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VIA Email and Mail

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Ontario Energy Board
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Re: Review of Framework Governing the Participation of Intervenors in Board Proceedings – Board File No. EB-2013-0301
Submissions of the Vulnerable Energy Consumers Coalition (VECC) and the Public Interest Advocacy Centre (PIAC)

Introduction

The Vulnerable Energy Consumers Coalition, comprised of the Ontario Coalition of Senior Citizens Organizations (OCSCO) and the Federation of Metro Tenants (FMTA, have been active in representing the interests of low and fixed income tenants and seniors in the regulatory process before the Ontario Energy Board since 1999. The Ontario Coalition of Senior Citizens' Organizations ("OCSCO") is a non-profit coalition of over 160 senior groups as well as individual members across Ontario. OCSCO represents the concerns of over 500,000 senior citizens through its group and individual members. OCSCO's mission is to improve the quality of life for Ontario's seniors. The Federation of the Metro Tenants Association (the "FTMA") is a Toronto non-profit corporation composed of over ninety-two affiliated tenants associations, individual tenants, housing organizations, and members of non-profit housing co-oops. In addition to encouraging the organization of tenants and the promotion of decent and affordable housing, the Federation provides general information, advice, and assistance to tenants.

The Public Interest Advocacy Centre is a non-profit charitable organization whose mandate includes the provision of research and legal representation on behalf of vulnerable Canadians in the regulation of important public services. PIAC helps facilitate the representation of VECC in the Ontario Energy Board. PIAC has played a similar role in Board proceedings since the 1980s, and is itself an occasional intervenor in Ontario Energy Board proceedings in matters touching upon broad consumer rights and remedies. PIAC's assistance and VECC's participation has been greatly enabled by the Board's current approach to public interest interventions and cost awards. VECC and PIAC appreciate the opportunity to provide input to this important proceeding.

Background

In the Background section, the Board's correspondence of August 22, 2013, notes several reasons for the initiation of the review of the intervenor participation framework. These include:

(1) Involvement of customers and other stakeholders in the development of capital and operational plans of electricity distributors
(2) Considerations of efficiency and effectiveness
(3) Possible changes to the Board's consultation

VECC/PIAC submits that increased stakeholder involvement with the planning process of individual distributors suggested by (1) above is a positive development. Particular local needs as well as complaints and concerns about the carrying out of operations may be vetted in an appropriate environment with the potential for follow up though an ongoing process. Properly engaged, such stakeholder involvement should produce better prepared applications and reduce regulatory process. However, such stakeholder involvement should not be confused with the participation of intervenor customer or stakeholder representatives in hearings required under the OEB Act 1998 to approve the capital and operating plans of a

distributor together with relevant rates. Both activities can play a role but not the same one.

Stakeholder involvement in the preparation of a distributors' plans is meant primarily as a way for the utility to be aware of ongoing customer concerns, customer response to ongoing programs such as DSM and potential planning issues such as location of renewable energy generation. It is not expected to be some kind of half-way house pre-approval process of distributor applications to the Board. Any such inference would likely subvert the necessary free exchange of information between the distributor and stakeholders and create a need for codification and standardization of customer involvement. Without discovery or formal fact finding tools what could be gleaned form a customer involvement at a distributor level. In addition, the idea that representative engaged customer groups could be sustained at any advanced level for the multitude of utilities is optimistic to say the least. A customer engagement process could result in better results for all, but not by neutering the intervenor hearing involvement.

The other trigger cited for the review is the possible expansion of Board efforts for customer input and consultation to surveys and focus groups in the policy development process. This would presumably allow for some proactive planning by all stakeholders and provide some potential supporting evidence for positions advanced on behalf of stakeholders. It should be noted that customer groups have been eager to undertake similar research over the past few decades, but were limited by the four corners of the issues in a specific proceeding. The Board has been assiduous in ensuring that the customer organization itself does not receive cost awards for organizational involvement so the possibility of such funded efforts on the horizon might be welcome if there is an opportunity for intervenor research.

However, such new consultations are arranged and customer research undertaken, it seems unlikely that such initiatives are incompatible with the current framework of intervention, although the presence of additional public evidence may curb the more speculative of submissions. Similar to

local customer involvement, the measures are likely enhancements rather than replacements in the current system.

This leaves issues of efficiency and effectiveness, the second cited trigger for review, as the remaining possible catalysts for change to the current framework. While the Board's correspondence of August 22, 2013 leaps into a consideration of remedial improvements , without any assessment of the state of effectiveness of the current framework for interventions. We would wish to examine the same before dealing with the questions posed therein.

