

EB-2013-0301

Ontario Energy Board

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B, as amended;

AND IN THE MATTER OF a consultation by the Board with respect to the role of intervenors in Board proceedings.

Submissions of the Energy Probe Research Foundation

September 27, 2013

Review of Framework Governing the Participation of Intervenors in Board Proceedings Consultation and Stakeholder Conference

How these Matters Came before the Board

By letter dated August 22, 2013, the Board announced a review of the framework governing the participation of intervenors in Board proceedings with a stated objective of determining whether there are ways the Board's approach to intervenors might be modified in order to better achieve the Board's statutory objectives. Energy Probe Research Foundation (Energy Probe) was invited to participate.

The announcement letter outlined a two phase consultation. In the first phase, the Board wishes to examine possible improvements to the existing framework for intervenor participation in respect of its approach to intervenor status, cost eligibility and cost awards.

Rationale for the Review

The rationale for the review is set out on Page 2 of the announcement letter:

.... First, the Board is implementing, under the Renewed Regulatory Framework for Electricity, a new approach to the regulation of electricity distributors. A central feature of this new approach 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 rate 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 the more formal process that is initiated by the Board once an application is filed.
(Page 2, Board Letter August 22, 2013)

Comment:

There are two potential perspective results on the need for increased distributor-customer engagement. First, it will directly reach out to utility customers and therefore reduce the need for the traditional intervenors. The other is that customers will be apprised of the proposed bill increases and feel intimidated and powerless so will request the traditional intervenors to represent them in more proceedings than at present. The analogy is a home owner that is facing a property revaluation leading to property tax increases, may hire a professional to represent his/her interests.

In conclusion, early consultation and engagement with a distributor does not reduce the need for experts retained on behalf of those customers. It increases the need.

Second, 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. (Page 2, Board Letter August 22, 2013)

Comment:

Energy Probe suggests that one of the key strengths of the Ontario regulatory regime is the ***diversity*** of intervenors that participate in the Board's application and hearing process and this results in a high degree of regulatory effectiveness in the public interest. Indeed, Energy Probe for decades has held up the OEB approach as a model of regulation in its advocacy and education efforts at home and abroad, and on occasion has brought reformers from other jurisdictions to Board proceedings to demonstrate the OEB's effectiveness.

Third, the Board is also undertaking a review of the way in which it consults with stakeholders, including consumers, in the review and development of regulatory policy, including the amendment of codes and rules under the *Ontario Energy Board Act*. The Board anticipates that, going forward, it will, in appropriate

circumstances, include the use of consumer focus groups and consumer surveys in the policy development process.
(Page 2, Board Letter August 22, 2013)

Comment:

Broadening participation in the regulatory Policy development process is on the surface an appropriate objective. However caution should be exercised in the extent of this in areas that are legal and technical in nature and require appropriate expertise to make meaningful input.

So, in the first phase, the Board has requested interested parties to provide comments on questions put forward by the Board. In order to guide the submissions, the Board has set forth a number of questions. A Stakeholder Conference for October 8, 2013, has been scheduled to provide a forum for discussing the questions. A second round of interested party submissions is scheduled to follow the Stakeholder Conference.

Phase Two

In the second phase, the Board wishes to examine whether alternative models for representation of consumer and other interests before the Board should be adopted.

It is the Board's contention, presented in the announcement letter, that the participation of many of the groups and associations in Board proceedings has been facilitated by the Board's current approach to intervenor cost awards. The Board states that it is interested in considering whether changes to the Board's approach to the determination of intervenor status, cost eligibility and cost awards might enhance the efficiency and effectiveness of the application and hearing process.

The History of Energy Probe as an Intervenor Participant Before the Board

Energy Probe Research Foundation (Energy Probe) is a non-profit environmental and consumer organization which promotes economic efficiency in the use of resources. Energy Probe represents its residential customer supporters in Ontario in proceedings and processes before the Board and also represents a broader public interest concern with respect to the overall financial health and operational integrity of our Ontario utilities. Energy Probe participates in developing public policy which the Foundation believes to be in the public interest.

The Foundation, one of Canada's largest environmental policy organizations and Canada's largest energy policy organization, has thousands of supporters, half of them in Ontario, of which most have tangibly expressed interest in energy issues. Energy Probe also has a strong consumer focus and is frequently acknowledged in the media as a consumer watchdog. Energy Probe participates in conferences and regulatory forums on energy issues which it believes to be in the public interest.

Many Energy Probe supporters receive information updates. Energy Probe frequently has direct communication with the public through interviews with the media, communications on the Internet, public speaking, and direct mail communication with its supporters.

