

FURTHER SUBMISSIONS OF THE CONSUMERS COUNCIL OF CANADA

**RE: ONTARIO ENERGY BOARD – REVIEW OF THE FRAMEWORK GOVERNING
THE PARTICIPATION OF INTERVENORS IN BOARD PROCEEDINGS
EB-2013-0301**

October 16, 2013

I. INTRODUCTION:

On August 22, 2013, the Ontario Energy Board (“Board”) initiated a review of the framework governing the participation of intervenors in applications, policy consultations and other proceedings before the Board. The Board indicated that the 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.

The Board requested written comments on a series of questions and held a Stakeholder Conference on October 8, 2013, to provide a forum for parties to discuss the issues. The Board has also provided parties with an opportunity for further comments on the issues explored at the Stakeholder Conference.

The Consumers Council of Canada (“Council”) made submissions on September 27, 2013. In addition, the Council participated in the Stakeholder Conference on October 8. These are the further submissions of the Council.

The Council will provide some general comments, and then set out its views on some of the issues either discussed at the meeting, or set out by other participants in the first round of submissions. Finally, the Council will make some additional recommendations for the Board to consider.

II. GENERAL COMMENTS:

The Board has stated that this review has been undertaken to determine whether there are ways in which its approach to intervenors might be modified in order to better achieve its statutory objectives. Among the most important of the Board’s objectives, from the Council’s perspective, as set out in the *Ontario Energy Board Act, 1998* are:

1. To protect the interests of consumer with respect to prices and the adequacy, reliability and quality of electricity service;

2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.

As indicated in its earlier submission the Council is of the view that in order to achieve those objectives it is critical that ratepayer groups are an integral part of the Board's proceedings and are provided sufficient resources to participate effectively in those processes. The current system does this, and from the Council's perspective should not be fundamentally changed. In large measure, most of the participants in this consultation process agree, including most of the local distribution companies ("LDCs") (those that have participated in this process). Changes should only be made if they can enhance the process and create efficiencies without encumbering the ability of intervenors to protect the interests of their relative constituencies. In support of the current framework we make the following observations:

1. As described in some of the initial submissions made by intervenors, it is apparent that the cost of interventions is relatively small in comparison to the cost of alternative models. The cost of interventions is not the primary driver for increased costs of utility regulation in Ontario. In addition, it represents a relatively small fraction of the overall costs of regulation;
2. There is no evidence to support the claim by the Electricity Distributors Association ("EDA") that, "due to a lack of proper safeguards, the current process has become cumbersome and more costly than necessary";
3. Having experienced intervenors participating in Board proceedings and consultation processes clearly creates value for money. This is evident by the fact that intervenors have been integral in contributing to reductions in applied-for rate increases by LDCs, thereby benefiting end-use consumers through lower rates. It is also evident by the fact that settlement agreements between LDCs and the intervenors have become the norm, eliminating to a large degree long, contested hearings and the costs associated with those hearings;
4. Allowing for a public and transparent rate review process enhances the Board's accountability in its decision-making processes. In addition, an inclusive process, with broad and diverse representation, brings a degree of legitimacy that a more exclusive process does not;
5. The Board has, under the current *Rules of Practice and Procedure* and the Practice Direction, all of the tools it needs to ensure that intervenors represent legitimate interests and conduct themselves in efficient and effective ways. The Board has the broad discretion to decide who is eligible to intervene in proceedings, who is eligible for cost awards, and ultimately the level of costs awarded at the end of the proceeding; and

6. Intervenors make concerted efforts today to cooperate creating efficiencies in the way they approach proceedings and consultation processes. This includes initial discussions regarding issues, collaboration around the interrogatory process, collaboration during settlement processes, and cooperation with respect to cross-examination and argument.

Many of the submissions and comments made at the Stakeholder Conference were supportive of maintaining the current framework. The LDCs focused primarily on proposing administrative changes to the current process in order to ensure legitimate interests are being represented, that their administrative burdens are reduced (e.g. changes to the interrogatory process), and that intervenor costs are controlled to the extent possible.

Although the Council is not opposed to changes to the current framework, and believes some changes will enhance the efficiency of the process, it is important that the Board does not impose upon intervenors changes that will limit their ability to effectively participate in a proceeding. The Council will comment, in the section below, on some of the proposals advanced by the LDCs in this process.

III. PROPOSALS FOR CHANGE:

Pre-Approved Budgets:

Several LDCs have made proposals that would require intervenors to file detailed budgets for the time they expect to spend in a proceeding, and the relative costs they expect to incur.

The Council would be prepared to file budgets if the Board required us to. The Council does, however, question the value of doing so. It is very difficult to determine at the outset of a proceeding, prior to a review of the pre-filed evidence, how much time it will take to participate effectively. With relatively limited applications preparing a budget may be a simple process. It would become problematic, however, to develop budgets for other applications like, for example, a cost of service proceeding for a large LDC.

The costs incurred during a hearing depend upon many issues beyond the control of the intervenor. This would include, among other things, the quality of the evidence (pre-filed evidence and answers to interrogatories), the scope of the evidence, whether experts are required, whether an application is settled in whole or in part, whether motions are a part of the process, and how long a hearing may last. Mandating budgets would require intervenors, at the start of a process, to estimate the time required for each step in the process, although the process may unfold in a completely different way than initially expected.

We also question what would be the status of the budget. Would the Board formally approve a budget? Would intervenors be held to the budgets? What if unexpected

stages in the process arise? What process would be followed to amend budgets? Ultimately, the Board can, and should, assess the reasonableness of an intervention and the intervenor's cost claim at the end of the process. It has the powers currently to do so, and has set out in its *Practice Direction on Cost Awards* a number of key factors it may consider is assessing whether an intervenor participated responsibly and added value to the process. Requiring intervenors to file budgets for Board approval at the commencement of a proceeding may be an unnecessary step, simply adding to the complexity of the regulatory process.

