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File OF-Gen-06 FRR  
29 April 2021

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Dear Mr. Thrasher:

**Trans Mountain Pipeline ULC (Trans Mountain)  
Request for Confidential Treatment  
Amended Order AO-001-FRO-002-2017 (Amended Order)**

**Background**

On 22 February 2021, Trans Mountain filed a [request](#), pursuant to section 60 of the *Canadian Energy Regulator Act* (CER Act), permitting it to file in confidence information in its certificate of insurance that discloses the names of its insurers. Trans Mountain also requested that the confidential treatment of the names of its insurers be applied to all future filings of its certificate of insurance.

Trans Mountain's request relates to the annual filing it must make by 30 April 2021 as part of its Financial Resources Plan, as required by condition 6 of the Amended Order AO-001-FRO-002-2017 ([Amended Order](#))<sup>1</sup> in relation to the currently operating Trans Mountain Pipeline. All pipeline companies regulated by the Canada Energy Regulator (CER) must have a Financial Resources Plan, which is a set of filings that detail how a company complies with the requirements in the CER Act and *Pipeline Financial Requirements Regulations*. A Financial Resources Plan provides details about a company's financial resources, including the types, terms, timing of access and how the financial resources maintained allow a company to pay the amount of applicable Absolute Liability.<sup>2</sup>

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<sup>1</sup> National Energy Board - Letter and Amended Order AO-001-FRO-002-2017

Trans Mountain Pipeline ULC – Replacement Plan for Financial Resource Requirements, [A98410](#).

<sup>2</sup> Additional details regarding Financial Resource Requirements can be found in [Pipeline Financial Requirements Guidelines](#) on the CER's website.

On 8 March 2021, the Commission of the Canada Energy Regulator (the Commission) established a public [comment process](#) ending on 22 March 2021,<sup>3</sup> and indicated that it would also consider the letters submitted prior to 8 March 2021.<sup>4</sup> A total of [30 comment letters](#) were filed with the CER prior to the deadline. Of the letters filed, 17 were in opposition to the granting of the request, while 13 were in favour.<sup>5</sup> On 25 March 2021, Trans Mountain filed its [reply comments](#).

### **Requirements to be Met**

Subsection 60(a) of the CER Act requires Trans Mountain to persuade the Commission that the disclosure of the information, in this instance, the names of its insurers as they would appear in materials compromising its pending filing, could reasonably be expected to result in a material loss or gain to Trans Mountain, being a person directly affected by the proceedings, or could reasonably be expected to prejudice Trans Mountain's competitive position.

Subsection 60(b) of the CER Act requires Trans Mountain to persuade the Commission of two elements. Under paragraph 60(b)(i), Trans Mountain must demonstrate that the information for which confidentiality is sought be financial, commercial, scientific or technical information and that it has been consistently treated as confidential information by Trans Mountain. Under paragraph 60(b)(ii), Trans Mountain must demonstrate that its interest in confidentiality outweighs the public interest in disclosure. Both elements of subsection 60(b) must be met for Trans Mountain to be granted confidentiality.

### **Trans Mountain's Request**

Trans Mountain provided, in its submissions, evidence that previously disclosing the names of its previous insurers in prior such filings resulted in the termination of insurance coverage and while Trans Mountain replaced this coverage, it experienced a significant reduction in available insurance capacity and incurred a significantly higher cost. Trans Mountain said if there is continued public disclosure of the names of its insurers, there will be ongoing targeting and pressure placed on insurers which could be expected to have the same result. Trans Mountain stated this would result in material loss to it and its shippers because of increased insurance premiums due to a smaller pool of insurers and challenges maintaining adequate insurance coverage, as required by section 138 of the CER Act.

Trans Mountain stated that the names of its insurers are commercial information as they are parties to a commercial contract. It stated that in the past, the names have not always been treated confidentially. The current and increasing pressures on insurers have caused Trans Mountain to establish practices that protect these names from disclosure, and that this information is and will be consistently treated as sensitive and confidential by

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<sup>3</sup> Comments submitted to the CER after 22 March 2021 were not considered by the Commission.

