

TransCanada PipeLines Limited ("TransCanada")

Application for Approval of Tariff Proposals ("Application")

NEB File OF-Tolls-Group1-T211-2011-04 03

Hearing Order RH-001-2013

**WRITTEN ARGUMENT OF
UNION GAS LIMITED**

September 17, 2013

1 **1. INTRODUCTION**

2 The Argument of Union Gas Limited ("Union") will focus primarily upon TransCanada's
3 proposed change to its existing tariff with respect to Alternate Receipt Points ("ARPs") and
4 Diversion rights.

5 Union coordinated its participation in this proceeding with Société en commandite Gaz
6 Métro Limitée ("Gaz Métro"), Enbridge Gas Distribution Inc. ("EGD") and the Industrial Gas
7 Users Association ("IGUA") in order to provide the Board with the perspective of virtually
8 the entire Canadian gas market in Ontario and Quebec respecting implementation of the
9 new RH-003-2011 Model. Collectively known as the Market Area Shippers ("MAS"), the
10 members sponsored a common position on each of TransCanada's proposed tariff changes,
11 though individual members took the lead in cross-examination and in testimony on each of
12 TransCanada's proposals.

13 Accordingly, Union has reviewed and supports the Arguments filed by Gaz Métro, EGD and
14 IGUA as they relate to TransCanada's other proposed tariff changes. While Union will be
15 the MAS member which replies principally to Argument respecting ARPs/Diversions, it also
16 reserves the right to Reply to Argument respecting other Tariff Proposals as its interests
17 may require.

18 Finally, Union alone sponsored evidence respecting its issues as an Expiring Shipper.¹
19 Union will present its Argument on this issue at the end of these submissions.

20 **2. NEW RH-003-2011 MODEL**

21 Union and MAS have focused their participation on this proceeding upon ensuring the
22 successful implementation of the new RH-003-2011 Model. That Model constitutes the
23 new status quo.² Indeed, the new RH-003-2011 Model affirmed the current provisions of
24 the TransCanada Tariff including the ARPs and out-of-path diversion rights which

¹ Ex. C20-3-1 to C20-3-4.

² RH-001-2013 Hearing Transcript, 2T1939-1951 (Johannson); 7T7888 (Henning).

1 TransCanada now seeks to eliminate. As the Board recently noted in upholding the BP
2 Complaint:

3 The Board does not find TransCanada's open season consistent
4 with the Board's RH-003-2011 Decision. That decision approved the
5 current provisions of the Mainline Tariff and continued the terms
6 and conditions of access to FT service. It is not consistent with the
7 RH-003-2011 Decision to modify the terms and conditions of access
8 to FT service, without Board approval, by altering documents
9 offering that Mainline service in a Daily Existing Capacity Open
10 Season.³ (emphasis supplied)

11 In the context of the ARPs/Diversion Rights Issue, it is important to reflect upon the critical
12 role played by the FT recourse service. In the RH-003-2011 Decision, the Board clearly
13 intended that FT service – and all its attributes – be available in order "... to protect
14 shippers from high tolls for discretionary services."⁴

15 The existing out-of-path diversion and ARP rights provide such protection across the entire
16 TransCanada system. If that protection was limited to only "eligible" receipt points at
17 TransCanada's sole discretion and to only in-path diversions where the "paths" are subject
18 to TransCanada's sole discretion, that protection would be lost. Even if afforded the ability
19 to select specified methodology to determine the "eligible" points, TransCanada will have
20 the opportunity to exercise its market power by choosing a methodology that excludes the
21 liquid points along the Mainline system. Despite TransCanada's somewhat vague
22 comments in its Reply Evidence, it appears it wishes the Board to delegate to it the ability
23 unilaterally to make changes to ARPs or paths in order to enhance its competitive position
24 vis-à-vis FT recourse shippers.⁵ This would be particularly true on paths to export points
25 such as East Hereford and Iroquois at which, TransCanada admits, "... at times can be very
26 high prices ...".⁶

³ NEB Letter Decision, September 5, 2013, page 6 of 6.

⁴ RH-003-2011 Decision, at p. 127.

⁵ Ex. B7-2, at p. 17.

⁶ Ex. B21, p. 4 of 15.

1 It is of serious concern that such an impermissible delegation of the Board's Part IV
2 authority. As noted in the Gaz Métro Argument, the unlawful nature of such delegation is
3 well established. Indeed, the *Act* itself constrains the NEB Chairperson from delegating to
4 even individual NEB members its powers, duties and functions under Part IV of the *Act*.⁷

5 Similarly, the suggestion in the U-10 response that out-of-path diversions be limited to a
6 single downstream delivery point such as Emerson or Dawn⁸ removes any constraint on the
7 exercise of TransCanada's market power over discretionary pricing over all other paths. By
8 limiting diversions in such a way, the Board could, as Ms. Piett noted during her
9 examination by Member George,⁹ perhaps inadvertently, be placed in the position of
10 having to decide where gas should flow, rather than allowing the market to function with
11 as little distortion as possible and thereby determine where gas should flow on any given
12 day.