Energy Probe has a history of representing the interests of many Ontarians who are not financial supporters, and receives active feedback on its initiatives through public and media interaction. The formation of Energy Probe began with work carried on in the name of the Energy and Resources Team of Pollution Probe at the University of Toronto beginning in 1970.

Probe first appeared before the Ontario Energy Board in 1974 to challenge the basis of Ontario Hydro's 1974-84 expansion program for failing to consider energy conservation in their forecasts. In 1980, Energy Probe separated from Pollution Probe and became incorporated as Energy Probe Research Foundation.

Energy Probe has appeared before the Board for almost 40 years, during which time it has been noted for its cooperative spirit, its often-unique perspective, and its contribution to the development of fair and reasonable rates for both individual consumers and commercial/industrial purchasers of natural gas and electricity. Its approach has been to look beyond annual cost minimization to consider what would be best for the marketplace in the long term.

Energy Probe then, is a non-profit organization which relies on individual donations to help protect the public interest. Without the prospect of funding assistance, its participation in the consultation initiatives of the Ontario Energy Board, and its ability to produce policy position papers, would be quite limited as well.

Members of Energy Probe's team regularly attend meetings of its Board of Directors, making presentations, providing written summaries of activities, answering the questions of Board Members, and receiving their input. Board Members themselves, in particular Professors Michael Trebilcock and Glenn Fox, publish on Ontario energy matters, as do journalists, lawyers and academics on the Energy Probe board.

To gain the names of past and present Energy Probe volunteer Board of Directors, one has only to look at the Energy Probe letterhead and the Energy Probe website, which features many of the most prominent names in the energy, environmental and economic fields.

In addition, Energy Probe reports its regulatory priorities to supporters and receives both financial support and comments in response from those supporters. Energy Probe's website is a leading source of independent information for Ontarians interested in energy matters, receiving more traffic than any other energy-oriented environmental organization.

Energy Probe has a long and unique record of advocating measures designed to lower utility risk, specifically for the purpose of reducing the cost of capital over the long term. Measures of this kind that Energy Probe has pursued include rate rebalancing to stabilize utility income expectations, even in the event of declining volumes, and also measures that reduce utility risk related to commodity costs. Incentive regulation for Ontario utilities was first advocated by Energy Probe, as was the disaggregation of utility services now seen in both gas and electricity.

In OEB proceedings Energy Probe is **represented** by a Case Manager, supported by Counsel and Consultants who have extensive experience in regulatory and consultative proceedings before Canadian regulatory tribunals.

Like other intervenors ratepayer and public interest groups Energy Probe seeks out the same type of advisors as the utilities. Some experienced advisors prefer to work on behalf of ratepayers and the public interest consumers, or environmental interests, etc., rather than for the utilities.

These representatives work closely with other long-standing intervenors that have both congruent and differential interests such as:

- Association of Major Power Consumers in Ontario (“AMPCO”)
- Association of Power Producers of Ontario (“APPrO”)
- Building Owners and Managers Association of the Greater Toronto Area (“BOMA”)
- Canadian Manufacturers and Exporters (“CME”)
- Consumers Council of Canada (“CCC”)
- Federation of Rental-housing Providers of Ontario (“FRPO”)
- Industrial Gas Users Association (“IGUA”)
- Green Energy Coalition (“GEC”)
- London Property Management Association (“LPMA”)
- Low Income Energy Network (“LIEN”)
- Pollution Probe
- School Energy Coalition (“SEC”)
- Vulnerable Energy Consumers Coalition (“VECC”)

Energy Probe has a province-wide constituency and therefore intervenes in as many policy and regulatory proceedings as possible. However its participation is broadly guided by the number of residential and small volume energy customers affected by an application and in policy matters on the potential impact of the policy proposals on its broad provincial constituency.

Therefore, Energy Probe's first focus in regulatory applications is on the large provincial gas and electricity utilities, such as Enbridge Gas Distribution Inc. ("EGD"), Union Gas Limited ("Union"), Hydro One Networks Inc. ("Hydro One"), and Ontario Power Generation Inc. ("OPG"), Toronto Hydro (THESL) and in the various important policy and other consultations which the Board undertakes related to the Ontario Energy Industry. As well, Energy Probe intervenes in the regulatory applications of mid-size Ontario electricity distributors.

Context – the Ontario Energy Board Regulatory Environment

At the 10,000 foot level, the OEB is an economic regulator charged with regulating the rates and conditions of service of gas and electric distribution utilities, generators of electricity and providers of energy related services.

The Board's role is set out on the consumer page of the OEB Web site.

