1. INTRODUCTION

The Fort McKay Métis Nation ("FMMN") writes to provide comments on the Commission of the Canada Energy Regulator's ("CER") review of the National Energy Board[1] Rules of Practice and Procedure (the "Rules").

We support the CER's goals of improving their regulatory system and aligning their regulatory system with the *United Nations Declaration on the Rights of Indigenous Peoples Act* ("UNDRIP Act") and related Action Plan Measures.[2] A key message in our submissions below is that these goals must be considered together. Values like efficiency and predictability must be understood and tackled in light of the obligations and directions that flow from Canada's adoption of UNDRIP and the spirit and intent of the UNDRIP Act.

While the Rules are focused on the technical aspects of CER hearings, our recommendations to support reconciliation may touch on points beyond the scope of the Rules. This broader perspective and approach is required if the CER is to succeed in implementing the UNDRIP Act and Action Plan Measures, enabling fair and meaningful participation by impacted Indigenous groups, and earning trust in the CER regulatory system.

2. BACKGROUND ON FMMN AND ITS SECTION 35 RIGHTS

FMMN is the legal entity by which Fort McKay Métis Nation acts, organizes, and governs itself. The Fort McKay Métis Nation is a distinct Métis community originating from when French Canadian fur traders entered Northeastern Alberta in the 1700s and 1800s. The historic community and its modern-day counterpart is located approximately 45 km north of Fort McMurray. As of June 2023, FMMN has over 116 members.

The Fort McKay Métis sit in the middle of Alberta's oil sands development. FMMN is surrounded by industrial development and in close proximity to various pipelines and related infrastructure and activities. Pipeline and other energy projects intersect FMMN traditional and hunting territory where FMMN members historically and currently exercise their rights to hunt, fish, trap and gather for food, social, cultural and consumptive purposes.

Fort McKay Métis have unextinguished rights, including among others, the right to hunt, fish, trap, and gather, as well as the right to engage in practices necessarily incidental to these activities. These Métis harvesting rights are protected by section 35(1) of the *Constitution Act, 1982*.

Recently, FMMN underwent Alberta's Métis Credible Assertion process. Alberta's recognition of Fort McKay Métis as a historic and contemporary Métis community in its Métis Harvesting Policy as well as its recognition that the Fort McKay Métis Community Association (the predecessor to FMMN) has met the criteria of credible assertion demonstrates that the provincial Crown recognizes the Fort McKay Métis' credibly asserted section 35 rights. What this means for the CER is that FMMN clearly is a rights-bearing community with a strong prima facie claim to section 35 rights.

3. FMMN COMMENTS AND RECOMMENDATIONS

Our submissions focus on:

A. Integrating Indigenous Knowledge;
B. Crown Consultation;

C. Reconciliation and Implementation of the United Nations Declaration on the Rights of Indigenous Peoples;
D. Enhancing Competitiveness; and
E. Improving Accessibility.

Should you have any questions or desire any follow-up discussion or clarification, please do not hesitate to contact us.

A. Integrating Indigenous Knowledge

Discussion question: Do you have feedback regarding how the Rules could incorporate process steps for providing and protecting Indigenous knowledge within hearings?

The Commission can take steps to implement its commitment to reconciliation and the UNDRIP Act in CER hearings by facilitating the integration of Indigenous knowledge into the hearing process. We have identified three barriers to the meaningful integration of Indigenous knowledge into the CER hearing process that should be resolved as part of the review of the CER Rules:

- challenges for Elders or knowledge keepers participating or providing testimony;
- systemic bias that hinders meaningful consideration of Indigenous knowledge when provided; and
- no requirement for the CER to integrate Indigenous knowledge into their recommendations and decision-making.

The recommendations below address these barriers:

1) Provide Timely and Sufficient Funding: The CER must provide timely and sufficient funding for gathering of Indigenous knowledge so impacted Indigenous groups have time to prepare accordingly. The process for funding applications should be easy to navigate. Costs for participating in hearings and sharing Indigenous knowledge should be easily covered.

