April 29, 2022

Ontario Energy Board
2300 Yonge Street, 27th floor
P. O. Box 2319
Toronto, Ontario, M4P 1E4

Attn: Ms. N. Marconi
Registrar

Dear Ms. Marconi

Re: **EB-2022-0011**

Thank you for the opportunity to review and comment on the Ontario Energy Board's (OEB) Framework for Review of Intervenor Processes and Cost Award ("the Framework"). We applaud the initial work that the OEB has undertaken, as there is a variety of opportunities to streamline the intervenor process without diluting its role, e.g., ensuring that work is properly scoped and minimizing potential duplication of work with other intervenors and/or with OEB staff.

The EDA's local distribution company (LDC) members are the face of Ontario's electricity sector to the consumer. We represent the interests of over 50 publicly and privately owned LDCs in Ontario that deliver electricity to 5 million residential, commercial, industrial and institutional customers throughout the province. Year in and year out our LDC members file rate rebasing applications with the OEB and interact with intervenors in other OEB proceedings.

These are our comments on the Framework and responses to the OEB's 15 questions.

We propose that interventions be 'fit for purpose', i.e., that they support the OEB in effectively adjudicating applications, amending Codes and forming policy. We support the OEB in adopting new practices and enhancing existing practices that will, first, enhance the effectiveness of its processes and, second, will render them more efficiently. Our key recommendations are that the OEB:

- improve the alignment between its administration of Cost Awards and intervenor effectiveness
- document its expectations of intervenors, of the actions that it will not allow, how it will monitor intervenors' participation and enforce its expectations
- develop and publicly post a comprehensive plan for managing intervenors participation in OEB proceedings
- improve how it scopes proceedings, adapts scoping and enforces scoping

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- be vigilant in managing policy issues through appropriate initiatives (e.g., policy formation, Code amendment)
- Commissioners, and potentially OEB staff be responsible for Code amendment and policy formation initiatives, engage in active adjudication
- address the role of OEB staff versus the role of the intervenor

Our comments are organized as follows:

- How to prioritize the objectives of this proceeding
- Scoping proceedings
- LDCs' perspectives on interventions
- Putting interventions into context
- Observations on the OEB's design of, and administration of, cost awards
- Information on the level of cost awards
- Analyzing cost awards and interventions from the perspective of a top quartile regulator
- The role of generic proceedings and of benchmarking
- Responses to 15 questions

Many of these topics are inter-related.

We have previously reviewed and considered the role of the intervenor[1]. Our past recommendations focused on:

- capping intervenors' costs or restricting the availability of intervenor funding
- better coordination of intervenor activities and OEB staff activities
- managing the scope of interventions

These recommendations continue to be relevant.

As we described previously, intervenors provide a range of contributions that are of differing value to the OEB. We questioned how to best coordinate the role of the intervenor and the role of OEB staff to better understand the role of the intervenor (e.g., whether it serves as an extension of the OEB's staff, to bring specific expertise, whether it is acceptable for intervenors to use a standardized approach when intervening in an LDC's rate rebasing application).

<u>How to prioritize the objectives of this proceeding</u>

The Framework itemizes that OEB proceedings are to be effective, efficient and to provide procedural fairness. We propose that the OEB consistently prioritize these goals as:

1. Providing procedural fairness
2. Providing effective proceedings
3. Conducting proceedings cost effectively

[1] The EDA's Ontario Energy Board Modernization Panel Submission Phase 1, August 2019

Procedural fairness is a mandatory feature of a tribunal's proceedings. We support reforms that first improve effectiveness and that, secondarily, support efficiency. While efficiency is a worthwhile objective, no one's interests are served by prioritizing an efficient process at the expense of an ineffective decision.

Scoping proceedings

We propose that the OEB revise its approach to scoping proceedings, specifically by replacing today's single step process at the outset of the OEB's process with either a two-step or multi-step process (e.g., continue today's approach and augment it with a review of scope later in the process, perhaps after the written portion of the discovery process is complete). We acknowledge the need to, and importance of, scoping a proceeding well. We question whether establishing the scope of a proceeding once and comparatively early in the process is serving the OEB well.

Establishing scope is useful when understanding an affected interest's desire to participate in an OEB proceeding. We can foresee that, as scope evolves, new issues may come into focus and that the issues identified early in the process may need to be amended or simply retired.

