NATIONAL ENERGY BOARD

TRANS MOUNTAIN PIPELINE ULC (TRANS MOUNTAIN)

COMPLAINT BY U.S. OIL & REFINING CO. (U.S. OIL) RESPECTING THE ALLOCATION OF CAPACITY AMONG UNCOMMITTED SHIPPERS NOMINATING TO BARGES

NEB File OF-Tolls-Group1-T260-2016-02

REPLY ARGUMENT OF U.S. OIL & REFINING CO.

February 14, 2017

Introduction

1. In accordance with the process established by the National Energy Board ("Board" or "NEB") in its letter dated December 16, 2016, following is the reply of U.S. Oil & Refining Co. ("U.S. Oil") to the arguments filed by Trans Mountain Pipeline ULC ("Trans Mountain") and Shell Trading Canada ("STC").

Background

Prior to RH-2-2011

2. Trans Mountain discusses the Board's August 16, 2007 Decision, in which the barge subcategory was established.[1] But what Trans Mountain conveniently omits from the discussion is reference to the important fact that Trans Mountain created the barge subcategory for smaller vessels (~80,000 bbls). This fact is highlighted in paragraphs 5 and 10 of the U.S. Oil argument, yet Trans Mountain does not address it.

RH-2-2011

3. With regard to the tariff amendment that removed the nomination limit for barges, Trans Mountain argues as follows:

> U.S. Oil suggests in its Argument that "Trans Mountain misrepresented to the Board the purpose for deleting the lot size nomination limit for Barges in Rule 14.3". It speculates that the "purpose" of that tariff amendment "was to open up the barge subcategory to larger barges" and that "Trans Mountain intended to open up the barge subcategory to larger barges and permit them to make single nominations for the ~160,000 bbls of capacity". These assertions are without foundation and should be disregarded.[2]

This is a remarkable argument for Trans Mountain to make. As has become patently evident, deleting the barge nomination limit in Rule 14.3 has opened up the barge subcategory to larger barges and has permitted them to make a single

[1] Trans Mountain argument, paras. 6-11.
[2] Trans Mountain argument, para. 17.

nomination for the ~160,000 bbls of capacity. Yet here we have Trans Mountain saying that this is not what the tariff amendment was intended to do.[3]

4. This is precisely why a pipeline company like Trans Mountain is required by the Board's Filing Manual to provide the rationale for tariff amendments that it proposes. So that interested parties and the Board can understand why an amendment is being made and can assess the potential impacts of the amendment. And so that any unintended consequences of an amendment can be identified and addressed.

5. Trans Mountain chose not to disclose to the Board the rationale and impacts of removing the nomination limit on barges from Rule 14.3, because "it did not consider it necessary".[4] In its argument, Trans Mountain re-iterates that it deleted the barge nomination limit to address two concerns expressed by a shipper using the barge subcategory:

> The proposed revisions included an amendment to Rule 14.3 to remove the 80,000 barrel nomination limits on barges. Trans Mountain's intent, as evidenced in this proceeding, was to address the concerns raised by its barge shipper. The proposed revisions would also ensure consistency in the tariff by using the same definition of "Barge" and "Tanker" throughout the tariff (including for the purpose of allocating capacity as provided for in Rule 14.3) and align the Tariff with Trans Mountain's practice of ensuring that a vessel nominating into the barge category was in fact a "Barge" and not a "Tanker".[5]

But in this regard, Trans Mountain provides no response at all to the submissions made by U.S. Oil in paragraphs 12 and 13 of its argument. The concern about tankers nominating to the barge subcategory had already been resolved by adding the definitions of "Barge" and "Tanker" to the Definitions section of Tariff

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[3] It is ironic that STC criticizes U.S. Oil for not being aware that the amendment to Rule 14.3 opened up the barge subcategory to larger barges (STC argument, para. 4) - yet Trans Mountain itself asserts that this is not what was intended by the amendment.

[4] Trans Mountain response to U.S. Oil information request 2(d).

[5] Trans Mountain argument, para. 20.

No. 84.[6] There was no need for Trans Mountain to subsequently remove the barge nomination limit from Rule 14.3 in RH-2-2011.[7] As has become readily apparent, all that this amendment did was open up the barge subcategory for use by larger barges – a result which Trans Mountain now claims it did not intend.

