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October 16, 2013

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
Suite 2700
Toronto, Ontario, M4P 1E4

Dear Ms. Walli:

**Re: EB-2013-0301 – Review of Framework Governing the Participation of Intervenors in Board Proceedings - Consultation and Stakeholder Conference - Further Comments of the London Property Management Association**

## I. INTRODUCTION

The Ontario Energy Board ("Board") initiated a consultation by way of a letter dated August 22, 2013 to review the framework governing the participation of intervenors in applications, policy consultations and other proceedings before the Board. The stated objective of the review is to determine whether there are ways in which the Board's approach to intervenors might be modified in order to better achieve the Board's statutory objectives.

A number of parties filed written comments on September 27, 2013 and later dates. A transcribed stakeholder conference was held on October 8, 2013. In the August 22, 2013 letter, the Board invited interested parties to submit further written comments on the issues explored at the stakeholder conference.

These are the written comments on the issues explored at the stakeholder conference provided on behalf of our client, the London Property Management Association ("LPMA").

## II. GENERAL COMMENTS ON THE VIEW PRESENTED AT THE STAKEHOLDER CONFERENCE

By the end of the stakeholder conference, it was apparent to all in attendance that this process was not, or at least should not be, about intervenor costs in isolation from other regulatory costs.

The general consensus was that there were three interrelated sets of regulatory costs. These costs were intervenor costs, LDC costs and Board costs. They are interrelated because the quality of the LDC evidence has a direct impact on how much time intervenors need to spending reviewing and understanding the evidence. Similarly, the number of interrogatories from intervenors affect the resources of the LDC to provide responses. The Board costs involve the amount of time and effort dedicated by Board staff to reviewing the evidence and doing interrogatories. In the event of an oral hearing, Staff has to spend additional time briefing the panel on the unresolved issues, adding to the overall cost of a proceeding.

There may be situations where more intervenor costs result in lower LDC costs, reducing the overall regulatory cost. For example, both EGD and Hydro Ottawa indicated the cost of dealing with duplicative interrogatories. In particular, Hydro Ottawa indicated it takes 15 minutes to deal with a duplicative interrogatory and that this additional time applied to all of the duplicative questions can result in additional staff time to process, including overtime. One way to avoid this LDC cost, of course, is to have the intervenors review each others' interrogatories (possibly through a conference call). While this may save time for the LDC it adds time and costs for each intervenor.

Similarly, some parties have suggested that Board Staff should do their interrogatories first. LPMA has found that having staff file their questions a few days prior to that of the intervenors does not provide any time reductions from the intervenor point of view. In fact it adds the time to review the Staff IRs. In addition, intervenors may have already begun their review of the evidence and have the majority of their questions drafted. The review of the Staff IRs can also lead to more intervenor questions, if they see that Staff has identified a potential issue that the intervenor had not, or had not yet progressed to that specific part of the evidence.

LPMA does offer a suggestion on the benefit of having Board staff file IRs and have the LDC respond to them before the intervenors file their interrogatories later in these comments.

As noted above, there are three interrelated regulatory costs associated with a hearing process. This review is focused on the smallest of these three buckets of costs, those of the intervenor. LPMA believes that in order to have a reasonable discussion of the costs, the Board and all stakeholders need to have factual information on all of the costs. These costs include the legal, consulting and internal costs incurred by the LDC to prepare an application (including the hourly rates paid to external legal and consultants, along with their hours), the time needed to prepare interrogatory responses, prepare for a settlement conference and an oral hearing. These costs need to be shown by the type of cost incurred, such as overtime.

In addition, the associated Board costs should be identified and separated into the components. Only then will all stakeholders have a view of the total costs and the interrelationship between the costs. In this process, we have only one bucket that represents less than 10% of the overall costs and this should be rectified immediately.

The other key agreement that came out of the stakeholder conference was that intervenor participation is valuable and needed in the regulatory process and should not be weakened or impaired in any way. The LDC representatives stated that the intervenors bring significant value to the process, as does Board staff. The only question, in their view, was whether or not this value could be delivered more efficiently.

LPMA agrees that this process should deal with the efficiency of intervenors, but not with just intervenors. It needs to be expanded to be a review of the efficiency of the regulatory process. This involves all parties involved. To date, this has not been addressed.

## III. COMMENTS ON ISSUES RAISED AT THE STAKEHOLDER CONFERENCE

LPMA's comments that follow in this section are based on the main issues discussed at the stakeholder conference.

