Shepherd Rubenstein

BY EMAIL and RESS

Mark Rubenstein
mark@shepherdrubenstein.com
Dir. 647-483-0113

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

April 29, 2022
Our File: EB20220011

Attn: Nancy Marconi, Acting Registrar

Dear Ms. Marconi:

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

We are counsel to the School Energy Coalition ("SEC"). These are SEC's comments on the OEB's Framework for Review of Intervenor Processes and Cost Awards ("Framework").[1]

A. Summary

SEC strongly supports OEB modernization. A review of intervenor processes and cost awards is an appropriate part of that agenda, since it is a fundamental part of ensuring that customers have an effective voice in matters that impact their interests. The OEB's journey to being a first quartile regulator requires a process that ensures that customers can be an integral part of the process that regulates monopoly utilities.

In summary, SEC submits:

- Ontario has the best customer representation system in North America. All proposed improvements should be assessed to ensure that Ontario maintains and strengthens that pre-eminent status. This is particularly true now, as Ontario goes through fundamental changes in its energy sectors, and the involvement of customer groups is critical to the decisions the OEB will need to make.

- The hallmarks of the Ontario system are: a) a diversity of views, and b) professionalism. Changes should be directed to enhancing those strengths.

- Key to the value of the Ontario system is that the customers – who pay for everyone involved in regulation, including utilities and their representatives, and the regulator itself, – are assured of having the resources necessary to present a strong voice at the table. Intervenors are a small percentage of the overall cost, but the value they bring, in terms of strengthening

[1] Framework for the Review of Intervenor Processes and Cost Awards ["Framework"]

the legitimacy of the regulatory process and decisions, as well as the reductions in utility's rate requests, is overwhelmingly worth it.

- To get diversity and direct participation by customer, public interest, and other interested organizations, which is so valuable to the OEB and its processes, the OEB must ensure that it balances efficiency and effectiveness. Attempting to control participation by intervenors is a delicate balance, because the pursuit of certain measures can easily result in the benefits being not just diminished, but even lost entirely. Grassroots processes rely on many separate decisions by diverse parties about how and when to express their individual and collective voices. That is a strength, not a weakness.

- Many of the objectives the OEB seeks from this review, can be best achieved through the better use of existing tools, by providing fair resources to customer groups, and by expanding the use of active adjudication.

B. General Comments and Context

The OEB's intervenor processes and cost awards system is fundamental to the ability of electricity and natural gas customers to have their voices heard, and their interests represented in the regulation of monopoly utilities.

The Framework correctly identifies the undoubted value of intervenors to the work of the OEB.[2] Intervenors bring a diversity of views to the OEB in assessing applications, and assist by providing the input of those directly affected by the OEB's decisions.

The cost award system is a necessary part of the OEB's ability to achieve this value. It is a way to partially level the playing field between regulated entities, with significant resources and large asymmetry of information, and those who provide those resources through their rates.

Having experienced customer and public interest group representation in adjudicative proceedings and policy consultations strengthens the legitimacy of the OEB's regulatory processes.

The OEB should be proud of the work it has done to cultivate a model that is highly regarded across Canada and the United States. The grassroots nature of the Ontario model has resulted in the OEB being represented by a diversity of views, from a wide range of organizations that represent different groups of utility customers. All of this is to the benefit of the customers, the OEB, energy regulatory policy, and the public interest. The OEB, in the several past reviews of the process, has consistently recognized this reality, and used those reviews as opportunities to enhance the effectiveness of the Ontario intervenor system.

The goal of this review should not simply be about efficiency, but also the effectiveness of the regulation of utilities. While there is recognition of both, most of the discussion in the Framework appears to be focused on efficiency rather than effectiveness.

SEC believes this is a mistake.

[2] Framework, p.2

What is missing from the Framework is any discussions about how the OEB can ***strengthen*** participation by intervenors, so they can provide even greater value to the regulatory process. If the OEB is to reach its goal of being a first quartile regulator, SEC believes that it should see this process as an opportunity to enhance the successful system it already has. Any review of the intervenor processes and cost awards should include discussions about how to make improvements to strengthen the voice of the customer and other public interest participants, and the value they bring to the OEB. While this may include making some improvements to enhance efficiency, it must look more at how intervenors can be more effective in representing the interests of their constituencies, and thus provide more value to OEB decision-makers.

