April 29, 2022

VIA RESS

Ontario Energy Board
P.O. Box 2319,
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4
Attention: Registrar

Dear Ms. Marconi,

Re: Framework for Review of Intervenor Processes and Cost Awards
Board File Number: EB-2022-0011

We are counsel to Anwaatin Inc. (**Anwaatin**) in the Framework for Review of Intervenor Processes and Cost Awards consultation (the **Consultation**). Anwaatin submits these comments on the Consultation and the Board's March 2022 report (the **Report**) pursuant to the Board's letter of March 31, 2022.

Anwaatin

Anwaatin is an Indigenous business corporation that works with Indigenous communities in linked energy markets that include Ontario, Quebec, California, and Manitoba. Anwaatin's mission is to ensure that Indigenous communities are afforded reliable and affordable energy and have a central role in the transition of the energy sector to address climate change. Anwaatin's interests are focused on ensuring that Indigenous communities and businesses (i) have access to efficient electricity and natural gas energy solutions for Indigenous communities; (ii) are provided with reliable energy transmission and distribution in order to meet basic health, safety and security needs and facilitate economic development; (iii) address poor electricity reliability and the disparate and adverse impacts that it has on Indigenous communities and Aboriginal rights; and (iv) strengthen distributed energy resources in Indigenous communities to facilitate their resilience, reconciliation, and efficient electrification solutions to address climate change.

Anwaatin's Indigenous membership for the Consultation presently includes Aroland First Nation, Animbiigoo Zaagi'igan Anishinaabek Nation, and Ginoogaming First Nation (collectively, the **Anwaatin First Nations**). The Anwaatin First Nations each have traditional territory, and associated rights and interests protected by the *Constitution Act, 1982*, that may be impacted by the outcomes of the FRIPCA. Anwaatin, on behalf of the Anwaatin First Nations, has been a frequent intervenor and has presented expert evidence on the realities of energy and natural gas regulation and services in numerous proceedings and consultations before the OEB.

Anwaatin's comments on the Consultation are focused on the following key areas: (i) leave to construct and rate proceedings; (ii) supporting and ensuring Indigenous participation; (iii)

Indigenous expert evidence and knowledge; (iv) the United Nations Declaration on the Rights of Indigenous Peoples; and (v) cost awards.

Leave to Construct and Rate Proceedings

Leave to construct and rate proceedings before the Board provide one of the most important opportunities for many First Nations and Indigenous communities to fully and meaningfully participate in decisions that affect their rights and traditional territories. Leave to construct proceedings in particular ensure that project proponents meaningfully consider and accommodate the concerns of Indigenous peoples in proceedings conducted under the Board's oversight and in a manner that upholds the constitutionally protected rights of Indigenous peoples to be consulted and accommodated.

Indigenous participation allows the Board to fully understand the contextual and legal implications of any activity that occurs on the lands and traditional territories of Indigenous peoples. Ensuring that Indigenous peoples are able to participate fully and meaningfully and without disadvantage to have their voices heard is an integral aspect of respecting and upholding the procedural fairness rights and duties owed to all persons, as well as the constitutionally protected rights of Indigenous peoples.

The Board notes in the Report that it may consider changes to how the OEB defines an interest in land with respect to a leave to construct application. Anwaatin strongly believes that any such change must respect Aboriginal and Treaty rights and be informed by an understanding of the historical and contemporary uses of traditional territories and Treaty lands by Indigenous peoples. A restrictive interpretation of "an interest in land" that is incompatible with how Indigenous peoples exercise the rights associated with their traditional territory and lands should be avoided. In reviewing the definition of an interest in land, Anwaatin submits that the Board should ensure that it adequately and properly exercises its delegated constitutional duty to consult and accommodate (**DTCA**) authority. Anwaatin further submits that an overly narrow or restrictive interpretation of "an interest in land" is likely to be inconsistent with the spirit and imperative of reconciliation.

Anwaatin is aware of, and extremely concerned by, the suggestion by at least one major utility that intervenors should be excluded from leave to construct proceedings. Leave to construct applications provide an important mechanism for First Nations and Indigenous communities to intervene and ensure that their Aboriginal and Treaty rights are respected and understood by project proponents, the Board, and other intervenors. Leave to construct proceedings, which are inherently likely to affect Aboriginal and Treaty rights associated with land and traditional territory, afford Indigenous peoples the protections of the Board's independent processes and adjudicative functions, including asking interrogatories, leading and testing evidence, cross-examining experts, and making submissions.

Anwaatin submits that the Board should avoid any action that may interfere with or limit the rights of Indigenous peoples to participate in leave to construct proceedings. Such a position would (i) unconstitutionally interfere with the Board's delegated authority to discharge the Crown's DTCA and (ii) be inconsistent with the requirement to uphold the honour of the Crown. Many First Nations and Indigenous communities rely on the Board's mechanisms and proceedings as a fundamentally important process (separate and apart from the Province's environmental assessment regime) for asserting and protecting against impacts of Board decisions on their rights, lands, and communities.

