



Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Ontario M5H 2S7
Telephone: 416.979.2211
Facsimile: 416.979.1234
goodmans.ca

Direct Line: 416.597.6281/6279
skauffman@goodmans.ca
pkolla@goodmans.ca

File OF-Tolls-Group1-T260-2023-03 01

September 6, 2023

VIA Online Submission Portal

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

Attention: Ms. Ramona Sladic, Secretary of the Commission

Dear Sirs/Mesdames:

Re: Trans Mountain Pipeline ULC on behalf of Trans Mountain Pipeline L.P. (“Trans Mountain”)

Application for Interim Commencement Date Tolls and Other Matters related to the Transportation of Petroleum on the Expanded Trans Mountain Pipeline System (C24695) (the “Application”)

Written Comments of Marathon Petroleum Canada Trading & Supply ULC (“Marathon”) in relation to Information Request No. 1 Responses

In its Process Letter No. 2 dated August 1, 2023 ([C25730-1](#)), the Commission granted intervenor status to Marathon in respect of the Application and provided Information Request No. 1 dated August 1, 2023 to Trans Mountain ([C25730-3](#)) and to Vancouver Fraser Port Authority (“VFPA”) ([C25730-4](#)) (collectively “IR No. 1”).

Trans Mountain delivered its response to IR No. 1 dated August 16, 2023 ([C25905-2](#)) (the “**Trans Mountain Response**”). VFPA delivered its response to IR No. 1 dated August 16, 2023 ([C25906-1](#)). Marathon has no comments in respect of VFPA’s response to IR No. 1 at this time.

In accordance with Process Letter No. 2, Marathon provides the following written comments in respect of the Trans Mountain Response.

Marathon has focused its written comments on key issues raised by the Trans Mountain Response. Marathon reserves the right to raise additional issues in connection with the Application or the Trans Mountain Response or VFPA’s response, and its lack of comment on all aspects of the Trans



Mountain Response or VFPA's response should not be presumed as Marathon agreeing with their submissions.

We would be pleased to address any questions regarding this submission.

1.1 Appropriate level of Uncapped Costs in interim Commencement Date tolls

Trans Mountain Did Not Answer Request 1.1(a) in IR No. 1

As a preliminary matter, Trans Mountain did not answer request 1.1(a) in IR No. 1, as the Trans Mountain Response does not actually confirm the Accuracy of the audited Certificate of Public Conveyance and Necessity (CPCN) Cost Estimate Report that Trans Mountain provided to shippers in 2017 (the "**CPCN Cost Estimate Report**"), as was requested by the Commission. Trans Mountain should be directed to provide the requested confirmation.

Shippers Did Not Agree to Trans Mountain's Spending

Page 7 of the Trans Mountain Response states that "Trans Mountain relied upon the approved risk allocation in the FSA to invest tens of billions of dollars in the TMEP, and that shippers expressed no concerns about the continued appropriateness of the agreed-upon risk allocation until their comments on their Application." This assertion that Trans Mountain "invested" tens of billions of dollars and that shippers are now trying to unfairly change the bargain is repeated throughout the Trans Mountain Response. The fundamental flaw in Trans Mountain's position is that *Marathon, like other shippers, never agreed or consented to Trans Mountain spending tens of billions of dollars*. Instead, Marathon agreed only that Trans Mountain could incur reasonable and necessary costs.¹ Trans Mountain's submission disregards that the agreed upon "risk allocation" between Trans Mountain and the shippers relies upon Trans Mountain incurring costs that are reasonable and necessary. Trans Mountain has not demonstrated the costs to be reasonable and necessary. The prejudice to shippers of these unprecedented cost increases is obvious and significant. For example, as the Commission has noted, the Fixed Toll using the CPCN Cost Estimate Report was \$5.76/bbl while the Application seeks a Fixed Toll of \$10.88/bbl.² As a further example, Trans Mountain negotiated in the Transportation Service Agreement a 2.5% yearly increase in the Fixed Toll, that if now permitted to stand in light of the excessive tolls that Trans Mountain proposes, would allow Trans Mountain to profit off its cost overruns on the backs of shippers.³

¹ Trans Mountain, Facility Support Agreement, s. 1.12 ([A3E7D3](#)): "The Parties shall each 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 their respective obligations pursuant to this Agreement."

² Process Letter No. 2 dated August 1, 2023, footnote 1 ([C25730-1](#)).

