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File: 6267

Sent by Electronic Mail and RESS Filing

September 27, 2013

Ontario Energy Board  
2300 Yonge Street  
Suite 2700  
Toronto, ON M4P 1E4

Attention: Kirsten Walli, Board Secretary

Dear Ms. Walli:

**Re: First Phase Submissions of Low-Income Energy Network  
Board File No. EB-2013-0301 - Review of Framework Governing the Participation  
of Intervenors in Board Proceedings**

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We are counsel for the Low-Income Energy Network (LIEN). LIEN appreciates that the Board has invited interested parties to comment on intervenor participation at the Board. LIEN sees this as an opportunity to assist the Board to improve intervenor participation and Board proceedings.

LIEN provides answers below to each of the Board's questions for the *First Phase - Review of the Board's Current Approach*.<sup>1</sup>

### **INTERVENOR STATUS**

*What factors should the Board consider in determining whether a person seeking intervenor status has a "substantial interest" in a particular proceeding before the Board? For instance, should the Board require a person seeking intervenor status to demonstrate consultation or engagement with a constituency directly affected by the application?*

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<sup>1</sup> Board Letter dated August 22, 2013 at pp. 3 and 4.

Subrule 23.02 of the Board's *Rules of Practice and Procedure* ("Rules") sets out the test for intervenor eligibility:

The person applying for intervenor status must satisfy the Board that he or she has a substantial interest and intends to participate actively and responsibly in the proceeding by submitting evidence, argument or interrogatories, or by crossexamining a witness.

The Rules do not provide further detail about what constitutes a "substantial interest".

LIEN submits that the Board should consider the following when determining whether a person, group or association has a "substantial interest" and should be granted intervenor status in a proceeding:

1 demonstrate how consultation or engagement with a constituency occurs

OR

2 demonstrate that the matter before the Board may affect the person, group or association directly, or indirectly

OR

3 possess information and/or expertise relevant to the subject matter of the proceeding.<sup>2</sup>

It is important for the person, group or association to represent a legitimate interest before the Board. Meeting any of the above would constitute a legitimate interest. For example, to meet the first branch of the test, a potential intervenor could include in its intervention request letter a web link or hard copy list of members and a brief description of the governing structure of the

<sup>2</sup> The third branch above is similar to the test under the *National Energy Board Act*, R.S., c. N-6, s. 55.2. The NEB expands on what is required under s. 55.2 on the NEB's website at [http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprcptn/pblchrng/prcptnthrhnggdncs52\\_2-eng.html](http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprcptn/pblchrng/prcptnthrhnggdncs52_2-eng.html):

"The [NEB] may choose to hear from any person who, in the [NEB]'s opinion, has relevant information or expertise.

1. The [NEB] may consider these factors when deciding if a person has relevant information:

- the source of the person's knowledge (for example, local, regional or Aboriginal);
- the extent to which the information is within the project scope and related to the list of issues; and
- how much value the information will add to the [NEB]'s decision or recommendation.

2. The [NEB] may consider these factors when deciding if a person has relevant expertise:

- the person's qualifications (for example, the person has specialist knowledge and experience);
- the extent to which the person's expertise is within the project scope and related to the list of issues; and
- how much value the information will add to the [NEB]'s decision or recommendation.

intervenor. This is important as the Board is charged with weighing and balancing the interests, represented by persons, groups or associations before the Board, in the public interest.

Under the second branch of the test, the Board could require the potential intervenor to provide a brief description in its intervention request letter of how it may be affected by the proceeding.

Under the third branch, the Board could require the potential intervenor to provide a brief description in its intervention request letter of the relevant information or relevant expertise the intervenor could offer during the proceeding.

For example, in LIEN's case, LIEN would indicate in its intervention request letter that LIEN was formed in 2004, represents over 80 environmental, legal, tenant/housing, and social service agencies across Ontario and is governed by a steering committee of members. LIEN has a clear mission statement and a set of three broad objectives<sup>3</sup>, through which LIEN governs its participation in any intervention before the Board. LIEN also has a legal subcommittee that decides whether LIEN should intervene when an opportunity arises. The legal subcommittee determines whether the proposed intervention meets LIEN's objectives, and provides direction to LIEN's legal counsel and/or consultants regarding the strategy for the intervention.