6. STC refers to Trans Mountain's letter to the Board filed on December 16, 2011 and points out that page 2 of the letter provides that "Tariff No. 86 contains the following substantive revisions" and that the chart that follows specifically indicates that Rules 14.2 through 14.7 have been changed.[8] What STC ignores is the "Explanation of Change" that Trans Mountain provides in the letter, as follows:

> Revised rules 14.2 through 14.7 significantly in order to implement Firm Service and to logistically amalgamate the Board's order reflecting the inclusion of "Priority Destination" and "Advanced Dock Nominations" provisions[9]

Nothing is mentioned about addressing two concerns raised by a barge shipper. Nothing is mentioned about opening up the barge subcategory to larger barges. As far as interested parties and the Board would have been aware, the amendment to Rule 14.3 was being made "in order to implement Firm Service".

7. Trans Mountain also refers to its December 16, 2011 letter to the Board, but in an entirely different sense than does STC. Trans Mountain now claims[10] that the tariff change to Rule 14.3 to remove the barge nomination limit was a "minor

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[6] STC states that Tariff No. 86 took effect January 12, 2012 and incorporated the following definition of "Barge": "a flatbottom vessel that is generally unpowered and towed or pushed by another craft". In fact, this definition of "Barge" had already been added to Tariff No. 84, which took effect on December 1, 2010 by Order TO-04-2010.

[7] As indicated in paragraph 13 of the U.S. Oil argument, the addition of the definitions of "Barge" and "Tanker" to the Definitions section of the Tariff did not require the removal of the definition of "Barges" in Rule 14.3 - as evidenced by the fact that Tariff No. 84 had both. The two definitions addressed entirely different issues. The definitions that were added to the Definitions section addressed the type of vessel that could nominate in the barge subcategory. The definition in Rule 14.3 addressed the lot size that a vessel could nominate in the barge subcategory.

[8] STC argument, para. 5.

[9] Trans Mountain letter to NEB filed December 20, 2011, p. 3, Filing [A2K0G6](), pdf p. 3.

[10] Trans Mountain argument, para. 21.

change", and that it was covered off in the December 16, 2011 letter by the wording:

> Administrative changes not listed above pertain to:
> …
> - Other minor typographical corrections and changes.

Seriously? The amendment to Rule 14.3 was "listed above" in the table of "substantive revisions" provided in the December 11, 2016 letter. The removal of the barge nomination limit has had the effect of opening up the barge subcategory to larger barges and permitting them to make single nominations for the ~160,000 bbls of barge capacity. For Trans Mountain to now suggest that it presented the amendment to the Board as a "minor typographical correction and change" defies credibility.

8. Trans Mountain points out that, while there was only one barge shipper calling at the Westridge Marine Terminal when the barge subcategory was established in 2007, it was clearly understood that other barge shippers would not be excluded from nominating for capacity.[11] U.S. Oil agrees. But what Trans Mountain again neglects to mention is that it created the barge subcategory for smaller vessels (~80,000 bbls). There was no contemplation in 2007 that the barge subcategory would be opened up to nominations from larger barges like the one that STC is now using. This remained the case in RH-4-2008, when the capacity in the barge subcategory was increased to accommodate a second smaller vessel (~80,000 bbls).[12]

9. Trans Mountain refers to the fact that circumstances have changed since the implementation of Tariff No. 86 following RH-2-2011, because larger barges have started to call on Westridge.[13] But larger barges are not a recent invention. So why is it that larger barges have started to call on Westridge? The reason is that

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[11] Trans Mountain argument, para. 37.

[12] It was contemplated in RH-4-2008 that two smaller barges could nominate in a month for the ~160,000 bbls of capacity or that one smaller barge could submit two nominations in a month for the ~160,000 bbls of capacity.

[13] Trans Mountain argument, paras. 38-39.

the Tariff amendment made by Trans Mountain to Rule 14.3 in Tariff No. 86 has enabled them to call on Westridge. And yet this amendment was made without any consideration for: (1) whether it was appropriate to open up the barge subcategory to larger barges; and (2) if so, what measures were necessary to ensure fairness and equity in allocating barge capacity among smaller and larger barges.

10. In the circumstances, as U.S. Oil indicated in paragraph 25 of its argument, the just remedy here would be to reinstitute the barge nomination limit in Rule 14.3 of the Tariff. If Trans Mountain then considered that there was good reason to change the Rule, it would apply to the Board for approval of the change – and include in its application complete and accurate information about the rationale for and impacts of the change. This is what Trans Mountain should have properly done in RH-2-2011.

Basis for the Complaint

Fairness and Equity

11. There is no longer any question that STC has been using a larger barge (~170,000 bbls) to transport crude oil from the Westridge Marine Terminal.[14] U.S. Oil is prepared to put aside the issue of whether it was appropriate to open up the barge subcategory to larger barges and is prepared to compete with STC and its larger barge to acquire the ~160,000 bbls of barge capacity. All that U.S. Oil asks is that the competition be fair and equitable.

