The Voice of Ontario's Electricity Distributors

September 27, 2013

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

Via website and by courier

Dear Ms. Walli:

Re: Board File No. EB - 2013- 0301
Review of Framework Governing Intervenors Participation in Board Proceedings

The Electricity Distributors Association (EDA) is the voice of Ontario's 75 local distribution companies (LDCs), or electricity utilities, the publicly and privately owned companies that safely and reliably deliver electricity to all Ontarians through 4.8 million homes, businesses, and public institutions.

The EDA would like to thank the Ontario Energy Board (the "Board") for giving the opportunity to provide comments on this important initiative. The EDA's submission has two parts. The first part of the submission presents our responses to the questions put forward in the Board's letter regarding intervenor status and cost eligibility. Under the existing rules, the Board should recognize that LDCs represent a public interest relevant to the Board's mandate.

The second part of the submission presents our position related to the question of whether the Board should consider making modifications to the Rules and the Practice Direction related to cost eligibility.

Part I

The first part of our submission examines the current approach to intervenor participation and proposes a new approach for short term implementation.

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Current Approach to Intervenor Participation

The intervention process is used to support the Board's mandate in protecting the interests of consumers, with respect to prices and to the adequacy, reliability and quality of electricity service. Over the years, due to lack of proper safeguards, the current process has become cumbersome and more costly than necessary. For example, interrogatories from intervenors appear to be designed to elicit more material than necessary to effectively review applications in a manner consistent with the Board's mandate. There are some intervenors that do not appear to represent a unique interest as they represent a subset of a larger group of customers already represented by another intervenor, often leading to unnecessary duplication of effort in the regulatory process.

The current framework has rules to prevent exploitation of the cost awards process. For example, intervenors must demonstrate that they do not unduly repeat questions asked by other parties, that they make efforts to co-operate with other parties to reduce duplication, and that they don't act to unnecessarily lengthen the duration of the process. Nevertheless, the current process often results in duplication as intervenors do not frequently pursue a coordinated approach in processing interrogatories.

Since intervenors are allowed to recover their costs, the amount of work undertaken by intervenors, along with their growing numbers, has led to an increase in cost awards payable which ultimately is borne by the customer. There is a need to balance the costs of intervention with the benefits it provides to customers.

In view of the above, it is important to review the current approach to intervenor status, cost eligibility and cost awards in the short term, while considering adopting a different model in the long term for the representation of consumer interests in Board proceedings.

New Proposed Approach to Intervenor Participation in the Short Term

a) Customer Consultation

In the context of the Renewed Regulatory Framework for Electricity ("RRFE"), the Board is placing more emphasis on the need for LDCs to engage with customers and other stakeholders during the development of capital and operational plans reflected in the distributor's rate applications. LDCs are in the best position to determine the nature and scope of that engagement with their customers, and with other stakeholders as appropriate. LDCs will always have the need to engage directly and exclusively with their customers due to the nature of the relationship and must retain the ability to do so distinct from other engagement processes. As part of this consultation the Board has asked how this engagement process may affect the role of intervenors in the more formal process that is initiated by the Board once an application is filed. We are seeking to ensure that the Board does not create two duplicative processes or interferes with the LDC-customer engagement process.

b) Intervenor Status

The party seeking intervenor status should demonstrate that it has consulted with the constituency that it represents; that it has received a specific mandate from that constituency to intervene in the rate hearing; and, that there is a governance regime in place relating to instruction to and participation of its legal counsel and other representatives in the proceeding. This would encourage stakeholders represented by intervenors to more actively oversee the work undertaken by a consultant/counsel working on their behalf.

c) Interrogatories

The Board staff should take a leadership role and identify potential issues in LDC applications and issue the first round of interrogatories. Intervenors should be expected to review Board staff interrogatories and only then raise their own interrogatories without duplicating the staff effort. Intervenors should be expected to share the work load by dividing responsibilities for the issues. While this is happening currently, the process should be formalized. Also, different parties representing common consumer interests should be expected to combine their interventions on issues relating to the revenue requirement.

d) Role of Board Staff

The EDA recommends that Board staff take positions on issues, particularly when taking part in the settlement process. Input based on the informed technical expertise of Board staff will improve the overall process, and the Board's ability to advance the public interest. For example, the current process of individual consumer groups engaging in self-interested arguments regarding cost allocation is detrimental to other consumer groups that are not represented in the proceeding. Therefore, the EDA proposes that Board staff contribute to the discussion on cost allocation, in order to highlight the implications for all ratepayers, not just those appearing at the hearings.

