PUBLIC INTEREST ADVOCACY CENTRE
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April 29, 2022 **VIA E-MAIL**

Ms. Nancy Marconi
Registrar
Ontario Energy Board
Toronto, ON

Dear Ms. Marconi:

Re: Framework for Review of Intervenor Processes and Cost Awards
EB-2022-0011

Please find attached the submission of the Vulnerable Energy Consumers Coalition (VECC) and the Public Interest Advocacy Centre (PIAC) on the above-noted consultation.

Yours truly,

John Lawford Digitally signed by John Lawford Date: 2022.04.29 16:43:39 -04'00'

John Lawford
Counsel for VECC/PIAC

VECC/PIAC Submissions EB-2022-0011 Intervenor Costs

PIAC
PUBLIC INTEREST ADVOCACY CENTRE
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Introduction

These are the submissions of the Vulnerable Energy Consumers Coalition (VECC).

The Vulnerable Energy Consumers Coalition (VECC) is an unincorporated coalition of two major Ontario organizations, the Ontario Society of Senior Citizens' Organizations (OSSCO) and the Federation of Metro Tenants' Associations (FMTA), facilitated by the assistance of a national non-profit corporation and registered charity, the Public Interest Advocacy Centre (PIAC).

PIAC is presenting VECC's intervention on this matter due to the possible ramifications for its management of public interest representation before the Board and due to PIAC's familiarity not only with processes of the OEB and other energy regulators, but also regulators such as the Canadian Radio-television and Telecommunications Commission (CRTC) which also has robust and long-standing public interest intervenor rules.

We have generally tried to organize our submissions around both the headings in the "Framework For Review Of Intervenor Processes And Cost Awards (March 2022)" ("Framework") document, as well as the list of consultation questions in Appendix B of this Framework document, with a cross-reference between the two. We note that a number of questions and substantive issues are raised in the body of the Framework document that do not reappear summarized in the questions in Appendix B; and, that the headings and attendant questions in the main Framework appear to focus more specifically on the problems and solutions likely to be the end result of this proceeding. We therefore have attempted to work these main process issues under the appropriate question and topic in our intervention, and then to address the specific Appendix B questions.

While we make a number of general observations and some, we hope helpful, suggestions we also would like to make clear that our comments are in light of the Board's current practices which we think are among the very best in North America. Proceedings before the Board have active participation and vigorous advocacy resulting in robust results which provide value for consumers – specifically reductions in revenue requirements for utilities in rate cases, which directly benefit ratepayers. The active participation of intervenors brings a healthy adversarial energy to the regulatory process and provides it a form of legitimacy which shows consumers that the regulator has not been captured by those it regulates.

We recognize, also, that the Board is responsibly responding to the Minister of Energy's Mandate Letter that requests: "*The OEB should also continue its work reviewing intervenor processes to identify opportunities to improve the efficiency and effectiveness*."

We note as well that the Board has previously considered the issue of intervenor cost awards in 2018 (as part of the OEB Modernization Review Panel Report[1]) and a proceeding in 2013 (EB-2013-0301) both of which raised similar questions, such as what is a "substantial issue" or whether pre-approved budgets

[1] Online: https://www.ontario.ca/document/ontario-energy-board-modernization-review-panel-final-report

should be used. We note, but have not included, VECC's prior submissions on the subject of Intervenor participation and costs awards (notably in 2018 and 2014) and our position is consistent over time: that we do not see any compelling reasons to make fundamental or wholesale changes to the current system of determining standing or the awarding of costs. Rather, some clarification and adjustment of present processes may be what is needed.

The Ontario Energy Board is a world class regulator and should be wary of change for the sake of change or to cede to outside pressures. Economic regulation is by definition a difficult but necessary activity.

That being said, we commence our comments at that point in the Framework that introduces potential changes to the intervenor process before the Board.

Appendix B – Question 1 – 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?*

5.0 APPROACH

5.1 Jurisdictional Review

We were pleased to see the results of the OEB Adjudicative Modernization Committee (AMC) of the OEB to undertake a review of intervenor processes in other jurisdictions. This Jurisdictional Review of Intervenor Processes and Cost Awards (Jurisdictional Review Report),[2] is a valuable study that summarizes most energy regulators' intervention practices in Canada and the United States.

However, we note the omission of the CRTC's intervenor costs award processes, despite the inclusion of U.S. and even U.K. energy regulators. While understandable due to the Jurisdictional Review Report's focus on energy regulation, we believe that the CRTC processes, being both longstanding and Canadian, despite being focused on telecommunications rather than energy, would add much clarity of thought to the OEB's present review. Therefore we make reference to these rules in addition to those summarized in the Jurisdictional Review Report.

We also trust that the OEB is not seriously considering the Consumer Advocate Model suggested in this section (at section 5.4). Despite the disclaimer in the Framework in s. 5.4 that only the present intervenor model is being considered, we are of the settled view that a Consumer Advocate Model has many downsides and that this proceeding is not the venue in which to discuss those disadvantages compared to the present "intervenor compensation programs" model.

[2] Online: https://www.oeb.ca/sites/default/files/Jurisdicational-Review-of-Intervenor-Processes-and-Cost-Awards.pdf

5.2 Identified Concerns

"*Through preliminary discussions with some stakeholders, the OEB has identified that there are several concerns with OEB intervenor processes and cost awards. These are the areas which the OEB intends to focus on first.*"

This is the first and major section questioning the present processes of intervenor approval (status); costs eligibility (costs eligibility) and costs awards adjudication (quantum). It is focused on outcomes ("greatest benefit") and the goal of "the efficiency and effectiveness of [the OEB's] adjudicative process".

After that is a laundry list of potential concerns, some of which are proposals to alter the present OEB rules and guidance on intervenor (1) status; (2) costs eligibility; and (3) quantum. Unfortunately, the listing nature of this paragraph may confuse some participants and readers by not clearly delineating which category (1, 2 or 3, or some combination thereof) to which the OEB intends its concerns to relate. Further uncertainty arises with the open ended question at the end of this section asking: "Are there concerns other than those identified in this report, related to intervenor processes or cost awards, that the OEB should examine?" For the record, VECC does not support additional inquiries beyond the extensive ones raised in this report.

