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

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## SUBMISSIONS OF THE

## SCHOOL ENERGY COALITION

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**September 27, 2013**

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# 1 OVERVIEW

## 1.1 *Background*

***1.1.1*** On August 22, 2013, the Board initiated a consultation to review the participation of intervenors in Board proceedings. The consultation has two phases. In the first phase, the Board will consider possible improvements to the existing framework for intervenor participation. In the second phase, the Board will look at alternative models for representation of consumer and other interests before the Board.

***1.1.2*** In this, the first phase of the consultation, parties are invited to provide an initial set of comments on questions posed by the Board. There will then be a stakeholder conference to discuss these issues, followed by a second round of submissions, informed by that discussion.

***1.1.3*** These are the initial submissions of the School Energy Coalition. They are organized as follows:

**(a)** Section 2 provides the Context of this discussion, which in our view is the most important aspect of understanding these issues.

**(b)** Section 3 considers the Board's questions with respect to whether someone should be allowed to have intervenor status at all.

**(c)** Section 4 deals with funding from the ratepayers for intervenor participation.

**(d)** Section 5 then considers whether the Practice Direction should be modified.

***1.1.4*** It will come as no surprise that the ratepayer groups involved in this process have worked together closely on the issues. This has included separate meetings to work through differing perspectives, and some exchanges of written materials as well. This has been of assistance to SEC in developing these submissions. SEC has also had a number of discussions with regulated utilities about these issues, which has also been of assistance. While these submissions are solely the position of SEC, and do not purport to represent the positions of other ratepayer groups or utilities, the ongoing dialogue has been of considerable value.

## 1.2 *Summary of Key Points*

***1.2.1*** Rather that provide an "executive summary" at this stage of our submissions, SEC believes it is more useful simply to highlight the two key overarching messages that should come from reading them.

***1.2.2*** ***It's Our Money.*** SEC comes from a somewhat different starting point in this analysis

than some other parties. Our whole analysis is framed around the principle that all of the money – perhaps $85 million per year – being spent by the utilities, the regulator and the intervenors on the regulatory process and related advocacy, is being provided by the ratepayers. We have a right to be here because everyone around the table is spending our money.

***1.2.3*** One implication of this is that, if saving money – our money – is one of the objectives, there are more obvious places to look than the intervenor system. For example, utilities spend about $45 million of ratepayer money on regulatory costs and lobbying/advocacy each year. Since a big chunk of that is not actually promoting the interests of ratepayers, but rather the interests of the shareholder, perhaps the shareholder should pick up some of that tab.

***1.2.4*** Even outside of the issue of saving money, the ratio of $1 of intervenor costs for $9 of utility regulatory/advocacy costs and $7 of regulator's costs suggests that, if anything, we may have clamped down too tightly on the intervenors, unduly restricting their ability to defend the ratepayers' interests.

***1.2.5*** All of this is to say that the ratepayers have a right to be at the table, and not to be fettered by unnecessary restrictions in defending their own interests.

***1.2.6*** ***Premier Ratepayer Representation System.*** Among the 60 or so jurisdictions in North America that have energy regulation, and ratepayer representation within it, Ontario's bottom-up intervenor model has proven over the years to be, if not the very best ratepayer representation system, at least one of the best. This is true whether you measure it on cost, or on effectiveness.

***1.2.7*** On a cost basis, a comparison of ratepayer representation costs in other jurisdictions shows that, adjusted for size, Ontario's costs are lower in almost all cases. For example, the cost of the Alberta system, a utility consumer advocate, is more than seven times the cost in Ontario. And, it is less effective.

***1.2.8*** On an effectiveness basis, the Board has the benefit of experienced and knowledgeable intervenor representatives in almost every proceeding before it, and certainly every major proceeding. Most of those settle, often with creative and thoughtful solutions, something that is only possible because of the intervenor system we have in place.

***1.2.9*** Even if you have the best system anywhere (which we might), it can always still be improved. However, the better the system you have, the more you risk if you play with the rules in hopes of improving it.

# 2 CONTEXT

## 2.1 ***Basic Principle***

***2.1.1*** It is easy to see the participation of intervenors in Board proceedings as a privilege that the Board grants to certain groups that assist the Board and represent appropriate constituencies. It comes at a cost, but it is a worthwhile cost.

***2.1.2*** SEC believes that is not the correct starting point. From the point of view of ratepayers, the entire regulatory process is funded by our money, probably to the tune of $85 million per year or more (see Section 2.3 below), and if anyone has a right to be part of that process, it is the ratepayers who are paying for it.

***2.1.3*** One may ask whether the regulatory costs of utilities, for example (about $45 million per year), should be paid for by the ratepayers or by the shareholders of those utilities (who benefit from the regulatory process). One may ask whether some of the costs of the regulatory agency (about $35 million per year) should be paid by the government, or by the shareholders of the utilities, rather than the ratepayers.

***2.1.4*** But of all the participants that should be at the regulatory table, at ratepayer expense, the most obvious is the ratepayers themselves. That is SEC's starting point in this analysis.

## 2.2 ***Benefits of Intervenor Participation***

***2.2.1*** Ontario has a ratepayer and public interest representation system that relies heavily on non-profit groups created to represent specific constituencies. Some of those intervenor groups are energy-specific (IGUA, and AMPCO, for example), and some are energy-related initiatives of organizations that have a broader mandate to represent their constituency (CCC, CME, VECC, SEC, BOMA, LPMA, etc.). Compared to some other jurisdictions, the Ontario model is much more bottom up (i.e. generated from the ratepayer groups themselves), compared to the top-down approach that is sometimes used elsewhere (e.g. representation by a government agency).

***2.2.2*** The use of that bottom-up model has produced a number of benefits for the regulation of energy in Ontario.

***2.2.3*** ***Experienced Individuals.*** The most obvious, perhaps, is that the individual consultants and lawyers who represent ratepayer and public interest intervenors in Ontario are, on average, highly experienced in energy regulation.

***2.2.4*** Part of that is probably structural. A bottom-up approach allows ratepayer and public interest groups to go to the same pool of advisors as the utilities (although offering a much lower hourly rate). Some experienced advisors prefer to work on behalf of consumers, or environmental interests, etc., rather than for the utilities. A person with

20-40 years' experience in energy regulation, such as many of the lawyers and consultants representing Ontario intervenors, has choices, and the Ontario system allows them to elect ratepayer representation, for example, rather than utility representation.

***2.2.5*** Alternative models – such as the Division of Ratepayer Advocates in California and elsewhere – require those who want to champion consumer interests to work for a government agency. Some experienced advisors decline to be government employees.

***2.2.6*** The other reason for the high level of experience of intervenor advisors may be self-induced within the Ontario model. Advisors working for Ontario intervenors see twenty or more rate applications every year. It is no surprise that, after a while, they develop a certain skill at the analysis of those applications.

***2.2.7*** The combination of these factors means that when intervenors participate in Board proceedings, the people representing them bring a significant expertise to the table. It is reasonable to say, SEC believes, that relative to most other jurisdictions, the average level of expertise of ratepayer representatives in Ontario is considerably higher.

