April 29, 2022

Ontario Energy Board
Attn: Registrar
Framework for Review of Intervenor Processes and Cost Awards

Submitted via email (registrar@oeb.ca)

Re: AMPCO Submission – Intervenor Processes and Cost Awards (EB-2022-0011)

AMPCO is the voice of industrial power users in Ontario. Our mission is industrial electricity rates that are competitive and fair.

Attached are AMPCO's comments on the Framework for Review of Intervenor Processes and Cost Awards. AMPCO appreciates the opportunity to provide such feedback.

Best Regards,

Colin Anderson
President

Framework for Review of Intervenor Processes and Cost Awards

Submission of the Association of Major Power Consumers in Ontario (AMPCO)

INTRODUCTION

AMPCO provides Ontario industries with effective advocacy on critical electricity policies, timely market analysis and expertise on regulatory matters that affect their bottom line. It is the forum of choice for major power consumers who recognize that their business success depends on an affordable and reliable electricity system.

This submission is in relation to the document entitled "Framework for Review of Intervenor Processes and Cost Awards" ("Framework Document") in the consultation initiated by the Ontario Energy Board ("OEB" or "the Board") on the same subject. AMPCO's members are major power consumers, responsible for approximately 15 TWh of annual load in the province, with a total annual electricity bill of more than $1.5B. A robust and affordable energy supply is critical to the success of their businesses, which is why AMPCO has an interest in this consultation.

AMPCO appreciates the opportunity to provide feedback.

AMPCO GENERAL COMMENTS

AMPCO fully supports the OEB's journey through the recommendations of the OEB Modernization Review Panel in becoming a Top Quartile Regulator. AMPCO further believes that certain subject areas touched upon by the Panel are likely more deserving of a focused review than others.

Reviewing intervenor processes and cost awards is a prudent action for the Board to undertake. However, in assessing the results of the jurisdictional review that was carried out in advance of the issuance of the current Framework document, AMPCO understands that there is no clear indication amongst those other jurisdictions of what

the single "best practice" is in terms of intervenor processes and costs awards[1]. Each jurisdiction must determine what constructs and processes work best for it, given the existing situation in which they find themselves. In AMPCO's submission, in many respects, Ontario has taken the top of the podium in terms of regulatory efficiency and effectiveness.

Much of the Framework Document reads as though Ontario's "glass is half empty" and there is considerable work to do to fill it up. AMPCO disagrees with this. While "efficiency" is a reasonable goal for the OEB to pursue, such a goal cannot exist without a corresponding goal of "effectiveness", and an appropriate amount of attention must be focussed there too. AMPCO believes that the OEB has done an excellent job in creating an effective intervenor process that adds value, serves the public interest and results in improved decision making by its existence. The Board need not apologize for its system – rather, it should be proud of it. In AMPCO's respectful submission, and as supported by consideration of both efficiency and effectiveness, Ontario's existing process is not fundamentally flawed and does not require a complete redesign.

ADDITIONAL DETAILED COMMENTS

1. AMPCO's view on the Size of the "Problem"

Arguably, the general aim of economic regulation is to create a system of incentives and penalties that aim to replicate the outcomes of competition in terms of consumer prices, quality and investment for regulated utilities and puts the protection of consumers' interests at its heart. Its outcome is intended to be rates that are just and reasonable. In AMPCO's submission, intervenors and their actions are absolutely critical to this outcome and the current Ontario construct serves the process well.

The existing intervenor community in Ontario brings a number of different entities together that, in aggregate, assess utility applications from a variety of viewpoints.

[1] Jurisdictional Review of Intervenor Processes and Cost Awards (December 1, 2021), Appendix A

Residential ratepayers, low income consumers, large industrial customers, coalitions of environmental groups and Ontario school boards, and a number of others all participate cooperatively in proceedings to ensure that customers are well-served. The constituents of these groups may be different, but they all have the common bond of being subject to the decisions of the Board and the requirement to pay the resulting regulated rates that are determined to be just and reasonable.

