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VIA E-MAIL TO RPPR@CER-REC.GC.CA

Canada Energy Regulator – Rules of Practice
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**Re: Commission of the Canada Energy Regulator Rules of Practice and Procedure Review
Submission of Driftpile Cree Nation, Louis Bull Tribe, Sucker Creek First Nation, and Whitefish Lake First Nation (collectively, the “Nations”)**

We write on behalf of the Nations in response to the Canada Energy Regulator’s (the “**CER**”) request for input on the “Canada Energy Regulator Rules of Practice and Procedure Review Discussion Paper” (the “**Discussion Paper**”).

We attach as Appendix A to this correspondence the submission of the Nations on the Discussion Paper.

We thank you for your consideration of the attached submission.

Sincerely,

MLT AIKINS LLP

Per:



Amy F. Lalji

AL:cgr

APPENDIX A

Comments on the Rules of Practice and Procedure Discussion Paper for Review

1. INTRODUCTION

The Commission of the Canada Energy Regulator (the “**Commission**”) seeks to comprehensively update the National Energy Board Rules of Practice and Procedure, 1995 (the “**Rules**”) that governs the conduct of hearings conducted pursuant to the *Canadian Energy Regulator Act* (the “**Act**”). In support of this work, the Commission has published the Discussion Paper. The Discussion Paper identifies the Commission’s intention to modernize the Rules to reflect the modern practices, processes, and terminology under the Act and to ensure that it aligns with Canada’s commitment to reconciliation and to implement the United Nations Declaration on the Rights of Indigenous Peoples (“**UNDRIP**”).

The Nations welcome the Commission’s plan to modernize the Rules and to be better aligned with the goals of Canada towards reconciliation and the implementation of the UNDRIP. The Nations are each frequent intervenors in proceedings before the Commission. This submission is informed by the Nations’ respective experiences participating in several CER proceedings concerning proposed activities regulated under the Act.

The Nations’ submissions to the Commission, included below, concern the following topics identified in the Discussion Paper:

- Reconciliation and the implementation of UNDRIP;
- Preserving and protecting Indigenous Knowledge;
- The role of the Crown Consultation Coordinator;
- Pre-hearing process steps; and
- Timelines in the Rules.

The Nations thank the Commission and the CER for the opportunity to comment on the Discussion Paper.

2. RECONCILIATION AND IMPLEMENTATION OF UNDRIP

The Discussion Paper states that the Commission is contemplating necessary changes to ensure that the Rules are aligned with achieving reconciliation and implementing UNDRIP in line with

the *United Nations Declaration on the Rights of Indigenous Peoples Act*¹ (“UNDA”) and the accompanying UNDA Action Plan (“**Action Plan**”). In particular, the Discussion Paper identifies Measure 34 of the Action Plan in connection to the CER’s intention to amend the Rules to support “the participation of Indigenous Peoples in projects and matters that are regulated by the CER.”²

Action Plan Measure 34 instructs Natural Resources Canada and the CER to work “in consultation and cooperation with First Nations, Métis and Inuit communities, governments, and organizations to: i) enhance the participation of Indigenous peoples in; and ii) set the measures that could enable them to exercise federal authority in respect of, projects and matters that are currently regulated by the Canada Energy Regulator.”³

The Nations submit that to adequately implement UNDRIP in accordance with Measure 34 of the Action Plan, the Rules should be amended to ensure that the following considerations are included:

- i. Participation of Indigenous peoples should be sufficiently enhanced

To date, Indigenous groups participating CER proceedings generally must apply for status as an “interested person” under Section 28 (an “**Intervenor**”). Intervenors are a general category of participant in a CER proceeding. Applications for Intervenor status are open to the public, special interest groups, and the natural resources sectors, and applicants generally must establish how their respective interests justify being granted status as an Intervenor on each respective CER proceeding.

Although it has been the practice of the Commission to no longer require such justification from most Indigenous groups seeking to participate in a CER proceeding, the Rules remain open to allowing the Commission to unduly scrutinize the applications of Indigenous groups who are concerned about a proposed project’s impacts to their Indigenous rights. Such scrutiny, although uncommon, would not be consistent with Canada’s commitments towards reconciliation and the implementation of UNDRIP. Further, the rights of participation for Intervenors established under the Rules does not distinguish between Indigenous groups and private individuals, special interest groups, or third-party companies in the natural resources sector.

