

**Trans Mountain Pipeline ULC on behalf of Trans Mountain Pipeline L.P.
(Trans Mountain)**

**Application dated 15 October 2013 pursuant to Part IV of the *National Energy Board Act*
(the “Act”) for approval of Tariff Amendments regarding Verification Procedures
(the “Application”)**

Hearing Order RHW-001-2013

WRITTEN ARGUMENT OF UNIFOR

1. For some time now the Chevron refinery in Burnaby BC has been unable to access to sufficient capacity on the Trans Mountain Pipeline to meet the needs of the refinery. The problem isn't that Chevron is unwilling to pay the price for the pipeline services it needs, but is entirely a consequence of tariff rules that prevent it from bidding for those services on a competitive basis.
2. The tariff rules in questions tilt the playing field decidedly in favour of export markets, and the large refineries operating just over the U.S. border. This explains why the majority of Trans Mountain Pipeline flows are destined to foreign markets while the Burnaby refinery, which is the only refinery operating in the lower BC mainland, is starved for supply.
3. The result threatens the security of energy supplies to BC consumers that rely on the Burnaby refinery for refined products, including gasoline and home heating oil. It also puts the jobs of refinery workers in jeopardy.
4. In simple terms, the Trans Mountain Pipeline Tariff creates an artificial market for pipeline services that discriminates against Canadian consumers, and puts the Burnaby refinery at a distinct competitive advantage relative to larger US refineries. These tariff rules are entirely at odds with the Canadian public interest.

5. It is apparent from the proposals and final argument of Trans Mountain that it is essentially satisfied with the status quo. The band-aid ‘solutions’ it presents will not resolve the problems created by the Tariff because they would allow shippers to continue to game the system by bidding for much greater pipeline allocations than they require or expect to utilize.
6. Moreover, the problems caused by the fictitious bidding system allowed by the Tariff are seriously exacerbated by the manner in which it has been administered by Trans Mountain which allows US refiners to submit inflated bids for pipeline capacity that far exceed the capacity of the Puget Sound pipeline they rely on to supply them.
7. Much of the evidence presented in these proceedings has been subject to confidentiality rules that have precluded public access and the transparency that must attend NEB proceedings. For this reason Unifor has declined to enter into the confidentiality undertakings necessary for it to access evidence that it would not be entitled to share with its members.
8. The following argument does not, therefore, address the specific and often confidential particulars of proposals to amend the Tariff. Nor is it necessary for Unifor to do so to make the essential point that the Board must eliminate tariff rules that treat Canadian refiners in an unfair and discriminatory manner relative to their U.S competitors.
9. The other issue addressed below is the perverse argument by Tesoro - a U.S refiner that benefits under the current tariff regime - that removing these discriminatory measures would offend the requirements of North American Free Trade Agreement (NAFTA). NAFTA rules prohibit measures that discriminate against US companies, they do not require that Canada accord them preferential treatment, yet that is the precisely the effect of the current tariff rules and why they need to be removed.
10. The following submissions rely extensively on the un-contradicted evidence of Unifor.¹

Unifor’s Interests in these Proceedings

¹ C-14-03 - Unifor Evidence (A59817) and 14-08-21 Unifor - Evidence of Unifor (A62347) ▾

11. Unifor has intervened in these proceedings because it has both a direct and public interest in the matter before the Board. Its direct interest arises from the fact that the jobs of its members depend upon western Canadian refineries having sufficient and secure access to the Trans Mountain Mainline System (the “Pipeline”). Its public interest concerns stem from its commitment to promoting energy security for individual, commercial and industrial consumers in Canada.
12. Unifor members are employed at three Canadian refineries that depend upon the Pipeline to ship oil or oil products: the Chevron Refinery in Burnaby BC, and the Suncor and Imperial refineries in Alberta.
13. The Chevron Burnaby refinery employs 250 people directly and provides employment for an additional 200 contract workers. The Burnaby refinery is the last remaining major oil refinery in British Columbia. For more than 50 years it has been dependent on the Pipeline as its major source of supply. Estimates are that the Burnaby refinery provides from 30% to 40% of refined petroleum products for the BC Lower Mainland.
14. Unifor also represents over 500 workers at the Suncor and Imperial Oil refineries in Alberta. An even greater number of indirect and induced jobs exist because of the refineries. Both refineries rely upon the Pipeline to ship refined products to British Columbia. These products represent another major source of supply for the residents, businesses and industries of Kamloops, and the Lower Mainland of BC. The Suncor and Imperial Oil refineries also serve prairie markets, but their business model is one that depends upon having reliable access to BC markets.