³ Trans Mountain, Transportation Service Agreement, s. 3.1(b) ([A3E7D4](#)): "Commencing on the first anniversary date of the Commencement Date and on each anniversary date thereafter, the Fixed Toll shall be increased by two and one half percent (2.5%) of the then prevailing Fixed Toll and included and charged in the Firm Service Toll for the next tolling year."



The last time that Trans Mountain provided a cost estimate to Marathon that was independently audited was in the 2017 CPCN Cost Estimate Report, when Trans Mountain estimated the total cost of the expanded Trans Mountain pipeline system (the “**Expansion Project**”) at \$7.4 billion. Between 2022 and 2023 alone, Trans Mountain’s cost estimate for the Expansion Project increased by an additional \$9.5 billion.

Page 10 of the Trans Mountain Response states that certain of the intervenors are “seeking to overturn or modify the toll methodology approved in RH-001-2012, after Trans Mountain relied on the NEB’s approval of that methodology to invest tens of billions of dollars in the Expansion Project.” Marathon strongly disagrees with this assertion by Trans Mountain that the NEB’s RH-001-2012 decision from 2013 ([A51913-1](#)) authorized it to overspend by tens of billions of dollars, after Trans Mountain has already far exceeded each of its cost estimates, including 414% more on Uncapped Costs than its 2017 audited CPCN Cost Estimate Report. Trans Mountain now seeks to pass these costs to shippers, without the necessary scrutiny, in the form of excessive interim tolls. Contrary to what Trans Mountain urges the Commission to accept, this was not the “risk allocation” to which Marathon agreed.

Trans Mountain Did Not Regularly or Sufficiently Update Shippers on Its Cost Estimates

Trans Mountain’s assertion on page 6 of the Trans Mountain Response that it has “regularly updated” shippers about its cost estimates is not accurate.

In 2017, Trans Mountain provided its shippers with the CPCN Cost Estimate Report. It was a full report that estimated the cost to complete the Expansion Project at \$7.4 billion.

In 2020, Trans Mountain released “a revised cost estimate for the [Expansion Project] of \$12.6 billion with service expected to start by the end of 2022.”⁴

Its quarterly reporting for 2020, respectively dated May 13, 2020⁵, August 18, 2020⁶, and November 4, 2020⁷, and for the 2020 year dated March 3, 2021⁸, repeated Trans Mountain’s \$12.6

⁴ Trans Mountain, *Management Report: For the year ended December 31, 2019*, dated March 4, 2020, p. 5: <https://s3-us-west-2.amazonaws.com/transmountain-craftcms/documents/TMC-12.31.2019-Management-Report-Final.pdf?mtime=20200528205923#asset:22127>

⁵ Trans Mountain, *Management Report: For the three month period ended March 31, 2020*, dated May 13, 2020, p. 4: <https://s3-us-west-2.amazonaws.com/transmountain-craftcms/documents/TMC-3.31.20-Management-Report-Final.pdf?mtime=20200529212852#asset:22159>

⁶ Trans Mountain, *Management Report: For the three and six month periods ended June 30, 2020*, dated August 18, 2020, p. 3: <https://s3-us-west-2.amazonaws.com/transmountain-craftcms/documents/TMC-6.30.20-Management-Report-Final.pdf?mtime=20200827204511>

⁷ Trans Mountain, *Management Report: For the three and nine month periods ended September 30, 2020*, dated November 4, 2020, p. 3: <https://s3-us-west-2.amazonaws.com/transmountain-craftcms/documents/TMC-9.30.20-Management-Report-Final.pdf?mtime=20201126181437#asset:26091>

⁸ Trans Mountain, *Management Report: For the year ended December 31, 2020*, dated March 3, 2021, p. 3, which noted that “construction is approximately 22% complete, with \$6.1 billion in capital spending incurred since the



billion cost estimate to complete the Expansion Project while giving no indication that the estimated cost would massively escalate.

In its 2021 quarterly reporting, Trans Mountain ceased providing Expansion Project cost estimates. Its quarterly reporting for 2021, respectively dated May 12, 2021⁹, August 13, 2021¹⁰, and November 12, 2021¹¹, reported only on the total capital spending to date.

