



September 27, 2013

Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, Suite 2700
Toronto, ON M4P 1E4

Dear Ms. Walli:

*Re: Ontario Energy Board Review of the Framework Governing the Participation of
Intervenors in Board Proceedings – EB-2013-0301*

Please find, attached, the submissions of the Consumers Council of Canada in the above-referenced consultation process. The submission will also be filed on the Board's RESS.

Yours truly,

A handwritten signature in black ink that reads 'Aubrey LeBlanc'.

Aubrey LeBlanc
President

SUBMISSIONS OF THE CONSUMERS COUNCIL OF CANADA

RE: ONTARIO ENERGY BOARD – REVIEW OF THE FRAMEWORK GOVERNING THE PARTICIPATION OF INTERVENORS IN BOARD PROCEEDINGS EB-2013-0301

SEPTEMBER 27, 2013

I. INTRODUCTION:

On August 22, 2013, the Ontario Energy Board (“Board”) initiated a review of the framework governing the participation of intervenors in applications, policy consultations and other proceedings before the Board. The Board indicated that the objective of 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 in two phases. 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 consider whether the Board should adopt a different model regarding the representation of consumer interests in Board proceedings.

As a part of the first phase, the Board has requested written comments from interested parties. In order to guide the submissions, the Board has set out a number of questions. The Board has also scheduled a Stakeholder Conference for October 8, 2013, to provide a forum for discussing the questions.

The Consumers Council of Canada (“Council”) has been an intervenor, participating in Board proceedings, consultations and working groups for more than a decade. In these submissions, the Council will first provide the Board with an overview of who the Council is and how we have been participating in Board initiatives. We will then set out some general comments regarding intervenor participation at the Board. Finally, we will provide comments in response to the questions posed by the Board regarding intervenor status and cost eligibility.

II. CONSUMERS COUNCIL OF CANADA

The Council is a non-profit consumer advocacy organization that, when acting before the Ontario Energy Board, seeks to represent retail residential consumers. The Council’s mandate includes the objective to work collaboratively with consumers, business and government, seeking an efficient, equitable, effective and safe marketplace for consumers by informing and advocating concerning consumer

rights and responsibilities. Since the Council's inception in 1994, it has been committed to producing evidence-based consumer research in pursuit of its mandate. The organization has an independent, volunteer board of directors elected from among its membership. Membership is open to application from the public.

The Council has extensive experience with processes involved in providing all levels of government with consumer impact research and analysis. In addition to its research and the participation of members, the Council also engages in five forms of outreach and consultation:

- Advisory committees and stakeholder panels;
- The Council's Public Interest Network;
- The Young Consumers Network, aged 18-35;
- Surveys of Canadians about views related to specific consumer issues; and
- Accepts consumer complaints.

The Council and its members represent consumers in many formal settings in addition to the Board, including, for example, at:

- Advertising Standards Canada
- Canadian Commission on Building and Fire Codes
- Canadian Food Inspection Agency
- Canadian Payments Association
- Canadian Radio-Television and Telecommunications Commission
- Competition Bureau Fraud Prevention Forum
- Electrical Safety Authority
- Financial Consumer Agency of Canada
- Hydro One Networks
- Independent Electricity System Operator
- Ontario Ministry of Housing, Building Code Advisory Committee
- Ontario Motor Vehicle Industry Council
- Pharmaceutical Advertising Advisory Board
- Standards Council of Canada
- Technical Standards and Safety Authority
- Travel Industry Council of Ontario
- Waste Diversion Ontario

The Council actively seeks opportunities to support research relevant to its advocacy. For example, the Office of Consumer Affairs, Industry Canada, has funded the Council through its contributions program for consumer groups to conduct past research relevant to its work in the energy sector, including, *Sustainable Household Consumption: Key Considerations and Elements for a Canadian Strategy, 2009*, *The Ontario Smart Metering Initiative: What does it mean for Ontario's residential consumers?*, *Energy Efficiency in Building Codes, 2007*, and *Consideration of*

Attribution Alternatives for Energy DSM Savings, 2006. The Council has a federally supported research project currently underway entitled: *Will Consumers Benefit from Enhanced Product Labeling on Energy-efficient Products?*

Through its own initiative the Council brings added value to its participation as an informed intervenor on behalf of consumers before the Board. In consequence of its broad representation of consumers across the economy it brings extensive, nuanced and inclusive perspectives to its work.

However, without cost awards, the Council would be unable to participate in Board proceedings, and the Council believes retail residential consumers would cease to be represented through independent advocacy.

