October 16, 2013

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

Dear Ms. Walli:

Re: Participation of Intervenors in Board Proceedings
EB-2013-0301
First Phase: Comments on Stakeholder Consultation

On October 8, 2013, the Board hosted a transcribed Stakeholder Consultation, which was well attended and at which EnWin and 9 other stakeholders gave presentations. EnWin's presentation built upon EnWin's initial submission, which was filed with the Board on September 27, 2013. EnWin continues to stand behind the initial submission and the content of the presentation.

By way of follow-up, EnWin wishes to emphasize that the Board's rules should promote engagement that is inclusive, technologically advanced, results in sophisticated interactions, and is a continual process. That engagement will differ based on the differing stakeholders, but without a doubt it includes a prominent role for the Intervenors. The Intervenors may be constituents, advocates or *amici*. With the Board, Intervenors, utilities, and other stakeholders engaged, regulation takes on the character of a collaborative enterprise. Through that collaboration, the public interest is better discerned and acted upon.

During the Stakeholder Consultation, other stakeholders expressed opinions that suggest to EnWin that some supplemental comments from EnWin may be of use to the Board. The Board invited supplemental comments in its letter of August 22, 2013.

Non-Intervenor Roles and Costs

First, some ratepayer groups raised issues in respect of the legal and consulting expenses of utilities, the fees paid by utilities to industry associations and the role of Board Staff. These lines of inquiry and discussion are clearly outside the scope of the first phase of the Board's initiative and likely beyond the scope of the second phase too. Perhaps examining the role of Board Staff as it relates to the Intervenors might be within the scope of the second phase.

Examining the cited utility expenditures is not relevant, except where those expenses are increased as a result of the participation of Intervenors in Board proceedings. Engaging in out of scope discussions is not a sound use of resources and distracts from the Board's intended focus: Intervenors. It is somewhat ironic that some of the traditional Intervenors have proposed a line of policy inquiry that would create inefficiencies in a proceeding meant to identify whether and how the participation of Intervenors in general creates inefficiencies.

In EnWin's experience, Intervenors are generally mindful of and contribute to procedural efficiencies. Nevertheless, the purpose of this proceeding is to investigate that further as part of a continuous improvement exercise. EnWin encourages the Board, Board Staff and any facilitators utilized by the Board to keep this proceeding focused so that it does not morph into an unmanageably large and vaguely defined initiative.

Government Ownership

Second, at the Stakeholder Consultation, some ratepayer groups took the position that provincial and municipal government ownership of utilities is not a relevant factor for the Board to consider in shaping its approach to regulation. EnWin takes the position that ownership is a relevant consideration. This view is shared in regulatory literature by expert Jose Gomez-Ibanez (see *Regulating Infrastructure*, Harvard University Press, 2003). In many jurisdictions, government ownership, which Gomez-Ibanez calls "Public Enterprise", is an alternative to regulation by an administrative body. In fact, Ontario almost exclusively used Public Enterprise for the electricity sector until 2000.

EnWin's position is that the impact of government ownership is a relevant and materially significant factor for the Board to consider. To the extent that government has used its position as shareholder to infuse a utility with public interest values and direction, the subsequent role of Intervenors and the decision-making of the Board should take that into account.

Despite suggestions during the Stakeholder Consultation, neither EnWin nor any other party has used this point about government ownership to argue for reduced scrutiny. EnWin submits that ownership can and often does affect the lens through which a company understands its role and priorities and the values of its stakeholders. EnWin submits that popularly elected officials who serve in oversight roles with the shareholder and the company Board of Directors have unique and important insights into the values of their communities. Where those insights are not part of LDC decision-making, the OEB might very well look to LDCs to solicit them as part of its vision to increase stakeholder engagement.

Level of Scrutiny

Third, contrary to the allusions of some stakeholders and building on the previous point, EnWin is unaware of any utility arguing for less scrutiny as part of this proceeding. In fact, EnWin, Hydro Ottawa and the EDA are all on record at the Stakeholder Consultation as supporting the Intervenor model. What EnWin and other utilities have proposed are adjustments to how Intervenors participate to increase transparency and efficiencies. If anything, EnWin has proposed that Intervenor Status and Cost Eligibility be applied less restrictively in order to facilitate greater input as the Board discerns the public interest.

