ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule. B, as amended;

AND IN THE MATTER OF 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.

EB-2024-0063

SUPPLEMENTARY WRITTEN SUBMISSIONS OF

MINOGI CORP.

AND

THREE FIRES GROUP INC.

January 6, 2025

Overview

1. We are counsel to Three Fires Group Inc. ("**Three Fires**" or "**TFG**") and Minogi Corp. ("**Minogi**") in the Ontario Energy Board's (the "**OEB**" or the "**Board**") generic proceeding on cost of capital and other matters (the "**Proceeding**").

2. These Supplementary Written Submissions are limited in scope, consistent with the Board's Decision and Order on Additional Submission, dated December 19, 2024. They respond to the Board's order that Three Fires, Minogi, Caldwell First Nation, and Mississaugas of the Credit First Nation may "file further submissions on the specific Aboriginal or Treaty Rights held by the First Nations they represent that could be adversely impact by this generic proceeding."

3. Three Fires and Minogi welcome the opportunity to address an issue of specific concern to the Board. Accordingly, they provide these supplementary submissions, which are structured to demonstrate the following central points:

   (a) This generic proceeding will have significant and potentially adverse consequences for First Nations in terms of the perpetuation of existing barriers to entry into Ontario's energy sector and the ability to assume more meaningful leadership and partnership roles in it.

   (b) The extent to which this Proceeding advances the ability of First Nations to participate in key project decision-making from the position of leadership and equity participation in energy projects will have significant implications for the nature of, and adverse impacts from, development that occurs on their reserve and traditional territories. In particular, the Board's decisions in this proceeding will have significant consequences for the extent to which First Nations self-determine what is developed on their traditional territory, which Aboriginal rights may be impacted and how, and who is at the table to influence which projects are developed (or not) and proposed (or not), as well as how economic benefits arising from initiatives that ultimately advance are shared.

   (c) Future proceedings, such as leave to construct proceedings, will of course also be influential to these interests, but they can never fully offset a shortfall in Indigenous

leadership and equity participation that a failure to address Indigenous considerations in this Proceeding would perpetuate. Nor will those future proceedings be in a position to reverse the adverse impacts of such a shortfall in terms of its impact on the nature of development that will take place on Indigenous traditional territories in Ontario over the coming years.

(d) In short, this proceeding will have a direct and meaningful impact on the future establishment and operation of energy infrastructure in Ontario, and particularly on the construction of significant new projects, necessarily producing potentially adverse consequences for the traditional territories where proposed projects are located, and thereby on the Aboriginal and Treaty rights of First Nations in terms of their ability to use the land and resources in question.

(e) The Aboriginal rights specifically implicated by this proceeding include the right to hunt, fish, and trap for food, social, and ceremonial purposes, water and subsurface water rights, as well as economic rights and benefits closely related to and derivative from these other Aboriginal rights both on and around traditional Aboriginal territories. The proceeding also implicates Aboriginal archaeological and cultural rights, including rights relating to archaeological and culturally significant sites. Finally, it also implicates subsurface land, subsurface water rights, and atmospheric rights and benefits that are *sui generis* and not relinquished in applicable treaties.

(f) The duty to consult arises in this Proceeding even though it occurs at a relatively early stage of the chain of decisions and conduct that will ultimately lead to infrastructure development and operations on the reserves and traditional territories of First Nations. The final section to these submissions sets out the applicable jurisprudence that demonstrates that the Board must implement the duty to consult, given its direct impact on Aboriginal and Treaty rights and given the fact that the Proceeding constitutes the kind of preliminary strategic or higher-level decision-making that the jurisprudence recognizes as giving rise to the duty.

4. Three Fires and Minogi wish to emphasize that their submissions relating to the duty to consult, in both these and their Original Submissions,[1] constitute important support in favour of the specific relief they have requested, but the relevant jurisprudence stands alongside the other examples that Three Fires and Minogi have provided of the policy, public interest, and legal frameworks that provide the basis for their three central requests for relief, in addition to requiring increasing levels of meaningful action in support of economic reconciliation in Ontario's energy sector and beyond.

The Significance of This Generic Proceeding for First Nations

5. This generic hearing has important consequences for many of the energy sector's defining elements. The Board's decision will influence questions such as access to capital and the consequent ownership composition of the sector's key actors, the profitability and viability of potential development projects, how earnings are distributed, the existence or elimination of barriers to entry in terms of ownership and decision-making opportunities, the ability of actors not traditionally party to energy sector ownership to maintain viable operations, and ultimately the fundamental question of which infrastructure projects are more or less likely to be conceived of, developed, proposed, and approved.

