

ONTARIO ENERGY BOARD

FRAMEWORK FOR REVIEW OF INTERVENOR PROCESSES AND COST AWARDS

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Ontario
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Board

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1.0 EXECUTIVE SUMMARY

This report provides background on the Ontario Energy Board's (OEB) present intervenor processes, including cost awards, and looks 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. The OEB has a [Stakeholder Engagement Framework](#) designed to bring good governance, implementation of enhanced tools and improved co-ordination to the OEB's engagement approach. Adjudicative process improvement is one point of engagement within the broad stakeholder framework. This Framework for Review of Intervenor Processes and Cost Award focuses on external participation in adjudicative proceedings.

The OEB recognizes the significant benefit that intervenors bring to proceedings and policy discussions at the OEB. It is important for the OEB to ensure that the cost of the interventions – both in terms of direct funding through cost awards and the costs associated with additional workload to applicants and the OEB – is commensurate with the value that is brought to the OEB's proceedings, while at the same time adhering to the legal requirements of procedural fairness and the right to be heard.

A review of intervenor processes was one of the proposed initiatives contained in the [Top Quartile Regulator Report, Phase 1 - March 2021](#), which looked at areas where the OEB should improve its performance to the level required of a top quartile regulator. The Minister of Energy's November 15, 2021 [Mandate Letter](#) also directed the OEB to continue its work reviewing intervenor processes to identify opportunities to improve efficiency and effectiveness.

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. The OEB is seeking input from stakeholders on the areas that have been identified.

The OEB will identify improvements to intervenor processes and cost awards using a three-pronged approach:

1. Clarifying expectations on the evidence to be filed for applications which should focus intervenors' reviews and reduce costs
2. Amending the *Rules of Practice and Procedure (Rules)*¹ and *Practice Direction on Cost Awards (Practice Direction)*² (and potentially other Practice Directions), or providing alternative guidance documents, to provide clarity for intervenors and applicants on OEB expectations and practices
3. Enhancing the OEB's active adjudication to allow for application-specific scope and intervention decisions

¹February 17, 2021

²April 24, 2014

For each prong, the framework outlines several initiatives or activities currently being implemented by the OEB, other potential changes to be considered, and questions for which feedback from stakeholders would be helpful. Potential changes are presented to gather input from stakeholders prior to developing a plan of initiatives to be implemented. Stakeholders are invited to provide any comments on these ideas in addition to responding to the questions. The list of questions for feedback is summarized in Appendix B.

The OEB has proceeded with initiatives for active adjudication including pilot projects, and will continue with this approach concurrent with consideration of comments from stakeholders on the specific questions.

2.0 INTRODUCTION

In March 2021, the OEB issued a report on the results of its Top Quartile Regulator (TQR) project, an initiative designed to move the OEB towards regulatory excellence and acting on the recommendations of the OEB Modernization Review Panel. The report summarized research that was conducted on best practices and ideas from other jurisdictions, examined areas where the OEB should improve its performance, and provided a series of proposed initiatives designed to enhance the OEB's performance in those areas to the level required of a top quartile regulator.

As outlined in the [OEB 2021-2024-Business Plan](#), the OEB has planned many initiatives aimed at improving its effectiveness and efficiency in the pursuit of the goal of becoming and being recognized as a top quartile regulator. This Report's focus is on intervenor processes and cost awards. Changes implemented as a result of this initiative are expected to improve the OEB's adjudicative process and enhance the experience for all parties. Similarly, other initiatives, either currently being implemented at the OEB, or planned, are expected to contribute to more effective and efficient adjudicative processes.

The TQR report identified a number of gaps which would benefit from a plan for improvement and actions the OEB should consider addressing, including:

- Considering strategies for reducing overlap and duplication in regulatory proceedings
 - Doing a more detailed jurisdictional review of intervenor processes to look for areas for improvement
- The need for greater predictability around steps in an adjudicative proceeding
 - 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.³

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.⁴ This definition will be considered as part of this review.

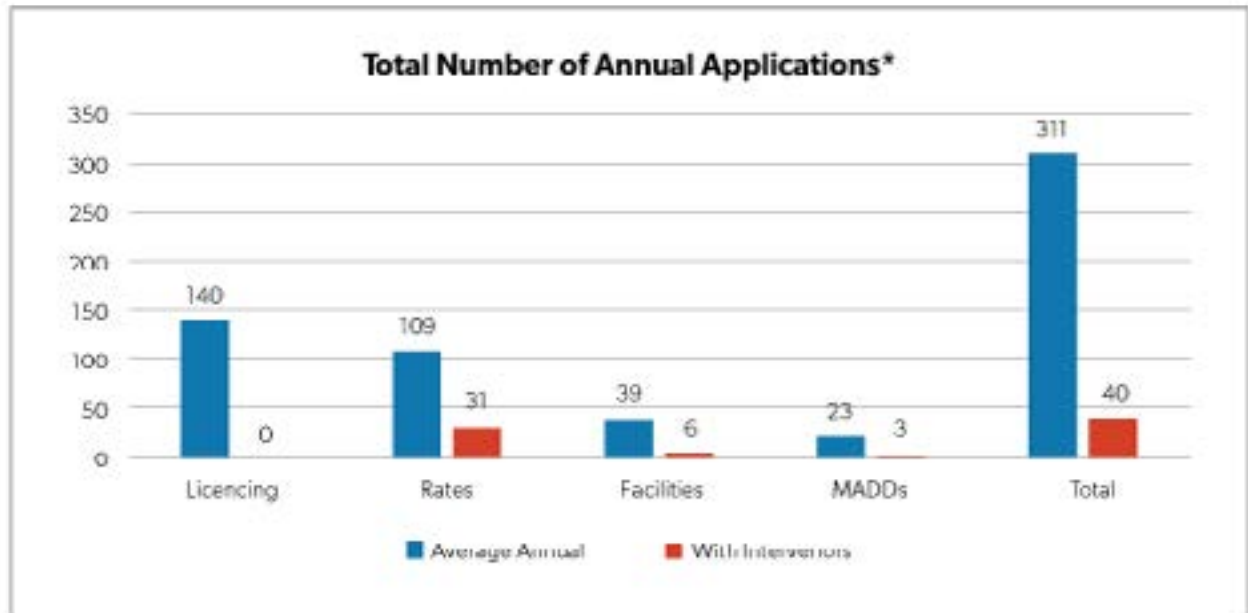
The OEB processes on average over 300 applications each year, including requests for approval of Licences, Rates, Facilities and Mergers/Amalgamations/Acquisitions/Divestitures (MAADs). A large number of the applications heard by the OEB are Licence applications. These follow a streamlined approach and are approved by an employee of the OEB under Section 6 of the *Ontario Energy Board Act, 1998*. As shown in the table below, intervenors are not typically involved in Licence applications,

