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July 11, 2016

Filed on RESS and Sent via Courier

Kirsten Walli
Board Secretary
2300 Yonge Street, Suite 2700
Toronto, ON
M4P 1E4

Dear Ms. Walli:

Re: EB-2016-0004 – Generic Proceeding on Natural Gas Expansion

We are counsel to Anwaatin Inc. (**Anwaatin**) in the above-mentioned proceeding. Please find attached the reply submissions of Anwaatin, filed pursuant to Procedural Order No. 3 (May 30, 2016).

Should you have further questions on this matter, please do not hesitate to contact me.

Yours very truly,

Lisa (Elisabeth) DeMarco

Encl.

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15 (Sched. B);

AND IN THE MATTER OF an Application under the Ontario Energy Board's own motion to consider potential alternative approaches to recover costs of expanding natural gas service to communities that are not currently served.

EB-2016-0004

Anwaatin Inc.

REPLY SUBMISSIONS

July 11, 2016

INTRODUCTION

1. We are counsel to Anwaatin Inc. (**Anwaatin**) in this application under the Ontario Energy Board's (the **OEB's** or the **Board's**) own motion to consider potential alternative approaches to recover costs of expanding natural gas service to rural, remote, and *First Nations and Métis* communities that are not currently served.
2. Anwaatin's Reply Submissions relate predominantly to Issues 1, 2, 4, 5, 6 and 8 as set out in Procedural Orders No. 2 and No. 3, and reply predominantly to the Submissions of Board Staff, BOMA, Energy Probe, Northern Cross Energy, and Parkland Fuels Corporation.
3. These Reply Submissions are being made in a very dynamic and evolving legal context, with the Federal Court of Appeal releasing a decision (*Gitxaala Nation v Canada*, 2016 FCA 187, hereinafter **Gitxaala**) on the duty to consult (**DTC**) with First Nations on energy pipelines on June 30, 2016 – after Final Submissions and before Reply Submissions in this proceeding. The Gitxaala Decision was also shortly preceded by Canada's decision to become a signatory to the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**), reaffirming Canada's commitment to adopt and implement UNDRIP in accordance with the Canadian Constitution.¹
4. These two points of progress stand in marked contrast to the extremely regressive energy poverty conditions and complete lack of consideration that currently challenge the well-being of many of Canada's First Nations and Métis communities.

¹ *Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples*, Government of Canada, accessed July 11, 2016, online: < <http://news.gc.ca/web/article-en.do?nid=1063339> >.

5. Anwaatin's submissions are organized as follows:
- (a) Energy Poverty, DTC and the First Nations Context in Canada
 - (b) First Nations and the Definition of Community (Issue 1)
 - (c) OEB Jurisdiction (Issue 2)
 - (d) First Nations and Proposed Changes to the EBO 188 Criteria and Municipal Franchise Process (Issues 4,5, 6, and 8 and 9)

A. Energy Poverty, DTC and the First Nations Context in Canada

6. On May 10, 2016, Canada announced that it had become a full signatory, without qualification, to the UNDRIP, reaffirming Canada's commitment to adopt and implement UNDRIP in accordance with the Canadian Constitution.² This confirms Canada's commitment to a renewed, nation-to-nation relationship with Indigenous peoples, based on recognition of rights, respect, co-operation and partnership and committed Canada to engaging with Indigenous groups on how to implement UNDRIP's guiding principles.³
7. On June 30, 2016, the Federal Court of Appeal (**FCA**) released its decision in *Gitxaala Nation v Canada*, 2016 FCA 187, quashing the Federal Government's Order in Council to the National Energy Board approving the Northern Gateway Pipeline and the Certificates of Public Convenience and Necessity (**CPCN**) issued under it. Specifically, the FCA ruled that Canada had failed to fulfill its constitutional duty to consult with affected Aboriginal peoples in a manner consistent with the DTC as defined by the Supreme Court of Canada. The matter is now remitted to the Governor in Council for redetermination.

