Ontario Energy Board | Commission de l'énergie de l'Ontario

BY EMAIL

May 1, 2020

Ms. Christine E. Long
Board Secretary and Registrar
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4

Dear Ms. Walli:

Re: Red Rock Indian Band and BingwiNeyaashi Anishinaabek First Nation
Motion to Review and Vary Phase 1 Decision and Order in EB-2018-0329
OEB Staff Submission
OEB File No. EB-2020-0107

In accordance with Procedural Order No. 1, please find attached the OEB staff Submission for the above proceeding. This document has been sent to the moving parties and to all other registered parties to this proceeding.

The moving parties are reminded that their Reply Submission is due by May 15, 2020.

Yours truly,

Original Signed By

Ritchie Murray
Project Advisor, Supply & Infrastructure

Encl.

c. All registered parties to this proceeding

Motion to Review and Vary Phase 1 Decision and Order in EB-2018-0329

Red Rock Indian Band and BingwiNeyaashi Anishinaabek First Nation

EB-2020-0107

OEB Staff Submission

May 1, 2020

1 OVERVIEW

Red Rock Indian Band (RRIB) and Bingwi Neyaashi Anishinaabek First Nation (BNA, and collectively the Moving Parties) have filed a motion (Motion) with the OEB seeking a review and variance of a decision (Decision) issued by the OEB on February 27, 2020. The Motion alleges that the OEB made one or more errors of fact in its decision. The OEB has sought submissions from parties and OEB staff regarding whether the Motion passes the "threshold" test.

For the reasons described below, OEB staff submits that the Motion does not pass the threshold test, and should be dismissed. It remains unclear to OEB staff what finding of fact the Moving Parties believe to be in error. Regardless, OEB staff submits that the Moving Parties have failed to identify any error in the Decision at all, factual or otherwise. To the extent there were any errors, they are not material or relevant to the outcome of the Decision. The Moving Parties have not raised any legitimate question as to the correctness of the Decision, and the Motion should be dismissed.

2 BACKGROUND

The Decision related to a number of applications (Applications) filed by the Town of Marathon (Marathon, or the Applicant) for the purpose of bringing natural gas to five Northern municipalities (Municipalities), one of which is Marathon. The Municipalities do not currently have natural gas service and are not located in the immediate vicinity of any natural gas transmission lines. The Applications contemplate that the Municipalities will be served by building natural gas distribution networks (Networks) in each municipality, and liquefied natural gas (LNG) will then be delivered to those Networks by truck. Marathon filed the Applications on behalf of all the Municipalities; however once approved and constructed the natural gas distribution Networks will be owned and operated by a yet to be created utility (Utility). Once the Applications are approved, Marathon or the Utility intend to make an application for the natural gas distribution rates that will be paid by the customers of the Utility.

The Applications sought approval for: 1) leave to construct separate distribution Networks in the each of the Municipalities, 2) the form of land use agreements related to the leave to construct applications, 3) municipal franchise agreements for each of the Municipalities, 4) certificates of public convenience and necessity for each of the Municipalities, 5) approval of a gas supply plan (GSP), and 6) approval of the cost consequences of a long term natural gas supply contract (the Gas Supply Contract)

between the Utility and Nipigon LNG, which is a company that produces LNG (collectively, the Project).

The Decision only granted two of the approvals sought in the Applications: the requests for approval of the forms of land use agreements and the municipal franchise agreements. For various reasons detailed in the Decision all other matters – leave to construct, the certificates, the GSP, and the Gas Supply Contract - were not approved and were deferred to phase 2 of the proceeding (Phase 2).

The Moving Parties were both intervenors in the proceeding, as were Nipigon LNG and Certarus Ltd. (Certarus), a company that provides CNG service and has two gas compression facilities in the general vicinity of the Municipalities.

The Motion relates to direction that the OEB provided in the Decision related to the GSP. One of the reasons that the Decision did not approve the proposed GSP in the Applications was that, in the OEB's view, the Applicants had not looked carefully enough at the option of supplying the Networks by truck-delivered compressed natural gas (CNG) instead of truck-delivered LNG. In declining to approve the GSP, the Decision noted:

> The proposed Gas Supply Plan has failed to demonstrate that a comprehensive and current assessment of alternatives including CNG was performed. The Applicant has not given adequate attention in the gas supply planning to the protection of customers in terms of timely access to natural gas, cost competitive service and the approach to risk mitigation with regard for the customers or the Municipalities.