The Board renders its decisions in the public interest. Intervenors, representing customers, are representatives of that public. Further, the actions of the intervenor community and the expertise that intervenors bring to the testing of evidence and the crafting of argument provides additional analysis and information to the Board that it relies upon in rendering high quality decisions. But for the existence of the intervenor community, the Board's decisions would likely be less robust than they are today.

The interaction of intervenors and applicants, with oversight and accountability provided by the regulatory process, represents a symbiotic relationship that must be encouraged, rather than suppressed. The results achieved with considered participation of both groups is better than it would be with just one or the other.

From a materiality perspective, it is clear that the costs of the existing system are *de minimis* when contrasted to the revenue requirements of the utilities being regulated. Looking at the Framework Document at page 18, one sees that total intervenor cost awards for both policy consultations and adjudicative proceedings have averaged $4.4 million per year over the last five years. These average annual costs were incurred while adjudicating total revenue requirements of $24.6 billion in 2020 ($20.0 billion electricity and $4.6 billion natural gas)[2]. This translates to total intervention costs being less than 0.02 per cent of total regulated revenue requirements. It should also be noted that intervenor costs are typically a tiny fraction of the total disallowances that are imposed on utilities in rate cases, largely due to the action of intervenors – further indication that the benefits achieved far outweigh the costs for ratepayers.

[2] Framework for Review of Intervenor Processes and Cost Awards (March 2022), Footnote 20

One of the most important points to remember in this entire discussion relates to who is actually paying the bill for these interventions. In a forward-looking test period, applicants include a forecast of regulatory costs that they will incur for the test period, including a forecast of intervenor funding. Ultimately, the Board will direct those same applicants to pay the actual intervenor amounts that are approved – amounts that typically are less than what the applicant forecast the expenses to be. So the applicant, whose forecast expenses form part of their revenue requirement, does not pay the intervenors – the ratepayer pays the intervenors through the payment of its rates. In the situation where forecast intervenor expenses exceed actual intervenor expenses, applicants will actually make money on the subject of intervenor costs.

To be clear, the costs that are being imposed on the system by intervenors are being borne by customers – the very groups that are represented by the intervenor community. If a specific community is unhappy with its regulatory representation, it can act to change that representation. Further, the Board already has the unilateral capability to disallow costs to intervenors that it believes did not perform in a fashion that warrants the level of award that is being requested. These powers do not need to be created; they already exist and are available to be used. To be clear, sufficient checks and balances already exist and have been employed previously to ensure an efficient process.

In AMPCO's respectful submission, this leads to the conclusion that the current intervention system in Ontario is not broken. No major modifications are required given the materiality of the issue and the existence of appropriate tools available to the regulator.

2. "Substantial Interest" - AMPCO's Approach to OEB Interventions

All intervenor groups routinely assess applications to determine whether or not they will participate.

AMPCO does not intervene in all proceedings before the OEB. Its decision making process for determining which proceedings it will be active in versus those that it will not be active in is very simple, and has been validated by its Board of Directors. AMPCO's Board is comprised of 15 elected members who represent various major industrial sectors within Ontario, including pulp and paper, steelmaking, mining, automotive manufacturing, petrochemical and others.

- For electricity applicants whose rates / payment amounts cut across the entire province (i.e. OPG, Hydro One, IESO), AMPCO will intervene. These applications affect AMPCO's entire membership and in some cases, are extremely large and complicated. AMPCO's Board of Directors has indicated that AMPCO should regularly intervene in such proceedings because of the impact that they have across the entire membership.
- For electricity applicants whose rates impact a specific service area, AMPCO will first determine if it has any members who are within that service area. Assuming that it has affected members, upon a high level review of the pre-filed evidence, AMPCO will investigate with its affected members whether there is sufficient grounds to warrant an intervention. If an affected member wants AMPCO to intervene, then AMPCO intervenes. If not, or if AMPCO has no affected members, then AMPCO does not intervene.
- For gas applicants, AMPCO generally does not intervene, unless its members request it, and the issue of concern is sufficiently related to electricity.
- With respect to OEB policy consultations, AMPCO generally intervenes if the policy issues are relevant and impact large use customers.

