# CANADA ENERGY REGULATOR

**IN THE MATTER OF** the *Canadian Energy Regulator Act*, SC 2019, c 28, s 10, and the Regulations made thereunder;

**AND IN THE MATTER OF** Enbridge Pipelines Inc. Application for Approval of the Transportation Service and Toll Methodology for the Canadian Mainline;

**AND IN THE MATTER OF** a request by the Canadian Energy Regulator that parties identify issues and make submissions on procedural matters;

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## SUBMISSION OF

## CANADIAN NATURAL RESOURCES LIMITED

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To: Ms. L. George
Secretary of the Commission
Suite 210, 517 10 Ave SW
Calgary, AB T2R 0A8

## INTRODUCTION

1. On December 19, 2019, Enbridge Pipelines Inc. ("Enbridge") filed an application with the Canadian Energy Regulator ("Commission" or "CER") for approval of transportation service and toll methodology for its Canadian Mainline ("Mainline"). Enbridge filed the application under Part 3 of the *Canadian Energy Regulator Act*[1] ("CER Act").

2. In its application, Enbridge seeks approval from the CER to shift the Mainline from its current common carriage status to 90% long-term firm service contracts. In addition, Enbridge seeks approval for specific toll methodologies to be used on the Canadian Mainline as well as for various other related approvals.

3. In this submission, Canadian Natural Resources Limited ("Canadian Natural") sets out why the CER should establish a preliminary regulatory process to first determine whether Enbridge should be permitted to convert the Mainline from common carrier to long-term firm service (the "Fundamental Conversion Issue"). The Commission, when determining the Fundamental Conversion Issue, must consider whether the proposed conversion is consistent with:

   - Section 239(1) of the CER Act, which requires that a pipeline transmitting oil operate as a common carrier;
   - Section 235 of the CER Act, which requires that the tolls applicable to a pipeline not be unjustly discriminatory;
   - The CER's mandate to ensure that a pipeline company not abuse its dominant market power; and
   - The CER's mandate to regulate in the Canadian public interest.

## STATEMENT OF FACTS

### History of the Mainline

4. The Enbridge Mainline system is Canada's largest transporter of crude oil, moving Western Canadian crude oil production to markets in eastern Canada and the U.S. Midwest. The Mainline also transports refined petroleum products to Saskatchewan and Manitoba and natural gas liquids to Sarnia, Ontario. [2]

5. The first pipeline in the Mainline network, Line 1, connected Edmonton to Superior and was built in 1950, in the wake of the Leduc, Alberta oil discovery that signaled the birth of the modern Canadian industry. In 1953 it was extended to Sarnia, Ontario. Since then, numerous additional lines have been built under the common carriage open access toll

[1] SC 2019, c 28, s 10.

[2] https://www.cer-rec.gc.ca/nrg/ntgrtd/pplnprtl/pplnprfls/crdl/nbrdgmnln-eng.html

structure, without firm service, to provide additional egress for Western Canadian Sedimentary Basin ("WCSB") production. The Mainline has been expanded and upgraded during the last thirty years to its current configuration and capacity.[3]

6. The Enbridge Mainline has historically operated as a common carrier and has been subject to continuous toll settlements since 1995.[4] This has resulted in what Enbridge refers to as a "commercial dynamic" that "is long standing and efficient as it allows refiners to effectively manage their crude oil requirements and the timing of crude oil deliveries off the Enbridge Mainline system."[5] Accordingly, refiners have been the largest shippers of record on the Mainline.

7. On May 2, 2011, Enbridge submitted an application to the CER's predecessor, the National Energy Board ("NEB"), for a Competitive Toll Settlement ("CTS") for the Mainline.[6] The CTS was the result of negotiations between Enbridge, shippers, producers, refiners and the Canadian Association of Petroleum Producers.

8. On June 24, 2011, the NEB approved the CTS. The NEB found that the CTS was consistent with the *Revised Guidelines for Negotiated Settlements of Traffic, Tolls and Tariffs* dated June 12, 2002[7] and approved Enbridge's request that the CTS be made effective July 1, 2011 and terminate on June 30, 2021.

