



Jonathan McGillivray
Associate

Bay Adelaide Centre
333 Bay Street, Suite 625
Toronto, ON M5H 2R2

TEL +1.647.208.2677

FAX +1.888.734.9459

jonathan@demarcoallan.com

June 3, 2019

Filed on RESS and Sent via Courier

Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319, 27th Floor
2300 Yonge Street
Toronto, ON M4P 1E4

Dear Ms. Walli:

**Re: EPCOR Natural Gas Limited Partnership Application for Leave to Construct Natural Gas Distribution Pipelines to serve the Municipality of Arran-Elderslie, the Municipality of Kincardine, and the Township of Huron-Kinloss
Board File No.: EB-2018-0263**

We are counsel to Anwaatin Inc. (**Anwaatin**) in the above-mentioned proceeding. Please find enclosed Anwaatin's written submissions, filed pursuant to Procedural Order No. 2.

Sincerely,

A handwritten signature in black ink, appearing to read "Jonathan McGillivray", is written over a horizontal line.

Jonathan McGillivray

Encl.

- c. Bruce Brandell and Dana Bissoondatt, EPCOR Utilities Inc.
Richard King, Osler, Hoskin & Harcourt LLP
Larry Sault, Anwaatin Inc.
Don Richardson, Shared Value Solutions Ltd.

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, as amended (the **Act**) and the *Municipal Franchises Act*, R.S.O. 1990, c. M. 55, as amended;

AND IN THE MATTER OF an application by EPCOR Natural Gas Limited Partnership under section 90 of the Act for an order or orders granting leave to construct natural gas distribution pipelines and ancillary facilities to serve the Municipality of Arran-Elderslie, the Municipality of Kincardine and the Township of Huron-Kinloss.

EB-2018-0263

SUBMISSIONS OF

ANWAATIN INC.

June 3, 2019

INTRODUCTION AND OVERVIEW

1. We are counsel to Anwaatin Inc. (**Anwaatin**) in the Ontario Energy Board (the **Board**) EB-2018-0263 proceeding to review EPCOR Natural Gas Limited Partnership's (**EPCOR's**) application for an order or orders pursuant to section 90 of the Act granting leave to construct natural gas distribution pipelines and ancillary facilities to serve the Municipality of Arran-Elderslie, the Municipality of Kincardine and the Township of Huron-Kinloss (the **Application**). Specifically, EPCOR is seeking leave to construct approximately 75 kilometres of NPS 8 to 6-inch steel high pressure pipe, 45 kilometres of 6-inch medium density polyethylene pipe (**MDPE**), and 178 kilometres of NPS 4 and 2 MDPE distribution pipeline (the **Southern Bruce Project**).
2. Anwaatin is a collective of Indigenous communities generally focused on: (i) ensuring that Indigenous rightsholders have been meaningfully consulted and accommodated; (ii) alleviating energy poverty and achieving reliable, affordable, and sustainable energy for its member Indigenous communities; and (iii) ensuring that the land, water, and broader environment are sustainably managed in a manner that reflects stewardship for seven generations. To that end, Anwaatin has been very active on other natural gas proceedings before the Board, including the EB-2016-0137 / EB-2016-0138 / EB-2016-0139 proceeding, in which EPCOR Southern Bruce Gas Inc. was granted a certificate of public convenience and necessity related to the Southern Bruce Project, and the EB-2018-0264 proceeding, in which EPCOR has applied for approval of natural gas distribution rates related to the Southern Bruce Project.
3. Anwaatin provides these submissions with the aim of assisting the Ontario Energy Board (the **Board**) in understanding the interests of Indigenous communities in accessing low-carbon, low-cost natural gas for home, business, industrial/institutional heating, power generation, and reducing the need for First Nations to rely on the electrical grid to provide baseload heat energy.
4. These submissions are provided in an overarching policy and pragmatic context for First Nations living in Ontario. That context includes:

- (a) **energy poverty**: a disproportionate number of Ontario's First Nations live in energy poverty and are saddled with increasing and unmanageable energy costs;
- (b) **pre-existing sovereignty**: Ontario's First Nations have pre-existing sovereignty that must be respected by all governments and cannot be ceded by treaty;
- (c) **duty to consult and accommodate**: the duty to consult with and accommodate First Nations on decisions and major government discussions has been enshrined in the Constitution and affirmed by the Supreme Court of Canada; and
- (d) **United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)**: Canada has become a signatory to, and is in the process of adopting, the UNDRIP, which, among other things, supports the First Nations rights.

Anwaatin asks the Board to consider and read these submissions in this overarching context to assist it and others in addressing the energy needs of First Nations set out herein.

- 5. The First Nations supporting Anwaatin's submissions are directly affected by energy poverty. Natural gas promises an alternative, low-carbon, low-cost source of heat energy that will have the additional benefit of opening local transmission grids to harness renewable energy sources such as solar, wind and hydro-electricity.