The Framework discusses the OEB's use of Issues Lists and conveys the OEB's concerns with the adequacy of this document. We recognize that the scope of the proceeding needs to be documented and share some of the OEB's concerns about the limits of the Issues List approach. We look forward to working with the OEB and others to identify, explore and analyze how to improve the Issues List determination process and of the alternative or complementary ways to scope a proceeding. We suggest that the OEB test alternative approaches in two or more upcoming proceedings to better understand their advantages and disadvantages.

LDCs' perspectives on interventions

We propose that the OEB categorize interventions before deciding whether to accept them. We also propose that a request for intervenor status address the impacts to the OEB's process if the intervention is not permitted.

We understand that interventions have context. Interventions can reflect that an affected interest:

- has not been appropriately satisfied
- needs a forum to better understand whether it has or has not been satisfied
- can scrutinize an application from a specific point of view that may be relevant to the OEB's adjudication to avoid the OEB incurring a greater risk (e.g., of successful appeal) if this point of view is not provided

We also recognize that some parties have acquired specialized skills and resources aligned with supporting the OEB's adjudication of applications or policy formation initiatives. For many parties, these resources need to be deployed, and cannot be held in an idle state. We suggest that the OEB be vigilant for such interventions.

The first two purposes engage whether the party has a 'substantial interest'. We anticipate that, in providing natural justice and procedural fairness, the OEB will be watchful and manage the number of permitted interventions that represent a legitimate interest so that the effectiveness of the OEB's adjudicative process is enhanced. We encourage the OEB to emphasize that interventions clearly set out both the affected interest and demonstrate that it is substantial.

We also suggest that the OEB communicate its expectations of the benefits to be obtained from an intervention and of the range of actions that the OEB may take if these expected benefits are not fulfilled. To be clear, we are proposing that the OEB set standards, communicate these standards, and apply pre-defined remedies if these standards are not met.

The OEB may wish to consider augmenting the documentation that a party seeking intervenor status is expected to provide. For example, in addition to documenting the party's affected interest or 'substantial' interest, the party could describe how the OEB's process will be impacted if intervenor status is not granted or if the intervenor is in a financial situation that may prevent it from participating. This complementary documentation is proposed to improve the OEB's understanding of the merits of the requested intervention.

Putting interventions into context

We propose that the Framework explicitly consider the role of OEB staff and of the OEB Commissioners to enhance and flesh out the context of an intervention. It will be helpful for the Framework to address the potential role(s) of OEB staff, including:

- to provide project management
- to complete the record
- to represent the interests not represented by any intervenor
- to ensure that OEB policies have been followed
- whether it is acceptable, or perhaps desirable, for OEB staff to duplicate the role of an intervenor, and if so, under what conditions

The OEB's design of, and administration of, cost awards

We recommend that the OEB review the design and administration of its cost award process to better align the incentives provided to intervenors with the outcomes the OEB is seeking:

- for whether it promotes a value-based approach, instead of a seniority-based approach
- for whether cost awards should be made for achieved efficiencies (e.g., if an intervenor serves as leader).

The review should also seek to identify any unintended consequences.

The OEB is focused on enabling value added interventions. However, the OEB's approach to cost awards is not explicitly informed by the provision of added value; rather, it is informed by

seniority and whether the intervention was conducted in a cost-effective manner (e.g., whether duplication existed). Just as utilities are to provide their customers with the needed services in an efficient manner, intervenors are to effectively represent their affected interest in an efficient manner. We propose that the cost award process be refreshed to emphasize that interventions are to provide value to the OEB, that not all interventions are equally meritorious and that allowing interventions for reasons of natural justice and procedural fairness allows the interest to be heard - it does not assure an award of costs.

Independent of a party's financial situation, we encourage the OEB to explore alternatives that will incent effective interventions, possibly using a funding cap or funding limits. For example, Idaho's approach to intervenor funding relies on a pre-set total funding amount that the intervenors compete for among themselves. The Alberta Energy Regulator funds customers or customer groups that have a material interest and who lack the means to adequately represent their interests in rate setting proceedings.

We suggest that the OEB expand and diversify its methods for identifying and assessing intervenors' "added value". We view the OEB's exclusive use of discounting of cost awards as a 'blunt' approach to assessing whether intervenors yielded the value that the OEB sought or expected, and, for disciplining interventions. We note that the OEB's decision to discount cost awards occurs after the proceeding is complete when the intervenor can neither amend nor revise its participation to better support the OEB in effectively adjudicating an application, amending a Code or forming policy.

<u>The level of past cost awards</u>

We propose that the OEB release its analysis of the costs of interventions, and in particular, its analysis of whether cost awards exhibit fixed cost behaviour (e.g., that costs do not vary over time or by the number of proceedings and initiatives), variable cost behaviour (e.g., that costs do vary with the number of proceedings/initiatives or their complexity) or a mix.

