EB-2013-0301

Ontario Energy Board

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B, as amended;

AND IN THE MATTER OF a consultation by the Board with respect to the role of intervenors in Board proceedings.

Second Round Submissions of the

Energy Probe Research Foundation

October 16, 2013

Review of Framework Governing the Participation of Intervenors in Board Proceedings
Consultation and Stakeholder Conference
Second Round Submissions

How These Matters Came Before the Board

By letter dated August 22, 2013, the Board announced a review of the framework governing the participation of intervenors in Board proceedings with a stated objective of determining whether there are ways the Board's approach to intervenors might be modified in order to better achieve the Board's statutory objectives. Energy Probe Research Foundation (Energy Probe) was invited to participate.

The announcement letter outlined a two phase consultation. In the first phase, the Board wishes to examine possible improvements to the existing framework for intervenor participation in respect of its approach to intervenor status, cost eligibility and cost awards.

The rationale for the review is set out on Page 2 of the announcement letter:

> …. First, the Board is implementing, under the Renewed Regulatory Framework for Electricity, a new approach to the regulation of electricity distributors. A central feature of this new approach is a strong emphasis on the need for each electricity distributor to engage with a broad range of customers and other stakeholders during the development of the capital and operational plans reflected in the distributor's rate application. The Board is interested in considering how this early consultation and engagement by a distributor with customers and other stakeholders might affect the role of intervenors in the more formal process that is initiated by the Board once an application is filed.
> (Page 2, Board Letter August 22, 2013)

Energy Probe filed Phase One first round submissions on September 27, 2013. One of Energy Probe's consultants attended the October 8, 2013 Stakeholder Conference accompanied by the Managing Director of Energy Probe.

Stakeholder Conference October 8th 2013

In Energy Probe's Initial Submission we suggested that the current Intervention and Cost Awards regime was working, was cost effective and importantly served the public interest.

Having participated in the Stakeholder Consultation Meeting on October 8, 2013 we have heard the concerns and submissions for reform from some of the utilities, primarily those of the Coalition of Large Distributors and the EDA, the Electricity Distributors Association, previously known as the Municipal Electric Association until 2001.

These two groups, in particular, are seeking to make changes that have not been clearly articulated and in our view, will not materially reduce the Regulatory onus Utilities must meet but will add significant onus on intervenors applying for a Cost Award. Also, the changes sought would dramatically increase the amount of process pre and post case, together with associated regulatory burden.

A key principle that the Board should maintain is that all Electricity Distributors must periodically make Application for Rates according to the Board's Regulatory Framework.

The corollary of this is that the ratepayers of all distributors in the Province should have the benefit of representation and eligibility for an award of costs, while ensuring all costs are kept to a minimum, especially for the smaller distributors.

It is our view that the current Intervention and Cost Award "model" has three key components that together result in an effective resolution of rate applications in over 80% of the Electricity Distribution 3GIRM and Rebasing Applications:

- Full discovery by Board Staff and Intervenors;
- Determination of key issues and negotiation of a Settlement Proposal; and,
- Ability (if necessary) to proceed to Board Adjudication of Unsettled Issues.

This process, if pursued in good faith by all parties, has been shown to result in successful regulatory outcomes with reasonable regulatory burden to the Board.

For those cases that proceed in whole or part to an adjudicative determination of issues by the Board, representations made by experienced representatives of intervenors are responsible, comprehensive and balanced. The Board is assisted by the bilateral views of the utility and ratepayers preventing one sided or imbalanced representations in favour of the utilities, or of a single ratepayer interest group.

Central Issue for Change

Energy Probe suggests that when the Board is considering the need for change the key issue is:

> **"What advantage would there be for the Board to give up the *flexibility* that it now has to govern Intervenor Status and Cost Awards?"**

Energy Probe will address this question in the framework of the Questions posed in the Boards August 2013 Letter to Stakeholders.

Intervenor Status

Q1. What factors should the Board consider in determining whether a person seeking intervenor status has a "substantial interest" in a particular proceeding before the Board? For instance, should the Board require a person seeking intervenor status to demonstrate consultation or engagement with a constituency directly affected by the application?

