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Ontario Energy Board

Practice Direction on Settlement Conferences

Revised February 17, 2021

ONTARIO ENERGY BOARD
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1. Introduction

The Ontario Energy Board is committed to the settlement conference process as part of its objective of achieving greater regulatory efficiency and effectiveness. A successful settlement conference process will result in OEB decisions that are in the public interest and are accepted by the parties while at the same time achieving savings in time and money to all participants.

2. Purpose of this Practice Direction

The purpose of this Practice Direction is to provide guidance on the OEB's settlement conference process, including the rights and obligations of all participants, the role of the facilitator and the role of OEB staff. This Practice Direction also sets out how the OEB will deal with the settlement proposal that is filed with the OEB.

This Practice Direction describes and supplements Rules 29 and 30 of the OEB's *Rules of Practice and Procedure*.

3. Overview of Settlement Conference Process

The purpose of a settlement conference is to settle all the issues referred to the settlement conference in the proceeding or, at least, to settle as many issues as possible. The OEB may exclude certain issues from settlement where it is of the view that those issues should be heard in full.

Commissioners will not participate in the settlement conference and they will not be advised of the admissions, concessions, offers to settle and related discussions that take place in the settlement conference.

A facilitator may be appointed by the OEB to chair the settlement conference and the facilitator will attempt to achieve a settlement of all issues or a settlement of as many issues as possible.

All parties to a proceeding and their representatives are entitled to participate in a settlement conference. However, Ontario utilities that are not the applicant in a proceeding may not participate in settlement conferences, unless they are a customer of the applicant or their participation is authorized by the OEB. Settlement conferences are not open to the public unless the OEB directs otherwise. In addition, settlement conferences are not transcribed and do not form part of the record of the proceeding.

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Where a settlement is reached, the parties, with the assistance of the facilitator, will prepare and file with the OEB a settlement proposal describing the agreement.

4. Applicability

The OEB may direct a settlement conference to be held in any proceeding. Parties to the proceeding may also request that the OEB direct the holding of a settlement conference in the proceeding and the OEB will give consideration to the request.

5. Timing

To help ensure that there is an adequate information base for the settlement of issues, the settlement conference will usually take place only after all the evidence of the applicant and intervenors is filed and the interrogatory process has been completed.

Where an issues list for a proceeding is fixed by the OEB, the settlement conference will be held after the issues to be considered have been determined by the OEB and the issues list has been provided to all parties.

The OEB may require parties to submit a position paper prior to the holding of the settlement conference. Position papers will not form part of the public record and will, therefore, not be provided to Commissioners.

6. Issues for Settlement and Hearing

In fixing an issues list, the OEB may indicate those issues which the OEB considers are issues for the settlement conference and those issues which the OEB regards as issues which must be heard in full in order to develop a complete evidentiary record on which the OEB can base its findings.

Participants in a settlement conference should bear in mind that where an issue that may be affected by external factors remains on the list of issues for settlement, they must consider whether, in the settlement proposal filed with the OEB, an appropriate adjustment mechanism should be included in relation to the settlement of that issue.

7. Material Changes in Pre-filed Evidence

Where a participant in a settlement conference becomes aware of a material change in its pre-filed evidence prior to or during a settlement conference, that participant must disclose that material change as soon as possible.

8. Authority to Enter into a Settlement Proposal

A party's representative at the settlement conference must have authority to settle issues on behalf of the party at the settlement conference and must have authority to enter into a settlement proposal. If there are any limitations on the representative's authority, they must be disclosed at the outset of the settlement conference.

9. Role of the Facilitator

The facilitator at a settlement conference has the authority to bring about a settlement of issues by any reasonable means and, in particular:

- (a) by clarifying and assessing a parties position;
- (b) by clarifying differences in the positions taken by the respective parties;
- (c) by encouraging a party to evaluate its own position in relation to other parties by introducing objective standards; and
- (d) by identifying settlement options or approaches that have not yet been considered.

