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Sent via electronic mail to: ***rppr@cer-rec.gc.ca***

Re: Comments from Kebaowek First Nation on the Review of the Canadian Energy Regulator's Rules of Procedure

Kebaowek First Nation ("Kebaowek") welcomes the opportunity to provide its views and recommendations to the Canada Energy Regulator (CER) as part of its review of its Rules of Practice and Procedure.[1]

Kebaowek First Nation ("KFN") is an Algonquin Anishinabeg First Nation and one of the eleven communities that constitute the broader Algonquin Nation. For centuries, the Algonquin Nation occupied the length of the Kichi Sìbì (Ottawa River) watershed, from its headwaters in north central Québec, all the way to its outlet in Montreal. Algonquin peoples have long exercised our customary laws and governance, known as Ona'ken'age'win, on our traditional territory. This law is based on Algonquin peoples' mobility on the territory, to hunt, gather, and control the use of the lands and waterways for future generations. The Algonquin Nation has never ceded its traditional territory, and its rights and title have not been extinguished. As Algonquin peoples we regard ourselves as keepers of the land, with seven generations worth of responsibilities for livelihood security, cultural identity, territoriality, and biodiversity.

Our comments are based on our extensive experience with Federal authorities and involvement in regulatory matters, impact assessments, licensing hearings, project reviews and law reform initiatives.

Kebaowek actively participates in federal law reform processes and has contributed written and oral submissions to the Impact Assessment Agency of Canada and the former Canadian Environmental Assessment Agency, the Canada Energy Regulator and former National Energy Board, standing committees and other federal regulators, including the Canadian Nuclear Safety

[1] CER, Phase I Early Engagement, Rules of Practice and Procedure Discussion Paper [**Discussion Paper**]

Commission. Like many other First Nations across Canada our interventions have focused on ensuring that decision-making and adjudicative processes are aligned with our ability to participate in decisions that impact our rights.

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

This Rules review provides the CER with an opportunity to be responsive to the realities and challenges of First Nation communities, including Kebaowek, with respect to participation in decision-making over our territory, environmental protection and self-determination regarding economic development.

Kebaowek supports the CER's commitment to align its Rules with the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).*[2] In proposing changes to the Rules, Kebaowek encourages the CER to consider feedback it has received in prior regulatory proceedings, including the many interventions from First Nations, that suggest practical ways forward to align with UNDRIP and the domestic *United Nations Declaration on the Rights of Indigenous Peoples Act* (UNDA). The CER should be proactive in bringing forward prior recommendations First Nations have made that will help guide how best to ensure new Rules are drafted in conformance with the principles set out in UNDRIP.

In keeping with UNDA Action Plan Measure 34 that empowers the participation of Indigenous peoples in decision-making and authority roles, Kebaowek also submits the CER must consider Rule changes that action Indigenous peoples' involvement in oversight and decision-making. New Rules should be added that create space for Indigenous-led regulatory decision making. We also suggest the creation of an Indigenous Liaison Office to support our meaningful participation and involvement, with accompanying funding that allows First Nations to retain the legal, technical and procedural assistance required to engage with community members and participate in CER matters.

Kebaowek recommends:

- **New Rules be drafted that make space for Indigenous-led decision-making, participation and oversight on a without prejudice basis**
- **New Rules be drafted creating an Indigenous Liaison Office to support meaningful participation and involvement of First Nations in decision-making**
- **New Rules be drafted requiring that hearings be conducted in a way that incorporates Indigenous legal traditions, protocol and Indigenous ways of knowing**

[2] Discussion Paper, p 3

- **All Rules be interpreted and applied in a way that is informed by Indigenous peoples, their needs and concerns**
- **New Rules be drafted allowing for hearings to occur in the Indigenous communities that stand to be impacted by a decision of the CER**

2. Regulatory Objectives - Enhancing Competitiveness

Kebaowek notes that among the regulatory objectives for the Rules Review is to 'enhance competitiveness' through predictable and timely processes.[3] Accordingly, changes to impose new time limits and shorten others are being considered. It is unclear on what basis this goal became an objective for the Rules Review, and we ask that in subsequent stages of engagement, the CER disclose the basis for this objective. As a regulator vested with acting in the public interest, we are concerned by the CER's framing of enhancing competitiveness – which on its face, appears to a goal that would benefit industry and proponents. We submit 'efficiency' could have been a better framing and we do not support competitiveness being a driving aim of the Rules reform.

Furthermore, we do not view 'enhancing competitiveness' as being aligned with the purposes of the *Canadian Energy Regulator Act.* Instead, the statutory purposes require regulatory hearings and decision-making processes to be fair, inclusive, transparent and efficient.[4] Kebaowek submits the objectives of this Rules Review ought to align with the mandate of the Regulator, which includes making transparent decisions. To that end - it is critical that the operations of the CER be free of bias, or a reasonable apprehension of bias, and recusal procedures in place to ensure trust in the CER's practices.

Kebaowek recommends:

- **The CER align its Rules Review objectives with the statutory purposes of the Act and ensure change to the Rules does not compromise the rigour of review, the number of projects or applications subject to review, the ability to access information, nor meaningful consultation - including early engagement**
- **A new Rule be added requiring that no decision under the Act prejudice inherent and constitutionally protected rights**
- **Any Rule change improve the ability of the CER to support the full and effective participation of Indigenous peoples**
- **A new Rule be added requiring that timelines serve the objective of full and effective participation by Indigenous Peoples**

[3] Discussion Paper, p 1 and 5

[4] *Canadian Energy Regulator Act,* SC 2019, c 28, s 10 at sections 6(d) and 11

3. Compensation and Cost Apportionment

Kebaowek supports the CER's suggestion that compensation be reflected in the Rules, not simply guidance. While the Act sets out a list of factors to be considered, in keeping with subsection 327(2)(i) that gives the CER discretion to 'consider any other factor appropriate,' we recommend the Rules import the "polluters pay principle."