Now, more than ever, customer group voices must be heard in the OEB's decision-making process. Ontario and Canada are implementing their respective plans for achieving significant GHG reduction targets. These plans are premised on increasing electrification, and reducing reliance on natural gas and other fossil fuels. Technological change and innovation also has a major part to play as the relationship between the customer and regulated utilities is evolving.

The OEB, as the regulator of both electricity and natural gas, clearly has a central role in the energy transition. Significant oversight will be required as the transition occurs. Customers need to know that they have a seat at the table as recovery of incremental costs will likely be requested by utilities. This is key to the OEB's ability to meet its statutory objective to protect the interests of customers with respect to price, and the adequacy, reliability and quality of electricity service.

Further, if customers have their ability to participate actively and meaningfully in proceedings curtailed, they will lose faith in the ability of the independent energy regulator to protect their interests. The acceptability of the OEB's decisions will be undermined, and customers will look for other ways to have their voices heard, and their concerns addressed. The OEB, and all of its stakeholders, including utilities, have an interest in promoting and enhancing the independence, legitimacy, and fairness of the regulatory process. Effective intervenor participation is a key part of that.

In undertaking this review, SEC urges the OEB to consider the comments made by utilities in the appropriate context. They have a natural incentive to advocate for changes that would weaken intervenors' ability to scrutinize their applications and, where appropriate, challenge their proposals to spend customer money. While utilities already have substantial resource and informational advantages, it is always in their interests to expand them.

The remainder of these submissions respond to the questions posed by the OEB in the Framework. We have not attempted to respond to each question, but have focused on some of the more important ones that relate directly to the intervenor and cost award processes, and have not been otherwise addressed in these general comments.

C. Consultation Questions

Intervenor Status: Substantial Interest (Questions #3-7)

The OEB has asked several questions that seek to define the term "substantial interest".

The problem is that there is no simple definition of substantial interest. The determination of substantial interest is contextual. It depends on the nature of the proceeding, the requested relief, and the specific interest of the individual or organization seeking intervenor status.

For some other energy regulators, the test for intervenor status is directly or adversely affected, which can more easily be defined.[3] Substantial interest is broader, and allows groups that bring to the process a policy or other relevant perspective to contribute to the OEB's understanding of an issue. This appropriately recognizes the OEB's public interest mandate, and recognizes the benefits from the involvement of a broad array of stakeholders that includes not just customer groups, but those that bring forward a policy perspective. The OEB has a long history of valuable contributions from this type of intervenor.

SEC agrees that providing more public guidance to potential intervenors through changes to the rules or other guidance documents could be helpful. This can be done by creating a list of interests that are likely, even if not guaranteed, to represent interests the OEB has in the past recognized as substantial. This could include, as suggested by in the Framework, those representing affected customers. It could also include Indigenous communities in applications that affect their territory and rights, and landowners where an interest in their land is at issue.

Most useful to potential intervenors, and to the OEB decision-maker (generally the Registrar), would be a requirement that groups seeking intervenor status that do not represent a group that has a listed interest, provide information, with sufficient specificity, about what their interest in a proceeding is, and how their participation will assist the OEB in rendering its decision.

The Framework mentions that the OEB is considering clarifying that parties representing discrete customer groups would, in rate applications, be considered to have a substantive interest. SEC agrees, but believes it is important that this not be limited solely to rate applications. It should include any application that directly or indirectly impacts customer rates. Leave to construct proceedings involve, among other things, assessment of the need and prudence of a proposed project, and thus directly determine whether the utility will spend the customers' money on the project. In terms of efficiency, the OEB does not want parties to consider these issues again in a subsequent application, when those costs are added to rates.[4] Similarly, MAAD applications and IESO market rules reviews implicate customers' interests. There are many other examples.

