



December 2, 2024

VIA RESS

Ontario Energy Board
P.O. Box 2319,
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4
Attention: Registrar

Dear Ms. Marconi,

Re: Generic Proceeding – Cost of Capital and Other Matters
Board File No.: EB-2024-0063

We write on behalf of Minogi Corp. (“**Minogi**”) and Three Fires Group (“**Three Fires**”) to seek an order permitting Minogi and Three Fires to file sur-reply submissions in response to the reply submissions of OEB Staff (“**Reply Submissions**”), as well as to a lesser extent the reply submissions of the Consumers Council of Canada.

All parties to this proceeding had access to a record that made clear the salience of Indigenous issues, and in particular the capital barriers that inhibit greater Indigenous participation in Ontario’s energy sector. In fact, Minogi and Three Fires undertook extensive efforts to generate a record sufficient for the Board to consider and grant effective relief in relation to these issues, as well as on questions relating to reconciliation more broadly.

This proceeding’s resulting record therefore includes:

- The Board’s issues list, which Issue #1(b) asks: “Should the approach to setting cost of capital parameters and capital structure differ depending on: ... b) The different types of ownership (e.g., municipal, private, public, co-operative, not for profit, **Indigenous/utility partnership**, etc.);
- The interrogatories of Minogi and Three Fires, as well as the interrogatories of Caldwell First Nation (“**CFN**”) and Mississaugas of the Credit First Nation (“**MCFN**”), which focused almost exclusively on issues relating to barriers to Indigenous equity participation, as well as Indigenous engagement in this proceeding;
- Minogi’s August 16 letter to the Board, which indicated that its anticipated approach in this proceeding would focus on the ways cost of capital can present unique challenges for First Nations interested in more active participation in Ontario’s energy sector, as well as its belief that First Nation perspectives have historically been disadvantaged or excluded from Ontario’s most important policy conversations;

- The 30-minute opening statement of Minogi and Three Fires, which transparently signalled that they would raise these same issues, as well as identify specific barriers to Indigenous participation, through cross-examination and in their written submissions;
- The approximately two hours of cross-examination of the four experts, which carried forward the themes of the opening statement.

Context is also important, in that this proceeding takes place within a growing societal recognition of the importance for all concerned parties to advance reconciliation, both within the energy sector and more generally. Minogi and Three Fires undertook significant efforts towards demonstrating these trends at the hearing, primarily through the cross-examination of Dr. Cleary.

Notwithstanding the availability of this record and the existence of this developing societal context, OEB Staff's original submissions ("**Original Submissions**") devote a total of only one page to questions of Indigenous equity participation, much of it summarizing the central positions of Minogi and Three Fires as articulated in their opening statement.¹ The submissions correctly identify the central positions of Minogi and Three Fires, then proceed to disagree with those positions in a few short sentences without further explanation or argument.

The length and detail of OEB Staff's Reply Submissions on questions relating to Indigenous equity participation stand in almost total contrast to the Original Submissions. The Reply Submissions devote six pages² to the general issue of how this proceeding should consider and potentially facilitate Indigenous equity participation in Ontario's energy sector. It includes arguments relating to the nature of the duty to consult, whether the experts' failure to address questions relating to Indigenous participation constitutes a shortcoming in their reports, the merits of proposed measures to reduce barriers to Indigenous participation in Ontario's energy sector, and the extent to which the current proceeding should be expected to address issues relating to reconciliation.

The case law is extensive in support of the proposition that a proper reply "is limited to issues that a party had no opportunity to deal with, or which could not reasonably have been anticipated".³ OEB Staff's Reply Submissions fail to satisfy this threshold for a proper reply, because:

- the core issues that the submissions address were each raised repeatedly, substantively, and transparently in advance of the Original Submissions; and
- recent statements from the Ontario Government and its energy advisory panels underscore that the goals and imperatives of reconciliation (as well as the honour of the Crown) are not solely the responsibility of Indigenous peoples. In the context of this growing recognition, there is no reason why OEB Staff could not have engaged more meaningfully on issues relating to reconciliation in its Original Submissions (or even, for that matter, at an earlier stage of the proceeding through its expert or cross-examinations).

¹ OEB Staff's Original Submissions, at pages 3 and 48.

² OEB Staff's Reply Submissions, at pages 14-19.

³ See for example [Deegan v. Canada \(Attorney General\)](#), 2019 FC 960 (CanLII), [2020] 1 FCR 411, at para 121.

On the basis of the above, Minogi and Three Fires request that the Indigenous intervenors⁴ be granted the opportunity to deliver a sur-reply, responding primarily to OEB Staff's Reply Submissions.⁵ Minogi and Three Fires believe that this approach will help to ensure that the Board has access to a full range of perspectives in its consideration of an extremely important set of issues.

In the alternative, Minogi and Three Fires request an order from the Board striking from the record the sections of the Reply Submissions under the heading "First Nations Concerns", which are set out at pages 14-19 of the submissions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Nick Daube', written in a cursive style.

Nicholas Daube

c. Dr. Don Richardson, Minogi
Reggie George, Three Fires

⁴ Minogi and Three Fires are uncertain as of the time of writing as to whether CFN and MCFN also seek a sur-reply.

⁵ Minogi and Three Fires would also likely use the opportunity to respond to a small number of points on page 33-34 of the Reply Submission of Consumers Council of Canada, namely CCC's policy comments concerning single-asset transmitters and the consequences of applying WACC to CWIP balances.