To be clear, the only times that AMPCO intervenes in an OEB proceeding where the applicant is a utility is when one or more of its members requests that it do so because they stand to be impacted by the decision in that proceeding. In AMPCO's view, this process naturally satisfies the question of "substantial interest" that has been raised by the OEB in its Framework Document. The cost of electricity for large industrial customers in Ontario is often one of the largest input costs that they face. Managing

those costs is critical to their competitiveness and their ability to attract much needed investment capital.

AMPCO further believes that "substantial interest" is also satisfied for non-governmental organizations (NGOs) that are active before the OEB. These organizations represent aspects of the public interest which have historically been, and are increasingly, an important aspect of public utility regulation. Failure to include such relevant perspectives in the regulatory process will detract from the OEB's ability to carry out its regulatory function. Such exclusions would compromise both the quality and effectiveness of the OEB's decisions, and would be contrary to the best interests of energy customers as well as the broader public interest.

3. Question 8 - Should parties representing for-profit interests be eligible of cost awards?

AMPCO represents approximately 40 large industrial entities that are heavy electricity users in the province of Ontario. Those entities exist for profit, whereas AMPCO does not. Pursuant to section 3 of the Board's Practice Direction on Cost Awards, AMPCO is currently fully qualified to apply for and receive cost awards – a qualification that should absolutely continue.

Question 8, as framed, appears discriminatory. It suggests that for-profit entities do not deserve cost award support (through associations, or otherwise) even though they are legitimate electricity customers, simply because they possess a profit motive. This stands in stark contrast to the treatment of utilities, who also possess a profit motive. Question 8 does not advance a similar suggestion in relation to utilities who have their full regulatory expenses covered by electricity customers. Why customers should have to pay the regulatory expenses of the utilities, but not the intervenors who are testing the utilities' evidence (on behalf of customers) is confusing and appears biased. In AMPCO's submission, it is neither just, reasonable nor fair to consider removing intervenor funding while maintaining funding for utilities.

It has already been demonstrated that the total amounts of intervenor cost awards are *de minimis* when contrasted to the revenue requirements of the utilities being regulated. So if the total amounts are small, then the amounts being contemplated within the context of Question 8 – a subset of the total - are even smaller. One still must bear in mind that these expenses, regardless of quantum, are being fully paid by electricity consumers, not by the applicant and not by the Board. Further, AMPCO's members pay through their bills a considerable amount of money for their electricity usage – more than $1.5B annually. There can be no debate that those industrial entities deserve to be represented in OEB proceedings and the presence of the large industrial perspective most certainly serves the public interest – regardless of for-profit versus not-for-profit status. They are ratepayers, and significant ones at that. Finally, as already established, the industrial entities can act to change their representation if they are unhappy with it. AMPCO emphatically maintains that it should continue to qualify for cost awards, going forward.

In addition to the points already raised, another approach to understanding why AMPCO should continue to qualify for cost awards is to assume a situation, for illustrative purposes only, in which AMPCO does not exist. In this situation, one of two outcomes would transpire for each of its represented members, in each regulatory application. The approximately 40 entities that are currently represented by AMPCO would need to assess whether to intervene in a given proceeding to safeguard their interests, or to not intervene at all, ignore the entire process and risk the consequences of an ill-informed decision.

In the first instance, the Board could have as many as 40 additional intervenors in a given application, all of which would possess a substantial interest and could participate in the regulatory proceedings – asking interrogatories, cross-examining witnesses, advancing evidence, submitting argument, etc. This level of additional participation would add weeks to the existing regulatory process – hardly an efficiency improvement. Further, the presence of AMPCO as an intervenor serves to balance and focus the varied interests of its members, and AMPCO's actions advance the general perspective of the large industrial electricity customer in the public interest. Individual members would

rightfully take the specific positions that would benefit each of them the most in each proceeding.