Turning then to these concerns, we must initially make some general observations, then comment more specifically on each one.

General Comments on "Identified Concerns" list

One of the strengths of the Ontario Energy Board is its history of reviewing its activities and renewing its approach to regulation to suit changing circumstances. This should include looking at all aspects of regulatory costs including intervenors, applicant(s) and the Board. While the present review exercise is focused on intervenors, the vast majority of regulatory costs lie are utility-specific and, to a lesser extent, regulator-specific, that is, those of the Energy Board itself. And while there is nothing wrong with reviewing intervener costs and processes, the present proceeding implies there are particular irritants, but never states clearly what underlying concerns need to be addressed. By not laying out clearly the issues the Board feels need to be addressed one is left to try and interpret the concern through a reading of the various questions posed. For example, the Board questions how it might encourage greater collaboration among intervenors. Why? Is the Board concerned by the absolute number of intervenors in a proceeding and the inefficiencies that may create with respect to the regulatory process? Is it a concern with the simple, overall quantum of intervenor costs awards? Is it that cost eligible intervenors do not collaborate sufficiently with non-cost eligible intervenors? Do the questions on status made under the ambit of "substantial interest" (see more below) about better aligning cost awards with the intervenor's stated interest or is the Board concerned that some parties should not have intervenor status in proceedings at all Whatever the driving rationale, it is unfortunately the case that the Report does not clearly articulate the reasons for the review. This leaves commenting parties to guess what underlying problem the Board is seeking to solve, the foundations of the problem (if any) or the motivations of those raising them.

We surmise, based on prior reviews and our experience, that one driving motivation may be that interventions and costs awards are not popular among the regulated utilities and related entities. Such pressure to review becomes more popular in proportion to the ability of intervening parties to successfully advocate for modifications to utility plans (and in particular, reduction of various recoveries of costs in rates). If so, we can only say that when regulated utilities are unhappy their customers often feel the opposite.

Consumer advocates like VECC (and PIAC) represent a diffuse group of customers. Unlike advocates for industrial or commercial customers, whose constituencies are arguably narrower and easier to contact for instructions, groups like VECC find it very difficult to engage and organize these individual ratepayer interests. For residential consumers, the impact to any individual is small and hence their attention and appetite to be engaged is low even though in its entirety the costs the customer class as a whole are very large. It is for this very reason that the intervenor costs awards system exists: it would be impossible for groups like VECC to engage sufficient individual ratepayers to fund our participation and advocacy – which we believe, however, greatly benefits them by delivering more just and reasonable rates. To its credit the Ontario Energy Board has long recognized this challenge in responding to regulatory processes and addressed it through exactly this means: its cost award regime and rules.

Regulated monopolies speak as if they are speaking for ratepayers. They do not. Management of incorporated companies have a fiduciary duty first to their shareholders. They are not purveyors of the public good - they are primarily stewards of private capital. Regulated utilities benefit in fact benefit from their insulation from the compromises, threats and volatility of truly open, competitive markets. As concentrated private interests, they enjoy access to and have influence with political and other power centres, and as well enjoy an asymmetry of information before the regulator. The continual danger in this unbalanced economic environment is that a regulator, especially one who naturally draws a significant portion of their human resources from within the industry they regulate, can be unduly influenced by utility viewpoint and lobbying. Public interest intervenors are part of the Board's methodology to provide a counterweight, amongst other measures such as independent appointments and public reporting, to these pressures.

Intervenor costs awards represent a relatively small cost (both the Board's resource costs and direct intervenor costs awards) for scrutinizing detailed and complex utility plans. Assuming without deciding that regulation is much less 'efficient' than "pure" markets, the price of such informed public (ratepayer) scrutiny is still far less than shareholders would find themselves paying were they to face the more severe discipline of such pure competitive markets.

With respect to whether <u>consumers</u> as ratepayers gain value from the current system we would make these observations:

- The Board has not raised the compensation scale for intervenors in over 12 years resulting in a effective reduction of these costs in the order of 30% during this time.
- Regulated utilities (who recover these costs from ratepayers) consistently spend more on their own consulting and legal fees than that of all combined intervenors in a proceeding – and these utility regulatory costs have generally risen with or beyond inflation over the last 12 years.

- Regulated utilities include in their rates their membership fees for organizations like the Electrical Distributors Association – whose activities include lobbying on behalf of shareholder interests, not those of their ratepayers. These association and representation costs are generally well in excess of the typical distribution utility's "once in 4-5 years" rates application and attendant costs of interventions.

If the Board is to proceed with proposing changes to its Rules of Practice and Procedure and Practice Direction of Cost Awards it should more clearly delineate the purpose of those changes and provide the reasons its sees to make those changes, in light of the undeniable benefits to ratepayers of the representation from intervenors that the costs award rules permit.

Specific Identified Concerns List

We turn now to consider the Frameworks' stated concerns under section 5.2, Identified Concerns.

- *How should the OEB better define what constitutes a "substantial interest"?*
- *How can the OEB create incentives for increased collaboration by intervenors?*
- *Should the OEB provide cost eligibility for multiple intervenors representing the same or similar interests?*
- *Are there steps the OEB can take to ensure that limited issue or specific policy driven intervenors participate in proceedings only with respect to those specific issues, other than reducing cost awards for activity at the end of a proceeding?*
- *How can the OEB ensure that the total cost awards granted are commensurate with the nature of a proceeding?*
- *How can the OEB ensure that immaterial issues are not explored in its proceedings?*
- *Should the OEB take additional steps to establish the scope of a proceeding early in the case?*
- *Should the OEB consider using more generic proceedings or policy consultations where a similar issue arises in multiple proceedings?*
- *Having one intervenor take the lead on a particular issue or issues in a proceeding may reduce duplication, but are there ways to better assist the OEB in understanding whether this has occurred and the impact on cost claims?*
- *How can the OEB support representation from Indigenous peoples in OEB hearings?*

Intervenor Status: Substantial Interest

How should the OEB better define what constitutes a "substantial interest"?

