

Calgary

November 20, 2014

Toronto

Shawn H. T. Denstedt, Q.C.
Direct Dial: 403.260.7088
SDenstedt@osler.com
Our Matter Number: 1142006

Montréal

Sent By Electronic Mail

Ottawa

National Energy Board
Centre 10
517 10th Avenue SW
Calgary, AB T2R 0A8

New York

Attention: Ms. Sheri Young, Secretary of the Board

Dear Madam:

**Re.: NOVA Gas Transmission Ltd. (“NGTL”)
North Montney Project (the “Project”)
Hearing Order GH-001-2014
Board File OF-Fac-Gas-N081-2013-10 02
Response to Sauteau First Nations (SFN) Notice of Motion regarding Final
and Reply Argument**

This letter is in response to the Notice of Motion (“Motion”) regarding final and reply argument filed by counsel to Sauteau First Nations (“SFN”) on November 14, 2014.¹ The SFN Motion seeks an amendment to the deadlines, by way of a time extension, for the filing of final and reply argument as set out in Procedural Update No. 5.²

NGTL submits that the deadlines set out in Procedural Update No. 5 are consistent with the historical and well known practice of the National Energy Board (the “NEB” or “Board”). In its Motion, SFN states that “if required to file final argument within six days of the close of record for the hearings SFN anticipates that it will not be possible for SFN to address the full scope of the evidence.”³

NGTL submits that SFN has failed to draw the fundamental distinction between argument and evidence. Evidence is defined in the GH-001-2014 Hearing Order as:

Testimony and documents (including statements, responses, reports, photographs, and other material or information) that applicants and

¹ C31-39 Sauteau First Nations - SFN Notice of Motion 7 (A64318) [*Motion*].

² A050 National Energy Board - Procedural Update No. 5 - NGTL North Montney GH-001-2014 (A64222).

³ *Motion*, at 2.

intervenors submit as part of the record. Evidence is used to prove or disprove an alleged fact to support a position on the application.⁴

Final argument is defined in the Hearing Order as:

The position of NGTL and Intervenors on the recommendations and decisions the Board should or should not make and the reasons why the evidence supports those recommendations and decisions. This may be done orally at the hearing or in writing, as directed by the Board.⁵

During an oral hearing before the Board all evidence is pre-filed prior to commencement of the oral hearings. The purpose of the oral hearings is to present all parties with an opportunity to provide the Board with the party's position on the evidence as filed. Cross-examination is a tool used to test the *existing* filed evidence. The majority of NGTL's evidence was filed months ago and the last substantial filing of evidence, NGTL's Reply Evidence, was filed on September 11, 2014. NGTL submits that SFN has had ample time to review the evidence filed by NGTL on the record and prepare final argument based on that evidence.

SFN states that less time is provided for final argument than the 10-day period in the *National Energy Board Rules of Practice and Procedure*⁶ ("Rules") for responding to a notice of motion. However, section 35 motions under the Rules are often accompanied by affidavits which provide new evidence that must be responded to, with both evidence and argument. Moreover, the Board has the authority to extend or abridge timelines fixed by its Rules. The Board has exercised its authority to abridge timelines in SFN's present Motion, in which NGTL is permitted less than 10 days to reply.

SFN relies on Enbridge Pipelines Inc. – Line 9B Reversal and Line 9 Capacity Expansion Project ("Line 9")⁷ and the Trans Mountain Pipeline ULC – Trans Mountain Expansion Project ("TMEP")⁸ proceedings to support their position that the "limited amount of time available to prepare and file final argument" is inconsistent with past Board practice.⁹ NGTL submits that due to the unique circumstances of these hearings, they are distinguishable on their facts.

⁴ A003 National Energy Board - Letter to NOVA Gas Transmission Ltd. - Hearing Order GH-001-2014 (A57134) ["Hearing Order"], 25.

⁵ Hearing Order, 25.

⁶ SOR/95-208.

⁷ Application for the Line 9B Reversal and Line 9 Capacity Expansion Project (OH-002-2013).

⁸ Application for Trans Mountain Expansion Project (OH-001-2014).

⁹ *Motion*, at 2.

With regard to the Line 9 proceeding, SFN states that the deadline for written final argument was fourteen days following the end of the evidentiary portion. First and foremost, it is important to note that the Line 9 proceeding included 60 intervenors and 111 commenters.¹⁰ In this proceeding there are only 38 intervenors and 12 commenters.¹¹ Second, the evidentiary portion of the Line 9 hearing ended on September 30, 2013.¹² The Board issued Procedural Direction No. 4 in which it started that written final argument was to be provided no later than October 3, 2013.¹³ Therefore, written final argument was due three days after the evidentiary portion of the hearing was closed. Written final argument was not fourteen days after evidentiary portion of the hearing was closed as stated in the SFN Motion.

SFN also points to the TMEP proceeding to support their argument that more time should be provided for final written argument. SFN fails to point out that there are over 400 intervenors and approximately 1279 commenters participating in the TMEP proceeding.¹⁴ During the first round of intervenor information requests Trans Mountain received over ten thousand questions.¹⁵ NGTL submits that the TMEP proceeding is unique in the Board's history and its process cannot be reasonably compared to the North Montney Project proceeding.

NGTL submits that in past proceedings the Board has utilized similar deadlines to the ones enumerated in Procedural Direction No. 5. In GH-2-2010, the Applicant NGTL was provided three days in order to review the Board's draft conditions and provide final argument and comments on the draft conditions.¹⁶ In GH-001-2012, the Applicant NGTL was informed on October 22, 2012 that it would be presenting oral final argument two days later on October 24, 2012.¹⁷ In GH-004-2011, the Applicant NGTL was provided

¹⁰ OH-002-2013 Reasons for Decision at 12.