² *Ibid.*

³ *Ibid.*

8. In reaching this conclusion, it is noteworthy that the FCA identified that the goal behind the DTC is the honourable treatment of Canada's Aboriginal peoples and Canada's reconciliation with them. Anwaatin respectfully submits that these same goals should inform the Board's approach to the DTC in its criteria and determinations arising out of this generic proceeding, and that that should start with an express recognition of the extreme energy poverty conditions that First Nations are living in.

9. Anwaatin, through Dr. Richardson and Chief Sault, led extensive evidence on the extreme energy poverty conditions that the First Nations represented by Anwaatin are living in. The exorbitant winter heating rates, choices of whether to "heat or eat", and the resulting respiratory illnesses in many community members appear to have been lost on a number of intervenors, including BOMA, Energy Probe, and FRPO, which all argue that no change is required to facilitate rational natural gas expansion to rural, remote **and First Nations communities**.

10. In fact, Energy Probe asserted that no party had put forward *any* compelling evidence that change to the status quo was required.⁴ And BOMA went as far as to assert that certain Northern and remote communities were, in fact, "*prospering*", even in light of the Anwaatin evidence.⁵

11. Further, at least nine (9) intervenors⁶ failed to acknowledge the Board's express change to Issue 4 to intentionally include rural, remote **and First Nations** communities.

⁴ Energy Probe Argument, at 3, para 1.2.

⁵ BOMA Submissions at 17-18.

⁶ CPA, Energy Probe, Environmental Defence, Parkland Fuels Corporation, NOACC Coalition, South Bruce, VECC, and IGUA.

12. Moreover, despite Anwaatin's thorough cross examination of at least seven (7) parties⁷ on their consultations with First Nations in and around the proposed natural gas expansions related to this proceeding, virtually none of those parties addressed First Nations consultations in their final submissions.
13. Finally, one (1) intervenor, Parkland Fuels Corporation, paternalistically asserted to the Board what it deemed to be the "*real interest of municipal and First Nations participants in the hearing*".⁸
14. These statistics in this proceeding are very telling, and validate the "out of sight out of mind" challenges that Chief Sault highlighted. Certainly the submissions in this proceeding alone emphasize the need to expressly include First Nations consultation requirements, as submitted by Board Staff, in any method or procedure for natural gas expansions to rural, remote and First Nations communities.
15. In fact, Board Staff Submissions stand in prominent contrast to those of other intervenors in both the nature and extent of consideration provided to the issues raised by Anwaatin and MoCreebec.
16. Anwaatin is largely supportive of an approach similar to the Board's approach: (i) in the East-West Tie Line (ii) to prequalify potential franchise applicants through a prequalification process that includes First Nations and Métis participation and consultation (iii) to expressly include First Nations and Métis consultation requirements in RFI minimal requirements (iv) to treat grants available through the Ministry as contributions in aid in order to increase the PI of a project, prioritizing First Nations

⁷ EPCOR, South Bruce, OGA, CPA, Parkland Fuels, and VECC.

⁸ Parkland Fuels Corporation at 2, para 2(b).

communities experiencing energy poverty, and (v) to treat loans in a manner to support conversion costs, again prioritizing First Nations households experiencing energy poverty.

17. Board Staff questioned whether Anwaatin is asserting that the DTC applies to the OEB in this proceeding and stated that it is is unaware of any Aboriginal or Treaty rights related to the provision of natural gas.⁹ Anwaatin, does not and cannot purport to speak on behalf of all First Nations and Métis people in the province and its comments are expressly its own. While there may, in fact, be Aboriginal and Treaty rights related to the provision of natural gas, Anwaatin takes no position on this issue in this proceeding. Similarly, Anwaatin takes no position on the Board's view that this **generic** proceeding does not trigger the formal duty consult, but confirms that Anwaatin's participation has been consistent with providing input to assist the Board in formulating **generic** criteria to facilitate rational natural gas expansion to rural, remote and First Nations communities, particularly those in energy poverty.

B. First Nations and the Definition of "Community" (Issue 1)

18. In its Final Argument, Anwaatin submitted that First Nations must fall within the definition of "community" for the purposes of evaluating whether a rational natural gas service expansion should be undertaken. This is largely consistent with the Board Staff and Union 50 person criteria, but may differ in the context of specific First Nations and Métis communities. This distinction is small, in that any defined "community" will still be subject to the Board's generic expansion criteria, but particularly meaningful for First Nations, who have been historically and systemically prejudiced and discriminated against in maintaining their community status.