Table 1 of the Framework provides data that would benefit from further analysis, especially if it is to be used to support decision making. We propose that the OEB provide similar data for other OEB initiatives that have relied on interventions such as Leave to Construct applications policy formation initiatives, and Code amendments. With this broader data set we propose that the OEB analyze whether intervenors' cost awards exhibit fixed or variable cost behaviour. If cost awards exhibit fixed behaviour, then we propose that the OEB revisit its conclusion that the number of initiatives is the relevant cost driver.

We are concerned that the OEB is incurring fixed costs for interventions. This conjecture may be tested by analyzing the hours that intervenors are engaged in OEB processes, whether adjudicating applications, participating in policy formation initiatives or engaging in Code amendment consultations. We also suggest that the OEB gather information on intervenors' other sources of revenues.

Analyzing interventions, cost awards and the consumer advocate model at TQRs

We propose that the OEB analyze how today's TQRs administer interventions, including how they make use of cost awards or a consumer advocate model or other approaches. The OEB's December 2021 Jurisdictional Review of Intervenor Processes and Cost Awards reviewed various regulators' approaches to intervenor funding in rate applications. The review was not focused on acknowledged TQRs and, furthermore, it did not identify whether the regulators that were reviewed were TQRs.

We also propose that the OEB share how it is achieving continuous improvement with the respect to the administration of interventions.

The Framework is silent on whether interventions provide an acceptable level of coverage of the affected interests generally. This is important as the OEB lacks a formal policy on how to process applications when there is a risk of inadequate levels of intervention (e.g., the requests for intervention do not represent the range of affected interests).

The role of generic proceedings and benchmarking

We propose that the OEB articulate its objective of using generic proceedings to enhance procedural effectiveness and efficiency, and that it develop an approach for transitioning generic issues discovered when adjudicating an application to a more appropriate proceeding (e.g., a policy formation or policy review initiative).

We also look forward to learning how the OEB may use benchmarking techniques to support making informed decisions on requests for intervenor status, cost awards and to support the adjudicative process.

There is more than one objective that can be served by relying on benchmarking techniques (e.g., to support identifying outliers, to constrain the need to adjudicate individual applications). To date, the OEB has made isolated use of benchmarking methods and, at this time, is conducting a proceeding focused on applying benchmarking techniques to LDCs. There are several issues to be resolved including:

- questions of data comparability and granularity that will support decisions, by the OEB and by applicants
- whether an appropriate body of knowledge exists
- whether to rely on benchmarking results for regulatory decision-making purposes.

Benchmarking may enhance the OEB's processing of applications and may be a useful technique for analyzing interventions. We propose that the OEB make use of benchmarking techniques only when conditions warrant and with forethought and thoughtfulness (e.g., to make appropriate use of qualitative data, with due attention to underlying relationships). We look forward to learning how the OEB will apply benchmarking techniques to intervenors (e.g., whether benchmarking can support cost awards) and of whether the OEB anticipates that

benchmarking can achieve procedural effectiveness and efficiency (e.g., if a top decile performer is eligible for relief from review and/or scrutiny).

The Framework raises the question of how to deal with generic or policy level issues. The Framework does not discuss the role of the engaged parties, does not canvass the advantages or disadvantages of deciding generic issues through standalone applications (e.g., the risk that similar applications will be adjudicated inconsistently), and does not explore how to appropriately transition generic issues from an adjudicative proceeding of a specific application to either a generic proceeding or a policy formation initiative. In the past, the OEB has used generic proceedings to decide common applications in an effort to reduce the need to adjudicate multiple comparable applications. It is of utmost importance that generic issues be effectively adjudicated, so that similar issues are dealt with in similar fashion.

Responses to the OEB's 15 questions

The EDA's responses to the OEB's questions are provided below.

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

The OEB should address the asymmetry of the consequences to the parties engaged in settlement activities[2]. In Settlement activities, the Applicant has an opportunity to actively participate in the decision-making process. If a Proposed Settlement Agreement cannot be reached, the Applicant will need to participate in a hearing before the Commissioners where the Applicant cannot control or influence the level of resources required (e.g., staff time to prepare and testify, review submissions, the need for legal counsel). The intervenor has the same opportunity to actively participate in the decision-making aspects of Settlement. In those cases where Settlement cannot be reached, the intervenor will, in addition to the cost award related to the activities leading up to and including Settlement, also be eligible for a cost award for the time required to prepare and participate in the adjudicative portion of the process.