***2.2.8*** ***Broader Perspectives.*** A second benefit of the Ontario model is that there are diverse ratepayer interests represented in each rate application and policy consultation. The Board gets input and positions having a broader range of perspectives. This allows the Board to reach more nuanced decisions. Anyone who has been in a contested proceeding before this Board would attest to that.

***2.2.9*** It is enticing to think of the diversity of ratepayer interests as being related only to things like cost allocation and rate design, where the rate impacts of the application are obviously different for different classes of ratepayers.

***2.2.10*** That is not true in practice. Different ratepayer groups have their own individual priorities and approaches on many, perhaps most, aspects of applications and proposed policies. This is in part because ratepayer groups view utility costs from different perspectives naturally. It may also be in part because of the specialized expertise of their advisors, although that may be circular, i.e. ratepayer groups select advisors that suit their approach and priorities.

***2.2.11*** The place where the intervenors most often see this is actually not open to most others: ADR. When intervenors develop their offers to the utility, they first have to reach a consensus amongst themselves. The intervenors don`t all start with one view. It often requires a lengthy discussion/negotiation to reach a starting point that is acceptable to all intervenors, both in terms of an offer, and in terms of a bottom line position on individual issues.

***2.2.12*** An example close to home is schools. School boards are, by their nature, focused on the long term, and they are confrontation-averse. In considering a rate proposal,

schools will generally value long-term asset management more than some other customer groups, for example, and will certainly be strongly driven to finding negotiated solutions. Contrast this with some other customer groups, who may be more focused on short-term impacts (immediate affordability for low-income ratepayers, perhaps), or may feel that a more aggressive approach will benefit their members.

***2.2.13*** The underlying logic of this is demonstrated in looking at how the regulatory process plays out in fact. As the Board is well aware, in policy consultations, and in contested rate applications, the positions of ratepayer groups are rarely the same. While they sometimes agree on particular issues, it would be unusual if there was no disagreement on any material item.

***2.2.14*** DSM and CDM may be the area with the most disagreement among ratepayer groups, simply due to the differing impact of these programs on those various classes of ratepayers. However, consider how much disagreement there has been on gas supply issues, and on capital planning, etc. There are many issues on which different ratepayer groups provide different positions, or different possible solutions, to the Board.

***2.2.15*** There are many recent examples where the Board has benefited from this variety of inputs, whether the proceeding was a policy consultation or a rate application.

***2.2.16*** ***Savings to Ratepayers.*** Of course, the participation of experienced representatives on behalf of intervenors, and the diversity of inputs to the Board, translate into rate savings for customers.

***2.2.17*** How much do the customers save by reason of interventions on their behalf? In many respects, this is an unanswerable question. At the broadest level, you can compare the rate increases requested by utilities each year, and then the rate increases or decreases actually ordered and implemented, and calculate the difference. That number is probably $500-800 million each year.

***2.2.18*** But how realistic is that number as a measure of intervenor effectiveness? It has weaknesses, in our view:

**(a)** At the most basic level, this approach assumes the intervenors are the cause of all of the reductions from applied for to final rates. That is certainly not the case. The Board itself, assisted by Board staff, would undoubtedly deliver on some of those reductions even if there were no intervenors. While everyone in the sector would agree, we think, that intervenors are the cause of some of the reductions, crediting them with all of the reductions is not realistic.

**(b)** How much does the participation of intervenors influence what was in the application in the first place? Did the utility "pad" its estimates, knowing they

could be cut back? If so, **s**hould intervenors get credit for knocking down a straw man? On the other side, many utilities report that their thinking about costs and budgets is sensitive to the fact that intervenors will be reviewing their applications. Some costs that they may otherwise include in their proposed budgets are removed before filing because they realize they will be challenged successfully anyway.

**(c)** This calculation also looks only at rate proceedings, but many of the most important contributions from intervenors come in policy matters (either within rate cases, or in separate consultations). For example, if the participation by ratepayer groups in the 3rd Generation IRM plan resulted in lower rates for LDCs for several years, how do you capture and measure that?

**(d)** Not everything an intervenor group does, even within a rate application, is driven by immediate rate reductions. Intervenors are also concerned about reliability, and customer service, and many other aspects of a healthy utility. In the long run, healthy utilities save the ratepayers money, but there is no way to measure that in this more simplistic, applied for vs. final rates, approach.

**(e)** Finally, all of this assumes that the intervenors are a monolith, and collectively cause certain ratepayer impacts. While intervenors work together, different intervenors have different areas of focus. Is it possible to identify which intervenor caused which rate reduction? Rarely would that be the case.

***2.2.19*** SEC believes that we can safely say that the Ontario regulatory process saves the ratepayers considerable sums of money each and every year, probably in the order of many hundreds of millions of dollars. We can also safely say that the Ontario intervenor model is a important factor allowing the Board to achieve that result. Beyond that, we are less confident in the ability of anyone to do a more rigorous cost-benefit analysis of this type.

***2.2.20*** ***Legitimacy of Results.*** When SEC talks to utilities, the single most important value of intervenors that they raise is the intervenor role in legitimizing regulatory outputs. When new rates are set, or new policies are announced, the fact that ratepayer and public interest groups had strong, experienced representation in the underlying proceedings means that the results are considered more robust and defensible.

***2.2.21*** In the simplest example, any Ontario LDC knows that they don't have to justify their rates to their local school board. The local school board already knows that they were represented when those rates were set, and already believes that the rates represent a reasonable outcome. The same is true, to a greater or lesser extent, with many other intervenor groups.

***2.2.22*** This legitimacy question is more fundamental than simple public perception. Upward pressure on energy costs will generate a reaction in energy consumers. Some of those consumers – particularly those who experience high individual impacts – will always

seek a way to protect their interests. A key role of the Board is to be that forum for ratepayer input and self-protection. Strong intervenor representation allows the Board to satisfy that requirement. Without it, those who want to protect themselves will find another route to do so, such as government lobbying, etc.

***2.2.23*** ***Cost Effectiveness.*** An important benefit of the Ontario model is that it is more cost-effective than alternative models found in other jurisdictions. At less than $0.41 per capita in Ontario in the last year ($5.5 million cost awards compared to Ontario population of 13.5 million), the cost is lower than virtually any other jurisdiction in North America that has ratepayer advocacy in energy regulation.

***2.2.24*** For example, about half of the jurisdictions in North America have some variation of the utility consumer advocate model. In every case, the cost per capita is higher. Ohio, with its Office of the Ohio Consumer Counsel, has a higher 2012 cost, $5.9 million (all figures for American states are in U.S. dollars), for a lower population, 11.5 million, served by fewer utilities. It spends $0.49 per capita, one of the lowest figures in the U.S. New Jersey's Division of Rate Counsel spent about $0.72 per capita in 2011 ($6.4 million), and had a 2012 budget higher than that. California's Division of Ratepayer Advocates also spent about $0.72 per capita in 2012 ($27.5 million) despite the economies of scale one would expect from its larger population and smaller number of utilities. If you go through the budgets and populations of the U.S. states with utility consumer advocates, the Ontario model is consistently less expensive.