<sup>4</sup> Robyn Allan, Stand.earth, and the Canadian Association of Petroleum Producers submitted letters prior to 8 March 2021 that can be found on [REGDOCS](#).

<sup>5</sup> The Commission received three comment letters filed prior to the 22 March 2021 deadline via email and mail ([C12187](#), [C12140](#), [C12099](#)). These letters were filed via other units/offices of the Commission and were delayed in their transfer to the appropriate folder in REGDOCS on the CER website.

Trans Mountain going forward. Trans Mountain referred to a previous decision<sup>6</sup> regarding Genesis Pipeline Canada Ltd. (Genesis) and NOVA Chemicals (Canada) Ltd. (NOVA Chemicals) where the National Energy Board (NEB) granted confidentiality over the names of the insurers pursuant to subsection 16.1(b) of the *National Energy Board Act* (predecessor to subsection 60(b) of the CER Act). Consistent with this precedent, Trans Mountain stated its interest in maintaining confidentiality over the names of its insurers outweighs the public interest in disclosure.

### **Comments received about the Request**

Comment letters that argued against granting confidentiality stated that Canadians have the right to know that sufficient insurance is available to cover catastrophic events and provide necessary compensation. Further comments included un-insuring of fossil-fuel projects, such as the Trans Mountain Pipeline, is the best and non-violent way of shifting Canada towards a carbon-free energy future; higher insurance premiums being experienced by Trans Mountain are not due to public pressure, but rather as a result of the larger trend in the insurance industry of considering the cost of climate change and divesting away from fossil fuel projects; Trans Mountain's poor safety record and aging pipeline, and not public pressure, is resulting in rising insurance costs; and transparency and accountability are essential for Trans Mountain as it is a Crown corporation. The Tsleil-Waututh Nation stated that granting the request would deprive their Indigenous community of their ability to assert their rights and communicate with insurance companies about potential infringement of their rights and title.

Comment letters filed supporting Trans Mountain's request set out that disclosure of the names of insurers will reduce the pool of available insurers and will lead to higher operating costs that will be passed onto shippers. Some stated that the CER has the appropriate knowledge to verify that Trans Mountain has met its financial requirements and is conducting business in the public interest, therefore, disclosure of this information is unnecessary for the public. Further comments noted the potentially reduced pool of available insurers will hinder Trans Mountain's ability to fulfill its regulatory financial requirements, as legally required by the CER and which is in the public interest. It was noted that the NEB has previously granted a similar type of confidentiality order for Nova Chemicals and Genesis in 2019.

### **Reply Comments of Trans Mountain**

Trans Mountain submitted that it had met the test for confidentiality under both subsections 60(a) and 60(b). It argued that some of the comments opposing its request reflect a fundamental misapprehension of the test for confidentiality established under the CER Act, while comments raised in regard to the broader trends of rising costs in the insurance industry are not supported by evidence and are irrelevant to the test for confidentiality.

Trans Mountain submitted that, contrary to comments raised by opposing parties, the test for confidentiality under subsection 60(a) does not require proof of actual harm, rather the reasonable potential for material loss and prejudice to one's competitive position. Further, the test is forward-looking and as such, does not require proof of evidence of past or present harm. Trans Mountain argued that the public comments submitted in this matter, particularly

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<sup>6</sup> National Energy Board decision regarding confidential treatment request by Genesis and NOVA Chemicals, dated 3 July 2019 – [C00254-1](#).

by Stand.earth, relating to their plans for a continued pressure campaign on the insurer companies to stop offering coverage for the Trans Mountain Pipeline, is sufficient to reasonably demonstrate the potential for harm to Trans Mountain in order to satisfy the test under subsection 60(a).

Trans Mountain submitted that there appeared from the letters of comment to be no dispute that the information sought be determined as confidential was commercial in nature and that it is and will be consistently treated as confidential, as per paragraph 60 (b)(i). It noted that the comments filed were in relation to paragraph 60 (b)(ii) regarding public interest. It stated that comments about granting confidentiality and the eroding of the public trust in the CER had no principled basis as section 60 of the CER Act provides an exception to the general principle that proceedings before the Commission are public. Further, the section sets out a test to be met.

