VIA RESS

April 29, 2022

Ontario Energy Board
Attn: Ms. Nancy Marconi, OEB Registrar
P.O. Box 2319
27th Floor, 2300 Yonge Street
Toronto ON M4P 1E4

**RE: EB-2022-0011 – Framework for Review of Intervenor Process and Cost Awards**
**FRPO Comments**

INTRODUCTION

On March 31st, the Board issued its report "*Framework for Review of Intervenor Processes and Cost Awards"* and an accompanying letter inviting stakeholder comments. As a frequent intervenor in OEB proceedings, almost exclusively for the gas industry, the Federation of Rental-housing Providers of Ontario (FRPO) requested standing and cost award eligibility to provide the Board-requested comments.

FRPO is the province's leading advocate for quality rental housing. We represent 2,200 members including over 800 multi-residential housing providers who supply and manage homes for over 350,000 households across Ontario. We are promoting a healthy competitive rental housing industry by ensuring that the impact of legislative and regulatory changes serve the best interests of housing-service providers and residents. Our participation in OEB proceedings for over a dozen years has served our members, their residents, and the Board.

The following are the comments of FRPO in response to the invitation and the report.

OVER-RIDING CONCERNS EMANATING FROM THE REPORT

The Voice of the Customers is Demonstrably Economical

The energy industry has increased in complexity in the two decades since the Ontario Energy Board Act, 1998 brought the regulation of electricity under its oversight. Social, economic, and environmental change has accelerated during that time. In an effort to bring efficiency to the regulatory process, the Board has encouraged, developed and implemented improved, streamlined regulatory constructs to reduce the costs of regulating components of the gas and electricity markets, particularly those that are repetitive. The resulting efforts have contributed to processes that strive to be efficient.

During the evolutions of these processes, utilities and intervenors have adapted to balance efficiency and effectiveness, while providing the Board with information that parties believe assists the Board to determine increasingly complex decision-making. While utilities have had to adapt and strategize how to best inform the Board in a manner that serves its

constituencies, intervenors have often needed to adjust reactively. Although not perfect, the Board systems have sought the balance of efficiency and effectiveness in a manner that is exemplary.

In our view, a significant contributor to the efficacy of this evolution has been the group of intervenors who have championed the interests of the stakeholders who receive or are impacted by the monopoly services. This is in spite of the fact that intervenor cost awards represent only a very small part (approximately 0.018%)[1] of the total revenue requirement of the entities regulated by the Board. While we join the Board in its intent to seek improvements that benefit the outcomes for customers, we have reservations about the priority given to the assessment of this element of ratepayer costs.

We emphasize this point by noting that ratepayers ultimately pay for all costs. Embedded in rates are the costs for the delivered services and the cost to generate a just and reasonable determination of the cost of those services. These costs include the regulatory expenses of the Board and the utilities including their representatives hired from outside agencies.

Tests for Comparable Economy of Utility Regulatory Costs are More Problematic

The objective measure of the cost of the customers' voices must be juxtaposed with their payment of the utility's regulatory costs. The customer is paying the utility to resource the utility's efforts to ensure their shareholders' opportunity for return is maximized while risk is minimized. In spite of the fact that there are well-meaning, customer-sensitive utility managers, agency theory would dictate that their responsibility to the shareholder is paramount. In pursuit of this responsibility, utility staff, whose salaries and benefits are covered in the revenue requirement, create evidence designed to meet the shareholder goals. If the nature of the application warrants expert testimony, the utility can seek experienced consultants from the energy industry to author and testify to evidence aligned with the utility proposition. Utility management's allocation of staff hours and consultant expenditures to produce and defend the evidence is rarely seen nor tested, yet it nonetheless will be paid for, one way or the other, by customers.

This imbalance in tests of economy goes beyond the lack of transparency on cost impacts. The inequities extend to the opportunity to acquire resources to make the case. The maximum OEB tariff available to customer representatives has been constant for the dozen years that FRPO has been active at the OEB. In recent years, FRPO believed that ratepayers would benefit from an expert to testify on gas supply operation concepts that are not evidenced by utilities nor pipelines but provide opportunity for enhanced asset utilization. If employed, these concepts could result in significant economic, social and environmental benefits. However, our pursuit of qualified candidates was frustrated by the capped tariffs which were lower than the market price that seasoned experts would command. In addition, concerns were expressed that assisting ratepayers created risk for the expert's company in

[1] Framework for Review of Intervenor Processes and Cost Awards_20220331, page 18

obtaining more lucrative utility contracts that were unencumbered by the OEB tariff in the future.

