



November 7, 2024

**VIA RESS**

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

Dear Ms. Marconi,

**Re: Generic Proceeding – Cost of Capital and Other Matters**  
**Board File No.: EB-2024-0063**

We are counsel to Caldwell First Nation (“**CFN**”) and Mississaugas of the Credit First Nation (“**MCFN**”) in the above-noted proceeding. Pursuant to Procedural Order No. 1 and the Board’s letter dated October 15, 2024, please find attached the written submissions of CFN and MCFN in the above-noted proceeding.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel Vollmer".

DT Vollmer

- c. All parties.  
Chief Nikki van Oirschot, CFN  
Councillor Larry Sault, MCFN  
John Wladarski, Northwind Business Development Inc., CFN

**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**

**WRITTEN SUBMISSIONS OF**

**CALDWELL FIRST NATION**

**AND**

**MISSISSAUGAS OF THE CREDIT FIRST NATION**

**November 7, 2024**

## A. Introduction

1. Caldwell First Nation (“**CFN**”) and Mississaugas of the Credit First Nation (“**MCFN**”) are participants in the Ontario Energy Board’s (the “**OEB**” or “**Board**”) generic proceeding on cost of capital and other matters (the “**Proceeding**”).
2. CFN’s traditional lands and territories include lands and water in Southern Ontario from the Detroit River along the north shore of Lake Erie to Long Point, including Point Pelee and Pelee Island. CFN has a membership that consists of approximately 385 registered members. CFN’s laws require CFN to preserve and even enhance a mutually respectful relationship with the Environment, to co-exist with Mother Earth, and to protect this relationship. CFN has the responsibility to care for its Traditional Territory for future generations, to preserve and protect wildlife, ecosystems, lands, waters, air, and resources.
3. MCFN is part of the Ojibwe (Anishinaabe) Nation. The Mississaugas of MCFN were the original owners of the territory commencing at Long Point on Lake Erie, eastward along the shore of Lake Erie to the Niagara River, down to Lake Ontario, northward along the shore of Lake Ontario to the Rouge River east of Toronto, up to the dividing ridges to the head waters of the Thames River, then southward back to Long Point. MCFN membership is now comprised of roughly 2,570 people, with nearly two-thirds living off reserve.
4. In considering cost of capital and rate structures, it is essential to acknowledge that over 50% of First Nations people in Ontario live off-reserve and contribute as both taxpayers and ratepayers. Additionally, on-reserve residents are also ratepayers for public utilities, paying for the services they receive. This dual contribution should be recognized in all policy discussions, underscoring First Nations’ stake in Ontario’s energy system and the need for equitable access to energy resources and opportunities.
5. As set out below and throughout these submissions, CFN and MCFN’s Aboriginal and Treaty rights, land use, cultural heritage, and other rights and interests will be affected by the outcomes and policies adopted by the Board as part of this Proceeding. CFN and MCFN both have traditional territory, and associated rights and interests protected by the *Constitution Act, 1982*, that will be impacted by the process and outcomes of this Proceeding.

**B. Overview**

6. CFN and MCFN's submission are generally that:
  - (a) there has been a complete lack of engagement with First Nations by the four expert reports (the "**Reports**") prepared as part of the Proceeding to understand their unique interests, issues, and ability to participate in Ontario's energy sector in relation to the cost of capital;
  - (b) it is misleading to assume that the OEB's status quo cost of capital methodology is neutral for all entities, especially First Nations which have significantly different concerns and ability in accessing capital and seeking equity participation in energy projects impacted by the OEB's cost of capital methodologies and policies; and
  - (c) the unique and specific interests of First Nations should be considered as part of this Proceeding and not a separate proceeding or engagement process that is unlikely to meaningfully address the concerns and interests of First Nations.
  