The Public Interest and Private Interests

Fourth, there was a fair bit of discussion about the public interest. EnWin perceives that in Ontario, pursuant to the regulatory compact as defined by the Ontario Court of Appeal, utilities have a legal obligation to have regard for the public interest. Again, this is not an argument for less scrutiny. It is an argument for thinking about the role of Intervenors in the context of LDCs that are meant to be having regard for the public interest and a Board that is meant to check that the utility has had adequate regard for the public interest in making its application.

As others have noted, this distinction between “the public interest” and “private interests” is important. The public interest is not the domain of any one stakeholder, including any one Intervenor or group of Intervenors. Individual stakeholders and Intervenors have private interests – things that are important to them. Those private interests may be economic or they may be social. Social interests might include environmental interests such as clean air or water. Economic and social interests may be singular to the stakeholder or held in common with other stakeholders. Regardless, they are private interests. The notion that an association speaks for the public interest is out-of-step with post-modern thought and observed realities.

As the ratepayer groups themselves have declared in this proceeding, Intervenors come to the proceedings with differing values. It is for that reason that stakeholders are invited to the proceeding, even where there are overlapping interests and representation.

If a stakeholder was somehow positioned to “know the public interest”, then the Board’s role would be moot. In truth, every stakeholder has their own take on the public interest which is informed by their discrete private interests. This is true for ratepayer representatives, environmental groups, public research institutions, and other Intervenors.

Beyond Economic Regulation

Fifth, several ratepayer groups referred to the Board as an economic regulator. This is consistent with the historic role of the Board but is now an out-of-date, inadequate descriptor. During the Stakeholder Conference, a ratepayer representative made the “economic regulator” argument by citing s. 1(1) of the OEB Act. However, in attempting to make that argument, the ratepayer representative ended up making the opposite case. As can be seen in the transcript at page 56 at lines 10-26, after listing the first 3 of the Board’s statutory objectives, he truncated the list with the statement: “And there’s a couple of other things mentioned in section 1(1).” Indeed, those “couple other things” relate to non-economic objectives (i.e. social objectives).

One of the main reasons why it is no longer sufficient to describe the Board as merely an economic regulator is that over time the Government has expanded the role of the Board, among other ways, through a CDM mandate and those "couple of other things". The Board is now responsible for advancing social objectives of the Government in addition to its traditional economic regulation. In addition to CDM, smart grid and renewable generation, the Board is also now engaged in redistribution of wealth and public welfare through its establishment of rules specific to low income residential consumers.

Adopting a social mandate in addition to an economic mandate is perfectly acceptable and is consistent with the role of an administrative board. Nearly 80 years ago, John Willis described this as the administrative board performing the role of "a government in miniature" ("Three Approaches to Administrative Law: the Judicial, the Conceptual and the Functional", University of Toronto Law Journal, 1935). This descriptor is meant to convey the broad balancing of economic and social factors in adjudicating and setting policy direction for a sector. It is precisely what the Board is engaged in every day.

This point about the mandate of the Board is quite important in evaluating the role of Intervenors. It will be difficult for the Board to properly evaluate the role of Intervenors if it is guided by an archaic descriptor of the Board's function and expertise. For example, there was a time when the Board's mandate and expertise did not encompass broader social factors, such as those affecting low income ratepayers. At that time, VECC or LIEN may have played lesser roles because the Board was confined to economic regulation. With its current mandate, the Board can deal with social issues. Putting that into practice, the Board has for many years now hosted a working group focused exclusively on low income issues. Both VECC and LEIN are participating Intervenors on that working group.

Administrative Board vs. Quasi-Judicial Tribunal

Sixth, one of the ratepayers argued that the OEB Act establishes the Board as a quasi-judicial tribunal (Transcript page 62 at 18-20). As the Board is aware, the Act does not describe the Board as a "quasi-judicial tribunal" and, in fact, only uses the term "judicial" in referring to the "taking judicial notice".

The Board is not a court, nor is it inherently court-like. It does a great many things that courts do not do and cannot do and the Board does not do a great many things that courts can do and must do. The Board is an administrative board governed by administrative law and put in place to administer functions of the government as an arm of the executive branch.

As Harry Arthurs wrote nearly 35 years ago, administrative boards have a history that dates back to the mid-nineteen century to "serve, and be understood to serve, compelling social purposes" as "a way of getting things done" through "creative, responsive [and] effective" solutions with "practical, contemporary usefulness" (see citation in EnWin's initial submission).

