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Review of the Framework Governing the

Participation of Intervenors in Ontario Energy Board Proceedings

POST-CONFERENCE

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PREAMBLE

The disadvantages to participating remotely in conferences like this (not benefiting from body language, being relegated to the back of the bus insofar as comments are concerned, not even knowing who is in the room, etc.) are sometimes compensated by speakerphones and microphones being left on during breaks. Is one really eavesdropping by paying attention to an informal conversation about $330 an hour? The essence of the not entirely off-line discussion thus captured was:

> 'if the Board is trying to reduce ratepayer expenses it need look no further than the fees charged by counsel representing utilities'.

If this Review was motivated by budgetary considerations, the excellent and to date unchallenged data provided by the London Property Management Association (LPMA), the School Energy Coalition (SEC), the Vulnerable Energy Consumers Coalition (VECC), and other participants, helped to put things in perspective. EnWin estimated that intervenors before the Board cost ratepayers "about a nickel per month" and the SEC estimated that for every $1 intervenors cost ratepayers, applications by their Local Distribution Company (LDC) cost them $9 and the Board costs them $7. If there are efficiencies to be made in the regulatory process, it would appear to make much more sense to follow the money.

Although it is true that the costs of intervenors cannot be reduced to just the $5.5 million because *inter alia* the number, if not duplicity, of their interrogatories also increases the costs of applicants, the example provided by one LDC during the conference of having to respond 36 times out of 665 with the simple phrase "Please see" does not appear to be terribly onerous. Responding to the other 629 questions is simply one of the costs of doing business in a regulated environment.

In addition to possibly upgrading its remote meeting technology, the Board may also wish to re-consider the manner in which it conducts policy consultations. As many pointed out, most participants had to second-guess its motivations in launching this review as it put very little meat on the table to argue over and its staff and facilitator were reluctant to provide any further details during the conference.

If the intention was to seek unbiased comments, that didn't quite work as planned either, given the consultations that some participants engaged in before submitting their comments. Although the mostly excellent comments by the SEC obviously benefited from its considerable knowledge and experience in this field, they also appeared to benefit from such consultations, which might explain why they were submitted after the deadline.

This practice reinforces the impression that some intervenors work perhaps too closely together and although they may not represent the same constituencies, their positions on many issues can be very similar. There is a difference between the kind of close cooperation between intervenors promoted by the Board to reduce costs and the kind of price- or policy-fixing practices that are normally sanctioned by regulators. Although it is true that the public interest is well served when diverse experts reach the same conclusion (although that has yet to advance climate change negotiations!), it would have been preferable if all participants had crafted their comments independently.

Ironically, it was hard to believe that a major member of the Electricity Distributors Association (EDA) could not explain why its lobbyist was making different arguments than those put forward by its largest funders, presumably, given the reluctance of the EDA counsel to be as transparent and accountable as the Board when it comes to revenue allocation.

It was also unfortunate that no one else in the room knew how much the EDA is paid to represent the interests of LDCs, was willing to provide that information, or would clarify the LPMA written estimate that ratepayers contribute about $45 million per year to the EDA (SEC used a more conservative estimate of $10 million) so that it can:

> provide Utility Distribution Companies (LDCs) with the valued industry knowledge, networking opportunities and collective action vital to the business success of each member.

Even harder to understand was the assertion that there is no link between the EDA's budget and its role, if any, in instigating this review or engaging in other activities designed to promote the "business success" of its members. EDA Annual Reports are only available on its website to members, so there is no easy way to know how much ratepayers pay for golf tournaments or conferences in luxury resorts, but we do know that none of the $5.5 million paid to intervenors before the Board to protect ratepayers' interests is spent in that manner, at least not directly.

There remains some difference of opinion about who really represents the public interest. Despite its generally excellent and surprisingly well-written comments, EnWin suggested during the conference that:

> Really, we all are in pursuit of the public interest, the Board, Board Staff, utilities, stakeholders.