13 Assigning a single, liquid, out of path diversion point to each contract would represent a
14 significant erosion of the constraint on TransCanada's discretionary pricing intended by RH-
15 003-2011. It would diminish the value to shippers of the recourse FT service. In Union and
16 MAS's submission, deregulation of the IT and STFT pricing – which as Messrs. Reed and
17 Henning agree, are part of the primary market -- cannot be justified unless and until
18 effective constraints to that unfettered pricing discretion are available on all paths across
19 the TransCanada system.

20 The new RH-003-2011 Model provided that protection. As more fully detailed by the Board
21 in its RH-003-2011 Decision under the subheading "*IT and STFT Pricing and FT Recourse*
22 *Rates*",¹⁰ the FT service – and all its attributes – were expected to both constrain the
23 exercise of TransCanada's market power over discretionary services pricing and provide a
24 means by which to mitigate demand charges:

⁷ *National Energy Board Act*, R.S.C., 1985, c. N-7, Section 14.

⁸ Ex. B21, Scenario 5, pp. 13-15.

⁹ RH-001-2013 Hearing Transcript, 7T8367-8369.

¹⁰ RH-003-2011 Decision, pp. 126-127.

1 Moreover, we are of the view that the ability of TransCanada to
2 charge for discretionary services at whatever level will be
3 constrained. All shippers purchasing FT service at recourse rates
4 may resell capacity in the secondary market to mitigate demand
5 charges. And, as indicated by ANE, it is unlikely there will be many
6 days when TransCanada will be able to achieve pricing for IT and
7 STFT service over a pricing level of 300 per cent for the FT toll.¹¹
8 (emphasis supplied)

9 By definition, TransCanada's Tariff Proposals would greatly reduce the number of paths,
10 ARPs and delivery points over which its discretionary pricing would be constrained.¹²

11 It would also seriously erode shippers' ability to mitigate unabsorbed demand charges
12 ("UDCs") by restricting the secondary market available to make such re-sales, in some
13 cases, by eliminating liquid markets such as export points altogether. As the aid-to-cross
14 provided by Alberta Northeast Gas Limited's ("ANE") counsel illustrates the UDC mitigation
15 options are reduced from 10 to 5.¹³ The fact is, however, that the 5 remaining options
16 must accommodate a much higher volume of UDCs than in the past.¹⁴

17 It cannot be contended that the overriding purpose of the new RH-003-2011 Model was to
18 provide TransCanada the unrestrained ability to maximize revenues by eroding the
19 effectiveness of FT recourse service to provide effective competition to IT and STFT pricing
20 and to provide reasonable UDC mitigation. The Board highlighted the centrality of the
21 existing FT service to the new RH-003-2011 Model in its recent Letter Decision upholding
22 the BP Complaint:

23 The importance of clarity and certainty about the terms of access
24 to the Mainline is elevated for FT service. Customers on the
25 Mainline have access to that service as recourse from
26 TransCanada's discretion to set the minimum bid floors for
27 interruptible transportation service and short-term firm

¹¹ RH-003-2011 Decision, p. 127.

¹² RH-001-2013 Hearing Transcript, 2T2536-2547.

¹³ Ex. C4-10.

¹⁴ Ex. C9-15, MAS-NEB 1.4(c); RH-001-2013 Hearing Transcript, Mr. Bowman, 2T2071-2074; Ex.C9-03, MAS Joint Evidence, Adobe p. 18, lines 16-19.

1 transportation service. If terms of access to FT service are changed
2 or subject to change without notice, then the effectiveness of FT
3 service as recourse from TransCanada's pricing discretion is
4 jeopardized.¹⁵ (emphasis added)

5 Moreover, the RH-003-2011 Decision also noted that "(t)he other available tools for
6 mitigating UDCs create far less distortion".¹⁶ Again, the value to shippers of FT recourse
7 service would be seriously diminished.

8 The Decision itself recognized that the new Model provided "... no guarantee that the
9 overall revenue will be higher, ..." ¹⁷ in light of its critical reliance on the FT service and its
10 existing attributes to effectively constrain the exercise of TransCanada's market power over
11 the pricing of discretionary services by permitting all FT shippers to re-sell their excess
12 capacity on the available paths of the system. TransCanada's proposal to seriously restrict
13 ARPs and diversion paths runs contrary to the conscious and deliberate balance which
14 underpinned the Board's conclusion that the tolls for IT and STFT would thereby be just and
15 reasonable.¹⁸

16 With respect to UDC mitigation, it is clear that the Board affirmed the appropriateness of
17 maintaining the "other available tolls for mitigating UDCs" such as existing ARPs and
18 diversion rights in the context of the Board's adaptation of FT service attributes to its new
19 Model when it decided to eliminate RAM.¹⁹ As discussed below, the firming up of FT
20 contracts to meet what had been discretionary requirements makes the UDC problem
21 acute in the post RH-003-2011 world.

