ONTARIO ENERGY ASSOCIATION ON BEHALF OF CLD+

FRAMEWORK FOR THE REVIEW OF INTERVENOR PROCESSES AND COST AWARDS EB-2022-0011

April 29, 2022

To shape our energy future for a stronger Ontario.

Ontario Energy Association

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SECTION 1: Introduction

The Ontario Energy Association ("OEA") is providing written comments on behalf of the following member organizations, which comprise the Coalition of Large Distributors Plus ("CLD+"): Alectra Utilities Corporation, Elexicon Energy Inc, Enbridge Gas Inc., Hydro One Networks Inc., Hydro Ottawa Limited, and Toronto Hydro-Electric System Limited. In order to contribute to the regulatory efficiency of this Ontario Energy Board (OEB) proceeding, the OEA and the CLD+ have worked together to compile a single set of comments that reflect the views of all CLD+ members.

The OEA and the CLD+ bring a special perspective to the OEB's review of intervenor processes and cost awards. The CLD+ serves over 70% of the electricity distribution customers, provides 98% of the electricity transmission capacity, and serves 99.8% of the natural gas distribution customers in the Province of Ontario. CLD+ members are active participants in OEB proceedings and together have vast experience with OEB practices and processes.

SECTION 2: The EB-2022-0011 Consultation

This consultation is not the OEB's first initiative to consider the framework for participation of intervenors in OEB proceedings. An earlier example is the OEB's EB-2013-0301 consultation, in which the OEB undertook a review of "the framework governing the participation of intervenors in applications, policy consultations and other proceedings before the Board".[1] In the notice initiating the EB-2013-0301 consultation, the OEB said, among other things, that:

> …the Board is undertaking a review of its application and hearing process, with the goal of enhancing the **efficiency and effectiveness** of that process. The Board is considering whether changes to the Board's approach to the determination of intervenor status, cost eligibility and cost awards might further enhance the **efficiency and effectiveness** of the application and hearing process.[2] (Emphasis added.)

At the conclusion of the first phase of the EB-2013-0301 consultation, the OEB said that the modifications it was making to the intervenor framework should be understood in relation to the OEB's expectations regarding all participants in OEB adjudicative proceedings. This was so, the OEB said, because:

> All constituencies have a common interest in ensuring that Board proceedings are **efficient and effective**, particularly in light of the fact that the costs of Board proceedings are borne by ratepayers.[3] (Emphasis added.)

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[1] EB-2013-0301 notice issued by the OEB on August 22, 2013 ("2013 Notice"), page 1.
[2] 2013 Notice, page 2.
[3] EB-2013-0301 notice issued by the OEB on April 24, 2014, page 3. The modifications to the intervenor framework adopted by the OEB included a requirement that intervenors provide information regarding the appointment and authorization of their representative in OEB proceedings and the introduction of a procedure whereby frequent intervenors file general organizational information for posting on the OEB's website: see page 4 of the notice.

The attention given to the efficiency and effectiveness of OEB proceedings has not lessened in the years since the 2013 consultation; rather, it has increased. The recommendations in the Final Report of the Ontario Energy Board Modernization Review Panel ("Review Panel Report") were gathered into four areas of "analysis and comments". Two of the four areas of analysis and comments were efficiency and effectiveness.[4]

Subsequent to the Review Panel Report, efficiency and effectiveness has continued to be a central theme of documents that provide relevant background for this consultation. These documents include the following:

1. the OEB's Top Quartile Regulator Report, Phase 1 ("Top Quartile Report")[5];
2. the OEB's Business Plan 2021-2024[6];
3. the OEB Chief Commissioner Plan Initiatives 2021 ("Chief Commissioner Plan");[7]
4. the OEB's Strategic Plan 2021/2022-2025/2026;[8] and,
5. the mandate letter issued by the Minister of Energy (the "Minister") on November 15, 2021 ("Mandate Letter").

In particular, the Minister said in the Mandate Letter that: "Modernizing and streamlining processes to reduce regulatory burden is vitally important to the work of an efficient and effective regulator."[9] In this context, the Minister added that the OEB should continue its work reviewing intervenor processes to identify opportunities to improve efficiency and effectiveness.[10]

The importance given to streamlining of processes in the Mandate Letter is confirmed by provisions of the *Ontario Energy Board Act, 1998*. Section 4.9 of the statute says that the OEB's annual report to the Minister shall include details of steps taken by the OEB's board of directors to "simplify or streamline practices and procedures in relation to the OEB's regulatory functions".[11]

On March 31, 2022, the OEB issued its Framework for Review of Intervenor Processes and Cost Awards ("Framework"). Section 5.2 of the Framework sets out a list of ten concerns that have been identified by the OEB ("Identified Concerns").[12] The Framework indicates that, in tackling issues including the Identified Concerns, the OEB is taking a three-pronged approach.[13] The Framework addresses each of these three prongs of the OEB's approach and poses questions for further consideration in each of the three areas. The questions raised for further consideration are captured in a List of Consultation Questions included at Appendix B of the Framework.

