ONTARIO ENERGY BOARD

IN THE MATTER OF the Notice of Motion to Review and Vary Phase 1 Decision and Order in EB-2018-0329 dated February 27, 2020, by Red Rock Indian Band and Bingwi Neyaashi Anishinaabek First Nation.

Nipigon LNG Corporation ("Nipigon LNG" or "NLNG") in its capacity as the general partner of Nipigon LNG LP

April 17, 2020

INTRODUCTION

1. Nipigon LNG is in receipt of the Decision and Order by the Ontario Energy Board (the "**Board**") in the matter of the North Shore Natural Gas Project (**EB-2018-0329**) Proceeding (the "**Proceeding**"), dated February 27, 2020 (the "**Decision**"), and Procedural Order 1 by the Board in the matter of the Notice to Review and Vary the Phase 1 Decision (**EB-2020-0107**) dated April 2, 2020.

2. On March 18, 2020, the Red Rock Indian Band ("**RRIB**") and Bingwi Neyaashi Anishinaabek First Nation ("**BNA**") submitted a notice of motion requesting the review and variation of the Decision on the basis that the Board erred such that there is a reviewable question as to the correctness of the Decision (the "**Notice of Motion**").

3. Nipigon LNG supports the Notice of Motion and makes the following brief submissions on the threshold question of whether the Notice of Motion raises sufficient grounds for the Board to review on the merits.

4. Nipigon LNG respectfully submits that the Board made errors of fact in the Decision by ordering the Corporation of the Town of Marathon (the "**Applicant**") to reassess compressed natural gas ("**CNG**") as the primary gas supply option for the North Shore Natural Gas Project (the **"Project"**), particularly:

    a) the Decision failed to consider the relevant and material fact that the Certarus Ltd. ("**Certarus**") and Enbridge Inc. ("**Enbridge**") partnership built and now operates its CNG production facility (the "**Certarus-Enbridge CNG Facility**") on the traditional land of RRIB, and neither Certarus nor Enbridge has engaged or consulted with RRIB; and

    b) the Decision relied on assertions not properly before the Board in evidence, and on that basis, effectively compels the Applicant to consider procuring its principal upstream gas supply from the Certarus-Enbridge CNG Facility.

5. The Notice of Motion has raised a serious question as to whether the Board has made errors of fact that ought to be reviewed. Accordingly, the threshold requirement under rule 43.01 of the Ontario Energy Board *Rules of Practice and Procedure* (the "**Board Rules**") has

been satisfied such that the Board should conduct a review on the merits of the Notice of Motion.[1]

THRESHOLD TEST

6. Rule 43.01 of the *Board Rules* sets out the following authority of the Board to determine whether a matter should be reviewed:

> 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.

7. The threshold question asks whether the grounds raised by a prospective review raise a question as to the correctness of the order or decision, which grounds may include:

a) error in fact;

b) change in circumstances;

c) new facts that have arisen; or

d) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.[2]

8. The Board has established that to meet the threshold question, an applicant must address the following considerations:

a) with respect to the question of the correctness of the decision, there must be an identifiable error in the decision;

b) in demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature; and

c) the applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision. [3]

9. Nipigon LNG agrees with the Notice of Motion, and submits that RRIB and BNA have extricated identifiable errors in the Decision that are material, and show a failure of the

[1] Ontario Energy Board *Rules of Practice and Procedure,* (Revised November 16, 2006, July 14, 2008, October 13, 2011, January 9, 2012, January 17, 2013, April 24, 2014 and October 28, 2016). [Board Rules]
[2] Board Rules, at rule 42.01(a)
[3] *Ontario (Energy Board) (Re),* 2007 LNONOEB 51, at paras 55-59.

Board to consider relevant information, as well as give undue weight and consideration to assertions made by Certarus that were not properly before the Board in evidence.

A. The Decision Failed to Consider that the Certarus-Enbridge CNG Facility is Located on RRIB's Traditional Lands in the Absence of Consultation

10. The Decision found that CNG ought to be considered and reviewed as part of the Applicant's revised Gas Supply Plan.[4] As Certarus and Enbridge are the only parties currently capable of providing CNG to the Applicant, it was relevant and material that the Board consider the submissions of RRIB and BNA as they relate to the Certarus-Enbridge CNG Facility. This was not done.

