

**NATIONAL ENERGY BOARD
OFFICE NATIONAL DE L'ÉNERGIE**



**Hearing Order RH-2-2011
Ordonnance d'audience RH-2-2011**

**Trans Mountain Pipeline ULC (Trans Mountain)
Firm Service Application of 29 November 2010**

**Trans Mountain Pipeline ULC (Trans Mountain)
Demande de service garanti datée du 29 novembre 2010**

VOLUME 5

**Hearing held at
L'audience tenue à**

**National Energy Board
444 Seventh Avenue SW
Calgary, Alberta**

**August 26, 2011
le 26 août 2011**

**International Reporting Inc.
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Transcript

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Order RH-2-2004

HEARING /AUDIENCE

RH-2-2011

**IN THE MATTER OF Trans Mountain Pipeline ULC (Trans Mountain)
Firm Service Application of 29 November 2010**

HEARING LOCATION/LIEU DE L'AUDIENCE

Hearing held in Calgary (Alberta), Friday, August 26, 2011
Audience tenue à Calgary (Alberta), vendredi, le 26 août 2011

BOARD PANEL/COMITÉ D'AUDIENCE DE L'OFFICE

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L. Mercier	Member/Membre
R. George	Member/Membre

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- Mr. Loyola Keough

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- Mr. Dennis P. Langen

BP Canada Energy Trading Company

- Mr. Allan L. McLarty, Q.C.
- Ms. Michelle L. Voinorosky

Canadian Natural Resources Limited

Cenovus Energy Inc.

- Mr. Don G. Davies
- Mr. Dennis P. Langen

Chevron Canada Limited

- Mr. Keith B. Bergner

Chevron Canada Resources

- Mr. Keith B. Bergner

ConocoPhillips Canada Resources Corp.

- Mr. Richard A. Neufeld, Q.C.

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Imperial Oil Limited

- Mr. Chris Brett
- Mr. P. John Landry

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- Mr. Douglas E. Crowther

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U.S. Oil & Refining Co.

- Mr. Don G. Davies
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- Mr. Mike Huk
- Mr. Geoffrey Dixon

National Energy Board/Office national de l'énergie

- Ms. Carole Hales
- Ms. Kristen Lozynsky

ERRATA

Thursday, August 25, 2011 - Volume 4

Paragraph No.:

Should read:

5888:

“...it might be clear in two to three years?”

“...it might be cleared in two to three years?”

5899:

“When the bids is higher than...”

“When the bid is higher than...”

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(i)

No.	Description	Paragraph No./No. de paragraphe
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Preliminary matters

--- Upon commencing at 9:03 a.m./L'audience débute à 9h03

6007. **THE CHAIRPERSON:** Bonjour à tous. Good morning, everyone.

6008. Are there any preliminary matters before we start?

6009. **MR. KEOUGH:** Thank you, Madam Chair. Just a housekeeping one, we do have for filing a letter which has the transcript corrections from Volume 2 and so we've put it in our letter format and captured those corrections.

6010. I would propose to distribute it to the Board and we will leave copies at the back of the room.

6011. **THE CHAIRPERSON:** That's great. Thank you.

6012. **MR. KING:** Good morning, Madam Chair. Alberta filed a letter with a couple of transcript corrections yesterday and we've provided copies to Ms. Wong, who I hope has provided copies to Board counsel and the Panel and I've left a number of them at the back of the room and I'll hand a few out along the way back to my seat.

6013. Thank you, Madam Chair.

6014. **THE CHAIRPERSON:** Very well, thank you.

6015. We all have corrections.

6016. **MR. McLARTY:** Indeed we do. Madam Chair, I too have a number of transcript corrections from Volume 4, yesterday.

6017. Unfortunately I was in such a rush to get out of the office this morning, I've both forgot to file it and to bring copies.

6018. But I can assure the Board that those corrections will be filed in due course as soon as I get back to the office.

6019. **THE CHAIRPERSON:** Thank you, Mr. McLarty.

6020. With that we're ready to hear the final argument. Mr. Keough?

--- **FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR MR. KEOUGH:**

6021. **MR. KEOUGH:** Thank you, Madam Chair, Board Members.
6022. I typically make a practice of giving a copy of the argument to the court reporter so that they can put in the references. I fully intend to do that but fortunately or unfortunately, we were working on this till a few moments ago.
6023. So we will send a copy to the court reporter when we're done with the references so they can be added so I don't have to interrupt the flow to keep putting in references.
6024. Thank you.
6025. Madam Chair, Board Members, Trans Mountain submits to you that this application is not only important to Trans Mountain and the firm service shippers, it's also important for the NEB itself.
6026. This is another opportunity for you, the Board, to continue what we will call "your long-standing practice" of allowing NEB regulated pipelines the flexibility to respond to changing market conditions, to be able to meet the needs of its shippers and to remain competitive in the market place.
6027. All of these are positive things and we submit to you, all of them are entirely consistent with the Canadian public interest. We're going to be asking you to continue this long-standing approach.
6028. By application dated November 29, 2010, Trans Mountain sought the Board's approval to institute a new firm service offering on the Trans Mountain pipeline system. This firm service offering was comprised of several key interrelated components.
6029. The key features of the application are one, the contracting of firm transportation service to the Westridge dock for a volume of 54,000 barrels per day; two, the reallocation of system capacity between land deliveries and dock deliveries such that 27,000 barrels per day would be added to the current dock allocation; three, the approval of several consequential tariff amendments and the pro forma transportation service agreements between Trans Mountain and the firm service shippers; and four, the approval of Trans Mountain's proposal with respect to the disposition of the firm service fees collected.
6030. In addition, Trans Mountain has made several additional tariff changes to

better align the overall tariff with the implementation of this firm service proposal. Finally, Trans Mountain has put forth proposals to address the reporting and collection of the firm service fees.

6031. Trans Mountain is requesting the Board's approval of these ancillary proposals as they are detailed in the Trans Mountain application.
6032. Now, at the outset I have to pause for a moment and discuss with you what is actually before the Board for consideration in this application, and hence what we consider your options are in terms of disposing of the application and other matters you've heard.
6033. In this regard we think that Board Member George got it right when he said the Board's options are; one, approve the application; two, deny the application or three, approve the application with conditions.
6034. The Board must also exercise caution in not attempting to address matters that are actually not before you in this application. For example, you've heard quite a bit about the current dock bid premium and the current disposition methodology for these funds.
6035. To be clear, Trans Mountain is not proposing to address or change this item in this application. This application deals only with the disposition and use of the firm service fees which result from Trans Mountain entering into the proposed firm service arrangements.
6036. These amounts, while in some respects at a maqua-level (phonetic), could be viewed as similar to the bid premiums are different in a number of respects from uncommitted dock shipper bid premiums and there is no inherent reason why a different source of funds cannot be treated differently.
6037. As such, without seeking to revisit the current treatment of dock bid premiums at all Trans Mountain has brought forward, with the support of its firm service shippers, who are actually paying these fees, a proposal regarding their use.
6038. Likewise, this application is not about expanding the Trans Mountain System; another popular topic. While I will have more to say about this later, the current application is not a forum that would allow the Board to decide on Trans Mountain expansion matters.

6039. If these types of issues were on the table Trans Mountain would have provided extensive and different evidence to properly address such issues. This was not done.
6040. I hesitate to add that if these issues were actually before you various parties may well have advanced different positions and there may even have been others who would have sought to join the party.
6041. All this to say that the Board should properly focus on the application that is before it and not try to address and solve numerous other issues on which certain parties have commented.
6042. As noted by Board Member George, there is no other application before you related to certain of these issues that were discussed in this proceeding. As indicated by Trans Mountain, to the extent that the Board seeks to adjust this filing Trans Mountain would have to consider such decisions and determine if the outcome remains acceptable to it.
6043. As noted, the firm service shippers also have a say in this regard with respect to certain items.
6044. In the materials filed by Trans Mountain its supporters and indeed its opponents, a number of issues have arisen which are the subject of considerable controversy. In fact, there is little, if anything, that all parties agree upon. We will be telling you that that is indicative of why some of your proposed conditions are not acceptable.
6045. Unfortunately that is the nature of the beast. Whenever changes are requested to the status quo those parties who perceive that they are negatively impacted by the new proposal are inclined to oppose such a proposal and assert the unfairness associated with doing anything that will impact their current position.
6046. While this may indeed be a natural reaction that does not make the positions being advanced by these parties right, to the contrary, a detailed assessment of the various positions being advanced is required in order to assess which positions in fact yield the most fair and equitable results and is the most balanced and reasonable in the overall circumstances.
6047. Therein lies the challenge for the Board. Trans Mountain will be submitting to you that when all of the issues are examined in light of the facts and the

evidence before you it is remarkably clear that Trans Mountain's proposals meets the criteria of being in the overall public interest and reflecting a more balanced and fair treatment of all parties, and as such, should be approved as filed.

6048. In assessing the relative merits of the positions being advanced by various parties it is instructive to pause and ask why has Trans Mountain advanced this application to the Board. This question will not only provide the appropriate context for viewing the application, it will highlight the uncontradicted merits of the proposal itself.

6049. First and foremost it must be understood that this application is filed in response to shipper and producer requests. The evidence before you is that certain parties which wished to obtain firm service to the Westridge dock. This was seen as a critical element in their continued quest to develop and secure markets for Canadian crude oil in existing and new offshore markets.

6050. These parties confirm to Trans Mountain that the current uncertainty associated with securing dock capacity from month to month and the uncertainty associated with the cost of such capacity was impeding their ability to seek out and retain such markets. *[C1-4(b)-(f)]*

6051. These shortcomings were leading to the discounting of Canadian crude in the marketplace.

6052. It is important to understand that it is the producers and shippers who are pursuing the continued development of these new markets, it is not Trans Mountain. While Trans Mountain and its application will support this endeavour the Board should not be confused in this regard.

6053. It appears that Chevron's expert witness, Mr. Gaske, did not fully appreciate this distinction when he argued repeatedly that Trans Mountain should not be out there looking for new business when its pipeline is full.

6054. As noted in Trans Mountain's application *[p 1-6]*, the contractual certainties these shippers and producers are seeking will result in them being able to transact commercial arrangements with buyers on an unconditional basis. You have been told this will add value to Canadian crude oil in the marketplace.

6055. Trans Mountain understood and agreed that such contractual certainty would be beneficial to Canadian producers and Canadian crude oil and result in

increased netbacks to producers. You have also heard that this project will have beneficial impacts for Canadian producers beyond the firm service shippers. [NEB-TMPL-1.2]

6056. While certain parties sought to refute this suggestion it is basic Economics 101 that if you remove this supply from the markets, otherwise being served it will reduce competition for producers seeking to serve those markets.

6057. In this regard we would note the totality of the capacity exiting the Western Canadian Sedimentary Basin is not constrained. At the same time Purvin & Gertz confirmed that the Asian and PADD V markets are growing.

6058. It is logical to assume that if the volumes available to clear other markets is reduced it will benefit those producers serving these markets. Additionally, as noted by the firm service shippers, they represent a very large cross-section of large and small producers that will derive direct benefits.

6059. Finally, as noted by the firm service shippers, this application is a nice first step towards larger market development. This is a very good thing for Canadian crude oil production.

6060. The development of new markets at a time when traditional markets for Canadian crude are posing new challenges is also seen as being beneficial to Canadian producers. In short, market diversification is a good thing and it will be aided by this proposal. Trans Mountain readily agrees that these results are entirely consistent with the overall public interest.

6061. Trans Mountain itself is not indifferent to the consequences of implementing this firm service proposal on its pipeline system, albeit for only a small portion of its overall capacity, some 18 percent. The remaining 82 percent will remain available to uncommitted shippers.

6062. Trans Mountain has repeatedly stated that not only should it be allowed to respond to changing market conditions that occur in the environment in which it operates, but it should be permitted to take steps that will allow it to compete with other oil pipelines on an equal footing.

6063. As I mentioned at the outset, the NEB has concurred with this view in numerous past decisions that I will touch upon later.

6064. The NEB has a long-standing recognition that the circumstances surrounding oil pipelines and the environment in which they operate is not static. To the contrary; these circumstances are constantly changing, and pipelines must be equipped with the tools to enable them to compete and respond to changing market circumstances. This is precisely what is happening here.
6065. As noted by Trans Mountain, one of the major changes that have occurred on numerous oil pipelines in recent years is the firming up of capacity via the establishment of long-term contracts with shippers. *[Vol. 2, Para 1533]* This has occurred on both existing and new oil pipelines.
6066. As I will discuss in a bit more detail later, these events have unfolded in a manner that allows these pipelines to continue to meet their legislative obligations, including what we call their common carrier obligations.
6067. In fact, the NEB has previously laid out a clear path regarding how oil pipelines, new or existing, can offer firm transportation service and still meet these requirements.
6068. The key elements for continuing to meet these obligations is the conduct of an open season for the service being offered and a full opportunity for all parties to participate on the same terms and conditions, if they desire. I will explain later how Trans Mountain has clearly met these criteria.
6069. An examination of other competing oil pipelines existing in the Western Canadian Sedimentary Basin confirms that numerous players are now offering firm transportation service to shippers. *[Vol. 2, Para 1533]*
6070. Once these firm arrangements are executed, shippers will have every incentive to fully utilize the contracted capacity, as the costs are sunk, versus shipping on a pipeline with only monthly commitments. To prohibit Trans Mountain from offering firm service would create a tilted playing field and inhibit its ability to compete in the marketplace. This would simply be unfair.
6071. Trans Mountain should be able to respond to the demands of the marketplace and provide a competitive product to market participants that require such a service offering.
6072. This is consistent with the NEB's recognition of the changing environment in which oil pipelines operate and their need to remain competitive. This approach is

also entirely consistent with the overall Canadian public interest.

6073. While we submit to you that the fair treatment of Trans Mountain, including allowing it to respond to shipper needs and compete in the marketplace on its own, provides a persuasive case for granting the relief requested. There is another equal, if not more important, basis upon which approval of this application is grounded.
6074. As mentioned a few moments ago, this application results in the fair and equitable treatment of all of the shipper constituents that seek to access the Trans Mountain pipeline, be it (1) land shippers, (2) uncommitted dock shippers, or (3) contracted dock shippers.
6075. The genesis of the proposal before you is grounded in achieving a fair and equitable balance amongst these various shipper groups. To clearly make this point, it is necessary to examine the application from three temporal perspectives.
6076. First, we need to look at the circumstances that existed at the time the application was filed and, in fact, immediately leading up to this filing.
6077. Second, we need to examine the impact, if any, of the dramatic market changes that occurred essentially concurrent with the filing to see if these unforeseen events impact the proposal in any way that dictates that changes or alterations should be made.
6078. Third, we need to have regard to the future. You have heard that the international crude oil market is very efficient and works well. [*Vol. 2, Para 2528 & 2834; Vol. 1, Para 925*]
6079. Therefore, it is fully expected that there will be a market response to the current anomalies, following which, things will return to a more "normal" state.
6080. In this regard, it must be absolutely clear that the application was not filed in response to these recent market developments that occurred in late 2010. The application was filed before these events unfolded. This led Board Member Mercier to call it the perfect storm. [*Vol. 2, para 2820*]
6081. Well, that storm had taken place, or took place after the application was filed. As such, this application is not a response to these extraordinary circumstances.

6082. That being said, Trans Mountain stress tested the proposals contained in the application against the new environment to assess whether they still made sense and yielded the intended fair and equitable balance between all shipper groups.
6083. As I will discuss with you in a moment, Trans Mountain confirmed that its application continued to yield the most fair and reasonable result.
6084. While it is important to understand what the application is about, it is equally important to understand what it is not about. It is not about giving certain parties entrenched or vested rights to pipeline capacity. It is not about assertions that if the status quo is changed then certain parties will possibly be harmed.
6085. In this regard, we submit to you that it is not harm if the quantum of a massive subsidy, which was never intended to occur, is reduced. While the dock bid premiums may, indeed, be reduced because of the overall reduction in the volume of uncommitted capacity that's available at Westridge, that's not harm. It is also not harm if a party has to pay market rates for a small portion of the capacity they wish to acquire from time to time.
6086. The test for harm and, in fact, the test for whether the application should be granted is not whether certain land shippers perceive that their current situation could potentially be altered. This is not the basis for making a public interest determination and achieving a fair and equitable balance between all shipper groups.
6087. As I mentioned at the outset, this application was brought forward by Trans Mountain in response to shipper and producer requests. However, in determining the appropriate balance between all shipper groups, Trans Mountain was careful to ensure that it treated all parties fairly. That is why the firm service offering was set at 54,000 barrels per day and did not even seek to accommodate the full 95,000 barrels per day bid into the open season process.
6088. As part of formulating its proposal, Trans Mountain examined the historic use of the pipeline by land shippers, including the demands they placed on the system since it was expanded in November of 2008.
6089. Of note are the very rare occasions over this full 26-month period when land demand exceeded available allocated capacity. *[B12-2 Q/A4; Attachment NEB-TMPL-1.4(a)]*
6090. Hence, no material land apportionment was required over this extended

period. Trans Mountain would commend to the Board its response to NEB IR No. 1.4(a), Attachment 1, in this regard.

6091. The actual data contained in this table is very telling. In this regard, it is instructed to note that when the TMX-1 expansion went into effect in November 2008, approximately 61 percent of the added capacity was allocated to land and some 39 percent was allocated to the dock, and you can see that in Attachment A to the application.
6092. In retrospect, this appears to have been an over-allocation to land as it was not needed to accommodate land deliveries over the next two years.
6093. This is in stark contrast to what was occurring with respect to dock demand over the same period. Not only were dock shippers taking up the unutilized land capacity there was significant apportionment regarding dock volumes. *[B12-2 Q/A 4; Attachment NEB-TMPL-1.4(a)]*
6094. In short, the dock was in high demand by shippers and producers as significant volumes well above the 52,000 barrels per day nominally allocated to the dock were actually being moved by shippers to markets over the Westridge dock over that full period. In reality, the actual utilization of the system was very different from the allocation that had been set.
6095. As I indicated, the problem encountered by dock shippers supporting this application was that the uncertainty with respect to obtaining capacity and the uncertainty associated with the price of that capacity, if they were successful, were creating issues in the marketplace that resulted in the discounting of Canadian crudes. *[Vol. 2, 2513-2528; C1-4(b)-(f) Q/A 3; B12-4 Q/A 1]*
6096. This was described by the firm service shippers who confirmed that they felt conditioning of the commercial arrangements was negatively impacting their ability to get true market prices.
6097. The firm service application is seen as a way to address these issues to the benefit of Canadian crude producers. Alleviating discounts for Canadian crude compared to world crude prices is indeed consistent with the Canadian public interest.
6098. Now, it is important to spend a few moments on the rigorous analysis conducted by Trans Mountain in support of its proposal. At all times, Trans Mountain was and is aware of the market volatility that could potentially impact its

proposal.

6099. You have heard clearly how Trans Mountain examined the past circumstances, the current extraordinary situation we are seeing as well as the future in an effort to reaffirm whether its proposal still made sense. *[B12-2 Q/A 3 & 4]*
6100. In order to assist in this evaluation, Trans Mountain retained the services of Purvin & Gertz or PGI to perform an assessment of forecast demand on the Trans Mountain system. *[B1-9]*
6101. PGI developed two scenarios in its report; low demand and high demand, and Trans Mountain chose to use the high demand case to incorporate a measure of conservatism in its evaluation.
6102. In contrast to a simple exercise that involves the mere adding of four numbers, PGI completed a fundamental supply-demand balance analysis for each commodity shipped on the Trans Mountain system.
6103. The data provided by PGI was used by Trans Mountain to assist it in developing a forecast of future apportionment for each category of shippers and facilitated a comparison of each category. The results enabled Trans Mountain to test whether the proposed reallocation of capacity remained fair and equitable and in line with the historic data compiled by Trans Mountain.
6104. During the course of this hearing, certain questions were raised regarding the fact that PGI did not update its forecast to reflect the dramatic changes in the marketplace that have occurred recently.
6105. While it is true that no numerical update was completed, Mr. Kelly provided a qualitative assessment of the impacts of recent events *[T. 2513-2539]* that adequately addressed the impacts of these developments on the proposed application.
6106. PGI also addressed these events in Rebuttal Evidence *[p. 3-5]* and observed that crude oil markets can be expected to respond in a rational manner to address this situation.
6107. In addition, since Canadian crudes will be attractive to all markets, either land or dock, the impacts of these events on the assessment of the relative allocation of capacity was actually not seen as material. As such, the PGI forecast remained valid as a tool for the use made of it by Trans Mountain.

6108. Now a brief comment on the circumstances that existed pre-November 2010 is warranted. One suspects that if the application had been heard before that time, there would have been little, if anything, that would have been said in opposition.
6109. The facts support a view that land shippers would have had no basis for objection and, in fact, a reallocation would simply have been reflective of the actual utilization of the system.
6110. From the time of the November 2008 expansion until late 2010, land shippers were not fully utilizing their allocated land capacity. [*Attachment NEB-TMPL-1.4(a)*]
6111. As I have noted before, there was little, if any, land apportionment over this full period. There would have been no argument that land shippers needed the full amount of capacity allocated to them.
6112. The facts associated with dock shippers over this same extended period provide a stark contrast. The dock was fully utilizing its allocated capacity. [*B12-2 Q/A 4 and Attachment NEB-TMPL-1.4(a)*]
6113. It was also fully utilizing the unused land capacity. Furthermore, the dock was in constant apportionment. This dock demand was very real -- had no doubt about that -- as we saw bid premiums go from a few million dollars per year to approximately 50 million dollars per year over this period. [*Vol. 2, Para. 2775*]
6114. The facts clearly demonstrate that over an extended period, the dock was under-served and the land was over-served. There is simply no other conclusion that you can reach on the facts.
6115. These circumstances form the background against which Trans Mountain formulated its response to the firm service shippers' requests. Trans Mountain considered that by reallocating a small amount of the pipeline's total capacity, some 9 percent, from land to dock would not only reflect reality but better balance the interests of both land and dock shippers. The result would be a fair and equitable solution for all.
6116. In order to respond to the shipper and producer requests, Trans Mountain had to consider how much dock capacity should be eligible for firm service contracts.

The materials widely distributed by Trans Mountain to industry participants clearly indicated that Trans Mountain was of the view that allocating or reallocating approximately -- sorry -- allocating approximately 50,000 barrels per day to firm contracts, hence the name Firm 50, and approximately 25,000 barrels per day to uncommitted volumes at the dock achieved a reasonable balance. *[Attachment 2, CPL-Shell-SEMI-TMPL-1.1]*

6117. This was the basis for Trans Mountain's proposal. It made eminent sense in light of the prevailing facts and took into account the needs and interest of all three shipper or producer groups, land, firm dock, uncommitted dock.

6118. As noted in Trans Mountain's response to NEB IR number 1.9, part b, Trans Mountain rigorously tested the data using past, present and future throughput scenarios that covered the spectrum of higher and lower demand. In every case, the conclusion was the same. Reallocating additional capacity to the dock achieved a better balance and resulted in fair and equitable treatment of all shippers.

6119. For better or for worse, market circumstances changed abruptly, essentially shortly after the application was filed.

6120. As discussed in the Purvin & Gertz rebuttal evidence, market forces have resulted in Canadian crudes experiencing extreme discounts in the marketplace. *[B12-4 Q/A 1]*

6121. It is no coincidence that this situation has led to an increased demand for Canadian crude oil in all -- and I stress "all" markets that can access them, be it for land shippers or shippers off the Westridge dock. Given current pricing it is not a shock that demand is extremely strong at the moment.

6122. The relevant question remains -- regarding the proposal is whether these market changes should result in any revisions to Trans Mountain's proposal. As you have heard, Trans Mountain stress tested its proposal against these current extraordinary circumstances.

6123. Trans Mountain conducted an assessment of the relative levels of apportionment on its system to see if the proposed reallocation still made sense. Trans Mountain submits to you that this comparison is indeed valid and yields reliable results that allow for an evaluation of the reasonableness of its proposal. *[B12-2 Q/A 3 & 4]*

6124. It is acknowledged that the process for acquiring land capacity is different than the process for accessing dock capacity. However, these inherent differences do not mean that the results obtained from examining the allocation occurring for each cannot be compared at the end.

6125. You have heard that for land all valid nominations were accepted for purposes of this evaluation. Trans Mountain did not attempt to solve or address any over allocation issues. The raw numbers showed that the percentage allocation for land volumes went from around zero percent to levels approaching 70 percent over the timeframe from November 2010 to the present. *[B12-2 Q/A 3]*

6126. While certain features of these nominations were curious, for example the aggregate Washington State numbers vastly exceeded available downstream pipeline capacity, there were nonetheless accepted, without filtering, for comparison purposes.

6127. Likewise, the dock bids were all counted in this evaluation. As apportionment on the dock was already high, the escalation in the dock bids was far more modest than experienced with land nominations.

6128. However, the price of the dock bids went up dramatically from approximately \$50 million to a forecast of approximately \$200 million. We submit this speaks to the value and legitimacy of those bids.

6129. As noted in Trans Mountain's rebuttal evidence, it must also be remembered that dock bids had premiums associated with them, unlike land bids, and hence there is more discipline for parties making these dock bids.

6130. Also not to be forgotten is that the dock premiums are forecast to be some \$200 million for 2011. *[Vol. 2, Para. 2775]* While this is exponentially higher than contemplated, it does indeed reflect the serious demand for dock capacity.

6131. In the end result, Trans Mountain assessed the prevailing conditions and compared the land versus dock apportionment. While land apportionment after changing to the proposed methodology would increase the percentage apportionment for land to approximately the same as for the dock, the conclusion reached was that it was still more fair and equitable to all parties to proceed with the reallocation of 27,000 barrels per day to the dock and implement the firm service proposal.

6132. Without using the proposed allocation methodology, dock allocation would actually be higher and land allocation lower.

6133. As I've noted, the extraordinary circumstances that we are currently experiencing are having a similar impact on all markets that can be -- that can possibly access the discounted Canadian crudes, whether they're land or dock. As such, in reality this factor became somewhat neutral in terms of the final assessment of what was fair and equitable to all.
6134. Trans Mountain also looked at the future when market forces will restore a more traditional market differential for Canadian crudes. We have heard that projects are already in the works to alleviate the infrastructure deficits that are causing the problem. *[Vol. 1, Para. 912-930; B12-2 Q/A 4]*
6135. Trans Mountain is confident that the market will work and that solutions will be implemented in an effective and efficient manner.
6136. When this occurs, Trans Mountain relied upon Purvin & Gertz high demand case to reflect the relative demand for land versus dock capacity. Again, this analysis showed that land volumes would return to more traditional levels with demand off the docks still being high. *[B1-9]*
6137. This scenario, again, reaffirmed that the proposed reallocation and firm service offering provided superior results and a more balanced treatment of all its shippers.
6138. Now not to be forgotten in this debate is the fact that Trans Mountain is also proposing a number of ancillary tariff changes that will assist land shippers in mitigating circumstances where in any month they need crude oil above historic levels.
6139. Trans Mountain's firm service proposal will allow land shippers to bid for uncommitted dock capacity and redirect these volumes to land deliveries. *[B1-2, pages 1-10 and 1-11]*
6140. In this way, land shippers could address any shortfall by acquiring additional capacity at market rates. Remember, the land allocation can still accommodate historic usage levels by land shippers.
6141. Additionally, it is open to land shippers to reach an agreement with dock shippers in this time of need and have volumes redirected to land destinations. *[B1-2, pages 1-10 and 1-11]*

6142. Trans Mountain considers that this will enhance the secondary market for pipeline capacity that already exists on its pipeline.

6143. In summary, land shippers will essentially have access to the full capacity of the pipeline, something they currently do not have. This dynamic reallocation of pipeline capacity will assist in meeting the needs of land shippers on those occasions when allocated land capacity does not fully satisfy their needs.

6144. Also of note is the fact that land shippers received the largest portion of the dock bid premium refunds and this toll credit will give them an advantage in bidding for such dock capacity in circumstances where they might need it.

6145. Another area that attracted significant debate was the potential impact of this proposal on uncommitted dock shippers. Trans Mountain also structured its proposal to address possible concerns that might arise regarding this component of its shipper group in advance.

6146. To begin with, the total capacity allocated to the dock would increase from 52,000 barrels per day to 79,000 barrels per day. This can only help respond to the high demand at the dock.

6147. We have also heard that there were five successful bidders in the open season. When combined with the residual uncommitted dock capacity of 25,000 barrels per day, there will be a material increase in the number of players shipping off Westridge. This is viewed as a positive development.

6148. Trans Mountain has also noted that it is likely that the firming up of the 54,000 barrels per day at the dock will alleviate the demand for uncommitted space. *[Vol. 2, Para 1232-1266]*

6149. We submit that this makes perfect sense, as these parties obviously valued the dock capacity the most. Additionally, uncommitted dock shippers can still bid on the available uncommitted capacity.

6150. Finally, they have the option of completing a transaction with a firm service shipper if they need to in the circumstances. *[B1-2, pp 1-10 & 1-11]*

6151. These shippers also have access to unused land capacity. *[B1-2, pp 1-10 & 1-11]* In short, their options to access capacity have been expanded, not narrowed.

6152. During the hearing, there was considerable discussion regarding Trans Mountain's proposal regarding the use of the firm service fees collected. As I said before, to be clear, this application is dealing solely with these fees collected from the firm service offering. This is separate and distinct from the collection and disposition of the uncommitted dock bid premiums.

6153. As noted, Trans Mountain is not seeking to address this latter issue here. To the extent it is considered a problem by any party, that is for another day. This application is not trying to solve any issues associated with the dock bid premiums.

6154. While the firm service proposal may lead to a reduction in the overall quantum of the dock bid premium and the pool of funds it creates as the amount of uncommitted dock capacity available has been reduced, the proposal does not impact the current disposition of these funds.

6155. Trans Mountain simply considers that it is inappropriate to contribute the firm service fees to this pool. As I've noted, the firm service fees are a different matter and need to be treated differently.

6156. As you have heard from the Firm Shipper Group, the use of these fees as proposed by Trans Mountain is very important to them. *[Vol. 3, Para 3475-3493]* These parties are advancing these funds and they want to see them used on projects that will benefit all system users.

6157. You have heard that one of the key uses of these funds is to cover pre-development costs for potential expansions in the future. Trans Mountain has confirmed that it will not expend these monies without financial back-stopping, and hence these projects will proceed very slowly, if at all, absent this impetus. *[Vol. 2, Para 2706]*

6158. Ironically, parties like Chevron and the other shipper group members stress that the real solution here is to expand the pipeline system. The Board discussed with these parties what it could possibly do to encourage the advancement of such pipeline expansion plans. *[Vol. 3, Para 4568-4585]*

6159. We have an easy answer for you. Grant this application, and allow Trans Mountain to use the fees it collects as it has requested and as the firm shippers want. This is the most immediate and beneficial thing you can do.

6160. Contrary to what the opponents have told you, granting this application will facilitate the very important first step towards expansion that they allegedly desire; not impair this goal. Absent the proposed use of the firm service fees, the existing stalemate will continue and no positive action will be taken.
6161. At this point, Trans Mountain is compelled to respond to an unsubstantiated comment made by Dr. Gaske during his appearance. He speculated that the firm service proposal would incent Trans Mountain to hold back on expansion if it could keep selling options. This is simply nonsensical. The money collected does not go to profit Trans Mountain
6162. Furthermore, the intended use of the firm service fee is to enable Trans Mountain to undertake the preliminary work in furtherance of an expansion. That is what Trans Mountain has agreed to do, as these monies will facilitate the key first step towards an expansion.
6163. If anything, it is the existing land shippers who have the perverse incentive to maintain the status quo. They get the first dibs on the bulk of the system capacity. They get the majority of the benefit from dock premiums. These parties may enjoy life from where they sit now. Why not fight any suggested changes when you have a good thing going?
6164. I will now discuss a number of specific issues that I've touched upon already in a bit more detail. I would note to you that a failure to address every possible issue certainly does not mean that Trans Mountain concurs with the views expressed by opponents to this project.
6165. I'd like to now talk about the introduction of firm service. You've already heard from me that Trans Mountain is bringing forward this application in response to requests from shippers and producers who use its system.
6166. I stress this because of the apparent confusion exhibited by Chevron's expert witness, who seems to think that it is Trans Mountain who is out there beating the bushes to find new markets for Canadian crude oil.
6167. You have heard from Trans Mountain that shipments off the dock have been strong for an extended period of time and, in fact, peaked at an average of some 143,000 barrels per day in one month. *[Vol. 2, Para 2595]*
6168. The point is that parties have been exploring these new markets for some

time, and this has allowed them to identify the concerns that are causing discounts for Canadian crudes in the marketplace due to contract conditioning.

6169. Trans Mountain and the firm service shippers have asserted that the current bid process on the dock causes uncertainty with respect to their ability to obtain capacity in any given month. It also causes uncertainty with respect to the price for such capacity.
6170. By the way, we would note that Chevron appeared to agree with these positions. [*Vol. 3, Para 4056-4059*]
6171. The parties interested in firm service were seeking ways to address these concerns, and approached Trans Mountain regarding the development of a service product that would address these identified shortcomings. To be clear, that is why Trans Mountain is here with this proposal.
6172. It is also critical to understand that Trans Mountain sought to structure a firm service offering that would recognize the interests of land and dock shippers. That is why the magnitude of the firm service offering was limited to approximately 50,000 barrels per day.
6173. In the end, it was 54,000. That is why additional tariff provisions were added, to provide enhanced flexibility to parties to access additional capacity in the event their requirements in any month exceeded typical levels.
6174. The firm service offering was also brought forward in a manner that ensured that Trans Mountain continued to meet its legislative obligations under the *NEB Act*, including specifically its common carrier obligation.
6175. Trans Mountain was also keenly aware of the NEB's previously expressed views that oil pipelines must be willing to adapt to the changing needs of the marketplace as the market for oil transportation evolves. [*Tesoro-TMPL-1.19(b)*]
6176. Trans Mountain has always had to respond to changing shipper needs, and this has led to where the pipeline is today. This is nothing new for Trans Mountain.
6177. Trans Mountain also took guidance from the views previously expressed by the Board on numerous occasions that an oil pipeline can continue to meet its common carrier obligations if when bringing forward a new firm transportation service offering, it conducts a transparent and fair open season process for such a

service. *[Teroso-TMPL 1.10 and 1.19]*

6178. The NEB has opined that if the open season provides all potential shippers a fair and equal opportunity to participate, the common carrier obligations will be met. The Board also commented on leaving a portion of capacity available for monthly nominations.
6179. Of note is the fact that oil pipelines used this process to enter into firm contracts with shippers in a wide variety of circumstances ranging from new pipelines to the conversion of gas pipelines to oil, to the reversal of facilities.
6180. The NEB found these various proposals to be acceptable once it was shown that a transparent and fair open season had been conducted. *[Chevron-TMPL-1.22; NEB-TMPL-1.10]*
6181. The clear evidence in this proceeding confirms that Trans Mountain conducted such a transparent and fair process with respect to its firm service offering. The slide decks used by Trans Mountain to introduce its Firm 50 proposal were filed in these proceedings. *[CPC-Shell-SEMI.TMPL 1.1, Attachment 1 and Attachment 2]*
6182. This information was broadly distributed and confirmed that Trans Mountain was proposing to offer approximately 50,000 barrels per day of firm dock capacity and 25,000 barrels per day of spot dock capacity. *[Slide 4]*
6183. In addition, the extensive open season process is described in detail under Tab B-1 of the Trans Mountain application. Furthermore, the extensive open season materials circulated to all potentially interested parties were included in the application. *[TABS 8-13]*
6184. These materials included draft transportation service agreements and draft rules and regulations.
6185. In short, anyone wishing to participate in the open season was fully aware of the details of the proposed service offering. The evidence also confirms that Trans Mountain engaged in extensive consultations with all interested parties throughout the entire open season process.
6186. Trans Mountain received extensive feedback during this entire open season process and attempted to respond to any concerns that had been raised.

