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BY EMAIL AND WEB POSTING

December 17, 2021

**To: All Regulated Entities
All Other Interested Stakeholders**

**Re: Adoption of Amendments to the Practice Direction on Confidential Filings
and related revisions to the Rules of Practice and Procedure, Rules of
Practice and Procedure for Enforcement Proceedings, and the Standard
Declaration and Undertaking Form
Ontario Energy Board File No. EB-2021-0227**

Today, the Ontario Energy Board (OEB) is posting a revised version of its Practice Direction on Confidential Filings (Practice Direction) as well as amendments to the Rules of Practice and Procedure (Rules)¹, Rules of Practice and Procedure for Enforcement Proceedings (Enforcement Rules)², and the standard Declaration and Undertaking form (D&U form) that are principally related to the Practice Direction amendments. The revisions to each of these documents are effective immediately, and updated versions of these documents are available on the OEB's website.

In this letter, the OEB also provides an update on its consideration of the potential need for revisions to the Rules related to appeals from orders made by of delegated decision-makers. This issue is discussed in section III below.

I. Background

By letter dated August 9, 2021, the OEB invited stakeholder comments on proposed amendments to the Practice Direction (the August Proposal) that are designed to streamline the process for considering confidentiality claims and reform how redactions for personal information will be addressed.

¹ Minor wording amendments to Rule 2.05, unrelated to the changes in the Practice Direction, have also been made.

² In addition to the changes consequential to the Practice Direction amendments, a new Rule 3.05 that sets out general principles of interpretation has been added to the Enforcement Rules consistent with Rule 2.05 of the Rules.

In response, the OEB received written comments from five stakeholders: the School Energy Coalition (SEC), Hydro One Networks Inc. (Hydro One), Toronto Hydro-Electric System Limited (THESL), the Electricity Distributors Association (EDA) and ONIT Energy Ltd. This feedback was largely supportive of the August Proposal, and four of these stakeholders also put forward some additional changes to the Practice Direction for the OEB's consideration.

Feedback on the August Proposal and the written comments that were provided by stakeholders was also received from members of the OEB's Adjudication Modernization Committee at a meeting held on September 9, 2021.

The OEB has considered the feedback received and has made changes to the Practice Direction relative to the August Proposal as described below. This letter also explains why the OEB has not adopted other changes suggested by stakeholders in finalizing the revisions to the Practice Direction.

II. Changes to August Proposal

Process for raising objections

Under the August Proposal, the timelines related to objections would be standardized, with parties having 5 business days to file an objection to a confidentiality request and the party requesting confidentiality also having 5 business days to reply to any objection.

In its comments, SEC raised concerns about the ability of intervenors to raise objections within the 5 business day timeframe given delays that intervenors sometimes face, after signing the D&U form, in receiving copies of the documents for which confidentiality is claimed. SEC also raised concerns about the party requesting confidentiality sometimes providing inadequate detail to support its request, as required under section 5.1.4 of the Practice Direction.

To address the concerns raised by SEC, the OEB has made the following additional changes to the Practice Direction:

- wording has been added to section 5.1.4 which states that the timeline for filing an objection does not commence until the requirements in that section have been fulfilled
- a new section 6.1.6 has been added to require timely delivery of un-redacted documents to representatives who have signed the D&U form

SEC also suggested that in large complex proceedings, the Registrar and/or panels of Commissioners should exercise their discretion (as contemplated in the Practice

Direction) to set a specifically tailored schedule for the filing of objections to confidentiality requests in those proceedings. For large complex proceedings, SEC further recommended that if information is provided in a staggered manner (for example, undertaking responses from a technical conference), it would be preferable to have one filing date for objections rather than multiple dates. The OEB agrees with SEC that the Practice Direction allows the needed flexibility to depart from the default timelines in appropriate cases, and that active management of confidentiality processes should be considered in those cases as needed.

Representatives who can sign the D&U form

Under the Practice Direction, external representatives of parties to the proceeding are generally given access to confidential information provided that they sign the D&U form. The August Proposal, however, maintained the proviso, set out in section 6.1.2, that as a general rule the OEB will not accept a D&U from counsel, experts or consultants that are internal representatives of a party.

In its comments, Hydro One advocated for the removal of this proviso. The OEB has considered this suggestion, which also received support from members of the Adjudication Modernization Committee, and has decided to remove the proviso that internal representatives should generally not be able to sign the D&U form. As such, there will no longer be a presumption that access to confidential filings will not be allowed for those representatives. This should not be understood as guaranteeing that internal representatives will be provided access in every case. Moreover, in some cases, the fact that a representative is internal to a party may be relevant in considering an objection to the acceptance of the D&U form or may necessitate additional measures to ensure that the confidentiality of the information is maintained.

Objections to representatives accessing confidential information

As noted in the previous section, representatives of parties to a proceeding are generally given access to confidential information provided that they sign the D&U form. There is, however, an ability for the person requesting confidentiality to object to representatives of other parties being able to access confidential information, even upon signing the D&U form.

In its comments, the EDA raised suggestions relating to the sequencing of objecting to the filing of the D&U form. The OEB notes that the timing of these objections was addressed in the August Proposal and can be found in sections 6.1.4 and 6.1.5 of the Practice Direction.

Personal information

Under the August Proposal, the process for addressing redactions for personal information is to be different from the process for addressing confidentiality claims and will involve a review of the redactions for personal information by OEB staff at first instance.