Rule 23.02 of the Board's *Rules of Practice and Procedure* provides as follows:

> ***"The person applying for intervenor status must satisfy the Board that he or she has a substantial interest and intends to participate actively and responsibly in the proceeding by submitting evidence, argument or interrogatories, or by cross-examining a witness."***

Rule 23.03(a) provides as follows:

> ***"Every letter of intervention shall contain the following information:***
>
> ***(a) a description of the intervenor, its membership, if any, the interest of the intervenor in the proceeding and the grounds for the intervention."***

The Board specifically asks, whether it should require intervenors to show, in more detail how they are consulting with the constituency they represent.

Most organizations to be relevant to their constituency develop their own methods of ensuring that their members' interests are identified and represented. If they do not they lose relevance and membership.

Energy Probe notes the suggestion by some utilities that ***local*** ratepayer representation be required, rather than local ratepayers being represented through province-wide organizations.

The geographic diversity of the Electricity Distribution sector is such that while local ratepayers should be informed by publication of the Notice of Application of their rights to intervene, in a practical sense they do not have the skills or resources to do this.

That is where province wide organizations fulfill the public interest intervention requirement in an efficient manner.

Energy Probe suggests that if, as stated in its communication for this Stakeholder Consultation, the Board wishes to improve local ratepayer interaction, the Applicant should be required to apprise local ratepayers interested in the Application of the Province-wide organizations that have been granted intervenor status and provide appropriate contact information. Costs incurred by the intervenor representatives to interact with interested local ratepayers should be recovered as part of the intervenor cost claim, regardless of whether the local ratepayer has been granted status.

There is also the specific case of Facilities/Leave to Construct Cases in which ***local landowner*** interests should be recognized and granted Cost Award Eligibility.

Q2. What conditions might the Board appropriately impose when granting intervenor status to a party? For instance, should the Board also require an intervenor to demonstrate how the intervening group or association governs the participation by its legal counsel and other representatives in the application?

Energy Probe suggests this question reaches into the whole issue of who should represent the financial interests of ratepayers and other economic, environmental and social interests in determination of just and reasonable rates and quality of service for Ontario's regulated monopoly electricity and gas distributors.

The fact is that there are a limited number of lawyers and regulatory consultants representing intervenor organizations under the umbrella of ratepayer and public interest.

The reasons for this are:

First, the certainty and scale of remuneration is less than in commercial practice, including working for the utilities.

Second, representatives are precluded by real or perceived conflict should they attempt to mix public interest work with utility commercial practice.

Third, regulatory legal practice and consulting is a specialized area that requires both competence and experience to undertake successfully, so the "stable" of such lawyers and consultants is small.

Intervenors therefore, are not able to access an extensive pool of lawyers and regulatory consultants like the Utilities and Board. This has a number of consequences, including relative stability of the representation of the intervenors and the continuity of that representation with only occasional changes as lawyers change practice or consultants change from one intervenor to another.

One collateral benefit of this structure is that some organizations and their representatives are active in other Canadian Jurisdictions. This provides synergies that enhance the quality of the interventions before the OEB.

To require intervenors to provide information on the governance of their representatives on a case by case basis would be too onerous. If the Board finds this information necessary as part of qualification for intervenor status, then a onetime qualification similar to that required by the Regie may be appropriate and only material changes to this qualification would be submitted thereafter.

Cost Award Eligibility

Q1. What factors should the Board consider in determining whether a party primarily represents the direct interests of consumers (e.g. ratepayers) in relation to services that are regulated by the Board? For instance, should the Board require the party to demonstrate consultation or engagement with a class of consumers directly affected by the application?

As worded, this question seems also to be focussed on the representation of the party requesting intervenor status. However, as noted below, the Board has set out two distinct considerations in Section 3.03 a) and b) of its Practice Direction on Cost Awards.

