

New Brunswick Board of Commissioners of Public Utilities

Notices of Intervention  
Pre-Hearing Conference

In the Matter of an application by Enbridge Gas New Brunswick Inc. dated June 25, 2002 to amend its permit to construct 2000-1

Public Utilities Board Offices, Saint John, N.B.  
August 19th 2002, 10:00 a.m.

CHAIRMAN: David C. Nicholson, Q.C.

VICE-CHAIRMAN James E. Bateman

COMMISSIONERS: H. Brian Tingley  
Jacques A. Dumont

BOARD COUNSEL: William O'Connell  
Ellen Desmond

BOARD SECRETARY: Lorraine Légère

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CHAIRMAN: Good morning, ladies and gentlemen. We have a new sound system and I will just caution you right now, you have to speak directly into it, otherwise the shorthand reporter can't hear us, which in some cases is probably not a bad idea.

This is the matter of an application by Enbridge Gas New Brunswick Inc. to amend its permit to construct 2000-1.

And the order of procedure this morning will be I will call for appearances and then we will deal with the matter of intervenor status, and then go on to talk about the actual date and time for the hearing and the procedure between now and then.

So for the applicant?

MR. HOYT: Len Hoyt from McInnes Cooper representing Enbridge Gas New Brunswick. I am joined by Andy Harrigan who is the manager of operations for Enbridge Gas New Brunswick and Greg Black, the manager of engineering and logistics for Enbridge Gas New Brunswick.

CHAIRMAN: Thank you, Mr. Hoyt. Mr. Mockler.

MR. MOCKLER: I appear for the Maritime Natural Gas Construction Association, and I have Mr. Ross and Mr. Martin with me. There are other members of the Association here as well.

CHAIRMAN: Thank you, Mr. Mockler. You don't need to rise to your feet. We try to keep it as informal as we can yet with some decorum.

My recollection is there is a second body of contractors who asked to intervene. Yes, sir, your name? Speak right into the microphone.

MR. HOWES: Hilary Howes, Construction Association of New Brunswick.

CHAIRMAN: Good. Thanks, Mr. Howes. Any other individuals or organizations here intending to intervene?

All right. Mr. Mockler, would you care to address the Board as to why you believe the Board should grant intervenor status to Maritime Natural Gas Pipeline Contractors Association Inc.?

MR. MOCKLER: I will, Mr. Chairman, although I was unclear that that was required this morning. Frankly I was retained on Friday. I had understood that intervenor status had been achieved at that point in time.

That having been said --

CHAIRMAN: Well I will just interrupt. Under most of our jurisdictions, Mr. Mockler, that would be true. However, in reference to the Natural Gas Distribution Act there is a regulation that is passed pursuant to that, that -- and a lot of it is set forth in the actual notice that has been signed by the Board.

For instance, I will read to you paragraph -- part of paragraph 1 setting the pre-hearing conference: When and where the applicant, intervenors and other interested parties should attend to make representations on the following: Let's see --

MR. MOCKLER: I think paragraph 2(c) probably.

CHAIRMAN: That is in the notice itself. Yes, (c), you are

right, the status of the persons -- interest justifies intervenor status of a proceeding. That comes right out of the Regulation.

MR. MOCKLER: Well actually, Mr. Chairman, your Regulation 23-1 talks about the use of that procedure where a hearing order has been issued, but what I got was an order that the Board has ordered the following, a pre-hearing conference, which I did not take to be a hearing ordered.

Having said that, I will proceed with what I believe justifies the intervention.

CHAIRMAN: Go ahead, please.

MR. MOCKLER: This Association is made up of a number of contractors within the Maritimes. The total number has been -- is 15 at the present time, all paid up members.

A number of these members have in fact worked on the pipeline, I'm not sure of just how many.

Thirdly, with respect to the construction there is as I understand it a local content as well as an aboriginal content and there is a question of whether or not those particular rules are being followed.

It's our understanding that the only contractor presently working for Enbridge in the construction field is an organization called Summerville from Ontario, and we are somewhat concerned with that.

In the process of the work that was done by some of the members in the construction, there were some considerable questions about safety matters, safety in terms of the actual construction procedures as well as safety in terms of the pipe itself that was being provided, including questions of quality control. They found a number of pipes that did not meet specifications and there is some issue in relation to why this is happening, where it's happening. This obviously is a safety measure interest because of the nature of the commodity with which we are dealing and the potential hazard this can create.

