



Submissions of Consumers Council of Canada

Re: Framework for Review of Intervenor Processes and Cost Awards

EB-2022-0011

INTRODUCTION:

The Ontario Energy Board (OEB) released its Report – Framework for Review of Intervenor Processes and Cost Awards (the Report) on March 31, 2022. The intent of the Report is to provide background on the OEB’s present intervenor processes, including cost awards and look at areas for improvement. The OEB is seeking input from all stakeholders on potential changes to improve both the efficiency and effectiveness of external participation in the adjudicative process.¹ These are the Submissions of the Consumers Council of Canada (Council) regarding the OEB’s Report. The Council has been a regular intervenor, participating in natural gas and electricity proceedings and consultations since 2003 representing the interests of residential consumers.

BACKGROUND:

In March 2021 the OEB issued a report on the results of its Top Quartile Regulator project (TQR Report), an initiative designed to move the OEB to regulatory excellence and acting on the recommendations of the OEB Modernization Review Panel. The TQR Report identified the need for strategies for reducing overlap and duplication in regulatory proceedings and encouraged the need for a jurisdictional review of intervenor processes to look for areas of improvement. It also identified a need for greater predictability around steps in an adjudicative proceeding. Specifically, it noted the need

¹ EB-2022-0011 OEB Framework for Review of Intervenor Processes and Cost Awards, p. 3

to better define what constitutes a “substantial interest” for interventions in OEB proceedings.²

On November 15, 2021, the Minister of Energy issued a Mandate letter to the Chair of the OEB. In that letter the Minister highlighted the governments priorities for the energy sector – promoting reliability, affordability, sustainability and consumer choice. The Minister highlighted some initiatives where the role in delivering these priorities will be critical over the next three years. One of those items highlighted was that, “The OEB should also outline its work reviewing intervenor processes to identify opportunities to improve efficiency and effectiveness.”

In December 2021, the OEB completed its jurisdictional review. In the Report the OEB concluded that there is no one model that could be adopted as the best practice but has found the approaches of other regulators informative in developing ideas for improving the efficiency and effectiveness of its intervenor processes. The OEB identified some examples of best practices:

- Assertive case management by panels
- Control of the scope of the proceeding
- Ensuring that the rules concerning participation are clear
- Striking a balance between ensuring that the discovery process provides the information necessary to properly consider the issues in an application, while at the same time ensuring that the proceedings are conducted in an efficient manner.³

As will be discussed below the Council is of the view that the OEB currently has the tools to achieve these best practices and has, in many cases, been using those tools to effectively manage regulatory proceedings.

The Report identifies a list of concerns with the current framework. These include:

- How to define “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 that the OEB can take to ensure that limited issue or specific policy driven intervenors participate in proceedings only with respect to those

² Report, p. 5

³ The Report, p. 11

issues, other than reducing cost awards for an activity at the end of a proceeding?

- How can the OEB ensure that the total cost awards 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 proceedings?

In answering many of the questions found in Appendix A the Council will address many of these concerns. Again, the Council is of the view that the OEB currently has the tools to address these concerns. We do not believe a need exists to make wholesale changes to intervenors participation in OEB proceedings and consultations and the way cost awards are granted. The stated goals of efficiency and effectiveness can be achieved within the OEB's current intervenor and cost award processes.

The Council notes that in 2013 the OEB undertook a review of the Framework Governing the Participation of Intervenors in Board Proceedings. Upon completion of that review the OEB did not make wholesale changes to the way intervenors participate in OEB proceedings and consultation processes or the way costs are awarded to those intervenors. In fact, that review concluded:

The review noted that the OEB has had a well-funded intervenor model for decades. With this model, associations and other organizations participate in OEB proceedings on behalf of customer groups/classes and provide broad perspectives, expertise and challenges on applications before the OEB. The OEB concluded that directly impacted parties, or the associations and organizations that represent them, would continue to be able to intervene in the OEB's processes in accordance with the current Rules.⁴

⁴ EB-2015-0159 Giving Consumers a Stronger Voice in OEB Adjudicative Processes – presentation April 13, 2016

