

Notes for Presentation to CAMPUT Program on Intervenor Funding

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I Introduction

-in these remarks, I will review the strengths, and some of the potential weaknesses, of a system of funding for public interest interventions in public utility proceedings.

-before doing so, I will describe the regulatory structure which underlies the intervenor funding system in Ontario, and describe, briefly, the typical proceeding in Ontario where funded interventions are involved

-these remarks reflect one person's experience in one jurisdiction.

- they are intended, however, to address more generally the strengths and weaknesses of funding public interest interventions in public utility proceedings.

II The Regulatory Framework

1. The regulatory instruments

-section 30 of the *Ontario Energy Board Act* (the “Act”) allows the Board to award costs in respect of a proceeding before it.

-the Board's Rules of Practice and Procedure allows a person to apply for eligibility to receive cost awards

-Board has issued a Practice Direction on Cost Awards which sets out the rules governing eligibility for cost awards, the criteria the Board will use in assessing cost claims, and the process to be followed in making claims

-section 30 of the Act limits cost awards to a “proceeding”

-confining cost awards to “proceedings” is an important limitation on the availability of intervenor costs

-for all intents and purposes, “proceedings” are limited to rate applications

-for example the Board convened a number of stakeholder groups for the purpose of trying to develop the regulatory framework for electricity distribution companies

-because these were not defined as “proceedings”, and no intervenor funding was available, residential consumers were effectively excluded from processes that had important implications for residential consumers

2. The process for making cost claims

-the first step is to determine eligibility

-the eligibility criteria appear in section 3 of the Practice Direction

-Board's recent rule changes have narrowed the eligibility to eliminate groups with commercial interests, for example, marketers of natural gas

-the eligible groups are, broadly defined, consumer and public interest groups

-at the conclusion of a “proceeding”, and as part of its order, the Board determines whether an intervenor is entitled to costs and, if so, what percentage of its reasonably-incurred costs it will receive

-section 5 of the Practice Direction sets out the considerations the Board may apply in determining whether an intervenor may be entitled to an award of costs

-the utilities comment on the claims, arguing, for example, that an intervenor's cost claim should be reduced based on the considerations in section 5 of the Practice Direction

-the Board makes a decision on how much to award by way of costs

-the scale of costs is prescribed in the Tariff attached to the Practice Direction

III The Circumstances in Ontario

-what follows is a brief description of a typical proceeding in Ontario where funded intervenors are involved

-intervenors receiving funding fall into two broad categories

-one is groups representing consumer interests

-those consist, in a typical rate case, of one group representing industrial consumers (IGUA), and two groups representing, respectively, the broad spectrum of residential consumers (CAC) and low or fixed income consumers (VECC). These three groups typically address all issues in a case

-the interests of residential and industrial consumers converge on some issues and diverge on others

-they must, accordingly, be separately represented

- in some cases, groups representing discrete consumer groups, like school boards, intervene

-these groups may address all issues or a more limited sub-set of issues

-the second is groups representing public interests

-these groups consist principally of two environmental groups, which typically limit their participation to demand side management issues

-a third group, Energy Probe, participates in most cases, but typically confines its participation to a more limited sub-set of issues

IV The Benefits of a System of Intervenor Funding

-the following reviews the benefits of a system of intervenor funding from the perspective of consumer groups

- a) allows consumer groups access to a process that directly affects consumers but which is otherwise complex and opaque

-the Board's processes would otherwise be dominated by groups with a commercial interest in the Board's decisions

-those groups have the resources to retain both experienced counsel and experts

-cost awards allow consumer groups, which represent the interests of those who pay, access to the process to ensure consumer interests are protected

-that, in and of itself, is an important benefit of intervenor funding

-it is a benefit to both consumers and regulators

b) intervenor funding is a cost-effective way to enhance the protection of consumer interests

-attached as Appendix “A” is a list of intervenor cost claims for Enbridge and Union for the last ten years

-these numbers must be read with some care, because of two factors

-one is that they include cost awards made to some commercial interests, something which is precluded under the Board's recent rule changes

-the second is that they reflect, in some cases, rate applications that encompassed unbundling issues, cases that involved the participation of marketer groups

-the average cost claim, for Union and Enbridge, for intervenor funding for main rates cases over the past decade, is about \$ 604,000