Of course, the Council cannot and does not pursue the personal financial interests of every residential consumer in the Province. Instead, it seeks to inform itself about retail residential consumers' experience of the marketplaces regulated by the Board and applies internationally accepted concepts concerning consumer rights and responsibilities to guide its representation and play its role capably.

Based on this, the Council has approached the Board's proceedings on the basis of a number of principles. It is important that consumers obtain safe, reliable distribution service (electricity and natural gas) at just and reasonable rates. Ultimately the rates determined by the Board should be reflective of the services provided. The Council accepts that the Board's role is to balance the interests of ratepayers with the interests of utility shareholders. The Council's participation has not been premised on the basis of achieving the lowest price for natural gas and electricity distribution, but rather what is fair to ratepayers, if the full range of consumer rights are to be protected. Those principles have guided the Council's participation in the Board's proceedings and consultation processes. The Council has relied on its consultants and legal counsel to assist it in advocating that the Board's decisions adhere to those principles.

The Council has been an active intervenor before the Board participating in proceedings, consultation processes, and Board-established working groups, since the late 1990s. The Council does not intervene in all Board proceedings. We have chosen to participate in rate proceedings for most of the larger local distribution companies ("LDCs") as well as the major policy reviews that have been undertaken by the Board. We have chosen to intervene in proceedings and consultation processes where we believe we can add value, and to ensure that the interests of residential consumers are sufficiently protected.

The Board has indicated that it has undertaken this review, in part, to consider 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. Among the most important of the Board's objectives, from the Council's perspective set out in *the Ontario Energy Board Act, 1998* are:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service;
2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.

The Council is of the view that for the Board to achieve those objectives it is critical that ratepayer groups are an integral part of the Board's proceedings, and are provided sufficient resources to participate effectively in those processes. Ratepayers fund the Board itself, and the regulatory costs for all of the LDCs. To ensure in the consideration of utility applications that an appropriate balance is achieved between the interests of utility ratepayers and shareholders, it is essential that ratepayers are included in the process. Ratepayers should not be kept in any way from participating effectively in Board proceedings, so they may properly represent their respective constituencies.

III. GENERAL ISSUES:

Current Framework for Intervenor Participation:

The Council is of the view that although there may be some ways to improve the efficiency and effectiveness of the current model for intervenor participation in the Board's proceedings, it is critical that the existing framework be maintained. In our view there is not an alternative model that could provide better value for Ontario consumers. Although some improvements could be made in order to enhance the efficiency and effectiveness of the current model, the fundamentals should remain in place.

In 1985 the Board released its E.B.O. 116 Report where it set out the rationale for awarding intervenor costs. This included:

1. The complexity of issues in proceedings before the Board give rise to an increasing need for the Board to ensure that a broad range of interests is represented so that the essential points are canvassed in sufficient depth to produce a record which provides maximum assistance to the Board:
2. The need to remove the financial barriers to meaningful intervention by interests having genuine concerns;
3. The Board's recognition that additional costs of cost eligible interventions are warranted in order to achieve the flow of high quality information for the Board for decision making purposes. (E.B.O. 116, pp. 177-179)

The Council submits that the only things that have changed since that report was issued, is that the Board's mandate has been substantially expanded and the Board's

proceedings have become more complex. In addition, Board Staff no longer assumes a public interest advocacy role. Therefore, we believe that the rationale for intervenor participation is still relevant.

In the following sections we set out what we view as the primary benefits of the current model.

Transparency and Accountability:

The current Board processes are transparent. They allow for the participation of a broad range of stakeholders, undertaken in a public forum. The evidence and hearing processes are, in large measure on the public record. At the end of the day consumers in Ontario can be confident that Board Decisions are based on an open process, where the interests of a broad range of interests were solicited and considered. From the Council's perspective this adds legitimacy to the Board's processes. If the Board's decisions were made having regard to little outside input we believe that transparency and accountability would be compromised and Board decisions undermined. Transparency, from the Council's perspective requires that those affected by Board Decisions be able to participate, and the current process allows for that.

This is important, too, from the perspective of Ontario LDCs. In the Council's discussions with many LDCs we have discovered that the LDCs see the value in intervenor representation in Board proceedings. If they are implementing a rate change it is far easier to explain and justify to its customers, if it is known that the application was the subject of a public, transparent process that included representation from a broad range of stakeholders, including those representing consumer or ratepayer interests. In addition, knowing that their applications will be scrutinized by intervenors provides LDCs with an incentive to bring forward robust proposals that have merit, and should be able to stand up to such scrutiny.