## The Open Season

9. On August 2, 2019, Enbridge announced the commencement of an open season for the Mainline (the "Open Season") which was scheduled to conclude on October 2, 2019. Enbridge proposed to replace the CTS with a new tolling arrangement which would include the addition of firm service contracts for up to 20 years utilizing 90% of the Mainline's capacity, leaving 10% for spot capacity. Under the current CTS, 100% of the Mainline's capacity is open access without any requirement for long-term commitments. Enbridge's Open Season would have required that shippers commit to over $150 billion for contract service on the Mainline.[8]

10. Between August 23 and 26, 2019, Suncor Energy Inc., Shell Canada Limited, The Explorers and Producers Association of Canada, and Canadian Natural submitted complaints to the NEB regarding the Open Season and particularly, the proposal to switch to firm service on the Mainline (the "Complaints"). On August 27, 2019, the NEB initiated a comment process on the Complaints (the "Complaint Proceeding") and the CER issued a decision on September 27, 2019, ordering that Enbridge may not offer firm service to

[3] https://www.enbridge.com/~/media/Enb/Documents/Factsheets/FS_ENB_Mainline_system.pdf?la=en

[4] C03823-7 Appendix 5 - Evidence of John Reed, at A10.

[5] C03823-2 Canadian Mainline Contracting Application, at para. 22.

[6] A29099.

[7] NEB Letter and Order TO-03-2011 (A29821).

[8] C01156-2 Suncor Complaint and Application, at para. 7.

prospective shippers on the Mainline until such firm service, including all associated tolls and terms and conditions of service, has been approved by the CER[9] (the "Open Season Decision"). The CER also stated, at that time, that the effect of the order was that Enbridge could not continue the Open Season.

**The Enbridge Application**

11. Notwithstanding the concerns raised by numerous Canadian producers and other interested parties regarding the proposed switch to firm service, the Complaint Proceeding, and the Open Season Decision, Enbridge did not modify its transportation service and toll methodology for the Mainline. In fact, Enbridge's application is essentially identical to that presented during the Open Season.

12. As part of its application, Enbridge proposes to shift the existing capacity on the Mainline from its current common carriage status to 90% long-term firm service contracts. This is a drastic and unprecedented shift from the currently available 100% capacity for spot shipments, at a time when the existing takeaway capacity from the WCSB is extremely limited and very valuable.[10]

13. The Enbridge application does not propose to serve new markets or increase capacity and, as a result, does not require Enbridge to obtain any project financing for the Mainline. In fact, Enbridge's expert acknowledges that, if the Enbridge application were approved, the only new commercial service offering being proposed is the switch from common carriage to "long-term firm contract service", as opposed to any type of offering requiring capital investment.[11] Unlike other open seasons, Enbridge's open season was not driven by a requirement to demonstrate commercial support for the Mainline but rather Enbridge's desire to solidify its revenue stream for many years to come and reduce its risk on an existing, in service pipeline asset.

14. In addition to seeking approval for the switch from common carrier to long-term service contracts, Enbridge seeks approval for the open season procedures and numerous transportation services agreements ("TSAs"). Enbridge also seeks approval for methodologies for receipt and delivery tankage requirements and receipt and delivery terminalling tolls. Enbridge also seeks an exemption related to its system of accounts.

## GROUNDS FOR PRELIMINARY CONSIDERATION OF THE FUNDAMENTAL CONVERSION ISSUE

**The Common Carriage Obligation**

15. Section 239(1) of the CER Act, also known as the "common carriage" provision, states:

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[9] CER Letter Decision, Complaints regarding Enbridge Mainline Open Season, September 27, 2019 (C01893-1).

[10] CER Letter Decision, Complaints regarding Enbridge Mainline Open Season, September 27, 2019 (C01893-1) at p. 2.

[11] C03823-7 Appendix 5 - Evidence of John Reed, at A62.

> 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.

16. Section 239(1) puts an obligation on companies transporting oil via pipeline to receive, transport and deliver all oil offered for transmission by means of its pipeline. Common carriage ensures that all prospective shippers have equal access to pipeline systems and ensures that there will not be any discrimination between shippers based on their business circumstances. By virtue of being a CER regulated oil pipeline, the Mainline is subject to the common carriage provision.

17. Throughout the NEB's history,[12] when considering a departure from common carriage to firm service, the NEB has generally only done so in the context of new capacity or service offerings. Indeed, the NEB has confirmed that the common carriage obligation may be met where an appropriate open season is held for new facilities or services and sufficient capacity is made available for uncommitted volumes:

> While the Board has broad discretion in assessing compliance with subsection 71(1), the Board has indicated in previous decisions that an oil pipeline may meet its common carrier obligations when an appropriate open season is conducted for new facilities or services and sufficient capacity is made available for uncommitted volumes.[13]

18. In its application, Enbridge attempts to justify its proposal to switch to 90% firm service by citing examples of where, in its view, oil pipelines have implemented firm capacity on existing facilities.[14] However, in each of the cases cited by Enbridge, additional capacity or a new service, including a change in direction, was being offered. None of the cases cited by Enbridge allowed for a conversion to contract carriage in the absence of a new service offering or capacity expansion. Therefore, Enbridge's proposal to switch from zero to 90% long-term firm service contracts is not consistent with its common carrier obligations under section 239(1) of the CER Act.