7. CFN and MCFN have coordinated with Three Fires Group Inc. ("**TFG**") and Minogi Corp. ("**MC**"), the only other Indigenous intervenors in the Proceeding, and generally support and adopt TFG/MC's submissions, and in particular support and adopt their submissions on the following topics:
  - (a) the applicable policy and legislative context sets a much higher standard for facilitating meaningful indigenous participation in the energy sector (paras 42-93);
  - (b) the duty to consult in the context of this Proceeding (paras 94-113);
  - (c) the Proceeding is an opportunity to advance reconciliation and economic reconciliation in a manner that supports the energy sector's broader objectives (paras 139-149 and 195-200); and
  - (d) TFG/MC's submissions and requested relief on Issue 13 and Issues 20/21 (paras 150-194).

**SUBMISSIONS**

**C. Implications for First Nations as a result of the outcomes of the Proceeding were not considered in any of the Reports**

8. When considering the importance and imperative for engaging with First Nations through Board processes it is important to emphasize the critical distinction between rights-holders and stakeholders in this context. First Nations are rights-holders, with inherent rights that distinguish them from other stakeholder groups. As such, regulators, regulated entities, and project proponents must approach First Nations directly, within their communities, rather than expecting engagement through generalized town hall sessions. This unique status as rights-holders requires regulatory bodies and policymakers to engage directly and meaningfully with First Nations, respecting their right to self-determination and consultation on matters that impact their lands and interests.<sup>1</sup>
9. The Reports were commissioned to assess the OEB's current cost of capital methodologies, yet none of them evaluate the potential impacts of the identified issues on First Nations communities, their rights, and their ability to justly and equitably access capital and secure favourably financing terms as compared to non-First Nations and Indigenous groups. As was noted in several interrogatory responses to the Indigenous intervenors, including CFN/MCFN, and through cross-examination of the authors of the Reports, it is evident that First Nation or Indigenous group were not consulted or engaged in preparing any of the Reports.
10. This omission results in a one-size-fits-all analysis that fails to acknowledge the historical and ongoing impacts and financial barriers experienced by First Nations in accessing capital in Ontario for equitable participation in energy projects.
11. The complete lack of engagement with First Nations in preparing the Reports means that they are unable to provide guidance to the Board on whether the status quo or recommended changes to the OEB's cost of capital methodology is fair and equitable to First Nations.
12. For example, in an interrogatory response on whether London Economics International ("LEI") consulted any Indigenous groups and/or First Nations in preparing its report (the

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<sup>1</sup> See also TFG/MC submissions on the duty to consult and accommodate.

“LEI Report”), LEI directed CFN/MCFN to its response to TFG/MC’s interrogatory with respect to Issue #12, stating:

It is neither usual nor appropriate for an independent consultant in a litigated proceeding to consult with any potential participant in drafting a report. Doing so raises the risk of perceived bias especially given that all parties have the opportunity to comment in the proceeding itself.

LEI notes that issues specific to First Nations would be worthy to consider as part of a separate proceeding.<sup>2</sup>

13. In response to a similar question at the oral hearing, Mr. Goulding, on behalf of LEI, reiterated that First Nations and Indigenous groups were not consulted or engaged:

MR. DAUBE: You'll agree with me that there is nothing here regarding Indigenous engagement or any specific effort to understand the consideration of Indigenous Peoples?

MR. GOULDING: I think that's not unique to a major public policy issue. Right? I think we have attempted to be fair to all stakeholders. We are not here to represent any individual stakeholder. And what we have presented is consistent with academic and economic theory, and so we neither present the perspectives of individual stakeholders, nor do we try to specifically look at alternatives for one particular group.

We have tried to approach this on a completely neutral basis, and that means that the perspectives are really from the standpoint of meeting the OEB's statutory requirement.<sup>3</sup>

...

MR. DAUBE: I just want to confirm that there is nothing in your approach here that specifically identifies consideration of First Nation interests or issues in the context of the cost of capital proceeding?

MR. GOULDING: I think that's fair, but I just want to emphasize I would also say there is certainly no attempt to discriminate against any particular investor, investor type, or individual, or rate payer for that matter.<sup>4</sup>

...

MR. DAUBE: ... this is M1-1-CFN-1 from Caldwell First Nation. And, at question (b), they asked a similar series of questions concerning the extent to which your recommendations considered Indigenous ownership for the purposes of cost of capital methodologies. And if we go to the answer, do you agree that your answer gave no details regarding specific or unique Indigenous interests or considerations? And you referred to section 4.14 of your report, for detailed reasoning? Is that all a fair characterization?