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[4] Review Panel Report, October 2018, pages 18-20.
[5] Top Quartile Report, pages 25-34.
[6] Ontario Energy Board Business Plan 2021-2024, pages 12-13
[7] Chief Commissioner Plan, pages 6-8.
[8] Efficiency and effectiveness and two of the strategic themes set out on pages 16-17 of the 5-Year Strategic Plan.
[9] Mandate Letter, page 3.
[10] Mandate Letter, page 4.
[11] *Ontario Energy Board Act, 1998*, SO 1998, c 15, Sch B, section 4.9(3)(a).
[12] Framework, pages 10-11.
[13] Framework, pages 12-13.

The OEB has invited comments and feedback from stakeholders on the issues, as well as on potential changes and the questions set out in Appendix B of the Framework.

The comments by the OEA/CLD+ will begin with a brief discussion of principles that guide this consultation. Then, the OEA/CLD+ will provide comments and recommendations regarding the OEB's intervenor processes and cost awards, following which the List of Consultation Questions in Appendix B of the Framework will be addressed. Specific actions recommended by the OEA/CLD+ are explained and set out in section 5 below and are gathered together in Appendix A to these comments.

SECTION 3: A Principled Framework

There are a number of key principles that provide over-arching direction and guidance for the OEB's Review of Intervenor Processes and Cost Awards. Two key principles are efficiency and effectiveness, which are high-lighted as recurrent themes in the Top Quartile Report, the Mandate Letter and each of the other background documents referred to section 2 above. And of course, efficiency and effectiveness feed into other principles or goals, such as timeliness and value commensurate with cost.

The key over-arching principles also include procedural fairness and the right to be heard, as discussed in section 4 of the Framework.[14] Giving effect to procedural fairness and the right to be heard does not mean that the efficiency or effectiveness of processes must be sacrificed. Procedural fairness and efficiency/effectiveness are not mutually exclusive outcomes of a regulatory proceeding. On the contrary, while observing the standard of procedural fairness, there is considerable scope to improve the efficiency and effectiveness of OEB proceedings.

SECTION 4: Value of Intervenors

Section 3 of the Framework addresses the role of intervenors in OEB proceedings. The OEA/CLD+ agree with the OEB that intervenors bring value to OEB proceedings by assisting the OEB in its consideration of applications by regulated utilities. As noted in the Framework, intervenors provide the views of impacted stakeholders that have a substantial interest in OEB proceedings and they can present a diversity of views that it could be costly for the OEB to provide on its own.

Given the value that existing intervenor processes add to OEB proceedings, the OEA/CLD+ do not propose a far-reaching overhaul of these processes. But it is the view of the OEA/CLD+ that important changes can and should be made to improve the efficiency and effectiveness of intervenor participation in OEB proceedings.

Indeed, the discussion of the value of intervenors in the Framework concludes with the following observations:

[14] Framework, page 8.

> Despite this value to the OEB's adjudicative processes, the participation of intervenors may lengthen proceedings, and increase the costs of the proceeding for both the OEB and applicants (and ultimately customers). It is therefore important for the OEB to ensure that the costs of the interventions … is commensurate with the value that is brought to the OEB's proceedings, while at the same time adhering to the legal requirements of procedural fairness and the right to be heard ….[15]

The OEA and CLD+ agree that it is of fundamental importance that intervenors, both individually and collectively, add value to OEB proceedings that is commensurate with the costs of their interventions. It is also important to recognize, however, that the implications of an intervention which does not add value to a proceeding go beyond whether the costs of the particular intervention are commensurate with value. As noted in the Framework, an intervention which does not add value has a broader impact, in that it tends to lengthen the proceedings and increase costs for the OEB and the applicant, and ultimately customers.

While the OEB has previously considered the role of intervenors in OEB proceedings, there is now good reason for heightened concern about the efficiency and effectiveness of intervenor processes. The trend in recent years has been towards a growing number of requests for intervenor status from entities and organizations that have not traditionally participated in OEB proceedings. Increasingly, requests for intervention are made by entities that advocate for specific technologies on behalf of commercial interests or for broader policy objectives. As a result of the changing landscape of intervention requests, it is all the more important that the OEB's intervenor processes and cost awards be re-examined to ensure that OEB proceedings are efficient and effective.

There are other differences between current circumstances and those that existed at the time of previous reviews of the OEB's intervenor framework. In particular, the evidence that the OEB requires from applicants regarding engagement with customers has undergone considerable evolution and change over recent years. Now, the OEB receives evidence directly from applicants about the communication of proposals to customers, any feedback provided in response by customers and how any feedback informed final proposals made by applicants. As set out in the OEB's *Handbook for Rate Applications*, customer engagement is expected to inform the development of utility plans and the OEB will consider the adequacy of customer engagement in assessing whether it has been demonstrated that a proposal provides value to customers.[16] The OEB's ability to use this evidence to satisfy itself that customer engagement has informed the development of utility plans and proposals is a material factor to be taken into account as the OEB considers changes that can be made to intervenor processes to enhance the efficiency and effectiveness of OEB proceedings.

The OEA/CLD+ are aware of suggestions that the contribution of intervenors to an OEB proceeding can be seen, or even measured, by attaching a dollar value to those aspects of an applicant's proposals that were not accepted by the OEB. But the financial implications of a decision reached by the OEB are in no way a measure of the contribution of intervenors to the proceeding which resulted in the decision. Otherwise, even ineffective and unhelpful participation by intervenors could be seen to have value in the event of a decision by the

[15] Framework, page 7.
[16] Ontario Energy Board *Handbook for Rate Applications*, October 13, 2016, pages 11-12.