As other intervenors pointed out, LDCs (including public utilities) are creatures of

corporate law and act in their own corporate interest, not in the public interest. The fact that some LDCs are owned by cash-strapped and conservation-challenged municipalities makes no difference. As the Building Owners and Managers Association (BOMA) pointed out, public ownership of utilities can even make matters worse.

In retrospect, the stakeholder conference might have been more productive had the facilitator been directed to identify points of divergence, if not disagreement, and then focused on them instead of allowing participants to repeat many of the same arguments they made in their written submissions. That said, it was refreshing to hear the *plaidoyer* of participants like Thomas Brett of BOMA and Doug Cunningham of Nishnawbe Aski Nation (NAN), who represented their constituencies with verve and veracity.

COST-EFFECTIVENESS OF COST-AWARDS

All intervenors and all applicants reported being generally satisfied with the current framework. As NAN and others pointed out, no evidence has been provided of any problem or abuse of the current approach followed by the Board.

The only discordant note was a reference by the EDA to “lack of proper safeguards” resulting in a “cumbersome and more costly” process. In fact, there are many proper safeguards in place. If the process has become cumbersome, it might make more sense to improve implementation of the safeguards rather than to adopt a new model unless there are other factors at play.

Everyone agreed that some tweaking could be done to improve certain aspects but most concluded that there was no need for any major changes. Although no one disagreed with the need to improve cost-effectiveness, numerous participants pointed out that cost-cutting measures that would reduce the

diversity and thus the quality of the information upon which the Board makes its semi-judicial decisions would be “misplaced and inappropriate”.

VECC pointed out that even if only 10% of the reductions in utilities’ revenue requirement could be attributed to the work of intervenors, the cost awards program has been “a remarkable financial success and a bargain for ratepayers”. This point was reiterated during the conference by numerous participants and was dealt with thoroughly in the written comments where the costs of intervenors are described as “minuscule” and “immaterial”. Although some participants argued for expanding, reducing, or restricting cost awards, no one challenged their usefulness to both the Board and to ratepayers, if not to applicants.

VECC observed that other participants reported that the ratio of cost claims of $879,792 for cost-of-service applications to the approved revenue requirement of $387 million is only 0.23%, much less than the 0.5% materiality threshold of the Board. VECC righty concluded that “things are not out of control” but the EDA went on to claim that:

> The cost to the utility and ratepayers in dealing with the interventions is incremental to cost awards paid. It is a significant cost to ratepayers, and the cost associated therefore with an inefficient and duplicative intervenor process is a substantial unnecessary cost imposed on ratepayers.

The EDA also suggested that “there should be a more robust and constructive role for Board Staff, which will lead to reducing intervenor costs”. Indeed, a more robust role for Board staff could lead to reducing intervenor costs as well as overall costs. Board staff could, for example, show applicants how to prepare better applications and perhaps even suggest that they retain more cost-effective counsel.

As NAN pointed out, “where you stand in this matter depends on where you sit” and it comes as no surprise that most applicants favour more restrictions on

intervenor status and funding, whereas most intervenors are generally pleased with the current rules and their interpretation by the Board.

NAN also pointed out that, as a semi-judicial body overseeing one of the most important sectors of Ontario's economy, the Board should not be expected to reduce its regulation to the most cost-effective model but rather to ensure that its important decisions take into consideration the best advice it can get from a diversity of sources. As NAN further noted, the mandate of the Board is:

> to promote economic efficiency and cost-effectiveness, but not in hearings -- in the generation and transmission and distribution and sale and demand of electricity.

DISTRIBUTION OF COST AWARDS

There were considerable efforts by some intervenors and applicants to change the way in which costs are awarded by the Board. As VECC noted, if any efforts by applicants or their lobbyists to reduce cost awards to intervenors succeed, there should also be "symmetrical" reductions in the costs applicants are able to pass along to ratepayers.

While generally supporting the existing framework, both gas utilities argued for much tighter controls on granting intervenor status and cost awards. If implemented, such measures could significantly reduce the diversity and quality of information provided to the Board, which is already the subject of some concern.