On March 28, 2022, two years after Trans Mountain last provided shippers with an Expansion Project cost estimate, Trans Mountain's Management Report for 2021 disclosed the Expansion Project cost estimate had increased by \$8.8 billion to \$21.4 billion.¹²

In its 2022 quarterly reporting dated May 11, 2022¹³ and August 11, 2022¹⁴, Trans Mountain repeated the \$21.4 billion project cost estimate. In its 2022 third quarter reporting issued November 2, 2022, Trans Mountain removed any reference to a cost estimate, noting only that it had spent \$16.6 billion on total construction capital spending to date.¹⁵

Finally, in a media release issued on March 10, 2023, Trans Mountain reported that the Expansion Project cost estimate had increased to \$30.9 billion – a staggering increase of \$9.5 billion in less than a year.¹⁶

Trans Mountain is incorrect when it asserts that “shippers expressed no concerns” about the increased costs until this Application. The record will show that Trans Mountain's engagement

inception of the project”: <https://docs.transmountain.com/TMC-12.31.20-Management-Report-Final.pdf?mtime=20210430190814>

⁹ Trans Mountain, *Management Report: For the three month period ended March 31, 2021*, dated May 12, 2021, p. 3: <https://docs.transmountain.com/TMC-3.31.21-Management-Report-Final.pdf?mtime=20210528182020>

¹⁰ Trans Mountain, *Management Report: For the three and six month periods ended June 30, 2021*, dated August 13, 2021, p. 3: <https://docs.transmountain.com/TMC-6.30.21-Management-Report-FINAL.pdf?mtime=20210827205007>

¹¹ Trans Mountain, *Management Report: For the three and nine month periods ended September 30, 2021*, dated November 12, 2021, p. 3: <https://docs.transmountain.com/TMC-9.30.21-Management-Report-Final.pdf?mtime=20211129225919#asset:32481>

¹² Trans Mountain, *Management Report: For the year ended December 31, 2021*, dated March 28, 2022, p. 3: <https://docs.transmountain.com/Corporate-Reports/TMC-12.31.21-Management-Report-Final.pdf>

¹³ Trans Mountain, *Management Report: For the three month period ended March 31, 2022*, dated May 11, 2022, p. 4: <https://docs.transmountain.com/Corporate-Reports/TMC-3.31.22-Management-Report-Final-5.30.22.pdf>

¹⁴ Trans Mountain, *Management Report: For the three and six month periods ended June 30, 2022*, dated August 11, 2022, p. 4: <https://docs.transmountain.com/Corporate-Reports/TMC-6.30.22-Management-Report-Final.pdf>

¹⁵ Trans Mountain, *Management Report: For the three and nine month periods ended September 30, 2022*, dated November 2, 2022, p. 4, 10: <https://docs.transmountain.com/Corporate-Reports/TMC-9.30.22-Management-Report-Final.pdf>

¹⁶ Trans Mountain media release dated March 10, 2023, *Trans Mountain Corporation Provides Update on the Expansion Project*: <https://www.transmountain.com/news/2023/trans-mountain-corporation-provides-update-on-the-expansion-project>



with shippers about the cost escalations on the Expansion Project was inadequate, but that nevertheless, concerns were certainly expressed.

More Information From Trans Mountain Is Needed

Trans Mountain urges the Commission to accept its proposed interim tolls, without anything more than a cursory review at this stage, on the basis that the NEB's RH-001-2012 decision from 2013 ([A51913-1](#)) limits the Commission's ability to do a more comprehensive assessment.

At this interim toll phase, when Trans Mountain has demonstrated a pattern of not providing full disclosure to its shippers about fundamental matters such as the basis for the cost increases or how it has allocated costs as between Uncapped and Capped Costs, it is entirely appropriate for the Commission to require full transparency by Trans Mountain. Marathon submits that more information is required to assess the reasonableness of Trans Mountain's proposed interim tolls, including by determining whether certain costs are appropriately included as Uncapped Costs. Marathon remains of the view that the interim tolls should not be based on Trans Mountain's latest cost estimates, but rather on the audited CPCN Cost Estimate Report that Trans Mountain provided to shippers in 2017.

Of note, while Trans Mountain concedes that the actual costs on the Expansion Project "have exceeded the CPCN Cost Estimate" from 2017, it continues to withhold and to not disclose information that would actually assist in determining and assessing the basis and reasonableness for the massive cost overruns. For example, on page 4 of the Trans Mountain Response, Trans Mountain states that "43 binders [were] provided to the Firm Service Shippers' independent auditor in 2017." Trans Mountain fails to note, however, that these 43 binders of materials have never been provided to the shippers (only to the independent auditor, who was prevented from sharing them with the shippers). On page 6 of the Trans Mountain Response, Trans Mountain states that it prepared certain "Class 1" and "Class 2" cost estimates or "Validated" forecasts in 2019, 2021 and 2022. However, none of these materials have ever been shared with Marathon. Trans Mountain should be required to produce these materials now in connection with the Application, in order to allow the shippers and the Commission to examine them as part of the process considering the proposed interim tolls.