To modernize the Rules to more appropriately reflect the commitments of Canada towards the implementation of UNDRIP and, the Commission should establish a distinct category of participation for Indigenous groups. Such a category would appropriately distinguish the

¹ SC 2021, c 14.

² Discussion Paper at PDF pg 3.

³ [The United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan](#) at PDF pg 33.

participation of Indigenous groups as holders of distinct and constitutionally protected rights from the participation of general Intervenors. This category of participation for Indigenous groups should include the following considerations:

- Distinct rights of participation for Indigenous groups in CER proceedings, which must support the unique duties of the Commission under Section 56 of the Act concerning its requirement to consider the adverse impacts to Indigenous peoples of a decision, order, or recommendation, and to generally reflect the “special Constitutional relationship”⁴ between the Canada and Indigenous peoples. Such rights of participation should be developed collaboratively by the Commission in consultation with Indigenous groups;
- Requirements for advanced notice by the Commission to Indigenous groups of potential CER proceedings for projects proposed within their territories during the pre-hearing phase;
- Process steps that adopt a permissive approach for the identification of Indigenous participants in CER proceedings, which should be streamlined to remove perceived barriers to Indigenous participation; and
- Continued and adequate capacity for the meaningful participation of Indigenous groups in hearing processes to support their role in ensuring the appropriate evaluation of a Project’s impacts to Indigenous rights.

ii. Measures to support the Indigenous co-administration of federal authority under the Act

The Rules should be updated to establish processes in which the Commission and Indigenous governing bodies share joint decision-making functions in the administration of public hearings under Part II “Public Hearings”. Joint decision-making and administration processes under the Rules could be implemented through an Indigenous assessment panel struck on an assessment-by-assessment basis and be composed of representatives of each potentially impacted Indigenous group. In the context of a project assessment, such a panel should be empowered to identify and make determinations concerning critical rights-based matters and to establish information requirements for the implementation of UNDRIP through the assessment process, among other critical matters.

⁴ “Principles respecting the Government of Canada’s relationship with Indigenous peoples”, online: <<https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html#:~:text=Indigenous%20peoples%20have%20a%20special,of%20the%20Constitution%20Act%2C%201982>>.

Such co-administration processes should be developed in alignment with forthcoming regulations under the Act currently being contemplated by the Minister of Energy and Natural Resources to authorize the delegation of “certain powers, duties and functions with respect to matters regulated under the [Act]”⁵ to Indigenous governing bodies under Sections 77 and 78 of the Act.

iii. Consideration for the Cumulative Effects of Development

The Nations’ respective Treaty rights have been significantly impacted by the cumulative effects of development within their territories. Cumulative effects, and the means by which proposed projects will mitigate, avoid, or offset them, have been critical issues that have increasingly been factored within CER proceedings, particularly following the Supreme Court of British Columbia’s *Yahey*⁶ decision and the subsequent development of a cumulative effects framework between the Province and certain Treaty No. 8 First Nations located within British Columbia. However, the Nations have observed that, on a hearing-by-hearing basis, the Commission and project proponents have treated cumulative effects issues inconsistently. This inconsistency has resulted in a lack of clarity for participating Indigenous groups and project proponents regarding how cumulative effects will be assessed by the Commission. These circumstances highlight a need for improved procedural certainty regarding how cumulative impacts will be assessed in CER proceedings.

Therefore, the Nations recommend that the Commission, through its implementation of the measures identified in the sections above, ensure that particular and appropriate consideration is made for cumulative effects. Further, the Commission should establish a cumulative effects assessment framework, in collaboration with Indigenous groups, to supplement the Rules by identifying topic-specific procedural requirements concerning the assessment of cumulative effects within all CER proceedings.