19. Enbridge also selectively relies on a portion of the NEB's Reasons for Decision regarding the Trans Mountain Westridge Marine Terminal.[15] In the Westridge example, the shift to contract carriage only applied to 18% of the total pipeline capacity, leaving 82% for uncommitted shipments. However, the Westridge case is unique and its circumstances are very different from those associated with the Mainline. In that decision, although the NEB allowed a conversion to firm service, it involved unique circumstances – the reallocation of land capacity to a marine terminal with dock shipments to align pipeline deliveries with marine transportation schedules. In this case, there are no logistical issues or exceptional

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[12] Pursuant to section 33 of the transitional provisions, every decision or order made by the NEB is considered to have been made under the CER Act and may be enforced as such.

[13] NEB Reasons for Decision RH-2-2011 at p 25-26 (emphasis added).

[14] C03823-2 Canadian Mainline Contracting Application, at para. 38 and footnote 38.

[15] C03823-2 Canadian Mainline Contracting Application, at para. 30.

circumstances to be addressed that require a change from the decades of common carriage on the Mainline. Again, the services provided via the Mainline are not changing in any way – it is not expanding, adding any new service, and there is no reallocation of land capacity to a marine terminal. The Westridge case is clearly distinguishable from Enbridge's current offering and, accordingly, provides no support or precedent for Enbridge's request to change the Mainline from 100% open access to 90% long-term service contracts.

20. In addition, in none of the cases cited by Enbridge did the applicant seeking firm service have the dominant market position of Enbridge's Mainline. As already determined by the CER, Enbridge has "a dominant position in the market." Enbridge controls over 70% of oil transportation capacity out of the WCSB. Enbridge's proposal would result in aggregate uncommitted oil pipeline capacity being reduced from approximately 80% to 15% of total oil pipeline capacity.[16] The evidence of the Brattle Group is that the oil transportation market is highly concentrated and that Enbridge has a Herfindahl-Hirschman Index ("HHI") statistic over 5,000 – well above the 2,500 threshold that U.S. courts and regulatory agencies commonly refer to as an indication of high risk that market incumbents possess market power.[17] Enbridge's proposal to convert the Mainline from common carriage to firm service is an abuse of its market power.

21. As confirmed by the CER, if the Mainline is permitted to convert to contract carriage there will be a significant lack of open access for producers in the WCSB. The reduction in aggregate uncommitted oil pipeline capacity from 80% to 15% will have a significant, adverse and highly prejudicial impact on producers and other industry participants in the WCSB who have made investment decisions based in part on the existing and historical open access to egress. For producers with operations in Saskatchewan, the issue is more acute because the Mainline is the only pipeline option available for oil produced in Saskatchewan.

22. Enbridge's proposed switch from common carriage to firm service is also unjustly discriminatory and therefore contrary to section 235 of the CER Act, which states:

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

23. Enbridge is seeking to reclassify existing shippers who are all currently receiving the same service and being treated the same by virtue of the Mainline's common carriage status into two distinct classes of shippers, despite the fact no new capacity is being offered. Pursuant to section 236 of the CER, the burden of showing this conversion is not unjustly discriminatory lies on Enbridge.

24. In the US, the Federal Energy Regulatory Commission ("FERC") has denied previous attempts to shift from common carriage to contract carriage precisely because no new capacity was offered. In the *Colonial* decision, FERC succinctly described Colonial's proposal as creating two classes of shippers, committed and uncommitted, out of one class

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[16] CER Letter Decision, Complaints regarding Enbridge Mainline Open Season, September 27, 2019 (C01893-1) at p. 2.

[17] C01156-3 Brattle Evidence - A6X0S9, at p. 3.

of shippers who were currently receiving the same service on existing capacity, as "unduly discriminatory".[18] Enbridge's proposal with regard to its Mainline is analogous to the *Colonial* scenario – Enbridge has not proposed any new facilities or services on its Mainline. Enbridge's proposal is contrary to section 239(1) of the CER Act.

