

Reply Attention of: Ludmila B. Herbst, Q.C.
Direct Dial Number: 604 661 1722
Email Address: lherbst@farris.com

FARRIS

File No: 01450-0174-0000

May 6, 2021

BY EMAIL

British Columbia Utilities Commission
Suite 410, 900 Howe Street
Vancouver, BC Canada
V6Z 2N3

Attention: Patrick Wruck, Commission Secretary

Dear Sirs/Mesdames:

Re: Pacific Northern Gas Ltd. – PNG-West Division – Application for a Certificate of Public Convenience and Necessity (“CPCN”) for the Salvus to Galloway Gas Line Upgrade Project (the “Project”) – Project Number 1599140

We are legal counsel for Pacific Northern Gas Ltd. (“PNG”) in the above-noted application (the “**Application**”). We write further to the letter dated May 4, 2021 (Exhibit A-9) from the British Columbia Utilities Commission (the “**BCUC**”) and the underlying letter dated April 30, 2021 (the “**April 30 Letter**”) from the Lax Kw’alaams Band (Exhibit E-1).

The April 30 Letter comes well after the close of the evidentiary record in this proceeding and focuses on issues that are outside the BCUC’s mandate. In the ordinary course this would be a brief letter urging that the April 30 Letter be disregarded on the basis of the above. However, in addition to this, we do wish to address the allegation that PNG has in some way been inaccurate or incomplete in material it has put before the BCUC. PNG deeply values its relationships including with First Nations, other customers and the BCUC, and this is not an allegation that should be left unaddressed.

Procedural background

PNG’s communications with Lax Kw’alaams in relation to the Project well pre-dated the filing of the Application. There is no doubt that the Lax Kw’alaams Band would have known that PNG intended to file the Application in the fall of 2020 and that a BCUC decision was anticipated in the spring of 2021.¹

¹ PNG communications included a letter to First Nations in late July 2020 in which PNG noted that it “is submitting an application to the BC Utilities Commission for approval to conduct necessary maintenance and infrastructure upgrade work on approximately 80 km of our West Transmission natural gas delivery facilities between the Salvus maintenance yard and the Galloway pressure regulating station...” (Exhibit B-1 – Appendix T-1). The Project Fact Sheet enclosed (Exhibit B-1 – Appendix T-2) noted that the Application was expected to be filed in the fall of 2020 and that a BCUC decision was anticipated in the spring of 2021. PNG’s subsequent presentations to First Nations again highlighted the expected fall 2020 filing date for the Application and BCUC decision anticipated in spring 2021 (Exhibit B-1 – Appendix T-3).

On October 9, 2020, PNG duly submitted the Application to the BCUC.

On November 6, 2020, the BCUC issued Order G-288-20 (Exhibit A-3), which set out a regulatory timetable. By November 20, 2020, PNG was required to, and did, publish public notice of the Application under the banner “We want to hear from you”. Under the heading “How to Participate”, options provided were submitting a letter of comment, registering as an interested party, and requesting intervener status. This notice was published throughout affected areas of PNG service territory.

As Order G-288-20 provided, the deadline for registering as an intervener was December 3, 2020.

One intervener registered: the British Columbia Old Age Pensioners’ Organization, Active Support Against Poverty, Disability Alliance BC, Council of Senior Citizens’ Organizations of BC, and the Tenant Resource and Advisory Center, known collectively as BCOAPO et al. (“**BCOAPO**”). BCOAPO participated actively in the proceeding, including by submitting information requests (“**IRs**”) (Exhibit C1-2). Two interested parties also registered: Nootka Road Construction Ltd. (Exhibit D-1) and Kyla Warren/Skeena Fisheries Commission (Exhibit D-2).

On January 22, 2021, after the first round of IRs had been completed, the BCUC issued Order G-23-21 (Exhibit A-6) establishing a further regulatory timetable. Pursuant to that timetable, PNG filed responses to a second round of IRs on February 23, 2021. The evidentiary record has long been closed. Also pursuant to that timetable, the exchange of closing submissions concluded on March 30, 2021.