2) Co-develop Protocols for Inclusion of Indigenous Knowledge with Impacted Indigenous Groups: The Rules should require that the impacted Indigenous groups, regulator, and project proponent collaboratively develop a binding Indigenous Knowledge protocol to determine how each hearing and subsequent decision-making process will integrate Indigenous knowledge.[3] The Rules could set out guiding principles for these protocols by including Canada's Indigenous Knowledge Policy Framework for Project Reviews and Regulatory Decisions (the "IK Framework")[4]. Canada developed the IK Framework to guide how federal departments, including the CER, incorporate Indigenous knowledge into their rules, policies, and guidance. The IK Framework lists five guiding principles:

    i. Respect Indigenous Peoples and their knowledge;
    ii. Establish and maintain collaborative relationships with Indigenous Peoples;
    iii. Meaningfully Consider Indigenous Knowledge;
    iv. Respect the Confidentiality of Indigenous Knowledge; and
    v. Support Capacity Building Related to Indigenous Knowledge.

    We recommend incorporating these five principles into the Rules as factors to consider in developing an Indigenous knowledge protocol.

3) Refer Reviews to Independent Indigenous Advisory Committee: Section 69(1) of the CER Act provides the Commission with the right to "review, vary or rescind any decision

of order it makes and, if applicable, may re-hear any applications before deciding it". Part III of the Rules establishes how an applicant may apply for review or rehearing of a decision or order of the Board. The decision in variance decision RH-005-2020 relating to the TransCanada Keystone Pipeline provides useful instruction, stating:

> *The Commission considers applications for review through a two-step process. In step one, the Commission considers, as a threshold test, whether the applicant has raised a doubt on a prima facie [citations omitted] basis as to the correctness of the decision. Grounds for a review application can include an error of law or of jurisdiction, changed circumstances or new facts that have arisen since the close of the original proceeding, or facts that were not placed in evidence in the original proceeding because they were not then discoverable by reasonable diligence*.

If the CER does not take into account Indigenous knowledge at certain decision points (see ss. 183(2), 262(2), 298(3) of the Act), it may be an error of law that can be reviewed. While the Rules provide broad powers to the Board to consider, dispose of, and decide on applications for review, the CER likely does not have the required expertise regarding questions relating to Indigenous knowledge. We recommend that the CER establish an independent Indigenous Knowledge advisory committee and amend the Rules so that the Board can direct relevant applications for reviews to this advisory committee.

4) Facilitating Evidence from Elders or Knowledge Keepers: A CER hearing is a formal tribunal process that may make Indigenous knowledge holders uncomfortable, and in turn inhibit meaningful participation. To address this dynamic, we recommend several amendments to the Rules, described in the Appendix of this memo.

B. Crown Consultation

Discussion question: Would you like to see the role of the Crown Consultation Coordinator, and the nature of its participation in Commission hearings reflected in the Rules? If so, how?

There is benefit to incorporating the role of the Crown Consultation Coordinator ("CCC") into the Rules. Beyond the Rules, it will be important for the CER to develop policies, tools and other guidance materials to further clarify the role of the CCC and to ensure the CCC has the direction and authority to meaningfully engage in consultation. FMMN would prefer to see the CCC role become a role that has the ability to flexibly and meaningfully address community concerns rather than a purely administrative role which has been the approach to consultation coordinators in the Alberta Consultation Office ("ACO"). This approach in the ACO has undermined consultation, regulatory proceedings and reconciliation.

In FMMN's view, the Rules could be a productive place to enshrine the helpful role that the CCC can play as an intermediary between the Commission and impacted Indigenous groups and clarify the role that the CCC can play as a core point of contact for many impacted Indigenous groups in their interactions with the CER. Accordingly, the Rules could be amended to clarify that CCC's responsibility of ensuring impacted Indigenous groups:

- understand the process they are participating in;
- have the resources and time to participate meaningfully;

- have an effective way to obtain the information necessary for the groups and the CER can responsibly understand potential effects on indigenous rights;
- have an accountability mechanism to support the CER in its obligation to incorporate UNDRIP into its processes and decision-making
- have the supports and processes needed to better connect indigenous participation to CER decision-making.

Supporting these goals in the Rules may build trust in the CER's process and ensure that Indigenous consultation and participation is well-informed and meaningful. In our view, the Rules should incorporate the following elements regarding the role of the CCC:

- The CCC should have authority to direct information requests and otherwise direct the proponent to make submissions relating to the exchange of documents and clarification of issues relating to consultation

- The CCC should be empowered to take steps to facilitate Indigenous participation. In practice, this could mean early and consistent engagement with Indigenous groups about how to participate and where to access funding, providing support for application processes, and being an initial point of contact for questions and concerns.

