes to the CLT would make this so.[105] Notably, Enbridge did not set the initial IJT tolls with any relation to the Lakehead local tolls as determined by the FERC. As a result of all the foregoing, the Commission is concerned that Enbridge would be charging IJT tolls that are not established with a meaningful connection to any component local tolls.

The Commission finds that as a result of these design features, the proposed IJT tolling methodology obfuscates the toll and revenue applicable to the Canadian Mainline, creating challenges for the Commission in assessing whether the Canadian toll would be just and reasonable based upon an assessment of cost of service toll comparisons and projected returns, as discussed in Section 4.3 (Cost of service toll comparison and projected returns).

4.5 Toll design

The parties disputed several aspects of the proposed toll design, the base toll design as well as the toll premiums, discounts, surcharges, and adjustments.

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[105] While Enbridge indicated that only uncommitted CLT to-the-border tolls would be adjusted in this manner, future changes to Lakehead local tolls would similarly have no impact on the committed international tolls.

4.5.1 Base toll design

The Hardisty to Chicago heavy crude oil committed base toll proposed by Enbridge is US$5.70/bbl. Enbridge calculated a corresponding committed base toll for all other receipt and delivery point pairings on the Enbridge Mainline.[106] These tolls were calculated on a system-wide distance basis and adjusted based on commodity type. Committed tolls include receipt and delivery terminalling, the Line 3 Replacement surcharge and the Line 5 surcharge, but do not include charges for receipt or delivery tankage, abandonment surcharges, or future toll adjustments.

The committed base toll is the basis for calculating the other base tolls.[107] In order to calculate the base tolls for each of the other receipt, delivery and commodity combinations, Enbridge divided the base toll into three components (Terminalling component, Line 3 Replacement Transmission components, and Non-Line 3 Replacement Transmission component), each of which was subject to a different adjustment mechanism.[108] After each component had been adjusted to reflect the applicable receipt, delivery and commodity combination, the adjusted components were re-bundled to create the base toll for that receipt, delivery and commodity combination.

Views of Enbridge

The proposed tolls are distance sensitive and are differentiated by product type, which are cost-based/user pay tolling concepts. For instance, if a heavy barrel is shipped, the shipper uses more capacity and power than if a light barrel is shipped, and as a result the heavy shipper pays a surcharge included within the tolls. Another example of cost causation is if a shipper uses more of the system (i.e., a longer haul) it pays more for transmission.

Different tolling pathways are experiencing different levels of toll increases/decreases because this is a feature of constructing the Mainline Contracting tolls with a distance-based principle. Certain surcharges[109] that applied during the term of the CTS had a postage stamp methodology. Determining the Mainline Contracting tolls under a distanced-based principle moved away from the postage stamp method.

In addition to the impacts related to moving from postage-stamp to distance-based treatment of certain surcharges, the reason that certain short-haul tolls see an increase relative to the adjusted CTS Exit Tolls is a function of the nuance embedded within the CLT tolls under the CTS. When the CTS started in July 2011, those Canadian tolls were set in Canadian dollars versus the US dollar IJT toll. At that time, there was parity between the Canadian dollar and the

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[106] The committed tolls do not include surcharges pertaining to costs related to the abandonment and decommissioning of all or a part of the Enbridge Mainline. The Land Matters Consultation Initiative abandonment surcharge methodology has been and will continue to be determined by the CER under separate processes. Enbridge has no current plans to apply to the CER for a change to this abandonment surcharge methodology.

[107] Other than the Edmonton to Hardisty base tolls, which were calculated using an Edmonton to Hardisty base toll for Heavy crude oil of US$0.6975/bbl.

[108] The Line 3 Replacement Transmission components were adjusted to reflect the distance between the applicable receipt and delivery point; The Non-Line 3 Replacement Transmission component was adjusted to reflect distance between the applicable receipt and delivery point, and the commodity shipped; The applicable terminalling sub-components were re-bundled with the Non-Line 3 Replacement and Line 3 Replacement Transmission components that resulted from the adjustments.

[109] Such as the Edmonton to Hardisty surcharge.

US dollar. Since that time, the Canadian dollar has depreciated; CLT tolls that were charged under the CTS have decreased over time when thinking about them in US dollar terms.

Short haul shippers would not be subsidizing medium or long-haul shippers under mainline contracting, because the Mainline Contracting tolls correct for the fact that under the CTS, CLT shippers have been subsidized by other hauls. Under the CTS, IJT shippers have been paying their fair rate, and a quirk of the CTS has meant that the CLT shippers have not been keeping pace and paying their fair share. To the extent that CLT shippers were benefitting from this foreign exchange relationship under the CTS, restoring the distance relationship between the CLT and IJT by setting the CLT tolls in US dollars impacts short haul shippers proportionately more than medium-haul and long-haul shippers.

Views of other parties

Opposing parties

CCRL & FCL raised issues with Enbridge's proposed tolling methodology, and expressed its views that:

- Enbridge's methodology to calculate base tolls is inappropriate. It has been decades since the Mainline tolls were rebased, and the tolls ought to be determined on a cost of service basis.
- Under the proposed tolls, short haul shippers would experience the most significant toll increases and would be subsidizing medium-haul and long-haul shippers given the relative toll increases between these hauls.[110] Under Mainline Contracting, CCRL & FCL is forecasting an increase in its tolls for crude oil of up to 46 per cent. CCRL & FCL forecasts the next highest increase for different receipt points at up to 24 per cent with some increases as low as 11 per cent.
- The proposed tolls are unjust because these short-haul shippers would experience the most significant toll increases and would be subsidizing medium-haul and long-haul shippers. CCRL & FCL also agrees with the written evidence of the CSG Group, which explains other ways that the tolls are unjustly discriminatory.

4.5.2 Toll premiums, discounts, surcharges, denomination, and adjustments

Uncommitted tolls would be determined based on a premium of US$0.29/bbl to the committed base toll of US$5.70/bbl, for an uncommitted base toll of $US5.99/bbl. This represents a premium of about 5 per cent. The premium for all other receipt/delivery point pairings would be determined by adjusting the US$0.29/bbl premium to reflect distance and commodity type. The Flex Service Term committed toll would be set at a US$0.40/bbl premium to the committed base toll and a US$0.11/bbl premium to the uncommitted base toll.

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[110] In its written evidence, CCRL & FCL provided a toll comparison between existing tolls contained in the Enbridge tariffs active at that time with Enbridge's proposed Mainline Contracting tolls, without incorporating any potential discounts. CCRL & FCL provided a comparison between the CTS Exit Tolls and Enbridge's proposed Mainline Contracting tolls in response to a Commission information request, and CCRL & FCL concluded that this comparison lead to similar conclusions as did the comparison it provided in its evidence.

Both committed and uncommitted tolls would be escalated annually by 65 per cent of the GDPP Index, starting 1 July 2022. During negotiations, discounts to the committed base toll were negotiated. Discounts to the committed base toll were included to incent long-term and high-volume contracts. Taken together, the committed toll discounts can decrease the base toll of US$5.70/bbl to US$5.11/bbl, a US$0.59/bbl, or 10.4 per cent discount.

Views of Enbridge

The committed service, Flex Service Term committed service, and uncommitted service in Mainline Contracting are each different from one another, having distinct attributes that were developed through negotiations with prospective shippers. Enbridge designed the services and tolls in conjunction with its shippers and in consideration of the prohibition of unjust discrimination set forth in the CER Act. Differences in the applicability of the Line 5 Surcharge, the costs of future Enbridge Mainline expansions, the most favoured nation toll adjustments, the minimum toll differential and the toll discounts reflect the inherent differences in the attributes applicable to each of these services. Because these service offerings are distinctly different, shippers electing one service versus another would not be similarly situated. On the basis of their different attributes, these service offerings warrant differentiated tolls throughout the term of Mainline Contracting, which is entirely consistent with the tolling principle of no unjust discrimination.

The differences in the applicability of the surcharges, adjustments, discounts or differentials between the services largely reflect that shippers seeking committed service are making a long-term commitment to the Enbridge Mainline and are seeking toll stability, while shippers electing the Flex Service Term and uncommitted service are making a relatively shorter and less certain commitment (Flex Service Term) or no long-term commitment whatsoever (uncommitted service) and are therefore subject to the tolls being adjusted based on costs that Enbridge would incur over this timeframe, such as costs for the Line 5 Tunnel and future Enbridge Mainline expansions, from which these shippers would benefit. The proposed service attributes and associated tolling for each of the services were developed to balance the relationship between the services and the flexibility those services provide relative to one another regarding their specific commitment to the system, but also to incent longer-term contractual commitments – which are beneficial for all of the system's shippers regardless of service type, the WCSB, and Enbridge.

Toll premiums

Enbridge provided the comparison of committed, uncommitted, and Flex Service Term attributes shown in Table 4.2 below, which includes rationale for Flex Service Term tolls being set highest, followed by uncommitted tolls then committed tolls:

Table 4.2 – Toll service offering attributes comparison

	Firm Service	Minimum Contract Term	Toll Discounts[111]	Enbridge's objective	Shipper receives	Comments	Toll is set as:
Committed	Yes	96 months	Yes	Contract 90 per cent of capacity for a minimum term of 96 months	Committed firm service, discounted toll ceiling for term, and volumetric renewal rights	Provides firm service to shipper and greatest revenue certainty to Enbridge	Lowest
Uncommitted	No	One month	N/A	Uncommitted Service for shippers that choose not to contract	Uncommitted receives maximum flexibility to ship month-to-month and piggybacks on the toll stability afforded by base-loading of volumes	Does not receive firm service and provides lowest revenue certainty to Enbridge	2nd Highest
Flex Service Term	Yes	36 months	No	To meet a "niche" and premium need of some shippers however does not meet Enbridge's objectives for longer-term revenue certainty	Flex Service Term receives a toll ceiling, subject to surcharges, for the term as well as premium service. Pays a fee for embedded optionality (i.e., termination rights on 36 month's notice).	Receives firm service like committed shippers and provides some revenue certainty (three years) to Enbridge	Highest

According to Enbridge, the uncommitted toll premium relative to the committed tolls is not unjustly discriminatory because these are distinct services with materially different attributes. In addition, the uncommitted toll premium proposed in Mainline Contracting, whereby uncommitted base tolls would have an approximate 5 per cent premium above committed base tolls, is fully consistent with the tolling premium between committed and uncommitted service tolls on other pipelines that have been approved by the Commission. The premiums reflected in Mainline Contracting are consistent with, or less than, the uncommitted service toll premiums that the NEB has previously approved in a number of proceedings, including for TransCanada Keystone and the Enbridge Bakken Pipeline.