### a) Budgets

The requirement for intervenors to submit a budget to the Board for approval was a common theme at the stakeholder conference.

LPMA does not believe that there would be much value to this budgeting exercise. As indicated below, hours vary based on numerous things, most of which are outside of the control on the intervenor.

As an example, the consultant to the LPMA was involved in fifteen cost of service applications for 2013 rates. Of these thirteen were completely settled through the settlement conference process. The total hours claimed ranged from 27.8 to 46.9 with an average of about 35 hours. Nine of the thirteen that were settled had the total hours in to the 30 to 40 range. The two remaining cost of service applications were for two of the larger electric LDCs in the province. One had a limited number of issues that went to oral hearing. The total hours spent on that application was 82.0. The other application did not have a settlement on any of the issues and everything went to oral hearing. The total hours spent on that application were 115.5.

LPMA submits that this shows that there is some variance in the hours for most of the applications before the Board that are ultimately settled. Similarly, the hours increase significantly when some, or especially all, of the issues go to an oral hearing.

For the thirteen cases that were settled, the hours covered the same procedural steps in each of the applications. There are generally three major parts to an application that is settled - review of the evidence and preparation of interrogatories; review of interrogatory responses and preparation of second round interrogatories or attendance at a technical conference; and the review of supplement responses, preparation for and attendance at the settlement conference along with the review of the draft settlement agreement. The variance in the number of hours in each of these three components across the thirteen applications was actually larger than the variance in the total hours. This is because of the different issues raised in the evidence, the quality of the interrogatory responses and the number of issues to be negotiated at the settlement conference. For example, a higher than average number of hours spent on reviewing the evidence and preparing first round interrogatories can be followed by below average time on second round interrogatories, especially if the responses to the first round are complete. This could then be followed by an average number of hours in the ADR process.

However, a prudent intervenor will have to budget for the worst case scenario, meaning above average hours for each of the three components. At the same time, they will have to budget for the worst case scenario which is that nothing was settled and everything has to go to hearing. At the beginning of the process, an intervenor would have to assume that all issues are contentious and will ultimately end up before the Board.

In the EB-2011-0054 Decision and Order on Cos Awards dated March 5, 2012, the Board concluded (in response to objections to intervenor costs by Hydro Ottawa) that (page 4):

> *"Analysis of and comparisons with cost claims filed and costs awarded in previous cost of service applications is informative, but not determinative of reasonable participation in subsequent cost of service applications. As the*

*intervenors pointed out in their responses, the hours spent and costs claimed depend on scope, complexity and size of the application and the duration and number of subsequent procedural steps."*

This also raises the issue of adjusting budgets part way through the process as issues arise or the level of complexity changes or the scope changes. This will add additional administrative costs to the process. In the view of LPMA this would not be money well spent. One of the significant benefits of the current intervenor process is the lack of administrative costs that would be paid for by ratepayers. Intervenor costs should remain focused on providing results rather than responding to red tape.

In addition to the questionable value of the Board approving budgets, there is the added cost and time of preparing defensible budgets, along with the Board approval process. As noted above, LPMA does not support the addition of administrative costs to the process. These administrative costs do not add to efficiency. They could also reduce the effectiveness of the intervention, if the budgets were combined with cost award caps. Less time and money would be dedicated at providing benefits to ratepayers and more money would be wasted in bureaucracy.

If the Board determines that some sort of intervenor budgeting is required, then LPMA suggest that it should only be required after the conclusion of the settlement conference and the filing of the settlement agreement, assuming that not all issues have been settled. This would essentially be a budget for cross-examination and argument.

As noted above, the number of hours involved in cases that have a complete settlement is relatively consistent in total. If budgets are required (independent of budgets for cross-examination and argument if not all issues are resolved in the settlement agreement), intervenors would budget based on their past experience and knowing that if they do not budget for the worst case scenario, they may be at a disadvantage when it comes to dealing with the LDCs. Even more perversely, this could lead to fewer complete settlement agreements and more hearings, adding to the overall costs of intervenors, LDCs and the Board.

Preparing a budget at the outset of an application makes the budget meaningless. It would be based on the worst case scenario and would not be based on any specific issues, because the evidence has not yet been reviewed and tested.