Trans Mountain noted that the redaction of its insurers' names is a very limited exception to the overall transparency of the CER's regulatory process and Trans Mountain's required filings with the CER. Trans Mountain also submitted that the ownership of the Trans Mountain Pipeline is not a relevant test for confidentiality as there is nothing in the CER Act that contemplates a different test or a higher threshold to be met when the applicant is a publicly-held company.

In regards to comments that confidentiality over this information would interfere with individuals' freedoms to publicly express concerns about the Trans Mountain Pipeline or otherwise, Trans Mountain stated this redaction of information only affects the ability for people to target and pressure its insurers to reduce or eliminate insurance coverage. It submitted that there is no public interest served by these campaigns which are contrary to the purposes of the CER Act, which are to ensure pipelines are safe, secure and efficient, and protect people, property and the environment. Further, these serve to undermine Trans Mountain's ability to obtain adequate insurance to satisfy its regulatory requirements.

### **Decision**

In making its determination, the Commission considered Trans Mountain's request, the public comment letters received, and Trans Mountain's reply, as discussed above. Additionally, the Commission has taken into consideration all of its obligations under the CER Act.

The Commission agrees with Trans Mountain that there is no requirement under the CER Act or otherwise for affidavit evidence to be filed. The submissions filed by Trans Mountain and the commenters are sufficient for the Commission to make its decision.

The Commission notes that the confidentiality request is in relation to a minimal amount of information set out on the certificate of insurance, being solely the names of insurers. Further, the Commission notes that the redaction of this information would still leave on the public record information about Trans Mountain's insurance, including the limit of liability/amount of coverage attributable to each un-named insurer. This information is transparent and available to the public and sets out the total amount of insurance coverage that Trans Mountain is required to have within its Financial Resources Plan, pursuant to the Amended Order.

Some commenters argued that Canadians have the right to know that pipelines have sufficient insurance to cover catastrophic events and provide necessary compensation. The Commission agrees that Canadians should have the opportunity to make themselves aware via publicly filed information that sufficient financial resources are available and are maintained to cover these events, including insurance should it be one of the types of financial resources used, as it is in this case. This opportunity is provided for Canadians through the robust requirements under the CER Act and the *Pipeline Financial Requirements Regulations*, as well as the CER's annual assessment of companies' financial resources plans. The opportunity for Canadians to be able to access publicly filed information to make themselves aware that the CER through its annual assessment has determined that sufficient financial resources are available and are maintained by a regulated company need not also require that, in addition to that information, the identifying details of insurers be made publicly available. It is the responsibility of the CER to assess whether the financial resources requirements are met.

In relation to the comments that un-insuring of fossil fuel projects, such as the Trans Mountain Pipeline, is the best and a non-violent way of shifting Canada towards a carbon-free energy future, the Commission finds that Trans Mountain has a statutory requirement, originally set out in by the *Pipeline Safety Act* of 2015, and continued under the CER Act and the *Pipeline Financial Requirements Regulations*, requiring it to have and maintain the amount of financial resources necessary to pay the amount of the limit of absolute liability as determined pursuant to the CER Act, which may or may not include insurance. Trans Mountain is also required by the Amended Order to maintain insurance policies of at least \$500 million. While determining the nature and composition of Canada's energy future may be a worthy policy debate, the statutory requirement that the pipelines and facilities regulated by the CER carry appropriate insurance or similar financial resources is one which the Commission cannot ignore, and one which serves a vital public interest.

In relation to comments that Trans Mountain's safety record and aging pipeline, and not public pressure, is causing rising insurance costs, the Commission has determined that these comments are not relevant to the matter before it. The issue before the Commission is whether the confidentiality provisions under the CER Act are met.