22 **3. THE BASIS FOR CHANGE OF THE NEW RH-003-2011 MODEL**

23 The Board provided guidance for future change to service attributes such as TransCanada's
24 ARP and Diversion Tariff Proposals:

¹⁵ NEB Letter Decision, September 5, 2013, page 5 of 6.

¹⁶ RH-003-2011 Decision, p. 141.

¹⁷ RH-003-2011 Decision, p. 128.

¹⁸ RH-003-2011 Decision, p. 127.

¹⁹ RH-003-2011 Decision, p. 141 above.

1 However, if upon implementation, or under new prevailing
2 circumstances, it is determined that these innovative services or
3 service features become or turn out to be detrimental to the
4 Mainline, they may need to be eliminated.²⁰

5 On this basis, Union and MAS respectfully submit that TransCanada has failed to justify the
6 need for its Tariff Proposals, particularly those related to ARPs and diversions.

7 **3.1 TransCanada seeks to "circumvent" the new RH-003-2011 Model**

8 First, for the reasons outlined above, it is TransCanada which has attempted to
9 "circumvent" or undermine the new RH-003-2011 Model by reducing the ability of existing
10 shippers to constrain the exercise of TransCanada's market power in its primary market
11 over its pricing of IT and STFT service.²¹ In this regard, Union and MAS advocate no change
12 to the new RH-003-2011 Model and the TransCanada Tariff at this time.²²

13 **3.2 Premature to Initiate Changes**

14 Second, it is premature to be making such changes only two months into the
15 implementation of the new Model.²³

16 As discussed below, there is no evidence which supports any need to provide TransCanada
17 with enhanced market power in the area of IT/STFT services pricing by eroding FT service.

18 As the Decision notes, "(t)olls for IT and STFT will be regulated on a complaint basis. Should
19 any interested person be denied access to the recourse rates, the interested person may file a
20 complaint with the Board."²⁴ As more fully detailed below, for eastern short haul service, the
21 Parkway/Maple bottleneck has been cited, up to this point, as the basis for declining to provide
22 incremental short haul FT service. In sum, therefore, there is no FT recourse available to

²⁰ RH-003-2011 Decision, p. 141; see also RH-001-2013 Hearing Transcript, Mr. Bowman, 2T2273.

²¹ RH-001-2013 Hearing Transcript, 2T2159-2171.

²² RH-001-2013 Hearing Transcript, 2T2159-2171.

²³ Ex. C9-03 MAS Written Evidence Adobe p. 24, line 24-26; Ex. C4-05 ANE Evidence Adobe p. 16 line 34-35, Adobe p. 17 line 1-3; RH-001-2013 Hearing Transcript, 6T6276-6277 (Mr. Carmichael), 6T7433 (Ms. Pielt), 6T7560 (Dr. Rahbar).

²⁴ RH-003-2011 Decision, p. 129.

1 eastern short haul shippers from Parkway to more easterly markets. Accordingly, until
2 incremental FT recourse service is available to shippers contracting for eastern short haul
3 service is made available, TransCanada possesses unrestricted discretion to price IT and STFT
4 service in the primary market over those paths at whatever level it may choose.²⁵

5 **3.3 RH-003-2011 Model Appears to be Working**

6 Third, the evidence now available in terms of revenue maximization strongly suggests that
7 implementation of the new Model is working as contemplated by the Board. As the evidence
8 of new FT contracting and renewals continued to be assembled over the course of the hearing,
9 it became evident that TransCanada's fear of massive shortfalls were groundless.

10 Whereas, the new Model had expressly contemplated shortfalls in the early years of the five-
11 year fixed toll regime offset by stronger performances in the later years, the forecasted Toll
12 Stabilization Adjustment ("TSA") account deficit is \$38.3 M in 2013, \$93.5 M in 2014, and
13 \$62.8 M in 2015, transitioning to an annual surplus of \$45.9 M in 2016 and \$148.6 M in 2017.²⁶
14 The combination of recent FT contracting, sales of discretionary services and cost-cutting
15 already has TransCanada poised to realize incentive profits over and above its recently
16 elevated 11.5% return on 40% common equity, both of which are also features of the new
17 Model.²⁷

18 Based on the undertaking responses and testimony, including EGD's confirmed intention to
19 contract an incremental 170,000 GJ/d of FT service in 2013,²⁸ the following chart demonstrates
20 that for the first two years of the new Model's five-year fixed toll regime there is a reasonable
21 likelihood that in 2013 and 2014 TransCanada's incentive mechanism will be triggered.²⁹ It is
22 also looking increasingly likely that the TSA account will not be in a significant deficit position
23 by the end of 2014 with a potential surplus not being out of the question.

²⁵ RH-001-2013 Hearing Transcript, 2T2102-2118; Ex. C9-3, Henning, p. 11 (Adobe p.58), line 10-13; p. 8 (Adobe p. 55) lines 8-10; Ex. C9-03 Enbridge Gas Distribution Written Evidence, p. 36, lines 1-5, 15-23, p. 64, lines 9-14, p. 71, lines 8-17; Ex. C9-6-7 TransCanada 1.16.