OVERVIEW

- 6. Anwaatin's submissions address the Board's consideration of:
 - (a) EPCOR's approach to consultation and relationships with Indigenous communities;
 - (b) the adequacy of EPCOR's services for its Indigenous customers; and
 - (c) the proposed Municipal Franchise Agreement in relation to the Indigenous rights and processes set out in the Official Plan of Bruce County (the **Official Plan**).

SUBMISSIONS

(a) The Board should consider EPCOR's approach to consultation and relationships with Indigenous communities.

7. Anwaatin submits that the Board should consider EPCOR's approach to, and success with, its Indigenous rights-holders as part of its decision-making process. Specifically, the Board should consider EPCOR's Indigenous policy and how it has engaged with and consulted the Indigenous communities. The Board should consider whether and how EPCOR has determined, interpreted, and applied its own procedural requirements, the Crown's procedural requirements, and the Board's procedural requirements in assisting the Crown to fulfill its duty to consult and accommodate affected Indigenous communities, including those that are directly affected natural gas customers in the Southern Bruce natural gas franchise area.
8. Anwaatin submits the Board must ensure that EPCOR, as a party seeking leave to construct the Southern Bruce Project, and the Crown have discharged their duty to consult prior to the commencement of construction. Further, consultation should include discussion of any relevant treaty rights and interests relating to affected First Nations territory.

(b) The Board should consider the adequacy of EPCOR's services for its Indigenous customers.

9. There is a serious need to address energy poverty in First Nations communities through access to affordable, reliable, sustainable and modern energy access. The expense of transporting diesel, heating oil and propane fuels, heating with electricity, and securing wood supplies for supplemental wood stove heating can be cost-prohibitive for First Nations. First Nations in Northern Ontario, for example, commonly pay eight to ten times more than southern Ontarians to heat their homes and other buildings. Natural gas is not available to many First Nations across Ontario.

10. The Board noted the importance of energy poverty existing in First Nations communities and indicated that it would respond to any proposal brought forward in the new framework with due consideration to the needs of the intended customers in its Decision with Reasons in EB-2016-0004.
11. Anwaatin submits that the Board should also assess and ensure the adequacy of EPCOR's services for its First Nations customers. Anwaatin submits that expanding reliable and affordable natural gas distribution service to Indigenous communities should be a priority in the Board's consideration of the Application.

(c) The proposed Municipal Franchise Agreement should be amended to reflect the Indigenous rights and processes set out in the Plan.

12. The Municipal Franchise Agreement, based on the "Model Franchise Agreement" (which the Board uses as a standard when considering applications under the *Municipal Franchises Act*), does not include reference to the Official Plan with respect to the following portions thereof:
 - (a) Among the Official Plan's goals, which are considered "of prime importance to the Community", is to "encourage a co-operative and mutual approach to social and land use planning issues with the First Nation Communities" (3.4.1.4).
 - (b) In Section 6.9.1, "First Nations", the Official Plan states:
 - 6.9.1.1. The County recognizes the desire of First Nations communities to be consulted on new development proposals within Bruce County. The County also recognizes that there are many common areas of concern related to new development proposals that include but are not necessarily limited to impacts upon fish and wildlife habitat, proper identification of archaeological resources identification and protection of burial grounds, and the impacts of new development on source water and the Great Lakes.
 - 6.9.1.2. At the same time, it is recognized that meaningful consultation is difficult without a formal communication protocol in place, which spells out:
 - i. The types of issues that require consultation;

- ii. Specific geographic areas of concern; and
- iii. The roles of First Nations, proponents, local municipalities, the County and the Crown in the consultation process.

6.9.1.3. The County shall endeavour to continue to work with the Crown and the First Nations towards a formalized consultative process. In the interim, the County shall:

- i. Continue to provide notice of all new development applications to First Nations where the application is within one (1) kilometre of a reserve;
- ii. Continue to provide open dialogue with First Nations Chiefs, band councils and Saugeen Ojibway representatives;
- iii. Assist First Nations and Metis representatives in obtaining information on development applications that they have identified an interest in;
- iv. Consult with the Saugeen Ojibway Nations for those lands identified in Appendix 'A' which does not constitute part of this Official Plan [Appendix 'A': Traditional Territories of the Saugeen Ojibway Nations (as provided by Saugeen Ojibway Nation)]; and
- v. Have regard for the results of a study being undertaken by the Saugeen Ojibway Nation on interior travel routes, former settlement areas and areas of past use, when it is available.

