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VIA RESS

Ms. Nancy Marconi
Registrar
Ontario Energy Board
27th Floor - 2300 Yonge Street
Toronto, ON
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Dear Ms. Marconi:

Re: OEB Seeks Input on Virtual Hearings

Ontario Power Generation Inc. ("OPG") appreciates the opportunity to provide early input into the Ontario Energy Board ("OEB") Framework for Review of Intervenor Processes and Cost Awards ("Framework").

OPG agrees with the OEB on both the benefits that intervenor participation brings to proceedings before the OEB, and the importance of ensuring that the cost of the interventions is commensurate to the value they provide. Furthermore, given the size of OPG's applications, OPG also agrees that the OEB can streamline evidence by establishing clear expectations for areas that are helpful to the OEB in making its determinations. To that end, OPG believes that managing duplicative interventions, preventing detailed inquiry into immaterial issues, and avoiding exploration of issues outside of the OEB's regulatory authority to establish OPG's payment amounts are key to ensuring intervenors continue to bring value to the OEB's review of OPG applications. As the OEB has identified, the exercise of active adjudication is important, and below, OPG proposes some additional tools to help assist with active adjudication.

OPG has organized its submissions broadly around the consultative questions posed by the OEB in the Framework dated March 31, 2022.

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?

OPG agrees with the concerns identified by the OEB in the Framework, and as stated above, considers the process for accepting intervenors, limiting duplication/increasing intervenor collaboration, and definition around cost awards as the most critical of the identified concerns.

As part of the exploration of the above issues, OPG would encourage the OEB to consider establishing a requirement for intervenors to develop intervention plans, possibly after determination of the issues list. If there are areas in an intervention plan which the OEB determines will not assist it in deciding the proceeding or where it views the planned hours as excessive, the OEB can provide early direction to the applicable intervenor(s). Requiring an intervention plan would also allow the OEB to suggest areas where it sees opportunities for collaboration. Ultimately, direction based on the filed intervention plans will allow intervenors to structure their participation in a manner that will be most useful to the OEB and will reduce the risk of cost award disallowances at the end of the proceeding.

Separately, OPG notes also that the OEB has indicated that the Commissioners' lack visibility into the contribution of individual intervenors during settlement, which makes assessing cost awards difficult in cases that are fully or substantially settled. In OPG's view, any approach to address this issue should recognize that the settlement privilege is essential to the full exchange of information necessary to achieve settlement and should not be undermined by efforts to identify individual intervenor's contributions. Doing so would negatively impact the likelihood of settlements.

OPG also agrees that the identification and correction of errors while the notice process is underway is a helpful change to the process.

Clarifying Application Expectations

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

As the only OEB-regulated generator, OPG thinks the most effective means to review evidence requirements for its applications, including requisite benchmarking, would be to initiate a review of the filing guidelines for OPG applications. While OPG believes the evidence it currently files is complete and comprehensive, there may be opportunities to reduce the volume of information filed or focus the evidence to reduce the number of interrogatories that OPG receives.

Determining the issues list early in a proceeding is also critical to the efficient conduct of applications. The issues list sets the scope of the proceeding. By clearly delineating what is in and out of scope, the issues list can reduce the number of interrogatory refusals and subsequent motions. In EB-2020-0290, a new approach was applied to setting OPG's issues list. The process started with the applicant proposing an issues list with its prefiled evidence, which was refined through collaborative sessions among the parties. Any unresolved areas were addressed in an Issues Day proceeding, where parties made submissions before the Commissioners, who then decided on the final issues list. OPG believes this process worked well to refine the issues list and resulted in an Issues Day hearing that focused on only the issues still in dispute among the parties.

Finally, OPG suggests that, for a large application like OPG's, the OEB consider whether an untranscribed Presentation Day/Application Workshop in lieu of the Stakeholder Information Day process currently in place would be more effective. OPG suggests that such a day take place after the application is filed and intervenors determined, but before interrogatories. This timing allows parties to discuss the

evidence with OPG following their initial review and may help clarify issues in advance of interrogatories. OPG expects that this approach will prove more valuable to parties than the current Stakeholder Information Day, which is held before OPG's evidence is finalized.

Intervenor Status: Substantial Interest

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

And

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

As OPG rarely files applications that do not relate to the establishment of payment amounts or riders, it has no comments on these issues and has focussed its submissions on issues impacting rate applications.

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

And

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

OPG believes that substantial interest should be defined relative to the OEB's regulatory authority and objectives as set out in the *Ontario Energy Board Act*. Under the current process, a party need only demonstrate that it represents a substantial number of electricity consumers for it to be considered to have substantial interest in OPG's applications. However, some such parties then advocate for relief that is beyond the scope of the OEB's regulatory authority over OPG, and pursue issues that are unrelated to the determination of OPG's payment amounts.

As part of considering intervention requests, the OEB could also consider whether the substantial interest is unique. Duplication of interests in an application leads to inefficiencies when parties with the same interests pursue identical or only slightly varied issues and arguments. For OPG, this is a particular problem in the discovery phase, where it receives slight variations on the same question and the differences yield information that is of limited value to the proceeding. Each of these questions, typically having multiple subparts, has to be tracked and responded to as a separate interrogatory.

As discussed in Questions 1 and 7, OPG believes that requiring intervenors to establish an intervention plan will allow the OEB to review how an intervenor plans to pursue its substantial interest in a particular application and exercise active adjudication to provide guidance on what areas are outside the OEB's regulatory authority or areas of duplication amongst intervenors.

