

December 15, 2022

SUBMITTED ON RESS

Registrar
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Attention: Nancy Marconi

Dear Ms. Marconi:

Re: Electricity Leave to Construct Filing Requirements Update (EB-2022-0261)

On November 10, 2022, the Ontario Energy Board (OEB) invited comments on its draft updates to Chapter 4 of the OEB's *Filing Requirements for Electricity Transmission Applications* (the "LTC Filing Requirements"). The OEB indicates its objectives for the updates are to enhance the timeliness and efficiency of proceedings, to reflect practices and requirements developed over time through decisions, as well as to reflect current legislative and policy frameworks.

The following comments are by Torys LLP on its own behalf, and not at the behest of any client. Our comments draw upon our experience in preparing and representing clients as applicants in a number of leave to construct¹ and expropriation² applications, in a range of circumstances.

A. Overall Structure

In our view, the structure of the LTC Filing Requirements would benefit from a reorganization so that it flows in a more logical and user-friendly manner, and better aligns with the sections of the legislation for which the filing requirements and other guidance are being provided. The current structure is confusing because, for example, sections 4.3, 4.4 and 4.6 are all related to s. 92 applications, s. 4.5 is related to s. 99 applications and there are no sections relating to s. 95, 98(3) or 101 applications despite that applications may be filed under each of these sections. Moreover, there are filing requirements, guidelines and expectations articulated in s. 4.2, which we see as more of a "background" section on the regulatory framework. If the OEB is amenable to reorganizing the document, our recommended structure is described in **Appendix 'A'**.

¹ EB-2009-0283 (Canadian Niagara Power); EB-2012-0365 (Dufferin Wind Power); EB-2013-0040/0041 (Bornish Wind, Kerwood Wind and Jericho Wind); EB-2013-0361 (Jericho Wind); EB-2014-0300 (Windlectric); EB-2016-0310 (Henvey Inlet Wind); and EB-2018-0190 (Wataynikaneyap Power). We also have experience with a number of natural gas leave to construct applications.

² EB-2013-0268 (Dufferin Wind Power); EB-2014-0335 (Union Gas); EB-2015-0230 (Union Gas); and EB-2017-0294 (Henvey Inlet Wind).

B. Section 4.1 (Introduction)

In the list set out in the first paragraph:

- The description in relation to Section 99 should be revised to simply say “Expropriation Applications” because a person may apply for leave to expropriate without having received LTC approval, i.e. if their project is exempt from the need for LTC approval.
- The list should reference sections 98(3) and 101, each of which can form the basis for an application to the OEB. The document should include any relevant filing requirements, guidance or commentary relating to such applications. See 4.6 and 4.7 of Appendix ‘A’.

C. Section 4.2.1 (Legislation)

- Section 92: It is not correct to say that under this section LTC is required only for electricity transmission lines. Section 92 requires LTC both for transmission and distribution, but distribution is exempted under section 6.2 of O. Reg. 161/99. While the effect is the same, the drafting is not accurate. Similarly, the language here does not reflect that LTC is also required to “make an interconnection”. Exemptions should be described as such, rather than omitting aspects from the description of section 92.
- Section 95: Clarification should be provided as to whether this section provides a basis for an application seeking exemption and/or whether it provides authority for the OEB to exempt a person on its own initiative, either in response to a LTC application that it determines is unnecessary or otherwise. While the current filing requirements and draft updates both imply that an application is required and impose an onus on the applicant to establish special circumstances, the language in Part VI of the legislation generally and in s. 95 specifically does not expressly state that this provision may form the basis of an application, which may cause confusion.
- Section 96(2): It is not clear why the reference to interconnection has been deleted. In addition, the commentary that environmental and Indigenous consultation matters “can only be considered to the extent they are relevant to the issues of price, reliability and quality of electricity service” is unclear and may cause confusion. While other parts of the document indicate that such matters are out of scope for electricity LTC applications, this suggests they could be in scope to the extent relevant to price, reliability and quality of service. The OEB should clarify its expectations in this regard, perhaps with examples from prior LTC decisions where it considered such matters to be relevant.
- Section 97: It would be helpful for the OEB to clarify the types of land rights for which it requires forms of landowner agreements. A project may involve long-term or permanent land rights for lines and stations, long-term or permanent land rights for access roads or buildings to be used for operations and maintenance of the lines and stations, as well as temporary land rights for access, construction, laydown and related purposes. In addition, where an applicant uses option agreements, it would be helpful for the OEB to clarify whether it requires the option agreements or only the underlying easements or leases that may be exercised under such option agreements. These aspects are not clear from the language in s. 97. Our experience is that s. 97 typically contributes significantly to the volume of materials in an LTC application but attracts little interest from parties.

