



DECISION

IN THE MATTER OF an application by Liberty Utilities (Gas New Brunswick) LP, as represented by its general partner Liberty Utilities (Gas New Brunswick) Corp. for a permit to construct pipelines to provide natural gas distribution service to Havelock, New Brunswick, pursuant to sections 4, 5, and 8 of the *Pipeline Act, 2005*, S.N.B. 2005, c. P-8.5, and sections 3, 4, 5 and 8 of the *Pipeline Filing Regulation - Pipeline Act, 2005*, N.B. Regulation 2006-3.

(Matter No. 496)

August 24, 2021

NEW BRUNSWICK ENERGY AND UTILITIES BOARD

IN THE MATTER OF an application by Liberty Utilities (Gas New Brunswick) LP, as represented by its general partner Liberty Utilities (Gas New Brunswick) Corp. for a permit to construct pipelines to provide natural gas distribution service to Havelock, New Brunswick, pursuant to sections 4, 5, and 8 of the *Pipeline Act, 2005*, S.N.B. 2005, c. P-8.5, and sections 3, 4, 5 and 8 of the *Pipeline Filing Regulation - Pipeline Act, 2005*, N.B. Regulation 2006-3.

(Matter No. 496)

NEW BRUNSWICK ENERGY AND UTILITIES BOARD:

| | |
|--------------------------|---------------------|
| Acting Chairperson: | François Beaulieu |
| Members: | Michael Costello |
| | John Patrick Herron |
| Board Counsel: | Katherine McBrearty |
| Counsel for Board Staff: | Matthew Letson |
| Chief Clerk: | Kathleen Mitchell |

APPLICANT:

| | |
|---|----------------|
| Liberty Utilities (Gas New Brunswick) LP: | Len Hoyt, Q.C. |
|---|----------------|

INTERVENERS:

| | |
|---|-----------------------|
| Department of Agriculture, Aquaculture and Fisheries: | Hon. Margaret Johnson |
| Department of Environment and Climate Change: | Hon. Gary Crossman |

| | |
|---|-----------------------------|
| Department of Justice and Public Safety: | Hon. Hugh J. Flemming, Q.C. |
| Department of Natural Resources and Energy Development: | Rachelle Standing |
| Department of Transportation and Infrastructure: | Hon. Jill Green |
| Graymont (NB) Inc.: | Peter Zed, Q.C. |
| Headwater Exploration Inc.: | Christopher Stewart |
| Local Service District of Havelock: | Terry Keating |
| PUBLIC INTERVENER: | Heather Black |

A. Introduction

- [1] This decision arises out of an application filed with the New Brunswick Energy and Utilities Board (Board) on April 29, 2021, by Liberty Utilities (Gas New Brunswick) LP, as represented by its general partner Liberty Utilities (Gas New Brunswick) Corp. (Liberty). The application was amended on May 5 (Application) and is made pursuant to sections 4, 5, and 8 of the *Pipeline Act, 2005*, S.N.B. 2005, c. P-8.5 (Act) and sections 3, 4, 5, and 8 of the *Pipeline Filing Regulation – Pipeline Act, 2005*, N.B. Regulation 2006-3 (Regulation).
- [2] The Application seeks approval of a permit to construct pipelines to provide natural gas distribution service to Havelock, New Brunswick. Liberty also seeks approval of a customer service charge to customers in Havelock.
- [3] The Board held a pre-hearing conference by video conference on June 3. Intervener requests were received by Graymont (NB) Inc. (Graymont) and Headwater Exploration Inc. (Headwater), which were granted. Neither party filed evidence concerning this matter.
- [4] In accordance with subsection 6(2) of the Act, the Minister of Agriculture, Aquaculture and Fisheries, the Minister of Environment and Climate Change, the Minister of Justice and Public Safety, the Minister of Natural Resources and Energy Development (NRED), the Minister of Transportation and Infrastructure, and the Local Service District of Havelock were deemed as parties. Only NRED filed evidence and appeared at the proceeding.
- [5] A hearing was conducted by video conference on June 23 and June 25.
- [6] Liberty presented a witness panel which included Mr. Gilles Volpé, Vice-President, Mr. Ed Armstrong, Manager of Operations, Mr. David Lavigne, Director of Finance and Regulatory, Mr. David Trottier, Senior Analyst – Planning and Technical Services, all of Liberty, and Mr. Chris Blair, a Principal, Environmental Services at Stantec.
- [7] Mr. Sacha Patino, Senior Advisor, appeared as a witness for NRED.

