

National Energy
Board



Office national
de l'énergie

The Public Hearing Process

Canada

The National Energy Board considers major regulatory matters through the public hearing process. This bulletin describes that process. It includes information on where hearings are held, where applications may be examined, the respective roles of Board Counsel, staff and the hearing process officer, the sequence of procedures at the hearing and the release of the decision.

THE BOARD

The National Energy Board is an independent regulatory tribunal that was created by the Parliament of Canada in 1959. Its powers and jurisdiction are based on the National Energy Board Act, the Canada Oil and Gas Operations Act and certain provisions of the Canada Petroleum Resources Act. The purpose of the Board is to make decisions that are fair, objective, and respected. The Board achieves this purpose by regulating in the Canadian public interest certain areas of the oil, gas, and electric utility industries. Copies of the Acts are available from the Board and from the Canada Communications Group, Public Works and Government Services Canada, 45 Sacré-Coeur Blvd., Hull, Quebec, K1A 0S7.

PUBLICATIONS

This information bulletin is one of a series that the Board publishes on its activities and procedures. Comments on this bulletin or suggestions for future topics are welcome. These bulletins provide general information only. For details of particular items, reference must be made to the relevant legislation.

BULLETINS IN THIS SERIES

1. Pipeline Route Approval Procedures
2. The Public Hearing Process
3. Non-Hearing Procedures
4. How to Participate in a Public Hearing
5. The Board's Publications
6. The Regulation of Tolls and Tariffs
7. The National Energy Board Library
8. Electric Power: A Compendium of Terms
9. Protection of the Environment
10. Pipeline Tolls and Tariffs: A Compendium of Terms
11. The Frontier Information Office
12. Pipeline Safety
13. Pipeline Regulation: An Overview for Landowners and Tenants

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The Public Hearing Process

This information bulletin explains the procedures currently used at public hearings by the National Energy Board (NEB). For further information, consult the *NEB Rules of Practice and Procedure* and the *NEB Act*.

Types of Hearings

Under the *NEB Act*, the Board holds public hearings in order to hear all sides and points of view prior to making decisions on specific matters. These include:

- certain applications for the construction and operation of international or interprovincial oil and gas pipelines or international or designated interprovincial power lines. (See *NEB Act*, Part III);
- certain applications to set the tolls and tariffs of pipeline companies under the Board's jurisdiction. (See *NEB Act*, Part IV);
- applications for a licence to export natural gas, oil or electricity, or to import natural gas. (See *NEB Act*, Part VI);
- interventions received from landowners opposed to the detailed route of a proposed pipeline. (See *NEB Act*, Section 34).

The Board also uses the public hearing process to conduct inquiries. For example, hearings were held in 1986 as part of the inquiry into the federal regulation of electricity exports.

The First Step

After a company files with the Secretary of the Board an application requiring a hearing, it becomes a public document and is made available in the Board's library. A news release is issued by the Board notifying the public of the filing.

The Board, either on its own or at the request of the Minister of Natural Resources, can initiate an inquiry on a particular issue. In either case, news releases are circulated.

Communications

All communications between the Board, the applicant, and other parties go through the Secretary of the Board. In this way, all correspondence becomes part of the record and is available for examination by anyone.

Initial Examination

The Board examines every application to ensure all the required information is included. If necessary, the Board may request additional information from the applicant to ensure that the application is complete. All additional information is on the public record.

Hearing Orders and Directions on Procedure

Once the Board is satisfied that an application is complete, it issues a hearing order containing directions on the procedures for the hearing. The order gives the location and date of the public hearing and the directions on procedure outline the steps to be followed by the applicant and intervenors, as well as any specific deadlines, such as the date by which intervention notices must be received. The Board also issues a news release to announce the hearing.

Issues

Attached to the hearing order, in most cases, is a list of issues that are to be dealt with at the hearing. The Board also permits parties to suggest additional relevant issues to be discussed at the hearing.

