

**Ontario Energy Board Review of Framework Governing the
Participation of Intervenors in Board Proceedings**

Board File No. EB-2013-0301

Northwatch's Written Submissions

September 27, 2013

1. Background

The Ontario Energy Board has initiated a review of the framework governing the participation of intervenors in applications, policy consultations and other proceedings before the Board. The Board has described the objectives and process as follows:

“The review is to determine whether there are ways in which the Board’s approach to intervenors might be modified in order to better achieve the Board’s statutory objectives. The review will proceed through two phases, as set out further below. The first phase will examine whether there are modifications that should be made, in the near term and within the existing framework, regarding the Board’s approach to intervenor status, cost eligibility and cost awards. The second phase will examine whether, over the longer term, the Board should consider adopting a different model regarding the representation of consumer interests in Board proceedings.”

Northwatch is a public interest organization concerned with environmental protection and social development in northeastern Ontario. Founded in 1988 to provide a representative regional voice in environmental decision-making and to address regional concerns with respect to energy, waste, mining and forestry related activities and initiatives, Northwatch has a long-term and consistent interest in electricity planning in Ontario. In particular, Northwatch’s interests are with respect to electricity generation and transmission in northeastern Ontario, conservation and efficiency measures, and rates and rate structures. Northwatch is a coalition of community and district based environmental, social justice and social development organizations.

In Northwatch’s 25 years of operation, the organization has maintained a dual mandate: to promote environmental protection and awareness, particularly in relationship to northeastern Ontario, and to support and promote public participation in environment-related decision-making.

2. Northwatch Response to Questions in Review of the Board’s Current Approach

2.1 Intervenor Status

2.1.1. 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?

The key factors the Board should consider relate to the ability of / potential for a decision or outcome of the proceeding to affect the interest(s) of the person seeking intervenor status, particularly if the decision or outcome may be experienced as an adverse affect by the person.

2.1.2. 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?

Conditions or requirements should be imposed, but the Board should be cautious against imposing requirements that would demand a level of effort that is disproportionate to the level of engagement in the proceeding, or disproportionate to the proceeding itself. For example, it should be possible to provide this “demonstration” at the commencement of a multi-phase proceeding, rather than at each phase in a multi-phase proceeding. It is reasonable, however, to require some demonstration on the part of the intervener that the intervention is being undertaken at the direction of the intervening group or association, and that accountability mechanisms are in place. In other processes, such as the Participant Funding Program now in place in the Canadian Nuclear Safety Commission, this is accomplished by provision of “endorsements” or resolutions passed by the government body of the applicant group. In establishing these conditions or requirements the Board should be clear in its expectations and should provide intervenors with some options in terms of how the expectations are met.

2.2 Cost Eligibility

2.2.1. 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?

Requiring a party to demonstrate consultation or engagement with those whom they present themselves as representing is reasonable. However, the Board may wish to place some clear limits on the resources that will be made available to support consultation or engagement with the class of customers, and do so in advance of the consultation or engagement commencing, in the interests of fairness.

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

Factors the Board should consider include the history of the party’s involvement in related issues or geography, the mandate of the party and how it relates to the matters before the Board, the history of participation of the party in previous Board proceedings and whether they represented a public interest in that proceeding, the views of the party in terms of how their representation of the public interest relates to the Board’s mandate and to the matter before the Board.

2.2.3. 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)?

The Board should expect reasonable efforts on the part of parties to combine efforts and interests, but should also recognize that there may be some inefficiencies in combining efforts, as well as efficiencies. For example, if two parties combine interests, it might require additional time and effort on the part of the legal counsel or other representatives to blend and balance the interests of the now combine parties into a single intervention. It would also be important to recognize that two parties may be able to combine efforts in one proceeding but not in another, given the differing interests they bring to the various proceedings.

2.2.4. 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?

In general, Northwatch favours a participant funding approach that is more similar to that provided through the Intervenor Funding Project Act¹ that was in place in Ontario from 1990 through to 1996. The approach incents parties to seek means in which to cooperate and identify the key areas of focus for each intervenor, thereby avoiding overlap and duplication, but also provides a greater level of predictability with respect to funding outcomes.

¹ As found at http://www.e-laws.gov.on.ca/html/repealedstatutes/english/elaws_rep_statutes_90i13_e.htm

2.3 Recommended Modifications

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

In general, the *Rules of Practice and Procedure* – or at least, the current approach as practiced under these rules – may serve to discourage the participation of persons or organizations in OEB proceedings without legal counsel or technical experts. In fact, Northwatch has received hearsay reports of members of the public with a concern in a matter or proceeding that was before the Board receiving advice that they could not participate in a Board proceeding without legal counsel. This is counter to Northwatch’s objectives with respect to the public having an ability to engage in environment-related decision-making, and is inconsistent with the Board’s public participation mandate.

There are many aspects of the Board’s current practice that are supportive of public participation, including the webcasting of proceedings, the posting of all key documents on a public registry, and the availability of subscribed email service. These are all very positive elements. However, there are other aspects that discourage public participation, including the legalistic nature of many of the Board’s communications and the expectation that all parties will be represented by legal counsel.

Northwatch would encourage the Board, in Phase II of this review process, to consider in particular means by which the process(es) may be made more inclusive and more available to public participants, and in particular to local residents or members of local and informal groups who may identify an interest in particular proceedings but be generally less inclined to participate for reasons outlined above, despite their having something valuable to offer the Board.

3. Conclusion

The preceding comments are intended to provide a preliminary outlining of Northwatch's views with respect to the current review. Unfortunately, engagement in a federal review hearing that is currently underway means that no Northwatch representative will be available to participate in the Stakeholder Conference on October 8th. Northwatch does intend to provide additional comments following the Stakeholder Conference.