Caps on Intervenor Costs:

Some LDCs are urging the Board to place caps on intervenor costs. As a matter of principle intervenors who are cost eligible should not be restricted, unnecessarily, in how they participate in hearings. Imposing caps may be restrictive, and prevent the intervenors from adequately representing their interests. As we noted above, the time and effort required by intervenors to participate in a proceeding depends on a number of factors outside of their control. It is not necessarily easy to predict the length and level of complexity of a particular proceeding at the outset. Caps could be arbitrary and could potentially create an imbalance between the level of resources available to an intervenor and an applicant in a proceeding.

There was some discussion at the Stakeholder Conference that caps could be set on the basis of the overall revenue requirement of an LDC, or by customer numbers. The problem with this approach is that depending up the factors listed above the length and complexity of a hearing process can vary considerably even for similar sized LDCs. What if the process unfolds in a way that was not expected? What process would be followed to amend the caps?

As with pre-approved budgets the Council questions whether imposing caps is fair to intervenors, in that it may impair their ability to do their job. In addition, imposing caps may simply add unnecessary steps (e.g. setting caps, changing caps etc.), further adding a level of complexity and cost to the regulatory process.

Some parties have suggested that one intervenor group be charged with the review of all the revenue requirement issues. This assumes all intervenors have exactly the same perspectives regarding an LDC's revenue requirement. This is simply not the case. In addition, certain intervenors bring different levels of expertise on various issues to the table. This is one of the benefits of allowing for diverse interests to be represented. The Council believes it is both impractical, and unfair, to designate one intervenor group to deal with all the revenue requirement issues in a cost of service proceeding.

Mandated Joint Interventions:

Some parties have suggested that the Board should force some intervenors to combine interventions. In some cases, combined interventions may be appropriate,

but it is the Council's view that the intervenors themselves should decide whether or not to combine interventions, instead of being mandated to do so.

Each intervenor typically has issues that it is most concerned with in a particular case. Although the ratepayer groups may be aligned on many issues, at times they are not. In addition, each intervenor may have different governance structures and may have different approaches to the regulatory process. It is important for the Board to encourage joint interventions where possible, but not impose them on intervenors. In addition, it is important to note that the cost of a joint intervention may not necessarily be less than the costs associated with two separate interventions.

As we have noted numerous times, the intervenors currently actively work to coordinate their efforts at every stage in the regulatory process. There is no reason to believe that this cooperation will not continue, and in fact, will be enhanced. This type of cooperation should continue to be encouraged by the Board.

Interrogatories:

From the Council's perspective it became apparent during the Stakeholder Conference that the LDCs feel particularly burdened by the current interrogatory process, particularly in a cost of service proceeding. Many of them are specifically looking for efficiencies with respect to the interrogatory process. The Council agrees that the current interrogatory process for the Applicants can be time consuming and cumbersome, and that improvements can be made. Having said that, ensuring that the record is complete and that all parties, including the Board, have sufficient evidence before them to test the application, is an important objective to maintain.

The Board has indicated that it is currently undergoing a review of its application and hearing process. The Council would hope that the Board, as a part of its review, is considering how best to facilitate the interrogatory process in a way that is efficient, but also effective. The Council encourages the Board to seek input from parties on the interrogatory process, with a goal to improving the process from the perspective of all participants in Board proceedings including Applicants, intervenors, Board Staff and the Board.

Governance and Reporting:

The Council is of the view that it is important for the Board to determine whether an intervenor represents a legitimate constituency, with an interest in the application, for which it is seeking intervenor status. The Council does not believe that once that status is granted the Board should dictate specifically how an intervenor engages its members, and/or governs their interventions before the Board. It should be up to the intervenor groups to develop those protocols. The Council is supportive,

however, of each intervenor explaining the process it follows to guide its interventions before the Board.

IV. RECOMMENDATIONS:

Having reviewed the initial submissions, and having participated in the Stakeholder Conference, the Council has the following further recommendations:

1. The Board has indicated why, in its letter of August 22, 2013, it has initiated this review. It is seeking to determine whether there are ways in which its approach to intervenors might be modified to better achieve its statutory objectives. The Board also expressed an interest in considering how LDC consultation and engagement with its customers and other stakeholder might affect the role of intervenors in the application process. In addition, as part of its review of the application and hearing process the Board is looking at ways to enhance the efficiency and effectiveness of that process. To the extent the Board has specific concerns with the current processes involving intervenors, it should make those concerns known so stakeholders can work towards proactively to address those concerns;
2. There is potentially an information gap for the Board regarding the settlement process and settlement agreements. The Council is of the view that this can be addressed, in some measure, if intervenors provide a greater level of detail regarding how their Counsel, Consultants and Experts spend their time during the negotiation process, and more broadly in terms of how they spend their time throughout an application process. More detailed cost claims may go some way in alleviating these concerns. In addition, more detailed cost claims would better assist the Board in assessing whether intervenors are spending their time in a cost-effective manner.
3. From case to case the role of Board Staff may differ. Some parties are of the view that Board Staff should take a more active role in proceedings. Others would like to see less of a role for Board Staff. The Council is of the view that in Phase 2 of this consultation process the role of Board Staff should be an issue for consideration.
4. There was very limited discussion at the Stakeholder Conference regarding LDC concerns with intervenors beyond the issues related to interrogatories, budgets and cost caps. To the extent new concerns are expressed in this round of reply submissions the Council encourages the Board to allow for further reply.