The Ontario Energy Board oversees the energy sector. It ensures companies in the natural gas and electricity sectors in Ontario follow the rules. Our objective, as a neutral government agency, is to promote a viable and efficient energy sector that provides consumers with reliable energy services at a reasonable cost.

Two of the Board's key current initiatives related to this consultation are set out in the OEB 2013-2016 Business Plan:

Enhance the way in which the Board and regulated entities communicate and engage with consumers.

Effective involvement of stakeholders to ensure the Board renders decisions and develops policies with comprehensive input from the parties most affected by the issues.

Diversity of the Electricity Distribution Sector

Over the years, the scope of the Board's mandate reach and legislation has materially broadened with implementation of the 1998 Ontario Energy Board Act and Electricity Act. The number of utilities, particularly electric distributors, which the Board regulates, has increased tenfold.

It appears from anecdotal evidence, some of these utilities have found it difficult to meet the regulatory burden which they must meet to have their rates approved.

In this regard, a major issue remains one of size and resources. There are a number of smaller utilities for which the costs of regulation are high relative to their rate base, equity and number of customers. The Board is continuing to streamline its regulation for these smaller utilities and this will reduce burden and costs.

Fortunately for the Board and ratepayers, under Board's Rules on Settlement Conferences, the majority of contested cases are either settled or substantially settled by the utilities and representatives of intervenor constituencies. Settlements are achievable because they balance the interests of the utilities and of intervenor constituencies represented by individuals that have acquired an expertise and institutional memory equivalent to the expertise of the staff and experts retained by the utilities to promote their case for rate increases. Without such settlements, the Board would not be able to hear and determine all of the Applications requiring a determination in a particular year. These settlements reduce regulatory burden by materially contributing to the efficient operation of the Board and allow the Board to meet the performance objectives set out in its Business Plan.

For cases that proceed in whole or part to an ***adjudicative determination of issues by the Board***, the existence the representations made by experienced representatives in proceedings before the Board are responsible, comprehensive and balanced. The Board is assisted by the bilateral views of the utility and ratepayers preventing one sided or imbalanced representations in favour of the utilities, or of a single ratepayer interest group.

Role of Board Staff

The role of Board Staff in proceedings before the Board has also evolved over time.

In the past there have been experiments with the “two staff model” in which the majority of Board staff performed a direct public interest role, while another group assisted the Board Members hearing the case.

However, like most other Canadian Energy Tribunals, OEB Board Staff’s primary role is and should remain to assist the Board. Board Staff have become increasingly skilled in assisting in the development of a record that provides the maximum assistance to the Board, rationalized on the grounds that utility and intervenor interests cannot be adequately represented by Board Staff.

Where intervenor interests diverge, for example in matters of cost allocation and rate design, Board Staff provide a critical role in providing analysis of options and associated impacts to the Board and ratepayers.

In all regulatory frameworks, the regulatory compact does not assume that Utilities represent the economic interests of their customers. The Utilities are first and foremost economic entities that must make a profit for their shareholder(s).

While it is important for utilities to communicate with their customers in a variety of ways utility communications with its customers this does not diminish the role and value added by intervenors in proceedings before the Board.

Utility Positions on Intervenor Status

As a consequence of the significant burden which the electricity utilities must discharge in proceedings before the Board, their representative, the Electricity Distributors Association (“EDA”), has been advocating for changes to the existing intervenor status and cost eligibility and cost awards regime:

- Traditional intervenors do not *directly* represent a utility’s local ratepayers/customers and represent only province-wide interests.
- Interventions are duplicative especially in the discovery process of filing interrogatories that also may overlap those of Board staff.
- Management of common or overlapping interests by intervenors is perceived to be wasteful.

Response:

Forcing parties with overlapping interests in a particular proceeding to collaborate or combine their interventions prior to the completion of an analysis of the application, including the pre-hearing discovery processes, may not save time and increase the efficiency of the overall process.

We suggest that the efficiency of the process is best served by allowing all parties with standing, including Board Staff, to analyze a rate application and to elicit information in the discovery process in a depth which is sufficient to enable them to determine the extent of their interest and also the extent to which they can collaborate with those who take the same or similar positions on common issues.

However, if material changes to cost allocation and rate design are part of the Issues List individual interventions among affected constituencies are in the public interest.

The amount of time which a particular intervenor needs to reasonably and prudently participate in a particular proceeding before the Board varies, having regard to the nature of the application, the nature of the intervenor interest, and the range of issues which the case raises. In these circumstances, flexibility and not rigidity is required when assessing the reasonableness of the amounts claimed and awarded for intervenor costs.