12. In those months in which U.S. Oil and STC both nominate for the entire ~160,000 bbls of barge capacity, U.S. Oil must offer a payment of at least twice that offered by STC in order to acquire the capacity, just because it uses its smaller Drakes Bay barge and requires two loading windows to transport the ~160,000 bbls. This

[14] STC argument, para. 3. It is not apparent why, when U.S. Oil requested STC to advise of the capacity of the barge(s) that it was using to transport volumes nominated in the barge subcategory, STC declined to provide the information on the basis that it considered it to be commercially confidential. (STC response to U.S. Oil IR 1(b)).

affords STC a huge advantage in competing with U.S. Oil to acquire the capacity. STC does not dispute this fact in its argument.[15]

13. Trans Mountain postulates that, if STC were to offer a bid price of $0.01/bbl and U.S. Oil were to offer a bid price of $0.02/bbl, this would not confer a huge competitive advantage on STC in acquiring the 160,000 bbls of barge capacity, because U.S. Oil would only have to pay $1,600 more.[16] While the arithmetic is correct, the underlying bid price assumptions are way off base. Trans Mountain knows full well that the bid prices for capacity in the barge subcategory have been multiples of dollars, not pennies. The illustration provided by U.S. Oil in paragraph 18 of its argument actually understates the magnitude of the competitive advantage afforded to STC.

14. STC suggests that U.S. Oil should address its significant competitive disadvantage by using a larger barge to call on the Westridge Marine Terminal.[17] Really? STC says that it would be inappropriate to force it to use a smaller barge. So why does STC think that it would be appropriate to force U.S. Oil to liquidate its significant financial investment in the Drakes Bay barge and make another significant financial investment in a larger barge? U.S. Oil has a relatively small refining operation. It does not have a fleet of barges that it can redeploy from one world location to another.

15. It is indeed ironic. The barge subcategory was created by Trans Mountain for smaller barges (~80,000 bbls). Now the suggestion is being made that smaller barges should step aside and the barge subcategory should just be used by larger barges. And this is all a direct result of what Trans Mountain would have us believe was a unintended consequence of a minor Tariff amendment made in RH-2-2011.

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[15] STC does not suggest that STC can fairly compete using its smaller barge. It acknowledges that U.S. Oil would need to offer a payment which is at least double the payment offered by one of its competitors using a larger barge.

[16] Trans Mountain argument, para. 40.

[17] STC argument, para. 13. Trans Mountain makes this same suggestion in paragraph 39 of its argument.

16. The answer here is not to force STC to use a smaller barge or to force U.S. Oil to use a larger barge. The methodology for allocating the barge capacity should accommodate both smaller and larger barges and should ensure that the capacity is fairly and equitably allocated amongst them. A methodology that requires a smaller barge to offer a payment at least twice that offered by a larger barge in order to acquire the ~160,000 bbls of barge capacity is not fair or equitable.

17. Trans Mountain refers to the impact of the allocation methodology and suggests that U.S. Oil has been relatively successful in acquiring capacity in the barge subcategory over the past five years.[18] When you drill down into the facts, though, here is what you find:

- STC started using its larger barge to call on the Westridge Marine Terminal some time in 2015.[19]
- In 2016, STC nominated for capacity in the barge subcategory in 8 of the 12 months.[20]
- In 2016, STC was awarded all of the available capacity in the barge subcategory in 7 of the 8 months in which it nominated.[21]

The situation has essentially got to the point that U.S. Oil is only able to acquire barge capacity in those months in which STC chooses not to nominate. In those months in which both U.S. Oil and STC nominate for the available capacity, the huge competitive advantage that the allocation methodology affords to STC will virtually assure that it gets the award.[22]

18. STC makes the following comments:

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[18] Trans Mountain argument, paras. 27-30.
[19] STC argument, para. 3.
[20] Trans Mountain response to U.S. Oil IR 3(a).
[21] Trans Mountain responses to NEB IR 1.1c and U.S. Oil IR 3(b).
[22] This situation was described in para. 31 of the U.S. Oil argument. Neither Trans Mountain nor STC took any exception to it in their arguments.