As mentioned at the start of our comments, we are somewhat confused as to the problem to be solved with this question. In our experience, the Board only infrequently runs into contested issues on whether to grant pure intervenor <u>status</u> in a proceeding.

Based on a review of the various questions in the Framework, and based on our experience with Board matters and discomfort in processes and with costs awards, it may be that the Board is concerned either that: (a) there too many cost eligible intervenors with similar or overlapping interests; or (b) some intervenors representing tangential issues may be perceived to be causing unnecessary proceeding costs.

We note, however, that neither of those questions addresses intervenor status, but rather targets either eligibility or quantum. Again, it is crucial to separate these stages to properly design effective and efficient processes for each of these stages.

From the Framework document, Section 2.0 – Introduction:

> "*A more precise definition of who is impacted by an application to provide better understanding and certainty to interested parties about whether there is a link between their interest and the scope of an application. To do this, the OEB could provide a better definition on what constitutes a "substantial interest" for interventions in OEB proceedings*
>
> *The OEB has defined an intervenor in a proceeding as someone who has satisfied the OEB that they have a substantial interest and intends to participate actively and responsibly in the proceeding by submitting evidence, argument, or interrogatories, or by cross examining a witness. This definition will be considered as part of this review*." [Emphasis added.]

It appears from these statements found earlier in the Framework that these considerations (whether an intervenor has a "substantial interest" in the proceeding or will undertake to participate responsibly) which, while wholly appropriate for evaluating a proposed intervenor's status to intervene do not fit the other goals outlined in the Framework document. Using these intervenor status tests in other contexts only confuses the discussion and risks excluding valuable intervenor work and viewpoints that would aid the Board in making better decisions.

The Board's formal rules for intervenor status are introduced by section 22.02 of the Rules of Practice and Procedure, which reads:

> 22.02 The 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 by submitting evidence, argument or interrogatories, or by cross-examining a witness.

It is from this provision that the Framework has seized on the term "substantial interest". The term is meant to restrict the Board's processes to participants who have a genuine stake in the outcome of the particular process. However, that interest is qualified by "substantial".[3] We believe this is simply meant to allow the Board, in its discretion, to screen out, in advance, persons with tenuous connections to the subject matter or with a meddling or unserious interest in proceedings. That is, the "substantial" in "substantial interest" is a method of ensuring the Board can exclude frivolous or vexatious participants or those seeking to abuse the process for other aims – this is buttressed by the second part of the above test, which requires potential intervenors "to participate actively and responsibly in the proceeding by submitting evidence, argument or interrogatories, or by cross-examining a witness.".

[3] While we do not advocate for changing the "substantial interest" threshold or the wording, we do note that the Canadian Radio-television and Telecommunications Commission (CRTC) has no intervenor qualification test. Rather, "any person" may intervene (in accordance with formal documentation requirements found in s. 26 of the CRTC *Rules of Practice and Procedure*) and the CRTC requires only, under subs. 68(a), an "interest in the outcome of the proceeding", not a "substantial interest" in order to apply for final intervenor costs, provided the intervenor otherwise "assisted the Commission in developing a better understanding of the matters that were considered" (subs. 68(b) and "participated in the proceeding in a responsible way" (subs. 68(c)).

We submit that this test is not, however, intended to pre-define or restrict the advocacy or interests or engagement of those participants who are accepted as intervenors based on their interest. We would expect the Board to err on the side of granting status, therefore, to new or unconventional intervenors and VECC would oppose additional barriers or qualifications at this stage, such as any purported matching of "stated" (or compelled statement of) interest with Board or applicant defined "definitions" of the "scope" of the proceeding in all but the most "mechanistic" proceedings.

VECC submits that the Framework's tying of the scope of the proceeding to the proposed intervenor's stated interest is an inappropriate method for seeking to exclude intervenors on a prejudicial basis. In short, requiring "issue intervenors" or "policy intervenors" (if these can even be defined) to pre-explain their relation to proceeding's subject matter and their expected level of involvement, limits their advocacy and inappropriately forces these parties to reveal advocacy strategies to respondent utilities or others. We can easily see this pre-justification and prejudicial assessment of the "appropriate" involvement of the "right" parties also being extended to judge even residential ratepayers in certain hearings where VECC's experience nonetheless leads us to believe ratepayers interests can be in issue.

Again, intervenors that are only seeking to disrupt the process, as unserious or use it for non-related purposes can and should be screened out by refusing intervenor status under the present "substantial interest" and "responsible participation" test under Rule 22.02.

Should any intervenors be deviating from "responsible participation" in the proceeding, we fully support OEB staff or Commissioner guidance during the process to remind intervenors of their commitment to responsible participation (leaving scope for vigorous advocacy) and of the Commission's ability to adjust the quantum of costs awards for unnecessary or overly lengthy participation.

However, if the Framework is implying that the status test can be used to "scope out" or "scope limit" intervenors' status or standing at the initial stages of the proceeding because of costs eligibility concerns or more likely, costs quantum concerns, we suggest that the law on standing is large and liberal for a reason, namely, the public interest is better served by increased access to justice and that these other aims cannot validly be achieved by limiting intervenor status. If the Framework is suggesting that certain "types" of groups or certain (mostly policy) "interests" do not deserve to be heard before they are known, this is simply prejudicial and not in accordance with the Board's duty to adjudicate under natural justice principles.

Costs Eligibility is a Different Test

By contrast, the Board's rules for <u>costs eligibility</u> are detailed and set out in section 3.03 of the Practice Direction On Cost Awards. The concept of "substantial interest" does not exist in the current Practice Direction. This makes sense, as the costs eligibility determination is a separate test. That is, one may intervene without being a costs award recipient or even asking to be eligible for costs, although most intervenors also apply both for status and costs eligibility.

