



By EMAIL and RESS

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Our File: EB20210180

Ontario Energy Board
2300 Yonge Street
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Toronto, Ontario
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Attn: Christine Long, Registrar

Dear Ms. Long:

Re: EB-2021-0180 – Innovation Sandbox 2.0 – SEC Submissions

We are counsel to the School Energy Coalition (“SEC”). Pursuant to the Board’s letter of August 26, 2021, this letter constitutes SEC’s submissions on the OEB Staff proposals for changes to the Innovation Sandbox.

The Fundamental Issue

The danger with the current process is that regulated utilities, who are by design and regulatory preference risk-averse (and should be), will decline to risk shareholder money pursuing innovation, but will, through a process that does not allow ratepayer input and has limited transparency, risk ratepayer money to pursue innovation.

While there is no current evidence that this has happened, it is also true that there is limited public information on the Innovation Sandbox to date, so some movement in this direction may already exist. Some of the input OEB Staff received from parties clearly inclines further in this direction, including proposals for OEB “funding” (which, of course, means ratepayer funding) of Innovation Sandbox experiments.

Innovation Sandbox 2.0

SEC submits that central to the Board’s approach to innovation and to this initiative as it moves forward should be a clear understanding that:

- a) Nothing should be recoverable in rates unless a proper proposal has been made and reviewed through a hearing or similar process, in compliance with the OEB Act and the Board’s mandate to establish and maintain just and reasonable rates.

- b) The Board's overall principle of transparency – the foundation of its public accountability – should not be ignored or diminished except in unusual cases where secrecy/confidentiality is essential.

This leads to an Innovation Sandbox 2.0 that has two key components.

First, pilot projects and other innovation initiatives should be funded by utility shareholders, as is the case in the private markets, if they relate to competitive market activities. Utilities can fund innovation through affiliates, or within the utility through shareholder funds. Some utilities already do this, recognizing that innovation benefits the utility as well as the customers.

On the other hand, there may be projects or initiatives that should be funded by customers through rates. ***If a utility believes that ratepayer funding is appropriate, then they should make a public application to the Board for a rate increase, and their customers will have full opportunity to test the appropriateness of the proposed spending.***

This approach ensures that the integrity of the rate-setting process is maintained. If rate-regulated utilities want to recover a cost in rates, including a cost associated with innovation, they must make a public application and undergo the appropriate regulatory and public scrutiny. The Board does not increase rates in private, and does not increase rates without justification, and it should not start now. Neither delegated authority nor any kind of general "innovation fund" should be used to circumvent the customer protections embedded in the rate-setting process.

Second, the basic rule for Innovation Sandbox 2.0 should be that all proposals, including all background materials related to those proposals, must be publicly posted on the website of the Board and the applicant. This should happen in real time, not after the fact.

That is, the default paradigm should be the same as the default paradigm for everything else the Board does: full transparency. The Board doesn't act in secret. It is a public body, and acts under constant public scrutiny.

We note that, as many innovative solutions will ultimately engage the competitive markets at one level or another, greater transparency will facilitate that engagement. The competitive markets operate on the basis of information flow. As the flow of information increases, so do both competition and innovation. This is a basic principle of market-driven economics, and should be embraced by the Board in this situation.

That does not mean that there is no information that should be confidential. However, this is not a wheel that has to be reinvented. The Board has a comprehensive Practice Direction on Confidential Filings, which applies to applications and could just as easily be applied to project proposals under Innovation Sandbox 2.0. While it allows for protection of certain types of information from public view, it also does two other things:

- Provides access to interested parties such as customer groups who have signed the appropriate Declaration and Undertaking.
- Maintains the primacy of the principle that the Board's processes are by default fully transparent, and any deviation from that is an exception that must just be justified.

We note that real-time disclosure of Innovation Sandbox proposals will have the positive effect of generating dialogue within the sector on new ideas and possibilities. In addition, it facilitates the goal of the "concierge" service by allowing interested parties to connect with each other and improve projects through collaboration.

SEC has noted previously that this is much like the patent system in most countries, which is one of the central ways that innovation is dealt with in public law. Under the standard approach to patents, a person or company can protect their intellectual property, but to do so they must make it fully public. This then allows others to build on their IP to innovate further, improving products and moving technology forward. That is the central justification of the patent system.

Some may take the view that requiring transparency will put a damper on utilities' willingness to engage in innovation or take advantage of the Innovation Sandbox. SEC does not agree.

Utilities remain free to pursue whatever innovative ideas they like in secret, just as companies can develop new technologies and keep them secret.

However, if a utility wants ratepayers to take any risk or spend any money, or wants the OEB to remove regulatory barriers (i.e. ratepayer protections) to facilitate the utility's innovation, then just like companies seeking patent protection those utilities will, in our view, accept that transparency is a necessary part of the process.

SEC submits that, if the Board adopts the two basic principles of a) rigorous public review of all innovation proposals requiring ratepayer funding or risk, and b) full real-time transparency with only the existing exceptions for confidentiality, the Innovation Sandbox 2.0 can strengthen and facilitate innovation in the sector, without giving up any of the protections for the customer that are so important to the Board's mandate.

Input on Specific Questions

At the September 30th stakeholder meeting, OEB Staff particularly sought input on five specific items. SEC's comments on those items, and one other raised in the consultation, are set out below.

The proposed Sandbox Goal and Project-Specific Eligibility Criteria

SEC is concerned that these proposals may be too limiting.