3. INDIGENOUS KNOWLEDGE

The Discussion Paper seeks feedback concerning how the Rules could incorporate formal process steps for providing and protecting Indigenous Knowledge that may be provided by Indigenous peoples within hearings before the Commission. The Nations submit that the Rules should be amended to:

- Incorporate flexible process steps for providing Indigenous knowledge; and

⁵ “Proposed Indigenous Ministerial Arrangements Regulations”, online: < <https://natural-resources.canada.ca/our-natural-resources/indigenous-peoples-and-natural-resources/proposed-indigenous-ministerial-arrangements-regulations/25840>>.

⁶ *Yahey v British Columbia*, 2021 BCSC 1287 (CanLII)

- Ensure that Indigenous knowledge is adequately and appropriately protected.

These submissions are discussed in further detail below.

a. The Rules should incorporate flexible process steps for providing Indigenous knowledge

The Rules currently do not include guidance on the process for sharing Indigenous Knowledge with the Commission, including through oral Indigenous Knowledge sessions. The original NEB Rules of Practice and Procedure did not contemplate such sharing of Indigenous Knowledge and the process and protocol for doing so can often be unpredictable and uncomfortable of Indigenous participants.

The Nations note that they have each been required to provide submissions on the need for the Commission to consider Indigenous Knowledge and the manner by which the Commission should consider such Indigenous Knowledge in recent Commission-led proceedings. Such engagement between the Nations and the Commission indicates that the Commission lacks sufficient clarity on the need to include process steps concerning the incorporation of Indigenous Knowledge in a given hearing.

Each of the Commission and participants to CER proceedings will benefit from a clearly delineated process in the Rules that allows Indigenous groups and their respective Knowledge Keepers to share Indigenous Knowledge with the Commission in appropriate, culturally safe settings. Further, such a process must account for the preferences of Indigenous groups concerning their expectations for the confidentiality of their shared Indigenous Knowledge, including reasonable expectations that such information will not be released for public review if so required. Additionally, project proponents should be prohibited from making use of any publicly available Indigenous knowledge in future applications without the specific consent of the respective Indigenous Knowledge Keepers.

The Nations recommend that the Commission set out a clear and flexible process for sharing Indigenous Knowledge. In particular, the Nations recommend that the Rules:

- Include guidance on what types of accommodation are available to ensure that Indigenous Knowledge Keepers can share Indigenous Knowledge in a culturally safe setting, including the option to host the Commission in the respective communities. In this regard, the Nations note that they are not aware of the Commission having held in-community oral Indigenous Knowledge session in past proceedings.
- Include a preliminary process step for Indigenous groups to inform the Commission of what type of accommodation for sharing Indigenous Knowledge they will be seeking.

- Establish clear requirements to ensure that questions asked to Indigenous Knowledge Keepers during oral Indigenous Knowledge sessions are appropriate and are not disparaging or in any way undermine the evidence of the Knowledge Keepers.

The amendments to the Rules recommended above changes would both simplify process of how Indigenous groups may share Indigenous Knowledge and limit the need for pre-hearing submissions concerning the sharing of such knowledge. Such amendments would support certainty for Indigenous groups that their Knowledge Keepers may share their knowledge in a respectful and culturally safe manner, and that oral Indigenous Knowledge sessions are accessible and are integrated into all relevant CER proceedings.

b. The Rules should support the adequate and appropriate protection of Indigenous Knowledge

The Nations identify two key themes necessary under the Rules to support the adequate and appropriate protection of Indigenous Knowledge when provided during CER proceedings, set out below.

- i. Ensuring Indigenous Knowledge is used confidentially and only for the purposes for which it is shared

The Rules do not currently contain guidelines for how the confidentiality of Indigenous Knowledge must be protected during a CER hearing or after the hearing process has been completed. Whereas Section 58 of the Act sets out that Indigenous Knowledge provided in confidence to the CER must be kept confidential the Act also identifies Commission's authority to make determinations concerning the confidentiality of Indigenous Knowledge, including regarding determinations of whether Indigenous Knowledge satisfies any of the exceptions to this confidentiality requirement set out under Section 58(2) of the Act. These exceptions include where the Commission, in its absolute discretion, determines that Indigenous Knowledge is "publicly available" and where the disclosure of Indigenous Knowledge is "necessary for the purposes of procedural fairness and natural justice".