Cost Awards

The Framework suggests that, while the quantum of cost awards is generally immaterial to any individual application, there are other costs to the application and the OEB, generated by intervenors through additional workload and potentially lengthening a regulatory process.[5] Changes to how the OEB awards costs are a way the OEB might, it is suggested, reduce some of these costs.[6]

Thorough review of applications has a cost, but it is a good cost. The alternative is a less thorough review. As the Framework itself notes, in other jurisdictions where different review systems are used, the cost is almost always higher than in Ontario.[7] Most importantly, there should be little doubt that whatever additional direct and indirect costs arise because of intervenors' participation in OEB processes, those costs are overwhelmingly outweighed by the benefits intervenors contribute in

[3] Jurisdictional Review of Intervenor Processes and Cost Awards, Appendix A
[4] As a recent example, in Enbridge's recent ICM application (EB-2021-0148), the OEB explicitly ruled out of scope the need and prudence of the St. Laurence Ottawa North Replacement Project, as those matters were being dealt with an on-going leave to construct proceeding. (EB-2020-0293). (See Letter from OEB, December 10, 2021)
[5] Framework, p.20
[6] Framework p.7
[7] Framework, p.12

reducing utility rate requests, and in simplifying and shortening regulatory processes through settlements and other activities.

The real issue is how to ensure that parties – whether intervenors or utilities - act responsibly, and do not pose an undue or unnecessary burden.

The OEB has already undertaken several initiatives, which SEC has supported, to modernize its adjudicative processes. These initiatives include changes to the filing requirements, the scope of motions to review, and the confidential filing process. These are a more appropriate venue to deal with ensuring that the adjudicative process balances efficiency and effectiveness.

As it is related to intervenors, the OEB should not discount its existing tools for controlling individual intervenors, if it believes they are abusing the process, or simply not adding sufficient value commensurate with their claimed costs. Being eligible for costs is no guarantee of recovery, and disallowing a request for a cost award, which occurs after the time has been expended by that intervenor's representatives, already sends a very strong message to all intervenor organizations.

While the OEB generally has no legal requirement to award costs, it must be recognized that cost recovery by intervening organizations is the lifeblood of the existing intervenor model. Cost awards use customer funds to provide resources to customer and public interest groups to retain expert representatives, just as customer funds provide even more resources to utilities for the same purpose. Any changes to the cost award system may have significant foreseen and unforeseen consequences on the ability of the OEB to achieve the value it recognizes these groups bring.

Promoting Collaboration (Question #7)

Significant Collaboration Already Occurs. The OEB should be careful not to confuse similar views, interests, and constituencies. While it may sometimes be appropriate for the OEB to limit cost awards where there are multiple parties representing the exact same constituency,[8] with respect to similar views and interests, the issue is very different and more complex.

Intervenors representing customer and other groups who may or may not have broadly similar interests, and even views, regularly collaborate and work together in individual cases. During cases intervenors usually discuss issues and areas of focus, coordinate cross-examinations, and share drafts of arguments. The Practice Direction on Cost Awards requires parties to make reasonable efforts to cooperate, and intervenors do so all the time.[9]

This happens not just because the OEB requires it. As a practical matter, there is limited time and resources available to intervenors for reviewing applications both large and small. Parties themselves benefit from – indeed, rely on - collaboration.

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[8] For example, in Enbridge's 2004 rate case (See *Decision on Costs* (RP-2003-0063), March 14, 2004), the OEB awarded recovery of half the costs of two intervenors - the Ontario Association of School Business Officials, and the Ontario Public School Boards' Association, on the basis that the intervenors represented the exact same consistency, public schools. The school boards responded by creating the School Energy Coalition, which included both of the original intervenors, and five other school board associations. This is an example of the existing tools working well. While this was an exceptional situation, it is those unique problems that are the ones that should concern the OEB. Those problems are usually susceptible to careful use of the existing rules.

[9] Practice Direction on Cost Awards, s. 5.01

At the same time, all parties have the right, and their representatives a responsibility, to be sufficiently knowledgeable in all aspects of an application that relate to their interest. Procedural fairness requires that their representatives must be able to participate in the process in a way that ensures that they can advocate for their interests. Approaches that force coordination are neither legally appropriate, nor helpful, and in our experience are likely to themselves be costly, time consuming steps that only serve to undermine the value the OEB gets from intervenor participation.

To get the diversity of views from customers, which is so valuable to the OEB and those it regulates, requires reliance on many individual decisions by those who represent their interests. On occasion, some of those decisions may seem to lead to inefficiency in the process, but as a whole they do not, and are necessary for an inclusive process.