***2.2.25*** The same comparison can be made in Canada, with an even greater disparity. Alberta, for example, with its 3.8 million population, has recently given its Utility Consumer Advocate a budget of $9.2 million, making the per capita cost there about $2.35.

***2.2.26*** In many of the utility consumer advocate jurisdictions, including Alberta, some intervenor groups still receive public funding and/or costs, so some of those comparative figures are understated.

***2.2.27*** Of course, the comparisons with other jurisdictions are not exact. Some of these organizations have responsibilities outside of energy (telecommunications and water, for example). Some are active in court proceedings. Some have responsibility to communicate consumer information to the public.

***2.2.28*** In addition, raw cost does not account for the other part of "cost effectiveness", i.e. effectiveness. Different jurisdictions – and individuals running advocacy offices - have different advocacy philosophies. In some places, the advocate is not allowed to settle cases, while in other places that is encouraged. In some places the advocacy office is highly bureaucratic, and less effective in actually engaging tough issues. In others, the advocate is nimble and on top of the issues, willing to get out in front of the tough ones.

***2.2.29*** But even accounting for the differences between jurisdictions, SEC believes that the cost-effectiveness of the Ontario model has proven itself again and again. Ontario has strong regulatory results, healthy utilities, and low cost representation of ratepayer and public interest groups.

***2.2.30*** ***ADR Process.*** A benefit of intervenors that is sometimes overlooked is the savings and other value arising out of the ADR process. This process can only happen as it does in Ontario because of the participation of knowledgeable and experienced intervenor representatives.

***2.2.31*** The most obvious value of Ontario's extensive ADR system is regulatory efficiency. Ontario has more than 80 rate-regulated utilities, a fact that would present a challenge to any regulator. Even with IRM in place for most utilities, in any given year there are at least thirty rate applications that are non-mechanistic, and thus require a full review and determination. This includes COS, Z factor, ICM, and similar applications. There are also at least ten applications that are not normal rate applications – deferral and variance accounts, earnings sharing, accounting orders, etc. – but still require a full review. This is all in addition to the many other applications, proceedings, and consultations going on at the Board at any given time.

***2.2.32*** This very heavy workload is possible in part because, in a typical year, 80% or more of the COS and other non-mechanistic applications are settled without an oral hearing and final argument process (or with that process limited to a narrow issue or issues). This saves considerable time and resources.

***2.2.33*** A more important aspect of the ADR benefit, though, is the ability for utilities and intervenors, sitting around a table rather than in combat at a hearing, to fashion creative solutions for the Board's consideration.

***2.2.34*** At the most obvious level, every year there are one or two settlement agreements that include a new solution to a problem. Utilities and intervenors, working together, have been able to find a mutually acceptable answer by listening to each other, and meeting each other's needs. Some of these solutions are very technical in nature, while others are concept-driven. In each case, though, they were made possible by the dialogue that ADR promotes. (ADR is a "carrot and stick" situation. The carrot for both utility and intervenors is ability to control your own destiny through a negotiated result. The stick on both sides is the cost and risk of an adjudicated result. Faced with the dual pressure of this carrot and stick, parties often find solutions they would not otherwise see.)

***2.2.35*** At a less obvious level, settlements can be more subtle because of the diversity of views in the room, and the ability to communicate in a non-adversarial way. It is difficult for a Board panel in an oral hearing, faced with conflicting evidence and argument and adversarial positioning, to spot some of these subtleties. In an ADR, the fact that Utility A needs and wants slightly more focus on capital enhancement, while Utility B's issues are personnel related, and Utility C is struggling to get on top of its

IT strategy, etc., often surface through dialogue.

***2.2.36*** Thus, it is submitted that both on cost, and on quality of results, the representation of ratepayers in the ADR process is a significant benefit to the Board and its regulatory processes.

***2.2.37*** ***Conclusion.*** The point of this discussion is not for SEC and other intervenors to pat themselves on the back and wallow in their value to the process. Aside from being unseemly, that would be decidedly unhelpful.

***2.2.38*** The point is, instead, much more mundane and basic.

***2.2.39*** Ontario has a model that works well. As with any system that is working, there will be potential for improvement, but there is also a strong imperative to preserve the current value and benefits. "Fixing" the current system should be considered only to the extent that it clearly improves the process, without risking the existing benefits. The better your existing system, the more you put at risk if you decide to change it.

## 2.3 ***Financial Context***

***2.3.1*** The other important context to this discussion is regulatory cost. However, that issue is not just one of the cost of intervenors, but also the other costs of regulation borne by the ratepayers.

***2.3.2*** ***Ontario Energy Board.*** The easiest of those costs to identify is the Board's budget. The Board's total budget for the current fiscal year is about $35.1 million, recovered entirely from regulated entities and licensees. A small portion of that comes from unregulated licensees (about 1%). The balance comes essentially from levies on regulated entities, who then include it in their regulatory budgets, and so is paid for by the ratepayers.

***2.3.3*** ***Utility Regulatory Budgets.*** More difficult to estimate is the overall regulatory costs of the utilities. SEC estimates that the total of the regulatory budgets of all of the rate-regulated utilities in Ontario is around $75 million per year. This is roughly the amount included in rates for regulatory costs. Deducting the amounts included in that total for OEB assessments and intervenor costs produces a net utility regulatory budget of about $35 million, all paid by the ratepayers.

***2.3.4*** This figure undoubtedly understates the total regulatory costs of the utilities. Regulated utilities regularly note that their costs of meeting their rate regulation obligations include many costs that are included in other OM&A areas, such as Executive and Management Compensation, Legal Departments, amounts charged by Affiliates. Of course, in addition many operational staff have regulatory activities as a key part of their job description, especially in a rebasing year.

***2.3.5*** Therefore, SEC believes that in estimating the internal regulatory costs of the utilities at about $35 million per year, that is likely a material underestimate.

***2.3.6*** We note, however, that some material component of the $35 million per year is not primarily "making the pitch" on behalf of the utility position. Some part of that is simply complying, in a largely objective way, with routine regulatory requirements. As with the additional costs outside of the regulatory budgets, we do not believe that these regulatory administration costs can be estimated with any accuracy. For the purpose of this analysis, we have assumed that the two offset each other.

***2.3.7*** ***Associations and Lobbying.*** The third component is amounts paid by the utilities to their associations, much of which is used to support lobbying and other activities promoting utility interests. The four primary associations are the Electricity Distributors Association (electricity LDCs), the Ontario Energy Association (primarily gas distributors, but also others), the Canadian Electricity Association (electricity transmitters and distributors), and the Canadian Nuclear Association (OPG). There are a number of other utility interest organizations supported by the utilities as well, such as the Ontario Energy Network, the Canadian Gas Association, etc.

***2.3.8*** Many of these organizations do not make their total budgets public. In other cases, they do not provide a split in costs between Ontario and the rest of Canada. In still other cases, they do not provide a split between regulated utility fees and private sector support.

***2.3.9*** Subject to those data limitations, SEC estimates (from data in rate applications, and from limited publicly available information), that Ontario regulated utilities fund their various associations (excluding fee for service entities such as MEARIE) annually in excess of $10 million. Essentially all of this money is provided by ratepayers.

