EB-2022-0011

BEFORE THE ONTARIO ENERGY BOARD

FRAMEWORK FOR REVIEW OF INTERVENOR PROCESSES AND COST AWARDS

Green Energy Coalition (GEC) Submissions

General Comments

The province and the federal government have committed to significant GHG reduction targets that are likely to have a dramatic impact on both the electricity and gas sectors. The advent of this energy transition makes the need for the involvement of customer and public interest intervenors more critical than ever as the Board will inevitably have a central role to play in this energy transition.

Participants in the regulatory process, including the Board, the utilities, and the intervenors are almost entirely funded by ratepayers who often wear multiple hats as customers, concerned citizens and as taxpayers. Ratepayers who are represented by these intervenors thus have a right to expect that these representatives will have the resources to bring a strong voice to the process. Intervenor costs are a small percentage of the total cost of regulation and a miniscule part of total rates, but the value that intervenor participation can bring, both in terms of strengthening the legitimacy of the regulatory process, as well as in the impact on utility rates and spending is significant.

Thus, the focus of this consultation should be on improving intervenor participation not simply reducing any cost inefficiency. While the Board should certainly discourage ineffective and wasteful expenditures of intervenor time and the costs that can impose on other parties, it

must be cautious not to throw out the baby with the bathwater. Much of the regulatory efficiency objective that the OEB seeks from this review can be best achieved through the better use of existing tools, especially enhanced use of active adjudication.

We offer the following comments on several of the specific matters identified in the Board's paper:

Identified Concerns

1. Are there concerns other than those identified in this report, related to intervenor processes, or cost awards that the OEB should examine?

While the Board has recognized the value of public participation, it has not indicated any steps it might consider to enlarge and enhance the effectiveness of intervenor participation. Most of the specific changes listed as considerations in the discussion paper appear to be about constraining intervenor participation and costs. Efforts to constrain intervenor costs have been underway for several years and we would argue they have not enhanced the regulatory process. We note, for example, that the Board has not altered the costs tariff (except to constrain it) in many years, effectively allowing inflation to cut it dramatically and make it more difficult for intervenors to hire experts and experienced counsel. The Board's determination that it would not award costs to cover both counsel and consultants for hearing attendance has led to intervenors represented by consultants rather than lawyers, and this has sometimes resulted in ineffective hearing room advocates, wasting the Board's time and ratepayer resources. In contrast, we have seen little scrutiny of utility expenditure of ratepayer funds on its regulatory efforts. For example, utilities are not constrained to paying a set hourly rate to their lawyers and indeed tend to hire from the most expensive law firms in the country. This asymmetrical focus on reducing intervenor-related costs rather than enhancing the effectiveness of the process is inconsistent with the amount of ratepayer money attributable to interventions versus utility expenditures on regulatory matters, let alone in total, and is inconsistent with the value that intervenor participation has brought to the process.

Widespread participation by diverse interest groups should be a goal of the Board. Other jurisdictions have had to resort to consumer advocates to fill the need for transparency and accountability, a poor substitute for a diverse array of consumer and public interest intervenors given that there is no monolithic consumer or public interest.

The OEB's progress in maintaining widespread intervenor participation to date is a feather in the Board's cap. The Board should consider how it can enlarge and encourage such participation, not constrain it in what can amount to a penny-wise and pound-foolish effort.

Clarifying Application Expectations

2. Are there other initiatives that the OEB should consider to better clarify application expectations and result in more efficient proceedings?

The Board should instruct applicants that their evidence should be designed to increase the understanding of the parties with the overall objective of reducing the number and scope of interrogatories required. Accordingly, in determining what evidence to file, applicants should consider what information the Board and the intervenors are likely to request, and provide that information in the pre-filed evidence rather than waiting for the request to be made in subsequent steps. This will ensure a better use of hearing time, and a more focused and informed cross examination.