The OEB went on to direct: "As 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 Moving Parties filed their Notice of Motion to Review and Vary on March 18, 2020. The Moving Parties argue that the OEB erred by:

1. 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
2. instead imposing the requirement on the Municipalities and RRIB and BNA that they investigate the possibility of using CNG as the primary supply for the Utility,

in effect reopening the issue of primary supply and delaying or imperiling the Project.

The Motion states that these failings amount to an error of fact which impacts the correctness of the Decision, and that the impact of the error is such that reconsideration could result in the OEB varying the Decision.

In Procedural Order No. 1, the OEB determined that, prior to hearing the Motion on its merits, the OEB would consider the "threshold" question under Rule 43.01 of the OEB's *Rules of Practice and Procedure* (Rules). The OEB directed that parties supporting the motion (including the Moving Parties) file their submissions on the threshold question by April 17, 2020, and that parties opposing the Motion file their submissions on the threshold question by May 1, 2020. The Moving Parties, Marathon, Nipigon LNG, and Anwaatin Inc. filed submissions on April 17 supporting the motion and arguing that the threshold test has been met. These are the submissions of OEB staff, which argue that the threshold test has not been met and that the Motion should be dismissed.

Motions under Rule 40 and the "threshold" question

The Motion was brought under Rule 40 of the OEB's *Rules of Practice and Procedure* (Rules). Rule 42.01 states:

42.01 Every notice of a motion made under Rule 40.01, in addition to the requirements under Rule 8.02, shall:

(a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:

(i) error in fact

(ii) change in circumstances

(iii) new facts that have arisen

(iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time

Rule 43 allows the OEB to consider a "threshold" question regarding whether a motion should proceed to be heard on its merits: "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."

3 SUBMISSION OF OEB STAFF ON THE THRESHOLD

OEB staff respectfully submits that the Motion does not pass the threshold test, and should be dismissed. The grounds presented by the Motion do not raise a legitimate question as to the correctness of the Decision.

The OEB discussed the purpose and test with respect to the threshold issue in a motion to review that was filed respecting the Natural Gas Electricity Interface proceeding (the NGEIR decision). The OEB observed that the purpose of the threshold test is to determine whether the grounds raise a question as to the correctness of the order or decision. There must be an identifiable error in the decision, and the moving party must show that the findings, conditions or orders are contrary to the evidence that was before the OEB, that the OEB failed to address a material issue, that the OEB made inconsistent findings, or something of a similar nature. The moving party must 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.[1]

Although there are no formal orders in the Decision related to the GSP (or any orders at all other than the orders approving the requested municipal franchise agreements and forms of land use agreements), OEB staff accepts that review requests under Rule 40 are not limited to “orders” and that a “decision” can also be reviewed. The decision that the Moving Parties challenge is the direction to Marathon that it conduct a more detailed assessment of the possibility of using CNG as the primary source of supply for the Utility. The Moving Parties state that Certarus, which would be the most likely provider of CNG for the Utility, has not engaged or consulted with the Moving Parties with respect to one of its CNG facilities, which is located on RRIB traditional territory. The Motion also refers to the possibility that a more comprehensive consideration of a CNG alternative will unnecessarily delay and perhaps even imperil the entire Project. The Motion states: “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.” OEB staff will address the arguments related to consultation and the arguments related to unnecessary delay separately.

As a starting point, however, it is useful to note that Certarus is not an applicant in this proceeding and is not seeking any approvals from the OEB. Further, to date the OEB

[1] EB-2006-0322/0338/0340, Motions to Review the Natural Gas Electricity Interface Review Decision, May 22, 2007

has not issued any approvals at all with respect to the GSP or the related Gas Supply Contract. All of these issues will be revisited by the OEB in Phase 2 of the proceeding.

Engagement and consultation with the Moving Parties by Certarus

The Moving Parties have not identified any errors of fact (or errors of any other kind) in the Decision related to Certarus' consultation and engagement with RRIB.

OEB staff understands that Certarus operates two natural gas compression facilities in Ontario: one in Red Rock, and one in Timmins. There are no other natural gas compression facilities in the general vicinity of the Municipalities. The Moving Parties allege that Certarus failed to engage and consult with them with respect to the Red Rock facility, which is in the traditional territory of RRIB. Although this is not explicitly stated by the Moving Parties, the suggestion appears to be that the lack of consultation or engagement renders Certarus ineligible to provide truck delivered CNG to the Utility. Certarus' compression facilities are not part of the Application, and OEB staff is not aware of any legal challenges against those facilities by RRIB or any other Indigenous group.