- Section 98: The drafting should more clearly articulate the distinction between s. 98(1), which provides an automatic right to enter land to any person meeting the enumerated eligibility requirements, and s. 98(3), which provides a basis to apply for the right to enter land where a person meets other requirements. In addition, while the current language references s. 98(4) and (5) which relate to 98(3), it does not reference s. 98(6) which relates to both 98(1) and (3). The relevant requirements and expectations for an application under s. 98(3) should cross-referenced (See 4.6 of Appendix 'A').
- Section 99: The sentence to which footnote 13 relates appears unrelated to the discussion of how issues of compensation are considered and should be deleted.

D. Section 4.2.2 (Related Regulatory Approvals)

The revisions to the second paragraph imply that applicants are required by the standard conditions of a LTC order to advise the OEB of all changes to a project that occur after it has been reviewed, regardless of materiality, and that, depending on materiality, an applicant may be required to apply for a variance of the order. This raises two concerns:

- First, in the standard conditions of approval, condition 3 clearly states that the applicant is required to advise the OEB only of proposed material changes to the project. As such, the suggestion in the current draft that there is an obligation to advise the OEB of all changes to a project after LTC has been granted, regardless of materiality, is incorrect.
- Second, it is our view that the approach contemplated by the standard conditions, which limits the obligation to advise the OEB of changes to those that are material, is more appropriate than creating an obligation on a proponent to advise the OEB of all changes to a project following receipt of LTC approval. The current practice should be maintained. Without a materiality qualification, proponents would need to file (and the OEB would be inundated with) numerous communications regarding all manner of project details, which are constantly changing as complex transmission construction projects move through final engineering, permitting, development and construction phases. This concern is further discussed in relation to section 4.6, below.

E. Section 4.3 (Information Required of Rate-Regulated Applicants)

The following comments are in relation to section 4.3 of the updated draft filing requirements. Most of the comments also apply to the equivalent parts of section 4.4 of the updated draft filing requirements, in relation to non-rate-regulated applicants, and should be reflected accordingly to the extent the comments are considered and adopted.

- Section 4.3.2.1 should be renamed to something along the lines of “Legal Application or “Formal Application” to better reflect the nature of that section.
- Section 4.3.2.2 is described as providing background and summary information to assist the OEB in drafting the Notice of Hearing. We agree this should include items 1, 3 and 5 as listed therein, but in our view items 2 and 3 (detailed maps and line drawings) are not needed for purposes of drafting the Notice and should instead form part of Exhibit C, with line drawings to support the description of the physical design in 4.3.3.2 and detailed maps to be included in 4.3.3.3.

