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REVIEW OF FRAMEWORK GOVERNING THE PARTICIPATION OF INTERVENORS IN BOARD PROCEEDINGS: PHASE I

SUBMISSIONS OF NISHNAWBE ASKI NATION

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(Corrected Version)

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NISHNAWBE ASKI NATION'S SUBMISSIONS IN RESPONSE TO PHASE I OF THE BOARD'S REVIEW OF INTERVENOR PARICIPATION FRAMEWORK

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?

The Board has not indicated why it has decided a review of its "framework governing the participation of intervenors, policy consultations and other proceedings" is necessary at this time. Further, the Board has not explained why it believes that its approach to intervenors "might be modified...to better achieve the Board's statutory objectives".

NAN is hopeful that the Board will outline in a written statement (a) why the Board believes that any such review is currently warranted and (b) the identity of any applicants, proponents, or other parties in OEB proceedings who have requested this policy review.

To properly answer all of the Board's questions, it makes sense to recall the Board's objectives. The objectives of the Board include those identified in statutes as well as the mandate and mission, vision, strategic goals, and key initiatives identified by the Board in its business plans.

In the broadest sense, the Board's objectives are outlined in s. 1(1) of the *Ontario Energy Board Act, 1998*, as follows:

> 1. (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:
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> 1. *To protect the interests of consumers* with respect to prices and the adequacy, reliability and quality of electricity service.

2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.
3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, *including having regard to the consumer's economic circumstances*.
4. To facilitate the implementation of a smart grid in Ontario.
5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities [emphasis added].

Other statutes relevant to the Board's authority and activities are the *Electricity Act, 1998*, the *Municipal Franchises Act*, the *Oil, Gas and Salt Resources Act*, the *Assessment Act*, and the *Toronto District Heating Corporation Act*.

The stated mandate and mission of the Board is to "promote a viable, sustainable and efficient energy sector that serves the public interest and assists consumers to obtain reliable energy services that are cost effective." [1]

The vision of the Board includes achieving regulatory outcomes "that are valued by consumers", to ensure that distributors, transmitters, etc. operate in a way that "provides consumers with a reliable energy supply at reasonable cost", that the Board's own processes are "efficient and effective" and understood and accessible to "industry *and* consumers", and that "energy consumers have the necessary information to make choices regarding their own use of energy.[2]

The strategic goals of the Board as they relate to consumers include ensuring that "consumers receive a reliable supply of energy that is cost effective", that they understand energy rates and prices and they can make informed choices about energy

[1] Ontario Energy Board 2013-2016 Business Plan Package ("OEB Business Plan"), p. 3
[2] *Ibid.*

products, that the Board's regulatory processes are understood by and accessible to consumers, and that consumers have confidence that energy providers are adhering to customer service and protection rules. [3]

The key initiatives of the Board for consumers are several and they include "continuing to address the needs of low-income energy consumers".

Thus, the thrust of the Board's objectives, authority, and activities has been and remains the protection of "public" and "consumer" interests within a regulatory framework promoting efficiency and cost effectiveness in the generation, transmission, and distribution of various forms of energy.

NAN therefore submits that the answer to all of the Board's questions must be placed in a "consumer protection" context.

NAN believes that the Board's current approach to intervenors has worked quite well and that if any changes are to be made to the factors which should be considered by the Board in granting intervenor status, the changes should broaden access, participation, and involvement in proceedings before the Board.

In short, there should be no attempt during this policy review to restrict access to the Board's processes.

The Board's first question rests on the stated requirement that any person requesting intervenor status should have a "substantial interest" in a particular proceeding before the person will be eligible to receive intervenor party status in the proceeding.[4] One might very well question whether having a "substantial interest" should be a *prima facie*

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[3] OEB Business Plan, *supra* note 1, p. 4
[4] *Rule 23.02* of the Board's *Rules of Practice and Procedure*

requirement or, alternatively, whether that concept should be defined in the *Rules* with greater particularity.