MR. GOULDING: Yes, that's fair.<sup>5</sup> (emphasis added)

14. LEI’s response clearly demonstrates that First Nations were not engaged, consulted, or approached in preparing the LEI Report, even though the report includes findings and

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<sup>2</sup> N-M1-1-CFN-1, Response a) referring to N.M1-12-TFG/Minogi-1, Response b)

<sup>3</sup> Transcript, Oral Hearing, Volume 1, pp. 146-147.

<sup>4</sup> *Ibid.*, p. 149.

<sup>5</sup> *Ibid.*, p. 152.

recommendations that would have significant consequences for First Nations in relation to the cost of capital if followed or implemented by the OEB.

15. In an interrogatory response from Concentric Energy Advisors (“**Concentric**”) regarding whether Concentric consulted with any Indigenous groups and/or First Nations in preparing its report (the “**Concentric Report**”), Concentric stated it “did not consult with any Indigenous Groups and/or First Nations in preparing our report.”<sup>6</sup>
16. Similarly, at the oral hearing, Concentric’s Mr. Dane noted that First Nations and Indigenous Peoples were not considered at all in preparing the Concentric Report:

MR. DAUBE: But no discussion of the specific impact of those questions on Indigenous Peoples, that's the conclusion. But no discussion of the implications for Indigenous Peoples; is that right?

MR. DANE: Yes, I don't recall such a discussion.

MR. DAUBE: Thank you. And, again, best of your recollection, I'm just trying to make sure you don't feel singled out here, those reports also don't explore the question of whether Indigenous Peoples have distinct interests that might influence the recommendations in those reports; is that right?

MR. DANE: That's right, I don't recall that.<sup>7</sup> (emphasis added)

...

MR. DAUBE: Yes. So, the original question was whether you agree that your report does not include any discussion of the specific impact of costs of capital questions at issue in this proceeding on Indigenous Peoples.

MR. DANE: I agree with that, yes.

MR. DAUBE: And, similarly, it doesn't include an exploration of the question of whether Indigenous Peoples have distinct interests that might influence their recommendations.

MR. DANE: That's correct.<sup>8</sup> (emphasis added)

17. In cross-examination, the witnesses from Nexus Economics also indicated they did not consider the interests of First Nations in preparing their report, while noting that had they

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<sup>6</sup> Exhibit N-M2-1-TFG/Minogi-3, Response a).

<sup>7</sup> Transcript, Oral Hearing, Volume 2, p. 101.

<sup>8</sup> *Ibid.*, pp. 103-104.

considered them they would have included details on impacts on their interest in their recommendations:

MR. DAUBE: Would you agree that your report doesn't directly examine the specific impact for Indigenous Peoples of the cost of capital questions at issue in this proceeding?

MR. ZARUMBA: That is accurate.

MR. DAUBE: And you would have included details of any such examination if you'd performed it for the purposes of this proceeding?

MR. ZARUMBA: Yes.

MR. DAUBE: Your report also does not investigate the question of whether Indigenous Peoples have distinct interests that might have influenced your recommendations?

MR. ZARUMBA: That is accurate.

MR. DAUBE: And, similarly, you would have included any such details if you had performed them?

MR. ZARUMBA: Yes.<sup>9</sup> (emphasis added)

18. Dr. Cleary similarly noted that he did not examine impacts on First Nations and Indigenous Peoples in preparing his report:

MR. DAUBE: Do you agree that your report doesn't directly examine the impact for Indigenous Peoples of the cost of capital questions at issue in this proceeding?

DR. CLEARY: Yes, I agree with that.

...

MR. DAUBE: Thank you. And then similarly, you didn't investigate the question of whether Indigenous Peoples have distinct interests that might influence your recommendations; is that right?

