CANADA ENERGY REGULATOR

IN THE MATTER OF Hearing order RH-001-2020 and File OF-Tolls-Group1-E101-2019-02 02;

AND IN THE MATTER OF the *Canadian Energy Regulator Act*, SC 2019, c 28, s 10;

AND IN THE MATTER OF Section 35 of the *National Energy Board Rules of Practice and Procedure, 1995* (SOR/95-208);

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

NOTICE OF MOTION BY CANADIAN NATURAL RESOURCES LIMITED

FOR SUMMARY DISMISSAL OF APPLICATION

September 15, 2020

To: Mr. Jean-Denis Charlebois
Secretary of the Commission
Suite 210, 517 10 Ave SW
Calgary, AB T2R 0A8

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I. INTRODUCTION

1. Canadian Natural Resources Limited ("Canadian Natural") hereby applies to the Commission ("Commission") of the Canada Energy Regulator ("CER") for an order to summarily dismiss the Canadian Mainline Contracting Application (C03823) (the "Application") filed by Enbridge Pipelines Inc. ("Enbridge").

II. BACKGROUND

A. Existing Tolling Framework under the CTS

2. The Enbridge Mainline has historically operated as a common carrier.[1] Over time, capacity usage has transitioned such that now the majority of the capacity is nominated by downstream markets which 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."[2] This commercial dynamic does not change the fact that the utilization and expansion of the Mainline has been driven by producers' development of, and investment in, the Western Canada Sedimentary Basin ("WCSB").

3. 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 Canadian Mainline.[3] The CTS was the result of negotiations between Enbridge, and a diversified group of interested parties including various Enbridge Mainline shippers and the Canadian Association of Petroleum Producers.

4. On June 24, 2011, the NEB approved the CTS.[4] The NEB found that the CTS was consistent with the *Revised Guidelines for Negotiated Settlements of Traffic, Tolls and Tariffs* dated June 12, 2002 ("*Guidelines for Negotiated Settlements*")[5] and approved Enbridge's request that the CTS be made effective July 1, 2011 and terminate on June 30, 2021. The negotiated settlement was uncontested and as a result limited information was filed with respect to the appropriateness of the tolls or rate of return.

B. 2019 Open Season and Complaints

5. 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.

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

[2] Enbridge Canadian Mainline Contracting Application, A7C1I2, PDF 14 at para. 22.

[3] Enbridge Pipelines Inc. - Competitive Toll Settlement and Final Toll Application (A29099).

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

[5] *Revised Guidelines for Negotiated Settlements of Traffic, Tolls and Tariffs* dated June 12, 2002 (A02885). The Guidelines for Negotiated Settlements were issued by the NEB on June 12, 2002, after an extensive comment period that was initiated by the NEB on January 30, 2002. The NEB formally approved the Guidelines for Negotiated Settlements, replacing the previous guidelines that were issued in August of 1994, after receiving comments on the draft revised guidelines from 25 interested parties with 7 parties filing reply comments.

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 for 90% of the Mainline's capacity, leaving 10% for spot capacity. Through the Open Season, Enbridge sought to solicit sufficient support from interested parties to enter into a negotiated or contested settlement which it would then present to the Commission for approval.

6. 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 (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 could not offer firm service to prospective shippers on the Mainline until such firm service, including all associated tolls and terms and conditions of service, has been approved by the Commission[6] (the "Open Season Decision"). The Commission also stated that the effect of the order was that Enbridge could not continue the Open Season.

C. Mainline Contracting Application

7. On December 19, 2019, Enbridge filed the Application, requesting the Commission grant the following relief:

- Approval of the conversion of the Canadian Mainline available capacity from common carriage (100% uncommitted volumes) to 90% of the available capacity being allocated to committed service;

- Approval of Enbridge's proposed terms and conditions, including the proposed tolls in the pro-forma committed transportation services agreements ("TSAs") and the pro-forma rules and regulations tariffs for crude petroleum, natural gas liquids and refined petroleum products ("Tariff");

- Approval of the methodologies to set the Canadian Mainline receipt and delivery revenue requirement and receipt and delivery terminalling tolls; and

- Approval of an exemption related to its system of accounts.

8. Notwithstanding the concerns raised by numerous Canadian producers and other stakeholders regarding the proposed switch to firm service, the Complaint Proceeding, and the Open Season Decision, Enbridge did not modify its proposed transportation service and tolls for the Canadian Mainline. In fact, the Application's proposed conversion and terms and conditions are essentially identical to those presented to shippers and stakeholders during the Open Season that elicited the Complaints.