6. The specific effects of this hearing for Indigenous peoples, who have experienced historical exclusion from leadership positions and equity participation in Ontario's energy sector, will be equally significant.

7. For example, the very first question in this Proceeding's Issues List asks, among other things, whether the approach to setting cost of capital parameters and capital structure should differ depending on the type of ownership, such as a utility/Indigenous partnership.[2]

8. Three Fires and Minogi's Original Submissions similarly identify a series of existing barriers to more meaningful Indigenous participation Ontario's sector relating to other issues that the Board has identified for the purposes of consideration in this hearing. How the Board

[1] Submitted November 7, 2024.
[2] See Issues List, approved April 22, 2024. The Board indicated in its letter approving the Issues List that "all parties had come to an agreement regarding the proposed issues list", providing its approval subject to, among other things, the usage of "Indigenous" instead of First Nations. The four First Nations intervenors had not yet intervened in this proceeding at the time that the Board approved the Issues List, but Minogi and Three Fires nevertheless view Issue #1 as an early (and positive) example of the recognition that this proceeding implicates questions that will affect the nature of Indigenous ownership, leadership, and general participation in Ontario's energy sector.

addresses these issues and the related concerns and considerations that Three Fires and Minogi have raised will also produce immediate effects for the nature and extent of Indigenous participation in Ontario's energy sector.

9. The role of Indigenous peoples in Ontario's energy sector, and whether existing barriers to increasing that participation persist, carry significant implications in a variety of respects, including for the nature of infrastructure development that will occur on the reserves and traditional territories of First Nations. This proceeding will impact the extent to which First Nations are at the decision-making tables to help decide, among other things, which projects are developed and proposed (or are never proposed) to the Board for approval, later questions of how projects and resources are developed once approvals are received, and enduring questions such as how earnings arising from these projects are shared or how projects will engage with local First Nation communities.

10. The Original Submissions of Three Fires and Minogi underscored that there is widespread recognition of these significant effects. Three Fires and Minogi provided extensive references from sources such as the Electrification and Energy Transition Panel report, as well as the Ontario Government's document entitled "Ontario's Affordable Energy Future: The Pressing Case for More Power", which underscored the importance of supporting increased Indigenous leadership and equity participation, in part due to the anticipated influence that Indigenous participation will have for future energy development.[3]

11. The ability for this Proceeding to influence questions relating to Indigenous leadership and participation in the sector is extensive. The Board's Generic Hearings Protocol stipulates that "the outcome of a generic hearing is binding on the regulated entities that are the subject of any ensuing order."[4] This binding effect will presumably last for as long as the Board's decision resulting from this generic hearing remains in place, which in the case of the Board's existing policy, of course, lasted for a period of longer than 15 years.

12. The impact of the Board's decision is also compounded by its timing in relation to Ontario's energy transition, which only amplifies the already significant effect the Proceeding would

[3] See, for example, pages 13-17 of the Original Submissions, as well as pages 20-21, which detail Dr. Cleary's evidence on similar, related points.
[4] Ontario Energy Board Generic Hearings Protocol, page 1: https://www.oeb.ca/sites/default/files/uploads/documents/regulatorycodes/2022-12/Generic-Hearings-Protocol.pdf.

otherwise have. As the Ontario Government recently noted in its Ontario's Affordable Energy Future report, Ontario's Independent Electricity System Operator forecasts an increase in electricity demand alone by 75% by 2050.[5] This increased demand will almost certainly mean massive investments and infrastructure development in Ontario's energy sector.

13. These developments will, of course, affect all of Ontario, but they produce consequences of particular concern to First Nations. Much of Ontario's anticipated infrastructure development will take place on or otherwise impact the reserve lands and traditional territories of First Nations, as Ontario's Electrification and Energy Transition Report (and others) have recognized:

> Most of the proposed solutions for achieving a clean energy economy rely on using Indigenous lands and resources to build clean and renewable energy infrastructure and extraction projects.[6]

14. The rapid pace at which this transition will take place also makes it imperative for First Nations to participate at the earliest stages of decision-making if they are to effectively influence outcomes such as which projects are developed and proposed, as well as how they proceed once approved. The Ontario Government has called for planning and regulatory frameworks that will support rapid development while promoting Indigenous leadership and participation in energy projects:

> This is a complex undertaking that will require a comprehensive view of how all energy sources are used across the economy. The pace of change has accelerated, and this is likely to continue as Ontario becomes home to new technologies and growing industries. Ontario must also plan for localized needs in certain communities and regions, changing the way power must flow across the province.
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> To meet this challenge, Ontario needs planning and regulatory frameworks that support building infrastructure and resources quickly and cost-effectively, and in a way that continues to promote Indigenous leadership and participation in energy projects. There is also a need to accelerate processes for building out the last mile to connect new homes and businesses supported by growth-oriented energy agencies to keep Ontario open for business.[7] (Emphasis added.)