- Section 4.3.2.3 (Evidence in Support of Need for the Project):
 - The updates introduce requirements relating to regional planning, including a need to provide evidence on related transmission or non-wires projects in any regional plans or bulk plans, and to obtain evidence in the form of a document from the IESO. The OEB should provide direction on how to request this information from the IESO, and direction to the IESO regarding the timelines for responding and the scope of information to be provided in the document. The expectations created by the updates are not aligned with the directions to the IESO. As contemplated in the OEB Response to RPPAG Recommendations in EB-2020-0176, dated April 28, 2022, the IESO document will “summarize all planned transmission investments (in related bulk and regional plans) with linkages to the transmission investment proposed in an LTC application”. However, the updated filing requirements also mention non-wire projects and additional information that the IESO “should include where available”. Unless the IESO is directly and specifically required to provide certain information to proponents within a specific period and through a specific process, applicants will have no certainty regarding the timing or scope of the document they require from the IESO as they prepare their applications. This should be avoided.
 - Regarding the relationship to other electricity system benefits, in addition to quantitative evidence, the filing requirements should invite applicants to provide qualitative evidence in relation to any other system benefits and project need.
- Section 4.3.2.5 (Analysis of Alternatives):
 - This section refers ambiguously to the ranking of project options but does not expressly require project options to be ranked. This will cause confusion. In our view, because the OEB will either approve or not approve a proposed project, and will not choose from among possible options, there should be no requirement to rank the various project options. Rather, it should be sufficient to demonstrate why each of the options other than the proposed project was rejected in favour of the proposed project. Any ranking of rejected options would be irrelevant.
- Section 4.3.2.6 (Project Costs)
 - There is no guidance in relation to the new Table 3, which may cause confusion.
 - It may be helpful to provide guidance regarding the distinction between the “Customer” column and the “Customer Capital Contribution” column in Table 5.
- Section 4.3.2.7 (Risks):
 - Consider whether this section should be combined with the need to explain the contingency component of the project cost, which appears to be part of 4.3.2.6.
- Section 4.3.2.8 (Comparable Projects):
 - The inclusion of cost information for comparable projects should be at the option of the applicant, or should only be required where an applicant has itself previously completed construction of comparable projects. Where an applicant has not

previously constructed a comparable project, it is not reasonable to expect them to have access to detailed and reliable cost information on projects constructed by other entities, broken down as required, or the means to assess the comparability of projects for inclusion. Such an applicant should not be put at a disadvantage in their application relative to an applicant that has completed prior comparable projects and is thereby able to provide such information.

- Table 6 contemplates that, in comparing a project to comparable projects, the applicant is expected to back out “Non-Comparable Costs” from “Comparable Project Costs”. It is not clear how the OEB expects this to be done or if it is reasonably achievable. All projects are unique for innumerable reasons, only some of which are captured by the table. For example, in addition to technical design, length, surroundings and environmental issues, there could be differences in factors such as the number of stations, the circumstances relating to land rights requirements, Indigenous engagement, prevailing economic conditions such as supply chain constraints and inflation impacts, number and quality of contractor bids received, site accessibility, seasonal and weather-related impacts, labour availability, etc.
- Immediately following Table 6 are two paragraphs that appear out of place. First is a paragraph regarding the apportionment of costs. It is not clear if this is related to the prior discussion of comparing costs with other projects. If so, this needs further explanation as to how cost responsibility is to be factored into the comparison of project costs with prior comparable projects. If not related, consideration should be given to moving this paragraph to the discussion around Tables 4 and 5 in section 4.3.2.6, which relates to cost allocation. Second is a paragraph regarding the submission of actual costs upon completion of a project. This too appears unrelated to the subject of comparable projects being addressed in section 4.3.2.8 and should be moved to the end of section 4.3.2.6.
- Section 4.3.2.12 (Establishment of Deferral Accounts):
 - The updates propose changes to the eligibility criteria for establishing a new deferral or variance account.
 - In relation to Prudence, the update refers to the need for “a plan that sets out how the amounts will be reasonably incurred”. It is not clear what plan this refers to in the context of a leave to construct application.
 - The filing requirements should clarify this would constitute relief under s. 78 of the OEB Act, which may be requested together with a request under s. 92.
 - The OEB should consider providing guidance or examples of where a proponent may consider making such a request and where an account may not be needed in connection with a transmission project, such as in relation to the tracking of CWIP or other project costs.
- Section 4.3.2.13 (Capital Contribution Period):
 - The OEB should consider whether it may be more appropriate to include this section as part of filing requirements for transmission and/or distribution rate applications.