6187. Trans Mountain submits that it conducted a comprehensive open season process that enabled all interested parties to make an informed decision regarding whether they would or would not participate.
6188. Equally important is the fact that all such parties would have clearly understood the consequences of not participating in this service offering. There were no hidden or concealed consequences of the actions these parties would take.
6189. As a result, Trans Mountain asserts to you that it has fully complied with its common carrier obligations and that the requested service offering can and should be implemented. There is simply no basis for suggesting that these obligations have not been fulfilled.
6190. Trans Mountain received bids for some 95,000 barrels per day of firm transportation service. [B16-2] This overwhelming response reaffirmed the need for this service product in the marketplace and endorsed the rationale put forth by Trans Mountain.
6191. Notwithstanding this strong response, other than an adjustment to the volume to meet discrete vessel sizes, Trans Mountain maintained the proposal as originally presented.
6192. This decision meant that a number of bidders would be unsuccessful in gaining firm capacity at the Westridge dock. While this is in many ways unfortunate, it reflects the reality of the circumstances surrounding the Trans Mountain system today where at the moment there is very high demand for service on the system but a lack of willingness on behalf of parties to commit to and backstop a system expansion.
6193. In restricting the quantum of its firm service offering to 54,000 barrels per day, Trans Mountain was very cognizant of the NEB's earlier views that when a common carrier pipeline is seeking to introduce firm transportation service contracts, it should retain a measure of spot capacity on its system for spot shipments.
6194. While the precise amount of spot capacity to be reserved could easily be debated, Trans Mountain adopted a conservative approach and reserved approximately one-third of the total dock capacity or 25,000 barrels a day for such spot shipments.
6195. Again, Trans Mountain tampered its position by certain practical realities,

as it sought to reserve sufficient capacity to provide crude to the largest Aframax shippers that call it the Westridge dock or for two of the smaller Panamax ships plus barges.

6196. Trans Mountain asserts that this level of spot capability is, if anything, generous in terms of the percentage of spot capacity typically reserved in these situations, particularly given the excess demand for firm capacity reflected in the open season.
6197. Again, we submit to you Trans Mountain has clearly met this aspect of its common carrier obligations.
6198. During questioning, a number of parties alluded to the fact that Trans Mountain did not conduct a firm service offering for land shippers. This is indeed a curious point, particularly since the concern was never raised during the entire open season.
6199. This may be explained by the fact that before the recent extraordinary crude oil price differentials arose, land shippers had first dibs on more capacity than they needed. One might ask why they would seek to firm up this capacity and make commitments and obligations when there was no reason to do so.
6200. A number of the opponents to this application appear to suggest that because a change to the status quo would result from this service offering it should be denied. Surely, that is not a valid test for the Board to employ.
6201. To the contrary, Trans Mountain submits that this Board must balance and weigh all relevant interests and arrive at a conclusion that is in the overall public interest.
6202. These same opponents claim they will be harmed if the status quo is tampered with. While these claims must be examined at more than a superficial level to gain a true understanding of their merit or lack thereof, again, surely this cannot be a valid substitute for the Board's public interest test.
6203. At this point, I think I need to pause and say to you that Trans Mountain gets it with respect to the views being put forward by opponents. It fully understands that any party, land, dock, whatever, would like access to additional volumes of Canadian crude at a time when these crudes are severely discounted in the marketplace. We get it that the prevailing pricing environment will make the

volumes of Canadian crude attractive in any market, again, whether it's land or over the dock.

6204. However, this factor does not make the existing allocation fair or equitable. Likewise, this factor should not lead the Board to conclude that this firm service offering is inappropriate or ill timed.
6205. As I have explained in my earlier remarks, to a large degree the current market dislocations are a neutral factor in looking at this situation as they equally influence the attractiveness of Canadian crudes to both land and dock shippers.
6206. The Board needs to examine this proposal in this light and not be swayed by the events that have little, if any, impact on the fair and equitable treatment of all shipper groups that would result from the implementation of this proposal.
6207. Trans Mountain provided a detailed explanation of why the proposed reallocation remains appropriate in these circumstances in its rebuttal evidence. [p. 3-7]
6208. Now, Trans Mountain feels compelled to respond to assertions made by certain parties that its firm service proposal is unfair to them. In reality, when one strips away the unfounded assertions being made, their true objective becomes clear. These parties want to maintain the unfair and unbalanced results associated with the status quo.
6209. Land shippers say they will be harmed because Trans Mountain is taking away 27,000 barrels a day of capacity from them. This is simply not the case. These parties ignore several key facts.
6210. First, these parties currently get first dibs to five-sixths of the Trans Mountain capacity, or some 248,000 barrels per day. If the requested 27,000 barrels a day is reallocated, as I've said before, this amounts to some nine percent of total system capacity.
6211. Even if the current application is approved, land shippers will continue to get first dibs on 221,000 barrels a day, or approximately 74 percent of the overall system capacity.
6212. Furthermore, these land shippers conveniently ignore the fact that this level of system capability is sufficient to meet their typical needs. Look at the facts.

Look at the situation that prevailed for more than two years before the recent extraordinary crude oil differentials showed up.

6213. For this full period, from November 2008 when the system was expanded through to October 2010, the land shippers rarely, if ever, used their fully-allocated land capacity. [*Attachment NEB-TMPL-1.4(a)*]

6214. The land shippers also want to ignore and, more importantly, want you to ignore that Trans Mountain has proposed several tariff changes made in conjunction with the requested approval that will mitigate the risks associated with any possible capacity shortfall in any given month for these specific shippers. [*B1-2, pages 1-10 and 1-11*]

6215. These new proposals will effectively allow land shippers to have access to the entire pipeline system.

6216. These parties can bid on the uncommitted dock capacity and redirect it to land deliveries. Likewise, they can reach an agreement with firm dock shippers and redirect the crude to land destinations. But let's be clear here. These parties do not like these options very much because they would have to pay a market rate for such capacity, just like the dock shippers do.

6217. We understand that the prospect of having to pay a premium above base tolls is not overly attractive to these shippers when they have historically not done so. They've gotten used to obtaining such capacity without paying any premiums. While their views are understandable, this does not make it fair to reject the application based on these cries of harm.

6218. We cannot help but note that Chevron provides a good case study for the land shippers' case or situation. As noted in Trans Mountain's rebuttal evidence, did British Columbia's demand suddenly triple in the last few months?

6219. Chevron has confirmed that it expects to take close to its nameplate capacity of some 57,000 barrels per day for its refinery. However, at the same time, it maintains that it will only require volumes similar to its historic levels.

6220. As cross-examination of Chevron clearly confirmed, this is close to 46 to 47,000 barrels per day, and not a higher number. [*Transcript 3953-3972*]

6221. Likewise, again as noted in Trans Mountain's rebuttal evidence, demand

for Canadian crude in Puget Sound seems to have suddenly escalated from around 150,000 barrels a day to an impressive 400,000 barrels per day. This is almost double the forecast given to Mr. Matwichuk by these parties a short time ago.

6222. The information confirms to you that with the requested reallocation land shippers will still be treated very fairly.

6223. Now let's turn for a moment to the uncommitted dock shippers. Again we see double-edged harm. Again, they are wrong. The facts demonstrate that the demand at the dock has exceeded its allocated capacity for some time.

6224. As I said earlier, fundamentally allocating an additional 27,000 barrels per day to the dock can do nothing but assist in helping the situation.

6225. Next, we have these parties asserting that the remaining volume of uncommitted capacity will limit the number of players off the dock. Again, the facts show otherwise. We have five firm shippers, plus those who successfully bid for uncommitted capacity.

6226. As I noted, the number of players off the dock will increase in a material way if this proposal is accepted.

6227. Like land shippers, the uncommitted dock shippers also seek to ignore the added features in Trans Mountain's proposal that will assist them in acquiring dock capacity in addition to being able to use any unused land capacity. These parties will be able to enter into transactions with firm shippers when they are not utilizing their capacity to the full extent allowed. *[B1-2, pages 1-10 and 1-11]*

6228. Now, in this regard, opponents of Trans Mountain's application seek to cast the secondary market for pipeline capacity in a negative light. There is no evidence to support this perspective.

6229. In fact, as observed by Trans Mountain, not only does a secondary market already exist on its system, it is commonplace on most, if not all, contract carriers.

6230. Contrary to being a negative, this secondary market results in an efficient utilization of pipeline capacity. Sometimes the capacity is available at a premium; sometimes available at a discount. This is the market working, and this Board has never seen fit to try to interfere with this market.

6231. In the end result, there are numerous options available to land and uncommitted dock shippers to mitigate any perceived harm. As I said before, changing the status quo to derive a more fair and equitable result is not "harm".
6232. Another aspect of the firm service offering is the rights and obligations reflected in the firm transportation service agreements. Parties in opposition focus primarily on the option afforded firm service shippers to effectively double their current capacity in the event of a system expansion. [Sections 7.2-7.4]
6233. Unfortunately, there seems to be a significant amount of confusion around any proposed system expansion and the impact of the step-up rights.
6234. When Trans Mountain talks about TMX-2 and adding an additional 80,000 barrels per day to its system, the level of firm support required by Trans Mountain must be viewed in the context of the entire expanded system, which would be some 380,000 barrels per day. And that includes the current system capacity of 300,000 barrels per day.
6235. The financial support required by Trans Mountain is not only with respect to the incremental 80,000 barrels per day; it relates to the entire system.
6236. Additionally, the doubling of the existing 54,000 barrels per day of firm contracted capacity that is proposed by this term of the TSA to some 108,000 barrels per day must properly be seen in the context of the overall expanded system. This 108,000 barrels per day would be out of the total system capacity that would then exist of some 380,000 barrels per day.
6237. This has always been clear and Trans Mountain has made this view known that this is how an expansion scenario would be viewed. In fact, it's unclear to Trans Mountain why confusion has arisen among shippers or parties in this regard.
6238. In addition, Trans Mountain noted that this is a fairly normal commercial term to be offered to any parties stepping up and providing firm service commitments here for 10 years and contributing significant funds to the system and -- to the system for the betterment of all parties.
6239. The arm's-length negotiations that led to the inclusion of this provision in the transportation service agreements confirm that it is a response to market forces.
6240. Trans Mountain submits that this provision is a reflection of the value

contributed by the firm service shippers as they explore the development of new markets for Canadian crude oil. We submit this provision is reasonable and appropriate and should be approved as requested.

6241. We would also note in this regard that Trans Mountain has never indicated that it will not attempt to accommodate all service requests in the event it moves forward with an expansion.

6242. At this point, I need to respond to the positions advanced by certain opponents that one could indeed aptly dub the “don’t worry, be happy” scenario. “Dismiss the current application,” they say, “send everyone away with some encouragement to play nice and everything will work out just fine.”

6243. We can only stress to the Board that you should not don the rose coloured glasses when you enter your deliberations on this application. Not to be pessimistic, but sending all parties away with instructions to "play nice" will achieve absolutely nothing.

6244. Look at reality, the opponents do not want to lose something they see as valuable. It may well be valuable to give in to certain shippers given the preferential access to more volumes of Canadian crude they would get in today's market, if the status quo was maintained.

6245. Again, we get it. Again, this does not make the result fair. Parties are not likely to change their stripes and give up an economic advantage because they have been told to "play nice". Such an expectation is entirely unrealistic and will only lead to unwarranted delays and a perpetuation of the current unfairness.

6246. Look at the gap of -- the magnitude of the gap and the various positions being advanced to you here. Look at the items of controversy. Unfortunately “don’t worry, be happy” is not a viable solution.

6247. In a similar vein, the suggestion that you should deny this application and tell Trans Mountain that the real solution is an expansion of its system is entirely without merit. Trans Mountain has had its TMX-2 and TMX-3 plans on the drawing board for years. And as you've heard, has not been able to garner support or commitments to move those projects forward.

6248. Potential shippers have been unwilling to make the long-term financial commitments needed by Trans Mountain to backstop these expansions. To be clear,

Trans Mountain has incented to expand its system and considers that this application will enhance that prospect. In fact I'm told that if the opponents would like, Trans Mountain can make transportation service agreements available at the door.

6249. As indicated at the outset, the irony of hearing the opponents espouse the virtues of expanding the system is that this application provides the best bet for moving this option forward.

6250. As you will hear in a few moments, the uses of the firm service fee as proposed by Trans Mountain and supported by firm shippers, would enable Trans Mountain to move forward with numerous pre-development activities without having to get shipper commitments to backstop these expenditures.

6251. While this seems like a win-win for both supporters of this proposal and opponents, apparently the support of the opponents for such an expansion does not extend to the use of the firm service fees for this pursuit. Again we suggest to you, their actions speak louder than their words.

6252. In the end result, the firm service proposal has several components including the offering of firm service to the dock, the reallocation of 27,000 barrels a day of capacity from the land to dock and the acceptance of the various TSA provisions and consequential tariff amendments.

6253. All are key parts of this proposal and Trans Mountain requests that these proposals be approved in totality.

6254. Madam Chair, I note the clock and unfortunately I have to advise you that I'm not yet done but I am moving on to a new topic being the firm service fees and the determination of those fees.

6255. I was wondering when you wanted to take a break.

6256. **THE CHAIRPERSON:** This is a perfect time. Thank you.

6257. **MR. KEOUGH:** Thank you, Madam Chair.

6258. **THE CHAIRPERSON:** We'll take a break for 20 minutes.

--- Upon recessing at 10:25 a.m./L'audience est suspendue à 10h25

--- Upon resuming at 10:44 a.m./L'audience est reprise à 10h44

6259. **THE CHAIRPERSON:** Welcome back.
6260. Mr. Keough, please proceed.
6261. **MR. KEOUGH:** Thank you, Madam Chair.
6262. I would next like to move on to talk about the firm service fees and the determination of these fees.
6263. Through the open season process, parties interested in acquiring firm service were requested to submit a bid for firm service as part as of the executed transportation service agreements that were submitted to Trans Mountain.
6264. Firm service capacity was then allocated in accordance with the open season criterion with the end result that capacity was awarded to those offering 10-year contracts and making the highest bid for firm service.
6265. At the end of the day, under the terms of the TSAs, the firm service shippers will pay the applicable base toll and the firm service fee on a ship or pay basis providing a firm revenue stream to the pipeline for the full term of the TSAs.
6266. As defined in the transportation service agreements, the firm service toll is comprised of first, the effective uncommitted toll plus second, the firm service fee established through the competitive open season process. *[Application - Attachment 11 - Sections 1.2 and 7.2; Chevron.TMPL-1.19(4)]*
6267. It is Trans Mountain's submission to you that the firm service fee is both a toll and an efficient allocation of capacity tool. *[NEB.TMPL-1.15(b)]*
6268. As an allocation methodology, Trans Mountain considers that the fee is an efficient way to allocate scarce capacity and, indeed, reflects the value that shippers have placed on that service.
6269. In a number of ways, the fee is analogous to the current bidding system in place for the Westridge dock, as it was previously approved by this Board in respect of the Westridge dock bid premium. Market forces have determined the outcome of the open season process.
6270. To the extent that the fee is considered a toll, Trans Mountain considers

that the fee and the methodology used for the determination of the fee complies with the statutory requirements of the *NEB Act [NEB.TMPL-1.15(c) and 2.1]* and is consistent with the Board's mandate as set forth in Part IV of the Act.

6271. The firm service fee is just and reasonable because each fee is the result of a fair, open and transparent firm service open season that was held by Trans Mountain. It was pursuant to this open season that all existing and potential shippers were provided an equal opportunity to participate in the firm service offering under the same terms and conditions.

6272. Trans Mountain also submits to you that the fee is not unduly discriminatory. Each shipper has chosen to pay the fee they tendered and had a choice of whether they would do so.

6273. Further, the shippers that did submit bids chose the amount of that bid. The firm service shippers will pay a firm service fee which is in addition to the base toll for uncommitted deliveries to Westridge dock.

6274. The payment of the fee provides certainty of firm service to each of these shippers. As stated in Trans Mountain's response to Board Information Request 1.15(c), each firm shipper will receive first priority on apportioned access to Westridge, providing certainty to each of these shippers that they will be able to ship their product each month on a firm basis and at a certain price.

6275. Amongst the firm shippers, priority to crude types and loading windows is first allocated to the highest bidder.

6276. Further, Trans Mountain would note that the Board has most recently, in its RH-1-2007 Reasons for Decision at page 22, confirmed that economic efficiency could require tolls to be set to reflect the value of the service, rather than reflecting the actual cost of providing the service.

6277. Trans Mountain submits to the Board that the fee promotes economic efficiency, as it seeks to most efficiently utilize the pipeline system over the 10-year term in accordance with the terms of the TSAs and adheres to the principles of inter-generational equity and cost causation.

6278. The Board has stated that it has a wide discretion in choosing the method to be used by it and the factors to be considered by it in addressing the justness and reasonableness of tolls. *[RH-1-2007, page 21]*

6279. Trans Mountain submits to you that the methodology used to establish the firm service fee and the resulting firm service fees themselves are consistent with the Act and the Board's mandate.

6280. Now this takes us to another area, which is the discussion of the investment of the firm service fee. I've touched on it earlier, but I want to provide a bit more detail around it.

6281. Trans Mountain is proposing to treat the firm service fees collected over the term of the transportation service agreements as a customer contribution and is proposing to invest these fees into capital projects for the benefit of all customers. Trans Mountain considers that this proposed use is appropriate and consistent with regulatory principles of inter-generational equity and cost causation. *[NEB.TMPL-2.2]*

6282. In effect, using the firm service fee to fund the advancement of incremental capital projects results in projects that will benefit all customers being undertaken at a reduced cost to all ratepayers. Indeed, the costs associated with these projects will not be recovered from other Trans Mountain shippers, either currently or in the future.

6283. These capital projects are designed to enhance existing and future operations of the pipeline in accordance with the Notice of Proposal *[Application, Attachment 14, page 2]* and Section 4.2 of the transportation service agreements.

6284. This proposed use of the fee is supported by all of the parties who submitted transportation service agreements to Trans Mountain in the open season process. *[Application, Exhibit B1-2, page 1-12, paras. 40-41]*

6285. The rationale for using the fees as a customer contribution was discussed by Trans Mountain in response to National Energy Board Information Request 1.13. The use was determined with the input of the Trans Mountain shippers prior to the issuance of the open season documents and is supported by the firm service shippers through the TSAs.

6286. Shippers who have contracted for firm service have signed these TSAs, which explicitly direct that the fees are to be used for the identified purposes. The shippers who have signed the TSAs and who will pay the fees have, pursuant to Section 4.2 of the TSAs, agreed that those fees shall be used for the identified

purposes.

6287. If we look at Section 4.2 of the TSAs, it says that the firm service fees are to be directed to, and I'll quote this:

"...any prudently incurred costs, including carrying costs, related to the preliminary activities in support of expansion of the Mainline System, whether or not such expansion is ever undertaken or placed in service, including such costs incurred prior to and after the commencement date and to the advancement of incremental capital projects on the Mainline System during the term of the agreement."

6288. Breaking this provision down, two of the components of the provision are that Trans Mountain will use the fees first for preliminary activities in support of expansion, and second, for incremental capital projects on the Mainline System.

6289. In respect of the latter reference to incremental capital projects, Trans Mountain has provided a significant amount of detail as to the intended capital projects that would fall into each of these categories for investment of the firm service fee. We will not detail them in argument, but they are available in the materials filed.

6290. Trans Mountain can confirm that the fees will be invested into capital projects which are designed to enhance existing and future operations of the pipeline and, in aggregate, will be of benefit to all shippers. You have heard that Trans Mountain is an integrated system and rarely can anything be done that, in the end result, does not benefit all shippers.

6291. Trans Mountain also provided a significant amount of detail with respect to the items that may be included in preliminary activities in support of expansion. *[Tesoro.TMPL-1.17(d)]*

6292. Now, certain discussions occurred on day two of the proceeding between Trans Mountain and counsel for Tesoro with respect to the investment of the fee in preliminary activities in support of expansion of the pipeline, and appeared to proceed down a path of questioning whether the firm service fees preliminary activities in support of expansion would be prudent.

6293. Trans Mountain explained that exploring alternatives for expansion is to the benefit of Trans Mountain shippers *[Transcripts, para. 2010, 2664]* and that the

costs already incurred in relation to proposed expansion would also be valuable in assessing expansion alternatives for the pipeline. *[Transcripts, para. 2064, 2071]*

6294. As noted by the firm service shipper panel, investing such costs into preliminary studies will help shippers understand what an expansion might look like, whether the market is suitable and whether an expansion can be justified.
[Transcripts, paras. 3301-3303]

6295. Trans Mountain proposes to make an annual filing with the Board that will identify what fees have been invested, and in what projects. *[Transcripts, para. 2678-2679]*

6296. I'll now turn to a determination regarding investment of the firm service fees.

6297. There has been some discussion about how decisions regarding the use of the firm service fees will be made and who will make them.

6298. As you have heard from Trans Mountain's witnesses, Trans Mountain intends to meet with its shippers on an annual or, if necessary, more frequent basis to discuss the investment of the firm service fees. *[NEB.TMPL-1.13; Tesoro.TMPL-1.17; Chevron.TMPL-1.18]*

6299. While it would seek consensus on the use of the collected service fees, you could understand that different shippers will make different uses of the system and that there may be a divergence of interests in terms of where the fees should go.

6300. We submit that the evidence generally supports Trans Mountain's submission that seeking consensus may indeed be difficult. *[Transcripts, para. 2908]* I will have more to say on this when discussing the possible conditions to any approval that were put forth by staff.

6301. Trans Mountain has told you that they will meet with their shippers. They have told you they will seek or attempt to seek a consensus. Trans Mountain has told you that in the event a consensus cannot be reached, Trans Mountain has reserved for itself the right to determine where the firm service fees will be invested.
[Transcripts, para. 1956] This proposal cannot effectively work in any other way.

6302. Trans Mountain considers that it is both fair and reasonable to adopt this approach and this is because there are several mechanisms to ensure that the actions

of Trans Mountain are consistent with its obligations. First, decisions with respect to the use of the fee will be made within the constraints of the TSAs themselves.
[Tesoro.TMPL-1.17(b) and (e)]

6303. We also cannot forget the Board processes. *[Application, para. 43]*
6304. Trans Mountain considers that this approach is a fair and reasonable one to the determination of the use of the fee and that there are several checks already in place with respect to the use of these fees.
6305. Further, all capital projects will be reviewed with shippers and use of internal procedures as well as the OPUARs, GAAP, and the Board guidelines for Section 52 and Section 58 applications. Trans Mountain will also follow its all internal procedures with respect to AFEs.
6306. Moreover, Trans Mountain will report on an annual basis to the Board in addition to its quarterly reporting on the Westridge Dock Bid Premiums. At the end of the day, the cost which are put forth for capital projects are subject to prudence in accordance with section 4.2 of the TSAs.
6307. Again, I will come back to this point in the context of the conditions put forward by Board counsel when discussing the matter with the Trans Mountain witness panel.
6308. I would like to now comment on the use of the fee as a customer contribution. There has also been discussion in this proceeding about the use of the firm service fee as a customer contribution and whether this is appropriate. Trans Mountain considers that collecting the fees as a customer contribution is indeed appropriate.
6309. First, using the fee as a customer contribution will reduce the cost of future expansion while improving service to shippers. *[Tesoro.TMPL-1.6(d) and 1.17(b)]*
6310. Using the fees as a customer contribution will reduce the pipeline's capital costs and related impacts on rate base, which will translate into smaller toll increases for shippers. *[NEB.TMPL-1.13(a)]*
6311. This will translate into a lessening of future expansion costs while improving service to shippers through these system improvements. We submit to you

there are no constraints on your ability to approve the fee as a customer contribution.

6312. Further, the proposed treatment of the fee as a customer contribution creates less market distortion than having tolls artificially lowered through the return of the fee, which would effectively cause an additional subsidy from Westridge dock shippers to land shippers. *[NEB.TMPL-1.13; CPC-Shell-SEMI.TMPL-1.24]*
6313. A brief comment on AFUDC interest and tax. The treatment of AFUDC, the allowance for funds used during construction, tax and interest was generally addressed in the evidence and in responses to certain information requests. Trans Mountain also commented on these matters in reply evidence.
6314. Trans Mountain does not propose to spend a significant amount of time on these matters and argument but would highlight for you a couple of points. AFUDC generally compensates shareholders for use of working capital while capital projects are under construction. Whilst completed, capital assets are placed into service and AFUDC ceases and, of course, return on rate base commences. *[Reply Evidence, page 10]*
6315. Where firm service fees are collected, they will be assigned to capital projects based on a first spent criteria. Where firm service fees are collected but not spent on a particular capital project in any given period, the fees will be put in a special deposit account and interest will accumulate on the outstanding balance and AFUDC will not be charged to the capital project.
6316. Where capital spending exceeds the available firm service fees in a period, AFUDC will be accumulated on the capital projects having that positive balance. *[Reply Evidence, page 11]*
6317. Trans Mountain has stated in reply evidence that it will review tax planning options to identify the most efficient tax treatment for the firm service fee funds.
6318. As part of the implementation of the firm service, Trans Mountain is requesting certain tariff amendments to reflect the proposed allocation of capacity and the introduction of this firm service offering.
6319. A blackline of these revisions was filed as Attachment 11 to the Application. While we do not propose to go through each of these changes in detail, we would like to address four of the requested changes.

6320. First, the deletion of the Advanced Nominations provisions. As noted in the application, [*Page 1-20, para. Iv*] bidding for Westridge capacity each month currently requires nominations to be made two days in advance of regular timing nominations through the Advanced Nomination process. Trans Mountain is proposing to delete the Advanced Nomination provision for two basic reasons.
6321. First, it is no longer needed. And second, it cannot be administered effectively with the implementation of firm service.
6322. The advanced timing was introduced in May of 2006 to facilitate the Westridge bidding process to address shipper concerns that if they were unsuccessful in nominating to Westridge, re-routing of a large volume of crude oil to another pipeline that would potentially be full at that point could leave the crude oil stranded at the Edmonton hub.
6323. The severe apportionment on all oil pipelines exiting Alberta in the 2006 period was a key driver for the inclusion of this provision in the first place.
[Transcripts, para. 1418]
6324. Allowing advanced nominations allowed shippers to nominate to other pipelines in the event their bid for Westridge capacity dock was not successful.
6325. The circumstances are no longer the case. [*Transcripts, para 2489, 1418-1420, 1424*] In particular, with the increased ex-Edmonton take away capacity available from Enbridge and Keystone pipelines [*Application, para. 47*], we submit the likelihood of crude being stranded in Edmonton is significantly reduced.
6326. The testimony of Chevron in this proceeding suggests that the advanced nominations should be retained. The basis for this is found at transcript paragraphs 4342 to 4343, where reference is made to the current apportionment on lines such as Enbridge Line No. 5 or Line 6b.
6327. Trans Mountain does not consider the near term apportionment due to operational issues supports the retention of the advanced nomination provision as the near term apportionment will resolve itself.
6328. Second, nominations from the firm shippers will be submitted to Trans Mountain in accordance with industry standard Crude Oil Logistics Committee's Industry Calendar "Initial Notice of Shipment" due date.

6329. In the event Westridge dock shippers continued with the advanced nomination process two days in advance of firm service nominations, Trans Mountain would have two separate nomination dates.

6330. However, with firm service, Trans Mountain will not be able to confirm the uncommitted nominations in any event until the firm service shippers have submitted their nominations.

6331. Therefore, even if an advanced nomination was to be received, Trans Mountain cannot readily do anything with it in any event until it receives the nominations from the firm service shippers.

6332. This is because the firm service shippers have the ability to choose the loading windows and crude types to be transported in this period. And it is the crude type transported on the system which will ultimately determine the overall capacity of the pipeline, and therefore the available capacity for uncommitted shippers at the Westridge dock. *[Transcripts, para.2967, 2969]*

6333. Therefore, even if advanced nomination bids were submitted to Trans Mountain, it will not be possible to confirm the uncommitted shippers bid until after the normal bidding process. *[Transcripts, para. 2968]*

6334. As a result, the allocation of capacity on the pipeline will require that allocations be done at the same time. *[Transcripts, para. 2967-2971, 2493, 4507-4708]*

6335. In addition, Trans Mountain has indicated that if changes were to be made to its application in this regard, it would require a number of other changes as well.

6336. I'd like to turn now to the issue of priority destination. Again, Trans Mountain is proposing to delete from its tariff the priority destination provisions. *[Exhibit B12-2 - Reply Evidence, pages 9-10; NEB.TMPL-1.6]*

6337. The fact is that no shipper has ever been designated by the Board as having priority destination status.

6338. Further, regardless of whether such a provision is in the tariff or not, Trans Mountain submits that a shipper would have to make an application to the Board for priority status. Therefore, whether or not there is a priority destination provision in

the tariff, an application to the Board will be required.

6339. In the event the Board were to ever grant a priority destination, Trans Mountain would proceed to file appropriate tariff wording in accordance with the Board directions arising out of those specific circumstances.
6340. On balance, therefore, and having regard to the complexities of the tariff, Trans Mountain considers that it is appropriate to delete this provision from the tariff and address revisions to the tariff if the Board were ever to approve such priority destination status.
6341. Next the alternate delivery point. Trans Mountain's panel explained in detail the dynamic reallocation that the firm service tariff will facilitate for Westridge dock and land shippers.
6342. One piece of this dynamic reallocation which offers optionality for shippers is the ability for a successful Westridge dock shipper to redirect nominated volumes to a land destination. [*CPC-Shell-SEMI.TMPL-1.14; Chevron.TMPL-1.15*]
6343. Pursuant to Section 14.7 of the tariff, all shippers nominating both firm and uncommitted to Westridge will have the ability to reallocate deliveries to a destination other than Westridge. [*Application, page 1-21, para. v*]
6344. The fee for this service was negotiated in the context of the open season process. [*CPC.Shell.SEMI.TMPL-1.14; Chevron.TMPL-1.15*]
6345. I'll next turn to loading windows and commodity limitations.
6346. Section 22.3 and Section 6.8 of the Amendments reflects that loading windows will be allocated first to firm service Westridge shippers based on the ranking of the contracted bids and then to uncommitted Westridge shippers ranked according to the highest priority based on the Westridge dock bid premium. [*Application, page 1-22, sections vii and x*]
6347. Priorities respecting commodities will follow the same process. It is submitted that this is fair and appropriate in the circumstances.
6348. I'll now turn to a discussion of the possible terms and conditions to any approval this Board may choose to grant. As I've mentioned, Board counsel proposed to the Trans Mountain panel certain conditions that the Board may consider imposing

on any approval.

6349. Now before I get into each of the individual conditions, I wanted to first address the issue more globally and explain why Trans Mountain considers that these proposed conditions are not appropriate and why Trans Mountain respectfully requests that none of the conditions be imposed on any approval that you grant.
6350. You have heard extensively from Trans Mountain -- and you can see from the positions advanced by others, the difficulties associated with trying to reach a consensus on issues related to the Trans Mountain system.
6351. Whether a consensus is sought in respect of capacity allocation [*Transcripts, paras. 2904-2910*], changes to the ITS [*Transcripts, para. 2915*], or as Trans Mountain submits, in respect of the use of the firm service fee, the difficulty is not having discussions with shippers, it is reaching consensus among the diverse group of shippers that have interests that vary significantly.
6352. Imposing a requirement to go through a process to try to reach a consensus will inhibit Trans Mountain's ability to actually get on with these projects that will be beneficial to the pipeline system and all of its shippers.
6353. Further, it is important to highlight that the proposed investment of the firm service fees is directed at developing and implementing an expansion on the system. We have heard from each and every panel that presented testimony in these proceedings, the urgent need to investigate expansion capacity for the pipeline to address the insufficiency of capacity.
6354. Given the apparent and obvious need to commence work on the preliminary activities for the pipeline expansion, and to proceed with feasibility and engineering studies, conditions that either delay or preclude the proposed investment of the firm service fee or that delay the decisions on where to invest these fees do not, in Trans Mountain's respectful submission, serve the interests of all shippers.
6355. Trans Mountain does not consider that such conditions are consistent with the public interest.
6356. Any delay to the proposed investment of the firm service fees at a time when all shippers in this proceeding have provided evidence that there is a need for pipeline expansion is not in the public interest.

6357. Trans Mountain considers that following this application, including the proposed investment of the firm service fees without the proposed conditions, will facilitate the preliminary work on expansion as described in the application and I suppose the IR responses.
6358. I'll now turn briefly to each of the proposed conditions. The first one, a condition that the firm service fees could not be spent on a project until the project has received regulatory approval. *[Transcript 2705]*
6359. Madam Chair, Board Members, such a condition will be of a significant concern to Trans Mountain. And in fact, will basically preclude the conduct of most of the uses for the proposed fee.
6360. Trans Mountain would highlight that each of the firm service shippers had directed pursuant to Section 4.2 of the TSAs that the fees be spent in accordance with this provision; that is the cost related to the preliminary activities in support of expansion and to the advancement of incremental capital projects for the pipeline. This is what the firm service shippers who are paying the fee support.
6361. Further, in the event Trans Mountain pursued preliminary activities without such regulatory approval the proposed condition would place Trans Mountain at risk, potentially a significant amount of risk for any expenditures until regulatory approval was obtained.
6362. As noted by Trans Mountain in testimony, absent the investment of the fee or funding by some party, Trans Mountain is not likely to proceed with incurring these development costs. *[Transcripts, para. 2712]*
6363. This condition is likely, therefore, at best, to slow activity towards an expansion *[Transcripts, para. 2712-2714]* at a time when parties are in general agreement that an expansion is required because of the capacity constraints on the pipeline *[Transcripts, para. 2706]*; hence, this condition would be totally counterproductive. Moreover, the firm service shippers have agreed to fund projects in accordance with section 4.2 of the TSAs.
6364. As noted by Cenovus in testimony *[Transcripts, 3490-3492]*, permitting the collection of the firm service fee but preventing the investment of the money until regulatory approval could create a perverse outcome whereby firm shippers are paying the fee, yet Trans Mountain cannot make use of it, and therefore a different form of backstopping would be required in order to facilitate the work that is intended

to be completed through investment of the firm service fee.

6365. The second condition; implementation of a formal dispute mechanism prior to the Board complaint process. *[Transcript para. 2723]*
6366. Again, in Trans Mountain's view implementing a formal dispute mechanism process would have a negative impact upon Trans Mountain's ability to proceed with projects and the potential expansion of the pipeline. *[Transcripts para. 2724]*
6367. Such a mechanism will only serve to delay the ability for Trans Mountain to proceed with investment of the fee, to the benefit of all shippers, and would put Trans Mountain at the mercy of opponents to any proposal.
6368. The firm service shippers, by the terms of the TSA, support the use of the firm service fees towards expansion and capital projects.
6369. Further, we heard from Cenovus in the proceeding that shippers paying for preliminary activities in support of the proposed expansion is quite reasonable from certain supporters of the project to fund feasibility studies or other works that is related to understanding what expansion might look like and whether or not the market is suitable and whether the expansion is justified. *[Transcripts paras. 3301-3303, 3490-3492]*
6370. In addition, as I've noted, the Trans Mountain system serves shippers with wide divergence of interests. Trans Mountain has agreed that it will meet with its shippers and that it will seek a consensus. However, it must be fully recognized that a consensus may be very difficult to achieve.
6371. As noted by Mr. Stoness *[Transcripts, para. 2722]*, and I quote:
- "If we were to implement that, likely what would result is we would only implement projects that benefited every shipper or they would not happen and that would not allow projects such as dock expansion, tank expansion that's not used by others to happen, so we don't think that's appropriate."*
6372. End of quote.
6373. Further, as noted by Trans Mountain, while they will seek consensus they

consider it unlikely that consensus could necessarily be achievable in all cases. In Trans Mountain's view the existence of such a condition would negatively impact its ability to proceed with projects. *[Transcripts, para. 2721, 2722, 2724]*

6374. In short, parties in opposition to any project could hamstring the operation of the pipeline and the use of these funds.

6375. Trans Mountain explained in response to Board questions that there are indeed collaborative processes in place to address issues on the pipeline, such as issues related to capacity allocation.

6376. For example, Trans Mountain has discussions with its shippers, at least monthly, in the context of any ITS and meets regularly, if not monthly, with CAPP. These meetings generally address a wide-range of topics.

6377. The fact is that requiring additional meetings through a condition on a potential approval you may grant to this firm service application will, in Trans Mountain's view, serve only to delay the potential expenditures in support of an expansion and delay the investigation and implementation of such plans.

6378. Trans Mountain has proposed a preliminary list of projects for investment using the firm service fee. During this proceeding parties agreed that projects, such as those listed in section 42 of the application, will be of benefit to the system. *[Transcripts, Chevron and BP]*

6379. Requiring that Trans Mountain and its shippers proceed through a formal dispute mechanism before investing the firm service fees will only delay such investment and potentially continue or exacerbate the current apportionment on the system.

6380. Indeed, requiring a dispute resolution may result in potential implementation only of projects that benefit every single shipper from their perspective. As noted, this will not allow projects, such as dock expansion or tank expansion to proceed. *[Transcripts, para. 2722]*

6381. The next condition; to the effect that the customer contribution liability account could only be debited after the project obtains regulatory approval. *[Transcripts, para. 2734]*

6382. In essence, that has the same effect as the first condition. Likewise, Trans

Mountain has significant concerns with such a proposed condition.