Indeed, what is a "substantial interest"? This term has many different meanings depending on the context in which it is used and therefore is not susceptible to precise or universal definition. In commercial law, "substantial interest" is often defined in terms of a percentage of ownership in a partnership, corporation, etc. In other contexts it has been used to evaluate whether a conflict of interest exists or may arise.

Understanding and possibly outlining in the *Rules* what is meant by a "substantial interest" in a proceeding

In terms of participation in proceedings before the courts, boards, and tribunals, it is arguable that "substantial interest" simply means any interest that is *not* a *remote or nominal* interest. The threshold for a "substantial interest" should not be unduly high. If a person/representative can show that its constituents have a pecuniary or proprietary interest in the issues and/or outcome of a proceeding before the Board, the definition should be easily satisfied.

However, in keeping with the idea that a substantial interest is simply more than a remote or nominal interest, NAN submits that it should be *presumed* that a person applying for intervenor party status has a substantial interest in a particular proceeding if their written request to the Board indicates that:

a) the person has an interest in issues or the outcome of the proceeding (i.e. the relief sought by the applicant, and in the Board's determination of the issues in the proceeding), with the concept of "interest" being understood broadly to include economic, social, environmental, and even cultural concerns;

b) the representation of the person's interest or the proposed participation in the proceeding will contribute to the Board's investigation, consideration, and/or determination of the issues in the proceeding; or

c) whether the interests of justice would be served by permitting the person to intervene in the proceeding.

Different levels of participation in Board proceedings

The Board already enjoys the option of having persons other the applicant in a proceeding participate in different ways.

The *Rules* provide for intervenor party status and other forms of participation in a proceeding, including as a commenter or, alternatively, as an observer. This "continuum of participation" currently gives the Board and stakeholders flexibility in determining how they may wish to participate in an OEB proceeding in which they have an interest.

It is submitted that the different forms of participation and involvement in OEB proceedings currently provided in the *Rules* reduces the need for the Board to review its approach to intervenors, including the need to change the Board's *Rules*.

Rationale for permitting broad public participation in OEB hearings

It is submitted that the Board should maintain and possibly articulate in its *Rules* and Policies that a *broad* approach to intervenor party status in applications will be taken where such status is requested. Providing an indication in the *Rules* of what "substantial interest" means (along the lines suggested by NAN above) would be one way in which a broad approach could be confirmed.

The reasons for confirming a broad approach to granting intervenor status in its various forms -- as a party, as a commenter, or simply as an observer -- are several. However, the literature, the statutory history in Ontario, and the case law provides some insight into this issue. A broad approach to granting intervenor status in one form or another is warranted on a number of grounds:

a) To avoid "regulatory capture". Public law theorists have observed that applicants who initiate proceedings to seek relief from boards and tribunals can be expected to focus their interest, resources, and energies to obtain regulatory outcomes that serve their own narrow-- and in most cases, economic or financial -- interests.[5] By contrast, the interests of consumers of goods and services of applicants are less well-organized, their resources are limited, and they do not have the focus or coherent voice that applicants seeking relief from the OEB will ordinarily have.

In such circumstances, the risk always exists that over time the imbalance of resources exerted by the "regulated" applicants before statutory boards and tribunals, will "capture" influence over the regulators and obtain favourable outcomes which simply serve their narrow interests.

