



July 19, 2016

by Email and Direct Mail

The Honourable Minister James Carr, P.C., M.P.
Minister of Natural Resources
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Subject:

National Energy Board Modernization – Expert Panel Terms of Reference-Comments of the Canadian Electricity Association

Dear Minister Carr,

Pursuant to the instructions set out in the above-referenced consultation as initiated June 20, 2016, the following comments are submitted by the Canadian Electricity Association (hereinafter "CEA") on behalf of its members in response to the call for comments on the National Energy Board (hereinafter "NEB") Modernization Expert Panel Draft Terms of Reference (hereinafter "DToR"). CEA appreciates the opportunity to provide this early stage input into the proceeding examining the DToR of the Expert Panel who will be tasked with examining the National Energy Board's structure, role and mandate.

CEA is a national forum and voice of the evolving electricity business in Canada. Members of CEA include integrated electric utilities, independent power producers, transmission and distribution companies, power marketers and the manufacturers and suppliers of materials, technology and service that enable the smooth functioning of the industry. CEA members have a significant interest in the outcome of this consultation and its future implementation in light of the current NEB's jurisdiction over international power lines and electricity trade. In what follows, CEA provides its views on the scope of the NEB Modernization Expert Panel DToR as well as on the conduct of the review process.

## 1.0 The Review of the NEB and the NEB Act

The review of the NEB and its governing legislation the NEB Act, (hereinafter "the Review") is intended to "restore confidence in Canada's environmental and regulatory processes" by ensuring the NEB's composition reflects regional views, has sufficient expertise in the fields of science, community development and Indigenous traditional knowledge and is collaborative with other Ministries. The Review is further intended "to create a modern, efficient and effective regulator" in order to build public trust. The Review will focus on six core areas, namely

- 1) Governance and Structure
- 2) Mandate and future opportunities
- 3) Decision-making on major projects
- Compliance, enforcement and monitoring
- 5) Indigenous Engagement
- 6) Public Engagement





## 2.0 Scope of Expert Panel DToR

- 2.1 Provide Clarity and Alignment with Federal/Provincial/municipal areas of jurisdiction Most notable of the potential outcomes of the Review is of the potential for a significantly increased mandate for the NEB. While the DToR provides some insight into the potential areas of an expanded mandate it remains silent on a) the precise nature of an expanded scope; and b) what mechanisms may be necessary to ensure clarity and alignment between the various Federal and provincial regulatory bodies and more specifically to guard against any potential overlap or duplication with federal or provincial initiatives and mandates. With respect to the first concern regarding the scope of an expanded mandate, CEA members are unclear as to the precise areas of additional oversight being proposed since the DTofR provides only sample topics (data compiling, renewables, low carbon economy) but not specific proposals. As a second concern CEA observes that the DToR is silent on the subject of mechanisms that may be adopted to ensure there is no overlap or duplication with provincial jurisdiction or processes or with other complementary federal mandates.
  - 2.1.1 CEA recommends that the Expert Panel's DToR specify the precise areas of potential oversight being proposed in order that stakeholders may provide their views on the merits of each potential area of additional NEB oversight.
  - 2.1.2 CEA recommends that the Expert Panel's DToR be modified to invite stakeholders to provide their feedback on mechanisms to ensure clarity and alignment with provincial regulatory jurisdiction and processes and with federal agencies with complementary mandates, the objective of which is to prevent overlap or duplication.
- 2.2 Solicit Input on what makes a Modern, Efficient and Effective Regulator
  CEA submits that creating a modern, efficient and effective regulator necessarily entails that the regulator
  itself adopt processes and standards that are efficient and effective; that the regulator operate on a
  transparent and predictable basis; render its decisions in a timely manner and is accountable to the public
  including regulated entities. The need for an efficient regulator and effective regulation are necessary
  enablers facilitating the transformation of Canadian energy markets and utilities. While the overarching
  purpose of the Review is to create a modernized NEB, the DToR does not give the Expert Panel the
  mandate to solicit views of what a modern, efficient and effective regulator might look like or the modern
  tools or mechanisms it may employ.
  - 2.2.1 CEA recommends that the Expert Panel's DToR be modified to invite stakeholders to provide their feedback on what a modern, efficient and effective regulator may look like and the tools it may require.
- 2.3 Shaping regulation and legislation so that it is efficient and proportional to purpose. Increasingly, CEA members are being required by their provincial and municipal regulators to find productivity and efficiency gains to maintain lower rates for utility electricity customers. Consistent with the focus on more outcome based regulation is the notion that the design and implementation of regulation and legislation should itself be efficient and proportional to purpose. Thus, while the Expert Panel's DToR reference use of legislative tools for lifecycle regulation there is no counterbalancing provisions to solicit input on areas where regulation may be streamlined, rendered more proportionate to purpose or eliminated





