

Submissions of Red Rock Indian Band and Bingwi Neyaashi Anishinaabek First Nation on the Rule 43.01 threshold question of whether the matter raised on their Motion to Review and Vary the Phase 1 Decision and Order in EB-2018-0329 dated February 27, 2020 should be reviewed on the merits

April 17, 2020

1. In Procedural Order No. 1 in this proceeding the Board has determined that it will receive submissions on a threshold issue prior to determining if the review on the merits sought by Red Rock Indian Band (“**RRIB**”) and the Bingwi Neyaashi Anishinaabek First Nation (“**BNA**”) is warranted.
2. RRIB and BNA (together, the “**Moving First Nations**”) submit that review on the merits of the Phase 1 Decision and Order in EB-2018-0329 (the “**Underlying Application**”) is warranted and ask that their motion be permitted to proceed to the merits phase.
3. To be clear: the Moving First Nations do not take issue with the OEB requiring the Applicant in the Underlying Application to provide more information about liquefied natural gas (“**LNG**”) supply before further approvals are granted, if that is what the Board thinks is procedurally appropriate. The Moving First Nations *do* object to the Applicant being required, as part of Phase 2, to “provide a more detailed assessment of the [compressed natural gas (“**CNG**”)] option that takes into consideration use of CNG supply as the primary supply to the Municipalities” (the “**Complained of Procedural Requirement**”). The Complained of Procedural Requirement to consider CNG as the primary supply to the Municipalities will result in Phase 2 taking more time because the Applicant in the Underlying Application will be required to go back and redo work to comply with that requirement. The resulting delay, increased burden on the Applicant,

and regulatory uncertainty each have the potential to cause the project (the “**Project**”) to fail.

4. The Moving First Nations are genuinely concerned that Certarus Ltd. (“**Certarus**”) would like to see the Project fail, and is unconcerned about the lost opportunities that this failure would spell for members of the Moving First Nations and other local communities. If Certarus’ intentions are otherwise, they have not shared those intentions through a direct dialogue with the Moving First Nations. Such a direct dialogue would be appropriate, particularly in light of the presence of the CNG facility built by Certarus on RRIB’s traditional territory. The absence of respectful and direct dialogue with the Moving First Nations about these issues has engendered rational suspicion and concern on the part of the Moving First Nations about Certarus’ motives in the Underlying Proceeding and issues affecting the Moving First Nations generally.
5. While the OEB did not specify what source or sources of CNG needed to be considered in complying with the Complained of Procedural Requirement, the Moving First Nations are aware of **only one** prospective supplier of CNG in the region that could supply the Project with CNG: Certarus. In assuming that there were other CNG options that merited study on the basis of no evidence, or that Certarus could be an appropriate option despite its failure to consult with RRIB, the Board made an error of fact.
6. Certarus could have made the proposal some time ago to use CNG for primary supply of the Project to the Municipalities if they thought it was appropriate. After all, Certarus has an established presence in the region, having planned and constructed a CNG facility on RRIB’s traditional lands without consulting RRIB. Certarus declined to make such a

proposal at an appropriate time, or to raise the issue with the Moving First Nations.

Instead, it intervened at a later stage and, in gaining the Complained of Procedural Requirement, protracted the regulatory timeline for approval of the Underlying Application.

7. The Moving First Nations respectfully submit that the Board's error has rewarded Certarus' procedural gamesmanship in the Underlying Application and failure to consult RRIB with unwarranted delay that threatens the Project. The order should be varied to remove the Complained of Procedural Requirement.

THE GROUNDS FOR ALLOWING THE MOTION TO BE HEARD ON THE MERITS ARE:

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

8. On December 4, 2018, the Applicant 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.
9. 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.
10. If Certarus thought that CNG supplied by Certarus should be considered for the primary supply of the Project, that was the time to say so. Certarus provided no such plan.
11. Enbridge 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.

12. On February 4, 2019, Enbridge formally withdrew its expression of interest in providing natural gas services to the Municipalities.

13. 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. Importantly, this process involved a dialogue between the Municipalities, Nipigon LNG LP, and the Moving First Nations. The Municipalities identified LNG as the primary gas supply for the Project throughout the consultation and assessment program and engaged in respectful dialogue with the Moving First Nations regarding the use of LNG as the primary gas supply. While not sufficient in itself for all purposes, that approach of the Municipalities and Nipigon LNG LP in dealing with the Moving First Nations on an issue that affected their populations and traditional territories was appropriate. It was in stark contrast to Certarus’ lack of engagement with, and unilateral action on, RRIB’s traditional territories.

14. 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.

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

Certarus intervenes

16. 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.”

17. 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’ CNG facility is located on traditional lands of the RRIB and that Certarus failed to consult RRIB in respect of Certarus’ CNG facility.
18. On October 3, 2020, 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 status was brought for the improper purpose of delaying the Project. The Moving First Nations submit that this objection was accurate with regard to motive and prescient with regard to outcome.
19. The Applicant’s 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.
20. 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

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

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.

21. 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."
22. 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."
23. In submissions to the Board, the Moving First Nations noted that the Municipalities and Nipigon LNG facilitated a dialogue with the Moving First Nations with respect to the scope and nature of the Project. The Moving First Nations 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.
24. 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 imposes the Complained of Procedural Requirement

25. On February 27, 2020, the Board rendered its Phase 1 Decision and Order in the Underlying Application. In its Decision, the Board imposed the Complained of Procedural Requirement by directing 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].
26. The Moving First Nations are concerned that if the Board does not waive the Complained of Procedural Requirement the Underlying Application will be derailed by some combination of delay, increased burden on the Applicant, and regulatory uncertainty. As a result, the Moving First Nations will lose benefits they hoped the Project would confer on RRIB and BNA members.

The Complained of Procedural Requirement was the result of an error

27. The Moving First Nations respectfully submit that the Board erred by:
- a. failing to consider that Certarus had not meaningfully engaged, let alone consulted, with the Moving First Nations in respect of the operation of its CNG facility on RRIB traditional territory; and
 - b. assuming that there were other CNG options that merited study on the basis of no evidence, or that Certarus could be an appropriate option in light of its failure to consult with RRIB.

The error merits variation

28. The Moving First Nations respectfully submit that imposing the Complained of Procedural Requirement on the Applicant, in effect reopening the issue of primary supply, threatens to delay and imperil the Project. Varying the order to remove the Complained of Procedural Requirement is merited.



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