Further, in our experience, multiple parties with seemingly similar, even identical interests, can review the same evidence, ask entirely different interrogatories, and reach different conclusions based on the information. This is a benefit of the existing system, rather than a drawback. Multiple sets of eyes on each application have produced much better reviews. This is driven in part by the inherent asymmetry of information between applicants and intervenors. Different intervenors, approaching the application from difference points of reference, all contribute to filling out the picture that the Commissioners then see.

Concerns With Pilot Approaches. The Framework lists several potential pilot approaches that the OEB is considering. As a general matter, SEC supports the use of pilot projects, but we do have concerns with a few that are listed.

Any pilot that "sets expectations of cost award levels at the outset of the proceeding" should not be considered.[10] SEC believes that it is unfair in an adjudicative process to, as a practical matter, limit the ability of customer representatives to participate, when no such restrictions are placed on utilities. The OEB regularly establishes limits like this in the context of consultations, and it is highly unfair, as it leads to a further imbalance of resources in favour of the utility. From a customer point of view, restrictions like this mean that the utilities get to spend more of the customers' money making the case for higher rates (or utility-favourable policies) than we get to spend making the case for lower rates.

The unfairness is only made worse in the context of the OEB's adjudicative processes. In the most extreme case, the utility can simply "rag the puck", drawing out the process in a multitude of different ways so that customers and their representatives run out of resources.

The Framework mentions that the OEB is considering piloting this in the context of establishing a policy framework through an adjudicative process. This is the exact kind of proceeding where such an approach may be unfair. These generic proceedings have significant ramifications across the sector, and may involve multiple utilities, which exacerbates the resource disadvantage. Those types of proceedings are also the hardest for the OEB to estimate in advance what is a reasonable level of effort.

Scrutinizing utility applications is hard work, and involves considerable effort. Intervenors are not all the same, and the OEB should not treat them as such with caps, budgets, and guidelines that pre-

[10] Framework, p.21

determine their level of involvement. This is especially true where the utility involvement is unrestricted. The test of each intervenor's effort is best determined at the end of the proceeding, when the value of their contribution can be more fairly assessed.

The OEB also mentions that it is considering as a pilot to encourage greater collaboration, "approving costs for intervenors of similar interests as one entity with a maximum number of hours shared by the group."[11] Parties who represent different consistencies, even if they share similar views and in a broad sense, similar interests (i.e., represent customers), have the right to actively participate in an OEB proceeding and be awarded costs insofar as they provide commensurate value. Treating multiple parties as a single intervenor with pre-determined cost caps are breach of procedural fairness.

The OEB would not do this for utilities who are also spending customer funds. It is no more appropriate for intervenors.

By way of example, if this kind of restriction were applied to SEC, it may even have to withdraw from the proceeding, as it would be unable to discharge its duty to represent the interests of its member schools. Limiting its ability to participate in applications and requiring that its "voice" be shared with another party would prevent it from representing the schools. An approach like this would undermine much of the value brought by intervenors to OEB proceedings.

Tariff Needs To Be Updated. In our experience, the best and most effective collaboration occurs when parties have trust and confidence in the abilities of other intervenors' representatives, so they can rely on them to undertake a detail review of a part of an application. The OEB and all parties benefit when this happens, but it requires the participation of experienced and skilled intervenor consultants and lawyers.

Thus, a significant barrier to effective cooperation and collaboration is that it is increasingly difficult for intervenor organizations to hire and retain individuals to represent them that have the necessary skills and experience. This is a natural consequence of a cost award tariff that has not changed in over 14 years[12], and where the hourly rates for counsel and consultants for utilities are now at a minimum of 2 to 4 times that of the maximum in the tariff.[13]

The OEB should revise the intervenor cost awards tariff. While there is no expectation, nor should there be, that any revised amounts should be set at the market rates for downtown Toronto counsel and consultants, they should at least reflect the passage of time since the tariff was last updated in 2007. This is necessary to allow intervenors to retain relevant and capable expertise. A tariff that has remained the same for more than 14 years does not represent reasonable reimbursement rates. SEC submits that updating the tariff will allow intervenors to continue to be represented in OEB proceedings, lead to greater cooperation and collaboration, and promote a more efficient and effective process.