-this figure reflects the costs of all intervenors

-the costs of consumer groups would be about one-half to two thirds of that amount

-there are several ways of measuring the relative significance of intervenor cost claims

-one is to compare them to overall utility O&M costs

-for example, Enbridge's O&M expense for F 2003 will be approximately \$270 million

-a cost claim of about \$600,000 would be a very small percentage of that amount

-a second is to compare them to the amount by which revenue deficiency claims have been reduced as a result of intervenor participation

-attached as Appendix B is an analysis, for both Enbridge and Union, of the amounts by which revenue deficiency and sufficiency claims have been adjusted as a result of intervenor participation

-the adjustments have, in most cases, been significant, and represent substantial savings for consumers

-the amount of intervenor cost claims, when measured against these savings, is small

- c) the presence of consumer groups improves the information base for, and therefore the quality of, Board decisions

-consumer groups have been aggressive in demanding the production of information about utilities' costs and the bases for claims for increased rates

-the most recent example is the information disclosed about utility outsourcing of services to affiliates by Enbridge

-that information allows the Board to make a better assessment of rate claims

-beyond that, the information allows a better understanding of the implications, some decidedly negative, for consumers of PBR regimes

- d) the presence of consumer groups helps to ensure that regulatory processes and decisions are better understood and, perhaps, more widely accepted by consumers

-consumer groups press the utilities and the Board to make decisions affecting consumers more clearly understandable to them

V The Potential Weaknesses of Intervenor Funding

a) it adds to the cost of regulatory proceedings

-there is no doubt that intervenor funding adds to the cost of regulatory proceedings

-but additional cost is relatively small, and the off-setting benefits are significant

b) the presence of consumer delays the regulatory process, and increases the risks of retroactive rate adjustments

-it must first be observed that, as the Board has found, regulatory delay is largely attributable to the decision of utilities as to when they will file applications for rate changes

-however, the presence of intervenors also delays the process once started, because of the time required for discovery, ADR and hearings

-it must be acknowledged that the duplication in the discovery process may delay the overall hearing process

-however, and perhaps counter-intuitively, some proceedings have been speeded-up as a result of comprehensive ADR settlements

-but the experience in Ontario suggests that the delay may be equally attributable to the utilities' refusal to disclose information

c) it is difficult to control

-the intervenor funding process works best when intervenor groups represent legitimate interests and behave responsibly

-there is a risk that intervenor funding may go to groups which meet neither of those tests

-but these risks can be managed by the Board setting, and enforcing, clear rules

-the Board can disallow claims, in whole or in part, for groups which do not contribute to the process

-it can, for example, disallow claims for those who prolong the process unnecessarily by duplicative cross-examination or needless interrogatories

VI Conclusion

-based on the experience in Ontario, intervenor funding is a cost-effective way to enhance the protection of consumer interests and improve the decision-making process

-there are clear benefits for both consumer groups and regulators

-it is less clear that intervenor funding benefits utilities

-one, somewhat ironic, measure of the success of intervenor funding is that the utilities regularly complain about intervenor groups and regularly lobby the government and the Board to curtail their activities

-I will conclude by addressing the argument that intervenor funding is unnecessary because regulators protect the public interest, including the interests of consumers

-the staff of the Board, and the Board itself, are sensitive to the interests of consumers and to the need to protect those interests

-Board staff and counsel do a thorough job in assessing the legitimacy of claims for rate increases

-but they cannot be, because of institutional limitations and the need to be fair, as rigorous in the pursuit of those interests as independently represented intervenor groups can be

-one way to understand the importance of intervenor funding is to appreciate what the process would look like without it

-residential consumers would not be represented, because neither the CAC nor VECC would participate

-many of the cost claims of utilities would go unchallenged, and residential consumers would be paying higher rates

-much of the critical information about the operation of the PBR regimes would not be uncovered

-the overall result would be a weaker and less effective regulatory system

-the interests of consumers are protected, and are seen to be protected, if they are independently represented

-the adversary process ensures those interests are protected in ways that the regulators alone cannot

-in part, that is a function of the fact that regulators have conflicting interests, including the interests of maintaining stable economic conditions for utilities

