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July 23, 2019

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

Dear Ms. Walli:

Re: EB-2018-0264
EPCOR Natural Gas Limited Partnership (EPCOR) application for gas distribution rates and other charges for the period from January 1, 2019 to December 31, 2028

We are counsel to Anwaatin Inc. (**Anwaatin**) in the above-mentioned proceeding (the **Proceeding**) and file these submissions on Board Staff's Draft Issues List (the **Draft Issues List**) in accordance with Procedural Order No. 3.

Anwaatin respectfully requests that the Board ensure that Indigenous rate payers and rights holders have, and can exercise, their right to be heard in this Proceeding through the inclusion of draft issue 11(a) in the final Issues List:

Issue 11: Stakeholder Engagement

- a) Has EPCOR effectively engaged and consulted with key stakeholders and First Nations and Métis communities? Has EPCOR undertaken consultation to ensure Indigenous rights and interests in the application have been considered and addressed?

Direct Indigenous interests and rights. Anwaatin submits that Indigenous peoples are both rate payers and rights holders that are directly afforded the right to be heard in this Proceeding pursuant to each and all of the Board's policies and procedures, the common law duty of fairness, and section 35 of the *Constitution Act, 1982* (the **Constitution**). Indigenous peoples, including those living off reserve who hold Treaty rights within the service area, (i) are rate paying customers that will be subject to the impending rates resulting from this Proceeding; (ii) have traditional aboriginal rights in and related to the land that may be impacted by the proposed Common Infrastructure Plan (**CIP**) that is being implemented through this Proceeding; and (iii) are rights

holders having Supreme Court enshrined aboriginal rights and title, which include economic rights¹ that may be negatively impacted by the access to natural gas and natural gas rates that are type subject of this Proceeding.

Board policies and procedures. The *Handbook for Utility Rate Applications* (the **Handbook**) expressly requires the Board to consider customer engagement, including whether and how customer input has informed planning and whether the utility's plans deliver benefits that address customer needs and preferences.² Customer engagement is, in addition, a key component of the *Filing Requirements for Natural Gas Rate Applications* (the **Filing Requirements**), pursuant to which EPCOR's application is filed.³ EPCOR expressly states that one of its goals in bringing the Southern Bruce system on line is effectively engaging and consulting with key stakeholders and First Nations and Métis communities.⁴ EPCOR has however, in conflict with the Handbook and the Filing Requirements, opposed the inclusion of this customer engagement issue and taken the position (in email correspondence to all parties on the Draft Issues List dated July 10, 2019) that customer engagement, including in relation to Indigenous customers, is not relevant.

Both Anwaatin's filed interrogatories and EPCOR's filed responses are predicated on these Handbook and Filing Requirements and the legitimate expectation that they will continue to apply to all customers — including Indigenous customers. Anwaatin submits that if the Board allows Indigenous customers and customer engagement to be precluded from the Issues List, it will constitute a major departure from the Board's own procedures and practices, and the legitimate expectation that they will be followed.

Common law duty of fairness. Anwaatin was expressly granted the right to intervene in this Proceeding by the Board on the basis of its identified "*mission to ensure that Indigenous communities are afforded reliable and affordable energy*" and goal to ensure that "*Indigenous communities have reliable energy transmission and distribution in order to meet the basic needs and facilitate economic development*". Further, Anwaatin actively participated as a Board-approved intervenor in the leave to construct and designation proceedings to further those goals.

Anwaatin respectfully submits that it would make a mockery of Anwaatin's standing as a Board-approved intervenor in this Proceeding, and its common law right to be heard in accordance with the duty of fairness, to now be denied the ability to address the customer engagement and economic development issues that were expressly identified in its notice of intervention. Draft issue 11(a) is therefore required to ensure that Indigenous customers and rights holders are permitted to examine and consider these issues.

Further, EPCOR's rates application in this Proceeding is not entirely independent of EPCOR's leave-to-construct application. Both include EPCOR's CIP with specific capital expenditures necessary to construct and maintain the system that are the subject of the Board's review in this rates application (Exhibit 2). This may include Indigenous procurement and employment that must be addressed as part of the customer engagement issues in this Proceeding.

¹ *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 257 at para 73: "Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land."

² Handbook for Utility Rate Applications (October 13, 2016), p. 12, available online at: https://www.oeb.ca/oeb/Documents/Regulatory/OEB_Rate_Handbook.pdf.

³ Filing Requirements for Natural Gas Rate Applications (February 16, 2017), s. 2.1.6, available online at: https://www.oeb.ca/oeb/Documents/Regulatory/Filing_Requirements_Natural_Gas_Rate_Applications.pdf.

⁴ Exhibit 1, Tab 2, Schedule 1, p. 9.

Constitutional rights. Indigenous peoples are the sole interest before this Board in this Proceeding that are afforded a “special public interest”, which is expressly protected by section 35 of the Constitution.⁵ Failure to allow Anwaatin to be heard on these issues affecting aboriginal rights and title, which were identified in its Notice of Intervention, constitutes, at best, an undue constraint, and, at worst, an outright denial of those constitutionally protected rights and interests.

Anwaatin therefore requests that the Board ensure that draft issue 11(a) is included in the final Issues List for this Proceeding.

Sincerely,



Lisa (Elisabeth) DeMarco

- 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.

⁵ *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, [2010] 2 SCR 650 at para 42.