The Flex Service Term committed toll premium to both the uncommitted service and committed service tolls is not unjustly discriminatory. The Flex Service Term committed toll premium is a negotiated level that reflects a combination of the fact that the Flex Service Term provides priority access to capacity without the same degree of long-term commitment as committed service, and the importance of incenting longer-term commitments to the system that provide more value in terms of toll certainty and stability for the benefit of the system's shippers and Enbridge. Enbridge is unaware of any other Canadian pipelines that provide a service similar to

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111 For volume/term and open season results.

the Flex Service Term committed service, so there is no similar precedent established for the premium for such a service.

Toll discounts[112]

Ultimately, during the negotiations with shippers the level of the base toll was not changed. Instead, Enbridge agreed to accommodate shipper positions related to negotiated discounts off the base toll that serve a subset of shipper interests or that serve the interests of all contract shippers, and other terms and conditions that enhance the value of and reduce the risks of the service to them.

The purpose of these discounts is to incent long-term and high-volume transportation movements on the Enbridge Mainline. Committed shippers that execute higher volume and/or longer-term contracts take on a greater level of commitment than those that do not and are therefore justified in receiving greater discounts. Flex Service Term commitments are subject to higher committed tolls and restrictions on the application of toll discounts and the most favoured nation toll provisions to reflect the revenue risk to Enbridge of shorter-term contracts.

Future capacity expansion surcharges[113]

As a result of the bilateral negotiations, Enbridge agreed that the committed toll would not be increased to recover the costs of future Mainline expansions, but it did not make this same concession in respect of the uncommitted or Flex Service Term tolls. This recognizes the different commitments that shippers make to the Mainline. Uncommitted shippers have no obligation to use the Mainline or make any payments beyond the current month charges for

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[112] The following summarizes the available toll discounts.

High volume Discount ($0.10 US$/bbl). Available to committed shippers that submit a bid in the open season for 300 Mb/d or more, for as long as the shipper's aggregate committed volumes remains above 300 Mb/d (excluding Flex Service Term commitments and contracts for Edmonton to Hardisty service)

Edmonton to Hardisty High Volume Discount ($0.2475 US$/bbl). Available to committed shippers that submit a bid in the open season for Edmonton to Hardisty service for 50 Mb/d or more.

Length of Term Discounts ($0.05 US$/bbl for Service Terms of 156-203 months (13-16 years); $0.10 US$/bbl for service terms of 204-240 months (17-20 years)). Available to committed shippers that sign TSAs with Service Terms meeting or exceeding 156 months (13 years) (Excluding Flex Service Term Commitments)

Cumulative Volume / Term Contracted Discount ($0.04 US$/bbl on all committed volumes). Available to committed shippers that receive an open season score (the calculation of which excludes any Edmonton to Hardisty and Flex Service Term commitments) that is greater than or equal to 6000 (score = Service Term in years x requested Committed Volume in Mb/d) (e.g., a TSA for 240 months (20 years) at 300 Mb/d = 20 x 300 = 6000)

Total Volume Contracted Discount ($0.01 US$/bbl on all committed volumes (except those contracted for a Flex Service Term) for every 50 Mb/d above 2.45 million bpd that are contracted as of the commencement date, to a maximum of $0.05/bbl (at 2.7 million bpd)). Based on aggregate committed volumes contracted by Enbridge as of the commencement date to the medium- and long-haul segments (excluding post-2022 ramp-up and Flex Service Term contracts).

Total Volume Delivered Discount ($0.05 US$/bbl). Available on all committed volumes (except those contracted for a Flex Service Term) for each incremental 50,000 bbls delivered that exceeds the greater of either 2.75 million bpd or 50 Mb/d above the total amount contracted to delivery points downstream of the Canadian border, to a maximum of $0.30/bbl.

[113] The uncommitted tolls and Flex Service Term committed tolls would be subject to recovery of any future Enbridge Mainline expansions. Committed tolls would not be subject to these costs. Enbridge will apply to the CER for approval to include the proportionate share for uncommitted shippers of these costs in the uncommitted tolls when the details of those projects and costs are known.

service nominated by the shipper. Flex Service Term shippers receive firm service yet may terminate their commitment on 36 months' notice.

Flex Service Term tolls are subject to the same future increases and surcharges as the uncommitted tolls because, although Flex Service Term shippers have firm service, they also have termination rights that allow for a term as short as 36 months and so are not making a long-term commitment to the Enbridge Mainline.

Line 5 Surcharge[114]

One of the key features that shippers sought in a Mainline Contracting structure was having predictable and stable tolls for the duration of the commitments to the Mainline. To secure such commitments, Enbridge agreed to bear the risk of Line 5 tunnel costs being greater than expected and agreed to maintain the negotiated tolling methodology for commitments made as part of the Mainline Contracting open season (as opposed to uncommitted shippers who would pay tolls that include the actual cost of the Line 5 tunnel). Shippers entering into contracts for priority service would be obligated to pay these tolls for the duration of the contractual commitments. Conversely, since shippers that prefer uncommitted service have no obligation to use the Mainline, or to make any payments beyond the current month charges for service nominated by the shipper, Enbridge was not willing to accept the same risks that it was to secure the very important financial assurances that accompanied priority service commitments.

Toll Currency Denomination

Enbridge's proposal sets the CLT and IJT tolls fully denominated in US dollars. Enbridge submitted that after having observed disparity between the CLT in Canadian dollars and the IJT in US dollars during the term of the CTS, it determined that the CLT under Mainline Contracting must be in the same currency as the IJT (i.e., US dollars), in order to maintain the distance relationship between tolls such that foreign exchange fluctuations over a potential 20-year timeframe do not change this relationship.

Due to the integrated nature of the Enbridge Mainline, both CLT and IJT tolls are calculated on a system-wide basis, which includes both Canadian dollar denominated costs and US dollar denominated costs. As such, Enbridge bears foreign exchange risk because of the potential for changes in US dollar denominated revenues diverging from changes in Canadian dollar denominated costs and financial results.

Views of other parties

Opposing parties

Uncommitted toll premium

Certain opposing intervenors submitted that an uncommitted toll premium is not appropriate in the current and likely future market circumstances where there is a shortage of pipeline capacity out of the WCSB, and that there is no need for a toll premium on uncommitted service to

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[114] The uncommitted tolls and Flex Service Term committed tolls would be subject to the Line 5 Surcharge. Committed tolls would not be subject to the Line 5 Surcharge. Enbridge will apply to the CER for approval to include the proportionate share for uncommitted shippers of these costs in the uncommitted tolls when the details of those projects and costs are known.

incentivize shippers to contract for committed service. Views submitted by opposing intervenors included:

- CCRL & FCL submitted that during negotiations, there was an uncommitted toll negotiating committee who voted down Enbridge's proposed package. Suncor submitted that contrary to the progress of a typical negotiation, the uncommitted toll was increased from US$5.80/bbl to US$5.99/bbl.
- The CSG submitted that when Enbridge was unable to reach an agreement with interested parties on spot tolls, it chose to apply a premium of US$0.30/bbl to the benchmark toll. Uncommitted shippers would also bear the risk associated with their proportionate share of Line 5 charges and any expansion costs, along with other regulatory change surcharges. However, uncommitted shippers are not eligible for toll discounts, so despite their throughput being included in the calculation of the most generous Total Volume Delivered Discount – i.e., the (up to) US$0.30/bbl Total Volume Delivered Discount – they would see no reduction in their tolls. This toll impact would be imposed even though the level of service afforded to uncommitted shippers would decrease dramatically as apportionment is exacerbated in the initial years of the proposed contracting regime.
- The CSG submitted that under Enbridge's proposal, common carriage would be re-allocated into two distinct classes: contract shippers and uncommitted shippers. Uncommitted shippers would pay on average US$0.77/bbl more than contract shippers, US$1.85/bbl more than a cost-based toll, and US$0.47/bbl more than they would have paid under a continuation of the CTS toll, all despite reduced service levels. Meanwhile Enbridge would enjoy returns greatly exceeding regulated pipeline norms, with little throughput risk and no increase in throughput risk compared to a cost of service model. In these circumstances, the risks and benefits of Mainline service are not fairly distributed between the pipeline owner and its interested parties. Given the Mainline's status as a natural monopoly, assigning a premium to uncommitted service within a constrained market in this manner is not just and reasonable, and is unjustly discriminatory.
- Suncor submitted that a toll premium on uncommitted service would only provide such an incentive in market circumstances where the certainty of obtaining uncommitted capacity was equal to the certainty of capacity provided by a long-term committed contract. This might occur in a circumstance where there was excess and potentially "stranded" capacity on the Mainline, however, that is not the case with respect to the Enbridge Mainline now or in the foreseeable future.

Flex Service Term committed toll premium

The CSG expressed concerns about the availability of the Flex Service Term option, and submitted that even if the Flex Service Term were available, it would be subject to a toll premium of US $0.40/bbl.

Toll discounts

Certain opposing intervenors expressed concerns that toll discounts for committed tolls were not warranted and that the structure of the overall package, including the toll discounts, provided benefits to a small subset of shippers who would be able to access those discounts. Specifically:

- The proposed tolling methodology rewards large shippers and penalizes small shippers who tend to be the most reliant upon spot service. The minimum volume commitment to benefit from the long-haul high volume discount (US$0.05/bbl) is set at 300 Mb/d, which is unattainable for most producers.
- The toll structure favours large shippers over small shippers and parties who own significant downstream assets over producers. Mainline Contracting may benefit a select number of primarily US-based shippers, as demonstrated by the fact that only four shippers are likely to receive full discounts under Mainline Contracting.
- Certain discounts reward significant term, as well as cumulative volume and term commitments, favouring facilities that can dedicate the bulk of their capacity over a long duration to transportation on the Mainline system. These discounts align with the interests of fixed location refiners over those of producers who seek diverse markets and flexible transportation options.
- The tolling methodology raises questions about whether discounts are appropriate at all on the Mainline. There is no capital outlay, no significant throughput risk and no increased regulatory risk facing Enbridge, and the capacity of the system is known, so no long-term commitment or discount is necessary to overcome those issues. Enbridge's discounts therefore serve mainly to differentiate the contract holders from the uncommitted shippers and ensure a long-term profitable margin for contracted shippers in the secondary market.
- Given significant uncertainty as to whether downside risk may manifest for the Mainline in the long-term future, a shorter initial term of five years would be preferable as compared to Enbridge's proposal to offer discounts to lock shippers into much longer-term commitments.

Future capacity expansion surcharges

Suncor expressed concerns regarding future capacity expansion surcharges:

- Enbridge has provided insufficient information about how costs of future Mainline expansions would be allocated to uncommitted tolls, and shippers would have little scope to negotiate any surcharge.
- Suncor would expect that a set of tolling principles could be readily established for expansion projects without knowing the specific details and costs of an individual project, consistent with the principles established by the CER/NEB in other cases. While it may not be possible to account for all extenuating circumstances, this is not a sufficient reason not to establish tolling principles, particularly given the market power held by Enbridge. The better alternative is, at a minimum, to have a reasonably well-defined methodology and set of principles. Should a situation arise that warrants a change, Enbridge could seek the appropriate alternative relief at the time.

