

NEW BRUNSWICK BOARD OF COMMISSIONERS OF PUBLIC UTILITIES

IN THE MATTER OF An Application dated August 11, 2003 by Enbridge Gas New Brunswick Inc. in
respect to consideration of a Rate Reinstatement Mechanism

Held at Board Premises, Saint John, N.B.

September 26th 2003, 10:00 a.m.

BEFORE: CHAIRMAN: David C. Nicholson, Q.C.

COMMISSIONER: J. Cowan-McGuigan

COMMISSIONER: Jacques A. Dumont

COMMISSIONER: Ken F. Sollows

..... CHAIRMAN: Good morning, ladies and gentlemen. This is a
prehearing conference in reference to Enbridge Gas New Brunswick Inc.'s application requesting
consideration of a rate reinstatement mechanism.

Could I have the appearances please for the applicant?

MR. STEWART: Len Hoyt of McInnes Cooper acting for Enbridge Gas New Brunswick. And I'm
joined by Tim Walker who is the Manager of Corporate Affairs for Enbridge Gas New Brunswick.

CHAIRMAN: And for Irving Energy Services Limited?

MR. STEWART: Christopher Stewart, Mr. Chairman.

CHAIRMAN: Now we had correspondence from both the Province as represented by the Department of Energy and from Competitive Energy Services asking that they be joined as intervenors.

But in the case of the Department, we got quite a kick out of it. Because of scheduling and vacations the entire Department is not available. But that is not the case with Competitive Energy Services.

However, having said that, the Board has considered in advance and we certainly will accept all three intervenors as requested.

Really the only thing we have to discuss I think this morning, unless the parties have something they want to talk about, is whether this would be an oral, a written or a combination hearing and then the actual dates.

Mr. Hoyt, do you see anything else?

MR. HOYT: Just two things. I just want to confirm that there weren't any letters of comment received yesterday. I believe that was the deadline. So it is still the same. It is the three intervenors is all that has been received.

CHAIRMAN: Mme. Secretary, that is all we got, is it not? Yes. There is nothing further.

MR. HOYT: And the only other thing, I noticed on the proposed schedule, it indicated, in terms of evidence to

intervenors, and had today's date, there wasn't anything in the actual order of the notice about Enbridge providing, and I assume the intervenors have that evidence. But if not we would be happy to provide it.

MR. STEWART: They do not.

MR. HOYT: All right. Then we will make a point of sending it out to the three of them or at least confirming that they have in fact received it.

CHAIRMAN: And that is all the evidence, that which came with the application that the applicant is going to file?

MR. HOYT: Yes, it is.

MR. STEWART: Sorry. Is your evidence just the sort of letter that you had on your website?

MR. HOYT: It is a letter and information in support of it.

MR. STEWART: I may actually have that. We will talk afterwards. I think if it is what was posted on your website I may already have it.

CHAIRMAN: Okay. Mr. Hoyt, what about the applicant's preferences as to the nature of the hearing?

MR. HOYT: In terms of the procedure, Enbridge would prefer a fully written procedure and note that both the Province and Competitive Energy also indicated that that would be their preference.

However, we note in the tentative schedule that has

been circulated by the Board as proposing an open discussion on October 16th. And that is something that seemed to worked well as part of the generic hearing. And the applicant would be prepared to go along with that.

I understand from Irving Energy's intervention that they prefer an oral one, but would like to just reserve any comments to see if that is still their position or not.

CHAIRMAN: Mr. Stewart?

MR. STEWART: Mr. Chairman, it is still our position -- first off I guess I was expecting to receive evidence today.

So I was prepared to come here and say well, I don't know what it is that I want to do until I see the evidence and/or until I make some determination in terms of what information requests are going to be made and/or what the responses to those are.

So having said that, if the evidence is the letter that I read -- and I confess that I haven't read it that carefully because I didn't know that that was going to constitute the evidence -- but our position would be pretty much as the Board has set out in your sort of tentative schedule.

The only concern that we would have is that unlike the

generic hearing, this is a matter where we have an application for a specific remedy. And we have evidence filed in support of that application.

We will review it. We will ask what information requests we want, if any. And we will look at those. I think it is appropriate to have a time schedule for something after that.

It may be that -- I mean, tentatively as I'm sitting here now, if that is the evidence, it is pretty sparse. And there were some very specific issues discussed when the rate mechanism was put in place in the first instance. And so there may be some questions or comments that need to flow from that.

That being the case, what I would like to do if possible would be to (a) have an oral hearing and keep it as the schedule is fine with us.

Second, in terms of the form or the procedure to be followed at that formal hearing, I would like to reserve the right, and I'm prepared to advise the Board in advance, to -- if in fact the evidence is Mr. Walker's, that he be made available for cross examination if need be.

And that is the concern that I have. If there is evidence going to be filed, the evidence should or could

be subject to cross examination. I don't know that yet.

And so I would like to set up a procedure which would at least envision the person giving that evidence be made available to be cross examined by us or any other interested party.

But I am prepared to advise the Board at some time in advance, perhaps after we have had an opportunity to review the responses to the interrogatories, whether or not we will in fact be seeking cross examination of a representative of Enbridge.

CHAIRMAN: So you are suggesting, as I hear it, that in fact if you believe cross is necessary, that it would occur on that date we have reserved for the discussion time. Is that what you are saying?

MR. STEWART: Correct. And then if we don't have a cross examination then we could have a discussion, or maybe both.

CHAIRMAN: Any comment on that, Mr. Hoyt?