6383. As noted by the Trans Mountain panel, one of the key elements of the proposed investment of the firm service fee is to use the fund to pre-build facilities that would increase the likelihood of expansion.
6384. Imposing this condition would require Trans Mountain to either be put at risk for TMX development costs or could indeed result in no TMX development taking place at all. This would obviously cause the projects to be delayed [Transcripts, para. 2735] which would serve no one's interest.
6385. As I've noted above, the firm service fee and its investment is already subject to numerous checks and balances, including Board approval of projects and an examination of the prudence of the expenditures. [Transcripts, paras. 2656, 2727, 2245, 2266, 2272-2293 and 2695]
6386. Trans Mountain submits to you that there is simply no need for any addition of condition in this regard.
6387. Finally, the last condition would be that Trans Mountain would be required to come back before the Board to determine how funds should be treated if they stay in the account for a certain amount of time. [Transcript, 2743]
6388. While Trans Mountain considers this to be unlikely it did note that the condition may not be overly onerous on its own, however, Trans Mountain is concerned with the implementation of this condition, particularly when combined with the other suggested conditions.
6389. Consider for example a scenario where Trans Mountain is precluded from investing the firm service fee until a formal dispute process has been completed or a regulatory approval obtained. Those processes could take an extended period.
6390. Trans Mountain has little, if any, control over the duration of such processes, yet imposition of the proposed condition could discourage discussions, particularly where shippers have the potential option of having the monies returned to them.
6391. Trans Mountain has stated in evidence that it expects to spend the firm service fees as they are collected. [Transcripts, paras. 2729, 2744; 2208-2209] Trans Mountain considers that the proposed condition is not required. The conditions

are not necessary and will only cause delay in putting the firm service fees to their intended uses and this would impact negatively Trans Mountain's ability to move forward with intended initiatives.

6392. In conclusion, Madam Chair, Board Members, Trans Mountain submits to you that all of the reasons and for all of the reasons noted herein and for the detailed positions advanced to you in evidence, Trans Mountain's firm service fee application should be approved as being consistent with the public interest.

6393. Trans Mountain respectfully submits to you that the relief it has sought in its application as detailed in paragraph 64 clearly meets the requirements of the *National Energy Board Act* and should be approved by you as being in the overall Canadian public interest.

6394. Subject to any questions, Madam Chair, those are my brief submissions.

--- (Laughter/Rires)

6395. **THE CHAIRPERSON:** Thank you, Mr. Keough. Just one moment, please.

--- (A short pause/Courte pause)

6396. **THE CHAIRPERSON:** I was asked by our Regulatory Officer to take five minutes' break for a sound check with the court reporter. So we'll take a five-minute break and, after that, the Members do have questions for you.

6397. **MR. KEOUGH:** Thank you, Madam Chair. I'm sure that won't make them any easier, but that's good.

6398. **THE CHAIRPERSON:** Thanks.

--- Upon recessing at 11:29 a.m./L'audience est suspendue à 11h29

--- Upon resuming at 11:44 a.m./L'audience est reprise à 11h44

6399. **THE CHAIRPERSON:** Sorry about our technology.

6400. Madam Mercier has some questions for you.

6401. **MEMBER MERCIER:** Good morning.

6402. **MR. KEOUGH:** Good morning.

6403. **MEMBER MERCIER:** Well, I will not make you sweat. I've got a very tiny one, and I think it's going to be very easy for you to talk about it.

6404. So I listened to your thorough arguments and there was just one point that you've highlighted that tweaked my interest, and it's an issue where you talk about the use of the fee and, you know, like you've got the list and everything, but what tweaked my interest is that the benefit of these fees, if they're collected, is that there would be no need for a backstopping agreement for a potential expansion.

6405. So I just want to understand what does that mean. It means that the Firm 50 shippers, because they've contributed to that fund, will not be constrained to get into backstopping agreements should there be an expansion? But would the same apply to other non-Firm 50 shippers?

6406. **MR. KEOUGH:** Okay. We need to be sort of clear, and if my remarks were not clear, I apologize for that.

6407. But when I was talking about there not being a need for backstopping arrangements, it was only with respect to the pre-development activities that would get the facility's expansion application to the point where it was brought to this Board. And those costs aren't small. I think there's an IR on it. The pre-development costs are quite extensive, in the tens of millions of dollars.

6408. And if the firm service fee could be used to fund those pre-development, pre-application activities, is probably a better word, then there would be no need to get backstopping for those activities. But once the expansion is on and an open season were held to determine if there's adequate support for the expansion, all parties are on an equal footing.

6409. And -- unless I'm going to get something thrown at me here -- I think all parties will be expected to provide the backstop via long-term firm arrangements for the expansion.

6410. So to be clear, the parties would only benefit from the fees being used for all the pre-development activities because those pre-development activities would not be undertaken by Trans Mountain if it had to assume the risk.

6411. **MEMBER MERCIER:** But those pre-development activities will benefit everybody on the system?
6412. **MR. KEOUGH:** Absolutely. Because everybody would see an advancement of the expansion proposals that otherwise would be in a stalemate.
6413. **MEMBER MERCIER:** Good. I'm glad I asked the question. It clarifies what I understood.
6414. Thank you.
6415. **MR. KEOUGH:** And I'm generally comfortable that I got it right.
6416. **MEMBER MERCIER:** Good.
- (Laughter/Rires)
6417. **THE CHAIRPERSON:** Mr. George?
6418. **MEMBER GEORGE:** Just a couple of clarification questions because I either missed the context or I didn't completely hear the answer.
6419. Towards the end, when you were talking about terms and conditions of approval -- and I think it came after or maybe it was within the context of the final dispute mechanism, but I don't think it was related to it -- it sounded like you were saying Trans Mountain is committed to consult with its shippers on the use of the firm service fee.
6420. Did I hear that right?
6421. **MR. KEOUGH:** Correct. But I will add the caveat that if those consultations are not fruitful and do not lead to a consensus, Trans Mountain has reserved the right to make the final decision.
6422. **MEMBER GEORGE:** I understood that to be your position. I was just referring to the commitment to consult, and nothing else.
6423. **MR. KEOUGH:** Yes.
6424. **MEMBER GEORGE:** Okay. Right before our technological challenge

Final argument
Mr. Keough

break, you were, I believe, discussing about the condition for coming back to the Board if the funds were staying too long in the account. Let me phrase it that way.

6425. And I thought you said on the face of this, it's not too onerous, and then you went on to say in conjunction with the others, it's a really bad thing.

6426. So if we said okay, we agree with you, all those other things are really bad, but we still want this one, what's your position?

6427. **MR. KEOUGH:** I think that that provision on a standalone basis, as I've said, would not be viewed as overly onerous and could be acceptable.

6428. What I highlighted was that if it were combined with the other conditions, there are lots of things that could occur that would drag out the timeframe that would be beyond Trans Mountain's control.

6429. So if that were the only condition that the funds were in the account for several years and not being utilized, then I'm not sure that the company will consider it to be a problem to come back and explain the situation to you.

6430. I don't think we would like to have an automatic mechanism that said what happens to those because there may be extenuating circumstances or there may be a project that's in the queue but hasn't really gotten to the point where the funds are being expended yet.

6431. So I think the preference would be not to have an automatic mechanism that said on the third anniversary of collecting any fees, "x" happens to them.

6432. I think it would be preferable to say on the third anniversary of collecting any fees for any specific year, if they weren't utilized, Trans Mountain would have to come back to the Board and explain why it needs to continue to retain those funds. Something like that as opposed to an automatic, it goes to the Loyola Keough Pension Fund -- that would be a good one actually.

6433. **MEMBER GEORGE:** Okay, is that a request?

6434. **MR. KEOUGH:** No.

6435. **MEMBER GEORGE:** No, I won't go there. Thank you, those are all my questions.

6436. **MR. KEOUGH:** Thank you, Mr. George.

6437. **THE CHAIRPERSON:** Thank you, Mr. Keough. These are all the questions from the Panel. Thank you very much for your argument.

6438. **MR. KEOUGH:** Thank you. I will be talking to you again tonight.

--- (Laughter/Rires)

6439. **THE CHAIRPERSON:** Tonight is the right word. All staff members have cancelled plans at seven o'clock this evening.

6440. **MR. KEOUGH:** Thank you.

6441. **THE CHAIRPERSON:** Mr. Davies, I don't know if you want to start just before lunch and interrupt your argument or if you would rather we take our lunch break now and come back all ready to hear you?

6442. **MR. DAVIES:** If I started, I expect I could be done around twelve-thirtyish, so I could go if you'd like. If you intend to take the break at noon, my preference would be to break now and come back after lunch.

6443. **THE CHAIRPERSON:** We are very attentive, so please go ahead.

--- **FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR MR. DAVIES:**

6444. **MR. DAVIES:** I better catch you when you're all ears.

6445. It is still morning, so good morning, Madam Chair and Members. I am pleased to present to you the final argument of the Firm Service Shippers, Astra Energy, Cenovus Energy, Nexen Marketing, PetroChina, and U.S. Oil.

6446. I have taken a different approach than Mr. Keough; I have given a copy of my chicken scratched notes to the Court Reporter and would ask that the evidentiary references be included in the transcript please.

6447. As you observed, Madam Chair, the Trans Mountain family is dysfunctional. Some of the kids play on the land, some of the kids play on the dock, some of the big kids play on both the land and the dock, and the kids just can't seem

to get along. Why is that?

6448. There are two main reasons for it. The first reason is that the Trans Mountain house is too small. The house simply doesn't have enough space for all the kids, and that has been the case for a number of years.

6449. The second reason is that historically Trans Mountain land kids have been treated pretty darn well, whereas as the Trans Mountain dock kids have not been treated very well at all. In 24 of the 26 months from November 2008 to December 2010, the land kids had more space than what they needed. *[Exhibit B12-2, pp. 5-6]*

6450. During that same period, the space for the dock kids was being significantly apportioned among them at levels of up to 100 percent. *[Exhibit B8-3]*

6451. And it's not just about the space. The land kids pay a cost of service toll for using their space, but the dock kids have to bid for and pay significant premiums to get any space at all and most of those bid premiums then go to reducing the tolls paid by the land kids.

6452. The revenue requirement to run the Trans Mountain house for 2011 is about \$270 million. *[Exhibit B8-7; Chevron.TMPL-1.11]*

6453. It is expected that the dock premiums alone will generate revenue for 2011 in the order of \$200,000 million. *[T. V2, 2790-2792]*

6454. The land kids get allocated about 83 percent of the house space and those dock kids that are fortunate enough to get space pay premiums above their cost to service tolls that pay about 74 percent of the cost of running the entire house. No wonder there is discord in the family.

6455. And this discord isn't a recent development by any means. Ms. Habib and Mr. George, you sat on the RH-4-2008 Trans Mountain capacity allocation proceeding that was heard in September of 2008.

6456. Dock kids like Astra Energy and U.S. Oil were then telling you that there wasn't enough dock space, that there needed to be a bigger Trans Mountain house, and that a capacity allocation caste system had developed amongst the land and dock kids. And here we are three years later talking about the same family problems.

6457. So what is the answer? One of the suggestions that we have heard in this

proceeding is family therapy. Let's establish a collaborative process designed to achieve consensus on things like space allocation. That's not going to work.

6458. In the existing house, the only way that you can give more space to the dock kids is to take space away from the land kids. It's a zero-sum game and if this proceeding has demonstrated anything, it is that there is no way that the land kids are going to voluntarily give up any of their space, and all the consultation and collaboration in the world isn't going to change that fact.

6459. Another suggested answer to the family discord is to eliminate the land and dock categories all together and allocate all the Trans Mountain space among all the kids every month based on an auction.

6460. You may recall that this was actually the proposal that was advanced by Astra Energy and U.S. Oil in the RH-4-2008 proceeding. The response from the land kids then was the same as the response from the land kids now. They don't like that idea one bit.

6461. Why? Because as Mr. McCutcheon of Chevron said, that would require the land kids to bid for capacity and they might not be assured of getting the capacity that they need. *[T. V3, 4451-4453]*

6462. My goodness, wouldn't that be an awful thing! It would put the land kids in exactly the same position as the dock kids find themselves, and the land kids certainly wouldn't want to see that happen.

6463. A last suggested answer to the family discord is let's get on with building a bigger house. Astra and U.S. Oil were suggesting that answer three years ago. Nothing has happened.

6464. Why? Because as I said earlier, the land kids have been making out pretty darn well. They have the bulk of the space, which has generally been enough to meet their needs, and they have the dock kids paying the bulk of the cost of running the house.

6465. Under those conditions, the land kids have absolutely no incentive to support an expansion. Indeed, their incentive is to keep the dock bid premiums as high as possible so that their tolls will be lower.

6466. Now, I know that conditions have changed a bit for the land kids since

November 2010. Extraordinary price discounts have been observed for Canadian light crude. Those discounts have resulted in increased refinery demand for Trans Mountain capacity and, as a consequence, the land is now under apportionment, too. And that land apportionment has kids like BP and Chevron now talking about expansion because they are now feeling some of the pain.

6467. But the fact is, that is all that they are doing at this stage, is talking about expansion. Talk is cheap, and expansion is not cheap. An expansion will require participants to make significant long-term financial commitments.

6468. Mr. Kelly of Purvin & Gertz tells us that he expects the market will react to resolve the current extraordinary price discounting such that within a couple of years we could be back to some normalcy and to no apportionment for the land kids.

6469. With that in mind, will Chevron and the Washington State refiners really step forward and put commitments on their balance sheets for 10 or 15 years to build a bigger Trans Mountain house? I guess we'll see, but I don't think we can bet the house on it.

6470. There is no silver bullet that is guaranteed to cure the Trans Mountain family dysfunction. Even an expansion, were it to garner shipper support, isn't assured of regulatory approval, and it's probably five years down the road, in any event.

6471. We can't all just continue to sit around waiting for something to happen. We've been doing that for too many years already. We need to make something happen. Action needs to be taken in the household now.

6472. As Ms. Zumwalt of Nexen said, markets don't get efficient on their own. Companies need to take action to make them efficient. And that brings me to the Trans Mountain firm service application.

6473. My five clients, the five firm service shippers, support an approval of the Trans Mountain application. Our submission to you is that an approval of the application would be in the Canadian public interest. I refer to the Canadian public interest because that is the test that the Board must apply in assessing this application; not at no harm to land shippers test, but a public interest test.

6474. The Board must balance the positive impacts of the firm service proposal against the negative impacts of the proposal and decide whether, on balance, the

proposal merits approval.

6475. So let's look at the benefits and detriments of the firm service proposal, starting with the benefits.
6476. My five clients were successful bidders in the firm service open season. There will be benefits that accrue to the five of them. And we don't apologize for that at all.
6477. Trans Mountain conducted a fair and transparent open season. All parties were given the same opportunity to acquire firm service and the benefits associated with it. And these benefits should form part of your public interest assessment.
6478. The specific benefits to the firm service shippers are described in their evidence, and let me observe, by the way, that the firm service shippers were under no obligation to file evidence in this proceeding. Their obligation under the transportation service agreement was to file a letter of comment.
6479. Their decision to file evidence and to present witnesses to be cross-examined on it is a reflection of the importance of the firm service to them.
6480. For Astra Energy, Cenovus Energy and Nexen Marketing, having firm service to the dock will provide transportation certainty that will enable them to develop long-term relationships with existing and new offshore markets. *[Exhibit C1-4b, C1-4c, C1-4d]*
6481. For U.S. Oil, having firm service to the dock will enable it to attain some security of supply for its Tacoma, Washington refinery. *[Exhibit C1-4f]*
6482. For PetroChina, having firm service to the dock will enable it to develop long-term relationships with Canadian suppliers in order for it to gain experience in processing Canadian crude slates in Pacific Basin refineries. *[Exhibit C1-4e]*
6483. The makeup of this group is noteworthy. There are long-time Trans Mountain shippers and there are relatively new Trans Mountain shippers. There are producer interests, marketer interests and refiner interests.
6484. And they are all looking for the same thing, transportation certainty, because transportation certainty allows buyers and sellers to transact business on a regular and predictable basis, which benefits the buyers in getting the crudes that they

need and benefits the sellers through the higher prices that they receive.

6485. For some of the firm service shippers, having firm service also addresses some outstanding equity issues. And what I'm referring to here is, first, the competitive position of U.S. Oil vis-à-vis the other Washington State refiners and, second, the competitive position of independent producers vis-à-vis integrated companies at the dock.

6486. In the case of U.S. Oil, its refinery is in competition with the four Washington State land refineries. The land refiners pay a cost of service toll to ship crude using their allocated land capacity.

6487. U.S. Oil, on the other hand, receives oil from Trans Mountain over the dock, which involves bidding for space and paying high premiums. So having firm service puts U.S. Oil on a more equitable playing field with the other refiners serving the Pacific Northwest market. *[T. V3, 3288-3290]*

6488. With regard to the competition between independent producers and integrated companies for dock space, the integrations that have refineries on the west coast and/or in offshore markets today have an undue competitive advantage. When BP pays a significant premium for dock capacity, it gets some of that premium back via the lower tolls that it pays for service to its Cherry Point refinery.

6489. When Chevron sells an occasional tanker of discounted Canadian crude to one of its refineries in Asia, what it loses on the crude price it gains on the refinery margin.

6490. As Mr. McCutcheon of Chevron conceded, Peter paying Paul is different than Peter paying Peter, which is why, as he told you, the integrations win most of the dock bids *[T. V3, 4333-4334]* because the independent producers, who are the Peters paying the Pauls, can't compete with the economics of the Peters that are paying themselves.

6491. So the firm service offering puts independent producers like Nexen on more of an equal footing with integrations at the dock. *[T. V3, 3497-3499]*

6492. So those are some of the benefits to the five firm service shippers, and let me make one last point here. The decision of these shippers to sign up for firm service was not motivated by the current discount pricing environment. They made their firm service commitments before the blow-out of the differential between WTI

and Brent. *[T. V3, 3371-3376]*

6493. Their commitments were made in pursuit of their long-term objectives; on the producers' side, to diversify their markets and on the refiner side, to secure reliable supply. My clients do not view firm service as a short-term fix to the current pricing environment. That is not why they signed up.

6494. Now, the public interest obviously transcends the interests of the firm service shippers and in that regard the evidence discloses that the benefits of firm service will accrue to more than just my five clients. Other Canadian producers will benefit, other Trans Mountain shippers will benefit and Trans Mountain itself will benefit.

6495. How will other Canadian producers benefit? In at least two ways, there will be a pricing benefit and there will be a market development benefit.

6496. With regard to pricing, if you take barrels away from existing markets and move them to offshore markets, the result will be to increase prices in the existing markets. And the introduction of firm service will have that effect. Buyers and sellers will now be able to, with certainty, conduct transactions for 52,000 barrels a day over the dock. And it's that certainty of being able to do business that will take those barrels out of the market. *[T. V3, 3420-3423]*

6497. Adding the certainty to the existing capacity will have the same effect as adding new capacity, which is to increase prices overall. *[T. V3, 664-665]*

6498. With regard to market development, the firm service provides a unique and important opportunity to assess whether west coast access makes sense for producers and offshore refiners. That is indeed PetroChina's very reason for participating, as a first step in determining whether and how Canadian crude might fit into its supply portfolio.

6499. Reference was made by Mr. Reimer of Cenovus to the example of the Pegasus Pipeline, where a small group of producers introduced Canadian heavy crude to the U.S. Gulf Coast six years ago, paving the way for what is today over a million barrels of pipeline capacity destined for that market. *[T. V3, 3246-3247]*

6500. The firm service on Trans Mountain will likewise provide an opportunity for offshore markets to assess the qualities of Canadian crude and if they like it, this market development initiative will open up a significant new option for Canadian

producers.

6501. How will other Trans Mountain shippers benefit from the firm service? They will benefit because the firm service offering will serve to encourage expansion. So that eventually there might be enough space in the house for all the kids.
6502. My clients see a direct link from firm service to expansion. If all goes according to plan, the firm service will prove up the concept that west coast access makes sense for Canadian producers and for offshore buyers, which will encourage others to make the same sort of transportation commitments that the firm service shippers have made.
6503. And in the meantime, the firm service premiums will be used to fund the studies necessary to understand what expansions might look like, so that when the time is right, informed decisions about expansions can be made.
6504. How will Trans Mountain benefit from the firm service? It will benefit by locking up 10 years of take-or-pay transportation charges for 54,000 barrels a day of capacity, which I might add, represents a significant financial obligation for the firm service shippers and an obligation that carries with it material risk.
6505. The oil market we see today may not be the oil market that we see a year from now and it certainly may not be the market that we see five years from now or 10 years from now. And irrespective of the demand for Trans Mountain capacity over the next 10 years, be it high or be it low, my clients will continue to provide Trans Mountain with a steady revenue stream.
6506. So those are some of the benefits that will result from an approval of this firm service application. There will be benefits to the firm service shippers, to Canadian producers, to Trans Mountain shippers and to Trans Mountain itself.
6507. Now, what about the detriments? In the evidence presented by Chevron, BP and Suncor, two detriments have been alleged. The first is potential harm to land shippers. The second is potential harm to uncommitted dock shippers.
6508. So let me deal with those. The allegation of potential harm to land shippers arises from the fact that as part of the firm service offering, 27,000 barrels a day will be reallocated from land capacity to dock capacity. The evidence does not demonstrate that this reallocation will cause any significant harm to land shippers. While the land category is now in apportionment, due to increased refinery demand

for discounted Canadian crude, that situation can be expected to resolve within a couple of years.

6509. In the meantime, if the land shippers want more capacity than what they have been allocated, there are ways for them to get it. They can make commercial arrangements to acquire capacity from either of the firm service shippers or from the uncommitted dock shippers. They have the entire pipeline capacity available to them.

6510. And of course the four Washington State refiners have had and continue to have alternate sources of supply. They are even arranging new sources of supply. And example is Tesoro's recent announcement of its plans to rail up to 30,000 barrels a day of Bakken oil to its Anacortes refinery. [*Exhibit B12-4, Attachment 1*] So it's not likely that the Washington State refiners are going to go short of oil.

6511. The other point to be made here, Madam Chair and Members, quite apart from the absence of evidence that the capacity reallocation will cause any significant harm to land shippers, is that the issue of capacity allocation is an issue of equity.

6512. There is a finite amount of capacity available on Trans Mountain. That capacity needs to be fairly allocated between the land and dock categories. And the fair way to do that is to balance the apportionment percentages of the two categories. That is the very balancing that Trans Mountain has done in its application.

6513. It looked at the respective apportionment percentages from November 2008 to December 2010. It had Purvin & Gertz prepare a throughput forecast and use the high throughput case to assess the respective apportionment percentages out to 2020.

6514. It even looked at the respective apportionment percentages during the recent period of unprecedented price discounts. And the conclusion in all cases was the proposed reallocation of 27,000 barrels a day from land to the dock is a fair and equitable result.

6515. The second allegation of potential harm is to uncommitted dock shippers. Here again there is no evidence to demonstrate that introducing firm service to the dock will cause any significant harm to uncommitted dock shippers.

6516. Yes, the uncommitted dock capacity will be reduced from 52,000 barrels a day to 25,000 barrels a day or from two Aframax tankers to one Aframax tanker, but the total dock capacity will increase from 54,000 barrels a day to 79,000 barrels a

day. Uncommitted dock shippers can make commercial arrangement to acquire dock capacity from the firm service shippers. They just need to be prepared to pay for it.

6517. This problem that remains at the dock isn't a consequence of the split between firm and uncommitted capacity. Over 30 percent of the capacity is being reserved for uncommitted shippers, which is far in excess of the uncommitted capacity reservations made on many other Canadian oil pipelines.

6518. The remaining problem at the dock is a function of the fact that there just isn't enough dock capacity to meet the total dock demand. And we all know what the answer to that problem is.

6519. But it's difficult to garner support for an expansion in circumstances where the holders of 83 percent of the pipeline capacity have been quite comfortable, thank you very much, because they've been getting the capacity that they need and they've been reaping the benefit of having significant congestion on the dock.

6520. So that's my discussion of the benefits and detriments of this firm service offering. And my submission to you is that when you put the benefits on one side of the ledger and the detriments on the other side of the ledger and when you weigh them, having regard for the evidence, the ledger tilts heavily to the benefit side, which shows that the application is in the public interest and should be approved.

6521. Now, Madam Chair and Members, I'm not going to stand here and tell you that an approval of this application is going to resolve all of the discord within the Trans Mountain family because it won't. The Trans Mountain house will still not have enough space for all the kids.

6522. But Mr. George, you hit the nail on the head yesterday with your Petula Clark song; shippers have not bellied up to the bar for an expansion and the Board can't tell them to. So you have essentially two choices; you can send the parties away for therapy, you can tell them to talk, which I suggest to you on the basis of history is likely to accomplish absolutely nothing, or you can approve this application which will more fairly allocate capacity between land and dock -- I think we're back on.

6523. So back to Petula Clark. I mentioned to you you have two choices; you can send the parties away to talk -- hello.

--- (Technical difficulties)

6524. **MR. DAVIES:** So back to Petula Clark.

6525. The point I was trying to make is that you essentially have two choices; you can send the parties away to talk, which I suggest to you is likely to accomplish absolutely nothing or you can approve this application which will more fairly allocate capacity between land and dock, which will curtail some of the sky-rocketing dock premiums, which will provide funds to investigate expansion opportunities, and which will create benefits to Canadians that significantly outweigh any costs.

6526. And by approving this application, Madam Chair and Members, the Board will not in any way be precluding the possibility of expansion. To the contrary, as I mentioned, the firm service shippers see an approval of this application as being a step towards expansion, by providing offshore market development and by providing funding for expansion studies.

6527. So, Madam Chair and Members, take Chevron and BP and Suncor at their word, they now say that they want to talk expansion, let them pursue expansion discussions. I'm sure Trans Mountain will be more than happy to oblige. But in the meantime approve this firm service application because to do so would serve the Canadian public interest.

6528. Before I conclude I want to briefly address one final matter and that relates to the issue of the step-up rights with respect to expansion capacity. The step-up rights were part of the service offering for which the firm service shippers submitted their bids. The rights were perceived to have value but they were not valued separately, apart from the rest of the firm service package.

6529. In my submission the Board should, in these circumstances, be very reluctant to remove the step-up rights from the package. And there's no reason for the Board to do that. There is no evidence to demonstrate that these rights will pose a problem to others seeking expansion capacity, if and when that capacity is made available.

6530. It is uncertain whether Trans Mountain will embark on any expansion and consequently whether the expansion rights will even be triggered. If Trans Mountain does embark on an expansion it is uncertain what the nature and the scope of that expansion might be. So at this stage we're dealing with hypothetical impacts of step-up rights in respect of hypothetical expansions.

6531. The evidence that we do have available is clear, if and when Trans

Mountain embarks on an expansion it will be incented to build as large an expansion as is necessary to meet market demand, which would include the demands of any firm service shippers choosing to exercise their step-up rights, as well as the demands of the other shippers subscribing to the open season. *[T.V. 2, 2462, 2463, 2957]*

6532. Further, the commercial terms for both the firm shippers and the other shippers in the case of an expansion would be identical. *[T. V. 2, 2479]* So there is no evidence that the step-up rights are a problem now or that they will be in the future.

6533. I would note, by the way, that step-up rights are not novel, as Dr. Gaske would have you believe, shippers on the Keystone and Southern Lights pipelines have similar rights to expansion capacity. *[Exhibit B8-7, page 31, Chevron-TMPL 1.22(6)]*

6534. So as I say, there is no reason for the Board to remove the step-up rights from the Trans Mountain firm service offering. If such rights ever do become a problem, and there is no reason to believe that they will, but if they do, the Board can at that time take such steps as is necessary to address any shipper concerns.

6535. So with that, Madam Chair and Members, my argument is done. Thank you for listening and I'd be pleased to respond to any questions.

6536. **THE CHAIRPERSON:** The Board has no questions of you, Mr. Davies, thank you very much.

6537. **MR. DAVIES:** Thank you.

6538. **THE CHAIRPERSON:** So we will take our lunch break and we'll be back by 1:30.

6539. Thanks.

--- Upon recessing at 12:30 p.m./L'audience est suspendue a 12h30

--- Upon resuming at 1:29 p.m./L'audience est reprise à 13h29

6540. **THE CHAIRPERSON:** Bon après-midi. Good afternoon everyone.

6541. Mr. McLarty, whenever -- I don't see Mr. McLarty. Mr. Crowther?

6542. **MR. DAVIES:** Madam Chair, I know that he's back from lunch. He'll be here I expect momentarily.

6543. **THE CHAIRPERSON:** Okay.

6544. I wanted to hear from the other granted sibling.

--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR MR. McLARTY:

6545. **MR. McLARTY:** Good afternoon, Madam Chair. Sorry I'm tardy; I thought an entrance would be appropriate.

6546. Madam Chair and Members of the Board, I'm pleased to be able to say that I'm presenting this argument on behalf of BP Canada Energy Trading Company, which I'll refer to as BP Canada.

6547. And I should also indicate, I suppose, before I start that I did make available to the court reporters a copy of my speaking notes and I would encourage though that they check the speaking notes against delivery because I am expecting a few changes.

6548. The Board's purpose here this week has been to address the application that's been made by Trans Mountain Pipelines Limited and that application requested that the Board approve Trans Mountain's proposal to contract 54,000 barrels a day of its total pipeline capacity of about 300,000 barrels a day to firm service shippers.

6549. Now, given I note that Mr. Keough's argument took almost two hours this morning, it strikes me that we can at least reasonably conclude that the application does raise at least difficult and contentious issues.

6550. So I want to make it quite clear at the outset that it is my submission and the submission of BP Canada that the evidentiary record that you have in front of you with respect to this application when it's considered in the context of the law that applies to this application leads to and should lead you to the unequivocal conclusion that this application does not warrant and should not be approved.

6551. More particularly, as to the issues that are identified by the Board in the issues list, it is my submission and the position of BP Canada that the offering 54,000 barrels per day of existing capacity to the Westridge marine terminal as committed

capacity, as proposed by Trans Mountain, is not appropriate.

6552. And as to Issue 2, that the re-allocation of 27,000 barrels per day of land capacity to the Westridge dock, as proposed by Trans Mountain is also not appropriate.
6553. I'm going to tell you that I and BP takes no position with respect to Issue Number 3, as to whether the open season was appropriate. And also as to Issue Number 4; no position is being taken as to the method proposed to determine the firm service fee.
6554. As to Issue Number 5, it is my submission and the submission of BP Canada that the use of the firm service fee is not appropriate.
6555. My argument though will focus primarily on Issues Number 1 and 2 and for the most part I will leave it some of my friends who will follow me, to develop the position on Issue Number 5.
6556. Now as I said, the application asks this Board to approve Trans Mountain's request to provide firm service on its system. That firm service application has, as Trans Mountain has noted a number of integral and essential components.
6557. The law as it applies to this application, I suggest, is primarily set out in sections 62, 63, 67, 68 and 71 of the *National Energy Board Act*.
6558. Section 71 of that Act has so far received the bulk of the attention in this proceeding. Section 71 requires an oil pipeline to receive, transport and to deliver all oil offered to it for transmission by means of its pipeline. That is the provision that has often been characterized as establishing the equivalent of "common carrier" obligations.
6559. As Mr. Stoness indicated when I was discussing with him Trans Mountain's position he told me that not everyone may have the same understanding of what a common carrier is nor of the obligations that a common carrier may have. Indeed, Mr. Stoness's definition of a common carrier, he said, includes contracts.
[Tr. P. 258]
6560. So let me give you my perspective of those common carrier obligations because that perspective, I will suggest to you, informs my submission on this

application.

6561. Simply put, section 71 imposes common carrier obligations on every oil pipeline under the Board's jurisdiction, absent an exemption, and none has been requested here.
6562. Now, issues have arisen before this Board, from time to time as to whether specific activities that are undertaken by a pipeline and an oil pipeline in particular, may take that pipeline outside the obligations expected of a common carrier. The Board has addressed that issue in the context where new facilities or services have been proposed.
6563. In those cases the Board has determined that an oil pipeline will meet its common carrier obligations when an appropriate open season is conducted and sufficient capacity is made available for uncommitted volumes [*Tr. P. 250*] and thereby it can allow or grant firm service.
6564. In that context the Board has determined that an oil pipeline can continue to meet its common carrier obligations and in some instances where only a very small portion of the pipeline capacity is actually reserved for uncommitted shippers. But in each of those cases the evidence has shown a demand -- have not shown a demand for a materially larger component of the uncommitted capacity.
6565. Notwithstanding that, the Board has in a number of cases [*OH-2-97 and H-1-2009*] been clearly been sensitive to the evidence, the substantive evidence before it, as to the potential demand for uncommitted capacity so as to ensure that sufficient capacity is made available for uncommitted shippers.
6566. Given this I would say I disagree with the definition that a common carrier can be either a contract carrier or an uncommitted carrier as Mr Stoness has suggested. [*Tr. P.260*]
6567. A common carrier is by the legislation required to deliver all oil offered for transmission. By virtue of the effect of a firm contract and the obligations associated with a firm contract, a contract carrier cannot satisfy those common carrier obligation.
6568. But all that really tells us is that the portion of a pipeline that may be under firm contract is not available to and cannot be available to satisfy the pipelines common carriage obligations. The fact that there is common carriage though does not

take the pipeline necessarily out of being a common carrier.

6569. So I'd say to you it follows from all of this; that whether Trans Mountain's proposal in front of you satisfies the statutory obligations, becomes a factual determination for the Board. And there are several questions, which, in my submission the Board will need to address from the evidentiary record that is in front of you.

6570. Those questions include, specifically whether there is a service being offered that would take the pipeline outside the scope of its statutory obligations, that's outside the common carrier obligations.

6571. Secondly, whether all parties that wished to participate in the service being offered had a fair and equal opportunity to participate, and as the Board has said, that's typically measured by "an appropriate open season". And thirdly, whether sufficient capacity is made available for uncommitted volumes.

6572. In terms of the application that's now available or now in front of you this means the pipeline which has a capacity of about 300,000 barrels per day, and Trans Mountain is proposing to commit some 54,000 barrels per day of that capacity to firm service shippers leave behind available for uncommitted shippers a volume of 246,000 barrels per day in total.

6573. Given that it is substantially a factual issue that is front of the Board I intend to focus my argument on the credibility of the evidence that is advanced for your decision, that suggests 246,000 barrels per day is an adequate volume available for uncommitted shippers. And when I say credibility what I mean to say is I want to address the substance that's behind the talk.

6574. The first point of note here is that Trans Mountain makes it clear that this application before you is a package and it's to be approved as a package. In that regard Trans Mountain has provided you with a rationale that relies on the Board taking and accepting the package as a whole.

6575. What I want to try to do is to unwrap some of that package for you to ensure that we, and particularly you the Board, understand how and on what basis the various components of that package also have underlying merit or not.

6576. The initial point of relevance to be identified by that is that Trans Mountain says that it is making this application because its shippers have requested

firm service.

6577. Now, I got to say I take no issue that some of Trans Mountain shippers may well have a desire to have priority access on the Trans Mountain pipeline. And I don't think anybody would necessarily be critical of them for having that desire.

6578. But that is of no material consequence, any more than would the matter that shippers -- other shippers would prefer that Trans Mountain not offer that priority access. What is important is whether Trans Mountain's response to that firm service request is, in all of the circumstances, a reasonable one.

6579. When you look at what Trans Mountain says about this application being in response to those shippers' requests, I would encourage you to be mindful of the position that Kinder Morgan communicated to this Board in its letter of comment in the Keystone XL proceeding [*Ex B1-12*].

6580. Kinder Morgan there complains that projects such as Keystone XL place Trans Mountain in a disadvantaged position relative to pipelines with contracted toll. And indeed that letter of comment goes on to say that continued approval of such projects by the Board would likely necessitate Trans Mountain to

“...seek the same financial certainty by applying to move some or all of their respective tolling practices to negotiated take of pay contracts”. [Ibid., para. 25]

6581. The Board approved the Keystone XL project, including the firm service request, so there is no surprise that we are now here considering an application by Trans Mountain that seeks to obtain the additional financial security to which it believes it is entitled, and that is financial security that is beyond that otherwise assured to it under the provisions of the *National Energy Board Act*.

6582. So is this application then as simple as Trans Mountain simply saying to you that it is responding to firm shippers' requests? I submit to you there is very much more behind this application and very much more to come should the Board decide to indulge Trans Mountain's position.

6583. The next question I think we need to address, and I would encourage the Board to address is what did Trans Mountain have that it thought that it was able to make available towards shippers stepping up to the plate with a request for firm service?