We agree with OEB Staff that proposals for innovation should be anchored in one or more long-term needs and/or public policy goals. Innovation cannot take place in a vacuum. It is rarely successful without a clearly defined purpose.

What the OEB Staff proposal appears to do is limit the kinds of goals/needs to the "energy transition" and "risks to the grid". That is, in fact, where most of the innovative proposals are likely to be, but it should not be a restriction. In our view, utilities should be free to engage in innovation to achieve any needs or goals that would benefit the sector and its customers.

By way of example only, a utility may want to propose a pilot project in which its shareholder gets a financial incentive/penalty tied to improvement or decline in its reliability statistics over a period of time. If they have a well thought out proposal, and the sector might benefit from seeing what happens, the utility should be free to come to the Innovation Sandbox staff for assistance and analysis. Then, assuming they wish to go ahead, the utility should be able to apply under whatever mechanism is available for the rate adjudication that would allow it to work.

SEC is concerned that the Sandbox Goal be worded so that it is broad enough to encompass any innovative project that is tied to a need or goal that is appropriate for the sector and its customers.

We do not have any additional comments with respect to the goal or the project-specific eligibility criteria.

The sufficiency of proposed awareness-raising activities
The sufficiency of transparency and communications activities proposed

As noted above, SEC believes that real-time transparency is necessary to ensure that Innovation Sandbox proposals and activities achieve maximum value for the utilities, their customers, and other stakeholders in the sector.

Thus, SEC is directionally aligned with the OEB Staff proposals, which also seek to expand transparency and communications. The difference is that SEC would like to see greater and more immediate transparency.

Innovation Dialogue: Expectations for what this activity should entail (e.g., role of OEB staff, nature of dialogue, stakeholders to be involved, meeting frequency)

SEC believes that, if the OEB provides real-time information on innovation proposals on an ongoing basis, that will go about 90% of the way to promote dialogue. Utilities, customer groups, and private sector stakeholders interested in innovative approaches to the sector will not be shy in contacting each other when they see what is being discussed and proposed.

OEB Staff could augment this by hosting stakeholder discussions, likely themed to particular subject areas. In our view, this should not be a scheduled, recurring activity, but rather should be responsive to the issues that are being raised by utilities and other stakeholders through the Innovation Sandbox. If, for example, an electricity distributor wants to do a bidirectional charging pilot as its EV population expands, that is likely to generate considerable interest. OEB Staff can play a useful role simply by getting everyone interested to a common table to discuss it.

Concierge Service: Expectations for what this service should entail (e.g., desired activities, role of OEB staff) and views on the OEB collaborating with another organization to provide this service (including suggestions related to what organization would be suitable)

This contemplates OEB Staff taking on a new role as a kind of matchmaker between companies interested in innovative new approaches to sectoral challenges.

SEC views this with caution. This kind of activity requires specific skills that are not currently part of how OEB Staff are selected and trained. Further, it is a step removed from the regulatory mandate of the OEB. Care should be taken to ensure the the staff of the OEB are not asked to take on new functions that are outside of either their skillset, or the Board's mandate.

That having been said, OEB staff are regularly talking to people within the sector, and where they see that people should be talking to each other, they often tell them so. This kind of informal dialogue between people who know each other is an often undervalued aspect of what everyone does in this area, and OEB staff in particular.

The difference is that a Concierge Service would formalize those informal peer-to-peer connections. It is not obvious to SEC that this would be an improvement.

The idea of a Concierge Service has been presented as conceptual only, and it could certainly be implemented in many possible ways. We have seen similar concepts implemented in other sectors (although rarely through a regulator), and they are not all the same. Thus, before making any specific comments on any potential service in this category, it would be useful to SEC and perhaps others to have a proposal on the table that we can analyse.

Ratepayer Funding of Innovation through an ICM-like application process.

OEB Staff did not make this proposal, but it has been discussed and we are aware that other parties are supporting this approach.

SEC has noted earlier that ratepayer funding should only be provided after a public application with appropriate participation and scrutiny. Generally speaking, we also believe that should be in the context of a rebasing application, in which innovation spending can be considered by the Board in the proper context.

If the Board were to make available a process in which utilities could propose innovation projects much as they propose ICM projects today, SEC believes that might be warranted in some cases. It should, however, be exceptional rather than normal. There is always a risk that any incremental funding process becomes a further way to increase rates asymmetrically, recognizing that there are few if any ways that rates decrease through incremental means.

By way of example, if a utility is in a ten year rebasing deferral period due to a merger, and wants to implement an innovative pilot project, they should be required to demonstrate that:

- The project is unrelated to their merger activities, and thus is not more appropriately funded by them out of merger savings,
- It cannot and should not wait until their scheduled rebasing for consideration by the Board,
- The amounts involved meet a relatively high dollar threshold, and
- If the costs are borne by the customers in rates, the benefits will also accrue to the benefit of the customers, and those benefits will be sufficiently greater than the costs to warrant the investment of the customers' money.

Subject to appropriate protections, SEC submits that funding major innovation projects, even outside of the normal rebasing cycle, should not be prohibited entirely.

Conclusion

SEC remains concerned about the Innovation Sandbox and its potential to have unintended negative consequences, but believes that the OEB Staff proposals are generally steps in the right direction. In our view, if the Board were to adopt the suggestions made by SEC in these submissions, the Innovation Sandbox 2.0 could end up providing material benefits for customers and for utilities.

All of which is respectfully submitted.

Yours very truly,
Shepherd Rubenstein Professional Corporation



Jay Shepherd

cc: Ted Doherty, SEC (by email)
Interested Parties (by email)