> The underlying fact is that U.S. Oil uses a smaller barge to make monthly nominations in an attempt to acquire the barge capacity. STC acknowledges that this election would require U.S. Oil offer a per unit payment which is at least double the payment offered by one of its competitors using a larger barge. That is not in question as this is exactly how the Bid Premium is intended to work.[23]

U.S. Oil begs to differ. U.S. Oil and STC both make monthly nominations to acquire all of the ~160,000 bbls of capacity in the barge subcategory. The Bid Premium methodology approved by the Board was never intended to require U.S.Oil to pay twice as much as STC for the capacity just because its smaller barge requires two loading windows to transport the volume.[24]

19. In its August 16, 2007 Decision, the Board was addressing a concern that the bid price methodology used to rank nominations for loadings over the Dock was threating the efficient use of the Dock. In particular, there had been a circumstance where a barge submitted a higher bid price than a Panamax tanker, leaving insufficient remaining Dock space for the tanker to economically use, with the result that the Dock space was not fully utilized. The Board thus approved the total value Premium ranking methodology for allocating Dock capacity. While the Board recognized that this could result in differential monetary impacts amongst shippers, it determined that the total bid value was nevertheless required to encourage the fullest use of the Dock facilities.

20. The current circumstances are much different. U.S. Oil and STC both nominate to acquire the ~160,000 bbls of capacity in the barge subcategory. The capacity will be fully utilized in a month whether it is awarded to U.S. Oil or to STC. The problem is one of unfairness and inequity in the allocation of the barge capacity between a larger barge and a smaller barge. This is a problem that should have been addressed by Trans Mountain at the time that the barge subcategory was opened up to larger barges, but it was not.

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[23] STC argument, para. 13.

[24] Particularly given that, as indicated in para. 28 of the U.S. Oil argument in para. 27 of this reply, there is no suggestion that two voyages per month by the Drake's Bay barge poses any problem to the efficient operation of the Westridge Dock.

Economic and Allocative Efficiency

21. Trans Mountain argues that the differential monetary impact on U.S. Oil and STC achieves allocative efficiency within the barge subcategory by ensuring allocation of the scarce capacity to the highest value use.[25] But in fact, it does not. Take the following illustration:

STC Nomination 1:	*160,000 bbls*	*x*	*$1.00/bbl*	*=*	*$160,000*
U.S. Oil Nomination 1:	*80,000 bbls*	*x*	*$1.90/bbl*	*=*	*$152,000*
U.S. Oil Nomination 2:	*80,000 bbls*	*x*	*$1.90/bbl*	*=*	*<u>$152,000</u>*
					$304,000

The 160,000 bbls of barge capacity would be allocated to STC for a payment of $160,000, even though U.S. Oil was prepared to pay $304,000 for this capacity. The capacity would not be awarded to the shipper that values it the most. Trans Mountain would be turning down incremental revenue of $144,000.

22. U.S. Oil's complaint is not with the total bid value allocation methodology per se. If a smaller barge were to nominate for less than the available ~160,000 bbls of barge capacity, it would be economically and allocatively efficient to require it to offer a higher bid price than a larger barge nominating for all of the available barge capacity. This is particularly so if the larger barge might be left with insufficient capacity to economically use, resulting in underutilization of the barge subcategory.

23. U.S. Oil's complaint is that both U.S. Oil and STC nominate for the ~160,000 bbls of barge capacity yet, just because U.S. Oil uses a smaller barge that requires two loading windows to transport the volume, it is required to offer a payment of at least twice that offered by STC in order to acquire the capacity. This result is unfair and inequitable and is not mandated by economic and allocative efficiency. The result is in fact inconsistent with economic and allocative efficiency because

[25] Trans Mountain argument, para. 39.

the capacity does not end up being awarded to the shipper that is prepared to pay the most for it.

The Remedies

Option 1

24. STC contends that reinstitution of a barge nomination limit in the Tariff would force it to use a smaller barge.[26] This is not the case. STC could continue to use its ~170,000 bbl barge but would be required to submit two separate nominations to acquire the ~160,000 of barge capacity. This is not discriminatory. STC would be in the same position as it was in before RH-2-2011. Tariff No. 76 following from RH-4-2008 had a barge nomination limit that required two nominations for the ~160,000 bbls of capacity.[27]

25. Reinstitution of the barge nomination limit would also be consistent with economic and allocative efficiency. The possible outcomes of the monthly bid process are that STC could be allocated the entire ~160,000 bbls of capacity, or U.S. Oil could be allocated the entire ~160,000 bbls of capacity, or STC and U.S. Oil could each be allocated half of the ~160,000 bbls of capacity.[28] In each case, the capacity in the barge subcategory would be fully utilized and would be allocated based on which shipper is prepared to pay the most for it.

Option 2

26. It is clear that STC would prefer to submit a single nomination for the ~160,000 bbls of barge capacity. This preference could be accommodated, in a way that would be fair and equitable, by allowing U.S. Oil to also submit a single nomination for the ~160,000 bbls of barge capacity. This would place the two

[26] STC argument, para. 13.