Line 5 surcharge

Suncor expressed concerns regarding the Line 5 Surcharge:

- The approach presented by Enbridge would effectively result in uncommitted shippers paying twice for the forecast Line 5 tunnel project. This is not a fair or appropriate result. Suncor understands a capital cost of US$500 million for the Line 5 tunnel is implicitly included in the proposed committed tolls. The Line 5 Surcharge would effectively result in double recovery.[115] Suncor recommends that the Line 5 Surcharge should be limited to the appropriate share (as clearly defined) of the actual Line 5 tunnel project costs, over and above the forecasted Line 5 tunnel project costs.
- Enbridge is not sharing any of the risk of the cost of the Line 5 tunnel with uncommitted shippers and, in fact, is proposing a surcharge to recover the uncommitted shipper's proportionate share of the full Line 5 tunnel costs (as opposed to that portion of the costs that exceed the expected Line 5 tunnel costs). Enbridge is not seeking recovery of greater-than-expected Line 5 tunnel costs from committed shippers.

Toll currency denomination

Some opposing intervenors argued that it is not appropriate for Enbridge to set the CLT tolls in US dollars. Doing so imposes new foreign exchange risk on shippers and submitted that CLT tolls should instead be set in Canadian dollars. Certain opposing intervenors also submitted concerns regarding the IJT being fully denominated in US dollars.

4.5.3 Commission analysis and findings

The Commission acknowledges the interrelationship between tolling design components and service design components in the Application and does not consider any of the individual tolling design features to be problematic when viewed in isolation. However, in aggregate, the overall toll design excessively favours committed shippers (not including Flex Service Term committed shippers) positioned to access the full benefits attached to significant term and volume commitments. The following elements of the toll design, when considered together and alongside the proposed service attributes, contributed to this view:

- Although discounts to the base toll were introduced, the initially proposed committed base toll of US$5.70/bbl ultimately did not change during negotiations, the uncommitted toll premium increased from its initial starting point and concessions made by Enbridge on tolling aspects throughout its negotiations largely applied only to certain committed service offerings.

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[115] Enbridge has proposed a premium for uncommitted tolls relative to committed tolls under Mainline Contracting. The committed tolls implicitly include the previously estimated Line 5 tunnel costs (amounting to US$500MM). Enbridge is also proposing a Line 5 Surcharge for uncommitted shipments which is based on the full cost of the Line 5 tunnel. Suncor is of the view that the actual Line 5 Tunnel costs will be greater than the previously estimated costs. Thus, with the Surcharge applied to uncommitted tolls, Enbridge will double recover uncommitted shippers' proportionate share of the US$500 million implicitly in the base toll and again in the Surcharge. In the unlikely event that the actual cost of the Line 5 Tunnel is less than US$500MM, Enbridge will double recover on the uncommitted proportionate share of those actual costs.

- The proposed toll discounts are only available to committed shippers who do not elect a Flex Service Term option, and the full application of toll discounts is likely to only be available to a small number of larger shippers.
- Committed shippers would be insulated from future surcharges related to expansions and the Line 5 surcharge, whereas uncommitted shippers and Flex Service Term committed shippers would not be insulated from these charges.
- The toll premium relationship between committed service, Flex Service Term committed service, and uncommitted service favours committed shippers that would not be Flex Service Term committed shippers.

The Commission finds that there is a lack of compelling reasons to incent long-term commitments to the degree proposed in this Application, considering that Mainline Contracting is not an essential tool to manage Enbridge's risk (as discussed in Section 3.4.1 Enbridge's risk exposure) and that the certainty of access afforded by the proposed committed service would already provide a substantive and desirable benefit to committed shippers. Accordingly, the Commission finds that further favouring committed shippers through the components embedded within the toll design was not justified within the context of the overall balance of attributes between the services, particularly given that the proposed reservation of 10 per cent of capacity for uncommitted volumes is not likely to provide a meaningful option to access pipeline capacity (Section 3.3 Access to capacity after implementation of firm service). This does not mean that incentives for committed service, including lower committed tolls relative to uncommitted tolls on the Canadian Mainline, would never be appropriate in a future service offering. Any such incentives included in a future service offering would be considered within the overall balance of attributes between services in that offering, and other circumstances – including the adequacy of capacity on the Canadian Mainline – as these considerations evolve over time.

Concerning the matter of unjust discrimination, the Commission agrees with Enbridge that establishing differences in tolls or terms of service for services that are sufficiently different from one another is not necessarily unjustly discriminatory. However, as noted in section 3.7, the prohibition against unjust discrimination still requires reasonable proportionality in the discrimination between different services. The Commission finds that Enbridge did not provide compelling evidence or argument that the differences between services, including the specific toll design as well as the financial commitments and other obligations applicable to shippers of a given service, were sufficient to justify the proportion of discrimination present between the services.[116]

Regarding the issue of toll currency denomination raised in the proceeding, the Commission generally views this as a commercial matter generally resolved most effectively by agreement. Parties can agree to a wide range of workable options to manage foreign exchange risks and currency denomination in commercial agreements, including in tolling agreements. Although parties disputed this issue at length in the hearing, the Commission does not consider it necessary to resolve this matter given the Commission's denial of the Application.

[116] In Section 3.7 (Unjust discrimination), the Commission made additional findings regarding unjust discrimination.

As a final matter regarding the proposed toll design, the Commission considers Enbridge's proposed approach to tolling aspects related to its abandonment and decommissioning costs to be appropriate, as it is consistent with the previous direction of the NEB in this regard. The amount that is collected and set aside for pipeline abandonment is not subject to negotiation as part of a settlement agreement, as previously stated by the NEB.[117]

4.6 Market power

Multiple parties to this proceeding raised concerns with Enbridge's potential abuses of market power. The Commission acts to prevent the abuse of market power, both actual and perceived, because an apprehension that some market players are abusing their power may lead to inefficient outcomes.

Views of Enbridge

Enbridge did not dispute that it currently has a dominant position, as measured by market share, in the oil transportation market from the WCSB. However, Enbridge submitted that it does not have any ability to exercise market power regarding the establishment of Mainline Contracting since the CER chose to review and approve Mainline Contracting before the open season would take place.

The relevant issue for the Commission to decide in this proceeding is not whether Enbridge has market power, but whether it has abused any market power that it may have had during the negotiations that led to the proposed terms for Mainline Contracting. An abuse of market power occurs when the holder of that market power is able to use its position to earn returns in excess of its cost of capital, and to do so on a sustained basis.

Enbridge submitted that the evidence in this record clearly and conclusively demonstrates that Enbridge's tolls are not the product of an abuse of market power. This evidence includes that:

- There were extensive arms-length negotiations with sophisticated market participants to develop the Mainline Contracting commercial framework which included numerous concessions.
- The commercial framework and resulting tolls proposed by Enbridge are required to be approved by the Commission.
- Shippers transporting the majority of volumes on the Enbridge Mainline support the Application. These supporting shippers have confirmed that they have a direct and substantial interest in the tolls being paid to Enbridge and consider the resulting tolling methodology to be reasonable.
- The only evidence that examined whether the proposed tolls would produce excessive returns over the 20-year life of Mainline Contracting, and that considered the dispersion of those returns based on the cost and throughput risk over that span of time, was Concentric's Revised Additional Written Evidence and related information request responses, and the testimony of Dr. Webb on behalf of Cenovus. Concentric's evidence concluded that within the wide range of possible future returns, the expected level of future returns was at or below the risk-adjusted cost of equity for the Mainline. In

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[117] NEB, *Reasons for Decision – Set-aside and Collection Mechanisms*, MH-001-2013 (May 2014) at 73 (pdf 91).

> economic terms, there is no evidence of an abuse of market power, because the only fully developed evidence on this point is that there is no excessive level of earnings produced by the Mainline Contracting tolling methodology.

The NEB has recognized that the presence of potential market power in an offering for new services is not determinative of whether the accompanying negotiated tolls are unjust and unreasonable when that market power can be mitigated. In the TMEP tolling decision, RH-001-2012, the NEB listed three factors that mitigate the potential abuse of market power under such circumstances: (1) the appropriateness of the open season process; (2) the mandatory review by the NEB of the tolling methodology; and (3) the presence of alternate sources of oil transportation.

Enbridge submitted that Mainline Contracting satisfies all three of these factors previously noted by the NEB:

- First, Enbridge has engaged in a robust stakeholder negotiation process to develop Mainline Contracting, and the open season would be fair and transparent.
- Second, there has been an extensive regulatory review of the proposed tolling methodology for Mainline Contracting, with all stakeholders having the opportunity to challenge all aspects of the Application. As the NEB stated in the TMEP decision, “In the Board’s view, the requirement for a regulatory review of tolls and tariffs acts as a significant constraint on a pipeline company’s market power.”
- Finally, as has been discussed throughout this proceeding, there are alternative sources of crude oil transportation by competing pipelines and by rail; the use of the rail alternative has expanded dramatically since the TMEP case; and the availability of pipeline capacity is expected to increase significantly by the time the first year of Mainline Contracting has been completed, due to the in-service of Line 3 Replacement and TMEP.

Enbridge concluded that there is no credible evidence to support a claim that the negotiated tolling methodology or the resulting tolls represent an abuse of market power, and that any concerns over the potential inappropriate exercise of market power have been fully and adequately addressed through the extensive regulatory review process in this proceeding.

Views of other parties

Supporting parties

Dr. Webb, on behalf of Cenovus, described several ways to ensure a negotiated rate does not reflect an exercise of market power, such as the regulator scrutinizing the process used to develop negotiated rates and the regulator comparing the negotiated rates to some reasonable benchmark. Dr. Webb submitted that three potential comparative benchmarks (comparison to CTS toll, to tolls on competing pipelines, and to the pipeline’s alternative cost of service tolls) are appropriate to consider in assessing the justness and reasonableness of Enbridge's proposed tolls.

Dr. Webb submitted that there are high-level quantitative reasons to believe that Mainline Contracting does not represent an exercise of market power. Mainline Contracting tolls are

similar to the tolls that were being charged under the CTS and are lower than the tolls charged by competing pipelines such as Keystone for delivery to the Midwest.

Dr. Webb submitted that in the majority of cost-based simulations he performed, the cost-based rate exceeds the Mainline Contracting rate, which provides evidence that Enbridge is not exercising market power, meaning that the Mainline Contracting tolls are within the zone of reasonableness. Further, in his opinion, the negotiation process and the high-level comparison of the Mainline Contracting tolls with CTS tolls and with the tolls charged by competing pipelines suggests Enbridge is not exercising market power, implying that the Mainline Contracting tolls are within the zone of reasonableness.