²⁶ RH-003-2011 Compliance Filing, Attachment B, Tab 3, Schedule 3.0.

²⁷ RH-003-2011 Decision, pp. 189-191.

²⁸ RH-001-2013 Hearing Transcript, 6T7285-7297.

²⁹ RH-003-2011 Decision, Chapter 12.3, at pp. 239-243.

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Chart 1

<u>TransCanada Revenue Requirement to Eliminate TSA (2013 & 2014)</u>			
2013 and 2014 Revenues and Remaining Revenue Shortfall			
Revenues (\$000) ¹	<u>2013</u>	<u>2014</u>	<u>Source</u>
Firm Services ²	\$ 1,159,208	\$ 1,266,352	U-5
Discretionary Miscellaneous Revenues	\$ 268,333	\$ 485	U-5
Non- Discretionary Miscellaneous Revenues	\$ 24,486	\$ 11,858	U-5
Total Revenues	\$ 1,452,027	\$ 1,278,695	U-5
Adjusted Revenue Requirement (with LTAA reduction) ³	\$ 1,551,550	\$ 1,533,516	U-5
Remaining Revenue Shortfall (with LTAA reduction)	\$ 99,523	\$ 254,821	U-5
<i>Estimated Cost Savings</i>	\$ 30,000	\$ 20,000	5T5449 (Mr. Bowman) & 5T5457 (Mr. Bowman)
<i>New Enbridge FT Contract</i>	\$ 16,200	\$ 97,200	6T7291 (Mr. LeBlanc) - Assumed only 2 months of 2013 revenues
Additional Revenue or Cost Savings	\$ 46,200	\$ 117,200	
Estimated Remaining Revenue Shortfall (with LTAA)	\$ 53,323	\$ 137,621	calculated
Revenue Shortfall to Achieve Earnings Sharing Threshold ⁴	\$ 38,000	\$ 93,000	2T2038 (Mr. Bowman, '13); 2T2040 (Mr. Bowman, '14)
Discretionary and FT revenue Required to Trigger Incentive⁵	\$ 15,323	\$ 44,621	calculated
<u>Chart Footnotes:</u>			
1. Includes revenues from known contracts as of September 1, 2013 up to the current contract end date.			
2. Firm Services include FT, FT-NR, FT-SN and STS.			
3. Source: RH-003-2011 Compliance Filing, Attachment B3, Schedule 2.0.			
4. This is the forecasted shortfall that triggers the Incentive Mechanism.			
5. This is the incremental, post September 1, 2013, FT, DMR and cost savings required to hit Incentive Mechanism Threshold (excluding new EGD contract).			

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While TransCanada's TSA for 2013 and 2014 is not yet in a surplus position, the inherently conservative nature of the foregoing analysis should be acknowledged. By and large, the revenues are literally in the bank. As Mr. Bowman explained:

1 **5358. MR. BOWMAN:** Yeah. What these are is these are booked
2 revenues and known contracts. So there is no renewal assumption
3 built into these numbers because that is unknown at this time.³⁰

4 Given the expected shortfall of \$150 M for 2014 referred to earlier by Mr. Johansson and the
5 other TransCanada witnesses³¹ prior to the filing of U-5,³² the incremental EGD 170,000 GJ/d FT
6 contract Mr. Leblanc confirmed virtually assures TransCanada of incentive profit sharing
7 without even a single dollar of discretionary revenue for 2014 taken into account.³³

8 Moreover, cost-cutting also draws TransCanada closer to its targets. The projected cost-cutting
9 appears modest in aggregate though its incidence in any particular year could affect whether
10 incentive profit-sharing is triggered in 2013 due to the deferred integrity work discussed with
11 the Board.³⁴

12 The discretionary revenues recorded are also actual contracted revenues. It is obviously very
13 conservative to assume that not a single dollar of discretionary revenue (IT and STFT) will be
14 realized over the remaining four months of 2013 and over all of 2014. In RH-003-2011,
15 TransCanada itself estimated between \$20 M and \$80 M of increased annual revenue with
16 much more limited pricing discretion.³⁵ Moreover, the Parkway/Maple bottleneck remains an
17 obstacle to any incremental eastern FT recourse short haul service leaving TransCanada with
18 the prospect of further price blow outs at Iroquois, East Hereford and Parkway in each of the
19 2013 and 2014 winters. In Union and MAS's view, discretionary service revenues are likely to
20 benefit from such elevated pricing,³⁶ to the detriment of the Ontario and Québec consumers.
21 In this regard, clearly TransCanada does indeed have the ability to maintain discretionary
22 services pricing at over 300% of the FT tolls more than "many days".³⁷ The record suggests that
23 for the first two months of the implementation of the new Model, highly elevated pricing at

³⁰ RH-001-2013 Hearing Transcript, 5T5358.

³¹ RH-001-2013 Hearing Transcript, 1T898; 5T5444.

³² Ex. B17.

³³ RH-001-2013 Hearing Transcript, 6T7289-7297.

³⁴ RH-001-2013 Hearing Transcript, 5T5408-5463.