The Gas utilities' have many more years of working with traditional intervenors and the relationship has evolved to a working relationship that allows for and facilitates settlements to be the norm in IRM cases although rebasing cases are somewhat more adversarial.

Traditional intervenors provide a core critical experience with regulatory applications under the Board's regulatory framework.

This core capability is applicable to Generic Proceedings such as DSM and Smart Meters and to specific distribution/rate applications

In addition, the applications for transmission rates and revenue requirements for OPG, IESO and OPA require particular specialized expertise and institutional memory.

Utility Positions on Cost Awards

As expressed by the EDA and anecdotal evidence, many Electricity Distributors take the position that it is the intervenor constituency which is materially increasing regulatory burden and related costs which utilities incur to obtain Board approval of their rates.

Response:

Regulatory costs are a function of the regulatory regime utilized by the regulatory tribunal and the specific choice by a utility as to the type of rate adjustment it seeks. The intervention of intervenors is a *derivative* from those decisions that are in the control of the Board and utility.

As shown in LPMA's Submission to this Consultation, Cost Analysis, there are three key facts that immerge:

- In COS cases the number of intervenors varies by the size of the distributor. Large distributors had 5 intervenors, mid-sized distributors had 2 or 3 intervenors and the smaller distributors had 1 intervenor.

- Intervenor costs are about \$5.5 million a year. This compares to the Board's costs of about \$35 million and Intervenor estimates of utility regulatory costs of around \$50 million a year.
- In 1998, prior to expansion of applications due to the new Energy Act and Electricity Act, intervenor costs were \$3.1 million and the Board's Costs \$4.4 million

This profile reflects co-operation among the active ratepayer intervenors to ensure that ratepayers of all distributors have the benefit of representation while ensuring costs are kept to a minimum, especially for the smaller distributors.

Under Incentive Regulation Mechanism regimes, the Board has offered electric utilities regulatory flexibility, including the four options arising from the RRFE. As noted earlier, the regulatory costs should directionally be reduced under those options that allow streamlined review of formula based rate increases without full/detailed disclosure of the utility's costs of service.

Potential Improvements to the current Intervention and Cost Award Model

The following are some suggestions for further discussion among parties to the consultation.

Intervenor Budgets

Some Tribunals, including the Regie and MPUB require detailed budgets in Cost of Service hearings.

Experience shows that it is not possible to provide a detailed Budget until the Issues have been identified and the Board's prehearing conference has occurred and the Procedural Order sets out the regulatory process clearly.

In larger cases submissions of budgets can be practical, but for smaller cases the time to do this is unreasonable. Calling for budgets from representatives of the experienced intervenor constituency in most cases is unlikely to save time or otherwise increase the efficiency of the process before the Board.

Pre-established limits is a mechanism that is used by the Board for Stakeholder Consultations.

To apply this approach to setting costs for eligible intervenors in applications involving a broad range of issues would be arbitrary and create either a standard amount or a beauty contest among the affected interests from which the Board should hear fully in reaching its decisions. It also does not fit with the ongoing priority of Settlements.

Assessment of Reasonableness of Amounts Claimed

First, it is important to distinguish cost claims in Applications that are Settled or substantively Settled from those that require a significant oral hearing.

All participants in a Settlement Conference work together in group dynamic to elicit, organize and present intervenor positions on issues in a framework which facilitates the achievement of settlements on a significant number of matters on the Issues List. Board Members assessing the reasonableness of intervenor cost claims need to be aware of the fact that it is the intervenors and not the facilitators who elicit, organize and implement that framework. Considerable intervenor time and effort go into achieving such a framework within a reasonably compressed time frame.

The time spent by Board Staff and its consultants up to the Settlement Conference could be a guide to the reasonableness of time spent by intervenors in preparing for and attending the Settlement Conferences.

If the Board Members require further information on the reasonableness of time spent by representatives of intervenors in the Settlement Conference process, then a report provided by the facilitator and/or Board Staff on the activities that occurred during the Conference would assist the Board.

Cost Claim Review.

In assessing the reasonableness of the overall quantum of cost eligible intervenor cost claims, The Board could consider reinstatement of the position of Cost Award Officer. However without this person directly observing the proceedings, any assessment would be arbitrary and potentially of little assistance to the Board. The primary criterion for awarding costs for oral Hearings should be the degree which an intervenor assists the Board.

When assessing the breadth of the range of reasonableness for intervenor cost claims, the Board, should also request a report from the Applicant on the time and costs the utility incurred in the pre-hearing (Settlement if applicable) and hearing stages of a proceeding. This information should be provided as an adjunct to the utilities review of the cost claims and could be point of reference for the Board's current practice of considering the cost claims of other intervenors as comparators for evaluating reasonableness.

