

File OF-Tolls-Group1-T260-2023-03-01
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Canada Energy Regulator
Suite 210 – 517 Tenth Avenue SW
Calgary, AB
T2R 0A8Attention: Ramona Sladic, Secretary of the Commission**Trans Mountain Pipeline ULC (“Trans Mountain”)
Application for Interim Commencement Date Tolls and Other Matters related to the
Transportation of Petroleum on the Expanded Trans Mountain Pipeline System (the
“Application”)****Cenovus Energy Inc. (“Cenovus”) Comments on Trans Mountain and Vancouver Fraser
Port Authority’s (“VFPA”) Responses to CER IR No. 1**

On 1 August 2023 the Commission of the Canada Energy Regulator (“CER”) established a process to consider the Application,¹ including one round of information requests to Trans Mountain² and to VFPA³ (“CER IR No. 1”), and the opportunity for Intervenor to comment on Trans Mountain and VFPA’s responses to CER IR No. 1.⁴ Accordingly, this letter provides Cenovus’s comments on the responses to CER IR No. 1.

Based on the responses to CER IR No. 1, and the four areas of concern raised in Cenovus’s initial comment letter on the Application, the comments below address seven topics:

1. Process
2. Jurisdiction

¹ [C25730-1 Process Letter No. 2 - Trans Mountain Pipeline ULC - Application for Interim Commencement Date Tolls and Other Matters related to the Transportation of Petroleum on the Expanded Trans Mountain Pipeline - A8R9A8](#) (“Process Letter No. 2”).

² [C25730-3 Information Request No. 1 to Trans Mountain - Application for Interim Commencement Date Tolls and other matters - A8R9C0](#) (“CER-TM IR No. 1”).

³ [C25730-4 Information Request No. 1 to Vancouver Fraser Port Authority - Trans Mountain Pipeline ULC Application for Interim Commencement Date Tolls and other matters- A8R9C1](#) (“CER-VFPA IR No. 1”).

⁴ On 28 August 2023 to the Commission extended the deadline for Internor comments from 30 August 2023 to 7 September 2023: [C25996-1 Ruling No. 1 – Request for Extension of Written Comment Deadline - Trans Mountain Interim Tolls - A8S3D5](#) (“Ruling No. 1”).

3. Quantum of the Commencement Date Toll
4. Enhanced Response Regime Cost Recovery Fee (“**ECRF**”)
5. Gateway Infrastructure Fee 2022 (“**GIF2**”)
6. Demurrage
7. Other matters raised by the Application

To the extent the comments below do not refer to, or address all of, the information and positions contained in Trans Mountain and VFPA’s respective responses to CER IR No. 1, such silence should not be construed as acceptance of or acquiescence to such information or positions. Given that the Commencement Date Toll is, ultimately, an interim toll, Cenovus has endeavoured to focus its comments on the matters most pressing to the determination of the Commencement Date Toll.

That said, it must be remembered that the Commencement Date Toll is a step along the way to determining the final Fixed Toll. Given the magnitude of the costs at stake, and their tolling implications, it is imperative that any assessment of the reasonableness and necessity of the costs underpinning the Commencement Date Toll Estimate not be hasty. It is more important to get this right, than to get it done fast.

In providing the foregoing and following comments, Cenovus expressly reserves all of its rights at law and in equity, and all of its rights under its Transportation Service Agreement (“**TSA**”) and Financial Support Agreement (“**FSA**”) for service on the Expanded Trans Mountain Pipeline System (“**TMEP**”).

Herein, capitalized terms that are not otherwise defined have the meaning given to them in the TSA and FSA.

I. PROCESS

In Process Letter No. 2, the Commission stated that it would make two decisions with respect to the Application:

- (i) a “Preliminary Decision” in the fall of 2023, which would not address all of the issues and concerns raised by interested parties in their June 2023 comment letters; and
- (ii) a “Final Interim Toll Decision” following a hearing process that would address the broader issues arising from the Application.

The reasoning for this two step process was to avoid delaying the Commencement Date for TMEP. Cenovus supports this approach.

