PETER C.P. THOMPSON, Q.C.
T 613.787.3528
pthompson@blg.com

Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen St, Suite 1100
Ottawa, ON, Canada K1P 1J9
T 613.237.5160
F 613.230.8842
blg.com

Borden Ladner Gervais

By electronic filing

October 16, 2013

Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
27th floor
Toronto, ON M4P 1E4

Dear Ms. Walli,

Review of Framework Governing the Participation of Intervenors in Board Proceedings – Consultation and Stakeholder Conference
Board File No.: EB-2013-0301
Our File No.: 339583-000167

The Board's letter of August 22, 2013, invites Interested Parties to submit comments on the issues explored at the Stakeholder Conference held on October 8, 2013. This letter summarizes the comments made on behalf of Canadian Manufacturers & Exporters ("CME") on those issues.

The comments which follow are reflected in the written submissions we filed on September 27, 2013, and in oral comments provided by counsel for CME during the course of the Stakeholder Conference. These comments can be summarized as follows:

1. The evidence does not demonstrate that cost eligible intervenors are the cause for material increases in the overall costs of utility regulation in Ontario. The annual total of cost awards to intervenors are but a small fraction of the overall annual costs of utility regulation.

2. The evidence does not demonstrate that the cost eligible intervenor constituency produces an unreasonable degree of inefficiency in the processing of utility applications which the Board is required to consider and determine. In fact, having regard to the high proportion of settlements that intervenors are able to achieve, their presence in proceedings before the Board materially enhances the efficiency of the Board's exercise of its adjudicative functions. The presence of intervenors representing various segments of the public interest is essential to the achievement of settlements. Board staff has no mandate to consent to a settlement of issues on behalf of particular segments of the public interest which is why it is not a signatory to the settlement agreements which materially contribute to the overall efficiency of the Board's operations.

3. Based on the points expressed in items 1 and 2, utility proposals to constrain the flexibility of the existing framework governing the participation of intervenors in Board proceedings, which are premised on assertions that the presence of intervenors representing a broad range of interests materially increases utility rates, should be rejected on grounds that the evidence does not support these assertions.

4. Regardless of the extent to which utilities engage in prior consultations with their customers, utilities do not "represent" either their customers or other segments of the public interest in proceedings before the Board. While they certainly "consider" those interests in formulating their applications, the interest which the utilities represent is the utility interest, the priority of which is to achieve the returns which the Board allows to utility owners. Similarly, Board staff "considers", but does not "represent", intervenor interests in proceedings before the Board. Modifications to the Board's current approach to intervenor status, cost eligibility and cost awards should not be rationalized on the grounds that intervenor interests will be adequately represented by Board staff and/or the utilities.

5. Preserving the flexibility of the existing regime continues to be the most appropriate manner of governing the participation of intervenors in proceedings before the Board. The Board should refrain from imposing measures at the outset of a proceeding that could constrain the ability of a cost eligible intervenor to participate in the process to the extent necessary to reasonably represent its interests. A determination of the value of cost eligible intervenors should continue to be made by the presiding panel at the end of the proceeding, having regard to a consideration of all of the factors listed in section 5.01 of the Board's *Practice Direction on Cost Awards* and, in particular, the following:

   (a) Time spent in the context of benchmarks, including the time spent and costs incurred by the utility in the pre-hearing and hearing stages of a particular proceeding,

   (b) The overall quality and effectiveness of the interventions,

   (c) Intervenor management of overlapping interests,

   (d) Settlement Conference activity supported by any information the Board requires pertaining to the actions that took place during that phase of the proceeding, which information does not disclose any confidential communications that took place between the participants therein, and

   (e) Inappropriate hearing room conduct which has continued despite an expression by the hearing panel of its concerns to the misbehaving party.

6. While the Board needs to be satisfied that an entity granted intervenor status represents a "substantial interest" in the proceeding, the Board should refrain from imposing rigid pre-requisites to the relationship between a party seeking intervenor status and its representatives in Board proceedings in order for that party to qualify for intervenor status. Instead, the Board should continue to flexibly apply the broad discretion it has under the existing regime to accord intervenor status to all those who can satisfy the

Board that, in their particular circumstances, they have a substantial interest in a particular Board proceeding.

7. Similarly, the Board should refrain from adopting measures calling for the Board to conduct a preliminary evaluation of the reasonableness of intervenor plans for reviewing and participating in particular Board proceedings. To be clear, we are not suggesting that a cost eligible intervenor cannot produce estimates of the time and resources that will likely be needed to adequately represent the intervenor's interests. Such estimates can be provided once the application materials have been reviewed and discovery questions thereon have been answered. However, calling for such estimates and other similar measures are likely to add, rather than reduce, the total time and costs of proceedings before the Board. Determinations of the value of interventions at the end of a particular proceeding continue to be the fairest and most efficient way for the Board to discharge its adjudicative responsibilities in the public interest.

We hope that this summary will be of some assistance to the Board and its staff when determining whether any further guidance is needed in relation to matters involving intervenor status, cost eligibility or cost awards, and whether any amendments to the *Rules* or the *Practice Direction* are warranted.

Yours very truly,

Peter C.P. Thompson, Q.C.

PCT\slc
c. EB-2013-0301 Interested Parties
Paul Clipsham
Vince DeRose

OTT01: 5948957: v1