Intervenor Status: Substantial Interest

The Board has appropriately recognized the OEB's public interest mandate, and has recognized the benefits that flow from the involvement of a broad array of stakeholders, including not just customer groups, but those that bring forward a policy perspective. Given the increasingly pressing importance of policy goals such as GHG reduction and the protection of vulnerable consumers, it is vital that the Board preserve a broad view of 'substantial interest'.

We would also stress that intervenors taking broader policy-oriented positions, as is the case for environmental groups, should not be viewed as somehow less central to the Board's mandate relative to 'ratepayer' organizations. Members of policy-oriented intervenors are also ratepayers. Just because they place greater emphasis on their concern for the environmental impacts of the Board's decisions than on the impact on their monthly bill does not make them non-ratepayers.

3. How should the OEB define substantial interest for leave to construct applications?

Leave to construct applications impact landowners and nearby property users as well as ratepayers. These applications also impact the environment directly and indirectly as they facilitate system reliance, expansion, and customer fuel choice. Accordingly, it is not appropriate to narrow the definition of substantial interest as a rule in these cases.

However, due to the impact on local property users the definition of substantial interest as it is applied to individuals should be expansive relative to rate cases and generic policy cases where it may be appropriate to encourage individuals to rely on experienced intervenor groups where possible.

4. How should the OEB define substantial interest for rate applications?

The Board's current practice has been successful in allowing a wide range of interests to be represented and to contribute to the Board's record. No narrowing of that practice should be considered.

Cost Awards

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

The public interest and the legitimacy of the Board's process benefits from a diverse array of participants. In our submission there are significant dangers if participation is unduly restricted by constraining standing or costs eligibility or cost awards. While the Board must be mindful of controlling regulatory costs, that goal must be balanced with the primary purpose of a public hearing tribunal – to hold *public*, accessible reviews to improve decision-making, and to ensure transparency and accountability for both the decision-making process and the utilities being regulated.

For intervenors to be informed and helpful to the Board they must remain active and engaged in the Board's processes. If intervenors are restricted in their participation in hearings, or on issues within hearings, because they are not deemed to be the lead intervenor or because the issue is not the intervenor's 'primary concern', they will become less and less knowledgeable and effective and less helpful to the Board in each successive hearing as their knowledge-base narrows or grows stale or becomes disconnected from related issues.

That said, the Board can limit duplication of effort and related costs to some degree by active adjudication. Hearing panels can exercise control to ensure professional conduct, effective, relevant and reasonably concise cross-examinations, and concise, helpful responses from witnesses. But the Board must recognize that all parties that are given standing as intervenors need to be cognizant to some extent of the entire case to play a meaningful and helpful role. They must read most of the evidence and monitor the proceedings whether they are the 'lead intervenor' or not. Even where an intervenor group has a narrower interest, it must remain informed of the context or its contribution will be less helpful to the Board.

Further, there is also a concern that can arise if coordination is expected with groups represented by less skilled or effective advocates. This can compromise effective intervention and amount to a waste of resources. The Board cannot know what policy differences exist between intervenor groups nor is it appropriate to force disclosure and debate of such differences. It is unreasonable to expect intervenors to inform the Board about their misgivings in regard to another intervenor's positions, advocacy approach, or the talent of their representative.

For all these reasons the concept that the Board's paper floats of "Developing strategies to require parties with a limited scope that overlaps with another party to work together (e.g., combined intervention) with cost awards set commensurately" threatens the effectiveness of participation and the public's view of the fairness and adequacy of the Board's process.

If an intervenor's participation is highly duplicative and offers little or no assistance to the Board, that can be considered in the Board's review of costs claimed, as has been done in the past.

Should the OEB provide cost eligibility for multiple intervenors representing the same or similar interests?