In carrying out his or her responsibilities, the facilitator will:

- (a) help to foster an environment of co-operation and trust among participants;
- (b) ensure that all participants have an opportunity to present their views on each issue;
- (c) facilitate the preparation of a settlement proposal which contains all the required components; and
- (d) facilitate the preparation of a list of outstanding issues.

The facilitator is responsible only for the settlement conference process. Parties making the settlement proposal are responsible for the appropriateness of the agreement and the adequacy of the evidence and rationale to support it. Parties are likewise responsible for the appropriateness and completeness of the list of outstanding issues referred to the settlement conference but not dealt with in the settlement proposal.

10. Privilege and Confidentiality of Settlement Information

Subject only to the exceptions provided below, any data, documents or information provided and any discussions, including negotiations, admissions, concessions, offers and counter-offers occurring during the course of a settlement conference (settlement information), whether culminating in a settlement proposal or not, are strictly confidential, privileged and without prejudice.

10.1 Privilege

Subject to the applicable law relating to settlement privilege, settlement information is not admissible as evidence in an OEB proceeding, or otherwise, except where the filing of such settlement information is necessary to resolve a subsequent dispute over the interpretation of any provision of a settlement proposal and subject to any direction of the OEB. In such case, only the settlement information that is necessary for the purpose of interpreting the settlement proposal shall be filed and such settlement information shall be filed using the appropriate protections afforded under the relevant legislation and OEB instruments.

10.2 Confidentiality

Every person who attends a settlement conference (each, a settlement attendee) has a positive and ongoing obligation not to disclose settlement information to any person that does not attend the settlement conference (a non-attendee), except that a settlement attendee may disclose settlement information to: (a) a non-attendee engaged by a party to assist the settlement attendee with the settlement conference, and (b) a non-attendee from whom a settlement attendee seeks instructions with respect to the negotiations in a settlement conference, provided that all of the following conditions are met:

- i) The provision of the settlement information by the settlement attendee is required to allow the non-attendee to fulfill its responsibilities under (a) or (b), as the case may be.
- ii) The settlement information that is provided by the settlement attendee is limited to that necessary for the fulfillment by the non-attendee of the responsibilities set out in (a) or (b), as the case may be.
- iii) The settlement attendee has specifically outlined the requirements of this section in respect of the settlement information provided and the non-attendee has agreed to be bound by the OEB's requirements pursuant to this section.

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- iv) The settlement attendee maintains a list of all non-attendees to whom the settlement attendee has provided settlement information and a notation that the obligations under (iii) have been fulfilled, which the OEB may require to be filed.

For clarity, the disclosure of settlement information to a non-attendee for any reason other than (a) and (b) above, including for the purpose of reporting the results of the settlement negotiations or of giving the reasons for positions taken in the course of a settlement conference is not permitted except to a non-attendee that provided instructions to a settlement attendee in relation to the settlement under (b) or otherwise.

11. Role of OEB Staff

OEB staff will attend the settlement conference to ensure that all relevant information is brought forward and considered in negotiations. Staff will endeavour to help the parties reach a settlement by presenting options for the consideration of the parties and offering advice on the strengths and weaknesses of the parties' proposals and the sufficiency of any rationale supporting the proposals. In some cases, the OEB may provide for OEB staff to be a party to the settlement conference and to any resulting settlement proposal.

Where it is not a party to the proposal, OEB staff will file a submission with the OEB commenting on two aspects of the settlement proposal: whether the settlement proposal represents an acceptable outcome from a public interest perspective, and whether the accompanying explanation and rationale is adequate to support the settlement proposal.

OEB staff who participate in the settlement conference in any way are bound by the same confidentiality standards that apply to the parties to the proceeding. In particular, staff will not discuss the content of the settlement proposal or the process by which the settlement was reached with the OEB panel hearing the case.

12. Rights of Parties Who Disagree with the Settlement of an Issue

A party who has been identified in the settlement proposal as a party who does not agree with the settlement of an issue is entitled to offer evidence in opposition to the settlement proposal and to cross-examine the applicant on that issue at the hearing. Where the hearing is a written hearing, the OEB may give directions as to how the right of such cross-examination is to be exercised.

