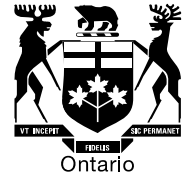


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BY E-MAIL

February 10, 2009

Board Secretary
Ontario Energy Board
2300 Yonge Street
Toronto ON M4P 1E4

Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

**Re: Board Staff Submission – File No. EB-2009- 0010
Association of Major Power Consumers of Ontario
Motion for a Review and Variance**

Please see the attached Board staff Submission for the above mentioned proceeding.
Please forward the attached to Association of Major Power Consumers of Ontario, and
copy Ontario Power Generation Inc.

Yours truly,

Original Signed By

Richard Battista
Case Manager

ONTARIO ENERGY BOARD STAFF SUBMISSION

EB-2009-0010

February 10, 2009

Introduction:

The Association of Major Power Consumers of Ontario ("AMPCO") is seeking a variance of the Ontario Energy Board's ("Board") Decision and Cost Order, dated November 10, 2008, with respect to the eligibility of AMPCO's costs for time spent by Mr. White in the EB-2007-0905 proceeding.¹

The grounds presented by AMPCO for the variance of the Decision and Cost Order include:

1. The Decision and Order of the Board to deny AMPCO's costs for time spent by Mr. White was based on an outdated curriculum vitae for Mr. White that identified Mr. White as the President of AMPCO;
2. Mr. White resigned as President of AMPCO effective October 31, 2007;
3. Currently, Mr. White provides consulting services to AMPCO and other clients through AITIA Analytics Inc. ("AITIA");
4. Mr. White is neither an employee nor an officer of AMPCO. Consequently, any disallowance of Mr. White's time cannot be based on Rule 6.05 of the Board's Practice Direction on Cost Awards;
5. Rule 7.01 of the Board's Rules of Practice and Procedure.

In support of the Motion, AMPCO provided a corrected and up-to-date curriculum vitae of Mr. White and an executed letter of resignation (from the position of President), dated October 16, 2007.

¹ The relevant section of the Decision and Order follows:

In addition, the AMPCO cost claim included a claim for \$10,434 for time spent by Mr. Adam White. According to his CV, Mr. White is both the President of AMPCO and the President and CEO of AITIA Analytics Inc. He has submitted bills to AMPCO from AITIA for his time, and those invoices have been filed with the cost claim. However, Mr. White's responsibilities as President of AMPCO include being "Responsible for monitoring the activities and engaging with regulatory agencies and agency processes on issues of importance to members." The Board concludes that the work conducted by Mr. White has been in his role as President of AMPCO. The Practice Direction on Cost Awards states: "A party will not be compensated for time spent by its employees or officers in preparing for or attending at Board processes". As a result, the claim for Mr. White's time is not eligible for recovery.

Discussion and Submission:²

In Board staff's view, the key question continues to be whether Mr. White's role and responsibilities at AMPCO, provided through a consultative services agreement between AITIA and AMPCO, during the course of the EB-2007-0905 proceeding are properly characterized as not those of an employee or officer of AMPCO. If this clearly were the case, the related costs claimed for Mr. White's time would be in compliance with Section 6.05 of the *Ontario Energy Board's Practice Direction on Cost Awards: Reimbursement for Costs Claimed* ("Practice"); specifically Section 6.05 which reads "A party will not be compensated for time spent by its employees or officers in preparing for or attending at Board processes."

Board staff accepts, based on the record as now filed, that Mr. White's contractual status with AMPCO is one of "consultant" and not one of "employee" or "officer".

However, the evidence continues to suggest that Mr. White's duties include functions that an employee or an officer of an organization would carry out, rather than that of a "consultant" providing services to the organization.