Value for Money:

In July, 2011, the Electricity Distributors Association ("EDA") issued a paper entitled, "The Case for Reform - How Regulatory Streamlining Could Benefit Ontario's Electricity Consumers." In addition, the EDA released a report on November 1, 2011, entitled "Electricity is the Answer".

In those reports, the EDA made a series of recommendations to revise the intervention process. Specifically, the EDA raised concerns about the cost of interventions and the growing number of intervenors, all of which "has led to a sharp increase in cost awards payable, which is ultimately borne by the consumers". The EDA advocated for caps on cost awards, reduced cost recovery and tighter rules around intervenor eligibility.

The Council has been in discussions with other intervenors regarding this process and understands that some intervenors will be providing the Board with quantitative analyses that demonstrate that the current intervenor framework provides value for electricity and natural gas ratepayers. With respect to the cost of the intervenor process the Council makes the following qualitative observations:

1. The participation by intervenors in rate proceedings ultimately results, in almost all cases, in a variance between what is applied for, and what is ultimately accepted by the Board. Not all of that is directly attributable to the participation of intervenors, but some of it is, resulting in clear savings for ratepayers directly arising from intervenor participation. With the gas utilities, for example, in some cases the approved revenue requirement has been in the order of tens of million dollars less than that which was applied for. Most of those cases resulted in approved revenue requirements that were the product of a negotiated settlement between intervenors and the utilities;
2. The majority of rate applications are now settled, in part, or in their entirety through the Board sanctioned Alternative Dispute Resolution (“ADR”) process, that has become a standard part of most rate proceedings. An ADR settlement avoids the need (or at least reduces it) for a contested, adversarial oral hearing process. This saves a considerable amount of time, resources, and ultimately the costs of the process. LDCs and intervenors participate in the ADR process, with Board Staff acting as observers (not becoming a party to any settlements, or taking positions);
3. The costs of interventions are much smaller than the costs the LDCs incur in order to put forward their rate cases before the Board;
4. LDCs incur costs in order to lobby the Government (through advisors and/or industry organizations like the Electricity Distributors Association, the Canadian Gas Association and the Canadian Electricity Association) and to promote the interest of their shareholders, all of which is paid by ratepayers. In most cases, these costs outweigh the annual cost of interventions.
5. Intervenors that have been active before the Board for many years make a concerted effort to work together, resulting in efficiencies and lower costs. Intervenors work together in many cases to coordinate interrogatories and avoid duplication (leaving certain topics to certain intervenors, for example). Intervenors often jointly sponsor experts. We collaborate with respect to cross-examination in the hearing process, often dividing up responsibilities and assigning a “designated lead”. In addition, we collaborate at the argument stage, often adopting the submissions of others; and
6. The cost of the current process is less than the cost of alternative models. A review of other jurisdictions that employ an “Office of the Consumer

Advocate” model demonstrates the Ontario model is more cost-effective. Alberta is one such jurisdiction, among others.

Existing Board Powers:

The current framework that guides the participation of intervenors in Board proceedings, is set out in the Board’s *Rule of Practice and Procedure* and the Practice Direction. The Council submits that those Rules and the Practice Direction, as currently drafted, give the Board adequate discretion to ensure that the intervenor process is efficient and effective. In our view, no new modifications are required.

The Board has the power to grant intervenor status and cost eligibility in each proceeding and consultation process. In addition, the Board has broad discretion in terms of deciding how much an intervenor should be awarded in costs. To the extent the Board is of the view that an intervenor has not participated responsibly, the Board has the power to reduce an intervenor’s costs, relative to those claimed.

Need For Review:

The Board has initiated this review for several reasons as set out in its Notice dated August 22, 2013:

1. A central feature of this new approach (to regulation under the RRFE) is a strong emphasis on the need for each electricity distributor to engage with a broad range of customers and other stakeholders during the development of the capital and operational plans reflected in the distributor’s application. The Board is interested in considering how this early consultation and engagement by a distributor with customers and other stakeholders might affect the role of intervenors in more formal process that is initiated by the Board once an application is filed;
2. The Board is undertaking a review of its application and hearing process, with the goal of enhancing the efficiency and effectiveness of that process. The Board is interested in considering whether changes to the Board’s approach to the determination of intervenor status, cost eligibility and cost awards might further enhance the efficiency and effectiveness of the application and hearing process;
3. The Board is undertaking a review of the way in which it consults with stakeholders and consumers in the review and development of regulatory policy. The Board anticipates it will include the use of consumer focus groups and consumer surveys in the policy development process.

