September 27, 2013

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

Dear Ms. Walli:

Re: Participation of Intervenors in Board Proceedings
EB-2013-0301
First Phase: Initial Submissions

On August 22, 2013, the Board issued a letter in which it announced that it had "initiated a review of the framework governing the participation of Intervenors in applications, policy consultations and other proceedings before the Board." The Board invited submissions on near term modifications to Intervenor status, cost eligibility and cost awards.

Enclosed are EnWin's submissions. Part 1 comprises the bulk of this submission and attempts to set out the context for the roles of Intervenors of varying types. Part 2 presents the preliminary outline of a cost award cap framework that is intended to protect and advance the objectives discussed in Part 1.

Yours very truly,

***EnWin* Utilities Ltd.**

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First Phase Initial Submissions of EnWin Utilities Ltd.

PART 1: The Role Intervenors put in Context

The work of the Ontario Energy Board ("OEB", the "Board") as an administrative board of the Government of Ontario is vital to the effective and efficient functioning of the energy sector in Ontario. Economic and social performance in the province depends heavily on the accessibility, safety and reliability of energy supply (i.e. electricity and natural gas) at reasonable rates and the Board is a central player in ensuring those outcomes are achieved. Under the Board's oversight, public utilities, including natural gas utilities primarily owned by the private sector and electricity utilities primarily owned by the public sector, provide the bulk of Ontario's energy services funded by rates established by the Board.

Legal scholar Harry Arthurs said that "administrative law must serve, and be understood to serve, compelling social purposes" and be recognized as "a way of getting things done" seeking "creative, responsive [and] effective" solutions through decision-making processes that are "understood to have both ancient roots and practical, contemporary usefulness."[1] At the heart of this proceeding, EB-2013-0301, the Board is examining how to better make decisions in pursuit of its compelling economic and social purpose. The Board has long recognized that useful decisions are informed not only by public utilities and the Board's own insights, but also the contributions of other stakeholders. To use Tony Prosser's terminology, the Board sees "regulation as a collaborative enterprise."[2]

In 2007, then OEB Chair Howard Wetston delivered an address to the Law Society of Upper Canada.[3] Mr. Wetston aligned his remarks with the position of the Supreme Court of Canada in *Capital Cities Communications*, noting, "the input of stakeholders is part of legitimizing the

[1] "Jonah and the Whale: The Appearance, Disappearance and Reappearance of Administrative Law" (1980), 30 U.T.L.J. at 238-9.
[2] *The Regulatory Enterprise: Government, Regulation, and Legitimacy* (New York: Oxford University Press, 2010) at 4.
[3] "Consistent, Predictable and Sound Regulatory Decision Making: The Role of Regulatory Policy".

regulatory practice of formulating agency guidelines" and that this leads to more legitimate and higher calibre decision-making.

In 2011, when Rosemarie Leclair delivered her first public address as OEB Chair, she similarly demonstrated a clear commitment to consulting stakeholders.[4] She articulated a vision of "sharing knowledge, expertise and experience that will, I believe, facilitate the development of a strong, sustainable and viable energy sector that will meet the long-term needs of Ontarians."

The "Framework Governing Intervenors Participation in Board Proceedings" cuts to the very core of formal stakeholder consultation. The role of stakeholders is fundamental to the iterative process that makes possible regulation as a collaborative enterprise. The nature and degree of stakeholder participation as Intervenors in the Board's decision-making processes, be they adjudicative or policy proceedings, is of central importance in the Board's quest for creative, responsive, efficient, and effective solutions that will benefit the public interest.

Public Interest

The Board is not alone in its search to better understand the public interest and how to ensure it is appropriately served. In Ontario, public utilities have a public interest mandate. The mandate arises from regulatory law and policy and is generally referred to as the "regulatory compact."[5] Thus, "a regulated utility must operate in a manner that balances the interests of the utility's shareholders against those of its ratepayers."[6] The role of the OEB is to ensure that public utilities have an appropriate understanding of the public interest mandate as it applies to the utility's activities and to ensure the utility meets its performance obligations and charges reasonable rates. As the Divisional Court stated, and the Court of Appeal reiterated, "It is not unusual to have constraints imposed on utilities that may place some restrictions on the board

[4] Untitled presentation to the Ontario Energy Association (May 6, 2011).
[5] Gordon Kaiser & Bob Heggie, "Developments in Public Utility Law" in Gordon Kaiser & Bob Heggie, eds., *Energy Law and Policy* (Toronto: Thomson Reuters Canada, 2011) at 180.
[6] *Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)*, 2010 ONCA 284 at para. 50.

of directors. That is so because the directors of utility companies have an obligation not only to the company, but to the public at large."[7]