- [8] The Board received a letter of comment from the New Brunswick Anti-Shale Gas Alliance. Letters of comment form part of the record in the Board's proceedings and such contributions are appreciated.
- [9] On July 2, a Partial Decision was issued in which the Board granted a permit to Liberty to construct pipelines and related facilities, including a gate station. The permit is subject to the conditions set out in Schedule A of the Partial Decision. The Chief Clerk of the Board subsequently issued a corresponding permit to construct. A customer service charge was also approved.
- [10] This decision provides the background and the Board's reasons for the decisions made in the Partial Decision.

B. Legislative Framework

- [11] The following provisions of the Act are relevant to this proceeding:

7 In considering an application for a permit, the Board shall take into account all matters that it considers relevant and shall consider

- (a) the location of the proposed pipeline and its effect upon public health and safety and the environment,
- (b) the financial responsibility of the applicant,
- (c) in the case of a pipeline for the transmission of natural gas, the existence of present and future markets for the pipeline, and
- (d) such other matters as it considers relevant in the public interest.

8(1) The Board may grant a permit to construct a pipeline subject to the terms and conditions expressed in the permit, or it may refuse to grant a permit.

8(2) The Board, when granting a permit, may prescribe the location and route of the pipeline and prescribe the location of the right of way of the pipeline and the relationship of its boundaries to the pipeline or any part of the pipeline.

- [12] The following provisions of the Regulation are also relevant:

4(2) With respect to early public notification, the application shall include evidence to show that there has been meaningful public input at a local and regional level during the planning and design phase of the project to ensure that those, including aboriginal communities, who may be affected by the project

- (a) are made aware of the project as early as possible, and
- (b) are given an opportunity to express their views to the applicant in advance of the application

in order that the concerns of the public and aboriginal communities are addressed in the application.

4(3) Prior to filing an application under subsection (1), an applicant shall, after first obtaining ex parte Board approval of the proposed elements of the public information program described in paragraphs (a) to (f), do the following:

- (a) implement a public information program to explain the project applied for and its potential effects and to allow an opportunity for public comment, providing as a minimum a map to identify the project location and sufficient information for the potential effects of the project to be identified;
- (b) provide interested persons, including aboriginal communities, adequate time to comment on the project;
- (c) respond to any relevant questions that may be raised by such interested persons;
- (d) provide such interested persons with information regarding Board procedures for examining the application, and the Board's address for obtaining information and expressing concerns directly to the Board;
- (e) if changes occur as a result of the comments received, notify those who made the comments and initiate a public notification program for persons affected by the project as a result of the changes; and
- (f) if changes to the project are made other than for the reasons in paragraph (c), initiate a public notification program for persons who would be affected.

4(4) The application filed with the Board shall include a description of the public information program conducted under subsection (3), including, but not limited to,

- (a) a description of the means and date of public notification and the date and location of meetings, if any;
- (b) a summary of public comments received and concerns expressed about the project's potentially adverse effects; and
- (c) with respect to the comments and concerns described in paragraph (b), a summary of the response to the interested person, including
 - (i) a summary of the measures the applicant has taken or intends to take to resolve those concerns, or
 - (ii) an explanation of why the applicant considers no further action is required with respect to those concerns.

[13] The following provisions of the *Gas Distribution Act, 1999*, S.N.B. 1999, c. G-2.11 (GDA) are applicable:

1 In this Act [...]

“customer service” is a service that is not a natural monopoly and includes appliance service, yardline or houseline maintenance, meter reading, billing, collections, call centre, load balancing, peaking service, supplier of last resort service, storage and arranging for pipeline capacity on a transmission line or a pipeline regulated by the United States Federal Energy Regulatory Commission;

59 The Board may make an order regulating the price charged by a gas marketer or a gas distributor for gas or a customer service if the Board is of the opinion that the price is not subject to effective competition sufficient to protect the interests of customers.

C. Issues

[14] The issues in this matter are:

- a) Whether the Board should grant a permit to construct, and if so, under what terms and conditions; and

- b) Whether the Board should approve a customer service charge.

D. Analysis

1. Permit to Construct

a. Considerations by the Board

[15] Section 7 of the Act sets out the factors that the Board shall consider with respect to an application for a permit to construct.

[16] The Pipeline Coordinating Committee (PCC) was established by the Board to allow for a more coordinated evaluation of these factors. Factors such as the location of the proposed pipeline and its effect upon public health and safety and the environment, as set out in subsection 7(a) of the Act, were evaluated by the PCC.