Rule 8.08 of the BCUC’s Rules of Practice and Procedure provides that “[l]etters of comment must be received by the BCUC by the last date included in the proceeding’s regulatory timetable before final arguments, unless the BCUC directs otherwise. Letters of comment that are received late will not be considered by the BCUC in the proceeding”. Rule 8.09 provides that “[s]ubmitting a letter of comment does not enable persons to otherwise participate in a hearing or reconsideration proceeding.” Further, the BCUC has indicated that it is generally reluctant to reopen an evidentiary record unless there are exceptional circumstances for it to do so; there must be finality to the BCUC’s process.²

PNG’s written argument of March 9, 2021 reaffirmed the request made in Exhibit B-1 that BCUC approval be granted no later than June 2021. At paragraphs 41-44 of its argument, PNG noted that this was “consistent with time being of the essence to deal with the regulatory, safety and reliability considerations” and that approval in June 2021 would accommodate an important construction start date of July 2021 (set in part around fisheries sensitive windows to minimize potential impacts) as well as allowing anticipated new customer obligations to be met.

The PNG comments that the Lax Kw’alaams Band now challenges in the April 30 Letter are consistent with the position that PNG took throughout the proceeding, including in Exhibit B-1.

Had Lax Kw’alaams believed statements that PNG was making were inaccurate, it had ample opportunity to challenge them.

² FortisBC Inc. Application for a Certificate of Public Convenience and Necessity for the Advanced Metering Infrastructure Project, Reasons for Decision in Order G-80-13 dated May 15, 2013 at p. 3.

It would not be appropriate for the Lax Kw'alaams Band to be given standing at this time and indeed, the April 30 Letter does not ask for this to be done. The Lax Kw'alaams Band did not register as an intervener (and, in that capacity or at all, pose IRs, seek to file evidence, seek other further process after IRs were responded to, or file a closing argument), register as an interested party, or (until one month after PNG's reply argument had been filed) submit a letter of comment.

The April 30 Letter itself does not suggest that on its merits the Application should not be granted. Rather, in that letter the Lax Kw'alaams Band asks that the BCUC "postpone any decision on the merits on this application until you have further investigated the failure of consultation with Lax Kw'alaams and PNG's failure to keep you advised". These two points are addressed in the next two sections of this letter.

Alleged "failure of consultation with Lax Kw'alaams"

The Lax Kw'alaams Band appears to be suggesting that the Application gives rise to a "duty to consult"; that the BCUC has the mandate to determine whether such a duty, if it arises, has been met; and that it has not been. None of these suggestions is correct.

The Application does not involve a Crown utility or a Crown project in some other sense. It is an application by PNG, a private utility, for the repair and maintenance of a pipeline that it owns, with the work in large part to occur on its longstanding right of way.

PNG is not the Crown and has no "duty to consult".

Even where a Crown utility is involved, the BCUC's policy in this regard states that it does not "have an independent duty to consult First Nations": *First Nations Information Filing Guidelines for Crown Utilities* (Appendix A to Order G-51-10), p. 1 of 7. Rather, "where the duty to consult is triggered, the Commission has the obligation to assess the adequacy of Crown consultation with First Nations within the scheme of its regulation": p. 1 of 7. The case of *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650 ("**Carrier Sekani**"), which considered the obligations of the BCUC, involved a Crown utility: BC Hydro. However, again, PNG is not the Crown or an agent of the Crown.

It should also be noted that even where, unlike in this case, the *First Nations Information Filing Guidelines for Crown Utilities* apply, "[t]he Commission's assessment is based on the evidence filed prior to the close of the evidentiary portion of a proceeding" (p. 3 of 7). There is no scope for advancing allegations after the evidentiary portion of the proceeding has closed.

To the extent of any further or broader consultation obligations, the entity that has taken on a "duty to consult" with First Nations is the Oil and Gas Commission ("**OGC**").

The OGC states on its website: "[t]he [OGC], as an agent of the Crown, fulfills the Crown's obligation to consult with Indigenous Nations prior to the authorization of activities under the Oil and Gas Activities Act and related specified enactments for which the Commission is the responsible decision maker". This is consistent with PNG's comment in response to BCUC IR 34.2 in this proceeding: "The legal duty to consult on the various Provincial authorizations required for the Project rests with the Crown, in this case the BC OGC" (Exhibit B-2). It also is reflective of the BCUC's findings in relation to FortisBC Energy

Inc.'s Certificate of Public Convenience and Necessity Application for the Lower Mainland Intermediate Pressure System Upgrade Project (October 16, 2015), at p. 62 of that decision:

The Panel notes that the OGC is the Crown agency responsible for First Nations consultation and that consultation is ongoing. FEI is only responsible for conducting preliminary discussions with identified First Nations and providing documentation for the OGC review process. The adequacy of First Nations consultation will be addressed by the OGC.