Meeting at least one of the branches of the test is important as the Board is charged with weighing and balancing the interests, represented by persons, groups or associations before the Board, in the public interest.

To summarize, LIEN submits that an intervenor need not have a direct interest in the application to obtain intervenor status. If (1) the person, group or association has demonstrated how consultation or engagement with a constituency occurs (2) the matter before the Board may affect the person, group or association directly, or indirectly, or (3) the person, group or association possesses relevant information and/or expertise, then the person, group or association is worthy of intervenor status.

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<sup>3</sup> LIEN's three primary objectives at the Board are to ensure that gas and electric utilities implement or continue to implement and follow:

1. policies, procedures, targets and budgets to facilitate aggressive conservation and demand management and fuel switching programs which will reduce the energy bills of low-income consumers (note: LIEN takes a leadership role on low-income DSM/CDM before the Board)
2. rate policies and rate schedules to lower the energy bills of low-income consumers (note: LIEN takes a leadership role on rate assistance for low-income consumers before the Board)
3. terms and conditions for utility service that are in the best interests of low-income consumers (note: LIEN is one of few consumer groups that have participated in Board proceedings dealing with terms and conditions of utility service).

*What conditions might the Board appropriately impose when granting intervenor status to a party? For instance, should the Board also require an intervenor to demonstrate how the intervening group or association governs the participation by its legal counsel and other representatives in the application?*

LIEN submits that the Board should consider imposing conditions where the Board believes that doing so will expedite, enhance or otherwise improve the intervention of the person, group or association on whom/which the conditions are to be imposed. This may be helpful to a new intervenor before the Board.

Intervenors should describe, in general terms, how the intervenor group or association governs participation by its legal counsel and other representatives in the intervention request letter.

LIEN submits that the Board seems to have two major interests in understanding how the intervenor group or association governs the participation of its representatives: (1) can the Board rely on the intervenor group to properly represent the interests of its constituency (if the interest is properly represented then the Board can assign appropriate weight to the intervention), and (2) will the intervenor provide efficient representation of the interest (if the intervention is efficient, then the Board can be confident that proceeding costs and associated ratepayer impacts are being managed effectively).

In order to meet the above concerns, LIEN submits that the Board should require intervenors to include at least one of the items below in their intervention request letters, to ensure that those representing intervenors at the Board (i.e., legal counsel, consultant or other representative) have some level of input from the intervenor itself:

- ◆ a web link to the intervenor's website listing or describing the intervenor's members/constituents
- ◆ a hard copy list of the intervenor's members/constituents
- ◆ a description of the intervenor's members/constituents
- ◆ a brief description of how the person, group or association instructing the representative has demonstrated consultation or engagement with a constituency, or
- ◆ a brief description of the relevant information and/or relevant expertise that the person, group or association instructing the representative possesses to assist in the proceeding.

## COST ELIGIBILITY

### **LEGAL TEST**

Unlike the test under the Rules for intervenor status (subrule 23.02), the Board's *Practice Direction on Cost Awards* does not require a party to have a "substantial interest" to be eligible for costs.

Instead, the Board's *Practice Direction on Cost Awards* sets out when a party may be eligible for a cost award (section 3.03) and the discretion that the Board may apply in determining whether a party is eligible for a cost award or not (section 3.04).

Section 3.03 states that a party may be eligible for a cost award where the party:

- (a) primarily represents the direct interests of consumers (e.g. ratepayers) in relation to services that are regulated by the Board;
- (b) primarily represents a public interest relevant to the Board's mandate; or
- (c) is a person with an interest in land that is affected by the process.

Section 3.04 states that the Board, in making a determination whether a party is eligible or ineligible, may:

- (a) in the case of a party that is an association or other form of organization comprised of two or more members, have regard to whether the individual members would themselves be eligible or ineligible;
- (b) in the case of a party that is a commercial entity, have regard to whether the entity primarily represents its own commercial interest (other than as a ratepayer) rather than the public interest, even if the entity may be in the business of providing services that can be said to serve a public interest relevant to the Board's mandate; and
- (c) also consider any other factor the Board considers to be relevant to the public interest.