As one of several environmental group intervenors, GEC is particularly concerned with the question that the Board has posed about multiple intervenors representing the same or similar interests. We offer the following observations from our experience to assist the Board in appreciating the implications of this issue:

GEC has participated in OEB cases for over 30 years. For much of that time it intervened in rate cases as well as generic reviews and major facilities cases. In recent years we have restricted our interventions to DSM cases, major facilities hearings, and generic policy cases such as the Gas IRP hearing. We have been able to do so in part due to the segregation of DSM, IRP and major facilities cases from the rate case processes. But also, by relying upon Environmental Defence (ED) to remain active in selected rate cases and facilities cases where there is an environmental concern at stake and there is little likelihood of ED's position differing from that of GEC's member groups. We do continue to intervene in DSM, IRP and selected facilities and CDM cases where there is a potential for GEC's member groups position to vary from that of ED's position or where the scale of the case or its impact on GEC's primary concerns warrants joint effort.

These groups have differing concerns that may not be obvious to the Board but that preclude them joining forces on all fronts. For example, GEC member group Greenpeace and ED have differing policy stances on certain matters and, as is a matter of public record, very different advocacy approaches, that would preclude these two groups being members in the same coalition. Energy Probe which formerly held itself out as an environmental group would now describe itself as a consumer advocacy organization and it has taken policy positions in direct conflict with GEC's.

Where such policy or advocacy approaches are not a barrier, we have been successful at cooperative efforts. For example, GEC and ED have cosponsored evidence in several recent cases or relied upon the other party to lead expert evidence. And counsel for one group has relied upon the efforts of counsel for the other to take a lead in cross, interrogatories, evidence production and argument on particular issues. For example, in the current Enbridge DSM proceeding ED has taken the lead on fuel switching economics and GEC and ED jointly sponsored the evidence of Energy Futures Group that is relied upon by numerous intervenors with GEC taking the lead on the presentation of that jointly sponsored evidence.

There is a significant workload when intervenors play a key role in a hearing as GEC and ED did in the EGI DSM Case. Applicants have counsel, often assisted by juniors (whether appearing before the Board in the hearing room or not) and assisted in great measure by numerous utility regulatory and policy staff. For intervenors to be able to be effective in what is an adversarial process against such formidable resources and the undeniable information asymmetry, it requires a significant amount of time that a single counsel may not be always able to provide.

Further, multiple parties with seemingly similar interests can review the same evidence, ask entirely different interrogatories, and reach different conclusions based on the information. This is a benefit of the existing system, rather than a drawback. Multiple sets of eyes on each application have produced much better reviews.

If cost eligibility were to be restricted, the non-funded organization would lose visibility into the matters before the Board. These organizations that do not represent pecuniary interests are chronically under-funded. They cannot dedicate staff to follow and stay informed about regulatory matters without the assistance of costs funded representatives staying actively involved. Without cost awards they would be ousted from both active involvement in the specific case and informed input into the process and subsequent cases.

Having one intervenor take the lead on a particular issue or issues in a proceeding may reduce duplication, but are there ways to better assist the OEB in understanding whether this has occurred and the impact on cost claims?

The Board could simply invite intervenors to indicate where they have coordinated efforts as part of their cost claim submission.

The board will often be at a disadvantage in terms of understanding what role an intervenor has played behind the scene. Accordingly, when the Board has concerns that a particular party's cost claim is excessive relative to other party's claims, as a matter of procedural fairness the Board should give notice of its concern and ask for submissions addressing the concern before reaching a determination.

Are there steps the OEB can take to ensure that limited issue or specific policy driven intervenors participate in proceedings only with respect to those specific issues, other than reducing cost awards for activity at the end of a proceeding?

As noted above, the Board must recognize that all parties that are given standing as intervenors need to be cognizant to some extent of the entire case to play a meaningful role. They must read the evidence and monitor the proceedings to both understand the context and to ascertain those elements of the case and the evidence that are related to their specific focus. Even where an intervenor group has a narrower interest, it must remain informed of the context or its contribution will be less helpful.

Under the existing rules the panel hearing a case can reduce costs awarded where an intervenor with a narrow interest has invested unneeded time and effort – though such reductions should be made with extreme caution given the considerable time required for any intervenor to stay on top of a case even where it is focussed on one aspect. Beyond that tool, active adjudication is the means by which a panel can curtail undue participation. There is nothing wrong with a Board member asking a cross-examiner how a particular line of cross is relevant to the intervenor's concern and will assist the Board.