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[5] "Ontario's Affordable Energy Future: The Pressing Case for More Power", published October 22, 2024, updated November 4, 2024, at page 3, located at https://www.ontario.ca/page/ontarios-affordable-energy-future-pressing-case-more-power.
[6] EETP Report, page 25 (TFG Supplementary Compendium for Panel 4, page 107). See also LEI Cross-Examination, Transcript Volume 1, page 154.
[7] "Ontario's Affordable Energy Future: The Pressing Case for More Power", page 19.

15. In short, while this Proceeding even in more routine circumstances would produce important consequences for First Nations and their ability to participate more meaningfully in the energy sector, the compounding effect and accelerating pace of the energy transition mean that the Board's decisions in this generic proceeding on questions that relate to Indigenous participation in the energy sector, as well as existing barriers to entry, will prove even more consequential than would otherwise be the case in terms of the ability of First Nations to influence decisions relating to infrastructure development on their reserve lands and traditional territories, as well as share in the economic benefits that arise from that development.

This Proceeding Implicates Aboriginal Rights to Use Land and Resources

16. As stated above, this generic proceeding will produce significant consequences for how infrastructure development proceeds and affects the lands and resources on Indigenous reserves and traditional territories, in part because this proceeding will influence whether First Nations are able to exercise improved levels of equity participation and project partnership, participate more meaningfully in decision-making relating to project development and execution (including which projects are proposed or not proposed to the Board for future consideration), and share in the resulting economic benefits.

17. The previous section to these submissions demonstrated that these questions relating to equity participation and ownership composition that this Proceeding will address will have a direct and meaningful impact on the future establishment and operation of energy infrastructure in Ontario, and particularly on the construction of significant new projects, necessarily producing consequences for the traditional territories where proposed projects are located.

18. These effects entail a direct impact on the Aboriginal and Treaty rights of First Nations in terms of their ability to use the land and resources in question.

19. More specifically, these effects implicate the related but more specific Aboriginal rights to hunt, fish, and trap for food, social, and ceremonial purposes, water and subsurface water rights, as well as economic rights and benefits closely related to and derivative from these

other Aboriginal rights, all of which are sufficient to give rise to a duty to consult.[8] Hunting rights, for example, may be negatively affected by not having Indigenous equity participation at the time of route selection. Fishing and ceremonial rights, to take further examples, may be similarly negatively affected, or may be negatively impacted by the absence of Indigenous equity partners who employ a seven-generation approach at the planning and financing stages.

20. Three Fires and Minogi similarly assert that this proceeding and its direct influence on the shape of future energy infrastructure development also implicate Aboriginal archaeological and cultural rights, including rights relating to archaeological and culturally significant sites.[9] Archeological artifacts and burial grounds may be negatively affected by the absence of traditional Indigenous ecological knowledge from a project's ownership structure at the earliest stages of development, then throughout the lifetime of a project's operation.

21. Finally, Three Fires and Minogi assert that this Proceeding will produce similar consequences for their Treaty rights arising from subsurface land, subsurface water rights, and atmospheric rights and benefits that are *sui generis* and not relinquished in applicable treaties.

22. Three Fires and Minogi anticipate that the full range of these constitutional entitlements will only become more pronounced, both for the Nations that they represent and for other First Nations located in Ontario, as the full scale of infrastructure development relating to the energy transition advances, with increasing impacts on Indigenous reserve lands, traditional territories, and related resource claims.

Sufficient Nexus Exists to Give Rise to the Duty to Consult

23. In this final section, Three Fires and Minogi address the concern raised in submissions from OEB Staff[10] and in the Board's Decision and Order on Additional Submission of whether a

[8] *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R v Van der Peet*, [1996] 2 SCR 507; *Ermineskin Cree Nation v. Canada (Environment and Climate Change)*, 2021 FC 758, at para 8 and 105, 109; *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 ("**COTFN**").
[9] See, for example, COTFN, in particular at para 6, 7, and 53.
[10] OEB Staff Reply Submission, page 15.

sufficient nexus exists "between the decision in question and a potential impact on an identified Aboriginal or Treaty right"[11] so as to ground the duty to consult.