GENERAL COMMENTS:

As set out below the Council is supportive of certain changes that may bring greater effectiveness and efficiency to the way intervenors participate in OEB processes and how they are awarded costs. It is important to not compromise or hinder effectiveness in the name of efficiency. It is also important to recognize that there are significant benefits to the current system, some of which the OEB has specifically acknowledged in the Report. These include:

- Intervenors assist the OEB in reviewing a utility's plans from the perspective of the stakeholders they represent, who have a substantial outcome in the proceeding. The OEB benefits by understanding the views of those impacted by a decision, and the cost award process is designed to encourage participation by those who might not otherwise be able to participate in proceedings;
- Providing a diversity of views that would be costly and challenging for the OEB to provide on its own;
- Permitting the OEB's extensive use of settlement conferences that allow those with a substantial interest in a proceeding to reach a settlement with applicants. If the agreement is accepted by the OEB, there may be no requirement for further process.

In addition, the Council submits the following benefits are clear:

- The overall cost of interventions (which have averaged \$4.4 million over the last five years)⁵ is *de minimis* as compared to total energy revenue for natural gas and electricity distributors (\$24.6 billion in 2020)⁶;
- The overall cost of interventions is *de minimis* when compared to the reductions made to the applied-for revenue requirements of the utilities on proceedings with intervenor participation. This return on investment is important. It clearly demonstrates value for money which is critical from the consumer perspective;
- Proceedings provide intervenors with an opportunity to assess, test and challenge the evidence provided in support of applications. This is done through pre-hearing discovery and cross-examination all of which is on the public record;
- Participation by a diverse set of intervenors, representing a broad group of interests provides public accountability for the OEB and the regulated utilities. Knowing that a utility application has been the subject of detailed scrutiny by

⁵ The Report, p. 18

⁶ The Report, p. 18

intervenors and the OEB in a public process enhances the accountability of the regulatory process. Customers can be assured that their interests are thoroughly considered and the public interest is sufficiently protected.

The OEB processes are important for ratepayers. Ratepayers rely on these processes not only to advocate for rates that are just and reasonable, but to advocate for security of supply, safety, reliability, and robust customer service policies. In addition, the OEB needs to recognize that the energy landscape is changing. Policies towards increased de-carbonization, electrification, and technological innovation will impact energy consumers significantly and the OEB needs to ensure ratepayers have access to its processes to advocate for their interests regarding these important issues.

The OEB and others have acknowledged that the current system allows for a wide and diverse group of stakeholders to participate in OEB proceedings and consultation processes. The OEB has explicitly stated that it benefits from an understanding of the views of those impacted by its decisions. The objectives of wholesale review of intervenor participation and cost awards on this occasion are unclear to the Council.

That having been said the Council believes the OEB, in reviewing the intervenor processes and cost awards, should not take a narrow view of the overall costs of regulation. What has not been mentioned in the Report are the costs incurred by the utilities to support their applications. There is clearly an imbalance here that needs to be addressed. The legal and consulting costs incurred by applicants can be significant and are rarely disallowed. Unlike intervenors, the consulting reports that applicants submit as part of their applications are not subject to any pre-approval process by the OEB. There are no limits on the number of studies undertaken. In addition, they are not subject to the below-market tariff structure that is in place for intervenors (that has not been revisited since 2007). Ratepayers pay the full costs of the regulatory processes, including applicant costs. From the Council's perspective a review of the cost award process should also include a review of the costs incurred by utilities to support their applications.

Much of the discussion in the Report looks at ways to create a more efficient regulatory process, but the Council does not see value in striving for minor efficiencies at the expense of *effectiveness*. The OEB should be looking at ways to facilitate better and fairer funding of intervenors. The overall goal should be to enable improvements and innovation in independent third-party representation of ratepayers.