OEB to deny aspects of a particular application. The key measure of the value brought to an OEB proceeding by intervenors is the extent to which each intervenor has participated responsibly, efficiently and effectively, and has contributed to an understanding of the issues, so as to assist the OEB with its consideration of the application.

SECTION 5: Enhancing Efficiency and Effectiveness

Energy regulators in many jurisdictions across North America have considered issues about intervenor processes and cost awards that are similar to those discussed in the Framework. Based on the collective experience of CLD+ members in OEB proceedings, as well as a review of what has worked in other North American jurisdictions, the OEA/CLD+ take the view that enhancements to the efficiency and effectiveness of intervenor processes can best be achieved through a combination of the following three tools:

1. a substantial interest test that provides procedural fairness and recognizes the importance of efficient and effective proceedings;
2. cost award and eligibility requirements that align incentives for parties with the regulator's goals of efficiency and effectiveness; and
3. active adjudication and case management that ensure established rules, policies and procedures are followed and interventions are focused on areas of value to the Commissioners.

The OEA/CLD+ recommend that the OEB consider and evaluate the examples of other jurisdictions where these tools have been successfully used to enhance the efficiency and effectiveness of proceedings. This recommendation is explored more fully under the headings that follow.

5.1 The Substantial Interest Test

The Top Quartile Report said that the OEB should consider undertaking a review of who has a substantial interest in an application.[17] This was noted to be a key component of the Chief Commissioner Plan and it was said there that determining the specific interest of each participant could lead to a reduction of overlap and duplication, which would in turn lead to increased efficiency.[18]

Rule 22.02 of the OEB's *Rules of Practice and Procedure* ("Rules") says that a person applying for intervenor status must satisfy the OEB that he or she "has a substantial interest" and "intends to participate actively and responsibly in the proceeding". The word "actively" certainly does not suggest that efficiency or effectiveness is a priority. The word "responsibly" might imply efficient or effective participation but, at best, any such meaning is more implicit than explicit.

Especially if they are given a liberal interpretation, the words indicating that a person seeking intervenor status must show a "substantial interest" and an intention to participate "actively and responsibly" do little or nothing to establish a fundamental requirement or

[17] Top Quartile Report, page 33.
[18] *Ibid.*

expectation that interventions in a proceeding be efficient and effective. Nor do these words suggest that efficiency and effectiveness are to be considered when requests for intervenor status are made by multiple entities representing the same interest. Particularly if "overlap and duplication" are to be avoided or reduced, this is a critical shortcoming of the words of Rule 22.02: numerous entities representing the same interests can all show a "substantial interest" and an intention to participate "actively and responsibly".

A fundamental starting point in any effort to give effect to the repeatedly stated concern about efficiency and effectiveness is the Rules. First, Rule 22.02 should be amended or supplemented with an explicit requirement that a person applying for intervenor status must satisfy the OEB that he or she will participate efficiently and effectively in the proceeding. Second, given that multiple entities representing the same interest can all meet a "substantial interest" test, the Rules should be amended to include wording to make clear that the OEB must be satisfied that proposed interventions will not be duplicative. In a number of jurisdictions, including Tennessee, Minnesota, Maine, Kansas, West Virginia and Wisconsin, an intervenor is required to demonstrate that its interests are not sufficiently represented by other intervenors.[19]

The OEA/CLD+ recommend that the Rules set out plainly that, but for exceptional circumstances, the OEB will reject requests for intervenor status that are duplicative. In exceptional circumstances, where an entity requesting intervenor status can show a clear justification for duplicative interventions, the OEA/CLD+ recommend that the OEB require the interventions to be grouped, both for the purpose of intervenor processes (such as interrogatories) and for the purpose of cost awards.

The Framework indicates that the OEB is considering a number of changes with respect to eligibility for intervenor status, including a requirement for parties not representing customers of the utility to state the policy aspects of the proceeding that are relevant to their interests, and how the party's participation will assist the OEB in making its determinations.[20] The OEA/CLD+ recommend that the OEB develop processes to channel issues of concern to intervenors with broad policy interests through policy consultations and generic hearings, rather than cost of service rate applications.

5.1.1 Substantial Interest Test – Recommended Actions

1. Amend Rule 22.02 to state that a person applying for intervenor status must satisfy the OEB that he or she will participate efficiently and effectively.

2. Amend Rule 22.02 to state that a person applying for intervenor status must satisfy the OEB that his or her interests are not sufficiently represented by other intervenors.

3. Amend the Rules to state that the OEB will not allow multiple intervenors to represent the same interest in a proceeding, other than in exceptional circumstances, where a clear justification is shown for more than one intervenor to represent the same interest.

[19] NARUC Report, *State Approaches to Intervenor Compensation* ("NARUC Report"), pages 8-11.
[20] Framework, page 17.

4. Amend the Rules to state that the OEB will group intervenors, for the purpose of intervenor processes and for the purpose of cost awards, in those exceptional circumstances when multiple intervenors are allowed to represent the same interest and in such other circumstances where the OEB deems the grouping of intervenors to be appropriate.

5. Develop processes to channel issues of concern to intervenors with broad policy interests through policy consultations and generic hearings.