However, in response to CER-TM IR No. 1.9, Trans Mountain indicates that “the timing of the Commencement Date remains uncertain,” that “[t]here are many factors impacting the Commencement Date that are unrelated to the timing of the Commission’s decision on Commencement Date Tolls” including risks related to mechanical completion (which has not yet been achieved), and therefore “[a] Decision by the Commission in the fall of 2023 will likely

have minimal impact on the Commencement Date.”⁵ In requesting a “Decision” in the fall of 2023, Trans Mountain made no distinction between the “Preliminary Decision” and “Final Interim Toll Decision” discussed in Process Letter No. 2. Therefore, Cenovus submits that if the Commission renders its Preliminary Decision in fall 2023, as planned, the Commencement Date will not be delayed by any ongoing process related to the Final Interim Toll Decision.

Accordingly—and bearing in mind that the Commencement Date Toll is inherently an interim toll, and that the Commission’s “Preliminary Decision” will effectively be an *interim* interim toll decision that will remain open to adjustment until a final Fixed Toll is established at some point in the future—Cenovus submits that the Commission should proceed as follows:

1. **Preliminary Decision:** Cenovus supports the Commission exercising its best judgment to set a preliminary Commencement Date Toll that is fair to both shippers and Trans Mountain pending the outcome of the Final Interim Toll Decision. In making the Preliminary Decision, Cenovus believes that the Commission should adhere as closely as possible to long-standing tolling principles, by setting the toll at a level that is as close as possible to what the final Commencement Date Toll will likely be, and making a decision that is consistent with the tolling methodology for TMEP (as approved in RH-001-2012). Admittedly, this is a difficult task. While Cenovus is deeply concerned about the quantum of the Commencement Date Toll proposed in the Application, and Cenovus believes that the Final Interim Toll Decision will result in a significant reduction to the toll proposed in the Application, Cenovus is not yet in a position to reasonably estimate what that reduction should be.
2. **Final Interim Toll Decision:** the Commission should establish a two phase hearing process, with the possibility of an adjustment to the Commencement Date Toll at the conclusion of each phase:
 - a. **Phase 1: Allocation between Capped vs Uncapped Costs:** The first logical step to adjudicating the quantum of the Commencement Date Toll is to determine whether Trans Mountain has appropriately allocated all costs underpinning the Commencement Date Toll as between Capped Costs and Uncapped Costs. To the extent Trans Mountain’s proposed Commencement Date Toll is based on any erroneous allocation of costs (actual or forecast) as between Capped and Uncapped Costs, such errors should be corrected and the Commencement Date Toll adjusted accordingly. In Cenovus’s view, determining the proper allocation between Capped and Uncapped Costs would largely be an accounting exercise. With timely disclosure of the necessary financial information from Trans Mountain, Cenovus believes that it should be possible to complete this phase well in advance of Trans Mountain’s currently anticipated Commencement Date of Q1 2024.

⁵ [C25905-2 Trans Mountain Response to CER IR No. 1 - A8S1R3](#) at PDF p. 38.

b. Phase 2: Testing prudence, reasonableness and necessity of Uncapped Costs⁶:

Cenovus strongly disagrees with Trans Mountain's position that the Commission should defer consideration of this issue until Trans Mountain applies for approval of a final Fixed Toll. Trans Mountain concedes that this inquiry can be undertaken as part of assessing the final Fixed Toll,⁷ but there is no wisdom in delaying the inevitable—especially since most of the costs that underpin Trans Mountain's proposed Commencement Date Toll are presumably actual costs which will not change for the purposes of determining the final Fixed Toll.⁸ Even in the best case scenario, Trans Mountain's application for final Fixed Tolls is at least 1.5 years away.⁹ In the meantime, the final Commencement Date Toll must be just and reasonable. As discussed below in Section III, the approved tolling methodology that requires, at a minimum, ensuring that estimated Costs and Expenses (actual and forecast) upon which the Commencement Date Toll is calculated are reasonably and necessarily incurred, as required by the express terms of the FSA.