Kebaowek recommends:

- **The factors for consideration in compensation matters require the application of polluter pays principle – requiring that costs associated with any harm to land or waters be paid by polluters, not government or society**
- **The polluter pays principle be defined in the Rules as a principle 'according to which polluters must bear the cost of measures to prevent, reduce, or mitigate environmental harm that they have contributed to or caused or contributed to through their facilities, operations, or activities'[5]**

4. Indigenous Knowledge

Kebaowek supports the inclusion of procedures in the Rules which protect Indigenous Knowledge (IK), including how it can be used and relied upon by the CER. While the Act provides some parameters for the confidential of IK, we submit the CER ought to ensure its Indigenous Advisory Committee lead the review, development and implementation of Rules specific to the protection of IK.

The Rules must also recognize the important relationship between Indigenous Knowledge and Indigenous legal traditions. As legal scholar Professor Borrows has remarked:

> Indigenous legal traditions also often rely upon elders or sanctioned wisdom keepers to identify and communicate law. In their aggregation, each of these cultural strands are wound together and reinforced by specific practices. These practices include such complex customs as pre-hearing preparations, mnemonic devices, ceremonial repetition, the appointment of witnesses, dances, feasts, songs, poems, the use of testing, and the use and importance of place and geographic space to help ensure that certain traditions are accredited within the community. Oral tradition does not stand alone, but is given meaning through the context of the larger cultural experiences that surround it.[6]

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[5] *Adapted from:* Canadian Environmental Law Association (2023) Environmental Accountability in Ontario: Consultation Paper

[6] John Borrows, Indigenous Legal Traditions in Canada, 19 WASH. U. J. L. & POL'Y 167 (2005), at p 191

Importantly, the Rules must set out mandatory IK protection provisions and also allow for IK sharing agreements, that take into account Indigenous models of data sovereignty. Examples include the OCAP model (First Nations' "ownership, control, access, and possession") as developed by the First Nations Information Governance Committee[7] and the international CARE Principles for Indigenous data governance which require that data be "findable, accessible, interoperable, reusable, for the collective benefit, authority to control, responsibility, and ethics" of Indigenous Peoples.[8]

Kebaowek also suggests the Rules engage "ethical space," that is, the space that is created when two societies with disparate worldviews engage with one another. We must recalibrate our ethical relations with each other, from an Indigenous earth jurisprudence point of view. Earth jurisprudence is a way of knowing the world is "sacred" that calls us all to the challenge of rethinking colonial government systems and laws to make something better, to do the long haul work.

The past several years have seen an increased emphasis on recognizing and applying traditional Indigenous-led research methodologies. The Supreme Court of Canada is on the cusp of a 'paradigm shift' in reconciling the history of Canadian law and specifically how it has been used to dispossess Indigenous peoples from their lands, children and legal traditions. We urge the CER to take up the Calls to Action in the final report of the Truth and Reconciliation Commission (2015) where, among its recommendations, was that reconciliation in Canada involve the revitalization and recognition of Indigenous laws.

Kebaowek recommends:

- **The Rules adopt the OCAP and CARE principles for IK and data sovereignty protection**
- **The CER recognize the significant role of Elders and Knowledge Keepers and in collaboration with First Nations, develop an oral history and Elder evidence protocol and rules specific to the provision of Elder-led guidance on all CER projects affecting Indigenous territories.**
- **The Rules be adaptable to ensure Indigenous laws, legal traditions and protocols can be upheld.[9] This is necessary to advance reconciliation and the revitalization of Indigenous laws in keeping with the TRC's Calls to Action**

[7] Online: https://fnigc.ca/
[8] Online: https://www.gida-global.org/care
[9] *Ibid*, p 34

- **The Rules specify how consent to provide IK will be given, what supports will be in place to ensure the translation of materials/conduct of hearings in Indigenous languages, and how hearings will allow for ceremony[10]**
- **New Rules be drafted permitting decision summaries to be made available in the Indigenous language spoken during the proceeding. We also support online and in-person engagement options that accommodate remote Indigenous communities**
- **The CER permit a 'special hearing' at the guidance of a First Nation in order to permit the sharing of IK, in line with Indigenous laws and traditions**
- **The CER enhance its awareness of First Nations' challenges and opportunities, and familiarize itself with the laws of the First Nation, language, preferred approaches to consultation and accommodation, and history. We also recommend mandatory training for CER staff on Indigenous laws, protocols, and traditions to enhance understanding and respect during proceedings**

5. Other Feedback

In addition to our topic-specific feedback, Kebaowek provides the following recommendations on capacity building and environmental protection that we believe are key to modernizing the CER's Rules and emphasizing the importance of Indigenous rights, participation and knowledge systems.

Kebaowek recommends:

- **New Rules be drafted which support the development of revenue-sharing or benefit agreements between project proponents and Indigenous communities, including programs to build community capacity in economic decision-making related to energy projects**
- **New Rules be drafted capturing broader environmental considerations, including an explicit provision that requiring an analysis of cumulative impacts on Indigenous territories and cultural heritage for all projects and that considerations of climate resilience and adaptation inform all decision-making**

Thank you for considering our comments and we look forward to ongoing dialogue between CER and Kebaowek before the finalization of new Rules.

[10] *See* Federal Court (2021) Practice Guidelines for Aboriginal Law Proceedings, p 19

Sincerely,

L Haymond