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

III. COMMISSION AUTHORITY TO SUMMARILY DISMISS THE APPLICATION

9. Canadian Natural submits that pursuant to the *Canadian Energy Regulator Act* ("*CER Act*"), the Commission clearly has the legislative authority to dismiss the Application at this stage of the proceeding.

A. Legislation and Rules

10. The Commission is a creature of statute, created to exercise the decision making authority conferred upon it by Parliament. Hearings before the Commission must be conducted in accordance with the requirements of the *CER Act* and its regulations, including the *National Energy Board Rules of Practice and Procedure, 1995* ("*Rules*"), and in accordance with the principles of natural justice.

11. Pursuant to subsection 32(1) of the *CER Act*, Parliament has conferred on the Commission the full and exclusive jurisdiction to inquire into, hear and determine any matter:

> **32 (1)** The Commission has full and exclusive jurisdiction to inquire into, hear and determine any matter if the Commission considers that
>
> […]
>
> **(c)** the circumstances may require the Commission, in the public interest, to make any order or give any direction, leave, sanction or approval that it is authorized to make or give, or that relates to anything that is prohibited, sanctioned or required to be done under this Act, a condition of a document of authorization, or an order made or direction given under this Act.

12. Subsection 31(2) of the *CER Act* sets out that the Commission is a court of record. This provision gives the Commission procedural and substantive powers akin to those of a superior court.[7]

13. Subsection 31(3) of the *CER Act* requires that "[a]ll applications and proceedings before the Commission must be dealt with as expeditiously as the circumstances and procedural fairness and natural justice permit."[8] The requirement of expeditious hearings prescribed by subsection 31(3) of the *CER Act* reflect the principle of proportionality, discussed below.

14. Section 52(3) of the *CER Act* provides that: "[t]he Commission may hold a public hearing in respect of any other matter if the Commission considers it appropriate to do so and shall make public its reasons for holding the hearing."[9] Put another way, there is no requirement to hold a hearing when one is not required under the circumstances.

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[7] See e.g. CER Letter Decision, Manitoba Minnesota Transmission Project Certificate EC-059, Condition 3 – Implementation of Commitments, and Condition 15 Commitments Tracking Table (A7H7I2, PDF 5).

[8] *CER Act*, s 31(3) [Emphasis added].

[9] *CER Act*, s 52(3) [Emphasis added].

15. Section 68(1) of the *CER Act* provides that: "[t]he Commission may make a decision or order that grants, in whole or in part, any application made to the Commission. The decision or order may also include — in addition to or in lieu of the relief applied for — any other relief that the Commission considers appropriate as if the application had been made for that other relief."[10]

16. While the *Rules* are silent on the specific topic of summary determination of applications, the following rules highlight the Commission's broad discretion with respect to procedure for a given application:

    (a) Section 4(1) of the *Rules* provides that at any time in a proceeding, where considerations of public interest and fairness so require, the Board may dispense with or vary any part of the *Rules*; and

    (b) Section 35 of the *Rules* govern motions by parties with respect to any matter that arises in the course of a proceeding and that requires a decision or order of the Commission.

B. Principle of Proportionality

17. As articulated by the Supreme Court of Canada ("SCC") in *Hryniak v Mauldin* ("*Hryniak*"), the proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.[11]

18. The SCC in *Hryniak* found that undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes. The SCC concluded that a "shift in culture" was necessary to promote the principal goal of a fair process that results in a just adjudication of disputes. The SCC held that "a fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found."[12]

19. A full hearing is not needed if a summary motion can achieve a fair and just adjudication. Just adjudication can be achieved where the process allows the decision maker to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result.

20. In *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*[13] ("*Weir-Jones*") the Alberta Court of Appeal ("ABCA"), in reviewing and affirming the chamber's judge decision to allow a dismissal of the action as statute-barred, extensively discusses *Hryniak*. Among other statements, the ABCA acknowledges the shift in culture called for by the SCC in *Hryniak* and states the position in Alberta as follows at para. 25:

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[10] *CER Act*, s 68(1).

[11] *Hryniak v Mauldin*, 2014 SCC 7.

[12] *Hryniak v Mauldin*, 2014 SCC 7 at para 28.

