



Red Rock Indian Band and Bingwi Neyaashi Anishinaabek First Nation

**Notice of Motion to Review and Vary Phase 1 Decision and Order
in EB-2018-0329 dated February 27, 2020**

PROCEDURAL ORDER NO. 1

April 2, 2020

The Corporation of the Town of Marathon (Town of Marathon), Township of Manitouwadge, Township of Schreiber, Township of Terrace Bay and the Municipality of Wawa (the Municipalities) have resolved to form a new natural gas distribution company (Utility) to distribute natural gas in their respective municipalities. On August 2, 2019, the Town of Marathon (Applicant), on its own behalf and as a representative of the Municipalities, applied to the Ontario Energy Board (OEB) for leave to construct (LTC) the necessary natural gas pipelines systems (Project), certificates of public convenience and necessity, approval of municipal franchise agreements, approval of land use agreements, approval of a Gas Supply Plan (GSP), and pre-approval of the cost consequences of a long-term liquefied natural gas (LNG) supply contract (Application). The OEB assigned the Application case number EB-2018-0329.

The Applicant proposed that the OEB's approval be granted through a two-phased approach. As the Utility has not yet been fully organized, Phase 1 of the Application did not include certain information on the Utility's financial capacity and technical ability. The Applicant therefore requested that approvals from Phase 1 of the proceeding be conditional on a requirement that the Utility file information for OEB review and approval regarding the Utility's technical and financial capacity in Phase 2 of the Application, which would occur at a later date.

Certarus Ltd. (Certarus) applied for and was granted intervenor status in the EB-2018-0329 proceeding. Certarus provides fully-integrated compressed natural gas (CNG) solutions to the North American market. Although the Applicant objected to Certarus's intervenor request, the OEB determined that "The OEB would be assisted by the consideration of possible alternatives for the proposed gas supply plan and gas supply contract."¹

Throughout the proceeding, Certarus questioned whether CNG had been rigorously considered as an alternative to LNG as a means of natural gas supply to the

¹ EB-2018-0329, Procedural Order No. 2, issued October 30, 2019, page 3

Municipalities. Certarus asserted that it could provide CNG service that meets the needs of the Project from one or more of its existing CNG facilities and at a lower cost than the LNG option.

The OEB issued its Decision and Order for Phase 1 (Phase 1 Decision) of the proceeding on February 27, 2020. The OEB approved the application for municipal franchise agreements and the forms of land use agreements, but did not approve any of the other requested approvals including LTC, approval of the GSP, and pre-approval of the cost consequences of the long-term LNG supply contract. A decision on the outstanding requested approvals will be made as part of Phase 2.

With respect to the GSP, the Phase 1 Decision expressed concern that, “[t]he proposed Gas Supply Plan has failed to demonstrate that a comprehensive and current assessment of alternatives including CNG was performed.” Furthermore, the OEB required that, “[a]s part of Phase 2, the Applicant must provide a more detailed assessment of the CNG option that takes into consideration use of CNG supply as the primary supply to the Municipalities.” The OEB did not specify what source or sources of CNG needed to be considered in the assessment.

On March 18, 2020, Red Rock Indian Band (RRIB) and Bingwi Neyaashi Anishinaabek First Nation (BNA) filed with the OEB a Notice of Motion to Review and Vary the Decision (Motion), under Rule 40 of the OEB’s Rules of Practice and Procedure. The Motion seeks to have the Phase 1 Decision varied to remove the requirement that the Applicant provide a more detailed assessment of the CNG option that takes into consideration use of CNG supply as the primary supply to the Municipalities as part of Phase 2.

RRIB and BNA filed the Motion on the basis that the OEB erred by:

- a) Failing to consider that Certarus had not meaningfully engaged with RRIB and BNA in respect of the operation of a CNG facility located on RRIB traditional territory
- b) Imposing the requirement for a more detailed assessment of CNG on the Applicant and RRIB and BNA, in effect reopens the issue of primary supply and delays or imperils the Project

RRIB and BNA further asserted that the threshold question for the Motion had 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; and (b) the impact of the OEB’s error is such that reconsideration could result in the OEB varying the Decision.

The threshold question

Rule 43.01 provides that: “In respect of a motion brought under Rule 40.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.” Rule 40.01 states: “Subject to Rule 40.02, any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision.”

The Phase 1 Decision did not include any final (or conditional) orders with respect to the GSP, the LTC or the request for approval of a long term contract. The Motion challenges the OEB’s decision with respect to the GSP; i.e., the direction that the Applicant must provide a more detailed assessment of the CNG option that takes into consideration use of CNG supply as the primary source of supply. RRIB and BNA argue that this amounts to an error of fact that impacts the correctness of the Phase 1 Decision, as (in their view) Certarus did not adequately consult with them respecting the operation of Certarus’ CNG facility.

The OEB has determined that it will receive submissions on the threshold issue prior to determining if a review on the merits is warranted. Without seeking to limit the breadth of submissions, the OEB is interested in the extent to which the errors in fact alleged by RRIB and BNA are in fact errors of fact, and whether, if there are errors of fact as alleged, these errors should result in the OEB varying its Phase 1 Decision.

The OEB deems the parties that were granted intervenor status in the EB-2018-0329 proceeding as intervenors in this Motion. In addition, those parties that were granted cost eligibility status in the EB-2018-0329 case are also eligible for cost awards in this proceeding. The list of approved intervenors is attached as Schedule A to this procedural order.

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. RRIB and BNA, and any parties (or OEB staff) that support the Motion, shall file their submissions with the OEB and serve them on all other parties by **April 17, 2020**.
2. Any parties (or OEB staff) opposing the Motion shall file their submissions with the OEB and serve them on all other parties by **May 1, 2020**.
3. RRIB and BNA shall file any reply submissions with the OEB and serve them on all other parties by **May 15, 2020**.

All materials filed with the OEB must quote the file number, **EB-2020-0107**, be made in a searchable/unrestricted PDF format and sent electronically through the OEB's web portal at <https://pes.ontarioenergyboard.ca/eservice>. Filings must clearly state the sender's name, postal address and telephone number, fax number and email address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at <https://www.oeb.ca/industry>. If the web portal is not available parties may email their documents to the address below.

NOTE: The OEB is temporarily waiving the paper copy filing requirement until further notice. All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

All communications should be directed to the attention of the Registrar at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Ritchie Murray at Ritchie.Murray@oeb.ca and OEB Counsel, Michael Millar at Michael.Millar@oeb.ca.

ADDRESS

Ontario Energy Board
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Fax: 416-440-7656

DATED at Toronto, **April 2, 2020**

ONTARIO ENERGY BOARD

By delegation, before: Christine E. Long

Original Signed By

Christine E. Long
Registrar and Board Secretary

Schedule A

Procedural Order No. 1

Red Rock Indian Band and Bingwi Neyaashi Anishinaabek First Nation

EB-2020-0107

Applicant and List of Intervenors

April 2, 2020

**Red Rock Indian Band and
Bingwi Neyaashi Anishinaabek First Nation (RRIB & BNA)
Motion to Review Decision and Order March 18, 2020 EB-2018-0329
EB-2020-0107**

APPLICANT & LIST OF INTERVENORS

April 02, 2020

APPLICANTS

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Red Rock Indian Band

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April 02, 2020

INTERVENORS

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April 02, 2020

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April 02, 2020

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April 02, 2020

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April 02, 2020

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April 02, 2020

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