Cenovus believes that testing the prudence, reasonableness, and necessity of the Commencement Date Toll Estimate will be a more complex and lengthy process than resolving the allocation question in Phase 1. Given the complete informational asymmetry between Trans Mountain and shippers related to project costs, Cenovus is very concerned that this process cannot fairly be completed prior to a Commencement Date in Q1 2024. Prudence, reasonableness, and necessity are questions of judgment that will require expert evidence to evaluate. In turn, experts will require extensive disclosure of information from Trans Mountain to render expert assessments of project costs. Therefore, to fairly test the quantum of the Commencement Date Toll, Cenovus believes that the following process steps will be required:

- i. two or more rounds of information requests from shippers to Trans Mountain;
- ii. motions on Trans Mountain's responses to information requests (if necessary);
- iii. the opportunity for Intervenor evidence from shippers;
- iv. Information requests from the Commission or Trans Mountain to shippers who file Intervenor evidence;
- v. motions on shippers' responses to information requests (if necessary);
- vi. the opportunity for reply evidence from Trans Mountain;
- vii. an oral hearing with the opportunity for cross-examination; and

⁶ It is unnecessary to inquire into Capped Costs, since any variation in Capped Costs since the CPCN Cost Estimate cannot affect the Commencement Date Toll or the final Fixed Toll under the terms of the FSA.

⁷ Trans Mountain response to CER-TM IR No. 1.2(a): [C25905-2 Trans Mountain Response to CER IR No. 1 - A8SIR3](#) at PDF p. 12.

⁸ This can be inferred from the fact that Trans Mountain asserts it is nearing mechanical completion of TMEP. Trans Mountain has not yet provided a breakdown of the Commencement Date Toll Estimate into actual vs forecast costs.

⁹ Under s. 3.2 of the FSA, Trans Mountain is required to provide shippers with its proposed final fixed toll within 15 months of the Commencement Date. Even if Trans Mountain achieves a Commencement Date in Q1 of 2024, that would mean the Trans Mountain's deadline to apply for a final Fixed Toll would not arise until Q2 or Q3 2025 at the earliest.

viii. the opportunity for written and oral argument.

Cenovus submits that it is unnecessary to complete this process before the actual Commencement Date. Since the Commencement Date Toll is an interim toll, it will always remain open to later adjustment. And, to the extent this process cannot be completed before Trans Mountain applies for approval of final Fixed Tolls, all parties will have at least a 1.5 year head start on the inquiries that will be necessary for determining the final Fixed Tolls.

Cenovus submits that the process suggested above is consistent with the tolling methodology approved in RH-001-2012 and will provide the fair and efficient process for shippers to test the prudence, reasonableness and necessity of the unprecedented cost escalation for the TMEP. Billions of dollars in project costs and tolls are at stake. Such high stakes behove the establishment of a thorough and robust hearing process.

II. JURISDICTION

(i) *Commission has jurisdiction to review the Commencement Date Cost Estimate*

With regard to Trans Mountain’s response to CER-TM IR No. 1.2(a), Cenovus submits that the Commission unquestionably has jurisdiction to review the Commencement Date Cost Estimate. The absence of contractual audit rights in the FSA with respect to the Commencement Date Cost Estimate does not—and cannot—limit or oust the Commission’s jurisdiction. In the Application, Trans Mountain has applied for approval of its proposed Commencement Date Toll based upon the Commencement Date Cost Estimate. Therefore, the Commission unquestionably has the jurisdiction to review the Commencement Date Cost Estimate in deciding the Application.

As the Commission itself noted in Process Letter No. 2: “the Commission must ensure that tolls are just and reasonable at all times.” This is because, as a matter of law, section 230 of the *Canadian Energy Regulator Act (CER Act)* expressly requires that all tolls “must be just and reasonable”. Section 226 of the *CER Act* bestows on the Commission the broadest possible authority to “make orders with respect to all matters relating to traffic, tolls or tariffs.”

In a recent decision related to another contract carriage pipeline, the Commission articulated the “untrammelled” breadth of its jurisdiction to ensure just and reasonable tolls as follows:

Part 1 of the CER Act provides the Commission with full and exclusive jurisdiction to determine matters within its mandate. In addition, the traffic, tolls, and tariffs provisions in Part 3 of the CER Act, particularly section 226, grant the Commission broad authority to make orders with respect to all matters relating to traffic, tolls, and tariffs.