***2.3.10*** We note that there may well be direct lobbying going on by Ontario regulated utilities, outside of their associations. Some of that would be included in their general regulatory budgets, but there would likely be additional amounts included in their General and Administrative budgets. All or most of these costs would also be borne by ratepayers, but we have not included them in this analysis, as they are impossible to estimate.

***2.3.11*** ***Conclusion.*** The above estimates suggest that the total cost incurred by utilities to make their own case for rate increases and other policy preferences is in the range of $45 million per year. Compared to the costs paid for intervenor involvement, that spending is about nine times the intervenor costs. All of it is paid by the ratepayers. In effect, for every dollar ratepayers spend to protect their own interests, they spend $9 to fund the utilities to protect their shareholders' interests, and they spend about $7 to fund the OEB to balance the interests of all industry stakeholders through the regulatory and adjudicative processes.

# 3 INTERVENOR STATUS

## 3.1 ***Introduction***

***3.1.1*** The Board, in its August 22nd letter, asked two questions under the hearing "Intervenor Status":

> *"1. What factors should the Board consider in determining whether a person seeking intervenor status has a "substantial interest" in a particular proceeding before the Board? For instance, should the Board require a person seeking intervenor status to demonstrate consultation or engagement with a constituency directly affected by the application?*
>
> *2. What conditions might the Board appropriately impose when granting intervenor status to a party? For instance, should the Board also require an intervenor to demonstrate how the intervening group or association governs the participation by its legal counsel and other representatives in the application?"*

***3.1.2*** Fundamental to these two questions is an unstated, and more basic question: How does the Board know that someone claiming to represent a group of ratepayers or others with an interest in an application actually represents them, and is not just some officious intermeddler, or, worse, a consultant just trying to get a paying assignment?

***3.1.3*** In order to look at these questions, in our view the first and most important step is to make a clear distinction between an intervenor, and an intervenor representative.

**(a)** The **intervenor** is an organization purporting to speak on behalf of a constituency with an interest in an application (schools, for example, or seniors, or individuals concerned about the environment). The Board obviously has an interest in whether such an organization in fact speaks on behalf of that constituency. The first question, above, speaks to this issue.

**(b)** The intervenor then hires **intervenor representatives**, individuals or firms who are consultants or lawyers with an expertise in energy regulation. The intervenor representatives deliver the intervenor's message on behalf of its constituency to the Board in Board proceedings. The Board would be concerned if a representative did not, in fact, speak for the intervenor, but that is quite a different question from whether the intervenor speaks for the constituency. The second question above speaks to this issue.

## 3.2 ***Consultation and Engagement***

***3.2.1*** Intervenor status is generally granted to an organization, not a person, so the analysis of intervenor status must be based on how the Board determines whether an organization represents a group with a "substantial interest".

***3.2.2*** ***Representing the Constituency.*** In the past, assessing whether an intervenor really represents a constituency has been relatively ad hoc, i.e. intervenors were identified/assessed using the concept of "I'll know one when I see it."

***3.2.3*** Put another way, intervenor status has been assessed by way of exception, rather than with some pre-determined procedure. Organizations that sought intervenor status had an obvious track record representing their constituency, so only those who lacked that had to be reviewed more closely.

***3.2.4*** For the most part, this has made a lot of sense, and has resulted in good decisions about intervenor status. Intervenors representing the public (as opposed to intervenors that are other utilities or other businesses related to the regulated utility sector ) have generally fallen into four loose categories:

**(a)** Organizations formed to represent a constituency generally (i.e. not specific to energy issues), that take on energy regulation as part of their overall representation of the constituency. CCC is part of this category, as is SEC, CME, LPMA and others. These organizations are not energy-related. They are generated out of the specific constituency, so representing that constituency on issues of concern to them is their primary raison d'etre. Energy is just one of their areas of representation. The examples are not limited to ratepayer interests. PWU and the Society are probably also in this category, representing the interests of union members in energy as well as many other areas. HRAI/HVAC is another such organization, representing the interests of HVAC contractors at the Board, but also in many areas unrelated to energy regulation.

**(b)** Organizations or entities formed for energy purposes as a coalition of organizations that would otherwise be in the first category, above. VECC is an example of that. Neither of its member organizations, the Ontario Council of Senior Citizens Associations and the Federation of Metro Tenants Associations, are energy related. Each has a legitimate interest in energy regulation, as do their many member organizations. However, by working together through VECC they represent those interests more efficiently. The same might be said of GEC, whose member organizations include environmental groups with interests outside of energy.

**(c)** Organizations formed by ratepayers for the express purpose of protecting their interests in energy regulation. The two most obvious examples are AMPCO and IGUA. In these organizations, the members each have a significant interest in the Board's proceedings, but by banding together they are able to have more efficient and more effective representation.

**(d)** Organizations formed by members of the public (whether or not in their capacity as ratepayers) to express public interest positions on energy issues. Some environmental groups may come within this category, for example.

***3.2.5*** ***Track Record.*** The reason this breakdown is important is that it shows an important fact, i.e. that the question of whether a proposed intervenor legitimately represents a particular constituency is, in most cases, non-controversial.

***3.2.6*** Consider many of the intervenors that appear before the Board regularly today. Is there any question whether SEC is a legitimate representative of the interests of schools? Is there any question whether AMPCO in electricity or IGUA in gas represent the interests of large users? What about CME, or CCC, or VECC?

***3.2.7*** The fact is that in most cases the answer is pretty obvious. Whether or not particular utilities like the positions these organizations are taking on behalf of their constituencies, there is no question about the organizations' legitimacy. They don't have that legitimacy challenged because – whether inside or outside the energy sector – they have a demonstrable track record. That track record is complete proof that they are legitimate representatives of their particular constituency.

***3.2.8*** ***Exceptions***. But Ontario has tens of thousands of non-governmental organizations, many of which are legitimate representatives of particular constituencies. Further, there is overlap between some of those organizations, so that in the end multiple organizations represent the same, or some of the same, people (like the EDA and OEA, for example) or interests.

***3.2.9*** Given this plethora of organizations, it is inevitable that at some point more than one organization will want to represent the same or very similar interests. What should the Board do in those situations?

***3.2.10*** This has happened, of course. SEC is very aware of one high profile example, in which two organizations – OASBO and OPSBA – sought in 2003 to represent the interests of schools in Board proceedings.

***3.2.11*** The Board solved that, not by applying some general procedure, but by looking at the specific situation. After providing a warning to the two organizations that the duplication would not be accepted by the Board going forward, the Board in the next case ordered a single cost award (as if only one organization had participated), and split it between the two.

***3.2.12*** Rough justice, perhaps, but the organizations got the message. Within a very short time, those two organizations, as well as five others representing components of the education sector, had folded all energy regulatory activities into an existing joint entity, Ontario Education Services Corporation, and the School Energy Coalition was born. Formal governance and reporting, as well as staffing and an advisory committee, were also implemented at that time. An invoicing system for individual school boards was implemented to cover costs not covered by cost awards. Those systems all continue.

