

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, SO 1998, c. 15 (Sched. B), as amended (**the Act**) and the *Municipal Franchises Act* (the **MFA**), RSO 1990, c. M.55, as amended;

AND IN THE MATTER OF an application by the Corporation of the Town of Marathon under section 8 of the MFA for an order or orders granting Certificates of Public Convenience and Necessity to the Corporation for the construction of works in the Town of Marathon, Township of Manitouwadge, Township of Schreiber, Township of Terrace Bay, and Municipality of Wawa;

AND IN THE MATTER OF an application by the Corporation of the Town of Marathon under section 90 of the Act for an order or order granting leave to construct natural gas distribution pipelines and ancillary facilities to serve the Town of Marathon, Township of Manitouwadge, Township of Schreiber, Township of Terrace Bay, and Municipality of Wawa;

AND IN THE MATTER OF an application by the Corporation of the Town of Marathon under section 97 of the Act for an order or orders approving the form of easement agreements;

AND IN THE MATTER OF an application by the Corporation of the Town of Marathon for an order or orders for a gas supply plan to serve the Town of Marathon, Township of Manitouwadge, Township of Schreiber, Township of Terrace Bay, and Municipality of Wawa;

AND IN THE MATTER OF an application by the Corporation of the Town of Marathon for an order or orders pre-approving the cost consequences associated with a long-term upstream liquefied natural gas contract to serve the Town of Marathon, Township of Manitouwadge, Township

of Schreiber, Township of Terrace Bay, and Municipality of Wawa.

NOTICE OF MOTION

March 18, 2020

Red Rock Indian Band (“**RRIB**”) and Bingwi Neyaashi Anishinaabek First Nation (“**BNA**”) will make a motion (the “**Motion**”) to the Ontario Energy Board (the “**Board**”) at its offices at 2300 Yonge Street, Toronto, on a date and a time to be fixed by the Board.

PROPOSED METHOD OF HEARING:

The Motion is proposed to be heard in writing.

THE MOTION IS FOR:

1. An Order:
 - a. reviewing the Decision and Order of the Board dated February 27, 2020 in EB-2018-0329 (the “**Decision**”) in respect of Phase I of the Corporation of the Town of Marathon’s (the “**Applicant’s**”) application (the “**Application**”) intended to bring liquefied natural gas (“**LNG**”) to the Town of Marathon, the Township of Manitouwadge, the Township of Schreiber, the Township of Terrace Bay and the Municipality of Wawa (the “**Municipalities**”) by means of the North Shore LNG Project (the “**Project**”); and
 - b. varying the Decision by dispensing with the requirement that the Applicant “provide a more detailed assessment of the [compressed natural gas (“**CNG**”)] option that takes into consideration use of CNG supply as the primary supply” [emphasis added]

to the Municipalities as part of Phase II of the Application to the Board for approval of the Project (the “**CNG Primary Supply Requirement**”).

2. An Order that this Motion and the issues to be determined herein satisfy the "threshold test" pursuant to Rule 43 of the *Board's Rules of Practice and Procedure*.
3. An Order that RRIB and BNA are eligible for an award of costs on this Motion in accordance with the Board's *Practice Direction on Cost Awards*.
4. Such further and other Orders as counsel may advise and the Board may permit.

THE GROUNDS FOR THE MOTION ARE:

The Application has proceeded on the basis that LNG will be the Project's Primary Fuel Supply

5. On December 4, 2018, the Municipalities submitted a notice of intent to file an application to the Board for approval of the Project. The notice of intent specified that the Project would use LNG as the primary fuel supply.
6. Shortly thereafter, the Board issued a Notice Letter requesting that any other party developing a plan to provide natural gas services present their position to the Municipalities. Enbridge Gas Inc. (“**Enbridge**”) filed a letter with the OEB expressing interest in providing natural gas service to the Municipalities. On January 23, 2019, the Municipalities filed an objection letter with the Board, stating that Enbridge did not confirm it was “currently developing a plan” to provide service to the Municipalities or provide the particulars required in the Board Notice Letter.
7. On February 4, 2019, Enbridge formally withdrew its expression of interest in providing natural gas services to the Municipalities.
8. From April to June 2019, the Municipalities implemented a public consultation and

environmental assessment program allowing interested or potentially affected parties to provide input into the Application. This process involved a dialogue between the Municipalities, Nipigon LNG LP, RRIB, and BNA. The Municipalities identified LNG as the primary gas supply for the Project throughout the consultation and assessment program and engaged in respectful dialogue with RRIB and BNA regarding the use of LNG as the primary gas supply.

9. In August 2019, the Applicant submitted its Application and the Board completed a preliminary review of the Project with LNG proposed as the primary gas supply.

10. On September 12, 2019, the Board issued a Notice of Hearing requesting that interested parties seek intervenor status.