One of the ways in which the role of intervenors could be enhanced is to make funding available for research and surveys to support an intervention. Customer engagement is undertaken by the utilities as the OEB has essentially made it a requirement under the

Renewed Regulatory Framework. Intervenors often challenge the extent to which utility commissioned customer engagement is truly independent and provides a meaningful customer assessment of a utility application to the OEB. The Council believes its role could be enhanced if it had the resources available to engage customers with respect to specific applications. This would ensure independence from the utility. The OEB could also make funding available more generally. For example, the OEB could provide costs to intervenors to undertake research and/or surveys to support policy consultations and to administer that work.

CONSULTATION QUESTIONS:

The Council does not intend to answer all of the questions set out in Appendix A. Instead, we will focus on the issues related to the participation of intervenors in OEB processes and the cost award system.

Clarifying Application Expectations:

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

The Council supports the initiatives set out in the Report. This includes revising the filing requirements for both small and larger utilities, Activity and Program Based Benchmarking and pre-application meetings. All of these should provide better clarification for utilities as to what the OEB expects with respect to an application. At this time the Council is not proposing any further steps to better clarify application expectations.

Intervenor Status: Substantial Interest

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

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

Are there any other types of applications for which substantial interest needs to be define? (5)

Are there any other changes the OEB should consider with respect to accepting intervenors into proceedings? (6)

With respect to utility rate applications, it should be clear that ratepayer groups have a substantial interest in the proceeding and accordingly should be accepted as intervenors and awarded costs. The outcome of those proceedings are rates – which are paid by utility customers. The primary reason for ratepayer groups for intervening in these proceedings is to ensure that the outcome is just and reasonable rates. In addition, there is a need to advocate for security of supply, safety, reliability, and robust

customer service policies. With respect to other parties, there should be a requirement that they demonstrate in each case their specific interest in a proceeding. In those cases, the OEB can decide whether that specific interest justifies an acceptance of the intervention and the provision of costs.

Ratepayers should also be deemed to have a substantial interest in leave to construct proceedings. Although the costs of facilities are not included in rates as a result of these proceedings, it is where need and prudence are determined. Once need and prudence are established the costs of those projects are ultimately recovered through rates. Landowners and Indigenous groups should also be deemed to have a substantial interest in leave to construct proceedings.

The Council does not believe that the OEB needs to establish what constitutes substantial interest for other proceedings. It should be up to individual intervenors to make a case to the OEB to justify their intervention and an award of costs. It will depend upon the nature of the application, the evidence and how the outcome of the proceeding may impact each intervenor. The OEB's purpose should be to filter out potential intervenors that are vexatious or unfocused regarding the objective of a proceeding. The OEB can do this and issue public decisions telling why parties are or will be denied standing or cost eligibility.

Cost Awards

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

Should parties representing for-profit interests be eligible for cost awards? (8)

Is there a better way to represent the interests identified by individual ratepayers? (9)

To be clear intervenors that participate regularly in OEB proceedings *do collaborate*. This is not necessarily obvious to the OEB as it would not be aware of pre-settlement and pre-hearing meetings, emails etc. These parties will continue to collaborate. The Council's concern is that intervenors will be *forced to cooperate* by the OEB. The Council believes it should be up to parties to decide how and when to collaborate. If at the end of the day the OEB considers that there is overlap and duplication it can deal with that through sound organization of hearings and the cost award process. Forcing collaboration may compromise the ability of intervenors to adequately represent their interests, which would be unfair.

The Council continues to support the availability of cost awards for for-profit interests. Organizations like the Association of Major Power Consumers in Ontario (AMPCO) and the Industrial Gas Users Association (IGUA) bring an important perspective to OEB

proceedings. They solicit their members and bring a consensus position to the OEB. In the absence of cost award these organisations may chose not to participate in OEB proceedings and important perspectives would be lost. This may cause for-profit organizations to pursue far less cost-effective and more politically intrusive conduct, which could result in costs to ratepayers and a deterioration of public trust in the fairness of the system.

Ultimately, intervenor costs are paid for by ratepayers, as are utility costs related to regulated proceedings, OEB costs and the cost utilities pay for industry organizations that lobby on behalf of their shareholders. All ratepayers and ratepayer groups should have fair access to the process.

