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

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PREAMBLE

There are many ways in which the Board's approach to the "determination of intervenor status, cost eligibility and cost awards" could be modified in order to "further enhance the efficiency and effectiveness of the application and hearing process", but getting to there from here will require some delicate deliberations, if not a few blunt instruments.

The question of intervenor status is complex, to say the least, because of the significant responsibilities of the Board in regulating one of the most important sectors of Ontario's economy. Although the regulatory process itself is not the subject of the current review, it is difficult to suggest changes to the intervenor framework without bearing in mind the impact of regulatory rules and practices.

A significant but sensitive fact is that most intervenors are represented by counsel, that all utilities depend on their counsel to minimize their exposure, and that the Board itself has its own counsel and a fair number of lawyers on staff and as members. Given their expertise and experience, it is no wonder that the regulatory process sometimes appears to focus more on legal interpretations rather than the increasing complexity of policy issues in the energy sector. It is hard to make progress, for example, when utility witnesses with the requisite knowledge are cross-examined by intervenors to the point that their counsel prefers to respond.

Another issue is the fact that the regulatory process itself has not evolved nearly as much as society since Bonbright's seminal work in 1961, *Principles of Public Utility Rates*. One need only think of the enormous changes in the telecommunications field over the last decade to see the extent to which some sectors have evolved. It would be hard for the Canadian Radio and Telecommunications Commission to use principles that were drafted during the Great Depression to regulate today's telecommunications industry, yet those principles are still referred to, if not relied on, to regulate the energy industry in Ontario.

Although some progress is now being made, this approach has resulted in decades of decisions where both private and public ratepayers, ably represented by their counsel, have succeeded in minimizing rate increases despite the negative impact on distribution systems, service standards, conservation programs, and the environment. Although utilities must be held to account, the single-minded focus on costs to today's consumers without due regard to long-term environmental and social costs, is an issue that will require more, not less, attention in the future.

> *Consumer advocates tend to focus on the total revenue requirement, the allocation of that revenue requirement between customer classes, and rate design. They typically do not concern themselves with environmental impacts or costs, except where those costs are internalized in the costs of providing service.*
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> Electricity Regulation in the US: A Guide
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INTERVENOR STATUS

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?

The bars to participating in Board proceedings appear to minimize the number of parties with only a minor interest requesting intervenor status and the mechanisms currently in place to enable parties to contribute to proceedings without having status appear to be adequate.

That said, would it help if the Board were to clarify, for example, that only parties whose livelihoods or businesses depend on reliable access to energy at fair and reasonable rates would have a "substantial interest"? Such a clarification would beg the question: fair and reasonable to whom?

Board staff could perhaps provide an analysis of how many parties have been denied intervenor status over the last few years, but it appears that the Board has rightly determined that almost all parties seeking intervenor status have a "substantial interest" in proceedings related to their industry, constituency, or community.

The Board may, however, wish to determine if those parties deemed to have a "substantial interest" in proceedings adequately reflect the various sectors of Ontario's economy and society. Has there been some turnover or renewal in the number or nature of parties granted status before the Board? Would it make sense for Board staff to encourage representatives of other sectors to participate

in its work or is it content to stay with the *status quo*?

Many of the intervenors granted status are from or are based in the Greater Toronto Area (GTA), which is fair enough, but the Board may wish to pay more attention to ensuring that parties outside the GTA are adequately represented in its work. Even organizations with provincial mandates sometimes find it difficult to represent all of their members equally well if they operate primarily only in or from the GTA or another major centre. Intervenors who insist that utility programs be delivered in a consistent manner across the Province should be careful about what they wish for as the tables could be turned on them. Do they, in fact, consult with and deliver their own programs in Sudbury and Thunder Bay as well as they do in Toronto?

Another aspect that the Board may wish to review is whether or not some parties consistently seek and gain status in all proceedings. It is hard to imagine that many parties could have a "substantial interest" in all proceedings before the Board. Again, it would be useful for Board staff to provide an analysis of how many parties systematically request and are granted intervenor status.

The current review indicates a welcomed willingness to update the manner in which the Board ensures that its work dovetails with the 'new emphasis on the need for Local Distribution Companies (LDCs) to engage a broad range of customers and other stakeholders during the development of the capital and operational plans reflected in their applications'.