***3.2.13*** The Board's solution to the school situation may not have worked in a different case of duplicative interventions. If the Board were faced with two organizations in the future seeking to represent the same constituency, the SEC approach would certainly have to be considered, but there may be others that more closely suit the particular situation. Two environmental groups with strongly differing views on environmental issues, for example, may not be susceptible to the same solution. In cases like that, the solution may be for the groups to more clearly distinguish between their respective constituencies, or to identify differences between their areas of interest.

***3.2.14*** The point, however, is that in those few cases where there are multiple organizations "competing" to represent a particular constituency, the Board already has multiple tools at its disposal to deal with that. The Board rarely has to pick "winners", and probably should not. The Board should, instead, keep all of its options open, so that representation issues can be dealt with in the best way for the actual situation presented.

***3.2.15*** ***Consultation Requirements – the Board's role.*** The Board specifically asks, in Question 1, whether it should require intervenor organizations to show how they are consulting with the constituency they represent. In our view, the answer is a very resounding no, unless there is specific reason to believe that an organization is not acting in the interests of their members. This should be a rare and exceptional case.

***3.2.16*** The starting point is that organizations that generally represent the interests of a constituency will develop their own methods of identifying and testing those interests. Those methods will be specific to the organization, and to the nature of its membership.

***3.2.17*** We will continue to use schools as an example. SEC, through its umbrella organization OESC, is constantly engaged in discussions with member organizations, and their members, about issues of concern, whether in energy or otherwise. These organizations exist for the sole purpose of speaking on behalf of their members on issues of concern to those members. There are two parts to that: a) identifying issues of concern to the members, and b) determining what to say about those issues. Organizations like this have to be proactive in receiving member input on the issues, and testing positions to ensure the members are onside. The members demand this, and the staff and directors on the organizations see this as their focus.

***3.2.18*** So, for example, in the energy area SEC regularly attends meetings of various member groups (school building managers, for example, or school board finance officials) to get input and feedback. Often SEC staff or external advisors give presentations at those meetings. The Board will be aware how often SEC brings up issues in proceedings that have had their genesis in the regular consultation with members.

***3.2.19*** Further, SEC's member organizations and their members require regular and detailed reporting of the activities carried out on their behalf. Some of this is formalized in

written reports circulated to member school boards and other organizations. Some of this is formalized in a presentation at the OESC annual meeting, and periodically in presentations at the annual meetings of member organizations. Some of this is less formal, such as phone calls, emails and other communications with school boards that have a specific interest in a particular issue.

***3.2.20*** The ways that SEC interacts with its constituency are very specific to that constituency. They do not exist because the Board wants SEC to talk to school boards. They exist because school boards have already determined how they will interact with their representative organizations.

***3.2.21*** The simple fact is that SEC and its member organizations neither need nor want the Board to tell them how to interact with schools. Those organizations do not claim to be experts in energy regulation. That's why they hire experts to represent them. By the same token, those organizations do claim to be experts in schools, which the Board is not. Those organizations know far better than the Board how the interests of school boards should be identified and promoted.

***3.2.22*** The same is true of many other organizations. They have different approaches to engage with their members and constituencies, but those approaches are usually different because their members and constituencies are different. In none of these cases does the Board have a greater expertise to stipulate how the organizations and their members should interact.

***3.2.23*** For example, some organizations use a "disseminate and wait" strategy, in which the organization sends out a newsletter, or updates a blog, or populates a website, and invites interested members of their constituency to respond. Where a constituency is diffuse, this can be more effective than trying to force engagement by everyone. Those who want to have a voice, are given the opportunity to do so, and those who prefer to be more passive have those wishes respected.

***3.2.24*** For other organizations, there are known opinion leaders within the constituency, and it is well accepted that those opinion leaders will know the range and direction of views of the members. Many industry associations, for example, are like this. The organization has to remained attuned to the views of those opinion leaders, knowing that in doing so it is expressing the views of the broader group. Trying to go out to the broader group directly is a waste of time and money, and is not what the broader group wants.

***3.2.25*** Still others can use sophisticated social media tracking and other means to identify what members of their group are talking about.

***3.2.26*** These are only examples. The point is that most organizations develop their own method of ensuring that their members' interests are identified and represented. If they do not, or they fail to do this effectively, they lose the support of their constituency,

and usually another organization takes their place as that group's voice. The Board's help in doing this is rarely required, nor in fact even helpful.

***3.2.27*** ***Consultation Requirements – Exceptions.*** In a very small number of cases, it is possible to identify organizations that do not in fact represent the interests of their members. This is usually organizations that once represented their members, but have been taken over internally by individuals with a specific agenda.

***3.2.28*** These situations, when they occur, are almost always self-correcting. An organization representing apple pickers can only go for so long focusing on grapes before its members will depart, forming a new organization that does speak to the interests of apple pickers. The errant organization will run out of money and other resources, and everyone will long since have stopped listening to them.

***3.2.29*** Where that doesn't happen, or where it will but it hasn't happened yet, the Board could in theory be faced with a situation in which an organization purporting to represent hospitals is in fact arguing for higher rates (perhaps so that there will be less sick people because of greater conservation and therefore reduced environmental impacts), and there is an obvious question whether the organization truly represents the interests of hospitals.

***3.2.30*** You can count on the fingers of one hand the number of times this has happened at the Board. In SEC's view, in the unlikely event that this did happen the Board should not have a pre-existing solution to the situation. The appropriate solution should be fashioned based on the specific situation. For example, if a group purporting to be an environmental group has a board of directors dominated by utilities, the solution to that situation is not to require the group to have focus groups with its members.

***3.2.31*** ***Conclusion.*** SEC believes that, in general, intrusion by the Board into the relationships between non-governmental organizations and their members – particularly how the organizations listen to and represent their members – is inappropriate and not productive. These groups usually know much better than the Board how that should be done, and do not need the Board's assistance.

***3.2.32*** In the rare case where there is direct evidence that an intervenor organization is acting contrary to the interests of its members, the Board should be reluctant to act. Where the Board does act, it should be with a response that is tailored to the specific concern being addressed.

***3.2.33*** There are, in our submission, no circumstances in which the Board should direct how intervenor organizations consult and engage with the members of their constituency.

## 3.3 ***Representation and Governance***

***3.3.1*** The second question is actually the simpler of the two. Once the Board accepts that a

particular organization legitimately represents the constituency they exist to protect, usually something that is relatively easy based on track record, the collateral question of whether the organization is instructing and supervising their lawyers and consultants is even easier to answer.

***3.3.2*** Any organization speaking on behalf of its constituency would only have a problem with whether their lawyers and consultants are saying the right things in three possible scenarios:

**(a)** They don't know what their lawyers or consultants are saying on their behalf.

**(b)** They know, but don't understand, what their lawyers or consultants are saying.

**(c)** They don't care what their lawyers or consultants are saying on their behalf.

***3.3.3*** In any of these cases, the likely immediate result would be that the organization would have a problem with its members, for the same reasons as outlined in the last section. Rarely can organizations allow their representatives to go off on a frolic for very long, before those the organization represents start asking pointed questions.