24. As the Board recognizes in its Decision and Order on Additional Submission, "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."[12]

25. The Supreme Court's decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*[13] confirms this position that strategic, higher-level decisions can produce the kind of potential for adverse impact sufficient to trigger the duty to consult, since such decisions may "set the stage" for further decisions that produce adverse impacts on Aboriginal rights:

> Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights.[14]
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> …
>
> **Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right**. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, **high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on lands and resources"**. **This is because such structural changes to the resources management may set the stage for further decisions that will have a direct adverse impact on land and resources**. For example, a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. This is an adverse impact: see Haida Nation. [15]
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> (Citations omitted.)

26. The Supreme Court confirmed in the same case that a "generous, purposive approach" is appropriate in the assessment of whether Crown conduct may adversely impact an Aboriginal claim or right:

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[11] Decision and Order on Additional Submission, Page 3.
[12] Decision and Order on Additional Submission, Page 3.
[13] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 ("***Carrier Sekani***")
[14] *Carrier Sekani,* para 44.
[15] *Carrier Sekani,* para 47. See also *Assn. of Iroquois and Allied Indians v. Ontario (Minister of Environment, Conservation and Parks),* 2024 ONCA 436 ("***Assn. of Iroquois***"), para 81-84.

> The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. **The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights**. Past wrongs, including previous breaches of the duty to consult, do not suffice.
>
> **Again, a generous, purposive approach to this element is in order, given that the doctrine's purpose, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown**" (citing *Haida Nation*). Mere speculative impacts, however, will not suffice. As stated in *R. v. Douglas*, there must an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.[16]
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> (Emphasis added.) (Citation references omitted.)

27. The Supreme Court's endorsement of a generous, purposive approach that recognizes that strategic or high-level decisions may raise the potential for adverse impacts sufficient to trigger the duty to consult is consistent means that courts will recognize the duty at an earlier stage in a series of decisions, rather than wait until options in terms of the impact on the exercise of Aboriginal rights have been limited. As the Federal Court has recognized, consultation must take place at the time of important preliminary decisions if consultations are to be meaningful:

> If it is to be meaningful, consultation cannot be postponed until the last and final point in a series of decisions. Once important preliminary decisions have been made there may well be "a clear momentum" to move forward with a particular course of action: see *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management),* 2004 BCSC 1320, 34 B.C.L.R. (4th) 280 at para. 75. Such a momentum may develop even if the preliminary decisions are not legally binding on the parties.[17]

28. For the purposes of the current proceeding, an instructive elaboration on the application of the principles set out above is the recognition by the Court of Appeal for British Columbia in the *Chartrand* decision that early decisions that reduce an Indigenous community's ability to participate in decision-making relating to protected rights will trigger a duty to consult. The decisions in question removed private lands from the boundaries of the applicable tree farm licence and approved a forest stewardship plan, which established "the strategies,

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[16] *Carrier Sekani,* para 45-46. See also *Assn. of Iroquois*, para 77.
[17] *Sambaa K'e Dene First Nation v. Duncan*, 2012 FC 204, at para 165, citing *The Squamish Nation et al v. The Minister of Sustainable Resource Management et al,* 2004 BCSC 1320, para 74. See also *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, para 35.

standards, values and measures that will guide Western's forestry operations within the KFN Traditional Territory."[18]

29. The Court of Appeal confirmed the importance of consultations relating to these strategic decisions, notwithstanding the possibility of continuing consultations as specific forestry operations advanced:

> The evidence of adverse impact to the KFN was that the Decisions affected the regulatory regime in a manner that threatened to reduce the KFN's ability to participate in decision-making that would have an impact upon its access to land, its exercise of hunting and fishing rights and the protection of cedar trees. **In the circumstances, in my view, the KFN ought not to have been obliged to demonstrate any impact other than the reduction in its ongoing ability to affect policy. High-level decisions might be expected to have high-level effects. As the KFN argued, strategic-level decisions engage consultation with respect to how Aboriginal interests will be recognized and accommodated at the higher strategic level. It ought to have sufficed to show that the Private Land Removal Decision and the Forest Stewardship Plan Approval Decision would have an impact upon decision-making in relation to lands and resources over which the KFN was actively advancing claims**.
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> As the Court noted in *Wii'litswx #1*, **consultation at the high level of forest planning is as necessary as consultation at the operational level to protect Aboriginal interests**. In that case, Neilson J. (as she then was) noted at para. 163, that consultation at the operational level has not always been successful in minimizing the effect of logging on Aboriginal interests. At para. 186 she observed:
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> > The Supreme Court of Canada in *Haida* and *Taku* has made it clear that meaningful consultation and accommodation at the strategic level has an important role to play in achieving the ultimate constitutional goal of reconciliation, and **should not be supplanted by delegation to operational levels**.
>
> (Emphasis added.)[19]