⁹ Board Staff Submissions at 39.

19. No other parties to this proceeding appear to be challenging the inclusion of all First Nations in the definition of “community”. Anwaatin therefore requests that the Board adjust the definition of “community” to expressly include First Nations and Métis accordingly.
20. Specifically, Anwaatin submits that the Board should define "community" to include First Nations, regardless of whether they meet a Board-mandated size threshold. Doing so would ensure that First Nations are no longer "out of sight, out of mind" but are instead fully and actively considered for community expansion projects.

C. OEB Jurisdiction (Issue 2)

21. Anwaatin generally supports Board Staff’s assessment of the law and the Board’s jurisdiction to broadly provide for just and reasonable rates related subsidies to facilitate rational natural expansion in a manner that is consistent with its mandate. Numerous parties submitted that the Board should not as a matter of policy, and legally cannot, authorize interutility cross-subsidies to fund natural gas distribution service expansion to communities that are currently unserved. Anwaatin respectfully disagrees and supports the submissions of Board Staff, VECC, and GreenField on this point.

D. First Nations and Proposed Changes to the EBO 188 Criteria and Municipal Franchise Process (Issues 4,5, 6, and 8 and 9)

22. As indicated in paragraphs 11 and 12, above, very few parties addressed First Nations issues in their submissions on Issue 4.
23. A number of parties argued to maintain the status quo and make no changes to the EBO 188 criteria. Northern Cross Energy asserted that the current rules prescribed by EBO 188

are “just and reasonable”.¹⁰ FRPO argued that there is no compelling reason for the Board to depart from the EBO 188 principle that existing customers should not subsidize new customers through higher rates as a result of the construction of financially unfeasible new distribution system projects.¹¹ Energy Probe argued that no parties in this proceeding had provided a compelling reason to deviate from the guidelines found in EBO-188.¹² BOMA argued that EBO-188 has “stood the test of time” and should not be altered.¹³

24. In fact, BOMA went further to argue that rural and remote communities had “prospered” despite the lack of access to natural gas.

*Many rural and remote communities have survived and prospered over the years heating with fuel oil, propane, coal, electricity, or wood*¹⁴

25. Anwaatin respectfully submits that these views, could not be more out of touch with the current realities of energy poverty and resulting strife in First Nations communities.
26. Specifically, each and all of the views by the parties set out in paragraphs 23 and 24, none of which adduced direct evidence in this proceeding, are directly controverted by the Anwaatin and MoCreebec evidence.
27. The Anwaatin communities are suffering from energy poverty. They are not “prospering”. This is not “just and reasonable”. Change is urgently required. EBO188, has not stood the

¹⁰ Northern Cross Energy Argument-in-Chief at 5:14-16.

¹¹ Final Submissions of Federation of Rental-housing Providers of Ontario in EB-2016-0004 (June 20, 2016) at 3.

¹² *The EBO 188 guidelines are a key component of [the Board's] mandate and the Board has done an excellent job in providing economic regulation of the gas sector. In Energy Probe's opinion, none of the parties involved in this proceeding, particularly the incumbent utilities, provided a compelling reason for what has significantly changed in the regulatory landscape that we should abandon this form of economic regulation and, instead, use utility bills as a source of funds for the social benefits that may arise out of the uneconomic expansions.* Energy Probe Argument, at 3, para 1.2.

¹³ BOMA Submissions at 8.

¹⁴ BOMA Submissions at 17-18.

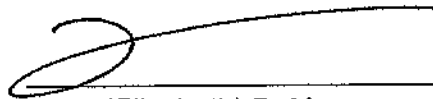
test of time. Its time has come, to undergo meaningful change in order to facilitate rational natural gas expansion to remote, rural, and First Nations communities.

