SCOTT POLLOCK
T 613.787.3541
spollock@blg.com

Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen St, Suite 1300
Ottawa, ON, Canada K1P 1J9
T 613.237.5160
F 613.230.8842
blg.com

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April 29, 2022

Nancy Marconi
Registrar, Ontario Energy Board
2300 Yonge Street, 27th floor
Toronto, ON M4P 1E4

Dear Ms. Marconi:

Re: Ontario Energy Board ("OEB" or the "Board")
Framework for Review of Intervenor Processes and Cost Awards
Board File #: EB-2022-0011

On March 31, 2022, the Board published a letter introducing its Framework for Intervenor Processes and Cost Awards (the "**Framework**"). Stakeholders were encouraged to provide their views on the issues and address the questions posed by the Framework by April 29, 2022.[1] Please consider this letter as Canadian Manufacturers & Exporters' ("**CME**") views with respect to the Board's questions.

General Comments

CME supports the Board's proactive approach to improving the regulatory process in Ontario. Regulators that rest on their laurels may fail to adapt to changing circumstances or fail to adopt best practices. However, in CME's view, the Board's process is, in many respects, already in the top quartile. The OEB has developed a world-class regulatory process that effectively and efficiently disposes of applications which have impacts measured in the billions of dollars.[2] Moreover, it allows stakeholder representation from a diverse set of interests for a cost that is significantly lower than the total application cost.[3]

Accordingly, CME submits that any changes to the Board's process should seek to enhance and strengthen stakeholder participation in the regulatory process and maximize the value intervenors bring to the regulatory process. The Board has, as part of its own continuing improvement efforts,

[1] The initial date of April 21, 2022 was rescheduled to April 29, 2022 by letter dated April 12, 2022.
[2] EB-2022-0011, Framework for Review of Intervenor Processes and Cost Awards, March, 2022, p. 18.
[3] EB-2022-0011, Framework for Review of Intervenor Processes and Cost Awards, March, 2022, p. 18.

introduced a number of measures that strengthen participation in the process while also increasing efficiency. The following measures are great examples:

1) The increased use of settlement conferences. As outlined in the Framework, the use of settlement conferences has worked well for the Board,[4] and saves significant amount of regulatory time and cost. Moreover, this efficiency is gained through strengthening representation and participation in the regulatory process. Stakeholders have the option but not the requirement to settle issues that can be responsibly settled, without resorting to a hearing. Participants are empowered to advocate for themselves, listen to others, and ultimately help determine the outcome. Intervenors have used this additional opportunity responsibly and increased regulatory efficiency.

2) Guidance from active adjudication. Recently, the Board panel in EB-2021-0002, published a letter at the end of the hearing outlining what topics it would find helpful to have submissions on.[5] While it did not prohibit parties from making the submissions that are of interest to their constituencies, this guidance will allow parties to spend more of their time where it is needed, and less time on other matters.

CME fully supports these measures and submits that the Board should continue to explore these types of opportunities, which strengthen the regulatory process and increase efficiency.

However, a number of the proposals outlined in the framework seek to gain regulatory efficiency by removing potential engagement with the regulatory process, or creating rigid categories. CME submits that it would be a mistake to pursue these types of measures, as it would undermine stakeholder participation and dilute the value provided by intervenors.

CME comments on the Board's articulated questions and various proposals are outlined in turn below.

The Substantial Interest Test (Board Questions #3, 4)

In the Framework, the Board summarized the current process for attaining intervenor status. In order to be an intervenor, an interested party must satisfy the Board that it has a "substantial interest" in the proceeding, and intends to participate actively and responsibly in the proceeding.[6] The request for intervenor status includes a number of details, including a "concise statement of the nature and scope of the intervenor's intended participation".[7]

[4] EB-2022-0011, Framework for Review of Intervenor Processes and Cost Awards, March, 2022, p. 11.
[5] EB-2021-0002, OEB Letter Re: Submissions, April 11, 2022.
[6] EB-2022-0011, Framework for Review of Intervenor Processes and Cost Awards, March, 2022, p. 16.
[7] EB-2022-0011, Framework for Review of Intervenor Processes and Cost Awards, March, 2022, p. 16.

The TQR Report found that the Board could provide a better definition of "substantial interest" for intervention in OEB proceedings.[8] Accordingly, the Board asked a number of questions to stakeholders on whether the Board should develop or change the definition of "substantial interest" in order to provide a better understanding to parties whether there is a link between their interest and the application in question.[9] These questions included, *inter alia*:

1) How should the Board define "substantial interest" with respect to rate applications? and
2) How should the Board define "substantial interest" with respect to leave to construct applications?

In addition to the articulated questions, the Board also indicated that it was looking to make additional changes to the "substantial interest" requirement, including pilot programs for limited scope interventions with pre-defined limits on costs and developing strategies to require combined interventions and to set cost awards commensurately.[10]

The Definition of Substantial Interest with Respect to Rate and Leave to Construct Applications

CME supports the clarification of the definition of "substantial interest" for intervenors whose interests are readily connected to the subject matter of the application. However, this development should not come at the expense of the flexibility inherent in the "substantial interest" test.