The Record Does Not Show that Trans Mountain Has Acted in a Manner Consistent with Its Obligations

Trans Mountain has an obligation under s. 1.12 of the Facility Support Agreement ("FSA") to undertake the Expansion Project "prudently and reasonably and in a manner that is consistent with customary and good operating procedures of the crude petroleum and transportation industry".¹⁷

¹⁷ Trans Mountain, Facility Support Agreement, s. 1.12 ([A3E7D3](#)).



It has a specific obligation under s. 4.2 of the FSA to construct the Expansion Project “using commercially reasonable efforts”.¹⁸

The Trans Mountain Response does nothing to demonstrate that it actually complied with its contractual obligations, especially when it now tries to minimize its failure by claiming on page 8 that “cost overruns on major capital projects in Canada are not uncommon” and attempting to support this claim with examples of cost overruns incurred on other projects. But those examples show cost overruns that are not even close in magnitude to the massive overruns Trans Mountain has run up on the Expansion Project. And those examples are not, in any event, material in assessing the issues at hand: the magnitude of Uncapped Costs and the excessive interim tolls that Trans Mountain now seeks.

Pages 5 and 6 of the Trans Mountain Response provide three general reasons for the massive cost overruns on the Expansion Project. These reasons appear to be after-the-fact attempts to justify the unreasonable manner in which Trans Mountain oversaw the Expansion Project and only further heighten Marathon’s legitimate concerns about the magnitude of interim tolls sought by Trans Mountain. Several of the examples cited by Trans Mountain (i.e., regulatory delays and legal challenges, market conditions changing) are normal course concerns that are expected to arise in any project and ought to have been considered by Trans Mountain as a prudent operator. Furthermore, Trans Mountain provides no insight into whether it followed normal industry practices by anticipating periods of significant demand for project materials and resources and in response, acting to secure access in advance through contractual means, to those materials and resources. Trans Mountain ought not be permitted to shield itself behind poor decisions that were within its control, to avoid scrutiny on unprecedented cost increases that could have been mitigated or avoided.

1.2 Forums for reviewing Trans Mountain costs

Page 12 of the Trans Mountain Response asserts that when s. 12.8(b) of the FSA provided the NEB or its successor with jurisdiction to hear “all matters relating to the determination of tolls”, those words somehow prevent the Commission from considering matters such as the Commencement Date Cost Estimate or As-Built Costs and Expenses.¹⁹ Marathon does not agree with this assertion. The wording “all matters relating to the determination of tolls” could not be broader.

In any event, no contractual provision nor prior regulatory decision can impair the Commission’s continuing duty to set tolls that are just and reasonable.²⁰ The NEB’s decision of August 17, 2012 ([A44942-1](#)) directed Trans Mountain to remove s. 2.2 of the FSA, holding that “[t]he ability of prospective shippers to raise valid concerns is a key part to the Board’s adjudicative process”. This

¹⁸ Trans Mountain, Facility Support Agreement, s. 4.2 ([A3E7D3](#))

¹⁹ Trans Mountain, Facility Support Agreement, s. 12.8 ([A3E7D3](#))

²⁰ *Canadian Energy Regulator Act*, S.C. 2019, c. 28, s. 10 at s. 230



logic applies with equal or greater force today. Shippers' valid concerns with the Expansion Project's massive cost increases and the resulting impact on interim tolls should be fully addressed by the Commission now.

The Trans Mountain Response purports to rely on matters having changed in recent years so dramatically that it justifies: (i) a 414% increase to Uncapped Costs since 2017; and (ii) \$9.5 billion in additional estimated costs since 2022. If so much has fundamentally changed since 2017 (or even 2022), then Trans Mountain cannot credibly claim that the NEB's RH-001-2012 decision from 2013 ([A51913-1](#)) blocks the Commission's ongoing duty to fully address matters now, even if it means re-visiting issues that the NEB considered in 2012.