11. In the RRIB's request for intervenor status, RRIB Chief Marcus Hardy alerted the Board to the fact that the Certarus-Enbridge partnership had built the only potential CNG supply facility for the Project on RRIB's traditional lands without engaging the First Nation:

> We understand that Certarus Ltd. (Certarus) will potentially be making submissions in the Proceeding in respect of its CNG Facility. The CNG Facility is located on traditional land of the Red Rock Indian Band, potentially affecting the socio-economic and environmental interests of the Band. At this time, the Band has not been consulted by Certarus, and the Band will be prejudiced if not able to make proper submissions in respect of the Proceeding.[5]

12. In its submissions to the Board, RRIB and BNA explicitly noted that the Certarus-Enbridge CNG Facility in Red Rock is located on the traditional land of RRIB, and RRIB was not consulted by the Crown or by Certarus or Enbridge prior to the erection of the facility on RRIB's traditional land:

> 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.[6]

13. In the Decision, the Board stated:

> The OEB is not aware of any specific Aboriginal or treaty rights that could be adversely affected by the Project. Since the Project is being built within

[4] Decision, at page 21 and Schedule D Item 5.
[5] EB-2018-0329, Red Rock Indian Band Intervenor Request Letter, Filed September 30, 2019.
[6] EB-2018-0329, Submissions of Red Rock Indian Band and Bingwi Neyaashi Anishinaabek, Filed January 6, 2020 at para 8.

> existing road allowances the potential for harm to Indigenous communities and their Aboriginal or treaty rights appears to be limited.[7]

14. The Board's above conclusion is an example of the Board's failure to consider relevant and material information that was before it in respect of Aboriginal or treaty rights adversely affected by the Project. For elements of the Project within the boundaries of the municipalities included in the Proceeding, the Board's finding regarding Indigenous consultation appears reasonable. But for elements of the Project that fall outside municipal boundaries, including the potential to originate CNG from the Certarus-Enbridge CNG Facility in Red Rock, the Board does not consider the potential for harm to Indigenous communities and their Aboriginal or treaty rights.

15. Moreover, the Board's failure to consider the fact that the Certarus-Enbridge partnership has not engaged in respectful dialogue with RRIB and other proximate First Nations appears to break with the spirit and principles behind Bill 34, which delivered a major policy promise by the Government of Ontario to repeal the *Green Energy Act*. In a statement in December 2018, the Honourable Greg Rickford, Minister of Energy, Northern Development and Mines, stated: "By repealing this act, we're restoring planning decisions to municipalities that were stripped by the previous government and *ensuring local voices have the final say on energy projects in their communities*."[8] (Emphasis added.)

16. The record on Phase 1 of the Proceeding dates back to December 4, 2018, when the Applicant submitted a notice of intent to file an application to the Board (although development work goes back five years). Since then, the Applicant has duly followed the Board's rules, guidelines, procedures and processes. It adhered to a consultation and assessment program that allowed interested or potentially affected parties, including all parties in the Proceeding, to provide input into the Application before it was submitted. In all matters in this Proceeding, the Applicant has been responsible and responsive, including consultation with RRIB and BNA, and other First Nation communities.

17. The Board failed to consider the above-noted factors as they relate to the submissions of Certarus regarding the Certarus-Enbridge CNG Facility. Accordingly, the Decision, as it relates to the requirement that the Applicant consider CNG as a primary supply option, has made a material error in fact.

B. The Board Accepted Evidence Not Properly Before it in Support of its Decision to Order CNG be Considered as a Primary Supply

18. This Proceeding is not a policy initiative, consultation, or generic hearing about gas supply optionality or the relative merits of CNG or LNG in facilitating natural gas expansion to unserved communities. Rather, the Proceeding is a specific review of a narrow matter, constrained by the Board's instructions and orders, and further, by time, cost, geography

[7] EB-2018-0328, Decision and Order, dated February 27, 2020 at page 11. [Decision]
[8] https://news.ontario.ca/mndmf/en/2018/12/ontario-scraps-the-green-energy-act.html.

and social history. It is imperative that, in this context, the Board consider only relevant information properly in front of it, according the Board's own rules and procedures.

