

August 28, 2023

RESS & EMAIL

Ontario Energy Board
P.O. Box 2319
27th Floor, 2300 Yonge Street
Toronto, ON M4P 1E4

Attention: Ms. Nancy Marconi, Registrar

Dear Ms. Marconi:

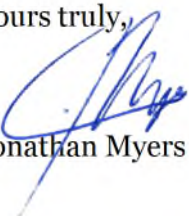
Re: Wataynikaneyap Power LP - 2024 Electricity Transmission Rates (EB-2023-0168) – Responding Submissions on Confidentiality

We are legal counsel to Wataynikaneyap Power LP (WPLP), applicant in the above-referenced proceeding. Enclosed is WPLP's responding submission on confidentiality.

Please note that the responding submission is being filed with a small number of redactions. As discussed in the submission, WPLP requests that the OEB determine the confidentiality of the underlying information concurrently and consistent with its review of WPLP's request for confidential treatment of parts of the application.

If you have any questions, please do not hesitate to contact me at the number shown above.

Yours truly,



Jonathan Myers

cc: Ms. Margaret Kenequanash, WPLP
Mr. Duane Fecteau, WPLP
Mr. Charles Keizer, Torys LLP

PUBLIC

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Sched. B) (the “Act”);

AND IN THE MATTER OF an application by Wataynikaneyap Power GP Inc. on behalf of Wataynikaneyap Power LP (“WPLP”) for an Order or Orders made pursuant to section 78 of the Act, approving or fixing just and reasonable rates for the transmission of electricity.

WATAYNIKANEYAP POWER LP

RESPONDING SUBMISSIONS ON CONFIDENTIALITY

EB-2023-0168

August 28, 2023

A. Introduction

Wataynikaneyap Power LP (“WPLP”) filed an application with the Ontario Energy Board (the “OEB”) on June 23, 2023 under section 78 of the *Ontario Energy Board Act, 1998*. In its application, WPLP is seeking approval of an electricity transmission revenue requirement in respect of a single test year, commencing January 1, 2024. Concurrent with its application, WPLP filed a request for certain information in the application to be treated confidentially. Further to Procedural Order No. 1, OEB staff filed submissions objecting in part to WPLP’s confidentiality request. The following are WPLP’s submissions in response to OEB staff. In addition, WPLP provides comments below on the need for confidential treatment of the submissions and decision on confidentiality.

B. Overview of WPLP’s Confidentiality Request

WPLP has requested the confidential treatment of certain information in the application on the basis that it relates directly to issues which are the subject of ongoing commercial discussions between WPLP and its contractor in relation to the Engineering, Procurement and Construction (EPC) contract pursuant to which WPLP’s transmission system is being constructed. More particularly, the information for which confidentiality is requested relates to commercial discussions concerning COVID-related cost and schedule impacts, including related contract change requests, which continue to be under review or are at different stages of resolution as between the parties.

WPLP appreciates the OEB’s approach to confidentiality as outlined in the *Practice Direction on Confidential Filings* (the “Practice Direction”), including the recognition that full and complete disclosure of all relevant information may require the filing of some information that is of a confidential nature, and that placing materials on the public record is the rule and confidentiality is the exception. WPLP also appreciates the administrative burden of managing confidentiality requests and filings, for the OEB and parties. It was with these considerations in mind, as well as the factors set out in Appendix A to the Practice Direction, that WPLP prepared its request. WPLP carefully considered and requested confidential treatment only for the specific information for which it identified real risks arising from disclosure on the public record.

C. Responding Submissions

OEB staff, in Table 2 of its submissions, breaks down WPLP’s requested redactions into eleven groups, numbered (i) to (xi).

OEB staff has not objected to WPLP’s requests for confidential treatment of the information in items (v), (vi) and (xi). In addition, OEB staff has not objected to confidential treatment for parts of the information in (iii), (vii), (viii). WPLP makes no further submissions regarding those items, which the parties agree are confidential and should be redacted, as follows.

	Exhibit	References	Status
(iii)	B-1-5: Project Costs	page 8-9, Table 3, all cost estimates under the “EPC Costs” category	Parties agree the information is confidential
(v)	B-1-5: Project Costs	page 23	
(vi)	C-2-1: In-Service Additions	page 2/3/4, Table 1 page 9 (sentence starting on line 3 and footnote 10) page 10 Appendix A (Table A-2)	
(vii)	C-2-1: In-Service Additions	page 8, Table 5, descriptions in first column and amounts in the Transmission Lines and Substations columns	
(viii)	C-2-1: In-Service Additions	page 11-12, Table 9, descriptions in first column and four corresponding amounts in second column	
(xi)	H-2-2: COVID-Related Construction Costs	page 4	

WPLP accepts OEB staff’s submissions regarding part of the information in item (i) which staff argues is not confidential, all of the information in item (ii), and the parts of the information in (viii) which staff argues is not confidential. Accordingly, WPLP accepts that the following information is not confidential and therefore does not need to be redacted.