³ [Top Quartile Regulator Report, Phase 1 - March 2021](#)

⁴ [Rules-Practice-and-Procedure, Revised December 17, 2021](#)

which are therefore not covered in this report.

Intervenors also participate in policy consultations, such as the Reliability and Power Quality Review or the Innovation Sandbox Renewal, however these are not the main focus of this review.



*based on 2016-2021

3.0 VALUE OF INTERVENORS

Intervenors are parties who the OEB has determined have a substantial interest in a matter being heard by the OEB. Intervenors provide a diversity of views for Commissioners to consider in assessing the applications of regulated entities and assist in bringing forward the views of those directly affected by the OEB's decisions. The OEB makes cost awards available to certain categories of intervenors to assist their participation in OEB proceedings.

As natural monopolies, the electricity and natural gas utilities regulated by the OEB are not exposed to market competition for their transmission and distribution services. Customers do not have a choice of utility if they want to be connected to the electricity grid or natural gas system. The utilities are given the opportunity to earn a return set by the OEB based on a fair return standard.

Given the absence of market forces, a key role of the OEB is to exercise oversight of utilities through licences, rules, codes, and adjudicative proceedings to ensure that natural gas and electricity utilities maintain a high level of service and reliability to customers and do so at a reasonable cost. Intervenors participate in many of these forums and assist the OEB by:

- Reviewing a utility's plans from the perspective of the stakeholders they represent, who have a substantial interest in the outcome of 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 OEB proceedings.
- Providing a diversity of views that would be costly for the OEB to provide on its own
 - This is by virtue of the additional external parties reviewing the evidence, and the experience, specialized viewpoints and expertise intervenors bring to the process.
 - If the OEB increased its resourcing to replace the work of intervenors, these costs would be largely fixed. The costs of cost eligible intervenors are higher or lower depending on the type and level of application activity and therefore are variable.
- 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. There are an average of nine settlement agreements each year for electricity rate applications and three for natural gas (including both complete and partial settlements).⁵

Despite this value to the OEB's adjudicative processes, the participation of intervenors may lengthen proceedings, and increase the costs of the proceeding for both the OEB and applicants (and ultimately customers). It is therefore important for the OEB to ensure that the cost of the interventions – both in terms of direct funding through cost awards and the additional workload to the applicants and the OEB – is commensurate with the value that is brought to the OEB's proceedings, while at the same time adhering to the legal requirements of procedural fairness and the right to be heard (see Section 4.0).

⁵ See Appendix A

4.0 PROCEDURAL FAIRNESS/ RIGHT TO BE HEARD

Although different tribunals have different powers and perform different functions, they all must follow the same general rules regarding the process they use to reach decisions. This concept is known as ‘procedural fairness’, or ‘natural justice’. The requirement for procedural fairness is generally triggered if a decision “is administrative and affects the rights, privileges or interests of an individual.” At a high level, procedural fairness includes ensuring that anyone materially affected by a decision of a tribunal has an opportunity to present their views on the matter to an unbiased decision maker. This is sometimes referred to as the right to be heard. The standards for meeting the right to be heard are flexible, and requirements will vary depending on the nature of the decision and what type of impact it will have on individuals.

Parties that may be directly impacted by a proceeding must be able to meaningfully participate in the process, but the OEB can place boundaries on the nature of that participation. The courts have accepted that tribunals have broad authority on how to control their hearings, and how best to balance the rights of participation with efficient and effective decision making. Panels of Commissioners can make procedural determinations during the hearing to balance fairness and efficiency.

Although the OEB must respect the rights to procedural fairness, the OEB controls its own process. The applicable legislation provides limited specific guidance on this process and provides significant leeway to tribunals such as the OEB. The OEB can and will control its processes so they are efficient and effective. The OEB is committed to active adjudication in its proceedings and will do so in a manner that ensures procedural fairness is maintained.

In most proceedings where a decision may adversely impact Aboriginal or treaty rights and the Constitutional duty to consult with Indigenous peoples is triggered, the OEB also must consider whether, based on the evidence before it, it is satisfied that the duty to consult has been discharged before it can issue a final decision approving an application. The OEB welcomes active participation by Indigenous peoples in OEB hearings to ensure that their voices are heard where they have a substantial interest in the proceeding. This includes concerns about any adverse impacts on their Aboriginal or treaty rights when within the OEB’s mandate, as well as other issues as may be within the scope of the hearing.

⁶ Baker v. Canada (Minister of Citizenship and Immigration), [1999] Supreme Court of Canada

⁷ See, for example, *Re: Sound v. Fitness Industry Council of Canada*, 2014 FCA 48 (CanLII), para. 42

5.0 APPROACH

Through the initiatives identified in this framework, the OEB will work to enhance the efficiency and effectiveness of its adjudicative processes, and particularly the role of intervenors within it.

The OEB's review of intervenor processes to date has included both a review of intervenor processes in other jurisdictions, as described in Section 5.1 below, and discussions with stakeholders. Findings from the jurisdictional review were presented to the [Adjudicative Modernization Committee](#) (AMC) and to frequent intervenors. Stakeholders were asked for input on potential improvements and efficiencies related to intervenor processes and cost awards.

While certain initiatives to improve the efficiency and effectiveness of adjudicative processes have been identified in this document for discussion purposes, the OEB is requesting additional feedback from stakeholders as to how these ideas should be refined and which initiatives should ultimately be pursued.