As NAN pointed out that:

> nine intervenors accounted for almost 4.4 million of the 5.5 million in funding. And further, four intervenors, the Vulnerable Energy Consumers Coalition, the Consumers Council of Canada, the School Energy Coalition and Energy Probe, accounted for about 50 percent of the intervenor funding granted by the Board last year.

In arguing to narrow considerably the intervenor community, both Union and Enbridge appear to be considering a cost-cutting Faustian pact by dealing only with the devils they know.

Several applicants suggested that some form of capping cost awards has value, at least to allow them to have some kind of budget going into a proceeding. The *proviso* is that caps could be adjusted by the Board during a proceeding that turns out to be more complicated than planned and that the Board always retains the right to award only reasonable costs for proceedings that take far less time than planned. As SEC rightly pointed out, however, it is the quality of applications that has the greatest bearing on the regulatory costs to process them so setting caps would be difficult to begin with and would have little value when there are significant changes during a proceeding.

EnWin proposed that a Working Group be established to work out the details but suggested that caps be based on the number of LDC customers. Others argued that caps would add another bureaucratic layer to the existing framework and could even lead to higher costs in a race to the top.

CHANGING CONTEXT

Perhaps the most telling comment made during the conference was by EnWin's representative, who noted that its system peak has fallen from 657 megawatts in 2006 to only 485 megawatts in 2013. The recent announcement by the Ontario Minister of Energy that the Province will not proceed with the construction of over $20 billion of new nuclear power plants is further evidence of significant change in the electricity sector, if not yet the energy sector, in Ontario. It is clear that practices that served various interests well over the last 50 years can no longer be relied on to do so in the future.

Another factor to be considered is the degree to which ‘out-of-court’ settlements are reached between applicants and intervenors. For participants like Ecology Ottawa, whose experience has been limited primarily to oral hearings and technical conferences, the work accomplished in settlement conferences that helps to streamline the regulatory process and reduce costs is undervalued because it happens behind-the-scenes.

It is also quite likely that the kind of posturing and legal wrangling that sometimes characterizes hearings before the Board contrasts sharply with the lower-profile but more productive work that occurs when intervenors cooperate and applicants negotiate during settlement conferences. As most of the work of the Board appears to be settled in that way, it would not make sense to contemplate major changes to the existing framework based primarily on what happens – or not – in hearings before the Board.

Given that energy prices in general will increase over the next few decades – hopefully more than sea levels – and that electricity prices will almost certainly continue their upward spiral as more of the real costs are incorporated into rates, the suggestion by NAN that the work of intervenors will be needed even more is quite salient.

Applicants or their counsel who believe that “everyone's in it for self-interest, regardless of whether it's a utility or whether it's a ratepayer of any other sort” might have a different opinion, or at least be more guarded in their comments, if they were to volunteer at their local food bank, women’s shelter, place of worship, or environmental organization. They would see many people who believe in helping others, protecting the innocent, or safeguarding the future and who do so not in their own self-interest but often at some risk to their own self-interest.

REPRESENTIVITY OF INTERVENORS

VECC rightly expressed some consternation about the amount of time spent on questioning whether or not intervenors truly represent their respective constituencies, or as one applicant suggested, just their “personal interests”.

VECC also questioned the suggestion that intervenors with no members in an applicant’s territory might not be in the best position to represent the ratepayers in question. Although it would clearly be best if provincial organizations had members across the Province, a complementary approach would be to facilitate the inclusion of intervenors with a clearly defined membership base in the applicant’s territory. There is benefit to all by having professional, outside intervenors working together with local intervenors.

That said, as many participants pointed out, it is unreasonable to expect that any increased engagement by LDCs of their clients in pre-application consultations can replace in any manner the professional role of intervenors. As VECC rightly pointed out, LDCs should focus on engaging their clients:

> on the issues that they have some expertise, including using DSM programs, complaints or praise for utility operations, siting of facilities, et cetera.