DR. CLEARY: That's correct.<sup>10</sup> (emphasis added)

19. The above statements highlight a significant oversight in the preparation of the Reports: the complete lack of any consultation with or consideration of First Nations and their unique financial needs in relation to the cost of capital and inclusion of those impacts in relevant recommendations to the Board.
20. The Reports do not provide any analysis of how the cost of capital issues under review in this Proceeding might specifically impact First Nations and Indigenous communities, nor do

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<sup>9</sup> Transcript, Oral Hearing, Volume 4, p. 149.

<sup>10</sup> Transcript, Oral Hearing, Volume 5, p. 199.

they consider whether these communities possess distinct interests that could affect the recommendations put forward in the Reports.

21. These omissions reveal a fundamental disconnect between the assumptions underlying the Reports and the realities faced by First Nations in relation to the cost of capital, and points to a one-size-fits-all analysis that disregards the historical and ongoing financial barriers that First Nations and Indigenous communities face in Ontario, particularly in securing favorable financing terms.
22. By disregarding the unique barriers that First Nations encounter in securing financing for energy projects, the Reports fail to provide a comprehensive assessment of the OEB's cost of capital framework and policies for systemically disadvantaged First Nations seeking equity participation in Ontario energy projects.
23. The lack of consultation with First Nations and their ability to equitably and fairly access capital in energy projects in Ontario underscores the need for a more inclusive approach that explicitly considers the challenges Indigenous communities face, ensuring that their interests are not only recognized but integrated into the OEB's cost of capital methodologies and related policies.
24. Without engagement with First Nations and understanding their unique circumstances in regard to access to capital, the Reports cannot adequately provide actionable recommendations to the OEB on whether the status quo methodology is fair to First Nations. This indicates a critical need for a revised approach to the issues of this Proceeding that explicitly incorporates First Nations perspectives and considers their interests into the OEB's cost of capital methodologies and policies.
25. Instead, the Board should consider implementing the recommendations from the Electrification and Energy Transition Panel ("**EETP**") report, Ontario's Clean Energy Opportunity (the "**EETP Report**"). The EETP Report includes specific findings and recommendations for government ministries, corporations, regulatory bodies, and other key

players, underscoring the need for meaningful engagement with First Nations at every stage of energy policy development.<sup>11</sup>

26. While this Proceeding focuses on cost of capital, it is connected to broader issues of economic reconciliation, which the EETP Report addresses comprehensively. This presents an opportunity for the OEB to implement these recommendations by addressing First Nations' access to capital as a core issue, not an afterthought, ensuring the OEB's cost of capital framework and policies reflect the distinct needs of Ontario's First Nations communities.
27. Incorporating these recommendations would reflect a commitment to fairer, more inclusive, and forward-thinking policies that benefit all communities. Accordingly, CFN/MCFN respectfully submits that the OEB has an opportunity to lead by example, utilizing the EETP's recommendations as a guide toward achieving economic reconciliation within Ontario's energy sector.

**D. The status quo cost of capital methodologies does not address historic and existing disadvantages for First Nations in relation to the cost of capital**

28. There has not been a "level playing field" in Ontario's existing energy policies and regulatory frameworks with respect to First Nations and Indigenous participation. The OEB's current cost of capital framework fails to consider the unique financial barriers faced by many First Nations in Ontario. This omission is significant, as the inability of First Nations to access capital on terms similar and as favorable as those available to other entities places them at a systemic disadvantage in participating in energy projects across Ontario.
29. Through this Proceeding, the OEB should seek to actively address the historical and ongoing disadvantages that have limited First Nations' equitable access to capital for energy projects. The principle of "nothing about us, without us", used by many First Nations, encapsulates the need for First Nations to be involved from the outset in developing any policies that has the potential to directly impact their rights, lands, and communities.

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<sup>11</sup> See EETP Report, pp 7-8, 25, 53, and 59-60.

30. True partnership with First Nations cannot be achieved by treating First Nations as symbolic participants or “cardboard cut-outs” in major policy development processes or energy projects. Instead, meaningful partnerships require robust and meaningful engagement, with First Nations at the table as equal partners in all decision-making processes that may impact their rights or lands.
31. As confirmed during the cross-examination of Mr. Goulding, the status quo policy, rooted largely in the OEB’s 2009 report on the cost of capital<sup>12</sup> and subsequent policies (“**2009 Report**”), does not reference First Nations or Indigenous Peoples. This lack of inclusion was continued in the 2016 OEB staff review report, leaving a gap in addressing these essential public policy concerns:

MR. DAUBE: And fair to say that when you are referencing status quo policy in your report, that often means in large part the 2009 cost of capital report and the policies that flow therefrom?

