



EPAC

Explorers and Producers
Association of Canada™
*L'association des explorateurs
et producteurs du Canada^{MC}*

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SENT BY ELECTRONIC MAIL

Ms. Louise George
Secretary of the Commission
Canada Energy Regulator
Suite 210, 517 Tenth Ave SW
Calgary, Alberta T2R 0A8

Dear Ms. George:

**File OF-Tolls Group 1-E101-2019-02 02
Enbridge Pipelines Inc. ("Enbridge")
Canadian Mainline Contracting Application ("Application")
Comments of The Explorers and Producers Association of Canada ("EPAC")**

On January 16, 2020, the Commission requested comments on the Application prior to confirming the list of issues and establishing its hearing procedure in the Application. EPAC will participate in the Commission's procedure with respect to this Application and the following are EPAC's submission in response to the January 16, 2020 letter from the Commission.

Background

EPAC was founded in 1986 and represents 170 members from start-ups to multi-billion-dollar public companies. EPAC members produce over 500,000 barrels per day of crude oil and condensate, which represents approximately 40% of total conventional (i.e. non-oil sands) production in Canada. This conventional oil production comes from the four western Canadian provinces and provides employment, rental payments to a large number of land owners, revenue for the provinces and payments to a diverse set of municipalities.

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The Enbridge Mainline has been operating for 70 years with 100% of its capacity available for nominations under uncommitted service. The Enbridge Mainline system constitutes 70% of all pipeline capacity leaving western Canada and the majority of EPAC member's oil production is transported on the Enbridge Mainline. The Enbridge Application, proposes to offer firm contracts for 90% of pipeline capacity, leaving only 10% available for uncommitted service.

The Unique Circumstances of the Application

Enbridge's proposed transformation from fully uncommitted service to 90% firm contracts constitutes a market altering event with the potential for negative consequences for a wide group of stakeholders, including producers and governments. A change of this magnitude is alarming considering the unique circumstances, as identified by the Commission in their decision of September 27, 2019 ordering Enbridge to suspend the Mainline open season until the offering had been approved by the Commission¹. The specific and unique circumstances identified by the Commission include:

1. *Enbridge's control of over 70% of oil transportation capacity out of the Western Canadian Sedimentary Basin, via pipeline or rail;*
2. *The lack of alternative transportation options for potential shippers (all other Canadian crude oil export pipelines are contracted and/or fully utilized, and rail is more expensive, involves long lead times in arranging transportation,³ and moves only a small portion of total western Canadian crude oil production);*
3. *The impact that proposed Mainline firm service would have on aggregate uncommitted oil pipeline capacity from western Canada (aggregate uncommitted oil pipeline capacity would be reduced from approximately 80% to 15% of total oil pipeline capacity);*
4. *The fact that Enbridge's proposed firm service offering only involves existing, rather than new, pipeline capacity; and*
5. *The considerable opposition to Enbridge's current open season.*

These specific and unique circumstances, when considered together, put Enbridge in a dominant position in the market. As a result, the Commission has concerns regarding the fairness of Enbridge's open season process and the perception of abuse of Enbridge's market power.²

¹ CER, CO1893-1, Letter Decision 27 September 2019, to Suncor, Shell, EPAC and CNRL re Enbridge Mainline Open Season ("CER, CO1893-1").

² CER, CO1893-1, p. 2.

EPAC submits that Enbridge's proposed conversion to 90% contracted service raises important legal and public interest issues. A threshold question is whether the proposed conversion is consistent with the common carrier requirements of the *Canadian Energy Regulator Act*, S.C. 2019, c. 28, s. 10 ("CERA"), specifically section 239(1) that requires a pipeline transmitting oil to operate as a common carrier and section 235 that requires no unjust discrimination. EPAC submits that this question is particularly germane to Enbridge's Application, given, for example, that the proposed conversion applies to existing rather than new pipeline capacity, distinguishing it from instances where firm service has been approved for new oil pipelines or major capacity expansion projects as a means of attracting initial capital investments. By contrast, Enbridge's Mainline has operated for 70 years since its inception under fully uncommitted service, and producers and shippers have made investments and structured their business operations for many decades on that basis. Further, as the Commission has also found, the conversion of Enbridge's Mainline from uncommitted to contract service would reduce the percentage of uncommitted pipeline capacity available out of western Canada from 80% to 15%, massively reducing the uncommitted capacity available to producers and shippers, in circumstances where they have few, if any, transportation alternatives.³ The implications of Enbridge's proposal are clearly substantial and far-reaching, and require a careful consideration of whether the proposed conversion meets the legal requirements of the CERA and is otherwise in the public interest.

EPAC's Submission on Procedural Matters

Given these unique circumstances, EPAC submits that the Commission should address the Application in two distinct parts. The Commission should first consider the preliminary issue of the appropriateness of converting the Enbridge Mainline to firm service. This preliminary issue would be determined *in advance* of tolling and other issues raised in the Application that could be addressed separately. EPAC respectfully submits that the Commission's determination of the preliminary issue as a threshold question will ultimately streamline the regulatory process and eliminate unnecessary submissions. Interested parties to the proceeding will not be forced to incur significant expense to address other detailed aspects of the Application, unless the Commission first determines that conversion to firm service is appropriate and in the public interest. Addressing the preliminary issue first, will allow a wider set of affected stakeholders to participate in the hearing, including those who may not have the financial means to participate in the full hearing. Further, some interested parties, such as industry associations like EPAC, may be primarily

³ Ibid.

concerned with the preliminary issue and upholding the principles of common carriage and the provisions of the CERA and may not need, or choose not, to participate in any subsequent proceeding that is held to address tolling and other issues raised in the Application.

The Enbridge Application is proposing a monumental change that has the potential to change the face of Canadian oil markets for decades. Therefore, the preliminary issue of the appropriateness of converting the Enbridge Mainline to firm service should be carefully considered as a threshold question by a process that is efficient, inclusive and consistent with the public interest.

Finally, addressing the preliminary issue first, is consistent with the approach contemplated by Enbridge's expert witness, Mr. John Reed, as follows:

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.⁴

EPAC's Submission on Preliminary Issues for the Commission to consider

1. Is the proposed conversion of the Enbridge Mainline capacity from fully uncommitted capacity to 90% firm service consistent with the common carrier requirements and other applicable provisions of CERA?
2. Is the proposed conversion in the public interest having regard for:
 - a. potential impacts on reasonable expectations of affected parties respecting access to the Enbridge Mainline given the long history of operating under fully uncommitted service;
 - b. potential impacts on downstream markets;
 - c. existing and proposed transportation alternatives (including rail capacity);
 - d. potential discrimination respecting access to capacity on the Mainline; and
 - e. potential impacts on oil markets, prices for Western Canadian oil producers and government royalties.

⁴ C03823-7 Appendix 5 Direct Evidence of John J Reed, Page 13 A20.

Postponement of the Determination of Other Issues Relevant to the Application

Assuming the Commission agrees to address the preliminary issue of the appropriateness of converting the Enbridge Mainline to firm service first, other issues relevant to the Application do not need to be determined at this time. Tolls and other terms and conditions contemplated in the Application need only be addressed when, and if, the Commission determines that the conversion to firm service is appropriate.

Respectively submitted,



Tristan Goodman
President



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cc:

The Honourable Jason Kenney, Premier – Province of Alberta

The Honourable Sonya Savage, Minister of Energy – Province of Alberta

The Honourable Scott Moe, Premier – Province of Saskatchewan

The Honourable Bronwyn Eyre, Minister of Energy and Resources – Province of Saskatchewan