Mr. White, in his Affidavit relating to an identical issue in the EB-2009-0013 proceeding, stated the following:

- Mr. White is the President and Chief Executive Officer of AITIA Analytics ("AITIA") Inc;
- On October 31, 2007 Mr. White resigned as President of AMPCO;
- On November 1, 2007 AITIA was contracted to provide services to AMPCO, such services to include the services of Mr. White to advise and act as President of AMPCO and perform all matters relating to the tasks and schedules outlined in Schedule A³ [to the Services Contract];

AMPCO also provided information on this issue through its interrogatory responses in the EB-2009-0013 proceeding:

² Board Staff will be referencing material filed in the EB-2009-0013 proceeding. AMPCO in correspondence to Board Counsel, dated February 3, 2009, indicated that they would not be filing any material in addition to what they had originally filed with their Notice of Motion. AMPCO assumed that that information filed under the EB-2009-0013 (Notice of Motion to Vary Cost Awards in the IPSP Case), given the similarity of the issue, would be available for review in this proceeding.

³ Schedule A is attached to this submission.

- In the response to IR #4, AMPCO reiterates that the contract between AITIA and AMPCO engages Mr. White to “act as President”; and
- In the response to IR #5, AMPCO replied:
 - (i) In providing services as President through his consulting company, does Mr. White carry out all the duties that he would as a President that was an employee of the organization?
 Answer: No. The services provided by AITIA and Mr. White are as specified in a schedule to the consulting services agreement between AITIA and AMPCO.
 - (ii) In providing these services as President of AMPCO through his consulting company, is Mr. White considered an officer of AMPCO?
 Answer: No. Mr. White is not an officer or a director of AMPCO.
 - (iii) Who at AMPCO has authority for approval of work or documents issued by AMPCO and who at AMPCO has authority for approval of invoices or of monies to be paid by AMPCO?
 Answer: The AMPCO Board of Directors has authority to approve work and documents issued by AMPCO subject to AMPCO Bylaw No. 1 as amended. The AMPCO Board of Directors, by resolution and pursuant to Bylaw No. 1, has delegated to Mr. White specific signing authorities and established conditions to that authority for work, invoices and monies to be paid by AMPCO.

Board staff notes that Mr. White is expected “to act as President” and is responsible for activities listed in “Schedule A” that appear to be of an ongoing managerial nature, normally carried out by an organization’s employees or officers. He also has signing authority for AMPCO, at least under certain conditions.

Board staff submits that the panel should consider the spirit and intent of the Practice Direction on Cost Awards. The key issue is not whether Mr. White’s contract with AMPCO formally labels him as “president”; the issue is whether he essentially performs the function of a president (or other officer or employee). Parties should not be permitted to avoid the prohibition on cost recovery in Section 6.05 of the Practice Direction by simply structuring their arrangements with their employees or officers to classify them as consultants. The focus should be on the actual duties carried out by Mr. White on behalf of AMPCO. If the panel is satisfied that Mr. White’s duties made him a *de facto* president, then the original decision barring cost recovery for his time should not be overturned.

Attachment

SCHEDULE "A"

SERVICES

1.1 The services provided shall include:

- (a) Development of strategy and tactics to deal with issues regarding energy matters of consequence to AMPCO and its members and present recommendations to the Board of Directors of AMPCO for ratification;
- (b) Identify the need for, select, retain and manage other consultants where there is a need for specialized information or services;
- (c) Maintain, develop and extend AMPCO's network of contacts in such organizations as electricity generators, transmitters and distributors, appropriate government ministries, regulatory commissions, industry association, media, consulting firms, and others;
- (d) Advise on upgrading and developing new methods, techniques and approaches to improve the effectiveness of AMPCO's public communications and industry influence;
- (e) Advise on developing an effective membership recruiting program with clearly identified objectives, targets and definition of the approach required;
- (f) Provide administrative functions as directed by AMPCO from time to time including without limitation, membership communications, member company billings and collection, financial record-keeping, money management, planning and arrangements for annual and special member meetings and AMPCO Board meetings, and maintenance of an information center for the membership; and
- (g) Consulting services to AMPCO and to individual members of AMPCO as may be directed by AMPCO from time to time, acting reasonably.