altogether. To illustrate, CEA has concerns that the DToR is silent on NEB authorization processes and information requirements and how these may be rendered more efficient.

- 2.3.1 CEA recommends that the Expert Panel's DToR be modified to invite stakeholders to provide their feedback on where current regulation may be streamlined, rendered more proportional to purpose or eliminated altogether. The DToR should further be amended to invite comments on mechanisms for ensuring the same for future regulation.
- 2.3.2 CEA recommends that the Expert Panel's DToR be modified to invite stakeholders to provide their feedback on the NEB authorization application processes to examine whether the information requirements (i) are still necessary;(ii) whether they overlap with provincial matters;(iii) whether they are in line with reforms that will be made to environmental legislation; (iv) provide clarity and certainty for the applicant.

## 3.0 Conduct of the NEB Modernization Review

CEA commends the government for its efforts to engage a wide-range of stakeholders and to produce and publish engagement plans to guide the conduct of the NEB Modernization review. Having said this, it is not clear based on the language contained in the DToR that the Public Engagement Plans¹ ultimately developed by the Expert Panel will provide all interested and impacted entities an opportunity to have their views known. What's more, there is no provision in the DToR that compel the Expert Panel to conduct a written consultation process or conduct the Public Engagement events in a manner that provides "all participants" an opportunity to contribute to or participate at the in-person events. CEA has further concerns that the consultation process itself has been allotted only six months which may be optimistic in light of the critical and enduring nature of the changes that will be made to the NEB Act. More clarity is necessary as regards the scope and timing of each stage of the consultation process as well as the timing of when the final report with recommendations will be made public.

Further, CEA observes that, unlike the DTofR for the consultation initiated to review the Canadian Environmental Assessment Act (hereinafter "the CEAA Review) the NEB Modernization DTofR do not explicitly provide for participant funding for Indigenous persons or groups. Although it is mentioned in the Government's backgrounder it is not explicitly captured in the DTofR.

- 3.0.1 CEA recommends that the DToR specifically stipulate that all Public Engagement events be open to all participants and stakeholders who have participated in this proceeding, and that these participants and stakeholders have an opportunity contribute their views to the Expert Panel directly whether via a written consultation process and/or at the in-person events.
- 3.0.2 CEA recommends that DToR stipulate the precise timelines for each stage of the consultation process including when the final report with recommendations is to be made public.

<sup>&</sup>lt;sup>1</sup> As differentiated from the Indigenous Engagement Plan in the DToR.





3.0.3 CEA recommends that the DToR stipulate that participant funding is provided for participation in the proceeding by Indigenous persons.

## 4.0 Conclusion

Finally, CEA would submit that in respect of the NEB's independence, it is vital that this not result in regulators becoming "isolated". Clearly, the principle of independence is critical. However, this should not and cannot come at the expense of the NEB's need to stay informed of, and engaged in, the accelerating transformational change taking place in the industry. Regulators must be permitted to creatively engage the plurality of stakeholders, in a variety of different discourses and formats. CEA believes that an unimpeded engagement by the NEB will be a necessary and integral ingredient to its ongoing success, and relevancy.

CEA appreciates the opportunity to provide this early stage input into the NEB Modernization Expert Panel's DToR and looks forward to working closely with the Government and the Expert Panel during the consultation process so that the concerns of CEA members may be heard and the long term interests of the electricity sector preserved.

All of which is respectfully submitted,

Honourable Sergio Marchi

President & Chief Executive Officer Canadian Electricity Association

C.C.

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