25. The FERC, in its well-reasoned decision in *Colonial*, stated the following:

> 33. The threshold issue to be addressed is whether the Commission should grant a declaratory order where the pipeline seeks approval for contract or committed rates for existing capacity. The core of Colonial's petition for declaratory order is the novel request for Commission authorization for contract rates for existing capacity that is fully utilized. <u>If the Commission declines the request for contract rates in this circumstance, where no new capacity or facilities are proposed, the Commission need not address the other issues raised by Colonial's petition such as the prorationing methodology, priority rights for excess capacity, waiver of the right to challenge Colonial's rates, or terms related to force majeure, and liability of the carrier. Nor does the Commission need to direct Colonial to redo the open season to eliminate potentially unlawful or discriminatory provisions, if the central notion of reclassifying existing shippers on existing facilities is rejected.</u>
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> [. . . . ]
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> 35. Beginning with Express, and occurring more frequently in recent years, the Commission has issued numerous declaratory orders approving contract or committed rates. The Commission recognizes that due to increased oil production in the U.S. and Canada, changing market dynamics for crude oil and refined products, and the large financial commitments necessary to increase infrastructure, oil pipelines have proposed and the Commission has approved various types of committed or contract rate structures. <u>Unlike the proposal by Colonial to establish contract rates for existing capacity, the Commission's body of precedent has approved contract rates with respect to new pipelines, expansion projects, or, at the very least, reversals or reconfigurations of existing pipelines in order to serve new markets or respond to changing market conditions. In all of the cases approving contract rates, contractual commitments of shippers were necessary to, among other things, determine support for construction of the project, obtain financing, ensure the initial financial viability of the project, or to determine the support in new or growing markets.</u> Even in the case of existing pipelines seeking to reverse or reconfigure their systems, contract rates ensure that a pipeline's investments to serve new markets are necessary in the long term.
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> 36. In this proceeding, although Colonial states that it "is reaching the point where it needs to determine whether to initiate large-scale and expensive expansion efforts," it nevertheless also states that it "is not immediately constructing new infrastructure." The fact that Colonial has been in allocation for the past two years suggests that shippers value the capacity. In addition, a number of the parties supporting the petition submit that they would like to see Colonial's capacity increase through expansion. The instant petition, however, does nothing to create additional capacity or new infrastructure.
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> 37. <u>The Commission finds that Colonial's request to create two classes of shippers, committed and uncommitted, out of one class of shippers who are currently receiving the same service on existing capacity, is unduly discriminatory in these circumstances.</u> In other cases, contract shippers make financial

[18] *Colonial Pipeline Co.*, 146 FERC ¶ 61,206 (2014) ("*Colonial*"), at 12.

> commitments to support the long-term viability of a new project. Such commitment is unnecessary here for a long-standing pipeline such as Colonial that has been in allocation for at least two years. The subject TSA proposal simply would ensure Colonial a legally unassailable revenue stream whether or not committed shippers make any shipments and without any commitment that new capacity will be added to a constrained system; at the same time it would degrade the service of existing shippers that would not (or could not) prudently sign the TSA as against their interests.
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> 38. The Commission finds that approving committed rates for existing capacity as requested by Colonial would essentially legalize such undue discrimination. If Colonial believes that there will be demand for capacity in the long-term, then it should consider expansion and determine the various methods by which such expansion can be financed. On the other hand, if the current allocation on the system is more of a short-term phenomenon that does not require expansion, there is no reason to create financial certainty for Colonial by way of guaranteed contract, while at the same time degrading relative service terms and rates for existing shippers who could not acquiesce to the proffered TSA.[19]

26. The circumstances in *Colonial* are the same as those that exist on the Canadian Mainline. Enbridge's proposal to switch from common carriage to firm service is unjustly discriminatory because it will reclassify existing shippers on an existing facility. We submit that the FERC's reasoning in *Colonial* is persuasive in this case and is directly applicable to the Mainline.

27. Contrary to Enbridge's assertions, Enbridge's proposal to switch from 100% uncommitted volumes to 10% uncommitted volumes is unprecedented, inconsistent with Enbridge's common carriage obligation in section 239(1) of the CER Act, unjustly discriminatory and does not align with previous NEB and FERC decisions. It represents an abuse of Enbridge's market power and the results would be contrary to the Canadian public interest.