-groups representing consumers have no such conflicts, and can vigorously and independently pursue the interests of consumers

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APPENDIX A

“Intervenor Funding Payments by Union Gas and Enbridge Gas in Rate Proceedings”

Intervenor funding Payments by Union Gas for
Proceedings from 1994 to Present

Union Gas Information**

	<u>Calendar</u>	<u>Test</u>	<u>Interven</u>
	<u>Proceedi</u>	<u>Year</u>	<u>Funding</u>
	<u>ng</u>		
			\$(000)
1	EBRO	1993/94	Full cost of service proceeding
2	EBRO	1995/96	Full cost of service proceeding
3	EBRO 1996	1997	Full cost of service proceeding
4	EBRO 1998	1999	Full cost of service proceeding
5	RP-1999- 2000	2000	PBR and unbundling case
6	RP-2000- 2001/02	NA	Enabling unbundling proceeding
7	RP-2001- 2001/02	2001/02	Proceeding pursuant to PBR
8	RP-2002- 2002/03	2003	Proceeding pursuant to PBR
9	Total intervenor		\$
10	Total number of		
11	Average per test		\$

** Thank you to Marcel
Reghelini who
provided this
information

**Intervenor funding Payments by Enbridge Gas for
Proceedings from 1991 to Present**

**Enbridge
Information****

	<u>Calenda</u> <u>Proceeding Year</u>	<u>Test</u> <u>Year</u>	<u>Intervenor</u> <u>Funding</u> \$(000)
1		1991	71.
2		1992	199.
3		1993	504.
4		1994	531.
5	EBRO 487	1995	807.
6	EBRO 490	1996	527.2
7	EBRO 492	1997	723.8
8	EBRO 495	1998	670.4
9	EBRO 497	1999	592.
10	RP 1999-01	2000	617.
11	RP 2000-0040	2001	484.
12	Total intervenor funding		\$ 5,726.4
13	Total number of test years		11
14	Average per test year		520.

**** Thank you to Tom
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APPENDIX B

“Analysis of Revenue Deficiency/Sufficiency Claims By
Enbridge and Union, as Affected by Intervenor Participation” *

EGD

EBRO 485 (1994 fiscal year) The revenue sufficiency as filed was \$14 million. The Board adjusted it by \$21.4 million for a total sufficiency of \$35.4 million. The Board approved O & M level for that year was \$223 million.

EBRO 487 (1995 fiscal year) The requested deficiency was \$4.2 million. The Board adjusted it by \$59.2 million for a total sufficiency of \$55 million. The Board approved O & M level in that year was \$233 million.

EBRO 490 (1996 fiscal year) - Revenue sufficiency was \$ 0.9 million as filed. The ADR Agreement and Board adjustments increased the sufficiency by \$23.5 million to \$24.4 million. (Rates would have had to recover \$23.5 million more without the Board/ADR adjustments.) The O & M level that year as approved by the Board was \$241.8 million.

EBRO 492 (1997 fiscal year) - The revenue deficiency was \$33.6 million as filed. The ADR agreement reduced it by \$24.6 million. The hearing further reduced it by \$7.4 million. In the end it became a sufficiency of \$1.6 million. O & M was \$248.1 million as approved by the Board.

EBRO 495 (1998 fiscal year) The requested deficiency was \$60.7 million. That was reduced by \$40 million through the ADR and hearing, for a final deficiency of \$20 million. The Board approved O & M level was \$250 million.

EBRO 497 (1999 fiscal year) The revenue deficiency was reduced at the end of the proceeding by \$43.8 million.

RP-1999-01 (2000 fiscal year) The revenue deficiency as filed was \$73 million. It was reduced through the ADR and hearing process by \$44.9 million for a final deficiency number of \$28.1 million.

RP-2000-40 (2001 fiscal year) The deficiency as filed was \$41.5 million. The Board reduced it as per the ADR agreement (no hearing) to \$23.9 million.

UNION GAS:

In EBRO 499 the revenue sufficiency requested was \$40.8 million. The final number was \$66.6 million for a reduction in the sufficiency of \$25.7 million. O & M in that year was \$262 million.

In the RP-1999-0017 proceeding the Board made adjustments in the range of \$30 million.

*Thanks to Julie Girvan for preparing this analysis.