***3.3.4*** In practice, most parties dealing with lawyers and consultants do not investigate whether those representatives are in fact being properly instructed and supervised by their clients. Parties use a variation on the "indoor management rule", assuming that if an organization says Person A speaks for them, anything Person A says on their behalf is in fact the views of the organization.

***3.3.5*** In the legal world, a fairly strict rule applies. It is considered highly improper to challenge whether a lawyer speaks on their client's behalf, unless there is clear evidence to the contrary.

***3.3.6*** In the only recent case that we know of in the energy regulatory field, five or six years ago, a utility contacted the client organization directly to ask whether it supported a particular position their lawyer was taking. The client organization responded very vigorously, telling the utility that it was not the utility's job to monitor whether their lawyer was representing them properly. The organization was fully capable of doing that themselves, and didn't appreciate the utility assuming otherwise.

***3.3.7*** With respect to every intervenor organization that appears before the Board, the Board has had one or more direct dealings with the staff or directors of the organization, and so has no doubt about the organization's reliance on their various lawyers or consultants. The possibility that a lawyer or consultant would claim to represent an organization untruthfully or erroneously does not arise in energy regulation.

***3.3.8*** Once the Board is aware that the organization has selected Person A to speak on their behalf, in our view it is highly inappropriate for the Board to take any further steps to

interfere in how the organization instructs or supervises their representatives. In the same way as the Board does not delve into the instructions given by utilities to their regulatory counsel, the Board should not delve into how intervenor organizations instruct and supervise their regulatory counsel or other advisors.

## 3.4 ***Conclusion***

***3.4.1*** In both the relationship between the intervenor organization and its members, and the relationship between the intervenor organization and its representatives, the Board's questions suggest that it may be considering closer supervision of the internal activities of the intervenors. The grass-roots nature of the model, with its inherent flexibility, would be replaced with a "command and control" approach.

***3.4.2*** The Board should not, in our view, take any steps in this direction. One of the strengths of the Ontario model of public interest representation is that it is driven by those whose interests are being protected. If the Board seeks to insert top-down control of the internal operations of the public interest groups appearing before it, it will be undermining this key strength, and limiting the ability of ratepayers and other members of the public to decide and support their own interests**.**

# 4 COSTS

## 4.1 ***Introduction***

***4.1.1*** The Board's August 22nd letter asks four questions with respect to costs and cost eligibility:

> *"1. What factors should the Board consider in determining whether a party primarily represents the direct interests of consumers (e.g. ratepayers) in relation to services that are regulated by the Board? For instance, should the Board require the party to demonstrate consultation or engagement with a class of consumers directly affected by the application?*
>
> *2. What factors should the Board consider in determining whether a party primarily represents a public interest relevant to the Board's mandate?*
>
> *3. What conditions might the Board appropriately impose when determining the eligibility of a party for costs? For instance, what efforts should the Board reasonably expect a party to take to combine its intervention with that of one or more similarly situated parties? Should the Board reasonably expect parties representing different consumer interests to combine their interventions on issues relating to revenue requirement (as opposed to cost allocation)?*
>
> *4. Should the Board consider different approaches to administering cost awards in adjudicative proceedings? For instance, should the Board consider adopting an approach that provides for pre-approved budgets, pre-established amounts for each hearing activity (similar to the approach taken for policy consultations), and pre-established amounts for disbursements?"*

***4.1.2*** We will deal with each of these questions in turn.

## 4.2 ***Direct Interests of Consumers***

***4.2.1*** At a high level, this question is basically the same as the first question under "Intervenor Status". The issue is whether an organization that claims to represent a class or group of ratepayers, actually represents them.

***4.2.2*** ***Typical Intervenor Organizations.*** In most cases, the question of whether an intervenor organization represents the direct interests of consumers is pretty obvious. Organizations are formed for a particular purpose, which is readily apparent. In many cases, the organization is representing its constituency in other areas of concern, outside of energy, often for a number of years. In other cases, the organization is formed with the specific purpose of allowing its members to participate together in the energy regulatory process, producing efficiencies.

***4.2.3*** As we have discussed at length in Section 3.2 of these Submissions, the key here is track record. If the organization has a record of representing a particular constituency that is recognizable as a class or group of ratepayers, then the relevant criterion for cost eligibility has been met, and no further analysis is required.

***4.2.4*** Following along the same logic, set out in Section 3.2, it is neither necessary nor appropriate for the Board to inquire how such intervenor organizations engage or consult their constituency. That's what they do, and why they exist. The Board can add nothing to this.

***4.2.5*** ***Unusual Cases.*** Not all intervenor organizations fit into a neat category. In those cases, the Board's inquiry may be more complicated.

***4.2.6*** We can create a simple example. University of Toronto has a kind of think tank called the Mowat Centre for Policy Innovation, which conducts research and promulgates opinions on public policy issues. Suppose that the Mowat Centre initiates a new project to intervene in rate applications or Board policy proceedings on behalf of consumers generally. How should the Board handle that?

***4.2.7*** Unlike most organizations that represent ratepayers, this is one that was not formed for that specific purpose. A review of their constating documents and public materials may reveal that consumer representation is not central to their internal mandate.

***4.2.8*** That should not be the end of the discussion, though. What if the Mowat Centre had a long track record of consumer representation in other areas, like telecommunications policy, or door-to-door sales, or water management? What if the Mowat Centre had a long track record in energy regulation in other jurisdictions?

***4.2.9*** In those circumstances, it would be legitimate for the Board to take further steps to assess whether the Mowat Centre represents the direct interests of consumers. Some of the indicia would be things like the identities and role of their advisory committee or others supervising the proposed intervention; the other methods by which the interests of the proposed constituency are being identified; etc. For example, in the case of the Mowat Centre, things like their advisory group made up of utilities would suggest that they are not legitimate representatives of consumer interests.

***4.2.10*** It would, in fact, be a rare case where an intervenor organization purports to represent ratepayers, but does not have a specific ratepayer focus. Most groups like that would be considered public interest groups, rather than ratepayer groups. Thus, the issue of whether a given organization represents ratepayers will not normally be a concern.

## 4.3 ***Public Interest Intervenors***

***4.3.1*** When ratepayer organizations appear before the Board, it is essentially as of right, because they are defending their own financial interests in the proceedings. The Board

is an economic regulator, and ratepayer organizations are representing their own economic interests, short and long term.

***4.3.2*** The same is not always true of public interest intervenors. Although of course ratepayer organizations are also acting in the public interest, the category of "public interest intervenor" generally refers to organizations that are pursuing non-economic public interest issues. The most common situation is environmental groups.

***4.3.3*** There are two ways to look at groups in this category. One way is to treat them as ratepayer representatives, but representing ratepayers who share a common point of view rather than a common economic interest. The other way is to treat them as representatives of a particular view in society, unconnected to whether those holding that view are ratepayers or not.

***4.3.4*** In either case, the issue is not the identity of those represented, but rather ensuring that the particular perspective is before the Board. To test whether such an organization in fact represents that particular perspective, again the best method is track record.