The Council submits that many utilities do survey their customers, as needed, to gauge how they can better serve their customers. The Council is extremely supportive of this type of engagement. In addition, it makes sense for the Board, at

times, to use consumer focus groups and surveys to assist it in the development of regulatory policy.

The Council is of the view, however, that although this type of engagement can enhance the LDCs' and the Board's understanding of consumer views, it cannot replace the current process. Utility rate applications are highly complex. The range of issues relevant to any application is usually quite broad. In order to properly assess the merits of those applications experts in utility regulation are required. The utilities themselves often retain experts to address certain issues. Many of the issues the Board considers in its consultation processes are also complex. Examples include the discussions around total factor productivity, benchmarking, inflation factors and the cost of capital. Surveys and customer focus groups are not going to assist the Board in these areas.

With respect to this process, the Board is seeking input on a number of issues. Other than the concerns expressed by the EDA in 2011, and the points set out above, it remains unclear as to what the problems are that the Board is trying to "fix". In order to facilitate meaningful and productive discussion at the stakeholder meeting on October 8, the Council submits that it would be helpful for the Board to set out its concerns with the current process and explain why changes might be required. The Council believes this will be constructive and helpful in facilitating meaningful discussion at the stakeholder meeting.

IV. 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?*

First and foremost, the Board should recognize that ratepayer/consumer groups have a substantial interest in the outcome of rate proceedings. Beyond that it is incumbent upon a group applying for intervenor status to demonstrate that they will be affected by the Board's decision. The Board must consider each application for intervenor status in the context of the relevant proceeding or consultation process.

An organization has to first demonstrate that it represents a constituency with a "substantial interest" in the proceeding. Beyond that, it is up to each organization to determine how it consults or engages with its constituency. The Council does not believe this to be something the Board should dictate.

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?*

Once the Board has established that an intervenor has a legitimate interest in a proceeding the Council believes it is up to the intervenor to determine how it governs the participation by its legal counsel and other representatives.

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?*

The Board's Practice Direction on Cost Awards states that a party in a Board process is eligible to apply for a cost award where the party "primarily represents the direct interests of consumers (e.g. ratepayers) in relation to services that are regulated by the Board." The Council submits that, if an organization has a track record of representing ratepayer interests before the Board, that should satisfy the Board that the organization is eligible for costs. As noted above, once an organization has been deemed to be legitimate in terms of representing ratepayers, it is not up to the Board to dictate reporting and engagement protocols. Every organization likely has its own way of doing this that meets the needs of that organization.

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 consider, on a case-by-case basis, whether an applicant for intervenor status or costs represents "a public interest relevant to the Board's mandate."

3. *What conditions might the Board 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 not impose conditions when determining the eligibility of a party for costs. We have not seen any evidence to support the contention that the current system, which allows for a broad representation of interests to be active in Board proceedings, is deficient or unnecessarily costly. In addition, it takes a review of an

application and the supporting evidence to determine where, or whether consumer interests might be aligned.

The Council is concerned that if the Board mandates parties to combine interventions, the balance between ratepayer interests and utility interests may be tipped in favour of the LDCs. Reducing the number and range of interventions can also reduce the level of scrutiny of LDCs. This is problematic given we are dealing with regulated monopolies. As noted above, the broad representation of interests appearing before the Board is beneficial to ratepayers and the broad public interest.

The intervenors that have been active before the Board for many years make a concerted effort to work together, striving for efficiencies and cost-effective interventions. There is no reason to believe that this will not continue. We are highly supportive of change that will enhance the process and make it more efficient, but not ones that will dampen the ability of intervenors to effectively represent their interests.

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-approved amounts for disbursements?*

In relatively simple consultation processes it makes sense for the Board to prescribe the amount of time that intervenors should be granted to comment on discussion papers or attend stakeholder conferences. That is a reasonable approach.

From the Council's perspective, when it comes to more complex consultations and proceedings, imposing pre-approved budgets or pre-established amounts for a hearing could potentially compromise the ability of intervenors to adequately represent their interests. In the absence of evidence that cost awards to intervenors are unreasonable, it is not clear at to why the Board would impose such conditions.

As noted earlier, the Board has the powers to assess cost claims and award costs on the basis of how well an intervenor contributes to the proceeding. Given the fact that until a proceeding is underway, it is difficult to assess the level of effort required, the Board should not try to impose time restrictions up front.