Having adopted an ethos of regulation as a collaborative enterprise, the OEB and public utilities are not only compelled but eager to infuse their understandings of the public interest through dialogue with stakeholders. As the OEB Chair succinctly stated, "None of us has a monopoly on serving the public interest or the interests of electricity customers."[8]

The corollary to this point is that the public interest is not synonymous with consumer interest or non-utility interest. The public interest is what emerges from the confluence of the private interests of consumers, utilities and others who are directly and indirectly affected by the matter before the Board. It is not only inaccurate but problematic to equate public interest with consumer interest. First, it presumes to set the utility against the public interest, which is conceptually and practically contrary to the mandate of a public utility. Second, it creates a framework in which consumers and the Board are united in the pursuit of the public interest, standing in common cause to oppose the utility's pursuit of shareholder interests. The legal regulatory compact framework and the philosophical framework of regulation as collaborative enterprise, render the idea of the public interest as excluding utility interests inconsistent and incomplete.

As a matter of practice, OEB adjudicative and policy proceedings are forums where public utilities and stakeholders along with the Board and its staff all bring forward their respective understandings of the individual private interests and the collective public interests at stake. This is a common and valuable way of conducting regulatory business in the Ontario energy sector. Participants in proceedings offer their unique perspectives as part of an interest-based exchange rather than a positional exchange. Using a contemporary understanding of public interest as a constellation of private interests, including stakeholder interests and utility

[7] *Ibid.* at para. 49.
[8] "Delivering Value to the Customer: Efficient Utilities and Effective Regulation" (March 26, 2012).

interests, allows for a more comprehensive and accurate discussion about the role of the OEB and he role of Intervenors in aiding the Board in its work.

Ultimately, in OEB proceedings, it is the OEB and only the OEB that discerns what the public interest is and what course of action will best serve the public interest. The OEB is aided through the offered perspectives of the utility/applicant and stakeholders. It is also aided by its own experience and the work undertaken by OEB staff. All of this is offered in pursuit of an understanding of the public interest that is amenable to the private interests of the utility, stakeholders and OEB staff.[9] The OEB weighs these inputs independently and expertly. The OEB itself is not inherently aligned with consumer interests any more than it is with utility interests. The public interest is greater than those inputs. OEB decisions, in adjudication and policy, articulate what the public interest is as it pertains to the specific matters at hand and sets forth Orders to benefit the public interest.

Substantial Interest

The Board's Rules of Practice and Procedure limits participation of stakeholders as Intervenors to those with a "substantial interest."[10] In *A Report with Respect to Decision-Making Processes at the OEB*,[11] the Board envisioned adjudicative proceedings in which only those who could demonstrate that their constituency had a "particular interest"[12] or a "specific and particular interest"[13] would be allowed to intervene.

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[9] That civil servants such as OEB staff have private interests that influence their official duties is acknowledged by various authorities, including Lorne Sossin in "From Neutrality to Compassion: The Place of Civil Service Values and Legal Norms in the Exercise of Administrative Decisions," (2005), *University of Toronto Law Review*, Vol. 55, at 430, where he notes that while there may be a "constitutional convention of bureaucratic neutrality… this ideal has never really existed in practice – civil servant judgments always have had a role in shaping, rather than just implementing, public policy."

[10] "Rules of Practice and Procedure", s. 23.02.

[11] "Report with Respect to Decision-Making Processes at the OEB" (September 27, 2006).

[12] *Ibid.* at 29.

[13] *Ibid.* at 4 and 32.

The origins of this provision appear to be rooted in legal tradition. In Supreme Court of Canada cases, participation in a proceeding is based on being "directly affected"[14] or having a "genuine interest".[15] It is unclear whether the Board's terms "substantial interest", "particular interest" and "specific and particular interest" are intended to be broader, narrower or different in some other way from the SCC threshold for standing. In any event, it appears that the Board's use of the term is meant to relate to the genuine interest concept used by the courts for the purpose of determining standing in judicial proceedings.

The Board, of course, is not a court. While some of its proceedings have a quasi-judicial character, the Board is neither constitutionally nor statutorily a court. Instead, it is an administrative board that is an independent arm of the executive branch of government. Such bodies have been described in this way:

> "The typical commission is a government in miniature. A whole field of human activity, usually economic, e.g. railways and public utilities, is handed over to a small body of persons who are charged with its regulation according to the terms of the creating statute."[16]

As with governments, it is in the public interest that the Board be open to a wide variety of stakeholders. Some of these will be directly affected, others will be qualified representatives equipped to advance the interests of groups of stakeholders, while others still may have no direct connection or representative role, but who will be in the position to offer meritorious contributions that will advance the Board's decision-making.

