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Our File No.: 25827.341

June 22, 2023

**By Electronic Filing**

Canada Energy Regulator  
Suite 210  
517 Tenth Avenue SW  
Calgary, AB T2R 0A8

**Attention: Ramona Sladic, Secretary of the Commission**

Dear Ramona Sladic:

**Re: File OF-Tolls-Group1-T260-2023-03 01  
Trans Mountain Pipeline ULC  
Application for Interim Commencement Date Tolls and Other Related Matters related  
to the Transportation of Petroleum on the Expanded Trans Mountain Pipeline System  
Process Letter No. 1: Comment on Process, Issues and Registration to Participate**

We are counsel to Canadian Natural Resources Limited ("**Canadian Natural**") and these comments are provided in accordance with the Commission's letter of June 8, 2023.<sup>1</sup>

**Interest in the Application**

Canadian Natural has a direct, substantial, and long-term financial interest in the Commission's adjudication of the tolls being proposed by Trans Mountain Pipeline ULC ("**Trans Mountain**") having entered into binding commitments to ship 94,000 barrels a day for twenty (20) years, representing over 10% of capacity on the expanded Trans Mountain Pipeline system.

Canadian Natural has numerous concerns with Trans Mountain's Application for Interim Commencement Date Tolls ("**Application**"). In particular, the Application proposes tolls based on significant and unprecedented cost increase without having demonstrated that such costs were reasonably or necessarily incurred since the audited Certificate of Public Convenience and Necessity ("**CPCN**") Fixed Tolls provided by Trans Mountain to shippers in 2017.

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<sup>1</sup> CER Filing No. C24789-1.

The Application's proposed expenses and tolls have been inflated to the point of adversely and materially impacting Canadian Natural, the competitiveness of Canada's oil industry, and the public interest.

As a result of the unaudited cost increase and the significant increase in tolls, a rigorous and comprehensive review by the Commission is required before the Application may be approved, if at all. Canadian Natural submits that to the extent such a review is not feasible, the tolls at the Commencement Date should be based on the mathematical mid-point between the audited CPCN Fixed Tolls and the Commencement Date Tolls provided in the Application. This acknowledges that there has been some cost pressure since 2017 as a result of flooding, wildfires and the pandemic.

Canadian Natural has registered as an intervenor and intends to actively participate in this proceeding. Please direct all correspondence to:

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### **Substantive Comments on the Application**

Canadian Natural's initial substantive comments on the Application are set out below. Among other issues, Canadian Natural is concerned that the Commencement Date Tolls set out in the Application do not accord with the tolling methodology approved in RH-001-2012, including the requirement set out in the Facility Support Agreement which requires "Costs and Expenses" to be reasonably and necessarily incurred.<sup>2</sup>

Canadian Natural continues to assess the Application and reserves the right to raise further concerns.

#### *Level of tolls*

As set out in the Application, the level of tolls being proposed in the Application are significantly above those previously provided by Trans Mountain. The cost increases underpinning the proposed tolls are unprecedented. Trans Mountain's 2017 CPCN Cost Estimate for Uncapped Costs was \$1.767 billion. Trans Mountain now claims that the Uncapped Costs are \$9.087 billion, an increase of \$7.320 billion or 514%. This level of increase is inconsistent with the cost control strategies and the cost estimate risk assessment process used to establish the 2017 CPCN Cost Estimate as a P95 estimate.

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<sup>2</sup> Facility Support Agreement, Section 6.1(a) as approved in RH-001-2012.

Without a rigorous review, fulsome audit and reconciliation of incurred costs and expenses to the 2017 CPCN Cost Estimate, the tolls proposed in the Application should not be used as the basis for Commencement Date Tolls.

As acknowledged by Trans Mountain, the 2017 CPCN Cost Estimate was subject to an extensive audit process and the auditor retained by the shippers was provided with "a significant amount of detailed information regarding the Capped Costs and Uncapped Costs included in the CPCN Cost Estimate and in the Revised Toll."<sup>3</sup> This is in sharp contrast to present circumstances. There has been no audit whatsoever of the costs put forward by Trans Mountain in the Application. Although Trans Mountain advised shippers that costs would be above the 2017 Cost CPCN Estimate, Trans Mountain has not provided shippers with any substantive or detailed information regarding these costs.

As a result of this limited data and engagement, shippers have not had an opportunity to test whether the increased costs: were properly allocated as between Uncapped Costs and Capped Costs; were necessarily incurred; or, are just and reasonable. In addition, the level of proposed increase in the tolls will negatively impact netbacks obtained by Canadian producers and may adversely and materially impact the overall competitiveness of Canada's oil industry and the public interest.