[27] STC did not advocate for removal of the barge nomination limit in RH-4-2008. (STC response to U.S. Oil IR 2(a)). And Trans Mountain obviously did not consider the nomination limit to be discriminatory because it chose to retain the limit in Tariff No. 76.

[28] U.S. Oil response to NEB IR 1.1(a). Even if STC was only allocated 80,000 bbls in a month, it would still be economic for it to use its larger barge to transport this volume the short distance from the Westridge Dock to its Puget Sound refinery, as U.S. Oil understands it did in June, 2016.

competitors on a level playing field in terms of bidding for the capacity. The capacity would be allocated to the competitor that is prepared to pay the most for it.[29]

27. This option would require that U.S. Oil transport the ~160,000 bbls from the Westridge Marine Terminal in two loading windows. But why should this be prohibited? As stated by U.S. Oil in paragraph 28 of its argument:

> The fact is, though, that the Drakes Bay barge only takes 8 to 10 hours to load and it has many times over the past 8 years (since the capacity of the barge subcategory was increased to 5,370 bpd) made two voyages per month transporting uncommitted volumes away from the Westridge Dock. This has never posed a problem to the efficient operation of the Dock.

Trans Mountain and STC do not question this in their arguments. The option of allowing the Drakes Bay barge to make a single nomination for the ~160,000 bbls of barge capacity would resolve the problem of unfairness and inequity without in any way compromising the efficient operation of the Westridge Marine Terminal.[30]

28. Trans Mountain contends that the current wording of its Tariff does not allow U.S. Oil to make a single nomination for the ~160,000 barrels of barge capacity and transport the volumes in two loading windows.[31] U.S. Oil's response to that contention is this. By deleting the barge nomination limit from Rule 14.3, Trans Mountain has created a situation that is unfair and inequitable (because a smaller barge must offer a payment at least twice that offered by a larger barge to

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[29] While STC cannot reasonably complain about this result from a fair competition perspective, it would obviously like to retain the huge competitive advantage that the current allocation methodology affords to it - so it professes concern that allowing two smaller barge loadings might affect the efficient operation of the Dock. But when asked to support this concern with facts, STC provided none. (STC response to U.S. Oil IR 2(b)).

[30] Trans Mountain raises the question at para. 56 of its argument whether a 40,000 bbl barge should be permitted to nominate for the 160,000 bbls of barge capacity and transport the volumes in four loading windows. There is no indication that a 40,000 bbl barge has ever called or will ever call on the Westridge Dock, or that such a barge would even be approved to call on the Westridge Dock. Such speculation does not excuse Trans Mountain from addressing the unfairness and inequity that its allocation procedure is causing between the current shippers in the barge subcategory.

[31] Trans Mountain argument, paras. 53-55.

acquire the ~160,000 bbls of barge capacity) and that is economically and allocatively inefficient (because the barge capacity is not allocated to the shipper that is prepared to pay the most for it). So if a Tariff amendment is now required to remedy this situation, Trans Mountain should be making it.

Option 3

29. With regard to the option of allocating capacity in the barge subcategory on the basis of bid price, it is clear that, in the months that they nominate, U.S. Oil wants to acquire the available ~160,000 bbls for its Tacoma refinery and STC wants to acquire the available ~160,000 bbls for its Puget Sound refinery. There is no reason to expect that one barge would successfully bid for less than the 160,000 bbls, leaving insufficient capacity for another barge to economically use. These circumstances are much different than those being addressed by the Board in its August 16, 2007 Decision.[32]

Relief Requested

30. In its complaint filed on October 11, 2016, U.S. Oil identified the unfairness and inequity in the procedure being used by Trans Mountain to allocate capacity in the barge subcategory and it presented three options for Trans Mountain to consider to address that unfairness and inequity. The ensuing four months have provided ample time for Trans Mountain to consult with its shippers about the complaint and the process established by the Board has afforded ample opportunity for Trans Mountain to provide its views on the appropriate option to address the complaint. Trans Mountain has instead chosen to simply dispute the complaint and to summarily reject all of the three options.

31. As U.S. Oil stated in its December 14, 2016 letter to the Board, every month that passes is another month in which U.S. Oil is being fairly disadvantaged in its ability to acquire uncommitted barge capacity. U.S. Oil therefore respectfully requests that the Board determine the remedy that it considers to be the most

[32] U.S. Oil response to NEB IR 1.3(a).

appropriate and direct Trans Mountain to make any Tariff amendments that are required to implement it.

ALL OF WHICH IS RESPECTFULLY submitted this 14th day of February, 2017.

NORTON ROSE FULBRIGHT CANADA LLP

Per: ______________________________

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