5.1 Jurisdictional Review

One of proposals for consideration in the TQR Report was for the OEB to undertake a more detailed review of intervenor processes in other jurisdictions to look for areas for improvement as it relates to overlap and duplication. The OEB proceeded with this work in 2021 and the [Jurisdictional Review of Intervenor Processes and Cost Awards](#)⁸ (*Jurisdictional Review Report*) details a jurisdictional review of intervenor processes for regulators in Canada, and some international regulators.

The OEB's jurisdictional review looked at eight provincial and one territorial energy regulator across Canada, plus the national Canada Energy Regulator and Canadian Nuclear Safety Commission. In addition, three energy regulators from the United States and the energy regulators in Great Britain and Australia were considered.

The review examined the following for each of the regulators and the OEB:

- Current practices for intervenor processes
- Test used for approving intervenor status
- Test used for approving cost awards eligibility
- Approaches to avoiding duplication of interventions
- Consumer Advocate Models

Through the review, the OEB found that many regulators are looking at their intervenor processes and considering whether changes are required. It is important to note that each regulator works within a different context, including the number of rate-regulated entities, prevailing legislation, and historical practices. This puts each jurisdiction at a different starting point as they review their processes.

The review revealed that many other jurisdictions use the same term "substantial interest" as the OEB with respect to granting interventions, but the OEB could not identify further generic criteria for defining a substantial interest, other than in decisions based on specific circumstances. Other jurisdictions that grant funding (cost awards) for interventions in adjudicative processes indicated that they could deal

⁸ December 8, 2021

with issues such as duplication or examination of immaterial matters at the end of the adjudicative process when determining the amount of funding to be granted. The OEB has similarly adopted the approach of disallowing portions of claimed cost awards at the end of the process where appropriate, but as discussed later in this document, is also interested in establishing clear expectations earlier in the adjudicative process.

Examples of best practices observed for other regulators include:

- 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 proceedings are conducted in an efficient manner

The OEB concludes 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 has also reviewed the recently released National Association of Regulatory Utility Commissioners' reports [State Approaches to Intervenor Compensation](#)⁹ and [Public Utilities Commissions and Consumer Advocates: Protecting the Public Interest](#)¹⁰ and has found the various approaches used by regulators in the United States to be informative as the OEB reviews its processes. The number of states that employ the Consumer Advocate Model (46) is greater than the number of states which have intervenor compensation programs (16, of which six are not currently active). Both reports recognize the increasing importance of participation of parties with unique perspectives, given the increasing complexity of applications and the evolving energy sector. Notable from the report on intervenor compensation is that nearly all states require that the potential intervenor show that intervention in the proceeding would be a financial hardship without intervenor compensation.

5.2 Identified Concerns

When the jurisdictional review of intervenor processes was initially discussed with the AMC¹¹, one question that arose was "what problem are we trying to solve". The OEB agrees that it is important to identify and prioritize concerns so that strategies for improving the efficiency and effectiveness of its adjudicative processes are focused on achieving the greatest benefit.

Through internal discussions and further input from AMC¹², the OEB has developed the following preliminary list of concerns to consider as it determines which initiatives it will seek to implement. The list may be augmented or amended as the OEB continues to engage with internal and external stakeholders.

- How should the OEB better define what constitutes a "substantial interest"?
- How can the OEB create incentives for increased collaboration by intervenors?

⁹ January 10, 2022; addresses intervenor compensation not the process for applying for intervenor status

¹⁰ January 7, 2022

¹¹ [Outcomes, September 9, 2021, meeting](#)

¹² January 18, 2022

- 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?

Question

Are there concerns other than those identified in this report, related to intervenor processes or cost awards, that the OEB should examine?

5.3 Current Practices

In addition to the identified concerns, the OEB believes it is important to identify aspects of the intervenor processes that have been working well for the OEB in making its determinations. The OEB is considering further enhancements for these areas as well.

- Settlement conferences
 - o A diversity of intervenors facilitates the settlement of matters with applicants in the public interest, without the need for a hearing. Appendix A provides a summary of the number of successful Settlement Proposals for rate applications in recent years. Settlement agreements, especially in larger cases, save all parties time and reduces regulatory costs
 - o One limitation of the current process is the lack of information the panel of Commissioners has on who were the major contributors to the negotiation, making assessment of the appropriateness of cost awards difficult, i.e., are some parties being funded to attend but are not providing a meaningful contribution?
- Exclusion of cost awards for mechanistic aspects of applications
 - o For many years, the OEB has not granted cost awards for mechanistic issues in incentive rate-

¹⁹ Rule 022, Section 4

²⁰ Rule 022, Section 3.1

setting applications, certain rate order processes or disposition of certain deferral and variance accounts.¹³ OEB staff continues its active involvement in these matters. While intervenors can choose to participate, it has been determined that given OEB staff's participation and the mechanistic nature of these matters, cost awards for intervenors are generally not warranted.

- o The OEB expects to continue to identify aspects of applications to be excluded from cost awards based on their mechanistic or straightforward nature.
- Identification of possible errors prior to the approval of interventions
 - o The OEB recently adopted an approach of having OEB staff identify potential errors in an application while the notice process is underway. At this point in the process there are no intervenors. Staff identifies potential issues to the applicant, who then can decide to update their evidence on the record. The goal of this approach is to reduce potential (and possibly duplicative) interrogatories that clarify errors.

5.4 Consumer Advocate

As noted in the *Jurisdictional Review Report*, the Consumer Advocate Model is used in many jurisdictions in the United States and by some regulators in Canada. These models have generally been adopted where there is concern that there is insufficient consumer representation in regulatory proceedings. Insufficient representation has generally not been an issue identified for OEB processes.

The purpose of this current initiative is to implement measures to improve the efficiency and effectiveness of current processes. For this reason, the introduction of a consumer advocate is not currently being considered while this initiative is underway. Furthermore, consumer advocates often have some form of government oversight, which could require a legislative amendment. There could also be significant costs to create a consumer advocate office that represents the diversity of views that the OEB's current intervenor process provides. In many jurisdictions, the consumer advocate represents residential consumers and other interests are represented using an intervenor model. Finally, a consumer advocate would not necessarily eliminate the legal right of other directly affected parties to participate, and therefore those with a substantial interest in a proceeding could still be eligible to participate in OEB proceedings.