³⁵ RH-003-2011 Decision, pp. 121-123.

³⁶ RH-001-2013 Hearing Transcript, 7T8350, 7T8364.

³⁷ RH-003-2011 Decision, p. 127.

1 multiples of the FT recourse toll have been maintained for a considerable portion of that
2 period.³⁸

3 Finally, a "zero" renewals assumption in U-5 also appears to be an unlikely prospect. Clearly,
4 Mr. Johannson had assumed approximately \$100 M in renewals in 2014 when he cited the
5 lower \$150 M shortfall forecast. In Union and MAS's view, however, it is likely that particularly
6 captive shippers will renew which tends to validate Mr. Johannson's earlier forecast. With the
7 continuing bottleneck from Parkway/Maple continuing to block incremental eastern short haul
8 FT recourse service, the \$100 M in renewals on the long haul path which Mr. Johannson
9 previously assumed strongly suggests both the realization of incentive profits for TransCanada
10 shareholders and a surplus TSA balance in 2014.

11 In sum, it appears premature to conclude that the new Model is broken and that, at this time,
12 TransCanada has been denied a reasonable opportunity to recover its costs such that a
13 degrading of FT recourse service is required to enable TransCanada to enhance its competitive
14 position.

15 **3.4 Changes in Circumstances – Acute UDC Problem and Lack of an** 16 **Incremental Eastern Short Haul FT Recourse Option**

17 Fourth, the only "new prevailing circumstances" that might affect a review of existing service
18 attributes are the need to mitigate the significantly increased UDC burden assumed by shippers
19 forced to firm-up their discretionary use;³⁹ and the persistence of the Parkway/Maple
20 bottleneck which had initially been expected to be rectified prior to the 2014/2015 heating
21 season (1 November 2014).⁴⁰

22 Including the most recent EGD 170,000 GJ/d FT contract, the record is clear that 1.4 Bcf/d⁴¹ of
23 incremental FT was contracted; much of this newly firmed up service replacing IT and STFT use

³⁸ TransCanada has earned \$4.5M/month of IT revenues alone over July/August 2013 while pricing their services well in excess of recourse rates; Ex. B15, U-4; RH-001-2013 Hearing Transcript, 1T918-924.

³⁹ RH-001-2013 Hearing Transcript, 2T2071-2074.

⁴⁰ RH-001-2013 Hearing Transcript, 2T2102-2118.

⁴¹ Ex. B14; RH-001-2013 Hearing Transcript, 6T7291.

1 due to their now elevated pricing,⁴² relates to only occasional or seasonal demand with the
2 result that LDCs have now incurred a much higher level of UDC exposure that must be
3 mitigated.⁴³ As indicated by Ms. Piett when discussing the recent contracting confirmed by
4 Enbridge;⁴⁴

5 7459. "So if you think, for instance, Enbridge's new contracts that
6 they've just announced today to us where they've increased their
7 long-haul capacity on TransCanada by *38 percent* (Enbridge)
8 has increased its capacity on TransCanada to meet *peak seasonal*
9 *and peaking needs*. Their expectation is that they would very rarely
10 use those contracts. So, in fact, they need to mitigate it the most.
11 In fact, they probably need to mitigate their costs at least *as much*
12 *as 80 percent of the time*. So under this scenario, they wouldn't
13 have access to do that."

14 In the circumstances, therefore, it is unfair and unreasonable to restrict shippers' ability to
15 mitigate a greatly increased UDC burden by limiting access to all operationally available points
16 including to liquid points, in the manner proposed by TransCanada. Indeed, the need for some
17 shippers to now do so has significantly increased.

18 It has been established on record that there is currently a bottleneck between Parkway and
19 Maple.⁴⁵ What is not clear on the record is when this bottleneck will be alleviated. Union and
20 MAS identified their concern with this situation in their evidence⁴⁶ and responses to
21 information requests. It is an important factor in connection with TransCanada's proposed
22 restrictions on ARPs and diversion rights. The fact remains that, at this time, and based on
23 TransCanada's estimates of a two to three years timeframe required to complete projects,⁴⁷
24 this situation is expected to continue for at least the next two heating seasons. Accordingly,
25 until this constraint is alleviated, shippers have no protection against the exercise of

⁴² RH-001-2013 Hearing Transcript, Mr. LeBlanc, 6T7289-7297; Messrs. Smith and Bowman 2T2061-2074.

⁴³ RH-001-2013 Hearing Transcript, Ms Piett, 7T7889-94, Messrs. Smith and Bowman 2T2071-2074,
Mr. Leblanc 7T7876.

⁴⁴ RH-001-2013 Hearing Transcript, 6T7459 (corrected by Ms. Piett at 7T7596-7598).

⁴⁵ RH-001-2013 Hearing Transcript, 2T2102-2103.

⁴⁶ Ex.C9-03, MAS Joint Evidence, p. 36, lines 1-5, 15-23, p. 64, lines 9-14, p. 71, lines 8-17.

⁴⁷ RH-001-2013 Hearing Transcript 3T3297.