The Problem of Apportionment

15. These proceedings arise from problems caused by increased demand for discounted western Canadian crude oil, inadequate pipeline capacity to meet that demand, and a pipeline tariff that tilts the playing field decidedly in favour of larger refineries when demand for pipeline services exceeds supply and results in apportionment. It is common ground that apportionment on the Pipeline is now a constant condition, often running as high as 70%.

16. This high level of apportionment is largely a consequence of shippers over-nominating for pipeline volumes because they know they will get only a fraction of the quantities they claim to be seeking. Thus, if a company needs 25,000 bbl/day to operate its refinery, and apportionment is running at 75%, it may bid for 100,000 bbl/day with some confidence that, given the depressed price for western Canadian crude oil, it will be able to sell any surplus for a handsome profit should it be accorded more than the 25,000 bbl/day it actually intends to refine.
17. The problem for Chevron is that under the tariff it is constrained from bidding for sufficient pipeline capacity to meet its needs in the face of apportionment and over-bidding by its competitors.
18. The constraint arises under s. 6.1 of the Trans Mountain Pipeline Tariff: *Monthly Nominations*, provides:

On or before the Monthly Nomination Date, the Shipper shall provide the Carrier with a Nomination on the Notice of Shipment indicating the volume of Petroleum to be transported for the following Month, the Receipt Point, the Delivery Point, the type(s) of Petroleum, and for Uncommitted Shipper Nominations to the Westridge Marine Terminal, the Bid Price. The Shipper shall, upon notice from the Carrier, provide written third party verification of the availability of its supply of Petroleum to satisfy the Nominated Volume and of its capability to remove such Petroleum from the Delivery Point(s) as may be required by the Carrier in support of such Shipper's Nomination. The Carrier shall not be obligated to accept the Shipper's Nomination where such verification is unacceptable to the Carrier acting reasonably. When the Shippers' Nominations have been apportioned pursuant to Rule 14, the Shipper shall be deemed to have submitted a Nomination equal to the Nomination specified in the Notice of Shipment reduced by the level of apportionment (the Allocated Volume). Except as expressly provided in a Contract, if a Shipper fails to Nominate any volume, the Shipper's monthly Nomination will be deemed to be zero.

19. Because of its relatively small size and limited storage capacity, Chevron has only a limited capacity to remove petroleum at the delivery point of its refinery. It cannot for that reason nominate for volumes sufficient to net the 57,000 bpd it needs to operate the refinery at capacity, in a highly apportioned market.

20. By comparison, Chevron’s principal US competitors have much larger facilities:

The Phillips P66 refinery in Ferndale –	100,000 bbl/day
The Shell (Equilon) refinery in Puget Sound –	150,000 bbl/day
The Tesoro refinery -	120,000 bbl/day
The BP at Cherry Point –	235,000 bbl/day

21. As those facilities are considered by Trans Mountain to be the “delivery point” for the purpose of verifying nominations for deliveries on the Pipeline, and even putting aside storage capacity, each of these refineries has the ability to nominate for volumes far in excess of those permitted the Burnaby refinery. Thus in a period of abundant demand and limited pipeline capacity, the provisions of the tariff have created an artificial market that favours companies that have the largest take-away capacity. In terms of downstream refining, these companies are all U.S. based.

22. In other words, the present tariff, as it is being interpreted and applied, has given these U.S. refiners a considerable competitive advantage over the Burnaby refinery when it comes to securing scarce space on the Trans Mountain Pipeline. Moreover this advantage is not one that was earned by dint of innovation or efficiency, but one simply bestowed by a tariff regime that advantages larger companies.

23. Moreover, the problem of over-nominating is exacerbated because of the manner in which the Tariff is applied by Trans Mountain in verifying removal capacity by U.S. refiners. For this purpose, Trans Mountain calculates removal capacity at their respective refineries and related facilities, ignoring the capacity limits of the Puget Sound pipeline through which these nominated volumes must be delivered. Yet the “delivery point” as defined by the tariff, is “Sumas” (at the U.S. border) not the particular destinations of the U.S. refineries.

24. The result has lead to the verification of nominated shipments (of as much as 500,000 bbl/d), to Puget Sound refineries - more than twice the delivery capacity of the Puget Sound pipeline (241,000 bbl/day). In other words U.S. refineries are not only nominating

for volumes far in excess of those they actually expect to refine, but these volumes far exceed the delivery capacity of the pipeline upon which they rely.

