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. INTRODUCTION

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

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

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

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

2. NEW RH-003-2011 MODEL

Union and MAS have focused their participation on this proceeding upon ensuring the successful implementation of the new RH-003-2011 Model. That Model constitutes the new status quo.[2] Indeed, the new RH-003-2011 Model affirmed the current provisions of 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).

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

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

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

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

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[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.

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

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

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

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

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[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.

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

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

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

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

> The importance of clarity and certainty about the terms of access to the Mainline is elevated for FT service. Customers on the Mainline have access to that service as recourse from TransCanada's discretion to set the minimum bid floors for 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.

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

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

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

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

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

The Board provided guidance for future change to service attributes such as TransCanada's 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.

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

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

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

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

3.2 Premature to Initiate Changes

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

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

As the Decision notes, "(t)olls for IT and STFT will be regulated on a complaint basis. Should any interested person be denied access to the recourse rates, the interested person may file a complaint with the Board."[24] As more fully detailed below, for eastern short haul service, the Parkway/Maple bottleneck has been cited, up to this point, as the basis for declining to provide 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. Piett), 6T7560 (Dr. Rahbar).
[24] RH-003-2011 Decision, p. 129.

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

3.3 RH-003-2011 Model Appears to be Working

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

Whereas, the new Model had expressly contemplated shortfalls in the early years of the five-year fixed toll regime offset by stronger performances in the later years, the forecasted Toll Stabilization Adjustment ("TSA") account deficit is $38.3 M in 2013, $93.5 M in 2014, and $62.8 M in 2015, transitioning to an annual surplus of $45.9 M in 2016 and $148.6 M in 2017.[26] The combination of recent FT contracting, sales of discretionary services and cost-cutting already has TransCanada poised to realize incentive profits over and above its recently elevated 11.5% return on 40% common equity, both of which are also features of the new Model.[27]

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

Chart 1

TransCanada Revenue Requirment to Eliminate TSA (2013 & 2014)

2013 and 2014 Revenues and Remaining Revenue Shortfall			
Revenues ($000)[1]	2013	2014	Source
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
Estimated Cost Savings	*$ 30,000*	*$ 20,000*	*5T5449 (Mr. Bowman) & 5T5457 (Mr. Bowman)*
New Enbridge FT Contract	*$ 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 Incentive[5]	**$ 15,323**	**$ 44,621**	**calculated**

Chart Footnotes:
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).

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:

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

Given the expected shortfall of $150 M for 2014 referred to earlier by Mr. Johannson and the other TransCanada witnesses[31] prior to the filing of U-5,[32] the incremental EGD 170,000 GJ/d FT contract Mr. Leblanc confirmed virtually assures TransCanada of incentive profit sharing without even a single dollar of discretionary revenue for 2014 taken into account.[33]

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

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

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[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.

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

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

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

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

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

Including the most recent EGD 170,000 GJ/d FT contract, the record is clear that 1.4 Bcf/d[41] of 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.

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

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

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

It has been established on record that there is currently a bottleneck between Parkway and Maple.[45] What is not clear on the record is when this bottleneck will be alleviated. Union and MAS identified their concern with this situation in their evidence[46] and responses to information requests. It is an important factor in connection with TransCanada's proposed restrictions on ARPs and diversion rights. The fact remains that, at this time, and based on TransCanada's estimates of a two to three years timeframe required to complete projects,[47] this situation is expected to continue for at least the next two heating seasons. Accordingly, until this constraint is alleviated, shippers have no protection against the exercise of

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[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.

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

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

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

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

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

4. MARKET POWER

No market power analyses of TransCanada's transportation services was conducted in RH-003-2011; nor did TransCanada tender a market power analysis in its Tariff Proposals 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.

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

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

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

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

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

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[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.

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

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

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

As it stands, however, TransCanada’s monopoly power compels firm shippers seeking short haul services east of Parkway to contract for Empress-based long haul service despite their desire to provide security of supply and access the Dawn and Niagara markets. In effect, therefore, TransCanada already extracts a long haul toll which is several times the FT recourse short haul toll. Practically speaking, any shipper wishing short haul discretionary 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.

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

TransCanada also can use its discretion to deny shippers access, for example, to what it refers to as the "very high prices" sometimes available at East Hereford and Iroquois[61] while harvesting those elevated margins without fear of competition.[62] Under scenario 4 of U-10,[63] if TransCanada was permitted to charge IT tolls for out of path diversions, then TransCanada would be permitted the ability to price certain paths at very high levels to effectively eliminate diversions along that path. As Ms. Piett discussed with TransCanada's counsel, TransCanada could exercise its discretion to eliminate a diversion to Iroquois of an Empress to Union EDA contract (which might yield an incremental charge of 14 cents for the diversions) with its own Dawn to Iroquois STFT service.

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

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

Equally, TransCanada's designation of a "deemed" path for diversions works more perverse 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.

Union's customers $30 M more each year under TransCanada's Tariff Proposals to replicate the flexibility of its 67,000 GJ/d Empress to Union CDA contract. For years Union has dropped off supply to meet peak conditions in the Union WDA and the Union NDA en route to the Union CDA to which it generally travels the balance of the year.[66] This is hardly abusive and is certainly not gaming, however, the "deemed" path TransCanada would designate for this contract is through Emerson and across Great Lakes through Dawn so that its in-path diversions could only be made along that path, not the Union WDA or Union NDA.[67] What is known is that TransCanada only has a 100,000 GJ/d forward haul contract on Great Lakes[68] along the path it deems for all Empress to CDA deliveries. By contrast, MAS shippers will hold Empress to CDA contracts with a volume of 338,795 GJ/d.[69] The arbitrariness of the "deemed" path designation is obvious. Clearly TransCanada will move almost all of the CDA contracted volumes along the NOL route yet diversions along that route would not be permitted per TransCanada's proposal. Assuming the path TransCanada designates for such diversions, Union would be forced to take incremental capacity from Empress to the WDA and the NDA, causing the $30M incurred costs. Further, these new contracts would be seldom scheduled absent design day conditions and virtually all those costs would need to be mitigated due to the very low levels at which those contracts would be utilized.

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

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[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.

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

5. GAMING

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

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

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[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 Evidence[79] 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.

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[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.