First Phase – Review of the Board's Approach

Counsel for VECC/PIAC in the within matter has had the advantage of reviewing the draft of the submissions of CME in this matter , and as a consequence, will provide a condensed version of the history of funded public interest interventions in the Ontario Energy Board and the principles behind such programs.

In general terms, there appears to be three supporting principles or rationales behind the institution of a cost award process similar to that employed by the OEB. These are (1) Fairness, (2) Need, and (3) Public Participation. Various tribunals have placed emphasis on one of the latter two principles in designing the operation of their particular cost award system. We will briefly describe the essential elements of each of the principles:

(I) Fairness refers to the concern that ratepayer revenues are used to pay for the utility's representation in tribunal proceedings to advance the interests of the shareholder. Without the presence of a cost award policy, the ratepayers may effectively be paying for representation that is contrary to their interests without any effective counterbalance.

(ii) Need addresses the disparity of resources between ordinary ratepayers on the one hand, and utility and industry stakeholders on the other. Because of the nature of regulatory proceedings, interventions ordinarily require professional assistance, the cost of which may be beyond the financial capacity of most non-commercial public interests. The need principle reflects the effective implementation of fairness described above by ensuring the provision of financial resources to qualified public interests.

(iii) Public Participation looks to the overall state of the evidentiary record that is before the hearing tribunal at the end of the day. While the focus of the need and the fairness principles is on the protection of the interests of intervenors, public participation looks to the quality of the decision making of the tribunal itself. It reflects the belief that the provision of informed representation of the views of all stakeholders assists the presiding tribunal and makes for better decisions.

The OEB generally made public participation its principal objective. In the 1985 Decision, **EBO 116**, the OEB established the cost award regime, giving the following rationale:

> "The Board believes it should have available to it a broad range of opinions and information for its decision making. Hearings before the Board are becoming increasingly complex. In such circumstances, the Board considers that in fulfilling its duty towards the public interest, which is implicit in the OEB Act, there is increasing need to ensure that a broad range of interests is represented at the Board's hearings and that the essential points are canvassed in sufficient depth to have developed a record that will provide maximum assistance to the Board."

This meant that the priorities of the intervention framework would be on diversity of views and completion of a record of evidence. This was a significant policy decision that shaped the approach of the Board to its responsibilities towards the public interest. In brief, the OEB decision meant

that its overarching responsibility would be to allow the full range of interests to be represented. With these interests heard, the Board would exercise its responsibilities under the relevant legislation.

Despite the potential for a significant expansion of funding that would be out of proportion to the matters being decided, the record since 1985 belies that proposition and shows some remarkable characteristics of both effectiveness and efficiency in the operation of the program. At the same time, it is likely inarguable that the Board has been faithful to its mandate of diversity.

The grumbling that has surfaced from time to time concerning the Board's policies associated with interventions and cost awards has centred on the financial expense of the latte. As such, it might be useful to review the effectiveness of cost awards from the standpoint of the overall rate impact. While it is difficult to precisely measure costs and benefits of cost awards to ratepayers, one proxy to ascertain their value involves the examination of the change in the utility revenue requirement (and thus in rates) from the original utility application filed with the Board and the final decision of the Board. In the early years of this century, VECC reviewed intervenor expenses in several large natural gas distribution proceedings:

UNION GAS ($millions)	Fiscal 2000 RP-1999-0017	Fiscal 1999 EBRO 499	Fiscal 1997 EBRO 493/494	Centra EBRO 489	Fiscal 1996 Union EBRO 486	Fiscal 1994 Union EBRO 476-03
Actual Intervenor Cost	$1.40	1.53*	$1.43	$0.59	$0.90	$0.38
* Forecast						
Reduction to Revenue Requirement						
PER ADR		$25.8	$34.4	$0.0		
PER BOARD	$29.60	$18.5	$70.5	$42.4	$23.065	$0.007
Total Impact	$29.60	$44.3	$104.9	$42.4	$23.065	$0.007

Note: RP-1999-0017 intervenor cost will have impacts on the term of Union's PBR from 2001 to 2003.