How can the OEB ensure that the total cost awards granted are commensurate with the nature of a proceeding?

The Board should appreciate that intervenors' ability to control costs is constrained by several factors beyond their control, including:

- The length of the proceeding
- The adequacy of the applicant's filing and the necessity for interrogatories
- The number of procedural steps such as technical conferences, presentation days, ADRs etc.
- The extent of the applicant's evidence and any updates
- The extent to which the applicant cooperates on discovery or precipitates motions
- The extent of processes related to confidentiality
- The extent of evidence presented by other parties

Setting a cap on costs in advance would require the Board to be omniscient. The Board must recognize that the extent of necessary costs can change dramatically depending on the above factors among others. And the Board must remain open to the possibility of unanticipated issues and perspectives informing its regulation.

Environmental groups and many consumer groups have very limited financial resources. The regulatory process is an expensive avenue for public participation and these groups must engage in a triage exercise for their limited resources. Put frankly, it is cheaper to climb a smokestack with a banner than to employ counsel and experts to engage in a prolonged regulatory proceeding. The resulting reality is that counsel and experts are typically asked to work on spec for cost awards. When the Board reduces a cost award it is the expert or lawyer who takes the hit. This is already a risk that has made it difficult for public interest intervenors to retain certain experts or counsel who are not in the business of gambling on cost awards. Any pre-capping will increase that risk because no expert faced with the need to exceed the cap due to the exigencies of the process as it unfolds will want to sacrifice their expert reputation by

cutting back on effort, so they will understandably be reluctant to accept the engagement with a cap that increases the probability that the Board will not award costs for any increased expenditure of time.

Further, capping costs in advance per party or in total is a dangerous concept that could invite abuse by applicants or intervenors adverse in interest. Such a party could simply rag the puck to defeat costs-limited intervenors.

Capping total costs at the close of a proceeding could similarly, unfairly penalize appropriate interventions due to the inefficient participation of others, the prolongation of proceedings by an applicant, or even due to the hearing panel's failure to effectively control its own process.

Pre-defining limits on cost awards for limited-scope intervenors, commensurate with that scope would carry these same risks.

The proposed potential pilot of "approving costs for intervenors of similar interests as one entity with a maximum number of hours shared by the group" would suffer all the shortcomings noted for capped costs as well as all the shortcomings we discuss above for forced collaborations and limiting eligibility.

The Board's existing practices have not been shown to result in costs that are not commensurate with the nature of the proceedings. Cost awards are a miniscule amount compared to the economic scale of the matters the Board is adjudicating and the value that has been obtained by intervenor participation. To in any way jeopardize the effectiveness of the hearing process to shave costs from this tiny aspect of rate funding would be penny wise and pound foolish and risks discrediting the Board's standing as a fair and impartial public regulator.

Mechanistic cost assessment

There is one particular practice that has developed in the Board's cost assessment process that needs to be addressed. On some occasions cost claims have been reduced for parties in what appears to be a mechanistic fashion based on deviation from the average claim or what appear to be arbitrary rules of thumb.

For example, in the recent IRP case the Board suggested that counsel time for a party presenting expert evidence should not be more than 25% higher than the time for parties not presenting experts. Yet sponsoring evidence requires a number of time-consuming steps including, assessment of evidence needs, coordination with other parties, selection of expert, settling report scope, submission of evidence proposal and budget to the Board, ongoing oversight and feedback on expert efforts, coordination of presentation day presentation, review of incoming interrogatories, review of draft responses to interrogatories, development of evidence-in-chief, preparation of experts for standing cross, coordination with co-sponsoring parties and other parties relying on evidence throughout, and responding in argument to issues arising from that evidence. Further, a party sponsoring evidence is likely already playing a lead role among the intervenors on the issue its evidence addresses.

Simply put, a fixed adder is arbitrary and the choice of 25% may be inadequate depending upon the particular role that intervenor played in the proceeding, and the circumstances of the case, including the scope of the expert evidence, and the time required to deal with matters beyond the control of the sponsoring party such as the number of interrogatories received or transcript undertakings required.