The Board has not reduced the definition of "substantial interest" to specific categories of intervenors for good reason. The current definition is broad enough to encompass a diverse set of intervenor interests, from ratepayer groups, to intervenors whose interests are more policy focused. The current definition of "substantial interest" allows the Board to be flexible, and to determine those parties that should be granted intervenor status on a case-by-case basis.

This context-sensitive review of "substantial interest" is also flexible enough to evolve over time. As certain aspects of policy or society change and its relevance waxes and wanes, the "substantial interest" test can change with it, providing the Board with the tools it needs to ensure that stakeholders are represented both now and in the future.

Accordingly, CME supports the Board's proposal to clarify that customer groups will have a substantial interest in certain types of proceedings. Indeed, such a clarification should go beyond simply rate applications, and should encompass all applications that will have a necessary implication for rates. For example, leave to construct proceedings are often where the 'need' and

[8] EB-2022-0011, Framework for Review of Intervenor Processes and Cost Awards, March, 2022, p. 5.
[9] EB-2022-0011, Framework for Review of Intervenor Processes and Cost Awards, March, 2022, p. 5.
[10] EB-2022-0011, Framework for Review of Intervenor Processes and Cost Awards, March, 2022, pp. 17-18.

'prudence' of capital investments are tested. Since those tests need to be met before the assets enter rate base, for instance, through an incremental capital module application, ratepayers necessarily have a substantial interest in such proceedings. The same can be said for MAADs and other proceedings, which flow through to rates.

However, as indicated, while the Board should provide an "express lane" for intervenors whose interest in the proceeding is known to be substantial, the Board should avoid restricting participation to those groups. The Board should retain the flexible "substantial interest" standard in order to ensure that stakeholders with other interests can participate upon demonstrating that their interest meets the threshold.

Cost Awards (Board Questions #7, 8)

The Board also requested stakeholder feedback on a number of questions related to granting cost awards for intervenors. The Board noted the "benefit" intervenors bring to policy discussions and proceedings before the OEB.[11] In CME's view, the discussion regarding intervenor cost awards should be made in the context of the facts surrounding intervenor and utility regulatory costs. In this regard:

1) Intervenor costs are an insignificant fraction of the total costs being passed on to ratepayers. As outlined in the Framework, cost awards are, on average, $4.4 million per year. In contrast, total energy revenues from natural gas and electricity distributors (so excluding transmitters and generators) was $24.6 billion[12];

2) Intervenor costs are significantly below the costs saved through the adversarial process. In major rate cases where CME has been involved, it is not uncommon for the Board to disallow tens or hundreds of millions from a utility's rebasing application. While those results are undoubtedly also a product of Board Staff's own efforts, there is no doubt that intervenors represent a net-positive to ratepayers;

3) Intervenor cost awards are not increasing. According to the Board's statistics, total cost awards, at least for electricity distribution rate applications has generally decreased over the past few years[13];

4) The Board does not review utility representation costs. Despite both being funded by ratepayers, utility representation is not reviewed by the Board or any other body. Given

[11] EB-2022-0011, Framework for Review of Intervenor Processes and Cost Awards, March, 2022, p. 3.
[12] EB-2022-0011, Framework for Review of Intervenor Processes and Cost Awards, March, 2022, p. 18.
[13] EB-2022-0011, Framework for Review of Intervenor Processes and Cost Awards, March, 2022, p. 20.

> that market rates are significantly above the tariff rates for experienced regulatory counsel, CME submits that utility representation likely costs ratepayers significantly more than intervener costs, and does so for the primary benefit of the shareholder, rather than ratepayers or the public interest.

With that context in mind, CME's comments regarding specific aspects of the Board's proposals are provided below.

Intervenors Already Collaborate

One of the potential changes outlined by the Board is to "encourage greater collaboration" amongst intervenors. In CME's view, additional incentive are not necessary in this respect. In CME's experience, intervenors collaborate on almost all parts of an application, and the Board's regulatory process has benefitted from those efficiencies.

To the extent that intervenors do not collaborate, it is usually for good reason. For instance, CME considers it necessary to review and understand the application for itself. Only once it understands the application and the issues at play can any meaningful collaboration occur. As a result, CME will review the entirety of the application without relying on other parties.

CME would also caution that discerning whether or not intervenors necessarily have similar views on issues is not an easy task. For instance, even groups that represent similar constituencies or have similar policy interests may have significantly different views on the severity of those issues, or their proper solutions. Trying to force collaboration using top-down determinations on the similarity of interests may therefore impact a parties' ability to advocate on behalf of its constituents. Accordingly, in CME's view, while encouraging collaboration is commendable, the Board should avoid trying to create rigid rules about who should need to collaborate with whom.

Parties Representing For-Profit Interests Should Be Eligible for Cost Awards

In CME's view, parties representing for-profit interests should be eligible for cost awards. CME, while not a for-profit entity itself, represents 400 for-profit member companies, representing 75% of the manufactured output in the province and 90% of all exports.