Importing the gatekeeping concept of "substantial interest" into the present costs eligibility test, as the Framework document may be read to imply –presumably as a method to limit the quantum of costs in terms of the number of potential costs applicants– is inappropriate. Even were it not applied arbitrarily, which is a risk of this inappropriate concept, one would need to answer a number of questions including:

- Is "substantial" measured only in dollar terms?
- Is it measured only when those dollar terms are above, rather than below, some target?
- Does it include proposals that have no dollar impact but address regulatory policy? And if so, then how is "substantial" measured in policy terms?
- Is a large change in rates affecting a small number of customers (like a microFit charge) a "substantial interest"?
- Does a small change affecting a large number of customers qualify as a "substantial interest"?
- What about matters that do not affect the applicant at all but may have "substantial" impact on future applications or the applications of other utilities?
- How are the constituents of the intervening party considered in the determination of what is substantial – is there some means or numbers test?
- If a utility files an application that reduces rates does anyone have a "substantial interest" and if not then why hold a hearing in any event?
- How is "substantial interest" understood, if based upon content of the application rather than status of the potential intervenor, when detailed application examination, including discovery, has yet to be undertaken?

The last point is particular concern given our experience that many issues are revealed in the exploration of an application. Regulated companies understandably frame applications in a positive manner which minimizes the negative impacts and in some cases minimizes issues with intent. Is the Board taking the application at face value to determine what issues will ultimately be examined and commented upon? If so, our experience tells us that gives applicants so much leeway to define issues that it will approach a risk of misleading the Board as to the likely effect of the application.

Costs Awards Considerations (Quantum of Awards)

"Considerations in Awarding Costs" – found in section 5 of the Practice Direction on Costs Awards – lists factors to assist the Board in exercising its discretion to determine an appropriate <u>quantum</u> of costs award for the application for costs made by an intervenor. These are quite detailed and based on years of experience of the Board with interventions and hearings but none of these fit with a "substantial interest" concept.

These considerations (from 5.01) are that intervenors:

(a) participated responsibly in the process;

(b) contributed to a better understanding by the Board of one or more of the issues in the process;

(c) complied with the Board's orders, rules, codes, guidelines, filing requirements and section 3.03.1 of this Practice Direction with respect to frequent intervenors, and any directions of the Board;

(d) made reasonable efforts to combine its intervention with that of one or more similarly interested parties, and to co-operate with all other parties;

(e) made reasonable efforts to ensure that its participation in the process, including its evidence, interrogatories and cross-examination, was not unduly repetitive and was focused on relevant and material issues;

(f) engaged in any conduct that tended to lengthen the process unnecessarily; or

(g) engaged in any conduct which the Board considers inappropriate or irresponsible.

These factors, some of which involve the intervenor's responsible participation in the proceeding, some of which relate to responsible advocacy, and some of which speak to the value of the content or argument of the intervenor, clearly have no relation to the discussion of intervenor status. Rather than who the intervenor is or why they are there (status) these factors seek to define how the intervenor acted in the proceeding and the effect of their actions on the proceeding (notably the usefulness of the intervention for the Board to complete its task of adjudication of the proceeding).

VECC notes that in the Framework, s. 5.2 concerns, some of the questions listed may imply that these new concerns might be determinative or considered apart from other relevant factors such as those listed by the CRTC, above. As an example, we note the 5.2 concerns appear to single out these two:

- *How can the OEB create incentives for increased collaboration by intervenors?*
- *Should the OEB provide cost eligibility for multiple intervenors representing the same or similar interests?*

These two concerns/questions both appear to be designed to constrain the number of intervenors eligible for costs, or the quantum available if there are two or more that appear to represent the same interest or advance in substance the same position in a proceeding.

As noted above, we do not think it is relevant or appropriate for the Board to limit the positions of intervenors that were permitted to enter the proceeding with intervenor status nor to force these intervenors, who may have in fact divergent interests, or divergent advocacy strategies, to work together beyond what might advance each of their causes. If the Board feels it must, for example, guide the Board's discretion to limit the quantum of recovery in cases of either intervenor or position "overlap", then this overlap should be only one of several concerns, weighed together and contextually, as in the CRTC quantum test. The Board should not set rules that an overlap of interests or positions advanced separately automatically requires reduction of one or more intervenor costs claims. Consider that in all cost of service applications, for example, almost all intervening parties share certain interests, such as the reduction of operating costs.

The next, related concern affecting the quantum adjudication from the s. 5.2 list is the "lead intervenor" question. This is phrased thus:

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

At present, any intervenor who made specific, or extraordinary efforts on a particular proceeding is free to justify its costs claim (if higher than similar intervenors) on the basis that it took the lead on issues either due to its experience, advocacy skills, particular knowledge or resources, or some other advantage. Provided this is properly explained in the costs claim or an objection to it as filed, this appears adequate to solve the "lead organization" question. We do not think that it would be appropriate or effective for costs applicants to have to claim their lead or worse, perceived 'superiority' on any particular issue. Instead, the party making such efforts simply must describe these efforts and trust the adjudicator to recognize the value of the efforts as such.

If the Board were to do anything on this question, it could be to confirm that any time spent negotiating or coordinating with other parties on who might be lead intervenor was fully compensable as a valuable part of the proceeding and all parties could claim this time in their costs claim, which is not usually awarded now.

Appendix B – Question 2 - Clarifying Application Expectations

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

6.0 CLARIFYING APPLICATION EXPECTATIONS

As we have discussed above it is not entirely clear what issues the Board hopes to address or its expectations in this proceeding.

Utility shareholders do not, in any event, pay the cost of regulation - that cost is paid by ratepayers. With respect to those costs we were struck in the Framework document's discussion by the lack of comparable context on regulatory costs. Table 1 provided in the document shows on a moving average basis whether one measures in absolute or real dollars intervenor costs have been falling since 2015.

Rate Year[22]	2013	2014	2015	2016	2017	2018	2019	2020	2021
Total Cost Awards ($000)	1,270.5	522.5	2,617.9	964.4	1,050.6	1,471.4	254.4	1,072.1	937.4
Moving Average of prior years		896.5	1,470.3	1,343.9	1,285.2	1,316.2	1,164.5	1,153.0	1,129.0

One might compare this to the Board's own costs over the same period:

	2013	2014	2015	2016	2017	2018	2019	2020	2021
Total Expense	36,176,742	35,595,501	37,535,707	49,120,150	45,676,603	43,841,842	45,860,613	45,958,237	44,016,544

(Annual Reports- various)

For the 2017 – 2021 period the Board costs, like intervenor costs, have been essentially flat but in real terms, on average, been declining. What is absent is any analysis on the utility regulatory costs, and in particular the application costs (including legal fees) spent and thus recovered by the Ontario regulated utilities from ratepayers. We think this would help frame the nature and the magnitude of issues around regulatory costs.