Opposing parties

Certain opposing intervenors submitted that the Application represents an attempt by Enbridge to abuse its market power by effectively forcing shippers to participate in an open season process if the Application were approved. These views included:

- CCRL & FCL submitted that the Application represents an exercise of Enbridge's market power by forcing shippers to participate in an open season process and enter into long-term contracts or risk losing the ability to reliably ship on the Canadian Mainline. The offering of both committed and uncommitted service under the terms of Mainline Contracting amounts to a Hobson's choice. Any shipper that requires consistent access to the Canadian Mainline has no choice but to bid into the open season or risk losing access. The reservation of 10 per cent uncommitted capacity is not a meaningful option. CCRL & FCL submitted that the negotiations reflected Enbridge's monopoly power and the terms proposed prior to filing have not materially changed.
- Suncor submitted that the fact that Suncor would be forced to participate in the open season and bid for capacity on terms and conditions, including tolls, that it does not consider fair or appropriate (if the Application is approved) reflects the market power held by Enbridge.
- The CSG submitted that the Application is an egregious attempt by Enbridge to exert its market power and is not the result of a fairly negotiated settlement with a broad and representative group of stakeholders, but simply reflects a negotiation between Enbridge and a subset of shippers who are well-placed to make long-term financial commitments for Mainline capacity. The terms of the proposed TSAs are unreasonably one-sided in favour of Enbridge, demonstrating Enbridge's exercise of market power.

Certain opposing intervenors submitted that the proposed tolls that would result from the Application would represent an abuse of market power by Enbridge:

- CCRL & FCL submitted that by requiring shippers to lock into contracts, Enbridge would shift risk for volume fluctuations from Enbridge to shippers, and that based on the applied-for tolls, CCRL & FCL would see an increase in tolls of nearly 50 per cent.
- The CSG submitted that the Application would result in Enbridge charging unjust and unreasonable tolls, unjustly discriminating amongst Mainline shippers, and entrenching its market power at the direct expense of Canadian interests, which clearly represents an attempt by Enbridge to abuse its market power.

- Suncor submitted that the fact that the base toll is significantly higher than the Canadian Mainline cost of service, was selected by Enbridge as the starting point for negotiations, and from which Enbridge refused to budge as the base toll, is clear evidence of the exercise of market power to influence the price of the service. Far from being cost-based, negotiated, market-based or competitive, the base toll was unilaterally fixed by Enbridge in an exercise of market power. All tolls calculated with reference to the base toll suffer from the same flaw, and the fact that certain shippers consider the terms and conditions of Mainline Contracting to be acceptable and are willing to pay the excessive tolls proposed does not mean that those tolls do not reflect an exercise of market power.
- Suncor submitted that the matters at issue in this proceeding are different than the matters at issue in the proceeding that resulted in Decision RH-003-2011. In that case, the issue was whether the cost-based tolls were too high to be "competitive," in the sense of delivering gas to the market at a price that was competitive to other sources of supply. In this proceeding, the issue is whether the applied-for tolls are so far above the cost-based levels that would be expected to prevail in a competitive market that they constitute an exercise of market power.

Certain opposing intervenors also submitted expert evidence related to concerns about the abuse of market power and excessive tolling levels. This evidence included expert evidence from Brattle on behalf of Suncor, and the expert evidence of Dr. Makholm, Priddle, and Drazen on behalf of the CSG:

- Drazen concluded that the magnitude of the difference between the proposed tolls and cost of service means that the proposed tolls cannot be accepted as just and reasonable, and supports this conclusion based on, amongst other points, that for a company with a high degree of market power, cost of service is the primary consideration in evaluating whether tolls are just and reasonable.
- Priddle submitted that under the current form of common carrier regulation of the Mainline by the CER, Enbridge's ability to exercise market power is greatly constrained. The CER must ensure that this regulatory constraint is maintained by continuance of the 100 per cent uncommitted service.
- Dr. Makholm noted that the tolls (i.e., the per-barrel charges) are simply one aspect of the overall terms and conditions under a pipeline tariff. While the regulator could find the tolls themselves to be reasonable, it is possible that the package of terms and conditions would not result in a just and reasonable tariff and would constitute an abuse of market power. He views that the entirety of the Mainline Contracting proposal offered by Enbridge constitutes an attempt to abuse its dominant market position at a time of constrained egress from the WCSB and that the tolls as a result are not just and reasonable.

The Brattle evidence concluded that the tolls proposed by Enbridge, which far exceed cost-reflective levels, represent an exercise of market power. Unless the Canadian Mainline tolls are constrained to be offered at levels reflective of the cost to provide that service, Enbridge's Canadian Mainline service offerings would reflect an exercise of market power.

4.6.1 Commission analysis and findings

Enbridge does not dispute that it has a dominant position in the market for oil transportation capacity out of the WCSB. The Commission agrees with Enbridge that the relevant issue for the Commission is whether Enbridge has abused market power during the negotiations leading to the development of Mainline Contracting. This requires an examination of the evidence related to market power, both in terms of substance and also in appearance or perception.[118]

Enbridge suggested that its potential to abuse market power was mitigated by the same factors listed by the NEB in its RH-001-2012 Decision: (1) the appropriateness of the open season process; (2) the mandatory review by the NEB of the tolling methodology; and (3) the presence of alternate sources of oil transportation. The Commission agrees that these factors can mitigate the potential abuse of market power, but do not do so fully in this case.

Regarding the first factor, the Commission's findings related to the open season process are presented in Section 3.2 (Fair and equal opportunity to access firm service - the open season) and did not materially inform the Commission's assessment of market power in this instance. The third factor would not have mitigated potential market power abuse given the lack of sufficient alternatives to transportation on the Mainline, as previously discussed in Chapter 2 (Application and context).

As stated earlier, the Commission has concerns that the proposed tolling methodology could produce unreasonable returns and unreasonably exceed cost of service tolls on a sustained basis on the Canadian Mainline. In this case, the record did not enable the Commission to make a definitive determination that the Application reflected an actual abuse of market power by Enbridge. However, having denied the implementation of firm service, there is no potential for these concerns to materialize or any actual abuse of market power to occur.

In the present case, the Commission finds that information asymmetry between Enbridge and its stakeholders during the negotiations that led to the development of Mainline Contracting did provide a reasonable basis for a perception that the Application represented an abuse of market power. In future steps related to the Canadian Mainline, the Commission encourages Enbridge to meaningfully consider concerns raised regarding market power, to ensure that perception of abuse is reasonably addressed before any future proceedings.

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[118] As the NEB found in *Reasons for Decision - TransCanada PipeLines Limited, North Bay Junction*, RH-3-2004, (December 2004) at 8 (pdf 22), market power must not be allowed to be abused, both in terms of substance and appearance and perception.

5 Terms and conditions of service

Enbridge requested that the Commission approve the implementation of firm service on the Canadian Mainline in accordance with all terms and conditions contained in the TSAs and the Rules Tariffs. The proposed terms and conditions of service are subject to the CER Act, including section 235. The Commission has not addressed every term and condition submitted for approval in this Application but notes concerns with term length and financial assurances. The Commission also offers guidance regarding the service design and the broad discretion Enbridge would retain over the life of the contracts. The other terms and conditions of Mainline Contracting, though not necessarily uncontroversial, did not materially contribute to concerns of unjust discrimination in the context of the broader Application.

5.1 Term length

Enbridge proposed a range of contract terms from 8 to 20 years, as well as a Flex Service Term, whereby a shipper may terminate all or a portion of the monthly volume commitment with 36 months' notice.

Views of Enbridge

During negotiations prospective shippers requested an increase in the contract term options, from the initial proposal of 8 to 12 years, up to 20 years, and that Enbridge did so in response to those requests. Also, Enbridge had discussions with prospective shippers about a shorter contract term of less than 8 years, but shippers expressed a preference for a Flex Service Term.[119]

Suncor's proposal of a contract term for a maximum of five years ignores Enbridge's reason for Mainline Contracting, being to mitigate its long-term risk as its Canadian pipeline competitors have been permitted to do. In proposing shorter contract terms, Suncor failed to consider that longer-term contracts are used to provide assured access which underpins investment by both shippers and Enbridge. Without this foundation, investment will suffer, capacity and throughput may erode, and tolls will most certainly be higher and more volatile.

Views of other parties

Opposing parties

Parties opposed to the application submitted that most PADD II refiners (including integrated companies) connected to the Enbridge Mainline are uniquely positioned to contract for the maximum 20-year contract term length in order to secure long-term feedstock. Uncertainty of future production rates and commodity markets make it difficult for upstream producers to lock themselves in to such large, long-term financial commitments.

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[119] As shown in Appendix 18 to the Application, Version 3 of the TSAs included a 36-to-95-month contract option at a premium toll.

Some opposing intervenors proposed alternative contract term lengths:

- Suncor asserted that the length of contract term is unfair, inappropriate, and the maximum contract term should be no more than five years. If Enbridge believes that long-in-the-future risks require it to charge a significantly higher toll at the beginning of contracting, a reasonable shipper-sensitive solution would be to reduce the maximum term of the contracts.
- Valero argued that the minimum term of eight years would result in some shippers having commitments on the Canadian Mainline that extend beyond the expiry of their take-or-pay commitments on Enbridge downstream pipelines. The minimum term should be reduced from eight years to four years or less to allow for a term that is much closer to the remaining terms of the commitments on the Enbridge-affiliated downstream pipelines.

5.2 Financial assurances

Enbridge proposed different credit terms for requirements contracts, take-or-pay contracts, and uncommitted shippers. In any case, investment grade shippers would not be required to provide Enbridge with financial assurances.

Views of Enbridge

The financial assurances under a requirements contract are less onerous than under a take or pay contract, having the option to provide a letter of credit for two months of financial and other obligations, as opposed to 12 months for take-or-pay shippers.

Under the existing uncommitted service structure, shippers must provide a guarantee from an investment grade parent company or a letter of credit covering 30 days of obligations. Under Mainline Contracting, credit requirements will change to 60 days of obligations.

Enbridge submitted that the changes in credit requirements under Mainline Contracting for uncommitted shippers, and under take-or-pay and the requirements contracts are in line with or in some cases are more lenient than industry standards. If Enbridge reduced the credit requirement under requirements contracts further, financial assurances would not be sufficient to even recover billed and current account receivables.

Earnest submitted that the CSG overstated its balance sheet burden claims, and that none of the Eastern Canadian refineries would require credit support to participate in Mainline Contracting, as they are investment grade companies.[120]

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[120] Enbridge provided data on the creditworthiness of its current shippers, showing that for May 2020, 70 per cent of shippers and 83 per cent by volume were investment grade, and none of the current or prospective Enbridge Mainline shippers have been downgraded below investment grade this year. 100 per cent of integrated energy companies, 75 per cent of refiners, 50 per cent of producers, and 33 per cent of marketers are investment grade shippers.