In our view, it is not appropriate for the Board to consider forcing/condensing intervenors into one or more ratepayer groups for cost award eligibility purposes. The public interest is broader (environment, society, economy) than just ratepayer interest and requires broader representation and ***diversity***.

Several Canadian Jurisdictions employ two broad criteria to determine cost award eligibility.

The first is ***Need*** - does the intervenor represent a constituency that has a "commercial/monetary interest" and implicitly may (or may not) have access to other sources of funds? The second is whether the intervenor represents the ***Public Interest*** rather than a distinct class of ratepayers.

In the OEB Practice Direction there is no explicit delineation of Cost Eligibility based on Need.

Section 3.03(a) of the OEB *Practice Direction on Cost Awards* which provides as follows:

> ***"A party in a Board process is eligible to apply for a cost award where the party:***
>
> ***(a) primarily represents the direct interests of consumers (e.g. ratepayers) in relation to services that are regulated by the Board;"***

While some intervenors clearly are primarily ratepayer representatives, others represent a subset of a ratepayer group. Others have a broader public interest constituency and others have an environmental focus. All of these diverse ratepayer and public interest perspectives are relevant to the Board's performance of its mandate under the Acts

Q2. What factors should the Board consider in determining whether a party primarily represents a public interest relevant to the Board's mandate?

3.03(b) of the *Practice Direction on Cost Awards* provides as follows:

> ***"A party in a Board process is eligible to apply for a cost award where the party:***
>
> ***(b) primarily represents a public interest relevant to the Board's mandate;"***

As noted above, the Board should not foreclose its consideration of any cost eligibility applications from a party that contends that it represents a public interest, without first considering all of the grounds and information advanced by that party to support the request.

It would be helpful for the Board to provide guidance to intervenors on the matters, criteria and attributes that the Board considers when considering whether to grant intervenor status, particularly for full participation (as opposed to observer status).

Q3. What conditions might the Board appropriately impose when determining the eligibility of a party for costs? For instance, what efforts should the Board reasonably expect a party to take to combine its intervention with that of one or more similarly situated parties? Should the Board reasonably expect parties representing different consumer interests to combine their interventions on issues relating to revenue requirement (as opposed to cost allocation)?

Some Canadian energy regulators (e.g. BCUC, MPUB and Regie) may require intervenors to combine efforts. This occurs not at the intervention stage, but at the Cost Award Eligibility stage.

A key factor is that these Regulators proceed primarily by Oral Hearings and Adjudication; whereas the Board proceeds in many cases by disclosure and Settlement Agreements with oral hearing of unsettled Issues.

The role of Board Staff is important. Are they another intervenor or is their role to ensure the applications are complete and contain all required information that the Board will require to consider and approve an application?

Energy Probe suggests the latter is the appropriate role rather than to test the claims made by the Applicant regarding cost and other pressures in support of an increase in rates.

The Board often has Staff proceed first in the disclosure (interrogatory) process. This has two consequences -- timing and Staff coverage of all of the Issues.

However, even if these issues can be addressed, then intervenor representatives will still need to examine the Application and note their detailed issues and questions on the proposed revenue requirement. The number of Interrogatories could be reduced, but in fact the Applicant sorts the questions by area of the filing and refers to, or repeats its responses to both Board Staff and other intervenor questions. The duplication that ensures from the current process is very small according to utility representatives at the Stakeholder meeting. Utility representatives tend to agree that it is more cost effective for the Applicant to review all interrogatories for duplication than to have every intervenor review each other's interrogatories.

Following the discovery process intervenor representatives routinely caucus to explore issues and positions both at the Settlement Conference, or in the event Settlement is not complete, at the oral hearing stage.

The Issue of Cost Award Caps has been raised by the Board and some utilities e.g. Enwin:

> If you've read our submission or if you read it after you hear this presentation, you'll see that our proposal is to talk about cost award caps as a way to do that. The Board does cost award caps today. They do it in policy proceedings all the time. I'm not sure if they did for this proceeding, but often for a stakeholder consultation the Board will say: You have 10 hours to prepare and attend, and so on and so forth. That's a cost award cap. [TR Page 24 and following]

For the majority of 3GIRM and rebasing applications which proceed by discovery and Settlement rather than oral hearing, Energy Probe believes such an approach is unnecessary.