- The CCC should be informed about and responsive to the issues faced by Indigenous communities, particularly regarding the socio-economic impacts that accompany resource development projects. Crown Consultation Coordinators should develop long-term relationships with Indigenous groups to build trust and increased participation in the regulatory process, which in turn would lead to better regulatory decisions.

- The CCC could be given authority to coordinate and synthesize region-wide project information as well as to seek revisions to timelines where the CCC identifies that timetables could be unfair to communities. CCCs should be well-informed about the regional context of applications and should support Crown understanding of cumulative impacts.

- The CCC should coordinate with impacted Indigenous groups to identify common concerns and anticipated impacts. This added layer of analysis could improve assessment of cumulative impacts, information sharing, and planning, and facilitate better accommodation and mitigation measures. In addition, regional perspectives may identify impacts that individual groups may be unaware of.

- The CCC should have an ability to work with communities to validate the understanding of CER staff and the Commission respecting potential impacts of applications on indigenous rights prior to the CER releasing final reports and decisions.

- The CCC should, in consultation and cooperation with indigenous communities, have a defined role for providing guidance and direction on the incorporation of UNDRIP into hearing processes, information requests and other activities set out in the Rules.

- The Commission may also want to consider clarifying that the CCC can provide evidence at a hearing when requested by a community.

By clarifying the functions of the CCC in the Rules, the CER can assist Indigenous groups to navigate the CER process and provide indigenous groups with improved procedural tools and

supports that are necessary for the CER to better understand the issues Indigenous groups are concerned about.

We would encourage the CER to conduct further engagement on this topic and to work with the Impact Assessment Agency to learn about the steps they have taken in recent years to better integrate their consultation role in their impact assessment processes.

C. Reconciliation and Implementation of the United Nations Declaration on the Rights of Indigenous Peoples

Discussion question: Do you have other feedback related to how the Commission can align the Rules with the CER Act, including the objectives outlined in the Act's preamble, such as the commitment to Reconciliation, and the UN Declaration?

Given the commitments in the preamble of the CER Act, we recommend the Rules reflect a binding requirement for the CER to review and assess an application's conformity with UNDRIP when issuing decision and particularly when making public interest determinations. More inclusion of UNDRIP in the Rules is necessary to support the CER's goal of achieving better the regulatory outcomes.

Meaningful protection of Indigenous rights, as described in UNDRIP and in section 35 of Canada's *Constitution Act, 1982*, is a primary goal of applying UNDRIP in the regulatory system. A clear way to support this goal is to require that applications explicitly incorporate an assessment of alignment with UNDRIP as well as details on the position of each community with respect to their free prior and informed consent. The current language in the preamble of the CER Act affirming Canada's commitment to "reconciliation" and implementing UNDRIP is a starting point, the Rules (and regulations that support the enabling legislation) must go beyond that to make those commitments binding and clearly incorporated into the CER processes.

In our submission, this question is too large to answer comprehensively in the context of this discussion paper and, as noted by CER staff in the public engagement sessions on the Discussion Paper, likely engage questions about CER guidance materials, CER policies and other mechanisms in addition to the Rules. For that reason, we strongly recommend that the CER undertake further engagement specific to this question.

D. Enhancing Competitiveness

Discussion question: Do you have other feedback related to how the Commission can update the Rules to enhance competitiveness through predictable and timely processes?

In our experience, "enhancing competitiveness through predictable and timely processes" is often code for minimizing Indigenous participation, setting arbitrary timelines in rules of procedure, and other steps that fail to reflect the circumstances and needs of communities like ours. To the point we made in our introduction, it is absolutely critical that the CER approach this particular question as inseparable from the question of UNDRIP.

In our submission, the right way to consider this question, and an approach that is less likely to result in procedural unfairness and delay, is through an increased focus on earlier engagement between the CER and impacted Indigenous groups in the Rules and certainly before the commencement of hearings. In short, a key step in improving how the Rules can enhance competitiveness of Canadian energy companies is to use the Rules to require earlier and tailored engagement with impacted Indigenous groups.

Earlier engagement can result in faster identification of priority issues, allow for discussions around funding and engagement protocols at an earlier stage, and can lead to an earlier assessment of impacts to rights, which, in turn, creates more time to discuss ways to resolve concerns. More generally, early engagement and better assessments of impacts to rights may avoid the delay and expense that often accompany overly streamlined, rushed, or under-resourced engagement processes. Indeed, the Supreme Court of Canada has held:

> No one benefits — not project proponents, not Indigenous peoples, and not non-Indigenous members of affected communities — when projects are prematurely approved only to be subjected to litigation.[5]

Canadian courts have further highlighted that the consultation process is not concerned with environmental effects *per se*,but rather focuses on the impact to the Aboriginal right.[6] Accordingly, the Rules should set out that early engagement should be focused on identifying potential impacts to Aboriginal and Treaty rights, not just potential environmental effects.