Views of other parties

Opposing parties

Some opposing parties submitted that many large Canadian producers struggle to meet the investment grade threshold today. Having to provide or increase an existing letter of credit will create a drain on producers' financial resources, which are already strained in the current market conditions.[121] Also many aggregators will be required to post additional credit as they would not meet Enbridge's investor grade threshold. The eventual costs of posting letters of credit with Enbridge will have to be passed on to the producer through a higher marketing margin, further eroding producer value. In addition, posting letters of credit consumes capacity available within credit lines and has the potential to negatively impact perceived credit worthiness and constrain financial liquidity.

In the comment letters, some smaller producers commented that they cannot support firm contracts on their balance sheets and that ultimately the credit requirements may prevent small producers from participating in the open season.

5.3 Service design and contract types

Under Mainline Contracting, a shipper may submit monthly nominations for the 10 per cent of uncommitted capacity or attempt to secure priority access in the open season by signing up for a contract. Enbridge proposed different types of firm service contracts as options for priority service, including five requirements contract types, and three take-or-pay contract types.

The five requirements contract types are specific to the type of interest or facility that may be designated and the type of petroleum to which the contract applies.[122] To qualify for a requirements contract, a shipper is required to dedicate a portion of its own crude oil production, NGL production capacity, or refining capacity to be shipped on the Canadian Mainline. A requirements contract shipper is relieved from its obligations to deliver its monthly volume commitment to the extent that the volumes produced from or processed by its designated interest or facility in a month fall below the shipper's monthly volume commitment for that interest or facility.

The three take-or-pay contract types are specific to the type of petroleum: crude oil, refined petroleum products, and NGLs. A take-or-pay contract does not require a shipper to designate an interest or facility and is more traditional in that the shipper must generally ship its contracted amount or otherwise make a deficiency payment.

There are four service hauls segments: Edmonton to Hardisty, short haul, medium haul, and long haul. Service haul segments are further divided into service hauls, providing service

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[121] For example, MEG submitted that Mainline Contracting would require MEG to take on a financial obligation in excess of C$1.6 billion (based on the minimum eight-year term) and would be incremental to MEG's obligation or FSP, which is in excess of C$1.5 billion. Also, the increased letter of credit would cost MEG in excess of C$1 million per year.

[122] The requirements contracts types are: receiving refiner (for crude oil); delivering refiner (for refined petroleum products); receiving NGL shipper (for NGLs); delivering NGL shipper (for NGLs); and producer (for crude oil).

ex-Edmonton and ex-Hardisty for each commodity type (crude oil, NGL and refined petroleum products).[123]

Views of Enbridge

Enbridge introduced the concept of service hauls to maintain as much as possible the way shippers nominate to the Enbridge Mainline today. The service haul concept was developed through negotiation to satisfy the needs of potential committed shippers that wanted more flexibility than contracting for point-to-point service.

Shippers do not have to select a specific delivery point in their TSAs; they simply commit to a service haul, which has multiple delivery points. Service haul commitments are much more flexible than point-to-point contracting, which is the norm on most contracted crude oil pipelines.

Enbridge provided the following responses to concerns raised by CCRL & FCL regarding the short haul for crude oil contractible capacity limits:

- Originally Enbridge proposed to offer 150 Mb/d of contractible capacity. However, in response to concerns raised by CCRL & FCL, the maximum volume was increased to 200 Mb/d.
- The main source of demand for short haul capacity is CCRL & FCL's 135 Mb/d refinery. Enbridge submitted that any party contracting for short haul capacity would ultimately have to sell its oil or its pipeline capacity to CCRL & FCL. If a hypothetical party did not use its contracted short haul capacity, that capacity would be offered for uncommitted service available to CCRL & FCL on a spot basis, and the hypothetical party would incur deficiency charges.

Enbridge submitted that various aspects of the Application provided flexibility to shippers, including the following:

- Shippers can satisfy their commitments to one service haul with shipments over another longer service haul, and those with an ex-Edmonton commitment can meet their commitment with volumes brought in at a Canadian receipt point downstream of Edmonton, provided they pay the committed toll from Edmonton.
- The long-haul contract would provide the ability to deliver to any of 12 delivery points on the Lakehead System and in Eastern Canada.
- Firm shippers may convert a take-or-pay contract to a refiner or producer requirements contract and vice versa, provided that the shipper meets all requirements of the new contract.
- Take-or-pay shippers may claim excused events and the circumstances under which a shipper can claim an excused event under a requirements contract are expanded.
- Flex Service Term offers a short-term contracting option for shippers that do not want to commit to a minimum of 96 months (eight years). It allows them to terminate all or a portion of their monthly volume commitment at any time upon 36 months' notice.

[123] Ex-Hardisty includes receipts from any of Hardisty, Kerrobert, Regina or Cromer.

- Ramp-up rights allow shippers the opportunity to submit commitments for initial volumes as well as for ramp-up volumes that take effect at a date later than the commencement date, as defined in the TSAs. This will allow committed shippers the opportunity to match ramp-up dates with projects in execution or slated for execution, provided they occur prior to the end of 2025.
- The committed volume increase option allows committed shippers to increase their monthly volume commitments post-open season if they are unsure of their expansion or ramp-up potential at the time of the open season.
- Requirements contracts offer shippers more flexibility than traditional take-or-pay agreements by accommodating planned or unplanned impacts to production or refining capacity (including for economic decisions made by a shipper), thereby reducing the long-term liability a producer or refiner must take on. Further, shippers are not required to move the actual barrels produced or processed by its designated interest or facility, just volumes equivalent to the dedicated volumes.
- While the producer requirements contract requires that a producer-shipper must designate one designated area, defined in the TSAs, to a requested service haul, the actual tendered volumes can come from anywhere and that the designated area monthly volume commitment is only a notional volume that is used to determine a shipper's eligibility to claim excused event relief in the event that it does not satisfy its monthly volume commitment in a month.

Views of other parties

Opposing parties

Parties raised concerns with the flexibility of the firm service offering, including that:

- Having to commit to a specific service haul removes future flexibility for producers. Locking in a destination point limits who a producer can sell its oil to – whereas locking in a receipt point (the inlet of the Canadian Mainline) does not have the same restriction for refiners.
- The flexibility to shippers being able to nominate to alternate receipt points is diminished by the fact that the shipper must pay a higher toll.
- A shipper may only nominate up to 25 per cent of its contracted volume to an alternate service haul and retain priority service. This is a concern for shippers that may have their receipt point change over the course of their terms due to where their production is located.
- The Flex Service Term cannot be considered a real option available to shippers since the open season would likely be oversubscribed.
- Under the take or pay TSA, a shipper will be limited to a discrete number of events in accordance with excused event provisions. This limitation, together with the removal of the shipper force majeure provisions, has the effect of shifting risk from Enbridge on to shippers.
- Under the requirements contract TSA, there is a limit to the relief available under an excused event, as Enbridge can elect to reduce a shipper's commitment volume if they claim excused events on average that exceed 25 per cent of commitment for 12 months.

> A production issue (or even a turnaround) could impact a producer for a number of months and reduce production significantly, leaving a producer at risk of having Enbridge unilaterally reduce the volume commitment even if production is anticipated to be restored.

The CSG and Suncor raised concerns with the designated area requirement in the producer requirements contract, given that production quantities at specific receipt locations today will vary over the term of the TSA as a result of the nature of crude oil production. Furthermore, for some shippers, requirements contracts may offer no effective relief from the deficiency payment obligations absent a full turnaround of the designated facility.

Opposing intervenors also argued that the take-or-pay contracts provide for a limited number of excused events in stark contrast to the flexibility that shippers currently have. The excused event clause results in reduced flexibility, requiring volumes to be shipped via pipeline in lieu of alternative transportation means when those means may better meet operational demands. Further, each excused event may only be applied for a maximum of three months, while an event could continue much longer than three months. It is also easier for a refiner to match its volume commitment with its refinery, storage, and throughput capacity, and therefore they are better able to obtain relief under the excused event clause under the refiner TSAs.

5.4 Discretion

The proposed TSAs grant Enbridge discretion throughout the contract life cycle as it pertains to moving ahead with contracting, renewals, and in response to future changes in law.

Views of Enbridge

Enbridge acknowledged that the change in law provisions of the TSAs put some risk of future toll increases on shippers. That risk allocation was negotiated between Enbridge and potential shippers. Enbridge is effectively locking in tolls for up to 20 years and has limited rights to adjust the tolls in circumstances that are beyond its control, such as a change in law. This provision was designed to insulate Enbridge from unforeseeable and unavoidable actions of governments and regulators that may have a significant impact on Enbridge Mainline operating and/or capital costs.

Change in law provisions allowing a carrier to recover costs related to future governmental or regulatory changes are commonplace in crude oil pipeline contracts, such as within the Keystone and TMEP TSAs. Moreover, Suncor and the CSG disregard the fact that, as a result of negotiation, Enbridge added to the TSAs a reciprocal Feedstock Impairment provision that provides shippers with contractual relief in circumstances when there is a change in law in Canada or the US that exclusively targets western Canadian petroleum.

The TSAs provide shippers with an evergreen renewal right, with each renewal term being equal to 50 per cent of the initial service term elected. Shippers may renew their contracts for the same volume (or less) than they originally subscribed for. However, the committed tolls that will apply during the renewal period may be revised by Enbridge, subject to future approval of the CER. Renewal tolls will be a function of the marketplace and Enbridge’s costs at the time.

The right of Enbridge to exercise its discretion as to whether or not the conditions precedent relating to regulatory approvals have been satisfied is in line with industry standards and is entirely reasonable. It would not be feasible or realistic to expect Enbridge to try to obtain the consent or agreement of all contracting shippers as to the appropriateness of the regulatory approvals.

Views of other parties

Opposing parties

Opposing parties argued that the change in law provision gives Enbridge broad discretion to increase tolls and significantly mitigate its risk exposure and is not symmetrical. Should changes in "Applicable Laws" reduce, for example, capital, expenses or taxes, there is no obligation on Enbridge to reduce tolls accordingly. Further, the broad nature of the provision means that any remedy ordered by a governmental authority, regardless of fault on the part of Enbridge, would amount to a "change in law" such that Enbridge would be able to recover costs from shippers that are otherwise properly to its account.

The CSG stated that the TSAs require shippers to enter into and be bound by the terms of the contract with very limited cancellation rights. In addition, given the proposed Open Season Procedures, a shipper would be entering into a TSA without any certainty of when, or if, its obligations would commence. The combination of these facts means a contracting producer would be in an untenable situation of not knowing whether or when its significant and restrictive shipping commitments will materialize, while having extremely limited abilities to withdraw from or modify those commitments in the interim.

5.5 Commission analysis and findings

The Commission acknowledges the value of market driven solutions for tolling as well as terms and conditions, particularly given the complexities of the Canadian Mainline, and the insights Enbridge and stakeholders bring to the design of an appropriate commercial framework. Although specific terms and conditions generally reflect a combination of many gives and takes, the Commission remains responsible for regulatory oversight under the CER Act. Concerns regarding term length and financial assurance requirements informed the Commission's findings on the common carriage obligation and unjust discrimination, as a result of the cumulative imbalance in benefits and burdens among different classes of shippers and discrimination against subsets of shippers or potential shippers (as discussed in Section 3.2 Fair and equal opportunity to access firm service – the open season and Section 3.7 Unjust discrimination). The Commission also provides comments regarding service design and discretion reserved by Enbridge.