Location of the Hearing

Although the Board has hearing rooms at its office in Calgary, it may conduct hearings anywhere in Canada. The Board's policy is to hold hearings in the region most affected by the proposed application. This can include moving the hearing from one location to another to accommodate local interests.

Availability of the Application

Once a hearing order is issued, the application and any associated documents are available for public viewing at the head office of the applicant company in addition to the Board's library. They may also be placed at town

halls or libraries near the hearing sites if the application is expected to draw significant local attention.

All registered intervenors are entitled to receive a copy of the application from the company.

Interventions

To participate in a public hearing, interested parties must send a letter, facsimile or formal legal submission to the Secretary of the Board stating their interest and reasons for wanting to participate. A time limit for the filing of interventions is set in the hearing order. It is not obligatory for an interested party to retain legal counsel in order to participate in the hearing.

If a party is unable to show it would be affected by the Board's decision, the Board may refuse to recognize the party as an intervenor in the hearing. However, the Board recognizes that many public groups, such as environmental associations, may raise issues relevant to the broad public interest of Canadians and such groups are frequently accorded status. For further details on interventions, see Information Bulletin No. 4, *How to Participate in a Public Hearing*.

Letters of Comment

If someone wants to make his or her views known to the Board, but does not wish to directly participate at the hearing, he or she may file a letter of comment with the Secretary of the Board and, if applicable, send a copy to the applicant. The letter of comment states the writer's views on the application and should be accompanied by any facts or information which support these views.

A letter of comment will be taken into consideration in the Board's proceedings. It should be noted, however, that a letter of comment is not sworn evidence and is not subject to cross-examination. Depending on circumstances, it may not be given the same weight as other evidence in the proceedings.

Once filed, the letter becomes a public document. The Secretary of the Board provides copies of letters of comment to all parties to the proceeding. An applicant, or any other party, may reply to the letter by serving a

letter of response on the person who has filed the letter and filing a copy with the Board's Secretary and serving all parties to the proceeding.

It should be noted that copies of applications and submissions are provided only to the applicant and intervenors. A person filing a letter of comment should not expect, other than letters of response, any further correspondence from the other parties involved.

Information Requests

Any party directly involved in a hearing may request additional information from the other participants, but must do so within the time limits set by the Board in the hearing order.

Language

The Board operates in both official languages. Applications and submissions may be made in either French or English and the Board will respond in the same language.

Intervenors should indicate which official language they intend to use at the hearing so the Board can arrange for simultaneous translation if necessary.

The Panel

Most hearings are held before a panel of three Board members. They have the same powers as the full Board when considering an application, including the power to decide.

Under Section 14 of the *NEB Act*, the Board may, in certain circumstances, delegate powers to a single member to preside over a hearing. That member renders the final decision.

Under Section 15, the Board may authorize a Board member to take evidence and submit a report to the Board. In this case, it is the Board as a whole which approves or denies the application.

Board Counsel

Board counsel has two main functions. The first is to advise the Board on legal matters, including the conduct of the hearing. The second is to cross-examine the applicant's and intervenors' witnesses in order to establish clearly the evidence needed for the Board to arrive at a decision.

Board counsel does not play an adversarial role and does not oppose or support either the applicant or any intervenor. Board counsel is available to assist all parties, especially those not represented by a lawyer.

Board Staff

The NEB staff works under the direction of the hearing panel to advise panel members on technical matters. Personnel at a hearing may include engineers, geologists, environmentalists, economists or accountants, depending on the nature of the case.

Hearing Process Officer

The hearing process officer is the court clerk, who is in charge of all physical arrangements for a hearing. He or she receives and records all exhibits, gives the oath to witnesses, schedules simultaneous translation when necessary and generally contributes to the smooth functioning of the hearing.

Court Reporters

The Board has contracted a private firm to provide verbatim transcripts of all hearings. A transcript of the day's proceedings is usually available later that same day. All testimonies are recorded in the official language in which they were given.