If the performance of any intervenor representative at an oral Hearing or the argument is not to the standard the Board considers appropriate, such as being unprepared, or the conduct of intervenor representatives in the hearing room, then the Board Hearing Panel should express its concerns when the behaviour occurs.

Energy Probe Response to Questions Posed by the Board

These Comments are segregated into Questions related to Intervenor Status and Standing and Eligibility for Cost Awards.

Intervenor Status

Q1. 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?

Rule 23.02 of the Board's *Rules of Practice and Procedure* provides as follows:

*“The person applying for intervenor status must satisfy the Board that he or she has a **substantial interest** and intends to participate actively and responsibly in the proceeding by submitting evidence, argument or interrogatories, or by cross-examining a witness.”*

Rule 23.03(a) provides as follows:

“Every letter of intervention shall contain the following information:

- (a) a description of the intervenor, its membership, if any, the interest of the intervenor in the proceeding and the grounds for the intervention.”*

The Board specifically asks, whether it should require intervenors to show how in more detail they are consulting with the constituency they represent.

Most organizations, to be relevant to their constituency, develop their own methods of ensuring that their members' interests are identified and represented.

The Board should continue to rely on the self-declaration by a party seeking intervenor status/standing to support a contention that he or she has a “substantial interest” in a particular proceeding before the Board. If there are questions, the Board Secretary can request additional information. The Board's determination of this issue should continue to depend upon the nature of the interest sought to be represented and the type of standing requested.

The Board should refrain from introducing additional measures which will go beyond the current self-declaration.

As noted earlier, the Regie requires that qualification for intervenor status is by an annual comprehensive submission . once qualified, an intervenor is not required to qualify for intervenor status in every proceeding. Whether this annual submission process meets the Board's Practice direction regarding interest in each case and would reduce regulatory burden is not clear.

Q2. 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?

Any condition which the Board might consider imposing regarding status ought not to be imposed before the party has an opportunity to respond to the concern. For example details of the relationship between the party requesting intervenor status and its governing body and retained counsel or representative.

It would be helpful for the Board to provide guidance to intervenors on the matters, criteria and attributes that the Board considers when considering whether to grant intervenor status, particularly for full participation (as opposed to observer status).

Cost Award Eligibility

Q1. 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?

As worded, this question seems to be focussed on the representation of the party requesting intervenor status. There are some 5 archetypes of qualified intervenors that have resulted from the Board's historic implementation of its Rules of Practice and Practice Direction.

It is not appropriate for the Board to force/condense these archetypes into the second category--a single ratepayer group. The public interest is broader (environment, society, economy) than just ratepayer interest and requires broader representation and ***diversity***.

This question is positioned in the Section on Cost Awards and accordingly we respond in the context of the issues that make a party eligible for a cost award.

Several Canadian Jurisdictions employ two broad criteria to determine cost award eligibility.

The first is **Need** - does the intervenor represent a constituency that has a “commercial/monetary interest” and implicitly may (or may not) have access to other sources of funds. The second is whether the intervenor represents the **Public Interest** rather than a distinct class of ratepayers.

In the OEB Practice Direction there is no explicit delineation of Cost Eligibility based on Need. Accordingly, how can/should the Board go beyond the self-declaration that the intervenor has no other sources of funding and determine Need based on qualitative factors, or by some type of means test, without intrusion into the financial accounts of the intervenor?

Section 3.03(a) of its *Practice Direction on Cost Awards* which provides as follows:

“A party in a Board process is eligible to apply for a cost award where the party:

(a) primarily represents the direct interests of consumers (e.g. ratepayers) in relation to services that are regulated by the Board;”

How can the Board classify intervenors as public interest or not and how does this affect Cost Award eligibility? While some intervenors clearly are ratepayer representatives, others represent a subset of a ratepayer group. Others have a broader constituency and interest and others have an environmental focus. This **diversity** is good news and bad news. The good news is the Board will hear from a wide spectrum of interests; the bad news is that attempts to classify intervenors are difficult, arbitrary and potentially unfair.

Q2. What factors should the Board consider in determining whether a party primarily represents a public interest relevant to the Board’s mandate?

303(b) of its *Practice Direction on Cost Awards* which provides as follows:

“A party in a Board process is eligible to apply for a cost award where the party:

(b) primarily represents a public interest relevant to the Board's mandate;"

Based on the points noted above, the Board should not foreclose its consideration of any cost eligibility applications by a party that contends that it represents a public interest without first considering all of the grounds and information advanced by that party to support the intervention request.