[17] The PCC consists of members of the following provincial and federal government departments, agencies and Board staff, which review applications and related materials in advance of being brought to the Board:

1. Planning and Impact Evaluation, Environment and Local Government;
2. Crown Lands, Natural Resources and Energy Development;
3. Technical Inspection Services, Public Safety;
4. Land Acquisition and Corridor Management, Transportation and Infrastructure;
5. Agriculture, Aquaculture and Fisheries;
6. Pipeline, Petroleum and Natural Gas, Natural Resources and Energy Development;
7. Archaeology Services, Tourism, Heritage and Culture;
8. Fish & Fish Habitat Protection Program, Fisheries and Oceans Canada;
9. Impact Assessment Agency of Canada / Government of Canada;
10. Environmental Protection Operations, Environment and Climate Change Canada;
11. New Brunswick Emergency Measures Organization;
12. Parks & Attractions, Tourism, Heritage and Culture; and
13. Pipeline Safety, Energy and Utilities Board.

[18] Following a review of a preliminary application and corresponding documentation, the PCC, on April 21, agreed that a permit should be issued based on the technical information presented, as well as written commitments and clarifications made during the review. The

PCC recommended 29 conditions, which were agreed upon by Liberty and incorporated into its Application.

- [19] Liberty also sought and responded to concerns from members of the public, including the Indigenous communities and representative organizations, with respect to these factors through the public information program conducted according to the Regulation.
- [20] The next factor that the Board needs to consider is the financial responsibility of Liberty pursuant to subsection 7(b).
- [21] As a regulated utility, the Board already has an ongoing understanding of Liberty's financial responsibility as it reviews Liberty's financial results annually. Based on the annual reviews and the evidence submitted in this proceeding, the Board is satisfied that sufficient funds are available to complete the project.
- [22] In the case of a pipeline for the transmission of natural gas, the Board must also consider the existence of present and future markets for the pipeline, in accordance with subsection 7(c). Implicitly, this analysis requires an evaluation of whether the market can support the investment either now or in the future.
- [23] Mr. Len Hoyt, Q.C., counsel for Liberty, stated that the proposed pipeline was not a transmission pipeline. However, Ms. Heather Black, the Public Intervener, disagreed and argued that the proposed pipelines are pipes and installations for gas transmission, as stipulated under the definition of "pipeline" in the Act. As such, she submitted that subsection 7(c) did apply to this proceeding. The Board agrees.
- [24] The Board is satisfied that present and future markets exist for the proposed pipeline for the reasons below.
- [25] Mr. Hoyt submitted that the Havelock expansion analysis indicates that the project is economically feasible. He stated that the revenue from present and future markets support the costs associated with this project's construction and operation.
- [26] Ms. Black submitted that the application materials, the Graymont agreement, and Liberty's expansion analysis support a market for gas in the area.

- [27] The Board finds the project to be economically feasible as the project's net present value is positive, and the internal rate of return is favourable. Furthermore, the Board is satisfied that the existing and future markets support the load without increasing risk to existing customers.
- [28] The Board is required to take into account all matters that it considers relevant in the public interest, pursuant to subsection 7(d). As a result, an evaluation of the adequacy of the duty to consult Indigenous communities is relevant.
- [29] Liberty sought and received advice from the Department of Aboriginal Affairs (DAA) concerning communication with Indigenous communities, building relations, and seeking their views on the project.
- [30] Pursuant to section 4 of the Regulation, Liberty undertook a public information program. Accordingly, on May 15, 2020, Liberty sent a letter to each of the 16 Indigenous communities in New Brunswick. It provided notice and information on the pipeline project. It also provided notice and information to Kopit Lodge, Mi'gmawe'l Tplu'taqnn Incorporated (MTI), and the Wolastoqey Nation in New Brunswick (WNNB), three representative Indigenous organizations in New Brunswick.
- [31] In his closing argument, Mr. Hoyt argued there had been no determination whether there is a duty to consult Indigenous communities regarding this project. He submitted, however, that the duty to consult has been satisfied, and the Board has both the jurisdiction and obligation to consider the adequacy of Crown consultation in this matter.
- [32] Mr. Hoyt stated that the design features of this project point to "at most" a low risk of potentially impacting Aboriginal or treaty rights. He noted that, to date, no specific concerns or identification of impacts to Aboriginal rights by the project had been identified based on the records of consultation filed by Liberty.