[13] *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49.

> … It comes down to whether summary disposition is possible, considering the record, the evidence, the facts, and the law that must be applied to them. If the record allows the judge to make the necessary findings of fact and apply the law, then the summary procedure should be used unless there is a substantive reason to conclude that summary disposition would not "achieve a just result". Presuming that summary disposition will always be "unjust" unless it meets some high standard of irrefutability defeats the whole concept of the "culture shift" mandated by *Hryniak v. Mauldin*. [Emphasis added.]

21. Regulatory tribunals have also been guided by *Hyrniak* in their approach to the fair determination of regulatory applications. In a decision of the Alberta Energy Regulator ("AER"), dated January 24, 2020,[14] the AER Panel granted a motion for summary dismissal of a company's common carrier and rateable take applications. The Panel noted that it was not aware of any previous decision of the AER or its predecessors dealing with a summary determination of an application. The AER Rules of Practice, similar to the Commission's *Rules*, were silent on the express topic of summary determinations. To provide guidance, the AER Panel appropriately looked to the Courts for guidance regarding summary judgment, including the *Hryniak* and *Weir-Jones* decisions.

22. The AER Panel concluded that the proportionality principle articulated in *Hryniak* was also a reasonable and appropriate goal for administrative tribunals.[15] To that end, the AER Panel, guided also by the relevant factors considered in *Weir-Jones*, phrased the applicable test to reflect the context of the motion before it as follows:[16]

> Is it possible to fairly resolve the dispute on a summary basis having regard to the record and the issues? In particular:
>
> > • Are there any uncertainties or gaps in the facts, the record or the law that indicate there is an issue that can only be decided after an oral hearing of the applications?
> >
> > • Does the record before the panel allow the panel to make the necessary findings of fact, including weighing the evidence?
> >
> > • Is a summary disposition of the applications a more expeditious and less expensive means of achieving a just and fair result for the parties?
>
> A recurring theme in [the Applicant's] submissions is that the panel must make its decision on the Motion based on the current evidentiary record, not on any speculative or contingent future. We agree. It is the current record before the panel that must be considered to determine whether it is possible to fairly and justly resolve the dispute.

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[14] AER Proceeding 360, Letter Decision, Harvest Operations Ltd. Motion to Dismiss Bearspaw Petroleum Ltd. Applications 1877294 and 1878333 (24 Jan 2020) [*AER Decision re Motion to Dismiss*]. Available online at: <https://www.aer.ca/documents/decisions/Participatory_Procedural/1877294%20_20200124.pdf>.

[15] *AER Decision re Motion to Dismiss*, PDF 6.

[16] *AER Decision re Motion to Dismiss*, PDF 6-7.

C. Conclusion on Commission's Authority to Summarily Dismiss the Application

23. Based on the foregoing, Canadian Natural submits that the applicable test the Commission should apply on this motion requires determination of the following questions:

    (a) Whether the Application is sufficiently complete in the sense that it allows the Commission to assess and weigh the evidence and find the facts relevant to its decision on the Application; and

    (b) If the Application is sufficiently complete, whether a summary disposition of the Applications is a more expeditious and less expensive means of achieving a just and fair result for the parties.

24. As the ABCA held in *Weir-Jones*, if the record allows the Commission to make the necessary findings of fact and apply the law, then the summary procedure should be used unless there is a substantive reason to conclude that summary disposition would not "achieve a just result".

IV. GROUNDS FOR SUMMARY DISMISSAL OF THE APPLICATION

25. Canadian Natural submits that the evidence tendered by Enbridge in this proceeding is sufficient for the Commission to assess and make the necessary findings of fact to determine that the Application must be dismissed. There are sufficient facts on the record for the Commission to reach the following conclusions:

    (a) The Application is contrary to the CER Filing Manual and should therefore be dismissed; and

    (b) Enbridge's requested conversion of the Mainline is contrary to the *CER Act* and the Application should therefore be dismissed.

26. In addition, as further set out below, a summary dismissal of the Application is a more expeditious and less expensive means of achieving a just and fair result for all the parties.

A. The Application is Contrary to the CER Filing Manual

27. The CER Filing Manual ("Filing Manual"), recently updated on August 6, 2020, explicitly states:[17]

> A Group 1 pipeline company not regulated on a complaint basis (see footnote 16 in Guide R) that has not reached a negotiated settlement with its interested parties is regulated on a cost-of-service basis and is required to provide the information outlined in the filing requirements within sections P.1 to P.5 of Guide P.