Granting intervenor status to representatives of broader constituencies, such as residential consumer groups, First Nation organizations, and commercial and industrial consumers, etc. provides a voice for the various "public interests" which are inevitably affected by the Board's decisions. A healthy degree of intervenor contribution to OEB proceedings also avoids the risk of the applicant's interests being viewed as representative of a monolithic "public interest";

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[5] Regulatory Capture, *Wikipedia.* See also Raj Anand and Ian G. Scott, "Financing Public Participation in Environmental Decision Making" in 60 *Canadian Bar Review* 81 For an informative summary of the American literature on regulatory capture, see William Novak, "A Revisionist History of Regulatory Capture", which article will appear in Daniel Carpenter and David Moss (eds.), *Preventing Regulatory Capture: Special Interest Influence and How to Limit it.*

b) Intervenors almost invariably provide a *different* perspective on the issues before the OEB with little risk of expanding the issues given the significant powers of the Board to control its own processes. Indeed, broader participation in OEB proceedings by persons other than the regulated applicant seeking relief from the Board usually results in higher *quality* decisions. It provides the Board with sources of information that do not reflect the narrow interests of the applicant in the proceeding, and it places the operation of the regulated entity in a broader social, economic, and cultural context. It has also been noted that, in the energy context, intervention in the early 1970s by citizen groups such as Pollution Probe and the Consumers' Association of Canada has resulted in social cost analysis and environmental impact issues being considered and reviewed in a much more rigorous way by the National Energy Board[6];

c) Public participation in OEB hearings fosters an open and balanced regulatory process. In this sense, intervention in OEB proceedings is an essential part of participation in a democratic society.

Inasmuch as broad public participation in *rule making* is important, it is equally important-- especially in the regulatory arena --to ensure public access to the application of rules to specific factual situations, that is, *adjudication*[7].

It is only through a broad approach to the granting of intervenor status that the ideal of equal justice for the greatest number can be achieved. It is only by overcoming "barriers to litigation" that the encouragement of public participation achieves the significant benefit of generating confidence in the

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[6] Anand and Scott. *supra,* note 5 at 95

[7] Michael I. Jeffery, Q.C., "Intervenor Funding as the Key to Effective Citizen Participation in Environmental Decision-Making: Putting the People Back into the Future", *Arizona Journal of International and Comparative Law,* Vol. 19, No. 2 (2002), 643 at 649-651

justice system[8]. As for the need for intervenor funding in respect of these democratic participation objectives, one commentator has observed:

> The clear imbalance of resources and finances between proponents and concerned individuals or community groups...is a major constraint on good governance, as it limits the potential for effective citizen participation, deliberation and balanced...decision-making. Sufficient resources are needed for effective participation in order to encourage concerned citizens taking advantage of the opportunities provided to challenge decisions and/or seek other avenues of redress. In some instances, it is left up to public groups to highlight inadequacies in decision-making and to see that the relevant laws are actually enforced. These groups will be unable to perform this function effectively if they have little or no funds to hire legal counsel, retain expert witnesses, produce documents and conduct research. Because members of the public have such an important role to play, they should not be left to rely on the ability to raise their own funds, or on funds from benevolent donors. Participation is one thing, but funds and resources are needed in order for there to be effective, meaningful participation. *Participatory tokenism* must be avoided. This is why the issue of intervenor funding is very relevant.[9]

d) Broad public participation in OEB proceedings can enhance the legitimacy of the outcomes and strengthen public confidence in the regulatory process. Increased public acceptability can also facilitate the implementation of administrative decisions which require public participation to be implemented.[10] Conversely, a narrower, more restrictive approach to the granting to intervenor status and access to intervenor funding would only serve to increase public cynicism about the regulatory arena and raise questions about whether the interests of all affected persons are being considered and taken into account in administrative decisions;

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[8] Anand and Scott, *supra,* note 5 at 90
[9] Michael I. Jeffery, "Environmental Governance: A Comparative Analysis of Public Participation and Access to Justice", (2005) 9 Journal of South Pacific Law 2 at 3
[10] Anand and Scott, *supra*, note 5 at 94

e) The role played by the OEB is not strictly *adjudicative*. The Board often has to review a range of technical and economic information and consider volumes of evidence. This *investigative* process is facilitated by written interrogatories-- in which all parties ordinarily participate --and that helps Board members focus attention on salient issues and obtain answers to pointed questions. Although Board Staff make a considerable contribution to the interrogatory process, the demands on their time in each proceeding are eased by the active involvement of intervenors in the investigative process. In this respect, intervenors promote rather than detract from the efficiency and effectiveness of the evidentiary and adjudicative aspects of OEB proceedings;