Preparing a budget after the first and second round interrogatories and/or technical conference stage for the settlement conference is not required, since the Board typically sets the length of the settlement conference. In most cases for the electric LDCs this is 2 days. If additional time is required in order to reduce the amount of issues going to an

oral hearing or preparation of argument, LPMA submits that this is a cost effective use of time. But how would this contingency be budgeted? This situation has occurred in a number of proceedings.

Some parties believe that intervenors should be able to provide up front budgets by issue. LPMA submits that this is not possible. It is not clear how a party can provide a budget by issue before reviewing the evidence in detail to see what the issues are. Even then, as the Board is aware, issues can be discovered in different stages of an application. In particular, issues may be identified upon review of the evidence, responses to interrogatories (initial and/or supplemental), at the settlement conference, or at the cross-examination stage. Requiring intervenors to budget by issue would be like requiring LDCs to budget for future government initiatives before the government makes them available to the industry for review. The LDC may have an overall budget to deal with government initiatives, but will not know the specific initiatives (issues) that need to dealt with until they have seen them and reviewed the potential impact on them.

**b) Cost Award Caps**

A number of parties have indicated that they believe the Board should set cost award caps for hearings.

The parties in favour of cost award caps note that the Board already does cost award caps for policy proceedings, consultatives and working groups and they believe that such a system could be extended to adjudicative proceedings. LPMA strongly disagrees.

In the EB-2011-0054 Decision and Order on Cost Awards, the Board agreed with intervenor submissions that the hours spent and costs claimed depend on scope, complexity and size of the application and the duration and number of subsequent procedural steps. LPMA would add to this list of cost drivers the quality of the application.

Parties in favour of cost award caps indicate that the caps would not be set in stone. The caps could be modified, because they may well be reasons to adjust it. The problem with this, as LPMA sees it, is that this could add significant administrative costs to the process not just for intervenors, but also for LDCs and the Board. Increased administrative costs, which would be paid for by ratepayers, is not a good use of time and money. Administrative costs do not add to efficiency, they detract from it.

**c) Combined Interventions**

A number of parties have suggested that the Board should force intervenors to combine their interventions. Some parties suggest that intervenors should be required to designate

a lead intervenor on an issue and then not allow other intervenors to ask interrogatories, conduct cross-examination or even provide argument on those issues where they are not the lead intervenor. Other parties suggest that cost awards should be reduced for intervenors that adopt the submissions of another intervenor. Clearly these views are not compatible with one another.

LPMA notes, with some amusement, that the LDCs are the parties that believe somehow the intervenors should be able to or forced to combine their interventions under the belief that all intervenors are the same with respect to the revenue requirement issues. This is somewhat hypocritical given the number of submissions provided by LDCs in this proceeding. As the Board is aware, submissions have been received from the Electricity Distributors Association, Coalition of Large Distributors, the CHEC Group, the Co-Operating Utilities, THESL and ENWIN. These submissions, while similar in some respects, are not identical to one another. Is there any reason to believe that diversity between LDCs should be allowed, but not between intervenors? Of course not.

Intervenors may have a common goal of, for example, reducing OM&A costs. However, some intervenors may approach this by concentrating on components that they believe are too high. One intervenor may concentrate on headcount or salary increases, while another targets benefits. Yet another may target amounts paid to an affiliate or bad debt and collection costs.

Even on an issue as simple as depreciation rates, there are often differences between intervenors. Those parties that are more focused on short term rates support low depreciation rates. Other parties may be more concerned with long term rates and support higher depreciation rates in order to reduce the higher cost of capital and PILS that result from lower depreciation rates over the longer term.

LPMA believes that the Board should not require intervenors to combine their interventions. This would reduce the diversity of opinions provided to the Board. It would limit the ability of individual intervenors to assist the Board in discharging its mandate.

Combined interventions may also be more expensive than the current process as the intervening parties may have to spend more time negotiating among themselves who does what and how differing opinions are to be reflected throughout the process.

LPMA notes that intervenors already work together to the extent possible based on their differing views and approaches to an application. This is apparent in the small number of

duplicative interrogatories relative to the total questions being asked, as well as parties taking lead roles in cross-examination, again to reduce duplication.

**d) Role of Board Staff**

LPMA submits that the Board should determine the role of Board staff, particularly in cost of service applications. LPMA believes that Board staff should take a lead role in ensuring that deferral and variance accounts follow the appropriate accounting rules. Board staff should also be involved in issues where there may be a deviation from Board policy. Other than that, LPMA suggests that staff resources would be more valuable if they were directed at standardizing accounting policies across all LDCs. As the Board is aware, effective benchmarking requires comparable accounting. While there has been some improvement over the last number of years, there is still significant differences in how some costs are accounted for between LDCs. More resources from staff applied to the audit process and education of LDCs (especially the small and medium ones) would also make cost of service applications more comparable across LDCs, potentially reducing the time needed by intervenors to review the evidence.