¹¹ A027 National Energy Board - Revised List of Parties GH-001-2014 (A62448)

¹² OH-002-2013 - Enbridge Pipelines Inc. (Enbridge) Application for the Line 9B Reversal and Line 9 Capacity Expansion Project (Project) pursuant to section 58 and Part IV of the National Energy Board Act (NEB Act) Procedural Update No. 4 – Procedural Directives for Oral Final Argument at 6.

¹³ OH-002-2013 - Enbridge Pipelines Inc. (Enbridge) Application for the Line 9B Reversal and Line 9 Capacity Expansion Project pursuant to section 58 and Part IV of the National Energy Board Act) Procedural Update No. 4 – Procedural Directives for Oral Final Argument [*Procedural Update No. 4*].

¹⁴ A014 - National Energy Board - Application for Trans Mountain Expansion Project - Ruling on Participation (A59504); A098 - National Energy Board - Ruling No. 41 - Ruling on Participation - Trans Mountain's new preferred corridor through Burnaby Mountain (A63853).

¹⁵ B038 - Trans Mountain Pipeline ULC - 2014-05-28 - Trans Mountain - Notice of Motion (A60646)

¹⁶ 10-10-13 NEB - Letter to All Parties to GH-2-2010 and East Prairie Métis Settlement regarding Procedural Matters and Revised Schedule (A26756).

¹⁷ 12-10-22 International Reporting Inc. - GH-001-2012 Hearing Oct. 22, 2012 - Vol. 8 (A48635) at Adobe 15, line 8169.

with less than 24 hours, noon the next day, to submit written final argument.¹⁸ In GH-2-2011, the Board heard oral final argument, starting with NGTL, fifteen minutes after the examination of the final panel was concluded.¹⁹ In RH-001-2012, a proceeding in which there were 18 intervenors,²⁰ the Board commenced final argument one day after the evidentiary record was closed.²¹

Typical NEB practice is to have intervenors provide final argument immediately after the final argument of the applicant. For example, in the GH-001-2012 proceeding, intervenor final argument commenced immediately after the Applicant NGTL's final argument, which was in turn followed by NGTL's reply that same day.²² Conversely, in Procedural Update No. 5 for this hearing, the Board required written final argument to be submitted by NGTL two business days after the record is closed. Supporting intervenors must file written final argument four business days after the record is closed. SFN, and the other adverse in interest intervenors, may file final argument six business days after the record is closed. The result is that SFN benefits from an extended period of time, which it would otherwise not have, to finalize its final argument.

SFN asserts in the Motion that it requires additional time to assess the evidence from the Calgary oral portion of the hearing. The Calgary portion of the hearing concluded on October 27, 2014. At that time, the Board concluded the evidentiary portion of the hearing for issues 1 to 5 of the List of Issues, subject to the provision of an undertaking and certain information request responses.²³ NGTL submits that SFN has already had over three weeks to assess the evidentiary record for the Calgary portion of the hearing for issues 1 to 5 on the List of Issues and to prepare draft argument for this phase. The Fort St. John portion of the hearing commenced on November 18, 2014. Six days after the complete evidentiary record is closed is sufficient for SFN to complete its argument.

Finally, the deadlines are in keeping with the spirit of the *National Energy Board Act* which was amended in 2012 to state that "all applications and proceedings before the

¹⁸ 12-05-08 International Reporting Inc. - GH-004-2011 Hearing Transcript Vol. 1 - May 8, 2012 (A41346) at Adobe 155, lines 1526-1528.

¹⁹ 11-11-30 International Reporting Inc. - GH-2-2011 Hearing Transcript Vol. 2 (A37282) at Adobe 70-71, lines 2033-2037.

²⁰ A05 - NEB - Letter regarding Trans Mountain Part IV Application - Amended Timetable and List of Parties - RH-001-2012 (A48729).

²¹ 13-02-19 International Reporting Inc. - RH-001-2012 Hearing Feb. 19, 2013 - Vol. 5 (A50527) at Adobe 96, line 7096; 13-02-20 International Reporting Inc. - RH-001-2012 Hearing Feb. 20, 2013 - Vol. 6 (A50550) at Adobe 8, line 7104.

²² 12-10-24 International Reporting Inc. - GH-001-2012 Hearing Oct. 24, 2012 - Vol. 10 (A48689).

²³ 14-10-27 International Reporting Inc. - GH-001-2014 Hearing Transcript Vol. 10 (A63866) at Adobe 81, line 13692.

Board are to be dealt with as expeditiously as the circumstances and considerations of fairness permit, but, in any case, within the time limit provided for under this Act, if there is one.”²⁴

NGTL submits that the deadlines are necessary due to the urgency of the matter at hand. Progress Energy Canada Ltd. must consider the findings of the Board in order to determine whether the Project will proceed or not. In its opening statement to the Board, Progress emphasized the urgency of concluding this regulatory process due to the competitive international LNG market:

Progress Energy urges that the Board expeditiously recommend approval of the NGTL application and confirm that the proposed continued use of roll-in of project costs is appropriate. In a very competitive international LNG marketplace, Progress Energy and its Asian partners are close to being able to successfully bring a major project to fruition. We ask that the Board not allow its process to be used as a means to add needless cost and risk to a project that will bring economic benefit to British Columbia and Canada.²⁵

The Board’s deadlines are critical to ensuring that this proceeding is dealt with in an expeditious manner. For these reasons NGTL respectfully requests that the Board deny the Motion.

Yours truly,



Shawn H. T. Denstedt, Q.C.

AD

cc: GH-001-2014 Interested Parties

²⁴ R.S.C., 1985, c. N-7 s 11(4).

²⁵ C29-11 Progress Energy Canada Ltd. - Opening Statement, Errata and Supplemental Responses to IR (A63582).