6584. Trans Mountain certainly was not advancing any new project or any new capacity addition nor any significant change in the use of the existing pipeline in terms of the way it operates or how it delivers oil.
6585. There is nothing in the application that would require or necessitate the support and financial underwriting of the firm shippers to enable Trans Mountain to proceed with any aspect of or any part of what it wanted to do to advance firm service on its pipeline.
6586. Trans Mountain has also not provided evidence to suggest that it has surplus capacity, that is capacity that is not otherwise in use or that is expected not to be in use during some term of the firm service agreement and that it would, therefore, like to make available to firm service users.
6587. So then what did Trans Mountain determine that it had that it could make available to firm shippers that would justify those shippers entering into long term firm service arrangements?
6588. The answer, it seems, is fairly simple and fairly obvious. It is a preference. It is priority access. Trans Mountain has offered firm service not for the purpose of advancing any other project or any other objective like underwriting a new pipeline development or enhancing a development. It indeed has offered firm service contracts for the sole purpose of creating a priority service for some shippers.
6589. Now, I have to say that I was struck by Mr. Keough's argument that it is unfair that dock shippers pay a premium but that land shippers do not have to bid or pay a premium to access land capacity.
6590. The concept of making space available only to the highest bidder, I can appreciate as being consistent with Trans Mountain's thinking, but certainly does not, in my thinking, mesh with my understanding or my views as to the regulatory principles of open access for shippers under common carrier principles.
6591. Land shippers are not asking for preferential access. They are simply asking for access and for their opportunity for access not to be sold as a preference to others.
6592. Trans Mountain has dressed this application up so that it looks somewhat less like the simple sale of a preference and so it is then able to argue that the

application will respond to various issues and will provide benefits; but be clear, that is not the offering. Indeed, Mr. Keough has not referred you to or shown you any evidence to demonstrate otherwise.

6593. This is firm service for the sake of creating firm service. The firm service offering is to obtain the financial security that Trans Mountain is seeking and to which it believes it is entitled and apparently without regard for the shippers that will have to bear the cost of that.

6594. Trans Mountain contends the firm service offering will address several problematic issues and will create benefits, but clearly that is not the objective of the offering, and I will come back to discuss the general lack of merit of those asserted benefits in a few minutes.

6595. Given that Trans Mountain had nothing more to sell than priority access, the question then must be asked what did it do to create something that looked different?

6596. Simply providing priority access for a premium fee, even masked with lots of lipstick and rouge in the form of the terms and conditions that Trans Mountain have applied to it would readily give rise to, I submit, a potentially larger legal challenge that the requirements might not constitute just discrimination and might be construed to contravene Section 67 of the *National Energy Board Act* and be considered as unjust discrimination.

6597. Having no new project or surplus capacity to market to potential firm shippers and with concern for an unjust discrimination challenge, Trans Mountain embarked on the creation of a product that it could rationalize to this Board as appropriate to sell to firm service shippers.

6598. That product was dock capacity. And of course what that is, is just shifting the priority access to a particular part of the system. Now I suspect if Trans Mountain had come to you and proposed to just auction off the 50,000 barrels of existing capacity to the highest bidder, it would have been very difficult to imagine how that too would not have raised some serious concerns about unjust discrimination.

6599. Moreover, even Trans Mountain has acknowledged that if it was going to meet the legislative requirements of the *National Energy Board Act*, it could not offer all of the available dock capacity to firm shippers. So where did that leave it? It left

it with the choice of then either pairing down any potential firm service offering or to find some more capacity to enlarge the potential dock offering.

6600. And that brings us to the determination by Trans Mountain that it should reallocate 27,000 barrels of capacity from land to dock. Mr. Keough says this is a changing of the status quo to achieve a more fair and equitable result. And of course Trans Mountain, in its position, contends this reallocation better reflects equities as between land and dock shippers.

6601. Now, I know the Board will consider the evidence with respect to the reallocation of capacity to the dock very carefully. But when you do, I would ask you to bear in mind the very high degree that this application is entirely balanced on that one very important component.

6602. And when you do think about that, I would ask that you reflect particularly carefully on the credibility of the evidence on which you are being asked to make this a viable application for Trans Mountain.

6603. The evidence on which I would encourage you to reflect is this. Firstly, the allocation of capacity as between land and dock is purely an issue that affects shippers. It is an issue in respect of which one would expect Trans Mountain should ostensibly be indifferent.

6604. It should be an important consideration for you in your investigation of this if Trans Mountain is not indifferent to that allocation to understand why.

6605. So if Trans Mountain is to be expected to be indifferent, how and why is it the issue of reallocation has now been identified and pursued by Trans Mountain and not by its shippers, which, of course, are the parties that should have the issue to the extent that one exists. And I say this, acknowledging that the firm shippers have jumped on the Trans Mountain bandwagon with respect to that issue.

6606. And indeed, Mr. Davies even went so far as to say that has been an issue that Astra -- the allocation issue has been an issue that Astra has complained about for some time.

6607. Well, I actually went back and had a look at look at the reference that the Mr. Davies was making to the position of Astra, and I had a look at the RH-4-2008 decision. And some of the things that I noted in there was that Astra was the only party to submit evidence that supported the removal of a particular aspect which

related to land destinations category.

6608. Astra, no doubt, did submit that dock shippers are prejudiced because dock is allocated only 17 percent of Trans Mountain capacity. But the other side of that coin in that same proceeding was that most parties opposed -- and this is set out in that same decision -- opposed the proposed changes on the basis that the current system is the product of extensive industry consultation, negotiation and compromise which continues to be endorsed or is not opposed by the majority of Trans Mountain shippers.

6609. The point of all of that is what we have and what, I think, has been obvious in this proceeding, is that there is no initiative that's been put forward for shippers to consider, for the Board to consider that would deal with the allocation issue and the equity issue other than as a tag-along and as an integral part of this firm service application.

6610. So it should not be a surprise that the issue that has arisen here is that you have Trans Mountain with a vested interest in advancing firm service and the firm service shippers, who have entered into contracts for the firm service as being on one side of that issue and parties who do not favour the firm service being on the other side of the firm service issue.

6611. That's quite different than a detailed consideration of the allocation issue and, in fact, it masks, you know, considerations of what that allocation issue is really all about and what the factors are that need to be considered.

6612. And I say to you that, absent the need that has been generated by Trans Mountain for this reallocation to accommodate the firm service application, the allocation of capacity as between land and dock shippers would not, at this point in time, be a ripe issue at all. [*Transcript, p. 5721*]

6613. Indeed, the only evidence in front of you on which the reallocation of capacity is contended to be a just and equitable reallocation, is made in the context of the firm service application and in the context of gaining your approval of the firm service application.

6614. Absent the need for the reallocation to make the firm service application work, Trans Mountain has not provided one objective piece of evidence, such as a shipper complaint, to confirm that the issue is, indeed, a real and not a contrived issue for purposes of its firm service application.

6615. Now, most, if not all, of Trans Mountain's shippers are involved in this proceeding and not one of them, nor Trans Mountain, has said to you that the reallocation of capacity is an issue that needs to be addressed other than in context of the firm service application.

6616. Even if we take the firm service shippers out of the mix, as much as 90 percent or more of Trans Mountain's shippers by volume, and that includes both land and dock shippers, are here saying that the allocation that exists is not presently an issue. *[Transcript p.617]*

6617. And I listened to Mr. Davies tell you earlier that this is a dispute between dock shippers and land shippers. I invite you also to look carefully at the evidence, not so. The evidence discloses quite clearly that at least half of the dock capacity, if not more, is used by land shippers that are also shippers on land and dock.

6618. The issue advanced here on behalf of shippers that complain about the reallocation of capacity are shippers that solely ship on the dock, or primarily ship on the dock.

6619. So what that tells you is that the issue that has been contrived or forced into this proceeding is not reallocation issue, not per se. It's an issue that relates and it's been generated by a firm service application on which the reallocation is predicated. That's all.

6620. As BP, I think, has told you in evidence, if there really is a reallocation issue that needs to be considered, then by all means, it should be considered. And it should be considered and assessed by all parties in a proper forum and a proper context, and not be biased by the need to support and substantiate this firm service application.

6621. If the reallocation of capacity, indeed, has merit, then it would be open to Trans Mountain to then suggest, yes, maybe it has an argument. But at this point in time, it has not done that.

6622. It has been made abundantly clear, and I think Mr. Davies' argument reinforces this, that the allocation of capacity in past years, indeed, has been a very contentious and difficult issue as among shippers. And I just read you a passage from the 2008 decision that just confirms that.

6623. But notwithstanding that, Trans Mountain did not consider it appropriate or necessary to consult with its shippers on the capacity allocation issue as an issue independent of the firm service application.
6624. There was and there has been no discussion as to the merit of Trans Mountain's proposed capacity reallocation that has not been biased by Trans Mountain's firm service application and its agenda to get that application approved.
6625. Finally, the basis on which the capacity reallocation is proposed, I submit to you, is without any real merit and is, at best, convenient for Trans Mountain. It is based on percentages calculated under significantly different allocation processes.
6626. And that's acknowledged by Trans Mountain, and calculated without any input, assessment or comment from those parties that stand to be most affected or impacted by that reallocation. Yet on that basis, Trans Mountain say to you this is a sound, reasonable basis on which to make that reallocation.
6627. In my submission, the reallocation issue that's been raised for you in this proceeding is one that has been contrived. It has been contrived to serve Trans Mountain's larger purpose.
6628. It is, moreover, short on any objective merit -- or short on objective merit and particularly so given the issue exists only to assist Trans Mountain with its rationalization of this application.
6629. So if you really want to test the merit and viability of the application that's currently in front of you, I ask you to address the question and maybe address it to Mr. Keough, as to how much of this application hangs together absent the proposed capacity reallocation. I submit to you, it is essential; the application doesn't work absent that.
6630. The firm service offering in front of you is for, as I've said, 54,000 barrels per day with a reservation of 25,000 barrels per day of dock capacity for uncommitted shippers. But the firm service offering also removes 54,000 barrels per day of capacity that would otherwise be available for uncommitted volumes for the entire system.
6631. We've heard it suggested in argument before that indeed by virtue of the redirection provisions and other provisions, the whole capacity of the system is made available to uncommitted shippers.

6632. With respect, that is just wrong. When the capacity is contracted away, that capacity is under the control of those firm shippers. What they do with it is their entitlement and their business. Whether they are prepared to contract it back or not, is also their business and there is no availability in that for uncommitted shippers to have any claim or any entitlement or any expectation that they will have recourse to that contract committed capacity.
6633. But the question that I think this Board is going to have to grapple with is the question whether sufficient capacity has been made available by Trans Mountain in advancing this application for uncommitted shippers. The answer, in my submission, is clearly no.
6634. There is, I say to you, no dispute that the pipeline is currently full without the firm service application. And the bulk if not all of the evidence, reflects a perception that the pipeline will continue to be full and indeed in apportionment, and at least full and in apportionment for the entire period of the firm service agreements.
6635. All of the projections are for usage to increase giving rise to the real and much more significant issues surrounding the need for increased capacity and capacity expansion.
6636. In that regard, I must say I couldn't help thinking about how and the purpose for which Trans Mountain has proposed the use of the firm service fees which is for capital expenditures in support of expansion.
6637. That proposal in itself seems to me to be entirely consistent and indeed predicated on the view that the pipeline is expected to continue to be full and probably in apportionment on a go-forward basis.
6638. If it were otherwise, the firm service fee proposal would simply not make any sense. Why would you expand if in fact there was existing capacity thought to be in existence on the pipeline.
6639. So in my submission, the evidence before you overwhelmingly points to the conclusion that by Trans Mountain limiting the capacity on its pipeline by contracting away to firm service users 54,000 barrels per day, Trans Mountain will not make sufficient capacity available for remaining uncommitted volumes, pure and simple.

6640. Notably, Trans Mountain is not able to provide the Board with any assurance that its reservation of capacity will be sufficient. [Tr. p. 365]
6641. I notice that this Board in other cases has had much less substantive evidence of the potential and required need for uncommitted capacity and notwithstanding, it has required the amount of capacity to be reserved for uncommitted shippers to be increased to ensure that there would be adequate capacity available for this use -- for their use.
6642. In this case, the evidence clearly warrants a reservation of the entire capacity of the pipeline. On that evidence, there is simply no reasonable basis for the proposed firm service offering.
6643. And it should be clear that the conduct of an open season does not fix the underlying offering nor is it an answer that Trans Mountain will not preserve sufficient capacity for uncommitted volumes.
6644. Now, Trans Mountain's answer to all of this, when I had a discussion with them earlier in the week, was to say back to me, "It's really about a fair allocation." And the comment was, "The difficulty with an allocation method when the pipeline is full is that there are parties that don't get what they nominate or they don't get what they did nominate." [Tr. p. 316]
6645. That, though, really misses the thrust of what the common carrier obligation requires. It's not about creating a better allocation methodology, even though Trans Mountain may think that is the effective or desirable result.
6646. This application is about contracting away firm capacity on a pipeline that is subject to the provisions of Section 71 of the *National Energy Board Act* and in doing so, assuring the Board that sufficient capacity is being reserved to satisfy uncommitted volumes. That requirement hasn't been satisfied.
6647. Indeed, the closest any of the evidence that Trans Mountain has put before this Board comes to suggest that the uncommitted volumes will be sufficient is Mr. Stoness' speculative assertion that it is likely that some of the demand for uncommitted off the dock will go away because it will be provided by firm service.
6648. Well that of course seems to belie the asserted intended benefits of this application that the firm service will be -- actually be used to establish new markets, and will not just be rerouted by the firm service shippers to satisfy those firm service

shippers historical markets in a more comfortable fashion.

6649. The points that come out of this, however, is that this Board is being asked to base its decision, and I might add a very important decision, on not one shred of analytical evidence, not one substantive piece of substantive evidence but rather, on Mr. Stoness' speculation that the firm service contracts will take away sufficient demand for uncommitted service from the dock such that the remaining 25,000 barrel per day reservation will be sufficient to meet uncommitted demand.

6650. Even if that could be assumed on some magical basis to have some merit, it fails entirely to address the total uncommitted volume requirement on the pipeline. And with respect to that issue, Trans Mountain has not even pretended to suggest that sufficient capacity will indeed be available to land shippers. That is all dismissed by Trans Mountain by arguing that it's just the impact of an equitable reallocation.

6651. Now, I fully acknowledge that this Board is the master of the evidence before it and that it is for you to decide on what you will rely for purposes of your decision.

6652. In my submission though the evidence before you, including Mr. Stoness' speculative view that it may -- of what may unfold in future, is neither a reasonable nor is it a substantive basis on which the Board can reasonably conclude that Trans Mountain will be able to satisfy its common carrier requirements in the context of the contract capacity that it is seeking approval of this Board to convey to firm service shippers.

6653. Given the absence of adequate capacity to meet uncommitted shipper volumes it seems to be implicit in Trans Mountain's proposals that it has suggested mitigation strategies to try to minimize the impact of this.

6654. I suggest to you that is no answer. But even if it were, given the obvious issues with Trans Mountain's ability to make sufficient capacity available for those uncommitted volumes, a mitigation strategy shouldn't be a consideration.

6655. But Trans Mountain says that if it's kind of wrong in -- I guess -- in the way it speculates on the way things might unfold in the future, then, that its provisions will make it possible for uncommitted shippers to repurchase capacity from the firm shippers in the secondary market.

6656. Even if it could be said or even if it could be said that such a mitigation

strategy made any real sense, which in my submission it does not, it seems unlikely, if one pays any attention to the evidence of the Firm Shipper Group, that they have very different plans for their capacity and are not likely to be inclined to just redirect those volumes to the uncommitted market so as to assist Trans Mountain to meet its common carrier obligations.

6657. In addition, given the priorities that are granted to each class of service in Trans Mountain's revised tariff, redirection is really only possible when the Trans Mountain pipeline is not full. Hence, that redirection opportunity will be of zero benefit to shippers when the pipeline is full. And the better evidence before you suggests this pipeline is likely to be full for the full term of the firm service agreements.

6658. So I say to you that the more cogent question that you probably need to grapple with is the one raised by Mr. Gasky as to why it makes sense in the context of the events and the circumstance that exist on the Trans Mountain pipeline system to focus on the development of new markets when the pipeline lacks the capacity to serve its existing markets.

6659. It is this apparent illogical approach that makes it necessary for Trans Mountain to actually develop these mitigation strategies and for the issues it creates and all of these issues create risks, risks that will potentially, as you heard in evidence yesterday, potentially risk that will force some existing markets off the Trans Mountain system.

6660. Now let me just address a couple of comments to the open season because an important part of the Board's consideration of the Trans Mountain application is the assurance that all parties had the opportunity to participate in this firm service offering through a transparent and open process.

6661. This open season, though, was quite unlike any other open season that has been previously brought before this Board. Typically, an open season is developed to solicit commercial interest and support for a project or a new service offering, such as a different use of an existing pipeline, with the terms and the conditions of the project fully developed.

6662. Every party that wishes to participate can subscribe, on the basis of the terms and the conditions offered, for a portion of the offering. And of course those are all consistent with common carrier intentions.

6663. When the open season is concluded, every party that wanted to participate in the project and that was prepared to make the commitment required by the terms of the offering is entitled to get a piece of that project. That is the typical open season. If Trans Mountain was to propose a capacity expansion one would expect that is exactly how it might work it's open season for that.

6664. Here, the open season was more than just a little bit different. Indeed, this open season was simply an auction with the highest bidders winning and the lower bidders losing. Nothing in that involved participation in the usual sense.

6665. But the more significant difficulty with this open season was that the offering was not structured for participation by all. Rather, it was an auction of priority service that placed existing land shippers in the impossible position of not only having to compete with other potential dock shippers but of also having to compete with themselves as dock shippers.

6666. That left existing land shippers, like BP Canada, severely disadvantaged compared to an entirely new player like the firm shipper PetroChina.

6667. Let me address a few comments to the alleged benefits that have been bandied about in respect of this application.

6668. Trans Mountain urges upon the Board that benefits will flow from the approval of this application to other than the firm. Mr. Davies spent some time in his argument outlining in detail the benefits that will flow to firm shippers from this application, and I say we take no issue with that.

6669. Clearly, the firm shippers will benefit. The issue here is whether the benefits will flow beyond those firm shippers.

6670. Specifically the assertions that are made to this Board are that this application will do two things and Mr. Davies reiterated this. It will assist in opening up of new markets and will improve netbacks to all producers.

6671. Now, I rather doubt that anyone involved in this proceeding would have any objection to an application that has the effect of opening up new markets, that is, of course, unless it is -- unless the opening up of those new markets is to be achieved at the expense of disintitling existing markets and that unfortunately is the reality of the application that Trans Mountain asks you to approve.

6672. And the evidence in this case is quite clear, there is no new capacity being offered, there are no new facilities being developed. Indeed, there is nothing of a tangible nature that is new here in any respect.
6673. This is simply a re-arrangement and a shifting of the parties entitled to participate so that some are provided a priority, which means some will benefit and the others will bear the burden of those parties obtaining a benefit.
6674. Indeed this is an application that promotes the creation of winners and of losers, and that, in my submission is the very anthesis of the common carriage principles that are set out in section 71 of the *National Energy Board Act*.
6675. It's not insignificant here that the winners will be those that have paid a premium, not to participate in anything, but rather for the pure entitlement to have priority service. And the losers, well those are the ones that are left with the protection assured to them of statutorily prescribed regulated rate services.
6676. Now, I must say, that seems to me to be a highly unusual result to construe as being reasonable from a statutory provision designed to promote fairness and sharing.
6677. The other potential benefit that has been projected from this application is that higher netbacks will flow from it to all producers. Trans Mountain has made a great deal of this asserted benefit but with other than utterances of the platitudes, there is again not one shred of tangible evidence that the application, if approved, will, or is even likely, to produce those increased netbacks.
6678. There is no substantive evidence to confirm that by shuffling how the existing Trans Mountain pipeline capacity will be used by different players, that it will result in benefits to all producers.
6679. Indeed, if that assertion was true, the Board might have expected to see something like a netback analysis of some of type. That is typically the type of evidence that this Board has had available to it in other cases where it is asserted that increased netbacks will occur and have been promised.
6680. There is, though, no such substantive evidence here. Even more significant in my discussion with Mr. Kelly on that very point he was not able to -- reluctant to identify for me the market mechanism that he thought would be at play to produce those improved netbacks.

6681. Eventually Mr. Kelly, albeit reluctantly, acknowledged that the market mechanism that is commonly understood to cause all boats to rise with the tide is an increase in take-away capacity. *[Tr. P. 703]*
6682. Notably, Mr. Kelly's reply evidence describes exactly that mechanism in the context of Bakkan supplies. *[Ex. B12-4, p4, lines 16-24]*
6683. There is, though, no capacity addition associated with this pipeline. There is no basis on which an expectation for all boats in the Alberta supply market to rise with the tide might occur.
6684. So what do we then have in terms of an argument that producers will benefit. Well, we have the explanation from Trans Mountain and supported by the firm shippers, that the certainty associated with firm capacity will, in some measure, be expected to have a beneficial impact on the market price.
6685. There is again no analysis of this and there is no indication of the magnitude of this, and more significantly, there's no indication of the market mechanism that will actually produce this result in terms of firming up 50,000 barrels a day of supply in a market of more than 2.2 million barrels. *[Tr. P.5877]*
6686. I think one could readily think that if you have 50,000 barrels a day of contract supply that is firm, it might well indeed have an impact on the top part of market. Now, if you have an impact on the top part of the market where the price is higher, how does that flow down to the clearing price at which the market is -- the rest of the market is cleared? I submit it simply does not.
6687. So might there be a marginal -- a small impact and I suggest it would be small, possibly, but this is not an impact that will result in an overall netback where all producers will benefit. Those few that had that supply, that firm market might, that's it.
6688. So the evidence before you is that at very best, the benefits that are asserted to flow from this application are just not well established, they're not well founded and if realized, in the context of new markets, will likely only be realized at the expense of existing markets and existing shippers.
6689. So in my submission the absence of a credible basis for this application is revealed most clearly by the Trans Mountain agenda getting this application

approved, not for shippers but to fulfill its own objective of seeking financial security.

6690. Not all oil pipelines in Canada have the foundation of contract financial security, and indeed such security is typically associated with unique projects that have significantly different risk levels associated with their establishment than we see here.

6691. There are, in any event, other options for oil pipelines to obtain the additional financial security that Trans Mountain desires; the Enbridge competitive toll settlement, being one very recent example. *[NEB Order TO-3-2011]*

6692. The absence of a credible foundation shows as well in the various disparate components of the package that Trans Mountain is asking you to approve. And I say to you it's not necessary to look very closely to see that those various components are not and have not been advanced as having merit outside the context of the firm service application and that those various components are all made necessary just to make this application all hang together.

6693. There are as well very few precedents or well accepted regulatory principles that have been advanced in support of this application or, indeed, of any of the various elements that are necessarily integral to this application.

6694. And as I had said, the substance of the application itself is the request for approval of priority access and for the payment of a premium to the established toll.

6695. Now, it doesn't matter how you dress it up or the number of filters that you impose upon that, like an open auction or a so-called equitable reallocation or customer contribution, that may -- that customer contribution I say to you really only deflects the appearance of the premium going -- not going to into Trans Mountain's jeans directly and it remains that the substance of the application is the payment for a preference and I say to you in the context of a common carriage obligation that's just wrong.

6696. Now, I do intend to leave it to some of my colleagues to develop some of the other issues that are raised by the Board's issue's list, but I would like to leave the Board with four important concluding thoughts.

6697. First, this firm service application is not really about equities, it's not really about new markets, and it's not really about netbacks; it's really about Trans Mountain following through on what it advised this Board in the Keystone XL

proceeding was its view of how it felt Trans Mountain should be treated fairly in the context of other firm service projects being approved.

6698. This application is about Trans Mountain advancing a proposal that will aid and assist Trans Mountain to protect its rights beyond the manner in which those rights are already assured to it by legislation as a common carrier.

6699. Trans Mountain is convinced that it should be entitled to sell firm service on its pipeline and be treated like other contract carriers. This, even though there are no real similarities between this firm service application and any other firm service application that has been previously approved by this Board.

6700. And if you really need to consider how this impacts matters as we have them in front of you, you will see that there's an allocation of capacity or the -- that the shortage of capacity issue has been the focus of considerable attention by just about every party.

6701. And the question the Board is asked is, you know, why is it, what's the impediment that's being created here to the establishment and allocation -- or establishment of new capacity?

6702. Well, Trans Mountain itself, I think, gave you some insight into that when they, in their reply evidence -- or rebuttal evidence yesterday told you about the last open season and the response to that last open season. What they told you is that the open season was for something that would take the system from 300,000 to 400,000 barrels per day which is an incremental amount of 400,000 barrels per day.

6703. The commercial arrangement that Trans Mountain was seeking with its shippers was for 340,000 barrels per day of that capacity to be committed, otherwise, made firm. In essence, an integral aspect of that application was the conversion of the Trans Mountain system from a common carrier to a firm carrier. There was no capacity addition offered independent of the existing Trans Mountain system.

6704. So is there an impediment established by the manner and the way in which expansion projects advance; indeed there is.

6705. Notwithstanding that, as Trans Mountain indicated, it did get a very substantial response, even to that proposal, just not a response that was quite large enough apparently for Trans Mountain to decide that it was prepared to accept the risk of an expansion.

6706. The second of the four points that I wanted to leave you with or the four thoughts that I wanted to leave you with is this. If this Board should determine there is a sufficient basis to grant the application, I would encourage you to consider the degree to which Section 71 of the *National Energy Board Act* will be hollowed out.
6707. That will follow if Trans Mountain is authorized to provide priority service on its pipeline on the pure basis that providing a priority for an increased fee does not constitute unjust discrimination and the only other constraint to offering priority service is the conduct of an auction at which all parties are allowed to bid.
6708. Further, that offering of priority service for the sake of providing a priority I ask you to consider whether that is acceptable as constituting a difference in terms of traffic of a different description as contemplated by Section 62 of the *National Energy Board Act*. In other words, creating a distinction for purpose of creating a distinction.
6709. The third important thought I would like to leave you with is this; if this application is approved, the message will be delivered that it is then up to all uncommitted shippers remaining to compete as best as they are able with other shippers to secure their position with respect to any shortages of available pipeline capacity.
6710. So if the objective intended by Trans Mountain or this Board is to drive Trans Mountain's remaining uncommitted shippers into a bidding war for all remaining pipeline capacity, the approval of this application will certainly provide a very strong incentive to that end.
6711. And that seems to me to be entirely contrary to what Parliament might have had in mind when it enacted Section 71 of the *National Energy Board Act*.
6712. Finally, I would like to comment on what I perceive as concerns that the Board might have for leaving various issues unresolved if it were to decide to reject this application. There are two points I would like to make there.
6713. One, I would encourage the Board to recall that this is -- and you were operating as a quasi judicial board in this proceeding, and your decision is required to be made on the basis of the evidence before you. That might not always enable you to satisfy your desire to resolve the industry problems for which you also have regulatory responsibility.

6714. On the other hand, the Board does have available to it a broad range of authority to allow it to address industry issues that it may perceive to exist and to do outside the context of your decision on this application or on like applications.
6715. The second of these two points is that I would encourage you to be a little bit circumspect about the issues that have been identified for you. Some of those, like the need for new capacity indeed are real, but the Board will obviously need to be cautious as to the degree that it may wish to take a position on such an issue.
6716. As to other issues, like capacity allocation and dock premiums, I would suggest that the Board be cautious to distinguish as between which of those are real and require your intervention, and particularly your intervention now, and those that have been contrived for purposes of this application or that have been generated by this application.
6717. And in that regard, I ask you to bear in mind what this application does, and that is that it commits not dock shippers as against land shippers, as Mr. Davies would ask you to believe; what it does is it pits uncommitted shippers as against firm shippers and in respect of the approval of this application.
6718. Madam Chair, those are my remarks. I am sorry I have taken as long as I have. If I am able to answer questions of the Board, I would be happy to do so.
6719. **THE CHAIRPERSON:** Don't be sorry, we didn't even feel the time. It was interesting to hear you, so we didn't feel the time that has passed.
6720. **MR. McLARTY:** Thank you.
6721. **THE CHAIRPERSON:** Thank you very much for your argument. Mr. George has questions for you.
6722. **MR. McLARTY:** Certainly.
6723. **MEMBER GEORGE:** Not being a lawyer, I am probably going to be asking your help to understand some of the lawyer arguments here.
6724. **MR. McLARTY:** Sure.
6725. **MEMBER GEORGE:** The first question would be I thought you said

that Section 71 says that any potential exemptions prescribed by the Board are only for new capacity. Did I hear you correctly?

6726. **MR. McLARTY:** I hope not.

6727. **MEMBER GEORGE:** That I didn't hear you correctly?

6728. **MR. McLARTY:** I hope you didn't hear me say that.

6729. **MEMBER GEORGE:** Okay.

6730. **MR. McLARTY:** If I did, I apologize. It certainly wasn't my intent to say that.

6731. **MEMBER GEORGE:** You were talking about -- this is at the very beginning, you were saying, okay, there's the law, there's Sections 62, 63, 71, you named another one in there, which I forgot to note down -- 67. Thank you, Madam Chair.

6732. You were talking about the common carrier obligation to all oil and that's when I thought you said that. Do you remember what was the -- what you said in terms of Section 71 in that context?

6733. **MR. McLARTY:** I think what I said about Section 71 is it reflects the -- what are commonly understood to be the common carrier provisions in the *National Energy Board Act*; and that the common carrier provisions apply to pipelines -- all oil pipelines in Canada, absent an exemption being obtained, that an exemption could be obtained not by Section 71 but an exemption is allowed in the -- I can't remember which section of the *National Energy Board Act*, and I simply acknowledged that the Board does have authority to grant exemptions to those provisions. And I observed that no exemption request has been made to you.

6734. **MEMBER GEORGE:** So if the Applicant didn't ask for an exemption under 71.1, I believe, then we should reject the application?

6735. **MR. McLARTY:** Oh, not at all, I'm not suggesting ---

6736. **MEMBER GEORGE:** You can tell I'm not a lawyer.

6737. **MR. McLARTY:** I don't think those things necessarily follow. I think

the basis on which I would suggest and I have suggested that the Board reject the application are for the large number of reasons that I have set out in my submission and, in particular, that the application simply doesn't meet the factual test that the Board has established of reserving adequate capacity for uncommitted shipper volumes.

6738. But that's a question of fact, and I'm suggesting to you that the evidence in this proceeding demonstrates that.

6739. **MEMBER GEORGE:** Thank you for that clarification.

6740. Also towards the beginning of your final argument, I thought you said that the application is really to give priority service or access to a small group of people. So is priority access something you object to in general or just specifically in this case?

6741. **MR. McLARTY:** Well, I'm suggesting that priority access simply for reason of paying a higher fee is inconsistent with common carrier provisions. And yes, I object to it on that basis.

6742. **MEMBER GEORGE:** Thank you.

6743. **THE CHAIRPERSON:** Thank you again, Mr. McLarty.

6744. **MEMBER GEORGE:** I'm sorry, I have one more.

6745. **THE CHAIRPERSON:** Sorry.

6746. **MEMBER GEORGE:** It was thank you to the answer to that question. I have one more question.

6747. **THE CHAIRPERSON:** I have no choice, Mr. George.

6748. **MEMBER GEORGE:** It was not a general but a specific thank you.

6749. At one point, and I've got it down at 2:12 today; I don't know what -- I'm trying to find the context here, I thought I heard you say that because the allocation issue is part of a package deal that it's inappropriate for the Board to consider it; is that correct interpretation of what you said?

6750. **MR. McLARTY:** No. I hope I didn't leave you with that impression. What I was suggesting is that there is a package deal and I would hope that the Board would consider the merits of the components of the package individually and that you don't simply say, well, it's part of a package so if it's consistent with the package then it all must be good.

6751. My point was simply to say, when you got a package in front of you look at the components and if the components are reasonable then the package is probably reasonable; if the components to the package don't make much sense then you have to ask yourself the question, is the package reasonable.

6752. **MEMBER GEORGE:** Thank you, sir, I now understand your final argument much better.

6753. **MR. McLARTY:** Thank you.

6754. **THE CHAIRPERSON:** Thank you, Mr. McLarty.

6755. I have no questions for you.

6756. **MR. McLARTY:** Thank you.

6757. **THE CHAIRPERSON:** We're ready for you, Mr. Bergner, whenever you are.

--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR MR. BERGNER:

6758. **MR. BERGNER:** Good afternoon, Madam Chair, Board Members.
Bonne après-midi.

6759. It's my privilege this afternoon to present final argument on behalf of Chevron Canada Limited and Chevron Canada Resources which I will collectively refer to as Chevron.

6760. I may take a moment first to apologize publicly and on record to the Court Reporter, to whom I have handed my speaking notes, such as they are. I've noticed a hybrid of approaches, some saying they will submit references later, some are including them in the speaking notes; I have included most of the references in my speaking notes.

6761. With that, bearing in mind the Chair's directive of yesterday to not review the evidence and to focus on the decisions the Board ought to make, I'd like to start with that point and to state Chevron's overall position on this application. And Chevron's position is very simple and very clear. The application should be rejected.

6762. The application should be rejected because it is not in the public interest. In the longer term Trans Mountain should return its focus to, and seriously explore expansion options with its shippers and then return to the NEB with a proposed -- a proposal to address the current situations, something that the current application, in my respectful submission, does not do.

6763. This is an important application for Chevron and this is an important application for the Board. The Board is being asked to chart new ground and in my respectful submission, is being asked to do so on an insufficient footing to justify that new and unprecedented move.

6764. Let me also be clear what this case is not about. This case is not about Chevron or any other shipper for that matter, seeking to invoke a form of acquired right based on its existing or past use of the pipeline. Chevron's testimony and its evidence filed in this proceeding made it abundantly clear it is making no such claim.
[T3: ln 3707]

6765. The first topic I'd like to address is the importance of this pipeline to Chevron, and humbly, what should be seen as the importance of Chevron to the pipeline.

6766. Chevron brings a broad perspective as both a land and a dock shipper and its combined perspective I'd like to focus on by looking at each of the constituent elements, starting with Chevron's role as a land shipper.

6767. Chevron owns and operates the Burnaby refinery in British Columbia. There was some false controversy in this proceeding and in the evidence about the size of the load represented by that Burnaby refinery.

6768. And I say false controversy because it really came down to a debate between whether the average throughput or the nameplate capacity of that refinery was the appropriate measure.

6769. And you will recall the exchange -- well for example, Mr. Kelly noted the

historical numbers from the refinery and forecast an ongoing average throughput of 47 or 48,000 barrels per day. Contrast with Chevron's evidence that its nameplate capacity of throughput is 57,000. [*Ex. C5-5(b) Ev. of Paul Gray, A:15, page 7*] The two are not comparable.

6770. The -- understanding the distinction between the average and the nameplate throughputs, the controversy on this issue falls away. The need of the Chevron Burnaby refinery is its nameplate capacity of 57,000 plus, a matter which didn't seem to be controversial, its isooctane capacity of 16,000 barrels per day.
6771. And I was searching last night for an analogy to try and make this clear and given that this Board also responsibility for electrical transmission lines I came up with this one. An electrical transmission system can't be built to serve the average load. When the load is higher an average capacity won't do it.
6772. It's the same with Chevron's reliance on the pipeline, it doesn't run 365 days of the year, it can run up to 57,000 plus 16 for the isooctane and some days when there's maintenance, shutdown, turnaround it's zero. Focusing on the average is to miss the point.
6773. Again, I call it a false controversy that falls away once you focus on the appropriate number. If the Trans Mountain pipeline is a house, as Mr. Davies has suggested, Chevron is and long has been an anchor tenant in that house. Chevron has lived in that house since 1954 when the pipeline was built and in fact, supported the building of it.
6774. Again, I don't mention these facts to invoke any form of acquired right based on having been there that length of time or based on past use, but I do so to highlight the importance of this fact. Currently the Chevron Burnaby refinery is just not getting what it needs.
6775. Mr. Gray candidly acknowledged under oath in cross-examination that he's unable to do his job of securing an adequate crude supply for the refinery. [*T3, Ins. 3834-45; XX of P. Gray by Loyola Keough*].
6776. He further testified, quote:

"The refinery has been running at reduced rates, we have been unable to find another economic crude to supply the refinery and make up the difference." (As read)

6777. These are not the words of a land shipper who is, “content”, as my friend suggested. Mr. Davies suggested that the land shippers were quite comfortable.

6778. The Applicants suggested that -- I believe the words were “Got a good thing going”; this is not a good thing, this is not a comfortable, content shipper who comes before you today. This is a shipper who is not getting the crude it needs for a refinery that has been there since 1954, when the pipeline was built.

6779. Mr. Proudfoot, one of the witnesses for the firm shippers made an interesting observation. In his cross-examination testimony he said, quote:

“The costs of not being able to procure reliable rateable crude for a refinery are it kind of puts you out of business if you don’t have access to a current rateable supply of crude oil.” (As read)

6780. Now, let me hasten to add, Chevron doesn’t agree with a lot of what the firm shippers had to say but it does believe this is a telling observation.

6781. I’ll also add on this point that the Burnaby refinery is the only Canadian refinery served by the Trans Mountain system. Its interests are part of the Canadian public interest which this Board is charged with evaluating.

6782. All of this current situation that I’ve been describing takes place under the current allocation to land. That highlights the significance of this application where the Applicant seeks to reduce land capacity allocation by 27,000 barrels per day. Already, the refinery is not getting what it needs. On its face, this application will make that worse.

