

September 27, 2013

BY RESS

Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Dear Ms. Walli:

**Re: Review of Framework Governing the Participation of Intervenors in Board Proceedings – Consultation and Stakeholder Conference
Board File No. EB-2013-0301**

Union Gas Limited thanks the Board for the opportunity to make submissions in connection to the participation of intervenors in proceedings before the Board. Union supports this initiative by the Board to make the regulatory process more efficient. As set out below, from Union's perspective, there is an opportunity for greater efficiencies to be achieved by eliminating or limiting the participation of intervenors who represent the same customer classes or interest, or who seek to review the same issue. Any changes to the framework should serve to improve the Board's ability to meet its overall mandate of protecting the public interest, and should not jeopardize that mandate.

Union's responses to the specific questions posed by the Board. In summary, Union's key recommendations are provided below:

- to require intervenors to file a letter of representation from their constituency, which sets out the issues of importance and relevance to them that are engaged in the particular proceeding;
- to require intervenors to file a budget, including hours and amounts, that they will need in order to address those key issues for their constituency during the hearing;
- to eliminate interventions by parties who have no direct and substantial interest in the proceeding; and
- to eliminate the duplication of interests represented during a particular proceeding.

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? For instance, should the Board require a person seeking intervenor status to demonstrate consultation or engagement with a constituency directly affected by the application?

In recent regulatory proceedings before the Board, it has appeared to Union that many intervenor groups represent identical or nearly identical constituencies or interests. Further, in some cases, there is doubt as to whether the intervenor’s constituency would truly be affected by the outcome of the proceeding and whether the intervenor is actually driving the intervenor’s participation and giving direction to its counsel, or whether the participation is driven by counsel. While Union appreciates efforts made by many intervenor groups to work together to streamline the regulatory process, individual participation by so many different stakeholders who are granted full participation rights has caused, from Union’s perspective, unnecessary delays, inefficiencies and duplication in the process.

From Union’s perspective, the efficiency of proceedings before the Board would be improved if the Board limited interventions to intervenors with a demonstrated interest in the subject-matter of the proceeding. In every case, intervenors should satisfy the Board that their constituencies will be directly affected by the outcome of the proceeding and that they will contribute to the Board’s understanding of the issues in the proceeding. Intervenors who cannot demonstrate this should not be permitted to participate in the proceeding.

Intervenors should also be required to demonstrate that their constituencies do not overlap with those of other intervenors. The Board should not allow separate interventions by intervenors with similar or overlapping constituencies.

Therefore, Union recommends that the Board consider the following factors when determining whether to grant intervenor status to a prospective intervenor:

- whether the intervenor’s constituency will be directly affected by the particular proceeding;
- whether the intervenor’s constituency overlaps with that of another intervenor or proposed intervenor; and
- whether the intervenor will contribute to the Board’s understanding of the issues in the proceeding;
- whether the issues that the intervenor proposes to address overlap with the issues other intervenor groups propose to address; and
- whether the intervenor is prepared to join with other intervenors in retaining common counsel to jointly represent their interests in the proceeding.

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?

Intervenors' participation should not be "at large" in all cases, but rather should be limited to issues that are relevant to the intervenor's interests. The Board should not permit interrogatories or examination by intervenors on issues that are not relevant to their particular interests.

Also, intervenors' counsel should be required to demonstrate that they have consulted with and received direction from their client or constituency with respect to each proceeding. Counsel's retainer or services agreement, or similar document, should be included in the intervention.

Therefore, Union recommends that the Board require all applications for intervenor status to include:

- a description of the issues on which the proposed intervenor seeks to intervene;
- an explanation of how those issues are relevant to the interests of the intervenor's constituency;
- an explanation of how and to what extent the proposed intervenor's constituency was consulted about the particular proceeding, and what directions the constituency provided to the intervenor; and
- a copy of the retainer or services agreement entered into between the intervenor and its counsel or consultants with respect to the particular proceeding.

Union further recommends that the Board should include the following as conditions of granting intervenor status:

- that the intervenor's participation be limited to certain specified issues on which the intervenor has demonstrated a substantial interest; and
- that the intervenor regularly consult its constituency concerning its participation in the proceeding.

Cost eligibility

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?

Intervenors who seek to recover their costs from regulated entities should be required to demonstrate that they represent the interests of consumers directly affected by the application. It should not be sufficient for the intervenor to demonstrate that they represent consumers generally.

Intervenors should also be required to demonstrate financial need. Union notes that, in some cases, it may be appropriate for the Board to require that an intervenor bear a portion of its costs.

Further, as noted above, from Union's perspective, all proposed intervenors should be required to demonstrate that they, rather than their counsel, are driving the intervenor's participation.

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

The Board should first consider whether the interest the intervenor seeks to represent falls within the Board's objectives as defined in sections 1 and 2 of the Act. It should then consider whether the intervenor is well suited to advance that particular interest in the proceeding. One of the factors that the Board should consider in that regard is whether the intervenor has a history of advancing the interest in forums other than the Board, for example, by engaging in public interest advocacy generally, being involved in public consultation processes, and being involved in proceedings before other administrative bodies. Further, costs eligibility on public interest grounds should only be granted where the intervenor represents an interest that is distinct from those of the other intervenors, and that would otherwise be unrepresented in the proceeding.

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)?

Some conditions that the Board should consider in fixing costs awards include:

- (a) financial need (the party's ability to participate in the proceeding without a costs award);
- (b) whether the intervenor's conduct tended to improve or worsen the overall efficiency of the proceeding, including whether the intervenor worked cooperatively with other intervenors to avoid duplication;
- (c) the importance of the issues in the proceeding to the intervenor's constituency relative to that of other intervenors;
- (d) whether the intervenor contributed positively to the Board's understanding of the issues; and
- (e) counsel or consultants' professional achievement, experience before regulatory tribunals and expertise (rather than simply years of experience).

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?

Union supports the use of pre-established amounts for policy consultations.

With respect to more complex applications, Union supports a requirement that budgets be filed at the time of the initial request for cost eligibility. The Board should critically assess each proposed budget having regard to the nature and complexity of the application, the extent of the intervenor's interest and the relative importance of the intervenor's constituency in connection with the issues engaged by the proceeding.

Budgets should not be pre-approved by the Board, but should be critically reviewed and commented on by the Board before the proceeding begins. At the time costs awards are made, the Board should award costs on the basis of the factors listed above. The Board should only award an amount of costs greater than that contemplated in the budget in exceptional circumstances and where the intervenor can demonstrate why a deviation from the budget was necessary.

Recommended modifications

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

Rules 23 and 41, and the Practice Direction, should be amended to reflect the reforms that the Board decides to implement.

Yours Truly,

[original signed by]

Mark Kitchen
Director, Regulatory Affairs

cc: Crawford Smith, Torys
Myriam Seers, Torys