*Timing of decision*

Trans Mountain claims that a decision from the Commission on the Application is required on or before September 14, 2023 on the basis that this will allow Trans Mountain to file the approved Interim Tolls three months in advance of the Commencement Date. First, Commencement Date Tolls need only be established thirty (30) day prior to the Commencement Date and second, Trans Mountain has not, anywhere in the Application, provided a definitive Commencement Date. In its most recent presentation to shippers on May 15, 2023, Trans Mountain failed to provide a forecast of the commencement as evidenced by the following figure where predicted dates are provided for everything but the Commencement Date:<sup>4</sup>



On June 1, 2023, Trans Mountain filed with the Commission its Construction Schedule pursuant to Condition 62.<sup>5</sup> The Construction Schedule only forecasts activities out to the end of November 2023 and shows several activities extending beyond November 2023. A reasonable interpretation of this

<sup>3</sup> Application para. 102.

<sup>4</sup> PDF 119 of Application.

<sup>5</sup> CER Filing No. C24685-1.

filing is that the Commencement Date will be in March of 2024 or later, allowing for a decision respecting the Commencement Date Tolls by February 2024 or later.

Trans Mountain has not provided any indication of the anticipated Commencement Date and therefore, the request for a decision by September 14, 2023 is arbitrary. It is the Commencement Date, by Trans Mountain's own admission, that drives the need for Commencement Date Tolls to be established. Trans Mountain has failed to justify its request for an expedited decision over the summer months.

Canadian Natural provides further comments on the process that the Commission should adopt to consider the Application below.

*The Application seeks final and not only interim approval*

Although Trans Mountain has emphasized that it is seeking interim approval of the Commencement Date Tolls prior to the establishment of final tolls, this is clearly not the case. Trans Mountain has requested the implementation on a final basis of certain charges, fees and penalties to be included in the Commencement Date Tolls.<sup>6</sup> Trans Mountain makes this request despite being well aware that shippers, including Canadian Natural, disagree with certain of those charges, fees and penalties.

The Commission's obligations to ensure tolls are in the public interest, just and reasonable, and not unduly discriminatory cannot be deferred in a circumstance where the carrier is requesting approval on a final basis, which is what Trans Mountain seeks in the Application. Without a comprehensive process, as further requested below, in which the Commission could fulfill its obligations, any final approvals would fetter the Commission's subsequent discretion.<sup>7</sup>

*Gateway Infrastructure Fee*

Canadian Natural disagrees with Trans Mountain's inclusion of the Gateway Infrastructure Fee ("**GIF**") in the proposed tolls. The authority to set and charge the GIF is derived pursuant to the *Canada Marine Act*.<sup>8</sup> It is the Vancouver Fraser Port Authority ("**VFPA**") and the Canadian Transportation Agency that are charged with ensuring the GIF is fair and reasonable and not unjustly discriminatory.<sup>9</sup> As such, Canadian Natural considers the inclusion of the GIF in the proposed tolls to be incompatible with the exclusive jurisdiction of VFPA and the Canadian Transportation Agency.

Furthermore, Trans Mountain, as the terminal operator of the Westridge Marine Terminal, is required to invoice and collect the GIF on behalf of the VFPA.<sup>10</sup> Trans Mountain is not invoiced the GIF and is not required to pay the GIF. Therefore, among other reasons, the GIF is not a legitimate cost of providing pipeline service.<sup>11</sup> As such, the GIF must be administered independently from the tolls and tariff regime under the *Canadian Energy Regulator Act*.

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<sup>6</sup> PDF 34 of Application.

<sup>7</sup> RH-3-2004 at para 212.

<sup>8</sup> SC 1998, c 10 at section 49.

<sup>9</sup> *Ibid.*

<sup>10</sup> Port of Vancouver Fee Document, effective January 1, 2023 at PDF 14 and 38.

<sup>11</sup> RH-1-2000 at para 72.

*Enhanced Response Regime Cost Recovery Fee ("ECRF")*

Pursuant to TO-001-2016, Trans Mountain may impose the ECRF to recover funds in the Deferral Account that were accrued to fund the Enhanced Response Regime ("**ERR**"). In the Application, Trans Mountain proposes to recover the funds over a four year period. Trans Mountain has not justified this request with any substantive analysis of how this period was calculated. Canadian Natural submits that the period over which funds used to support the ERR are recovered should be tied to the life of the assets acquired by the Western Canada Marine Response Corporation.