If the Board proposes changes to its Rules of Practice and Procedure and Practice Direction on Cost Awards it should consider doing a more in-depth analysis with respect to the source of regulatory costs and the extent to which these have risen in real terms over the past 10 years. This would provide a context for the discussion on the cost and benefits of any rule change.

Appendix B – Questions 3, 4, 5, 6 – 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?*

Please see our comments above under Appendix B – Question 1 – and 5.2 "Identified Concerns" to the extent that these discuss the general concept of the test for intervenor status and substantial interest.

7.0 RULES OF PRACTICE AND PROCEDURE, PRACTICE DIRECTION ON COST AWARDS, AND GUIDANCE DOCUMENTS

7.1 Intervenor Status: Substantial Interest

The Framework Document also addresses additional questions regarding intervenor processes and costs awards in later sections, notably 7.1, 7.2. 7.3 and 7.4. Once again, the Framework document links these possible changes or questions to "substantial interest", which is a test for intervenor status, and, we believe, a concept which should not serve as a basis for any efficiency or effectiveness improvements suggested in the questions.

Leave to Construct

VECC has no comments on the "Potential Changes" posited in this section. It is not clear to us what particularly different issue with respect to either intervenor status, cost eligibility or costs quantum awarded arises in leave to construct applications.

Rate Applications

The OEB has proposed the following "Potential Changes" under this heading for rate applications:

- Clarifying that parties representing discrete customer groups of a utility seeking a rate approval will be considered to have a substantial interest in a proceeding.

- Defining the expected scope of intervention for individual customers representing only themselves in a rate application, e.g., the OEB could consider limiting participation to submissions and facilitate coordination of the individual with an intervenor representing a consumer association for the purposes of discovery and cross-examination.

- 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.

- Undertaking pilot approaches for limited-scope intervenors, such as pre-defining limits on cost awards commensurate with that scope.

- Developing strategies to require parties with a limited scope that overlaps with another party to work together (e.g., combined intervention) with cost awards set commensurately.

Regarding bullet point 1, we do not think it necessary to make such a presumption, as groups representing ratepayers, such as VECC, make clear our interest in intervention applications and also file frequent intervenor information, as well as our firm belief that ratepayer representation is facially a substantial interest in all but the very most esoteric or technical Board proceedings.

Regarding bullet point 2, we have no comment on limiting individuals' potential participation but we caution the Board that it cannot assume ratepayer group representatives can easily assist individual ratepayer advocates, as this will cause: client representation issues, including confidentiality and other client legal duties and attendant issues to be managed; likely significant time expenditures on the part of established intervenors in explaining process and advocacy, with attendant loss of time to work on substantive issues; strategy disagreements; likely non-compensable time in coordinating with such persons; inevitable conflicts with other parties over conduct of such individuals, etc. Having said that it has always been our practice to assist informally, where feasible, individual ratepayers in understanding the Board's processes.

Regarding bullet point 3, we understand that such parties already indicate the source of their interest, whether grounded in wider policy issues or otherwise, and that the Board already makes determinations as to whether the party has a substantial interest and commits to responsible participation as part of the usual determination of intervenor status (also see our comments above in relation to 5.2 "Identified Concerns").

Regarding bullet point 4, we strongly object to such pilot projects positing "limited-scope" interventions. Intervenors already self-regulate, in accordance with active adjudication by the Commission and guidance of some other intervenors and the utilities, their level of participation and usually make costs claims commensurate with their limited participation. The Board also has the ability to reduce the quantum of any claim that is based on excessive time or irrelevant work. The point also implies that one could pre-define the maximum cost award (a cap) prior to the proceeding. While we are aware that in some jurisdictions (the BCUC comes to mind) intervenors are sometimes requested to provide an estimate of their cost, our experience is that this budget does not equate to the actual award, nor is there a hard cap. Rather it is a method of initially gauging the proceedings' cost. We would also caution that pre-defining awards makes possible manipulations by unscrupulous or callous Applicants to exhaust the resources of the interested party. Finally, for large, complex proceedings, it can be exceedingly difficult to estimate with any accuracy the upper limit of one's costs.

Regarding bullet point 5, we reiterate our above answer to bullet point 4, and add that it is unfair and potentially a breach of natural justice to require parties to collaborate. The concerns stated above in bullet point 2 also arise in this context: forced cooperation or assistance leads to conflicts of interest, confidentiality issues, wasted time and effort and frustration on the part of all parties.

The Board should note that one of the primary benefits of the present intervenor system is a vigorous and varied representation of the public interest. With that varied representation comes by necessity some minimal overlap in certain actors or positions, and that this overlap may present differently when labels are attached to this varied representation, such as "policy-based" or "limited-scope" intervenors. However, the overall diversity interest in having multiple intervenors far outweighs any minor overlap of interests or parties, and the Board should not dabble in efforts to erase the overlap to the risk of that diversity and its overall positive effect on public interest representation.

Whatever the case, our initial factual observations about OEB processes from an intervenor point of view and experience, which may assist the Board in determining the importance of or practicality of changing that process, are:

- In most rate-setting proceedings there are only one to three intervenors who generally do not have overlapping interests and generally represent residential ratepayers, small commercial/institutional customers and industrial customers. Their focus is on the rates to be charged to their specific constituency. This may lead to there being issues of common concern. However, it can also lead to differences of opinion and perspectives among intervenors.
- In a very few (generally larger utility) cases there are a larger number of intervenors who represent customer groups but also other more general societal interests (e.g., energy efficiency, pollution/GHG, or particular consumer segments such as indigenous communities).
- In most small to mid-size electricity distribution proceedings, intervenor numbers and costs are highly predictable and move around a mean. Cost variation is often attributable to variation in the quality or complexity of the application submitted.
- In very large utility proceedings (e.g., OPG, Hydro One, Toronto Hydro, Alectra, Hydro Ottawa and Enbridge Gas) there is a much larger variance in the number of intervenors and intervenor cost claims. Generally, in these proceedings, the issues are highly complex and frequently it falls to specific intervenors to take the "lead" on specific topics based on their expertise and past experience in dealing with the topic.