Part 3 of the CER Act repeats the former *National Energy Board Act*, (**NEB Act**) Part IV provisions, apart from minor changes to modernize language. In considering the traffic, tolls, and tariffs provisions in Part IV of the former NEB Act, the Federal Court of Appeal has commented that they provided the NEB with “authority

in the broadest possible terms to make orders with respect to all matters relating to [tolls and tariffs].” The court went on to state that the NEB’s power in respect of ensuring tolls are just and reasonable “is not trammelled or fettered by statutory rules or directions as to how that function is to be carried out or how the purpose is to be achieved.” There are no statutory rules which restrict the Commission’s authority to set just and reasonable tolls.¹⁰

And, as noted above, there are efficiencies to be gained by the Commission exercising its jurisdiction to review the Commencement Date Toll Estimate. Since the TMEP is nearing mechanical completion, Cenovus expects that most costs underpinning the Commencement Date Toll Estimate are already incurred actual costs, which will directly overlap with the final As-Built Costs and Expenses. In response to CER-TM IR No. 1.2(b) and (c), Trans Mountain acknowledges that either shippers or the Commission may inquire into the reasonableness and necessity of the As-Built Costs and Expenses.¹¹ Since most of those costs are presumably known already, it makes no sense to waste 18 months or more to start the inquiry that Trans Mountain admits will ultimately be permissible under the tolling methodology approved in RH-001-2012.

(ii) *Commission has jurisdiction to decide whether Trans Mountain may collect GIF2 from shippers*

In response to CER-TM IR No. 1.7(b.2) and CER-VFPA IR No. 1(a.2) both Trans Mountain and the VFPA respectively concede that the Commission has jurisdiction to determine whether Trans Mountain may collect GIF2 from shippers. Notably, the VFPA acknowledges that:

When implementing and designing the GIF2, the VFPA was aware that, due to regulatory restrictions, the Westridge Marine Terminal, the terminal Trans Mountain operates from and part of the Second Narrows East grouping of terminals, would be legally unable to recover GIF2 from its customers until it had received regulatory approval from the Canada Energy Regulator to increase its tariff.¹²

Cenovus agrees that the Commission has jurisdiction. The only mechanism by which Trans Mountain may collect GIF2 from shippers is through tolls. Therefore, for the same reasons outlined above, the Commission has the broadest possible discretion to determine whether Trans Mountain may collect GIF2 from shippers. Cenovus submits that the Commission should exercise its jurisdiction to determine if Trans Mountain collecting GIF2 from shippers would be just and reasonable.

¹⁰ [C22525-1 Commission - Reasons for Decision - Complaints by Phillips 66 Canada Ltd. and Cenovus Energy Inc. regarding Keystone’s proposed 2020 and 2021 tolls and Keystone’s proposed 2022 tolls - A8J2H6](#) at PDF p. 17 citing the Federal Court of Appeal’s decision in *British Columbia Hydro and Power Authority v Westcoast Transmission Co.*, [1981] 2 FC 646, [1981 CanLII 4683 \(FCA\)](#) at 655-656.

¹¹ Trans Mountain response to CER-TM IR No. 1.2(b) and (c): [C25905-2 Trans Mountain Response to CER IR No. 1 - A8S1R3](#) at PDF p. 13.

¹² [C25906-1 VFPA Response to CER Information Request made on August 1, 2023 - A8S1X1](#) at PDF p. 3.

III. Quantum of the Commencement Date Toll

As noted, Cenovus remains deeply concerned about the quantum of the Commencement Date Toll proposed by Trans Mountain in the Application. Trans Mountain's responses to CER-TM IR No. 1 did not assuage those concerns. If anything, it made them worse.

Through Table 1.1-3, Trans Mountain tacitly admits that, compared to other major projects with substantial cost overruns (ranging from 103% to 263%),¹³ the 414% cost escalation for the TMEP is more than 1.5x higher than next closest project overrun. Such performance merits careful scrutiny by the Commission and shippers of Trans Mountain's costs and their tolling implications.