Board Staff should continue to review standard IRM applications and play a role in Z-factor and incremental capital module applications to ensure that Board policy is being followed. Intervenors should continue to be involved in the IRM applications where there are Z-factors or incremental capital modules or some other non-standard evidence.

**e) Duplication of Interrogatories**

The duplication of interrogatories and the time and costs incurred by LDCs was a recurring theme at the stakeholder conference. In Section IV below, LPMA notes that intervenors could put in place a process to review one another`s interrogatories with the goal of reducing duplication. This process, however, comes at the cost of additional intervenor time, that may outweigh the savings to the LDCs.

**f) Is the Board Getting What It Needs?**

A key question raised at the stakeholder conference is whether or not the Board perceives that it is getting enough assistance from this process to enable it to discharge its function.

The Board has recently indicated that it needs more detail and/or justification for components of settlement agreements. This implies that previous settlement agreements may not have provided the level of detail or justification that it would like to see.

More detail could be provided by the LDC and intervenors. However, this will take more time and result in higher LDC costs and intervenor costs.

Intervenors would find it useful, as would LDCs, if they had a better indication of what the Board is looking for in terms of additional details or justification.

**g) Cost Award Detail**

It has been suggested that the Board and LDCs would be better informed on the time and costs claimed by intervenors if more detail was provided by intervenors in their cost award claims.

It is not clear to LPMA what type of additional detail would be of use to the Board and LDCs. LPMA`s cost claims have always included a detailed invoice of the time spent by its consultant on the application.

If further detail would be of assistance to the Board, then LPMA suggests that the Board provide some examples of the detail it would be interested in having.

**h) Incentive Rewards for Intervenors**

EGD suggested that the Board might want to introduce an incentive reward for intervenors of up to 33% of the allowed tariff rates if an intervenor can demonstrate efficiency through combined efforts or whatever means.

LPMA does not support incentive rewards for intervenors. These incentives would add to the cost, paid for by ratepayers. Intervenors do not seek to be rewarded with a bonus for doing their jobs as best as they can.

## IV. PROCESS CHANGES

LPMA suggests that the Board should make some simple, yet effective, changes to the regulatory process that would, in the view of the LPMA, reduce overall costs of the process, which would save ratepayers money.

**a) Timing Changes**

As a consultant that has worked for, and still assists LDC with regulatory matters and filings, I sympathize with the LDC complaints about the time needed to prepare interrogatory responses. Often responses need to be generated by people who are actually busy running the LDC on a day to day basis, rather than the people involved in the regulatory process.

As was noted in the Coalition of Large Distributors presentation, the number of interrogatories has increased over the years, but the time allocated to LDCs to provide

answers has generally stayed at about two weeks. The increase in interrogatories is in response to an industry that is much more complicated than it was in the past. Things like smart meters, accounting changes, smart grid investments and CDM have all made the industry more complex than it has ever been.

LPMA recommends that LDCs should be given more time to provide interrogatory responses. This would cut down on overtime costs and hopefully allow the LDCs to provide more comprehensive responses. This should, in turn, lead to a lower level of second round interrogatories or technical conference questions, that are focused on understanding the responses provided.

Similarly, the time to provide second round interrogatory responses or technical conference undertakings should be expanded to allow for complete responses to be provided.

LPMA further submits that the settlement conference should start a minimum of one week after the second round of interrogatory responses or technical conference undertakings have been provided by the LDCs.

In the current process, the settlement conference often begins a day or two after receiving the responses. In order to be prepared for the settlement conference, intervenors often need to get ready prior to receiving the second round responses. This is because a couple of days if not sufficient for preparation for the settlement conference because the intervenors are involved in many processes at the same time. Therefore we prepare in advance and then re-evaluate our preparation after receiving the responses. This often involves reviewing notes from a week or two earlier. This time could be reduced if there were more time available between receiving the final round of interrogatory/technical conference responses and the beginning of the settlement conference.

**b) Technical Conferences**

In the view of LPMA, technical conferences should not be used as substitute for a second round of interrogatories, unless there is a specific reason to do so.