*Demurrage Charge*

Demurrage Charges may be imposed by Trans Mountain if a vessel fails to lift within its allocated Load Window. Canadian Natural has concerns with the Demurrage Charge being proposed by Trans Mountain.

First, Trans Mountain seeks Commission approval of the Demurrage Charge "on a final basis".<sup>12</sup> Canadian Natural's concerns in respect to final determinations, as outlined above, similarly apply to the Demurrage Charge.

Second, the Demurrage Charge for Trans Mountain Pipeline was historically to the account of shippers. However, in the Application, Trans Mountain seeks approval of the Demurrage Charge to its account. Trans Mountain did not disclose this proposed change to shippers until April 18, 2023. Allocating the Demurrage Charge to Trans Mountain's account is unreasonable since Demurrage Charges can arise due to no fault of the shipper. Demurrage Charges can arise because of weather conditions and operational issues at the port facility that are beyond the shipper's control. In addition, Trans Mountain retains the right to delay a load window, with no limits on the notice period or the period of the delay meaning that to some degree, Trans Mountain, and not the shipper, determines when a Demurrage Charge may arise. This compounds the unfairness of allocating Demurrage Charges to Trans Mountain's account.

Third, these charges can be significant. Trans Mountain seeks to impose a Demurrage Charge of \$0.75/m<sup>3</sup> per day pro rata, translating to between \$65,560 and \$67,760/day for light crude and between \$60,450 and \$65,770/day for heavy crude. Trans Mountain has not provided any rationale for the proposed quantum of the Demurrage Charge which is significantly above the \$0.25/m<sup>3</sup> per day Demurrage Charge imposed under Trans Mountain's Tariff No. 114.

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<sup>12</sup> PDF 34 of Application.

### *Edmonton to Edmonton Tolls*

In the Application, Trans Mountain proposes to implement Edmonton to Edmonton tolls on what appears to be a final basis. Canadian Natural's concerns in respect to final determinations, as outlined above, similarly apply to the proposed Edmonton to Edmonton tolls. In addition, Canadian Natural objects to the inclusion of the Edmonton to Edmonton tolls on the basis that these tolls were not previously contemplated by the parties. The Application does not justify the need for the tolls. Therefore, these tolls ought not to be approved by the Commission.

### *Variable Toll*

Canadian Natural has concerns regarding the Variable Toll. First, Trans Mountain has not provided any justification for its anticipated Variable Toll. A significant portion of the Variable Toll will consist of power costs. Trans Mountain has not provided any analysis substantiating anticipated power costs in Alberta and British Columbia. This should be provided so that shippers can assess Trans Mountain's estimates. In addition, Canadian Natural is concerned that the significant and unprecedented increase in proposed tolls may result in a material reduction in utilization of the remaining uncommitted capacity. This will impact the proportion of the total Variable Toll paid by committed shippers and will also adversely impact the anticipated sharing of certain revenues that committed shippers are entitled to from uncommitted shippers. Trans Mountain should be required to provide an assessment of anticipated utilization of the uncommitted capacity taking into account the increase in proposed tolls.

### *Tank Metered Direct Inject Service*

Volumes tendered at the Edmonton designated receipt point and not utilizing tankage facilities at the Edmonton terminal will receive a Direct Inject Credit applicable against the Fixed Toll component. The Application proposes that the Direct Inject Credit be \$0.13 per barrel. However, the methodology underlying the Direct Inject Credit is not provided and there is no explanation as to whether the proposed annual escalation will apply to the Direct Inject Credit and if not, why not. This lack of clarity and uncertainty regarding the Direct Inject Credit frustrates Canadian Natural's business planning.

### *Escalation*

The Fixed Tolls are subjected to an annual escalation of 2.5%. As the tolls have increased significantly, the cost of this escalation has also correspondingly risen for Canadian Natural and other shippers.

The total cost of this escalation for Canadian Natural alone has now reached a staggering \$1.816 billion. This represents an increase of approximately \$815 million in unclassified costs and is an 81% increase compared to the 2017 CPCN.

The Application, however, only sets out the tolls for the first year. By the 20<sup>th</sup> year, Canadian Natural is expected to pay a toll of \$15.25 per barrel compared to the year 20 toll of \$8.41 per barrel based on CPCN costs.

Given the increased costs, and the new initial level of tolls proposed in the Application, Canadian Natural questions the underlying assumptions that led to the initial establishment of the 2.5% annual escalation and the fairness of this cost escalation.