- [33] Mr. Hoyt submitted that notwithstanding the findings by the Crown that the duty to consult had been satisfied, which no Indigenous community has disagreed with, Liberty plans to continue community engagement.
- [34] In addition to the steps taken by Liberty, NRED, in coordination with the DAA, undertook consultation with Indigenous communities as representatives of the Crown. On January 29, 2021, NRED sent a letter to 15 Indigenous communities to inform them of the forthcoming application by Liberty and invited each community to share any concerns it may have in terms of potential adverse impacts to its Aboriginal and treaty rights. Information was also provided on the regulatory process and on registering as an intervener with the Board.
- [35] A second letter was sent by NRED to the same Indigenous communities on May 6 to advise them that it had determined that the duty to consult had been satisfied. In its view, it was unaware of any appreciable adverse impacts on Aboriginal or treaty rights by the project. This conclusion was reached following a review of all information, including communications and work by Liberty with the Indigenous communities, the design of the project, and the mitigation measures implemented.
- [36] Ms. Rachelle Standing, counsel for NRED, and Ms. Black agreed with Mr. Hoyt's comments that the duty to consult had been satisfied by the Crown.
- [37] The Supreme Court of Canada stipulates that a potential decision by a regulatory tribunal may trigger the Crown's duty to consult. The duty to consult would be triggered when the Crown has knowledge, real or constructive, of a potential or recognized Aboriginal or treaty right that may be adversely affected by the tribunal's decision. While the Crown has the duty to consult, the Board must be satisfied that such consultation is adequate.
- [38] Mr. Hoyt submitted, in closing arguments, there was no formal delegation of the procedural aspects of the duty to consult to Liberty by the Crown. He argued, however, that Liberty

was in the best position to carry out the procedural aspects of the consultation and mitigate any concerns raised in the present matter.

- [39] Ms. Standing submitted, in closing arguments, that the Crown has discretion as to how it structures its consultation process. She argued that where the duty to consult is at the low end of the spectrum in this circumstance, formal delegation is not necessarily done. The Board agrees. The Board is satisfied that Liberty conducted all elements of the public information program approved by the Board, according to section 4 of the Regulation.
- [40] The evidence demonstrates communication and sharing of information between the Crown, Liberty, and the Indigenous communities. The communities were notified of the details of the project and were given the opportunity to ask questions and raise concerns with both Liberty and NRED.
- [41] Mr. Patino testified that no comments were received from any Indigenous community on any potential adverse impacts to Aboriginal and treaty rights or NRED's assessment of the duty to consult. Furthermore, the Board did not receive any intervener requests or letters of comment from any Indigenous community or organization.
- [42] While the Peskotomuhkati Nation at Skutik was not included in the NRED's correspondence, the Board is satisfied that this Indigenous community was provided initial notice and information by Liberty and was notified of the hearing.
- [43] Kopit Lodge, MTI, and WNNB all asserted Aboriginal rights over the land encompassed by the project. Mr. Patino testified that neither NRED, nor DAA, received any particulars of Aboriginal or treaty rights that this project would impact.
- [44] In closing arguments, Ms. Standing argued "[...] that [a] blanket assertion in the absence of providing [...] a specific impact to the specific property in question does not necessarily trigger any greater consultation obligations." The Board agrees.

[45] The Crown has assessed that the duty to consult has been satisfied and is at the low end of the spectrum. The proposed Havelock pipeline is being constructed on a pre-existing right-of-way that has been in place since 1963. The Crown further stated there have been no adverse impacts identified.

[46] Liberty submitted the project also avoids any travel through wetlands or watercourses and that no specific impacts have been identified by any Indigenous community or representative organization.

[47] As a result, the Board is satisfied the consultation was adequate in the present matter.

2. Customer Service Charge

[48] Liberty proposes to charge customers in Havelock, including Graymont, a service charge based on the negotiated cost of transportation service outlined in the agreement between Headwater and Liberty (Headwater-Liberty Agreement) on the Headwater Pipeline. Initially, Liberty did not feel that Board approval of the customer service charge was necessary; however, it requested Board approval of this charge in final arguments.

[49] The proposed transportation service commences at the Headwater Pipeline interconnection with the Maritimes & Northeast transmission pipeline and ends at the Headwater Pipeline gate station interconnection. Liberty submitted it will pay Headwater a toll for this transportation service and then charge customers in Havelock for such service.

[50] In final arguments, Mr. Hoyt stated that the toll that Liberty will pay to Headwater was determined by Headwater and Graymont. He argued that this would benefit other potential customers in Havelock who may benefit from this negotiated industrial toll and that both Headwater and Graymont were “two sophisticated arm’s-length parties.”

