



Canada Energy  
Regulator

Régie de l'énergie  
du Canada

# Canada Energy Regulator Reasons for Decision

CNOOC Marketing Canada  
RH-001-2022

# Canada Energy Regulator Reasons for Decision

In the Matter of

**CNOOC Marketing Canada**

Application dated 14 April 2022 in respect of PKM Canada North 40 Limited Partnership for access to Connection Facilities at the Trans Mountain Edmonton Terminal on reasonable terms

RH-001-2022  
January 2023

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CNOOC Marketing Canada  
RH-001-2022

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CNOOC Marketing Canada  
RH-001-2022

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## Glossary of terms and abbreviations

Application or Complaint	14 April 2022 application from CNOOC for an order requiring Pembina to allow CNOOC and/or its sublessees to access pipeline facilities for receiving, transporting, and delivering oil from interconnecting pipelines at the Edmonton Terminal on reasonable terms ( <a href="#">C18574</a> ).
CER	Canada Energy Regulator
CER Act	<i>Canadian Energy Regulatory Act</i> , S.C. 2019, c. 28, s. 10
CNOOC	CNOOC Marketing Canada, the successor of Nexen Marketing.
Connection Facilities	Header, meters, piping, and related equipment at the interconnection between feeder and downstream pipelines and the Terminal.
Cost Allocation Methodology	Attachment to the Tankage Agreement that describes the method used for calculating costs to be allocated to the Merchant Tanks and paid to Trans Mountain by Pembina.
Edmonton Terminal	A tank terminal located in Sherwood Park, Alberta (shown in <b>Figure 2.1</b> ), which forms part of, and is the starting point for, the CER-regulated Trans Mountain Pipeline System, owned and operated by Trans Mountain and affiliates. The Edmonton Terminal includes all facilities within its boundary, including all tanks and all Connection Facilities.
Edmonton Terminal Expansion Project (ETEP)	An Expansion Project at the Edmonton Terminal involving the construction of sixteen (16) additional tanks, approved by the NEB on 6 March 2008 through the issuance of Order XO-T246-04-2008.
ETEP Inbound Connection Facilities	Connection Facilities at the Edmonton Terminal downstream of Tank Manifold 1 to Tank Manifold 3 and piping into the Merchant Tanks. Depicted as the green coloured portion of the highlighted yellow path in <b>Figure 2.2</b> .
Feeder Pipelines	All pipelines that carry Petroleum to the Edmonton Terminal. These pipelines are under the jurisdiction of the Alberta Energy Regulator.
Imperial	Canada Imperial Oil Limited
Inbound Connection Facilities	Connection Facilities at the Edmonton Terminal upstream of the Merchant Tanks, from the meter banks up to the Merchant Tanks, including Tank Manifold 1, Tank Manifold 2, Tank Manifold 3, and all connecting piping. Depicted in yellow highlighting in <b>Figure 2.2</b> .

IR	Information Request
KMCT	Kinder Morgan Canada Terminals ULC, the predecessor of Pembina
Legacy Inbound Connection Facilities	Connection Facilities at the Edmonton Terminal including from the entry of the facility (Meter Bank 2) up to and including Tank Manifold 1. Depicted as the red coloured portion of the highlighted yellow path in <b>Figure 2.2</b> .
Legacy System Tank(s)	System Tank(s) that were constructed before the ETEP.
Merchant Tank(s)	Tank(s) contracted out for merchant service to customers to receive, store and deliver Petroleum to refineries or connected pipelines. Commonly referred to as contract tanks.
NEB	National Energy Board
NEB Act	<i>National Energy Board Act, R.S.C., 1985, c. N-7, [Repealed, 2019, c. 28, s. 44]</i>
Pembina	PKM Canada North 40 Limited Partnership and its predecessors, the successor of Kinder Morgan Canada Terminals ULC.
Petroleum	Crude oil, refined petroleum and any other petroleum product approved for transportation on the Trans Mountain Pipeline System as specified in the Tariff.
System Tank(s)	Tank(s) used to support transportation operations on the Trans Mountain Pipeline System. Depicted in <b>Figure 2.2</b> as “Regulated Crude Tanks”.
Tankage Agreement	Agreement between Trans Mountain and Pembina that provides terms and conditions upon which Trans Mountain makes the capacity of the Merchant Tanks available for the exclusive use of Pembina.
Tariff No. 105	Trans Mountain’s Rules and Regulations Governing the Transportation of Petroleum.
TMPLP	Trans Mountain Pipeline L.P.
Terminal Services Agreement (TSA)	Agreement between Pembina and CNOOC that provides terms and conditions that allow CNOOC to use the capacity of three Merchant Tanks for a 20-year period.
Trans Mountain	Trans Mountain Pipeline ULC

Trans Mountain  
Expansion Project  
(TMEP)

An expansion of the Trans Mountain Pipeline System, approved by the NEB through the issuance of Certificate O-065.

Trans Mountain  
Pipeline System

The existing CER-regulated Trans Mountain Pipeline System. The TMEP will become part of the Trans Mountain Pipeline System once placed into operation, expanding the capacity of the Trans Mountain Pipeline System.

VISTA System

A software application used by Trans Mountain to facilitate shippers' requests to transport Petroleum (also referred to as nominations) each month.



## 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 14 April 2022 by CNOOC Marketing Canada pursuant to sections 32, 34, 226, 235 and 239 of the *Canadian Energy Regulator Act* filed with the Canada Energy Regulator under File OF-TollsGroup1-T260-2022-02 01;

**AND IN THE MATTER OF** the Commission of the Canada Energy Regulator Procedural Letter RH-001-2022, dated 30 June 2022;

**HEARD** in Calgary, Alberta on 11, 12, 13, and 21 October 2022.

### **BEFORE:**

Stephania Luciuk	Presiding Commissioner
Mark Watton	Commissioner
Mélanie Chartier	Commissioner

### **Participants**

### **Appearances**

### **Witnesses**

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# 1 Introduction and summary

On 14 April 2022, the Canada Energy Regulator (**CER**) received an application from CNOOC Marketing Canada (**CNOOC**) for an order pursuant to sections 32, 34, 226, 235 and 239 of the *Canadian Energy Regulator Act* (**CER Act**) requiring PKM Canada North 40 Limited Partnership (**Pembina**) to allow CNOOC and/or its sublessees to access pipeline facilities for receiving, transporting, and delivering oil from interconnecting pipelines (**Connection Facilities**) at the Edmonton Terminal on reasonable terms (**Application** or **Complaint**).

In its Application, CNOOC requested an order of the Commission:

- a) Declaring that Pembina has contravened sections 235 and 239 of the CER Act by refusing to provide the access requested by CNOOC without any reasonable basis to do so;
- b) Directing Pembina to consent to the receipt, transportation and delivery of oil offered by CNOOC or its sublessees for transmission on the Connection Facilities from the point where those Connection Facilities interconnect with the feeder and downstream pipelines that CNOOC or its sublessee elect to use to deliver and receive oil from the Edmonton Terminal, as may change from time to time, to the point where the Connection Facilities connect with the Terminal tanks leased by CNOOC; and
- c) Directing Pembina and CNOOC to negotiate in good faith to determine reasonable commercial terms for CNOOC and its sublessee's use of the Connection Facilities, failing which either party may apply to the Commission for determination of the reasonable commercial terms for that use.

CNOOC later confirmed it was seeking relief against Pembina as well as Trans Mountain Pipeline ULC (**Trans Mountain**), the operator of the Edmonton Terminal, as might be appropriate under the CER Act.

CNOOC's requested relief was focused on access to Connection Facilities at the Edmonton Terminal, operated by Trans Mountain. However, the origins of the dispute involve a sublease of Merchant Tanks by CNOOC from Pembina, who has exclusive use of all Merchant Tank capacity at the Edmonton Terminal. In 2021, CNOOC sought, but was unable to obtain, connectivity from the Woodland Pipeline, a feeder pipeline at the Edmonton Terminal, through to Tank 35, one of the three tanks which CNOOC had subleased from Pembina. Trans Mountain was owner and operator of the Edmonton Terminal at all relevant times, controlling use of the Connection Facilities which connected inbound Feeder Pipelines to the Merchant Tanks as well as outbound connections from the Tanks. Trans Mountain transported Petroleum destined for storage in the Merchant Tanks only if destination verification was provided by Pembina.

All three parties described the key issues before the Commission differently. CNOOC identified three main issues:

- Whether Pembina has exclusive rights to use what Pembina calls the “Pembina Connection Facilities”<sup>1</sup> (referred to in this Decision as the Edmonton Terminal Expansion Project (**ETEP**) Inbound Connection Facilities) at the Edmonton Terminal;
- Whether the ETEP Inbound Connection Facilities are subject to the common carriage provisions of the CER Act; and
- Whether Pembina’s rights to the ETEP Inbound Connection Facilities give Pembina the lawful ability to deny access to Merchant Tank customers to particular upstream and downstream pipelines that connect to the Legacy Connection Facilities that are part of the regulated Trans Mountain Pipeline System.

Although CNOOC framed its Complaint as an issue of access to the Connection Facilities, Trans Mountain framed the issue in terms of the permitted use of Tank 35 to access and receive Petroleum from certain feeders, such as the Woodland Pipeline, operated by Enbridge Inc. Pembina stated the dispute was about Merchant Tank connectivity and a private contractual arrangement in the secondary market and framed the issue as whether the CER should respect or disrupt the fundamental commercial basis for the Merchant Tanks in place since the National Energy Board (**NEB**) first approved the ETEP application in 2008.

The Commission considers the key issue before it to be whether Pembina or Trans Mountain or both have contravened section 235 or subsection 239(1) of the CER Act by failing to allow CNOOC to transport product into Tank 35 from the Woodland Pipeline through the Connection Facilities. The Commission first considered the threshold issue of the extent to which the Commission can and should apply its powers to regulate the Merchant Tanks at the Edmonton Terminal. The Commission is of the view that these issues subsume the issues as framed by the parties.

These issues must be considered in the context of the unique facts and circumstances surrounding the dispute before the Commission, which include the following:

- Most merchant tanks are provincially regulated. However, the CER has jurisdiction over these Merchant Tanks. The NEB approved Trans Mountain’s application to construct and operate the Edmonton Terminal, which is a part of the federally regulated Trans Mountain system and which includes the Merchant Tanks at issue. Trans Mountain (the operator of the Edmonton Terminal) leased exclusive use of the capacity of the Merchant Tanks to its affiliate, Kinder Morgan Canada Terminals ULC (**KMCT**), as anticipated by the NEB approval. The relationship between Trans Mountain and its affiliate is governed by an affiliate code of conduct.
- KMCT later transferred exclusive use rights for all the Merchant Tanks to Pembina without any additional regulatory process or approval. Pembina is not an affiliate of Trans Mountain and is not subject to an affiliate code of conduct.

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<sup>1</sup> The parties were not consistent in how they referred to facilities at the Edmonton Terminal, described in greater detail in **Section 4.3.1** of this decision. For clarity, the Commission refers to these facilities in the Decision as the ETEP Inbound Connection Facilities.

- Pembina subleases three of the Merchant Tanks to CNOOC.
- Trans Mountain is and always has been able to recall the Merchant Tanks into system service as System Tanks on its CER-regulated pipeline.