Q3. 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 Canadian energy regulators¹ may require intervenors to combine efforts. This occurs not at the intervention stage, but at the Cost Award Eligibility stage.

As discussed above, the existing E.B.O. 116 OEB Cost Award regime stems from the goal for a broad range of interests to be represented, so that complex issues can be examined in depth and for the removal of financial barriers to the presentation of meaningful interventions by interests having genuine concerns.

Accordingly, the Board cannot reasonably expect cost eligible intervenors to join forces with respect to the presentation of a common position with respect to their overlapping interests in a complex case, until each of them has analyzed the application, participated in the pre-hearing discovery process and in the initial settlement conference process where positions are formulated within the context of a framework which has been developed to facilitate the settlement of matters in issue.

Board-mandated coordination of case management by intervenors may not achieve any efficiencies over and above those already being achieved by the Board's directions that intervenors with overlapping interests are expected to act in a

¹ Web Search - Appendix

manner which minimizes duplication. Requiring case management coordination before the application analysis and pre-hearing discovery processes have been completed is inappropriate.

However, in larger Cost of Service cases which are not scheduled for a settlement conference, or follow from a Partial Settlement a ***second stage application for cost award status confirmation*** could be considered at which intervenors may choose to divide the case file, as is done by intervenors in larger cases in establishing the individual consulting teams.

Q4. 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?

As noted earlier, some Canadian jurisdictions require Intervenor Budgets to be submitted after the Application and procedural orders have been issued (anti-facto).

The adoption of a pre-approved budget process will add another level of bureaucracy to the intervenor cost award process. This is likely to lengthen, rather than shorten, the duration between the filing of an application and its ultimate disposition.

Applying pre-determined time limits, similar to those used in OEB policy consultations, for the steps involved in conducting a prudent intervention in a complex case would be arbitrary and intrude into the case management process used by each intervenor.

If adopted, such a process would require the Board to take into account in detail, the nature and issues in each particular application, To develop a sound base of information from which to derive reasonable estimates of such limits would require someone to classify each application that the Board receives, having regard to its complexity and the issues it raises, and then consider the total time spent by intervenors in other comparable proceedings before the Board. This would be a time consuming and, in our view, an unnecessary task.

A far better approach is to continue to apply post-facto the “Principles In Awarding Costs” specified in section 5.01 of the Board’s *Practice Direction on Cost Awards* as follows:

“5.01 In determining the amount of a cost award to a party, the Board may consider, amongst other things, whether the party:

- (a) participated responsibly in the process;*
- (b) asked questions in interrogatories or on cross-examination which were unduly repetitive of questions already asked by one or more other parties;*
- (c) made reasonable efforts to ensure that its evidence or intervention was not unduly repetitive of evidence presented by or the intervention of one or more other parties;*
- (d) made reasonable efforts to co-operate with one or more other parties in order to reduce the duplication of interrogatories, evidence, questions on cross-examination or interventions;*
- (e) made reasonable efforts to combine its intervention with that of one or more similarly interested parties;*
- (f) contributed to a better understanding by the Board of one or more of the issues in the process;*
- (g) complied with directions of the Board, including directions related to the pre-filing of written evidence;*
- (h) addressed issues in its interrogatories, its written or oral evidence, its questions on cross-examination, its argument or otherwise in its intervention which were not relevant to the issues in the process;*
- (i) engaged in any other conduct that tended to lengthen unnecessarily the duration of the process; or*
- (j) engaged in any other conduct which the Board considers inappropriate or irresponsible.”*

Potential Modifications

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

The *Rules* and the *Practice Direction* broadly define the Board’s discretion with respect to intervenor status, cost eligibility, and the assessment of cost awards. In combination, these provisions give the Board all the power it needs to continue to determine matters pertaining to intervenor participation in proceedings before the

Board in a fair and transparent manner and at a cost which is compatible with the guiding principles upon which the Board's cost award regime is based.

In these circumstances, we submit that no modification to the *Rules* and the *Practice Direction* are needed to assure that the Board's awards to cost eligible intervenors are appropriate and reasonable.

Neither the obligation of the utilities to more frequently consult and communicate with their customers, nor the Board's plan to make greater use of customer surveys and focus groups, should work as an adjunct to cost eligible intervenors to presenting interventions which fully and completely examine the details of the applications and express the concerns of parties affected by the applications.

Modifications to the Process for Applying for Intervenor Status

The Rules of Practice set out the current requirements. The process is based on discrete applications for intervenor status on an application/case-specific basis.