[51] Mr. Hoyt submitted that Liberty is providing a customer service by arranging for transportation service over the Headwater Pipeline to customers in Havelock. He stated that the definition is not exhaustive under the GDA and argued that the arrangement for pipeline capacity over the Headwater Pipeline would fall within the definition of customer service.

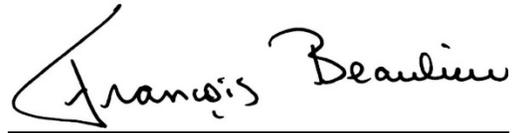
- [52] Furthermore, he stated, although the amounts of both the toll and the customer service charge are the same, Liberty is not seeking approval of the toll to use the Headwater Pipeline.
- [53] In closing arguments, Mr. Christopher Stewart, counsel for Headwater, argued that the Board's approval of the toll for transportation service over the Headwater Pipeline is not necessary as his client is not a common carrier, pursuant to the legislation. Mr. Stewart further argued that Headwater is not a public utility according to subsection 53(b) of the *Energy and Utilities Board Act* as Headwater is not, directly or indirectly, offering gas transmission or delivery services to or for the public.
- [54] Mr. Peter Zed, Q.C., counsel for Graymont, argued an application to become a common carrier was not contemplated when the Board approved Enbridge's, now Liberty's, access to Corridor's, now Headwater's, pipeline in 2006 as a condition to their permit to construct. Mr. Zed submitted that two sophisticated arm's length parties negotiated a satisfactory rate and that should a future customer not be able to make an arrangement with Headwater, it could make an application for a common carrier declaration. He also submitted that it is not within the Board's jurisdiction to make a finding of common carrier absent an application.
- [55] Ms. Black agreed with Liberty's proposal regarding the customer service charge. In her view, the definition of customer service under the GDA is inclusive of this kind of service. Ms. Black submitted that section 59 of the GDA provides for the Board to fix the price of a customer service if customers' interests are not protected otherwise.
- [56] Ms. Black argued, however, that the toll being charged to Liberty by Headwater is regulated under section 44 of the Act. In her view, section 44 is not specific to common carriers. She submitted that there is a class of tolls imposed by common carriers and a class of tolls that are imposed by negotiation between contractual carriers, which requires those tolls to be just and reasonable.
- [57] While the amounts that Liberty proposes to charge to customers in Havelock for transportation are based on the toll arrangement set out in the Headwater-Liberty Agreement, the amounts themselves need to be evaluated by the Board as a customer service charge under the GDA.

- [58] The GDA defines customer service as a “service that is not a natural monopoly” and includes services such as “arranging for pipeline capacity on a transmission line.” While the Headwater Pipeline is not a transmission line, the definition is not exhaustive and accommodates the transaction in this proceeding.
- [59] The Board is of the opinion that, even though sophisticated arm’s length parties negotiated the amounts that Liberty proposes to charge to customers in Havelock, the parties have not presented evidence that the customer service charge will be subject to effective competition sufficient to protect customers’ interests. As such, the Board, pursuant to section 59 of the GDA, will set the customer service charge.
- [60] The Board approves a customer service charge to be levied on customers in Havelock. The Board finds that the amounts agreed upon in the Headwater-Liberty Agreement are reasonable, at this time. These amounts may, however, be subject to further review.
- [61] Liberty is directed to file the Headwater-Liberty Agreement publicly with the Board within five business days of this decision. In the alternative, Liberty can withdraw their Claim for Confidentiality over this document with the Chief Clerk within five business days of this decision.
- [62] Once the Headwater-Liberty Agreement becomes publicly available, the Board will issue a subsequent order setting the customer service charge for customers in Havelock.

E. Conclusion

- [63] For the reasons above, the permit to construct pipelines and customer service charge were approved in the Partial Decision dated July 2. A permit to construct was subsequently issued to Liberty by the Chief Clerk subject to the conditions set out in Schedule A of the Partial Decision.
- [64] Sections (a) and (b) of the permit to construct expire on December 31, 2022, and section (c) expires on August 30, 2044.

Dated at Saint John, New Brunswick, this 24th day of August, 2021.

Handwritten signature of François Beaulieu in cursive script.

François Beaulieu
Acting Chairperson

Handwritten signature of Michael Costello in cursive script.

Michael Costello
Member

Handwritten signature of John Herron in cursive script.

John Patrick Herron
Member