5.2 Incentives and Cost Awards to Encourage Efficiency and Effectiveness

Many aspects of regulation by the OEB are aimed at creating incentives to drive particular outcomes. And indeed, one of the Identified Concerns with respect to intervenor processes and cost awards is incentives for increased intervenor collaboration.[21] Yet cost awards based on hourly rates do not create an incentive for efficiency and effectiveness; they are an incentive for a greater number of hours rather than for efficiency.

Because intervenor cost awards based on hourly rates run counter to the OEB's use of incentives to encourage desired outcomes, there is a compelling need for an approach to intervenor processes and cost awards that will create incentives for intervenor collaboration, efficiency and effectiveness. The OEA/CLD+ therefore recommend that the OEB consider how cost awards can be improved to better align incentives with efficiency and effectiveness than under the current hourly rates approach.

Intervenors who are responsible for the costs of their own interventions have an inherent financial incentive to participate in OEB proceedings efficiently and effectively. These participants who bear their own costs are encouraged to focus on the aspects of a proceeding that are most important to them and that have the greatest impact. Accordingly, the OEA/CLD+ recommend that the OEB give effect to this incentive for efficiency and effectiveness in the OEB's approach to cost eligibility. In view of the inherent financial incentive for intervenors who bear their own costs, eligibility for costs should be allowed only when it is really needed. The OEA/CLD+ recommend that the OEB adopt a financial need test for cost eligibility.

The OEA/CLD+ recommended in section 5.1 above that Rule 22.02 be amended to state that a person applying for intervenor status must satisfy the OEB that he or she will participate efficiently and effectively in the proceeding. The OEA/CLD+ also recommend that the extent to which an intervenor actually does participate efficiently and effectively in a proceeding be considered by the OEB at the time of cost awards. The OEB's criteria for cost award requests should be explicit in stating that the efficiency and effectiveness of an intervenor's participation will be part of the assessment of the appropriate cost award to be made to the intervenor. In line with recommendation 5 in section 5.1.1, above, one of the criteria for cost awards should be the extent to which each intervenor pursued issues of specific relevance to the applicant in the particular proceeding, as opposed to broader issues more appropriate for a generic hearing or policy consultation.

Examples of cost award criteria that relate to efficiency and effectiveness can be seen in other jurisdictions. In determining the amount of a cost award, the British Columbia Utilities

[21] Framework, page 10.

Commission ("BCUC") considers, among other things, whether the participant joined with other groups with similar interests to reduce costs and whether the participant made reasonable efforts to avoid conduct that would unnecessarily lengthen the duration of the proceeding, such as ensuring participation was not unduly repetitive.[22]

The Alberta Utilities Commission ("AUC") considers a number of criteria that relate to efficiency and effectiveness, such as whether the participant asked questions on cross-examination that were unduly repetitive, whether the participant made reasonable efforts to ensure that its evidence was not unduly repetitive, whether the participant made reasonable efforts to cooperate with other parties to reduce the duplication of evidence and questions or to combine its submission with that of similarly interested participants and whether the participant engaged in conduct that unnecessarily lengthened the duration of the hearing or other proceeding.[23]

The OEA/CLD+ recommends that the OEB make efficiency and effectiveness criteria for cost awards clear so that they will be understood from the start of each proceeding. In order to do so, the OEB could establish a template for cost award requests which sets out information about efficiency and effectiveness, including collaboration, that intervenors will be expected to provide when requesting a cost award. The template could include criteria or categories for efficiency - such as combining questions and arguments or removing duplication - with instructions for intervenors to provide information about what they did, and the time spent on these activities to enhance efficiency and effectiveness.

The OEB could make use of the information provided by intervenors about their efforts to enhance efficiency and effectiveness in many different ways. The basic point of requiring the information is that the OEB would take it into account when determining cost awards. Other potential uses of the information range across a spectrum. The different approaches on the spectrum include, for example, a benchmarking and incentives model for intervenors. The benchmarking model would allow the OEB to make determinations about intervenor compensation and incentives based on where each intervenor ranks against the benchmark and the intervenor's peers.

5.2.1 Intervenor Processes and Cost Awards – Recommended Actions

1. Establish a financial need test for intervenor cost eligibility.

2. Establish criteria for cost award requests, such as those considered by the AUC, which make clear that the determination of a cost award for an intervenor will include an assessment of the efficiency and effectiveness of that intervenor's participation.

3. Establish a template for cost award requests which sets out information about efficiency and effectiveness, including collaboration, that intervenors will need to provide when requesting a cost award.

[22] BCUC Participant Assistance and Cost Award Guidelines, Appendix A to Order G-143-16, section 4.3.

[23] AUC Rule 022, section 11.2.

4. Consider other approaches to cost awards for intervenors that better align incentives with efficiency and effectiveness than the current practice of using hourly rates, such as a benchmarking and incentives model for intervenors.

5.3 Active Adjudication

Active adjudication, including case management, is a central element of the oversight needed to ensure that a proceeding stays on track and meets the objectives of efficiency and effectiveness. Despite having their own views about scope and materiality, the parties cannot be certain, in the absence of guidance from the OEB panel hearing an application, what the panel will consider to be necessary, or even helpful. Thus, active adjudication, including case management, is a key tool to avoid time and resources being spent on issues and points that ultimately will not be helpful to the panel.