Although the Board is right to 'consider how such engagement and consultation by LDCs might affect the role of intervenors in its more formal process', it may be underestimating the challenges that will be involved in ensuring that LDCs are up to the task. For many decades, most LDCs have not worked very closely with their stakeholders and, for the most part, their corporate culture is not akin to reaching out and engaging stakeholders, let alone listening to them.

It has always been a problem getting utilities that for years promoted the consumption of energy to deliver Conservation and Demand Management (CDM) programs and it will be a problem getting utilities that have never really engaged their customers to involve them in a process that many still believe is too complicated for them to understand. One may also recall that, in certain company, a former Ontario Minister of Energy sometimes referred to utility executives as DOUGs – Dumb Old Utility Guys. Rightly concerned primarily with reliability and safety issues, utilities have hired and motivated their employees to deliver, not to deliberate.

This challenge is all the more difficult given the animosity that most LDCs face because many of their customers still think that LDCs control the price of electricity and are still responsible for power plants, transmission lines, and blackouts. Some customers in many regions or neighbourhoods also believe that

their LDC offers poor service standards, further complicating efforts to engage them in future planning.

In their defence, many LDCs have yet to adjust to the debundling and partial rebundling of their operations over the last couple of decades, let alone the unfortunate manner in which they have sometimes been treated by the Ontario Power Authority. The poor introduction of Smart Meters also complicates their task.

Furthermore, most consumers in Ontario are served either by Hydro One (which faces considerable geographic challenges in engaging people across its vast territory) or municipal utilities, many of which have been told by their shareholders to reduce expenses in order to increase profits. It will be difficult to get LDCs that have disengaged from CDM and other programs to engage in public participation programs. Because the federal government has almost totally abandoned this field over the last couple of decades, there is also a generational gap in the public participation profession and even more cynicism to deal with.

It would be erroneous to conclude that the current stakeholder process has not worked well, but there is clearly room for improvement. Even those intervenors with a clear focus on policy issues, whether it be social or environmental, often struggle to advance their concerns in the face of obstructions, if not outright opposition, from industry and consumer groups focused on reducing energy prices at almost any cost.

Perhaps the most useful change in practice would be for the Board to require, periodically or on a case-by-case basis, that intervenors demonstrate not only how their constituency is directly affected by an application but how their constituency has been consulted or engaged in the application at hand. It is hard to believe, for example, that the actual members of some parties represented in Board proceedings would object to cost-effective CDM programs that could help ensure that families no longer have to choose between paying their utility bills or their grocery bills and could thus afford to send their children to school on a full stomach.

To the extent to which the Board considers non-profit organizations as those that "represent a public interest relevant to the Board's mandate", it may wish to consider developing its own rules for determining which non-profits are truly non-profits with an actual and active membership base. Sadly, there is very little regulation of the non-profit sector in Ontario, or Canada for that matter. Some non-profits are hard to distinguish from progressive consulting companies and some parties appear to have relatively few members but meet the minimal conditions of Industry Canada for the number of directors.

There is also the sensitive issue of industry associations, notably those whose primary function is to lobby for changes in economic, social and environmental

legislation that would favour their members at the expense not only of ratepayers but of all taxpayers, society in general, and the environment. If all of their members are for-profit, private companies, it seems hard to justify treating them in the same way as non-profit organizations that are not funded by private companies. Rule 3.04(a) would appear to allow the Board to disqualify organizations with more than two members who would not qualify by themselves because they do not primarily represent the direct interests of consumers, but primarily their own corporate interests or those of their shareholders.

The Board may also wish to reconsider whether or not organizations representing private, for-profit interests should be regarded as acting in the public interest and thus eligible for cost awards.

The granting of intervenor status in itself does not appear to be a major problem but rather that of cost awards. The award of over $5.5 million to 38 eligible intervenors in proceedings before the Board during the 2012 - 2013 fiscal year is a significant amount in absolute terms, but it needs to be compared to the total number of dollars generated by the energy rates approved during the same period to see its relative value.

That said, the Board has a responsibility to ensure that it invests ratepayer funds in “effective, fair and transparent regulation” that promotes a “viable, sustainable and efficient energy sector … at reasonable cost”. This updated description of the Board’s mandate still does not explicitly acknowledge any responsibility to future generations of consumers but it is better than previous descriptions that focused simply on fair and reasonable rates to today’s consumers.

Although the Board encourages intervenors with similar positions to work together, the establishment of coalitions whose sole purpose appears to be working with the Board may not be accomplishing this goal. If the work of such coalitions is consistently delegated to others, their members may not work together at all. Correspondence regularly submitted to the Board appears to indicate very little contribution from or oversight of some members of some coalitions.