The range of depths of the pipes is also a matter of some interest to my client.

The following of the requirements for local content is of course a matter of some considerable interest, and where the workers are coming from we understand that there are a number of workers being brought in from Ontario to do work here, which may -- may or may not -- meet the requirements of the agreements that they have.

We also understand that the labour unions in Ontario are in fact putting pressure on Summerville to bring Ontario workers in to New Brunswick.

Now I make these -- I make these comments and these

allegations at this point in time without the benefit of an affidavit, and I am prepared ultimately to file an affidavit if that is required, although I had the impression from reading the Regulations, and doing it quite quickly, that this Board has seen fit to organize itself with rules that give it power to make rules almost on an ad hoc basis, and that's probably a good thing.

Those are our submissions with respect to our --

CHAIRMAN: Those are the matters that your client intends to address --

MR. MOCKLER: Yes.

CHAIRMAN: -- in the hearing process, Mr. Mockler?

MR. MOCKLER: Yes, that's correct.

CHAIRMAN: Okay. I guess just because the press is here I do want to make it perfectly clear that the Board's safety division has dealt with a certain pipe that would not go to meet certain standards or there was pitting involved, et cetera. And so the safety aspect of that has been looked into carefully by the Board. And we would hope that members of your client organization would always let the Board know if they are aware of something and not have the pipes buried too.

Mr. Hoyt, do you have any comments you wish to make?

MR. HOYT: Yes. Mr. Chair, do you want to deal with

Construction Association first and then deal with them together?

CHAIRMAN: I think we -- since the Maritime Natural Gas Association is represented by counsel that we deal with that and we then move on to the other.

MR. HOYT: Sure. I think it's important, Mr. Chair, to remember what EGNB's application is for. They have applied for approval to install a high pressure steel pipe in specific areas of Saint John, and to amend its permit to construct to allow Enbridge to construct high pressure polyethylene pipe and high pressure -- and extra high pressure steel pipe as part of the infield on the seven municipalities currently covered by its permit to construct when necessary.

Enbridge has made it clear in its application that it will continue to construct all pipe in accordance with the applicable regulations, the industry standards and the conditions that the Board imposed on its permit to construct when it was originally granted.

To deal specifically with the comments of Mr. Mockler of the Maritime Natural Gas Pipeline Contractors Association, I would refer to their letter of intervention dated July 26th, which indicates that the association's membership includes the three New Brunswick construction

companies who constructed the first 80 kilometres of distribution pipeline for Enbridge Gas New Brunswick in Fredericton, Oromocto, Moncton, Dieppe, Saint John and St. George under its permit to construct.

And I would also refer to the five individuals who are named as authorized to represent the association as being Mr. Jim Martin -- James Martin, Mr. Francois Hache, Mr. Romauld Robichaud, Mr. George Martin and Mr. David Ross, all of whom I believe to be connected with those three companies.

The three New Brunswick construction companies that I believe are being referred to are Robinson Construction, HEF Construction and Neilson Roso.

All of those companies currently have litigation ongoing with Enbridge Gas New Brunswick and I have copies of the first page of each notice of action if the Board would be interested in having that before them.

CHAIRMAN: At this point, Mr. Hoyt, what I'm looking for is a reason why you don't believe they should gain intervenor status.

MR. HOYT: Correct.

CHAIRMAN: Not going to the truth of what Mr. Mockler is speaking about or anything else like that.

MR. HOYT: No --



CHAIRMAN: I mean, for instance I don't wish to usurp your time or anything, you can have plenty of time, but I was looking at it from the point of view from reading the interventions that perhaps all they were doing was coming before this Board to say -- trying to push the fact that some or all of them had not been paid for some sub-contract work or that nature. My response to Mr. Mockler and anybody else tell us what jurisdictions the Board could possibly have over that. And if so, should you be allowed to have intervenor status. But if you are coming to talk about matters that -- of safety -- and I'm speculating here -- but matters of safety practice or construction practices or whatever, then I think the Board -- and I don't speak for my fellow commissioners -- we certainly want to hear, we don't want to turn a deaf ear to that kind. So that's what I'm honing in on is if there is a reason that -- I mean, the subject of the litigation is compensation as I would appreciate it. And the Board has no jurisdiction over that. That's what the court system is for and they deal with that. But otherwise these other matters in my opinion as I see it, but I will speak to my fellow commissioners, they at least should be heard that's all.