***4.3.5*** As with ratepayer groups, it is generally not useful to inquire into the organization's engagement/consultation strategy. Track record is a better indicator of representation, and the important goal is to ensure that the particular perspective is presented well before the Board. If that goal is accomplished, then cost eligibility is justified and the money well spent.

## 4.4 ***Combining Interventions***

***4.4.1*** The Board asks whether it should impose conditions on intervenor participation in order to allow cost eligibility. Although the simple answer should be no, the issue is more subtle than that.

***4.4.2*** The examples the Board gives are a requirement to combine interventions, or to combine activities on particular issues. In both examples, the Board's existing rules and practices already achieve the preferred result.

***4.4.3*** ***Intervenor Co-operation***. Currently, the Board's rules and practices require intervenor representatives to work together to avoid duplication and promote regulatory efficiency. The intervenor representatives do just that.

***4.4.4*** As much as one might want to say that intervenor representatives co-operate because of the Board's expectations, that is only part of the story. The main reason we co-operate is that there is a lot to be done, and one or two people can't do all of it. In the interests of efficiency, and in order to ensure that we are able to represent our clients, we have to co-operate.

***4.4.5*** A typical rate application is 2000 to 4000 pages, plus up to an equal amount of

additional material from interrogatory responses, transcripts, etc. It is difficult enough to even cover all of that material effectively, but the challenge is increased because the material usually includes a number of key specialty areas, such as load forecasting, asset management, cost allocation, taxes, pension costs, etc. It is rare that one intervenor representative will have expertise in all of these areas. While all have exposure to all of these issues, it would be poor judgment for a lawyer or consultant to focus on a specialized area of expertise if they know another lawyer or consultant, for another intervenor, has a high level of knowledge and understanding of that area.

***4.4.6*** The challenge is further increased because intervenor lawyers and consultants are not looking at one or two applications in a year, or even at one time. Many intervenor organizations have to look at ten, twenty, or even more applications each year. While some active intervenors have two or more consultants or lawyers assisting them, the extent of the workload for a typical intervenor representative is still very high.

***4.4.7*** The solution to this is co-operation, and the Board will be aware that co-operation between intervenors is intrinsic to how Board proceedings normally unfold.

***4.4.8*** In a rate application, for example, the intervenor representatives will first ascertain who the individuals are representing each intervenor. This tells us what expertise is at the table, and allows us to assess what things should be the focus of each. The intervenors become, in effect, a team with a range of capabilities within the team. (Much like Board Staff often have different people considering different aspects of an application.)

***4.4.9*** Sometimes the intervenor representatives communicate directly with each other to split up primary responsibility for areas within the application. Usually, though, that is not necessary. The intervenors already know the expertise and preferences of the other consultants and lawyers. They already know what areas will be covered by others, and what areas others will expect them to cover.

***4.4.10*** That is not to say that intervenor representatives only look at part of an application, and ignore the rest. Each intervenor representative still has to review the whole application, because they need to ensure that the specific interests of their constituency are protected. Also, as we have noted earlier (para. 2.2.8 to 2.2.14 above) different ratepayer groups have different views of some issues, and want to ensure that those views are well expressed.

***4.4.11*** However, there is a substantial difference between a “light” review of an Exhibit, and a detailed review for the purpose of pursuing detailed interrogatories or other discovery. If a lawyer or consultant is going to rely mainly on another person for detailed analysis of an area, a quick read of the exhibit, perhaps even skipping some sections (ones that are highly technical, for example), is sufficient. Conversely, a detailed review means not only reading everything, but also things like:

**(a)** Cross-referencing to other areas of the application;

**(b)** Comparisons to other utilities;

**(c)** Calculation of trends and ratios, sometimes including modeling of different scenarios;

**(d)** Research outside of the application (such as best practices in asset management planning, or the credentials of a proposed expert, or legal research);

**(e)** Review of previous applications and other utility-specific filings; and

**(f)** Drafting of interrogatories.

***4.4.12*** This sort of co-operation continues throughout any application process. This is why, in recent years, duplication in interrogatories, or in technical conference or oral hearing questioning, is increasingly uncommon. While this was once a complaint, it is now rare that more than two or three interrogatories, for example, are similar to interrogatories by another party. Even in those cases, it is often because the two intervenors are attacking the same issue from different directions.

***4.4.13*** The same is true when there is an oral hearing or technical conference. Intervenors will discuss with each other their areas of concentration, and one will take the lead in the questioning. Others understand that their questioning must avoid ploughing the same ground as someone who preceded them.

***4.4.14*** Of course, if experts are to be retained, the Board will be aware that for years intervenors have formed ad hoc groups to retain experts jointly. It is very rare to have duplication in expert evidence on the intervenor side.

***4.4.15*** Final argument/submissions is another area in which co-operation is built into the process. The Board will be aware that intervenors with common interests or similar positions often circulate drafts of their submissions, and it is normal to have submissions that expressly adopt the positions and analysis of someone else.

***4.4.16*** Of course, this pattern of lack of duplication is not just because intervenor lawyers and consultants are busy, and so have to be efficient. And, it is not just because we can't advance the interests of our clients effectively without co-operation among intervenor representatives. It is also because the Board regularly monitors duplication, and is not willing to allow intervenor representatives to waste the Board's time. For example, in oral hearings cross-examinations that go on too long, or go over ground already covered, are normally cut off. This is as it should be.

***4.4.17*** We note that, in policy discussions, the level of co-operation is often even more pronounced. Because policy discussions are so specific to individual issues, the ability

to rely on the intervenor lawyer or consultants who are most expert in that area is enhanced. For example, schools care a lot about reliability, but undoubtedly there are other intervenor representatives that can pursue these issues better than SEC. In gas proceedings, there are some consultants that are intimately familiar with gas supply and transportation issues, and the Board will have seen other intervenors, such as SEC, deferring to their expertise. That doesn't mean that SEC will not have policy positions in these areas. It does mean, though, that we can leave the heavy lifting to others, and concentrate on how our members' specific concerns and perspectives should be expressed within the overall discussion.

***4.4.18*** The point, of course, is that there is no problem to solve here. The Board does not currently have a problem with duplication and wasted effort by intervenors. Whenever a problem starts to surface, the Board's experience in managing its own process kicks in, and the problem is nipped in the bud.

***4.4.19*** So since there is co-operation already, should the Board simply formalize that process? The obvious answer is no. The current system is highly flexible, and is working well. Formalizing it means adding bureaucracy (meetings and agreements, all a complete waste of time) and thus cost, to achieve no incremental benefits. In fact, it is likely that a more formal co-operation requirement, by lacking flexibility, would probably be less effective.

***4.4.20*** ***Utility Combinations.*** We would be remiss if we did not come back to context on this question. It is important to keep in mind that the big money is being spent here, not on the intervenor side, but by the utilities and the Board.

***4.4.21*** So, for example, on a rate application when the utility and the intervenors are in the room, what are the numbers? The answer is that in many cases the number of personnel and advisors there for the utility – in an ADR, at a technical conference, in a meeting – will exceed the number of intervenor representatives, often by a factor of two. And if you look at the overall cost of those personnel in those situations, it is rare that the cost of the intervenors being there is as much as the cost of all the utility representatives there.