28. Sections P.1 through P.5 of the Filing Manual specifically address the filing requirements related to a pipeline company's cost of service, rate base, financial statements, cost of capital, and tolls.

[17] CER Filing Manual, PDF 192 [emphasis added].

29. Enbridge's entire case rests on the fact that its proposed tolls and tariffs were "negotiated" and some shippers support them. Consistently, Enbridge attempts to present the Application as a "negotiated settlement".[18] However, neither the Application nor Mr. Reed's report make reference to the governing regime for negotiated settlements before the Commission: the *Guidelines for Negotiated Settlements*.

30. Recently, in response to the following information request from Canadian Natural:

> Please confirm that Enbridge has not previously filed as a "Negotiated Package" an application for tolls, terms, procedures and/or conditions for the Canadian Mainline where such "Negotiated Package" did not have the support of CAPP or a majority of non-integrated Canadian producers. If not confirmed, please identify such application(s) and confirm whether Enbridge referred to such application(s) as a "Negotiated Package," negotiated settlement, or similar phraseology and whether the NEB considered such application as a negotiated settlement under the Filing Guidelines.

Enbridge responded as follows:[19]

> The terms, conditions and tolls of the Mainline Contract Offering are a negotiated package. It is confirmed that, unlike the cases referred to in the response to CNRL 1.1(c), approval of this negotiated package is not being sought under the Negotiated Settlement Guidelines.

31. For the benefit of the Commission, Enbridge's response to CNRL 1.1(c) referred to several of Enbridge's previously filed negotiated settlements:[20]

> Since the filing of the 1995 Incentive Toll Settlement ("ITS"), which was a negotiated settlement under the National Energy Board's ("NEB") Negotiated Settlement Guidelines, Enbridge filed the 2000 ITS, 2005 ITS, 2010 ITS and 2011 ITS as negotiated settlements for the Canadian Mainline with the NEB. The counterparty to those settlements was Canadian Association of Petroleum Producers ("CAPP").
>
> The CTS was filed as a negotiated settlement for the Enbridge Mainline and approved by the NEB under its Negotiated Settlement Guidelines. CAPP, shippers, including BP Products North America Inc., ("BP"), Cenovus Energy Inc., ("Cenovus"), CITGO Petroleum ("CITGO"), Flint Hill Resources, Imperial Oil Limited ("Imperial"), CNRL, Husky Energy Marketing Inc. and Suncor Energy Marketing Inc. ("Suncor"), and the Alberta Department of Energy were the counterparties to that negotiated settlement.
>
> With the exception of the 2010 Settlement, there was no opposition filed on the settlements. In the 2010 Settlement, comments were received from Suncor, Imperial and CITGO. While these three parties did not object to the ITS, the Base

[18] Application for Canadian Mainline Contracting (C03823-2) paras. 1 & 23.

[19] Enbridge response to CNRL IR 1.2(l), A7H5Q9, PDF 8-9 [emphasis added]. See also Enbridge's response to CNRL 1.6(a), where Enbridge expressly confirmed that Enbridge had not reached a negotiated settlement (contested or otherwise) with its interested parties (such as CAPP or the Representative Shipper Group) with respect to the Application (A7H5Q9, PDF 24).

[20] CNRL IR 1.2(l), A7H5Q9, PDF 3.

> Toll or other elements, they did object to any inclusion of Alberta Clipper Project costs (which was the subject of a separate proceeding).

32. Enbridge's confirmation that it is not seeking approval for a settlement or contested settlement under the *Guidelines for Negotiated Settlements* means, that as a Group 1 pipeline company, it must be regulated on a cost-of-service basis.

33. However, Enbridge has confirmed on several occasions in this proceeding that it is not seeking, and will not accept, tolls and tariffs established on a cost-of-service basis. For instance, Enbridge has stated:[21]

> Enbridge has not prepared such a cost of service model for the Mainline Contracting tolling methodology because the tolls were the product of negotiation rather than developed on a cost of service basis.

And:[22]

> It is important to note that this is a *simplified* model and therefore not comparable to the type of cost of service model that would be used to file for cost of service tolls pursuant to the CER filing manual.

And:[23]

> Enbridge did not file a cost-based tolls application, so the Simplified Mainline Contracting Earnings Model was not intended to match the level of detail that would be present in a cost of service study that fully reflects the Filing Manual.