	Exhibit	References	Status
(i)	C-2-1: In-Service Additions	page 9, sentences starting from line 5 to 7 and footnote 9	Parties agree the information is not confidential
(ii)	B-1-5: Project Costs	page 7, Table 2	
(viii)	C-2-1: In-Service Additions	page 11, line 4 pages 11-12, Table 9, total amount for “Substation Change Orders” category and amount shown for “Total Variance”	

For the reasons that follow, WPLP does not agree with OEB staff’s submissions regarding the information in groups (iv), (ix) and (x), and regarding certain parts of the information in groups (i), (iii) and (vii) which OEB staff argues is not confidential.

1. General

In WPLP’s view, it is important to keep in mind the introductory words found in Appendix A to the Practice Direction, which state that “(t) he OEB will strive to find a balance between the general public interest in transparency and openness and the need to protect confidential information”. The need to find an appropriate balance between the general interest in transparency and the specific need to protect confidential information requires the OEB to take into consideration the context of the information for which confidentiality has been requested, as well as the OEB’s other public interest objectives such as protecting the interests of ratepayers.

As noted above, the context for WPLP’s confidentiality request is that the proposed redactions relate directly to issues which are the subject of ongoing commercial discussions between WPLP and its EPC contractor. The information relates to COVID-related cost and schedule impacts which continue to be under review or are at different stages of resolution as between the parties. Disclosure on the public record would significantly interfere with and prejudice WPLP’s position in those discussions, as well as in any process that may subsequently be required to resolve the issues. Consequently, disclosure could produce a significant loss to WPLP and corresponding gain for the EPC contractor, and any impacts on WPLP could ultimately impact ratepayers.

Finally, WPLP notes that the only parties in the proceeding are WPLP and OEB staff. As such, the OEB may take into consideration that the practical and administrative impacts of dealing with confidential information will be considerably less in this proceeding than in a proceeding with multiple intervenors. For example, there will be no need for undertakings or impacts on discussions during the settlement conference.

2. Group (i)

Exhibit	References	Status
A-3-1: Executive Summary	Page 13, footnote 17	Parties disagree on whether the information is confidential
C-2-1: In-Service Additions	Page 9, footnote 8	
H-2-2: COVID-Related Construction Costs	Page 1, footnote 2 Page 8, footnote 7	

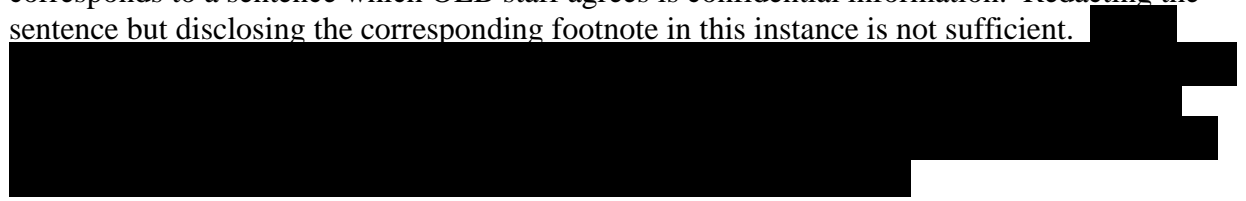
OEB staff argues that this information should not be treated confidentially based on their characterization of the information as “generally referenc(ing) specific categories of costs on which commercial discussions are ongoing between WPP and Valard”, as well as [REDACTED]

Staff’s characterization of the information as consisting only of the identification of cost categories that are the subject of the discussions is flawed because it ignores the most significant aspects of the information for which confidential treatment is sought. Regarding the footnotes which appear in A-3-1 and H-2-2, the text indicates that there are amounts which are the subject of ongoing commercial discussions under the EPC contract, and that the resolution of those discussions may result in WPLP incurring additional costs for the project but until resolved between the parties any such amounts remain uncertain and have therefore not been recognized

by WPLP as having been incurred.