25. The confluence of these factors explains why export markets claim the largest proportion of Pipeline output either through the Westridge Dock, or through Sumas. The four refineries in Puget Sound routinely consume 2/3rds² of Pipeline throughput even net of deliveries to the Westridge Dock. A fifth Washington State refinery is supplied by the Trans Mountain Pipeline via barge from the Westridge Dock.
26. For the Burnaby refinery, apportionment on the Pipeline, and limited means of alternative supply, have resulted in scaled back operations – at times - for extended periods.

The Public Interest

27. Only 19 Canadian refineries remain in operation today, a decline from over 40 oil refineries operating in Canada in the 1970s. Canadian refineries produce 400,000 fewer barrels of refined products per day than they did in the early 1980's and employ 10,000 fewer people than they did in 1989.
28. Thus, while the production of Western Canadian conventional and oil sands crude oil has been growing for many years and is projected to continue to do so, Canadians are actually losing ground in the labour intensive value-added processing sector, and apportionment on the Pipeline, driven almost entirely by export demand for discounted Western Canadian crude oil, is seriously exacerbating the problem.
29. It is even possible that BC's last refinery will fall victim to this growing export demand and tariff rules that favour large U.S. based refineries competing for scarce pipeline capacity. While the Suncor and Imperial Oil refineries are not similarly at risk, their future prospects depend upon being able to reliably ship refined products to BC markets.
30. The considerable number of jobs at these refineries have provided quality of life and economic security for generations of employees and their communities. These are jobs

² Chevron response to NEB 2.1 a) attachment 1, B12-03 NEB 2 1(a) - Attachment 1 (Public) - A3V7Z0

that are well-paying and provide incomes that are family and community sustaining. Their economic impact in the community extends well beyond the numbers of employees actually working on site.

31. The refineries are also an important part of the Canadian economy, spending hundreds of \$millions a year on goods and services, investing very substantial sums in capital improvement and paying taxes to three levels of government.
32. In addition to these direct contributions to the Canadian employment and industrial economy, Western Canadian refineries play an essential role in meeting the energy needs of Western Canada. Any disruption in the supply of refined products from these refineries would certainly create market instability and raise consumer prices. There is no evidence that alternative means of supply exist to meet West Coast needs that would avert such adverse impacts.
33. The sustainability of a domestic energy economy, and the security of energy supply to Canadian consumers, are both vital public interest considerations that the Board should have foremost in mind. Tariff rules for service on the Pipeline must support, not jeopardize, the ability of Canadian refineries to create and maintain good jobs, while providing an essential service to Canadians. The current Trans Mountain Pipeline Tariffs fails these tests.
34. In addition, the Pipeline tariff must not continue to foster an artificial market in which shippers are compelled to overbid for pipeline capacity. It does nothing to inspire public confidence in the Canadian regulatory system, nor does it serve the public interest, to have the use of vital pipeline infrastructure allocated on the basis of fictitious bids for pipeline services.

Tesoro's NAFTA Argument

35. In the public version of its reply evidence,³ Tesoro takes the position that it would be inconsistent with the North American Free Trade Agreement for Trans Mountain to

³ Prepared Testimony of D. Schofield (A4A0A7), at pp. 7 and 10.

simply give effect to the tariff as currently written by taking the term “delivery point” to be Sumas, rather than the US refineries that are served by the Puget Sound pipeline. Tesoro’s contention is fundamentally flawed for several reasons.

36. To begin with Tariff is not an export measure to which NAFTA rules apply. The Board’s authority to regulate oil exports and imports is established under Part VI of the Act. The present application does not engage or call upon the Board to exercise that authority. Rather it concerns the provisions of a tariff authorized under Part IV of the Act. The Board’s authority to regulate pipeline services, and to establish toll rules in regard thereto, is explicitly acknowledged as an exception under NAFTA rules.⁴
37. The simple answer to Tesoro’s contention is that the regulation and administration of pipeline tariffs are not measures that impose quantitative restrictions on the export of energy. Rather, the measure in question is one regulating the *provision of service*, not the export of energy *goods*, and is explicitly exempt under Annex V to the trade in services provisions of NAFTA Chapter 12 concerning *Trade in Services*.
38. Moreover, as we know, the North American energy system is integrated with dozens of pipelines transporting oil and oil products across the Canada-US border every day, and in both directions. For example, eastern Canadian consumers access western Canadian oil through a complex network of pipelines travelling across Canada, then through the U.S. and back into Canada. The terms for pipeline service on this integrated pipeline network inevitably affect international pipeline flows.
39. To obviate the risk of pipeline regulation becoming embroiled in disruptive cross border trade disputes, the NAFTA Parties specifically provided for such measures to be exempt from the constraints on quantitative restrictions that would otherwise apply under NAFTA Article 1207 to such services. They did so with the clear intent that such tariffs be regarded as related to pipeline *services*, not trade in *goods*.