Supporting and Ensuring Indigenous Participation

The Board notes in the Report that in proceedings where a decision may have adverse impacts on the Aboriginal or Treaty rights of First Nations, Indigenous peoples and communities, and where the DTCA is triggered, it must consider whether the Crown's constitutional DTCA has been discharged. The Board further notes the importance of the "active participation by Indigenous peoples in OEB hearings to ensure that their voices are heard where they have a substantial interest in the proceeding" (p. 9).

There are 133 First Nation governments, nine regions of the Métis Nation of Ontario, and two independent Métis nations in Ontario. The Board is likely aware of the often very limited engagement by Indigenous governments, First Nations, Métis, and Indigenous communities in most OEB proceedings and consultations, regardless of whether their rights may be specifically or generally affected. In addition, Anwaatin is often the only intervenor representing the interests and views of *any* of Ontario's Indigenous communities. This illustrates, in Anwaatin's view, an area of much needed improvement within the Board's broader approach to intervenors in Board proceedings and consultations. The Board would benefit from more frequently engaging with the many diverse perspectives of Ontario's Indigenous peoples by encouraging their broader participation and firmly supporting just and equitable access to Board proceedings for unrepresented Indigenous nations. Failing to proactively support the involvement of Ontario's Indigenous peoples is inconsistent with the expectation that the Board work to ensure effective Indigenous participation in decisions that affect their rights and interests.

The Board may benefit from considering and adopting, with the necessary modifications, certain elements of the approaches employed by several federal agencies and regulators. By way of example, the Impact Assessment Agency of Canada (**IAAC**), Canada Energy Regulator (**CER**), Canadian Nuclear Safety Commission, Fisheries and Oceans Canada, and Transport Canada intentionally encourage and facilitate the participation of Indigenous peoples in their proceedings, consultations, and assessments. This approach is a means to address the financial and capacity limits of many Indigenous communities that may prevent them from meaningfully engaging and participating in proceedings and consultations. In this regard, Anwaatin would encourage the Board to consider (i) the IAAC's Indigenous Capacity Support Program, which provides funding to Indigenous communities and Indigenous organizations to support meaningful engagement in consultations, and (ii) the CER's Indigenous Advisory Committee, which advises the CER on improving and enhancing the involvement of Indigenous peoples and organizations regarding CER-regulated pipelines, transmission lines and offshore renewable energy projects, as well as abandoned pipelines. Anwaatin would moreover be pleased to work with the Board on developing best practices for Indigenous participation that are consistent with regulatory excellence.

The Board should consider whether the current intervenor mechanism to facilitate participation through the awarding of costs is inadequate or inappropriate when considering the realities of many First Nations and Indigenous communities. The Board may be interested in considering whether its current cost recovery mechanism could be modified to provide a form of capacity and/or participation funding to Indigenous communities and organizations. Providing capacity or participation funding could be an additional means of ensuring more Indigenous voices are heard and more Indigenous peoples have the ability and capacity to effectively and meaningfully participate in Board proceedings and consultations.

Indigenous Expert Evidence and Knowledge

Anwaatin has provided the Board with evidence of the unique experiences of on- and off-reserve Indigenous communities and First Nations relevant to the Board's mandate in numerous proceedings and consultations. Expert evidence provided to the Board is often at significant cost, both financially and in terms of resources, to Indigenous peoples and governments. The Board should adequate consideration of the challenges and difficulties associated with obtaining expert evidence from Indigenous peoples and communities and the barriers associated with providing such evidence to the Board. Potential guidance provided by the Board on expert witness procedures should ensure that it is inclusive and welcoming to the realities of Indigenous governments, Elders, and community members. Indigenous knowledge holders and community leaders are uniquely able and qualified to provide their deep and detailed understanding of many issues before the Board and demonstrate how they relate to and impact Indigenous peoples, identities, and rights.

Anwaatin submits that the Board should consider how it may improve the process by which expert evidence can be provided. In addition, the Board should consider how it may best facilitate a broader understanding of the unique experiences, knowledge, and challenges of First Nations and Indigenous peoples in Ontario and how these communities are each collectively and separately affected by decisions of the Board. Anwaatin encourages the Board to consider work being undertaken by the IAAC, Transport Canada, CER, and Fisheries and Oceans Canada, in collaboration with Indigenous peoples, to develop an Indigenous Knowledge Policy Framework. Developing such a policy or framework, whether alone or in collaboration with entities such as the Independent Electricity System Operator (IESO), may allow the Board to consistently receive and apply Indigenous knowledge in a way that improves knowledge sharing and advances reconciliation. If the Board decides to pursue the development of such a policy or framework, it should ensure that the participation of Indigenous groups is facilitated and supported (including through participant funding).