Practically, the Board often accepts a wide range of interventions despite the narrow language of "substantial interest". It may be to the Board's benefit to formally accept that broader group of stakeholders into the process. These are stakeholders that:

- Have a substantial interest (i.e. a constituent),

[14] *Borowski v. Canada (Minister of Justice)*, [1981] 2 S.C.R. 575.
[15] *Finlay v. Canada (Minister of Finance)*, [1986] S.C.J. No. 73.
[16] John Willis, "Three Approaches to Administrative Law: the Judicial, the Conceptual and the Functional" (1935), 1 U.T.L.J. 53 at 56.

- Represent a substantial interest (i.e. advocate), or
- Aid the Board in better understanding a substantial interest without having any direct interest (i.e. *amicus curiae* – or perhaps more accurately *amicus tribunatus* or *amicus concilium*).

The Board benefits from constituents, advocates and *amici*. All three contribute to the understanding of the private interests of a certain stakeholder or set of stakeholders. As K.C. Davis emphasized nearly 25 years ago:

> "Today's imagination can and should be prodded. If tens or even hundreds of millions of people of the world can listen to a television program, what is the potential for millions of responses – perhaps by electronic means?"[17]

Today, in an era with interactive communications technology that Davis could not have fathomed, the sentiment is even truer and more forceful today. The involvement of any of the three types of intervening stakeholders promote a greater understanding of the public interest enabling the Board to inform its work as a government in miniature pursuing regulation as a collaborative enterprise. The OEB Chair's focus on customer-centric regulation anticipates and demands this sort of inclusive, advanced and continual engagement.

Further, governments and administrative boards face increasing pressure for openness, transparency and accountability in order to establish and sustain legitimacy. The question is no longer: "What substantial interest does this stakeholder have to warrant standing in the proceeding?" Rather, the contemporary question is to the effect of: "How can this stakeholder be effectively engaged and their perspective efficiently incorporated into the Board's process of making an adjudicative or policy decision in the public interest?"

[17] K. C. Davis, *Administrative Law of the Eighties*, (San Diego: K. C. Davis Publishing Co., 1989) at 193.

While there is the theoretical potential that a preponderance of intervening stakeholders could overwhelm the proceeding, to date this remains a theoretical risk.[18] With ongoing advancements in communications technology, there are also increasingly new mechanisms to encourage, assemble, organize, and report on large data sets, including stakeholder perspectives. Thus, there are few reasons for the Board not to take a "large tent" approach to its proceedings whereby the Board welcomes the participation of constituents, advocates and *amici*.

Once the intervening stakeholders are "in the tent", the Board can and should turn its efforts to organizing the Intervenors in a manner that facilitates the Board's discernment of related private interests and optimizes the use of time and costs. For example, Intervenors with similar substantial interests can be connected and encouraged to work in unison where practical. This is already done by the Board, especially where individual constituents who lack experience and expertise are connected with advocates and *amici* who claim to represent or speak to the benefit of that class of customer.

AMPCO provides a helpful example. While AMPCO may be an electricity customer in its own right, it does not intervene as a constituent.[19] AMPCO is an association and intervenes as a representative advocate for its membership. However, in some proceedings, the private interests of large users that are not AMPCO members may be at stake. It may benefit the Board's understanding of the public interest to better understand the private interests of the large users and through intervention by AMPCO as an *amici* Intervenor. Even with large user constituents and large user representatives intervening, in the Board's judgment the inclusion of AMPCO may assist those other stakeholders and the Board given AMPCO's expertise on large user energy issues and extensive experience before the Board and in Board policy proceedings. Through the combined efforts of these related stakeholders, the Board will benefit from an

[18] Even proceedings of the Board with unusually large numbers of stakeholders intervening have been successfully co-ordinated by the OEB and its staff (e.g. IPSP, East-West Tie).
[19] That is, AMPCO as an entity unto itself may be a customer of Toronto Hydro-Electric System Limited or another LDC but does not intervene in its own right as a customer of the LDC.

articulation of the private interest that is locally attuned and expertly understood. Similar examples apply to CCC, CME, SEC, VECC, and others from whom the Board regularly hears.

The question is not which of these stakeholders has a substantial interest. The question it is whether their discrete expressions of a substantially similar private interest can be drawn in and co-ordinated such that the Board is better placed to infuse its understanding of the public interest with their locally-attuned, expertly-understood articulation of a private interest.

Benefits of Intervenors

The Board and the sector as a whole have benefited from active, responsible participation by consumers, utilities and other stakeholders as the Board pursues the public interest. All of these stakeholders have argued from perspectives that are informed by their own private interests. These diverse arguments have allowed the Board to discern the public interest.