⁴ NAFTA Annex V

40. Finally on this point, we note that in final argument⁵ Trans Mountain mischaracterizes the notion of treating Sumas as a delivery point (as the Tariff clearly stipulates), as an “Export Destination Limit”. For the reasons noted above, the measure in question does not, in either design or effect, seek to limit exports, and nothing in the reforms advocated by Chevron and other Canadian refiners, would preclude the Puget Sound pipeline from being utilized to full capacity.

Tesoro Is Not Being Treated in a Discriminatory Manner

41. There is also no merit to Tesoro’s contention that it would be unfairly treated if Tariff nomination rules were amended to remove provisions that clearly accord it preferential treatment in relation to Canadian refiners.
42. We do not have the benefit of knowing how Tesoro will present its concern about unfair trade treatment in final argument which will only be filed at the same time as Unifor’s. However, the simple answer to any such concern is that reforms advocated by Chevron and other Canadian refiners simply seek to have the Board address measures that clearly discriminate against Canadian refiners. There is absolutely nothing in NAFTA that requires Canada to establish or maintain such measures.
43. Furthermore, if Tesoro, contrary to the plain facts of this matter, believes that it has not been accorded fair (*National Treatment*) as a foreign investor, the remedy lies under NAFTA rules concerning foreign investment (Chapter 11), which provide dispute settlement procedures for resolving such disputes.
44. Even assuming that it could establish that treating Sumas as a delivery point is *de facto* discriminatory, which it is not, it would nevertheless fail in such a claim for reasons set out by the dispute Panel in the Pope and Talbot case⁶.

⁵ Public Written Argument by TransMountain Pipeline ULC (A62550), see for example pp. 4 and 5.

⁶ Pope & Talbot Inc v. Canada, Award on the Merits of Phase 2 (UNCITRAL, 10 Apr. 2001), at paras 116
<http://www.naftaclaims.com/Disputes/Canada/Pope/PopelInterimMeritsAward.pdf>

45. That case involved a claim by Pope & Talbot for damages under Chapter 11 arising from what it regarded as an unfair allocation of export quotas for lumber it produced. The company operated sawmills in Canada and exported most of the softwood lumber it produced to the U.S. The dispute arose out of Canada's implementation of the Softwood Lumber Agreement ("SLA") it had negotiated with the U.S. The SLA established a limit on the free export of softwood lumber into the U.S. and required Canada to collect a fee for export of softwood lumber in excess of certain established quantities.
46. Each year Canada allocated export quotas among its softwood lumber producers in accordance with the developed procedures and criteria (Export Control Regime). Unsatisfied with allocations of quota to its investment, Pope and Talbot invoked NAFTA dispute procedures, and argued *inter alia* that its quota allocation represented discriminatory treatment and a breach of Canada's obligation to provide *National Treatment* to foreign investors. That contention is similar to the one Tesoro is apparently making in these proceedings.
47. The tribunal dismissed the claim and found that Pope and Talbot had not been treated in a discriminatory fashion. It found that there was nothing in Canada's approach that indicated an intention to discriminate against U.S exporters, and furthermore that "a reasonable nexus" existed between the export control measure and "rational government policies" belying any concern about discriminatory treatment. If Pope and Talbot couldn't succeed in respect of measures that explicitly concerned exports, Tesoro has no chance whatsoever when the measure in question concerns the allocation of domestic pipeline services.
48. While the Board has a statutory obligation to give effect to NAFTA, it is neither the obligation nor role of the Board to become the court of first instance with respect to the Tesoro's inventive and meritless trade arguments. That is the function and role of expert dispute bodies established under this trade agreement.

In Conclusion

49. Finally, Unifor encourages the Board to be mindful of the fact that the “N” in NEB stands for “National” not “North American”. The first priority of the Board must be to ensure the security of energy supply to Canadian consumers. The current Trans Mountain Pipeline tariff confounds any such notion by actually putting the Burnaby refinery at a disadvantage relative to its U.S. competitors.

50. Therefore, whatever the particular details, the effect of amendments to the Tariff, as well as the manner in which reforms are implemented by Trans Mountain, must at the very least level the playing field for Canadian consumers of pipeline services, including the Burnaby refinery so that it may fairly bid for Trans Mountain Pipeline services.

Submitted on behalf of Unifor:

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