13. The Official Plan also includes Section 4.3.3, "Requirements for Environmental Impact Studies", which includes:

4.3.3.1. In order to achieve County objectives for the protection of the natural environment, development proponents shall be required to prepare an EIS for any proposal that is:

- i. In, or within 120 metres of, a provincially significant wetland;
- ii. In, or within 60 metres of, a locally significant wetland;

- iii. In, or within 120 metres of, the habitat of threatened or endangered species;
- iv. In, or within, 120 metres of, a significant woodland, significant valleyland, significant wildlife habitat, deer wintering areas;
- v. In, or within 120 metres of, fish habitat;
- vi. Within the '100 Metre Buffer Zone' or '2 Year Time of Travel (WHPA-B)' for Wellhead Protection Areas or within a 'Intake Protection Zone 1 (IPZ-1)' or 'Intake Protection Zone 2 (IPZ-2)' for Intake Protection Zones; vii) Within known areas of karst topography; viii) In, or within 50 metres of Areas of Natural and Scientific Interest (ANSI) Earth Science.

[...]

4.3.3.3. The EIS shall be prepared prior to any development approvals and any site alteration (except as may be necessary for the preparation of pre-development studies or surveys) or development. In considering the loss of functions or features, particularly with regard to wetlands and fish habitat, the proponent is also advised to consult with the First Nations to determine potential impacts on resource, utilization, aboriginal interests, and other cultural values.”

- 14. The Official Plan includes the following economic development objective: “[e]ncourage and promote opportunities to work with the First Nations in seeking mutually beneficial and socially and environmentally sustainable economic development opportunities” (5.5.1).
- 15. Section 4.10 of the Official Plan states that, in cases where archaeological resources involve First Nations heritage sites or burial grounds, the First Nations shall be consulted regarding the manner in which these resources and features are to be dealt with.

REQUESTED RELIEF

16. Anwaatin requests that the Board:

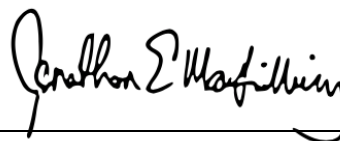
- (a) consider and expressly determine whether EPCOR has adequately consulted with affected Indigenous communities;
- (b) consider and expressly determine whether EPCOR has fully executed the procedural duties of consultation delegated to it by the Crown, particularly in relation to cultural heritage, archaeology, socio-economic, and environmental rights and interests;
- (c) impose the following conditions of any potential approval of the Application:
 - i. for each work site, during construction and for the lifecycle of the project where maintenance work involving excavation or integrity digs are required, provide First Nations with the following information: (A) exact location and size of site; (B) plans to protect the environment and sensitive watershed; and (C) the contamination characteristics, dewatering details, and water treatment and discharge plans for the site;
- (d) require EPCOR to permit monitors selected by the each First Nation to actively participate in EPCOR's environmental and archaeological assessment and monitoring work at any work site, during construction and for the lifecycle of the project where maintenance work involving excavation or integrity digs are required, and any area that has high archaeological potential or has significant environmental concerns, as determined by the First Nations;
- (e) provide reasonable financial resources to the First Nations to hire and administer the monitors and to hire consultants to review the construction permits and approvals required by EPCOR, to the extent necessary to protect the First Nation rights, title and interests, where maintenance work involving excavation or integrity digs are required during construction and for the lifecycle of the project;

- (f) require EPCOR to have adequate insurance and reserve a specified quantum of funds sufficient for any cleanup, compensation and restoration in the event of accidents and malfunctions on the First Nation traditional territory resulting from the project;
- (g) stipulate that all affected First Nations communities receive natural gas service and natural rates that reflect their inherent rights to the land and resources upon which the proposed project is built; and
- (h) amend the Municipal Franchise Agreement to expressly incorporate the following elements of the Official Plan:
 - i. encourage a co-operative and mutual approach to social and land use planning issues with the First Nation Communities;
 - ii. carry out meaningful consultation with First Nation Communities, including consulting with First Nations to determine potential impacts on resource, utilization, aboriginal interests, and other cultural values, and consulting First Nations in seeking mutually beneficial and socially and environmentally sustainable economic development opportunities with respect to the Project;
 - iii. have regard for the results of a study being undertaken by the Saugeen Ojibway Nation on interior travel routes, former settlement areas and areas of past use, when it is available;
 - iv. in cases where archaeological resources involve First Nations heritage sites or burial grounds, ensure that First Nations are consulted regarding the manner in which these resources and features are to be dealt with; and
- (i) expressly determine EPCOR's ongoing compliance with these conditions and specifically whether EPCOR has ensured access to reliable and affordable natural gas services for Indigenous communities.

ALL OF WHICH IS RESPECTFULLY
SUBMITTED THIS 3rd DAY OF JUNE, 2019.



Lisa (Elisabeth) DeMarco
DeMarco Allan LLP
Counsel for Anwaatin



Jonathan McGillivray
DeMarco Allan LLP
Counsel for Anwaatin