Consideration of the Application necessitates that the Commission give effect to competing factors – namely, the CER’s role as a regulator of the entire Edmonton Terminal and the original regulatory framework that conveyed an intent to treat the Merchant Tanks and System Tanks differently. The Commission has considered all of the evidence and argument on the record. For the reasons that follow, the Commission finds that:

- Pembina does not have exclusive rights to any of the Connection Facilities.
- Section 235 of the CER Act applies to Trans Mountain as operator of the Trans Mountain Pipeline System. To the extent Pembina provides services on CER-regulated pipeline facilities at the Edmonton Terminal, section 235 also applies to Pembina. Pembina has unjustly discriminated against CNOOC. Trans Mountain has not discriminated.
- Subsection 239(1) of the CER Act applies to the Edmonton Terminal, and Trans Mountain is responsible for the common carriage obligation, as operator of the Trans Mountain Pipeline System. Trans Mountain has met its common carriage obligation.

The evidence before the Commission was largely focused on connectivity from the Woodland Pipeline. Accordingly, the Commission grants partial relief against Pembina as follows:

- The Commission directs Pembina to consent to the receipt, transportation and delivery of oil offered by CNOOC for transmission on the Connection Facilities from the Woodland Pipeline if operationally feasible, and if CNOOC requests this connectivity for itself or as part of a request to sublease otherwise permitted by a terminal services agreement. The Commission directs Pembina and CNOOC to negotiate in good faith to determine reasonable commercial terms for such connectivity, failing which, either party may apply to the Commission for determination of the reasonable commercial terms for that use.

The record before the Commission also suggests that CNOOC was not readily able to ascertain verification procedures applicable to deliveries into the Merchant Tanks. The Commission considers it appropriate for Trans Mountain to clarify relevant tariff provisions related to verification procedures. Pursuant to section 226:

- The Commission directs Trans Mountain to amend its Rules and Regulations Tariff (currently Tariff No. 105) to clarify its Nomination Verification processes (section 6.2 of the Tariff) at the Edmonton Terminal, including which portions of the Terminal Services Agreement (**TSA**) (e.g., the Dedicated Facilities or the operational description of inbound connecting pipeline facilities) or other method Trans Mountain will use to verify a shipper’s ability to deliver Petroleum into Merchant Tanks.

- Trans Mountain must consult with all interested parties in developing the amendments. Within 90 days from the issuance of this Decision, Trans Mountain must file with the CER draft tariff amendments, a summary of any outstanding concerns and an indication of how Trans Mountain will address any outstanding concerns. Trans Mountain must copy all interested parties.

In this Decision, **Chapter 2** provides background information related to the facilities at issue as well as the regulatory history that preceded CNOOC's Complaint. **Chapter 4** reviews the legal framework applicable to the Edmonton Terminal, the nature of economic regulation undertaken by the Commission in respect of the Merchant Tanks as well as the rights that apply to the Connection Facilities. **Chapter 5** provides the Commission's findings and reasons related to unjust discrimination, set out in section 235 of the CER Act. Finally, **Chapter 6** addresses the alleged breach of the common carriage obligation, set out in subsection 239(1) of the CER Act.



Stephania Luciuk  
Presiding Commissioner



Mark Watton  
Commissioner



Mélanie Chartier  
Commissioner

Calgary, Alberta  
January 2023

## 2 Background

### 2.1 History of the Edmonton Terminal

The Edmonton Terminal, a storage tank terminal located in Sherwood Park, Alberta (shown in **Figure 2.1**), is part of the Trans Mountain Pipeline System. The Trans Mountain Pipeline System, inclusive of the Edmonton Terminal, is owned and operated by Trans Mountain and its affiliates, and regulated by the CER.<sup>2</sup> The Edmonton Terminal is the starting point of the Trans Mountain Pipeline System and includes all facilities within the boundary including all tanks and all Connection Facilities (**Edmonton Terminal**).

In June 2007, the Edmonton Terminal housed 19 System Tanks with an overall capacity of 2,642,000 barrels. These tanks provide operational storage for the Trans Mountain Pipeline System for a variety of Petroleum. These tanks are known as the Legacy System Tanks. On 13 August 2007, Trans Mountain Inc., the general partner of Trans Mountain Pipeline L.P. (**TMPLP**), applied to the NEB for authorization to construct and operate an expansion project referred to as the Edmonton Terminal Expansion Project (**ETEP**).<sup>3</sup>

The ETEP application originally contemplated construction of both dedicated tanks to be used to support the operation of the Trans Mountain Pipeline System (**System Tanks**) and additional tanks to be used by commercial parties for various purposes not necessarily for the support of transportation on the Trans Mountain Pipeline System (**Merchant Tanks**). As described in the ETEP application, the exclusive use of the capacity of the Merchant Tanks would be governed pursuant to a long-term tankage agreement between TMPLP and its then affiliate KMCT (**Tankage Agreement**). In the ETEP proceeding, Trans Mountain identified the terms and conditions for the exclusive use of the capacity the Merchant Tanks. Under that arrangement, KMCT would receive exclusive use of the capacity of the Merchant Tanks and would pay all associated costs of the Merchant Tanks, ensuring that such costs were not passed on to Trans Mountain regulated shippers.

After approval of the ETEP, Trans Mountain constructed 16 new tanks, 15 of which were transferred to KMCT as Merchant Tanks under the long-term Tankage Agreement. KMCT leased the capacity of three Merchant Tanks to Nexen Marketing, now CNOOC, for a 20-year term pursuant to a terminal services agreement (**TSA**). In 2019, Pembina acquired KMCT, including rights and obligations under the Tankage Agreement. Further, Pembina took over the TSA with CNOOC when it acquired KMCT.

The TSA permits CNOOC to sublease its Merchant Tank capacity to a third party, subject to approval by Pembina. CNOOC (and its predecessor, Nexen Marketing) subleased the use of Tank 35 to Canada Imperial Oil Limited (**Imperial**) for a term of one year in each of 2018, 2019 and 2020. In the years 2018, 2019 and 2020, CNOOC and Pembina (and their predecessors) effected TSA amendments to permit and confirm additional fees for connectivity from the inbound Woodland Pipeline, which is used exclusively by Imperial.

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<sup>2</sup> Trans Mountain Pipeline L.P. owns the assets located at the Edmonton Terminal. Trans Mountain Pipeline ULC is the general partner of Trans Mountain Pipeline L.P. Trans Mountain Canada Inc. provides the services for the operation of the Edmonton Terminal. The Trans Mountain entities continue to be affiliates.

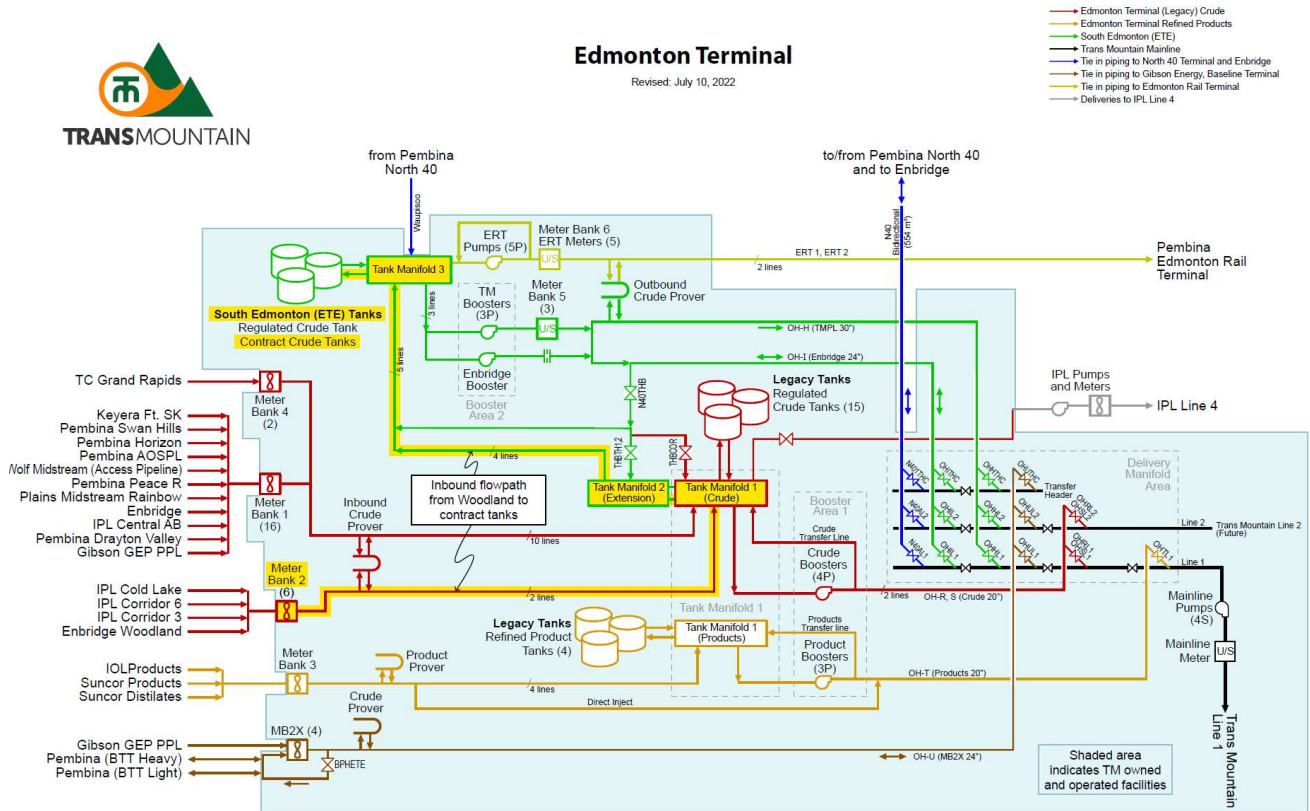
<sup>3</sup> Trans Mountain Pipeline L.P., *ETEP Application*, Filing ID [A1A0C0](#) (13 August 2017)

In August 2021, CNOOC requested permission from Pembina to extend the sublease of the capacity of Tank 35 to Imperial for the period of September 2021 to July 2022, with the same connectivity from the inbound Woodland Pipeline. In September 2021, Pembina notified CNOOC that it would consent to CNOOC's sublease to Imperial but did not renew the requested Woodland Pipeline inbound connectivity.

**Figure 2.1: Edmonton Terminal map**



**Figure 2.2: Trans Mountain’s Edmonton Terminal simplified piping drawing**



## 2.2 Relevant facilities

**Figure 2.2**, a simplified piping drawing provided by Trans Mountain in its written evidence, provides a visual guide to the facilities at issue in this Application<sup>4</sup>:

- All 16 ETEP tanks are located within the existing boundaries of the Edmonton Terminal.<sup>5</sup> The ETEP Tanks and associated ETEP facilities are depicted in green.
- All Petroleum entering the 16 ETEP tanks is transported within and through the Edmonton Terminal using Trans Mountain and affiliate owned and operated pipelines and other supporting infrastructure such as header, meters, piping, and related equipment, at the interconnection between feeder and downstream pipelines and the Terminal (**Connection Facilities**). The Connection Facilities are highlighted in yellow.
- Other relevant Petroleum facilities, including the Legacy System Tanks (the tanks that pre-dated the ETEP application) and associated facilities are shown in red.

<sup>4</sup> The blue shaded area shown in **Figure 2.2** indicates the facilities at the Edmonton Terminal that are owned and operated by Trans Mountain and affiliates. A colour version of **Figure 2.2** can be found in Trans Mountain, *Written Evidence*, Filing ID [C20312-2](#) (28 July 2022) at 12.

<sup>5</sup> Of the 16 ETEP tanks, currently one is used as a System Tank and 15 as Merchant Tanks. When the Trans Mountain Pipeline System expansion is completed and the Trans Mountain Expansion Project (**TMEP**) is placed into service, some additional tanks are expected to be recalled to system service.