And:[24]

> Enbridge has not prepared a cost-based study to allocate a revenue requirement to Canadian Mainline services.

And:[25]

> Enbridge does not dispute that it has not provided detailed cost of capital studies; nor should these be required for the evaluation of a negotiated tolling methodology.

34. And, when asked whether he assessed whether the tolls are cost based, Mr. Reed responded:[26]

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[21] Revised Additional Written Evidence, A7H5U8, PDF 17.

[22] Revised Additional Written Evidence, A7H5U8, PDF 17.

[23] Enbridge response to Suncor IR 1.3(a), A7H5S1, PDF 9.

[24] Enbridge response to Suncor IR 1.22(a), A7H5S1, PDF 75.

[25] Enbridge response to Total IR 001, C07883-2, PDF 1.

[26] Appendix 5 to Application, Evidence of John Reed, A7C1I7, PDF 40.

> No, I have not. Furthermore, the level of risk that Enbridge is accepting in the Negotiated Package does not lend itself to a standard cost of service review. As noted above, the tolls were the product of extensive discussions and negotiations between Mainline stakeholders including existing shippers and Enbridge, and Mainline shippers have found it in their economic interest to support those tolls, as evidenced by the letters of support from shippers. Given we have direct evidence of support for negotiated tolls by shippers representing a substantial portion of the volumes shipped on the Canadian Mainline, I did not use the standard of cost-based tolls to assess whether the tolls were just and reasonable. Instead, I view the tolls and the Negotiated Package as a contractual arrangement that is agreeable to both the shippers who elect firm service and Enbridge.

35. More recently, as part of the additional information filed by Enbridge in response to the Commission's directions in CER Ruling No. 2,[27] Enbridge stated:[28]

> Enbridge has not presented its Application as a negotiated settlement under the settlement guidelines. Further, no consultation was performed with interested parties regarding cost of service tolls because Enbridge has not applied for cost of service tolls.

36. Therefore, Enbridge's own evidence repeatedly and expressly confirms that the Application is not being filed pursuant to the *Guidelines for Negotiated Settlements* and the Application has not been developed on a cost-of-service basis. These two facts are uncontroverted. The relief Enbridge seeks in the Application is contrary to and non-compliant with the CER's Filing Manual which explicitly states that under these circumstances Enbridge "is to be regulated on a cost-of-service basis."

37. We note that in this proceeding, the Commission has made the following statement:[29]

> The Commission has previously indicated that cost of service information, including the information as outlined in sections P.1 to P.5 of the Filing Manual, is relevant to the proceeding. At the same time, the amount of Guide P information provided in this proceeding should reflect the fact that cost of service tolls are not being applied for, but rather used to assess Enbridge's proposed negotiated tolling methodology.

38. With respect, latitude to only partially meet the filing requirements stipulated in P.1 to P.5 of the Filing Manual would only exist if Enbridge's Application were filed pursuant to the *Guidelines for Negotiated Settlements* which explicitly state that:[30]

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[27] CER Ruling No. 2 dated September 4, 2020 (C08182-1)

[28] Additional Directed Information from Enbridge, filed September 15, 2020, Guide P - Tolls and Tariffs P.1 Cost of Service at PDF 4 (A7I4Z8).

[29] CER Ruling No. 2 dated September 4, 2020, at PDF 2 (C08182-1). In addition, in its letter dated May 19, 2020, regarding the Postponement Comment Process Results and Process Steps (C06352-1), the Commission made a similar statement at PDF 3.

[30] *Revised Guidelines for Negotiated Settlements of Traffic, Tolls and Tariffs* dated June 12, 2002 at PDF 4 (A02885) [emphasis added].

> For settlements that address all elements of a pipeline company's tolls application, the applicant will provide the following information:
>
> • an explanation of how the agreed-upon revenue requirement is determined
> • the resulting tolls
> • an explanation of the derivation of these tolls
> • any toll design or tariff changes, accompanied by:
>
> - a concise description of each issue;
> - a clear and concise statement of the resolution for each issue; and
> - a brief rationale for each resolution.

39. However, in cases such as this one, where an application is not filed pursuant to the *Guidelines for Negotiated Settlements*, the CER's Filing Manual explicitly requires that the company be "regulated on a cost-of-service basis." Deviating from this requirement of the Filing Manual would establish a dangerous precedent.