E. Improving accessibility

Discussion question: Do you have feedback related to how the Rules could better support accessibility to and throughout Commission processes?

FMMN supports the use of plain language in the Rules and any supporting documents. As outlined above, information regarding hearings and related engagement should be easily accessible to impacted Indigenous communities, and improving accessibility to such materials may support that goal.

FMMN also recommends that the Rules enable and ideally require holding hearings in impacted Indigenous communities where a community makes that request. This would improve accessibility to the Commission's hearing processes while also assisting commissioners, staff and the proponent to gain additional insights into community concerns and evidence. Holding local hearings would mitigate mobility and health barriers faced by elders and knowledge keepers who would like to participate in hearings. In addition, local hearings could bring down costs of participation. Elders and knowledge keepers will likely feel more comfortable in their own communities, leading to improved sharing of Indigenous Knowledge.

In our experience, proponents sometimes object to portions of hearings being held in communities out of a misguided (or strategic) suggestion that doing so would undermine the integrity of the hearing process. Updates to the Rules around community hearings would provide a useful place to clarify procedures to allow for hearings in communities for the reasons listed above and avoid any unnecessary time and expense related to this concern.

4. CLOSING COMMENTS

FMMN appreciates the opportunity to comment on the CER's efforts to align its regulatory system with Canada's commitments to reconciliation and the UNDRIP Act.

A key message of this submission is that the Rules can and must be updated to better reflect UNDRIP and remove barriers to indigenous participation in the aspects of the CER's functions covered by the Rules. This is how the CER can advance its objectives around competitiveness, predictability and timeliness.

We are hopeful that our comments will assist in implementing the UNDRIP Act and Action Plan Measures into the CER, improving participation for impacted Indigenous groups, and supporting better regulatory outcomes for impacted Indigenous groups.

If the CER would like to engage further on any of the above topics, we would welcome the opportunity to discuss our recommendations. Thank you for your consideration of our submissions.

5. APPENDIX: PRELIMINARY THOUGHTS ON RULE REVISIONS TO FACILITATE EVIDENCE FROM ELDERS OR KNOWLEDGE KEEPERS

Section	Revision and Rationale
4(1)	The Rules permit the Board to dispense with or vary rules "where consideration of public interest and fairness require".[7] FMMN recommends that the Rules should permit the Board to vary the rules to facilitate the inclusion of Indigenous knowledge.
6(1)	Section 36(1) of the Rules establishes the process for providing evidence at an oral hearing. There are currently no provisions that directly address how Indigenous knowledge can be shared and protected. This section should establish rules for how Indigenous knowledge, and specifically oral evidence provided by elders and knowledge keepers, can be shared at hearings. The Rules should include: 1. privacy considerations for individuals sharing Indigenous knowledge; 2. requirements to allow for cultural and spiritual practices to take place prior to oral evidence (such as drumming, prayers, smudging, etc) 3. permission for witnesses that share Indigenous knowledge to attend and listen to the testimony of other witnesses to facilitate comfort with the pacing and process of an administrative tribunal;[8] 4. flexibility and permissions to record oral testimony on audio or video in advance of the hearing, subject to reasonable limits, that could be shared privately, or publicly with permission; 5. flexibility and permissions to enable live or pre-recorded oral evidence; and 6. flexibility for oral evidence to be provided outside of hearing rooms.
37(1)	Section 37(1) of the Rules establishes the process for providing evidence at a written hearing. Indigenous knowledge can often only be provided orally.

	This section of the Rules should allow pre-recorded audio or video evidence, subject to reasonable limits, to ensure the opportunity for the Board to hear Indigenous knowledge. We also recommend including requirements for the Commission to go to impacted Indigenous communities where requested to facilitate the sharing of Indigenous Knowledge.
RECOMMENDATION OF NEW RULE	We recommend adding a Rule that allows oral evidence to be provided in the first language of the Elder or knowledge keeper testifying. The Board should permit indigenous testimony through an interpreter and provide funding to hire an interpreter and translator (for the written transcript of the oral evidence) where needed.