*What factors should the Board consider in determining whether a party primarily represents the direct interests of consumers (e.g. ratepayers) in relation to services that are regulated by the Board? For instance, should the Board require the party to demonstrate consultation or engagement with a class of consumers directly affected by the application?*

LIEN submits that the Board, when determining whether a party primarily represents the direct interests of consumers and accordingly may be eligible for a cost award under section 3.03(a), should consider whether the party has demonstrated (through previous participation in Board proceedings, or for a party appearing at a Board proceeding for the first time, in its intervention and cost eligibility request letter), or when asked to do so, can demonstrate, that the party's members/constituents are consumers:

- a) whose interests may be directly or indirectly affected by the proceeding
- b) generally affected by services regulated by the Board, namely those consumers whose interests the Board is required to protect under section 1(1) paragraphs 1 and 3 (electricity) and/or section 2 paragraphs 2 and 5 (gas) of the *Ontario Energy Board Act, 1998*<sup>4</sup> (the "Act"), or
- c) whose interests, while not directly or indirectly affected by the proceeding, may be directly or indirectly affected by a related proceeding in the future.

*What factors should the Board consider in determining whether a party primarily represents a public interest relevant to the Board's mandate?*

LIEN submits that the Board, when determining whether a party primarily represents a public interest and accordingly may be eligible for a cost award under section 3.03(b), should consider whether the party has demonstrated or can demonstrate that it represents, as part of its core objectives, one or more interests of the public, such as:

- ◆ environmental protection
- ◆ energy conservation and sustainability
- ◆ consumer protection (including low-income consumer protection and bill mitigation/management)
- ◆ demand management
- ◆ reliability and quality of service (electricity and gas)
- ◆ promotion of renewable energy
- ◆ other interests directly or indirectly related to the Board's objectives under sections 1 and 2 of the *Act*.

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<sup>4</sup> S.O. 1998, Chapter 15, Schedule B.

*What conditions might the Board appropriately impose when determining the eligibility of a party for costs? For instance, what efforts should the Board reasonably expect a party to take to combine its intervention with that of one or more similarly situated parties? Should the Board reasonably expect parties representing different consumer interests to combine their interventions on issues relating to revenue requirement (as opposed to cost allocation)?*

LIEN submits that the recently-formed Alberta Energy Regulator (“AER”)’s Directive 031<sup>5</sup> on cost claims may be a helpful comparator when assessing what qualifies as “reasonable” costs.

We note that the AER’s test for determining *eligibility for costs* is a low threshold: those persons, groups, or associations “whose business includes the trading in or transportation or recovery of any energy resources” will not be deemed eligible for costs.<sup>6</sup>

LIEN submits that the AER’s general test for determining a party’s (referred to as a “participant” in Directive 031) *cost award* once a proceeding is complete may be helpful to the Board. This test is set out in section 5 of Directive 031:

When determining a participant costs award, the regulator will recognize all those expenses incurred by the participant that it considers reasonable and directly and necessarily related to the participation. When assessing a claim for costs, the regulator will refer to part 5 of the *Rules of Practice* and the scale of costs outlined in appendix D of this directive.

Section 64 of the *Rules of Practice* states:

- (1) The Regulator may award costs to a participant if the Regulator is of the opinion that
- (a) the costs are reasonable and directly and necessarily related to the proceeding, and
  - (b) the participant acted responsibly in the proceeding and contributed to a better understanding of the issues before the Regulator.

The AER considers the following factors when deciding whether a party’s costs are reasonable. Specifically, the AER looks at whether the party did one or more of the following:<sup>7</sup>

- asked questions on cross-examination that were unduly repetitive of questions previously asked by another participant and answered by that participant’s witness;
- made reasonable efforts to ensure that the participant’s evidence was not unduly repetitive of evidence presented by another participant;

<sup>5</sup> See AER Directive 031 at <http://www.aer.ca/documents/directives/Directive031.pdf>.

<sup>6</sup> AER Directive 031, section 2 at <http://www.aer.ca/documents/directives/Directive031.pdf>.

<sup>7</sup> AER Directive 031, section 5.1 at <http://www.aer.ca/documents/directives/Directive031.pdf>.