As a starting point, it should be observed that it is not entirely clear whether the Moving Parties are alleging that the OEB (or Certarus) has failed to discharge or consider the formal "duty to consult". The duty to consult is a Constitutional requirement which, where triggered, must be considered by the OEB in respect to the exercise of its statutory powers.[2] As explained by the Supreme Court in *Haida Nation v. British Columbia (Minister of Forests)* (Haida), the duty to consult arises where the Crown contemplates action that may have an adverse affect on claimed or proven Aboriginal or treaty rights.[3] In *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* (*Rio Tinto*), the Supreme Court noted that the duty to consult was not triggered by every Crown decision or action. Instead, there must be a real, appreciable, and non-speculative impact on the rightsholders' ability to exercise their Aboriginal or treaty rights.[4] Numerous cases discuss the role of tribunals in considering or fulfilling the duty to consult; most recently the Supreme Court cases *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, and *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.* The OEB has accepted its important role with respect to the duty to consult, and (for example) every natural gas leave to construct decision includes a separate section

[2] Section 96(2) of the OEB Act creates an exception related to leave to construct for electricity transmission projects. However this is not relevant to the Motion.
[3] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, paragraph 35
[4] 2010 SCC 43

which describes potential impacts to Aboriginal or treaty rights from the project, and (where applicable) how those have been mitigated.

Although the Motion uses the terms “consultation” and “engagement”, it does not use the term “duty to consult”. The Motion does not specifically mention Aboriginal or treaty rights at all. No case law is referred to and no details are provided regarding whether or how the formal duty to consult (as defined by Haida and many related cases) is engaged at all by the Decision respecting the GSP. The Motion also does not specifically state that Certarus’ gas compression facility (for which, again, no approvals are sought in this proceeding) engages the duty to consult in any way. As the Motion does not specifically mention the duty to consult, nor suggest that the OEB has failed to discharge its responsibilities with respect to the duty to consult, it is OEB staff’s assumption that the Moving Parties are not arguing that the duty to consult has been breached.

Even if it is the Moving Parties’ position that the OEB has failed to adequately consider the duty to consult with respect to the GSP, they have brought forward no facts, case law, or argument to support that assertion. Neither the Moving Parties nor any other party has identified any Aboriginal or treaty rights that could be impacted by the OEB’s approval of the GSP, or of the direction it provided that the Applicant look more closely at the CNG option.

Nipigon LNG does state in its submissions that the OEB failed to consider the impacts of the Project on Aboriginal or treaty rights. Anwwatin Inc. (Anwaatin) also suggests that the OEB has somehow breached the duty to consult. However neither Nipigon LNG nor Anwaatin filed a motion and cannot raise new grounds for the Moving Parties’ Motion in its submissions. Nipigon LNG and Anwaatin certainly cannot make arguments respecting Aboriginal or treaty rights on behalf of the Moving Parties when the Moving Parties themselves have not directly raised these issues. Nipigon LNG and Anwaatin also provided no details regarding what Aboriginal or treaty rights could be adversely affected by the Decision.

The Moving parties have not explained why an alleged failure to consult and engage on the part of Certarus would render invalid a direction from the OEB that the Applicants look more carefully at a CNG supply option. The Moving Parties have not explained what “error of fact” the OEB has made, and (even had an error been made out) what impact that had on the direction the OEB provided in the Decision.

Potential to delay the project

The second issue identified by the Moving Parties is the potential for the OEB's direction to delay the Project, or even cause the entire Project to fail.

It is worthwhile at this point to discuss the purpose of a GSP and the purpose of the OEB's review of GSPs. The Applicant filed its proposed GSP in accordance with the OEB's *Framework for the Assessment of Distributor Gas Supply Plans* (Framework). The purpose of the Framework is to "ensure that there is transparency, accountability and measurability regarding the distributors' gas supply plans to assure they deliver value to consumers."[5] The Framework specifically requires that applicants consider various supply options, and provide the OEB with details and analysis demonstrating why it selected its proposed option (including consideration of cost).[6] The GSP filed by the Applicant considered three potential supply options: LNG, CNG and a physical pipeline. Although the proposed GSP concluded that LNG was the best option, the OEB is not required to accept this conclusion. Indeed one of the key purposes of the OEB's review of the GSP is to consider whether the proposed option is in fact the best option. The Applicant has asked the OEB for approval of the cost consequences of the GSP (which will ultimately be borne by ratepayers), and the OEB cannot do that without conducting a thorough review of alternatives.