The April 30 Letter reflects that the Lax Kw'alaams Band is unhappy with developments in the spring of 2021 in the OGC's approach to consultation on the current work package before it. This is not the first work package in relation to the Project that has come before the OGC. The OGC has already issued a permit related to Segment 3 (Khyex Mouth to Work Channel). In issuing the permit, the OGC determined that the consultation was adequate, and that determination is required in each instance where the OGC will be issuing permits for the various work packages.

The BCUC is not the adjudicator of whether the OGC has fulfilled a duty to consult nor is it an appeal tribunal from the OGC in this regard.

Alleged “failure” of PNG to keep the BCUC “advised”

PNG values its relationships, including with First Nations. The importance that PNG attributes to these relationships is reflected in PNG's engagement with First Nations from well prior to the filing of the Application, PNG's exploration of economic opportunities for First Nations in relation to work on the Project, and the fact that the approvals PNG seeks contemplate engagement with First Nations on a going forward basis as work on the Project unfolds. These matters are outlined in PNG's filings including both Exhibits B-1 and B-2.

Whether in relation to its engagement with First Nations or other aspects of its Application, PNG strove to put forward an accurate and complete record. The suggestion that PNG has somehow failed to do so is inaccurate.

PNG's filed evidence appropriately reflected the fact that PNG perceived its dealings with Lax Kw'alaams and other First Nations in relation to the Application to have been productive and positive. Indeed a very substantial contract worth \$940,000 for clearing in relation to the Project was awarded to a joint venture involving Lax Kw'alaams and Metlakatla affiliated Coast Tsimshian Enterprise partnership company.

With respect to the fact that the Lax Kw'alaams Band and the OGC now seem to be at odds over the nature or scope of consultation that the OGC is undertaking, the first sign of this that came to PNG's attention was in March 2021 and only very recently have issues between those entities seemed to crystallize. The reference to “Crown agency” in the April 30 Letter seems perhaps to be to a Ministry or the government, not the BCUC.

Although as noted above the BCUC does not have the mandate to assess the adequacy of consultation by the OGC, we note that on May 5, 2021, Metlakatla Indian Band wrote to the OGC and to PNG directly,

in both cases under the subject line of the OGC proceeding, in relation to a perceived inadequacy of consultation and/or accommodation.

BCUC approval would leave open any existing oversight

Even with BCUC approval of the Application, PNG would continue to require OGC approval of work packages. Correspondingly, the OGC will be continuing to engage in consultation with First Nations on an ongoing basis.

It is also important to note that a decision on the Application will not end whatever degree of oversight the BCUC has now in relation to PNG engagement with First Nations. To the contrary, if the conditions that BCOAPO specifically requested and PNG agreed to in the proceeding are implemented, that oversight would be regularized and enhanced. As stated in paragraphs 8 and 9 of PNG's reply argument (footnotes omitted):

8. BCOAPO envisions that certain information related to or stemming from Indigenous engagement would be included in the above reports. BCOAPO notes that it sees "considerable value in the Utility providing the same level of reporting in regards to its engagement with Indigenous groups affected or potentially affected by the Project." In this regard, BCOAPO asks that the Panel direct PNG to file:
 - (a) "information with respect to its on-going Indigenous engagement activities, feedback received and related project outcomes, as part of Semi-Annual Progress Reports on the STG Project"; and
 - (b) "Material Change Reports on any material changes to the [STG] Project scope or costs precipitated by Indigenous feedback and concerns raised, within 30 days of the date on which a material change occurs, based on criteria specified by the BCUC".
9. PNG does not object to being required to report to the BCUC in the manner outlined in paragraphs 7-8 above. The Project is a significant one and BCOAPO's request aligns with monitoring and recording that PNG would be undertaking in any event.

Conclusion

In all the circumstances, PNG requests that the BCUC continue with its consideration of the evidentiary record and submissions as they stood prior to the April 30 Letter, and proceed to issue its decision on the Application.

In the alternative, if any further process is undertaken, PNG asks that its nature and timeline reflect the fact that, on the unchallenged evidence, the Project is required to align with current regulatory requirements and ensure the continued safe, reliable delivery of natural gas to PNG customers, and that there are timing constraints in performing the work proposed. Correspondingly, PNG requests that any further process, if ordered, be consistent with its request that a BCUC decision on the Application be

May 6, 2021

- 6 -

FARRIS

issued in June 2021.

Yours truly,

FARRIS LLP

Per: 

Ludmila B. Herbst, Q.C.

LBH/JY/ltt

c.c.: Lax Kw'alaams Band (Neegann Aaswaakshin and Mayor Gary Reece)
Greg McDade, Q.C.
BCOAPO
client