Alternatively, if no AMPCO members intervene, the Board will have lost the perspective of the large industrial electricity customer from its proceedings. AMPCO currently represents approximately 15 TWh of large industrial demand in the province – approximately half of the total large industrial demand and approximately 11 per cent of the total Ontario demand. Removing this representation will make acting in the public interest significantly more difficult, since the OEB will be less informed as to what those interests are, and to what motivates them.

With the existing qualification for cost awards, AMPCO can act in the interests of its membership, providing the perspective of the large industrial electricity customer to the OEB, thereby enhancing the Board's understanding of this segment of the ratepayer base – all of which is paid for by the ratepayer. If AMPCO does not qualify for cost awards, with its current structure it will be unable to continue participating in OEB proceedings.

To be clear, while the Board ultimately renders the decisions in cases, those decisions are all informed by the constituencies that are represented by the intervenors who participate in the regulatory process and serve the public interest. Eliminate those intervenors, the public interest will be neglected and the decisions themselves will suffer.

4. Intervenor Coordination

Appendix B of the OEB's Framework Document lists the questions that the Board asks in relation to the intervenor process and cost awards. Question 7 reads as follows:

> *"What more could the OEB do to encourage greater collaboration of intervenors with similar views on issues and similar interests?"*

With respect, the Board needs to do nothing more. Intervenors already collaborate and do so much more broadly than just with other intervenors whose constituents may be similarly minded. Intervenors routinely communicate with each other and often establish "lead" roles on certain critical issues in order to avoid duplication and permit a deeper dive into the evidence than would be possible if all intervenors tackled all issues.

While this type of coordination routinely takes place, it should not be mandated by (or organized in conjunction with) the OEB. Indeed, AMPCO contends that such an activity would undermine the independence and objectivity of the regulator.

Consider a situation where AMPCO is advised by its Board of Directors to intervene in a specific application and to focus on a specific issue. Similarly, another intervenor may also be directed by its Board to do the same, and to focus on the same issue. The OEB should not have the authority to deny either of these Board-directed intervenors from executing the wishes of their respective Boards. Each intervenor is present in the proceeding as a result of its Board's direction – including addressing those issues in which each Board has a specific interest. The two intervenors may approach the issue the same or they may approach it very differently, depending on the viewpoints of their respective Boards. Often like-minded intervenors do not duplicate efforts during the discovery phase which further enhances the collective understanding of certain issues. So notwithstanding the fact that intervenors routinely collaborate, the OEB should not look to insert itself in any way in that collaborative process.

Another related issue is the question of cost award disallowances. The OEB has in the past disallowed portions of intervenor cost claims as a result of a certain intervenor's hours being higher than average. Without additional information, this can result in incorrect disallowances and it can reduce the question of determining cost award amounts to a mathematical averaging exercise which may not be appropriate depending on the scope of the proceeding. As already indicated, often certain intervenors are charged with taking the lead on a given issue. This role will almost certainly ensure that the intervenor in question will charge more hours on that particular issue than others.

In fact, some intervenors can lead multiple issues, which can further exaggerate the difference in claimed amounts. The OEB must understand that the lead role approach actually serves to minimize duplication (thereby shortening the regulatory proceeding) and reduces the cost claims of other intervenors who were not in a lead role. To penalize the lead intervenor out of a lack of understanding of this approach is inappropriate. The OEB needs to take steps to better understand this dynamic when evaluating cost claim amounts.