Cenovus disagrees with Trans Mountain's position, set out in response to CER-TM IR No. 1.1(c) that under the FSA shippers agreed to bear all risks related to escalation of Uncapped Costs. In particular, Cenovus specifically denies Trans Mountain's assertion that "[t]he parties did not agree to any limit on the ultimate amount of 'uncapped' costs that could be included in the tolls."¹⁴ Effectively, Trans Mountain's position is that committed shippers agreed to write a blank cheque to Trans Mountain for all Uncapped Costs. Not only is that suggestion commercially absurd, it is contrary to the overall scheme of Article 3 within the context of the FSA as a whole, and it is contrary to the express wording of at least three of the FSA's specific provisions.

Cenovus does not believe that, properly interpreted, Article 3 of the FSA permits the Commencement Date Cost Estimate to so radically depart from the CPCN Cost Estimate, as Trans Mountain has proposed in the Application. The purpose of the CPCN Cost Estimate—and the express requirement that it achieve prescribed levels of probability and accuracy—was to allow shippers to know their risk and maximum potential Fixed Toll financial obligation to Trans Mountain over the life of their TSAs. To suggest that the Commencement Date Toll Estimate and final As-Built Costs and Expenses can blow past the CPCN Cost Estimate with no consequence is to improperly ignore the overall scheme of Article 3 within the FSA as a whole.

Moreover, there are at least three provisions of the FSA that also expressly or implicitly limit the ultimate amount of Uncapped Costs that Trans Mountain can recover through Firm Service Tolls:

- (a) First, "Uncapped Costs" are defined in the FSA to mean the "Costs and Expenses" resulting from or relating to certain categories outline in Schedule B of FSA. In Article 6.1 of the FSA, the definition of "Costs and Expenses" is expressly limited to costs and expenses that are "reasonably and necessarily incurred by or on behalf of the Carrier related to work required to undertaken...in connection with the development and construction of the Expansion...". Thus, to be an Uncapped Cost, a cost or expense must be (i) reasonable, (ii) necessary, and (iii) related to work required to be undertaken.
- (b) Second, Article 4.2 of the FSA is an express covenant about how Trans Mountain would construct the TMEP. It provides that "Carrier will proceed, using commercially

¹³ See [C25905-2 Trans Mountain Response to CER IR No. 1 - A8S1R3](#) at PDF p. 9.

¹⁴ [C25905-2 Trans Mountain Response to CER IR No. 1 - A8S1R3](#) at PDF p. 7.

reasonable efforts, to construct the Expansion and perform any other actions as are reasonably necessary to enable the Carrier to provide the Firm Service.” Therefore, if Trans Mountain incurred increased Uncapped costs because it failed to use commercially reasonable efforts, or because it exerted greater efforts than were commercially reasonable, such costs were incurred in breach of Article 4.2.

- (c) Third, Article 1.12 of the FSA expressly required that Trans Mountain “act prudently and reasonably and in a manner that is consistent with customary and good operating procedures of the crude petroleum and transportation industry” in performing its obligations under the FSA. Therefore, it would be a breach of contract for Trans Mountain to recover any Uncapped Costs that were imprudently incurred, or incurred as a result of Trans Mountain’s failure to adhere to customary and good industry practice.

Therefore, contrary to what Trans Mountain asserts in response to CER-TM IR No. 1.1, there are several limits on Uncapped Costs. The extent to which these limits apply raise both factual and legal questions that will require the assistance of thorough process and expert evidence to resolve.

Finally, with regard to Trans Mountain’s response to CER-TM IR No. 1.4, Cenovus submits that the impact the Commencement Date Toll may have on Trans Mountain’s return on equity, its ability to achieve certain balance sheet metrics to attract new investors, or its ability to refinance its short-term debt on terms it considers commercially favorable, are irrelevant to the determination of the proper quantum of the Commencement Date Toll and the final Fixed Toll. This was confirmed in RH-001-2012 where the NEB held:

The Board notes that the proposed toll methodology is not based on cost of service. The applied-for toll methodology is essentially a negotiated agreement allocating risk among parties, which includes gives and takes. Based on the record of this proceeding, **the Board was not persuaded that return on equity is a relevant factor** in the context of the bilateral negotiations that occurred during the Open Season process, which the Board found to be appropriate and that resulted in the proposed TSA and FSA. **A number of economic cycles can be expected to occur over the life of the Expanded System and, the supply and market dynamics of oil transportation to the west coast may change during this time. These cycles and changes will affect the risks and rewards encountered by Trans Mountain. As a result, the approval of the proposed toll methodology will result in a wide range of possible returns for Trans Mountain. Ultimately, the actual return on equity for the Expanded System will depend on how Trans Mountain manages the circumstances and risks of the pipeline over the contract periods.**

Under the proposed toll methodology, cost information was neither provided nor required. As a result, it is not necessary for the Board to express a view regarding the likelihood of Trans Mountain

recovering prudently incurred costs. **If Trans Mountain is prepared to expand its Current System on the basis of the applied-for toll methodology, it is because, in Trans Mountain’s own assessment, it will have a reasonable opportunity to recover its prudently incurred costs, including its cost of capital, over the life of the Expanded System. If Trans Mountain believes it has a reasonable opportunity to recover its cost of capital under the proposed toll methodology, the Board is of the view that the requirements of the Fair Return Standard are met.**¹⁵ [Emphasis added]

Therefore, adjudicating the quantum of the Commencement Date Toll should focus only on whether the Uncapped Costs in the Commencement Date Toll Estimate comply with all of the requirements of the FSA.

IV. ECRF

Regarding Trans Mountain’s responses to CER-TM IR No. 1.6, Cenovus submits that Trans Mountain has not justified accelerated recovery, over a three year period instead of five year period, of the balance due from Westridge shippers related to the TMEP bulk oil cargo fee. Doing so unnecessarily results in an ECRF that is 70% higher (\$1.81/ m³) than it would if a five year recovery period were employed (\$1.09/ m³). This is not just and reasonable, especially in the face of the massive increase in the Commencement Date Toll.

In Cenovus’s view, Trans Mountain’s 2015 application for the TMEP bulk oil cargo fee funding mechanism clearly contemplated a five year recovery period. It was described as a “maximum” recovery period because of the possibility that, using a unit-based fee (\$/m³), higher than expected throughput in years 1 to 4 might result in the balance due being fully recovered in less than five years. Hence, Trans Mountain’s 2015 application said: “The collection of the fixed amount will cease when the balance due for Westridge Shippers account is fully recovered from shippers.”

V. GIF2

Neither Trans Mountain nor VFPA have demonstrated that it is just and reasonable for Trans Mountain to collect GIF2 from shippers.

As a preliminary point, there is currently a judicial review application pending before the Federal Court of Canada, brought by five terminal operators, challenging the VFPA’s jurisdiction to impose GIF2.¹⁶ Therefore, it is an open question whether the VFPA is entitled to collect GIF2 at all. In this regard, the VFPA was incorrect when it asserted in its May 30, 2023 letter to Trans Mountain that the Federal Court of Canada has already confirmed that GIF2 falls within the

¹⁵ [A51913-1 NEB - Reasons for Decision - Trans Mountain - Tolls and Tariffs - RH-001-2012](#) at PDF p. 38.

¹⁶ Federal Court of Canada Docket No. T-2256-22. For a brief overview of the proceeding, see *Pacific Coast Terminals Co. Ltd. v. Vancouver Fraser Port Authority*, 2023 FC 1099 at paras 4-10.

ambit of s. 49(1) of the *Canada Marine Act*, SC 1998, c 10.¹⁷ In *Shipping Federation of Canada v. Vancouver Fraser Port Authority*, 2012 FC 301, the case referenced by VFPA in its May 30th letter, the power of the VFPA to impose GIF1 was not an issue, and the case long predates and had nothing to do with GIF2.

Regarding Trans Mountain response to CER-TM IR No. 1.7(b.2) and (c), Cenovus disagrees with any suggestion that s. 8.1 of the Rules and Regulations (“Rules”) *entitles* Trans Mountain to collect GIF2 from shippers. The Commission’s recent approval of amendments to the Rules did not involve approval of any *pro forma* Toll Schedule, much less one that included GIF2 as an “additional charge”. At most, Article 8 of the Rules provides the mechanism by which Trans Mountain would collect GIF2 from shippers, *but only if* the Commission determines that doing so would be just and reasonable.