***4.4.22*** In policy consultations, the difference is even more striking. It is normal in a major consultation to have twenty to fifty utility representatives in the room at a stakeholder conference, compared to four to six representing ratepayers. On working groups, a ratio of four to one or more is normal. Do utilities not have a common interest in reliability? Or low income policies? Or the scorecard?

***4.4.23*** In our submission, if the Board seriously wants to save money by cutting back on duplication, the place to start is the $45 million of ratepayer money the utilities are spending to defend their interests, rather than the $5 million of their own money that the ratepayers are spending to defend their own interests.

***4.4.24*** ***Conclusion.*** SEC therefore submits that the Board already has rules prohibiting unnecessary duplication and inefficiency, and those rules are working. Further restrictions on ratepayer representation in this area would be fundamentally unfair, and of no actual benefit to the process.

## 4.5 ***Changes to Costs System***

***4.5.1*** The Board has asked whether stakeholders believe there should be changes in the administration of intervenor costs, such as requiring pre-approval of budgets. In our submission, there should be changes, but budget pre-approval is not one of them.

***4.5.2*** ***Budgets***. Dealing first with the issue of pre-approval of budgets, SEC believes there are four clear reasons why this is not a good idea.

***4.5.3*** First, at the beginning of a proceeding, it is not possible to identify the issues that will take the most time, or cause the most controversy, or are the most complicated. A careful review of the application can identify what is most likely to start out as problematic, but that is not predictive of how the proceeding will unfold. A high capital budget, for example, may look like it will take a lot of time. However, review of past spending by that utility, coupled with its load forecast, may make the capital budget non-controversial. On the other side, the trend of OM&A may be the hidden issue that ends up being the main problem.

***4.5.4*** In any case, the biggest reason for higher than normal intervenor costs is a bad application. That is not always readily apparent. Bad applications are sometimes quite "pretty" on the surface, but when you look carefully under the hood you find a lot of things that need work. The time commitment skyrockets. Usually in these cases things continue to surface, even as late as ADR.

***4.5.5*** As a result of these uncertainties, the overall budget for a given proceeding is not predictable at the outset.

***4.5.6*** Second, pre-approval of budgets would require that the Board, early in the process, would have to assess how much cost is reasonable in that proceeding. How will the Board do that, before any of the issues have surfaced and before interrogatories have identified complications and concerns?

***4.5.7*** Further, who will do that? It is unreasonable to expect Board members to review the application at the outset and form an opinion on the proceeding's complexity. Someone on Board Staff would have to be given that responsibility. Before anything happens, the case manager, for example, would have to review the entire application, not just for completeness, but also for all possible issues, and do a calculation of a reasonable cost range for that application. How much time that would add to the process is anybody's guess. Then, the Board panel would then have to rely on the "evidence" of the case manager to determine the reasonableness of intervenor budgets.

***4.5.8*** None of this is realistic. At the beginning of a proceeding, the Board is not in a position to adjudicate the reasonableness of cost claims in advance. Board members know how much of a challenge it is at the end of the proceeding. Doing the same thing in advance makes it that much more difficult to produce a fair result.

***4.5.9*** Third, pre-approval of a budget changes the dynamic of a contested proceeding, by providing the utility with a tactical advantage. Once the budget is set, the intervenors have finite resources, while the utility's resources remain unlimited. In the most extreme case, the utility can simply "rag the puck", building up the hours so that the intervenors run out of budget.

***4.5.10*** Of course, utilities will say that they have whatever budget is in their application, but that misses two key points: the utility will usually include in its regulatory budget the most expensive proceeding it can reasonably expect (an oral hearing), and the utility can always amend its budget during the process if it is understated.

***4.5.11*** It would be inherently unfair to place no limits on the amount of ratepayer money the utility can use to defend their point of view, while placing limits on the ratepayer money available to intervenors.

***4.5.12*** Fourth, and most important, pre-approval of budgets is not an improvement over the current system. The current rule is that costs must be "reasonably incurred". Intervenors are at risk for their spending, and the Board can determine at the end – when they have seen how the proceeding unfolded - whether their spending was reasonable.

***4.5.13*** If there was pre-approval, how would that change? Since cost claims are generally pretty reasonable already (with some exceptions), the overall cost of the process is not likely to change much. If anything, it might be higher, because budgets have to build in contingencies, whereas actual spending is the real thing. The real change would be that the Board would be adding a difficult pre-hearing process, the only impact of which would be to make proceedings longer, and provide a tactical advantage to the applicant.

***4.5.14*** For these reasons, it is submitted that pre-approval of budgets is not appropriate.

***4.5.15*** ***Utility Data.*** There are two changes to the costs process that, in our view, would be valuable.

***4.5.16*** The first change is that, when considering cost claims, the Board in our view could benefit from further contextual information. To that end, SEC proposes that, at the same time as the intervenors file their claims for costs, the applicant should be required to file a similar document setting out all of its costs of the application process, including both internal and external costs. The filing would be public, like cost claims, and would include invoices from external counsel and lawyers, and similar documentation.

***4.5.17*** The intention is not that the Board would then make any decision on the reasonableness of the applicant's costs. The purpose, instead, is to allow the Board to put the cost claims of the intervenors in an overall context. After seeing a number of packages such as this, the Board will be in a position to see how complex any given application has been behind the scenes. For example, if cost claims seem to have high amounts for ADR, relative to other applications, the Board can see whether the utility's costs for ADR have similarly been high relative to other utilities.

***4.5.18*** We note that a collateral benefit of requiring this filing is that the Board will begin to develop a database of utility regulatory costs for applications, which can then be used in the future to inform policy on keeping regulatory costs down.

***4.5.19*** ***Hourly Rates.*** The second change is with respect to acceptable hourly rates for lawyers and consultants.

***4.5.20*** In SEC's submission, the Board should do a review of market rates, at least every three years, and should then apply those market rates, not just to intervenor cost claims, but also to the hourly rates of utility advisors. Utilities should be required to limit the hourly rates they pay to their counsel and consultants to the same rates that intervenors pay to their representatives.

***4.5.21*** We do not expect this to increase average rates for intervenor advisors, although a full review might result in those rates being more granular than the current four levels. What we would expect, though, is that the hourly rates paid by utilities to their counsel would be substantially reduced, producing a material saving for ratepayers.

# 5 MODIFICATIONS TO THE PRACTICE DIRECTION

## 5.1 ***General***

***5.1.1*** At this stage in this consultation, SEC is not in a position to propose specific changes to the Rules or Practice Direction. Some of the discussion in these Submissions would, if adopted produce such a result, but we believe we would benefit from hearing the views of others before refining our suggestions and making specific rule change proposals.

# 6 GENERAL ISSUES

## 6.1 ***Conclusion***

***6.1.1*** SEC appreciates being allowed to provide input to the Board on these important issues.

## 6.2 ***Costs***

***6.2.1*** SEC submits that it has participated responsibly in this process with a view to providing assistance to the Board, and requests that the Board order payment of its reasonably incurred costs for that participation.

All of which is respectfully submitted.

Jay Shepherd
Counsel for the School Energy Coalition