Accordingly, the Rules should establish clear guidance to the Commission in interpreting and applying the exceptions under Section 58(2) of the Act, including in respect to:

- How Indigenous Knowledge, or certain aspects of Indigenous Knowledge, may appropriately be identified as being in the public domain based on the considerations and submissions provided by the respective Indigenous Nation which provided Indigenous Knowledge with such guidance favoring the protections of confidentiality of such knowledge;

- Establishing procedures for project proponents to be appropriately authorized by Knowledge Keepers to safely use Indigenous Knowledge shared within a CER proceeding; and
- Creating transparent procedures for determining whether, and with what limitations, disclosure of Indigenous Knowledge by the Commission should be undertaken with considerations for procedural fairness and natural justice.

Further, the Rules should be amended to include processes for the Commission to ensure that appropriate protections are in place reflecting the distinct sensitivities and cultural protocols identified by Indigenous groups in circumstances where the Commission intends to impose conditions on the disclosure of Indigenous Knowledge pursuant to Section 58(3) of the Act. In this regard, the Commission should ensure that the Rules do not promote circumstances in which an Indigenous Nation must decide between withdrawing its Indigenous Knowledge or allowing it to come fully into the public record where such Indigenous Nation wishes to preserve the confidentiality of certain Indigenous Knowledge.

Finally, the Nations note that nearly all the documents filed in CER proceedings are posted online to the REGDOCS system and that those documents are maintained and made available online to the public after each CER proceeding concludes. In circumstances where Indigenous Knowledge that has been duly posted on REGDOCS, such Indigenous Knowledge generally remains available indefinitely and may be referenced or used by the public for purposes that are not directly associated with the original intentions of the respective Indigenous groups that shared such Indigenous Knowledge. Indigenous Knowledge is often provided by Indigenous groups in a highly context-specific manner directed at the specific matters at issue in each respective CER proceeding and such Indigenous Knowledge is often not intended for broad and generalized public consumption.

In order to ensure that the Commission upholds the original intentions of Indigenous groups that have shared such Indigenous Knowledge that has been duly posted to REGDOCS, the Nations submit that the Rules should be amended to ensure that Indigenous Knowledge not be made available on REGDOCS in perpetuity, subject to the wishes of the respective Indigenous groups. Accordingly, the Nations recommend the following measures be implemented in the Rules:

- Indigenous Knowledge that has been duly authorized in the context of a particular CER proceeding should be removed from REGDOCS at the close of a hearing process pursuant to any requirements of each respective Indigenous Nation; and
- If Indigenous Knowledge must become part of the record in a CER proceeding and posted to REGDOCS, the Rules should clearly state that such Indigenous Knowledge is not to be used as part of a different project's Application as evidence in a different CER proceeding.

ii. Ensuring the accuracy of shared Indigenous Knowledge

Although it is common practice for only the Commission to verify the transcript of oral Indigenous Knowledge prior to entering it into the record of a CER proceeding, the Nations recommend that specific process steps be created in the Rules to require that the Indigenous groups that share Indigenous Knowledge review transcripts or recordings of their oral Indigenous Knowledge session before it is filed as a record in a CER proceeding. This verification step would create clear requirements that oral Indigenous Knowledge be validated in the record to ensure the accuracy and integrity of such shared Indigenous Knowledge and may also provide opportunities for participating Indigenous groups to create and submit translations of such records in their respective Indigenous languages, as may be required in accordance with their customs.

4. CROWN CONSULTATION

The Discussion Paper enquires whether the role of the Crown Consultation Coordinator (the “CCC”), and the nature of the CCC’s participation in CER proceedings before the Commission, should be formalized in the Rules. It also asks for input on how the CCC’s role should be formalized in the Rules.

a. The CCC’s role should be formalized in the Rules

When the Crown’s actions may create impacts to the rights of Indigenous peoples, the Crown has a duty to consult. In certain cases, the Crown has chosen to delegate part of the duty to consult to the Canada Energy Regulator. The CCC plays an integral role in the discharge of the Crown’s duty to consult for CER regulatory proceedings involving major projects.