In the absence of the voluntary participation by these stakeholders, the Board would have been faced with making its decisions with lesser quality information or it would have needed to incur additional expense to ascertain those other private interests. Certainly, there is an important debate to be had over the appropriate cost level and cost management of stakeholder participation. However, there should be no doubt that sustaining the quality of the Board's decision-making depends on stakeholder participation and that this participation will come at a cost to some group of persons in some way, be they ratepayers, stakeholders, stakeholder representatives, or taxpayers.

Involving stakeholders directly has also allowed for iterative exchanges between Intervenors, applicants and the Board that would not have been possible without the interventions. While there are and must be opportunities to obtain stakeholder feedback through surveys, polling, letters of comment, and other solicitations of one-way input, the iterative demands of

interrogatories, technical conferences, settlement conferences, hearings, and policy development require Intervenors.

At various points in the past there has been a sense in government and administrative settings that stakeholders (constituents, advocates and *amici*) did not need to be engaged.[20] In this world view, the interests of citizens and stakeholders could be ascertained in aggregate by centralized authorities. This approach sidelines stakeholders, which is contrary to contemporary values and the Board's policy direction.

As noted in the Sossin quote above, this model also suffers from a flawed expectation that these authorities were able to and did forego their own personal biases and lens through which they interpreted the interests of remote stakeholders.[21]

Fortunately, the development of regulation as a collaborative enterprise has dispatched that myth and its false promise of providing greater efficiency without surrendering the effectiveness of the articulation and advocacy of stakeholders' private interests. Only stakeholders themselves (constituents, advocates and *amici*) can ensure that their private interests are adequately expressed in the collaboration. The diversity of Ontario, its service areas and the stakeholders therein defy generalizations by centralized authorities.

Similarly, the private interests at issue in a proceeding cannot simply be left to *amici* Intervenors who lack meaningful "on the ground" knowledge. Toronto-based *amici* may suffer from many of the same blinders and biases as Toronto-based civil servants in considering how generic stakeholder issues apply in the context of Windsor or Wasaga. The *amici* stakeholders

[20] For example, the idea of a "Two Staff" model in which OEB Staff would be divided into administrators and consumer advocates. A similar concept is a Consumer Advocate or Public Defender, which is a model used in some other jurisdictions.

[21] A weakness of the current model is that OEB staff is caught in a tension between serving as neutral administrators and active advisors. That may very well be a related discussion that should be incorporated into this consultation. Should there be a role for Board staff in identifying and advocating private interests in the Board's pursuit of the public interest? Should Board staff be an Intervenor and, if so, what framework would govern that role?

must therefore reach out to communities to become representative advocates or partner with constituents or local advocates in some fashion to shape their own understandings. Alternatively, in setting cost awards, the Board should reflect the need to engage additional stakeholders as Intervenors or through other means to supplement the *amici* perspective.

Cost Award Eligibility – General

Unlike some jurisdictions, the Board does not currently use a "financial means" or a "for-profit" test in determining cost award eligibility. In fact, a number of groups would likely be ineligible for cost awards if such a test was applied. Consumer groups such as AMPCO and CME regularly represent the private interests of for-profit commercial corporations worth billions of dollars. Other consumer groups such as SEC represent institutional/government sector private interests that may not be profit motivated, but are equipped with considerable budgets and are, in any event, funded through government taxes and/or monopoly rates. Still others may represent not-for-profit organizations that rely on donor support rather than government support; but this does not inherently establish that these organizations lack the funds to participate in Board proceedings. Similarly, individual constituents who periodically participate on their own behalf may have financial means that are great or small. Groups that represent generators (including renewable energy generators) are private interests with for-profit, commercial motives.

At the same time, the OEB rules currently exclude cost eligibility for organizations that are quite comparable to those who are eligible, including insofar as financial means and profit-orientation are concerned. These include: non-applicant utilities, utility investors, municipalities, the Electricity Distributors Association ("EDA"), the Independent Electricity System Operator ("IESO"), and the Ontario Power Authority ("OPA").

Similar to the financial means comments above, the Board has not instituted an explicit rule making cost eligibility contingent upon being adversely financially impacted by the outcome of a proceeding. This idea relates to the *a priori* substantial interest provision for obtaining

Intervenor status. As the Board is acutely aware, proceedings are nuanced and any such rule would be extremely difficult to apply, whether the proceedings relate to rates, licences, service area, policy development, or otherwise. It would also generally only allow for cost eligibility to constituents and render advocates and *amici* ineligible for cost awards.

