



Ontario
Energy
Board | Commission
de l'énergie
de l'Ontario

DECISION AND ORDER ON ADDITIONAL SUBMISSION

EB-2024-0063

A generic proceeding commenced by the Ontario Energy Board on its own motion to consider the cost of capital parameters and deemed capital structure to be used to set rates

BEFORE: Michael Janigan
Presiding Commissioner

Lynne Anderson
Chief Commissioner

Pankaj Sardana
Commissioner

December 19, 2024

OVERVIEW

On December 2, 2024, intervenors Minogi Corp. (Minogi) and Three Fires Group (Three Fires) filed a letter (Letter) with the Ontario Energy Board (OEB) seeking an order permitting them to file sur-reply submissions in response to certain reply submissions filed by OEB staff, and to a lesser extent certain reply submissions from the Consumers Council of Canada.

Minogi and Three Fires state that OEB staff's reply arguments failed to satisfy the threshold for proper reply, in that their reply arguments could have and should have been raised in OEB staff's initial submission.

For the reasons set out below, the OEB does not accept that OEB staff's reply submission was improper. However, the OEB will allow Minogi and Three Fires an opportunity to file an additional submission on the single limited issue of the duty to consult and the Aboriginal or Treaty rights that could be impacted by this proceeding. The OEB is also providing this same opportunity to Caldwell First Nation (CFN) and Mississaugas of the Credit First Nation (MCFN), who also filed a submission in this proceeding.

Analysis and decision regarding sur-reply

As is the OEB's common practice in proceedings commenced on the OEB's motion, the OEB allows every party (and OEB staff) two rounds of written final submissions: initial written submissions, and subsequently, reply submissions providing an opportunity for any party to respond to the initial submissions of any other party. Parties may not be fully aware of what the positions of other parties will be until after the initial submissions.

As Minogi and Three Fires note in the Letter, proper reply argument "is limited to issues that a party had no opportunity to deal with, or which could not reasonably have been anticipated."¹ Although parties should make their best efforts to address the known positions of other parties in their initial argument, they can only do so to the extent a position has already been clearly articulated on the record. Parties cannot be expected to provide detailed responses to positions they have not yet seen in full.

It was apparent to parties and OEB staff that Minogi and Three Fires were generally interested in finding ways to support First Nations equity participation in energy projects. They also sought to address the historic exclusion of First Nations from energy planning and intended to address in some way the duty to consult (or other "rights and legal entitlements"). Nevertheless, prior to the filing of their initial argument their specific position on each of these issues remained unclear. In some areas, Minogi and Three Fires provided a preview of what their submissions would be, such as their proposals to

reduce barriers to First Nations investors in infrastructure projects, and encouraging the OEB to adopt an approach of concurrent cost recovery. OEB staff addressed these positions in its initial submissions and at least partially disagreed with Minogi and Three Fires' positions on these issues, based on the information OEB staff had at that time.

The OEB acknowledges that OEB staff's submissions on certain First Nations issues are more detailed in their reply argument. However, in the context of this proceeding and the record as it stood at the time, the OEB does not accept that OEB staff's reply submissions amount to improper reply. For the most part they were provided in direct response to the initial submissions filed by Minogi and Three Fires (or other First Nations intervenors). Even if certain areas could have been covered in OEB staff's initial submissions (for example the observation that this is a generic proceeding on the cost of capital, and is not the only avenue, or for some matters the most appropriate avenue, through which Indigenous concerns can be considered), this was in response to the initial submission by Minogi and Three Fires and therefore does not amount to improper reply.

Opportunity for further submission

Minogi and Three Fires provided significant argument in their initial submissions regarding the duty to consult, including a strong suggestion that the duty had been triggered by this proceeding. The potential affect of this proceeding on Aboriginal and Treaty rights was also raised in the intervention requests by Minogi and Three Fires. Furthermore, CFN and MCFN asserted in their submission that Aboriginal and Treaty rights "will be affected by the outcomes and policies adopted by the Board as part of this Proceeding". To this point in the proceeding, neither Minogi and Three Fires nor CFN and MCFN have identified any specific Aboriginal or Treaty right held by the First Nations they represent that might be adversely affected by this proceeding.

The OEB appreciates that strategic, higher-level decisions can in some cases trigger the duty to consult where they set the groundwork for future impacts to Aboriginal or Treaty rights. However, there must still be some nexus between the decision in question and a potential impact on an identified Aboriginal or Treaty right.

Potential impacts to Aboriginal or Treaty rights is something that the OEB takes very seriously, and the OEB is therefore granting Minogi and Three Fires and CFN and MCFN an opportunity to file an additional submission related to whether and how the duty to consult is triggered in this generic proceeding on the cost of capital, with reference to the specific Aboriginal or Treaty rights held by the First Nations they represent that could be adversely impacted.

Any such additional submission that Minogi and Three Fires and CFN and MCFN may wish to file must be limited to this single issue and be filed by January 6, 2025.

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. Minogi Corp., Three Fires Group, Caldwell First Nation and Mississaugas of the Credit First Nation may, by **January 6, 2025**, file further submissions on the specific Aboriginal or Treaty rights held by the First Nations they represent that could be adversely impacted by this generic proceeding.

Parties are responsible for ensuring that any documents they file with the OEB, such as applicant and intervenor evidence, interrogatories and responses to interrogatories or any other type of document, **do not include personal information** (as that phrase is defined in the *Freedom of Information and Protection of Privacy Act*), unless filed in accordance with rule 9A of the OEB's [Rules of Practice and Procedure](#).

Please quote file number, **EB-2024-0063** for all materials filed and submit them in searchable/unrestricted PDF format with a digital signature through the [OEB's online filing portal](#).

- Filings should clearly state the sender's name, postal address, telephone number and e-mail address.
- Please use the document naming conventions and document submission standards outlined in the [Regulatory Electronic Submission System \(RESS\) Document Guidelines](#) found at the [File documents online page](#) on the OEB's website.
- Parties are encouraged to use RESS. Those who have not yet [set up an account](#), or require assistance using the online filing portal can contact registrar@oeb.ca for assistance.
- Cost claims are filed through the OEB's online filing portal. Please visit the [File documents online page](#) of the OEB's website for more information. All participants shall download a copy of their submitted cost claim and serve it on all required parties as per the [Practice Direction on Cost Awards](#).

All communications should be directed to the attention of the Registrar at the address below and be received by end of business, 4:45 p.m., on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Fiona O'Connell, at fiona.oconnell@oeb.ca and OEB Counsel, Ian Richler, at ian.richler@oeb.ca

DATED at Toronto December 19, 2024

ONTARIO ENERGY BOARD

Nancy Marconi
Registrar