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

Dear Ms. Walli:

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

We are counsel to the Association of Power Producers of Ontario ("APPrO"). The members of APPrO represent more than 98% of Ontario's generating capacity and are active in all generation technologies: gas, wind, cogeneration, district heat and power, nuclear, hydroelectric, coal, solar, geothermal, energy from waste, and fuel cells. APPrO regularly participates in two types of Board proceedings: (a) rate proceedings that affect APPrO's members as ratepayers; and (b) generic policy consultations initiated by the Board that could impact Ontario generators.

With respect to (a), APPrO's members are among the largest consumers of natural gas in the province, and therefore regularly participate in Union Gas and Enbridge rate proceedings. APPrO's members are also the primary ratepayers of the Export Transmission Service ("ETS") charge, and therefore participate in Hydro One's transmission rate proceedings on the ETS issue. With respect to (b), APPrO participates in the Board's broader policy initiatives in order to represent the collective interest of Ontario generators. APPrO believes that in doing so, not only are process efficiencies achieved (i.e., as opposed to numerous individual generators participating), but that the exercise of formulating a collective view through APPrO is of benefit to these broader policy deliberations.

Before addressing the specific questions posed by the Board, APPrO wishes to provide the following contextual comments for the Board's consideration:

- The $5.5 million in intervenor funding is ultimately ratepayer money, and the Board is quite appropriately seeking to ensure that those funds are well spent. That having been said, the $5.5 million in intervenor funding is immaterial in the

context of the collective revenue requirement of the 80+ electricity distributors, four electricity transmitters and three natural gas utilities.

- For many intervenors (including APPrO), the Board's tariff schedule only partially covers the costs of legal counsel and consultants. So the decision to participate in a Board proceeding is not made lightly. A financial commitment is required, and intervenors such as APPrO will weigh the potential costs of participating against the issues at stake for its members.

- In the absence of intervenor funding, intervenors such as APPrO will not be able to participate in Board proceedings. In APPrO's view, the participation of consumers in Board proceedings is of significant benefit to Ontario ratepayers, and that benefit far exceeds the cost of intervenor funding.

- The Board has a number of tools for ensuring that intervenor costs are kept to a reasonable level – including some that go beyond the scope of the questions posed by the Board in this proceeding (e.g., extending length of IRM terms, tighter controls on hearing processes, etc.).

APPrO provides the following comments for the Board's consideration in response to the above Review Notice sent on August 22, 2013:

A. 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 the absence of further guidance or criteria, the term "substantial interest" is a somewhat ineffective threshold for determining whether a party should be granted intervenor status. This Board (and indeed, most other energy regulators in Canada) routinely grant intervenor status to entities seeking participation rights, without much scrutiny or guidance as to what constitutes "substantial interest".

APPrO does not necessarily take issue with this approach to granting intervenors status. The granting of such status is a decision separate and apart from any decision on cost eligibility. In other words, just because a party is granted intervenor status does not mean it will automatically be found to be cost award eligible.

The only reason for plausibly restricting or bringing greater scrutiny to granting intervenor status would be if the Board felt that its proceedings were becoming inefficient

and protracted as a result of too many intervenors (some of which are duplicative in terms of their interests). If that is the case, then the solution lies in the Board's management of the process – i.e., ensuring that like-minded parties co-ordinate their participation in the written interrogatory process and hearing room.

In APPrO's view, the second question in item 1 seems to suggest that the Board is concerned that some interventions are being routinely submitted by counsel or consultants without direct or meaningful consideration on the part of the client. This almost goes to the legitimacy of the intervention. This is not APPrO's experience. As noted above in our preliminary comments, any intervention by APPrO involves a financial cost (in addition to a time and personnel commitment by APPrO members), so the decision to participate in a hearing is not taken lightly. APPrO does not participate in a Board proceeding unless its members have a substantial interest. To the extent that the Board believes some intervenors are not engaging in a similar dialogue, APPrO would support rules requiring intervenors to demonstrate constituency engagement or consultation for two reasons: (a) it should dispel any concerns about the legitimacy of interventions; and (b) it is likely to contribute to process efficiencies, on the basis that any additional time and thought spent at the front-end of the process by intervenors are bound to make interventions more efficient.