MR. HOYT: But my reaction to the letter of intervention was

the same as yours, Mr. Chairman, in that these are primarily three companies who have ongoing litigation with Enbridge Gas New Brunswick. And my understanding is that that is the basis of this association. I think its important to the Board be aware of that. Now the points that Mr. Mockler raised today, for example, the pipe that you responded to in terms of how the safety division of the Board has reacted, as I understand it, determined that the pipe was in fact adequate for its purposes and has put a process in place to ensure that it doesn't happen in the future.

CHAIRMAN: And that increased testing be effected in that -- in reference to that pipe to always ensure the safety of the company. But we are -- we want to be open to any concerns that do come forth in the safety fashion that's all we are doing. That's my only point there.

MR. HOYT: Right. And our point is that the company participated in a process with the Board and -- to ensure that that doesn't happen in the future. Again with ranges of depths of pipes and so on those are all matters that are covered by regulations and industry standards that the company is subject to. Those are things that the company is obligated to do under existing legislation, the standards and the conditions that were imposed on the

permits. So I think that the matters that Mr. Mockler is raising are items that the company is committing in this application to continue.

It is -- those types of things aren't pipe-type dependent. They apply to the pipe that Enbridge is putting -- currently constructing throughout the province and will continue to apply to the pipe that's being applied for today.

CHAIRMAN: Thank you, Mr. Hoyt. I will hear from Mr. Howes.

Just basically Mr. Howes you have been following this and that is why I let him go forward to begin with and what the position of your construction association is and why you believe you should become an intervenor in front of this Board in reference to this particular application.

MR. HOWES: Mr. Chairman, the situation with respect to my members lies in the lack of payment between those that have contracted work from Enbridge Gas and its sub-contractors. Normally my members who are sub-contractors in this situation have legal recourse through the Mechanics Lien Act and the Crown Construction Contracts Act in the province of New Brunswick. Unfortunately in this case, where these natural gas pipelines run under city streets and provincial streets or provincial highways, the normal legal recourse under those two acts

are no longer available to them. You cannot lien a government property basically, you cannot lien government lands.

Our members would like to request that because those avenues of recourse are not open to them, that Enbridge be required to request of its contractors labour and material payments bonds. That would give my members the protection that they need to do the work.

CHAIRMAN: Mr. Hoyt?

MR. HOYT: With respect to the two items that the

Construction Association raises, and this is assuming is that they have requested an informal intervenor status as I understand it and --

CHAIRMAN: Is that correct, Mr. Howes, it is informal intervenor status not formal? And do you understand the difference between the two?

MR. HOWES: We are learning the difference between the two, Mr. Chairman. This is the first time my association has appeared before this Board. I believe we initially requested informal status.

CHAIRMAN: All right. I will try to give you a brief capsulization. The secretary of the Board can give you the sheet which sets that all out for you. But informal intervenor status just simply means that you can address

the Board and tell us what your concerns are, et cetera, and you will not be cross-examined on that. And it will give your presentation the weight that we consider it deserves.

A formal intervenor status, which is what Mr. Mockler's client is applying for, has a right to cross-examine witnesses, call witnesses itself to get all the documentation concerning the process and be involved totally, so that's the difference between the two.

MR. HOWES: I think in this instance, Mr. Chairman, we could possibly just remain as an informal status. I don't believe -- I believe our case is very clear and is indisputable, so we would not need to examine or cross-examine anybody in this instance.

CHAIRMAN: Mr. Hoyt, any comments?

MR. HOYT: Yes, with respect to the two items raised. First the mechanics' lien, the inability of members to file a claim for lien. Clearly that's a subject for the Mechanics' Lien Act. There have been three decisions of the Court of Queen's Bench judges over the last year or so where such claims for lien were filed, all of which vacated the liens. And I think clearly that that item is a matter for legislative change.

With respect to the bonds, the position that Enbridge

should be required to provide contractors, Enbridge's standard form of contract currently provides them with the ability to require that in certain circumstances when the commercial viability of the contractors in question and whatnot. And in fact with respect to the three primary contractors from the initial construction season a bond was in fact required from HEF. Where it is unnecessary -- or the company feels that it is unnecessary to require a bond it simply adds cost to the contractor which ultimately will end up passed on to the customers.