f) It has been noted that the expiration of the *Intervenor Funding Project Act* in 1996 has increased the burdens facing public interest groups and reduced participation in regulatory approval processes.[11] The intervenor funding provided under that *Act* was instrumental in broadening public access and involvement in OEB proceedings. In fact, a 1995 survey conducted by the OEB and the Environmental Assessment Board confirmed the business community's support for continued intervenor funding.[12] Ensuring that access to intervenor funding, as currently provided by the Board's *Rules,* is maintained has become particularly important given that the Ontario Government has not introduced legislation to replace the lapsed *Intervenor Funding Project Act.*

[11] Iler Campbell LLP, "Intervenor Funding and Access to Environmental Justice: Time for the Ontario Political Parties to revisit this issue?" (August 2011)
[12] *Ibid.* at 3

Should the Board require a person seeking intervenor status to demonstrate consultation or engagement with a constituency directly affected by the application?

The Board currently enjoys broad discretion in granting intervenor party status as well as the less involved roles of commenter and observer. In exercising that discretion, and in response to a written request for intervenor party status by a person, the Board already has the statutory power to determine whether the person:

> (a) has a "substantial interest" in the subject matter of the proceeding; and
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> (b) intends to participate actively and responsibly in the proceeding by submitting evidence, argument or interrogatories, or by cross-examining a witness.

NAN submits that, in granting intervenor party status in a proceeding, the Board should obtain some comfort that an organization is *bona fides*, that it purports to represent a particular constituency, and that is has a degree of institutional credibility in doing so.

As for individuals seeking intervenor party status, different considerations might come into play in assessing whether the person has a substantial interest in the issues in the proceeding (e.g. the person has an interest as a landowner affected by the applicant's activities, etc.).

In addition to information in the letter to the Board from the person requesting intervenor party status, the Board always has the option of obtaining additional information on an organization's activities, including its mission statement, its stated goals and objectives, and a list of the organization's members to determine the representational credentials of the person or organization.

That being said, NAN submits that the Board should *not* be conducting a *comprehensive* investigation into whether a person seeking intervenor status can actually demonstrate

consultation or engagement with a constituency directly affected by the application. That would include how the intervening group or association governs the participation by its legal counsel or other representative in a proceeding.

Doing so might compromise the independence and impartiality of the Board and detract from the issues to be canvassed and determined in the application in the proceeding.

However, the Board should, at a minimum, obtain sufficient information about the representative nature of an organization or person requesting intervenor party status.

The history of a person or organization's involvement in previous OEB activities obviously assists the Board in making a determination in future proceedings.

Rule 23.07 already provides additional safeguards if there is some dispute or controversy about the appropriateness of a person being granted intervenor status because it permits a party (e.g. the applicant in the proceeding itself) to object to a person applying for intervenor status by filing and serving written submissions to that effect.

The fact that the *Rules* permit opposition by other parties-- the most obvious party being the applicant in the proceeding --to a request for intervenor party status is more consistent with adversarial principles and less consistent with the Board requiring the person to demonstrate actual consultation or engagement with a constituency directly affected by the application.

If another party (e.g. the applicant in the proceeding) should raise an objection, the issue of demonstrating consultation or engagement with a constituency may be one of the issues considered by the Board in dealing with the objection. However, in doing so, the Board should more properly act as an adjudicator of that issue rather than as an investigator and the objection should be determined in the context of a proper motion by the objecting party.

2. What conditions might the Board appropriately impose when granting intervenor status to a party?

Given the broad mandate of the Board to protect consumer interests in Ontario, NAN is not clear why the OEB would be concerned about imposing conditions when granting intervenor status to a person in a proceeding.

Further, in the absence of the specific context and issues raised by an application before the Board, it is difficult if not impossible to answer this question in a factual vacuum.