In relation to the comments from the Tsleil-Waututh Nation, the Commission is not persuaded that the Tsleil-Waututh Nation has an established or potential Aboriginal right to communicate with Trans Mountain's insurers that is protected by section 35 of *the Constitution Act, 1982*.

In regard to the comments that Trans Mountain, as a Crown Corporation, should face increased requirements for transparency, the Commission notes that neither section 60 of the CER Act or the *Pipeline Financial Requirements Regulations* have different disclosure requirements for Crown Corporations from those of other forms of companies. The Commission and its predecessor, the NEB, have previously granted to other companies confidential treatment for information contained within their insurance certificates pursuant to subsection 16.1(b) of the *National Energy Board Act* and subsection 60(b) of the CER Act.<sup>7</sup> The tests to be met for confidentiality in these two sections are the same.

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<sup>7</sup> See [C00254-1](#), [C03374-1](#), [C03375-1](#), and [C03378-1](#).

In evaluating Trans Mountain's requested relief, the Commission finds that Trans Mountain has satisfied the requirements for confidentiality pursuant to subsection 60(a) and 60(b) of the CER Act.

The Commission is persuaded by the evidence and submissions filed by Trans Mountain that it has met the test for confidentiality set out in the second part of subsection 60(a) of the CER Act as the disclosure of the names of Trans Mountain's insurers could reasonably be expected to prejudice its competitive position in its dealing with potential insurers including but not limited to, its ability to obtain adequate insurance at a reasonable price.

The Commission is also persuaded by the evidence and submissions filed by Trans Mountain that Trans Mountain has met the test for confidentiality set out in subsection 60(b) of the CER Act. In respect of subsection 60(b), the Commission finds that the names of Trans Mountain's insurers are commercial information, as they relate to a commercial contract between the insurance companies and Trans Mountain.

The Commission also finds that, in respect of paragraph 60(b)(i), Trans Mountain has met the test of consistently treating this commercial information as confidential. Trans Mountain acknowledged that the names of the company's prior insurers were not always treated confidentially in previous regulatory filings; however, it is persuasive to the Commission that Trans Mountain has established practices to protect the information particular to the filing, which is to be made by 30 April 2021, and that the names of the insurers have consistently been treated as being confidential. The Commission notes that the certificate of insurance filed in the Financial Resources Plan on 24 April 2020,<sup>8</sup> was in force from 31 August 2019 to 31 August 2020. It is clear that confidentiality is sought by Trans Mountain over the insurers' names contained in the current certificate of insurance which would have been issued after the 31 August 2020 expiry date. This current certificate of insurance is required to be filed as part of the Financial Resources Plan on or before 30 April 2021. Trans Mountain has stated it is and will be consistently treating the names of its insurers as sensitive and confidential information.<sup>9</sup> The Commission concludes, based on the information in Trans Mountain's application,<sup>10</sup> and the information on the record, that Trans Mountain has treated the names of the insurers within the current certificate of insurance as confidential information since the expiry of the previous certificate on 31 August 2020. The Commission notes that none of the comments filed in opposition to Trans Mountain's request addressed the matter of the treatment of insurers' names as commercial information, nor were any comments filed disputing Trans Mountain's treatment of the commercial information as confidential.<sup>11</sup>

In respect of paragraph 60(b)(ii), the Commission finds that Trans Mountain's interest in confidentiality outweighs the public interest in disclosure of the names of Trans Mountain's insurers for the operating Trans Mountain Pipeline. In making this determination, the Commission considered all facets of the public interest discussed in the submissions, as well

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<sup>8</sup> [C05894-1](#); certificate of insurance at PDF pages 4 and 5.

<sup>9</sup> [C11610-1](#).

<sup>10</sup> Ibid. and including the referenced articles by [Valeria Volcovici, "Insurers Pressed to Drop Coverage of Canada's Oil Sands Pipeline," Insurance Journal \(August 8, 2019\)](#); and [Lyle Adriano, "Major petition urges insurers to drop Trans Mountain coverage," Insurance Business Canada \(August 6, 2020\)](#).