It is important that the Board remain focused on the public interest and discerning it through the input of all those with valuable insights, not just individual ratepayers (constituents) facing proposals for higher rates. On the issue of cost eligibility, the Board should pursue a policy that is fair, is consistently applied and leads to a practical solution – all of which are important principles of administrative boards, policy and law.

While regulatory conventions have developed to determine who is and who is not cost award eligible, it is timely for the Board to distill a clear policy on cost eligibility. In the absence of that clear policy, participants and potential participants will be left in a state of considerable uncertainty. This uncertainty would be problematic and should be avoided.

Cost Award Eligibility – Engaging Constituent Interests

There is value to the Board in knowing up-front that there will be intervention by stakeholders who bring local knowledge (constituents and advocates) as well as experience and ability (certain constituents, certain advocates and *amici*) to proceedings. This allows the Board to mitigate its own resource requirements and authorize streamlined processes.

Also, there is value to the Intervenors in knowing whether and to what degree their participation will be funded through cost awards. Over time, an informal consortium of professional counsel and consultants specializing in interventions before the OEB has assembled. While some critique this as creating an "Intervenor industry" it has also ensured the professional articulation and engagement of stakeholder interests. In the absence of cost eligibility policy certainty, this pool of talent is likely to dissipate and not be replenished.

Further, there is value to the applicant in knowing the calibre and nature of the interventions and the process that flows from that. In the heat of an adversarial proceeding or in the immediate aftermath some applicants can be quick to criticize and even condemn the current Intervenor status, cost eligibility and cost award rules and practice. However, sober second thought generally leads to the realization that some version of this framework is necessary to ensure that "the other side" is present, independent, of high calibre, professional, and capable of navigating the complexities of applications and the protocols of Board procedures.

Most importantly, there is value to consumers and other constituents in knowing that their interests are being represented by qualified individuals and groups. This allows them the option of placing their trust in the Intervenors (especially advocates and *amici*) and in the process. That trust in place, the constituent may choose to play a lesser role or even no role in the proceeding. Board published data indicates that there are about 8 million energy ratepayers in Ontario and about $5 million in cost awards per year. It is sensible that many constituents would consent to a framework in which they pay about a nickel per month[22] for others who are better positioned than they are to be vigilant on their behalf. Thus, engaged consumers may effectively delegate participation to credible constituents, advocates and *amici* well suited to express comparable private interests.

Cost Award Eligibility – Engaging Utility and Other Stakeholder Interests

In order to complete the full picture of what the public interest is, the Board does and must look to interests beyond the interests of ratepayers and other constituents. The most prominent of these other interests are those of the utility/applicant.

The Board quite reasonably expects the utility/applicant to advance its own interests in adjudicative proceedings with the costs of that work dealt with as part of the application rather than the cost award process. However, presently, the Board does not allow cost awards for

[22] This rough approximation is intended to be illustrative and for the sake of simplicity bypasses differences between customer classes, volumetric based charges, overlapping constituent identity as a natural gas and electricity ratepayer, etc.

utilities participating in adjudicative proceedings in which the utility is not the applicant nor in policy proceedings. As a result, it is exclusively the intervening utility or its ratepayers that pay for this work. From a fairness perspective, it may be more appropriate that these costs be recovered from the applicant, the applicant's ratepayers or all provincial ratepayers, depending on the nature of the proceeding. This participation by the intervening utilities advances the Board's understanding of the public interest and, as such, it ought to be a compensated activity. Whether the Board allows for compensation through cost awards or cost recovery embedded in distribution rates or variance account rate riders, there ought to be appropriate cost recovery for the utility and appropriate allocation of those costs to ratepayers.

In a similar way, the Board's understanding of the public interest and pursuit of regulation as a collaborative enterprise is aided by the input of stakeholders that are not utilities but have perspectives that are attuned to "utility-side" interests. These include investors, lenders, vendors, credit rating agencies, unions, the EDA, OEA, and others. These stakeholders have perspectives based on their contributions to the functionality of the energy sector, the performance of utilities and the satisfaction of consumer needs and wants. Unlike utilities, these stakeholders are not able to seek direct recovery through rates or cost awards for the cost of advancing their private interests as constituents, advocates and *amici* in their own right. To the extent that these entities have their costs covered by utilities that in turn recover those costs through OEB-approved rates, the same cost allocation issues arise as discussed above. Further, indirect cost recovery through utility rates may lead to perceived or actual bias and therefore adversely affect the Board's consideration of those perspectives.

Municipalities, particularly those with ownership stakes in a utility, present an especially difficult situation. Generally, these stakeholders are denied cost eligibility. Notwithstanding their significant use of energy as consumers – usage levels that in numerous services areas may exceed those of, for example, schools – the OEB has directed municipalities to exert pressure on utilities as shareholders using corporate tools rather than consumers using regulatory

tools.[23] This proceeding offers an opportunity to revisit this OEB position. Given the scenario below, it may be prudent to do so.

