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22 September 2013

Ontario Energy Board
2300 Yonge St., 27th Floor
Toronto, ON
M4P 1E4

Attn: Ms Kirsten Walli
Board Secretary

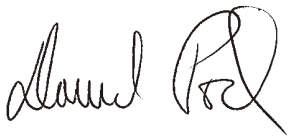
By electronic filing and e-mail

Dear Ms Walli:

**Re: EB-2013-0301**

Attached please find GEC's initial written submissions on the questions posed in the Board's notice of August 22nd.

Sincerely,



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**Ontario Energy Board**

**Review of Framework Governing the Participation of Intervenors**

**GEC Initial Comments**

The Green Energy Coalition (GEC) represents over 125,000 Ontario residents who are members or supporters of its member organizations: the David Suzuki Foundation, Greenpeace Canada, Sierra Club of Canada and WWF-Canada. All of the GEC's member groups are charitable or non-profit organizations active on environmental and energy policy matters.

GEC offers the following comments in response to the questions posed in the Board's August 22nd notice:

**Intervenor Status**

1. *What factors should the Board consider in determining whether a person seeking intervenor status has a "substantial interest" in a particular proceeding before the Board? For instance, should the Board require a person seeking intervenor status to demonstrate consultation or engagement with a constituency directly affected by the application?*

GEC submits that a *public* process must allow participation as an intervenor to any individual or group that has a substantial interest. 'Substantial interest' must not be confined to pecuniary interest. An individual, organization or a corporation can have a substantial interest.

For a representative organization (i.e. a group said to represent an interest held by its members or sector) to have intervenor status, it should, if called upon, be able to demonstrate that it in fact has the support of such a constituency by way, for example, of membership or donor base and that its general position in regard to the matters at hand be apparent to that membership. That said, a representative organization should not be required to demonstrate specific consultation on the particulars of each matter that it engages in. To require such specific consultation would be unduly onerous and would not be practical given the timelines that the Board's processes typically entail.

2. *What conditions might the Board appropriately impose when granting intervenor status to a party? For instance, should the Board also require an intervenor to demonstrate how the intervening group or association governs the participation by its legal counsel and other representatives in the application?*

Legal counsel are required by the rules of the Law Society of Upper Canada to act within the instructions of their client. The Board can rely on that obligation. Where a party is not represented by counsel, the Board may wish to require such a demonstration where the intervenor has not so demonstrated in a prior Board proceeding.

**Cost Eligibility**

1. *What factors should the Board consider in determining whether a party primarily represents the direct interests of consumers (e.g. ratepayers) in relation to services that are regulated by the Board? For instance, should the Board require the party to demonstrate consultation or engagement with a class of consumers directly affected by the application?*

For the Board's process to remain efficient it cannot grant costs to every affected individual or corporation. The Board should limit costs for individual intervenors to those facing unique and significant impact. Costs should generally be reserved for organizations that represent a sector. In regard to demonstrating consultation or engagement, see our comments about membership or donor base and about the extent of required consultation, provided above under Intervenor Status Question 1 .

2. *What factors should the Board consider in determining whether a party primarily represents a public interest relevant to the Board's mandate?*

As in the case of a determining intervenor status, 'public interest' may not necessarily include a pecuniary interest, indeed it is unlikely to be the case. As noted by the courts, the Board has a broad public interest mandate but the interpretation of that phrase must have reference to the Board's statute. While the specific objectives in the Act offer some guidance as to the Board's mandate and thus the public interests at stake, the listed objectives are not an exhaustive delineation.

The statute makes clear that energy efficiency is within the Board's objectives, but there has on occasion been a suggestion that the Board is an 'economic regulator' and as such concerns such as environmental impact or public health impact are not relevant to the Board's jurisdiction. However, the only rationale for 'energy efficiency' being an objective distinct from economic efficiency is the non-economic benefits of energy efficiency which are primarily environmental and public health benefits. Accordingly, these concerns must be viewed as relevant to the Board's mandate. Further, in an era where monetization of externalities by way of a carbon tax or trading regime appears inevitable, and there is a predictable pattern of the tightening of safety requirements for inherently dangerous activities such as nuclear power and hazardous goods pipeline transport, the consideration of such impacts is appropriate even within the confines of economic regulation as these environmental and public health concerns can be expected to significantly affect costs going forward.

Similarly, the statute must be interpreted as giving the Board jurisdiction to consider the social impacts of its economic determinations. The legislature cannot have intended the Board to be blind to social hardships that the regulation of the sector can impose or help alleviate. Accordingly, 'public interest' must be given a broad interpretation and it is appropriate to consider intervenor stats and cost eligibility determinations in that context.

For a party to be found to represent such a public interest it should be able to demonstrate a record of concern and activity in regard to the matter.