5.5 Three-Pronged Approach

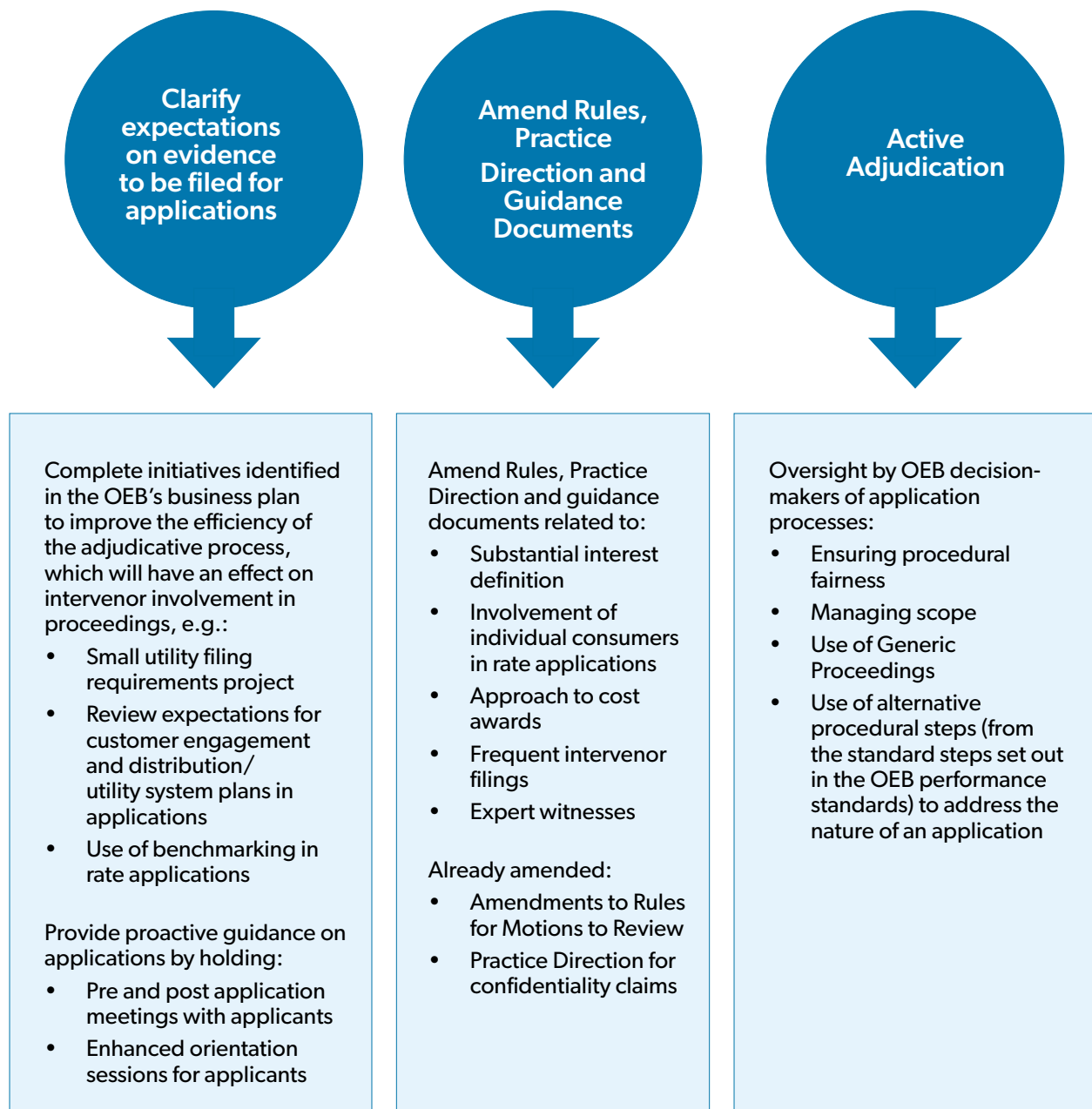
The OEB is taking a three-pronged approach to identifying improvements to intervenor participation in the adjudicative processes. This includes:

1. Clarifying expectations on the evidence to be filed for applications which should focus intervenors' review and reduce costs
2. Amending the Rules or Practice Direction(s), or providing guidance documents, in order to provide clarity for intervenors, applicants or the Registrar on issues such as:
 - a. which parties should be granted intervenor status in OEB proceedings?

¹³For example, EB-2020-0134, Enbridge Gas Inc.: Application to dispose 2019 balances in certain Deferral and Variance Accounts (DVAs) and to review amounts for earnings sharing, the Notice of Application, 18092020 indicated that cost awards would be limited to only the review of certain DVAs and earnings sharing.

- b. who should be granted costs awards eligibility?
 - c. the quantum of those cost awards
3. Conducting active adjudication to allow for application-specific scope and intervention decisions. Active adjudication reflects the OEB controlling its adjudicative processes to ensure that the information being put on the record of each proceeding is relevant and of material value to the decision-maker, while ensuring that procedural fairness is respected.

Each of these prongs are described in further detail below, and the OEB is seeking input from stakeholders on how these ideas should be refined and which initiatives should ultimately be pursued.



6.0 CLARIFYING APPLICATION EXPECTATIONS

A review of intervenor participation in the OEB’s adjudicative processes must also consider the other initiatives the OEB is undertaking to enhance the efficiency and effectiveness of its adjudicative processes. By establishing clear expectations for the areas that are helpful to the OEB in making its determinations, the OEB expects to reduce the **quantity** of evidence to focus on **quality** evidence. The OEB would therefore expect the level of discovery for an application to be reduced. By using active adjudication (as discussed in Section 7), the OEB will maintain oversight of the scope of proceedings and the materiality of matters being examined. The following sections discuss several individual initiatives already underway or completed, which are expected to result in more focussed evidence and discovery.