THESL proposed that if the OEB determines that the redacted information is not personal information, the person who filed the information should be given the ability to withdraw the information similar to what can be done under section 5.1.13 of the Practice Direction if the OEB determines that information for which confidential treatment was requested should be placed on the public record or disclosed to another party. Moreover, THESL suggested that if the filing party plans to appeal or seek review of a determination that a redaction is not personal information, the information should remain confidential until the appeal/review process is complete - similar to what is done under section 5.1.15 of the Practice Direction if the OEB determines that information for which confidential treatment was requested should be placed on the public record.

The OEB has added new sections 10.1.3 to 10.1.5 to the Practice Direction in response to THESL's proposals. To be clear, however, the OEB does not intend to issue a formal decision on redactions for personal information in the normal course. Rather, the OEB may issue an order requiring that the information be placed on the public record or disclosed to another party if it concludes that the redacted information does not qualify as personal information (for example, business contact information of employees).

Additions to "presumptively confidential" categories in schedule B

In the August Proposal, the OEB put forward specific categories of information that would be deemed "presumptively confidential", and these were captured in Appendix B. Absent an objection from another party to the proceeding, information fitting within one of the "presumptively confidential" categories will be accorded confidential treatment by the OEB, without the need for a formal confidentiality ruling.

In its comments, the EDA suggested the following "presumptively confidential" categories be added:

- information about unregulated affiliates that could reasonably be expected to prejudice their financial interests
- information that could reasonably be expected to harm the distributor or customers, e.g. cyber security measures or IT systems information
- load profiles/energy usage data from a group of customers where data aggregation is not sufficient to protect the identity of a specific customer

The “presumptively confidential” list is intended to streamline the confidentiality process by eliminating the need for formal rulings on confidentiality in relation to categories of information that, based on experience, will often not be contentious from a confidentiality perspective. In the OEB’s view, the first two additional categories suggested by the EDA are general in nature and will require judgment as to whether the disclosure of the information will cause harm in any given case. The OEB has therefore not added these categories to Appendix B. In respect of the EDA’s third suggestion involving load profiles, the OEB’s intent is to capture information that would disclose the load profile or energy usage of a specific customer and has made changes to the wording of the third “presumptively confidential” category listed in Appendix B to make this clearer.

In its comments, the EDA also sought confirmation that the OEB will not, without due process, rely on precedents established prior to the adoption of the changes to the Practice Direction if those precedents conflict with the adopted changes. The OEB notes that the intent of the “presumptively confidential” categories is generally to reflect, and not to change, past practice. The OEB further notes that the Practice Direction sets out the OEB’s expectation that parties will not claim confidentiality where the same type of information has been put on the public record in a previous proceeding, absent a compelling reason why confidential treatment is warranted in a later proceeding.

Redactions for non-relevance

A number of members of the Adjudication Modernization Committee raised questions about how the OEB intends to address the filing of documents that contain both relevant and non-relevant information (sometimes referred to as “permanent redactions”). The August Proposal did not address this situation. However, in the past, parties have sometimes made redactions for non-relevance which were reviewed and verified by the panel of OEB Commissioners adjudicating a given matter.

The OEB generally expects that only relevant information will be filed in a proceeding. In preparing documents, regulated entities should take steps to avoid co-mingling information that is relevant to its regulated business with other information that is not relevant to the regulated business. However, in some circumstances, a party may need to file a document that contains some information that is relevant and other information that is not relevant to a particular proceeding. Recognizing this, the OEB has added a new Part 11 to the Practice Direction that addresses what a party should do if it seeks to redact non-relevant information from its filing and how the OEB will address such requests. There is, however, no requirement to redact out non-relevant information from a document that also contains relevant information and generally the OEB would not expect parties to do so absent a particular concern about the non-relevant information being made public. The Practice Direction also includes a new Part 12 which explains what parties should do when there are multiple reasons for redactions in a document (ie., non-relevance, confidentiality, and personal information).

III Rule 17 – Appeals from Orders made under Delegation

In the context of its consultation on amendments to the Rules related to motions to review (Rules 40-43), the OEB invited stakeholders to comment on whether additional guidance or greater clarity would be desirable in relation to appeals from orders made by delegated decision-makers.³ These appeals are provided for in section 7 of the *Ontario Energy Board Act, 1998* and are governed by Rule 17 of the Rules. The OEB has not received any comments in response to these invitations.

The OEB will not be making any amendments to Rule 17 at this time. Stakeholders are reminded that Rules 40-43 do not apply to appeals of orders made by delegated decision-makers. In filing such appeals stakeholders should be guided by section 7 of the *Ontario Energy Board Act, 1998* and Rule 17 of the Rules, and consider materiality. The OEB recently refreshed all of its delegations. For greater transparency, details of the matters that are delegated, and the conditions and restrictions associated with those delegations, are posted on the [OEB's website](#).

I look forward to working with the industry and other stakeholders as we work to further improve the efficiency and effectiveness of our adjudication. Any questions relating to the current amendments should be directed to Registrar@oeb.ca. The OEB's toll-free number is 1-888-632-6273. Cost awards related to this initiative will be addressed by separate correspondence

Yours truly,

Original signed by

Lynne Anderson
Chief Commissioner

³ Letters from the OEB dated May 13, 2021, and July 30, 2021.