Term length

The Commission finds the minimum term length of eight years to be long, considering:

- the risks that Enbridge seeks to mitigate do not justify the eight-year minimum term (as discussed in Section 3.4.1 Enbridge's risk exposure);
- the commitments being sought by Enbridge are not directly in support of, or reliably linked to, any new capital investments (as discussed in Section 3.4.2 Future Canadian Mainline expansions);

- the potential unavailability of the Flex Service Term offering in the event of open season oversubscription (as discussed in Section 3.2 Fair and equal opportunity to access firm service – the open season);
- the potential negative impacts such contracts would place on prospective shippers (as discussed in Section 3.4.3 Shipper need) and potential barriers to the ability of some parties to contract for committed service; and
- any price distortions or unreasonable volatility that could adversely affect market participants (as discussed in Section 3.5.2 Commodity prices) could potentially remain in effect for the duration of the minimum contract term.

While Enbridge presented the Flex Service Term as an alternative to a shorter standard contract length, the Commission does not consider this an acceptable solution due to the reasonable likelihood that the open season would be oversubscribed.

The Commission acknowledges that Enbridge is proposing a suite of contract offerings and that these term lengths were offered in response to shipper requests and designed to meet the needs of a diverse set of current and prospective shippers. While the contract term range is favourable to parties that submitted letters of support, the minimum term length of eight years is generally unfavourable or potentially inaccessible for smaller shippers, burdensome for potential shippers who prefer uncommitted access but may feel compelled to participate in the open season, and potentially problematic for shippers whose needs may change following the open season.

The Commission does not take issue with the maximum term length of 20 years in principle, but notes that in other applications, longer terms have generally been associated with capital investments or a higher degree of cost-sensitivity in tolling methodology, or both. A 20 year, largely fixed toll arrangement may be appropriate in some circumstances and sophisticated parties may well be willing to commit after weighing the benefits and risks relative to their specific circumstances. In this case, the maximum and minimum term lengths would reduce the overall ability of parties to access capacity. The benefits of longer terms would accrue to a subset of shippers who negotiated an increase in term lengths with Enbridge as compared to the original contracting proposal.

The Commission takes no position as to whether alternative contract lengths proposed by opposing intervenors are ideal or would be acceptable in a future offering, though shorter terms or more reliable access to Flex Service Term offerings would mitigate some of the concerns noted above. Ultimately, parties will have to consider term lengths proposed by Enbridge in the future, if a similar service offering is proposed, relative to the entirety of the terms and conditions - as will the Commission.

Financial assurances

The proposed financial assurances represent a material change from what is currently required of shippers. Access to the Canadian Mainline is currently available to parties of all sizes, provided they can provide financial assurances covering 30 days of obligations. Under Mainline Contracting, uncommitted shippers would require double the current commitments and committed shippers face two to twelve times more financial commitments depending on the TSA type.

The Commission is not persuaded that a need for the full increase in assurances is required, particularly considering the level of volume risk that Enbridge seeks to mitigate through firm service and the fact that no major new capital investments were included in this Application. As asserted by opposing intervenors, this proposed approach is likely to disproportionately impact certain types of market participants, such as smaller producers and aggregators, that are less likely to be investment grade and therefore more likely to require a letter of credit or some other type of credit support. Absent a clear justification for this enhanced risk mitigation by Enbridge, the financial assurances requirements could result in discrimination against small shippers and any other shippers unable to take on additional financial commitments, which may impact their participation in the open season.

Service design

The Commission is of the view that Enbridge's service haul design was thoughtful and incorporates features that do not exist in traditional take-or-pay contracts, including:

- allowing shippers to contract for service within a specified path, which may include several receipt and delivery points, rather than traditional fixed point-to-point contracting;
- allowing shippers that contract under one service haul, to ship under any longer service hauls;
- allowing shippers to enter requirements contracts and take advantage of a wider range of excused events including those due to economic decisions made by the shipper; and
- allowing shippers to contract for facilities that are not yet in-service, through ramp-up rights, as well as for facilities that may face greater long-term uncertainties, through Flex Service Terms or terms which provide an option to reduce committed volumes.

The introduction of different types of contracts created optionality for a potentially broader spectrum of shippers to meet their needs. The Commission does not find the service haul design to be discriminatory, nor was it convinced by certain opposing intervenor arguments that the short haul segment or medium haul segment are discriminatory.

However, while the flexibility offered by Flex Service Terms, ramp-up rights, and the committed volume increase option could provide optionality that is favourable to various current and prospective shippers, access to this optionality depends on the level of subscription to capacity in the open season. The evidence indicates that high demand for service in the open season could limit or obviate most of the potential benefits, given the reasonable possibility that no, or limited, capacity would actually be awarded through those provisions. Additionally, while the provisions in the TSAs around excused events are novel and may potentially add some flexibility relative to other potential relief from deficiency payments, in many circumstances these benefits may come at the expense of relief from unforeseen events that would have been provided by a force majeure clause.

Flexibility in service design was highlighted by Enbridge as a feature of Mainline Contracting that favourably enhanced the Application. The Commission agrees but has concerns about whether the implementation of Mainline Contracting would have actually allowed all stakeholders to realize the full scope of service design benefits.

Discretion

The Commission acknowledges that Enbridge and other pipeline companies require a certain level of discretion to effectively operate their pipelines. This flexibility may exist in operations (e.g., scheduling) and in relation to commercial matters (e.g., tolls offered at renewal). The Commission affirms that discretion and flexibility retained by a pipeline company must be balanced with transparency and a reasonable degree of certainty or predictability for shippers and stakeholders.

In particular, the Commission is concerned that the provisions in the TSAs relating to the renewal of contracts create a lack of transparency and information asymmetry. Under these clauses, a shipper would need to decide whether to agree to a potentially unique renewal toll based on its volume and term commitment, without knowledge of what tolls are being offered to other shippers and prior to any regulatory filing of the proposed tolls. Further, it is unclear whether shippers would have access to sufficient information to assess the justness and reasonableness of these tolls when they are offered.

The Commission expects that Enbridge will ensure a fair degree of transparency and predictability in its exercise of discretion and in its dealings with shippers and stakeholders. This includes sharing relevant information, providing advance notice of changes, and taking other reasonable steps to ensure shippers can raise issues and concerns with Enbridge or the CER as needed.

6 Other relief

This chapter addresses Enbridge's additional requested relief: approval of the continuation of Enbridge's exemption from certain financial reporting and accounting requirements and approval to add the DSV Procedure to its Rules Tariff.

6.1 Accounting regulations and financial surveillance

Enbridge requested that the Commission approve the continuation of Enbridge's exemption from the requirement to keep the system of accounts described by the OPUAR. Enbridge intends to continue filing reduced financial surveillance information.[124]

Views of Enbridge

Enbridge stated that it complies with the requirements of the OPUAR with the exception that it does not keep its general ledger according to the system of accounts prescribed by the OPUAR. Instead, Enbridge keeps its general ledger according to its own chart of accounts as a part of the Enbridge Inc. group of companies, whose requirements to manage and report on its consolidated businesses drive the system of accounts used in its day-to-day operations. If, despite granting the exemption, the Commission were to later require it, Enbridge could recast its general ledger according to the system of accounts prescribed by the OPUAR. Regardless of the timing of the recasting, Enbridge would expect that no prior period information would be lost or different.

Enbridge is seeking to minimize the time and effort required to undertake the considerable and detailed allocations which ultimately do not generate financial information that is timelier, more accurate, more complete, or more relevant than the financial information available from Enbridge's current financial system based on Enbridge's chart of accounts. Additionally, Enbridge has historically relied on its own chart of accounts to provide operating cost financial information with sufficient visibility and transparency to enable Enbridge and its shippers to negotiate several incentive tolling settlements including the ten-year CTS.

With respect to financial surveillance reporting, Enbridge intends to file under Section 8 of Guide BB.1, applicable to settlements, under Mainline Contracting. Pipelines like Keystone and others without a negotiated settlement file their Guide BB requirements similarly. Enbridge has been filing under Section 8 of Guide BB.1 during the CTS, which is a negotiated settlement, since 2017. Items 1 to 7 under the Commission's Guide BB are related to cost of service tolls, and the proposed Mainline Contracting tolls are not based on cost of service.

Views of other parties

The CSG stated that the Toll Information Regulations Guide BB filing guidelines were updated in 2016 and the full amount of detail outlined in Guide BB is required, given that there is no

[124] As outlined in CER Filing Manual – Guide BB.1 Section 8.

negotiated settlement and the interested parties have not agreed to Enbridge filing a lesser amount of information.[125]

In final argument, the CSG also raised the following issues with financial and accounting information:

- The lack of transparency and access to cogent information, and particularly cost of service information, is a significant concern to stakeholders and is an impediment to fair and open toll discussions.
- The CSG opposes Enbridge's request for an exemption from the requirements of the OPUAR. The Canadian Mainline is a regulated monopoly. Consequently, it is necessary the Commission and the public have access to information which allows for the assessment of the reasonableness of tolls, tariffs, and conditions of service.
- The OPUAR exemption sought by Enbridge has historically been granted in the context of a negotiated settlement where otherwise confidential information sufficient to support accommodations and agreement has been exchanged between Enbridge and its stakeholders. This is not the current case.
- In the absence of information sharing through true negotiation, the only opportunity for the Commission, the public and stakeholders to obtain relevant information is through Enbridge's compliance with the existing regulatory reporting and disclosure requirements.

6.1.1 Commission analysis and findings

The Commission finds that a continued exemption from the requirement to keep the system of accounts described by the OPUAR is appropriate. For Enbridge, using its system of accounts is significantly less onerous than using the system of accounts prescribed in the OPUAR. The Commission accepts Enbridge's position that under its current toll framework, the OPUAR system of accounts would not be likely to produce more timely, accurate, complete, or relevant information. Opposing intervenors did not provide compelling reasons to reject the exemption request. Further, the Commission finds Enbridge's description of its accounts, and Enbridge's ability to recast its accounts in the future if necessary, ensures the information will be retroactively available, if deemed necessary in the future. Should there be a material change in Enbridge's system of accounts or its ability to recast its accounts, the Commission directs Enbridge to promptly notify the CER.

The Commission also directs Enbridge to meet the full financial surveillance reporting requirements and filing dates in Guide BB.1 of the CER Filing Manual. Where Enbridge cannot provide any information, Enbridge must provide an explanation for not doing so (e.g., if it does not exist for the Canadian Mainline).