6.1 Utility Filing Requirements Project

The OEB constituted a working group consisting of intervenor and small utility representatives to review the cost-of-service filing requirements for small utilities. Right sizing the evidence required to be filed by small utilities is expected to allow all parties to focus on material aspects of the applicant’s request and reduce the need for some interrogatories.

On December 16, 2021, the OEB issued [Cost of Service Filing Requirements for Small Utilities](#), which will apply to all electricity distributors with less than 30,000 customers.¹⁴

Building on the successful revisions to the filing requirements for small utilities, the filing requirements for the remainder of electricity distributors will be reviewed to determine what changes could be made to improve the efficiency of the cost-of-service application process. The OEB expects that many of the revisions made for small utilities will be applicable to larger utilities. The OEB has formed a new working group to specifically consider matters such as customer engagement, innovation and grid optimization, use of benchmarking, excel models and other issues unique to distributors with 30,000 customers or more.

6.2 Use of Benchmarking

The OEB has launched an initiative to develop Activity and Program Based Benchmarking (APB)¹⁵ to encourage continuous improvement by regulated utilities. APB is expected to enhance utility performance and increase the effectiveness and efficiency of regulation, by focusing the review of the evidence. The benchmarking of activities and programs will complement the OEB’s total cost benchmarking for electricity distributors, which has been in use since 2006. The OEB will consider the appropriate use of this benchmarking as part of its review of the filing requirements for electricity distributors, including potentially reducing evidentiary requirements for good performers.

¹⁴The applicability of the Filing Requirements for Small Utilities was expanded to 30,000 customers following receipt of the [November 15, 2021 Mandate Letter](#)

¹⁵EB-2018-0278

6.3 Pre-Application Meetings, Post Application Debriefs and Orientation Sessions

One of the observations in the OEB's [November 2020 Financial Review Report](#) was the need for "space" for the OEB to dialogue with applicants in advance of the filing of their applications, without prejudice to any future decision. To respond to this, the OEB has made pre-application meetings available for all electricity and natural gas cost-based rate applications, regardless of utility size. Pre-application meetings are not mandatory but are being offered to assist applicants.¹⁶

The meetings may include stakeholders who intervened in the applicant's most recent cost of service proceeding or in any subsequent hearings involving the applicant. Alternatively, a utility may request to have a pre-application meeting only with OEB staff.

Pre-application meetings provide an opportunity for distributors to receive early feedback on their application prior to finalizing it. Distributors can discuss the application process that the OEB may follow to review the application, the applicable filing requirements, and any issues of concern for stakeholders. OEB staff and participating stakeholders will likewise have an opportunity to understand the key issues that are likely to arise in the upcoming proceeding and therefore provide an opportunity to focus their examination once the application is filed. The purpose of a pre-application meeting is not to settle any issues but to assist the applicant in preparing an application that can proceed with fewer interrogatories.

The OEB has also initiated post application debriefing meetings with applicants. This is an opportunity for the applicant, OEB staff and potentially intervenors to provide feedback on the proceeding and to discuss potential areas of improvement in the processing of future applications. Commissioners will also debrief on the adjudicative process of major proceedings with other Commissioners to discuss potential process improvements for future consideration.

Question

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

¹⁶ [OEB letter Filing Requirements, June 24, 2021](#)

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

The OEB plans to review its Rules and Practice Direction with respect to intervenor processes, with the intention of either amending them or providing further guidance through a separate document. Whether a party is granted intervenor standing in a proceeding and whether that party is eligible to make a claim for costs for their participation are two separate matters for the OEB to determine.

The Rules currently state that intervenor status will be granted to those that can demonstrate a substantial interest in a proceeding.

The OEB has a process for funding some parties for their participation through the granting of cost awards, as described in the Practice Direction.

7.1 Intervenor Status: Substantial Interest

Most applications heard by the OEB for which there are intervenors fall into the broad categories of major rates, facilities (leave to construct pipeline and transmission lines, storage pools and well drilling), and major MAADs applications.

Following the issuance of the notice of proceeding, interested parties may file a request to intervene in the proceeding. In accordance with the Rules, to be granted intervenor status, parties must satisfy the OEB that they have a **substantial interest** and intend to participate actively and responsibly in the proceeding by (for example) submitting interrogatories, filing evidence, cross-examining a witness, and/or filing argument. The request must include:

- a) a description of the intervenor, its membership, if any, the interest of the intervenor in the proceeding and the grounds for the intervention
- b) in the case of a frequent intervenor, an attached document describing the intervenor, its mandate and objectives, membership, if any, the constituency represented, the types of programs or activities carried out, and the identity of their authorized representative in OEB proceedings, unless such a document was otherwise filed within the previous 12-month period
- c) subject to Rule 22.04, a concise statement of the nature and scope of the intervenor's intended participation
- d) a request for the written evidence, if it is desired
- e) an indication as to whether the intervenor intends to seek an award of costs
- f) if applicable, the intervenor's intention to participate in the hearing using the French language
- g) the full name, address, telephone number, and email address, of no more than two representatives of the intervenor, including counsel, for the purposes of service and delivery of documents in the proceeding¹⁷

¹⁷ Rule 22.03

The Chief Commissioner has delegated the authority to determine if a party should be granted intervenor status (including the determination of whether they have a substantial interest in the proceeding) to the OEB's Registrar. The OEB, either through its Rules, a supplementary guidance document or through the delegation to the Registrar, intends to provide more guidance to prospective intervenors, applicants and the Registrar on what comprises a substantial interest. The OEB intends to establish clearer guidance for different types of OEB proceedings. In doing so, the OEB will ensure that it adheres to the principle of procedural fairness and the right of anyone materially impacted by a decision to be heard.

Delegating the decisions on intervenor status to the Registrar provides for greater consistency; however, there may also be a role for earlier involvement by Commissioners to consider whether a particular issue identified by a party is within scope of the proceeding and warrants approval for intervenor status.