It is not clear from the current language what, if anything, is to be included as part of an LTC application in respect of this issue.

- Section 4.3.2.14 (Project Schedule):
 - The Project Schedule would be more appropriately included as part of Exhibit C (Project Details), under section 4.3.3.
- Section 4.3.3.1 (Route):
 - The revisions to the second paragraph of this section will cause confusion and regulatory burden. For similar reasons as described above in relation to 4.2.2 and below in relation to 4.6, a proponent should not need to advise the OEB of modifications that are not material, such as where no new landowners are impacted.
- Section 4.3.4.1 (Operational Details):
 - Further guidance on the OEB's expectations would be of assistance to applicants. In addition, as this section is typically short, consideration should be given to moving this into another exhibit rather than leaving it as the only aspect of Exhibit D.
- Sections 4.3.5.1, 4.3.5.2 and 4.3.5.4 (Land Matters):
 - There is overlap between the requirements under sections 4.3.5.1 (Description of Land Rights), 4.3.5.2 (Land Easements Required) and 4.3.5.4 (Land Acquisition Process). We recommend these sections be harmonized and/or made less prescriptive so that applications do not need to include multiple summary tables where a single table could be used to present all information. In our view, an applicant should be required to perform title searches to identify the affected properties. A single summary table should be provided setting out, for each affected parcel: the PIN, the nature of land ownership, the name of the landowner (confidential), the municipal/ mailing address for the property (confidential), existing rights held on the property to be used for the project if any, the type of new land rights to be acquired for the project, the width/dimensions of any easement or other rights to be acquired on the property (distinguishing between permanent and temporary needs), whether an offer has been made using one or more of the forms of agreement for which s. 97 approval is being requested, and the status of the acquisition process. The foregoing could be done in a single summary table.
 - We disagree with the additions in 4.3.5.4 of requirements to provide information on the specifics of negotiations with individual landowners and on the specifics of any disagreements in relation to s. 41(9) of the Electricity Act. In our view, these requirements would be onerous on applicants, likely require additional information to be treated confidentially, the information would be fluid in nature as negotiations progress and would therefore require updates throughout the proceeding, and such information would not be of material assistance to the OEB in determining the matters at issue in a LTC proceeding relative to sections 96 and 97 of the OEB Act. Moreover, there are other procedural safeguards for landowners in that an applicant must use an approved form of agreement and may not construct on land where it does not have the necessary rights, and for the owners of public streets and highways

pursuant to s. 41 of the Electricity Act.

- Section 4.3.5.3 (Early Access to Land):
 - This section is unhelpful, out of place, and should be replaced with an explanation that, upon receiving LTC approval or being exempt from the need for LTC approval under section 95, a project proponent will be entitled under section 98(1) to enter on project lands to conduct necessary surveys and examinations, but that if a project proponent has commenced its environmental assessment work and requires early access to project lands for such purposes prior to receiving LTC approval then they must file a separate application to the OEB for approval under section 98(3), either in advance of or in parallel with the LTC application. Any filing requirements or guidance for an application under s. 98(3) should be set out in a new section 4.6 (per the structure recommended in Appendix 'A'), which should be cross-referenced. It is not appropriate to include those requirements as part of the filing requirements for LTC applications, which are distinct from early land access applications.

F. Section 4.4 (Information Required of Non-Rate Regulated Applicants)

As noted in Part E, above, to the extent the comments there relate to equivalent provisions in section 4.4 in respect of non-rate regulated applicants, those comments should be applied. The comments below relate to aspects of section 4.4 that are not also part of section 4.3.