Certarus intervenes

11. Certarus Ltd. ("**Certarus**") – which has executed agreements with an Enbridge subsidiary "concerning investments in two natural gas compression hubs and ancillary facilities in Ontario"¹ – submitted a request for intervenor status in this Application "in order to adduce evidence related to its competitive gas supply service."

12. On September 27, 2019, RRIB submitted a request for intervenor status in response to the request by Certarus. Among other things, RRIB raised concerns that Certarus's CNG facility is located on traditional lands of the RRIB and that Certarus failed to consult RRIB in respect of Certarus' CNG facility.

13. On October 3, 2019, the Applicant submitted a letter to the Board objecting to the granting of intervenor status to Certarus on the grounds that Certarus' request for intervenor

¹ EB-2019-0183 Exhibit I.EPCOR.1, Page 3 of 4, filed November 27, 2019.

status was brought for the improper purpose of delaying the Project. The letter noted that the Project was premised on LNG as the primary supply option and that a primary CNG supply option had been ruled out as non-viable at an early stage of development.

14. On October 7, 2019, the Board issued Procedural Order No. 1, directing Certarus to file a response to the objections by the Applicant. On October 11, 2019, Certarus submitted a response to objections to its request to intervene. In its response, Certarus stated that it did not, by way of intervention, challenge the Applicant's proposed use of LNG as the primary gas supply (a position ultimately supported by Board Staff). Instead, Certarus stated that it wished to ensure it retained the ability to supply CNG to the Municipalities beyond the contracted amounts of LNG services set out in the Application.

15. On October 11, 2019, BNA submitted a letter request to the Board for late intervention. BNA noted in the letter request that it sought intervenor status "because its interests are impacted by this application in a manner similar to the intervenor RRIB."

16. On October 30, 2019, the Board issued Procedural Order No. 2, allowing the intervention requests of Certarus, RRIB, and BNA. The Board approved Certarus' intervention to address "possible alternatives for the proposed gas supply plan and gas supply contract."

17. In submissions to the Board, BNA and RRIB noted that the Municipalities and Nipigon LNG facilitated a dialogue with BNA and RRIB with respect to the scope and nature of the Project. BNA and RRIB both expressed support for the Project insofar as it would bring opportunity to RRIB and BNA and make natural gas available to off-reserve members who are or may in the future reside in the Municipalities.

18. By contrast to the dialogue conducted by the Municipalities and Nipigon LNG, RRIB

stressed in submissions that it was not consulted by Certarus prior to the erection of Certarus' CNG facility, which is located on RRIB's traditional land. RRIB noted that "it would be counterproductive to the goal of reconciliation with First Nations if this Project — which has been advanced through respectful dialogue between Nipigon LNG and RRIB and with the interests of RRIB's population in mind — were derailed by the intervention of a direct competitor (Certarus) who has not engaged with RRIB in a manner that has advanced the goal of reconciliation."

The Board's Decision

19. On February 27, 2020, the Board rendered its Decision in this matter. In its Decision, the Board directed that the "the Applicant [...] provide a more detailed assessment of the CNG option that takes into consideration [the] use of CNG supply as the primary supply to the Municipalities" [emphasis added].

20. RRIB and BNA are concerned that if the Board does not waive the CNG Primary Supply Requirement the Application will be derailed and RRIB and BNA will lose benefits they hoped the Project would confer on RRIB and BNA members, including work beginning on the projects on or before April 20, 2020.

CNG Primary Supply Requirement was the result of an error

21. RRIB and BNA respectfully submit that the Board erred by:

- a. failing to consider that Certarus had not meaningfully engaged, let alone consulted, with RRIB and BNA in respect of the operation of its CNG facility on RRIB traditional territory; and
- b. instead imposing the CNG Primary Supply Requirement on the Municipalities and

RRIB and BNA, in effect reopening the issue of primary supply and delaying or imperilling the Project.

22. RRIB and BNA respectfully submit that the threshold test for the Board to hear this Motion has been met in that:

- (a) the determination of the issues advanced in this Notice of Motion raise questions of errors in fact impacting the correctness of the Decision;
- (b) the impact of the Board's error is such that reconsideration could result in the Board varying the Decision; and
- (c) such other grounds as counsel may advise and the Board may permit.

THE FOLLOWING DOCUMENTARY MATERIAL AND EVIDENCE will be relied upon at the hearing of the Motion:

- 23. Rules 40 through 42 of the Board's *Rules of Practice and Procedure*; and
- 24. The record and Decision in EB-2018-0329.
- 25. Enbridge's Answer to Interrogatory from EPCOR Natural Gas Resources Ltd., EB-2019-0183, Exhibit I.EPCOR.1, filed November 27, 2019.
- 26. RRIB's submissions on this Motion to be delivered in accordance with the Board's procedural order or orders.
- 27. A Motion Record including RRIB and BNA's submissions and Book of Authorities.



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