MR. HOYT: Yes. I disagree with it. I think that the procedure as suggested by the Board is very reasonable. I think the proposed schedule clearly enables intervenors to ask questions, ask as many as they want. And then further submissions can be made on the open discussion.

There really aren't a million questions to be asked on

this. Mr. Stewart described the evidence as sparse, and then in the intervention compares it to the full rate hearing.

This is quite different. This isn't to deal or to open up the issues that were canvassed at the full rate hearing. It is to deal with one aspect, and one that is important, but only one aspect.

In the past there haven't been issues about Enbridge not being responsive to questions. And again I would encourage the intervenors to ask whatever questions come to mind.

It just seems that to turn it into something more, to turn it into a more courtroom-like proceeding, is not necessary in this case.

CHAIRMAN: Mr. Stewart, would it be helpful if the Board took a brief recess of 15 or 20 minutes for you to have the opportunity to look at what Mr. Hoyt has sent to the Board by way of evidence to ensure that you understand what has been filed?

MR. STEWART: It may, Mr. Chairman.

CHAIRMAN: All right. Why don't we do that then. We will take a 15-minute break.

(Recess - 10:15 a.m. - 10:30 a.m.)

CHAIRMAN: Mr. Stewart, you have had an opportunity to

review the evidence?

MR. STEWART: I have, Mr. Chairman. As I understand it, it's the sort of the two and a quarter pages that were filed at the time that the order was submitted to the Board and I got it off Enbridge's website.

I guess the proverbial bottom line, Mr. Chairman, is it doesn't really change my positioning. In fact, if anything, it sort of reinforces it. I mean, Mr. Hoyt is correct. This is just one issue of a variety of issues involving Enbridge's rate mechanism. But it does represent a fundamental change. It does represent a complete reversal of an earlier position. I am not attempting to make the proverbial mountain out of a mole hill. I will look at this evidence. If we file information requests, we will -- we will get responses. And Mr. Hoyt is correct, I don't think anyone or at least I don't believe that I have, suggest that Enbridge doesn't take those seriously and respond to them in full. That may be all that my client either wants to know and then we can come have the discussion that we need to. But it may not be either. I don't know that now. And I am not prepared to preclude at least some sort of examination on the basis of the evidence on the 16th.

CHAIRMAN: If the Board were to go along with that, how long

do you think it would take you to assess the responses to the interrogatories before you could let Mr. Hoyt and the Board know whether or not you want to have Mr. Walker -- I presume it's Mr. Walker put on as a witness?

MR. HOYT: It may be. Likely. He would be involved.

CHAIRMAN: Yes.

MR. STEWART: Well I know the schedule is tight for this thing. But I notice that Friday noon are the responses, before the close of business on Monday.

CHAIRMAN: Close of business on Monday.

MR. GOSS: Monday is a holiday.

CHAIRMAN: Don't take it.

MR. STEWART: It appears I won't be anyway. Well then first thing Tuesday morning.

CHAIRMAN: Does anyone have a calendar in front of them? What's that date?

MR. GOSS: 14th.

CHAIRMAN: Mr. Hoyt, do you have anything further to say?

MR. HOYT: Well I am just wondering whether I save it until the 14th when I see what Mr. Stewart's position is or speak now in terms of why I don't think that there is any requirement to cross examination in this case. I can do it either way.

CHAIRMAN: I think you better do it now, Mr. Hoyt. I don't

think there will be an opportunity on the 14th.

MR. HOYT: Well to me the keys are Irving's right to be heard and whether it's affected. And the natural justice doesn't necessarily mean courtroom style proceeding. I mean, the right to cross examination, like the right to an oral hearing, depends on a variety of circumstances that can be required by statute. But when the statute is silent, as in the Gas Distribution Act, and the Tribunal governs its own procedure, the common law is reluctant to impose courtroom procedures and technical rules of evidence. You need to look at the governing statute in terms of the Gas Distribution Act. And I think it's quite clear in Section 72 that this Board is the master of its own procedure. And the obligation is on the Board to be fair and to proceed fairly when making its decision.

The recent trends in administrative law show the shift from strict application of natural justice rules to a more flexible procedural fairness for Boards. The principle of fairness established a lower threshold for providing procedural protection and requires less trial-like procedures than those established by the principles of natural justice.

The basic purpose of a procedural fairness is to ensure that individuals are given the opportunity to

participate in the decision making process. So they can inform the decision makers about any fact or arguments the Tribunal would need in order to make a fair decision. And I think that the procedure that the Board has proposed is more than reasonable to accomplish all of those objectives.

CHAIRMAN: Thanks, Mr. Hoyt. We had an opportunity while we were out and as far as we are concerned, we can't envisage if Mr. Stewart were to request a witness to be put forward by the applicant for cross purposes that that would expand the hearing on the 16th so it will go over another day. It should be all be able to be cleared up on that day.

So I think the Board in the interest of getting the best kind of appreciation and understanding of what is going on, we will give Mr. Stewart the opportunity to request that a witness be presented by the applicant, but he must inform you by the close of business on the 14th or that will be it. We will just have a discussion day.

And we had prepared this tentative filing schedule. I believe we gave Enbridge the opportunity to review it and it appears to be okay from their point of view.

Mr. Stewart, any problem with it?

MR. STEWART: No, Mr. Chair.

CHAIRMAN: All right. Then we will adjourn until the 16th

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of October here at 10:00 a.m. Thank you.

(Adjourned)

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

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