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?***

APPrO has a couple of suggestions as to what conditions might be imposed on intervenors when granting intervenor status:

- As noted in our response to question 1 above, the Board could explicitly state (in its decision granting intervenor status) that it expects, for example, Intervenor A to cooperate with Intervenors C and D on certain issues given the shared interests of the three intervenors. This would presumably eliminate duplicative submissions and duplicative time spent.

- The Board could also confine the participation of an intervenor to interests or issues that the intervenor organization purports to represent. For example, rate proceedings would be restricted to intervenors representing ratepayers (APPrO's cost eligibility is typically restricted by the Board in this manner – e.g., APPrO is granted cost awards in gas rate proceedings and the setting of Hydro One's ETS). Apart from rate proceedings, the Board's other proceedings fall into two categories: (a) facilities proceedings (transmission lines, gas pipelines); and (b) generic policy initiatives. For facilities proceedings, the interests of ratepayers

are still at the forefront and ratepayer interventions are legitimate. Landowner interests would also seem to be legitimate, and in the case of gas pipelines, environmental interventions may be appropriate. Environmental interventions may not be appropriate in the case of transmission lines, given the Board's jurisdiction in such facilities applications is confined to pricing, reliability, quality and availability of electricity service (with environmental considerations being dealt with in a different regulatory regime).

An explicit requirement that a proposed intervenor demonstrate how the group or association governs the participation of its legal counsel is not an onerous requirement for *bona fide* intervening groups or associations. The requirement could be satisfied by a simple affidavit sworn by the instructing client, group or association.

B. 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 OEB is an economic regulator, and most of its proceedings relate to the setting of utility rates. In rate cases, the Board's mandate is to set just and reasonable rates, by balancing the interests of consumers against the financial viability of the regulated utilities that serve consumers. Consequently, APPrO believes that it is appropriate to generally restrict cost eligibility in rate cases to ratepayer groups. This is consistent with the Board's treatment of APPrO. As noted above, APPrO is only found to be cost eligible in rate proceedings when APPrO intervenes on behalf of its members as ratepayers (natural gas rate proceedings and the ETS charge). APPrO has no issue demonstrating consultation/engagement with its members in order to be cost eligible in rate proceedings.

In other Board proceedings (facilities proceedings and the many generic policy proceedings), the Board's mandate goes beyond economic regulation. In those proceedings, the Board benefits from having broader interests represented (i.e., the test for cost eligibility cannot be merely whether the intervenor is a ratepayer or represents the interests of ratepayers). It may be more in line with a "public interest" test as noted in the question below.

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

There is no uniform "public interest" test that can be applied to the variety of non-rate proceedings of the Board. As a result, "public interest" factors may vary depending upon the nature of the non-rate proceeding.

That having been said, any factors have to relate to the Board's jurisdiction and mandate. For instance, the Board has little or no environmental jurisdiction related to electricity transmission line leave-to-construct proceedings. It seems unreasonable to award costs to an environmental NGO intervenor in such proceedings. There is no "public interest" that the NGO represents within the sphere of the Board's jurisdiction.

For time-limited policy-based proceedings or initiatives, the concept of pre-approved budgets or capped cost awards seems to be a sensible way of imposing cost discipline on intervenors.

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)?***

In APPrO's experience, intervenors already do coordinate efforts on issues related to revenue requirement. This can include assigning certain intervenors to take the lead on certain issues or revenue requirement components (i.e., reviewing the evidence in a more detailed manner, drafting more information requests, preparing a more extensive cross-examination). However, ultimately each intervenor is responsible to its own constituent members and cannot (for that reason) completely divest itself of responsibility and rely solely on the work of others.

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?***

APPrO does not think this approach is possible. The reality is that the issues that arise and time/cost of participation in any adjudicative proceeding are difficult to predict.

C. Recommended Modifications

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

At this point, APPrO is not advocating for any changes to the Rules and the Practice Direction. Pending the outcome of the discussion occasioned by this and other responses, APPrO may make additional submissions.

Yours very truly,

per Richard King

Richard King

RK:pw

c: Dave Butters, APPrO