19. It is a well established principle of administrative law that a decision that directly affects parties may not be made without consideration of the factual circumstances. A tribunal must find the facts and these findings must be based on evidence. The requirement for evidence promotes accurate fact finding and the need for procedural fairness.[9]

20. Throughout the Proceeding, only one party introduced evidence for the Board to consider regarding the feasibility of CNG as a primary fuel supply. That party was the Applicant. Other parties had the opportunity to test the Applicant's evidence in respect of both LNG and CNG as a primary fuel supply and no party concluded the Applicant's CNG evidence was incorrect or improper. In argument, Board Staff and the School Energy Coalition ("**SEC**") submitted that the Applicant had made its case that LNG is the most beneficial and cost-effective option as the primary gas supply.[10]

21. In contrast, Certarus introduced unsubstantiated claims in the form of its written argument for the Board to consider regarding CNG. Certarus did not submit evidence to the Board. No party, through written interrogatories, cross-examination or any other means, had the opportunity to test Certarus's assertions in respect of its ability to deliver CNG to the Applicant.

22. The assertions of Certarus were contained in written argument, and did not comply with the evidentiary requirements of the Board Rules, which state: "written evidence shall include a statement of the qualifications of the person who prepared the evidence or under whose direction or control the evidence was prepared."[11] This was not done by Certarus, and Certarus made no actual evidentiary submissions on the record that the parties, or the Board, might properly rely on.

23. There were no other submissions regarding the availability of CNG to the Project, which the Board panel could have drawn upon in its determination that the Applicant reassess CNG as a primary gas supply.

24. Moreover, the Board appears to have accepted, again without evidence, Certarus's claims about its business affairs, and even incorporated Certarus's promotional content into Procedural Order 1, dated April 2, 2020: "Certarus provides fully-integrated compressed natural gas (CNG) solutions to the North American market."[12]

25. Consequently, the parties in this Proceeding have not had an opportunity to obtain a clear understanding of the commercial, operational and financial relationships with Enbridge Gas and its affiliated companies. This commercial, operational and financial information

[9] Sara Blake, Administrative Law in Canada, 6th ed. at 2.162. [Accessed online at Lexis Advance Quicklaw]
[10] EB-2018-0329, Submissions of OEB Staff, Filed January 6, 2020 at page 22; EB-2018-0329, Submissions of School Energy Coalition, Filed January 6, 2020 at page 6.
[11] Board Rules, at rule 13.02
[12] EB-2020-0107 Procedural Order No. 1, issued on April 2, 2020 at page 1. [Procedural Order No. 1]

was not placed in evidence in the Proceeding because Certarus chose not to disclose the information in its submissions and Certarus was not subject to examination.

26. By proffering claims as evidence, failing to participate in a good faith exchange of information and withholding key details about its commercial, operational and financial affairs, Certarus avoided scrutiny by the Applicant, Board Staff and Intervenors and circumvented the Board's established process. Accordingly, it was improper for the Board to rely on the submissions of Certarus in the manner that it did when concluding that further action was required by the Applicant to assess CNG as a primary fuel supply.

C. Materiality of Errors

27. The Project is at an advanced stage in the Proceeding – it has been more than 16 months since the Applicant first notified the Board of its intent to file an application. The Decision contains significant errors of fact resulting from the failure to consider relevant information before it, while at the same time giving improper weight to assertions not properly within evidence. If the noted errors are corrected, it is submitted that the Board would come to a different conclusion, as the Decision as currently held is not supported by the evidentiary record before the Board.

28. As a result, the Decision will create costly delays for the Applicant, RRIB and BNA by reopening previous steps in the Proceeding. Without evidence and irrespective of the real hardships currently faced by northern Ontario households and businesses, the Board is now requiring the Applicant to deliver information regarding the primary supply of CNG, which was not a relevant concern during the Proceeding.

29. As a result, the Project may be significantly delayed, or may not proceed at all. The assessment requested by the Board is not a desktop or paper-based exercise. While the Board heard that LNG and CNG are interchangeable as fuels, the Decision does not reflect an understanding that they require different delivery systems and represent different risks for the Applicant. For the Applicant to comply with the Decision, the Applicant will be required to:

    a) re-complete work done in respect of environmental assessments;

    b) initiate and complete additional public information sessions for the Project using CNG instead of LNG to identify constraints and mitigate concerns specific to CNG; and

    c) re-complete or perform additional engagement in respect of First Nation communities regarding the use and impacts of CNG as a primary gas supply.

30. The above will take a significant amount of time, and increase the costs associated with the Project, all of which place the viability of the completion of the Project in jeopardy.

31. For these reasons, the threshold question must be answered in the affirmative, and the Board ought to conduct a full review of the issues raised by the Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th DAY OF APRIL 2020.

Borden Ladner Gervais LLP

Per:

Original signed by
Alan L. Ross, Q.C.

Original signed by
Curtis Fawcett