- Section 4.4 (Introduction):
 - In the introductory section, it would be helpful to include a short summary identifying the sections of the filing requirements that differ for non-rate regulated applicants relative to those for rate regulated applicants.
- Section 4.4.2.3 (Evidence in Support of Need):
 - Regarding the additional language that price is generally not a factor that is considered where the proponent is not rate-regulated, as the costs are not passed on to consumers through transmission rates, the OEB should consider adding some commentary that references the new exemptions from the need for LTC which were introduced by O. Reg. 511/22.
- Section 4.4.5.3 (Early Access to Land):
 - The section on early access to land should not differ as between applications for rate regulated and non-rate regulated projects, but it does in the draft updates. Please see comments above regarding this aspect of the filing requirements.

G. Section 4.5 (Expropriation)

- Section 4.5.1 (Introduction):
 - The introductory paragraph only states that a person who has received LTC may apply for leave to expropriate. However, s. 99(1)2 of the Act also provides that a person who is exempt from the requirement to obtain LTC, whether under section 95

or by regulation, may also apply for leave to expropriate. This includes, for example, a person intending to construct, expand or reinforce an electricity distribution line. The filing requirements should be clear on this.

- We suggest the reference to “best efforts” be replaced with “reasonable efforts” to align with the standard applied later in this section for taking steps to minimize impacts, and to ensure that an application will not be at risk of failing solely based on a finding that an applicant made reasonable but not best efforts to negotiate an agreement. The legislation does not require any level of effort to negotiate an agreement, so a moderate expectation on the part of the OEB is more appropriate.
- Section 4.5.2 (Legislation):
 - This section is not be required given that the legislation relating to expropriation is already summarized in section 4.2.1, but clarification relating to the application of the Expropriations Act should be added to the introduction in 4.5.1.
- Section 4.5.3 (Filing Requirements):
 - The filing requirements that are provided here for expropriation applications are sparse and likely to result in applications that do not include information the OEB considers necessary or helpful to make its decision. This will give rise to numerous interrogatories to complete the record. Based on our experience, a complete application for expropriation should include:
 - description of the applicant
 - description of the underlying project
 - reference to and/or a copy of the LTC decision
 - maps showing the approved route/facility locations from the LTC
 - description of project land requirements generally
 - detailed property-specific descriptions of the land interests to be expropriated, including a summary table by PIN with landowner information (confidential) based on title searches
 - aerial plans of each subject property showing the extent of the lands for which leave to expropriate is sought
 - draft plans of expropriation for each subject property
 - evidence describing why the proposed takings are in the public interest, having regard to the scope and nature of the public interest test applied by the OEB under s. 99
 - It is not clear what the OEB’s intended meaning is for the last paragraph of 4.5.3. An applicant will seek leave to expropriate when it is unable to reach agreement on

acquiring lands required for a project. If leave to expropriate is granted, the applicant is required to address matters of compensation for the takings outside of the proceeding through processes under the Expropriations Act for which the OEB is not responsible. In that context, it is not clear what “settlements” this paragraph is referring to, why the OEB is concerned with those negotiations or what the OEB expects the applicant to demonstrate in its expropriation application (particularly if the applicant will not attempt to negotiate compensation until after leave to expropriate is granted). In our view, unless this paragraph is intended to describe the OEB’s filing requirements for matters within the scope of an expropriation application, it should be deleted.

- Section 4.5.4 (Post-Hearing Filings):
 - It is not clear what “settlement” the OEB is referring to in paragraph 3. It appears the intention may be to say that a person must inform the OEB “. . . if, on a voluntary or negotiated basis subsequent to the OEB’s decision but prior to registering the plan of expropriation on title, it has secured the required interests in land from a landowner in respect of any of the properties authorized for expropriation by the OEB decision and therefore no longer requires authority for such taking”.

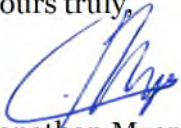
H. Section 4.6 (Changes to OEB-Approved Projects)

As noted in our earlier comments in Part D, there is a discrepancy between the standard conditions of approval and the updates to the filing requirements in that the standard conditions only require an applicant to advise the OEB of material changes to an approved project whereas the draft updates require an applicant to advise of any changes. For the reasons indicated in Part D, we strongly urge the OEB to include a materiality qualification here.