5. Active Adjudication

Appendix B of the OEB's Framework Document lists the questions that the Board asks in relation to the intervenor process and cost awards. Questions 12 &13 read as follows:

> *"12. Are there other ways Commissioners can enhance their approach to active adjudication while ensuring procedural fairness?"*
>
> *"13. Are there other tools that the OEB could employ to ensure that the scope of a hearing and materiality of issues is clearer earlier in the proceeding?"*

As stated earlier in this document, even though AMPCO believes that the intervenor process and cost awards system functions well (and the OEB has existing tools to manage the process), there are nonetheless some incremental improvements that could be made.

a. Issues List Determination and Materiality of Issues

In general terms, the earlier an Issues List can be established, the better it is for management of the scope of the proceeding. Obviously, there are situations that require considerable discovery before an issue can be determined to be on or off the Issues List, but often that is not the case – the issue can be identified as sufficiently large or small to make an early determination as to its inclusion.

AMPCO feels that through active adjudication, a Panel can typically establish a draft Issues List earlier in the proceeding than currently happens. If there are extenuating

circumstances, or if it comes to light later that a determination was made in error on a specific issue, a change can be made and steps taken to remedy the situation.

At one point, the OEB considered creating a priority system for issues with different treatment depending on whether the issue was determined to be a "Primary Issue" or a "Secondary Issue". AMPCO believes that this approach has merit and should be revisited. Primary Issues were intended to proceed to oral hearing based on their importance and materiality, while Secondary Issues were to be dealt with through written submissions in argument. Such a system could be facilitated by active adjudication, where Panel members drive to categorize issues as primary or secondary earlier to bring efficiencies to the process. AMPCO further understands that the details of such a system may be challenging to construct, but the resulting efficiency gains would certainly justify the effort.

b. Updated Filing Guidelines

The Board creates filing guidelines for different types of applications in order to bring some standardization to the evidence filed. That standardization supports the ability to assess known major issues in the application and provides for comparability from rate case to rate case.

Like any guideline, these documents require periodic review and updating in order to keep them relevant – for both applicants as well as intervenors. The Board needs to undertake such reviews at regular intervals. The Board's current work underway to review and update the Electricity Cost of Service Filing Requirements supports this point.

6. Amount of Current Cost Awards and the Need for a Level Playing Field

The OEB last updated its cost award tariffs on November 16, 2007. The rates it pays intervenors for legal counsel and consultants have been maintained at the same level

for over 14 years. Not surprisingly, market rates for counsel and consultants have not been similarly frozen.

Intervenors generally do not recover their entire costs through the existing OEB process. With a top rate for legal counsel of $330/hr, it is understandable why they don't. Currently, typical rates for regulatory counsel would be somewhere in the range of three times that amount. This is precisely the type of external legal support that applicants to the OEB can afford to hire, and then build those rates into their regulatory expenses for full recovery from customers.

This requires further elaboration because it provides an excellent example of the slanted playing field that exists. An applicant hires counsel to provide legal support to its entire rate case and has little incentive to minimize that level of support because all the expenses are recoverable from ratepayers. The intervenors who are testing the evidence on the other hand, have two options. In the first option, they can either hire counsel at the OEB approved rate of $330/hr – counsel that is likely to be seriously outgunned by the applicant's more experienced, better resourced (and significantly more expensive) counsel. The second option sees the intervenor hiring similar counsel to the applicant (assuming it can find quality counsel that is not already conflicted out…) and be out of pocket somewhere in the neighbourhood of $660 for every single hour that counsel bills. This assumes that there are no additional junior counsel requirements or other miscellaneous expenses – a very poor assumption. So the applicant can afford the best counsel, with little limit on number of hours, all funded by the ratepayer whereas the intervenor must pay two thirds of its comparable counsel's cost out of pocket – with a very real limit on number of hours, since it is paying two thirds of the hourly rate for every hour billed without compensation. Alternatively, intervenors who cannot afford the significant top up simply do not retain counsel. This does not seem like a level playing field.

AMPCO agrees that Appendix B of the report entitled Jurisdictional Review of Intervenor Processes and Cost Awards (December 1, 2021), shows that other jurisdictions face this same challenge, presumably because none of them have updated their tariffs either.

This fact does not level the playing field – it simply suggests that other fields are equally slanted and equally in need of attention.

AMPCO recommends that the OEB review the tariff amounts that are currently approved within this context.