Currently, the Edmonton Terminal has 23 connected Feeder Pipelines supplying Petroleum from throughout Alberta. In addition to providing access to transportation on the Trans Mountain Pipeline System, the Terminal also provides connections to other transportation and storage options such as the Enbridge Mainline, Pembina's North 40 Terminal, and the Pembina Edmonton Rail Terminal.

Inbound Connection Facilities are used to handle Petroleum received from Feeder Pipelines, such as the Woodland Pipeline, at the Edmonton Terminal for delivery into the Merchant Tanks (**Inbound Connection Facilities**). The Inbound Connection Facilities include the meter banks, and all facilities from the meter banks up to the Merchant Tanks, including Tank Manifold 1, Tank Manifold 2, Tank Manifold 3, and all connecting piping (as highlighted in yellow in **Figure 2.2**).

Two categories of Inbound Connection Facilities were discussed in the proceeding: the green and red coloured portions of the highlighted yellow path in **Figure 2.2**. The green Inbound Connection Facilities, often referred to in the proceeding as the "Pembina Connection Facilities,"<sup>6</sup> comprise the Connection Facilities upstream of Tank Manifold 1 to Tank Manifold 3 and piping into the Merchant Tanks (**ETEP Inbound Connection Facilities**). The red Inbound Connection Facilities, often referred to as the "Trans Mountain Connection Facilities,"<sup>7</sup> comprise facilities from Meter Bank 2 up to and including Tank Manifold 1 (**Legacy Inbound Connection Facilities**). Merchant Tank customers must use both the Legacy Inbound Connection Facilities and the ETEP Inbound Connection Facilities to transport Petroleum from most Feeder Pipelines, including from the Woodland Pipeline, into the Merchant Tanks.

Over time, additional Feeder Pipelines including the Woodland Pipeline (as depicted in **Figure 2.2** as "Enbridge Woodland") have been connected to the Edmonton Terminal. The Woodland Pipeline exclusively transports oil from the Kearl Oil Sands Project and its only shipper is Imperial Oil. The Woodland Pipeline was completed after the initial signing of the TSA.

Outbound Connection Facilities include facilities downstream of the Merchant Tanks and Tank Manifold 3, as depicted in **Figure 2.2** in green without yellow highlighting. The outbound Connection Facilities provide interconnects to the Trans Mountain Mainline System, which includes the additional infrastructure and capacity that will be provided by the TMEP, as well as to other transportation and storage options such as the Enbridge Mainline, Pembina's North 40 Terminal, and the Pembina Edmonton Rail Terminal.

### **2.3 Trans Mountain's Tariff**

Section 225 of the CER Act defines "tariff" as meaning "a schedule of tolls, conditions, classifications, practices or rules and regulations applicable to the provision of a service by a company and includes rules respecting the calculation of tolls."

The Trans Mountain Pipeline System, including the Edmonton Terminal, is governed by the terms and conditions of service set out in Trans Mountain's Rules and Regulations Governing the Transportation of Petroleum Tariff, Tariff No. 105, as approved by the Commission. In

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<sup>6</sup> The Commission is of the view that the term Pembina Connection Facilities is misleading, for reasons provided in **Section 4.3.1** below.

<sup>7</sup> The Commission is of the view that the term Trans Mountain Connection Facilities is misleading, for reasons provided in **Section 4.3.1** below.

addition to Tariff No. 105, the following documents set out applicable terms and conditions of service within the Edmonton Terminal:

- Trans Mountain's Tariff No. 112 sets out the tolls to be paid on transportation of Petroleum.<sup>8</sup> This includes tolls for receipt services at the Edmonton Terminal, such as tolls to transport Petroleum to the Merchant Tanks (Metered In, 3<sup>rd</sup> Party Toll). These tolls are paid for the use of System Tanks, the Legacy Inbound Connection Facilities, and Trans Mountain's share of the ETEP Inbound Connection Facilities.
- The Cost Allocation Methodology describes the method for calculating costs to be allocated to the Merchant Tanks and paid to Trans Mountain by Pembina. This cost allocation is applicable to the Merchant Tanks and Pembina's share of the ETEP Inbound Connection Facilities.

All shippers nominating Petroleum at the Edmonton Terminal are subject to Tariff No. 105. This includes shippers, such as CNOOC, nominating volumes to and from Merchant Tanks. The following terms and conditions of Tariff No. 105 apply to a shipper nominating Petroleum to the Trans Mountain Pipeline System from the Woodland Pipeline:

- Rule 3.1 states that Petroleum will be accepted for transportation on Trans Mountain's Mainline System only when tendered pursuant to Rule 6 at a receipt point and nominated for delivery to one or more delivery points.
- Rule 3.2 requires that the shipper has provided or made arrangements for the necessary facilities and/or transportation service satisfactory to Trans Mountain at the receipt point and delivery point for handling the Petroleum at the rate of flow at which the Carrier is then operating the Mainline System at such receipt point and delivery point.
- Rule 6.2 describes Trans Mountain's verification process to ensure necessary arrangements have been made at receipt points. If a shipper does not provide required verifications acceptable to Trans Mountain, then Trans Mountain is not obligated to accept a shipper's Nomination.
- Rule 6.5 states that if the shipper is unable to remove from the delivery point(s) the volume of Petroleum to be tendered, Trans Mountain may reduce the amount of Petroleum accepted from the shipper for transportation to the amount which the shipper has verified it will be able to remove from the delivery point(s).

Trans Mountain uses the VISTA System, a software application, to facilitate shippers' submissions of nominations each month and to automate its verification procedures. Trans Mountain includes particular Feeder Pipelines in each shipper's drop-down list in the VISTA System. For Merchant Tank customers, the drop-down list only includes inbound connections which are listed in Schedule "A" of the shipper's terminal services agreement with Pembina. This practice is currently not explicitly stated in Trans Mountain's Tariff.

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<sup>8</sup> "Petroleum," as defined under 1.63 of the Rules and Regulations Tariff (105), "means Crude Petroleum, Refined Petroleum and any other petroleum product approved for transportation in accordance with the Commodity Approval Process." ([Link](#)) at 4.

## 2.4 Relevant commercial agreements

### Tankage Agreement

The Tankage Agreement grants Pembina a contractual right for the exclusive use of the Merchant Tanks, while Trans Mountain retains ownership of and operates them. Pursuant to the Tankage Agreement, Trans Mountain charges Pembina a fee set for the exclusive use of the capacity of the Merchant Tanks determined in accordance with the Cost Allocation Methodology which is attached to the Tankage Agreement. The Tankage Agreement does not limit the connections available to Pembina at the Edmonton Terminal.

The Tankage Agreement reflects the terms and conditions that Trans Mountain described in the ETEP application (as discussed in **Section 2.1**) and which the NEB was informed would govern the treatment of Merchant Tanks.<sup>9</sup>

### Terminal Services Agreement

The TSA is an agreement between Pembina and CNOOC that allows for CNOOC to use the capacity of three 400,000-barrel Merchant Tanks at the Edmonton Terminal (Tanks 27, 28, and 35).<sup>10</sup> The TSA allows CNOOC to use the leased tanks to store Petroleum received from Feeder Pipelines until such time as CNOOC elects to inject that Petroleum into a downstream pipeline. The TSA also permits CNOOC to sublease any or all tanks with the prior written consent of Pembina, subject to a sublease fee.

The TSA addresses how CNOOC may use dedicated facilities including three Petroleum tanks, as well as facilities consisting of existing meter(s), piping, valves, and related equipment, and new piping, valves, meter(s) and variable speed drive pump(s), and related equipment shared with other tanks at the Edmonton Terminal. In addition, the TSA sets out various fees payable by CNOOC to Pembina, including: Fixed Facility Services and Fees, which include storage, tank mixers, additional steam blending and holdover fee, and Variable Services and Fees, which include outbound movement for all volumes delivered to Enbridge pipeline connections or to TMPLP pipeline connections as well as excess throughput, tank to tank transfer, blending, subleasing, terminal access, third party facilities, tank bottom changeout and additional services.

Schedule "A" in the TSA lists inbound Feeder Pipelines from which CNOOC's Petroleum may be delivered into the tanks, as well as outbound pipelines. Trans Mountain uses Schedule "A" to manage the list of receipt points and delivery points in its VISTA System, as discussed in **Section 2.3**<sup>11</sup> The TSA has been amended numerous times by the parties, including periodic amendments for the addition of the Woodland Pipeline inbound connection in exchange for a Variable Facility Fee on previous occasions.

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<sup>9</sup> The Tankage Agreement also had regard to the Memorandum of Understanding between Trans Mountain and Canadian Association of Petroleum Producers, dated 14 February 2008, which set out construction schedule, costs, ownership, build out provisions, operation, term, and cost allocation methodology (which later became the NEB approved Cost Allocation Methodology document).

<sup>10</sup> The TSA is an agreement that was initially made on 29 February 2012, by and between KMCT and Nexen Marketing (the "Customer"). The successor companies Pembina and CNOOC, respectively, are now party to this agreement.

<sup>11</sup> A redacted copy of the entire TSA is provided to Trans Mountain for verification purposes.

### 3 Procedural summary

On 14 April 2022, CNOOC filed its Application ([C18574](#)). On 17 May 2022, the Commission issued a letter ([C19170](#)) soliciting comments on the Application, including comments on further process the Commission may establish to consider the Application. In response, Trans Mountain filed comments on 27 May 2022 ([C19294](#)), Pembina filed comments on 6 June 2022 ([C19398](#)), and CNOOC filed reply comments on 10 June 2022 ([C19499](#)).

On 30 June 2022, the Commission issued a Procedural Letter ([C19943](#)) establishing a public hearing process to consider the Application (RH-001-2022). The Commission found that the Application establishes an arguable case for the Commission's consideration. The letter included a Timetable of Events setting out the procedural steps with dates, and a List of Parties. The hearing was designed with both written and oral components. The written component provided parties with the opportunity to file additional evidence to supplement the Application and letters of comment, responses to the Commission's Information Requests (**IRs**), and an opening statement prior to final argument. The oral component provided parties with the opportunity to cross-examine other parties and provide oral final argument.

On 6 July 2022, Pembina filed a notice of motion to stay the Timetable of Events and extend the deadline for Pembina to file any additional written evidence by four weeks (**Motion**) ([C20010](#)). Upon reviewing comments from the parties, on 13 July 2022, the Commission issued Ruling No. 1 ([C20098](#)) which granted the Motion in part and issued a Revised Timetable of Events. The Commission provided Pembina with a 25 day extension, which provided additional time for all parties to prepare any additional written evidence. The Commission also increased the period of time between each step in the written component of the hearing.

On 25 August 2022, the Commission issued Procedural Update No. 1 ([C20669](#)) which provided information on the oral component of the hearing, including dates for cross-examination and information on the use of a virtual video conferencing platform.

During the written component of the hearing the Commission approved three requests for confidential treatment of information:

- On 26 August 2022, the Commission issued Ruling No. 2 ([C20677](#)) which granted confidential treatment of portions of Pembina's Written Evidence.
- On 22 September 2022, the Commission issued Ruling No. 3 ([C21025](#)) which granted confidential treatment of portions of Trans Mountain's Reply Evidence.
- On 7 October 2022, the Commission issued Ruling No. 4 ([C21274](#)) which granted confidential treatment of portions of Pembina's response to Commission IR No. 1.

The Commission also accepted written evidence during oral cross-examination by way of an undertaking response, granting confidential treatment of that evidence, consistent with its prior rulings.

The Commission heard oral cross-examination from 11 to 13 October 2022. Oral final argument was heard on 21 October 2022. Both oral cross-examination and oral final argument included *in camera* portions, which were excluded from the live audio and video stream broadcast on the CER's website and redacted from the publicly available transcript.