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[11] Framework, p.21

[12] OEB Letter Re: Consultation on the Practice Direction on Cost Awards (EB-2007-0683), November 16, 2017, Appendix A

[13] It is difficult to explain why a utility can, with the customer's money, retain a lawyer with 15 years of experience at $600-$750 per hour, while the customer's lawyer or consultant, with more than double that experience, is only reimbursable at $330 per hour.

Assessment of Cost Claims. Ultimately, the OEB already has the existing authority to disallow portions of cost award claims if it finds that an eligible intervenor has not properly cooperated with others, and has undertaken activities, such as repetitive or duplicative cross-examinations, that provide no value. The OEB should not discount the signal it sends by disallowing even a small portion of a cost claim, which represents time and costs that have already been expended by intervenors.

At the same time, when Commissioners solely assess cost claims through a mechanistic lens, making reductions to parties who deviate from the average, even substantially, that acts as a disincentive for collaboration. This approach to assessing cost awards disproportionally impacts parties who take on a leadership role. It should be encouraged, not penalized, as it has the effect of reducing overall costs.

The value of the effort by intervenors is best assessed by the OEB when reviewing a cost claim. In any individual case that time may not be predicable, and not all intervenors will equally expend the necessary time.

This is not to say that comparison amongst parties is not appropriate. However, it should be one factor, among many that are considered in the assessment of cost claims.

It may also be helpful to the OEB, in assessing the cost claims of intervenors, to obtain similar information from applicants regarding actual time expended and costs incurred for their external legal counsel and consultants, as a point of comparison. In SEC's experience, especially in the larger cases with many intervenors, the costs incurred by utilities are higher than the aggregate amount spent by all intervenors, sometimes by an order of magnitude.

Much of an OEB process goes on out of sight of the Commissioners, so determining whether a claim is reasonable can sometimes be challenging. It may assist Commissioners if they were permitted or even required, to propose a reduction to any cost claim before making a final determination. That would allow affected and interested parties, and also the applicant, the ability to comment on the proposed change, and provide any information of which the Commissioners may not be aware that would assist their decision.

For-Profit Cost Eligibility (Question #8)

SEC strongly disagrees with any proposal that would end cost award eligibility for organizations representing for-profit customers. Even though such a proposal would not affect SEC, limiting eligibility in this way would likely significantly reduce, if not eliminate, an important customer perspective from OEB proceedings, and would undermine the inclusive nature of the process. Organizations like IGUA, AMPCO, LPMA, FRPO, CME and others would not be eligible, even though as customers they are paying significant amounts to fund utility representation in proceedings. This is both unfair and unwise.

The question itself appears to be based on an incorrect premise of the purpose of the cost awards. The Ontario system is not a needs-based system, and that is one of its key strengths. Cost awards recognize that customers are responsible through rates for all costs of the entire regulatory process. Customers pay all the applicants' regulatory costs, both internal and external, including those incurred in making their case for rate increases. The customers also pay for the costs of membership fees that fund related advocacy organizations (e.g., Electricity Distribution Association,

Ontario Energy Association, etc.). Similarly, the OEB's entire budget is funded initially by regulated entities, but they in turn pass on those costs through rates. Those costs are not funded by shareholders, but by captive monopoly customers.

It would be fundamentally unfair that the shareholder would have access, through the regulated entity, to ratepayer funds for the regulatory process, but those footing the bill, the customers, would not.

In SEC's view, for customer groups the fundamental basis for eligibility should be that the utility is spending our money to protect the shareholder's interest, and at the very least we should have similar resources to protect our interests as customers. Cost awards recognize this by providing cost recovery so that organizations who represent customers, as well as those who can provide policy expertise, are represented. Those customers who pay for the entire regulatory system are for-profit and non-profit entities.

All customers should be treated equally.

Active Adjudication and Oversight of Scope (Questions #12 and #13)

The Framework defines active adjudication as an "enhanced approach used by the OEB to proactively establish and control adjudicative processes that are efficient, effective and procedurally fair."[14] The OEB already engages in substantial active adjudication, particularly when compared to other jurisdictions, but it can always do more to enhance its processes. Most of the concerns that the OEB has identified can be remedied through expanding active adjudication, as opposed to making changes to the intervenor and cost award process.