1 TransCanada's market power over the pricing of the IT and STFT services along paths east of
2 Parkway.

3 Mr. Reed has acknowledged the potential for market power abuse in circumstances where
4 physical bottlenecks exist and further, he has acknowledged that it can take some time to
5 remedy them. In that regard Mr. Reed discussed the following related excerpts of his own
6 testimony from the OEB Storage Forbearance Proceeding:

7 It is true that the potential for market power abuse in transmission
8 markets could exist in instances where ... (i) the demand for
9 pipeline capacity exceeds the supply of pipeline capacity in a
10 particular market and, ... (ii) the time period for additional pipeline
11 capacity to enter the market is significant.⁴⁸

12 Mr. Reed concluded that firm transportation services in the Eastern Triangle are not workably
13 competitive.⁴⁹ While Dr. Carpenter's definition of the primary market for TransCanada's
14 transportation services would only extend to STFT service. Union and MAS submit that this
15 conclusion applies to all transportation services offered by TransCanada in the primary market
16 including IT service.⁵⁰ In that respect, Mr. Reed concurs with Union and MAS.⁵¹

17 While this situation also raises other potential issues, apropos ARPs and diversion rights, it is of
18 considerable concern that TransCanada's tariff proposals would further enhance the exercise
19 of TransCanada's market power over the pricing of eastern short haul discretionary services by
20 restricting the scope of the shippers ARP and diversion rights under FT recourse service in the
21 manner outlined by TransCanada.

22 **4. MARKET POWER**

23 No market power analyses of TransCanada's transportation services was conducted in RH-
24 003-2011; nor did TransCanada tender a market power analysis in its Tariff Proposals
25 Application. As part of its burden to persuade the Board that its tariff proposals are just

⁴⁸ RH-001-2013 Hearing Transcript, 2T2585-2596.

⁴⁹ RH-001-2013 Hearing Transcript, 2T2596; Ex. C20-7 at p. 8.

⁵⁰ RH-001-2013 Hearing Transcript, 2T2338-2362.

⁵¹ RH-001-2013 Hearing Transcript, Mr. Reed, 2T2329-2336; Mr. Henning, 7T8006-8008.

1 and reasonable, Union and MAS respectfully submit that TransCanada must demonstrate
2 that its proposals do not permit it to unreasonably exercise market power in the
3 circumstances. As stated in Tenaska's evidence:⁵²

4 The FERC-imposed secondary receipt and delivery mechanism is
5 designed to provide firm shippers with the maximum possible path
6 flexibility. It does that in order to allow shippers to utilize the firm
7 entitlements they pay for as fully as possible, and in order to
8 encourage competition in the transportation market between
9 shippers and the pipeline and amongst shippers operating in the
10 secondary market.

11 In instances where market-based rate authority has been sought for FERC jurisdictional
12 natural gas services, the applicant bears the burden to demonstrate that the relevant
13 product market within the relevant geographic market lacks concentration.⁵³ While such
14 findings have been made for natural gas storage service, FERC has never made such a
15 finding for natural gas transportation service.⁵⁴

16 While it was only in Reply Evidence that TransCanada offered some discussion of market
17 power, Dr. Carpenter only focused upon the impact of those proposals on gas commodity
18 prices rather than upon TransCanada's transportation services. Under cross-examination,
19 however, Dr. Carpenter and Mr. Reed both agree that for the NOL and the eastern portion
20 of the TransCanada system, none of the delivery areas other than Dawn are workably
21 competitive in terms of primary transportation services.⁵⁵ That would include the Eastern
22 Triangle north and east of Parkway.

23 In Union and MAS's respectful submission, the Board should find that TransCanada
24 possesses market power in the primary market for all the transportation services it offers.
25 In light of that finding and in light of the lack of short haul recourse FT service alternatives
26 particularly in the Eastern Triangle, at a minimum, the Board should reject any new

⁵² Ex. C18-3, p. 11, lines 21-25.

⁵³ RH-001-2013 Hearing Transcript, 2T2410-2411.

⁵⁴ Ex. B-13, U-6, Adobe p. 21-22.

⁵⁵ RH-001-2013 Hearing Transcript, 2T2295-2328, 2T2381-2407.

1 restrictions on the recourse FT service attributes designed to enhance TransCanada's
2 competitive position. The Board should, therefore, not permit TransCanada to exercise
3 unfettered discretion over the designation of "eligible" receipt or delivery points or over
4 the "deeming" of transportation paths for any of the recourse FT diversions which may
5 compete with its IT and STFT services.