In the Decision the OEB reviewed the proposed GSP and the related proposed Gas Supply Contract. The GSP describes (among other things) Marathon's plan to source all of the natural gas for the Utility with LNG supplied by Nipigon LNG. The Gas Supply Contract is the instrument through which Marathon's plans to secure the supply of LNG from Nipigon LNG. The total 10 year cost of the Gas Supply Contract, if it had been approved as filed, would have been almost $90 million in firm capacity charges alone, and would have formed a significant component of the rates that would ultimately have been borne by ratepayers served by the Utility. In the Decision, the OEB expressed a number of concerns regarding the Gas Supply Contract and declined to approve it because it did not adequately protect the interests of the Utility's ratepayers. The Decision explained what these issues were and allowed Marathon the opportunity to bring back a revised Gas Supply Contract proposal in Phase 2 of the proceeding.

It is in this context that the OEB also observed that, based on the evidence in the proceeding, CNG appears to be another (and potentially cheaper) alternative to LNG for supplying the Utility. The OEB found that the GSP did not provide sufficient rationale for why the CNG option had been disregarded, and directed it to look more carefully at this option in its filings for Phase 2. It would not be appropriate for the OEB to approve a

[5] Framework, page 1
[6] Framework, pages 9-10

GSP where it was not satisfied that the Applicant had sufficiently examined all potential options.

It is possible that the OEB's direction with respect to CNG may cause delay. However, that on its own cannot serve as a rationale to allow the Motion. One of the key purposes of the OEB's review of a GSP is to examine alternatives and to ensure that (amongst other things) the selected alternative ultimately provides value to ratepayers. The OEB found that the Applicant had not given sufficient consideration to CNG as an alternative to LNG, and directed it to look more closely into that option and provide more information as part of Phase 2 of the proceeding. The decision on the GSP (and related Gas Supply Contract), and the direction regarding CNG in particular, were entirely consistent with the Framework and the OEB's objectives of both protecting the interests of consumers with respect to prices, and to facilitate competition in the sale of gas.[7] If this causes a delay to the Phase 2 filing, while unfortunate, it is not a ground for overturning the direction.

In its submissions, Nipigon LNG suggested that the OEB's CNG direction will require the Applicant to re-complete work conducted in the environmental assessment and initiate and conduct new public information sessions. It is not clear to OEB staff why this would be the case. The environmental assessment Nipigon LNG refers to is presumably the Environmental Report that the Applicant prepared in accordance with the Environmental Guidelines. The Environmental Report is required for the leave to construct approvals, not the GSP. OEB staff understands that only minor changes would be required to the leave to construct proposals to accommodate CNG instead of (or in addition to) LNG. The as filed Environmental Report includes some general references to LNG, but it is not an assessment of the environmental impacts of supplying the Project with LNG, nor is it intended to be. Similarly, OEB staff is not aware of any reason that new community information sessions would be required. These are requirements for leave to construct applications, not for a GSP. It is notable that the Applicant did not raise these specific issues in its submissions on the Motion.

4 CONCLUSION

The Moving Parties have not identified any errors in the Decision, factual or otherwise. The Motion does not pass the threshold test and should be dismissed.

[7] *Ontario Energy Board Act, 1998*, s. 2

The thrust of the Moving Parties complaint appears to be that they do not believe that the direction that the Applicant conduct a more detailed assessment of the CNG supply option was appropriate. However, the Moving Parties have not raised any grounds that legitimately challenge the correctness of the Decision. They have not identified any errors in the Decision at all, let alone any errors that, if corrected, could change the outcome of the Decision. The Moving Parties have not shown that the OEB's direction to Marathon was the result of an error of fact, was contrary to the evidence, that it failed to address a material issue, or that it was inconsistent with other findings. OEB staff therefore submits that the Motion does not pass the threshold test and should be dismissed.

OEB staff observes that to date the OEB has made no final determination regarding the GSP. The LTC, the certificate applications, the GSP, and the Gas Supply Contract will all be considered in Phase 2. To the extent that the Moving Parties believe there is a good reason that Certarus is not a suitable supplier, they can presumably make these arguments in Phase 2.

All of which is respectfully submitted.