Cost Awards

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

The OEB could consider implementing one or more of the options below to encourage greater collaboration amongst intervenors with similar views and interests:

- (i) When considering intervention requests or intervention plans (discussed in Question 1) for parties seeking cost awards eligibility that have substantially the same interest, the OEB can make it clear that only one party will receive a cost award. This may have the affect of encouraging the parties to form a coalition and designate a single representative. If the individual parties nevertheless determine to proceed separately, those denied funding eligibility can still participate at their own expense.
- (ii) The OEB could set a maximum budget for individual cost awards based on the size/significance of the proceeding. In extraordinary circumstances, such as where a significant and unanticipated new issue emerged during a proceeding, the OEB could indicate that it will consider increasing the budget to address the new issue. Establishing a budget to moderate the expected cost of the intervention to ratepayers at the beginning of the proceeding will allow intervenors to manage their time accordingly, and is consistent with the approach used in many engagements where an initial budget is established at the outset. Costs must then be managed within the approved budget unless authorization to exceed is obtained.
- (iii) The OEB could indicate that only parties who make a substantial contribution to the resolution of an issue would be provided with cost awards. This will encourage parties to work together to develop information and positions that help the OEB decide issues.

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

No. Parties who represent individual for-profit entities having substantial economic interests in the outcome of the proceeding should be required to fund their own intervention. This could be assessed based on the anticipated cost of intervention compared to the impact of the proposed rate change on the group or association.

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

OPG believes that for OPG payment amounts applications, intervention by individual ratepayers is typically not helpful to the OEB in light of the complexity, size and scope of the proceedings. Instead, the current process employed in OPG's applications of welcoming letters of comment and requiring the applicant to respond to them serves the interest of individual consumers well.

Frequent Intervenor Filings

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

The OEB should continue to require annual filings. The filings are important to understand the interests that each intervenor group represents and ensure that the representatives appearing at the OEB are authorized to act for each group.

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?

OPG bears the burden of proof on all issues in its application. Under the current method of conducting OEB proceedings, OPG is frequently faced in argument with claims that were not introduced during the course of the proceeding and have no evidentiary basis in the record. This creates procedural unfairness because OPG is not presented with the claims it has to meet until it is too late to submit rebuttal evidence and OPG is denied the opportunity to test intervenor claims through cross-examination.

In instances where an intervenor proposes to put forward highly technical positions requiring niche areas of expertise such as project engineering, OPG sees the value of involving qualified expert witnesses, the cost of which should be compensated. Just as the applicant is required to provide evidence when putting forward a position, (i) intervenors should be required to substantiate their claims with evidence, and (ii) applicants should have an opportunity to file rebuttal evidence and/or cross-examine the intervenor or its expert on its position. The inclusion of experts in these instances would provide intervenors with the requisite level of technical knowledge.

Active Adjudication

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

OPG believes that Commissioners exercising active adjudication significantly improve the discovery process, resulting in regulatory efficiencies while ensuring procedural fairness. For example, OPG often receives interrogatories that request all documents, reports, etc. on particular issues, which can capture hundreds or even thousands of documents for a company of OPG's size. In responding to such interrogatories, OPG must attempt to refine and/or explain why it is overbroad. In OPG's last application, OPG filed 142 attachments to a single interrogatory of this nature.

Commissioners exercising active adjudication can consider:

- (i) Providing written guidance on what evidence is helpful to Commissioners in making decisions. This could help eliminate overbroad interrogatories, interrogatories that seek to explore immaterial issues and interrogatories that ask for minutiae at a level that is inconsistent with the scope of the issue being explored. Eliminating these types of interrogatories will help ensure that

information pertinent to decision making is not masked by the shear volume of material produced through the interrogatory process.

- (ii) Allowing applicants to decline to answer interrogatories on the basis of materiality.
- (iii) Establishing the scope of the proceeding early, through the issues list, and using these determinations to rule on relevance throughout the proceeding.
- (iv) Limiting the constant refreshing of data. The OEB sets rates on the basis of a forecast forward test year. While new information necessarily will become available on a daily basis that could impact the forecast underpinning the application, the constant updating of information rarely impacts the forecast materially. If new information does emerge that materially impacts the forecast, the OEB's Rules of Practice and Procedure already require applicants to update their evidence.
- (v) Meaningfully reducing cost awards where the OEB finds that intervenors have pursued immaterial issues, advanced positions that are unsupported by evidence on the record or necessitated motions due to overly broad or out of scope discovery requests.

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?

OPG believes that early determination of the issues list is the most effective tool to ensure the scope of a hearing and materiality of issues is established early in the proceeding. As discussed in OPG's response to Question 2 above, the process employed in OPG's most recent application provided opportunities for intervenors and OPG to discuss issues in the proceeding, come to an agreed-upon issues list, and to limit discussion of the issue list before the Commissioners to areas of disagreement. This effectively determined the scope of the proceeding, and had it happened prior to interrogatories, would have significantly aided in the determination of relevance and limited the refusals and motions that followed.

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?

OPG does not have any comments on generic proceedings.

If there are any questions with respect to these submissions, please do not hesitate to contact me.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Evelyn Wong', with a long horizontal flourish extending to the right.

Evelyn Wong

Cc:

S. Zadeh, Ontario Power Generation Inc. (by email)

A. Collier, Ontario Power Generation Inc. (by email)