The extent of information required for a Notice of Change appears excessive and onerous, both for the proponent to prepare and the OEB to review, particularly given that a project will have already been approved. Based on that approval, equipment and materials will have been ordered, construction contracts executed, options for land rights exercised and construction may be underway. The scope of information to be included in the Notice of Change suggests that it will raise a question of whether the project continues to be needed. Onerous notice requirements, which take a long time for the OEB to review and which create uncertainty for proponents as to whether their LTC approval may itself be at risk will deter proponents from making project refinements and improvements. This should be avoided.

We hope these comments are of assistance to the Board and we look forward to providing further input as may be helpful in connection with updating the LTC filing requirements.

Yours truly,



Jonathan Myers

Appendix 'A'

Recommended Structure

4.1 Introduction

4.2 Regulatory Framework

- Describe overall regulatory framework. Do not include filing requirements, commentary or guidance.

4.2.1 Legislation

- Identify at a high level what the relevant sections of the legislation are and how they relate to one another. Cross-reference to other sections of the document for the corresponding filing requirements, commentary, guidance.

4.2.2 Related Regulatory Approvals

4.2.2.1 Other OEB Approvals

4.2.2.2 Other Non-OEB Approvals

- Including environmental matters and Indigenous consultation, which are currently part of subsection 4.2.3

4.2.2.3 Implications of Other Approvals Requiring Project Changes

- Describe implications at a high-level where project is under review or already has been reviewed. Cross reference to detailed discussion of this point in 4.3.5 of this recommended structure (currently in 4.6).

4.3 Filing Requirements for Leave to Construct Projects (Section 92)

- Add short introduction with a roadmap for this section, including context for why there are different requirements for rate regulated vs non-rate regulated applicants (consider moving some of the language from the current section 4.1).

4.3.1 Scope of the Public Interest Test (per Section 96)

- Take from current section 4.2.3

4.3.2 Exemptions from the Need for Leave to Construct

4.3.2.1 Legislative Exclusions (per scope of Section 92)

- Take from current section 4.2.1

4.3.2.2 Regulatory Exemptions (per O. Reg. 161/99)

- Reference all available exemptions, including for all distribution-related facilities, lines shorter than 2 km and the new exemptions for lines fully paid for by customers or non-licensed transmitters, which was issued under O. Reg. 511/22 on November 1

4.3.2.3 Exemptions by Application (per Section 95)

- Cross reference to section 4.4 of this recommended structure

4.3.2.4 Partial Exemptions (per Section 96.1)

- Relates to demonstration of need for priority projects

4.3.3 Information Required of Rate Regulated Applicants

- Take from current section 4.3

4.3.4 Information Required of Non-Rate Regulated Applicants

- Take from current section 4.4

4.3.5 Changes to Projects After Leave to Construct Approval

- Take from current section 4.6

4.4 Filing Requirements for Leave to Construct Exemption Applications (Section 95)

- Set out any applicable requirements, guidance or commentary relating to exemption applications under s. 95. Take from current 4.2.1

4.5 Filing Requirements for Leave to Expropriate Applications (Section 99)

- Take from current 4.5

4.6 Filing Requirements for Early Land Access Applications (Section 98(3))

- Set out any applicable requirements, guidance or commentary relating to early access applications under section 98(3). Take from current section 4.2.1

4.7 Filing Requirements for Leave to Cross Applications (Section 101)

- Set out any applicable requirements, guidance or commentary relating to leave to cross applications under section 101. Take from current section 4.2.1
- Clarify circumstances where leave under s. 101 is required. If a proponent seeks leave to construct a line that crosses a highway, utility line or ditch, do they also need leave under s. 101? When is a standalone s. 101 application needed? Evidence?