Potential Changes

Leave to Construct

The OEB is considering changes to its Rules, or providing guidance, in the following areas with respect to who is eligible to become an intervenor:

- Defining an interest in land with respect to a leave to construct application
- Ensuring there is clarity on expectations on what aspects of a facility are considered in the leave to construct application (as opposed to issues that might be considered in a rate application), to establish the typical scope of the respective proceedings and participation of intervenors.
- The OEB has documented its approach to the duty to consult with Indigenous peoples in its Environmental Guidelines for Hydrocarbon Pipelines and Facilities in Ontario. The OEB is initiating a review of this process, separate from this initiative on intervenor processes. To the extent material changes to the current process are considered, the OEB expects that it will seek external comment on these changes.

Rate Applications

The OEB is considering changes to its Rules, or providing guidance, in the following areas:

- 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 application¹⁸, 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.

¹⁸ This would not be applicable to an individual with an interest in land affected by a facilities application

- 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.

Questions

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

7.2 Cost Awards

The OEB's Practice Direction on Costs Awards establishes the process by which parties can apply for a cost award for participating in an OEB proceeding if they are eligible. The Practice Direction provides that a party is eligible to apply for an award of costs where the party:

- (a) primarily represents the direct interests of consumers (e.g., ratepayers) in relation to services that are regulated by the Board;
- (b) primarily represents an interest or policy perspective relevant to the Board's mandate and to the proceeding for which cost award eligibility is sought; or
- (c) is a person with an interest in land that is affected by the process.¹⁹

While the OEB has made provision for funding (cost awards) for intervenor participation, it is generally not a legal requirement to do so, other than for certain circumstances related to the duty to consult with Indigenous peoples. However, the OEB has found that cost awards allow certain parties to participate in OEB proceedings that would otherwise find it difficult to do so, and this assists in providing the diversity of views that may be helpful to its decisions.

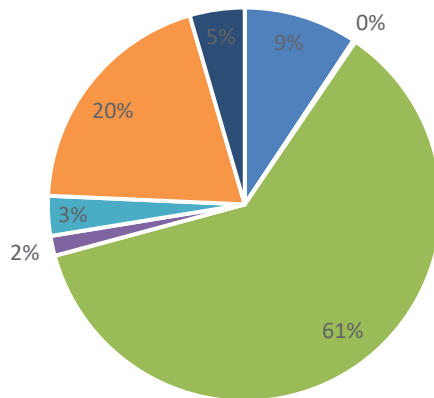
Total cost awards for both policy consultations and adjudicative proceedings have averaged \$4.4 million per year over the last five years.²⁰ An analysis of cost awards from the OEB's 2020/2021 fiscal year shows that 57% of cost awards were granted for electricity rates proceedings (transmitters and distributors), and 24% were for natural gas rates proceedings. For the 2019/2020 fiscal year, electricity rates proceedings (transmitters and distributors) were 61% of the total cost awards and natural gas rates proceedings were 20%.

The following charts show the percentage breakdown of cost awards by type of proceeding for the 2019/2020 and 2020/2021 fiscal years.

¹⁹ Practice Direction on Cost Awards Section 3.03

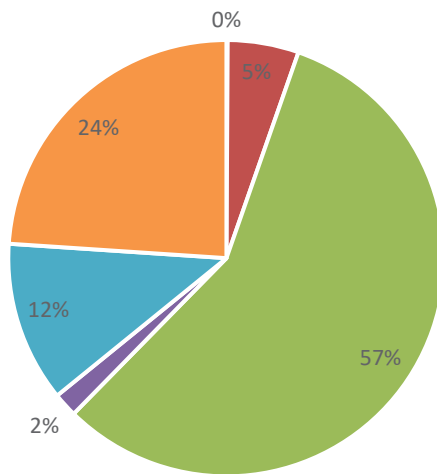
²⁰ Per the OEB's yearbooks, total energy revenues for natural gas and electricity distributors were \$24.6 billion in 2020 (\$20.0 billion electricity and \$4.6 billion natural gas).

Breakdown of Cost Award Fiscal 2019/2020*



- Leave to Construct - Electricity
- MAADs
- Rates - Electricity
- Motion to Review
- Leave to Construct - Gas
- Rates - Gas
- Market Rules

Breakdown of Cost Award Fiscal 2020/2021*



- Leave to Construct - Electricity
- MAADs
- Rates - Electricity
- Motion to Review
- Leave to Construct - Gas
- Rates - Gas

*Cost awards related to Ontario Power Generation’s EB-2020-0290 application are not included.

Rate applications for electricity distributors have been the largest category for costs awards. The OEB has tracked these cost awards by rate year (the year for which rates are set) for electricity cost-based rate applications (cost of service and Custom IR²¹) since 2013. The summary of historical cost awards is shown in the table below.

Table 1 – Total Cost Awards for Electricity Distribution Cost-Based Rate Applications

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
# Applications > \$100M	2	0	3	1	1	1	0	1	1
# Applications > \$500M	0	0	2	0	0	1	0	1	0
Total # of Applications	22	11	11	13	10	9	4	6	10
Average # of intervenors per application ²³	3	3	4	4	3	3	2	4	4

The magnitude of cost awards varies depending on the number of applications, particularly from larger utilities with major applications. For example, in 2015 the OEB reviewed four Custom IR applications, including both Hydro One and Toronto Hydro.

While the current quantum of cost awards is not material with respect to total energy costs in the province, costs awards may disproportionately impact smaller utilities with lower revenues in some proceedings.

Participation by Individuals

While the OEB does not generally provide cost awards to individuals representing only themselves in a rate application²⁴, the Practice Direction is not explicit and does make provision for a possible honorarium. There is a separate provision for eligibility for a cost award for a person with an interest in land affected by an application, e.g., an application for leave to construct an electricity transmission line or hydrocarbon pipeline.

²¹ Custom IR applications are the largest rate applications and set rates for a minimum of five years.

²² Applications are typically filed in the prior year for rates effective either January 1 or May 1 of the rate year.