This requires applicants for intervenor status to file with the Board and the Applicant general information on their organization/ constituency as well as an expression of the specific interest(s) in the matters that the Application raises.

Where a party is seeking an award of costs, then a declaration regarding sources/availability funds is required.

Tweaking of the intervention application process may be possible, for example providing an annual submission on the intervening organization and its constituency and financial status. This may not improve efficiency because Applicants for rates would need to examine both this documentation as well as the Letter regarding request to be granted intervenor status and the specific interests raised by the current application.

Submission Summary

The main conclusion of Energy Probe's submissions in this phase of the Board's intervention and cost awards consultation is that the Board is seeking a solution to a problem that does not exist, or at best is perceived to exist in a limited number of the hundreds of applications before the Board.

A major benefit of the present Ontario intervention and cost award model is that there are diverse ratepayer and public interest views represented in each rate application and policy consultation. Accordingly, the Board receives input and positions having a broader range of perspectives. This allows the Board to reach balanced and clearly articulated decisions.

The problem with the present model as perceived in particular by the electricity distribution utilities, is excessive intervenor involvement and the associated additional regulatory costs, particularly in electricity distribution rate cases.

In fact data prepared by LPMA on behalf of stakeholders show that the majority of rate applications are settled between the utility and a small group of intervenors at a low cost to the utility and customers that has not increased significantly over the past 15 years.

There are some larger cases related to rebasing cost of service applications. Some of these are also substantially settled under the Board's ADR protocols, some proceed to adjudication.

Accordingly, Energy Probe suggests that the focus should be on improving regulatory efficiency for the few cases that proceed to a full hearing and adjudication before the Board. The number/frequency of these should decrease with the roll out of the RRFE.

There are potentially lessons that can be applied from other Canadian jurisdictions that can streamline the intervention and cost award processes particularly for adjudicated cases.

Institution of a Consumer Advocate in a jurisdiction like Ontario with active intervenors representing energy consumers and the public interest is a matter for Phase 2.

Costs

Energy Probe appreciates the opportunity to provide input to the Board on these important issues.

Energy Probe has acted responsibly and consulted with other parties with a view to providing assistance to the Board, and requests that the Board reimburse its legitimately incurred costs.

Respectfully submitted at Toronto, Ontario this 27th day of September 2013.

Energy Probe Research Foundation

Web Search Intervenor Cost Award Availability - Canadian Energy Regulators

In a number of provinces, including British Columbia, Manitoba, and Ontario, energy consumers have been represented by organizations such as the Public Interest Advocacy Centre, the Consumers Association of Canada, and other organizations that purport to represent the broad public interest.

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Energy Commission	Consumer Advocate	Cost Awards	Criteria	Eligibility	Examples Funded Intervenor
BCUC	No	Yes	Need. Assist Tribunal	Public Interest Ratepayer Groups	Residential ratepayer groups and industrial ratepayer groups. Environmental groups and independent power producers
AUC	Yes	Yes	Need. Assist Tribunal	Rule 009- Local Intervenor Rule 022- Cost Awards	City of Calgary, CAC
MPUB	No	Yes	Need, Assist Tribunal	4(2) The Board may recommend or order that Intervenor with similar interests present a joint intervention.	Public Interest Law Centre (for CAC/MSOS)
NEB	No	No	N/A	N/A	N/A
NBPUB	Yes	No	N/A	<i>A full time public energy advocate was included as a component of the New Brunswick Energy Blueprint, October 2011.</i>	N/A
NSPUB	Yes	Yes	Need Assist Tribunal	Non-profit, public interest intervenors with limited financial resources	Maritime Link : Costs awarded if intervention <i>complementary</i> to CA and SBA
NFPUB	Yes	No	-	N/A	N/A
NWTPUB	No	Yes	Assistance to Tribunal	Section 32(b) Rules Scale of Costs Guideline	Ratepayer Groups
OEB	No	Yes	Assist Tribunal	Practice Direction on Cost awards s 3.03-3.05	Direct and public interest, Landowners
PEIEC	?	?	?	<i>Facilitating Public Involvement –ratepayer-funded consumer advocate position should be established by Government to represent residential and general service customers and help facilitate the participation of other interested parties at regulatory hearings. PEIC Rept 09/12</i>	
Regie	No	Yes	Need. Assist Tribunal	Guidelines 2009. Qualification Letter (need). Interventions present unique perspective etc.	OC, MUC etc



Energy Probe Probe International Environment Probe Consumer Policy Institute Urban Renaissance Institute Environmental Bureau of Investigation The Margaret Laurence Fund

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About Us

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Background

Energy Probe Research Foundation is one of Canada's largest independent think tanks, with 17 public policy researchers, assisted by a motivated team of interns, volunteers, and other support staff, working in diverse areas of concern to Canadian citizens.