These imbalances in the resourcing of parties in a contested proceeding tip the scales away from outcomes that benefit customers. And clearly, there is a lack of evidence from which the Board could assess equity. Giving credit where due, we believe that the recommendations proposed by London Property Management Association (LPMA) in their submissions[2] would be a constructive step to measuring and rectifying the problem. Requiring utilities to allocate their budgeted regulatory costs in a deferral account for subsequent review would be an informative first step. Using this information, the Board would have insight into the utility costs and the resulting balance. Further, the transparency on rates and ultimate costs of outside lawyers and consultants could give the Board understanding to rectify the resource imbalance in the public interest.

## FRAMEWORK REPORT ISSUES

The Report identifies a number of questions prompted from the content. In attempting to be helpful, FRPO provides its considered responses from its experience in providing responses to the questions under the broader areas.

### 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?

The group of intervenor representatives provides diverse experience from an academic, professional and work experience perspective. Given these respective backgrounds, in our collaboration, we rely on different intervenor organizations to take the lead on certain aspects of application depending on the approvals sought and the issues that arise. The consequence of this approach is that one or a few parties may invest more time in interrogatories, technical conferences, or settlement conferences. This time investment tends to create efficiency through reducing the costs of other intervenors, thus reducing the overall costs. We understand that this collaboration and efficiency is not only desired by the Board but is expected.

It has been our experience, though, that when parties bring forth their respective cost awards, the lead parties tend to have higher costs due to time invested in discovery or negotiation than other parties. These costs can be viewed as outliers in the cost award assessment process resulting in the lead parties having their requested costs reduced to bring their total costs more in line with other parties. Respectfully, we see this method of reduction as unfair and inconsistent with the expectations of the Board for efficiency.

The inequity of this approach can be exacerbated by reductions that are made without supporting information requested by the Board for the reasons underlying the observed outliers' requests. As an example, given the limitation on information available to the Board on respective contributions from a successful settlement conference, it is difficult for the

[2] LPMA_Comments_Intrv Framework_20220429, Section 5, pg. 5

Board to have insight into the investment of time by lawyers who accept the role as lead negotiator on behalf of the group. If the Board reduces the cost of that legal intervenor without an understanding of the additional investment by that party to ultimately reduce the overall cost of the proceeding, the reduction acts as a disincentive to parties taking that role.

A further example is when a consultant that has experience in certain realms of the utility business. In some cases, other intervenors rely on the experienced intervenor's investment in discovery. Further, at times, the consultant may assist in interpreting the utility's response to assist parties in understanding the issue during a negotiation or even at the time of submissions. As a result of their well-intentioned involvement for the benefit of ratepayers, the costs for that intervenor's consultant can appear as an outlier in the cost categories for the proceeding. For those requests to be reduced to a level that is aligned with other intervenors again results in disincentives for those lead parties. FPRO has previously identified this concern,[3] but the approach continues.[4]

## Clarifying Application Expectations

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

We agree with LPMA[5] that the Board has encouraged a more complete application, but those applications can be further enhanced if sections are not replicated and repeated in different tabs and/or schedules of the evidence and may be worthy of investigation to improve.

## Intervenor Status: Substantial Interest

3. How should the OEB define substantial interest for leave to construct applications?
4. How should the OEB define substantial interest for rate applications?
5. Are there other types of applications for which substantive interest needs to be further defined?
6. Are there other changes the OEB should consider with respect to accepting intervenors into proceedings?

We respectfully submit that ratepayers have a substantial interest in all proceedings. Other parties have an important role as they can contribute to the Board's views on the societal and environment aspects of the matters to be decided in the public interest. The Board's own Rules of Practice and Procedure provide the Board with significant discretion in its determination of standing.[6] An improvement that could be of some assistance to parties would be some guidelines from the Board in terms of what criteria the Board would be seeking to qualify for standing.

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[3] FRPO_COMMENTS_COST AWARDS_M17 OS LINE_20200804
[4] dec_order_Cost Awards_EGI 2022 Rates_20211125
[5] LPMA_Comments_Intrv Framework_20220429, Answer to Question 2, pg. 7-8
[6] ONTARIO ENERGY BOARD Rules of Practice and Procedure Revised July 30, 2021, Rule 22.09

## Cost Awards

7. What more could the OEB do to encourage greater collaboration of intervenors with similar views on issues and similar interests?
8. Should parties representing for-profit interests be eligible of cost awards?
9. Is there a better way to represent the interests identified by individual rate payers?