As the Board is aware, *Rule 23.09* already confirms that the "Board may grant intervenor status on conditions it considers appropriate."

If certain revisions to this *Rule* are to be proposed, NAN submits that they should circumscribe the Board's power to impose conditions. Presumably, this *Rule* is most relevant to persons who have been granted intervenor party status as opposed the role of commenter or observer, both of which involve less active roles in OEB proceedings.

In NAN's opinion, the interests of justice and fairness would not be served if the Board were to grant intervenor party status to a number of persons but impose restrictions on only one or some of them in a proceeding.

The power under *Rule* 23.09 should be exercised sparingly and judiciously and the Board should be required to outline in writing the reasons for imposing any conditions on a person who has been granted intervenor party status in a proceeding.

Indeed, with respect to intervenor party status, the granting of such status should ordinarily entitle the person to participate in an OEB as a *full party*, with all of the

attendant rights and obligations outlined in the *Rules* (e.g. the right of a party to submit evidence, offer argument, file interrogatories, and cross-examine witnesses).

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?

In NAN's view, it would not be desirable for the Board to start inquiring into how an intervening group or association governs the participation by its legal counsel and other representatives in a proceeding. This is the case for a number of reasons:

a) Such inquiries may easily trench upon solicitor-client privilege between legal counsel and his or her client;

b) The inquiries may interfere with or compromise confidential communications between legal counsel, consultants, representatives, and members of the intervening organization;

c) It would add to a level of complexity to the OEB proceeding which is simply not warranted;

d) Such inquiries are inconsistent with granting broad access to Board proceedings and encouraging public involvement; and

e) The key issue for intervenors in a proceeding is not the nature of the ongoing consultation and engagement between legal counsel/representatives and constituent members of an intervening party but rather the participation of the intervening party in the Board's investigative (i.e. evidentiary) and adversarial process, the party's contribution to the consideration of issues, and

the party's assistance to the Board in making its determination on the pending application; and

f) NAN believes that neither the Board nor the applicant in a proceeding would sanction or approve of such inquiries as it relates to legal counsel or other representatives for the applicant. That being the case, intervening parties should not be held to different standards.

Broadly stated, the Board should not be "looking behind" the representations, statements, or position of an applicant's representative (including legal counsel) during a proceeding, nor should it be revisiting at the costs stage whether a person who has been granted intervenor status has, in fact, the requisite representative capacity.

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 the services that are regulated by the Board? Should the Board require the party to demonstrate consultation or engagement with a class of consumers directly affected by the application?

In NAN's view, the Board should not, *at the costs stage*, require a party who has already been granted intervenor status to demonstrate consultation or engagement with a class of consumers directly affected by the application.

Once intervenor status has been granted, a presumption should arise that such consultation and engagement had taken place and is taking place on an ongoing basis. Representation of a larger group at an OEB proceeding often involves issues of the delegation of responsibilities, the reposing of trust and confidence in representatives, and

other obligations, the nature and extent of which should not be the subject of investigation by the Board.

The factors to be considered by the Board in determining whether a party primarily represents the direct interests of consumers in relation to the services regulated by the Board are essentially the same factors as those outlined in discussed and the first group of questions under the heading "Intervenor Status".

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

For the most part, NAN's submissions in relation to this question can be found in the answer to the first question under "Intervenor Status".

The *Rules* require a person applying for intervenor status to have a "substantial interest"--presumably in the issues in the proceeding.

In NAN's opinion, a "public interest relevant to the Board's mandate" is a broader concept than "substantial interest" and its use in determining whether costs eligibility should be granted should encourage findings of eligibility for persons who have been granted intervenor status.

If the criterion of "public interest relevant to the Board's mandate" is used, the Board should, once again, look at the formal organizational status of a person seeking intervenor status, including any mission statement, stated aims and objectives, and possibly any electoral or representational process associated with the members of the organization.