As might be divined from above comments, VECC also would answer questions 5 and 6 (further defining 'substantial interest' in other applications and other changes to accepting intervenors) in the negative, that is, there is no need, and it is not appropriate to do so – in fact, it may risk the real benefits of the present intervenor structure.

In conclusion, We do not believe the Board should use terms or tests for determining intervenor status for (1) defining or limiting interventions – i.e., intervenor <u>status</u> is not costs claim eligibility nor is it relevant to costs awards (amount) considerations; or (2) defining or limiting the quantum of any

eventual intervenor costs award. "Substantial interest" is a concept only relevant to granting intervenor status, not costs eligibility or quantum, which have their own respective test and factors.

Appendix B – Questions 7, 8, 9 – 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 ratepayers?*

7.2 Cost Awards

The strength of the current OEB system is that it hears from actual organizations with different positions (diversity and vigorous advocacy for various facets of the public interest). One of the most glaring flaws of the single public advocate model discussed in the Framework is that it lacks these characteristics. Our experience of the public advocate model in other jurisdictions is that the "ratepayer" position lacks any coherence both in how its interests are formed, how tradeoffs are made within interests (say between rate classes) or whether there is any consistency of those positions over time. As a practical matter most public advocate offices hire the same professionals who simply bring along their prevailing positions. In addition, the public advocate is, despite efforts to insulate it, ultimately beholden to its funders, usually the provincial government or the regulator itself, which bends their representation.

Ultimately all intervenors (or almost all) have a common interest – they want the lowest rate and the most reliable service. However, intervenors – even those from seemingly similar organizations – bring different perspective often informed by that organization. At VECC we have had occasions where we were contacted by consumers and had their issue dealt with directly in a proceeding of the Board. We have witnessed similar experiences from other intervenors some who have decades of experience in specific areas (gas transportation and supply come to mind).

The Framework in this part again posits a list of "Potential Changes", some of which are covered by the formalized question in Appendix B (and identified as such below in headings) and some in other points that do not appear in the questions. We deal with each bullet point (and, if available, Appendix B question) below. They are, unfortunately, important enough, and radical enough to list:

- Consider pilot approaches in which cost award guidelines are established to set expectations of cost award levels at the outset of certain proceedings.25 Pilot projects could include proceedings such as those that are:
  - establishing a policy framework through an adjudicative process26
  - innovation projects that meet predetermined criteria established by the OEB
  - of limited scope, cost or impact
  - predominantly mechanistic but include narrow issues for which a prudence review is expected

- Consider pilot approaches to cost awards that encourage greater collaboration, e.g., approving costs for intervenors of similar interests as one entity with a maximum number of hours shared by the group.

- Consider a rule to formalize the OEB's current approach of not granting costs awards for mechanistic or routine aspects of a proceeding.

- Consider any comments received on the current cost award fee schedule.

- For intervenors in rate applications representing a broad policy interest and not a specific consumer group, consider the need for additional justification for cost awards by assessing how the policy interest is relevant to the specific application.

- Consider whether parties representing for-profit interests should not be eligible for cost awards, or should have a different approach to cost awards than an hourly rate.

- Determine a better way to accommodate the interests identified by individual rate payers, e.g., limiting the availability of an honourarium where their interests can be accommodated by an existing approved intervenor that represents the ratepayer's rate class.

Bullet 1 – 'Pilot Approaches' Hearings – a Sandbox?

The Framework lists a number of types of proceedings in which it would create a sort of 'regulatory sandbox' in which it appears it could subject intervenors to new intervenor-limiting and costs limiting rules (dealt with in the following bullets). We would urge the Board not to do this with 'live' proceedings, and especially with real intervenors and their costs, even if they are policy hearings, 'innovation projects' (whatever these are), of 'limited scope, cost or impact', or 'predominantly mechanistic with prudential features. First, this list could include rate hearings for smaller utilities but which VECC often intervenes in alone or with one other party to ensure just and reasonable rates even for smaller communities. We also disagree that policy hearings are necessarily 'less important' to ratepayers. They can indeed have far-reaching effects. We are also on the record as opposing such sandboxing with live participants, as it were, both in substantive 'innovation' projects and in hearings considering them.

Bullet 2 – 'Pilot Approaches' – Encouraging Greater Collaboration by Limiting Costs to One Entity

Coordinating interests – Question 7

A number of questions posed in the Framework explore whether there can be efficiency by looking at common interest among participants.

The first thing that comes to mind when reading this list is who will decide which intervenors have common interests? Should the Board decide when and how the Consumers Council of Canada (CCC) should take the same position so as to be in common with VECC? CCC and VECC do work both informally and formally (single interventions) in proceedings. That does not mean we always share the same view or agree on the best approach for moving forward an issue we do agree upon. Sometimes our interests are not the same, as they are informed by our client associations. This question does not acknowledge the autonomy or value of seemingly 'similar' interested parties and that there can be diverse opinion on both substance and strategy.

The Board may disallow or limit the participation of a party but respectfully, it is not it's place (nor is it regulated utilities') to make the assumption as to the uniformity of the position or strategies of interested parties. The Board customarily asks for parties to work together and in our experience they do exactly that. We are at a loss to understand what is broken here.

Our experience is that intervenors do cooperate formally and informally in proceedings. However, unless intervenors are able to freely and voluntarily arrange such cooperation, we would have to abdicate our responsibilities to our foundational members and those ratepayers we represent on any number of issues. In the same way it would be wrong for the Board to force utilities to combine positions or to split up their agenda in, say, a policy proceeding or to exclude the participation of industry-level representatives such as the EDA (or, conversely, require individual utilities to join the industry association position).

If the Board is concerned about the variation of costs among similar cost eligible groups it should address that directly in applying the present test for costs quantum. If the Board is concerned about the ratepayer cost of multiple cost eligible groups in a proceeding it should address that directly. However, we remind the Board that our perception -as well as previous research- appears to demonstrate that the costs to ratepayers of such representation is heavily outweighed by the savings to ratepayers achieved, usually, due to revenue requirement reductions achieved by intervenors in rate hearings.