United Nations Declaration on the Rights of Indigenous Peoples

The Truth and Reconciliation Commission of Canada has issued Calls to Action that direct all orders of government in Canada to recognize and implement the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**).[1] Canada has affirmed its support for UNDRIP[2] and is in the process of implementing UNDRIP into Canadian law and reviewing all laws for their compatibility with UNDRIP.[3] British Columbia has also adopted its own UNDRIP legislation, and — in Anwaatin's view — it is only a matter of time before each province, including Ontario, adopts its own UNDRIP implementation legislation. Anwaatin believes that the Board is in a unique and important position to adopt processes, including those contemplated in the Consultation, that are compatible with implementing and protecting the rights recognized under UNDRIP.

The Board has proposed potential changes to approving intervenors and assessing intervenors with similar interest. Article 18 of UNDRIP provides that Indigenous peoples have the right to participate in decision-making in matters that affect their rights, through representatives chosen

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[1] Truth and Reconciliation Commission of Canada, *Calls to Action*, Call to Action 42, available online at: < http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf>.

[2] United Nations, *Continuing Session, Speakers in Permanent Forum Call upon Government to Repeal Oppressive Laws, Practices that Encroach on Rights of Indigenous Peoples*, (10 May 2016), HR/5299, available online at: <https://www.un.org/press/en/2016/hr5299.doc.htm>.

[3] See *United Nations Declaration on the Rights of Indigenous Peoples* (S.C. 2021, c. 14), available at: <https://www.laws-lois.justice.gc.ca/eng/acts/U-2.2/page-1.html>.

by themselves in accordance with their own procedures. Anwaatin submits that the Board should remain cognizant of this long-recognized right of Indigenous peoples while it contemplates any approach that encourages greater collaboration between intervenors. Specifically, the Board should consider the impacts of requiring intervenors advancing the interests of Indigenous peoples to collaborate or be joined with other intervenors that the Board perceives to have similar interests on the right of Indigenous peoples to choose their own representation in accordance with their own procedures. Further, the Board should refrain from imposing any limits of participation that may limit or infringe upon the procedural rights of Indigenous peoples and the rights articulated in Article 18.

Article 19 of UNDRIP provides that governments must consult and cooperate in good faith with Indigenous peoples through their own representative institutions in order to obtain their free, prior, and informed consent before adopting and implementing legislative or administrative measures that may affect them. Similarly, Article 27 of UNDRIP provides that governments must ensure that Indigenous peoples have the right to participate in fair, independent, impartial, open, and transparent processes to recognize and adjudicate their rights pertaining to their lands, territories, and resources, including those which were traditionally owned or otherwise occupied or used. The Board, as an administrative body overseeing and adjudicating such processes, is in the position to ensure that the right of Indigenous peoples to participate is recognized and that any of its decision that affect Indigenous peoples first receives their free, prior, and informed consent. Anwaatin submits that a robust and equitable intervenor process must be one that is informed by UNDRIP and one where the Board ensures that Indigenous peoples are consulted, with the objective of obtaining their consent, whenever they may be impacted by decisions of the Board.

Cost Awards

Indigenous communities and First Nations face significant risks related to costs associated with intervening in Board proceedings and consultations. For example, the fees charged by consultants and lawyers may far exceed the cost award tariff (which Anwaatin notes has not been adjusted in more than one and a half decades) thereby requiring Indigenous clients to pay the difference between the approved OEB rates and the rates of their legal counsel. In addition, Indigenous intervenors are required to bear the risk that their costs may be challenged or only partially covered by the Board's cost award. This can result in significant and adverse financial impacts to First Nations and Indigenous communities with limited means to satisfy the financial burdens imposed on them as a result of the Board's cost recovery regime. As a result, many Indigenous communities are often reluctant to engage in Board proceedings and consultations.

The Board's current approach to cost recovery and cost awards may not adequately consider the logistical and technical challenges of participation, including the limited and unreliable internet access in many First Nation and Indigenous communities (especially those in remote and near-remote communities across Ontario). In addition, limited and unreliable electricity coupled with unreliable and slow internet access is a significant barrier to broad and equitable Indigenous participation in Board proceedings and consultations. The Board may be interested in considering alternative approaches to Indigenous participation in proceedings and consultations before the Board, including through capacity funding, dedicated participation funding, and other human rights-based approaches that address the unique and disproportionate effects of unreliable electricity and communication services in many Indigenous communities. Anwaatin submits that a broader effort by the Board to encourage and support equitable participation of Indigenous communities and peoples advances the goals and spirit of reconciliation.

Sincerely,

Lisa (Elisabeth) DeMarco

c. Larry Sault, Anwaatin Inc.
Don Richardson