Our senior staff has demonstrated the country's longest commitment to the environment: Four have been with us since we were founded 20 years ago, and three others first joined us more than 10 years ago. In addition to being unusually tenacious, our staff has drawn an unusual number of honours. Four members are listed in various editions of Who's Who (Probe International's Patricia Adams, Environment Probe's Elizabeth Brubaker, Energy Probe's Norman Rubin, and Urban Renaissance Institute's Lawrence Solomon). Energy Probe's Thomas Adams is a former member of the Independent Market Operator and Pamela Hardie is a former member of the Ontario

Energy Board (both bodies help regulate Ontario's power sector). *Time Canada* listed Probe International's Grainne Ryder among the 40 young Canadians likely to make a difference to the country, and Janet Fletcher was [awarded the Conservationist Pioneer Award](#) by the Latornell Symposium.

Our work is also distinguished by its academic standing. Most of our books have been adopted by university courses, our work appears in leading university texts, and it is published by academic publishers in Canada, the United States, and France. Our books have been translated into the Spanish, Bengali, Chinese, Bahasa Indonesia, Japanese, Estonian, and Finnish languages.

Like our staff, our board of directors has also shown a long-term commitment to our foundation and to the environment. Three of our nine current directors have been with us since our inception, and three others have been with us for 10 years or more. Our past directors, who also remained with us for many, many terms, include Thomas Berger, George Erasmus, George Ignatieff, Jane Jacobs, Margaret Laurence, Walter Pitman, David Suzuki and other leaders of Canadian society.

The 10 principles that guide us

The following principles have evolved from our 20-year-long analysis of the root causes of environmental destruction and of the elements of a sustainable society:

1. We work for environmental sustainability by promoting property rights (private or communal), markets, the rule of law, the right to know, accountability through liability, cost and risk internalization, economic efficiency, competition, consumer choice, and an informed public.

2. We strive to eliminate tragedies of the commons¹ by advocating property rights where resources can be exclusive, divisible, and alienable. In these situations, EPRF believes resources are most sustainably managed by the users of the resources themselves. EPRF advocates property rights:
 - to establish and preserve rights and responsibilities;
 - to account fully for social and environmental costs based on the values assigned by the rights holders; and
 - to internalize risks and costs (and to eliminate moral hazards²) in decision making.
3. We favour court actions based on the common law of nuisance, trespass, and riparian rights to empower individuals to protect themselves from environmental harm. We do not believe that governments should have the discretion to negotiate with polluters, or with other parties, to override traditional common law protections.
4. We generally oppose expropriation, which often results in environmental harm. We believe that voluntary agreements more fully internalize costs, protect the environment, and ensure economic efficiency.
5. We argue for the break up of unnatural monopolies, created by political or regulatory decree. Where natural monopolies exist, we advocate regulation that is mandated to protect the interests of consumers.
6. Where property rights cannot easily or affordably be assigned or enforced, we strive to eliminate tragic commons through statutory law and regulation. Although rigorous regulation is often required, regulatory authority must seek to avoid creating barriers to entry, stifling innovation, interrupting the flow of information, and forcing regulated parties to act against their best judgment.
7. We work to ensure the integrity of regulatory systems and the strict enforcement of laws that penalize unauthorized pollution. To

eliminate biases and conflicts of interest, and to ensure that public and private sector polluters are treated equally, we advocate independent regulators, who are subject to due process and judicial review, and regulatory processes that require full disclosure of information.

8. We work to establish decentralized decision-making processes and to devolve decision making to the lowest practicable level – that which is closest to the individual.
9. We oppose subsidies to resource use. Where society favours subsidies to ensure social equity, we favour subsidizing resource users with direct payments, untied to the level of consumption, rather than subsidies that lower the apparent cost of the resource.
10. We oppose the socialization of private sector costs and risks through government subsidies and indemnities to the corporate sector. For example, while we approve of private insurance as a way to internalize risks and costs, we oppose government indemnities to resource or financial sectors, particularly if those indemnities protect risk takers and polluters from the risks and costs of their activities.

Notes

¹ The tragedy of the commons, popularized by Garrett Hardin's essay in 1968, explains individuals' incentives to exploit common resources for personal gain and the exhaustion of the resources in the process. "Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in the commons brings ruin to all." ([Return](#))

² "Moral hazard" refers to people's increased incentives to take risks when insured. ([Return](#))

Contact Us

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[Renaissance Institute](#)
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