### **3.1 Procedural matter raised by Trans Mountain**

Prior to the commencement of cross-examination, Trans Mountain raised a concern relating to CNOOC's 7 October 2022 opening statement ([C21282-2](#)). Trans Mountain stated:

- Prior to the filing of its opening statement, CNOOC did not request any relief against Trans Mountain.
- CNOOC's opening statement effectively changed its requested relief.
- CNOOC did not seek to amend its Application to request the Commission to issue any order or make any direction to Trans Mountain.
- Opening statements are to be a summary of a party's evidence already filed on the record of the proceeding.
- As a matter of procedural fairness, Trans Mountain needed to understand what relief was being sought and the basis for that relief.
- There was nothing unique about this process that would suggest that CNOOC can jettison procedural fairness.
- Trans Mountain clarified that it was not seeking further process or any other form of relief in relation to its concern.

In response, CNOOC stated:

- Its Application sought access to the Connection Facilities, as defined in the Application. At that time, it was not clear to CNOOC what the relationship was between Trans Mountain and Pembina at these facilities.
- In deciding on the process for this proceeding, the Commission placed the burden on both Pembina and Trans Mountain to demonstrate compliance with the CER Act and Trans Mountain's tariff.
- The record supports the statements CNOOC made in its opening statement.
- Section 68 of the CER Act provides that the Commission may include "any other relief that the Commission considers appropriate as if the application had been made for that other relief" in a decision.

### **3.2 Commission analysis and findings**

The Commission heard Trans Mountain and CNOOC's oral submissions on this preliminary matter prior to cross-examination. The Commission took note that Trans Mountain was not seeking any relief relating to its concern and proceeded with the remaining components of the proceeding on that basis. Trans Mountain then raised the matter again in its final argument.

The Commission is not persuaded that CNOOC's relief sought, as described in its opening statement, or the relief granted in this Decision, gives rise to procedural unfairness. Specifically, the following procedural steps and circumstances confirm that Trans Mountain was aware of the case to be met and had a fair opportunity to fully put forward evidence and argument for the Commission's consideration:

- Following the initial comment process carried out by the Commission, the Commission advised in its Procedural Letter dated 30 June 2022 ([C19943](#)) that it would consider Trans Mountain's compliance with the CER Act.<sup>12</sup> In its comments, Pembina claimed that CNOOC could not seek relief against it, as it is neither the owner nor operator of the facilities. CNOOC argued that additional process was required to, among other things, determine whether the requested relief should be granted against Pembina, Trans Mountain, or both. Trans Mountain confirmed that it is owner and operator of the facilities.
- The Commission then set down a process, in which it confirmed the burden was on Trans Mountain and/or Pembina to prove compliance with CER Act requirements.
- As part of that process, IRs were issued to Trans Mountain by the CER, including questions relating to Trans Mountain's Tariff, whether Trans Mountain has obligations under section 235 and subsection 239(1) of the CER Act for the Edmonton Terminal, and how these obligations were being met. CNOOC and Pembina's responses to the Commission's IRs to them also put Trans Mountain on notice of their views that Trans Mountain was not in compliance with CER Act requirements.
- Trans Mountain acknowledged that it heard the Commission about the shift of burden, understood the nature of the IRs that the Commission issued to Trans Mountain, and fully participated in the process that the Commission established.

The Commission also notes that subsection 68(1) of the CER Act provides the Commission with authority to make a decision or order that may include "...in addition to or in lieu of the grant relief applied for – any other relief that the Commission considers appropriate as if the application had been made for that other relief."

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<sup>12</sup> The initial comment process refers to the comments the Commission solicited in its 17 May 2022 letter, Filing ID [C19170](#). All parties filed comments, as noted in the Procedural Summary.

## 4 Regulatory framework

Because merchant tanks are typically provincially regulated and given the unique nature of the original NEB approval of the tankage construction and arrangements at the Edmonton Terminal, the regulatory framework applicable to the Application must be carefully considered. This Chapter reviews the applicable provisions of the CER Act in **Section 4.1**, the degree of economic regulation applicable to the Merchant Tanks in **Section 4.2** and the Connection Facilities and other facilities at the Edmonton Terminal in **Section 4.3**.

### 4.1 Legal framework

The Commission has full and exclusive jurisdiction to determine matters within its mandate, pursuant to sections 32 and 34 of the CER Act. The Commission also has broad authority to make orders with respect to all matters relating to traffic, tolls or tariffs pursuant to section 226 of the CER Act. In considering the traffic, tolls and tariffs provisions in Part IV of the former *National Energy Board Act (NEB Act)*, the Federal Court of Appeal has commented that these provisions provided the NEB with “authority in the broadest of terms to make orders with respect to all matters relating to [tolls and tariffs].”<sup>13</sup> Part 3 of the CER Act repeats the former NEB Act Part IV provisions, apart from minor changes to modernize language. The Commission’s authority with respect to all matters relating to tolls and tariffs continues to be broad.

CNOOC’s Application alleges contravention of section 235 and subsection 239 of the CER Act. Section 235 of the CER Act, commonly known as the prohibition against unjust discrimination, states:

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

The Commission first determines whether there is discrimination. If established, the Commission determines whether the discrimination is unjust. Section 236 states:

**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.

Pursuant to section 231 of the CER Act, the Commission may determine whether there is unjust discrimination in the circumstances before it.<sup>14</sup> The factors considered in a particular hearing will depend on the specifics of the individual complaint or application before the Commission.<sup>15</sup>

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<sup>13</sup> *British Columbia Hydro and Power Authority v Westcoast Transmission Limited*, [1981] 2 F.C. 646 (Fed. Court of Canada – Appeal Division) at 655. See also *Trans Mountain Pipeline Company Ltd. v National Energy Board*, [1979] 2 F.C. 118 (Fed. Court of Canada – Appeal Division); and *TransCanada Pipelines Limited v National Energy Board*, 2004 FCA 149 at para 30.

<sup>14</sup> CER, *Reasons for Decision - NGTL System Rate Design and Services RH-001-2019*, Filing ID [C05448](#) (March 2020) at PDF 14 of 65.

<sup>15</sup> CER, *Reasons for Decision – Kingston Midstream Westspur Limited RH-003-2020*, Filing ID [C13917](#) (July 2021) at PDF 18 of 69 [RH-003-2020].

Subsection 239(1) of the CER Act sets out what is commonly referred to as the common carriage obligation for oil pipelines:

**239 (1)** 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.

The CER Act does not specify how the Commission should assess whether an oil pipeline operator meets this requirement or provide any criteria the Commission should consider in prescribing any exemptions or conditions under this provision. Previous decisions of the NEB and Commission, while not binding, provide useful guidance for the interpretation and application of this provision. An oil pipeline carrier is under a *prima facie* duty to ship all oil tendered to it, unless the company operating the pipeline can convince the Commission that for some reason it cannot.<sup>16</sup> However, prior decisions also affirm that:

- The common carriage obligation is a relative concept and tempered by a test of reasonableness.<sup>17</sup>
- The regulator has broad authority and can tailor the common carriage obligation to fit unique circumstances.<sup>18</sup>

This pragmatic approach is consistent with the courts' interpretation of statutory common carriage obligations.<sup>19</sup>

For complaint applications, a complainant must establish a *prima facie* or arguable case for the Commission to establish a process. Once that *prima facie* case is established, the burden of proof shifts to the other party, in this case both Trans Mountain and Pembina, to establish compliance with the CER Act. Each party must adduce evidence in support of its position, known as the persuasive burden. This means that a complainant still has the burden to prove entitlement to its requested relief. The standard of proof for all parties is on a balance of probabilities.

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<sup>16</sup> Ibid at 12; NEB, Reasons for Decision - Gulf Canada Limited – RH-4-84 (December 1984) at 3.

<sup>17</sup> NEB, *Reasons for Decision, PanCanadian Petroleum Limited* [MH-4-96](#) (February 1997) at 11 [MH-4-96]; NEB, *Reasons for Decision - Trans Mountain Pipeline ULC Application for Firm Service to the Westridge Marine Terminal* RH-2-2011, Filing ID [A37359](#) (December 2011) [RH-2-2011]; NEB, *Reasons for Decision, Trans-Northern Inc. – Suspension of Service* [MH-3-2000](#), (November 2000) at 7 [MH-3-2000]; NEB, *Reasons for Decision, Interprovincial Pipe Line Inc. Facilities and Toll Methodology* [OH-2-97](#) (December 1997) at 52 [OH-2-97].

<sup>18</sup> 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-1-2009]; NEB, *Reasons for Decision - Trans-Northern Pipelines Inc. Capacity Expansion and Line Reversal Facilities* OH-1-2003, Filing ID [A06643](#) (August 2003); MH-3-2000, *supra* note 17; OH-2-97, *supra* note 17; MH-4-96, *supra* note 177; RH-2-2011, *supra* note 177.

<sup>19</sup> *Patchett & Sons Ltd. v Pacific Great Eastern Railway Co.* (1959) SCR 271 at 273.



## 4.2 CER regulation of the Merchant Tanks

None of the parties disputed that the entirety of the Edmonton Terminal, including Merchant Tanks, are within CER jurisdiction.<sup>20</sup> However, the parties did not agree on the degree of regulatory oversight applicable to the Merchant Tanks.

### Views of CNOOC included the following:

- Arguments regarding the use of economic regulation for the disputed facilities are largely irrelevant to the Application. The issue at the heart of the Complaint is whether there is any regulatory justification for Pembina, or any other company, to have the authority to block CNOOC's access to Connection Facilities in a way that Trans Mountain could not under its tariff and common carrier obligations.
- When Trans Mountain applied for the Merchant Tanks it was clear that all the applied-for facilities, including the tanks, were being applied for as part of the regulated system and that all aspects of the NEB Act, now the CER Act, including the part of the Act dealing with economic regulation and common carrier matters, would apply to the facilities.

### Views of Trans Mountain included the following:

- The underlying issue in this proceeding is what Feeder Pipelines and downstream pipelines CNOOC can or should be permitted to use to transport Petroleum to and from the Edmonton Terminal.
- Trans Mountain remains of the view that all aspects of the CER Act apply to the Edmonton Terminal.

### Views of Pembina included the following:

- The NEB approved the ETEP with full knowledge that the Merchant Tanks were to be constructed and operated for the exclusive use of the party with the long-term lease for those tanks, implicitly approving such exclusive use and contract-based service.
- Since tank 35 provides merchant storage solutions that may be used for any number of purposes not necessary for transportation on the regulated pipeline system, regulatory principles support that tank 35 and the Connection Facilities should not be economically regulated, and the requested access should not be granted.
- The services on the Merchant Tanks are, and always have been, governed by private agreements, first between Trans Mountain and Pembina, and then between Pembina and users of the Merchant Tanks. Merchant Tanks have always been subject to the right to be recalled into regulated service, and sufficient NEB and CER oversight to ensure that the regulated customers of Trans Mountain do not bear the costs of the Merchant Tanks and that Merchant Tank users pay appropriately for common facilities.

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<sup>20</sup> CNOOC applied to the Alberta Energy Regulator for a common carrier and access order in respect of the Connection Facilities in December 2021, however, through Pembina's response to that application, CNOOC became aware that the Connection Facilities and the Terminal are regulated by the CER.

- Merchant Tanks were constructed to service non-regulated commercial needs and were not integral or necessary for a shipper to receive regulated transportation service on the regulated Trans Mountain pipeline system.