ENBRIDGE GAS ($millions)	Fiscal 2001 RP-2000-0040	Fiscal 2000 RP-1999-0001	Fiscal 1999 EBRO 497	Fiscal 1998 EBRO 495	Fiscal 1997 EBRO 492	Fiscal 1996 EBRO 490
Actual Intervenor Cost	$0.49	$0.71	$0.81*	$0.69	$0.72	$0.53
* Forcast						
Reduction to Revenue Requirement						
PER ADR	$17.6	$1.2	$3.4	$2.1	$24.6	$22.6
PER BOARD		$43.7	$40.4	$38.6	$7.4	$0.9
Total Impact	$17.6	$44.9	$43.8	$40.7	$32.0	$23.5

Note: RP-1999-0001 Actual Intervenor costs include the intervenor costs associated with the RP-1999-0001 Motion

The financial records from these proceedings disclose that intervenor costs were in the range of 2%-4% of **the reduction** to the utility's revenue requirement. While clearly all of the reduction in each case cannot be ascribed to the efforts of the intervenors, it is important to note that even if only 10% of such reductions were attributable to their efforts, the cost awards program was proving at this stage to be a remarkable financial success and bargain for the ratepayers. There is virtually no other ratepayer expense that appears to be as efficient in reducing rates.

The restructuring of Ontario's electricity industry brought with it the requirement for regulation of a vast array of municipally owned distribution systems as well as components of the old Ontario Hydro transmission, generation and distribution. As each of these newly regulated elements made their way through the regulatory process , the potential for this new activity to generate a disproportionate expense in Board time and utility costs without ratepayer benefit was once again raised, primarily by some of the newly regulated entities.

In 2012, Robert Warren, legal counsel, compiled statistics with OEB data demonstrating real value for electricity distribution ratepayers in funding interventions It shows that the current OEB regulatory process has saved millions of dollars for Ontario ratepayers by making the EDCs justify their claims for operating and capital expenses. In a provincial electric distribution industry generating more than $3 billion in revenues, the average EDC rate application in 2010 and 2011 was reduced 3.8 per cent by the OEB, or about $28 per customer. If this result obtains across the entire set of EDCs, it means that regulation is saving Ontarians at least $114million a year. And what about the allegation of needless interventions it turns out they have cost a little over 2 cents per customer on average, and that amounts to about a tenth of one percent of the average EDC revenue request. See Warren's chart at: http://www.piac.ca/energy/regulation_bogeyman_not_driving_up_electricity_costs

Other intervenor representatives have completed research in connection with this proceeding on the size of the cost award investment in rates in comparison with other regulatory expenses. The School Energy Coalition(SEC) has calculated that intervenor cost awards amount to approximately 6% of the total utility regulatory costs of approximately 85 million including amounts paid to the Board. SEC also notes that an estimated $10 million per year is paid by utilities to the various lobby and representative groups to largely advance owner interests and recovered from ratepayers .The London Property Management Association (LMPA) has analyzed intervenor cost award totals from the previous year and notes that the ratios of intervenor costs to the revenue requirement range from 0.1% to 1.71%. For all of the cost of service applications with cost awards in the year, the ratio of cost claims ($879,792.22) to the approved revenue requirements ($387,762,269) is 0.23%. LMPA notes that this figure is less than half of the Board defined materiality threshold of 0.5%.

Even a cursory review of rate proceedings involving the vast majority of smaller EDCs shows that their rates proceedings have been resolved at the Alternate Dispute Resolution phase . It is trite to note that such resolutions

are inimical to any supposed intervenor representative interest to increase the size of the intervenor cost award.

Finally, the following cost statistics show that intervenors have managed to continue the effective representation that is saving ratepayer money on their energy utility bills without the increases in costs that might be expected.

1997- 1998 Ontario Energy Board Annual Report

Total Board expenditures 1997-98	$4,397,229
Total Intervenor Cost Awards 1997-98	$3,053,743

2012-2013 Total Board Expenditures from 2013-14 Business Plan (page 4, Budget)	$ 35,301,000
Total Intervenor Cost Awards 2012-2013 (Board proceeding letter)	$5,500,000

This shows while there has been an eightfold increase in Board expenditures over the past 15 years, intervenor cost awards have less than doubled despite the massive increase in Board regulatory activities. While it is, of course, too intensive an exercise to true up costs engaged by each new regulatory activity, directionally , we would submit that it is indisputable that the intervenors engaged in the regulatory process over the last fifteen years have carried out their roles responsibly , efficiently and effectively. The results noted above cannot be achieved without a generally accepted approach that combines preparation, collaboration, compromise when necessary and finally some forensic skill in ventilated issues when necessary.

We recognize that much of what is alleged to take place among intervenors during the conduct of the informal and formal regulatory processes of the Board is hidden from view of the Board members. That is why the existence of rather overwhelming evidence of the success of the current system is necessary to be reviewed before any reforms are undertaken.

This does not mean that we suggest that Board proceedings are free from failings arising sometimes from intervenor participation. However, such failings, similar to those exhibited on occasion by regulated utilities or the regulator itself, are case specific and not systemic in nature. This is an adjudicative board , and in non-authoritarian judicial and quasi-judicial systems, it is rare to find complete satisfaction with every aspect of the conduct of proceedings.