- made reasonable efforts to cooperate with other participants to reduce the duplication of evidence and questions or to combine the participant's submission with that of similarly interested participants;
- presented in oral evidence significant new evidence that was available to the participant at the time the participant filed documentary evidence but that was not filed at that time;
- failed to comply with a direction of the regulator, including a direction on the filing of evidence;
- submitted evidence and argument on issues that were not relevant to the proceeding;
- needed legal or technical assistance to take part in the proceeding;
- engaged in conduct that unnecessarily lengthened the duration of the proceeding or resulted in unnecessary costs;
- denied or refused to admit anything that should have been admitted;
- took any step or stage in the proceeding that was (i) improper, vexatious or unnecessary, or (ii) taken through negligence, mistake or excessive caution;
- failed to comply with part 5 of the Rules of Practice.

LIEN submits that the conditions above may provide guidance to the Board. LIEN's intention in including this list is for guidance only. LIEN does not suggest that the Board should adopt the list in its entirety. However, LIEN submits that the seventh factor above (needed legal or technical assistance to participate) is one that the Board should recognize as necessary and commonplace for most intervenors, including LIEN. Legal and technical issues arise in most, if not all, Board proceedings, requiring legal counsel, consultants, or both. Further, many proceedings require experts. LIEN submits the Board should continue to accept costs of legal counsel, consultants and experts as the Board has done in the past.

LIEN submits that the Board should consider the third factor above (reasonable efforts to reduce duplication of submissions and combine submissions) only in light of the following comments.

LIEN submits that the positions of parties may not be fully developed at the start of a proceeding and may evolve as the proceeding takes place, based on, among other things, the evidence presented, cross-examinations, and interrogatories. The best way to facilitate the combination of interventions at the outset of a proceeding is for the Board to hold a settlement conference. This facilitates the understanding of the evidence/positions of all parties, the open exchange of positions among all parties in a confidential setting, and the search for common ground. If a full settlement is reached, then the subsequent process is shortened. If a partial settlement is reached, then the process can proceed to deal with the unsettled issues; any opportunity for joint intervention on remaining issues could be encouraged and expected by the Board at the hearing/subsequent process.



There may be more opportunity for combining interests related to revenue requirement as opposed to cost allocation. LIEN submits that the potential for combining interests would be best facilitated through a settlement conference as discussed above. The Board should expect that parties will make best efforts to explore and identify opportunities for combining interests, while balancing the length of time and expense to be incurred in such efforts compared to a separate intervention. Such an approach takes into account that, at some point, there will be diminishing returns in seeking to combine, as opposed to conducting separate, interventions. Joint efforts take more time to develop and have higher administrative/coordination costs.

*Should the Board consider different approaches to administering cost awards in adjudicative proceedings? For instance, should the Board consider adopting an approach that provides for pre-approved budgets, pre-established amounts for each hearing activity (similar to the approach for policy consultations), and pre-established amounts for disbursements?*

LIEN welcomes the exploration of different approaches that will enhance opportunities for effective intervention before the Board. Any approach adopted for cost awards should take into account the nature of the proceeding and the amount of flexibility intervenors may require in conducting an intervention.

Over the years, particular intervenors have taken the lead on certain matters because of expertise, experience and interest. This approach has served the intervenors well as such a lead has been helpful in exploring, analyzing and resolving issues; it has led to more efficient, effective and cost-effective interventions by all intervenors and this approach has been helpful to the Board. Any approach adopted by the Board for administering cost awards should continue to allow this flexibility in intervenor leadership.

Pre-approved budgets or pre-established amounts may be appropriate in particular proceedings, for example, where it is a more routine proceeding with standard issues. However, even what appears to be a routine proceeding may become more complex during the proceeding and pre-set amounts may need to be adjusted accordingly. As well, certain proceedings may settle quickly and the pre-established amounts may be too high. Because of these concerns, LIEN is cautious about offering support for pre-approved budgets or pre-established amounts for hearing activities. The Board may wish to experiment with this approach in certain limited hearings that are likely to be more predictable in scope and level of effort required. Those hearings that are more complex, contain new issues to address, or some combination thereof may not be suitable for pre-approved budgets or pre-established amounts. LIEN continues to strongly support the need for flexibility in interventions as discussed above. The current approach provides appropriate flexibility in scale of intervention and in fostering leadership roles by intervenors.