Indigenous communities need complete clarity as to how Crown will discharge the duty to consult. In the context of regulatory proceedings before the Commission for major projects, where the CCC is discharging part of the duty to consult, Indigenous communities require clarity as to the CCC’s role. The Nations therefore recommend that the Commission formalize the CCC’s role in CER regulatory proceedings within the Rules.

b. The CCC’s submissions should be given weight by the Commission and by the Governor in Council

The CCC, in the context of CER proceedings, engages directly with Indigenous groups to listen and to understand the how the rights and interests of those Indigenous groups interact with the project that is the subject of the proceeding. The CCC then synthesizes what they have heard from Indigenous communities and uses that information to formulate the CCC’s submissions to both the Commission and, eventually, the Governor in Council.

Given the CCC's role of facilitating direct contact between the Crown and potentially affected Indigenous groups, as well as in collecting and synthesizing perspective provided by those Indigenous groups, the CCC's submissions should be regarded as providing valuable context concerning the rights and interests of potentially affected Indigenous peoples in support of the Commission's determinations within a CER proceeding. Accordingly, the Nations recommend that the Commission identify the role of the CCC in the Rules and establish considerations that the Commission must make within a CER proceeding with respect to the CCC's submissions.

For the most part, the Nations have observed that while the CCC is able to relay information provided by Indigenous intervenors, their relevance to the commission beyond providing information is unclear. Clear processes should be established to ensure that due weight be given to the assessments made by the CCC, and the CCC should not be relegated to simply act as note takers. The ability to take part in some hearing steps is helpful, but the CCC's ability to work in parallel to the Commission to discharge the duty to consult must be more clearly identified.

c. The Rules should empower the Commission to attend and observe CCC-hosted sessions with Indigenous communities

Further to the Nations' submissions above concerning the role of the CCC, the Nations recommend that the Commission amend the Rules to establish that the Commission may attend and observe CCC information sessions and meetings with Indigenous groups that may be scheduled from time to time during all phases of a CER proceeding. The purpose of the Commission's attendance in this regard would be to support its fulsome understanding of the perspectives of participating Indigenous groups and the subsequent submissions of the CCC in the respective CER proceeding.

5. Pre-Hearing Process Steps

The Discussion Paper notes that "the current Rules tie several process steps to the issuance of a hearing order (notice of public hearing, applying to participate)."⁷ The Nations agree that the current requirement under the Rules that several process steps follow a hearing order is out of step with the Commission's current practices. In certain recent CER proceedings the Commission has ordered process steps to occur before the Commission's issuance of the hearing order.⁸

In the Nations' view, participants in CER proceedings do not have a clear understanding of which pre-hearing process steps may be available on a hearing-by-hearing basis. This question is

⁷ At PDF pg 5.

⁸ For example, several separate comment processes were undertaken prior to the issuance of the hearing orders in each of the in the CER proceedings for the Pouce Coupé Pipe Line Ltd Taylor to Gordondale Pipeline Project and the Westcoast Energy Inc Sunrise Expansion Program.

left to the discretion of the Commission in each particular proceeding, which creates uncertainty for participants who are left to rely on the guidance of precedents set by previous Commissions in previous CER proceedings.

The Nations submit that all participants in CER proceedings would benefit from greater certainty as to what process steps should be available in the pre-hearing phase, and that certain steps be required when presented depending on the nature and scope of each particular project. They recommend that the Rules include guidance on what steps the Commission can order in the pre-Hearing Order stage of a CER proceeding. The Nations strongly recommend that the Rules be amended to identify the following pre-Hearing Order process steps, among others that the Commission may identify, including considerations for the Commission's assessment of requests by participants for such pre-Hearing Order process steps:

- Comment process and/or workshop on completeness of the Application; and
- Comment process and/or workshop on the draft Timetable of Events and/or draft List of Issues;

6. The Commission's Examination of Timelines in the Rules

The Discussion Paper states that the Commission will “examine all timelines set in the Rules and consider whether new time limits should be added. In certain instances, timelines may be shortened and in others they may be extended.”⁹

The Nations submit that the Commission, in considering timelines set out in the Rules, must ensure that any consideration to reduce a respective timeline is required to consider how such reduction in process timelines may impact Indigenous groups participating in CER proceedings, to ensure that adequate time is afforded for their meaningful engagement in all respective process steps.

⁹ At PDF pg 5.