#### **4.2.1 Commission analysis and findings**

At issue before the Commission is whether the original approval of the ETEP application or subsequent exclusive lease of the capacity of the Merchant Tanks to Pembina has the effect of eliminating or diminishing economic regulation of the Merchant Tanks by the Commission.

Pembina submits that the NEB-approved merchant tankage arrangement explicitly allowed an exclusive long-term lease to a Trans Mountain affiliate free from any direct economic regulatory oversight other than the Cost Allocation Methodology. The Commission disagrees and finds that Part 3 of the CER Act applies to the entirety of the Edmonton Terminal, including the Merchant Tanks. The provisions in Part 3 must be applied in accordance with their meaning and intent, and should be interpreted in a reasonable and contextual manner with all the flexibility granted to the CER and Commission by the statute and courts' interpretations of the NEB Act and the CER Act.

As already noted, the circumstances of this Application are unique in many respects. The Commission considered the facts before it carefully. While the Commission finds that economic regulation applies to the Merchant Tanks, the degree of economic regulation should reflect the approach of differentiating between System Tanks and Merchant Tanks adopted by the NEB in its ETEP approval.

The Commission notes that the predecessors of each of Trans Mountain and Pembina chose to build the Merchant Tanks as part of the Edmonton Terminal. In doing so, they took on the benefits of various efficiencies associated with building a single expansion with Merchant Tanks and System Tanks, as well as the responsibility of compliance with the NEB Act pursuant to which the project was approved. The Commission is of the view that the original ETEP approval anticipated ongoing regulatory oversight of the Merchant Tanks that would include:

- Authority to receive and adjudicate complaints pertaining to Merchant Tanks and related arrangements at the Edmonton Terminal; and
- Economic regulation necessary to ensure relevant statutory obligations and principles applicable to CER-regulated infrastructure are respected.

The evidence filed in the ETEP application, and the resulting NEB decision, provide context that the NEB intended for Part IV of the NEB Act to apply to the Merchant Tanks. Upon reviewing the ETEP application, which described the unique economic arrangement for the Merchant Tanks, the NEB stated in the Preamble to its IR that it:

...turned its mind to the question of whether it has jurisdiction over all thirteen tanks, as applied for by [Trans Mountain Inc.], using the standard legal tests. Further, as the Applicant is no doubt aware, if the [NEB] were to assume jurisdiction over the thirteen (13) applied-for tanks, then all aspects of the [NEB Act] and its regulations would apply to those tanks regardless of whether they will actually serve the regulated system immediately.

Trans Mountain did not challenge this regulatory approach in its response and confirmed that the NEB would have jurisdiction over all applied-for tanks, providing a legal jurisdictional

analysis to support its submission.<sup>21</sup> Trans Mountain also confirmed that it “is aware that all aspects of the NEB Act and Regulations, including Part IV of the NEB Act would apply to all of the Project Facilities.”<sup>22</sup> The Commission finds it clear that, in issuing Order XO-T246-04-2008 on 6 March 2008, approving construction of the Merchant Tanks as part of the ETEP, the NEB intended to regulate the facilities, and apply the provisions of the NEB Act.

However, the NEB understood the Merchant Tanks would be excluded from rate base unlike the System Tanks, and that Trans Mountain would not establish commercial terms for use of the Merchant Tank capacity. In the interests of regulatory certainty and predictability, the Commission considers it appropriate to give continued effect to this expectation of differentiated, and in this case lighter, economic regulation while exercising its statutorily mandated oversight role.

Moreover, the Commission acknowledges that the original ETEP application sought to achieve efficiencies through a creative approach to the construction of merchant and transportation storage. As explained by Pembina’s expert, Mr. Wetmore, combining construction of the System Tanks with the Merchant Tanks enabled Trans Mountain to achieve operational and economic synergies, to maximize the efficient use of a single terminal site and minimize the project’s footprint. The Commission supports innovation by pipeline companies and others in constructing facilities, encouraging investment, and negotiating related agreements that are mutually beneficial. The Commission has consistently found that in instances in which competition exists, it is in the public interest to allow competitive forces to work.<sup>23</sup>

The Commission finds that in these circumstances, complaint-based economic regulation is appropriate. Trans Mountain is a Group 1 company and is generally subject to full economic regulation including detailed reporting requirements and tolls and tariffs that are subject to Commission approval. However, this type of oversight over the Merchant Tanks is unnecessary given the merchant tank arrangements that were approved by the NEB. Economic regulation of the Merchant Tanks to a lighter degree, which nonetheless prevents frustration of the key purposes of Part 3 of the CER Act, respects the merchant tankage arrangements in place at the Edmonton Terminal, while serving the CER’s role as an economic regulator of pipeline facilities within its jurisdiction.

In the Commission’s view, parties did not point to useful precedents with respect to the CER’s regulation of merchant tankage. The Commission is not persuaded that considering the Federal Energy Regulatory Commission of the United States’ economic regulation of merchant tanks is required in this case, as its legislative regime is distinguishable in many respects. The Commission agrees with CNOOC’s expert witness Mr. Reed that the Canadian regulatory framework, as administered by the Commission and as established in the Trans Mountain Tariff, is robust enough to resolve the issues.

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<sup>21</sup> Trans Mountain, *ETEP proceeding, IR No. 3 Response 3.1.1*, Filing ID [A1D2Z4](#) (4 February 2008) at PDF 2 - 7.

<sup>22</sup> *Ibid*, at PDF 7 - 8

<sup>23</sup> RH-003-2020, *supra* note 15 at PDF 48; NEB, *Reasons for Decision - NOVA Gas Transmission Ltd., North Montney Mainline Variance and Sunset Clause Extension GC-125 MH-031-2017*, Filing ID [A92071](#) at PDF 80.

### **4.3 The Connection Facilities**

Having addressed the degree of economic regulation applicable to the Merchant Tanks, the Commission addresses the regulatory regime applicable to the Connection Facilities. While both the Merchant Tanks and Connection Facilities are situated on the Edmonton Terminal, are subject to the CER Act and are under the jurisdiction of the CER, the regulatory expectations pertaining to each are not identical. While the Commission accepts that Pembina acquired contractual, exclusive use rights to the capacity of the Merchant Tanks, the Commission finds that Pembina did not acquire exclusive use of the Connection Facilities.

#### **Views of CNOOC included the following:**

- No one in this proceeding has disputed that the Edmonton Terminal, including the Connection Facilities, is a part of the CER-regulated Trans Mountain Pipeline System.
- While Pembina claims that its cost-sharing arrangement with Trans Mountain implies a form of exclusive right to the Connection Facilities, the equivalent of firm service for the majority of the capacity of these facilities, or a lease of flow paths using the facilities, the record does not support that Pembina acquired these rights. While cost-sharing arrangements on CER pipelines are relatively common, the Commission has never interpreted these arrangements to create the types of rights that Pembina is claiming.

#### **Views of Trans Mountain included the following:**

- Trans Mountain's arrangement with Pembina is a lease of the exclusive capacity of the Merchant Tanks but Pembina has no additional rights to Connection Facilities at the Terminal relative to any other shipper on the regulated Trans Mountain system. Trans Mountain did not grant Pembina any firm or committed transportation service to or from the Merchant Tanks at the Edmonton Terminal and there is no basis for the idea that Pembina has any exclusive right to the inbound Connection Facilities. Neither the Operational Services Agreement<sup>24</sup> or Tankage Agreement afford this to Pembina, nor is there any practical necessity.

#### **Views of Pembina included the following:**

- The current allocation of costs between Merchant Tanks and the regulated Trans Mountain system is based on Pembina's exclusive use of the Merchant Tanks. Pembina bears the costs and risks of the Merchant Tanks and in return can use them as it sees fit. If Pembina is not entitled to exclusive use of the Merchant Tanks, a different arrangement for the costs of the Merchant Tanks may be necessary. Finding the Merchant Tanks subject to the common carrier obligation would essentially extend Trans Mountain's common carrier obligation to the Merchant Tanks, raising the question of whether all 15 Merchant Tanks should be included in Trans Mountain's

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<sup>24</sup> The Operational Services Agreement was signed on 31 August 2018 by Trans Mountain and Pembina's predecessor KM Canada North 40 Limited Partnership (KMCN), after which time KMCN was acquired by Pembina.

regulated revenue requirement, undoubtedly increasing tolls for Trans Mountain's regulated customers.

- Pursuant to the Tankage Agreement with Trans Mountain, Pembina holds an exclusive contractual right to use the Merchant Tanks for the storage and handling of Petroleum. Such right comes with a corresponding right to flow Petroleum into the Edmonton Terminal and then to the Merchant Tanks through various connection facilities, as a matter of practical necessity, and in part as a matter of the facilities for which Pembina pays Trans Mountain.
- If CNOOC's requested relief is granted, every agreement Pembina has for Merchant Tanks would be subject to complete renegotiation since each party pays negotiated rates for the access it requires. If such access were required to be offered to CNOOC, those agreements, including CNOOC's TSA, would be placed on an entirely new economic footing.

#### **4.3.1 Commission analysis and findings**

Much of CNOOC's Application, including its requested relief, focused on Pembina's rights with respect to the Connection Facilities. The Commission finds that Pembina does not have exclusive rights to the Connection Facilities, which are owned and operated by Trans Mountain and which provide service not only to the Merchant Tanks but also other parts of the Edmonton Terminal.

All Connection Facilities are owned and operated by Trans Mountain. Both the ETEP and Legacy Inbound Connection Facilities are utilized by the System Tanks as well as the Merchant Tanks. Trans Mountain is obligated to fully comply with all applicable regulatory requirements in the CER Act in respect of the Connection Facilities. Trans Mountain would not be able to grant exclusive use of these facilities and effectively contract out of its common carriage and other regulatory obligations via the Tankage Agreement or otherwise.

In any event, Pembina did not provide persuasive evidence to support its claim of exclusive rights to the Connection Facilities. The Tankage Agreement does not expressly refer to such rights as asserted by Pembina and the Commission is not persuaded that such rights can be implied. In particular, Pembina did not adduce evidence to substantiate its claim that every agreement Pembina has for Merchant Tanks would be subject to complete renegotiation if rights to exclusive use of the Connection Facilities were not implied in this case.

Pembina's view is that the ETEP Inbound Connection Facilities and the Legacy Inbound Connection Facilities are, and have always been, treated differently from each other in terms of cost recovery and tolling. Pembina considers that paying for a portion of the costs on the ETEP Inbound Connection Facilities as set out in the Cost Allocation Methodology entitles Pembina to use the ETEP Inbound Connection Facilities as needed to transport Petroleum into the Merchant Tanks. The Commission finds that Pembina's payment of a portion of the costs of these facilities does not grant Pembina any *exclusivity* of use. The Cost Allocation Methodology requires Pembina to pay its share of the costs of the Connection Facilities used to access the Merchant Tanks. Cost allocation is an accounting exercise which is intended, in part, to avoid cross-subsidization, or in other words, to avoid having Trans Mountain Mainline System shippers pay for facilities that are not yet required for the operation of the Trans Mountain Mainline System.

In summary, the Commission confirms that Trans Mountain cannot contract out of its statutory obligations, such as subsection 239(1), in respect of the Connection Facilities. In any event, the Commission is not persuaded that Trans Mountain explicitly or impliedly granted Pembina exclusive rights to the Connection Facilities. The Commission acknowledges that Pembina has a right to *use* the Connection Facilities to access the Merchant Tanks. However, the scope of this right would not allow Pembina to exclude shippers from the Connection Facilities, or direct Trans Mountain to do so.