MR. GOULDING: Yes, I think that's correct. I mean, it does mean things that have happened afterwards, as well. But, generally, I think that's a fair statement.

MR. DAUBE: Do you agree, subject to check if you would like, that there are no direct references in this report to First Nations, Indigenous or Aboriginal Peoples.

MR. GOULDING: Yes. Subject to check, but yes.

MR. DAUBE: And the same goes for the 2016 review produced by OEB Staff?

MR. GOULDING: Subject to check, yes.

MR. DAUBE: And so far as you're aware, there is no discussion of how any of the cost of capital issues examined will either help or hinder the integration of First Nations or Indigenous Peoples into the energy sector, so far as you are aware?

MR. GOULDING: So far as I am aware, but we can't have -- we can't solve all public policy problems through a generic cost of capital proceeding. Right? They are extremely important matters that absolutely need to be addressed, but we can't address them all in a generic proceeding.<sup>13</sup> (emphasis added)

32. The above response reflects this gap, acknowledging that the framework neither contemplates nor addresses the particular needs of Indigenous communities in Ontario’s energy sector.

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<sup>12</sup> EB-2009-0084, [Report of the Board on the Cost of Capital for Ontario's Regulated Utilities](#), (11 December 2009).

<sup>13</sup> Transcript, Oral Hearing, Volume 1, pp. 153-154.

33. The reliance on the status quo approach to the OEB's cost of capital methodologies that omits specific consideration for First Nations has significant repercussions for First Nations access to capital. The current framework effectively assumes a level playing field that does not exist in practice.
34. The status quo approach is not capable of addressing the public policy issues relevant to supporting equity participation by First Nations. In fact, the status quo indirectly disadvantages First Nations as there is a lack of explicit mechanisms or adjustments aimed at redressing the historical and current barriers to capital for many First Nations.
35. CFN/MCFN respectfully submits that by failing to address barriers to capital for First Nations communities, the status quo effectively excludes First Nations from equitable participation in energy development, underscoring the need for a revised approach that directly addresses these disparities.
36. Advancing reconciliation further support the position that regulatory bodies like the OEB have a responsibility to ensure First Nations and Indigenous-owned entities are not disadvantaged by default assumptions of neutrality.<sup>14</sup>
37. By addressing these issues within this Proceeding, and not as part of a separate proceeding that may not adequately address the specific issues of the OEB's cost of capital methodologies, the Board can demonstrate its commitment to the equitable treatment of First Nations and Indigenous Peoples and acknowledge that First Nations' inclusion is a matter of regulatory fairness and integrity in this Proceeding.
38. Accordingly, First Nations' unique interests and barriers to capital access are inextricably linked to the broader goals of OEB's cost of capital policies and must be addressed within this Proceeding. CFN/MCFN submit that Integrating these considerations is not only essential for fairness and regulatory alignment but also reflects the OEB's responsibility to ensure that its policies and methodologies are inclusive, equitable, and supportive of First Nations and Indigenous communities and their integral role in Ontario's energy sector.

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<sup>14</sup> CFN/MCFN adopts TFG/MC's submissions related to reconciliation at paras 42-130.

**E. First Nations concerns and access to capital should be considered as part of this Proceeding**

39. First Nations' unique challenges accessing capital on favourable terms to other entities should be considered within this Proceeding and not as part of a separate future proceeding or engagement process.
40. First Nations communities have consistently raised concerns about being marginalized or excluded from policy development – often referred to as the “out of sight, out of mind” issue amongst First Nations. This pattern has been pervasive in energy and economic policy, including in the development of the 2009 Decision. The lack of engagement with First Nations in the Reports underscores the urgent need to shift from outdated approaches that fail to engage First Nations meaningfully.
41. CFN/MCFN notes that some of the experts expressed support for addressing First Nations issues in a separate proceeding. For example, Mr. Goulding acknowledged that the OEB's cost of capital methodology could impact Indigenous equity participation in the energy sector but suggested that these considerations might be better addressed in a separate proceeding, and questioned whether a generic cost of capital proceeding is the appropriate forum to address systemic barriers faced by Indigenous communities:

MR. DAUBE: Will you agree that, if the OEB wishes to increase opportunities for Indigenous equity participation in the energy sector, that that objective would serve as a consideration running counter to the recommendations you make in this section?