A technical conference is much more time consuming for all parties involved. The LDC has to bring all of the required people to Toronto, instead of letting them prepare responses to a second round of interrogatories. Intervenors come to a technical conference and basically ask the same questions as they would have filed as second round interrogatories. Many of these questions are detailed in nature, or require calculations, that end up requiring an undertaking to respond to them. The only benefit of a technical conference is the ability to have follow up questions.

Based on experience, technical conferences are more time consuming, and thus costly, than a second round of interrogatory responses. In addition to more time needed for a technical conference, the preparation for a settlement conference is usually more time consuming because of instead of looking for a second round interrogatory response, an intervenor now has to find the response in a long transcript. More time and costs to get to the same thing.

**c) Interrogatory Process**

LPMA notes that the Board has tried a number of different processes with respect to the filing of interrogatories with Board staff filing in advance of intervenors, all parties filing at the same time, etc.

In the London Hydro rate case (EB-2012-0146), Board Staff filed their interrogatories and then London Hydro provided responses to those interrogatories several weeks later. Intervenor interrogatories were then due one week after the responses to the staff questions were received.

Second round interrogatories from all intervenors and Board Staff were then due on the same date, approximately 3 weeks after intervenors received responses to their questions.

LPMA believes that the Board should try this process in more proceedings to see if it has any impact on the number of interrogatories filed. Some parties have expressed the belief that by allowing Board staff to go first, the number of intervenor interrogatories would be reduced. This is not LPMA's experience. In fact, the number of intervenor interrogatories may have been higher in the London Hydro case, as intervenors had a considerable amount of additional evidence to review in the preparation of their own interrogatories.

However, LPMA believes that this process did lead to a reduction in the number of second round interrogatories from all parties. It was not clear whether the overall impact was a reduction in interrogatories and/or costs.

**d) Early Intervenor Filings**

Regardless of whether or not Board Staff files its interrogatories at the same time as the intervenors or at some time prior to that, LPMA believes that intervenors should be encouraged to file their interrogatories as soon as they are able to do so. This may lead to an opportunity for remaining intervenors to review the questions, eliminate any duplications, and add to areas that may not be fully covered by the early filing intervenor.

As in the case of Board Staff filing prior to intervenors, this is only helpful if the interrogatories are provided well in advance of the filing deadline.

**e) Reduction in Duplication**

LPMA agrees that intervenors already do a lot to reduce duplication in cross-examination. The question raised by the LDCs is can they do more to reduce duplication in interrogatories. The obvious answer is yes, but would it be cost effective?

For example, would it be cost effective for intervenors to spend 1 hour on a conference call reviewing all of the interrogatories to weed out or re-word duplications, saving the LDC a few hours of preparation time. The increased intervenor costs may be more than the incremental LDC savings.

Intervenors are very cautious about their time spent on an application and do not like to spend time that, in the view of intervenors, is not productive. However, if LDCs and/or the Board believe this is an area where the LDC savings would be in excess of the additional intervenor costs they should clearly indicate so. Intervenors will respond appropriately.

**f) LDC and Board Staff Costs**

As noted earlier in these comments, the focus in this proceeding is on intervenor costs, rather than the more appropriate regulatory costs. Since the costs from all three parties involved in a proceeding (intervenors, applicant, Board) are intricately interrelated, cost reductions from intervenors could ultimately result in higher costs.

A clear example of this is the proposal by some parties that intervenors should be required to assign a lead intervenor to an issue and then the remaining intervenors are not allowed to ask interrogatories on the issue. This proposal will ultimately lead to less settlements since an intervenor cannot, in good conscience, agree to something on which they have not been allowed to ask questions...even if their position is the similar to that of the lead intervenor. This is because the intervenor in question may have had a different approach to the issue, or a different focus than the lead intervenor. This ultimately leads to unsettled issues going to hearing, adding substantial time, costs and delays to the application. This is in the interest of nobody.

The goal of this process should be to ensure that the entire regulatory process is efficient, while remaining effective. To do this, the Board and all stakeholders need more information than is currently available. Knowing intervenor costs by application is only a first step. The Board should require LDCs to file their costs for each application as well, including internal costs (with any overtime highlighted) and the costs and hours for

external parties. Similarly the Board should track and make public its costs associated with each application, again on a disaggregated basis that allows for an analysis of these costs in a future efficiency review.

Sincerely,

*Randy Aiken*

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