Enbridge's applied for tolling methodology was not approved and the CTS has expired. As a result, the Commission considers Guide BB.1 information is relevant to, and likely to support, future discussions or any regulatory proceedings by ensuring transparency and information

[125] The NEB previously summarized the two options for the level of detail Group 1 companies, such as Enbridge, should file in surveillance reports: NEB, *Letter – Exemptions from Filing Requirements in the Toll Information Regulations*, Filing ID A84845-1 (10 July 2017) at 2.

symmetry. Toll negotiations may sometimes proceed in a manner that obviates the need for this degree of information sharing, but the Commission disagrees that cost information is generally not required if a non-cost based methodology is proposed by a company (as detailed in Chapter 4 Tolling methodology).

Some parties were of the view that there was insufficient information initially provided by Enbridge during negotiations, so they sought further information to support their participation in negotiations and their assessment of the service offering. Reducing or modifying filing requirements has the potential to negatively impact interested parties' ability to assess whether tolls are just and reasonable, to participate in negotiations, and to file a complaint if they believe it is warranted. Such a reduction in transparency also has the potential to create the perception of the abuse of market power.

6.2 Destination verification procedure

Enbridge has a DSV Procedure which has applied to all nominations on the Enbridge Mainline since July 2013. Enbridge requested approval to add the DSV Procedure to its Rules Tariff. The relief requested applies notwithstanding the denial of Mainline Contracting, and as such, this issue has been considered separately. Specifically, the DSV Procedure constitutes a rule applicable to the provision of service, therefore the Commission assessed whether the DSV Procedure results in unjust discrimination in service under section 235 of the CER Act.

Views of Enbridge

The DSV Procedure requires that officers of downstream facilities provide an affidavit confirming the maximum capability the facility is able to take off of the Enridge Mainline, and on a monthly basis, an affidavit confirming that the facility expects to and is capable of receiving volumes nominated to it by specific shippers.[126]

The DSV Procedure ensures the efficient operation of the Enbridge Mainline by confirming there is a party willing to take delivery of every barrel before it is injected onto the system. The DSV Procedure is an operational necessity for the Enbridge Mainline. If barrels cannot be delivered as scheduled, Enbridge may be forced to slow down or, in extreme cases, shut down a pipeline.

In response to opposing intervenors, Enbridge submitted that:

- Enbridge is adding the DSV Procedure to the Rules Tariffs to provide clarity to all shippers, committed and uncommitted.
- The DSV Procedure was approved by the FERC following a technical conference and proceeding in 2013. Various verification methods were considered by a shipper working group in the development of the current procedure.
- Enbridge would be open to implementing an alternative verification procedure provided it contained certain attributes, including an establishment of maximum capability, monthly verification by the operator of each facility, and the ability to enforce the destination

[126] The capability of a downstream facility is calculated as either the lesser of: the capacity of the connecting pipeline into the refinery; or the sum of the refining capacity, the working storage capacity, and the sustainable ongoing movement of crude oil out of the refinery.

verification process in instances where destination facilities do not accept deliveries of the crude oil that they verified.

- Certified off-takers and downstream buyers cannot exert negotiating power over producers under either the CTS or Mainline Contracting by withholding verification or otherwise, because marketers and producers can find alternative buyers if they do not like the price and/or terms that they are offered.
- The claim that producers cannot ship on the Canadian Mainline today or under Mainline Contracting because of the requirement for destination verification is without merit. Enbridge's DSV Procedure did not prevent producers from shipping on the Canadian Mainline. The market dynamic, whereby refiners are generally the shippers on the Canadian Mainline, was in play long before the DSV Procedure was implemented. Irrespective of destination verification, producers need to make commercial arrangements with refiners in order to ship their oil on a pipeline.
- Under Mainline Contracting, it is unlikely that downstream facilities will be able to withhold capacity from firm capacity holders without downstream facilities.
- The evidence filed in this proceeding indicates that refiners have never withheld destination verification of a third party's barrels destined for their facilities and that doing so would be against the interest of refiners, which is in reliably securing feedstock for their facilities.

Views of other parties

Supporting parties

Supporting parties (including BP, URC, Motiva, Imperial, Cenovus, and Flint Hills Resources Canada, LP) submitted that:

- They have not previously withheld verification of a third party's barrels on the Canadian Mainline destined for its downstream facility.
- Under Mainline Contracting, although there is potential to withhold verification from specific parties, the refiner assumes the risks associated with this. Further, there is no incentive to withhold verification from a producer with firm capacity:
    - Doing so would negate one of the primary reasons for BP and other supporting shippers to support firm service, namely, certainty of access to supply and transportation.
    - Refiners are interested in securing reliable feedstock for their refineries and are, therefore, motivated to enter commercial arrangements with producers that hold firm capacity.
- The Application includes strong incentives for shippers with downstream facilities to contract with producers to deliver volumes to their destinations as opposed to shipping the volumes themselves as uncommitted barrels subject to a higher toll, because barrels are otherwise relinquished to the spot market where the downstream party may not be able to access them.

Opposing parties

Parties opposed to the DSV Procedure (including EPAC, the Government of Saskatchewan, the CSG, and Caltex Resources Ltd.) submitted that:

- The proposed DSV Procedure severely disadvantages upstream producers and gives a bargaining power advantage to the small number of companies able to execute the majority of downstream verification volumes.
- The most important reason why producers are not the shippers of record on the Enbridge Mainline is the downstream verification requirements enforced by Enbridge. If the refiner prefers to be the shipper, they will not give the producer the downstream verification which effectively precludes upstream producers from being shippers on the Enbridge Mainline.
- The CSG noted that, because downstream verification happens after the purchase and sale have been made, downstream parties do not have to withhold downstream verification to exert bargaining power. They simply do not enter into an agreement to purchase the oil to nominate to begin with. The reason why there is no evidence of refineries withholding downstream verification is because it does not occur.
- Unlike other pipelines, such as Keystone Pipeline System and Express Pipeline System which do not have mandatory supply and destination verification requirements, the Enbridge system's complexity and lack of a liquid hub at the outlet mean that a downstream verification procedure is a necessity on the Mainline.
- Under Mainline Contracting, producers can participate in the open season, but they cannot use that capacity on a month-to-month basis without a verified sale to a connected refinery, storage facility, or connecting carrier. A firm shipper who is not successful in obtaining destination verification may have its nomination reduced, be subject to a deficiency payment, and could see its firm capacity released as spot capacity.
- Even in the absence of any verification procedures, as long as there is inadequate pipeline egress capacity from the WCSB, crude oil buyers have an advantage in bargaining power over crude oil sellers.

6.2.1 Commission analysis and findings

The Commission approves the inclusion of the DSV Procedure in the Canadian Mainline Rules Tariff.

The Commission agrees with parties that the DSV Procedure results in discrimination due to advantages that shippers with downstream facilities have as compared to other shippers. For example, the DSV Procedure may allow parties with downstream facilities the option to nominate for greater volumes than they prefer to receive in order to mitigate apportionment risk. The DSV Procedure also allows some parties to verify their own barrels for their own nominations, which is an advantage over shippers that must seek verification from a third party. However, the Commission finds that the discrimination that results from the DSV Procedure is justified.

Enbridge has demonstrated that downstream verification is needed for the efficient utilization of the system. Specifically, the DSV Procedure ensures that every barrel has a destination that will accept the product before it is injected onto the Enbridge Mainline. This prevents Enbridge from having to slow down the pipeline if barrels cannot be delivered as scheduled. As EPAC and the CSG highlighted, the Enbridge Mainline terminates into discrete facilities rather than a liquid market hub, which makes the assurance that each barrel will be accepted by its destination facility essential to the system's operation. The Commission notes that the configuration of the Enbridge Mainline requires a verification procedure such as the DSV Procedure and that the configuration of the system, not the DSV Procedure per se, contributes to the advantages enjoyed by certain parties holding downstream facilities or contracts.

The Commission is satisfied that Enbridge has consulted with shippers and attempted different forms of downstream verification prior to establishing its current DSV Procedure. Enbridge has also shown willingness to continue to consider alternative destination verification procedures. Notably, no alternatives to the DSV Procedure or proposed attributes of an alternative procedure were presented by opposing parties, even when specifically requested by the Commission. The Commission encourages Enbridge to continue working with its shippers and the broader industry to come up with creative solutions that may meet operational needs and strike a better balance of control and benefits among all interested parties.

The Commission acknowledges parties' concerns regarding the industry-wide supply and destination verification issues identified in the NEB's *2019 Minister's Report.* The Commission concurs with the statement in the *2019 Minister's Report:* "These issues relate not only to NEB [now CER]-regulated pipelines, but also facilities, companies, and behaviours that extend beyond the NEB's jurisdiction. For this reason, any improvements to existing verification procedures must be developed and coordinated across jurisdictions. They cannot be addressed by the NEB alone."[127] For the purposes of this proceeding, the Commission finds the DSV Procedure to be the best available option to suit the needs of the Canadian Mainline.

The Commission understands that the DSV Procedure may have differing impacts on different firm service offerings that Enbridge may propose in the future. With the inclusion of the DSV Procedure in the Canadian Mainline tariff, parties will be welcome to raise concerns with the DSV Procedure in future proceedings.

The Commission directs Enbridge to file its updated Rules Tariff and the DSV Procedure document with the CER. Enbridge must notify the CER and file amended documents 90 days prior to the effective date of any future changes to these procedures, to allow reasonable time for parties to review changes and raise any concerns as well as for any process to be conducted if deemed necessary by the Commission.

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[127] NEB, *Optimizing Oil Pipeline and Rail Capacity out of Western Canada*, https://www.cer-rec.gc.ca/en/data-analysis/energy-commodities/crude-oil-petroleum-products/report/2019-optimizing-capacity/2019ptmzngcpct-eng.pdf (March 2019) at 17.

7 Disposition

After careful consideration of all of the evidence and submissions, the Commission denies the implementation of Mainline Contracting and Enbridge's proposed terms, conditions and tolls. Accordingly, the open season will not proceed and the existing interim tolls and conditions of service remain in effect.

The Commission approves the continuation of Enbridge's exemption from the requirement to keep the system of accounts described by the OPUAR, but Enbridge must file its financial surveillance reports in full.

The Commission also approves adding the DSV Procedure to the Canadian Mainline tariffs. The Commission directs Enbridge to file its updated Rules Tariff and the DSV Procedure document with the CER. Enbridge must notify the CER and file amendments to these documents 90 days prior to the effective date of any future changes to these procedures.

The foregoing constitutes the Commission's Reasons for Decision in respect of the Application considered by the Commission in the RH-001-2020 proceeding.