EnWin also suggested that cost awards be extended to the EDA and municipalities, but appears to be the only LDC willing to pay higher costs. Although municipalities clearly do have closer contact with the communities than the Board or some intervenors, it is not clear how this would justify awarding them costs to intervene before the Board.

In any event, such a move could be considered to be “double-dipping” as the EDA is already funded by ratepayers through its members and many municipalities receive substantial profits from their LDCs. In addition, those

municipalities that are 100% shareholders of LDCs appoint their own directors to the Boards, many of whom are quite adept at bringing the municipal perspective to bear and, in many cases, it is to generate more revenue for municipal priorities like roads, not conservation or demand management programs.

The request of the Gas Pipeline Landowners of Ontario (GAPLO) and Lambton County Storage Association (LCSA) that all landowners directly affected by an application benefit from automatic intervenor status sounds reasonable as the 10-day limit to register with the Board is often difficult for those who do not follow the Board's work on a daily basis. Such status would presumably depend on some form of pre-registration and a more precise definition of "directly affected" than is the case for public interest intervenors. Although the Board currently interprets the 10-day and other rules in a progressive fashion, that should not stand in the way of tweaking things to provide greater clarity and certainty to directly affected landowners.

Suggesting as the EDA does that the current practice to determine cost-eligibility is "essentially arbitrary because of the disconnection between the criteria and objectives", calls into question what almost all participants, including applicants, regard as a fundamentally good framework. Asserting that the purpose of the "regime" is to come to decisions that replicate that of an "open and competitive market" is not helpful as it further confuses private and public interests. The EDA also appears to forget that an intervenor can be awarded costs not only because it represents a public interest but because it:

> 3.03(a) primarily represents the direct interests of consumers (e.g. ratepayers) in relation to services that are regulated by the Board;

The Association of Power Producers of Ontario (APPrO) suggested that it would be unreasonable to award costs to environmental organizations intervening on transmission line proceedings because "the Board has little or no environmental

jurisdiction” in such proceedings. On the other hand, GAPLO and LSCA “submit that the Board's mandate does include the protection of the environment”.

Although it is certainly true that the Board weighs inputs “independently and expertly”, one may recall that it took a Superior Court decision to confirm that nothing prohibited the Board from dealing with low-income issues and it is quite likely that a similar decision would be reached if APPrO were to continue to argue that:

> There is no "public interest" that the [environmental] NGO represents within the sphere of the Board's jurisdiction.

There is still much work to be done on the environmental protection front, but many ENGOs have long since expanded their mandates to include all three of the environmental, social and economic pillars of sustainable development because of their concern, in this field, to safeguard the public interests of future ratepayers.

Furthermore, the notion that “all ratepayers share an interest in lower energy bills” needs to be challenged, especially if lower bills means lower quality, reliability, or service. There are also thousands of ratepayers in Ontario, including many businesses, who choose to pay higher energy bills in order to ‘reduce their environmental impact, support the development of renewable generation, and help build a cleaner world for tomorrow’.

Although the recommendation by the Coalition of Large Distributors that intervenors applying for status be required to demonstrate a substantial interest in “precise” issues of an application is questionable, its recommendation that intervenors applying for cost-awards be required to show that they “participated in any pre-filing stakeholder engagement process” makes sense.

The suggestion by LIEN that one of the ways in which a party can be granted status is to “demonstrate how consultation or engagement with a constituency

occurs" is also questionable. One must also take with a grain of salt claims by organizations to represent agencies across the Province as there is sometimes confusion between subscribing to a newsletter and subscribing to the policies of an organization. Furthermore, claims to represent other organizations could be cited in efforts to disqualify such organizations from qualifying themselves for status or cost awards.

Although not directly addressed, there were a few comments made about the impact that the legal profession has on the intervenor process. There is clearly a need for intervenors to be nearly as well armed, legally speaking, as applicants but the dominance of counsel could be attenuated if the Board were to encourage more (not less) diversity of representatives. It should also drop the annoying rule that cost claims be signed by a notary, which poses no problems for most counsel but is an additional burden for other representatives.