In this period of increasing energy costs, it is foreseeable that provincial and municipal governments will want to influence (and where possible) control energy costs. The province or municipality can do this by exercising authority over the utility to force the utility to reduce revenue requirement or to allocate costs away from rate classes in which the government is a consumer (e.g. shift to residential or large use). Of course, irrespective of its seemingly controlling role as shareholder, the government has no more ability than the utility itself to change rates to benefit the government.[24] Only the OEB through an OEB proceeding can do that.

The OEB may or may not accept the application for rates that reflect this shareholder-directed strategy. The government will be the only private consumer interest not compensated for being at the table when the application is debated and the OEB's discernment of rates in the public interest takes place. It is reasonable to expect that this does and would continue to decrease the government's ability or willingness to help shape the Board's understanding of the public interest, which includes the government's private interest as a consumer. Asking the utility to advance the consumer interests of its shareholder is incompatible with the utility's expertise.[25] It would also distort the public utility mandate of offering a vision of the public interest in the manner expected by the Ontario Court of Appeal. It would skew the proceeding.

There is apparent example of the utility as "shareholder voice on consumer issues" that EnWin is aware of and it is clear why that model should be discouraged. Municipalities, which are

[23] For example, this issue has been raised in various recent cases involving Toronto Hydro-Electric System Limited in which the City of Toronto has sought cost award eligibility to speak to street lighting matters.
[24] To the extent that the Ontario Government affects the bills it pays by exercising its authority to force a rate freeze or to implement a clean energy benefit, it is exercising its ability as government rather than as shareholder.
[25] For example, the staff at EnWin would be ill-suited to represent the interests of the City of Windsor in an OEB proceeding to set distribution rates. EnWin staff would lack the insights to do so. Also, it would be a farce for EnWin to retain a lawyer to advance the City's private interests as a consumer by cross-examining an EnWin panel.

discrete legal personalities, should be permitted to be cost eligible Intervenors. This is more consistent with the "large tent" consultative approach and will lead to greater openness and transparency in the regulatory process.

PART 2: Preliminary Proposal for Cost Award Caps

The Proposed Framework for Governing Intervenor Participation

EnWin and other utilities have long argued for regulatory streamlining. It is only appropriate that we should seek to addresses as much of the foregoing as possible through a model that is as simple as possible. Potential solutions that create more rules, split more hairs or require material increases in the workload of the OEB, OEB staff, utilities, stakeholders, or others would be inconsistent with a long line of utility advocacy. Moreover, as the OEB pursues increased consumer engagement, a cause that EnWin and other utilities strongly endorse, a simple model is preferable because it is likely to be more comprehensible to stakeholders.

EnWin submits that the Board should implement framework whereby in each adjudicative and policy proceeding:

- Intervenor status is granted with very few limitations,
- Cost eligibility is granted to a broad range of stakeholders, and
- Cost awards are capped.

Intervenor status has largely been covered in the sections above. Virtually everyone who applies for Intervenor status generally is granted that status. This practice should continue. The exception for granting status should be to exclude parties with a history of engaging in frivolous or vexatious conduct in OEB proceedings.

Cost eligibility has also been largely covered in the sections above. Virtually everyone who applies for cost eligibility should be granted that status too. This recognizes that the Board is seeking broader stakeholder engagement and every intervening stakeholder will incur costs as

an Intervenor. Cost eligibility may be reduced or revoked where the Intervenor has engaged in frivolous or vexatious conduct in the proceeding or taken other actions or incurred other expenses that are unreasonable. The challenges are preventing total cost awards from spiraling upwards beyond the point of reasonableness and establishing an allocation of available funds that brings sufficient private interests forward to enable the Board to discern the public interest. EnWin proposes cost award caps to address these challenges.

Cost award caps have not been addressed above. EnWin proposes that the Board establish a cap on cost awards for each adjudicative and policy proceeding. In some ways this resembles the Board's current practice of establishing cost award caps for particular segments of particular proceedings (e.g. "Cost eligible Intervenors will be eligible for up to 10 hours of time in relation to preparation for and attendance at the Stakeholder Consultation.") Using a cost award cap currently and through this proposal allows the Board to control the bottom line and encourage desirable behaviours among Intervenors.

Cost Award Caps

Several years ago, the Board published a list of cost awards for Cost of Service proceedings and illustrated the cost award per customer in each proceeding. For the average utility, the cost was about $1 per ratepayer. In that way, the Board has already turned its mind in a preliminary way to setting parameters for cost awards that have some relationship to the nature of the proceeding and the size of the applicant/application.