<sup>11</sup> Comment letters received by the Commission can be found [here](#), while Trans Mountain's reply comments can be accessed [here](#).

as the value to Trans Mountain in keeping the names of its insurers confidential. While the Commission agrees that there is a high degree of public interest in knowing the pipeline is sufficiently insured, that public interest does not necessarily include a requirement that the particulars of all insurers be made widely available.

The Commission accepts Trans Mountain's arguments that the disclosure of the names of Trans Mountain's insurers has limited and could continue to limit its ability to obtain adequate insurance at a reasonable price, which is required for the fulfilment of its regulatory obligations and for the protection of people, property and the environment, as required by the CER Act.<sup>12</sup>

The Commission notes that Trans Mountain's certificate of insurance is filed to meet its compliance with the CER Act, *Pipeline Financial Requirements Regulations*, and the Amended Order. Specifically, Trans Mountain, as a company with the capacity to transport at least 250,000 barrels of oil per day, has an Absolutely Liability limit of \$1 billion.<sup>13</sup> Absolute Liability means that Trans Mountain is liable, regardless of negligence or fault, for losses or damages resulting from an unintended or uncontrolled release up to \$1 billion. Accordingly, the CER requires Trans Mountain to file its Financial Resources Plan annually to demonstrate how it maintains sufficient Financial Resources to meet its Absolute Liability Limit. Insurance is one instrument that can be used to demonstrate compliance.<sup>14</sup> If disclosure of the names of its insurers limits Trans Mountain's ability to first access insurance and second to access insurance at a reasonable cost, Trans Mountain may face difficulty in meeting its obligations under the CER Act, the *Pipeline Financial Requirements Regulations*, and the Amended Order. The public comment process provided the Commission with comments that argued that it is in the public interest for Trans Mountain to have access to sufficient financial resources to pay for an unintended or uncontrolled release. Limiting or shrinking the pool of insurers creates a risk to the public interest in this regard.

In coming to this conclusion, the Commission is mindful that the information requested to be kept confidential is only one element of the overall information contained in the certificate of insurance. The information in relation to the limit of liability/amount of coverage, the insurance broker issuing the certificate, the policy dates for coverage and the type of coverage are all information that is still available to the public.

Accordingly, the Commission grants the relief requested by Trans Mountain to file in confidence, information in its certificate of insurance that discloses the names of its insurers. The Commission has also determined that this confidential treatment may be applied to all future filings of the names of the insurers, as set out in Trans Mountain's certificate(s) of insurance, unless there is a material change. The Commission will not place the confidential information on the public record or otherwise make it available to the public.

Financial Resource Requirements do not apply to a pipeline under construction that does not contain any commodity. Therefore, the Commission's decision on Trans Mountain's request only applies to the current operating Trans Mountain Pipeline, and not in relation to the Trans Mountain Expansion Project for which a separate request for confidentiality must be sought at the appropriate time.

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<sup>12</sup> CER Act, section 6.

<sup>13</sup> Amended Order AO-001-FRO-002-2017.

<sup>14</sup> CER Act, subsection 138(3).

The Commission considered the arguments made by multiple parties that Trans Mountain by virtue of its current form of public ownership should be subject to higher requirements for transparency. In response, the Commission notes that to the extent that any member of the Canadian public is of the opinion that there is another government entity that should make such records accessible to the public, it is open to them to make a request to that entity under applicable access to information legislation.

Finally, to provide Trans Mountain with sufficient time to file its Financial Resources Plan update due on or before 30 April 2021, the Commission grants an extension to 31 May 2021. Trans Mountain must inform the Commission by 30 April 2021 of its intention to exercise this extension.

Yours sincerely,

*Signed by*

Jean-Denis Charlebois  
Secretary of the Commission

Attachment – Appendix I

c.c. List of Interested Parties



**APPENDIX I – LIST OF INTERESTED PARTIES**

**Trans Mountain Pipeline ULC  
Request for Confidential Treatment  
Amended Order AO-001-FRO-002-2017  
File OF-Gen-06 FRR**

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