## RECOMMENDED MODIFICATIONS

*Are there modifications that the Board should consider making to the Rules and the Practice Direction?*

LIEN submits that the Board should consider making the following modifications:

- 1 Under section 23 of the Rules, set out the test below to determine whether a potential intervenor has a “substantial interest” and should be granted intervenor status in a proceeding:
  - a) demonstrate how consultation or engagement with a constituency occurs

OR

  - b) demonstrate that the matter before the Board may affect the person, group or association directly, or indirectly

OR

  - c) possess information and/or expertise relevant to the subject matter of the proceeding.
- 2 Under the Rules, require intervenors to include at least one of the items below in their intervention request letters, to ensure that those representing intervenors at the Board (i.e., legal counsel, consultant or other representative) have some level of input from the intervenor itself:
  - a) a web link to the intervenor’s website listing or describing the intervenor’s members/constituents
  - b) a hard copy list of the intervenor’s members/constituents
  - c) a description of the intervenor’s members/constituents
  - d) a brief description of how the person, group or association instructing the representative has demonstrated consultation or engagement with a constituency, or
  - e) a brief description of the relevant information and/or relevant expertise that the person, group or association instructing the representative possesses to assist in the proceeding.
- 3 Under the *Practice Direction on Cost Awards*, when determining whether a party primarily represents the direct interests of consumers and accordingly may be eligible for a cost award under section 3.03(a), the Board should consider whether the party has demonstrated



(through previous participation in Board proceedings, or for a party appearing at a Board proceeding for the first time, in its intervention and cost eligibility request letter), or when asked to do so, can demonstrate, that the party's members/constituents are consumers:

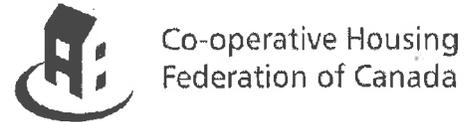
- a) whose interests may be directly or indirectly affected by the proceeding
  - b) generally affected by services regulated by the Board, namely those consumers whose interests the Board is required to protect under section 1(1) paragraphs 1 and 3 (electricity) and/or section 2 paragraphs 2 and 5 (gas) of the *Ontario Energy Board Act, 1998*<sup>8</sup> (the "Act"), or
  - c) whose interests, while not directly or indirectly affected by the proceeding, may be directly or indirectly affected by a related proceeding in the future.
- 4 Under the *Practice Direction on Cost Awards*, when determining whether a party primarily represents a public interest and accordingly may be eligible for a cost award under section 3.03(b), the Board should consider whether the party has demonstrated or can demonstrate that it represents, as part of its core objectives, one or more interests of the public, such as:
- ◆ environmental protection
  - ◆ energy conservation and sustainability
  - ◆ consumer protection (including low-income consumer protection and bill mitigation/management)
  - ◆ demand management
  - ◆ reliability and quality of service (electricity and gas)
  - ◆ promotion of renewable energy
  - ◆ other interests directly or indirectly related to the Board's objectives under sections 1 and 2 of the *Act*.

Yours truly,

Matt Gardner

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<sup>8</sup> S.O. 1998, Chapter 15, Schedule B.



September 27, 2013  
Ontario Energy Board  
2300 Yonge Street  
Suite 2700  
Toronto, ON M4P 1E4

Attention: Kirsten Walli, Board Secretary

Dear Ms. Walli:

**Re: First Phase Submissions of Low-Income Energy Network  
Board File No. EB-2013-0301 - Review of Framework Governing the Participation  
of Intervenors in Board Proceedings**

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Please accept this letter in support of the Low-Income Energy Network submission referenced above. We appreciate the opportunity to assist the Ontario Energy Board to improve intervenor participation and Board proceedings and strongly support the direction herein.

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Olga Tasci  
Director, Operations  
Directrice des Opérations  
The Agency for Co-operative  
Housing

A handwritten signature in black ink, appearing to read "D. Reagan", written over a horizontal line.

Dale Reagan  
Managing Director, Ontario Region  
Co-operative Housing Federation of  
Canada  
Ontario Region Office

A handwritten signature in black ink, appearing to read "Sarah Baker", written over a horizontal line.

Sarah Baker  
Director of Energy Services  
Housing Services Corporation

A handwritten signature in black ink, appearing to read "Sharad Kerur", written over a horizontal line.

Sharad Kerur  
Executive Director  
Ontario Non-profit Housing Association  
(ONPHA)