²³ Number of intervenors varies from one to 12 (Hydro One)

²⁴ Practice Direction on Cost Awards, Section 3.03

Potential Changes

The OEB will evaluate the criteria for who is granted costs awards and will review the approach to the quantum of those cost awards. These amendments may lead to the adoption of different approaches depending on the nature of the proceeding. The OEB could:

- 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.

Questions

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

²⁵ Pilot projects chosen will depend on the types of applications the OEB receives

²⁶ For example, see EB-2020-0091 Enbridge Gas Inc. Integrated Resource Planning Proposal

7.3 Frequent Intervenor Filings

The OEB reviewed its intervenor processes in 2014.²⁷ As a result of this review, the OEB requires frequent intervenors to annually file information including:

- their mandate and objectives
- their membership and the constituency they represent
- the types of programs or activities by which they carry out their mandate
- the appointment and authorization of the individual or individuals who represent them and act on their behalf in OEB proceedings

This was intended to enhance the transparency and credibility of the intervenor framework; however, it is unclear what value these filings currently bring to the process.

While the OEB has found it helpful to have contact information from intervenors for the purposes of its stakeholdering initiatives, there is concern that an intervenor that makes an annual filing to the OEB may assume that they will be granted intervenor status in proceedings without having to justify a substantial interest in a particular proceeding.

Potential Change

- Review the requirement for annual filings by frequent intervenors to clarify or amend the purpose of these requirements.

Question

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

7.4 Use of Expert Witnesses

An expert is someone, engaged by the applicant, OEB staff or an intervenor, who has specialized knowledge or expertise and can assist the OEB with a “ready made inference” based on facts they have reviewed. The purpose of an expert is to provide opinion evidence that is generally outside the experience or knowledge of the panel of Commissioners hearing the case, or that would assist by providing context to difficult or complicated evidence.

Although experts have specialized knowledge, the Commissioners must determine the outcome of every case. Expert evidence can assist with expertise on specific matters, however the panel of Commissioners is not required to accept the expert’s conclusions. An expert must also be unbiased and independent – their duty is to the OEB, and not to their client.

The “threshold” for admitting expert evidence generally considers:

- Relevance: Are the expert’s opinions relevant to a material issue before the tribunal?

³⁵ For those proceedings covered by CER Cost Recovery Regulations i.e., Oil, Gas, Electricity. CER now offers PFP for northern hearings and offshore applications for which there is currently no cost recovery mechanism.

- Necessity: Are the opinions necessary to the Commissioners' decision-making process?
- Qualifications: Does the expert have special knowledge, based on qualifications or experience, to provide a proper basis for the opinions offered?

Expert evidence can be costly to prepare and time consuming to hear. The panel of Commissioners must assess the relevance and the necessity upfront and be willing to deny the expert evidence if it does not add sufficient value to warrant the associated time and cost. Commissioners must consider whether the expert genuinely has any expertise, and whether that expertise would assist them in their consideration of the issues before them. To ensure that a witness meets the test for being an expert, they should be properly qualified before being permitted to give evidence in an oral hearing.

In an intervenor's request to file expert evidence, the OEB often requires an estimate to be provided of the cost to assess the cost / benefit of the evidence to the proceeding. This expectation is not reflected in the OEB's Rules or Practice Direction.

Potential Change

- Amend the Rules to require requests to file expert evidence to include the expected cost of the expert evidence if cost eligibility is being sought, reflective of the OEB's current practice.
- Develop a standard approach to a material cost overrun for expert evidence in advance of the cost award process.
- Establish a process to qualify experts earlier in a proceeding e.g. prior to interrogatories on the evidence.

Question

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

8.0 ACTIVE ADJUDICATION

The OEB is using the term “active adjudication” to explain the enhanced approach used by the OEB to proactively establish and control adjudicative processes that are efficient, effective and procedurally fair. Defining and administering the scope of proceedings is an important aspect of active adjudication, as well as ensuring that matters being explored are material.

Activities

- Continue to ensure that Commissioners have regular training in administrative law, including briefings on relevant court decisions.
- Continue to use the OEB’s internal discussions amongst Commissioners to discuss common approaches to active adjudication, in a manner that does not affect the independence of decision making.

Question

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

8.2 Oversight of Scope in Proceedings

The OEB manages the scope of proceedings predominantly through the use of Issues Lists. Establishing an Issues List is not mandatory, but it is a useful tool for applications with numerous issues to be decided, and to provide expectations to parties on matters that are material and relevant to the proceeding. It provides a convenient structure for organizing interrogatories, cross examination, submissions and a decision. It also is a tool for Commissioners to use in assessing whether the participation of intervenors was in scope of the proceeding when reviewing cost claims.

The OEB generally establishes an Issues List for cost-based rate applications. For electricity distribution rate applications, a set of standard issues are used. In 2021, the OEB developed generic Issues Lists for both electricity and natural gas Leave to Construct applications. Generic Issues Lists can be augmented or amended by the panel of Commissioners where appropriate based on the specific circumstances in a proceeding.

Once set, all parties are required to adhere to the scope of the proceeding defined by the Issues List. Applicants may object to discovery or argument that goes beyond that scope. Where Intervenors disagree with a refusal to answer an interrogatory or technical conference questions based on scope, they may file a motion seeking to compel answers. The panel of Commissioners must then decide whether the information is in scope, relevant, material, and helpful to them in making the decision on all issues.

While the OEB can disallow an intervenor’s costs for not adhering to the defined scope, not addressing out of scope discovery until the cost award stage can add complexity and effort to the adjudicative

process. Providing earlier guidance to applicants and parties on the OEB's expectations can promote greater efficiency.

Activity

- Continue to use Issues Lists or other guidance in procedural orders to scope proceedings.
- Continue to caution intervenors that the OEB will consider whether participation was focussed on material issues when determining cost awards.