In the implementation of active adjudication, including case management, it is important that Commissioners recognize that procedural fairness is not mutually exclusive of an efficient and effective process. Whenever the OEB exercises its adjudicative powers to address issues about the process and scope of a particular proceeding, efficiency and effectiveness should be an important consideration for the OEB. Although it may seem that the easy path is always to lean towards more rather than less information on the record of a proceeding, this is not required by procedural fairness and it certainly does not make for efficient and effective processes.

In the section of the Top Quartile Report on "Efficiency", one of the areas of discussion is the amount of information filed with the OEB by regulated entities. In particular, one of the "gap areas" identified in the Top Quartile Report (namely, Gap Area 3) is as follows:

> Focus on priority information to be filed. The OEB should only be requesting information that is necessary to do its work.[24]

The Framework indicates that, by establishing clear expectations for the areas that are helpful to the OEB in making its determinations, the OEB expects to reduce the **quantity** of evidence to focus on **quality** evidence.[25] (Emphasis in original.) The OEB therefore expects the level of discovery for an application to be reduced. The OEA/CLD+ recommend that this approach to the quality of evidence - as opposed to quantity - be introduced and reinforced in OEB proceedings through active adjudication and case management by the OEB.

Indeed, active adjudication, including case management is crucial, or even essential, if the OEB is to maintain a focus on information that is necessary for the OEB to do its work and on the quality, rather than quantity, of evidence. While some of the examples in the Framework contemplate a more active role by OEB staff, no-one involved in an OEB proceeding knows better than the OEB panel itself what information the panel needs to do its work. Uncertainty about what the panel needs in order to do its work in the circumstances of a particular proceeding causes the quantity of the evidence filed in that case to overwhelm the quality of the evidence.

[24] Top Quartile Report, page 34.
[25] Framework, page 14.

The Commissioners are in the best position to ensure that the record meets their needs, through active case management.

When parties to a proceeding lack guidance from the OEB panel about information that will actually help the panel make its decision **in the particular circumstances of that case**, the natural and inexorable tendency as parties seek to build the evidentiary record is to err on the side of the quantity of evidence. Through active adjudication, including case management, parties are better able to maintain their focus on what the OEB panel will actually need to make its decision. Thus, the tendency to err on the side of the quantity of evidence swings over to an impetus to build a record of quality evidence in those areas where, due to active adjudication, the parties know what information the OEB needs.

The OEA/CLD+ recommend that, when developing Procedural Orders, the OEB allow for the availability of the panel of Commissioners, or potentially the presiding Commissioner, to provide active case management so as to keep the proceeding on an efficient and effective track. Further, the OEA/CLD+ recommend that the OEB's case management include both: (1) where necessary, expeditious determination of disputed issues about scope and materiality; and (2) active panel (or presiding Commissioner) involvement in providing guidance about how the parties can assist the panel with evidence that it needs to make its decision.

An Issues List is an important tool to bring structure to the scope of an OEB proceeding. At the time when an Issues List is established, the OEB panel may of course need to determine any disputes about the content of the Issues List that cannot be resolved by the parties. But the panel can also become more actively involved by providing guidance about areas of the case where a particular focus by the parties would be of assistance to the panel and about what would or would not be helpful to the panel in areas of the case (if any) that are routine or mechanistic.

Again, at the time when interrogatories are submitted, the OEB panel may need to determine disputes about the scope or materiality of particular questions, but the panel can also become more actively involved by providing guidance so as to bring a focus to areas of enquiry that will be helpful to it. Due to the time pressures associated with completing responses to interrogatories, it would contribute greatly to the efficiency and effectiveness of a proceeding if rulings on disputed questions could be made expeditiously (which in many or most cases probably means within 24 hours). As alluded to above, the OEA/CLD+ recommend that Procedural Orders be developed with a view to the availability of the panel to make expeditious rulings in the interrogatory phase of a proceeding.

A particularly important juncture in a proceeding for active case management is prior to the start of a hearing. At this point, the panel or the presiding Commissioner, can address the implications of any outstanding procedural or scope issues, or preliminary matters, that may delay the start of the hearing. The panel or presiding Commissioner can direct the parties towards the completion of a hearing plan that allows the OEB and hearing participants to organize themselves efficiently based on the expected timing of cross-examinations and other hearing activities. In many cases, it may be useful to update the status of the issues in the Issues List prior to the start of the hearing and to establish which issues will be contested during the hearing. Perhaps most importantly of all, the panel or presiding Commissioner

can guide the parties towards areas of the case where a particular focus would be helpful to the panel. And any other guidance from the panel or presiding Commissioner that may contribute to the efficiency and effectiveness of the hearing can be provided at this time.

5.3.1 Active Adjudication – Recommended Actions

1. Develop Procedural Orders with a view to the availability of the panel of Commissioners, or the presiding Commissioner, to engage in active case management at points in the proceeding including, but not limited to, Issues Day, the interrogatory process and prior to the start of the hearing.

2. Plan for and conduct case management activities to include both: (1) where necessary, expeditious determination of disputed issues about scope and materiality; and (2) active panel (or presiding Commissioner) involvement in providing guidance about how the parties can assist the panel with evidence that it needs to make its decision.