Here, where there is demonstrable evidence of some three decades of success with the path chosen by the Board in EBO116, there should be great reluctance to institute change that might diminish the current benefits. This program is working and providing value for ratepayers.

Board Questions

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?

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?

There appears to be some considerable concern evinced by these questions that there is some likelihood that an intervention purportedly on behalf of one set of stakeholder interests may not being carried out in a way that advances those interests. In other jurisdictions, this apprehension usually arises when "astro-turf" groups arise in support of the regulated

utility's position before a board or a court. This has not occurred in the Ontario Energy Board, nor to the best recollection of counsel, have there been instances where intervenors have supported measures the net effect of which would be harmful to their clients.

VECC is not aware that the current application of the term "substantial interest" has been unduly inclusive or difficult to interpret in the granting of intervenor status. In a perfect world, large energy ratepayer organizations with significant communication and staff resources could put forward a set of instructions to counsel or consultants that tracked both the policy and technical details of proceedings with some granularity. However, the task of representing ordinary or vulnerable consumers in energy issues has largely fallen to associations and organizations struggling to carry out a wide array of tasks with minimal resources. They hardly are indifferent to the results of the Board's deliberations but, because of resource constraints, must concentrate on communicating the objectives associated with intervention to their representatives and largely accepting the technical advice therefrom. As we have noted, such organizations have been scrupulously excluded from any Board funding in the past that could help bolster their ability to participate. This hardly makes the clients' instructions meaningless and/or justifies potential intrusion into the retainer relationship.
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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?**

One would hope that the question associated with" engagement with a constituency directly affected by an application" is not a veiled attempt to marginalize ratepayer representatives as some 21st century derivative of the term "outside agitators", intent on pressing for ratepayer advantage

that is undesired by utility customers, particularly in the franchise areas of small utilities. There are occasions, possibly in the siting of utility operations where local input is paramount. For the most part , however, applications from the range of distribution utilities involve the application of principles and Board rules and precedents that are applicable across the province. There are possibly more problems created for ratepayer representation in an application if the meaningful instructions are limited to possibly only those resident in a particular franchise area. Once again, local participation may be helpful in the application preparation stage but is not a sine que non of the exercise of the statutory responsibilities of the Board

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's Decision in EBO 116 provides a lens for the determining of this issue in that it placed a priority on being able to hear from a range of interests that must be considered in the making of a Decision in the proceeding. This is seldom a bright line test or one that can be readily portable from application to application. For example, while individual private commercial interests might not qualify, the general public interest in business establishment and employment may do so. The public interest is not always the majority interest and may be part of a mix of shared values. This starting point mirrors the EBO 116 approach.

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 of 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)?

Intervenors have been alert to the responsibility to avoid duplication in their representation before the Board at least for the past two decades and have the added assistance of Rule 5.1 of the Board's Practice Direction for Costs. We note the difficulties cited in the submission of CME in the within

proceeding of determining the nature of each intervenor' s interest, and the position to be advanced prior to a review of the utility applicant's evidence. Often, while the objectives of intervenors might be the same, the time required and ability to execute a representation plan leading to cooperative effort are very different. Similar to CME, VECC believes that the adjudication of unnecessary representation should be a case by case approach in accordance with the above-noted rule. Such a finding should only be made with caution particularly in circumstances where there are an array of interests opposing the position of the potentially duplicative parties.

4. Should the Board consider different approaches to administering cost awards in adjudicative proceedings? For instance, should the Board consider adopting an Ontario Energy Board 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 VECC's view, there already Rules in place to police potential problems with the cost awards particularly with respect to excessive time claims. As we have noted earlier, there are no systemic weaknesses in the current system for intervenor recognition and cost awards, and the amounts that have been awarded have been frugal and effective by most reasonable metrics. The initiation of the kind of procedure contemplated by this question would lead to an unreasonable allotment of time in budgeting and possibly rebudgeting when the need arises. Where the resources opposing intervenors are potentially unlimited, the imposition of arbitrary limits would undoubtedly weaken the position of intervenors.

Recommended Modifications

VECC does not see a need for changes to the current Rules and Practice Directions. VECC notes these instruments governing on interventions have been reviewed by the Board on a number of occasions since EBO116, and the current framework reflects the amendments that were made to increase efficiency. Any difficulties are not not of a systemic nature and the current

Rules, practices and regulatory culture are sufficient to ensure that departures from good practice rarely occur.

All of which is respectfully submitted this 27th day of September 2013

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