3. *What conditions might the Board appropriately impose when determining the eligibility of a party for costs? For instance, what efforts should the Board reasonably expect a party to take to combine its intervention with that of one or more similarly situated parties? Should the Board reasonably expect parties representing different consumer interests to combine their interventions on issues relating to revenue requirement (as opposed to cost allocation)?*

There is an understandable temptation to require combined interventions in the interest of regulatory efficiency. However, the dangers may outweigh the benefits:

First, in most cases the proceedings before the Board are not 'one off' matters. Each hearing is informed by a string of prior proceedings. Regular participation before the Board by counsel and/or a consultant allows a party and its representatives to stay informed about the complex facts and regulatory mechanisms at play. Such knowledge is needed to facilitate informed decisions about whether to intervene, and to make informed decisions about what position to advocate in subsequent cases. If a regular intervenor does not have a consistent presence by way of counsel or consultant it will lose effectiveness and be less helpful to the Board. Parties must rely upon their consultants and counsel to identify emerging issues. Thus combined representation may effectively preclude effective individual representation in subsequent processes. Further, to the extent that the parties do not have identical interests the effective representation of one or more of the combined parties may be compromised which risks both unfairness and a loss of information for the Board.

Second, what may appear to the Board to be a subtle difference in approach or focus may have great significance to the intervenors. For example, GEC has been very successful at combining the interventions of several environmental groups but has not been able to include all intervenors with an environmental or public health protection mandate because of differences in policy or approach. A group that has a more conservative constituency should not be forced into a choice between joining a coalition with a more 'activist' group or being precluded from participation. Similarly, a broad activist environmental coalition like GEC could be hampered if it was forced to include a group with an allegiance to a particular political party or political viewpoint as is the case with some public interest groups that have appeared before the Board.

That said, the Board should usually be able to expect cooperation in the presentation of expert evidence and the coordination of cross-examinations as coordinating these activities does not typically require that identical positions be advocated. This coordination may take the form of co-sponsorship, or of one party relying upon the evidence of the other or of the division of responsibility for cross-examination on the various issues in a given case. This type of cooperation has often occurred for GEC and other public interest intervenors and among the consumer groups.

4. *Should the Board consider different approaches to administering cost awards in adjudicative proceedings? For instance, should the Board consider adopting an approach that*

*provides for pre-approved budgets, pre-established amounts for each hearing activity (similar to the approach for policy consultations), and pre-established amounts for disbursements?*

In contrast to defined consultations with known scope, the resources required for adjudicative processes are often difficult to forecast. The expected number of hearing days, the complexity of issues, the number and complexity of legal or procedural issues, the likelihood of settlement, the extent of settlement discussions, the need for motions, and the factual context can and often do shift.

For pre-approval of budgets to allow for effective intervention amidst such uncertainty there would appear to be two options: either a very generous budget must be available so that the budget does not compromise the intervention, or a process must be put in place that allows intervenors to seek approval for specific expected spending and to revise that request.

If the first option, where a one-size-fits-all approach to budgeting is used, if it is at a level which does not allow for more intensive intervention where required, it effectively negates the purposes of intervenor funding – to allow proper representation and to assist the Board and thereby enhance the quality of the process. If such a process errs on the generous side to avoid that concern, pre-approval may be counter-productive as it could encourage more spending rather than constraint.

If the second approach is used, specific budget (i.e. intervenor-specific) pre-approval, it is apparent from the experience with the Intervenor Funding Project Act that the time and costs of that budget pre-approval process can be significant and may offset any economic and regulatory efficiency gained. Further, as foresight is necessarily imperfect, the pre-approved budget may ultimately be inappropriate and either compromise the intervention or require subsequent applications for additional costs eligibility.

It is important to note that the enabling of proper representation has value in a democratic process even where it has not assisted the Board in the particular case. Where a public hearing process is mandated by the Act it must be assumed that the legislature placed value in the opportunity for the public to be heard, to feel it has been heard, and to be seen to be heard. While proper funding can often further that goal while enhancing the quality of the hearing and thereby assisting the panel, it can sometimes lengthen the process without enhancing the testing of an application. Nevertheless, in a democracy, enabling *effective* broad public participation has value, in and of itself.

In our experience, pre-approved budgeting is not required to control costs. The risk of costs disallowance is a very real concern for less well healed intervenor groups. For public interest intervenor groups such as those in the GEC, counsel and experts are retained on a 'spec' basis, bearing the full risk of a cost award denial or reduction. We would expect, even in the case of better resourced intervenors, such as industry groups, that a cost claim reduction would likely lead to some of the pain being imposed on counsel. Accordingly, GEC believes that most parties have an incentive to control costs. That said, some law firms and consultancies are notorious for their excess, and the Board can and should challenge extreme cost excursions as required, as it has to date.

It is unclear what disbursements the question refers to. If it refers to expert fees, the above comments apply. If to travel expenses, there would seem to be little reason to discriminate in favour of Toronto-based groups or experts. Given the high public and consumer cost impacts of the matters before the Board, it would be penny-wise and pound-foolish to encourage intervenors to use less than optimal experts in an effort to modestly trim intervention costs. Further, the Board should benefit from the diversity of experience that comes with an expanded population of experts appearing before it.

**Recommended Modifications**

1. *Are there modifications that the Board should consider making to the Rules and the Practice Direction?*

GEC will address this question after considering the suggestions of other parties.

**All of which is respectfully submitted,**

**David Poch**
**Counsel to GEC**