## 5 Unjust discrimination

Having found that Pembina does not have exclusive use rights to the Connection Facilities, the Commission must still determine whether Trans Mountain or Pembina breached the CER Act while providing services related to merchant tank storage at the Edmonton Terminal. The Commission first considered section 235, which the Commission finds applies to both Trans Mountain and Pembina. Based on the facts before us, the Commission finds that Pembina contravened section 235 of the CER Act, but Trans Mountain did not.

### **Views of CNOOC included the following:**

- CNOOC is not requesting that the Commission change the contractual arrangements for use of tank capacity, assign rights to the tanks, or oversee the terms of arrangements in the secondary market. CNOOC is requesting confirmation that the parties that hold rights to use tanks at the Terminal can also obtain reasonable access to the CER-regulated Connection Facilities that allow Petroleum to enter and exit those tanks.
- Trans Mountain has an obligation under section 235 of the CER Act for the entire Trans Mountain Pipeline System, which includes the Edmonton Terminal. Trans Mountain's arrangement with Pembina at the Edmonton Terminal means that Trans Mountain is discriminating against CNOOC for oil transportation at the Edmonton Terminal.
- As the lessee of CER-regulated pipeline facilities (which include the Merchant Tanks), Pembina has an obligation under section 235 of the CER Act to not unjustly discriminate in respect of those facilities.
- Pembina restricting or preventing CNOOC's use of the Connection Facilities and forcing CNOOC to seek alternative arrangements, despite available capacity on the Connection Facilities, results in unjust discrimination between the availability of this capacity to CNOOC and its availability to other shippers.
- The pipelines which show up in a drop-down list in the VISTA System when the shipper goes to make a nomination do not include all pipelines that can be accessed at the Edmonton Terminal through the Trans Mountain Pipeline system. They only include the pipelines listed in the shipper's TSA with Pembina, as well as any other pipelines that Pembina agrees to allow the shipper access to.
- Trans Mountain shippers on the Connection Facilities are treated differently based on, first, whether they choose to deliver Petroleum into a Merchant Tank or a System Tank; second, the terms of the shipper's private contract with Pembina, which is unrelated to transportation on the Trans Mountain Pipeline System; and third, the subjective decisions of Pembina as to what is in its best interests at any given time.
- CNOOC requests that it be provided, in the VISTA System, a listing of all feeders and outbound connections that are connected to the Edmonton Terminal including the Woodland feeder and, also, that Trans Mountain conduct its supply verification only with respect to the storage capacity of a tank and types of crude in a tank.

- Pembina has market power through its effective control over the majority of merchant oil storage in the Edmonton area as well as access to the CER-regulated Connection Facilities for accessing the Merchant Tanks. Pembina provides most of the merchant oil storage in the Edmonton area, with 9.6 million barrels of net capacity. The second largest provider in the Edmonton area is Gibson Energy, who has 1.7 million barrels of merchant storage capacity, which CNOOC highlighted is less than 15 per cent of Pembina’s capacity.
- By denying access to the Connection Facilities to companies like CNOOC, who Pembina is in direct competition with, Pembina is able to obtain an unfair commercial advantage for its own benefit, to the detriment of others. In this case, Pembina’s refusal to provide access to the Connection Facilities was a “commercial decision” made to act in Pembina’s best interests, considering low demand for its storage tanks at the Terminal. It was a means for Pembina to secure a commercial advantage by potentially leasing one of its empty tanks to Imperial (who still needed a tank at the Terminal), while also being paid by CNOOC for Tank 35.
- Pembina abused its market power at the Edmonton Terminal around and since September 2021. In August 2021, CNOOC requested Pembina’s consent to extend the term of its Tank 35 sublease with Imperial until 31 July 2022, along with inbound connectivity to the Woodland Pipeline. Pembina informed CNOOC in September 2021 that Pembina consented to the sublease extension with Imperial, but not the extension of connectivity to the Woodland Pipeline, which Pembina knew would undermine the purpose of the sublease and frustrate CNOOC’s business dealings with Imperial. Pembina refused to provide any reasonable justification for such refusal.
- Pembina is controlling the market by dictating how and to what extent its competitors can participate in the market. This is not a proper functioning market; it is anti-competitive behaviour by Pembina over CER-regulated facilities that the Commission can, and should, intervene to address. The Commission and its predecessor have consistently held that they will consider concerns about the workings of the secondary market that parties bring to their attention and that if the secondary market is not functioning well, for example if there is insufficient competition to prevent abuses of market power, then more active regulatory oversight and intervention by the Commission may be required.<sup>25</sup>

**Views of Trans Mountain included the following:**

- Trans Mountain provides access to the Connection Facilities under certain terms and conditions that are defined in its Tariff. Pembina makes arrangements with its customers through its TSA.
- As part of the nomination verification process, Trans Mountain verifies that a shipper has made necessary arrangements at the receipt point and delivery point for the shipper’s Petroleum.

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<sup>25</sup> Citing NEB, Decision - Possible Changes to the Secondary Market for Natural Gas Transportation Services (February 2, 1995) File 4820-A000-3 at 2; NEB, Reasons for Decision - Alliance Pipeline Ltd. as General Partner of Alliance Pipeline Limited Partnership Part IV Tolls and Tariffs RH-002-2014, Filing ID [A71142](#) (July 2015) at PDF 21 [RH-002-2014].



- In the case of a delivery to a Merchant Tank, the shipper is required to submit a nomination on the Feeder Pipeline indicating the Edmonton Terminal as the delivery facility and must verify its ability to remove the Petroleum at the delivery point. Once all verifications have been met, accepted nominations are provided to Trans Mountain's scheduling group to execute.
- Trans Mountain operates the Edmonton Terminal in a manner that is not unjustly discriminatory by charging all shippers, including shippers nominating to the Merchant Tanks, in accordance with its Tariffs (105 and 112) that have been approved by the Commission. Trans Mountain applies the same verification process under its Tariff to all Merchant Tank deliveries. Trans Mountain does not treat CNOOC any differently from other shippers that nominate for delivery to a Merchant Tank.
- Trans Mountain has been using this verification process since the Edmonton Terminal began operating.
- Trans Mountain's Tariff does not speak specifically to the TSA or get into specifics of how it satisfies itself with respect to arrangements made at upstream and downstream delivery points.
- The Tariff is not as clear as it could be, and one option would be to amend certain parts of the Tariff to make it clearer.

**Views of Pembina included the following:**

- Trans Mountain is subject to the unjust discrimination prohibition and its obligations under the CER Act generally apply to portions of the Edmonton Terminal which are not exclusively contracted to Pembina.
- The unjust discrimination prohibition and obligations under the CER Act would have applied to the Merchant Tanks if no action was taken by the CER or its predecessor the NEB. Open, non-discriminatory, and regulated access to the Merchant Tanks was not contemplated by the NEB or the parties to the proceeding at the time Trans Mountain filed its ETEP application. The Merchant Tanks were understood to be exclusively contracted to Pembina's predecessor. In the ETEP order, the NEB must have been satisfied that approving the ETEP and the contractual arrangements underpinning the project would not contravene the NEB Act.
- The capacity of the Merchant Tanks never was and never has been offered on a non-discriminatory basis to Trans Mountain shippers. Instead, it was only ever offered to one shipper/customer, Pembina and its predecessors.
- Bringing such contract holders under the definition of a company generally in Part 3 of the CER Act may prevent them for instance from charging any toll for the rights which they re-sell without seeking approval of such re-sell price through a tariff approved by the Commission under section 229 of the CER Act. These outcomes are not practically workable and are not how the CER and NEB have operated in practice. Creating this degree of uncertainty in the secondary market would not serve the interests of economic efficiency. In the case of merchant tankage in particular, these outcomes are not appropriate from a regulatory economics perspective, as discussed in the Evidence and Reply Evidence of Mr. Wetmore.

- Finding that the unjust discrimination provision of section 235 of the CER Act applies to Pembina as a company who is, in effect, holding a contract for service and re-selling the rights under that contract, might, Pembina suggests, have significant impacts on unregulated secondary markets and transactions on CER regulated pipelines in general.
- Pembina is in a position analogous to that of a shipper holding a long-term contract for firm service and re-selling that contract to third parties in a secondary transaction. In this way, the services Pembina offers on the Merchant Tanks have never been, and should not be, economically regulated by the CER.
- Pembina, acting as an unregulated commercial entity, can and does make decisions on the form and conditions of re-sale in the secondary market based on its commercial interests. Within this context, Pembina has chosen to re-sell the rights which it possesses under the Tankage Agreement in a particular manner, i.e., separated out by source Feeder Pipeline in addition to rights to tankage. There are other parties that currently have access to the Connection Facilities and do receive Petroleum from the Woodland Pipeline for delivery into Merchant Tanks.
- Connectivity to the Merchant Tanks was limited to those connections specifically outlined in the TSA. The extra connectivity which CNOOC received was always provided on a time-limited basis, subject to immediate termination at the end of each term. CNOOC remains able to use Tank 35 as it has contracted for such use.
- Pembina's restriction on the source of the Petroleum it will accept into the Merchant Tanks and related facilities operates separate and apart from Trans Mountain's regulated Tariff No. 105 and Tariff No. 112. If Trans Mountain were to accept a nomination from the Woodland Pipeline feeder, under order from the CER or otherwise, Pembina would be within its contractual rights under the Tankage Agreement to deny acceptance of that movement at the delivery point associated with the Merchant Tanks.
- Pembina charges for use of the Merchant Tanks and the "Pembina Connection Facilities" in part on the basis of the source of the Petroleum. Indirectly restricting CNOOC's ability to use the Woodland Feeder is consistent with Pembina's exclusive right to use the Merchant Tanks.
- No expert evidence has been put before the Commission on market power and no party has conducted market power analysis, both of which are necessary for the Commission to make any findings on such a complex topic.
- There is insufficient evidence in this proceeding to conclude that Pembina was able to market directly to Imperial, following the breakdown of negotiations between Pembina and CNOOC in September 2021.

## **5.1 Commission analysis and findings**

### **5.1.1 Applicability of section 235 of the CER Act**

Section 235 applies to Trans Mountain as operator of the Trans Mountain Pipeline System. To the extent Pembina provides services on CER-regulated pipeline facilities at the Edmonton Terminal, the Commission finds that section 235 of the CER Act applies to Pembina, and there was no implicit exemption from this provision.

Section 235 of the CER Act requires a company not to make any unjust discrimination. The term *company* is defined in section 2 of the CER Act:

**company** includes

- (a) a person having authority under a Special Act to construct or operate a pipeline; and
- (b) a body corporate incorporated or continued under the [Canada Business Corporations Act](#) or an Act of the legislature of a province and not discontinued under the Act in question.

Subsection 2(b) of the definition of “company” includes companies that are not pipeline operators. To give proper effect to this definition in the context of the CER Act, the Commission must carefully consider when the Act refers to companies, with no qualifications, and when the Act refers to only some companies, such as in section 239 which explicitly applies only to a company operating a pipeline.

When reading the entirety of the CER Act, the Commission notes that Parliament conferred broad authority upon the CER to make decisions regarding traffic, tolls, and tariffs, in sections 32, 34, and 226 in particular. When these provisions are considered along with the plain language meaning of sections 2 and 235, it is clear that Parliament’s intent was not to restrict the Commission’s ability to apply unjust discrimination principles or to prescribe limits on the unjust discrimination prohibition to specific parties in limited scenarios. Rather, a proper interpretation involves applying section 235 to all relevant companies to determine if discrimination exists and then allowing the Commission to conduct a careful assessment of the facts of any case to determine whether discrimination is “not unjust.” The Commission will apply principles of economic regulation and draw on its history of regulatory decision-making.