We have heard criticism, often from regulated utilities, that intervenors in OEB proceedings lack legitimate interaction with their constituency. Certainly when one tries to represent a diffuse and diverse set of interest like residential consumers, there is no perfect way to link an intervenor to its interest. Like democracy the participation system in place today is simply the least flawed of the many that might be tried. The current system relies upon the Board to make a finding of standing based on its knowledge of the intervenor and their stated interests.

It may be that the real issue is not whether parties work together (since they do) but rather an discomfort with awarding of costs to parties with what appear to be similar interests. If this is the case then it would be more effective for the Board to deal with this directly in its cost quantum determination process. We do not think the Board needs to make any changes to its current policy of encouraging parties to work efficiently together.

Bullet 3 – 'Mechanistic' or 'Routine' Rule for aspects of Applications being non-compensable

Again it is not clear why the Board feels the need to consider some formalizaton of the current practice. Parties do not regularly intervene in mechanistic applications like electricity IRMs. When VECC does, it is because of a specific issues that is outside of the mechanistic formula applications. We note that some other applications considered "mechanistic", such as gas supply adjustments, frequently incorporate non-mechanistic issues and in any event attract very limited interventions.

Bullet 4 – Comments on 'Current cost award fee schedule'

VECC must point out that this fee schedule has not been updated in approximately 15 years. This is an egregious oversight on the Board's part and makes our representation much more difficult, especially vis-à-vis utility regulatory counsel, whose rates are market-driven, not formally capped and have risen in this time period considerably. We request an increase to 2/3 of market rates, which would likely increase the most senior counsel's hourly fees, for example, to well over $400/hour.

Bullet 5 – Broad Policy Interest Intervenors and Costs Eligibility Tied to Relevance to Proceeding

VECC again resists categorization of intervenors with such labels as "policy intervenors". That said, we recognize the need to make submissions that are relevant to the proceeding; however, this point appears to raise the risk for these intervenors either to being scoped out at the start of a proceeding when it is difficult to know what exactly will be dealt with and on the other end, a risk of considerable time being disallowed if additional "relevance linking" must be demonstrated after the interventions are filed. We do not see this as a major problem in the vast majority of applications and believe it can be managed through more judicious granting of intervenor status and more active adjudication by the OEB.

Bullet 6 - 'For profit' intervenors' eligibility – Question 8

We support the continued eligibility for costs of 'for-profit' intervenors (usually associations of commercial ratepayers, municipal interests and other associations) which may collect dues to advocate but which continue in the main to act responsibly in hearings and to bring to proceedings a valuable scrutiny from a different ratepayer constituency than most of the ratepayer interests. Again, the value of this diversity of viewpoint, in VECC's view, provides more overall value to the system than costs.

Bullet 7 - Individual ratepayer representation – Question 9

VECC believes that for the ratepayers it represents through their client groups (FMTA – tenants) and OSSCO (seniors), it is undeniable that VECC is the most efficient and effective method to represent the interests of individuals in those client groups. We also believe that, for any similarly situated individual consumers not associated with these client groups, our representation of our clients' members has the benefit of helping in equal measures, all such similarly situated ratepayers. Finally, VECC believes that most general ratepayer interests are highly congruent with the interests of our client group members. Therefore, in the main, VECC can better represent, at a high level, in an effective manner, most residential ratepayers in most rate-setting proceedings. However, we are of course supportive of other ratepayer intervenor groups who, as we have noted above, may have a different interest or facet of the public interest to represent and possibly a different and helpful advocacy strategy different from VECC and that this diversity serves all individual ratepayers.

VECC recognizes that some individual ratepayers are dedicated consumers who wish to bring their individual experience to the Board and that in some contexts, this participation and evidence provides valuable individual, specific evidence in a proceeding. However, again given the Board's present rules on individual intervenors, and its duty to adjudicate fairly for all, we believe the present rules strike the right balance in this area.

Appendix B – Question 10 – Frequent Intervenor Filings

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

7.3 Frequent Intervenor Filings

In its questions the Board identified certain types of applications (leave-to-construct) as a source of uncertainty. It is hard for us to understand why since capital projects make up the bulk of how a utility makes its shareholder return. If VECC has a substantive interest in a general rate case it is hard to see how it would not have a similar interest in a leave-to-construct case where the capital project will impact future rates. As explained above, these questions appear to go to the issue of standing and how to considers the veracity of associations that appear in front of the Board.

VECC, we hope, is a well-known intervenor. PIAC, which works to resource VECC and other consumer interests, has a long history. We have an active website which engages a public presence and our clients like VECC are active in specific communities. VECC participates in small utility applications because unlike in urban areas, lower income families and seniors often own homes. We participate in energy issues before the Board but also make presentations to government representatives on behalf of change in the sector. Given the income inequality that exists in many places, this means our interest is substantial.

The frequent filer form requirements are, in our view, an efficient and cost effective way for intervenors like VECC to participate in Board proceedings and to document, for the record and in a transparent manner, our ratepayer support and interests. The Board, has, in our view, made appropriate use of the filings as a method (reflected in section 22.03(b) of the Rules of Practice and Procedure) of assisting VECC and other frequent filers in allowing letters of intervention not be required to repeat this information. We do however think annual filing of the form is perhaps unnecessary, as once each 2 years likely is sufficient to reflect the changes in the structure of frequent intervenors (with a further requirement to refile when a material change takes place at an organization).

We do not think the Board should use the frequent intervenor filing as a triage measure to prioritize frequent intervenors for intervenor status. Instead, it should be an intervention filing convenience and transparency measure rather than standing in for an adjudication of substantial interest and responsible participation.

Appendix B – Question 11 – Use of Expert Witnesses

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

7.4 Use of Expert Witnesses

The reasons for this question perplexes us. Intervenors seldom seek to file expert evidence. When they do the Board qualifies the expert and the applicant has an opportunity to challenge their qualifications.

Is the Board is concerned about consultants who assist intervenors also taking on the role of expert witness? When approved in a proceeding is it the cost of intervenor sponsored witness that is of concern? We simply do not understand what issue is of concern to the Board.