2. What conditions might the Board appropriately impose when granting intervenor status to a party?

It would be entirely appropriate for the Board to require intervenors to demonstrate how they govern the participation of their legal counsel and representatives in this field. Although the nature of hearings does not allow for simultaneous consultations – rates are not being auctioned off to the highest bidder – the current practice gives considerable latitude for counsel and representatives to act on their behalf.

Generally speaking, counsel and representatives do an excellent job accurately reflecting the concerns of their constituencies in their presentations and during proceedings, but correspondence with the Board indicates that they do so without much, if any, engagement of their constituencies or the members of the organizations they are representing.

If this is a dilemma, there are at least two solutions. First, the Board could improve the engagement of the constituencies in question, which would have the benefit of improving their understanding of the issues at hand. Second, the Board could move towards working with a number of independent experts representing the constituencies in question. Such an approach might merit more analysis in the second phase of this review.

COST ELIGIBILITY

1. What factors should the Board consider in determining whether a party primarily represents the direct interests of consumers in relation to services that are regulated by the Board?

Before considering ways in which only parties primarily representing the direct interests of consumers are awarded costs, the Board may wish to restrict awards to parties based in Ontario or representing primarily consumers in Ontario. Without calling into question the legitimacy of any party, some may think it aberrant for the Ontario Energy Board to award costs to parties that have relatively few members and possibly not even any employees in Ontario.

Although it is encouraging that the Board recognizes the value of expertise from outside Ontario, if not Canada, relying on such expertise on an ongoing basis does not help to build capacity within the Province and occasionally results in advice based on a poor understanding of Ontario's increasingly complex society, if not geography.

The Board may also wish to examine more closely the actual constituencies of intervenors being represented to ensure, for example, that constituencies receiving primarily public funds are not treated the same way as those that receive no or very little public funds.

An easy but potentially unpopular approach would be for the Board to restrict cost awards to non-profit organizations or better yet, charitable organizations as the latter benefit from some oversight and regulation from Revenue Canada because of the tax implications involved.

It would be entirely appropriate for the Board to require parties to demonstrate the extent to which they have consulted or engaged the consumers directly

affected by applications that they work on. This would not be an onerous obligation for most parties appearing before the Board.

The Board may also wish to monitor more closely the actual contributions of intervenors. Although it would be difficult in practice for the Board to weigh the value of written contributions, some may think it unusual that intervenors who attend hearings or consultations but rarely participate actively in them can be awarded the same costs as more active intervenors.

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

There are several factors to consider when determining whether or not a party primarily represents a public interest relevant to the Board's mandate. Perhaps the easiest is to differentiate between public and private interests. The Board has a good track record of excluding for-profit, private companies from cost awards, but there appears to be some grey areas when it comes to non-profit organizations representing for-profit companies or, even more difficult, non-profit organizations representing for-profit interests in general.

Most attention, however, appears to be focused on whether or not legitimate non-profit organizations primarily represent a public interest relevant to the Board's mandate. Given the increasingly important impact of regulatory decisions in the energy sector – one need only think of the on-going issues of various pipeline proposals – it is hard to argue that non-profit organizations with a general mandate (whether that be consumer, environmental, safety, labour, etc) should be excluded because energy issues might not dominate their agenda.

Given the strong representation of parties based in or near the GTA, both the size and geographic location of parties should also be factored into such decisions. Although smaller organizations are rightly encouraged to work with others in these matters, the Board should seek to ensure more diversity in the intervenor community.

3. What conditions might the Board appropriately impose when determining the eligibility of a party for costs?

It would be entirely appropriate for the Board to expect parties representing different consumer interests to combine their interventions on issues relating to revenue requirement (as opposed to cost allocation). In addition to streamlining hearings, such an approach would have the added benefit of having parties work together in a less formal and perhaps less contentious manner than is possible when representing their interests in public before members of the Board.

Although perhaps more rightly part of the second phase of this review, such an approach could benefit from a greater emphasis than is currently the case on multi-stakeholder consultations designed to work towards a consensus. Such an approach would require more time and thus funding but could result in lower overall cost awards if the Board required the use of professional facilitators. Note that multi-stakeholder processes to achieve consensus could reduce the need for the Alternative Dispute Resolution mechanism currently included in the Board's Rule of Practice and Procedure.