Adjusting cost awards based on deviation from averages is also a fundamentally flawed approach. For example, if there are numerous intervenors who are relatively inactive, why should a responsibly participating, active or lead intervenor be constrained by reference to an average that includes the lesser efforts of intervenors that may be adding little value to the process?

Mechanistic cost assessments will discourage intervenors from leading evidence or taking a lead role and risking a reduced cost award due the larger scale of their claim. Yet taking a lead role has the benefit of reducing overall costs, and should be encouraged, not penalized.

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

GEC is a coalition of non-profit environmental groups but is concerned that for-profit groups remain eligible for cost awards where participation by these groups can enhance the record and improve transparency and accountability. The issue is most acute for sectors where the individual interest of the intervenor's constituents is relatively small and it is therefor difficult for a representative group to raise or allocate funds for intervention. A group such as the Small Business Utility Alliance exemplifies that category. But as a matter of fairness, groups representing more monied interests should not be expected to pay for the participation of competing interests and not be granted the same access and cost support so long as they meet the same tests of substantial interest and helpful contribution to the process.

9. Is there a better way to represent the interests identified by individual rate payers?

Individual participation is typically accommodated by letters of concern. This is a suitable mechanism except in unusual cases where there is no interest group adequately representing the individual's concern and that concern is relevant and material to the Board's considerations. The Board can utilize the cost eligibility request procedure to elicit information from proposed intervenors and determine whether separate costs eligible representation of an individual is warranted.

Frequent Intervenor Filings

10. How should the OEB proceed with the annual filings currently required from frequent intervenors?

GEC has no concerns with the current process. It enhances transparency and may streamline the task facing the Registrar.

Use of Expert Witnesses

11. Are there other changes that the OEB should consider to clarify the requirements for experts filing evidence and the related requests for cost awards?

The Board is considering "Develop a standard approach to a material cost overrun for expert evidence in advance of the cost award process." We caution the Board that for the same reasons intervenors have limited control of their costs so do experts including:

- The length of the proceeding

- The adequacy of the applicant's filing and the necessity for interrogatories
- The number of procedural steps such as technical conferences, presentation days, ADRs etc.
- The extent of the applicant's evidence and that of other parties, and any updates
- The extent to which the applicant cooperates on discovery or precipitates motions
- The extent of motions and processes related to confidentiality

In the recent IRP case a GEC expert witness had its costs reduced with the Board noting "the time spent at the technical and other conferences is above the amount that would be expected for the expert witness". We respectfully submit that limiting expert hours for attendance at technical conferences or monitoring hearings will diminish the value of the expert's evidence for the Board. To make an optimal contribution to the process an expert must appreciate the context, be able to respond in an informed manner to questions that arise, and appreciate what the live issues in the case are as well as the concerns of all parties to the proceeding. That being so, constraining expert costs based on time in attendance (which is beyond the control of the witness) would be counterproductive.

Active Adjudication

The Board's paper suggests that "For limited issue or specific policy driven intervention requests, ensure the scope of the proceeding has been confirmed before granting intervenor status. A panel of Commissioners could scope a proceeding prior to final approval of intervenor status. This may be necessary if broader policy issues are raised, and the OEB must determine whether these issues are relevant to the specific application being heard."

In our submission that approach would risk putting the cart before the horse. Intervenors play an important role in the Board's process for setting the issues list which in large measure defines the hearing scope. To play that role the parties must be represented and have invested time digesting the pre-filed evidence, which requires a prior cost eligibility finding for most intervenors.

12. Are there other ways Commissioners can enhance their approach to active adjudication while ensuring procedural fairness?

How can the OEB ensure that immaterial issues are not explored in its proceedings?

The Board's existing practice of settling an issues list can serve this purpose if active adjudication encourages the hearing participants to adhere to that list.

All of which is respectfully submitted this 29th day of April, 2022

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On behalf of GEC