However, in larger Cost of Service cases which are not scheduled for a settlement conference, or follow from a Partial Settlement, then a second stage application for cost award status confirmation ***could*** be considered, at which point intervenors may choose to subdivide the case file, in establishing their areas of focus.

In any budget process, we suggest ***flexibility*** is essential. If the case requires evidence updates or new evidence, budgets must be adjusted.

Enbridge periodically has large Cost of Service Rebasing Cases and recognizes this:

> Enbridge does not believe it is necessary or even feasible, for that matter, to preset budget expectations for adjudicative proceedings. Enbridge knows all too well that the unpredictive nature of these proceedings makes it very difficult to forecast what level of activity may be required or appropriate for a given case.
> [TR Page 77]

Q4. Should the Board consider different approaches to administering cost awards in adjudicative proceedings? For instance, should the Board consider adopting an approach that provides for pre-approved budgets, pre-established amounts for each hearing activity (similar to the approach for policy consultations), and pre-established amounts for disbursements?

As noted earlier, some Canadian jurisdictions require Intervenor Budgets to be submitted after the Application and Procedural Orders have been issued.

For the OEB, which proceeds in many cases by discovery followed by a Settlement Conference, this will add unnecessary process and since there may only be few parties other than Board Staff, this will not save money.

The adoption of a budget pre-approval process is likely to lengthen, rather than shorten, the duration between the filing of an application and its disposition.

Applying pre-determined time limits, similar to those used in OEB policy consultations, for the steps involved in conducting a prudent intervention in a complex case would be arbitrary and intrude into the case management process used by each intervenor.

The Board did employ a pre-approved budget model in its early days, prior to regulating the numerous Ontario electricity distribution utilities. The Intervenor Funding Project Act, which took effect on April 1, 1989, established procedures for advance funding of intervenors. The Board found the pre-approved budget model to be inefficient and time consuming, and moved toward the current model as a result of its 1993 review of Cost Awards Guidelines.

The Intervenor Funding Project Act was repealed on April 1, 1996.

Cost Award Decisions

In determining whether or not to grant the cost claim and requested costs, as it has done in its past practice, the Board should continue to exercise its judgment, informed by whatever sources of information it requires, to award, reduce or deny the cost claim of any party.

It is important to distinguish cost claims in Applications that are Settled or substantively Settled from those that require a significant oral hearing.

All participants in a Settlement Conference work together in group dynamic to elicit, organize and present intervenor positions on issues in a framework which facilitates the achievement of settlements on a significant number of matters on the Issues List. The time spent by Board Staff and its consultants up to the Settlement Conference could be a guide to the reasonableness of time spent by intervenors in preparing for and attending the Settlement Conferences.

If the Board Members require further information on the reasonableness of time spent by representatives of intervenors in the Settlement Conference process, then a report provided by the facilitator and/or Board Staff on the activities that occurred during the Conference would assist the Board.

When assessing the breadth of the range of reasonableness for intervenor cost claims, the Board, should also request a report from the Applicant on the time and costs the utility incurred in the pre-hearing (Settlement if applicable) and hearing stages of a proceeding. This information should be provided as an adjunct to the utilities review of the cost claims and could be point of reference for the Board's current practice of considering the cost claims of other intervenors as comparators for evaluating reasonableness.