The settlement process requires fundamental reconsideration relating in part to the roles of the parties involved and to the process itself. Further comments will be provided during the Stakeholder Conference on October 8.

e) Cost Awards

In order to enhance the efficiency and effectiveness of the Board's hearing process, we propose that the Board establish a cap on cost awards for each hearing. The cap would be based on the anticipated effort required, as is presently done for policy consultations. This would encourage intervenors to focus on issues that are material and help ensure that cost awards are better balanced with the benefits they provide. The EDA acknowledges that hours of intervenor effort and dollars of intervenor costs do not always correlate with the outcomes or benefits to consumers. But combined with the requirement that a governance regime is in place (as described above), a cap would enhance the expectation of a degree of alignment in this regard.

We recommend that the Board adopt an approach that provides for pre-approved intervenor budgets, and pre-established amounts for each hearing activity in rate applications. This approach would ensure that there is an appropriate balance of costs and benefits for every

hearing. The pre-approved intervenor budget should be determined by the Board based on customer numbers, or revenue requirement, or a combination of both. The parties should be required to bring in a separate motion for the Board to approve any increase in the pre-approved budget for cost awards.

On a related matter, the EDA recommends that the Board look for opportunities to reduce the administrative requirements of dealing with intervenor cost claims. These might include upholding the deadlines for filing cost claims, penalizing errors in cost claim submissions, and imposing a materiality threshold for processing corrections in cost award claims.

Key Recommendations

The key recommendations outlined in the new proposed approach to intervenor participation are summarized below:

- Revise eligibility rules for Intervenor status in rate applications. The party seeking intervenor status must demonstrate to the Board that:
  - it has consulted with the constituency that it represents;
  - it has received a specific mandate from that constituency to intervene in the rate hearing; and,
  - there is a governance regime in place relating to instruction to and participation of its legal counsel and other representatives in the application proceeding.

- Reduce duplication of effort between Board staff and intervenors in the application process by ensuring that:
  - Board staff takes a leadership role, issues the first round of interrogatories, and takes positions on issues, particularly in settlement conferences;
  - intervenors raise their own interrogatories without duplicating Board staff effort;
  - intervenors share the work load, by dividing responsibilities for different issues in the application;
  - Board staff screens interrogatories from intervenors for duplication and relevance before sending them to the applicant.

- Establish a cap on cost awards provided to intervenors so that costs and benefits to customers are balanced. The cap should be determined using criteria encompassing the size and scope of the rate filing to ensure customer benefit.

Part II

This part of the submission is related to the question of whether the Board should consider making modifications to the Rules and the Practice Direction related to cost eligibility.

The Board's basic policy is that parties representing the "public interest" are eligible for cost awards, and parties representing some other interest are not. The Board has presumptively

determined that certain classes of parties are not associated with the public interest and are not eligible for cost awards, including the Electricity Distributors Association.

We believe the "Rules and Practice Direction" should be completely changed to eliminate the presumptive disqualifying factors that make certain parties ineligible for cost awards.

The Board is creating disqualifying criteria based on factors which are likely irrelevant in any particular case. As long as the party's interest is reasonably engaged by the proceeding, and it behaves responsibly, it should not matter that it represents private interests. The present rules are premised on the view that private and public interests cannot coincide. But that is patently not so. A scheme of economic regulation is only effective and in the public interest when it achieves outcomes that are fair to private sector participants and are consistent with competitive markets. Having the private interests represented in the proceedings is beneficial to the public interest. The Board should instead be focused on whether the interest of a particular intervenor is reasonably implicated by the proceeding and if the intervention would be of assistance.

There may be some arguable policy reasons for the view that market participants and government entities should not get costs, but those should give way to a set of cost rules which are focused on creating the proper incentives to best ensure an efficient process that produces the best outcomes.

The current rules, quite simply, don't sufficiently recognize the value of an intervenor's contribution to the Board and the public interest. The Board should be encouraging, not discouraging, intervenors who regularly are of assistance to the Board. The realities of cost pressures on all parties mean that the unavailability of cost awards hamper and discourage responsible and valuable interventions. A more flexible regime will permit the Board to grant cost eligibility when it is in the public interest to do so and to withhold eligibility in cases when it is not. Inflexible presumptions benefit neither the Board nor the public interest.

Finally – if the presumptive disqualifications are not revised – it should at least be acknowledged that the rule treating associations as ineligible if their members are ineligible is counterproductive, and has been unfairly applied by the Board. It should be removed. It manifestly saves the Board and the other parties money and time if interested parties are encouraged to intervene collectively. Moreover, it saves ratepayers money as well in most cases. Admittedly, one would hope that there would be sufficient incentives for industry members to associate with one another on all interventions, but the realities of budgets and budgeting processes are significant impediments to this outcome. If a proceeding engages the interests of an association's members and a collective intervention would be of assistance to the Board, the participation should be encouraged. Finally, as the Board has made exceptions to this rule for some private interests, continued universal application of the rule to LDCs and their Association is unfair.

Recommendation

In view of the above, we recommend that the "Rules and Practice Direction" should be changed to eliminate the presumptive disqualifying factors that make a party ineligible for cost awards.

Yours sincerely,

Teresa Sarkesian
Vice President, Policy and Government Affairs
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