6783. Look at the facts, says Mr. Keough in pointing to the underutilization of land capacity in 2008-2009. Look at the facts, he says. But nowhere do we hear about the facts, that in 2008 and 2010 the Chevron refinery, by its own admission, ran at reduced rates.

6784. Nowhere do we hear about the catastrophic fire that impacted the Tesoro refinery in 2010. Look at the facts. I agree with Mr. Keough on that point; look at all the facts in evaluating that 26-month period.

6785. I will say that this is the most important issue for Chevron in this proceeding, the proposal to take capacity from the land away. And I will insert a

period there, taking land capacity away, regardless of the fact that in this case it's moved to the dock. The loss of land capacity is the most important issue for Chevron in this proceeding.

6786. The Applicant has characterized this as "*one of the fundamental components of this application*". They've not come forward with an application that says let's adjust the percentages between land and dock. They've brought that application in conjunction with a lot of other elements that we'll be coming to.

6787. But this is not a stand-alone application that says it's time to look at, again, the division between land and dock, nor have they come forward with an application that says it's time to do away with the division between land and dock. They want to shift capacity from one category to the other.

6788. Chevron believes taking a long-term perspective on the repeated incidents of apportionment on the Trans Mountain system provides a more fulsome and more realistic assessment of the apportionment that's recently occurred on the Trans Mountain system.

6789. It's not a matter of looking at 26 or 35 months. It's a matter of looking at the dynamics on this entire system over the last several years when there has been repeated incidents of apportionment.

6790. Now, in contrast to this, we have two competing views of the future. And I will confess, I don't know what the future holds. None of us do. But we do have two competing views. And on one hand, we have a forecast provided by Purvin & Gertz that says, looking forward, apportionment on the land will be zero.

6791. In contrast to this, we have the view put forward by Chevron and by the Washington State shippers very much to the contrary, that apportionment will be high.

6792. Now, since those views have been put forward, we do have some experience. We have a number of months in which Purvin & Gertz, Mr. Kelly's forecast, has, I will respectfully say, been overtaken by events.

6793. And I cast no aspersions on Purvin & Gertz in respect of this. It's simply been overtaken by events. Mr. Kelly candidly acknowledged under cross-examination that forecasts are, by their nature, uncertain and that forecasts of more distant, future events carry a greater degree of uncertainty. [*V. 2 KBB cross, 1339-*

1343]

6794. So the portion that we've had to test is the first half, the portion of the forecast that carries the least uncertainty.
6795. Now, Chevron's evidence filed in this proceeding put forward its views about what the future holds, and it pointed to three factors in explaining why it expects land nominations to continue to be high into the future, and those three are: increasing Alberta production.
6796. Seems uncontroversial in this proceeding; supported by the CAPP 2011 report, which I will add as a footnote, notes increasing heavy and light conventional production. So that's factor number one, increasing Alberta production.
6797. Factor number two, falling Alaska North Slope production. Chevron's evidence included a graph demonstrating visually the dramatic decline in Alaska North Slope production.
6798. Neither of these elements seem at all controversial on the evidence in this proceeding. Both of them are extremely long-term and durable phenomena that can be expected to persist and continue for years into the future.
6799. The third element that Chevron identified is the one that seems to have attracted the most attention, and that is the price differential.
6800. Now, notwithstanding this was not mentioned anywhere in Trans Mountain's application or discussed extensively in the Purvin & Gertz forecast, this was one that seems to have been seized upon with, I'll characterize it as great enthusiasm, by both Trans Mountain and Purvin & Gertz in explaining the recent dramatic increases in nominations on the system.
6801. And just before we get into the price forecast, let me repeat again that the other two factors -- the first two factors identified by Chevron, increasing Alberta production and dramatically declining ANS production, neither of those are controversial. Those are the long-term background facts against which price comes into play.
6802. Now, we've heard a lot of talk about the dramatic and unforeseen events in the marketplace in the last few months, which have been primarily ascribed to the price differential.

6803. Now, markets are apt to produce dramatic and unforeseen events. Markets do that very well. And we don't know what will cause the next one; technological change, price changes, demand changes. Markets are, by nature, an unpredictable beast.

6804. But into that atmosphere of unpredictability, we are asked to rely on a long-term forecast to make what is a long-term, in our respect, irreversible change to the manner in which apportionment is conducted on this system.

6805. In the reply evidence, we heard for the first time a new forecast. We heard the forecast that infrastructure projects in another jurisdiction not within the control of this Board will come into play and will alleviate the problem. The first time we heard that was reply evidence.

6806. During the oral hearing, the forecast was refined somewhat, and the forecast said, well, that will take at least a number of years.

6807. Now, here again we have a mid to long-term forecast. At some point in the future, other infrastructure projects that are, at this point, unnamed, unidentified, highly uncertain may take care of the problem that we're experiencing right now.

6808. Chevron takes no comfort in that forecast any more than it takes in the short-term forecast that has proven to be so dramatically departed from the reality currently being experienced on the system. At a minimum, even if it's entirely accurate, the best case scenario is this will take a few years to resolve itself.

6809. And Mr. Davies referenced this, and I found some irony in this, where the other shippers are being accused of putting forward a "don't worry, be happy" view. It sounded very much to me like "don't worry, be happy", and I believe the quote was "that situation will resolve in a couple of years". Chevron's not very happy with that prospect, even if it turns out to be accurate.

6810. Chevron's evidence, in its IR responses discussed demand for capacity on the Trans Mountain pipeline system in the land category being driven more by refinery pull than it is by producer push.

6811. The refineries are connected to the pipe. Unlike a ship, Chevron can't sail its refinery away, to take service from another pipeline or take service from another market. The refinery is connected to the pipe. It takes 100 percent of its load from

that pipe, and I will add isn't getting what it needs right now.

6812. The other Washington State shippers who -- I won't spend long on this because they can certainly speak for themselves -- put forward their own forecast, and I note only this one fact; that there's a base case and a high case in their forecast as well. And the material change in assumption is when other pipeline projects will come on-stream.

6813. The notable fact is there's no difference in their base case and their high case forecast. Obviously, the Shippers Group members found the timing of other pipeline projects to be not at all relevant to their assessment of formulating demand.

6814. It's refinery pull that is driving the demand for the land shippers; a refinery pull driven by increasing Alberta production and dramatically declining ANS production. [*Paul Gray Chevron evidence, Ex. C5-5b, page 9-10*]

6815. Those factors aren't going away. Those are long-term trends.

6816. This application would harm land shippers including Chevron. I don't need to repeat that apportionment is currently high and has often -- I will hasten to add -- been high in the past. This is not a new experience, although this level of apportionment, 70 percent in the current month, that level is unprecedented.

6817. Despite this current high level of apportionment, Trans Mountain continues to assert that now is the right time to move capacity away from the land shippers.

6818. Now, let me turn to a slightly different topic and that is comparing land and dock nominations. Throughout the oral evidence, we heard repeated assertions about what is fair and equitable, as between these two categories of shippers.

6819. And again, Trans Mountain's application is not eliminating these two categories of shippers that were established by this Board, but they say we can look at the percentage numbers and if we make those equal that's fair and equitable.

6820. Dr. Gaske described that as a simple formulaic approach and it breaks down for a number of reasons.

6821. One, this Board has acknowledged in its past decisions, and I won't go through them in any detail, but I'm relying, in particular, on the series of four

decisions from March 2006 to August 2007 that looked at the land and dock categories extensively.

6822. And in those decisions, the Board acknowledged that dock nominations are different in nature from land nominations and those differences, the Board found, justifies treating them differently for apportionment purposes.

6823. So already, there is some suspicion as to whether these two numbers are really showing the same thing.

6824. Also in its reply evidence, and this is the second part, Trans Mountain has put forward an allegation of over-nominations on the land. Now, before I discuss that more generally, let me make two points. One is the Applicants have stated expressly, and this is Mr. Rinne's evidence. He says, quote:

"We didn't design this firm service offering as a way of solving the apportionment process and the concerns around over nomination that you're talking about right now. We didn't design it to solve that problem."

6825. So they've not purported to bring forward a solution to that problem.

6826. The second I emphasize even more strongly, which is this very allegation was put to the Chevron witnesses in cross-examination, and they categorically denied it. Mr. Gray said, quote:

"I can confirm that all our nominations reflect our demand on the system. If I had the opportunity, I would take every barrel I nominated."

6827. The allegations of over-nominations, Mr. Gray categorically rejected.

6828. Now, Trans Mountain has in its tariff -- and this is the third point about over-nominations -- Trans Mountain has in its tariff provisions that are expressly designed to prevent over-nominations and they do it in two ways.

6829. One, there is upstream verification. If there's a nomination made to a land destination, they check with other pipelines, is that oil available if there's space for it.

6830. The other part of the verification process is at the downstream area. Is

there sufficient take-away capacity in the facility to which it's being nominated, so that this crude can flow if there's pipeline space available.

6831. Both of those verification processes are in Trans Mountain's tariff and are Trans Mountain's responsibility to enforce. Now, land nominations verified upstream, verified downstream of the pipeline, the constraint is the pipeline capacity in the middle.

6832. Now, let's contrast dock nominations. Dock nominations, we heard in the evidence, there's a problem with verifying them.

6833. There's also a difference downstream and Chevron's evidence, Mr. McCutcheon and Mr. Gaske both speak to this, that given the delay in the date between the nomination process and the actual delivery of crude to the Westridge dock, you don't have to arrange a ship to take that crude away until you know you've won the nomination process. [C5-5c, Evidence of Geoff McCutcheon, A8, pg. 3]

6834. There's a problem with verification upstream and there's no need yet to have any take-away capacity downstream.

6835. Another factor making dock nominations different is they're in tanker-sized lots. We heard the total bid value process currently used at the Westridge dock favours the larger ships, favours the Aframax, 600,000. One additional nomination of an Aframax, a 600,000-barrel nomination.

6836. The two processes are very different. I've highlighted a few of those differences. All of this makes a straight comparison of the percentage over here and a percentage over there. This is a classic apples and oranges situation and the analysis is perhaps fruit salad.

6837. The other reasons to explain the increase in dock nominations are, in my respectful submission, simply more credible. No party, including the Applicants, disputes that the price differential has been driving extreme nominations both on the land, both on the dock.

6838. And again, in terms of comfort as to when this situation might resolve itself, Trans Mountain's reply evidence is, quote:

"It is expected to be addressed as delivery infrastructure projects and processing arrangements adjust in the future." [Trans

Mountain Reply Evidence, Exhibit B12-2, page 5 of 14]

6839. So sometime in the future, we expect it to resolve itself. Again, another forecast saying don't worry, be happy, it'll resolve itself in a couple of years.
6840. Again, I mentioned Dr. Gaske's description of this as to why this very simplistic formulaic approach comparing the two percentage numbers is inappropriate. [v3. 4218-4225]
6841. Mr. McCutcheon and Mr. Gray also spoke to that. [v3. 4228-4238] I won't take you to that now, but I will leave you with the references in the transcript.
6842. Now, obviously, the Burnaby dock -- forgive me, the Burnaby Refinery is a very important asset to Chevron, but it's not Chevron's only interest. So I'd like now to turn to Chevron's role as a dock shipper as distinct from a land shipper.
6843. Chevron ships crude over the Westridge dock and you heard Mr. McCutcheon describe how Chevron has helped to expand markets for Canadian crude. [Ex. C5-5c, Ev. of Geoff McCutcheon, A6, page 2 and A12, page 5-6]
6844. Now, the firm shippers, again, gave some evidence and the reference for this is in the notes, that firm service would *"give you the opportunity to allow various companies around the world to test Canadian crude"*.
6845. That's part of the market development; they're going to have a chance to test Canadian crude.
6846. With greatest respect, 10 years is not a test. A test is what Mr. McCutcheon described Chevron's market development efforts. He said:

"There's a lot of work that goes into prior to ever actually shipping a cargo. It involves sending assays, providing samples, providing technical information and hopefully at the end of the day, followed by a cargo.

But even then, in those circumstances, it may not have been Chevron that actually even benefited. It may have been another shipper who actually shipped to those markets as well."
6847. We don't need firm service for market development efforts. We don't need

firm service to allow other consumers to test Canadian crude.

6848. The justification -- the other justification, in addition to market developments, that Trans Mountain puts forward is the shipper requests. We're doing this because we were asked to.

6849. Now, in IR 1.8 -- and I won't take you to it -- Chevron asked Trans Mountain to produce "*all evidence, including correspondence, demonstrating the requests that had been made.*"

6850. Trans Mountain's response was: "*The information is confidential; the correspondence is confidential.*"

6851. We asked for all evidence of requests. All evidence. That was their response. And this, they say, is the first and foremost reason that they're pursuing firm service; they were asked to.

6852. Now, we saw evidence introduced to the Chevron witness panel that in 2005 Chevron stated very publicly that it was willing to consider firm service arrangements for the Burnaby refinery. [*IR from 2005 put to them*]

6853. Today, in 2011, such arrangements have never been offered and are certainly not on offer now. They are nowhere in this application. If Trans Mountain is responding to shipper requests, I respectfully submit it is doing so selectively.

6854. We've seen Chevron's willingness to consider these arrangements. We've not seen any evidence of the shipper requests.

6855. Now, another factor that Trans Mountain puts forward in justification for its firm service offering is the certainty that overseas refineries desire in obtaining a supply of Canadian crude.

6856. Now, I will hasten to add, Chevron finds some irony in the submission that the firm shippers and Trans Mountain have repeatedly invoked the need of foreign refineries to obtain a certainty of supply of crude, where Chevron, the domestic Canadian refinery, is left without security of supply, notwithstanding geographically it is far closer, not only to the pipeline, but to the source, being Edmonton, of this crude.

6857. But somehow overseas refineries have a need for certainty of supply that

looms very large, again notwithstanding the fact that, by definition, if they're taking crude from tankers over the Burnaby dock, by definition they have access to waterborne crude in tankers, which can come from an awful lot of places, in contrast to Chevron, who takes all of its throughput from the pipeline.

6858. Netbacks is the next topic I'd like to address. Again, a justification put forward by Trans Mountain as to why -- in support of its firm service proposal.

6859. There's a number of places this appears, but I've referenced one in the reply evidence where Trans Mountain makes, I would respectfully suggest, the unsupported allegation that:

"...selling capacity on a long-term basis is likely to result in market development that would not otherwise occur and also likely to result in higher net backs to Canadian producers."
[NEB.TMPL-1.2 & Reply Evidence A12]

6860. Now, the first observation I'd like to make is Trans Mountain proved utterly unable to provide any evidence to support this supposed benefit. Trans Mountain was asked in IRs to provide information about the buying and selling price of oil being traded over the dock, the location to which those shipments were being sent, et cetera, and, not surprisingly, Trans Mountain said, "We have no basis for knowing that information".

6861. In short, Trans Mountain's justification remained entirely unproven and it put forward nothing more than its own speculation as to what might be good for producers.

6862. Now, there was another party involved in filing written evidence, and that was the firm shippers. Now, even after seeing the application and the IR responses where Trans Mountain put forward no support for this suggestion that producers would see higher net backs.

6863. The evidence filed by the Firm 50 shippers failed to even address the topic. Didn't come up. In the absence of any evidence on this topic, it's not surprising there was no IRs and there was no cross-examination at the hearing by any of the shippers opposed to firm service -- the firm service application.

6864. However, once the opportunity for cross-examination had passed, the firm shippers found their voice. They gave lengthy and detailed answers in support of

Trans Mountain's theory of the case.

6865. Now, the objection to this was overruled, so the evidence is admissible. The evidence is properly before you.

6866. However, I respectfully submit that when the Board comes to evaluate and weigh this evidence, it should be seen for what it is, which is untested submissions from parties that are likely to benefit from firm service capacity in the current market condition for a number of years.

6867. Let's look at the other side of the ledger on the question of net backs.

6868. Chevron brought forward to evidence -- forgive me, two witnesses that gave evidence on this topic. The first is Mr. McCutcheon, a trader with decades of experience who gave evidence that, in his view, the net backs are not going to change *"with changing the names of the shipper on the pipeline"*. [v. 4313-4318]

6869. Mr. McLarty made a similar point, so I won't dwell on this one.

6870. Not one additional drop of oil is going to flow down the Trans Mountain pipeline. What will change is the name of the shipper will now be the firm service shippers if, I hasten to add, the application is accepted.

6871. Now, the other witness was Dr. Gaske, the only expert economist to testify in this proceeding. Now, one of the perils of a regulatory practice is lawyers talking about economics. I hope it will be comforting that you don't have to take this from me. You can take it from an expert economist who addressed this question expressly.

6872. And he said there are lots of producers in Alberta who would probably like to sign a 10-year contract and, as sellers, they will probably sell at what they think is a discount. A discount.

6873. Usually in these long-term arrangements, the person who takes on the greater risk, say the person willing to commit to a long-term purchase, will get a discount. And the seller, the oil producer in Edmonton, will typically sell at a lower price.

6874. So my mind, if you're making an assumption about what is likely to happen, the net back will actually go lower. Not higher; lower.

6875. This is the only economist we heard from.
6876. Now, what about the transfer of dock capacity to the firm service shippers? Looking within the dock now, if you will.
6877. Again, this is occurring against the backdrop of what Chevron believes are these long-term trends; increasing Alberta production, declining ANS production, mix in the current atmosphere of high discounts, all of which are driving high demand.
6878. Into this constrained market we add five new players with a significant degree of market power.
6879. Now, Trans Mountain responded to an IR from the NEB, discussing the limit of 40 percent to any one shipper and they said, quote:
- “Without limiting the bids to 40 percent it had the potential risk that one shipper might be in a position to exercise too much market power.”* (As read)
6880. So there’s no denial that the firm shippers are being handed market power. The only limit is on how much and Trans Mountain has said more than 40 percent, that’s too much.
6881. Now, the firm shippers gave evidence that at the time they placed their bid, at least one of the witnesses spoke to this. They placed the higher value on the access to capacity in the latter half of the 10-year time period.
6882. Now, I pause to note that that’s the period of time when Mr. Kelly forecasted there would be apportionment on the Trans Mountain system, in the latter half of the 10-year forecast period.
6883. Now, in the first few years of that 10-year period where Trans Mountain now acknowledges that the price differentials will continue for at least that period of time, and demand will continue to be high and apportionment will correspondingly continue to be high, the firm shippers stand in a position to, with respect, extract monopoly rents from the other shippers who depend on the Trans Mountain pipeline.
6884. Now, the recent numbers are interesting to reflect. The recent bid premiums have been in the range of \$14; Q1, 2011, \$14.65 a barrel. The average firm

shipper fee is about 10 percent of that, \$1.45 per barrel.

6885. Now, by simple math if the conditions we're experiencing now persist for even a single year the firm service shippers stand to extract the entire value of their 10-year commitment in this single year. The other nine years, if you will, the years they thought had value when they bid, those, if you'll pardon the expression, are gravy.

6886. Now, I expect that Trans Mountain and the firm service shippers may be heard to say in reply that while things may have gone the other way; markets go up, markets go down and the firm shippers took a risk and they shouldn't be denied the benefit of that, even though -- even in the short term it's worked out what appears to be very well for them, if this application were approved.

6887. Now, Chevron would still be opposed in this circumstance. Locking up the majority of dock capacity in a few private hands places the control of this regulated pipeline into private hands. It is no answer to say, "Well you can buy at market rates".

6888. With greatest respect, this market is a monopoly. There is no other pipeline shipping Alberta crude from Edmonton to the West Coast, this is it. This market is a monopoly. Perhaps an oligopoly if the five of them are allowed.

6889. Now, all five of them have put forward evidence, sparse as it may have been, in their direct, about their future plans. Now, all of them have plans; they're all capable sophisticated companies, we have no reason to suspect they can't fully execute on those plans. The mitigation strategy Trans Mountain is proposing says, well, if their plans fail maybe you can buy their space.

6890. We can't run a business, we can't run a refinery in the hope that someone else's business plan doesn't work out and they have some spare capacity to sell us. That's no way to run a refinery. Recall Mr. Proudfoot's statement, "If you don't have a reliable rateable source of crude it kind of puts you out of business."

6891. Now, needless to say Chevron's view is the application will harm non-firm dock shippers, including Chevron. Now, I'd like to address Mr. Davies point, if I may, if I can find my note.

6892. He said -- and I don't have a transcript; so it's words to the effect of the no harm to shippers test is not the test, it's the public interest. We take no issue with

that. I note that when Trans Mountain put forward this application it was in large part premised on: Don't worry, there will be no harm to shippers, look we've put forward a forecast, apportionment will be zero.

6893. Now, that hasn't quite worked out. And so Mr. Davies says you've got to look at the benefits and you got to look at the burdens; with that we entirely agree. You've got to look at this in the Canadian public interest overall.

6894. The benefits put forward Trans Mountain has failed to prove; increase netbacks, market development, et cetera. It's not a producer, it doesn't know these things and it didn't provide any information and any support for these things. The burdens you've heard a great deal about.

6895. Now let's talk about dynamic reallocation, that's a phrase we heard quite a bit from Trans Mountain. Now, I'm going to ask you to compare two circumstances.

6896. Under one circumstance every single player in the market gets to make an evaluation every single month based on all the information available to it as to what the value of dock capacity might be and every single month they can consider all the information and they can make a bid and every other shipper can do it too.

6897. And next month if something's changed, if they have new information, if their condition, their circumstance or the market conditions have changed they can make a new evaluation and they can make a new bid every single month.

6898. Contrast that with, we're going to bid once, we're going to lock the results in for 10 years and if things change maybe you'll be able to buy it from them if their business plans don't work out.

6899. It's immediately apparent which of these dynamic reallocation methods is far more dynamic. The current system allows participation by any shipper, existing or new. And I will say, you know, it's always the new shipper, the future shipper that doesn't have a voice at these proceedings because they're not around yet.

6900. Now, they're not shut out of the dock bid premium system that happens every month. If they arrive they can bid that month. Under this system they're shut out; wait 10 years, maybe there'll be another one. That's not dynamic reallocation. That's locking in the results for 10 years.

6901. Forgive me, some quick editing here.

6902. Chevron's view -- Chevron doesn't come to this with rose-coloured glasses. Chevron doesn't say the existing system is perfect. Chevron does say it works reasonably well, reasonably well. Could it be adjusted, could it be tweaked; everything can be improved.
6903. We're not saying this is the end, this is perfect. It's a workable system, far better than the changes being proposed by Trans Mountain and those are the choices before you.
6904. The application by Trans Mountain versus the status quo, and as between those two Chevron believes the current system is workable and is far more dynamic.
6905. Now, because it occupied a lot of discussion during the oral hearing I do want to deal for a moment with the disposition of the bid premiums under the existing system. The bid premiums that have been growing very large as of late.
6906. Now, Mr. Davies and the firm shippers came with a number of complaints about what happens to the bid premium dollars. Now, this application doesn't remedy that. In contrast this application expands the bidding process on the Trans Mountain system to a larger volume. You have still got the same issue about who pays bid premiums, who receives benefit. It's the same issue.
6907. The problems become bigger under this application because now it's being applied to a bigger proportion of capacity. The same debates are going to be there about who put the money in, what was the money spent on, where did the money go and who saw benefit from that. This doesn't eliminate that problem, this expands that problem.
6908. Now, if there is a perceived problem Trans Mountain hasn't proposed to address it in this application, they propose to expand it. Since the bid premium has been introduced it's been tweaked -- if I can use that technical term -- several times. The original view was it should be refunded to shippers in the next year.
6909. The bid premiums grew to a level that -- to be frank -- wasn't anticipated, and that system was changed, amended a bit and those bid premiums in the high years were spread out over a number of years.
6910. If the situation's changed again, if there's a problem the intelligent minds in this room and on this Board can address that problem. Firm 50 is not a solution to

that problem, it expands the problem.

6911. I'd like to discuss the mitigation strategies and I'm not going to go through these in details but simply to note that all of the mitigation strategies are discussed in some detail in Chevron's evidence. Mr. Gray discusses those so-called mitigation strategies available to land shippers. Mr. McCutcheon discusses those available to the dock shippers.

6912. In all cases Chevron's conclusion is the mitigation measures simply fail. They're not going to be there or in fairness, they may not be there when Chevron needs them. Again, Chevron can't run its business hoping someone else's plans don't work out and maybe they'll have some extra capacity to sell.

6913. I note in this regard that Trans Mountain stated in one of its IR responses to this Board, at IR 2.3:

"However, firm service Westridge shippers have made a significant take-or-pay obligation, it is reasonable to expect they would nominate their committed volumes every month."

6914. We think so too. They have their own plans for these volumes and selling it to us maybe it'll happen if their plans don't work out but Chevron's -- Chevron doesn't take any comfort from this proposed mitigation strategy.

6915. Madam Chair, I note the time. I'm well along but not as close to the end as I'd like to be.

6916. **THE CHAIRPERSON:** How far?

6917. **MR. BERGNER:** That's a tough question. Two-thirds -- a third.

6918. **THE CHAIRPERSON:** I think we have all earned an afternoon break. So we will break for 20 minutes.

6919. **MR. BERGNER:** Very good, thank you.

--- Upon recessing at 3:36 p.m./L'audience est suspendue à 15h36

--- Upon resuming at 3:57 p.m. /L'audience est reprise à 15h57

6920. **THE CHAIRPERSON:** Please proceed.

6921. **MR. BERGNER:** Thank you, Madam Chair.
6922. I've taken a few minutes and hopefully consolidated some of my thoughts; so I hope to finish quicker than I began.
6923. We were discussing the long-term problem created by this Firm 50 Application. This is essentially locking things in for a 10-year time period, on a very dynamic system.
6924. What I'd like to turn to next is an even longer term problem with is the step-up rights that are also included as part of this offering.
6925. This has the firm shippers with an option that, frankly, may last much longer than 10 years and create a situation where they continue to get priority access to the Westridge dock.
6926. Now, Dr. Gaske testified that this was -- came to selling two products with one price. And because there's the two products you don't know what value is being placed on access to current capacity and what value is being placed on the step-up rights. All of the -- I believe it was all of the firm shippers gave evidence that they did place value on that option but they couldn't put a number on it.
6927. Now, in that circumstance a few problems arise; one is you don't even know if your methodology has awarded capacity to those who value it most because you don't know what value they place on that capacity. You know it's part of the firm service fee but you don't know how much.
6928. Further, you don't know what the toll is. This is not like the bid premium, just an allocation methodology, not part of the toll. Trans Mountain's evidence is this is, in part, a tolling methodology. Well how much is the toll? We don't know because we don't have any numbers to put on it.
6929. And for the Board that creates a problem. Are just and reasonable tolls being charged? We can't answer that question because we don't even know what the toll is.
6930. This approach Trans Mountain is proposing is, in my respectful submission, entirely without precedent. They invoke the firm service arrangements on other Canadian pipelines which clearly we acknowledge exist, but Chevron notes

that firm service in those circumstances has been used to support new capacity or new services on those pipelines, not a situation where you're transferring capacity away from existing shippers on a pipeline not being expanded to create a new class of customers to which you give certain new types of rights.

6931. Now, when you set off on a journey 10 years or longer, a journey which once you've taken that first step is essentially irreversible, they signed the 10-year contract, plus the step-up rights that last beyond that, if you're going to set off on a journey from which you -- it's difficult to make adjustments once you've started, you don't do so on the basis of simply a forecast that says, well it'll be okay, there won't be apportionment.

6932. You do so on the basis of rigorous analysis that is utterly lacking from this application. There's no economic analysis; there's no regulatory precedent that they invoke, and they do so completely without a contingency plan.

6933. Now, I'd like -- I'm not going to spend any time going through the detail of this but I'd like to contrast this with what's happened the last 10 years on the Trans Mountain pipeline.

6934. Now, we discussed a moment ago that this was a dynamic pipeline, a dynamic situation and the last 10 years proved that in spades; 2003 we've got the pipeline splitting land and dock capacity; 2003, 2005 we've got the priority access applications from Chevron settled by a negotiated settlement.

6935. Sometimes the dysfunctional family can find an agreement that works; 2006, lands subdivided into domestic and export categories; also 2006, two-day advance nomination procedures at the dock; later in 2006 that had some unintended consequences, so the bid premium came in at the dock.

6936. Two thousand seven (2007), dock capacity again further sub-divided into two categories, tanker and barge, to again deal with some unexpected unforeseen consequences; 2008, the anchor loop decision which you'll be familiar with, where the land category was again recombined, the domestic and export categories put together.

6937. The last 10 years on this pipeline have demonstrated that change has consequences and some of those consequences are unforeseeable. And if there are unforeseeable unexpected consequences the parties, the pipeline, the shippers, the Board can react and the system can be made to work better in light of the experience.

6938. This is fundamentally different. This is saying we're going to take the first step and the journey doesn't end for 10 years. Whether it works out well, whether it doesn't work out, whatever the consequences may be we got a forecast, it'll be okay.
6939. That's fundamentally different from anything that's happened on this pipeline in the last 10 years. And the need for revisions to the tariff shouldn't be taken as a sign of failure. It's not a dysfunctional family that can never get it right and they keep having to come back.
6940. It's the industry, the pipeline and its shippers responding to circumstances as they arise, as they change, as unintended consequences come to light, things nobody foresaw, we've got a new problem, we need a new solution. And maybe we can find one; maybe we need the Board's help.
6941. Most of these solutions, I will note, even when it came to the Board, came with the majority of shippers in support and not always the same majority. As different issues arose different people were affected differently. There was a shifting majority but there was usually a majority. This application is fundamentally different.
6942. Mr. Hinger gave in a very candid and a very forthright comment the observation that if all shippers are equally mad at him he feels he's done his job. And even by that test Trans Mountain has failed miserably in this application. It has some shippers, the firm service shippers very happy with this application, very supportive.
6943. It has the vast majority by volume of its shippers on this side of the room extremely unhappy. Shippers who are here in strenuous opposition, hiring experts, hiring lawyers to spend time in a hearing room battling its service provider.
6944. This is not the way shippers want to conduct business. This is not meeting Mr. Hinger's test of making all shippers a little bit mad at him, and we like him very much; we're not mad at him personally.
6945. And in utter contrast to the series of negotiated and sometimes -- and Board-approved settlements, arrangements, adjustments that have taken place over the last 10 years, this is a fundamental departure from any of that. Many of these adjustments were put in place for a trial period. We didn't know how the bid premium system is going to work out, we're going to put it in place for a three-month

trial, if it doesn't work come back with something else and we'll fix it.

6946. The two-day advance nomination, the bid premium, the adjustments between categories, the creation of new categories; many of these were trial runs. We'll try it out, typically for three months, six months, if something we didn't foresee comes up, come back and we'll tweak it again.
6947. This is different. Step once on that first step and we have 10 years to see the results. Because the firm shippers and Trans Mountain will have contractual obligations that they will very understandably and rightfully insist upon fulfilment of. Once they have these contractual obligations they have rights they're not going to give away easily. This one is different, 10 years or longer with the step-up rights.
6948. Now, another word about the precedence from other pipelines. This is nothing new they'll tell you, they do this on other pipelines. Well, there is a fundamental difference with what's being done here and what's being done on other pipelines.
6949. Usually on other pipelines and an example that comes to mind is, albeit a gas pipeline, the Mackenzie gas project. Where you make -- where shippers make a long-term commitment, 10 years, 15 years, 20 years, the toll is a discount.
6950. Why? Because shippers are taking on a risk. They're making a commitment that they'll be there for 10 years, 15 years, 20 years, and in light of that they get a discount from their regular nomination toll.
6951. This is founded on a very different premise, a very different footing. The bid for the firm service fee sits on a foundation of assumed scarcity. If there was enough pipeline capacity to go around nobody bids a premium. The only reason there's a premium is we assume over the next 10 years there's not going to be enough to go around and that has some value and maybe we can capture that value.
6952. If you're asking for a long-term commitment and to pay extra for taking on that added risk that's a different model than has been used on any other pipeline.
6953. Dr. Gaske testified that the setting of the firm service fee, he says, quote:

"From my perspective, it still runs the problem that essentially you have a monopoly pipeline charging monopoly level charges to certain customers and then using that as financing. If you need

financing you should go to the market for financing or bring your partners."

6954. Now, against that you hold what I'll characterize as Trans Mountain's threat, that while without the firm service fees work on the expansion will go ahead slowly or not at all. What that's saying is if we can't finance our work the way we choose to we won't do our job.
6955. It's a remarkable statement for a regulated pipeline that's supposed to be regulated in the public interest, a remarkable statement to make. If we can't finance it this way we might not do it. So implicit to that as a threat you better give us what we want because otherwise all these people clamouring for expansions, well they might not get it because we might not do it, we might move ahead slowly or not at all.
6956. Conditions I'd like to speak to. There was a number of questions to various panels about conditions. Obviously an important consideration about -- I think the overall theme from -- well, from Trans Mountain first, is they say these conditions are not appropriate. We've given you our application. We've told you how we want to finance this work. That's what we want.
6957. The position from Chevron is conditions won't fix this. This is fundamentally flawed as an application and imposing conditions about what you can do with the fee, when we can spend it, what kind of oversight, what kind of dispute resolution, et cetera, this won't cure the fundamental flaw, which is Chevron and other shippers are being denied access to the pipeline, denied access at the regulated rate set by this Board as just and reasonable.
6958. Priority destination, another matter I'd like to speak to.
6959. Now, in its undertaking, U-3, Trans Mountain confirms that this is an aspect of their application *"not related to the Firm Service Application"*. So it's an add-on. It's taking it on.
6960. Now, Chevron respectfully submits that the original reasons priority destination was introduced still remain valid. We filed that evidence from Trans Mountain's own mouth in the letters it wrote to this Board in 1985 explaining what priority access application was -- sorry, why a priority access -- priority destination, forgive me, category was an appropriate inclusion in the tariff.
6961. Those circumstances haven't changed, and I commend those 1985 letters

to you. I won't take you to them now, but also to note again that in 2005 Chevron proposed another way. Chevron said it was willing to consider firm non-curtable commitments, which would come at a premium price, and that may render the priority destination unnecessary.

6962. That was 2005. That's still not been offered, and it's not on offer today.
[Ex. B-19 & V. 3 4081-4103]

6963. The priority destination status is the only protection in the tariff for a shipper like Chevron, who doesn't have access to other economic alternatives. And again, we're not here making that claim, but it's an important protection for us.

6964. We brought two applications in the past. They were settled by negotiated settlements, but if it's taken out of the tariff, Trans Mountain's answer is, "Well, you can apply to put it back". It's in the tariff for a reason, and it's found to be just and reasonable for inclusion in the tariff by this Board.

6965. Trans Mountain hasn't made the case for taking it out and, if anything, this application would render it more likely that Chevron would have to call upon such protections given that capacity's being taken away from the land and its refinery is still going to be, the refinery that's not getting the crude it needs now.

6966. There were other, I'll call them, alternate proposals or alternate ideas discussed during the course of the hearing, and some of these have been touched on. For example, there was some questioning around eliminating the land and dock categories, putting those two together. There was some limited discussion of firm service for the land shippers, an issue we've touched on.

6967. Trans Mountain's submissions on these are these are not before the Board in this application and, at least on that point, we do agree. They are important for discussion. They are important for consideration, just like all these other ideas were important for consideration: the bid premium; the two-day advance.

6968. All of these things started off as discussion between Trans Mountain and its shippers, and these may be important discussions.

6969. The evidence, the testimony on this proceeding, simply isn't adequate enough. The parties haven't fully addressed it. Not in this proceeding.

6970. Now, there was one such possibility or proposal that did receive a

significant amount of discussion, and so I do want to mention it as well. There was some questioning about re-directing a portion of the current bid premium to another purpose. And again, that's a discussion that can be had. That's an issue that can be considered.

6971. There's no application to do that and, in fact, the application says, well, here's an idea. Let's make more bidding on the pipeline. And well, we'll do something different with this one.
6972. So again, that's not an issue that Trans Mountain has brought forward or that we think the evidence and submissions in this proceeding are fulsome enough for there to be a decision on it.
6973. Now, there was a lot of discussion about is there shipper support for an expansion. What happened in 2006? With all this apportionment, how come people aren't stepping up?
6974. Well, Chevron's answer to that is clear. 2006 was five years ago. There is no point stirring the ashes of who did what, who said what in 2006, why did it fail. Trans Mountain has announced it's going ahead with another open season. That's where the focus needs to be. That's the future.
6975. Stirring the ashes of the past is, frankly, the dysfunctional family saying "he said/she said", and it really doesn't matter.
6976. What does matter is this application is coming to you for a decision on the eve of that open season. Chevron's plea to you is please, don't distort the market on the eve of that open season. Let the shippers speak in the open season.
6977. Trans Mountain is not coming in the wake of a failed open season saying, "We tried, but now we've got to try something else". They were coming to you saying, "We'll do this as a first step, and then maybe we'll try".
6978. Well, now something else has changed. Now they've committed to going ahead with the open season. And we want to see that play itself out without the added noise, disturbance and distraction of a whole new regime created by the Firm 50 Application.
6979. I will end where I began, which is on the relief side. And the relief Chevron seeks from this Board is very simple. The application should be dismissed.