Collaboration and coordination of intervenors has been increasingly effective over the last 10 years. This collaboration has worked across differing views as the intervenors have collaborated but have respectfully agreed to disagree on final positions or requests for relief. At the same time, the diversity of background of the intervenor representatives allows for different initial perspectives on the issues in an application that assists in dealing with the information asymmetry that is inherent at the outset of the proceeding. Through communication, education and often informed debate, the intervening parties increase in their respective understanding of issues with the result being improved submissions and often enhanced settlements. Requiring parties that appear to have similar interests to combine interventions and "divide up the work" runs the risk of reducing the diversity that has brought value to the Board and customers in the past. Further, we support the submissions of LPMA whose assessment of the data from cost awards shows that collaboration is working.[7]

FRPO strongly supports the eligibility for cost awards for for-profit customers. As described above in our initial comments, ratepayers pay for the entire cost of regulation. Rejecting the availability of costs for a responsibly represented for-profit customer who could assist the Board while the system funds the entire costs of the for-profit utility would be inequitable. Not surprisingly, we see merit in the idea of a not-for-profit umbrella organization coordinating the interests of numerous for-profit customers as a means of providing efficiency in bringing these customers views to the Board.

## Frequent Intervenor Filings

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

We believe the current system of annual filings is acceptable as a simple administrative tool to inform/remind the Board of the constituencies represented and to ensure ongoing or updated endorsement of representation. To the extent this process is enhanced by Board-produced guidelines, the filing could achieve more functionality as a tool.

## Use of Expert Witnesses

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

Consistent with our concerns expressed above regarding the imbalance between the economics of the voice of the customer and that of the utility, we believe the expert filing requirements should be aligned for ratepayers and utilities. Further, the Board could

[7] LPMA_Comments_Intrv Framework_20220429, Section 6, pg. 5-6

institute a change mechanism that would require early identification of issues resulting in material changes for the Board's consideration and guidance. This system would be applied to both intervenor and utility experts bringing better cost control, transparency and balance in parties making their case while assisting the Board.

## Active Adjudication

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

FRPO believes that the Board has the tools to increase effectiveness through active adjudication. We respect that parties that hold polar opposite views on issues can be challenged in communicating effectively with each other. However, if the gap in perspectives is not providing clarity to the Board on the underlying issues, intervention by the Board can be very helpful. This intervention extends to directing intervenors who are arguing not questioning and witnesses who are advocating not answering in the discovery process.

## Oversight of Scope of Proceedings

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?

We understand that there are risks to efficiency if there is no control over materiality of issues. However, we would caution against too early a limitation on scope by way of the Board's expectations regarding materiality. Often the materiality of issues is only evident after initial or sometimes secondary discovery such as a technical or settlement conference. Limiting the scope of initial inquiry can inhibit the effectiveness of the entire proceeding.

If the Board were to initiate a move to restrict the scope of the proceeding from the outset, we submit that intervenor input into the process would provide a more informed basis for the determination of issues. The process of using a draft issues list for review and comment with reasons allows the Board to hear from parties other than the utility at the outset of the proceeding. While not completely eliminating the risk of precluding the consideration of emerging issues found in discovery, the contribution of intervenor's perspectives enhances procedural fairness.

## Generic Proceedings

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?

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

Given FRPO's focus on natural gas issues, we believe our intervenor colleagues would have more insight on these matters from their experience across electric utilities. Furthermore, the merger of the two major gas utilities has resulted in a generic issue perhaps becoming a one utility matter.

The most notable example is the provision of storage services. The current regulatory construct for storage in Ontario was developed in a generic proceeding.[8] The consolidation of the storage market climaxing with the merging of the two utilities created a de facto monopoly provider in Ontario. However, with Enbridge's utility and non-utility storage services seeing different regulatory oversight, the proper type of proceeding remains questionable. This is particularly true when it is understood that the non-utility provider sells services to the utility monopoly distributor in a non-arm's length transaction. Ratepayers' concerns regarding this matter were deemed out of scope in the merger proceeding[9] but the issue still has not been determined.

CONCLUSION

FPRO appreciates the opportunity to have input into the Board's consideration of the Framework. As outlined above, we believe the current Framework is working but can be improved. We provided comment on areas from our knowledge and experience while respecting that other intervenors, with more administrative law background and scope of experience, have constructive feedback on these questions. We have benefited from the ongoing collaboration with these intervenors beyond our expressly specific assistance provided by LPMA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON BEHALF OF FRPO,

Dwayne R. Quinn
Principal
DR QUINN & ASSOCIATES LTD.

[8] EB-2005-0551
[9] EB-2017-0306/EB-2017-0307 Decision and Order, August 30, 2018, pg. 48