Based on the modern approach to statutory interpretation, reading the words of the CER Act in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and object of the CER Act, the Commission finds that “company” can include companies operating in the secondary market offering service on CER-regulated pipeline facilities, including Merchant Tanks subject to CER jurisdiction. The Commission concludes that section 235 of the CER Act applies to Pembina given the facts of this Application. Pursuant to section 236, Pembina bears the burden of proving that any discrimination is “not unjust.”

Pembina submitted that the NEB was aware that Pembina’s predecessor was entering into contracts for the exclusive use of merchant tank capacity and that an exclusive contract is, on its face, incompatible with the no unjust discrimination obligation. Pembina states that it negotiates customized terms and connectivity with different customers, and described these practices as typical of the merchant tankage business and well understood by its sublessees. Pembina concluded that the only appropriate way to reconcile this inconsistency is that the NEB contemplated, at least implicitly, some form of exemption from or modified application of the non-discrimination obligation to the service offered on the Merchant Tanks, or was otherwise satisfied that the non-discrimination obligation was reasonably fulfilled by a grant of exclusive contract.

The Commission does not agree that the NEB must have granted some implicit exemption. The NEB signalled a contrary intention to have all of Part 3 of the CER Act (previously Part 4 of the NEB Act) apply to the Edmonton Terminal, including Merchant Tanks. While the NEB was aware of the arrangements anticipated for the exclusive use of the capacity of the Merchant Tanks, the necessary conclusion is not that section 235 would never apply.

The Commission is of the view that Pembina's commercial practices do not determine the applicability of section 235. Section 235 does not prohibit all discrimination – only discrimination that is unjust. The facts and circumstances of commercial practices would only be relevant to the consideration of whether discrimination is not unjust. CNOOC itself confirmed that it was not seeking to change the basic contractual arrangements between Pembina and its sublessees. The practices identified by Pembina are indicative that certain discrimination has been tacitly accepted as just and within the contemplation of the NEB, the original parties to the Tankage Agreement and all successors and sublessees who have since had rights with respect to the Merchant Tanks.

To be clear, the Commission makes no specific findings about Pembina's commercial practices related to Merchant Tanks, as they were not challenged in this Application. The Commission merely addresses these practices to explain that section 235 applies. In sum, Pembina's commercial practices do not demonstrate that section 235 cannot or was never intended to apply to the Merchant Tanks, but the Commission accepts that evidence about merchant tankage and longstanding practices at the Edmonton Terminal and within the storage market may be relevant to the justness of discrimination, and scope of discrimination that may be justifiable.

### **5.1.2 Pembina**

#### ***Did Pembina discriminate?***

The Commission finds that there was discrimination by Pembina in this case. In particular, the Commission finds that Pembina discriminated against CNOOC when, for a period of time in 2021, Pembina declined to allow inbound connectivity from the Woodland Pipeline and refused to participate in negotiation regarding CNOOC's request for this connectivity. CNOOC adduced evidence that following CNOOC's request on 16 August 2021, on 8 September 2021 Pembina provided consent for CNOOC to continue subleasing to Imperial, but did not renew connectivity to the Woodland Pipeline, and did not propose any commercial terms or fees for such access. This evidence was not directly contested.

The record before the Commission regarding the negotiations between Pembina and CNOOC was limited, but Pembina stated that commercial discussions resumed in early 2022. The Commission acknowledges Pembina's evidence that it offered a fee and terms for Woodland Pipeline connectivity on 28 February 2022, and requested a meeting with CNOOC on 15 March 2022 to discuss the connectivity issue. Notwithstanding this evidence, the Commission finds that, for a period of time between September 2021 and February 2022, Pembina declined to advance commercial discussions that could lead to providing access to the Merchant Tanks for CNOOC or its sublessee from the Woodland Pipeline.

The Commission finds:

- Pembina refused to allow CNOOC to deliver oil from the Woodland Pipeline to Tank 35 in September 2021 despite CNOOC having had this access for several years leading up to September 2021.
- One or more other parties currently have access to the Connection Facilities and receive Petroleum from the Woodland Pipeline for delivery into Merchant Tanks, as conceded by Pembina.

By allowing some parties to deliver oil from the Woodland Pipeline to one or more Merchant Tanks, and refusing to provide this connectivity to CNOOC, Pembina discriminated. The fact that Pembina has entered into different agreements with other sublessees does not differentiate those parties from CNOOC – in other words, such other sublessees remain similarly situated for the purpose of section 235. On a balance of probabilities, the weight of evidence demonstrates that Pembina advanced discussions with one or more similarly situated parties to achieve the delivery of oil from the Woodland Pipeline to Merchant Tanks, but declined to provide the same opportunity to CNOOC, at least until commercial discussions resumed.

### ***Was the discrimination unjust?***

Section 236 provides: "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." Therefore, Pembina was required to demonstrate that the discrimination was not unjust. The Commission finds that Pembina failed to meet its burden in this regard.

In this proceeding, the Commission notes that Pembina did not advance the common justifications offered to the Commission to demonstrate that discrimination is just. For example, Pembina did not argue that operational constraints or efficiencies related to merchant tankage prevented it from advancing discussions with CNOOC regarding connectivity to the Merchant Tanks from the Woodland Pipeline. Indeed, the evidence before the Commission supports that apart from some tanks having different capacities, the tanks are nearly indistinguishable. The Commission also finds that capacity existed in September 2021 to enable CNOOC to deliver oil from the Woodland Pipeline to Tank 35, had Pembina permitted it to do so.

The evidence is clear that Pembina advised CNOOC that the decision to halt negotiations was made for Pembina's commercial interests. The Commission finds that Pembina's commercial interests alone do not provide justification for discrimination. Pembina also suggested that granting broad relief as requested by CNOOC might disrupt the balance of risks and benefits achieved between Pembina and its customers – for example, potentially shifting the costs of many connections to customers who needed only limited connections or effectively improving the commercial position of a sublessee. However, the Commission notes that these submissions were not tendered pursuant to section 236, nor supported with clear and cogent evidence to illustrate the justness of the discrimination found to exist in respect of the Woodland Pipeline as required by that provision.

Pembina also argued that it is an unregulated commercial entity acting in a position analogous to that of a shipper holding a long-term contract for firm service and re-selling that contract to third parties in a secondary transaction. The Commission puts little weight on this analogy and finds it does not assist in justifying the discrimination.

- The Commission does not agree that Pembina is analogous to a firm shipper. Many CER-regulated pipelines offer firm service which generally provides priority service and does not provide exclusive service.
- If a firm shipper has surplus capacity and it elects not to resell that capacity to a third party, the pipeline operator offers up the unused capacity in the primary market pursuant to the terms of its CER-regulated tariff. This is not analogous to the exclusive capacity held by Pembina.
- Generally, with firm service in scenarios with adequate or spare capacity, firm shippers attempting to resell unneeded capacity in the secondary market compete with the service offered by the pipeline in the primary market. The ability to resell capacity enables firm shippers to mitigate the requirement to pay firm service fees for unneeded capacity and gives other market players choices which may be more attractive than the terms offered by the pipeline in the primary market. Again, this is not analogous to this situation where the pipeline operator does not offer service in the primary market, so it is not competing with Pembina.
- In a scenario involving firm service with constrained capacity, all capacity would initially be awarded to shippers in the primary market in accordance with the pipeline's tariff. A firm shipper may be able to resell its capacity for whatever rate the market will bear, competing with other firm shippers who also have incentives to resell their capacity. This is not analogous to the current circumstance, where Pembina controls the ability to sublease tanks. In a firm service scenario, through the secondary market scarce capacity could move to its highest-value use, and new creative service offerings might arise. Price signals might incent the development of additional infrastructure or result in changes to supply or demand, or any combination of those factors. This does not happen in the current situation where all price signals are seen only by Pembina through confidential agreements, limiting any signals sent to the market.

The Commission also notes CNOOC's submission that it is unaware of any example of a shipper on a CER-regulated pipeline being awarded exclusive rights to capacity that also allow the shipper to block access to the pipeline capacity, even when unused. The Commission is of the view that allowing any relevant parties to behave in this way would create inefficiency and frustrate the proper functioning of the market and invite intervention by the Commission pursuant to Part 3 of the CER Act.

When responding to the alleged breach of section 235, CNOOC also challenged the degree of applicable regulatory oversight that should apply given that Pembina's subleases operate in a secondary market. The matter of CER regulation of the Merchant Tanks was thoroughly discussed in **Section 4.2**. The Commission is of the view that the fact that CNOOC's sublease is a secondary market transaction is not a complete defence to a potential breach of section 235. The Commission does not regulate markets – neither primary nor secondary; it regulates “pipelines” as defined in the CER Act,<sup>26</sup> including the terms and conditions of access to pipelines.

As discussed in **Section 4.2.1**, the Commission expects that regulatory intervention pursuant to section 235 will generally be limited and judiciously applied in relation to the Merchant Tanks. However, in these narrow circumstances, the Commission finds some limited intervention is warranted despite the sublease technically being a secondary market transaction, for a number of reasons:

- Private commercial arrangements do not justify discrimination<sup>27</sup> or constrain the Commission's jurisdiction,<sup>28</sup> considerations or decisions.<sup>29</sup>
- The Commission will be less likely to intervene in a functioning secondary market, but the exclusive use of all Merchant Tanks at the Edmonton Terminal, acquired by KMCT and later Pembina, did not give rise to an efficient secondary market.
- The Commission finds that Pembina holds a dominant position on merchant tankage within the Edmonton Terminal, having exclusively leased 100 per cent of all Merchant Tank capacity from Trans Mountain. No other Merchant Tanks or merchant tankage is available at the Edmonton Terminal, beyond what is offered by Pembina and/or other sublessees of Pembina, which are also subject to Pembina's approval and discretion. The Commission is of the view that a full market analysis is not required to make note of Pembina's dominant position on merchant tankage within the Edmonton Terminal.
- Pembina competes with CNOOC in reselling tank capacity at the Edmonton Terminal because they both sublease tanks. However, Pembina gives itself and/or others the ability to offer terms and conditions, specifically allowing product from the Woodland Pipeline to enter one or more other Merchant Tanks, while denying that opportunity to similarly situated tanks, specifically Tank 35. CNOOC is required to pay fixed fees to Pembina for Tank 35, pursuant to its 20-year contract, even if the tank is unused. Pembina has little incentive to offer additional connectivity to CNOOC, particularly if Pembina has other tanks available for sublease and could offer a new terminal services agreement to another Merchant Tank customer without any competition. Pembina's decision to refuse to negotiate the additional connectivity, therefore limiting CNOOC's use of Tank 35 in September 2021, appears to the Commission to be anti-competitive

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<sup>26</sup> Pursuant to section 2 of the CER Act, “*pipeline*” means a line — including all branches, extensions, tanks, reservoirs, storage or loading facilities, pumps, racks, compressors, interstation communication systems, real or personal property, or immovable or movable, and any connected works — that connects at least two provinces or extends beyond the limits of a province, Sable Island or an area referred to in paragraph (c) of the definition *designated area* in section 368 and that is used or is to be used for the transmission of oil, gas or any other commodity. It does not however include a sewer or water pipeline that is used or is to be used solely for municipal purposes.

<sup>27</sup> For example, see RH-003-2020, *supra* note 15, at PDF 31.

<sup>28</sup> NEB, *Reasons for Decision, Federated Pipe Lines (Northern) Ltd. Application for the Taylor to Belloy Pipeline Project OH-3-96* (April 1997) at 14.

