

Enbridge Open Season Terminated by Canada Energy Regulator

by Steven A. Weiler

On September 27, 2019, the Canada Energy Regulator (CER), formerly the National Energy Board (NEB), ordered Enbridge to terminate the open season process that had begun on August 2, 2019. The order terminates a controversial attempt by Enbridge to convert approximately 90% of the existing crude oil transportation capacity on the Enbridge Mainline from common carriage to contract carriage through multi-year Transportation Service Agreements (TSAs).

The Enbridge Mainline system is the largest transporter of crude oil in Canada, with an average annual capacity of 2.85 million barrels per day. The Enbridge Mainline provides transportation for crude oil out of the Western Canadian Sedimentary Basin to destinations in Canada and the United States. The Mainline system is comprised of a series of pipelines extending from Edmonton, Alberta to the US-Canada border near Gretna, Saskatchewan. After crossing the US-Canada border, the affiliated Enbridge Lakehead pipeline provides service to Clearbrook, Minnesota and Superior, Wisconsin. Additional Enbridge pipelines provide transportation service beyond Superior, Wisconsin to markets in the Upper Midwest, Eastern Canada, market hubs at Patoka, Illinois and Cushing, Oklahoma, and the US Gulf Coast. Enbridge controls over 70% of the pipeline and rail crude oil transportation capacity out of Western Canada.

Enbridge's Mainline system operates on a common carriage model, where any interested shipper can nominate volumes for transportation on a monthly basis. In contrast, a contract carriage model provides the lion's share of transportation service to shippers that enter into long-term TSAs, while reserving a smaller portion of the capacity for shippers without long-term contracts.

On August 2, 2019, Enbridge announced the open season as a response to its customers' requests for guaranteed access to the Enbridge Mainline system. Under the current common carriage system, the Enbridge mainline had been oversubscribed for years, with prorationing (or apportionment) levels at approximately 40%. In other words, shippers had sought to transport about 40% more crude oil than Enbridge could transport

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in any given month. As a result, Enbridge reduced individual shipper nominations on an equal basis to match the level of available transportation capacity in that month.

Under Enbridge's proposed open season, shippers would enter into TSAs with Enbridge that would give the shippers priority access to a fixed allocation of capacity for the length of their contract, which could range from eight to 20 years. While the contract carriage model is common for new oil pipelines and expansion capacity on existing oil pipelines, there is limited precedent dealing with Enbridge's proposal to convert existing transportation capacity from common carriage to contract carriage.

On August 23, 2019, Suncor Energy, one of Canada's largest producers of crude oil, filed a complaint asking the Canadian regulator to find that Enbridge could not offer contract capacity on the Mainline system through its current open season process without first obtaining regulatory approval for the rates, terms, and conditions of contract carriage. Suncor argued that the current open season process was an abuse of market power by Enbridge. In essence, the lack of available alternative transportation options to Enbridge forced shippers to choose between participating in the open season at uncertain rates and terms to preserve existing business commitments or risk being shut out of access to transportation out of Western Canada. Letters of support for the Suncor complaint were filed by a number of shippers.

In response to the Suncor complaint, Enbridge argued that the CER should not intervene in the open season, as the CER had previously found that it would not be in the best interest of industry for the Commission to involve itself in the terms and conditions of open seasons. Enbridge maintained that it was common for open seasons to take place prior to seeking approval of the related rates, terms, and conditions by the CER. Furthermore, the results of the open season process would inform the CER's decision on any subsequent tariff application to implement the results of the open season.

The CER agreed with Enbridge that it had traditionally declined to intervene in pipeline open seasons, unless it was necessary to do so. The CER found that the open season process for the Mainline system presented unique circumstances: (1) the level of market power Enbridge possessed in the transportation of crude oil out of the Western Canadian Sedimentary Basin; (2) the lack of available alternatives to Enbridge for shippers; (3) the impact on the amount of uncommitted transportation capacity from Western Canada; (4) the fact that the open season was for existing capacity rather than new pipeline capacity; (5) and the significant level of shipper opposition to the open season process. When considered as a whole, the CER determined that this unique set of circumstances compelled it to grant the relief sought by Suncor and terminate Enbridge's open season process.

The CER ruled that Enbridge was free to make a tariff application in the future to convert some portion of the Enbridge Mainline system to contract carriage. The merits of that proposal could be evaluated along with the proposed rates, terms, and conditions of service.

Although not cited by the CER, its decision is consistent with a decision by the Federal

Energy Regulatory Commission (FERC) involving a pipeline's open season to convert existing pipeline capacity to contract carriage. In Colonial Pipeline Co., FERC rejected Colonial's application for approval of the rates, terms, and conditions of an open season to convert a significant portion of Colonial's existing common carriage pipeline system to contract carriage. FERC found that the proposal to create two classes of shippers, committed and uncommitted, where only one class currently existed, was unduly discriminatory.

The CER's decision puts the ball back in Enbridge's court to decide if it wants to continue to pursue its plan of converting a portion of the Mainline system to contract carriage. If you have questions about the impact of the decision, please contact Fred Jauss or Steven Weiler.