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

We suggest that the Framework will benefit from a clear discussion of Commissioners' delegation of decision-making authority. Delegation is a cost efficiency tactic where the regulator engages a lower cost staff member rather than the higher cost Commissioner to decide an application. Delegation cannot impact effectiveness. We propose that delegation be supported with a structured approach to training (e.g., work shadowing, close supervision for initial assignments) and supervision (e.g., spot checks) and that the OEB communicate both transparently to support demonstrating that applications are being decided effectively. Please see our comments on the use of benchmarking techniques (on page 6-7).

[2] The EDA's Ontario Energy Board Modernization Panel Submission, August 2019 p 17

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

Please see our comments under ‘LDCs’ perspectives on interventions’ (on pages 3-4).

We look forward to the improved focus that engaging parties with a substantial interest in the application will bring. For example, the OEB could clarify that issues addressed in the Environmental Assessment process are out of scope of applications seeking orders granting Leave to Construct. We propose that the OEB explore how to combine similar interests so that the time expended, costs incurred and the impact to rates of representing these interests can be kept reasonable.

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

Please see our comments under ‘LDCs’ perspectives on interventions’ (on page 3).

We suggest that the OEB review how other regulators - TQRs in particular - define ‘substantial interest’. We also propose that the OEB analyze how using these approaches could impact decision making and adjudication in Ontario.

We propose that the OEB be clear that parties are expected to know the interest they intend to represent and how it is affected by the utility’s application. We do not support interventions by parties that do not know what their interest is until after they review and analyze the evidence and prepare interrogatories.

5. Are there other types of applications for which substantive interest needs to be further defined?

We recommend that the OEB consider applying this standard to future applications seeking approval and recovery through rates of investments in innovative technologies.

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

We propose that the OEB:

- Communicate in plain language the purpose of the initiative
- Identify the metrics that it will use to establish an intervenor’s performance, including the data it will require and the data sources it will rely on
- Identify the actions available to the OEB if it concludes that an intervenor did not enhance the effectiveness and quality of the initiative
- Be prepared to apply these actions
- Make this approach and its resulting decisions publicly available.

Parties seeking intervenor status, especially those that do not represent customers of the utility, should be required to identify which issues of the proceeding are relevant to their interests, how the party's participation will assist the OEB in adjudicating an application or in forming policy or in amending its Code, whether the interests they represent may be better protected through an alternative process (e.g., a generic hearing, a policy setting initiative).

With respect to limited-scope interventions, we propose that the OEB explore using pre-defined budgets or cost award limits that either align with or are informed by the scope of the intervention. Clearly this would need to occur at the earliest stage possible. Please see our response to question 8 for further details.

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

We propose that the OEB explore ways to encourage greater collaboration where it will contribute to the effectiveness of the adjudication process (e.g., by running a pilot project testing alternative cost awards that encourage collaboration, such as sharing of cost awards which is a feature of Idaho's model, capping cost awards as is used in Minnesota, New Hampshire and Wisconsin, establishing intervenor conferences/meetings to address collaboration and reduce duplicative work). We support formalizing the OEB's approach of not granting awards for mechanistic/routine aspects of proceeding.

In addition, we propose that the OEB consider how changes to defining 'substantial interest' could encourage intervenors to collaborate at the earliest stage of a proceeding. For example, as noted in the Framework, the OEB could pilot grouping intervenors that share common perspectives and limit either the number of hours or the total potential cost award that could be provided to the group; this approach is successfully used in Idaho. The OEB could also consider changes to the cost award process at the end of the proceeding (e.g., for the materiality of the contribution, for the effort expended to mitigate duplication). Alternatively, the OEB could group intervenors with similar interests and limit the number of hours to be funded or approve a cost award for the group.

8. Should parties representing for-profit interests be eligible of cost awards?

Whether a party represents an affected interest or not is unrelated to its status as for-profit or not-for-profit. The OEB's priorities should first be to establish how eligibility for intervenor status will be assessed, and second to address whether a party's financial need may be a barrier to them participating in the OEB's proceeding. We wonder whether the operation of the OEB's intervenor funding policies may have addressed any financial need that was previously experienced by long-standing intervenors.

9. Is there a better way to represent the interests identified by individual rate payers?

We trust that the OEB will incent and support individual rate payers in organizing to act collectively and collaboratively, whether they are self-represented or not. Their common interest, as well as any relevant specific interests, should be established at the earliest opportunity and should inform the scope of their participation in the proceeding. As is stated elsewhere, the OEB's expectations of intervenors needs to be clear (please see pages 3-4).