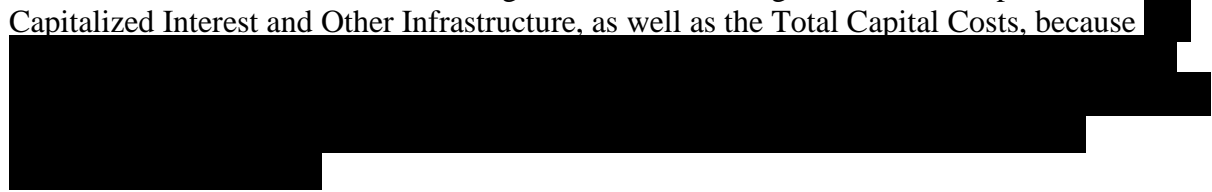
In WPLP’s view, C-2-1, footnote 8 also needs to be treated confidentially. Footnote 8 corresponds to a sentence which OEB staff agrees is confidential information. Redacting the sentence but disclosing the corresponding footnote in this instance is not sufficient.



3. Group (iii)

Exhibit	References	Status
B-1-5: Project Costs	Pages 8-9, Table 3, all cost estimates except those under the “EPC Costs” category	Parties disagree on whether the information is confidential

While staff agreed that the information related to EPC Costs is confidential, they argue that the other cost information is not confidential because in their view it does not appear to have any impact on negotiations between WPLP and Valard. In WPLP’s view, it is necessary to treat the entire column as confidential, including the amounts relating to Non-EPC Capital Costs, Capitalized Interest and Other Infrastructure, as well as the Total Capital Costs, because



4. Groups (iv) and (ix)

Exhibit	References	Status
B-1-5: Project Costs	Pages 17 and 18	Parties disagree on whether the information is confidential
C-2-1: In-Service Additions	Appendix A, Table A-1	

Staff argues, in relation to both Group (iv) and Group (ix), that this information should be placed on the public record because it can be derived in multiple ways. First, staff suggests that the

information can be derived based on information in C-2-1, Table A-1 and footnote 14 on that same page. Second, staff indicates that the information can be derived [REDACTED] WPLP disagrees, as follows.

First, it is not correct that there is adequate information in C-2-1, Table A-1 and the corresponding footnote to derive the information which WPLP is proposing to redact. WPLP made an error in not marking for redaction footnote 14 in the confidential filing. However, WPLP confirms that in the public version of the application, footnote 14 which relates to C-2-1, Table A-1 is in fact redacted. The information that WPLP proposes to redact cannot be derived from C-2-1, Table A-1 without the information in footnote 14. WPLP regrets any inconvenience caused by its error.

Second, WPLP does not agree that OEB staff's ability to derive the redacted information by making a calculation using information it sourced from certain publicly available data points necessarily makes the calculated amount itself public information. Footnote 4 of OEB staff's submission points to [REDACTED] to argue that the amount which WPLP seeks to keep confidential can be calculated using those other data points. However, it is not clear in law that where information can be derived from public sources, using specialized knowledge, experience and expertise, means that such information should be considered to be publicly available.

In a 2019 decision by the Information and Privacy Commissioner (IPC) under the *Personal Health Information Protection Act*, the IPC considered an analogous question in the context of the disclosure of patient information. The IPC distinguished between circumstances where someone with special knowledge could identify the patient because of their knowledge of the circumstances, and circumstances where a member of the public without special knowledge of the circumstances could identify the patient. The IPC concluded that the test is whether it is reasonably foreseeable, in the circumstances, that a member of the public without special knowledge or expertise could identify the patient by combining various sources of publicly available information.¹ In WPLP's view, the same test should apply in the circumstances of the proposed redaction. Moreover, it is WPLP's view that it is not reasonably foreseeable that a member of the public, who does not possess the special knowledge, experience and expertise of OEB staff, would be able to derive the information that WPLP seeks to keep confidential. Whether or not OEB staff has been able to derive the information using its special knowledge is not determinative.

Third, OEB staff has not considered the consequence of the information being placed on the public record, which is that it would assist the EPC contractor and prejudice WPLP in the ongoing commercial discussions, and that any resulting impact to WPLP reflected in the outcome of those discussions could ultimately have adverse impacts for ratepayers.

¹ Information and Privacy Commissioner, Ontario, Canada, PHIPA Decision 82, HC15-64, Grand River Hospital, January 18, 2019, paras 30-35 [document.do \(ipc.on.ca\)](https://www.ipc.on.ca/document.do).

WPLP therefore submits that the proposed redactions in Group (iv) Group (ix) should be treated as confidential information and remain redacted.

5. Group (vii)

Exhibit	References	Status
C-2-1: In-Service Additions	Page 8, Table 5, estimates in the “Total” column	Parties disagree on whether the information is confidential

OEB staff argues that the amounts in the “Total” column should appear on the public record because (a) [REDACTED] and (b) with that amount referred to in (a) the other amounts in the “Total” column can be derived based on the information in the table. For the reasons that follow, WPLP disagrees.