6980. This would allow Trans Mountain and its shippers to get on with the more pressing and appropriate task of considering the terms and conditions under which the pipeline might be expanded, and once those -- the appropriate course regarding expansion becomes clear, it then may be appropriate to have further discussion about what are the apportionment mechanisms going to be on that system.

6981. Or, if the open season fails, God forbid, then we're going to have a discussion about what the apportionment proceedings will be.

6982. To do it now on the eve of that open season just adds a whole level of complication that we've not seen and haven't experienced on this pipeline before.

6983. Trans Mountain's current proposal is a piecemeal approach and, if it's a first step, it's a first step in the wrong direction, and on a 10-year course from which it's not easy to change course.

6984. If and when the application is rejected, Trans Mountain and its shippers are best able to discuss the appropriate mechanisms that may be employed, and once the unfortunate effects of this application that has resulted in some tension between Trans Mountain and its shippers -- once those unfortunate impacts are removed by the dismissal of this application, Trans Mountain and its shippers can and will do better.

6985. Subject to questions, those are my submissions.

6986. **THE CHAIRPERSON:** Thank you very much. Just one moment, please.

--- (A short pause/Courte pause)

6987. **THE CHAIRPERSON:** Mr. George has a question.

6988. **MEMBER GEORGE:** Mine will be a boring question.

6989. Your answer, --and I'm paraphrasing my own words so you can confirm or affirm my understanding of what you said, and this came right after the break.

6990. What I thought I heard was, "We don't know all the value people ascribe to different components in this application". And then I thought you were implying or you said that this calls into question just and reasonable tolls.

6991. Is that correct?

6992. **MR. BERGNER:** Yes, because the firm service fee represents a combined price for two things; one, access to the system now, and two, a step-up right on a future expansion. We don't know what value is being ascribed to each of those things.

6993. And to the extent that access to the system now constitutes part of the toll, which Trans Mountain says it does, then we simply don't know what the toll is. And if we don't know what it is, we can't know whether it's a just and reasonable toll.

6994. It's different for every shipper, and it's a number that -- it's not even identified because it's -- it can't be desegregated.

6995. **MEMBER GEORGE:** I think you answered my question, but I'll ask another way and maybe it'll help my understanding.

6996. We do this all the time at the Board when we accept negotiated settlements. We don't know what the gives and takes are. There are many, many components in these negotiated -- tolling negotiated settlements, but if it follows the rules of the game that we've set out accept the tolling settlement, it doesn't give us heartburn to accept it.

6997. So what's the difference here? What's the distinction I'm missing?

6998. **MR. BERGNER:** In a negotiated toll where you don't know how much is allocated to this category and that category, what you do know is what's the toll that results; what's the amount shippers pay. And here, not only do we not know that bottom line number, it could well be different for all five of them.

6999. And because they're paying -- presumably paying different firm service fees, and within that firm service fee there's these two parts. So how much is for the option; how much is for access now? We don't know.

7000. **MEMBER GEORGE:** Thank you. I understand your position.

7001. **THE CHAIRPERSON:** A question for you, Mr. Bergner.

7002. You're telling the Board to deny the application, and in the hope of

another open season that would be successful. So what would be your position -- and I'm sure other parties will have the opportunity to comment on this as we go from bottom up.

7003. What would be your position if the Board were to say, okay, we're going to proceed with our decision like working on the RFD and all of this. You have six months, parties, to come up with something, at the end of which we'll release the decision if nothing happens. And each party's taking a risk on what the Board's decision might be, given this diverse position of the two.

7004. What do you think about that?

7005. **MR. BERGNER:** I should probably take instructions on the point. However, I will make this observation, which is six months, I ---

7006. **THE CHAIRPERSON:** Well, however it is. Certain period of time. I haven't thought it through. It was just a reaction to what you just told the Board, and it's a hypothetical question.

7007. **MR. BERGNER:** Well, let me make this observation, that the -- right now, discussions around the open season, around what are the terms and conditions on which the pipeline might be expanded, Mr. McCutcheon testified are significantly complicated by the existence of this Firm 50 Application.

7008. Is there going to be 54 committed -- 54,000 committed barrels, is there going to be step-up rights of 108? And that's getting in the way of proceeding with the open season.

7009. As opposed to leaving that lingering uncertainty, my proposal would be somewhat different, or a variation of this proposal. The application can be dismissed without prejudice. If the open season fails, the application can be brought back.

7010. But we'll know what the position of the parties is around the fundamental - - the problem we all agree on, which is there's not enough space to go around. If we can find a solution to that problem in the open season, then this step is not only unnecessary, it's getting in the way of getting to that open season.

7011. So as opposed to lingering uncertainty with a pending decision, you know, everyone's going to have to contemplate two possible outcomes in the open season.

Maybe there'll be 108,000 of committed capacity; maybe there won't be. Maybe I'll get some of that capacity; maybe I won't.

7012. That's -- open season are hard enough. That is a significant complicating factor. It's clear, if the application is dismissed without prejudice to it being re-brought should the open season fail.

7013. **THE CHAIRPERSON:** Thank you, sir. These are all our questions.

7014. **MR. BERGNER:** Thank you. And let me just add as a footnote, what you've just heard are my thoughts. I should perhaps take instructions before I give you Chevron's final position on the proposal.

7015. **THE CHAIRPERSON:** We're only talking hypothetical. Thank you.

7016. **MR. BERGNER:** Thank you.

7017. **THE CHAIRPERSON:** Mr. Neufeld.

--- (A short pause/Courte pause)

--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR MR. NEUFELD:

7018. **MR. NEUFELD:** Good afternoon, Madam Chair and Board Members.

7019. My submissions today are made on behalf of ConocoPhillips Canada Marketing & Trading ULC, Suncor Energy Marketing Inc. and Shell Canada Ltd. I have earlier today provided a copy of my draft argument to the court reporters, and if they would insert the references, I would appreciate that.

7020. In the interests of time, I have condensed some of the portions of the argument, however, so I'm just warning the reporters that they may have to jump around a little bit.

7021. Before I proceed with my prepared remarks, I'd like to respond very briefly to the family theme that was laid out by Mr. Davies about too many kids and not enough rooms.

7022. Many years ago, many years ago, my parents moved their family from the farm to Calgary. At the time, they had six children. They moved into a home that

had two bedrooms and no bathroom in what's now the -- in what was then the Town of Montgomery.

7023. We moved on up to a bungalow that had three bedrooms and one bedroom, but they proceeded to add five more kids. So I consider myself to be somewhat of an expert in apportionment.

--- (Laughter/Rires)

7024. **MR. NEUFELD:** And I can tell you, Madam Chair, from that perspective that the one thing you don't do is show preferences to one group over another. The one thing you don't do is fail to follow the rules. And the last thing you do is auction off priority access to the most valuable room in the house, particularly the bathroom.

7025. So with that, let me talk about the block, which is a little bit more dry.

7026. This is an important application for this Board, I suggest, and it may be one of the most important matters that's ever come before your Board because of the consequences, not of refusal, which I suggest are few, but rather the adverse consequences that would flow from this approval, or approval of this application which I suggest are many.

7027. As discussed in the opening statement of Mr. Stoness, the application rests on three fundamental components, and I'm not going to take you back to that -- it's far too late in the day -- in terms of chapter and verse, but we know them: the reallocation of capacity; the granting of what we term as priority access to scarce capacity in the form of the firm service for 10 years, and lastly, the authorization to spend the fees that are generated from that auction.

7028. Offered in support of the request were a series of suggested benefits or allegations. Again, they're familiar to the Board.

7029. The first was that the proposal was in response to shippers' needs, and should therefore proceed. The second dealt with the fairness or unfairness of allocation between land and dock. The third was that the service would cause net backs to increase for Canadian producers generally.

7030. The fourth was that providing firm service will lower the cost of future expansions and enhance operations of the pipeline. The fifth, that it would provide a

firm revenue stream; and finally, that the firm service would allow the pipeline to compete with the availability of firm service on other Canadian pipelines.

7031. Now, what I'm going to do in these remarks is to address each of these allegations except the net back one, which -- in respect of which Conoco, Shell and Suncor simply adopt and agree with the submissions that have been made to you by BP and Chevron, both.

7032. Before entering into discussion of where the evidence was left, I suppose, on those allegations, I think it is important, notwithstanding the lateness of the day, for us to go back to some of the rules that we all operate under and, in particular, the way that financial or economic regulation is incorporated in your governing legislation. And this is something which the Trans Mountain system, of course, is quite familiar with.

7033. It was constructed in 1955, and since 1959 the pipeline has been subject to ongoing financial regulation by the Board. Now, the essence of that economic regulation when applied to an oil pipeline is captured in three important provisions, and again, I'm not going to go into detail on these.

7034. The first, obviously, is the duty to charge tolls that are only just and reasonable. [S. 62] The second is the duty not to unduly discriminate between shippers. And the third, and I suggest clearly the most important provision, is the one in Section 71 of the Act.

7035. Now, one of my pet peeves is when lawyers appear before you and I have to listen to it and they read legislation, but I am going to take us back and I am, in this case, going to re-read for the Board Section 71(1) because it really is the critical point of this entire proceeding.

7036. The obligation there is stated as this, again:

"Subject to such exemptions, conditions or regulations as the Board may prescribe, a company operating a pipeline for the transmission of oil shall, according to its powers, without delay and with due care and diligence, receive, transport and deliver all oil offered for transmission by means of the pipeline."

7037. Now, from a policy perspective, if we review past NEB decisions, and again, I'm not going to go into any detail here, we have a number of cases which give

us some pretty good explanations as to why these provisions are important and why you exercise, as a Board, these supervisory powers, starting with the power to require just and reasonable tolls and no undue discrimination.

7038. There was a very succinct statement that was made in a decision by this Board dealing with the Murphy Oil Company back in 2000 where it described the purpose of economic regulation as follows. It's that:

"...economic regulation is designed to prevent the potential abuse of market power by a company operating in a monopolistic environment or in one with limited competition. Regulation ensures that such a company charges rates which are fair to customers and provides the company with a reasonable opportunity to earn a fair return on its capital."

7039. Again, I've read already Section 71(1), which deals with the specific obligations of a common carrier. I'm not going to re-read that and I'm not going to take you to any particular decisions. Those are included in Mr. Matwichuk's evidence or a discussion of them are included.

7040. The important thing that emerges when you look at those decisions is that in each instance in which oil pipelines have been allowed to offer contract carriage, as it were, you had a situation where contract carriage shippers were underpinning with their investment in that firm service the capital cost of new capacity.

7041. In each of those cases as well, the Board only approved the firm service offering after being satisfied, as Mr. McLarty reviewed with you, that requirements of common carriage shippers could be met in the configuration that was proposed.

7042. So the important point, and I think the one that I want to leave you with, is in each of these cases, the provision of contract carriage by the pipeline actually enabled it to discharge the Section 71 obligations imposed on it in offering service to all who might offer oil for transportation.

7043. So those are the fundamental legislative principles or statutory obligations that should guide us as we proceed.

7044. But before I go on to discuss how they apply specifically in this case, I do also want to make note of one other section of the Act.

7045. As you know, Madam Chair, Part III of the Act deals with approval of pipeline projects, as opposed to tolls and tariffs that are dealt with under Part IV.
7046. And of course, the most important provision in Part II is that of Section 52 of the Act, which provides that before a pipeline is approved for construction, it must be found to be in the Canadian public convenience and necessity, something which involves a broad range of considerations, such as whether there are adequate supplies and markets, whether the project is financially feasible, whether it will have acceptable environmental effects, and whether it is in the public interest.
7047. It also triggers the Canadian *Environmental Assessment Act*, meaning that before the Board can approve such a project, an assessment Act must be complete under that Act.
7048. Now, I mention that -- these provisions of Part III and the CEAA not because they apply to this application, but, to the contrary, to underscore that the public interest issues and the evidentiary record that would be present in a facilities application are not present in this case.
7049. This is important to bear in mind because it was a complete answer and an appropriate answer to those who would have had these issues considered at hearings in Vancouver and Vancouver Island on this application.
7050. But it is also a complete answer to those who would say, for example, that the public interest associated with increasing the delivery of oil out of Vancouver in the quest of new markets somehow justifies the removal of pipeline capacity from common carriage that's needed by existing customers.
7051. You simply don't have the evidentiary record before you to venture opinions or to make findings concerning the public interest associated with potential expansion.
7052. I also say to you that when you look at the public interest in this case, the primary determinants and the primary objectives of the Act that should inform your decision on the public interest are the meat and potatoes provisions of Part IV, that is to say, is the offering, is the proposal that involves the charging of just and reasonable tolls.
7053. And Board Member George, you just had the discussion with Mr. Bergner about some of the difficulties this application faces on that.

7054. Is the proposal one that's going to constitute undue discrimination, creating different classes of customers on no good basis? You heard from Mr. McLarty on that.
7055. Is the proposal one that enables the company to accept oil, and all oil that's offered for transportation, according to its ability and with all due diligence or is it not?
7056. Those are the questions that bear on the public interest in this case, because this case involves commercial issues between companies, all of whom have certain rights and obligations in appearing before you.
7057. Now, I mention this because from time to time, although -- and again, Mr. Keough commenced this morning by saying "Oh we're not here to talk about expansions and so forth". But from time to time we've seen, for example, in response to questions about conditions, well you can't impose that condition, that would delay an expansion. You heard that from several speakers.
7058. Embedded in that, if my friends are saying that the public interest issues here are so broad, embedded in that suggestion is an implicit assumption that an expansion is in the public interest. And I'm saying to you that that is not an area where the Board can or should go at this stage, with this record, and with this evidence.
7059. These activities and the development of an expansion application may well be in the commercial interest of Trans Mountain, the firm service shippers, and my clients. If they are, they should be pursued.
7060. In particular we suggest that Trans Mountain can and should invest in the pursuit of expansion opportunities. And I might say, invest its own capital in the pursuit of expansion opportunities and business development rather than doing so and seeking to do so in ways that involve getting funding from -- and I quote -- "someone else", to quote Mr. Stoness. *[Tr. Vol. 2, Para 2712]*
7061. So with those background comments on how the Act applies, let me turn to the application, and particularly why Suncor, Shell and Conoco say that this application must be refused.
7062. We say this for two reasons. First, the proposal contravenes Part IV of the

Act in a number of ways. Second, we say that the reasons advanced by Trans Mountain in justifying the unprecedented request made here are ones that are riddled with internal contradictions and inconsistencies.

7063. Let's go back then to Part IV of the Act and section 71. As I mentioned, since 1959 shippers on the Trans Mountain system have enjoyed the protections of economic regulation under the *National Energy Board Act* and they make no apology for that. These are statutory protections that they are entitled to receive.
7064. Trans Mountain has provided safe and reliable transportation service for all customers offering crude oil and refined products for shipment, subject to apportionment. That's its business, and that's its legal obligation under section 71 of the Act, and its predecessor provisions.
7065. When expansion of the system was needed, Trans Mountain, with no shipper opposition expanded the system, and that expansion was placed into service most recently in 2008. It added the expansion cost to its rate base, no firm service contracts.
7066. It rolled the cost of expansion into the common carriage tolls, and it made the expanded capacity available to all shippers; [*Tr. Vol. 2, para 1667-1681*] again, its business and its legal obligation under the Act.
7067. When apportionment was needed, the approach taken in the past, as you heard, was to seek consensus with shippers on that issue, as well. That hasn't always been possible, but the effort was made. [*Reason For Decision, Trans Mountain Pipeline Inc., Capacity Allocation Procedures, March 2006 to August 2007 and Reasons for Decision RH-4-2008*]
7068. In late 2005, Kinder Morgan took ownership of Trans Mountain, [*Tr. Vol. 2, para 1618*] and three and a half years later it filed a letter of comment with the Board in the Keystone XL proceeding [*Ex. B1-12*] that they considered important enough to this proceeding to attach to its application.
7069. In it Kinder Morgan warned the Board that in response to Keystone, Keystone XL, and Kinder Morgan's own Express pipeline, Trans Mountain and Enbridge would likely move some or all of their respective system tolling practices to negotiated take or pay contracts. [*Ibid at para 25*]
7070. It noted that the AUC has a long-standing practice of refraining from

regulating the tolls of Alberta jurisdictional pipelines, and that the FERC has a longstanding practice of permitting market-based tolling.

7071. Well, we can't say that we weren't warned. After failing to get shipper support for expansion, which as you heard was tied to converting the existing common carriage capacity also to firm service, in 2009 Trans Mountain began discussion that led to the proposal of this application, which of course contemplates taking 54,000 barrels a day of capacity out of common carriage access and selling priority access to the highest bidder over those 54,000 barrels of capacity for the next 10 years.

7072. Now, as discussed by Dr. Gaske, the proposal is unprecedented for a regulated pipeline, and was simply an exercise of monopoly power by carving out capacity and extracting the highest bid possible from those shippers who were prepared to pay the most. *[Tr. Vol. 3, para 4363 to 4369 and 4416 to 4420]*

7073. In taking this approach, we say with respect, that Trans Mountain appears to have deliberately ignored the obligations imposed on it under section 71 of the Act or at least interpreted them in a way that we certainly don't agree with.

7074. At a time of apportionment it advances to you a proposal that will not accept it, to accept -- will not enable it, rather, to accept all oil offered for transport with due diligence as the Act requires it, but in fact will disable it from doing so to the extent of 54,000 barrels a day or almost 20 percent of its currently reduced capacity.

7075. Now, when questioned on this by Mr. McLarty, Mr. Stoness pointed to two features of the application that he said would satisfy the common carrier obligations. The first was the ability of land shippers to bid for the 20,000 or so of dock space, and then to redirect those volumes to land destinations.

7076. Well, what's the toll for that? What's the toll for that, we don't know. By definition it's a bid, you don't know what the toll is for that service.

7077. The second was the ability of land shippers to seek capacity from firm shippers. *[Tr. Vol. 1, para 403-404]*

7078. Now, we submit to you that that's not a solution either. Neither of these address the basic problem -- which is that the proposal disables it from providing and satisfying its section 71 obligations, far from due diligence this is a deliberate

withdrawal of common carriage capacity that's needed in order to sell it to the highest bidder.

7079. So we say that it's simply not credible and we say that it's also not credible to argue that their obligation under section 71 can somehow be delegated or satisfied by granting control and arbitrage opportunities to unregulated third parties.

7080. In any event -- and I'm not going to go into detail in a secondary market issue, I think Mr. Bergner addressed this quite well.

7081. We submit that the suggestion of a functional secondary market is quite inconsistent with the other allegations that have been advanced concerning, in particular, the opening of new markets. I mean clearly these shippers intend to use their capacity and that's why they paid a premium for it.

7082. So in conclusion on section 71 we say that this is simply the anthesis of a pipeline complying with its due diligence obligations under section 71. This is a course of conduct that's designed to remove capacity from common carriage that's needed.

7083. So let me then turn to the reasons that have been offered by Trans Mountain in support of, again, what we consider to be an unprecedented request.

7084. In no particular order, I'll deal with each of the five remaining suggestions.

7085. The first was that firm service should be provided because shippers have requested it. Well as Mr. McLarty indicated, the answer to that is quite simple. We're not dealing here with an expansion application being advanced in response to service request; we're dealing with a zero sum gain.

7086. We're dealing with a proposal to grant a few shippers priority access to the system over other shippers who by definition would have less priority to that system. So in a zero sum game, we say that if shipper responsiveness is a criterion, at best this is a wash. You have some customer saying, "Do it" you have some customers saying "Don't." The application is not responsive to shipper request.

7087. The second area where reason that's offered up is that the firm service proposal more equitably allocates pipeline capacity between shippers. This was a subject of a lot of discussion in this hearing and a number of speeches that we heard from the Trans Mountain panel. All of which were really focused on showing

themselves as attempting to strike an equitable balance between all of the shippers.

7088. In our submission, Madam Chair, those speeches ran quite hollow. If this proceeding had been convened solely to consider the issue of allocation between land and dock, there's no doubt that Trans Mountain would have had credibility in offering its views on a balanced allocation approach, but it wasn't.

7089. It's been evident from the opening moments of this hearing that we are here because Trans Mountain has a service offering that it wants to pursue and has a certain way that it wants to pursue it. It doesn't want any conditions to restrict it in the way that it pursues that service offering.

7090. In short it's seeking to carry out the plan that they alluded to in the Keystone proceeding; to move its system, in part for now, to take or pay contracts and negotiated tolls. That's what we're dealing with here. *[Exhibit B16-2]*

7091. Put quite simply, Trans Mountain has a horse in this race, it's not unbiased, it's not indifferent to the result as between dock and land shipments as it might have been in years gone by.

7092. Leaving that bias aside, the primary basis on which Trans Mountain argues the reallocation to be appropriate, appeared thus to be an exercise in comparing historical demand at the dock and land destinations with forecast demand for the dock and the land destinations as explained in the balancing of interest speech from Mr. Rinne. *[see for eg. Tr. Vol. 1, Para 281 to 288]*

7093. We submit that when you critically analyze the evidence in this proceeding, you'll see that the explanations offered were simply not reliable.

7094. First of all, as discussed by Mr. McCutcheon and Ms. Friesen, it's really important to bear in mind that in looking at the allocation issue that existing land shippers are also existing dock shippers. *[Tr. Vol. 3, Paras. 4331-4333; Tr. Vol.4, Paras. 5446-5447]*

7095. Although they might all want to access additional dock capacity, they are not advocating reallocation of land space to the dock.

7096. Second, and as canvassed by Mr. McLarty in his remarks, the reallocation issue only arises here because of the firm service application. Because having proposed to sell bought priority access to all of the existing dock space to firm service

shippers, Trans Mountain was left with no common carriage capacity at all to the dock if it was to keep that offering at the 54,000 barrels a day number. *[Tr. Vol. 1, para 226 to 264]*

7097. And so it had to take 25,000 barrels from land and move it over to the dock.
7098. You know, the evidence was -- that was presented concerned the hind cast, the forecast. The hind cast that they presented used land delivery data for a period in which one major land user, Tesoro, was not in operation due to a catastrophic fire. Hopefully that won't happen very often.
7099. And in any event, as Mr. Bergner canvassed with you, the differences in nomination practices and procedures between the dock and land deliveries, was an apples-to-oranges comparison in any event.
7100. What the forecast evidence presented did show, I suggest, was that for the foreseeable future this pipeline system is going to be at or near capacity. Of course that's something that you could have concluded in the first place from the success of the auction.
7101. The parties in the market are certainly projecting that there will be scarce capacity and that's really all those forecast showed.
7102. Mr. McCutcheon -- and this was echoed by Ms. Friesen -- put the equitable allocation issue into perspective best when he noted that under the Trans Mountain proposal common carriage dock shippers will generally be reduced to fighting over one cargo per month versus the two available now. *[Tr. Vol. 3, para 4032 to 4033]*
7103. You know, from the dock perspective, at a time of clearly scarce capacity that can hardly be considered to be equitable or reasonable or in keeping with Section 71 of the Act.
7104. I'm going to skip all over the offshore market development issues and the benefits alleged in terms of netbacks because those have been covered, Madam Chair, and let me move on to the alleged benefit of lowered cost of future expansion.
7105. In the context of the Board's list of issues, this allegation goes to the question of whether the proposed use of firm service fees is appropriate I think. And

the position of ConocoPhillips and Shell and Suncor in respect of this issue is that Trans Mountain has failed to provide any convincing evidence to demonstrate that the use of the firm service fee as proposed will benefit all shippers. There are a number of reasons for this.

7106. First, my clients agree with Dr. Gaske's comments that a pipeline service provider should not be looking to its customers to fund business development activities in the first place. *[Tr. Vol.3 paragraphs 4363 to 4367]*

7107. Second, we submit to you that without an actual expansion application before you, there is simply no way to determine whether and to what extent shippers will benefit.

7108. At a minimum, we suggest that shippers and you to make that conclusion would need to know the amount of expansion capacity that's proposed. You would need to know its likely costs and you'd need to know how the expansion capacity would be tolled.

7109. Would it be rolled in to existing rate base? Would it be cost of service based tolls? Would it be market-based negotiated tolls?

7110. You know, you've heard a lot of assurances, for example that these firm service revenue fees will not -- will serve to lower the costs of future expansions and will not be charged back then to future shippers. They won't go into rate base.

7111. Well what happens if you have market-based tolls that don't -- that aren't rate-based, that don't have a rate base? They aren't based on a rate base to start with. What happens to those costs then, do they have -- do those investments have value to the pipeline service provider in setting the charge that it would like to make for the expansion? I guess it would.

7112. Thirdly, we say that it's clear that the expenditures proposed here would take place far before any determination would be made as to whether the projects would actually be proceeding and if so, under what cost and as I mentioned what tolling mechanism.

7113. So for example, it appears that the first thing Trans Mountain would do with the firm service fee, if you were to approve this application, would be to write itself a cheque for the \$8 million in TMX-2 predevelopment costs that it has booked but quite appropriately refrained from passing on to its existing customers.

7114. So even if you're prepared to venture a finding that because expansion of the system is in the public interest, so too is it in the public interest to allow the proposed use of the firm service fee, the evidence is not there to support the claim that allowing it to use shippers' money to fund predevelopment activity will benefit all shippers in the long run. We simply don't know.
7115. So let's turn, then, to the next alleged benefit, which is the firm service revenue stream. This is closely tied to another argument advanced, which is that allowing this application would allow Trans Mountain to compete with the availability of firm service on other Canadian pipelines. Accordingly, I'm going to discuss these two together.
7116. Now, ConcoPhillips and Suncor and Shell do not dispute the 10-year firm service agreements will provide 10 years of revenue. That's obvious, and obviously, to that extent, Trans Mountain stands to benefit.
7117. However, the flip side of that occasion is that common carriage customers, who will pay the same toll as firm service customers, remember, based on their tolling methodology, leaving aside the firm service fee, will, for 10 years, rank behind the firm service shippers in accessing the system. For 10 years.
7118. So while Trans Mountain may benefit from 10 years of firm revenue, common carriage shippers would suffer from 10 years of reduced service, albeit at the same toll as they were paying before. We say that's not fair.
7119. In addition, and as pointed out by Mr. Brownie, under the existing incentive toll settlement, Trans Mountain doesn't bear the volume risk on its pipeline from a tolls perspective in the first place. Its shippers do. *[Tr. Vol. 4, Para 5588]*
7120. And the majority of shippers who have borne the volume risk on the Trans Mountain system, historically and currently under the incentive tolling settlement, are saying that they don't want this proposal to proceed, the majority by volume.
7121. Now, at page 47 and 48 of its application *[Ex. B1-2]*, Trans Mountain lays out the case for being able to offer firm service under this argument, saying that it was facing circumstances, and I quote:

"...when it is critical that it be able to respond to competitive market forces and meet the needs of its shippers."

7122. And of course, it referred back to the Kinder Morgan letter of comment to Keystone XL, where Kinder Morgan described, amongst other things, the risk of death spiral faced by a cost of service pipeline whose volumes decreased due to factors such as reduced regional demand, decreasing supply or competitive pipeline alternatives.
7123. Now, it's our submission that the evidence in this case clearly shows that this is not a pipeline that's in the throes of a death spiral. It's connected to a large and growing source of supply.
7124. The CAPP 2010 crude oil forecast provided by Trans Mountain in support of its application projected that western Canadian crude oil supply will grow from two and a half million barrels per day in 2010 to approximately 3.8 million barrels a day in 2020. [*Ex. B1-5 at p. 29*]
7125. As pointed out by Mr. McCutcheon, the Trans Mountain has the advantage of a range of refiner and product customers in the Vancouver and Washington State area who are reliant, if not captive, to Trans Mountain for pipeline service.
7126. It's currently the only pipeline providing access for Canadian crude for offshore markets, and the ANS crude oil supply has declined precipitously, as you heard in the evidence. [*Tr. Vol. 3 Paras 4304-4311*]
7127. So if there's a death spiral risk here, Madam Chair, it's pretty hard to find.
7128. In any event, and as discussed by Mr. Brownie, if such a risk does materialize, there are mechanism other than an application such as the one before you today for Trans Mountain to compete.
7129. One way would be to work with its shippers to work to find innovative solutions to problems perceived to exist in running a common carrier pipeline. I'll use the word pure common carrier pipeline as was used by Ms. Buchinski in a world where contract carriage also exists for oil.
7130. The example Mr. Brownie gave was the Enbridge competitive toll settlement when Enbridge sat down with its shippers and negotiated a 10-year agreement in which it accepted volume risk. Now, Mr. Stoness may consider that to be unfair competition, but we don't.

7131. So to recap, Madam Chair, ConcoPhillips and Suncor and Shell submit to you that the application before you contravenes the Act and the reasons offered by Trans Mountain in support of its application are simply not supported.
7132. Before closing, I propose to respond to two recurring themes that we've heard from Trans Mountain and, to a lesser extent, the Firm Service Group in extolling the virtues of the application, the first being that the problems inherent in this proposal were, in some fashion, cured by conducting an open season and the second being that the proposal is somehow justified by a subsidy of land shippers by dock shippers.
7133. I'll turn first to the subject of open seasons. The Board's list of issues in this case includes the issue of whether the open season was appropriate. Now, that begs, of course, the question appropriate for what purpose.
7134. The Act does not define or even refer to the term "open season". A review of past decisions demonstrates that, in practice, open seasons have been used for different purposes, primarily, though, at the project development stage.
7135. For new projects, open seasons have been used as a method of marketing the availability of contract carriage service to industry with the objective of securing sufficient contracted support to demonstrate need. *[See for example Express Pipeline Ltd. - OH-1-95 at p. 44]*
7136. We saw that, for example, in the Express case going back to the late 1990s; similarly with the Alliance Pipeline case in the 1997 era.
7137. Open season processes have also been used as a mechanism for offering potential oil shippers an opportunity to participate and enter into discussions on the development of new service on oil pipelines. We saw that, for example, in the TransNorthern Pipeline reversal case. *[See TNPI Reversal decision OH-1-2003]*
7138. And in particular, these cases talk about the need to offer an open season to show that the long-term firm capacity that was being offered in order to secure long-term shipments that could finance the pipeline have been offered to everyone.
7139. In the present case, there is no new project or project expansion before the Board, and so the question that arises is what purpose one might reasonably expect an open season to achieve. Clearly, it can't be used to demonstrate need to construct a

pipeline because we're not there, or to invest in an expansion, because we're not there, either.

7140. What it did test and ultimately demonstrated was a desire on the part of some customers to move ahead of other customers in the line in terms of accessing existing capacity, and it did it in two ways.
7141. First, it demonstrated that desire by securing bids for the full amount optioned, and second, by securing the highest possible bid price from each of the successful bidders.
7142. ConocoPhillips and Suncor and Shell do not take issue with the process that was used for conducting the open season. What they do take issue with is any suggestion that the open season here in some fashion justifies or cleanses the priority access offering itself.
7143. As I say, what was being sold here was 10 years' worth of priority access to assist some that was under apportionment and which was projected to be full for at least 10 years to come, at least on the evidence that you've got here.
7144. As explained by Ms. Friesen, the fact that customers were prepared to pay a premium for firm service demonstrates that it was the scarcity of capacity that drove the auction. [Tr. Vol. 4, Paras 5868-5869]
7145. The auction was, by design, a mechanism for using the scarcity of capacity to drive a high price. As explained by Dr. Gaske, the auction here was really an exercise in what economists would call first-degree price discrimination, and I'll quote from him:

"And in fact, in economics, the way this was set up is what we would call first-degree price discrimination. The bidders who got capacity, each one paid the amount that they bid so that in first-degree price discrimination what a monopolist does is extracts as much as it possibly can from each shipper, and it's highly discriminatory. It gets as much as it can from the highest value shipper and then it gets what it can from the next-highest and divides up the market that way. So this whole idea of auctioning off long-term capacity at more than a cost-based regulated rate, I think, is a major step for this Board to take and would be a precedent that I don't believe I've seen anywhere else." [Tr. Vol. 4]

7146. That was Dr. Gaske's view.

7147. So if by "appropriate" the Board's list of issues means that the auction was conducted in a procedurally regular manner, we can agree with that. If by "appropriate" the list of issues means that the product being sold and the way it was sold was appropriate, ConocoPhillips and Suncor and Shell say that it most certainly was not.

7148. Not only was the product being sold inappropriate, but it came with significant baggage for existing common carriage shippers and, in particular, those who ship to both land and dock because, for those shippers, participation in this auction meant that they could well end up being forced to support or at least remain silent in respect of important tariff amendments and transportation service provisions such as expansion rights, in respect of which they may have been fundamentally opposed. *[Tr. Vol. 2 paragraphs 1860, 1861, 1862 & 1863]*

7149. And lastly, the product being sold in the auction was also tied to both firm service priority over existing shippers as well as priority rights to expansion, with the proceeds of the auction going to support project development costs that ordinarily would be borne by the pipeline.

7150. So again, we say that the product was not appropriate.

7151. So was the open season appropriate? We say no. It may have been run with procedural regularity, but it should -- but the auction should never have taken place.

7152. Let me turn, then, to the so-called subsidy. We heard this at a number of times during the proceeding as a way to justify the reallocation that was going on. We heard this during the week from both Trans Mountain and Astra, and it relates to the issue of bid premiums for the dock.

7153. On a number of occasions, Trans Mountain suggested that the bid premiums currently received by it constitute a subsidy by dock shippers of the land shippers, with the inference being that those who support firm service in this case are somehow subsidizing those who oppose firm service in this case.

7154. And Mr. Keough's remarks this morning, I suggest, was a classic example of how that inference has been used consistently throughout this proceeding.

7155. Now, hopefully this misconception was put to rest in the evidence of Ms. Friesen and Mr. McCutcheon. Both of those witnesses clarified that while there are dock shipments and land shipments, the companies involved here are, for the most part, the same companies. *[Tr. Vol. 3 paras 4331-4334]*
7156. So while there may, at first blush, appear to be cross-subsidization, it's not nearly as straightforward as some would lead you to believe.
7157. In any event, if there is a real issue of cross-subsidization, then that's clearly one that can be managed through existing tolling mechanisms. Let's remember that that premium only exists as a method to allocate scarce capacity.
7158. It was not intended to be a tolling mechanism, although the inference has been left and scattered throughout this hearing record that in some fashion it was, and so it's unfair that certain shippers should receive a benefit, whereas others don't receive as much of a benefit from the way that the dock premiums are currently credited back to shippers.
7159. If there's an issue, it can be dealt with, Ms. Friesen explained. There is an incentive toll settlement here that goes until the end of the year. This can be dealt with next year in an incentive toll settlement or, if absolutely necessary, I suppose, the next time that Trans Mountain appears before you with a tolls application.
7160. Before sitting down, I want to briefly address some of the implications made in Mr. Davies' argument regarding the need for the Board to step back here and let the market operate. The firm shippers put their money on the table, they've won the competition, and complaints from existing shippers are nothing more than sour grapes, or at least that's the inference that's left.
7161. Madam Chair, ConocoPhillips and Suncor and Shell take no issue with the decisions that were made in this case by the Firm Shipper Group members. Each of them placed a value on the priority access offered for sale in the auction, together with the incidental benefits that come along with it such as the expansion rights, preferential loading windows, you know, having 50,000 barrels a day of capacity tied up over the next 10 years, and so forth.
7162. At the end of the process, these firm shippers agreed to purchase priority access to scarce pipeline capacity that they can either use themselves or resell it to those needing it most at, presumably, the highest price they can obtain. We say that

doesn't tell you much.

7163. The fact that these companies were prepared to participate in the auction and we're the recipients of what Dr. Gaske what Dr. Gaske described as first-degree price discrimination by a monopolist service provider, to use an economist term, is not evidence of the market at work.
7164. It is, we submit, evidence of a market that's failed to work, and it's proof of the need for this Board to require that Trans Mountain comply with the Act. Nothing more and nothing less.
7165. So, to conclude, we suggest to you that the application should be denied. The proposal before you would, if approved, deprive existing customers on the of some of the most basic and fundamental protections offered by the *National Energy Board Act*, the right to service on an oil pipeline with all due diligence, without undue discrimination, and at a just and reasonable toll.
7166. It would countenance a course of conduct through the auction process that was designed to disable, rather than to enable, Trans Mountain to provide service in accordance with Section 71 of the Act.
7167. It would countenance a price setting mechanism for the determination of tolls for that we suggest violate the Act. It would countenance, rather than prevent, the exercise of price discrimination by a monopoly pipeline service provider, to the detriment of existing customers.
7168. None of that can be considered to be in the public interest.
7169. Denial of the application, and maintenance of the status quo is the only reasonable outcome here. If the application is denied, let's remember that Trans Mountain can continue to earn or have the opportunity to earn what we believe and consider to be an excellent return, with a full pipeline system. That's not such a bad thing.
7170. Trans Mountain and its shippers can turn their efforts to addressing important issues that we've heard, and if there's a need to address specifically issues such as the allocation of dock capacity -- or capacity, rather, the use of future dock premiums and whether and how best to approach evaluation of future capital projects, all without the tremendous confusion complication and, we say, acrimony that this proposal has introduced.