6 At its heart, TransCanada's ARP/diversion tariff proposal seeks to inhibit FT shippers from
7 competing with its IT and STFT services in order to maximize the revenues it derives from
8 its unlimited pricing discretion. Dr. Carpenter concedes that – "by definition" – the
9 universe of diversion delivery locations and the universe of ARPs that can be accessed
10 under any given FT contract would be reduced.⁵⁶

11 The central importance of the existing attributes of the FT recourse service to the proper
12 implementation and functioning of the new RH-003-2011 Model cannot be understated.
13 As Mr. Henning testified, the existing ARP and diversion rights are critical to constraining
14 the exercise of TransCanada market power over the pricing of IT and STFT service.⁵⁷ That is
15 the fundamental flaw in all the U10 scenarios where diversions are priced at the same IT
16 tolls as TransCanada itself would charge.⁵⁸

17 As it stands, however, TransCanada's monopoly power compels firm shippers seeking short
18 haul services east of Parkway to contract for Empress-based long haul service despite their
19 desire to provide security of supply and access the Dawn and Niagara markets. In effect,
20 therefore, TransCanada already extracts a long haul toll which is several times the FT
21 recourse short haul toll. Practically speaking, any shipper wishing short haul discretionary
22 services east of Parkway can expect that those services will be priced at over 370%⁵⁹ of the

⁵⁶ RH-001-2013 Hearing Transcript, 2T2537-2547.

⁵⁷ Ex. C9-3, pp. 8 and 11.

⁵⁸ Ex. B21, U-10, Scenarios 4(a) and (c), pp. 11-13.

⁵⁹ Ex. C9-6-4, the Empress to Enbridge EDA Compliance Toll is over 370% of the Union Dawn to Enbridge EDA Compliance Toll.

1 FT short haul toll in order to force them back to Empress.⁶⁰ To the Board that should be an
2 unacceptable exercise of market power.

3 TransCanada also can use its discretion to deny shippers access, for example, to what it
4 refers to as the "very high prices" sometimes available at East Hereford and Iroquois⁶¹
5 while harvesting those elevated margins without fear of competition.⁶² Under scenario 4
6 of U-10,⁶³ if TransCanada was permitted to charge IT tolls for out of path diversions, then
7 TransCanada would be permitted the ability to price certain paths at very high levels to
8 effectively eliminate diversions along that path. As Ms. Piett discussed with TransCanada's
9 counsel, TransCanada could exercise its discretion to eliminate a diversion to Iroquois of an
10 Empress to Union EDA contract (which might yield an incremental charge of 14 cents for
11 the diversions) with its own Dawn to Iroquois STFT service.

12 7872. On the other hand, TransCanada may not wish to receive
13 just -- I believe it's 14 cents -- just that 14 cents. They would prefer
14 to meet that market, perhaps, at Iroquois with a Dawn to Iroquois
15 service. So they would -- I would think, would want to shut down
16 their diversion so that they can serve the Iroquois market all day
17 long from Dawn at a higher toll and preclude us from competing in
18 that market.⁶⁴ (emphasis supplied)

19 As Mr. Lange explained, the reality of the nominations process and the priorities accorded
20 STFT means that this discretionary service has in the past, and will continue to influence
21 market access to diversions. To extend priority to IT service equal to that of diversions
22 would only further impair the ability of the FT recourse service to constrain discretionary
23 pricing and would diminish the ability to mitigate UDCs.⁶⁵

24 Equally, TransCanada's designation of a "deemed" path for diversions works more perverse
25 results than even its "gaming" allegations suggest. As Ms. Piett indicated, it would cost

⁶⁰ RH-001-2013 Hearing Transcript, Mr. Henning, 7T7873-7875.

⁶¹ Ex. B21, p. 4 of 15.

⁶² RH-001-2013 Hearing Transcript, 7T7856-7872.

⁶³ Ex. B21.

⁶⁴ RH-001-2013 Hearing Transcript, 7T7872.

⁶⁵ RH-001-2013 Hearing Transcript, 7T8574-8580.

1 Union's customers \$30 M more each year under TransCanada's Tariff Proposals to replicate
2 the flexibility of its 67,000 GJ/d Empress to Union CDA contract. For years Union has
3 dropped off supply to meet peak conditions in the Union WDA and the Union NDA en route
4 to the Union CDA to which it generally travels the balance of the year.⁶⁶ This is hardly
5 abusive and is certainly not gaming, however, the "deemed" path TransCanada would
6 designate for this contract is through Emerson and across Great Lakes through Dawn so
7 that its in-path diversions could only be made along that path, not the Union WDA or
8 Union NDA.⁶⁷ What is known is that TransCanada only has a 100,000 GJ/d forward haul
9 contract on Great Lakes⁶⁸ along the path it deems for all Empress to CDA deliveries. By
10 contrast, MAS shippers will hold Empress to CDA contracts with a volume of 338,795
11 GJ/d.⁶⁹ The arbitrariness of the "deemed" path designation is obvious. Clearly
12 TransCanada will move almost all of the CDA contracted volumes along the NOL route yet
13 diversions along that route would not be permitted per TransCanada's proposal.
14 Assuming the path TransCanada designates for such diversions, Union would be forced to
15 take incremental capacity from Empress to the WDA and the NDA, causing the \$30M
16 incurred costs. Further, these new contracts would be seldom scheduled absent design day
17 conditions and virtually all those costs would need to be mitigated due to the very low
18 levels at which those contracts would be utilized.