Appendix I – List of issues

The Commission has identified but does not limit itself to the following issues for discussion in the proceeding, which relate to the specific proposals in Enbridge's application and may relate to any alternative proposal(s):

1) Whether offering any firm service on the Canadian Mainline at this time is in the public interest and consistent with the common carrier and other requirements of the *Canadian Energy Regulator Act*, having regard to relevant circumstances and considerations, including:
    a. Whether there is a material need for firm service on the Canadian Mainline, including based on the importance to market participants of long-term certainty of priority access to pipeline capacity and Enbridge's risk exposure without contracting.
    b. Appropriateness of converting existing uncommitted capacity to committed service in the absence of new or expanded Canadian Mainline facilities.
    c. Appropriateness of allowing, or not, firm service on the Canadian Mainline in light of the presence of firm service on other existing and proposed Canadian oil pipelines.
    d. Appropriateness of materially decreasing total uncommitted oil pipeline capacity out of western Canada.
    e. The impacts of firm service on various stakeholders and the competitiveness of the Western Canadian Sedimentary Basin, including through impacts on factors such as:
        i. commodity pricing,
        ii. producer netbacks,
        iii. commercial arrangements, and
        iv. opportunities for new entrants.
    f. Whether the Canadian Mainline's unique circumstances, including jurisdictional, operational and commercial, support or weaken the merits of implementing firm service.
    g. Whether 10 per cent, or some other amount, is the appropriate amount of Canadian Mainline capacity that should be reserved for uncommitted service, in the event that firm service is implemented.
2) Appropriateness of the proposed terms and conditions of firm and uncommitted services.
3) Appropriateness of, and basis for, the proposed tolls and toll methodologies, including whether they should be reflective of cost of service and toll principles and if so, whether they are.
4) Appropriateness of the proposed Open Season Procedures.
5) Appropriateness of exempting Enbridge from the requirement to keep the system of accounts described by the *Oil Pipeline Uniform Accounting Regulations.*

Appendix II – Detailed procedural history

On 16 January 2020, following the CER's receipt of the Application, the Commission requested comments prior to confirming the List of Issues and establishing its hearing procedure for the Application. Interested persons identified issues the Commission should consider and provided submissions on procedural matters, such as processes the Commission may establish to consider the Application efficiently.

The Commission also received a request for the Application to be heard in two phases. The first phase would consider the preliminary issue of the appropriateness of converting the Canadian Mainline from exclusively uncommitted service to largely committed service. The second phase would address all other issues in the Application, including tolls and terms and conditions of service, but would only proceed if the Commission approved the conversion to committed service in the first phase. Enbridge and other interested parties filed comments opposing a two-phase hearing.

On 24 February 2020, the Commission issued a Notice of Public Hearing and provided information for interested parties to register to participate.

On 16 March 2020, the CER issued a notice regarding the regulator's precautionary measures and business continuity plans in response to the COVID-19 pandemic. The notice explained that the majority of the CER workforce will work remotely going forward to preserve the CER's ability to operate. Further, the notice stated that effective immediately all in-person correspondence with external parties will be suspended, including oral portions of hearings.

On 25 and 27 March 2020, the Commission received requests from interested parties[128] to postpone any process steps in light of the current health crisis and the strain COVID-19 was putting on the industry. The Commission set out a comment process seeking input from interested persons on 3 April 2020.

On 19 May 2020, the Commission, having considered the comments received, determined that the hearing would proceed. The Commission stated that the hearing process would be structured in a manner that balances the need to address pandemic-related challenges and the Commission's mandate to adjudicate in an appropriately expeditious manner under the circumstances. In response to comments requesting that the Application be heard in two parts, the Commission also decided to proceed with the assessment of the entire Application in a single hearing process. The Commission was not persuaded that a two-phase process was likely to achieve greater efficiency and was of the view that a single hearing would enable an integrated and efficient assessment of Enbridge's Application.

On 20 May 2020, the Commission issued the list of participants, having received 67 registrations, of which 39 requested intervenor status and 28 requested commenter status. Consistent with the direction the Commission provided to interested parties, the Commission granted all registrants their requested participation status.

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[128] On 25 March 2020, the Commission received requests from Total E&P Canada Ltd., Canadian Natural Resources Limited, MEG, Shell Canada Limited, Crescent Point Energy Corp., NAL Resources Limited and ConocoPhillips Canada; Suncor submitted a request on 27 March 2020.

On 22 May 2020, the Commission issued Hearing Order RH-001-2020 describing the procedural steps for the Application. The Hearing Order was adapted to address the concerns provided by parties, including Enbridge. The Commission stated that the timeline of the proceeding was extended for Enbridge and intervenors to provide filings. Pursuant to the Hearing Order, the following steps, among others, occurred:

- additional written evidence from Enbridge;
- three rounds of intervenor information requests to Enbridge;
- intervenor evidence and letters of comment from commenters;
- one round of Enbridge information requests to intervenors;
- opportunities for motions from parties to compel further information;
- reply evidence from Enbridge; and
- oral cross-examination, written argument and oral final summary argument.

On 15 September 2020, the Commission received a motion from Canadian Natural Resources Limited requesting summary dismissal of the Application. The Commission issued Ruling No. 4 on 22 October 2020 rejecting the motion.

The Commission heard oral cross examination for approximately six weeks, from 19 May 2021 to 29 June 2021. Written final argument was received on 5 and 7 July 2021 and oral summary final argument was heard from 12 to 16 July 2021. Both oral cross examination and oral summary final argument were heard virtually and broadcast via a live audio and video stream on the CER’s website.

Appendix III – NEB and CER decisions referenced in this decision

Decision	Detailed reference
GH-5-89	NEB, Reasons for Decision - Volume 1 Tolling and Economic Feasibility, Express Pipeline Ltd., GH-5-89 (November 1990)
GHW-5-90 and RH-3-90	NEB, Reasons for Decision - Interprovincial Pipe Line Company, Application for facilities to accumulate and inject natural gas liquids and for the toll design applicable thereto and an application by the prospective shippers regarding conditions of access to the applied-for facilities, GHW-5-90 & RH-3-90 (February 1991)
GHW-R-1-2007	NEB, Reasons for Decision - Canadian Association of Petroleum Producers Review of GHW-1-2007 Decision, GHW-R-1-2007, Filing ID A17402 (December 2007)
MH-4-96	NEB, Reasons for Decision - PanCanadian Petroleum Limited Request for Service, MH-4-96 (February 1997)
MH-3-2000	NEB, Reasons for Decision - Trans-Northern Pipelines Inc. Suspension of Service, MH-3-2000 (November 2000)
MH-1-2009	NEB, Reasons for Decision - Kinder Morgan Canada Company Windsor-Sarnia Pipeline Section 21 Review and Section 71 Applications, MH-1-2009, Filing ID A24956 (April 2010)
MH-001-2013	NEB, Reasons for Decision - Set-aside and collection Mechanisms, MH-001-2013, Filing ID A60676 (May 2014)
OH-1-95	NEB, Reasons for Decision - Express Pipeline Ltd. Application for the Express Pipeline Project, OH-1-95 (June 1996)
OH-2-97	NEB, Reasons for Decision - Interprovincial Pipe Line Inc., Line 9 Reversal Project and a United Refining Company Application for Designation of a Priority Destination on Interprovincial Pipe Line Inc., OH-2-97 (December 1997)
OH-1-2003	NEB, Reasons for Decision -Trans-Northern Pipelines Inc. Capacity Expansion and Line Reversal Facilities, OH-1-2003, Filing ID A06643 (August 2003)
OH-1-2007	NEB, Reasons for Decision - TransCanada Keystone Pipeline GP Ltd. Application for Construction and Operation of the Keystone Pipeline, OH-1-2007, Filing ID A16511 (September 2007)
OH-3-2007	NEB, Reasons for Decision - Enbridge Southern Lights GP on behalf of Enbridge Southern Lights LP and Enbridge Pipelines Inc., Application for the Southern Lights Project, consisting of the Diluent Pipeline Project and the Capacity Replacement Project, OH-3-2007, Filing ID A17747 (February 2008)

Decision	Detailed reference
OH-1-2008	NEB, Reasons for Decision - TransCanada Keystone Pipeline GP Ltd., Cushing Expansion Project, OH-1-2008, Filing ID A19308 (July 2008)
OH-1-2009	NEB, Reasons for Decision -TransCanada Keystone Pipeline GP Ltd., Keystone XL Pipeline, OH-1-2009, Filing ID A24669 (March 2010)
OH-3-2011	NEB, Reasons for Decision - Vantage Pipeline Canada ULC, Application for the Vantage Pipeline Project, OH-3-2011, Filing ID A38581 (January 2012)
OH-004-2011	Joint Review Panel for the Enbridge Northern Gateway Project, Joint Review Panel Report - Northern Gateway Pipelines Inc., Enbridge Northern Gateway Pipeline Project, OH-004-2011, Filing ID A56136 (December 2013)
RH-4-86	NEB, Reasons for Decision - Interprovincial Pipe Line Limited, Application dated 5 September 1986 for New Tolls effective 1 January 1987, RH-4-86 (June 1987)
RH-1-88	NEB, Reasons for Decision - TransCanada PipeLines Limited, Phase I – Toll Design and Tariff Matters, RH-1-88 (November 1988)
RH-2-91	NEB, Reasons for Decision - Interprovincial Pipe Line Limited, Application dated 27 June 1991 for New Tolls effective January 1 1992, RH-2-91 (June 1992)
RH-3-2004	NEB, Reasons for Decision - TransCanada PipeLines Limited, North Bay Junction, RH-3-2004, Filing ID A08726 (December 2004)
RH-1-2005	NEB, Reasons for Decision - Enbridge Pipelines Inc. Application for the Spearhead Non-Routine Adjustment (NRA) and for the 20" Reversal Project NRA, RH-1-2005, Filing ID A09920 (June 2005)
RH-1-2007	NEB, Reasons for Decision - TransCanada PipeLines Limited, Gros Cacouna Receipt Point, RH-1-2007, Filing ID A16008 (July 2007)
RH-3-2008	NEB, Reasons for Decision - Enbridge Pipelines Inc., Line 9 Tolls and Tariff, RH-3-2008, Filing ID A21467 (April 2009)
RH-2-2011	NEB, Reasons for Decision - Trans Mountain Pipeline ULC on behalf of Trans Mountain Pipeline L.P., Application for Firm Service to the Westridge Marine Terminal, RH-2-2011, Filing ID A37359 (December 2011)
RH-003-2011	NEB, Reasons for Decision - TransCanada PipeLines Limited, NOVA Gas Transmission Ltd., and Foothills Pipe Lines Ltd., Business and Services Restructuring Proposal and Mainline Final Tolls for 2012 and 2013, RH-003-2011, Filing ID A51040 (March 2013)
RH-001-2012	NEB, Reasons for Decision - Trans Mountain Pipeline ULC, Part IV Application for approval of the Transportation Service to be provided and the toll methodology to be applied on a future expanded Trans Mountain Pipeline System, RH-001-2012, Filing ID A51913 (May 2013)

Decision	Detailed reference
RH-002-2014	NEB, Reasons for Decision - Alliance Pipeline Ltd., Application for New Services and related Tolls and Tariffs for Service on the Alliance Pipeline, RH-002-2014, Filing ID A71142 (July 2015)