We propose that the OEB explore assigning new intervenors a 'mentor' or providing a training program on the role of intervenors and how to effectively represent an interest in an OEB proceeding.

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

We note the OEB's concern with the value of these filings. Our members find that they enhance transparency and assist in demonstrating that the intervenors represent their identified constituency. Some additional requirements that the OEB may wish to consider include:

- requiring that the intervenor provide proof that they regularly engage with their membership, and that they are accurately representing their membership's views in the subject proceeding (note: this requirement could be modelled on the evidence that LDCs must provide of their stakeholdering with customers and of how the feedback gained has supported investment decisions)
- reviewing intervenors' filings (e.g., for accuracy and timeliness)
- requiring that the intervenor complete and submit a financial need test; this is proposed to assist the OEB in understanding whether the intervenor may be experiencing financial need that would, in the absence of a cost award, result in a barrier to entry to the OEB's proceeding or initiative

The OEB may benefit from reviewing the outcomes of the Alberta Energy Regulator's funding of customers or customer groups that have a material interest and lack the means to adequately represent their interests in rate setting proceedings.

The Framework should address the options available to the OEB if a party seeking intervenor status characterization of its constituency does not align with the constituency's feedback to the utility (e.g., feedback gathered as part of the utility's customer engagement).

We propose that the OEB require that parties that will or intend to seek a cost award submit the information required of frequent intervenors in the annual filing.

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

The OEB should permit expert evidence on material matters and on matters that are in scope of the proceeding and that are reasonably expected to impact the outcome of the proceeding. The OEB should require information on how incurring the costs of the studies benefits rate payers and that the benefits of these studies are reasonably expected to exceed their costs. We propose that this apply regardless of the party that identified the need for the study.

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

We anticipate that enhancing active adjudication will convey the OEB's priorities and yield other benefits. We propose that the OEB frame its expectations of intervenors first and appropriately deploy active adjudication second.

The Commissioners should establish meaningful mechanisms that will focus intervenors on effectively supporting the Commissioners (e.g., early identification and termination of duplicative questions). Having communicated these mechanisms, the OEB should next consider developing guidance on how it will use active adjudication to achieve the intended outcomes and objectives. For example, we propose that the OEB explore the advantages and disadvantages of setting and using principles to adjudicate objections (e.g., pertaining to relevance or scope). Commissioners should have the active adjudication tools to support them in dealing expeditiously with procedural issues. We also suggest that the OEB explore whether making greater use of interlocutory determinations of issues that are in scope will enhance the OEB in effectively addressing issues and, if they will, how to schedule them so as to avoid creating delay.

Active adjudication may be capable of focusing parties' participation. As an example, LDCs have experienced some parties 'repurposing' the interrogatory process to gather a wide range of information that may be of arguable pertinence to the application. We propose that the OEB be vigilant for such information requests and, upon detection, take appropriate action, perhaps by using active adjudication methods**.** Alternatively, the OEB may wish to explore the procedural step of requiring that all intervenors participate in a conference focused on eliminating duplicative or out of scope interrogatories.

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?

We encourage the OEB to take all reasonable action to limit, and ideally eliminate, unnecessary and duplicative interrogatories. Just as a panel of OEB Commissioners will not permit repetitive cross examination in an oral proceeding, neither should the OEB allow duplicative questions during the written phase of the discovery process.

We also support the establishment of Issues Lists that clearly set out the contested issues of an application. Please see the response to question 12 for further details.

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?

Many LDCs foresee an emerging need to provide and charge for stand-by or back-up service, for an electric vehicle specific rate class and rate design, to address the regulatory issues of grid investments driven by decarbonization, to name a few. We trust that the OEB tracks the policy questions that are repeatedly raised.

15. Are there other changes that the OEB could consider with respect to generic proceedings?

We make no comment.

Thank you for the opportunity to comment on the Framework. This is a positive first step in a review of the current intervenor process. We look forward to contributing to the next steps in this initiative and to the OEB's future considerations (e.g., of the risks that intervenors incur and of the methods available to mitigate these risks) and to assessing the lessons learned from other jurisdictions, some of which are cited herein.

If you have any questions on these comments or require any clarifications, please do not hesitate to contact Kathi Farmer, the EDA's Senior Regulatory Affairs Advisor at kfarmer@eda-on.ca or at 416.659.1546

Sincerely,

Teresa Sarkesian
President and Chief Executive Officer