It would be entirely appropriate for the Board to require parties to demonstrate the extent to which they have consulted or engaged 'their' consumers directly affected by applications that they work on, but requiring intervenors to file detailed instructions from their parties is neither practical nor useful. That said, there should be no exemption from any such requirement for legal counsel as the Law Society of Upper Canada is hardly in a position to confirm whether or not its members effectively engage the consumers they represent.

Enbridge started its presentation by noting that it was generally satisfied with the current system and had only some "subtle tweaks" to recommend. Unfortunately, any subtlety was lost in translation as Enbridge went on to confirm its written comments that intervenor status be granted only to parties:

1. "directly affected" by an application;
2. who can demonstrate an "effective means to obtain instruction and direction from representatives of that constituency"; and
3. who are not already represented by another intervenor.

Followed strictly, such rules could significantly reduce the number and diversity of intervenors, all in the name of efficiency. Would people “directly affected” by a ruptured pipeline crossing a river in their community be granted status if they were still struggling to organize an environmental defence organization or to provide effective direction to their representatives?

Enbridge further muddies the waters when it recommends that cost-awards be restricted only to parties that are “directly and substantially impacted by the application” as opposed to a party that “primarily represents the direct interests of consumers”. Finally, Enbridge lets the other shoe drop by recommending that:

> the Board should grant cost eligibility [only] to those intervenors who represent actual customer groups, as opposed to merely [sic] representing a public interest per se, a role that we see Board Staff is much better aligned to do, and we see that as Board Staff's mandate.

These comments at least have the merit of clearly demonstrating that large corporate interests, including all utilities, act primarily in their own interest, not in the public interest. Although others are better placed to comment on the changing role of Board staff over the last few decades, it is hard to understand how a major utility with extensive experience with Board staff could misconstrue its current mandate, which is to help the Board make well-informed decisions, not to represent any constituency or just the public interest.

The written comments of Union Gas, if adopted, would also significantly reduce the diversity and quality of information provided to the Board, as it is also suggesting that parties not “directly affected” by an application should not even be granted status, let alone costs.

Instead of making the somewhat disingenuous suggestion that “Counsel’s retainer or services agreement, or similar document, should be included in the intervention”, Union might want to suggest that the Board put a cap on the fees

charged by all counsel, including those of applicants. Seeking a condition that "the intervenor regularly consult its constituency concerning its participation in the proceeding" is also impractical.

Likewise, asking the Board to consider "counsel or consultants' professional achievement, experience before regulatory tribunals and expertise (rather than simply years of experience)" in fixing cost awards is not only quite subjective but unlikely to make much of a difference. If forced to live by the same rules, Union might find it difficult to retain counsel or consultants if they were to be remunerated *post facto* based on a subjective analysis of their success in defending applications before the Board.

The issue of intervenor independence, raised in the written comments of the Cornerstone Hydro Electric Concepts Association, might merit more attention if, in fact, there is evidence that some consultants might have a conflict of interest if they simultaneously work for various parties who may have different goals.

CONCLUSION

One would like to think that if the facilitator had asked conference participants if they could live with a slightly modified version of the NAN injunction, that is, to focus on the most cost-effective way of ensuring "the quality of representation and the quality of the decisions coming out of the Board", a consensus on such a mission statement could have been achieved.

If so, various ways of tweaking the existing framework have been tabled. Suggestions for significant changes in the way intervenors are granted status, are awarded costs, or participate more generally in proceedings, might best be left to consider during the Second Phase of this review, which would focus on whether or not the Board should consider adopting a different model to represent

consumer interests.

Finally, Ecology Ottawa wishes to thank the Board for being able to participate in this process, particularly because as one of the few newcomers it appreciates the opportunity to understand better how the Board works and it hopes that a fresh perspective on some issues might be useful. As a result, some of the comments made in the original submission of 27 September 2013 have been modified herein to reflect this better understanding of the challenges facing all participants in the regulatory process.