For instance, NAN represents the interests of 49 First Nation communities covering two-thirds of the geographical area of Ontario. Elections are held across those 49

communities every three (3) years to elect the Grand Chief and the several Deputy Grand Chiefs who constitute the executive of NAN.

NAN was established in 1973 to represent the socio-economic and political aspirations of its First Nation member communities to all levels of government to promote self-determination while establishing spiritual, cultural, social, and economic independence. NAN, which represents a constituency of 45,000 people, has the following stated objectives:

* **Implementing advocacy and policy directives from NAN Chiefs-in-Assembly**
* **Advocating to improve the quality of life for the people in areas of education, lands and resources, health, governance, and justice**
* **Improving the awareness and sustainability of traditions, culture, and language of the people through unity and nationhood**
* **Developing and implementing policies which reflect the aspirations and betterment of the people; and**
* **Developing strong partnerships with other organizations**

The territory covered by NAN encompasses James Bay Treaty No. 9 and Ontario's portion of Treaty No. 5 and is 210,000 square miles. NAN's work as a representative and umbrella organization has the principal objective of improving the quality of life of NAN residents.

This is the kind of information which the Board should be considering in understanding the constituency of a representative organization seeking intervenor status and cost eligibility in OEB proceedings.

NAN also believes that the Cost Eligibility factors in section 3 of the *Practice Direction on Cost Awards* have, to date, worked well for many years in assisting the Board in making eligibility determinations at the outset of a proceeding.

3. What conditions might the Board appropriately impose when determining eligibility of a party for costs? 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 requirements (as opposed to cost allocation)?

The Board's *Practice Direction on Cost Awards* is very comprehensive and it appears to have served the intervenor process well for many years. The Board's Cost Powers in section 2.01 are also substantial.

As is the case in the granting of intervenor status, Rule 4.02 permits the applicant in a proceeding to file objections to a request by a person for intervenor funding.

With respect to the quantum of costs awards, the principles outlined in Section 5 of the *Practice Direction* and the Board's Tariff are similarly comprehensive. They provide the Board with a great deal of flexibility in determining the actual costs to be awarded to an intervening party.

However, as far as improving the cost process is concerned, NAN's experience has been that there is no means by which a party can make submissions to the Board where the Board is contemplating awarding less costs than those claimed by the party in its Cost Claim.

There appears to be no provision in OEB proceedings for a party to make submissions in writing to the Board to respond to any of the Board's concerns about items, fees, or disbursements requested in a Cost Claim. Instead, the Board simply issues its decision on each Cost Claim, with the receiving party having to accept the Board's decision unquestioningly.

NAN submits that the *Rules* could be amended to provide a party with the opportunity to deal with any concerns about a Cost Claim which the Board may have, to require the Board to advise a party that it is considering not approving the Cost Claim (either by rejecting it in its entirety or by reducing the quantum being claimed), and to permit the party to make submissions to the Board in such circumstances before any cost decision is actually rendered.

So far as combining consumer interests is concerned, NAN submits that it makes more sense for the Board to address that issue at the time that determinations about party intervenor status are being made rather than at the costs stage in a proceeding.

If the Board wishes to request two or more organizations to combine their efforts in an OEB proceeding and use the same representative or legal counsel, there should be some provision for the organizations to make submissions to the Board on that issue.

If the Board makes a decision to have two or more organizations represented by the same lawyer or consultants, the risk will exist that the member organizations may not agree to take the same position on an issue before the Board and/or that the interests of the member organizations may in fact become divergent and conflicting, such that their legal counsel or representative may not be able to give "undivided loyalty" to his or her clients.

Further, combining two or more interests does not necessary mean that preparation and advocacy time will be significantly reduced. That would only be the case if the issues of each member organization were very similar and they agreed to take the same position on such issues.