40. If the CER accepts applications from pipeline companies that neither comply with the *Guidelines for Negotiated Settlements* nor are based on cost-of-service, this would have long term and prejudicial consequences for industry participants by effectively creating a new filing category of tolls and tariffs to be considered by the Commission. This new undefined and non-transparent filing category would put an unfair and undue burden on shippers and industry participants who would be required to go through a costly and time consuming information request process and potentially a hearing to obtain the necessary information to assess the fairness and reasonableness of the tolls and tariffs. This should not be permitted by the Commission. The onus should remain on Enbridge to achieve a negotiated (or contested settlement) pursuant to the *Guidelines for Negotiated Settlements* or to file and defend an application based on cost-of-service.

41. Therefore, we respectfully submit that the Commission's statement reproduced in paragraph 36 fails to take into account the explicit requirement in the Filing Manual which stipulates that if the application is not based on a settlement under the *Guidelines for Negotiated Settlements*, Enbridge is regulated on a cost-of-service basis and is required to provide the information outlined in the filing requirements within sections P.1 to P.5 of Guide P.

42. Enbridge's Application requesting approval of what it calls a "negotiated package", in the absence of a settlement pursuant to the *Guidelines for Negotiated Settlements*, is contrary to the Filing Manual and therefore, the Commission must grant this request for summary dismissal. Further process, including holding an oral hearing, will not change these undisputed facts. Dismissing the Application at this stage is clearly a more expeditious and less expensive means of achieving a just and fair result for the parties. Enbridge can then pursue a settlement pursuant to the *Guidelines for Negotiated Settlements* or apply for cost-of-service based tolls.

B. Enbridge's Requested Conversion of the Mainline is Contrary to the *CER Act*

43. The second ground upon which the Commission should summarily dismiss the Application is that the requested conversion of the Mainline from 100% spot service to 90% long-term contracts is contrary to the *CER Act*.

44. The CER has already made the following factual findings regarding the Mainline:[31]

(a) The Mainline represents over 70% of oil transportation capacity out of the WCSB, via pipeline or rail;

(b) There is a lack of alternative transportation options for producers in the WCSB;

(c) The proposed conversion from 100% spot service to 90% long-term contracts on the Mainline would reduce uncommitted oil pipeline capacity from western Canada from approximately 80% to 15% of total oil pipeline capacity;

(d) Enbridge's proposed firm service offering only involves existing, rather than new, pipeline capacity.

45. Enbridge's Application, additional evidence, and responses to information requests do not contradict any of these previous CER findings. In fact, Enbridge's expert acknowledges that if the 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.[32]

46. Simply put, Mainline capacity currently available to all is being monetized at a time when its value is highest, to those parties willing, or alternatively, with no other choice, than to contract for firm service at whatever toll Enbridge demands. Despite Enbridge's attempts to claim otherwise, as set out below, it is clear that the Application is unlike other cases in which the Commission or its predecessor allowed converting existing uncommitted capacity to contract carriage.

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

> 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.

48. 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 Canadian Mainline is subject to the common carriage provision.

49. Throughout the NEB's history,[33] 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

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

[32] Appendix 5 to Application, Evidence of John Reed, A7C1I7, PDF 44.

[33] 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.

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.[34]

50. The rationale for such an approach is clear. Allowing financial support through contract service for the purpose of increasing aggregate capacity benefits every type of shipper. The additional firm capacity created by those shippers who underwrite the increase in throughput and additional infrastructure fulfils their needs, and it also increases the capacity available to common carriage shippers that remain on existing pipelines. No such common benefit arises as a result of the Enbridge Application.

51. 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.[35] 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. Enbridge's reliance on these cases demonstrates that its 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*.

52. Enbridge also selectively relies on a portion of the NEB's Reasons for Decision regarding the Trans Mountain Westridge Marine Terminal.[36] This case is unique and its circumstances are very different from those associated with the Canadian 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 which had particular delivery requirements and had to be aligned with marine transportation schedules. In addition, the increased allocation to dock capacity allowed shippers additional access to export markets not readily provided via land destinations. In this case, there are no equivalent logistical issues or exceptional circumstances to be addressed that require a change from the decades of common carriage on the Canadian Mainline. Further, in terms of magnitude, Trans Mountain's application for firm service to Westridge represented a shift to contract carriage for only 18% of the total pipeline capacity, in contrast to 90%, leaving 82% for uncommitted volumes. The Westridge case further demonstrates the unprecedented nature of Enbridge's intention to go from zero to 90% long-term firm service contracts without any new capacity or service offering.