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Except with leave of the OEB, a late intervenor or a party that did not choose to participate in the settlement conference may not oppose, or offer evidence opposing, a settlement proposal.

13. Withdrawal from a Settlement Proposal

If evidence is introduced at the hearing which affects the settlement proposal or the settlement of one or more issues in it, a party may, with permission of the OEB, withdraw from the proposal or from its agreement to the settlement of specified issues. The withdrawing party must give notice to the OEB and to the other parties of its intention to withdraw and the reasons for withdrawing. Once a party has withdrawn from a settlement proposal or from its agreement to the settlement of specified issues, it is entitled to offer evidence in opposition to the settlement proposal and to cross-examine on an issue where does not agree with the settlement of that issue.

14. The Filing of the Settlement Proposal

Where agreement is reached at the settlement conference on all or some of the issues, a settlement proposal describing the agreement shall be filed with the Registrar.

The settlement proposal must identify those participants who disagree with the settlement of a particular issue and those participants who have taken no position on an issue. It is the responsibility of the participants to ensure that the settlement proposal contains sufficient evidence to support the proposal and that the quality and detail of the evidence and the rationale for the settlement of issues will allow the OEB to make findings on the issues. To assist the OEB, parties are expected to prepare a proposal that:

- (a) presents the settled issues in an organized, concise and understandable manner;
- (b) demonstrates a well referenced, correct and transparent link between each settled issue and the evidence; and
- (c) provides clear rationale to support the acceptance of each settled issue.

Parties to the settlement proposal should make it clear in the proposal whether or not they expect the OEB to accept the proposal, or certain issues within the proposal, as a package, and should outline the rationale for the position taken.

Once a settlement proposal is filed, it is binding on all the parties who have agreed to it,

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on late intervenors and on parties who did not choose to participate in the settlement conference (subject to the rights to seek leave of the OEB to disagree or withdraw described above).

Following the filing of a settlement proposal, the OEB may, at the request of the parties, modify the issues list for the proceeding.

15. Acceptance of the Settlement Proposal

After considering the settlement proposal, if the OEB determines that:

- (a) the rationale for the settlement of issues in the proposal is inadequate;
- (b) the quality and detail of the evidence in the proposal will not allow the OEB to make findings on the issues; or
- (c) the proposal, or certain issues within the proposal, cannot be accepted as a package despite the request of the parties;

the OEB may direct the parties to make reasonable efforts to revise the settlement proposal. Where the OEB gives this direction, the settlement conference will be reconvened in order to address the OEB's concerns. All the provisions of the settlement conference apply to such a reconvened conference.

Where, despite any efforts to revise the settlement proposal, the OEB is of the view that the quality and detail of the evidence in the proposal or the rationale for the settlement of issues will not allow the OEB to make findings on one or more settled issues, or where the OEB is of the view that the public interest requires a hearing of certain issues, the OEB will hear evidence on those issues even if they were dealt with in the settlement proposal as well as on any issues excluded from the settlement conference. The OEB may give directions as to the issues on which it requires evidence at the hearing.

Where the OEB accepts a settlement proposal, it may adopt as its findings the settlement of issues in the settlement proposal. The OEB may accept a settlement proposal as a package provided that the OEB is satisfied that the evidence supports the settlement proposal, the settlement proposal is in the public interest, and all evidence relevant to the issues in the proceeding is available to all parties and to the OEB both in the settlement proposal itself and as part of the public record.

Parties will be informed of the OEB's acceptance or partial acceptance of the settlement proposal prior to the hearing.

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Acceptance of the settlement proposal by the OEB is subject to reconsideration where significant new evidence or information emerges in the hearing or where the effect of external factors has not been sufficiently accounted for in the settlement proposal.

16. Costs

The settlement conference is part of the OEB's proceedings and the OEB may award costs in relation to a party's participation in it. Where the OEB determines that an intervenor is eligible for costs, the OEB may award costs on the basis of a fixed amount per day for participation in the settlement conference. A fixed daily amount would replace any other cost award that might be made in the proceeding in relation to participation in the settlement conference with the exception of reasonable disbursements.