With respect to those bonds it seems to be -- the association seems to be asking the Board to get into the contracting practices of Enbridge, which to date it hasn't done. Neither the Act nor the regulations makes it a requirement that EGNB file other contracts as part of an application for either a permit to construct or in this case an amendment to a permit to construct. So again, Enbridge is of the position that it as well is not an issue proper for this particular application.

CHAIRMAN: Mr. Hoyt, at the time that the legislation was drafted why there was contemplation of a standard construction by-law as I understand, to be passed by a provincial regulation. And that then would be -- every municipal -- the government would be burdened or whatever

with that standard construction by-law. And the Board and staff were not privy to the negotiations there, but certainly from my perspective that would be the protection of subs, et cetera, et cetera would be -- since this -- the property is not lienable, that would have been an appropriate place to deal with that particular matter. That certainly would be my approach to it.

MR. HOYT: And just so that the parties here are clear, it is my understanding though is that the standard construction regulation was in effect to be a standard municipal agreement which would be the agreement that the company would be required to enter with municipalities over which they were going to work. It wouldn't be the standard contract that Enbridge would be required to enter with its subs, but as to its -- or with its contractors -- but as to your point about it perhaps being an appropriate place for municipalities to deal with this lien issue, that is something that the province could have required, and at least to date it has not.

CHAIRMAN: The Board will take a brief recess.

(Recess)

CHAIRMAN: The Board has taken a brief recess to consider Intervenor status and, Mr. Mockler, we will grant your client, Maritime Natural Gas Association -- Contractors

Association, I guess, a formal intervenor status in this proceeding.

And since, Mr. Howes, you are just asking for informal status we will grant that to you as well.

Now in complete honesty the Board when approaching this particular application on the narrow confines of the application itself, we didn't believe there would be any interventions from the point of view that it was not really in and of itself a very contentious thing. And we had on that basis sort of planned that we would proceed immediately with the formal hearing today and get that over with.

Now I will turn to you, Mr. Mockler, who have had very little time to prepare and say is that acceptable to you and/or your client?

MR. MOCKLER: Well it really isn't, Mr. Chairman, because I have reviewed the application and there are things in the application which come to my mind that need to be looked at in greater detail, some of the calculations that might have given rise to some of the statements that are in here.

Secondly, I want to have the chance to get some evidence together. We have some significant evidence. And thirdly, it's just not adequate time to --



CHAIRMAN: No, I appreciate that.

MR. MOCKLER: -- present our case.

CHAIRMAN: In our process, that of course Mr. Hoyt is very familiar with, is we tend to use a procedure of written questions and answers, Mr. Mockler, on interrogatories is what we call them, and I'm sure you are familiar with those. And we find it is very useful because it cuts down the time spent in the hearing room and that certainly is a cost saver for the client.

I don't know if in this particular hearing if that's necessary that we go the formal way which would include EGNB having their witness' testimony in writing in advance, et cetera. I kind of think on this one that the issues aren't that broad and not that complex. We don't need to go that formal way.

But what I'm going to suggest right now -- and I will turn to you, Mr. Hoyt, and you, Mr. Mockler, and find out what you think, and maybe even Board counsel sitting back there anonymously, Mr. O'Connell, what you think about it -- but probably give you a recess now of 10 or 15 minutes for the solicitors to talk about the best way to proceed and what the best timing is on it, and then come back and hear what you have to say.

Any comments on that, Mr. Hoyt?

MR. HOYT: No. From Enbridge's point of view we would just like a tight time table. And in terms of the specific application that was made with respect to Saint John, the company actually has an agreement with CanSugar to put natural gas facilities in place. It's a construction period of four to five weeks and it's quite important that it be done in this construction season.

Just recently another customer -- a potential customer in Dieppe, an asphalt plant, it has been determined its load requirements exceed the capacity of intermediate pressure polyethylene, a good example of why the second part of the application is there.

Again we need to get Enbridge facilities in place by the end of this construction season.

So again a long process I don't think would add anything. As you indicated, this isn't that complicated an application, so whatever process is adopted -- and we would prefer a written process, where the company would be pleased to respond to written interrogatories on a very timely basis, and then let the Board make its decision based on additional submissions from Mr. Mockler. Time is of the essence.