Frequent Intervenor Filings

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

The Council is of the view that the OEB needs to provide clarity as to why annual filings are required and the value of these filings for the OEB. The Council supports annual filings to the extent they allow the OEB to assess the legitimacy of interventions and identify the individuals responsible for those interventions. The Council suggests that after an initial filing, parties only be required to file an update if circumstances within an organization change.

Active Adjudication

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

The Council is of the view that active adjudication is the most appropriate tool the OEB has to bring greater efficiency and effectiveness to OEB proceedings. The OEB has defined active adjudication to explain the enhanced approach used by the OEB to proactively establish and control adjudicative processes that are efficient, effective and procedurally fair⁷.

The Council sees active adjudication as essentially managing the process. There have been concerns expressed by the OEB and the utilities that intervenors pursue issues beyond the scope of a proceeding and matters that are not material. This is not helpful to the OEB, delays the process and adds to costs.

⁷ The Report, p. 24

The OEB has the tools to be more proactive in proceedings. The OEB panels should clearly define the scope of proceeding and ensure that all parties stay within the established scope. The Panel should not hesitate to intervene in a hearing when parties are out of scope and unhelpful to the OEB. Actively managing proceedings will result in greater efficiency. The decision makers need to be clear about what evidence will be relevant to their decision making, though they must also be juridically prudent in accepting useful but unanticipated evidence. They could create procedural opportunities to weigh and approve such initiatives by taking an anticipatory rather than a reactionary approach in order to avoid confusion about the award of costs.

Assessing conduct in a hearing should not be limited to intervenors. To the extent utility witnesses are unhelpful, they, too, need to be told to move on. All parties should expect that proceedings need to be focussed and not a forum for speeches or repetitive advocacy of positions. Hearings are for cross-examination and the testing of evidence. The Council is of the view that the effective “management of the process” will ensure that hearings are of value to the OEB and its panel members.

The Council is also of the view that it is important throughout a proceeding to provide guidance to parties. For example, Commissioners may choose to provide guidance regarding issues and structure for final argument. This allows parties to focus their submissions in ways that are helpful to the OEB and its decision making.

Generic Proceedings

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 consider with respect to generic proceedings? (15)

The Council has long supported the use of generic proceedings. Generic proceedings allow parties to bring forward evidence in support of their positions and have that evidence tested through a formal hearing process. With respect to policy issues it puts all parties, including intervenors and utilities, on a level playing field. It is unclear why these questions have been posed in the context of a review of intervenor processes and cost awards. From the Council’s perspective, when the OEB is considering major policy changes, with significant impact on ratepayers, a generic proceeding is far preferable to policy consultations. The effectiveness of intervenor participation is enhanced when intervenors can participate on an equal footing with the utilities. Rather than simply making submissions that are unchallenged, all parties have a right to bring evidence and have that evidence adequately tested before the OEB.

In preparing for a generic proceeding, the OEB should first develop a protocol for the proceeding, to ensure the proceeding will be a meaningful one.

Benefits to the public would include:

- Assisting ratepayers to address their capacity-to-participate challenges
- Establishing common expectations among parties
- Reduce "fatigue" among members of the public seeking access to a thorough and exacting process
- Permitting of building relationships necessary engage the proceeding

Such protocols can:

- build ratepayers' and the general public's knowledge and capacity by contributing towards the development of relevant expertise. Ratepayers will be able to rely on experienced advocates to coordinate and respond to the contents of the file;
- provide support to ratepayers and their communities to bring forward both common and community-specific perspectives;
- permit the clarification of whose evidence most needs to be heard, the procedures, roles and responsibilities, the stages of the hearing, and timelines;
- strengthen relationships between ratepayers, their communities, the OEB and government, independent of the content of a specific hearing. Protocols provide opportunities to work together on process improvements, information sharing, and common understanding of issues;
- enhance the predictability of the regulatory process;
- develop ongoing information exchange among all parties;
- create efficiencies by establishing a way to engage issues impacting ratepayers ; and,
- facilitate dialogue among intervenors, the industry and government representatives acting before the board, leading to improved relationships and greater faith in the economic system.

Protocols should respect all participants' individual rights