EnWin expects that in rate cases the cost award cap would likely have some relationship to the customer count, revenue requirement or revenue deficiency. In a policy proceeding, the Board may follow a cost award cap approach that resembles what it does today: setting the cap on a proceeding segment-by-segment basis as opposed to up-front. That said, to the extent possible, cost award caps should be set at the outset of the adjudicative and policy proceedings

to provide all those involved with a sense of the overall scope of activity and manage their efforts and resources accordingly.

Illustration

With the cost award cap established, the Board would subdivide the total amount available for cost awards to separately cap cost awards for consumer-side and utility-side Intervenors and within those categories cap cost awards for constituents, advocates and *amici*. An illustration of a hypothetical cost award cap breakdown follows:

	Total Revenue Requirement: $100M **All Intervenors** Total Cost Award Cap: 0.2% or $200k	
	Consumer-side Intervenors Cap: 90% of Total Cap or $180k[26]	**Utility-side Intervenors**[27] Cap: 10% of Total Cap or $20k
Constituents	10% of Consumer Cap or $18k	20% of Utility Cap or $4k
Advocates	40% of Consumer Cap or $72k	70% of Utility Cap or $14k
Amici	50% of Consumer Cap or $90k	10% of Utility Cap or $2k

Opportunities and Alternatives

By setting caps for consumer-side and utility-side, it enables the Intervenors themselves to organize their interventions within the high level budget. This might entail joint retainers of experts, co-ordination of interrogatories, certain counsel not attending technical conferences, or other cost management techniques. However it is to be done, it is left to the Intervenors to manage their work within the architecture of the budget. Particularly on the consumer-side, it will be for the Intervenors themselves to enhance the effectiveness of their interventions by establishing a sensible "sharing of the pie." Presumably this would include utilizing the funds to

[26] It is critical to note that it is not the intention of the chart to propose the 90/10 divide or the 10/40/50 and 20/70/10 subdivides as actual ratios. These are simply illustrative. EnWin anticipates that the Board has access to very good data on what types of interventions generally occur and the balance between the various categories.

[27] Utility-side Intervenors might be: constituent = embedded distributor; advocates = CHEC or IBEW; *amici* = S&P

include local insight and professional expertise and that would give voice to the perspectives of a wide array of customer classes and other stakeholder types.

This preliminary proposal envisions the subdivisions among constituents, advocates and *amici* for the purpose of illustrating that there should be some protection in place to ensure that no one Intervenor or group of Intervenors can consume all of the budget and, in effect, sideline other stakeholders. That is, the Board's objective is to draw in constituents so it is desirable to prevent a small group of *amici* from being eligible to use all of the cost awards, unless of course no constituents choose to intervene.

An alternative approach would be to prescriptively subdivide the total cost awards ($200k in the example) among individual Intervenors. While this alternative approach may be necessary if the expectation or reality is that Intervenors cannot collaboratively manage their budgets within the 3 categories, experience suggests that for the advocates and *amici* this is more or less a status quo practice. That said, the Board may wish to establish a cost award cap policy that uses this alternative approach in situations where the Board determines it is most appropriate.

A third approach would be to set caps for each customer class. For example, it would be up to Residential consumers to decide how to allocate their share of the total cost award cap. There are two significant drawbacks to cost award caps based on customer class. First, the main issue of most applications is common to all ratepayers. For example, in rate applications the revenue requirement is the main issue and is an issue in common for all ratepayers. Thus, the structure promotes multiple customer classes making the same arguments, as is the case today. This is inefficient. The second significant drawback to cost award caps based on customer class is that expert, professional Intervenors (experienced advocates and *amici* in particular) may be positioned to consume all of the available cost awards within each customer class, leaving little opportunity for constituent Intervenors to offset their costs. This would adversely affect the OEB objective of engaging more constituent stakeholders directly. Irrespective of these

drawbacks, the Board may wish to establish a cost award cap policy that uses this alternative approach in situations where the Board determines it is most appropriate.

Implementation and Adjustments

Following the notice period, the Board, Board staff, the applicant, and the Intervenors will know who wants to intervene in the proceeding. It is at this stage that the cost award cap can be set and the divisions and subdivisions of the total cost award cap can occur. Alternatively, if the Board establishes the total cost award cap, the divisions or the subdivisions as a matter of standard policy, this would be the stage at which Intervenors could file a request or a motion to adjust the divisions or subdivisions. Practically speaking, it is likely that over the course of a year or so, a general norm will develop in respect of what the appropriate divisions and subdivisions.