3. Engage with and guide hearing participants during case management activities so that procedural fairness will be observed while a focus is maintained on information that is necessary for the OEB to do its work, as well as the quality, rather than the quantity, of evidence.

4. Prior to the start of a hearing, engage in active case management to direct the development of a hearing plan, to focus parties on key areas of interest to the panel and to address other matters such as those discussed above, so as to guide the parties towards an efficient and effective hearing.

SECTION 6: List of Consultation Questions

Identified Concerns

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

The ten Identified Concerns set out in the Framework can be summarized as follows:

1. Better definition of a substantial interest;
2. Incentives for increased intervenor collaboration;
3. Cost eligibility for multiple intervenors representing the same interests;
4. Participation of limited issue or specific policy driven intervenors;
5. Total cost awards that are commensurate;
6. Not exploring immaterial issues;
7. Establishing scope early in a proceeding;
8. Use of generic proceedings or policy consultations;
9. OEB understanding of intervenors taking lead roles; and
10. Supporting representation from indigenous peoples.

The OEA/CLD+ agree with the OEB's list of Identified Concerns. The OEA/CLD+ point out there can be no reasonable expectation that regulatory proceedings will consistently meet a standard of efficiency and effectiveness if there is a basis for concern about matters such as intervenor collaboration, avoidance of immaterial issues and early establishment of scope.

The OEA/CLD+ believe that a process that includes an intervenor meeting in advance of a settlement conference would improve the efficiency and effectiveness of OEB proceedings. An intervenor pre-meeting would reduce downtime and inefficiency that occurs at the outset of a settlement conference as intervenors bring their own discussions to a point where they are ready to begin meaningful discussions with the applicant. And by allowing some days between an intervenor pre-meeting and the start of the full settlement conference, the process could include a step for intervenors to make the applicant aware of any matters coming out of the intervenor meeting, such as information requests, that would otherwise delay the start of meaningful settlement discussions if raised for the first time at the outset of the settlement conference.

Clarifying Application Expectations

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

The OEA/CLD+ support the indication in the Top Quartile Report that the OEB should continue to re-examine filing requirements to ensure that all information requested is necessary for the OEB to do its work.[26] The efficiency and effectiveness of OEB proceedings can be improved by ensuring that applicants are only required to file information that is necessary for the OEB to do its work.

While clarifying expectations for evidence to be filed in applications will assuredly promote efficiency in the adjudicative process, this action will not directly address the Identified Concerns listed in section 5.2 of the report. Particularly in view of the concerns that the OEB has identified in the Framework, the OEB should also ensure that it clearly communicates expectations to intervenors. The recommendations set out in sections 5.1, 5.2 and 5.3 above have been developed with this in mind.

The Framework discusses generic Filing Requirements.[27] But it is important to consider whether, in addition to the Filing Requirements, it is appropriate to continue to have ongoing utility-specific requirements that are established through prior decisions. Once established, these requirements can become case-by-case expectations which place additional burden on applicants. If new requirements are to become ongoing expectations, the Filing Requirements should be updated as needed to reflect current expectations. There should not be a separate set of filing expectations based on prior decisions that exists in parallel to the Filing Requirements.

A similar concern arises in relation to interrogatories that are repeated from one case to the next, such that they become much like standard requests for additional evidence. If evidence given in answer to standard interrogatories is appropriate in every case, then this

[26] Top Quartile Report, page 34.
[27] Framework, pages 14-15.

begs the question of why such evidence would not be contemplated by the Filing Requirements. Conversely, if the evidence is not contemplated as part of the Filing Requirements, then it is not clear why it is appropriate for interrogatories seeking such evidence to be asked in every case.

The Framework describes three initiatives already under way or completed to advance the OEB's goals with respect to clarifying application expectations. These initiatives are as follows:

1. Review of the filing requirements for electricity distributors;
2. Developing Activity and Program Based Benchmarking ("APB") to encourage continuous improvement; and
3. Pre-application meetings, post-application de-briefs and orientation sessions.[28]

APB is expected to complement the OEB's total cost benchmarking for electricity distributors. The OEA/CLD+ are concerned that there has not yet been sufficient engagement to work out issues with APB and that further work on the development of APB is needed. As noted in previous submissions from the CLD and its members, in order for the OEB to make best use of the APB initiative to reduce evidentiary or regulatory burden for applications, the OEB should continue to refine its approach to APB to ensure that utilities are compared on a level playing field. The OEB will consider the appropriate use of APB as part of its review of the filing requirements, including potentially reducing evidentiary requirements for good performers.[29] The OEA/CLD+ query whether this means that if a utility performs within the benchmark, related issues will not be subject to interrogatories and cross-examination in a proceeding. It is the view of the OEA/CLD+ that the incentive for a utility to meet the benchmark should be a reduced regulatory burden in a proceeding.

Intervenor Status: Substantial Interest

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

See section 5.1, above, regarding the substantial interest test.

More specifically with regard to leave to construct applications, the definition of 'substantial interest' should be clarified to assist intervenors in understanding what is within the scope of an OEB leave to construct proceeding. Often issues raised in leave to construct proceedings relate to the EA process and are not relevant to the OEB's determination of whether to grant leave to construct.

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

See section 5.1, above, regarding the substantial interest test.