> *In the past decade or so, many commissions have formed stakeholder collaboratives to engage utilities, state agencies, customer group representatives, environmental groups, and others in a less formal process, aimed at achieving some degree of consensus on dealing with a major issue. These collaboratives may meet for a few months or more, then collectively recommend a change to regulations, tariffs, or policies.*
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> Electricity Regulation in the US: A Guide
> Vermont, March 2011
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It would also be reasonable for the Board to require a party to combine its intervention with that of one or more similarly situated parties on a case-by-case basis. Please see the comments above regarding coalitions.

Another unpopular approach or blunt instrument to improve the cost-effectiveness of cost awards would be to reduce or at least freeze the rates paid to counsel and experts working for intervenors. If it does not already do so, the Board may also wish to ensure that cost awards are paid only to parties, not directly to their counsel or experts.

4. Should the Board consider different approaches to administering cost awards in adjudicative proceedings?

The Board should experiment with pre-approved budgets and amounts for each hearing activity, which would be easier to do than lowering the rates paid to counsel and experts. Such an approach would also help to avoid any tendency for intervenors to drag things out during hearings or digress into details that are not relevant to the discussion at hand.

At times, some intervenors appear oblivious to the fact that each hour of a hearing comes at a considerable cost to ratepayers when all of the expenses associated with it are added up. It would be more problematic to provide pre-established amounts for disbursements as they can vary significantly depending on the complexity of the hearing.

RECOMMENDED MODIFICATIONS

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

Although the Board does not have a reputation for abusing its considerable discretion with respect to matters such as intervenor status, eligibility for cost awards, and the assessment of costs, the absence of clear rules can make things difficult for new intervenors who are unaware of the ways in which the Board operates. This problem could be addressed if Board staff were directed to seek out and mentor newcomers so that they could learn more quickly how to work with the Board, if not other intervenors.

The Board may wish to pay more attention to the timeframes involved in making decisions on cost awards as there are sometimes cases where a decision on eligibility occurs after or so close to the deadline for making submissions that some intervenors may invest considerable time in making submissions but are subsequently denied cost awards.

There have also been cases where a utility has objected to legitimate cost awards after eligibility has been granted. The Board may wish to order that once utilities have accepted the eligibility of intervenors for cost awards, the responsibility for determining the amount of the award rests solely with the Board. Having two parties involved in such oversight may not be the most efficient way to proceed.

Alternatively, the Board could consider reviewing the rules for utilities to object to applications for cost awards. There have been cases when utilities object to applications and the Board overrules the objection but apparently relatively few cases of utilities objecting to applications and the Board accepting the objection. The latter may be influenced by the reluctance of utilities to alienate intervenors and reinforces the argument for the Board to be the sole determinant of cost awards and for it to seek some renewal of the intervenor community, or at least help new members join the club.

The Board may also wish to review the application of its Principles in Awarding Costs (5.01), which are quite reasonable but do not always seem to be followed in practice. There have been cases where Board members chairing hearings have been obliged to ask intervenors, sometimes repeatedly, to get to the point or to address the issue at hand, but such requests do not appear to have resulted in any adjustment of cost awards. It could be informative for Board staff to provide an analysis of cases where cost awards have been adjusted for reasons other than excessive time spent on preparation or disbursements, notably

inappropriate treatment of witnesses and behavior that unnecessarily prolongs proceedings.

The Board may also wish to strengthen its oversight of cost awards in order to ensure that ratepayers are not being required to pay unreasonable or unjustified fees and expenses to intervenors. That said, the policy of the Board not to accept business class train tickets to Toronto even when they are cheaper (let alone safer and more energy-efficient) than economy airfare should be modified.

A more significant issue that the Board should reconsider is the practice not to allow employees of intervenors that have been awarded costs to work on applications. This decision does not help to build capacity in the non-profit sector, leads to reliance on a small number of experts in this field, and does not encourage renewal of the intervenor community.

Alternatively, the Board may wish to consult the rules that Revenue Canada uses to determine whether or not consultants should be classified as employees and then apply Rule 6.05 in a more rigorous manner.

The Board may also wish to expand the list in Rule 3.05 to exclude other organizations that receive substantial public funding for their operations.

Finally, the Board may wish to consider modifying the Practice Decision to specify that the first test of a party claiming to represent a “public interest relevant to the Board’s mandate” would be for the party to be a non-profit organization. This would not automatically qualify non-profit organizations but would screen out parties that claim to represent a public interest but have no legal obligation to do so.