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NEB Receives Final Arguments In Chevron Priority Destination Bid

By Elsie Ross

The current situation in which **Chevron Canada Limited**'s Burnaby refinery finds itself is exactly the situation which the Priority Destination Designation in **Trans Mountain Pipeline ULC**'s tariff was designed to address, says Chevron.

"If the Burnaby refinery does not qualify for PDD, then the provision (which this board found to be appropriate for inclusion in the tariff) is meaningless," Chevron counsel **Chris Sanderson** and **Keith Bergner** said in final arguments following a **National Energy Board** hearing on the company's application for PDD.

If approved by the board, the designation would guarantee Chevron access to 57,000 bbls per day of crude (the nameplate capacity of the Burnaby refinery) out of the currently apportioned 300,000 bbl-per-day Trans Mountain pipeline system from Edmonton to Burnaby, British Columbia. Although PDD has been in the tariff since 1985, this would be the first time it has been used.

For more than two years, Trans Mountain shippers have faced apportionments of up to 70 per cent of nominated volumes on the system as Washington state refineries have turned to cheaper mid-continent crude as an alternative to the more expensive imported crude. As a result, Chevron, which until recently had access to crude delivered only from Trans Mountain, argued it needs an assured supply of crude in order to operate.

"The evidence before the board demands the conclusion that the choice faced by Chevron is to take delivery from the pipeline by one means or another or to close the refinery," said the company. "The physical limitations on the site make it clear that it is simply not plausible that 57,000 bbls per day could be delivered to the refinery by any other means than by pipeline."

Intervening in opposition to the application were **Imperial Oil Limited** along with four refineries in the United States: **BP Canada Energy Group ULC**, **Tesoro Canada Supply and Distribution Ltd.**, **Phillips 66 Canada ULC** and **Shell Trading Canada**. Their refineries in the Puget Sound area of Washington State have a total capacity of 590,900 bbls per day and access Canadian crude via the Trans Mountain and **Trans Mountain (Puget Sound) LLP** pipelines.

In the hearing, the American refineries challenged the need for the PDD and argued that the designation is discriminatory and would reward Chevron for its choice not to invest in alternative delivery sources when faced with apportionment as they have done.

The Trans Mountain tariff defines "Priority Destination" as a refinery, terminal or other facility connected to, or capable of receiving petroleum from, Trans Mountain or its Puget Sound pipeline "and so designated by the National Energy Board by reason that it is not capable of being supplied economically from alternative sources."

The word "economically" in the tariff refers to the manner in which crude oil is delivered, rather than the way in which the refinery is operated, Chevron argued. "The profitability of the refinery is not relevant in assessing whether or not the refinery can be economically supplied from alternative sources."

Chevron said that when it filed its application for PDD in June 2012, some 18 months after apportionment had started, the Burnaby refinery had access to crude only from Trans Mountain Pipeline. Since then, it has invested in rail and truck services but will not be able to obtain more than 14,000 bbls per day from sources other than the pipeline, it said. "The definition of Priority Destination does not contemplate affected locations being required to make major investments," it said.

The only other source of crude would be importing crude by ship, which would require significant additional infrastructure. Imported crude, though, is currently more expensive than domestic crude and there is nothing in the Priority Destination that contemplates requiring a location so designated to arrange alternate forms of delivery prior to being entitled to receive PDD, Chevron argued. "Such an interpretation would fundamentally defeat the intent of the PDD," it said.

The company said it does not submit that transport by truck, ship or rail is impossible but rather that it is "undesirable relative to the pipeline," which is a superior option from an environmental and public acceptability perspective.

Chevron said that between 2003 and 2011 it invested $325 million in the refinery and that has been put at risk by the current inability of Trans Mountain to meet the refinery's needs. "All that Chevron seeks is access to the pipeline on which it relies," it said.

Imperial Oil, which ships refined products from its Edmonton Strathcona refinery to the West Coast for domestic and export markets, argued that the board should dismiss the application in part because Chevron is applying for a PDD because of the high levels of apportionment on Trans Mountain.

"The answer to apportionment is not to give the Burnaby refinery a PDD," said counsel **Don Davies** in final argument. "The answer is to rectify the artificial apportionment."

Imperial attributed the high apportionment levels not only to the growth in Canadian crude production and the mid-continent price discount but to the Burnaby refinery nominating volumes grossly in excess of its refinery requirements and the Washington State refineries nominating volumes grossly in excess of what can actually be delivered to them by the Puget Sound pipeline. (Figures and certain information in hearing participants' argument was blacked out because the NEB hearing included confidential information related to refinery operations.)

According to Imperial, Trans Mountain is allowed to accept nominations from the United States refiners for the purpose of prorating all nominations to land destinations and this distorts the apportionment determination to the detriment of the Canadian land destinations.

"Eliminating the over-nominations by the Burnaby and Washington state refineries during times of apportionment might actually render Chevron's PDD moot," it suggested.

BP argued that the Burnaby refinery has not met the PDD standard in that it and the other Puget Sound refiners have faced similar supply issues of apportionment, counsel **Dennis Langen** said in final argument.

PDD relief also is incompatible with market-based regulation because to grant it is to grant a regulatory preference that results in firm uncommitted capacity to Chevron that other shippers have obtained only by taking on risk and significant financial commitments, said BP.

Once an active secondary market with the option for third party crude and capacity purchases developed, the Burnaby refinery's supply risk disappeared, said Phillips 66 Canada ULC and Shell Trading Canada in a joint final argument. "The refinery can easily meet its requirements on the secondary market provided that it is willing to pay market prices for the capacity or crude in the pipeline," said **Gordon Cameron** and **Katie Slipp**, counsel for the companies.

Tesoro co-counsel **Brian Wallac**e and **Matthew Keen** agreed in their final argument.

"Chevron does not face any supply risk whatsoever, only a price risk," said Tesoro. "There is no evidence in this proceeding to show that Chevron is incapable of purchasing sufficient capacity of crude to meet its refinery needs at market prices."

However, while Chevron may be able to acquire the oil needed to run the refinery at a price, "this begs the question of where the tipping point lies that may persuade Chevron to abandon the refinery operations in Burnaby because the price for oil in the secondary pipeline market is simply too high," said **Steven Shrybman**, counsel for the **Communication, Energy and Paperworkers Union of Canada**, an intervener in support of the application.

The Burnaby refinery plays an important role in providing energy products to B.C. consumers with about 25-30 per cent of the market for gasoline, diesel and aviation fuels, he said. "Should the Burnaby refinery go out of business, the result may be greater supply risks and/or increased prices for B.C. consumers."

Chevron in its public reply argument challenged the suggestion from some interveners that the secondary market is effective in allocating pipeline capacity to those who value it most. The land destination allocation favours shippers who are able to boost their nominations the highest -- not those who value the capacity the most, it maintained.

"Given this initial allocation, the secondary market simply operates to confer unearned profits on a shipper," said Chevron. That shipper then is able to sell that capacity on an unregulated basis to those that are not able to boost their nominations as high or who have no other source of supply able to replace crude volumes equivalent to refinery capacity, it said.

In final argument on behalf of intervener Trans Mountain, counsel **Marie Buchinski** said any PDD should not exceed 55,000 bbls per day, the nominal throughput capacity of the refinery.

Trans Mountain also urged that priority destination volumes be subject to a take or pay obligation and that any crude received at Burnaby under a PDD be used only at the refinery with no right or ability for Chevron to export, market or redirect the volumes.

In addition, the priority destination designation should be subject to review if conditions change, said Trans Mountain.

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