Potential Changes

- To enhance the scoping of proceedings, the OEB can consider tools such as:
 - Make better use of interlocutory determinations on whether certain matters, raised through the discovery process, are in scope. This may be initiated by OEB staff, the applicant or intervenors requesting clarity on scope during the proceeding; or the panel of Commissioners may identify issues that are arising in the proceeding that may require a decision on scope.
 - Use pilot or enhanced approaches to assess the scope or materiality of issues, such as a pre-interrogatory response conference, pre-hearing conference, pre-submission conference, or non-transcribed discussion of issues for the purpose of removing out of scope or immaterial issues and prioritizing others. These could be with or without the panel of Commissioners.²⁸
 - For limited issue or specific policy driven intervention requests, ensure the scope of the proceeding has been confirmed before granting intervenor status. A panel of Commissioners could scope a proceeding prior to final approval of intervenor status. This may be necessary if broader policy issues are raised, and the OEB must determine whether these issues are relevant to the specific application being heard.

Question

Are there other tools that the OEB could employ to ensure that the scope of a hearing and materiality of issues is clearer earlier in the proceeding?

8.3 Generic Proceedings

Sometimes an applicant will include a proposal in its application that may also be an issue for other utilities, e.g., the approach to standby rates or how tax changes such as the accelerated capital cost allowance should be treated in an application. These generic issues may be better addressed through focussed discussion in a single proceeding, rather than hearing these issues in multiple utility

²⁸ As was done for OPG's 2022-2026 payment amounts application, EB-2020-0290

applications. This approach can also reduce the burden on an individual utility of presenting evidence on a generic matter, and can focus the participation of intervenors for particular issues. A generic review can be either an adjudicative proceeding or policy consultation. However, this approach may result in a particular applicant having to wait until the end of a future generic review for a determination rather than getting one in a current proceeding. The benefits of a generic proceeding must be considered on a case-by-case basis.

Potential Changes

- The OEB has introduced pre-application meetings for cost-based rate applications. As part of these meetings, participants could identify matters that may be generic in nature that have no existing policy, or the circumstances of an existing policy have materially changed. A determination can then be made by the OEB on whether a generic proceeding should be planned and if so, how that would impact the planned application.
- The OEB's Registrar or other OEB staff can identify matters that may be appropriate for a generic proceeding, and discuss those matters with the Chief Commissioner before issuing the first procedural order in a proceeding.²⁹
- The presiding member of a panel of Commissioners could identify potential generic issues to the Chief Commissioner at the time that a determination is being made on the scope of a proceeding.
- As part of the OEB's business planning process, the OEB could consider the plans for generic proceedings based on input from stakeholders, and matters that have arisen in proceedings.

Question

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

²⁸ As was done for OPG's 2022-2026 payment amounts application, EB-2020-0290

²⁹ An example of this is the OEB's generic hearing on transmission matters (EB-2021-0243) and the removal of export transmission service from the scope of the EB-2021-0110

9.0 NEXT STEPS

The OEB is interested in hearing from all stakeholders regarding potential improvements to intervenor processes and cost awards. Specifically, feedback would be appreciated on the questions as listed in Appendix B.

The OEB is proceeding with active adjudication and will implement pilot projects for new approaches to adjudication as appropriate. Comments from stakeholders on the specific questions will assist in the consideration of those approaches and inform any amendments to the OEB's Rules, Practice Direction or other guidance documents.

While there are specific activities the OEB has identified for its review of intervenor processes, the OEB is committed to continuous improvement and will continue to review intervenor processes once the elements of this framework will have been implemented.

⁴⁵ Rules of Practice and Procedure, July 30, 2021

⁴⁶ Practice Direction on Cost Awards, April 24, 2014

APPENDIX A – SETTLEMENT PROPOSALS IN RATE APPLICATIONS

SETTLEMENT TRACKER - ELECTRICITY

	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Number of Applications Approved/Planned	22	11	11	13	12	10	4	6	10	8
Small (<20 k customers)	10	5	3	5	6	5	3	2	3	1
Large	11	6	8	8	6	5	1	4	7	1
Settlement Agreements	18	8	8	12	12	8	4	5	10	2
Partial	2	3	6	4	5	2	2	1	3	0
Small (<20 k customers)	0	1	1	2	3	1	1	0	0	
Large	2	2	5	2	2	1	1	1	3	
Complete	16	5	2	8	7	6	2	4	7	2
Small (<20 k customers)	7	1	2	3	3	4	2	2	3	1
Large	9	4	0	5	4	2	0	2	4	1
No Settlement Agreement	4	3	3***	1	0	2	0	1	0	0
Small (<20 k customers)	3*	3**	0	0	0	1****	0	0	0	
Large	1	0	3	1	0	1	0	1	0	

Notes:

* Centre Wellington, Sinoux Lookout, HONI Remotes: No ADR convened – Written Hearing

** Cooperative Hydro Embrun, Fort Frances & Hydro : No ADR convened – Written Hearing

*** Three Custom IR: HONI, Oshawa PUC, THESL

**** Sinoux Lookout – AMR Pilot: No ADR convened

SETTLEMENT TRACKER - NATURAL GAS

	2013	2014	2015	2016	2017	2018	2019	2020	2021
Number of Applications Approved/ Planned	4	6	5	5	5	4	3	5	4
Major*	1	1	0	0	0	0	1	1	0
Others	3	5	5	5	5	4	2	4	4
Settlement Agreements	4	4	4	4	4	4	3	3	1
Partial	3	1	0	0	2	1	3	1	0
Complete	1	3	4**	4	2	3	0	2	1
No Settlement Agreement	0	2	1	1	1	0	0	2***	3***

Notes:

* Major applications include Cost of Service and Custom IR

** Enbridge Gas Annual IRM had 2 settlement proposals

*** EPCOR South Bruce IRM – no ADR scheduled

**** EPCOR Alymer IRM and EPCOR South IRM – no ARD scheduled

APPENDIX B – LIST OF CONSULTATION QUESTIONS

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?

Clarifying Application Expectations

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

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?

Cost Awards

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

Frequent Intervenor Filings

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

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?

Active Adjudication

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

Oversight of Scope of Proceedings

13. Are there other tools that the OEB could employ to ensure that the scope of a hearing and materiality of issues is clearer earlier in the proceeding?

Generic Proceedings

14. Are there existing issues that do not currently have policy development work underway, which should be addressed through generic hearings instead of through individual applications?
15. Are there other changes that the OEB could consider with respect to generic proceedings?



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