Cenovus also disagrees with Trans Mountain’s assertion, in response to CER-TM IR No. 1.7(a.2), that “the VFPA established the GIF 2 using a cost recovery mechanism similar to that already in place for the GIF1.”¹⁸ As the VFPA confirms, GIF1 was allocated based on the benefits each terminal received from the projects ; since none of the GIF1 projects benefited Westridge, GIF1 was not imposed on Westridge.¹⁹ If this same principle were applied, GIF2 would be equally inapplicable to Westridge, because none of the projects funded by GIF2 benefit Westridge either.

In response to CER-VFPA IR No. 1(a.3), the VFPA identifies seven GIF2 projects that it says are “related to Trans Mountain” and the VFPA asserts that the Westridge Marine Terminal, as part of the Second Narrows East grouping of terminals, contribute to the need for such projects and will benefit from them.²⁰ Cenovus disagrees. The GIF2 project costs allocated to Trans Mountain relate to improving road and rail infrastructure. However, no petroleum travels to or from Westridge by road or rail. It all goes by pipeline and vessel. Cenovus therefore fails to see how Westridge operations contribute to the need for, or will benefit from, such projects.

Cenovus submits that shippers should be permitted to fully test the VFPA assertions, and respond to them, as part of the hearing process for the Final Commencement Date Toll. Until then, Cenovus submits that any collection of GIF2 by Trans Mountain should be done on an interim basis and subject to refund.

VI. DEMURRAGE

Cenovus agrees with Trans Mountain that both the FSA and RH-001-2012 are silent with respect to demurrage, and that the parties’ previous arrangements with respect to demurrage have been through toll settlements. This means that neither the Commission, nor its predecessor the NEB, have ever expressly considered how demurrage revenue should be allocated as between Trans

¹⁷ See Attachment 1 to Trans Mountain’s response to CER-TM IR No. 1: [C25905-2 Trans Mountain Response to CER IR No. 1 - A8S1R3](#) at PDF p. 46.

¹⁸ [C25905-2 Trans Mountain Response to CER IR No. 1 - A8S1R3](#) at PDF p. 31.

¹⁹ [C25906-1 VFPA Response to CER Information Request made on August 1, 2023 - A8S1X1](#) at PDF p. 2.

²⁰ [C25906-1 VFPA Response to CER Information Request made on August 1, 2023 - A8S1X1](#) at PDF p. 4.

Mountain and shippers. Therefore, the issue is ripe for consideration by the Commission as part of its Final Interim Toll Decision.

Cenovus disagrees with Trans Mountain's assertion that it "will bear the majority of the financial risk resulting from Demurrage events" because of its exposure to lost Uncommitted Toll revenue. Trans Mountain has the ability to mitigate that risk by exercising its self-help remedies under the Rules. By contrast, other shippers are also exposed to considerable financial risks from demurrage events, but have no self-help remedies. For example, a demurrage event could cause innocent shippers to breach their downstream delivery deadlines, or to miss their berthing windows at Westridge, both of which could have significant cost consequence. Therefore, it is not self-evident that Trans Mountain should get to retain all demurrage revenue, when both Trans Mountain and shippers are both adversely affected by demurrage events.

VII. OTHER MATTERS

With respect to Trans Mountain's request that certain components of the Application be approved on a final basis, Cenovus does not object to the Commission approving on a final basis the non-contested toll elements identified in Table 1.5-1 (i.e. items no. 2, 3, 5, 6, 7, and 9). Cenovus submits that contested toll elements—demurrage, the ECRF, and GIF2—should not be approved on a final basis and any collection of these costs by Trans Mountain should be on an interim basis, and subject to refund.

With respect to Trans Mountain's request to amend Order TO-004-2013, and in light of Trans Mountain responses to CER-TM IR No. 1.10, Cenovus does not object to the requested amendment provided that it is granted on the express understanding that (i) it does not change the approved tolling methodology for the TMEP; and (ii) the amendment is without prejudice to shippers existing rights under the TSA, FSA and at law and equity.

Yours very truly,

LAWSON LUNDELL LLP



Alastair MacKinnon

ADM2

cc. List of Parties