As for the total cost award cap, this too would and must remain subject to motions for adjustment at the outset and throughout a proceeding. While the Board would almost certainly not look kindly on repeated requests for adjustment by the Intervenors, in certain cases there will be Z-Factor-like extraordinary circumstances where it will be appropriate to raise the total cost cap (and perhaps simultaneously allocate those incremental funds to the consumer-side or utility-side).

It is also possible that a cost award cap should be decreased and that would be pursued by the applicant. This might arise if, for example, an applicant had worked out a settlement for its rate application prior to the proceeding and, as a result, much of the Intervenor work had already taken place and would be compensated outside of the cost award formula. Another example would be an application that was extraordinarily less complex than a typical one, though this would likely be a very unusual circumstance.

Criteria

For the cost award cap to work several things need to happen. First, the total cost award cap needs to be high enough to allow effective participation by Intervenors while not so high as to encourage inefficient interventions. This is pretty straightforward to address. The OEB has lots of data on cost awards in different types of proceedings as a historic reference point in setting the formula for total cost award caps. The cost award caps for cost of service rate applications, IRM rate applications, service area amendment applications, licensing applications, etc. will be different because the natures of the proceedings require different degrees of stakeholder input to assist the Board in discerning the public interest.

If the Board intends to attract a broader spectrum of cost eligible stakeholders, including consumer-side constituents and utility-side Intervenors of all types, then those total cost award caps must logically be adjusted upward to fund continuing and new (or newly cost eligible) Intervenors. If the Board seeks thorough Intervenor reviews of cost of service applications, the cost award caps will need to be greater than for IRM applications. If the Board expects larger, more complex applications to be properly examined by sufficient numbers of stakeholders, those proceedings will have higher cost award caps.

At the same time, even small applications require some basic minimum level of expense to be properly reviewed by stakeholders. Accordingly, cost award caps must not be strictly proportional. Just as the OEB has done in various policies, there may be floors (and by the same token ceilings) to prevent proportionate cost award calculations from rendering imprudent results.[28]

Related to this point will be a concern among some that a cost award cap will give Intervenors a blank cheque. If the cap is set at a sensible level rooted in the historic experience of hundreds of applicants in countless proceedings over the past decade, then the cap will very likely be

[28] For example, a revenue requirement cost award cap model might set the total cost award cap at 0.2% subject to a floor that ensures at least $25,000 in cost awards and subject to a ceiling that limits cost awards to no more than $1 million.

about right more often than not. Sometimes it will be a little higher than it would need to be and the Intervenors might come out a little bit ahead, that is, they will have more time than they require to do their work and, as such, will be able to spend more time on the proceeding than would have otherwise been the case. But in a mirroring way, there will also be situations where the scrutiny will be spread a little thinner. That is the trade-off of a simpler model: it is not as precise as a case-by-case analysis. That trade-off is nothing new to the Board or the sector.

The second thing that has to happen for a cost award cap to work is for workable subdivisions of the total cost award cap to be implemented. Largely, this means Intervenors working together to "slice the pie", but to the extent this does not work, the OEB would need to make the call. While initially this might create some disruption if significant numbers of stakeholders suddenly throng to OEB proceedings, it is more likely a pattern will gradually emerge.

The third thing that must be in place is the ability to bring motions to have cost award caps adjusted. While this may on its face appear to be an incremental activity, in fact it simply moves the "after the proceeding" dispute over costs incurred to the front of the proceeding. This is a better time to come into alignment and common understanding of expected costs because the costs have yet to be incurred. Practically, once a norm emerges and there is general acceptance of the framework there will likely be very few issues. The issues that do emerge will be fairly obvious and generally they will be resolved by consensus.

Full Cost Recovery

The last piece of this preliminary consideration of a cost award cap framework is that it would allow for full cost recovery of cost award expenses during Cost of Service rate proceedings. Cost award uncertainty in COS is one of the pain points commonly cited by utilities. Establishing cost award caps up-front and performing any adjustments through formal motions would increase

transparency and predictability of these costs. This would allow applications to be amended any time a cost award was set or reset thus ensuring that full cost recovery was achieved.

Summary of Benefits of Cost Award Cap

Ultimately, the cost cap award approach is intended to provide a simple and transparent mechanism for promoting stakeholder engagement and full cost recovery. It is meant to encourage participation from a wide range of stakeholders. It envisions sustaining or improving upon the quality of input the Board receives through establishing appropriate "total cost award caps" and appropriate allocations of the cap among stakeholder groups. At the same time, it is intended to encourage efficiency by setting a total cap and allocations within that cap. How the efficiency would be gained would be up to the Intervenors to manage. While this might include further co-ordinating their efforts and prioritizing their activities, the light-handed regulatory structure of the model ultimately leaves those decisions to the Intervenors.