30. The Court of Appeal for Ontario in its *Assn. of Iroquois* decision recently endorsed these principles from *Chartrand*), characterizing the principles as follows:

> However, Crown decisions or conduct need not have an "immediate impact" to trigger a duty to consult - it is sufficient for the decision or conduct to have a "potential for adverse impact". Thus, **strategic decisions that affect a regulatory regime in a manner that threatens to reduce an Indigenous community's ability to participate in decision-making that may have an impact on its protected rights will be subject to a duty to consult**.[20] (Citations omitted.) (Emphasis added.)

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[18] *Chartrand v. British Columbia (Forests, Lands and Natural Resource Operations),* 2015 BCCA 345 ("***Chartrand***"), para 4, 10-12, 15-20 and 35.
[19] *Chartrand,* para 70-71.
[20] *Assn. of Iroquois,* para 81, citing *Chartrand*.

31. *Chartrand* therefore reinforces that a higher-level, preliminary decision may exhibit the direct link to potential adverse impacts necessary to trigger a duty to consult, even if subsequent government conduct, such as more focused operational activity, may also trigger the duty in relation to the same or similar set of constitutional entitlements. This can be true in the policy context, such as in a generic proceeding like this one, where governing policy helps to shape and determine subsequent participants, decisions, and conduct, notwithstanding the fact that future proceedings (such as leave to construct proceedings) may also influence related matters without the ability to override or reverse the effects of this decision.

32. The principles from the *Chartrand* decision therefore find comfortable fit with the current generic proceeding, which will significantly impact the extent to which First Nations are able to participate in decision-making in relation to lands and resources, as well as related economic benefits, over which Three Fires and Minogi (as well as other First Nations) exercise constitutional claims.

33. In this way, the current proceeding is factually very different from the primary case upon which OEB Staff relies.[21] The court in *Buffalo River*[22] found that the decisions in question had no impact on the Aboriginal rights in question, and found that there could be no impact until such uncertain time as the government took further action.

34. In particular, the court held that the duty to consult did not arise because the permits in question related to subsurface rights, and therefore had no impact on the surface rights relevant to the applicable assertions of Aboriginal rights. According to the court, any risk to the relevant surface rights was "only lawfully possible if and once the Crown has granted a Permit-Holder access to the surface under the second-stage decision-making process. And, there is no suggestion that that is even contemplated—let alone occurring—at this juncture."[23]

35. Neither *Buffalo River,* nor the second case referenced in OEB Staff submissions, *Innu Nation*,[24] addresses the gatekeeping or barrier to entry questions that exist for First Nations

[21] OEB Staff Reply Submission, page 15.
[22] *Buffalo River Dene Nation v. Saskatchewan (Energy and Resources)*, 2015 SKCA ("***Buffalo River***").
[23] *Buffalo River,* para 89 and 105.
[24] *Innu Nation Inc. v. Canada (Crown-Indigenous Relations)*, 2024 FC 896.

in this hearing. As a result, Minogi and Three Fires submit that the cases are factually distinguishable (as it pertains to their result) from the current proceeding.

Concluding Remarks

36. In their Original Submissions, Three Fires and Minogi made the following observation:

> The OEB is one of the only entities that can enable Indigenous ownership in energy projects across Ontario, as well as ensure that Indigenous voices are at the table on the central policy and project-development questions that the energy sector faces.[25]

37. These supplementary submissions have elaborated on this original point in order to demonstrate how the Board's binding decisions in the specific context of this generic hearing will have a direct bearing on the future ability of First Nations to participate more meaningfully in Ontario's energy sector, and in a way that allows for the exercise of their Treaty and Aboriginal rights as they arise in relation to the significant development that will take place under the parameters and guidance that the Board sets in this hearing's final decisions.

38. Three Fires and Minogi respectfully request that the Board use the current opportunity to advance reconciliation and support Indigenous participation and leadership in the energy sector, recognizing that a decision to defer this opportunity would have a limiting effect on the ability of First Nations to exercise their Aboriginal and Treaty rights not capable of full rectification at a future date, for the reasons provided in both Three Fires and Minogi's current submissions and in their Original Submissions.

[25] Original Submissions, para 13.

ALL OF WHICH IS RESPECTFULLY
SUBMITTED THIS 6th day of January, 2025

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