**Regulatory Efficiency**

28. Canadian Natural submits that in accordance with principles of regulatory efficiency, the Fundamental Conversion Issue should be determined by the CER prior to making a determination on the other aspects of Enbridge's application. An express purpose of the CER Act "is to ensure that regulatory hearings and decision-making processes related to those energy matters are fair, inclusive, transparent and efficient."[20] Consistent with this, recently the CER stated "When designing a process for a project application, the Commission looks at the specifics of that case and how it can meet its obligation to adjudicate efficiently while still ensuring procedural fairness and meeting the legislated time limit. It is not a one size fits all approach."[21]

29. In addition to seeking approval of long-term service contracts, Enbridge seeks approval of open season procedures and the TSAs. The application includes eight distinct TSAs each

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[19] *Colonial*, at para. 33, 35, 36 to 38 (emphasis added).

[20] CER Act, section 6(d) (emphasis added).

[21] CER – Ruling No. 2 – NOVA Gas Transmission Ltd – Edson Mainline Expansion – Amended Timetable of Events and List of Issues (C02269), PDF page 5

consisting of approximately 130 to 150 pages. Issues arising in connection with only the TSAs for committed tolls, as acknowledged by Enbridge in its application, include: the specifics of requirement contracts, the specifics of take or pay contracts, proposed service hauls, the term of contracts, the requirements regarding financial assurances, ramp up rights, the committed volume increase option, excused events, feedstock impairment, reductions in committed volumes, renewal provisions, termination clauses, committed toll levels, the GDPP adjustment, toll surcharges, flex service committed tolls, most favoured nation toll adjustments, deficiency payments, failure to tender payments.[22]

30. In addition to the above, numerous issues also arise, again as acknowledged by Enbridge, with respect to the uncommitted tolls.[23] Enbridge is also seeking approval of methodologies for receipt and delivery tankage requirements and receipt and delivery terminalling tolls. Enbridge seeks approval of the open season procedures and amendments to its Rules Tariff. Finally, Enbridge seeks an exemption related to its system of accounts.

31. The Enbridge application in its entirety consists of 42 appendices whereas only three of the appendices are relevant to the Fundamental Conversion Issue.[24] Numerous Canadian producers and other interested parties have expressed concern with the Fundamental Conversion Issue. These parties should not be required to incur the material expenses associated with participation in a proceeding, including information requests and a hearing, that is scoped to consider the myriad of issues raised in the Enbridge application prior to a decision on the Fundamental Conversion Issue. In fact, the CER's disposition on the Fundamental Conversion Issue may vitiate the need to address the other issues raised in Enbridge's application.

32. We note that a preliminary consideration of the Fundamental Conversion Issue is consistent with Enbridge's own expert evidence. In his evidence Mr. Reed states as follows:

> Q20. HOW DID YOU ASSESS WHETHER THE APPLICATION WAS IN THE CANADIAN PUBLIC INTEREST?
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> A20. In my view, it is helpful to break the question of public interest into two parts. The first question before the CER in the instant Application is whether converting the Canadian Mainline from 100% uncommitted service to a structure that offers both uncommitted and committed service is in the Canadian public interest. Once the CER determines that Canadian Mainline contracting is in the public interest, the second step involves making a determination as to whether the tolls, terms, and conditions Enbridge proposes to achieve contracting on the Canadian Mainline, which I refer to in my evidence as the Negotiated Package, are just, reasonable, and not unjustly discriminatory. Given the different issues involved, I believe the two questions are separable and below I present my evidence related to the

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[22] C03823-2 Canadian Mainline Contracting Application, at pp. 31 to 52.

[23] C03823-2 Canadian Mainline Contracting Application, at pp. 53 to 57.

[24] These are appendices 5, 6 and 7 – the expert reports of Mr. Reed, Dr. Church and Mr. Earnest.

concept of Canadian Mainline contracting and the merits of the proposed Negotiated Package separately.[25]

33. We submit that the issues arising in connection with the TSAs, open season procedures, Rules Tariff and other specific tolling matters are distinct from the Fundamental Conversion Issue. A proceeding and hearing into the Fundamental Conversion Issue will be more cost effective, efficient and orderly than a hearing into the entire Enbridge application.

## CONCLUSION

34. Canadian Natural respectfully submits that the proposed conversion of the Mainline from common carriage to contract carriage is unprecedented and inconsistent with the common carriage obligations established in the CER Act. The proposed conversion is an abuse of market power by Enbridge and unjustly discriminatory, and not in the public interest. In accordance with principles of regulatory efficiency, a proceeding and hearing on the Fundamental Conversion Issue should occur prior to the CER's consideration of any other matters.

35. Therefore, we respectfully request the CER establish a preliminary regulatory process to first address the Fundamental Conversion Issue before addressing any other aspects of the Enbridge application.

[25] C03823-7 Appendix 5 - Evidence of John Reed, at A20.