"Principles In Awarding Costs" specified in section 5.01 of the Board's *Practice Direction on Cost Awards* as follows:

"5.01 In determining the amount of a cost award to a party, the Board may consider, amongst other things, whether the party:

- *(a) participated responsibly in the process;*
- *(b) asked questions in interrogatories or on cross-examination which were unduly repetitive of questions already asked by one or more other parties;*
- *(c) made reasonable efforts to ensure that its evidence or intervention was not unduly repetitive of evidence presented by or the intervention of one or more other parties;*
- *(d) made reasonable efforts to co-operate with one or more other parties in order to reduce the duplication of interrogatories, evidence, questions on cross-examination or interventions;*
- *(e) made reasonable efforts to combine its intervention with that of one or more similarly interested parties;*
- *(f) contributed to a better understanding by the Board of one or more of the issues in the process;*
- *(g) complied with directions of the Board, including directions related to the pre-filing of written evidence;*

(h) addressed issues in its interrogatories, its written or oral evidence, its questions on cross-examination, its argument or otherwise in its intervention which were not relevant to the issues in the process;

(i) engaged in any other conduct that tended to lengthen unnecessarily the duration of the process; or

(j) engaged in any other conduct which the Board considers inappropriate or irresponsible."

These positive and negative intervention attributes are comprehensive and perhaps the primary issue is ***who keeps the Scorecard*** - the Applicant (potential conflict), Board Staff Case Manager or other party tasked with providing the information required by the Board to issue its Cost Award Decision.

Potential Modifications

1. Are there modifications that the Board should consider making to the Rules and the Practice Direction?

The *Rules* and the *Practice Direction* broadly define the Board's discretion with respect to intervenor status, cost eligibility, and the assessment of cost awards.

In Energy Probe's submission these provisions give the Board all the powers and flexibility it needs to continue to determine matters pertaining to intervenor participation in proceedings before the Board in a fair and transparent manner and at a cost which is compatible with the guiding principles upon which the Board's cost award regime is based.

The obligation of the utilities to more frequently consult and communicate with their customers, and the Board's plan to make greater use of customer surveys and focus groups, should work to provide information to consumers and act as an adjunct to cost eligible intervenors conducting interventions which fully and completely examine the details of the applications and the concerns of parties affected by the applications.

In larger cases submissions of budgets can be practical, but for smaller cases the time to do this is unreasonable, and in the majority of cases is unlikely to save time or otherwise increase the efficiency of the Board's processes.

Pre-established cost limits is a mechanism that is appropriate and used by the Board for Stakeholder Consultations. To apply this approach to technically and financially complex rate cases is to be considered with caution.

Board Questions	References	EP Responses
Intervenor Status ***Q1. What factors should the Board consider in determining whether a person seeking intervenor status has a "substantial interest" in a particular proceeding before the Board? For instance, should the Board require a person seeking intervenor status to demonstrate consultation or engagement with a constituency directly affected by the application?***	Rule 23.02 -***substantial interest*** Rule 23.03(a) *(b) a description of the intervenor, its membership, if any, the interest of the intervenor in the proceeding and the grounds for the intervention*	Most organizations to be relevant to their constituency develop their own methods of ensuring that their members' interests are identified and represented- no oversight is required. If the Board wishes to improve local ratepayer interaction, the Applicant should be required to apprise local ratepayers interested in the Application of the Province-wide organizations that have been granted intervenor status and provide appropriate contact information.
Q2. What conditions might the Board appropriately impose when granting intervenor status to a party? For instance, should the Board also require an intervenor to demonstrate how the intervening group or association governs the participation by its legal counsel and other representatives in the application?	Rule 23.03(a)	This raises the issue of ***who should represent*** the interests of ratepayers and other public interest groups at the Board. To require intervenors to provide information on the governance of their ***representatives*** on a case by case basis is too onerous. If the Board finds this information necessary as part of qualification for intervenor status, then a one- time qualification (similar to that of the Regie) may be appropriate. Only material changes to this would be submitted thereafter.
Cost Award Eligibility ***Q1. What factors should the Board consider in determining whether a party primarily represents the direct interests of consumers (e.g. ratepayers) in relation to services that are regulated by the Board? For instance, should the Board require the party to demonstrate consultation or engagement with a class of consumers directly affected by the application?***	Section 3.03(a)(b) *Practice Direction on Cost Awards* *"A party in a Board process is eligible to apply for a cost award where the party:* *a) primarily represents the* ***direct interests of consumers*** *(e.g. ratepayers) in relation to services that are regulated by the Board;"* *(b) primarily represents a* ***public***	It is not appropriate for the Board to consider forcing/condensing intervenors into one or more ratepayer groups for cost award eligibility purposes. Some intervenors are primarily ratepayer representatives, others represent a subset of a ratepayer group. Others have a broader public interest constituency and others have an environmental focus. All of these diverse ratepayer and public interest perspectives are relevant to the Board's performance of its mandate under the Acts. The public interest is broader (environment, society, economy) than just ratepayer interest and requires broader