Parties representing for-profit interests should be eligible for cost awards on a principled basis. As CME understands it, the usual concern regarding allowing for-profit businesses to have their representation paid for is that these businesses would enjoy a private windfall at the public's expense. Intervenors before the Board do not engage this concern.

As the Board is well aware, ratepayers, including for-profit entities, pay for regulatory costs occasioned by utilities, including the costs of intervening parties, as well as the costs incurred by the utility for its own representation. Receiving cost awards is not a windfall, but rather the appropriate recovery, from ratepayers, of costs incurred by ratepayers for their own representation in regulatory proceedings.

In contrast, denying cost recovery would put an unfair cost burden on ratepayers. They would not only be required to pay for their own representation before the Board, but also pay in rates for the general regulatory costs of the utility and other ratepayers. This would be an unjust and unreasonable outcome, and completely inimical to the Board's public interest mandate.

Moreover, denying for-profit entities cost recovery poses significant practical problems that would damage the goals the Board is trying to achieve. In this regard:

1) A not-for-profit entity such as CME, without cost recovery, would not be able to intervene on members' behalf. Accordingly, many members, with the resources and wherewithal to do so, would likely intervene on their own behalf. This would increase the total number of interventions and cause significant overlap and duplication, reducing the efficiency of the regulatory process rather than enhance it; and,

2) Other for-profit entities, usually smaller businesses, without the resources and wherewithal to intervene, would no longer be represented. The Board would therefore be deprived of their views and participation in its proceedings.

As a result, denying cost recovery for for-profit entities would decrease efficiency and weaken participation in the regulatory process.

<u>General Cost Recovery Comments</u>

In addition to the above, CME also wishes to comment on some of the proposed potential changes outlined by the Board. In this regard:

1) Intervenors with broad policy interests should be treated equally. In its potential changes, the Board indicates that it is considering whether broad policy intervenors should be required to justify their cost awards by assessing how the policy interest is relevant to a specific application. In CME's view, this change would muddy the water between the "substantial interest" test and the operative lens to view cost awards.

At the time of intervention, the Board currently assesses the relevance of an intervenor's interest in the proceeding, whether it be policy based or more tied to consumer advocacy. After that stage, the Board should continue to focus on whether that intervenor has participated responsibly and provided value commensurate with the cost award. In CME's view, it would be arbitrary and unreasonable for the Board to accept a policy intervenor into the proceeding on the basis that it had a "substantial interest" in the proceeding, and then refuse to provide it with a cost award solely on the basis that its interest was insufficient. CME submits therefore that the litmus test for cost awards should continue to be a review of the activities undertaken by the intervenor and the value it provided to the regulatory process.

2) Cost caps should not be implemented. The Board has always had the discretion to award costs. To the extent that parties provide value commensurate with those costs, they should be awarded them. To the extent that they do not, the Board has the power to deny them cost recovery. Arbitrarily determined caps only distracts from that central dynamic and should be avoided.

3) Tariff rates no longer resemble market rates and should be updated. The Board Practice Direction on Cost Awards provides the cost award tariff, which sets out the maximum hourly rate for counsel and consultants. As CME understands it, the rates set out in the Cost Award Tariff have not been updated in over a decade. CME is not suggesting that the OEB Cost Award Tariff needs to match private market rates. That being said, as time goes on, the maximum hourly tariff rate becomes less aligned with market rates. As a result, it can be difficult for intervenor groups to hire experienced counsel. Accordingly, CME suggests that the Board update the Cost Award Tariff to bring it more in line with Ontario market rates for counsel and consultants.

Active Adjudication (Board Question #12, 13)

The Board has used the term "active adjudication" to describe its approach to proactively engage with the adjudicative process to drive efficient and procedurally fair processes. CME fully supports the Board's efforts to actively adjudicate proceedings. In particular:

1) CME supports the development of an issues list. CME recognizes that it can be difficult to develop an issues list too early in the proceeding, given that parties need a chance to review the evidence in order to form a position with respect to issues that are in scope.

2) CME supports the Board's continued cautions to parties that their focus on relevant matters at issue can have an impact on their cost awards.

3) As previously outlined, CME supports the Board's proactive communication to guide the parties as to the panel's view of the most important issues in the proceeding. This allows intervenors to focus their time on submissions that will be helpful and useful to the panel, and away from issues that can be successfully canvassed in less time.

4) CME also supports the expansion of the Board's proactive guidance in the context of a proceeding. For instance, the Board can remind parties of the appropriate scope of the proceeding before or during the hearing, in order to ensure cross-examinations or other submissions are appropriately tailored to the matters at issue.

Accordingly, CME appreciates the steps the Board has already taken with respect to active adjudication, and encourages the Board to continue to adopt a proactive stance to scoping and management of the proceeding to ensure that the activities of the parties are within scope and of value to the regulatory process.

Yours very truly

Borden Ladner Gervais LLP

Scott Pollock
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