7171. We suggest that included in that evaluation should be a serious and considered examination of expansion options, and a serious and considered re-examination by Trans Mountain of its apparent desire to have customers bear all of the costs and risks associated with development options.
7172. We submit that denial of the application is the only approach open that will maintain appropriate respect for the protections provided to shippers under the Act, while encouraging all parties to move forward on a collaborative basis to improve the manner in which the system operates.
7173. In time, that may well include firm service, and even firm service for the groups appearing before you today, but in a way that everyone else on the system can support, and perhaps participate in.
7174. Thank you.
7175. **THE CHAIRPERSON:** Mr. George has questions.
7176. **MEMBER GEORGE:** If I can formulate them at this time. Okay.
7177. Sorry. I just have to put some order in my notes here. I'm not as quick as 9:00 this morning.
7178. **MR. NEUFELD:** None of us are.
7179. **MEMBER GEORGE:** Mr. Neufeld, I'll ask you a variation of the question I asked Mr. McLarty and that's does Section 71 limit the Board to new capacity in prescribing exemptions, conditions or regulations?
7180. **MR. NEUFELD:** No, it doesn't. It's the obligation is as stated and I think that the context that that obligation has been rationalized with firm service, it has in something that's arisen obviously where you have new capacity and capacity expansions. Because in that case there's an opportunity for the company to offer contract carriage service clearly in a way where they can accommodate and enable the common carriage service as well along the way. And that's what most of the cases I deal with.
7181. **MEMBER GEORGE:** Okay, I guess that would generate another question in my mind providing context. Is there any criterion or any criteria you can

offer for the Board's consideration that the Board should use if it chose to prescribe exemptions, conditions or regulations?

7182. **MR. NEUFELD:** Well I would refer you on that back to the remarks of Mr. McLarty. I mean -- what he laid out for you was that the basic test is, is the pipeline complying with those provisions by placing itself in a position where it can accept with due diligence all oil that's offered to it for service.

7183. So the criterion would be primarily and foremost, is there sufficient capacity for common carriage customers or uncommitted carriage customers -- uncommitted customers if you want to call them that, on the system at the present time. So that's clearly one circumstance that the Board would want to have a look at.

7184. Another might be a situation where, for example, and this -- you alluded to this a little bit yesterday in your discussions with the Shipper Group panel, Board Member George, which was how does Section 71 or Sub-section 71.3 fit within all of this? So you might have a -- someone wants to go home -- wouldn't be the only one.

--- (Laughter/Rires)

--- (A short pause/Courte pause)

7185. **MR. NEUFELD:** I think we're back.

7186. And so you may have a situation involving, for example, an oil pipeline that's clearly uneconomic and they might seek an exemption from their obligation to provide common carriage service to one particular area or another.

7187. So that's some large -- a situation where you can have an application for a suspension of service which could constitute an application for an exemption under Sub-section 71.1, you see what I mean?

7188. **MEMBER GEORGE:** Thank you for that.

7189. I believe that you mentioned that there's a problem with the toll if we don't know part of that toll exactly and I believe this was in your discussion on the firm service fee. Though -- so would that be a definition of the toll in the NEB -- can I see that a toll includes any toll rate charge or alliance or allowance charged or made?

7190. I guess my question would be does this mean that a toll must be an exact number or exactly known?
7191. **MR. NEUFELD:** It must be discernible and I think under Section 60 of the Act, I believe, Mr. Crowther may be addressing this in his remarks; you may want to leave your questions for him.
7192. There is a requirement that companies not charge a toll that has either not been approved or is not included in a tariff that's been filed with the Board. We read that as meaning you should be able to discern certainly what the toll is as opposed to a completely undetermined amount.
7193. **MEMBER GEORGE:** I'm not quite sure I understand the term "discern." I know what it means in plain language English but what does it mean in this context?
7194. **MR. NEUFELD:** What are they charging.
7195. **MEMBER GEORGE:** Thank you.
7196. **THE CHAIRPERSON:** Just one clarification question, Mr. Neufeld.
7197. You had posed a question, is the proposal one that allows the company to accept all oil?
7198. And you're saying contrary to, for example, looking at another pipeline such as, for example, Keystone where you have got some that is under contract and then there's a portion -- however that percentage whatever it is, that can be made available to whoever may request it.
7199. You're saying that the reason why this proposal could be contravening with Section 72.1 is because all of the capacity on it right now is called for.
7200. **MR. NEUFELD:** Yes, and I focus really on -- there's also the provision there with due diligence and without delay. And it just seems to me -- and seems to my clients -- that what's happening here is you have a system that's full, you have common carriage customers who need that capacity and then they have dropped upon them a set of contractual arrangements that disable the company from providing the service that's needed on an uncommitted basis. And that can't be due diligence, in fact it's the opposite.

7201. **THE CHAIRPERSON:** Thank you for that.
7202. I think with this we have no further questions for you. We thank you for your argument.
7203. **MR. NEUFELD:** Thank you and thank you for your patience and I'll add thank you to the reporters in Ottawa for their patience. I'm sure it's getting late there.
7204. **THE CHAIRPERSON:** Absolutely.
7205. I was going to ask if the preference of parties would be to continue after a short break or if the argument of Mr. Crowther and Imperial and Mr. King, if this is going to take another two or three hours, perhaps we can continue on Monday.
7206. I just want to see what's the parties' preference. We didn't make any plans for Friday evening, to tell you the truth. But -- so we're available for you but I'm also taking into account how much -- how alert parties might be or tired.
7207. **MR. LANDRY:** Madam Chair, from Imperial's perspective, I would expect to be about 20 minutes to a half hour.
7208. **MR. CROWTHER:** Good afternoon, Madam Chair.
7209. I expect to be approximately one half hour with my argument and my strong preference would be that we continue tonight. I appreciate that everyone is tired. It has already been a very long day but I think fairness dictates that we continue.
7210. I think it would be unfair for instance to give the Applicant the weekend to prepare its reply, given the tight timeframes under which we've been all compelled to operate.
7211. **THE CHAIRPERSON:** I was only thinking with human factors. This -- I overlooked that, so ---
7212. **MR. CROWTHER:** Well, indeed, Madam Chairman, the human factor is an important one and I think we are where we are and I -- my suggestion is the best and fairest way to get past where we are is to persevere this evening. Thank you.

7213. **MR. McLARTY:** Madam Chair, just to alleviate Mr. Crowther's concern, Trans Mountain is good to go and, in fact, are keen to do so.

7214. **THE CHAIRPERSON:** Mr. George was asking me how long do you think Mr. Keough would take?

--- (Laughter/Rires)

7215. **MR. KEOUGH:** Madam Chair, you've heard the expression 'burning the midnight oil'?

7216. **THE CHAIRPERSON:** Yes, I was going to say until midnight.

7217. **MR. KEOUGH:** I can safely say you will not have to do that.

7218. **THE CHAIRPERSON:** Okay, good.

7219. **MR. KEOUGH:** I would hope to be not too long. I mean ---

--- (Laughter/Rires)

7220. **MR. KEOUGH:** There's a lot that has been said and I will not show you the number of yellow sticky notes that I have been handed. But that being said, I would hope to keep it in the half-hour, 45 minute range at most.

7221. **THE CHAIRPERSON:** Yes, we are really good at holding people accountable.

--- (Laughter/Rires)

7222. **MR. KEOUGH:** I'm prepared.

7223. **THE CHAIRPERSON:** Thank you, sir.

7224. We will continue then with Imperial.

--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR MR. LANDRY:

7225. **MR. LANDRY:** Thank you, Madam Chair.

7226. I have provided the Court Reporter, as other parties have, with the notes of my -- notes on argument with case and evidentiary references, and I would just ask that the reporter include those references in the record.

7227. Madam Chair, Imperial's argument will be divided into six parts.

7228. First, I will give you a brief overview of Imperial's position on the application. Second, I will review with the Board Imperial's interests in this application. Third, I will discuss with you the *National Energy Board Act* common carrier obligations for a pipeline such as the Trans Mountain pipeline.

7229. Fourth, I will discuss the principles of fair and equal access in the context of NEB regulated pipelines. Fifth, I will review why Imperial says that Trans Mountain's application inappropriately utilizes the contract carriage principles set by the Board in previous cases. And finally, I will provide some closing comments.

7230. As I said, I would like to start by giving the Board an overview of Imperial Oil's position on this application. At a high level, Imperial opposes the Firm 50 Application and for the reasons that follow, it says that the Board must deny it.

7231. In summary, the three overall reasons why Imperial says the Firm 50 Applications should be denied are as follows:

7232. Firstly, it is inappropriate to convert existing common carriage capacity to contract where existing common carriage demand exceeds capacity.

7233. It prejudices uncommitted shippers by restricting access to capacity to both land destinations and to the Westridge dock. And Trans Mountain should consider and respond to the needs of all shippers, rather than just the needs of the select few highest Firm 50 bidders.

7234. It is very instructive in this case, Madam Chair, that the Board has heard that shippers representing the overwhelming majority of the volume on the Trans Mountain pipeline are opposed to this application.

7235. This point must be kept in mind each time Trans Mountain suggests to you it is responding to shipper demand.

7236. Secondly, it is inappropriate to auction Firm 50 capacity and future

expansion rights to the highest bidder through market based firm service fees. It results in firm shipper market control over present and future capacity of an NEB regulated monopoly pipeline, which is chronically oversubscribed.

7237. It allows for pre-collection of funds for undefined projects to the benefit of Trans Mountain shareholders, contrary to regulatory principles. And it is also contrary to cost-of-service principles fundamental to just and reasonable rates in a regulatory environment.

7238. Thirdly, Madam Chair, it is inappropriate to allow a few select firm shippers and Trans Mountain to take advantage of a market driven opportunity resulting from Trans Mountain's status as a regulated entity which has a monopoly on pipeline capacity for the B.C., Washington, and export markets served from the west coast.

7239. Madam Chair and Members of the Board, at its essence, Trans Mountain's Firm 50 Application is really about Trans Mountain's attempt to collect market based fees, which reduces Trans Mountain's risk while increasing their shareholder value with minimal ongoing regulatory scrutiny.

7240. Now, going to what Imperial Oil's interest in this proceeding is, Madam Chair; Imperial is, as I am sure the Board is aware, one of the largest crude oil producers, refiners and marketers in Canada and has utilized common carriage pipelines across Canada, including Trans Mountain for over 50 years.

7241. Imperial and its affiliates have a long history as shippers on Trans Mountain including both land shipments, shipping crude to the former Ioco Refinery in Vancouver, which is now closed, and currently shipping refined products to the Pacific Northwest market, and also Westridge dock shipments for crude exports.

7242. Being both a land based shipper without refining operations and a dock shipper, in those respects, Imperial believes it can provide a more balanced perspective on the issues the Board has to deal with on this application.

7243. I would say to you, Madam Chair, this is particularly important given the suggestions made by both Trans Mountain and the firm shippers that uncommitted shippers have some ulterior motive behind their opposition to maintain the status quo.

7244. Let me assure you that in the case of Imperial there is no ulterior motive. Imperial's opposition as a land based shipper with no refinery operations and as a

dock shipper is on a principle basis, and because the Firm 50 approach is, in its view, an inappropriate and inadequate response to the issues facing the Trans Mountain pipeline you have heard about this week.

7245. I would like to talk quickly about the common carrier obligations under the NEB Act that my friends have alluded to in earlier argument.

7246. As we have heard, Section 71(1) imposes a common carrier obligation on all oil pipelines. The Board itself has defined the term "common carrier" in information Bulletin No. 10, and I'll quote, it says:

"A 'Common Carrier' is one who provides transportation for remuneration without discrimination among customers. Service must normally be provided on demand when capacity is available. When demand exceeds available capacity, it is allocated to customers in proportion to the demand." [Information Bulletin No. 10, Pipeline Tolls and Tariffs: A compendium of Terms (January 1995)]

7247. Now the open access nature of common carrier pipelines highlighted in this definition is an important public good. As the Board noted in the *TransCanada Keystone* case in 2007,

"...open access to transportation capacity is an important prerequisite to enable the effective and efficient operation of the market..." [TransCanada Keystone Pipeline GP Ltd. (Re), OH-1-2007]

7248. Open access is especially important when many shippers have based their investments and operations on the fundamental premise that the pipeline is a common carrier pipeline with no contract carriage.

7249. In this case, the Trans Mountain line is chronically oversubscribed. Trans Mountain is presently not able to ship all of the oil tendered to it because the demand for uncommitted pipeline capacity exceeds the supply.

7250. Yet, notwithstanding this capacity constraint, Trans Mountain proposes to further reduce uncommitted capacity so that it can charge a premium for firm capacity to finance cost it would otherwise have to finance itself.

7251. Fundamentally, in this case, converting any uncommitted capacity to firm capacity simply will not provide sufficient capacity to meet Trans Mountain's common carrier obligations.

When a common carrier cannot ship all of the oil tendered to it, this is hardly a time to allow departure from basic common carrier obligations to allow a select few shippers to have preferential access and through the proposed new rules, control an unregulated secondary market.

7252. Now, in this regard, Trans Mountain's proposal substitutes regulation of a monopoly by the NEB with the creation of a secondary market for Westridge capacity that is controlled by the highest bidder for firm capacity. There will be no oversight by the NEB of the rates charged by the firm shippers to any nominees for their capacity.

7253. As my -- as one of my earlier colleagues indicated, Kinder Morgan itself cautioned regarding the creation of secondary markets and I have a reference to the Trans Mountain Pipeline Case Allocation Procedures in -- I believe it was 2007. *[Trans Mountain Pipeline Inc., Capacity Allocation Procedures, (March 2006 to August 200) A1C2R9, at pp. 7 and 11]*

7254. The end result of such an approach will be that uncommitted shippers will be unable to obtain a regulated rate in that secondary market.

7255. Now I'd like to discuss again, some -- with the Board, some of the basic principles of fair and equal access. Because the basic principles of fair and equal access at non discriminatory prices fundamentally underlie the regulatory framework within which the Board's jurisdiction is premised, those principles apply to pipelines that offer purely common carriage and those pipelines which also reserve capacity for contract carriage.

7256. The regulatory framework, as we all know, is such that a pipeline owner is given a monopoly but is restrained from exercising monopoly power because once the pipeline is in operation, it's required to provide equal and fair access to all shippers at Board approved non discriminatory rates that are based on cost of service principles.

7257. This includes, of course, providing the owner with a reasonable rate of return and that rate of return is intended to be reflective of the risk the pipeline owner takes in operating the pipeline within that regulatory framework.

7258. Although in the case of a pure common carriage pipeline, there is no guarantee that the pipeline will be fully utilized, cost of service regulatory principles ensure that the pipeline is kept whole including the receipt of a fair return on capital it invests in the pipeline.

7259. In that regard, there are minimal financial risks to a pure common carriage pipeline and, in the case of Trans Mountain, this risk is further moderated by the true up mechanism provided by the current and previous settlements which have been approved by the NEB.

7260. In effect, such a pipeline becomes a public utility resource that can be utilized by any shipper at non discriminatory pricing based on cost of service principles.

7261. Now, Madam Chair, as my friends have spoken about, over the last two decades the Board has approved the construction and operation of a number of pipelines and has allowed a portion of the new pipeline capacity to be used for contract carriage in which the pipelines' economics are underpinned by long-term take or pay commitments.

7262. The Board has ultimately permitted contract capacity because the pipelines otherwise would be uneconomic because the risks for the pipeline owner absent the take or pay commitments would have been too great.

7263. Now a summary of the Board's reasoning from those cases is that one, restricted uncommitted shipper access is acceptable because fair and equal access is still maintained since all shippers had a chance to participate in the open season for the take or pay commitments.

7264. Two, the toll differential is not unduly discriminatory because the committed shippers are underwriting the cost of the pipeline.

7265. And three, new uncommitted pipeline capacity is created, that is the Board has required that a portion of the line's total capacity be reserved for uncommitted movements.

7266. Now with that as a backdrop, Madam Chair, Board Members, I'd like to provide you with why Imperial says that the Trans Mountain's Application inappropriately applies the contract carriage principles utilized by the Board in those cases that I referred to.

7267. The Trans Mountain's Application is attempting to apply principles utilized by the Board in permitting contract capacity for new pipeline projects to an existing pure common carrier pipeline model.
7268. The application does not offer any new capacity as you've heard at this time, in fact Trans Mountain freely concedes an expansion may not even happen.
7269. Instead of constructing new pipeline capacity in response to high demand using principles established by the Board when allowing contract carriage, Trans Mountain proposes to reduce capacity, i.e. restrict access available to uncommitted shippers now and in the future using biddable tolls.
7270. Trans Mountain justifies the restriction on equal access on the basis that there is a demand for firm service for the Westridge dock for amongst other reasons to develop new markets, and because all shippers were informed of the service offering and it held an open season using Board's accepted rules.
7271. Yet, as a couple of my friends have already indicated, open season firm capacity was only offered to one class of shippers, that is the dock shippers. The land shippers had no offering or choices in the open season that were consistent with the Board's reasoning's in allowing contract carriage on common carriage pipelines.
7272. Trans Mountain justifies biddable tolls and its rationale for not following basic cost of service principles in effect on the basis that the firm service fees are a more efficient way to collect market-based revenues than dock premiums on a scarce public utility resource.
7273. It does so even though the Board made it very clear in approving the dock premium approach that that approach was only a temporary apportionment technique caused by the unique nature of the Westridge dock in relation to the Trans Mountain Pipeline.
7274. In that regard, Madam Chair, Trans Mountain is replacing cost of service tolls with biddable tolls, in which capacity is allocated to the highest bidder.
7275. As I said, the Board specifically rejected biddable tolls as a desirable tolling methodology [*in Trans Mountain Pipeline Inc., (March 2006 to August 2007) A1C2R9*] and if I might, Madam Chair, seek your indulgence, I'd like to just quote from that decision on the issue of biddable tolls.

7276. And the Board said at that time, and I quote:

“The Board agrees with those parties who argued that this decision should not be used as a precedent for allowing biddable tolls in other circumstances. The Board acknowledges that biddable tolls have been primarily approved for discretionary services thus far, and has only approved them in this case given the particular facts of this case: the unique circumstances of Dock traffic and how capacity can be allocated; the fact that the Premium will only be charged in times of apportionment; and the fact that they are being approved, not primarily for tolling purposes, but as a means to deal with a service condition which is expected to be relieved at some time in the future when sufficient expansions occur.”

7277. Now, Madam Chair, it's very clear that the effect of the Firm 50 Application is that Trans Mountain is favouring a new market while discriminating against an existing captive market. It is also effectively advocating an approach that is contrary to the Board's dock premium decision. *[Trans Mountain A1C2R9]*

7278. The unique circumstances referred to by the Board in the dock bid premium decision do not apply here.

7279. The firm service toll premium would not be charged only during times of apportionment, but rather would be charged for the entire length of the contracts and further, the firm contracts would do nothing to relieve the pipeline from chronic apportionment, the very service condition that the Board referred to as a basis for allowing biddable tolls in the first place.

7280. Instead, Trans Mountain's present application would increase the level of apportionment by reducing the uncommitted capacity available on the pipeline while at the same time failing to harness demand for firm service in order to finance future expansion.

7281. And I would point out -- if given the evidence of the Trans Mountain panel, Trans Mountain appears to want to jump right to TMX-3 at significant cost above the more modest TMX-2 expansion in a timeframe which, not coincidentally, corresponds to the same timing as another major project in front of the Board, that is the Northern Gateway project, and the way in which it wants to do this is to have the

shippers finance the development costs for that expansion through its proposed use of firm service fees.

7282. An approach that has no precedent with this Board and you heard from Dr. Gaske that he said there's no precedent in any regulatory jurisdiction he is aware of including the FERC.

7283. The reason for that, Madam Chair, is that it is fundamentally inappropriate within the regulatory construct within which regulated utilities in this country operate.

7284. Clearly, Trans Mountain is pursuing a strategy solely based on competitive interests rather than considering the best interests of all of its shippers.

7285. Trans Mountain's approach eviscerates the principles underlying common carriage pipelines even though the Trans Mountain Pipeline was built and regulated for decades purely on common carriage model of equal and fair access and non discriminatory pricing based on cost of service for all shippers.

7286. In particular, this approach is inappropriate where there is no economic requirement to underwrite any new investment and market-based support utilizing common carriage principles is clearly demonstrated by historic throughput.

7287. Instead of focusing on its own competitive interest, Trans Mountain should be cost effectively trying to expand incrementally in the interest of all shippers including any shippers wishing to develop new market opportunities.

7288. Through the high demand for Trans Mountain pipeline capacity, the market is clearly signalling that additional pipeline capacity, whether firm or uncommitted is necessary. Instead of responding to this market signal by expanding pipeline capacity, Trans Mountain is limiting supply for uncommitted capacity by selling firm capacity to the highest bidder.

7289. Imperial believes that Trans Mountain should be cost effectively expanding the pipeline in the interest of all shippers. Trans Mountain already completed TMX-1 which added 75,000 barrels per day. This was recently completed with the support of uncommitted shippers.

7290. The next logical expansion is TMX-2, which would add 80,000 barrels a day of capacity.

7291. I want to make a couple of points in regard to that. Firstly, Trans Mountain indicates in the firm service open season that the interest was higher than the 54,000 barrels a day -- it was 95,000 barrels a day, and it turned away therefore unsubscribed (sic) for offerings. *[Even TMPL acknowledge this point it says in its Application at p. 1-19, para. 60: "The results of the Open Season demonstrate a clear market demand for long-term Firm Service to Westridge "]*
7292. Secondly, there's no suggestion that the demand for dock capacity will decrease over the forecast planning period. Converting common carriage capacity to contract is not an adequate response to that excess demand.
7293. The response by Trans Mountain to auction firm service to the highest bidder, does nothing but create winners and losers for the Westridge capacity and all the land shippers become losers.
7294. Instead of harnessing the demand to create new capacity, either for uncommitted or firm shippers, Trans Mountain proposes to convert existing uncommitted capacity -- scarce uncommitted capacity -- to firm capacity.
7295. By doing so, Trans Mountain may satiate some of the demand for firm capacity, the demand that could have been harnessed in support of future expansion.
7296. And thirdly, at the same time Trans Mountain has offered firm service rates to committed shippers for two times the 54,000 barrels per day of firm capacity of any new expansion, so this option likely provides no opportunities for any other shippers to obtain additional capacity should Trans Mountain incrementally expand to TMX-2.
7297. Now, Madam Chair, I'd like to make one final point before summing up.
7298. Both Trans Mountain and the committed shippers attempted to justify the Firm 50 Application on the basis that it would result in benefits to all producers in the form of increased netbacks. I would ask the Board to look very carefully at that evidence. It is the type of evidence that simply cannot be relied upon by this Board in its deliberations.
7299. The evidence when looked at carefully is nothing but conclusory statements unsupported by the type of rigorous analysis that would need to be performed to justify such bold statements.

7300. And I would say to you that a clear indication of the lack of validity to the point is that you have a line-up of some of the largest producers and shippers of oil in Canada who are strongly opposed to the application. Surely, if the point was so obvious, that type of opposition would not exist.
7301. So, Madam Chair, in closing, Trans Mountain 's proposal is simply, in Imperial's submission, an opportunistic attempt to utilize a regulated public utility asset for the benefit of itself, i.e. reducing its regulatory risk for its capacity expansion plans and a few shippers that signed TSAs for firm service.
7302. It does so on the backs of uncommitted shippers by restricting our access to a viable and scarce public utility resource in a way that will result in reduce access for uncommitted shippers for both the land and the dock shipments.
7303. Allowing a pure common carriage pipeline to be converted, at least in part, to a pipeline with contract carriage service attributes in an era of high demand and materially constrained capacity without offering additional capacity, does nothing but benefit in a material way a select group of shippers to the material detriment of other large shippers such as Imperial and small shippers.
7304. It is unprecedented, and fundamentally inappropriate in the regulatory environment under which regulated pipelines operate. It is not in the public interest and is contrary to the Act.
7305. This is especially problematic, Madam Chair, when Trans Mountain is currently a true monopoly pipeline in British Columbia, land and marine, and in Washington State, and when many large and small shippers have built and operated their businesses on the basis of the pipeline being a common carriage pipeline.
7306. If there is more demand for pipeline capacity than exists, and specific demand for firm capacity, the appropriate approach is capture the increase in demand and expand the pipeline. Demand for firm capacity can be harnessed to underwrite the risks inherent in providing new capacity.
7307. For all of these reasons, Imperial says that the Firm 50 Application must be denied.
7308. And, Madam Chair, the final point I would like to make is that there was much discussion during the last couple of days about what the Board could do to help deal with the many issues that were debated extensively over the course of the week.

7309. Imperial, for its part, would promote the Board in its decision establishing an environment and the motivation for Trans Mountain to collaboratively work with all of its shippers on progressing an expansion on reasonable terms that will satisfy market demands for the capacity. This approach succeeded before the recent TMX-1 expansion, and it can succeed again.
7310. Expansion is the only solution that has the potential to solve all of the core issues facing the parties. The capacity constraints for land and dock shippers, the exorbitant dock premiums that have evolved in today's markets, the issue of the need to take care of the captive market that exists in British Columbia and Washington, and the desire to develop new offshore markets.
7311. There is simply no doubt that using your regulatory jurisdiction to establish an environment that fosters collaborative discussions amongst all interested parties is clearly in the public interest.
7312. Now, Mr. Davies I know was not belittling this proceeding or the circumstances facing the Board or the Board's jurisdiction, in providing his humorous analogy of a dysfunctional family; but using such an analogy allows him to take a very superficial approach to the question of what it is that you can do or should do.
7313. This is not a family; this is a regulated utility in a regulated environment. This is a true monopoly pipeline; you are the regulator of that pipeline.
7314. You have substantial and the necessary jurisdiction to specifically deal with all the issues that you've heard about this week, and I would draw your attention to the broad discretion you have and I'll just reference some sections that have not been referenced to date; Section 20, Section 12, Section 13, Section 15 and there are many more.
7315. Imperial encourages you not to shy away from your regulatory role in regulating this pipeline. Create the environment that will foster the collaboration that will result in solutions to the issue that you heard this week.
7316. Madam Chair and Members of the Board, those are the submissions of Imperial.
7317. **THE CHAIRPERSON:** Thank you, Mr. Landry.

7318. Mr. George is on a roll.

--- (Laughter/Rires)

7319. **MEMBER GEORGE:** Yes, I noticed that you are encouraging us to -- or reminding us that we have full and exclusive jurisdiction to inquire into and hear, and determine any matter basically whatsoever -- it's a pretty good section -- basically, what I'm hearing you say is take up your responsibilities and solve this mess.

7320. Because personally, looking at how the industry has resolved this piecemeal, we had a recounting of every single mess that every single way we tried to do this. I'm at the point of thinking that maybe we just need to get everybody into a full-tolling situation here and resolve every single issue, the dock premium.

7321. I am looking at the way you allocate within land, you know, based on refinery capacity, which has no physical bearing on what they can use; that there's a pipeline that can only bring to them 180, and I can go on, and on, and on, and on here.

7322. And what we are getting in terms of applications are very piecemeal things that we have to revisit, as I forget who recounted, all the cases in front of us.

7323. I for one would very seriously take your advice and look at the full powers the Board has here in dealing with this situation.

7324. **THE CHAIRPERSON:** Thank you very much, Mr. Landry, for your argument.

7325. **MR. LANDRY:** Thank you, Madam Chair.

7326. **THE CHAIRPERSON:** I wonder, given the time, if we can have a 10-minute comfort break, and we will be back in 10 minutes.

--- Upon recessing at 6:04 p.m./L'audience est suspendue à 18h04

--- Upon resuming at 6:19 p.m./L'audience est reprise à 18h19

7327. **THE CHAIRPERSON:** We are all re-energized, Mr. Crowther, and ready for you.

--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR MR. CROWTHER:

7328. **MR. CROWTHER:** I wish I could say the same, Madam Chair.
7329. But please believe me when I tell you that I am acutely aware that I am one of the few remaining obstacles standing between all of the good people in this room and a beautiful summer weekend, which is truly a scarce commodity in our part of the world.
7330. Nevertheless, it is my privilege and pleasure to present the argument of Tesoro Canada Supply and Distribution Ltd., a long-time and significant shipper on the Trans Mountain Pipeline System. *[2T1910-1917]*
7331. I will refer to my client simply as "Tesoro" throughout my submissions. And let me quickly disabuse Mr. Keough of any notion that Tesoro is enjoying life from where it is sitting at the moment facing substantial apportionment on a pipeline upon which it and its predecessors, in Anacortes, Washington, have relied for decades.
7332. I have provided the Court Reporters with a copy of my notes but caution that my remarks may depart from them. My notes include headings. I would ask that they be recorded in the transcript. And like several of the counsel who have preceded me, I have also included evidentiary references and would ask that, in the interest of efficiency, they be recorded in the transcript, so that I need not take time to read them into the record.
7333. This argument treats the principal issues set out in the list of issues that the Board established for this proceeding. I confess to having struggled without success to find a more creative way to structure my argument than simply tracking the issues as they were articulated and in the order in which they appear in the Board's issues list.
7334. However, I hasten to add that the fact that I will discuss the issues separately should not be taken to mean that Tesoro considers them to be unrelated. To the contrary, and as Mr. Keough's argument suggested, a great many of the issues are intertwined and inseparable.
7335. Moreover, as Mr. Stoness confirmed to you on Tuesday, Madam Chair, so far as Trans Mountain is concerned, this is an "all or none" proposition. *[2T2921]*
7336. Mr. Keough took some care to remind you of the issues that are before

you and to inform you of the options from which you may choose in making your decision. I do not disagree with what he said to you in that regard.

7337. However, Mr. Keough also commented on various other matters that he argued are extraneous to this proceeding but on which a fair amount of transcript ink was nonetheless spilt during this week.

7338. I offer two observations regarding Mr. Keough's admonitions.

7339. First, since Trans Mountain considers a regulatory application to be a consultation with its shippers, it should not be surprised that those shippers had important things to say during this hearing.

7340. Second, a lot of Mr. Davies' theories about why his metaphorical Trans Mountain kids have been squabbling, such as the current dock allocation procedure and the disposition of the dock premiums, are precisely the kind of issues that Mr. Keough, correctly in my submission, tells you are outside of those that are open for your determination in this case.

7341. I have benefited from my place in the order of appearances because it has afforded me the opportunity to hear the arguments that have been made on behalf of the other parties that oppose the Trans Mountain Application. My submissions are shorter as a consequence.

7342. Nevertheless, because of the importance to Tesoro of the matters that the Board must decide in this case and despite the lateness of the hour, it will be necessary for me to tread some of the same ground as did Messrs. Bergner, McLarty and Neufeld in particular. I hope that, in doing so, I will not test your patience beyond its limits.

7343. Tesoro is opposed to the Trans Mountain Application in all of its aspects and respectfully urges the Board to deny it.

7344. In Tesoro's submission, the Application embodies nothing less than a proposal by Trans Mountain to sell to firm shippers the opportunity to exercise unregulated market power over a scarce resource, being Westridge dock capacity.

7345. I have no doubt that Trans Mountain and the putative firm shippers will reject this characterization. But that does not make it unfair and, in any event, it doesn't really matter.

7346. No matter how one may choose to characterize the Trans Mountain proposal, Tesoro submits that it contravenes the National Energy Board Act in several respects.

7347. I will explain why Tesoro considers that to be the case as I make my way through the issues that the Board has identified for discussion.

7348. And I start at the beginning with issue 1, whether offering some of the existing uncommitted capacity to the Westridge marine terminal as committed capacity is appropriate. In Tesoro's respectful submission, the answer to this question is clearly no.

7349. There is no dispute that Westridge dock capacity is scarce. [1T402]

7350. The current levels of apportionment are high and are expected to remain so. [1T743-44; Ex, B1-10, Attachment 6]

7351. Indeed, the assumption of scarcity of dock capacity is the basic underpinning of the Trans Mountain proposal. The company asserts that long-term unapportioned access to the Westridge dock is required in support of offshore market development. [Ex. B1-2, para. 3]

7352. If dock capacity were not expected to be scarce in the future, then there would be no need for firm service to ensure unapportioned access.

7353. There is no use in paying extra to reserve a seat on the train if one is comfortable that there will always be seats available whenever one wants to travel.

7354. You have heard several times already today about subsection 71(1) of the *National Energy Board Act* and so I will not refer to its specific provisions.

7355. However, I will be so presumptuous as to remind you that the policy of the Board, as articulated in RH-4-84, confirmed in MH-4-96, and cited in MH-1-2009 -- a decision with which the Panel Members will be particularly familiar -- the policy is that an oil pipeline is, quote:

". . .under a prima facie duty to ship all oil tendered to it, including petroleum product, unless it can convince the Board that for some reason, such as a safety or capacity related one, it cannot." [MH-

1-2009 Reasons for Decision, p. 7]

7356. Subsection 71(1), of course, empowers the Board to grant exemptions and we've heard some about that already today, but Trans Mountain has not requested one. *[Ex. B8-5, CPC-Shell-SEMI.TMPL-12.4(d)]*

7357. Even if it were to do so -- and it would obviously be unfair for us to hear such a request from Trans Mountain for the first time in its reply argument -- for all of the reasons that I am discussing here, an exemption would be unwarranted and inappropriate in this case.

7358. To this point in time, Trans Mountain has, in the words of the decisions that I just mentioned, been able to convince the Board that, due to capacity reasons, it cannot ship all oil tendered to it for service to the Westridge dock. It is, rather, as we all know, permitted to allocate the dock capacity according to the approved Capacity Allocation Procedures.

7359. Trans Mountain now comes before the Board seeking to firm up the majority of the Westridge dock capacity, leaving -- even after its proposed reallocation of land capacity -- only 25,000 barrels per day available as uncommitted or non-firm dock capacity. *[Ex. B1-2, para. 5]*

7360. With the greatest of respect, the Board must not permit Trans Mountain to implement its proposal if it has any doubt, if the Board has any doubt that the 25,000 barrels per day of uncommitted capacity will be sufficient to enable Trans Mountain to ship all oil tendered to it for service to the Westridge dock at any time during the 10-year term of the firm transportation service agreements.

7361. In no such case should it be possible for Trans Mountain to convince the Board that its firm service proposal conforms to Trans Mountain's subsection 71(1) obligations.

7362. The situation, I submit, is just this simple. Trans Mountain cannot, today, ship all oil that is tendered to it and it most certainly should not be permitted to make itself less able to do so in the future. That would be the effect of the firm service proposal and it should therefore be rejected.

7363. And should the Board have doubts about the future ability of Trans Mountain to ship all of the oil that will be tendered to it for Westridge delivery? Yes, absolutely. I will name but a few of the reasons.

7364. Mr. Kelly says that the Purvin & Gertz Inc. Report that was provided as Attachment 5 to the Application [*Ex. B1-9*] does not represent the current views of his organization. [*IT897-906*]
7365. Given that, Madam Chair and Members, you should simply ignore it, as well as the Trans Mountain apportionment calculations or what Mr. Keough calls the "stress test" for which it served as the basis. [*IT940*]
7366. There is further reason to question the Trans Mountain apportionment calculations because they were performed on an annual basis, something that could well obscure or, at best, mute the true potential for apportionment, which is, in reality, applied monthly. [*IT993-96*]
7367. Mr. Stoness suggests that it is uncertain (although he nevertheless claims to believe it to be likely) whether some of the demand for uncommitted Dock capacity would disappear once the firm service contracts became effective. [*IT328*]
7368. Finally, as explained by Chevron and amplified by Ms. Friesen in her testimony yesterday on behalf of BP, even if it were to be available, 25,000 barrels per day of non-firm capacity would accommodate only a single Aframax tanker, or two Panamax tankers, and so an increased number of non-firm shippers could be shut out of Westridge dock access. [*Ex. C5-5b, A24*]
7369. In sum, there is, for these and other reasons, a substantial doubt about Trans Mountain's future ability to ship all oil tendered to it for service to the dock. In Tesoro's submission, that doubt simply cannot, and must not, be resolved in favour of the firm service proposal.
7370. This is probably as good a point as any at which to address the oft-repeated refrain from Trans Mountain that it is likely that the 54,000 barrels per day of firm Westridge dock capacity would be made available in the secondary market. [*IT380*]
7371. The suggestion from Trans Mountain seems to be that the availability of this capacity should eliminate any fears that non-firm dock shippers or land shippers will be able to move their crude as, and when, they need. There are several responses.
7372. First, Trans Mountain cannot meet its obligations under subsection 71(1)

of the *National Energy Board Act* by fobbing them off to the firm shippers.