In addition, the OEA/CLD+ recommend that the OEB consider the approach taken in proceedings before the AUC, where the test requires a person to establish that they have

[28] *Ibid.*
[29] Framework, page 14.

rights that may be "directly and adversely" affected by the AUC's decision on an application.[30]

Question 5: Are there other types of applications for which substantive interest needs to be further defined?

No comments.

Question 6: Are there other changes the OEB should consider with respect to accepting intervenors into proceedings?

See section 5.1, above, regarding the substantial interest test.

A potential change under consideration by the OEB is pilot approaches for limited-scope intervenors, such as pre-defining limits on cost awards commensurate with that scope.[31] The OEA/CLD+ suggest that the OEB may also wish to consider limits on cost awards, or an upfront budget, for non-complex applications, similar to the practice of the Canada Energy Regulator ("CER").

Cost Awards

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

The OEA/CLD+ support improvements to regulatory processes that will encourage greater collaboration among intervenors so that intervenors collectively can bring greater efficiency and effectiveness to their participation in OEB proceedings. The OEA/CLD+ note that duplication is a theme of the background documents[32] referred to in section 2 above and duplication can be avoided or reduced if intervenors work collaboratively.

For recommendations of the OEA/CLD+ to encourage greater collaboration of intervenors, see section 5.2, above. In line with the comments in both section 5.1 and 5.2, the OEB could group intervenors of similar interests and make only one cost award for each group; further, the OEB could set a maximum number of hours, or a maximum cost amount, to be shared by a group of intervenors of similar interests. This is done in Kansas, California, Alaska, West Virginia and Wisconsin.[33]

As well, the OEA/CLD+ support the OEB's suggestion about formalizing the current approach of not granting cost awards for mechanistic/routine aspects of proceedings.[34]

Question 8: Should parties representing for-profit interests be eligible for cost awards?

[30] Ontario Energy Board Jurisdictional Review of Intervenor Processes and Cost Awards, December 1, 2021, page 10.
[31] Framework, page 18.
[32] Top Quartile Report, page 32 and page 33; Chief Commissioner Plan, pages 6 and 7; Business Plan, page 17
[33] NARUC Report, pages 8-11.
[34] Framework, page 21.

Generally, for-profit companies and entities representing commercial interests, including organizations or associations representing for-profit or commercial interests, should not be eligible for cost awards. For-profit companies are not eligible to apply for funding for participation in hearings before the CER.[35] Business, commercial, institutional or industrial entities, including associations of these entities, are not eligible for cost awards from the AUC.[36]

For the reasons set out in section 5.2, above, the OEA/CLD+ recommend that the OEB adopt a financial need test for cost eligibility. Thus, even if the OEB does not accept the recommendation of the OEA/CLD+ that for-profit and commercial entities not be eligible for cost awards, any such entity should still be required to satisfy a financial need test and to demonstrate, further, that either: (1) its participation would bring a material benefit to the process that is available only through its participation; and (2) a denial of cost eligibility would prevent its participation in the proceeding such as to cause material prejudice to it due to its exclusion from the proceeding.

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

First, the interests and proposed scope of activity of the individual ratepayer(s) should be established at the outset of the proceeding. Second, when the interests and proposed scope are known, the individual ratepayer(s) should be guided to work with an intervenor that generally represents the same interest. Third, the identified intervenor should be guided to make best efforts to gather the views of the individual ratepayer(s) and to bring forward relevant aspects of those views as appropriate during the proceeding (or, if for any reason the intervenor is not able to do so, to inform the OEB). Fourth, any honorarium awarded to the individual ratepayer(s) should take into account the extent to which the individual added any value in light of the OEB's guidance about working with an intervenor of like interest – this limitation on any honorarium should be made clear to the individual ratepayer(s) at the outset. Fifth, the OEB should use active adjudication, including case management tools (see section 5.3 above), to assist the individual ratepayer(s) in meeting the expectations of the OEB.

Frequent Intervenor Filings

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

The annual filings serve purposes of transparency and accountability. In line with the goal of continuous improvement, the OEB should enhance the use of the annual filings to gain a better understanding of the mandate, constituents, interests and objectives of intervenors.

To begin with, the OEB should enforce compliance with the annual filing requirements. Further, the OEA/CLD+ recommend that the OEB consider enhancements to its internal processes, not only to ensure compliance with the annual filing requirement, but also to

[35] Canada Energy Regulator Participant Funding Guide: https://www.cer-rec.gc.ca/en/applications-hearings/participate-hearing/hearing-process/participant-funding-program/participant-funding-guide.html#s2.

[36] AUC Rule 022, section 4(d).

evaluate and audit information provided in the annual filings. The information provided in the annual filings could serve a useful purpose to support the benchmarking of intervenors as discussed in section 5.2, above.

Each annual filing should set out how the particular intervenor has engaged, and proposes in the coming year to engage, with the interest that it represents ("Stakeholders"). The information provided in each annual filing about engagement with Stakeholders should explain what the intervenor has done and will do to ascertain the (relevant) views of the Stakeholders and to get feedback from the Stakeholders about the actions taken by the intervenor to pursue the views of the Stakeholders in OEB proceedings. Each annual filing should report on this feedback from the Stakeholders.