53. 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 stated by the

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

[35] Enbridge Canadian Mainline Contracting Application, A7C1I2, PDF 22 at para 38 and footnote 38.

[36] Enbridge Canadian Mainline Contracting Application, A7C1I2, PDF 17-18 at para 30.

Commission, Enbridge has "a dominant position in the market."[37] Enbridge controls over 70% of oil transportation capacity out of the WCSB and Enbridge's proposal would result in aggregate uncommitted oil pipeline capacity being reduced from approximately 80% to 15% of total oil pipeline capacity.[38]

54. 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.

55. Enbridge is seeking to reclassify existing shippers who are all currently receiving the same service and being treated the same by virtue of the Canadian Mainline's common carriage status into two distinct classes of shippers, despite the fact that 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.

56. In the U.S., 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 of shippers who were currently receiving the same service on existing capacity, as "unduly discriminatory".[39]

57. The circumstances in *Colonial* are essentially 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. As the NEB has done, the FERC has previously approved contract rates but only where 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."[40] Enbridge is not proposing any new services or facilities. The pipeline at issue in *Colonial*, like the Mainline, had a history of apportionment. We submit that the FERC's reasoning in *Colonial* is persuasive in this case and is directly applicable to the Mainline.

58. 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.

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

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

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

[40] *Colonial*, at para. 35.

59. In the Application, Enbridge asserts that the conversion to firm service is justified because of: 1) "the desire of some shippers for long-term priority access to Canadian Mainline pipeline capacity"[41]; and 2) "the desire of Enbridge to retain volumes on the Enbridge Mainline and reduce its long-term volume risk."[42] However, the record in this proceeding now clearly demonstrates that the reference to "some shippers" refers almost entirely to refiners located in the United States ("U.S.") who benefit from continued depressed pricing for oil produced from the WCSB.[43] The Application is opposed by a wide swathe of Canadian producers, refineries, and WCSB stakeholders. The fact that several U.S. based refiners desire long-term priority access does not justify the conversion of the Mainline to firm service. No further regulatory process is required for the Commission to reach this conclusion.

60. With respect to volume risk, Enbridge's own evidence in this proceeding contradicts its assertion that it is at risk of lost volumes. Enbridge's expert, Mr. Reed, acknowledges that he only developed a "qualitative catalogue" of risks.[44] Despite specific information requests from both the CER and Canadian Natural on the topic of volume risk, Enbridge has failed to provide any substantive or quantitative evidence to support its position that volume risk presents a real concern.[45] Enbridge confirmed in its response to Canadian Natural that it was only relying on the "CAPP 2019 forecast to model WCSB crude supply and dispositions for Mainline Contracting."[46] The forecast being relied upon by Enbridge shows western Canada oil sands and conventional supply increasing from under 5 million barrels per day to over 6 million barrels per day in 2035.[47] Enbridge has completely failed to back up its assertion with any credible evidence, and the only forecast it is relying on shows WCSB production increasing by over 20% by 2035. There is no need for an oral hearing to further probe this issue as Enbridge's own evidence fails to demonstrate that volume risk exists.

61. The facts relied upon by Enbridge in support of its unprecedented request to convert the Mainline to 90% firm service, without any new service or capacity offering, are clearly established and thus no further evidence is required by the Commission to make a determination that this is inconsistent with the *CER Act*.

62. The proposed tolls and terms and conditions of service, including long-term take-or-pay contracts for 90% of available capacity on the Canadian Mainline, are reflective of

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[41] Enbridge Canadian Mainline Contracting Application, A7C1I2, PDF 7 at para 3.

[42] Enbridge Canadian Mainline Contracting Application, A7C1I2, PDF 14 at para 3.

[43] In Reasons for Decision Concerning Tolls for the Milk River Pipeline, August 2001, the National Energy Board stated, at PDF 9: "Therefore, whether the payment of tolls is made by shippers, producers or refiners, the netback received by producers is impacted by the tolls on the Milk River Pipeline."

[44] C06800-3 Additional Evidence of Dr. Reed, at PDF 9, l. 6-10.

[45] Enbridge Response to CER IR No. 3.8 (b) (C08084-2).

[46] Enbridge Response to CNRL IR No 1.9 (a) to (c) (C07659-2).