It would appear that, historically at least, different consumer groups have made separate applications for intervenor party status before the Board for certain reasons. Those reasons may involve the belief that the consumer interests represented by one

person/organization are *not* the same or similar enough to warrant consolidation with another organization for the OEB proceeding.

In NAN's view, this question presumes that there is a need to control intervenor costs or, alternatively, there is some reason to believe that control over costs has been lost in the OEB process. The Board has not provided any information to suggest that either situation is the case.

The OEB's website provides information on Cost Awards by Intervenor (April 1, 2013 to March 31, 2013) which confirms that just over $5.5 million in intervenor funding was awarded during that period. Nine intervenors accounted for almost $4.4 million of that funding. Further, four intervenors -- the Vulnerable Energy Consumers Coalition, the Consumers Council of Canada, the School Energy Coalition, and Energy Probe Research Foundation -- accounted for about 50% of the $5.5 million in intervenor funding.

Aside from reviewing the websites of these organizations, NAN is not clear on how these organizations differ in terms of the constituencies they purport to represent. Each of these organizations appears to represent the interests of broad consumer groups.

If these groups are going to participate in the October 8, 2013 hearing at the Board's offices, perhaps they could advise other participants as to how they represent different consumer interests. The Board, of course, is in the best position to question which constituencies are being represented by which organizations that frequently seek intervenor party status in OEB proceedings.

The Board has indicated in its August 22, 2013 letter that it intends to examine the role of intervenors, including how the Board awards intervenor costs in order to ensure that participation in application hearings is both inclusive and *cost-effective*.

The problem with the concept of "cost effectiveness" is that it is a very malleable concept, the meaning of which depends on who is using it.

There can be little doubt that applicant transmitters or distributors will have a radically different view of "cost-effectiveness" in OEB proceedings than intervenor parties who are representing consumer groups, especially those which are economically marginalized.

To a transmitter or distributor wishing to maximize its annual revenue in an application, the most "cost effective" OEB hearing could very well be one in which there is little or no participation by other persons. As in an election, the most "cost effective" campaign is one in which the candidate obtains victory through acclamation.

NAN questions whether it is appropriate to talk about "cost-effectiveness" when it comes to the steps and requirements in OEB proceedings.

A more helpful approach than talking about controlling costs in an OEB proceeding might be to talk about how the *diversity of interests will be represented and accommodated, whether the representational capacity of proposed party intervenors is adequate to the issues in the proceeding, and the information and evidence required by the Board to ensure that quality decisions are made.*

4. Should the Board consider different approaches to administering cost awards in adjudicative proceedings? 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?

NAN does not see any need at this time to be considering different approaches to administering cost awards in OEB proceedings, especially since the Board's *Practice Direction on Cost Awards* is very detailed and it appears to have served the OEB process well for many years.

Further, the problem with pre-approved budgets is that the issues in an OEB proceeding are seldom as straightforward as the initial application may cause them to appear.

Further, the number and nature of the parties in a proceeding (which may be determined in large part by the nature of the relief sought by the applicant distributor, transmitter, the Ontario Power Authority and the issues that must be canvassed given that relief), will affect the issues to be canvassed and the perspective on those issues, thus making pre-hearing budgets unreasonable and unworkable.

It would likely be difficult if not impossible to assess the costs of a proceedings at the outset given the interrogatory process, whether a hearing will be in writing or oral, whether cross-examinations of representatives/witnesses will take place, whether settlement discussions will be part of the process, and so on.

The volume and complexity of the evidence to be filed by the parties also affects the total costs incurred in a proceeding, thus making pre-approved budgets difficult to prepare and ultimately meet.

Recommendation Modifications

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

NAN submits that if any revisions are to be made to the Board's *Rules* and/or Practice Direction relating to intervenors, they should be designed to broaden access to and participation in OEB proceedings.

In addition to providing particulars for the term "substantial interest", NAN would like to consider this issue further and would be willing at the hearing on October 8, 2013 to present any proposed amendments to the *Rules* in writing to the Board and other parties at that time.