1.3 Keeping shippers whole for differences between interim and final tolls

1.4 Trans Mountain's ability to meet its financial obligations under differing toll levels

Marathon agrees that shippers should be kept whole for differences between interim and final tolls. Importantly, the Trans Mountain Response asserts that if the approved interim tolls are reduced from the amount it seeks, Trans Mountain may become insolvent. For example, page 20 of the Trans Mountain Response states that setting interim tolls using mid-point tolls "would cause Trans Mountain to be unable to meet its financial obligations and significantly impair its ability to attract capital on reasonable terms." Marathon is concerned that this statement signals a serious risk to shippers that Trans Mountain may be unable to repay to shippers any amounts that may be owing to them once final tolls are established. The setting of interim tolls cannot be used to force shippers to provide liquidity to Trans Mountain and assume the risk of becoming unsecured creditors if an insolvency event occurs. Accordingly, interim tolls should be set in a just and reasonable manner that minimizes, to the greatest degree possible, the possibility of Trans Mountain having to pay any adjustment to shippers once final tolls are set. This mitigates in favour of a proper assessment being done now, before interim tolls are set.

1.5 Requests for relief on a final basis in the Application

Table 1.5-1 of the Trans Mountain Response incorrectly asserts that shippers such as Marathon are not contesting certain aspects of the Application. In its letter dated June 23, 2023 ([C25076-1](#)) providing initial comments on Trans Mountain's Application, Marathon explicitly reserved the right to raise further issues in connection with the Application. Marathon's lack of comment on certain aspects of the Application should not have been taken by Trans Mountain as consent or lack of objection.

Given the paucity of information provided by Trans Mountain to shippers prior to the Application being filed, or in the Application itself, Marathon submits that no relief should be granted on a final basis at this time. All matters should be open to review by the Commission when it considers final tolls, following the audit that will be conducted after the Commencement Date. In this regard, Marathon disagrees with the Trans Mountain Response's assertion at page 27 that "all information



that is needed to determine on a final basis whether the above components are just and reasonable is contained in the Application.”

In particular (but without limitation), Item No. 7 in Table 1.5-1 of the Trans Mountain Response, being “Indigenous Consultation and Accommodation Costs (ICAC) as a new Variable Toll component”, clearly cannot be determined on a final basis at this time. Marathon specifically (and without limitation) contests this item. Trans Mountain states in the Application and its schedules that ICAC amounts to approximately \$660 million, of which Trans Mountain says it expects to incur approximately \$274 million by the Commencement Date. Yet Trans Mountain provides no details whatsoever about ICAC in the Application, and instead gives only aggregate approximate total amounts. There is no proper factual basis for the Commission to finally determine that ICAC was incurred by Trans Mountain consistent with its obligations under the FSA, including s. 1.12 that required Trans Mountain to perform its obligations prudently and reasonably and in a manner that is consistent with customary and good operating procedures of the crude petroleum and transportation industry.²¹

1.8 Demurrage Revenues to Trans Mountain’s Account

The Trans Mountain Response at page 33 argues that there is no provision in the FSA or RH-001-2012 that requires Trans Mountain to share any collected demurrage revenue. By the same logic, there is nothing that allows Trans Mountain to keep all or any of it. Demurrage should not be utilized as a source of revenue for Trans Mountain, which would be offside of industry norms. Demurrage revenues should not be to Trans Mountain’s account.

1.9 Timing of the Commission’s Decision

Trans Mountain applied for interim tolls and argued for an attenuated process before the Commission on the basis of urgency. It was therefore surprising to Marathon that the Trans Mountain Response at page 38 conceded that “the timing of the Commencement Date remains uncertain, and Trans Mountain cannot complete any detailed quantification of risks based on the timing of that date”. Marathon notes that Trans Mountain continues to release six month look ahead schedules, most recently on September 1, 2023 ([C26032-1](#)) that show time-bars projecting task completion dates which extend through the last day of the six month period, but without providing certainty on the target completion date. Trans Mountain’s actions give little comfort to Marathon that Trans Mountain will not allow timelines to slip, and costs to escalate, further.

²¹ Trans Mountain, Facility Support Agreement, s. 1.12 ([A3E7D3](#)).

Goodmans^{LLP}

Yours truly,

Goodmans LLP

Two handwritten signatures in blue ink. The first signature is 'Skap' and the second is 'Peter'.

Suzy Kauffman and Peter Kolla

Copy via email at phdpc@mac.com to:
Philip H. Davies, Consultant
Philip H. Davies Professional Services

7404715