[47] CAPP 2019 Crude Oil Forecast, Markets and Transportation at Figure 2.7 (https://www.capp.ca/wp-content/uploads/2019/11/338843.pdf)

Enbridge attempting to abuse its market power to ensure Enbridge enjoys decades of guaranteed (and likely excessive) profits with no benefit of additional capacity or service on the Mainline. The shift to contract carriage would have a profoundly negative impact on the functioning of the WCSB markets – to the tune of a reduction in spot capacity out of western Canada from approximately 80% of total takeaway capacity to only 15%.

63. It is Canadian Natural's position that the facts on the record to date are clear and no amount of additional process, including holding an oral hearing, will change the undisputed fact that Enbridge is requesting a fundamental conversion of the Canadian Mainline in the absence of any proposal to serve new markets; increase capacity; or offer anything new that requires Enbridge to obtain project financing for the Canadian Mainline. Dismissing the Application at this stage is clearly a more expeditious and less expensive means of achieving a just and fair result for the parties, which, in the circumstances, requires maintaining the current 100% allocation of available capacity for spot service. Nothing prevents Enbridge from later applying for approval of a firm service offering associated with new service or capacity.

C. Summary Dismissal of the Application is Expeditious and Less Expensive

64. Canadian Natural submits that based on the Application filed by Enbridge and the additional evidence provided by Enbridge in response to information requests, the Commission can now make the necessary findings of fact to make a determination on the Application.

65. Doing so now by summarily dismissing the Application will avoid the unnecessary strain on the limited regulatory resources of parties. In particular, the vast majority of producers and other stakeholders who are opposed to the Application will not be required to incur the significant expenses and drain on human resources required to participate in further rounds of information requests and an oral hearing. This is a particularly important fairness and public interest consideration when one considers the exceptional circumstances currently facing the Canadian oil producing industry.

66. It is no answer for Enbridge to argue in response to this motion that additional process should be required to allow Enbridge to continue to address in fits and bits the clear deficiencies in the Application. Putting forward a deficient application and waiting for other parties to request additional information is compromising efficiency and increasing costs. This should not be permitted to continue and the Commission should instead follow the example set by the Ontario Superior Court of Justice: [48]

> I am entitled to assume that the evidence filed by the Danos's is as good as it gets. I can and do draw an adverse inference from Peter Danos's failure to put forward any evidence whatsoever in relation to the critical issues in this case. Assuming there is no better evidence available, as I am entitled to do, it would be unjust to force the Defendant to carry on with this litigation to trial.

[48] In *Danos v. BMW Group Financial Services Canada et al,* 014 ONSC 2060 (CanLII), <http://canlii.ca/t/g6k9d>, aff'd 2014 ONCA 8872, at para. 47.

V. REQUESTED RELIEF

67. It is clear from the record that Enbridge is attempting to abuse its market power as no company in a competitive business would proceed with such a proposal in the face of so much opposition from its customers. Enbridge's customers would simply go elsewhere. However, in this case they cannot do so. The fact is that Canadian producers must use the Mainline for the majority of their production and whether they pay the toll directly to Enbridge or not, the toll is borne by the producers in the netback price. While the Application is supported by refiners who represent the shippers of record for approximately 70% of the volumes shipped on the Mainline, it is indisputable that all of that oil being shipped is provided by producers in the WCSB. The supply provided by these producers enables Enbridge to exist, and producers are clearly essential elements in Enbridge's business. No business operating in a competitive environment would attempt to foist such a proposal on its customers in the face of such significant opposition.

68. In the circumstances, Canadian Natural submits it would be just and reasonable to dismiss the Application at this stage. Canadian Natural expects any such dismissal would be without prejudice to Enbridge's ability to attempt to negotiate a settlement that meets the requirements of the *Guidelines for Negotiated Settlements* or file a new tolling application based on cost-of-service principles.

69. The Application should be denied summarily on the basis that:

    (a) Contrary to the CER's Filing Manual, the Application has not been filed under the *Guidelines for Negotiated Settlements* nor has the Application been developed on a cost-of-service basis;

    (b) Enbridge's proposed conversion from common carriage to firm service is contrary to section 239(1) of the CER Act (the "common carriage" provision), and unjustly discriminatory and therefore contrary to section 235 of the CER Act;

70. No further evidence is necessary for the Commission to reach these conclusions.