...

MR. GOULDING: Yes, I am sure. But I would say that this is not the only way that the OEB could encourage those objectives.

MR. DAUBE: Not the only way, one way.

MR. GOULDING: I get back to my point that we can't accomplish every worthy policy objective through a generic proceeding. And, you know, my concern is actually it doesn't do the challenges justice. Right? I would like to understand: What's the trade-off, for example, between de-risking a project by encouraging equity participation by particular First Nations groups, and the challenges that historically groups that have been unable to accumulate capital over time through discrimination? Right? Do we solve that through a cost of capital proceeding? Do we solve it through setting up a separate fund that will loan money to buy in the equity, and we do that off the backs of the -- not the backs -- off of the hearts of all taxpayers or ratepayers?

I think these are important considerations that are best addressed in a separate proceeding. What we are trying to do here is identify the way in which the ability to raise

capital and to compensate for risks is impacted by the generic cost of capital proceeding. And so, I think that this is the starting point, not the ending point with regards to particular conversations like this.

42. Such an approach overlooks the fundamental relevance of access to capital as part of the OEB's cost of capital framework and current methodologies under review. Separating these concerns risks creating an incomplete assessment of the current methodology's fairness and equity, especially for First Nations. Isolating First Nations' concerns into a separate proceeding is likely to provide a fragmented policy approach that fails to address the interconnected nature of the First Nations' concerns and issues identified as part of this Proceeding.
43. By not addressing the impacts on First Nations as a result of the OEB's cost of capital framework, the Board runs the risks of perpetuating systemic inequities if these important issues are relegated to a separate proceeding that is likely to be more general and not exclusively focused on the OEB's cost of capital policies.
44. First Nations access to capital is not a peripheral issue but one that fundamentally influences the viability and cost-effectiveness of First Nations ability to pursue equity participation in energy projects, supporting economic reconciliation and ensuring First Nations have a stake in the projects that impact their right, lands, and communities. Addressing these issues in isolation would fail to recognize the inseparable link between capital accessibility and overall energy project equity participation.
45. CFN/MCFN submits that addressing the unique interests and challenges of First Nations in accessing capital is integral to a fair evaluation of the OEB's cost of capital methodology and should be included within this Proceeding and not deferred to a separate engagement process or proceeding.

## **F. Conclusions**

46. CFN/MCFN's submissions have addressed several key issues with the Reports and the Proceeding. CFN/MCFN's submissions, stated generally, are that:

- (a) the Reports have entirely overlooked engagement with First Nations, failing to consider their unique interests, challenges, and capacity to participate equitably in Ontario's energy sector within the context of access to and the cost of capital;
  - (b) assuming that the status quo of the OEB's cost of capital framework and policies is neutral for all entities is misleading, as First Nations face distinct barriers and impacts when accessing capital that are not accounted for under the status quo nor considered as part of this Proceeding;
  - (c) advancing reconciliation in this Proceeding and Ontario's energy landscape more broadly requires engaging First Nations at every level of policy development related to the reviewing and revising the OEB's cost of capital framework and related policies;  
and
  - (d) the specific and unique interests of First Nations related to the impacts of the OEB's cost of capital methodologies and related policies should be addressed within this Proceeding, rather than deferred to a separate proceeding or engagement process that may not effectively or meaningfully address these concerns and issues.
47. CFN/MCFN generally support the relief requested by TFG/Minogi at para 201.

ALL OF WHICH IS RESPECTFULLY  
SUBMITTED THIS 7<sup>th</sup> day of November, 2024



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DT Vollmer  
Resilient LLP  
Counsel for CFN and MCFN