CHAIRMAN: Right. How about we take a brief recess and you gentlemen talk about it and see what the most expeditious

way we would go.

The other thing is are certain parts for instance in Mr. Mocker's mind severable from the point of view that deal with just the specific application involved here of the extra high pressure and high pressure, that we could deal with that. Give the permits to the company to go ahead, but deal with the broader more general issues in a hearing at a later date.

MR. MOCKLER: Yes, I see what you are saying.

CHAIRMAN: That kind of thing?

MR. MOCKLER: Yes.

CHAIRMAN: Okay. Let us know when you are done.

(Recess)

CHAIRMAN: Mr. Hoyt, Mr. Mockler, I understand that your attempt was not successful?

MR. MOCKLER: No, we have a bit of an impasse.

CHAIRMAN: There is either an impasse or there isn't. Well that was reported to us by Board counsel, Mr. O'Connell, and as a result of that the Board discussed what it is that -- how we would proceed. And we will proceed by way of a paper hearing from this point forward. All of what I'm going to read to you will be provided by the Board secretary in electronic communication form, i.e., e-mail, if that is acceptable to you, Mr. Mockler --

MR. MOCKLER: Yes.

CHAIRMAN: -- by close of business today or first thing tomorrow morning on the schedule? And that is that the questions by the intervenor to EGNB will be sent by noon hour, that is 12:00 o'clock noon, on Thursday, August 22nd. The answers by EGNB will be delivered by noon, 12:00 o'clock, on Monday, August 26th. The evidence of the contractors would be on Tuesday, September 3rd at noon. Questions to the contractors will be Friday, September 6th at noon. Answers by the contractors would be Wednesday, September 11th at noon. And the final comments by both parties would be Monday, September 16th, at noon.

The Board will hopefully be able to arrive at and deliver a decision during the week of September 23rd.

Now I will ask after we rise from here now that, Mr. Mockler, you provide the Board secretary, Mrs. Legere, with your e-mail address, et cetera, and any of the members of your client association who wish to be copied with these matters, because we all know it's so easy to do that. But if you would do that and she will add that to the set of co-ordinates. And Mr. Hoyt, you can as well provide her with the names of who you would like to see in addition to yourself receiving on behalf of the applicant.

MR. HOYT: Yes, I will.

CHAIRMAN: Okay.

MR. MOCKLER: Mr. Chairman, does this mean that we will not have the opportunity for oral cross-examination?

CHAIRMAN: That's right. That's right. It's all in written presentation, which is a method of having a hearing which is more expeditions, et cetera. You know, it may well turn out that the Board could say look, we want to have counsel in front of us to deal with some things that are a little unclear in reference to these matters, but on the whole this procedure will be in writing and that will be it.

Okay. Now to Mr. Howes on behalf of the Construction Association, your presentation can be by way of a letter detailing your concerns, et cetera, et cetera.

MR. HOWES: I have already placed that on Mrs. Legere's desk.

CHAIRMAN: All right. Well we will -- again we will consider that at the time.

MR. HOYT: Mr. Chairman --

CHAIRMAN: Yes, Mr. Hoyt.

MR. HOYT: -- is that a letter different than the letter of intervention and, if not -- if so, we didn't get a copy of it.

CHAIRMAN: No, that's right. And this was the next thing I was about to remark on is that it's the responsibility of each party to copy the Board and all of the other parties that are on the co-ordinates list that the Board secretary will be sending out.

So that letter, Mr. Howes, is that in the -- do you have that in electronic form, i.e., something that could be sent by e-mail to the parties?

MR. HOWES: I can provide hard copy copies to these gentlemen this morning, sir.

CHAIRMAN: Well then that's good. That's exactly how we will handle that.

Okay. Nothing else the Board wants to say. We will -- I just want to make absolutely certain that when you come to the evidence, Mr. Mockler, it's not in point form, it's in the form of a narrative as to what it is that your clients want to say. And if you have some difficulty -- in other words, this process is a bit different than Brookville Transport et cetera, et cetera.

MR. MOCKLER: Yes.

CHAIRMAN: So if you would like to speak with Board counsel after he can show you some precedents on that.

MR. MOCKLER: Yes.

CHAIRMAN: Okay. Good. Thank you very much.

(Adjourned)

Certified to be a true transcript of the proceedings of this examination as recorded by me, to the best of my ability.

Reporter