The redactions proposed in this table are interconnected and should be viewed as such. Their purpose is to protect against the possibility of the EPC contractor being able to reverse-calculate certain items of information within the table which could then prejudice WPLP’s position in the commercial discussions. It is therefore incorrect to assume that the availability of one of the redacted numbers [REDACTED] should not be treated as confidential. Furthermore, it is only with that one number [REDACTED] that the other amounts in the “Total” column can be derived. This reaffirms the importance of redacting that number [REDACTED]. Protecting against the reverse calculation of amounts in the table is also why WPLP has redacted the descriptors in the first column, which OEB staff appears to have accepted as being confidential. For these reasons, WPLP reiterates the importance of redacting all of the information for which it has sought confidential treatment in Table 5, including the items in the “Total” column.

6. Group (x)

Exhibit	References	Status
H-1-1-A: 2021-2023 CCCDA – Draft Revised Accounting Order	Page 1, footnote 2	Parties disagree on whether the information is confidential
H-1-1-C: EPC COVID-Related Costs Deferral Account – Draft Accounting Order	Page 1, footnote 1	

OEB staff argues that this information should be placed on the public record because it does not include cost estimates, so it is unclear to OEB staff as to how disclosure of the information in the footnotes would harm any party in the commercial discussions.

While the footnotes do not reference specific amounts, [REDACTED]

[REDACTED]

Disclosure of the footnotes could therefore interfere significantly with the commercial discussions that remain ongoing and the footnotes, in their entirety, should remain redacted.

D. Interim Confidential Treatment of Submissions and Decision on Confidentiality

As noted in its letter dated August 25, 2023, OEB staff refiled its submission on confidentiality with redactions based on concerns raised by WPLP. WPLP appreciates staff doing so despite disagreeing with WPLP on the need for those redactions. Based on similar concerns, WPLP has applied redactions, at least on an interim basis, to its responding submissions. In essence, WPLP's concern is that certain information in the staff submission and in WPLP's responding submission may itself be confidential, depending on the outcome of the underlying confidentiality request, and that disclosing those submissions on the public record without redactions would undermine WPLP's request before it is considered by the OEB.

WPLP requests that the OEB determine the confidentiality of the redacted portions of the staff submissions and of WPLP's responding submissions as part of its decision on confidentiality in respect of the application. WPLP also requests that the OEB consider whether any aspects of its decision on confidentiality may require confidential treatment.

As indicated in their letter, OEB staff is of the view that the information redacted on an interim basis in its submissions should not be treated confidentially because it references other publicly available information to explain their view on why confidential treatment is not appropriate. In WPLP's view, for the reasons set out in relation to Groups (iv) and (x) above, whether or not OEB staff is able to derive the proposed confidential information from publicly available information using its special knowledge and expertise is not determinative of whether the underlying information is itself confidential. Furthermore, there are other references in staff's submission which could assist a person in determining the proposed confidential information, and there is at least one instance where staff's submission overtly discloses information for which confidential treatment is sought.² It is therefore necessary to redact those portions of staff's submissions, at least in the interim, until the OEB can issue its decision. Staff's submissions would otherwise assist persons, including the EPC contractor, in deciphering the very information which WPLP seeks to redact, thereby undermining the purpose of WPLP's request. Upon making its decision on confidentiality, the OEB (with the assistance of the parties if needed) could identify the specific information in the submissions and the decision which, based on the OEB's findings, should remain redacted on a permanent basis.

² [REDACTED]

It is important to recognize that the foregoing is consistent with the OEB's well-established practice of treating information, for which confidentiality has been requested, as confidential on an interim basis until such time as the OEB is able to make a determination on whether or not it is confidential information.³ Submissions, which directly or indirectly disclose the very information that is being treated as confidential on an interim basis, should not be placed on the public record.

Furthermore, the interim redactions provide an opportunity for the OEB to consider the appropriate balance between the general interest in transparency and WPLP's specific need to protect its confidential information, taking into consideration the specific context of the information for which confidentiality has been requested, as well as the OEB's other public interest objectives. In WPLP's view, those considerations did not appear to factor into OEB staff's submissions.

All of which is respectfully submitted this 28th day of August, 2023.

WATAYNIKANEYAP POWER GP INC.
on behalf of WATAYNIKANEYAP POWER LP

By its counsel, Torys LLP



Jonathan Myers

³ OEB, Practice Direction, Section 5.1.5: "The confidential, un-redacted version of the document will be kept confidential until the OEB has made a determination on the confidentiality request".