7373. Second, as much as it might like to, Trans Mountain cannot have its cake and eat it.

7374. The fundamental proposition behind the Trans Mountain Application is that firm service is essential if Canadian crude oil is to be sold under long-term contracts in offshore markets. [See, for example, Ex. B1-2, at para. 3; Ex. B8-2, NEB.TMPL-1.2]

7375. I mentioned that a few moments ago. Trans Mountain said, in response to an Information Request from Tesoro, that it assumes that the firm shippers have made a rational, economic decision to purchase a product that is attractive to them. [Ex. B8-4, Tesoro.TMPL-1.7 (b) and (c)]

7376. If the product is so attractive, then should we not be expecting the firm shippers to use it rather than make it available to someone else?

7377. This is, in fact, exactly the same argument that Trans Mountain advances as the source of its worries that firm contracts on competing pipelines will incite the contracting shippers to use that capacity and thus make Trans Mountain more swingy.

7378. We at least cannot forget that, as Mr. Davies highlighted today, U.S. Oil & Refining Co. wishes to enter its firm service contract in order to attain some security of supply for its Tacoma, Washington refinery. [Ex. C1-4f, A. 3]

7379. What else can be taken from this other than that the U.S. Oil firm service capacity, whatever the amount of that capacity, will not be going anywhere.

7380. Finally, even if it were to be made available to other shippers in the secondary market, and even if, contrary to the substantial evidence that transferred or assigned firm service capacity could be of little value to uncommitted shippers in many circumstances, that capacity would only come at a price, an unregulated price, although I must say I wonder if Mr. Stoness sent shivers down the spines of the firm shippers when he claimed that such matters could be made the subject of a complaint to the NEB. [2T1516]

7381. With all respect to Mr. Stoness and as firmly asserted by Mr. Keough this morning, the secondary market is not regulated by this Board.

7382. In summary on this point, Tesoro submits that Trans Mountain cannot legitimately look to the 54,000 barrels per day of firm service capacity to solve its problems and the Board should not be "convinced", based on the evidence in this proceeding, that Trans Mountain could comply with its obligations under subsection 71(1) of the *National Energy Board Act* while providing the firm service that it proposes.
7383. Issue 1A: Whether the applied-for amendments to the pipeline tariff Rules and Regulations are appropriate, Tesoro submits that the answer to this question must also be "no" because the Trans Mountain proposal is contrary to both of Sections 60 and 62 of the *National Energy Board Act*.
7384. A few words first about Section 60.
7385. As the Panel Members will know, Section 60 of the *Act* prohibits a company from charging any tolls except those that are either: (a) specified in a tariff that has been filed with the Board and is in effect; or (b) approved by the Board. The Trans Mountain proposal fails to fit within either of those options.
7386. As Trans Mountain states in the response to NEB.TMPL-2.1 [*Ex. B10-2*], the firm service toll will be the sum of two parts: the Burnaby Tank metered light toll, as approved by the Board from time to time; and, the firm service fees as established through the Open Season. [*See also Ex. B8-7; Chevron.TMPL-1.3*]
7387. The firm service fee portion of the firm service toll would not be specified in the Trans Mountain tariff, nor would Trans Mountain seek to have the Board approve the firm service fee.
7388. As Tesoro understands the proposal, Trans Mountain would instead file nothing other than annual information confirming the amount of firm service fees collected, which we already know would be \$28.6 million per annum, and the disposition of those fees.
7389. Trans Mountain also states that the average firm service fee is \$1.45 per barrel per year and refers to the statement in the Application that it had identified 25 cents per barrel as the minimum acceptable bid in the open season process, for 10-year contracts, that is. [*Ex. B10-2; NEB.TMPL-2.1*]
7390. The claims from Trans Mountain are that what it proposes is similar to the method currently used by Trans Mountain for reporting of the Westridge dock

premium. It also claims that the structure of the firm service fee has been disclosed, as has the related aggregate information and, therefore, the requirements of Section 60 have been met.

7391. With respect, that is not nearly enough to comply with Section 60 so far as the firm service toll is concerned.

7392. The Board has consistently considered the Westridge dock premium to be a tool for the allocation of Westridge dock capacity, and not primarily a tolling methodology. [*Reasons for Decision Trans Mountain Pipeline Inc. – Capacity Allocation Procedures, March 2008 to August 2007, at p. 23*]

7393. Such a description would be inapposite in the case of the firm service toll.

7394. The only situation of which I am aware that could be said to be even close to what Trans Mountain is trying to do arises under the framework for light-handed regulation of the west coast gathering facilities, but even there, the obligation on the pipeline is to report the high, low and average tolls so as to meet the recognized need for a reasonable degree of price disclosure. And we won't have that here.

7395. We may know the minimum bid, but we certainly don't know the high bid. We don't know the range.

7396. The differences among the Trans Mountain proposal and those other regimes, that is, the regime for the reporting of the Westridge dock premium and that for the reporting of tolls under the framework for light-handed regulation of the west coast gathering system, the differences among those regimes and the Trans Mountain proposal are substantial, important and, in Tesoro's submission, determinative of this issue.

7397. Tesoro submits that the Trans Mountain proposal also fails to meet requirement found in section 62 of the *National Energy Act* that,

"...all tolls...shall always, under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate."

7398. The Board has previously decided that the phrase "*under substantially similar circumstances and conditions with respect to all traffic of the same*

description" requires a consideration of all relevant matters affecting the traffic of the commodity by a pipeline.

7399. The Board has broad discretion in determining what matters are relevant and what weight should be assigned to each of them. [*RH-1-88 Phase II Reasons for Decision, TransCanada Pipelines Limited, Tolls, June 1989*]

7400. The problem for Trans Mountain is not that the firm shippers would pay different tolls than would the non-firm shippers, which is the matter addressed in the response to NEB.TMPL-1.15(c) [*Ex. B8-2*].

7401. It is, instead, that the firm shippers would not all be paying the same firm service toll. [*Ex. B8-4; Tesoro.TMPL-1.10(g); 2T1934*]

7402. Compliance with the requirements of section 62 was carefully considered by the Board when the capacity allocation procedures were brought before it in 2006 through 2007.

7403. At that time, the Board decided that the biddable dock premiums were acceptable under section 62 because: the premiums are primarily a means of allocating capacity; it is open to anyone desiring Westridge dock capacity to submit a bid; and, given the characteristics of marine transportation, dock nominations cannot reasonably be done on a pro rata basis. [*Reasons for Decision Trans Mountain Pipeline Inc. – Capacity Allocation Procedures, March 2008 to August 2007, at p. 15*]

7404. None of those factors would exist under the Trans Mountain proposal and principally because, unlike the dock premiums, the firm service fees are not established through monthly capacity bids as among the firm shippers.

7405. As Trans Mountain took pains to describe in the response to NEB.TMPL-1.15(c) [*Ex. B8-2*], quote:

“Trans Mountain is of the view that the circumstances and conditions of the Firm Service Shippers are not substantially similar to the circumstances of uncommitted shippers. Each Firm Service Shipper that will pay the Firm Service Fee would receive first priority unapportioned access to Westridge. The Firm Service Fee for the Firm Service provides each Firm Service Shipper with the ability to ship product every month on a firm basis. Therefore,

the circumstances and conditions of uncommitted shippers are not substantially similar to those of Firm Service Shippers. It is not traffic of the same description transported under substantially similar circumstances and conditions.”

7406. Now, I took the trouble and tested your patience to cite that lengthy paragraph because by Trans Mountain's own description then, the relevant traffic in this case is "*first priority unapportioned access to the Westridge dock*", for which each firm shipper should, according to section 62 but contrary to the Trans Mountain proposal, be paying an equal toll.

7407. Although it has not yet done so -- and fairness demands that we not now hear this from Trans Mountain in reply argument -- Trans Mountain may nevertheless attempt to justify its multiple firm service tolls on the basis of the priorities established among the firm shippers regarding such matters as: shipping priority; commodity selection; and, make-up rights. [*Ex. B8-2; NEB.TMPL-1.15(c)*]

7408. Now, according to this argument, each firm shipper would receive different service or represent different traffic, which would justify it paying different tolls. With respect, this is just too fine a distinction to save the Trans Mountain firm service ship from foundering on section 62 of the Act.

7409. Issue 2: Whether the re-allocation of a portion of land capacity to Westridge dock capacity is appropriate?

7410. Tesoro submits that this question must also be answered "no" and that is because, once again, the Trans Mountain proposal is contrary to its obligations under subsection 71(1) of the *National Energy Board Act*.

7411. Trans Mountain cannot, today, ship all oil that is tendered to it by land shippers. Implementing the firm service proposal would make it even less able to do so.

7412. The proposed reallocation is therefore inappropriate and must not be approved by this Board.

7413. As the hearing unfolded, we heard many, many assertions from Trans Mountain that the re-allocation of land capacity to Westridge dock would result in a fairer and more equitable allocation of the capacity of the Trans Mountain Pipeline. [*See for example: 1T285; 1T287; 1T484; 1T837; 2T1386; and, 2T1399. See also*

2T2384.]

7414. Since capacity re-allocation is an essential and integral part of the firm service proposal, it is unsurprising that the firm shippers share Trans Mountain's view on that issue.

7415. Now, I am not suggesting that the firm shippers need apologize for this, nor did I expect that they would even before I heard Mr. Davies say as much.

7416. The proposed firm service would be a very, very good deal for them and they cannot be faulted for doing all that they can to further their individual interests.

7417. The Board will also, no doubt, find it unsurprising that those opposed to the firm service proposal -- representing the vast majority of Trans Mountain's shippers whether measured by number or volume and including both land and dock shippers -- see the re-allocation of land capacity to Westridge dock much, much differently.

7418. This leaves the Board facing its familiar challenges of weighing, if not balancing, competing views. However, as Mr. Neufeld noted, it is vitally important that, in undertaking this task, the Board not mistake Trans Mountain for a neutral in the debate.

7419. As Mr. Davies told you a number of hours ago, that Trans Mountain also stands to benefit from approval of its proposal. Indeed, the fact is that Trans Mountain has a huge stake in the outcome.

7420. It sees firm service as enabling it to: compete with other pipelines; secure a firm revenue stream; reduce its risk; and, protect, if not increase, the return on its investment.

7421. The point of all of this is to say that, as others before me have also observed, Trans Mountain's assessment of fairness and equity of its proposed capacity re-allocation cannot be assumed to be free from self-interest or bias.

7422. According to the Trans Mountain reply evidence, its proposed re-allocation of pipeline capacity is based on actual nominations for the period November 2008 through to December 2010.

7423. Despite what Tesoro submits is compelling contrary evidence [*see, for*

example, Ex. C2-5(b) – (f)], Trans Mountain steadfastly maintains that its selected timeframe is representative of pipeline usage and a valid basis upon which to assess the reasonableness of the proposed allocation. [Ex. B12-2, A3.]

7424. Trans Mountain blithely dismisses the high nominations that have been experienced for nearly a year now as being reflective of anomalous and transitory discounts for Canadian crude and with slightly dark hints at improper nominations on the part of land shippers. *[See for example, Ex. B12-2, A3 and A4]*

7425. Trans Mountain also, apparently, ignores among other important ones, the fact that its 26-month period encompassed a number of months during which Tesoro's usual substantial volumes were not included in the monthly nominations *[2T1920-21]* and Chevron's Burnaby refinery was labouring under significant operational difficulties. *[3T3928-30]*

7426. Finally, according to Trans Mountain, the current discounts for Canadian crude will be “addressed” as delivery infrastructure projects and processing arrangements adjust in the future.

7427. The insurmountable problem for Trans Mountain is, however, that no one -- and certainly none of Messrs. Kelly, Stoness or Rinne -- can know how far off that future may be. *[1T923-930]*

7428. I should pause here to say that I find it interesting that Mr. Davies could suggest that his clients, the firm shippers, face considerable risk under the firm service proposal because the oil market of today may not be the oil market of the future while at the same time, professing with such great confidence, that the current discounts on Canadian crude can be expected to be resolved in a couple of years.

7429. I also found it interesting that Mr. Davies took the trouble to highlight the recent announcement by Tesoro that it is pursuing the option of railing Bakken crude to its Anacortes Refinery without mentioning that it is clear from the evidence, that Tesoro's purpose in doing so is to replace crude that it currently sources from the Alaska North Slope and not crude that it buys in Canada.

7430. All of this information is disclosed in the Tesoro press release that is an attachment to the Purvin & Gertz Reply Evidence, the Exhibit B12-4.

7431. In summary on this point, Tesoro submits that there is at the very least, considerable doubt as to the validity of Trans Mountain's 26-month look back as a

predictor of future land capacity demand.

7432. And for the reasons I expressed earlier, that doubt cannot, and must not, be resolved in favour of the firm service proposal.

7433. Issue 3, whether the open season process was appropriate? Madam Chair and Members, I have stated Tesoro's positions regarding the inappropriateness of Trans Mountain's offer of firm service and the reallocation of capacity that is integral to it. I have also outlined the reasons for those positions.

7434. As to the appropriateness of the open season, Tesoro submits the following, no open season, no matter how it may have been conducted, could possibly either insulate the Trans Mountain proposal from the Board's disapprobation nor could any open season sanitize that proposal against the contraventions of the *National Energy Board Act* that I have already discussed.

7435. Issue 4: Whether the method to determine the firm service fee is appropriate? Tesoro's submissions regarding issue 4 are essentially the same as those that I just offered in respect of issue 3, and mostly because the firm service fee was determined through the open season that Trans Mountain conducted last fall.

7436. In Tesoro's view, the entirety of the Trans Mountain proposal is inappropriate and that inappropriateness could not be remedied through any open season or any method of determining the firm service fee.

7437. There are also the other problems with the firm service fee upon which I have already touched, specifically the non-compliance with Section 60 and 62 of the Act.

7438. Issue 5: Whether the proposed use of the firm service fee is appropriate? Unfortunately, Madam Chair, Trans Mountain is five-for-five.

7439. Tesoro submits that the proposed use of the firm service fee is, most certainly, inappropriate.

7440. Although Trans Mountain may consult its shippers on the application of the firm service fees, it alone would be the ultimate decision-maker. [2T1954-55]

7441. No approval from the Board would be required prior to the application of firm service fees to preliminary expansion costs and Trans Mountain is loath to

accept such a regime. [2T2734-35]

7442. Further, the expenditure of firm service fees would not be limited to projects that are undertaken and placed in service.
7443. In fact, as I discussed at considerable length with the Trans Mountain witnesses on Tuesday, under the express terms of the proposed transportation service agreement, Trans Mountain would be permitted to apply firm service fees to cover the costs of preliminary activities in support of expansion regardless of whether the relevant expansion were ever to be undertaken. [2T1990-93]
7444. In addition, it is clear that Trans Mountain would be unrestricted in applying the firm service fees to cover the costs of future expansions no matter how remote the chances that those projects would actually proceed. [2T1996-97]
7445. Also of considerable significance is the fact that, under its proposal, Trans Mountain would apply firm service fees to approximately \$8 million of costs incurred prior to 2011. [2T2060-68]
7446. The apparent intention on Trans Mountain's part is to minimize its disallowance risk and revenue requirement relating to project development costs, and also potentially to increase its return on investment, recognizing that the Board would ordinarily only allow the recovery through tolls of the costs of projects that do not proceed, particularly those costs that go beyond those of preliminary surveys and investigations, in exceptional circumstances. [2T2101-09; 2T2156-59; 2T2160-73. See RH-2-97 Reasons for Decision Westcoast Energy Inc. Part I, August 1997, p. 14]
7447. All of these reasons stretch the Trans Mountain proposal from the novel to the extraordinary if not to the cavalier.
7448. In Tesoro's respectful submission, the proposal is inappropriate and should not be approved.
7449. Madam Chair and Members, that concludes my submissions. I thank you for your attention and I would be pleased to address any questions you have.
7450. **THE CHAIRPERSON:** Thank you, sir.
7451. No questions for you, Mr. Crowther. Thank you very much.

7452. **MR. CROWTHER:** I stopped Mr. George's roll apparently.

7453. Thank you, Madam Chair.

7454. **THE CHAIRPERSON:** Mr. King?

--- (A short pause/Courte pause)

--- **FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR MR. KING:**

7455. **MR. KING:** Good evening, Madam Chair, Panel Members.

7456. For the record, my name is Colin King for the Government of Alberta, Department of Energy and I'm pleased to provide final argument.

7457. Alberta supports this application. There has been discussion on the record about how the Board should balance interest to make a decision in the public interest and what exactly that means.

7458. There has also been some discussion about the Board making decisions in response to either short term anomalies or in consideration of longer term outlooks and objectives.

7459. Alberta encourages the Board to take a long-term and broad public interest perspective in making its decision in respect of this application.

7460. In the longer term, Alberta anticipates significant increases in crude oil supply out of the Western Canadian Sedimentary Basin. We submit the record supports that, we don't think it can be reasonably in doubt, and I think we've heard some of the counsel today affirm that. I think Mr. Bergner did.

7461. In addition, the record supports that in the longer term this pipeline system needs increased capacity in the form of an economic capital expansion. Longer-term expansion will alleviate the difficult equity issues associated with apportionment. But the status quo is likely to result in a chronic apportionment which is not in any parties' interest in the longer term.

7462. Taking the long term, Alberta anticipates that producers will continue supplying their traditional markets, but it also expects that Canadian producers will be

forced to identify and most importantly, negotiate their entry into new markets to absorb anticipated growth in crude oil supply.

7463. We heard from the Firm Shippers Group that firm service at the dock will be a helpful first step towards facilitating the testing and acceptance of Canadian crudes into diversified markets.

7464. The firm transportation appears to be a helpful pre-requisite for Canadian industry participants to be able to offer potential customers certainty with respect to supply.

7465. The competition to commercially connect with new markets takes both certainty and a longer time horizon than the existing one-month bidding system can offer.

7466. That new markets require time and certainty was confirmed by Mr. Le Tavec for BP, who offered that, in making crude purchase decisions, a number of factors are included, notably the reliability of supply in combination with the quality of the crude. And that's supported at Volume 3 of the transcript at paragraphs 5553 through to 5556.

7467. He went on to discuss the Cherry Point refinery following that.

7468. If Western Canadian Sedimentary Basin producers cannot enter and gain acceptance into new markets in a timely way, this may risk enduring significant price risks -- price discounts, again, over the long term.

7469. In closing, the Board's approval of this application would be a pragmatic and reasonable step and would have the important benefit of sending the appropriate signal to the growing Asia Pacific market that while Canadian producers are interested, they are also reasonably able to develop long-term market relationships.

7470. Madam Chair, that completes my final argument. I will provide no comments in reply directly, but would attempt to respond to any questions that you may have.

7471. And again, we urge the Board to take a long-term view in making its public interest determination.

7472. Thank you.

7473. **THE CHAIRPERSON:** Thank you, Mr. King.

7474. Mr. George?

7475. **MEMBER GEORGE:** Mr. King, we've heard over the last week that we have in front of us a difficult and complex question in front of us. We've been enjoined to accept the application, we've been enjoined to deny the application, and we've heard all the arguments and there's evidence throughout the record that parties have used one way or the other.

7476. In your mind, the most important part here in this application, what would you quality it as?

7477. Before I say that, it sounded to me it was the development of markets for an increasing Alberta supply. Did I hear you correctly?

7478. **MR. KING:** I think you did hear me correctly. New markets and diverse markets is currently a concern to us. I'm not sure I could parse out any -- I'm not sure I'm able to parse out any specific element of the application. Our position is that we're supporting it.

7479. **MEMBER GEORGE:** Thank you.

7480. **THE CHAIRPERSON:** Thank you, Mr. King.

7481. **MR. KING:** Thank you.

7482. **THE CHAIRPERSON:** Is there anybody other -- before Mr. Davies would like to do a reply? I see none.

7483. Mr. Davies.

--- (A short pause/Courte pause)

--- **REPLY BY/RÉPLIQUE PAR MR. DAVIES:**

7484. **MR. DAVIES:** Thank you. I have just a few submissions to make by way of reply.

7485. Mr. McLarty and his followers made this assertion, "If Trans Mountain pipeline capacity is required by uncommitted shippers to existing markets, then none of that capacity can be used to provide firm service to new markets."

7486. That effectively creates no harm to existing markets test. It asks the Board to ignore the benefits that could be achieved by accessing the new markets, which is contrary to the Board's statutory mandate to make decisions that balance the benefits and the harms in order to make decisions that are in the Canadian public interest.

7487. The effect of Mr. McLarty's position would be that, on Trans Mountain, firm service to new and diverse markets could only be introduced if there were to be an expansion. And I would point out that there is nothing at all in Section 71(1) of the *National Energy Board Act* that would drive you to that conclusion.

7488. Section 71(1) imposes a duty on an oil pipeline to receive, transport and deliver all oil offered to it, subject to exemptions, conditions or regulations imposed by the Board. As the Board has noted in previous decisions, including MH-4-96, MH-3-2000 and MH-1-2009, the subsection does not specifically refer to common carriage, but it does reflect the common law duties of a common carrier pipeline.

7489. And as those decisions also note, the subsection does not specify the criteria that the Board must take into account, it grants the Board broad authority, and it allows the Board to tailor the obligations of the pipeline to the particular facts of a particular case.

7490. Section 71(1) does not oust the Board's public interest mandate.

7491. Mr. Neufeld told you that the Board cannot, in this proceeding, make a determination that a Trans Mountain expansion would be in the public interest. I agree. That is why what the Board needs to do is now make a decision on the application that is before it based on its assessment of what is in the public interest.

7492. Mr. Neufeld also told you that Trans Mountain should work with its shippers to find innovative solutions to its common carrier problems, like Enbridge did with its competitive toll settlement. Enbridge, though, doesn't have a dock, and that is the big difference.

7493. Trans Mountain is unique. It delivers to land destinations and it delivers to the dock. And it's that uniqueness that serves to frustrate efforts to reach

collaborative solutions because different shippers have different economic interests, which is why talk is not the answer.

7494. And to those that advocate further talk, Madam Chair and Members, I make this observation. None of those say, "Approve the application and let's talk". They all say, "Deny the application and let's talk". So the question needs to be asked: what's their motivation? Do they really want to talk?

7495. If so, they could have already picked up the phone and dialed Trans Mountain's number. They didn't need to hire a lawyer to come to a hearing to announce that they wanted to talk to Trans Mountain.

7496. So do they really want to talk, or are they saying that in this hearing in an effort to persuade you to deny the application? I'll leave that question for you to ponder.

7497. Mr. Landry asserts that Imperial Oil has no ulterior motives and that it can provide a more balanced assessment of this application than can others. How do we know that; just because Mr. Landry says so in argument?

7498. With respect, if Imperial had wanted to present its assessment of this application, it should have done so through evidence and witnesses, not through the submissions of its counsel.

7499. Let me also assure Mr. Landry that my purpose in presenting argument was not to be humourous.

7500. Mr. Crowther tells you that firm service is a very, very good deal. In fact, he may have even said "very, very, very good deal". Well, if it was so good, why didn't Tesoro bid on the firm service capacity and use it to make deliveries to its land destination refinery?

7501. That question will have to remain unanswered because Tesoro didn't present a witness to answer it.

7502. Madam Chair and Members, those are my further submissions. We look forward to receiving your decision.

7503. **THE CHAIRPERSON:** Thank you, Mr. Davies.

7504. Mr. Keough, I remember your promise.

--- (Laughter/Rires)

7505. **MR. KEOUGH:** Well, I've got almost five hours, don't I?

--- (Laughter/Rires)

--- **REPLY BY/RÉPLIQUE PAR MR. KEOUGH:**

7506. **MR. KEOUGH:** Thank you, Madam Chair, Board Members. I will try to be as succinct as I can.

7507. First, I would note I rest my case on the validity of the "be happy, don't worry" approach to this matter based on what you've heard over the last seven or eight or nine hours. It simply won't work. It's not a viable option.

7508. The next thing I wanted to talk about is what I'll call the legal issues or, more appropriately, the spectre of potential legal issues that numerous of my friends have raised. And I associate myself very much with the comments made by Mr. Davies just now.

7509. You've heard them quote various sections of the *National Energy Board Act*. You've heard bald assertions, nothing more, that the proposal breaches all of these various sections. You haven't heard any explanation as to why. You haven't heard any explanation as to how. You've just heard the assertions.

7510. But absent from these assertions is anyone saying to you that you can't approve the application because to do so would be in breach of the legislation. No one has said that to you because it would be legally incorrect.

7511. Trust me, if they could have made that assertion, they would have. Nobody has said if you approve this application, you will be in breach of your legislative mandate.

7512. There's been all this talk about Trans Mountain's common carrier obligation. Trans Mountain has always acted in a manner consistent with its common carrier obligation, and it will continue to do so if this application is approved.

7513. In Trans Mountain's application and in various Information Requests, including the one Mr. Crowther referred you to, NEB 1.15 -- there's also 2.1, 2.2, Chevron 1.22 -- all of those talk about this issue, talk about the legislative requirements.
7514. If my friends are right, they say Trans Mountain hasn't come before you and asked for an exemption. Trans Mountain doesn't need to come before you and ask for an exemption for this application to be accepted.
7515. Trans Mountain hasn't transported all of the crude tendered to it for years. Has it been in breach of the legislation for years? Of course it has not. There are provisions in the tariff that allow for apportionment, the approved tariff.
7516. There's no breach of the common carrier obligation. And if this application is granted, the common carrier obligation will still be fulfilled. That's been explained in detail in the application.
7517. It's been explained how the open season process is in full compliance with the recipe this Board has set in past decisions to ensure an oil pipeline carrier that operates according to the criteria you've outlined still fulfils its common carrier obligation.
7518. There's no breach of the common carrier obligation. To the contrary; the application would be entirely consistent with that.
7519. In reality, all that would happen is that a component, a small component, of the overall pipeline capacity would essentially be allocated using a different mechanism. We've got two different ones now. You've got nominations, you've got bids. The third one would be from capacity.
7520. There's no breach of the legislation. They want to put up this spectre of this so that you don't approve it so that they can, as Mr. Davies just told you, preserve the status quo.
7521. And let's ask, who benefits from preservation of the status quo? Oh, wait, now. It's their clients, their clients who get priority access to five-sixths of the capacity on the system. That's who would benefit from the status quo if nothing is done for more and more years.
7522. Don't try to read motives into what Trans Mountain is trying to do here.

Read motives into what is really behind the positions being advanced to you in opposition, or you can read motives into both, I suppose.

7523. And Trans Mountain, by the way, never said it didn't have an interest in the application. In fact, I think my argument acknowledged that Trans Mountain has always said, "Yeah, we'll benefit from this".

7524. They'll benefit from the first important step of the impetus to move expansion forward; they'll benefit by the security of the revenue stream. Absolutely. Never denied.

7525. Now comes the fun part. I've got to look through my notes.

--- (A short pause/Courte pause)

7526. **MR. KEOUGH:** Mr. McLarty made the point, and I think I got it down right, he said, "Land shippers are not asking for preferential access". Well, they're not asking for it because they already have it.

7527. And up until November of 2010, they had preferential access to more than they needed. The current system gives them that. They don't have to come here and ask for it; they've already got it.

7528. And as an aside, they have it with no extra fee.

7529. Mr. McLarty says the firm service is for -- they're creating a service for the sake of creating a service. The firm service shippers pay a base rate and they pay a premium on top of that.

7530. And what do they get in return for it? They do get firm access. But the premiums do not go for the benefit of Trans Mountain. They go for the benefit of all the shippers. That's their proposal before you.

7531. Mr. Davies has already addressed the positions advanced by parties that you can't do this when the system is full. I associate myself with his comments.

7532. Mr. McLarty also used the expression regarding the reallocation issue and said this was contrived to serve Trans Mountain's larger purpose. Now, if something is contrived by providing a detailed analysis and evaluation of the facts and explaining to you why the new proposal is more fair and equitable than the existing

situation, then I suppose he is right; it was contrived.

--- (A short pause/Courte pause)

7533. **MR. KEOUGH:** Mr. McLarty says no new facilities are being offered here; all you'd be doing is shifting the parties entitled to participate. Some will benefit, and some will bear the burden.

7534. Well, we can tell you, as I've just said, if you deny the application, we clearly know who will benefit. Those who have benefited under the existing system will continue to do so.

7535. There was a comment made by Mr. McLarty that the re-direct option under the tariff would only be available when the pipeline is not full. I touch on that because it's just not factually correct.

7536. You can re-direct anywhere upstream from the dock. The only constraint would be for the Washington refiners is if the Puget Sound pipeline were full. But otherwise, his comment is not actually very accurate.

7537. Mr. McLarty said there's no evidence that we would have surplus capacity in the future. Again, I'm sure he is making that comment oblivious to the Purvin & Gertz report that's filed in evidence.

7538. Likewise, he made a comment that there's no benefits analysis that's been made. Again, I think if you look at the Purvin & Gertz report you will find some information in that regard.

7539. And same comment with respect to net backs. I think if you look at BR-1.12, Purvin & Gertz, there is a net back analysis provided.

7540. Chevron tells you we're a bidder off the dock. We're obviously a land bidder. We're going to be deprived; we're going to be harmed. Why didn't they bid? They didn't bid because they didn't value the product, the service being offered to the same extent that other parties did. They could have; it's their choice.

7541. There was reference made by Chevron to Mr. Gaske's speculation -- I suppose I can elevate it to that -- under the 10-year deals, the sellers will be selling at a discount, not at a premium in the markets they're going to access. I'm not sure that makes any sense at any level.

7542. You've heard evidence of the markets that are being targeted. The price in that market will reflect the clearing price for that market. Canadian producers find that market attractive, and Canadian producers don't have to sell their crude at an even greater discount in these markets. They'll get the prevailing market price.
7543. Mr. Bergner, for Chevron, doesn't want you to look at the 26-month period prior to November 2010 when all of the land requirements were satisfied and they did not take their apportionment.
7544. We submit to you that period is very telling because it is reflective of a more normal situation, not a situation where all markets want every barrel of Canadian crude they can get. The mistake would be to make a decision based on the current anomalies.
7545. There was an interesting comment made by Chevron as well with respect to market power. And I think it had been echoed by other counsel. That is a very curious comment coming from the land shippers because what we have if this application were to be granted is five firm shippers who have 54,000 barrels per day of capacity at the dock.
7546. What we have right now four U.S. refiners, one Canadian refiner, toss in a couple of refined products shippers if you want. Those parties are controlling five-sixths of the system, 248,000 barrels in priority to those barrels going elsewhere. Even if the application is granted, it will still be 221,000 barrels. Do the math.
7547. Chevron also put before you a comparison of the bid dock premiums -- or dock bid premiums, I suppose, and firm service fee and says they're getting a great deal. Is it Johnny-come-lately wishing they had participated or is it a party that did not participate of their own free will now trying to find a way to undo what has been done with the open season?
7548. There's also suggestions, and a couple of parties made this, about the tolls. And I think Mr. Neufeld went the furthest, that, well, you don't know what the tolls are; how do you know they're just and reasonable? They're market-based tolls. They're arrived at through a competitive open season process.
7549. You don't have to look far to see where this type of structure has been acceptable to the Board in the past because that's the case with the dock bid premiums. Those aren't disclosed.

7550. The NEB relies upon the working of market forces. There's many examples with pipelines under your jurisdiction where you rely upon market forces. This firm service offering is no different.

7551. The specific numbers are kept confidential because of the commercial harm that would result if they were disclosed. The NEB has accepted that approach. The NEB has accepted the outcome as being something you could improve within your jurisdiction. There's more than one way to skin the tolling cat.

7552. Your broad jurisdiction gives you the ability to accept these approaches, and you have done so in a number of circumstances for an extended period of time. So suggestions that you can't approve it because you don't know the toll, they're baseless.

7553. There was also criticism regarding the acceptance of long-term contracts in the context of the common carrier pipeline, and there are -- there was criticism of the benefits and rights that the shippers will get from entering into those long-term contracts.

7554. Well, long-term contracts in any circumstance involve the assumption of various risks, obligations, and yes, they bestow certain rights. These are no different here.

7555. Do the parties who enter into or have entered into these contracts get certain rights? Of course, they do. They're paying a significant premium. The amount of money they're committing to the system with the base toll and the premium for 10 years is huge. So of course they get something in return.

7556. It would be commercially unreasonable to think they're not going to get anything.

7557. Chevron said conditions will not fix the problem, the application is flawed and they don't want you to look at a solution here where you would approve the application at all.

7558. Again, it gets back to my earlier point, who wins if that's the decision? Who wins if parties are sent away to squabble for more years? Who's the winner?

7559. Those who benefit from the status quo, that's why they don't want you to

do anything. Their support for an expansion that was echoed through the witnesses rings pretty hollow when they come in and oppose an application that if granted as applied for, would be the impetus to allegedly solve the problem. That old, you know, “actions speak louder than words” phrase that I used earlier, sort of comes back a little bit.

7560. We've been talking about expansion for years without the impetus that's to be provided by this application and the disposition of the firm service fees. I'm not sure this Board or Trans Mountain would hold that much hope for a different conclusion when this happened in the past.

7561. In that regard, Madam Chair, I do have to make a comment -- and I know you were only floating this as a hypothetical, I suppose, where you would say the Board would hold their decision in abeyance, tell parties to go away and if they're not back within a certain period of time, you will render the decision.

7562. That is not acceptable to Trans Mountain. That is not an answer. An applicant has a right to due process. An applicant has a right to have its application considered in a timely manner. Posing us the gun to the head and say, “Do something in six months” is of no value other than you will have delayed things for six months.

7563. Our friends at Shell, Suncor and Conoco started off by saying, “Do not show a preference for one group over another.” Way too late for that. The preference already exists.

7564. It was interesting to hear some of the comments made by Conoco at all, when dealing with the list of issues and talking about the open season, and they seemed to infer that there are constraints on the circumstances in which an open season can be used. And they seemed to think it can only be when there's an expansion to an existing system or a new project or something like that, and they can't be used in this type of circumstance.

7565. There's absolutely no basis for that. This is a new service and when a pipeline is bringing forth a new service and wanting to test that service in the marketplace to see if it has interest for the new service, to see if we can get people to commit to the service, the -- and particularly when it's an oil pipeline, the only way you're going to be able to do that is through an open and transparent open season.

7566. As explained in the application, that's exactly what Trans Mountain did. There's no improper use of that vehicle in the current circumstances. There's no

prohibition on using that vehicle in these circumstances when a new service is being introduced.

7567. I found it somewhat ironic that Imperial jumps into the fray and immediately goes to the operation of the secondary market, and suggests to you that let's ignore everything else because we're putting the power in the hands of the firm shippers regarding the secondary market.

7568. Well, the secondary market is, if you'll pardon the pun, secondary. There are a variety of other mechanisms available to both land and dock shippers that I exhaustively took you through today that I won't repeat, before you even get to the availability of the secondary market, which as I noted earlier, is a functioning mechanism to efficiently allocate pipeline capacity on numerous pipelines.

7569. Madam Chair, I'm just going to check -- I've ignored probably 85 percent or 100 percent of the stickies. I just want to check with my client for a moment just to make sure we're done, but I think we're done.

7570. **THE CHAIRPERSON:** Of course.

--- (A short pause/Courte pause)

7571. **MR. KEOUGH:** I'm done. Thank you, Madam Chair.

7572. **THE CHAIRPERSON:** Thank you.

7573. The Board has no questions of you. Thank you very much.

7574. **MR. KEOUGH:** Thank you, Madam Chair, and I would want to, on behalf of Trans Mountain, thank the Board for your indulgence and patience in sitting until this late hour on a Friday night.

7575. And also thank the court clerk and the court reporter for their patience with -- I will extend it to everyone, I was going to say me, but I'll include others.

7576. Thank you.

7577. **THE CHAIRPERSON:** Thank you, Mr. Keough.

Closing remarks
Chairperson

7578. Well, the Board thanks the Applicant and all parties for their helpful submissions. Over the span of this week, you have captivated us, indeed, with very interesting, important and challenging issues. We will carefully review and consider all of the submissions.

7579. The Board will, of course, reserve its decision on this application.

7580. Throughout this proceeding, the Board has been assisted by the participation of all the parties, counsel and witnesses. We are very much appreciative of the efforts and the accommodation of all of you.

7581. The Board also appreciates the work of the court reporters and sound technicians, especially given the long hours that we have sat.

7582. Last, but not least, we thank very much our own staff, those in the hearing room and those who work behind the scenes to ensure the smooth functioning of the hearing. Your efforts are very, very much appreciated.

7583. With that, the evidentiary portion of the RH-2-2011 is closed. Have a very good weekend.

--- Upon adjourning at 7:42 p.m/L'audience est ajournée à 19h42