### **Comments on the process**

Trans Mountain's Application for Interim Commencement Date Tolls is, we submit, unlike any other interim tolls application previously considered by the Commission or its predecessor. The proposed tolls represent a significant and unprecedented increase that, if approved, will not only materially impact shippers but potentially the entire industry and the public interest. In addition, Trans Mountain seeks implementation on a final basis of certain charges, fees and penalties to be included in the Commencement Date Tolls. Finally, the proposed Commencement Date Tolls are likely to be in effect for 2 years or more before the Commission will be able to review and issue a decision on the final tolls. Therefore, we submit that the Application cannot be approved prior to the carrying out of a rigorous and comprehensive review by the Commission. Any such process must include, at a minimum, the following:

1. Two rounds of information requests to Trans Mountain including time for motions with respect to the sufficiency of the responses;
2. Intervenors file written evidence and commenters file letters of comment;
3. Trans Mountain files reply evidence; and
4. Oral hearing.

We recognize that the process we propose means that the Commission will be unable to issue a decision on the Application in September of 2023, or likely in 2023 at all. However, we note that despite seeking a Commission decision on the Application by September 14, 2023, Trans Mountain has not proposed any sort of process that would achieve this result. The decision to file the Application for Commencement Date Tolls shortly before the summer was Trans Mountain's decision alone. Trans Mountain now seeks an expedited review and approval of the highest tolls ever proposed for a Canadian oil pipeline knowing that none of the intervenors are likely to have much success retaining the required experts and other support over the months of July and August.

If Trans Mountain maintains that its Application must be approved on or before September 14, 2023, or before a rigorous and comprehensive Commission review can be undertaken, we submit that Trans Mountain should be directed to file proposed interim Commencement Date Tolls based on the mid-point between the audited 2017 CPCN Fixed Tolls and the Commencement Date Tolls provided in the Application, and on the basis that none of the proposed tolls will be implemented on a final basis. A

remedy to mitigate and address the significant and unprecedented proposed increase in tolls aligns with the Commission's authority in respect of the amelioration of rate shock.<sup>13</sup>

Additionally, as noted above, Trans Mountain has not provided sufficient information to shippers that is necessary to evaluate whether the Commencement Date Tolls proposed in the Application comply with the tolling methodology approved in Decision RH-001-2012. Canadian Natural considers that advancing the commencement of an audit on the Final Tolls – as suggested by Trans Mountain in its Application<sup>14</sup> – would create an avenue for ongoing engagement between Trans Mountain and shippers in respect to the establishment of Final Tolls. However, given the significant and unprecedented increase in costs in the Application, Canadian Natural requests the timely and sufficient disclosure of costs incurred by Trans Mountain in order to evaluate Trans Mountain's compliance with the approved tolling methodology.

### **Comments on issues raised**

Canadian Natural submits that if the Commission issues a list of issues, it should, at a minimum, include the following:

1. Whether the costs have been appropriately allocated by Trans Mountain to Uncapped Costs.
2. Whether the costs allocated to Uncapped Costs were reasonably and necessarily incurred.
3. Whether the proposed Interim Commencement Date Tolls are in the public interest.
4. Whether the Interim Commencement Date Tolls should be determined based on the mid-point between the audited 2017 CPCN Fixed Tolls and Commencement Date Tolls, as opposed to the Commencement Date Tolls set out in the Application.
5. Whether the GIF should be included in any tolls approved by the Commission.
6. Whether the proposed Demurrage Charges are appropriate and whether they should be to the account of shippers.
7. The appropriate period of time over which Trans Mountain should recover funds in the Deferral Account that were accrued to fund the ERR.
8. Whether the Edmonton to Edmonton tolls should be approved.
9. A determination of the assumptions used to calculate the Variable Toll and appropriateness thereof.
10. A determination of the assumptions used to calculate the Direct Inject Credit and appropriateness thereof, and whether the credit is subject to annual escalation and if not, why not.
11. Appropriateness of escalation given the unprecedented cost increase.
12. What is the anticipated utilization of the uncommitted capacity taking into account the increased tolls.

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<sup>13</sup> *TransCanada Pipelines Ltd. v National Energy Board*, 2004 FCA 149 at para 43.

<sup>14</sup> PDF 27-28 of the Application.



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Yours truly,

**BENNETT JONES LLP**

A handwritten signature in black ink, appearing to read 'm. ignasiak', written in a cursive style.

Martin Ignasiak KC