Our concern with respect to expert witnesses is that it is exceedingly hard to retain and have funded such persons based on the Board's established rates. This leaves most proceedings with little countervailing evidence to that provided by the Applicant and lends itself to lopsided decision making.

If the Board is uncomfortable with experts engaged by the intervenor community it should articulate those concerns in a specific proceeding so that a meaningful and helpful response can be provided.

Appendix B – Question 12 – Active Adjudication

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

8.0 ACTIVE ADJUDICATION

We do question what may have happened to section 8.1 or what it may have contained?

8.2 Oversight of Scope in Proceedings [Issues List]

The Framework notes that the Board "manages the scope of proceedings predominantly through the use of Issues Lists." With respect to issues list we are somewhat wary of ideas of making issues list the lynchpin of efficiency in proceedings. Over more than 30 years of practice before the Board, we have seen just about every iteration of their use, misuse and abuse.

If done early in the process, an issues list tends to be perfunctory. The current perfunctory version used commonly in most electricity distribution rate proceedings is not only of little value, it is widely ignored because the application is best processed by methodically addressing the evidence which shares the form of a cost of service formula. At any rate proceeding the elements of <u>the cost of service formula are the primary issues.</u>

In many proceedings, and certainly in the larger complex proceedings, specific issues often do not "pop out" of the application but are more likely to germinate and bud slowly as the process unveils itself. Our experience is that a real understanding of specific issues do not become clear until the settlement conference. It is here that the contentious issues are articulated and either resolved or documented for arbitration by the panel as an unsettled issues in the proceeding.

If any change is needed (and we are not certain there is a need) then it might be for panels of the Board to create a greater expectation that as part of settlement, or after that, that all issues be clearly identified.

Aside from the issues list, in our view the most effective change the Board could make to its adjudication process– whether in respect to the issuance of cost awards or the decision itself – is in its decision reasoning.

While the Board is generally quite good at articulating its concerns, too often its decisions rely on a recitation of arguments without critically engaging with or addressing them. Even when arguments are addressed, the reasons often rely on pre-existing policies which are not being examined in the proceeding and not subject to the evidence before the panel. This can leave both intervenors and the applicant frustrated as how to address matters moving forward and it petrifies policy in light of changing circumstances. In the face of cogent argument a panel should feel a compulsion to explain *why* a policy is still relevant, when it might be reviewed and why its impacts remain just and reasonable. Addressing arguments is not just an inherently good intellectual practice but also a well-reasoned decision allows the parties and the applicant to move forward in addressing the regulator's concern. In fact, we are somewhat surprised that the Board's Top Quartile Regulatory initiative gives so much emphasis to the timelines of proceedings and so little on the substantive quality of the actual decisions made.

The Board might consider adding to its Active Adjudication objectives giving the time, resources and assistance to commissioners to make well-reasoned decisions.

The Board and Board Commissioner panels have all of the authorities and powers necessary to manage a proceeding both its timeliness and its costliness. What sometimes is missing is the willingness or perhaps the understanding of when and how to intervene. In part this may be because Commissioners, like us all, have both strengths and weaknesses. It is not clear to us that the Board expends the resources to ensure that its members are well prepared and given adequate training on how to exercise their powers. Hearing timeliness, for example, often seems to devolve into a simple allocation of time irrespective of how that time is used. The result can be that unhelpful participation is given the same consideration as helpful time. In a hearing environment it is role of the adjudicators to guide the process if it goes astray. Certainly, this is a difficult task since it must be balanced by the requirement to let parties be heard. The Board must also remain cognizant that any "management rules" its institutes are not manipulated by the Applicant to frustrate detailed (and sometimes embarrassing) examination.

Appendix B – Questions 13, 14 – Generic Proceedings

8.3 Generic Proceedings

13. *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?*
14. *Are there other changes that the OEB could consider with respect to generic proceedings?*

VECC/PIAC has a long history before the Energy Board. Over that time, we have seen many changes and many changes back again – some better than others. One trend we have observed which has not worked well is the process by which the Board develops policy. Originally almost all policy was developed in the more formal process of generic hearings today most policies is done under the "Staff paper" framework.

There is of course nothing inherently wrong with a Board Staff paper outlining or even proposing policies. It provides an easy way to establish objectives or outline points of concern. It should not however operate as a projection of an outcome as often seems to be the case today with the Staff paper eventually morphing into the Board policy.

This is wrong and for two reasons. First it starts the entire policy discussion with an objective instead of articulating a problem and seeking views as to what might address that problem (perhaps no policy is even needed). As such it pre-determines too much and stifles the policy conversation.

The second problem the current policy process typically establishes a wall between the adjudicators who will presumably apply that policy and the interested parties who want to influence its creation. This creates a "shadow docket" policy authorship and habitually eliminates dissenting or qualifying opinions of adjudicators who will apply the policy. In eliminating any of this (perhaps discomforting to the idea of uniformity) discussion the policy also provides no insight or nuance for adjudicators who arrive after the policies creation but who are required (in the case of Codes/Rules rules) or to be persuaded (in the case non Code/Rule made policies) to apply those policies.

Formal generic proceedings address these issues and were at one time the more common way to formulate and articulate Board policy. The main characteristics of this type of proceeding are:

- **Panels of adjudicators (sometime large panels) are engaged a number of times in the process to hear from parties and to best defined and understand the problem to be solved and the ways it might be addressed.**
- **The articulation of the policy objectives and the way to move forward are articulated in a decision which outline next steps including making allowances for parties (utilities and interested parties) to bring forward evidence which can be tested and heard by the panel.**
- **Staff led papers can be utilized in this process to help guide the conversation to create a more efficient process but are not themselves generally the framework of the final policy – to the contrary staff should be encouraged to explore positions it might not ultimately support.**
- **The policy is at least initially articulated in the form of a decision which allows for dissent or qualification and provides direction for the staff if the ultimate policy vehicle is a more formal set of rules or directions**.

While we think this process leads to better and more robust outcomes. Its downside is that it can be slow and cumbersome and often more costly. Our suggestion is that the Board use a mix of its current "staff paper" process and generic hearings where the matter will have "substantial" and far reaching implications.

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