28. While Anwaatin has suggested a Universal Service Fund, the changes proposed by Board Staff may also represent progress for certain First Nations communities seeking access to affordable natural gas – particularly when they are situated within close proximity of natural gas distribution or transmission lines.
29. Anwaatin was asked to provide, and provided, OGA with data showing the predominantly close proximity of the Anwaatin First Nations to natural gas lines (Undertaking J 1.3) attached as Appendix A. The map outlined at Appendix B also outlines all First Nations communities within 60 km of the TransCanada Mainline that currently have natural gas service as well. This supports Anwaatin's view that natural gas expansion to rural and remote First Nations communities can be done in an economically rational manner.
30. A natural gas expansion framework that improves equitable access to energy and applies the principles of availability, affordability and accessibility may require existing customers to contribute funding to expansion in to costlier communities. A USF mechanism is therefore consistent with—and does not depart from—the principles of EBO 188. Given the energy poverty that exists in First Nation communities, Anwaatin submits that the Board should ensure that the framework it implements will place a super-priority on facilitating natural gas expansion to energy-poor First Nations as expeditiously as possible.
31. Anwaatin supports Board Staff's criteria for First Nation and Métis participation and consultation to be included in the requirements to pre-qualify potential proponents with the requisite financial and technical experience and expertise to operate a natural gas

distribution system.¹⁵ Similarly, express inclusion of First Nation consultation requirements in any resulting RFI is also integral. Consultation should be meaningful and include discussion of any relevant treaty rights and impacts on the interests of affected First Nations communities.

ALL OF WHICH IS RESPECTFULLY
SUBMITTED THIS

11th day of July, 2016



Lisa (Elisabeth) DeMarco
DeMarco Allan LLP
Counsel for Anwaatin

¹⁵ OEB Staff Submission at 31-32.

APPENDIX A

ANWAATIN RESPONSE TO UNDERTAKING J1.3

ANWAATIN TO PROVIDE THE DISTANCE FROM THE MAINLINE AND THE DISTRIBUTION SYSTEM FOR EACH OF THE COMMUNITIES

Response:

Community	Lat, Lon(deg)	Distance in KM from TCPL - Point to Point	Distance in KM from TCPL - Road/Hwy	Nearest Distribution System
Aroland First Nation	50.175378, -86.706513	50 km	70 km - Hwy 584	70 km - Geraldton
MoCreebec (Moose Factory/Moosonee)	51.263973, -80.657615	240 km	greater than 300 km	300+ km Kapuskasing
Whitesand First Nation	50.302835, -89.036354	200 km	230 km - Hwy 527	250 km - Thunder Bay
Red Rock First Nation	49.063002, -88.299213	3.5 km	4 km - Hwy 585	6 km - Nipigon
Animbiigoo Zaagiigan Anishinaabek (Partridge Lake Reserve)	49.711718, -87.386360	1 km	1 km - Rock Point Rd	34 km - Geraldton
Bingwi Neyaashi Anishinaabek (Sand Point)	49.468328, -88.116338	1 km	1 km - Hwy 11	16 km - Beardmore
Biinjitiwaabik Zaaging Anishinaabek (Rocky Bay)	49.436878, -88.130114	0.5 km	0.6 km - Macdiarmid Rd	22 km - Beardmore

APPENDIX B

Ontario First Nations within 60 km of TransCanada's Mainline with natural gas service in 2016

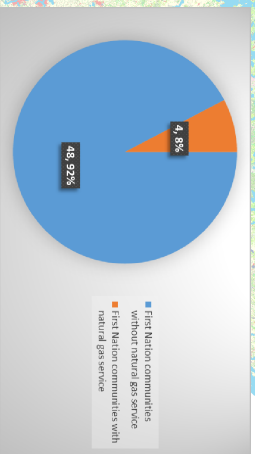


This map is based on data provided by Union Gas. It may not be reproduced without prior written consent of Anwaastin.

Data sources: Land Information Ontario, TransCanada, Union Gas, Coordinate System: Canada Lambert Conformal Conic Projection: Lambert Conformal Conic Datum: North American 1983

Prepared 2016-07-07 by **ANWAASTIN**
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 1-381-41-387

0 50 100 200 Kilometres



- ★ First Nation served by Union Gas
- Other First Nation
- Energy East Pumpstations
- TransCanada Pipeline