Photocopying of transcripts is prohibited, but copies may be purchased from the court reporter. Copies are also kept on file for viewing in the Board's library in Calgary.

The Hearing

The Board's public hearing process is similar to that of a court. Testimony is provided by witnesses under oath who are subject to cross-examination. Most parties are

represented by lawyers, although it is by no means essential.

All hearings are open to the public. However, the use of tape recorders or any sound recordings within the hearing room is strictly prohibited. Photographs and video recording (without sound) are allowed, but only with the consent of the presiding Board member, and only for a limited time (usually at the start of the day or after a break).

To reduce the hearing time, each party may file its evidence, including the questions for its own witnesses (known as its evidence-in-chief), before the start of the hearing. A pre-hearing conference may also be held to resolve procedural questions and further reduce hearing time.

Prior to the hearing, the Board establishes an order by which each participant will be called upon at the hearing.

Most public hearings follow a relatively standard procedure. The hearing begins with the presiding Board member making a brief opening statement. Next, each participant introduces him or herself, and states who he or she represents. At this time, parties may raise any matters they wish to have considered before evidence is presented.

Next, the applicant presents its case. When the evidence-in-chief has already been submitted in writing, each witness for the applicant adopts his or her pre-filed testimony and is then available for cross-examination. Each intervenor is given the chance to question the witness, with final cross-examination usually performed by Board counsel. As in a courtroom, the applicant is given a final opportunity to re-examine its witness. The members of the Board may pose questions at any time.

After the applicant has finished presenting its case, the process is repeated for each intervenor who has provided evidence. The applicant leads off the cross-examination of an intervenor's witness, followed by each of the other intervenors, and finally Board counsel. Once again, each intervenor is given the chance to re-examine its own witness after cross-examination is completed.

Each party having stated its case, the applicant is given a final chance to introduce any new evidence to rebut that of the intervenors.

The final stage of the hearing, known as the argument, allows each party to summarize its position. The applicant presents its argument first and is also given a chance at the end to rebut the other arguments. The presiding Board member then officially closes the hearing.

It is possible for arguments to be written rather than oral. A reasonable length of time will be allowed for preparation of written arguments if this method is adopted by the hearing panel.

The Decision

Although the decision can be rendered immediately following the close of the hearing, most often the Board takes time for deliberation. The outcome is announced in a document called *Reasons for Decision*. A news release is also issued. Both are published in French and English.

Intervenors' Costs

In general, parties making representations at a public hearing being conducted by the Board must do so at their own expense. The Board does not have the authority to award costs against an applicant, with one exception under Section 39 of the *NEB Act*. The exception involves **only** hearings on the **detailed routing** of a pipeline. (See Information Bulletin No. 1, *Pipeline Route Approval Procedures*.) When the detailed route is opposed by landowners who are directly or indirectly affected by it, the Board has the authority to award landowners reasonable costs of participating in the

hearings. These costs are paid by the company that intends to build the line.

Governor-in-Council Approvals

Export licences and certificates authorizing construction of pipelines and international power lines require the approval of the Governor in Council. The Board's decision is either approved or rejected by the Governor in Council, but cannot be altered.

A denial of an application by the Board is final and is not subject to Governor-in-Council approval. NEB decisions do not require Governor-in-Council approval.

Reviews of Decisions

Under Section 21 of the *NEB Act*, the Board may review or alter any decision it has made. Interested parties may apply for a review, but only if specific requirements set out in the *NEB Rules of Practice and Procedure* are met. If a review is warranted, the Board may hold another public hearing or call for submissions.

Once again, any changes to a licence or certificate resulting from a review must be approved by the Governor in Council.

Appeals

Board decisions may be appealed to the Federal Court of Canada but only on a point of law or jurisdiction. Permission to appeal must be obtained by applying to the Court within thirty days after the Board's decision is made public, unless the Court grants an extension.