19 Other examples of the arbitrariness of the deemed paths are reflected in the discussion
20 between TransCanada's witnesses and Union's counsel regarding actual flow versus
21 "deemed paths" over the Eastern Triangle.⁷⁰ In sum, TransCanada reports Eastern Triangle
22 capacities as only the capacity along the North Bay Shortcut and the Montreal Line but that
23 it varies all across the area;⁷¹ that operationally, gas flows in different directions seasonally

⁶⁶ RH-001-2013 Hearing Transcript 7T7889-7894; Ex. C9-15 NEB 1.4(a).

⁶⁷ Ex. B10, Adobe pp. 3-29.

⁶⁸ Ex. B2-11 TransCanada-Union 7(d), Table Union 7-1, Adobe page 12.

⁶⁹ Ex. C9-6-4, response to TransCanada IR 1; RH-001-2013 Hearing Transcript, 6T7291.

⁷⁰ RH-001-2013 Hearing Transcript, 2T2192-2262.

⁷¹ RH-001-2013 Hearing Transcript, 2T2207.

1 and otherwise across those two sections as well as the Barrie Line;⁷² and that short haul
2 service is also provided via firm backhaul on Great Lakes from Dawn;⁷³ and that it is
3 impossible to determine the exact route taken by any particular volume on any particular
4 day.⁷⁴ In these circumstances, the potential for TransCanada to abuse its market power by
5 deeming "paths" and "ARPs" in a black-box should give the Board serious concerns about
6 delegating TransCanada a virtual free hand to further restrict existing rights under the FT
7 recourse service through the discretion it seeks over changes to "eligibility". As noted in
8 NEB 1.4(b), the test at the FERC is operational feasibility with the burden of providing
9 operational limitations residing with the pipeline; which is not permitted to unreasonably
10 restrict capacity.

11 **5. GAMING**

12 In Union and MAS's opinion, the "gaming" concern is greatly exaggerated. At best, there is
13 only approximately 50 TJ/d of very short haul FT service which might be viewed as
14 potentially abusive.⁷⁵ When one considers the serious distortions and significant added
15 costs to reasonable and long accepted practices associated with TransCanada's proposed
16 "cure", it is impossible to conclude that a just and reasonable balance is achieved.⁷⁶

17 When one considers the potential for increased exercise of TransCanada's market power,
18 particularly in connection with absence of incremental recourse service on eastern short
19 haul paths for as long as the Parkway/Maple bottleneck persists, the revisions TransCanada
20 seeks to the ARP and diversions provisions of its existing tariff simply cannot be justified.
21 As noted at NEB 1.3(a),⁷⁷ TransCanada's tariff proposals represent a cure worse than the
22 "gaming problem" it was intended to address, which greatly enhances the exercise of
23 TransCanada's market power.

⁷² RH-001-2013 Hearing Transcript, 2T2245-2249.

⁷³ RH-001-2013 Hearing Transcript, 2T2254.

⁷⁴ RH-001-2013 Hearing Transcript, 2T2256-2262.

⁷⁵ Ex. C9-3, at p. 18, lines 12-20.

⁷⁶ Ex. C9-6-3, NEB 1.3(a)-(c).

⁷⁷ Ex. C9-6-3.

6. CONFIRM ACCEPTABILITY OF EXISTING TARIFF PRACTICES

In order to prevent further controversy and disruption, Union and MAS respectfully submit that the Board should confirm the acceptability of TransCanada's past practice with respect to Eastern Triangle ARPs and Diversions which it referenced three times in its evidence and discussed with the TransCanada Panel under cross-examination by Union's counsel.

For simplicity, this evidence uses the expression "eliminate out-of-path ARPs and Diversions." However, under the current Tariff, out-of-path ARPs are not permitted except that for areas such as the Eastern Triangle, TransCanada's current practice has been to group certain receipt locations together and deem them to be valid ARPs for a given primary contracted path. The grouped points do not necessarily fall strictly within a shipper's contracted path in the Eastern Triangle. For example, St. Clair and Union Dawn are currently valid ARPs for contracts with a Parkway receipt. (see Application, page 6, footnote 17)⁷⁸

Union and MAS respectfully request that the Board direct TransCanada to modify its tariff to ensure that continuation of current practice is fully authorized.

7. EXPIRING SHIPPER

TransCanada's Reply Evidence⁷⁹ appears to resolve Union's concerns outlined in its Expiring Shipper evidence.⁸⁰ Union respectfully requests that the Board direct TransCanada to grant Union the renewals requested therein.

8. CONCLUSION

In conclusion, TransCanada's Tariff Proposals relating to ARPs and Diversions should be rejected and the related service attributes of the critical FT recourse service confirmed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17TH DAY OF SEPTEMBER, 2013.

⁷⁸ Ex. B7-2, p. 3, footnote 2, and p. 15, footnote 27; Ex. B7-3 Reed, p. 3, footnote 1; RH-001-2013 Hearing Transcript, 2T2173-2191 and 2T2247-2258 and 2T2191-2262.

⁷⁹ Ex. B1-2 at Section 3.1.5, pp. 13-14.

⁸⁰ Ex. C20-3.