<sup>29</sup> RH-003-2020, *supra* note 15 at 21; MH-1-2009, *supra* note 18 at PDF 36.

behaviour. The Commission agrees with Pembina that there is an insufficient record to find that market power was abused, however prior CER decisions have similarly intervened to address an apprehension of abuse.<sup>30</sup>

No single factor triggered the Commission's intervention pursuant to section 235. The Commission is compelled to act given the unique market circumstances and facilities described throughout the decision, Pembina's refusal for a period of time in 2021 to even permit discussions to proceed regarding requested connectivity into Tank 35 and Pembina's failure to offer a robust justification for the resulting discrimination.

### ***Direction***

Having found that Pembina has unjustly discriminated in contravention of section 235 of the CER Act, the Commission directs Pembina to consent to the receipt, transportation and delivery of oil offered by CNOOC for transmission on the Connection Facilities from the Woodland Pipeline if operationally feasible, and if CNOOC requests this connectivity for itself or as part of a request to sublease otherwise permitted by a terminal services agreement. The Commission directs Pembina and CNOOC to negotiate in good faith to determine reasonable commercial terms for such connectivity, failing which either party may apply to the Commission for determination of the reasonable commercial terms for that use.

CNOOC requested the Commission direct Pembina to consent to the receipt, transportation and delivery of oil offered by CNOOC or its sublessees for transmission on the Connection Facilities from feeder and downstream pipelines that CNOOC or its sublessee elect to use to deliver and receive oil from the Edmonton Terminal, as may change from time to time, and that it be provided a listing of all feeders and outbound connections that are connected to the Edmonton Terminal. The Commission finds it appropriate to narrow the relief to match the evidence tendered in the Application, which was largely focused on arrangements pertaining to the Woodland Pipeline and which did not include the views of any other customers or potentially affected parties. Moreover, the Commission is mindful that the parties did not provide a detailed record of their commercial dealings that would justify broader relief. The Commission encourages Pembina and CNOOC to negotiate in the future with the Commission's findings and reasons in this decision as guidance. Particularly, Pembina must be mindful that it does not enjoy exclusive rights to any Connection Facilities within the Edmonton Terminal.

### **5.1.3 Trans Mountain**

#### ***Did Trans Mountain discriminate?***

Based on the record before us, the Commission finds that Trans Mountain has not discriminated.

Trans Mountain has submitted that it did not discriminate as it treats all shippers the same by following its Tariff. Trans Mountain has verified a shipper's ability to deliver a product to a Merchant Tank using the same practice since construction of the tanks. Shippers enter into commercial arrangements at each receipt and delivery point where they make nominations for

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<sup>30</sup> RH-003-2020, *supra* note 15 citing RH-003-2004 at 9; RH-002-2014, *supra* note 25 at 7.



service on a pipeline. Pipeline operators, as a practical matter, may need to verify the ability of shippers to remove product from the pipeline at nominated delivery points.

The Commission accepts that Trans Mountain elected to use TSAs as the singular tool to verify that a shipper is able to remove Petroleum at a Merchant Tank within the Edmonton Terminal, based on the understanding that the TSA represented the agreement between Pembina and its sublessees. When Trans Mountain, as a practical matter, considers the commercial arrangements a shipper has at a delivery point for verification purposes, Trans Mountain is not unjustly discriminating provided its practices are consistent. The Commission is also mindful that the terms and conditions of the contractual arrangements and potential disputes arising between a shipper and third party, are not Trans Mountain's responsibility to oversee.

### ***Direction***

The Commission finds that the record in this Application demonstrates that Trans Mountain's verification practices were consistent with its tariff obligations. However, CNOOC was unaware of how Trans Mountain conducts verification with respect to shipments involving the Merchant Tanks at the Edmonton Terminal. The Commission notes that Trans Mountain's Tariff No. 105 is not explicit in this respect and contains no reference to the TSAs. Further, the TSA does not appear to indicate that Schedule "A" will be provided to Trans Mountain nor used for verification of nominations on the Trans Mountain pipeline system. CNOOC understood that Pembina was instructing Trans Mountain directly regarding use of the Connection Facilities and there was confusion about why CNOOC was not able to make a nomination to transport oil from the Woodland Pipeline to Tank 35, which gave rise to regulatory process before the Commission as well as the provincial regulator in respect of this dispute. The Commission notes that Pembina and Trans Mountain possess information that their customers and shippers do not. The Commission continues to be of the view that Trans Mountain should consistently endeavour to provide clear and transparent information to shippers about its operations and practices.

For these reasons, and noting that Trans Mountain observed that tariff amendments may be appropriate to achieve greater clarity, pursuant to section 226 of the CER Act, the Commission directs Trans Mountain to amend its Rules and Regulations Tariff (currently Tariff No. 105) to clarify its Nomination Verification processes (section 6.2 of the Tariff) at the Edmonton Terminal, including which portions of the TSA (e.g., the Dedicated Facilities or the operational description of inbound connecting pipeline facilities) or other method Trans Mountain will use to verify a shipper's ability to deliver Petroleum into Merchant Tanks.

Trans Mountain must consult with all interested parties in developing these amendments. Within 90 days of the issuance of this decision, Trans Mountain must file with the CER draft tariff amendments, a summary of any outstanding concerns and an indication of how Trans Mountain will address any outstanding concerns. Trans Mountain must copy all interested parties.

The Commission recognizes that it is not practical to put the minutiae of every detail of the operation of pipeline into a pipeline's published tariff. Some judgement is required when determining which details are included and sometimes the need for clarification is only obvious in retrospect.

## 6 Common carriage

The Commission finds that the common carrier obligation does not apply to Pembina as it is not the operator of the facilities in question. The Commission finds that the common carrier obligation applies to Trans Mountain, and that Trans Mountain has met its obligation.

### **Views of Trans Mountain included the following:**

- The underlying issue in this proceeding is not one of access to Trans Mountain's facilities at the Edmonton Terminal. The underlying issue is what Feeder Pipelines and downstream pipelines CNOOC can or should be permitted to use to transport Petroleum to and from the Edmonton Terminal.
- Trans Mountain is operating the Edmonton Terminal in a manner consistent with the obligation of a common carrier under the CER Act as it provides service on the same terms and conditions to all shippers pursuant to Tariff No. 105 and Tariff No. 112.
- The common carrier obligation is "relative" and compliance is to be determined by a test of reasonableness. Tribunals and courts have consistently ruled that the obligations of a statutory carrier in respect of both service and facilities are tempered by a test of reasonableness.

### **Views of Pembina included the following:**

- The obligations on pipeline operators under the CER Act, including the common carrier obligation when and if applicable, rest with Trans Mountain. Pembina is not the owner nor operator of the Merchant Tanks and is not and cannot be subject to any common carrier obligations.
- Connectivity to the Merchant Tanks was limited to those connections specifically outlined in the TSA. The extra connectivity which CNOOC received was always provided on a time-limited basis, subject to immediate termination at the end of each term. CNOOC remains able to use Tank 35 as it has contracted for such use.

### **Views of CNOOC included the following:**

- The common carrier requirements in section 239 of the CER Act apply to the Connection Facilities and the tanks at the Terminal. The Commission has never issued any such exemption in respect of the Connection Facilities, nor has the NEB.
- Pursuant to section 239 of the CER Act, oil tendered to the Connection Facilities must be received, transported, and delivered, unless it is shown that complying with the common carrier obligation is unreasonable.
- The Connection Facilities have capacity and Pembina, as the party controlling access to them, has not provided any reasonable basis for its refusal to provide the access requested by CNOOC, which is contrary to the CER Act.

- If a common carrier obligation attaches to the Connection Facilities, it should not matter who holds a contract for the use of the tank. It would be surprising if a regulator would allow common carrier obligations to be sidestepped by simply allowing contracts for the exclusive use of those facilities by another party who could then control access free of CER oversight.

## 6.1 Commission analysis and findings

Subsection 239(1) of the CER Act applies to the Edmonton Terminal, and Trans Mountain is responsible for the common carriage obligation, as operator of the Trans Mountain Pipeline System. The Commission finds that Trans Mountain met its obligation under this provision.

Assessment of whether a common carrier has met its obligations is a matter of judgment based on context and consideration of the circumstances. The Commission retains broad discretion in determining what factors may be relevant and what weight should be assigned to each factor in making its determination.<sup>31</sup> As consistently held by the CER and courts, and explained in **Section 4.1**, the common carriage obligation is not absolute; it is a relative concept, tempered by a test of reasonableness.<sup>32</sup> Oil offered for transmission on a pipeline subject to subsection 239(1) may be received, transported and delivered under many different types of commercial arrangements.<sup>33</sup>

CNOOC alleged a breach of the common carriage obligation with respect to the Connection Facilities, as opposed to the Merchant Tanks. Access to the Connection Facilities is governed by Trans Mountain's Tariff. The Commission finds that Trans Mountain did not permit nominations in its VISTA System from Woodland Pipeline to Tank 35 because Trans Mountain was informed by Pembina (via the TSA) that the appropriate commercial arrangements were not in place to provide verification. Pursuant to Rule 6.2 of Trans Mountain's Tariff No. 105, set out in **Section 2.3**, Trans Mountain is not required to accept a shipper's nomination if it cannot verify necessary arrangements have been made at receipt points. In these circumstances, therefore, Trans Mountain was within its rights under its Tariff to not permit the nomination. The Commission has placed significant weight on this factor and finds it was reasonable for Trans Mountain to deny nominations that do not meet the requirements of its Tariff.

The common carriage obligation must be considered in this light - the obligation on Trans Mountain is tempered by what can reasonably be expected of it in these circumstances. As such, in the Commission's view, the evidence tendered established Trans Mountain has met its obligation under subsection 239(1). Regardless, the partial relief granted by the Commission should allow for commercial arrangements under which CNOOC or its sublessee could transport oil from the Woodland Pipeline to Tank 35. With such arrangements in place, the matter of the common carriage obligation is moot in any event.

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<sup>31</sup> CER, *Reasons for Decision – Enbridge Pipelines Inc. – Canadian Mainline Contracting RH-001-2020*, Filing ID [C16317](#) (November 2021) at 18 and 20; RH-2-2011, *supra* note 17 at 25.

<sup>32</sup> MH-4-96, *supra* note 17 at 11; MH-3-2000, *supra* note 177 at 6.

<sup>33</sup> OH-2-97, *supra* note 17 at 53.

## 7 Disposition

For the reasons provided, the Commission directs the following:

- Pursuant to sections 226 and 235 of the CER Act, the Commission directs Pembina to consent to the receipt, transportation and delivery of oil offered by CNOOC for transmission on the Connection Facilities from the Woodland Pipeline if operationally feasible, and if CNOOC requests this connectivity for itself or as part of a request to sublease otherwise permitted by a terminal services agreement. The Commission directs Pembina and CNOOC to negotiate in good faith to determine reasonable commercial terms for such connectivity, failing which, either party may apply to the Commission for determination of the reasonable commercial terms for that use.
- Pursuant to section 226 of the CER Act, the Commission directs Trans Mountain to amend its Rules and Regulations Tariff (currently Tariff No. 105) to clarify its Nomination Verification processes (section 6.2 of the Tariff) at the Edmonton Terminal, including which portions of the TSA (e.g., the Dedicated Facilities or the operational description of inbound connecting pipeline facilities) or other method Trans Mountain will use to verify a shipper's ability to deliver Petroleum into Merchant Tanks.

Trans Mountain must consult with all interested parties in developing the amendments. Within 90 days from the issuance of this Decision, Trans Mountain must file with the CER draft tariff amendments, a summary of any outstanding concerns and an indication of how Trans Mountain will address any outstanding concerns. Trans Mountain must copy all interested parties.