Federal Court decisions can be appealed, with leave (i.e. prior permission), to the Supreme Court of Canada.

APPENDIX I**Step-by-step Summary of the Hearing Process**

The following is a summary of the steps involved in a typical public hearing conducted by the Board.

The Preparation for the Hearing

1. A company files its application with the Secretary of the Board. The Board issues a news release to announce the filing.
2. Prior to issuing a hearing order, the Board examines the application to determine whether it is sufficiently complete to set a hearing date. The Board may issue letters requesting information to clarify certain points or to obtain further information. (Note: intervenors are permitted to do likewise after they officially become participants in the proceeding.)
3. When all required information has been received, the Board issues a hearing order. It contains directions on procedure, including a date and location for the hearing. It provides the deadlines for the filing of interventions, letters of comment and evidence by the applicant and intervenors. The order also directs the applicant to publish a notice of hearing in certain specified newspapers and to serve a copy of the application and hearing order on certain parties. In most cases, the order also provides a list of issues to be considered at the hearing. The Board issues a news release simultaneously with the hearing order.
4. Intervenors file their written interventions with the Board and serve them on the applicant by the time limit specified in the hearing order. Intervenors may suggest additional issues to be considered at the hearing.
5. The Board issues a list of all intervenors and their addresses to everyone involved.
6. The applicant serves its application on each intervenor.

7. Intervenors serve their interventions on all other parties.
8. The applicant provides the Board and intervenors with copies of its written direct evidence by the time limit specified in the hearing order.
9. Information requests may be made of the applicant by the intervenors, and the applicant must reply.
10. Subsequently, intervenors provide the Board, the applicant, and all other interested parties with copies of their written direct evidence.
11. Letters of comment are filed with the Board and served on the applicant.
12. The Board serves the letters of comment on all other parties.
13. Information requests may be made of the intervenors by the applicant and other parties to the proceeding, and the intervenors must reply.
14. Throughout, the Board can issue information requests to the applicant or to the intervenors.

The Hearing

15. At the beginning of the hearing, participants obtain a pre-numbered exhibit list and the order of appearances from the hearing process officer.
16. The presiding member of the hearing panel gives an opening statement.
17. The applicant registers its appearance and enters the application, written direct evidence and all supporting documents as exhibits on the record.
18. Intervenors register their appearances, according to the order of appearances established by the Board prior to the hearing, and enter their interventions, written direct evidence and any supporting documents as exhibits on the record.
19. The Board deals with any preliminary matters or motions.

20. The applicant presents its direct evidence (examination-in-chief). The evidence is usually divided into separate subject matters with a panel of expert witnesses addressing each subject area. All witnesses are sworn or affirmed.
21. Intervenors cross-examine the applicant's witnesses according to the order of appearances.
22. Board counsel examines the applicant's witnesses. The members of the Board on the hearing panel may ask questions of the witnesses at any time.
23. The applicant's counsel may then re-examine the witnesses.
24. Intervenors present their direct evidence according to the order of appearances.
25. The applicant and other intervenors cross-examine the intervenors' witnesses.
26. Board counsel and Board Members may ask questions of the intervenor's witnesses.
27. The intervenor may then re-examine his or her witness.
28. The applicant may present reply evidence pertaining to new matters raised in cross-examination.
29. The applicant presents its argument.
30. Intervenors present their arguments according to the order of appearances.
31. The applicant presents its reply argument.
32. The hearing concludes and the record of the proceeding closes. The Board considers no further submissions regarding the application once the record is closed.

The Decision

33. The Board makes its decision and prepares its Reasons for Decision.
34. The Board releases the Reasons for Decision to the applicant, all interested parties in the proceedings, and persons on the Board's mailing list. The Reasons for Decision may be issued before or after any required approvals by the Governor in Council, depending upon the particular requirements of legislation. In addition, the Board issues a news release outlining its decision.