The Framework refers to a concern that an intervenor that makes an annual filing to the OEB may assume they will be granted intervenor status in proceedings without having to justify a substantial interest in a particular proceeding.[37] The OEB can clarify in its guidance documents that neither the requirement to make an annual filing, nor compliance with the requirement, implies any pre-determination that intervenor status will be granted in a particular proceeding.

Use of Expert Witnesses

Question 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 OEB should make clear that expert evidence is only to be filed in respect of subject-matter that is material to the OEB's decision in the particular proceeding and that will likely impact the outcome of the proceeding.

The process should allow for the OEB panel to balance the use and cost of expert evidence (and response evidence) such that the value of the evidence to the Commissioners is commensurate with the cost to ratepayers.

Active Adjudication

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

See the comments about active adjudication in section 5.3, above.

The OEA/CLD+ largely agree with the suggestions about active adjudication set out under the heading "Potential Changes" in section 8.2 of the Framework.[38] In particular, the OEA/CLD+ agree that the OEB could "make better use" of interlocutory determinations of whether particular issues are within the scope of a proceeding. As discussed in section 5.3, such determinations would be particularly helpful during the interrogatory phase of the process if they could be made expeditiously. Thus, an important consideration is that the panel or the presiding Commissioner should be available to deal expeditiously with

[37] Framework, page 22.
[38] Framework, page 24.

procedural issues if interlocutory determinations are to bring greater efficiency and effectiveness to OEB proceedings.

In general, the OEA/CLD+ believe that Commissioners can be more active in making known their views about whether questions are helpful to the panel, or are duplicative of information already available to the panel. As discussed in section 5.3 above, parties of course will hold their own views about whether particular questions and answers are helpful, but, without more active involvement by the OEB panel, parties often can be left in uncertainty about the panel's views.

Oversight of Scope of Proceedings

Question 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?

Again, the OEA/CLD+ believe that active adjudication, including case management, is the key tool for the OEB to employ to ensure that the scope of a hearing and materiality of issues is more clear earlier in the proceeding. Much as the parties may have very well-formed views about scope and materiality, it is the views of the OEB panel that really matter. Through active adjudication and case management, the views of the OEB panel about scope and materiality can be made more clear earlier in a proceeding and can guide the course of the proceeding.

Generic Proceedings

Question 14: Are there existing issues that do not currently have policy development work underway, which should be addressed through generic hearings instead of through individual applications?

Stand-by rates should be addressed. The issue of stand-by rates and the C&I rate design consultation have been outstanding for a long time with no resolution.

More generally, the OEB should identify and track important policy questions - especially those that arise repeatedly - that are not being addressed through a policy proceeding (e.g., EVs, electrification, DERs). The OEB should also actively monitor the policy questions identified and tracked in this manner so as to assess, among other things, the appropriateness and timing of generic proceedings – or other forums, such as policy consultations - to address the questions.

Question 15: Are there other changes that the OEB could consider with respect to generic proceedings?

No comments.

APPENDIX A: LIST OF RECOMMENDED ACTIONS

Substantial Interest Test

1. Amend Rule 22.02 to state that a person applying for intervenor status must satisfy the OEB that he or she will participate efficiently and effectively.

2. Amend Rule 22.02 to state that a person applying for intervenor status must satisfy the OEB that his or her interests are not sufficiently represented by other intervenors.

3. Amend the Rules to state that the OEB will not allow multiple intervenors to represent the same interest in a proceeding, other than in exceptional circumstances, where a clear justification is shown for more than one intervenor to represent the same interest.

4. Amend the Rules to state that the OEB will group intervenors, for the purpose of intervenor processes and for the purpose of cost awards, in those exceptional circumstances when multiple intervenors are allowed to represent the same interest and in such other circumstances where the OEB deems the grouping of intervenors to be appropriate.

5. Develop processes to channel issues of concern to intervenors with broad policy interests through policy consultations and generic hearings.

Intervenor Processes and Cost Awards

6. Establish a financial need test for intervenor cost eligibility.

7. Establish criteria for cost award requests, such as those considered by the AUC, which make clear that the determination of a cost award for an intervenor will include an assessment of the efficiency and effectiveness of that intervenor's participation.

8. Establish a template for cost award requests which sets out information about efficiency and effectiveness, including collaboration, that intervenors will need to provide when requesting a cost award.

9. Consider other approaches to cost awards for intervenors that better align incentives with efficiency and effectiveness than the current practice of using hourly rates, such as a benchmarking and incentives model for intervenors.

Active Adjudication

10. Develop Procedural Orders with a view to the availability of the panel of Commissioners, or the presiding Commissioner, to engage in active case management at points in the proceeding including, but not limited to, Issues Day, the interrogatory process and prior to the start of the hearing.

11. Plan for and conduct case management activities to include both: (1) where necessary, expeditious determination of disputed issues about scope and

materiality; and (2) active panel (or presiding Commissioner) involvement in providing guidance about how the parties can assist the panel with evidence that it needs to make its decision.

12. Engage with and guide hearing participants during case management activities so that procedural fairness will be observed while a focus is maintained on information that is necessary for the OEB to do its work, as well as the quality, rather than the quantity, of evidence.

13. Prior to the start of a hearing, engage in active case management to direct the development of a hearing plan, to focus parties on key areas of interest to the panel and to address other matters such as those discussed in section 5.3 above, so as to guide the parties towards an efficient and effective hearing.

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