The distinction between a quasi-judicial tribunal and an administrative board may seem academic, but it is actually quite important in thinking about how Intervenors should participate in Board proceedings. The paradigm of a quasi-judicial tribunal carries with it the notion that adversaries align across the aisle with the purpose of leading competing evidence and delivering counter-punching arguments. Both sides must have comparable resources in order to have a chance to muster equally compelling cases. The adjudicator in common law courtroom settings is passive and must make a choice between the alternatives. This paradigm bears very little resemblance to most of what takes place today at the Board.

In reality, the bulk of the Board's work is performed outside of any type of adjudication. This includes licensing, regulatory reporting, regulatory audit, compliance monitoring, consumer protection, policy development, public education, advising the Minister, and working with other government agencies. Many of these functions may not be apparent to some or all stakeholders and no doubt there are additional functions beyond these. Characterizing the Board as a quasi-judicial tribunal minimizes or entirely disregards these functions. These functions often involve or relate to Board proceedings and are therefore within the scope of considering the role of Intervenors in this initiative.

Similarly, in performing its adjudicative function, the Board adheres to administrative law principles and requirements rather than judicial ones. Were the Board to take a judicial approach, stakeholders would not be Intervenors, they would be Defendants. An Intervenor expresses a private interest and perspective to better inform the adjudicator; a Defendant guards against its adversary who is seeking to obtain something that lies within the possession or control of the Defendant. Clearly, the role of the Intervenor is very different than that of a Defendant. In this proceeding, in examining the role of an Intervenor, using judicial paradigms blurs that role.

One of the ratepayer representatives very aptly described the sector as part of a "complex ecosystem". EnWin agrees with that description. Given that complexity and the interconnectedness of the energy sector with the broader ecosystem, it is important that the Board not be hindered by the narrow language of "quasi-judicial tribunal". Instead it should be thought of as a "government in miniature" with the broad powers and procedural latitude to engage stakeholders as part of overseeing the energy sector.

Regulatory Capture

Seventh, one of the ratepayer representatives spoke about the risk of regulatory capture. It was raised in the context of utilities capturing the regulator. It is worth noting that stakeholders are also in a position to capture the regulator. Given the regularity with which the Intervenors engage with the Board, in Ontario there is at least as much reason to be attentive to regulatory capture by the Intervenors or a subset thereof. These Intervenors may be as or more likely than many utilities to intentionally or unintentionally gain unfair advantage and influence Board decisions through such things as helping to define the language and concepts of regulation through pervasive involvement in Board processes and extensive working relationships with the regulator and its staff in adjudicative and policy proceedings.

To be clear, EnWin has not raised any concern about regulatory capture by Intervenors. However, if the Board is inclined to follow-up with the ratepayer representative's caution about the risk regulatory capture by utilities and how the participation by Intervenors should be considered as a check on that risk, EnWin submits that an examination of the risk of regulatory capture by Intervenors would be necessary to fully consider the risk of regulatory capture.

Clarity of Purpose

Eighth, several ratepayer representatives asked variations on "Why are we here?" and "What is the purpose of this initiative?" To EnWin, the purpose is quite clear. The Board has spent years examining its regulatory policies and processes in search of increased effectiveness and efficiencies. This is part of that. It is also appropriate as a check against the fairness of costs borne by all ratepayers.

In the Board's proceedings, Intervenors advance their own stakeholders' private interest. Through the Board's rules for Intervenor status, cost award eligibility and cost awards, the cost of the pursuit of these private interests is socialized and borne by all ratepayers. This is cross-subsidization of the private interests of the few from the pocketbooks of the many.

All ratepayers, but especially the unrepresented ratepayers ought to be assured from time-to-time that this cross-subsidization is not working against them. It is prudent for the Board to revisit its rules to ensure that funding the advocacy of select private interests is an effective and efficient way to aid in the Board's discernment of the public interest.

To the extent the Board satisfies itself and stakeholders of that, it will further legitimize its rules and the participation of Intervenors. To the extent that adjustments to how Intervenors participate are identified such that improvements are made to the effectiveness and efficiency of the regulatory process, the Board will add further value to Ontario's regulation of the energy sector.

Yours very truly,

***ENWIN* Utilities Ltd.**

Andrew J Sasso

Per: Andrew J. Sasso, B.Comm., LL.B.
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