Ensuring Proceedings Remain On Scope and Parties Focus on Material Issues. Commissioners should not feel constrained to point out to intervenors during a proceeding that, based on the information available (e.g. interrogatories that have asked, technical conference transcripts, cross-examination), they have been addressing immaterial issues, are unacceptably duplicative of others, and/or are focusing on out-of-scope issues. The Commissioners should not wait until assessing a cost claim.

On the other side, it would be helpful for the OEB, where appropriate, to provide guidance to all parties during a proceeding on how they are participating in the process. Commissioners should not hesitate to provide guidance to an applicant if they feel that responses to interrogatories or technical conference questions are unduly non-responsive, or that they are defining the scope of a proceeding too narrowly. If witnesses in an oral hearing are making speeches rather than answering questions, Commissioners should be willing to step in and insist on more helpful answers. This happens now, but from the customers' point of view more active guidance by the Commissioners in an oral proceeding might be a valuable shift.

Relying on the filing of motions to address participation issues is not always the most efficient or effective way to move the proceeding forward. The Commissioners are entitled to have every party focus on being as helpful as possible, and should insist on it.

[14] Framework, p.24-25

Guidance On Areas of Interest To the Panel. One way to promote greater effectiveness of the adjudicative process is for the Commissioners to provide guidance to all parties regarding specific areas of interest to them, and on which they wish parties to focus. While in most cases this is unnecessary, as the key issues are easily identifiable, in proceedings that span many issues and topics, it is not always clear what the hearing panel themselves are grappling with the most.

As an example, in the on-going Enbridge DSM application (EB-2021-0002), the OEB provided in a Procedural Order both general guidance for final argument, and then, in a subsequent letter after the hearing, information on the various topics that it was hoping parties would address directly in their submissions.[15] While the letter was clear that parties need not address those specific issues, and that it should not be construed as limiting what submissions could be made, it is extremely helpful in providing an insight into what the hearing panel sees as the key matters in issue in an application, as parties prepare their final arguments.

Guidance can also be provided by way of approval of an issues list. In the 2021 Niagara Peninsula Energy Inc. cost of service application (EB-2020-0040), the OEB panel, in approving an agreed upon issues list, added three additional issues. In doing so, the Panel recognized that the new issues were subsumed in the standard issues list, but noted that "by adding these specific issues to the approved Issues List, the OEB is defining the scope of the proceeding, effectively highlighting three issues of importance to the OEB."[16] SEC was an intervenor in this application, and found this to be extremely helpful.

Case/Pre-Hearing Conferences. One approach that both courts and other tribunals use to help in active case management is through short case or pre-hearing conferences. SEC believes the OEB should consider piloting such an initiative.

Unlike pre-application conferences, this would involve the appearance of the parties in front of the OEB panel hearing the application. The purpose of these conferences would be to allow parties, through a more informal setting, but still on the record, the ability to raise logistical issues with the Commissioners, resolve minor issues of scope and process, and receive procedural guidance from the hearing panel. To ensure they are efficient and deal with only pressing matters, these conferences could be convened on short-notice, be of relatively brief duration, and be convened virtually. The outcomes would then be memorialized in a Procedural Order. This could be effective to implement a more proactive form of active adjudication in the more complex proceedings, (e.g. the ones that generally attract the most intervenors and the most diverse set of issues).

Expert Evidence and Generic Hearings (Questions #11 and #14)

The Framework discusses expert evidence and the use of generic hearings. The questions raise important issues that the OEB should consider, but it is unclear why they are being raised in the context of a review of intervenor processes and cost awards. For example, it is most often the applicant who files expert evidence, not intervenors, and so questions related to when to qualify experts have a bigger effect on them.

[15] Letter to All Parties Re: Written Submissions (EB-2021-0002), April 11, 2022
[16] Decision on the Issues List, Confidentiality, and Interim Rate Order (EB-2020-0040), December 4, 2020, p.2

Issues related to expert evidence and generic hearings are not fundamentally about intervenors, but deal with a separate set of concerns. The OEB should review these issues as a part of a separate consultation.

D. Conclusion

SEC appreciates the opportunity to provide input as part of this important review, and welcomes any further opportunity to engage the OEB on these important issues, which affect its ability to represent the interest of its members.

Yours very truly,
Shepherd Rubenstein P.C.

Mark Rubenstein

cc: Ted Doherty, SEC (by email)