Q2. What factors should the Board consider in determining whether a party primarily represents a public interest relevant to the Board's mandate?	***interest relevant to the Board's mandate;"***	representation and ***diversity***. It would be helpful for the Board to provide guidance to intervenors on the matters, criteria and attributes that the Board considers when considering whether to grant intervenor status.
Q3. What conditions might the Board appropriately impose when determining the eligibility of a party for costs? For instance, what efforts should the Board reasonably expect a party to take to combine its intervention with that of one or more similarly situated parties? Should the Board reasonably expect parties representing different consumer interests to combine their interventions on issues relating to revenue requirement (as opposed to cost allocation)? ***Q4. Should the Board consider different approaches to administering cost awards in adjudicative proceedings? For instance, should the Board consider adopting an approach that provides for pre-approved budgets, pre-established amounts for each hearing activity (similar to the approach for policy consultations), and pre-established amounts for disbursements?***		Some Canadian energy regulators may require intervenors to combine efforts. A key factor is that these Regulators proceed primarily by Oral Hearings and Adjudication; whereas the OEB proceeds in many cases by disclosure and Settlement Agreements with oral hearing of Unsettled Issues. Is Board Staff another intervenor or is their role to ensure the applications are complete and contain all required information that the Board will require to consider an application; rather than to test the claims made by the Applicant regarding cost and other pressures in support of an increase in rates. For the majority of 3GIRM and rebasing applications which proceed by discovery and Settlement rather than oral hearing, Energy Probe believes requiring budgets is unnecessary In COS/Rebasing cases, any budget process needs ***flexibility***. If the case requires evidence updates or new evidence budgets must be adjusted.

Cost Award Decisions	5.01 *Practice Direction on Cost Awards* as follows: *"5.01In determining the amount of a cost award to a party, the Board may consider, amongst other things, whether the party---(a)-(j):*	In determining whether or not to grant the cost claim and requested costs, as it has done in its past practice, the Board should continue to exercise its judgment, informed by whatever sources of information it requires, to award, reduce or deny the cost claim of any party. Who keeps the ***Scorecard*** is an issue. It is important to distinguish cost claims in Applications that are Settled or substantively Settled, from those that require a significant oral hearing. Report from ADR facilitator and/or Board Staff on the activities that occurred during the Settlement Conference would assist the Board. The Board, should compare claims to a report from the Applicant on the time and costs the utility incurred in the pre-hearing, (Settlement if applicable) and hearing stages of a proceeding.
Potential Modifications ***1. Are there modifications that the Board should consider making to the Rules and the Practice Direction?***		The *Rules* and the *Practice Direction* broadly define the Board's discretion with respect to intervenor status, cost eligibility, and the assessment of cost awards. In Energy Probe's submission these provisions give the Board all the powers and flexibility it needs to continue to determine matters pertaining to intervenor participation in proceedings before the Board in a fair and transparent manner and at a cost which is compatible with the guiding principles upon which the Board's cost award regime is based. For discussion • Qualification of Intervenors and representatives for granting Intervenor Status.

		• Report from ADR facilitator and/or Board Staff on the activities that occurred during Settlement Conferences • Budgets for COS/rebasing cases (after Discovery). Flexibility essential

Costs

Energy Probe appreciates the opportunity to provide input to the Board on these important issues.

Energy Probe has acted responsibly and consulted with other parties with a view to providing assistance to the Board, and requests that the Board reimburse its legitimately incurred costs.

Respectfully submitted at Toronto, Ontario this 16th day of October 2013.

Energy Probe Research Foundation