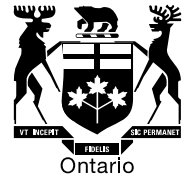


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BY EMAIL

February 11, 2009

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, Suite 2700
Toronto ON M4P 1E4

Dear Ms. Walli:

**Re: Motion by AMPCO to Vary the Board's Cost Claim Decision and Order in
the Integrated Power System Plan and Proposed Procurement Processes
Proceeding
Board File No.: EB-2009-0013**

Pursuant to Procedural Order No. 1, please find enclosed Board Staff's submission.

Yours truly,

Original signed by

David Richmond
Project Advisor, Applications

cc: Miriam Heinz, Ontario Power Authority
Adam White, AMPCO
All Registered Intervenors in EB-2007-0707 Proceeding

Attachment

Motion from the Association of Major Power Consumers in Ontario, the Ontario Mining Association and the Ontario Federation of Agriculture to Vary the Board's Cost Claim Decision and Order

Board Staff Submission

Board File No. EB-2009-0013

Background

The Association of Major Power Consumers in Ontario ("AMPCO"), the Ontario Mining Association ("OMA") and the Ontario Federation of Agriculture ("OFA") (collectively "AMPCO et al") are cost award eligible intervenors in the Board's Integrated Power System Plan ("IPSP") proceeding. In accordance with the Board's Procedural Order No. 8, AMPCO et al filed a cost claim on September 18, 2008 for its participation in the Phase 2A portion of the proceeding (from the completion of Phase 1 to and including September 2, 2008). AMPCO et al along with its other Alliance partners had significant participation in the IPSP proceeding and utilized various consultants in this proceeding.

AMPCO et al filed a motion with the Board on December 22, 2008 related to the Board's November 28, 2008 Phase 2A Decision and Order. In its motion AMPCO et al requests an order to vary the cost awards decision in regard to amounts charged by Mr. Adam White (for AMPCO only) as well as the Board's denial of 25% of the costs claimed by the OMA, the OFA and AMPCO (after the denial of costs applied to Mr. White's claim). AMPCO seeks an increase of \$47,906.25 as a result of the denial of costs claimed by Mr. White and a further increase of \$104,622.14, \$58,218.91, \$12,731.25 to AMPCO, OMA and OFA respectively as a result of the denial of 25% of the costs claimed by these three parties.

Submissions

The implications of the Board's Decision allowing Additional Time for the Preparation of Intervenor Evidence

On June 11, 2008 GEC-Pembina-OSEA filed a motion with the Board, followed by AMPCO-OMA on June 12, 2008 for additional time to file intervenor evidence in the IPSP proceeding and to carry out other associated tasks. The Board in its Motion Decision and Order of June 25, 2008 allowed for more time to file intervenor evidence and adjusted certain dates in Procedural Order 3 to reflect these changes. Specifically,

AMPCO and the OMA (and its Alliance partners) were allowed more time to review IR responses, prepare intervenor evidence and coordinate their efforts with other intervenors. Mr. White states in paragraph 21b of the Motion Record of AMPCO et al that after being granted the delay, the Alliance produced what it said it intended to produce and no one suggested that its work product was duplicative or beyond the scope of the IPSP proceeding.

AMPCO et al in its motion asserts that in allowing more time for general preparation and for the filing of intervenor evidence, the Board has also approved the content and the coordination of that evidence submission and that the Board has also approved all of the costs that an intervenor could incur to assemble this evidence submission. Board staff submits that when the Board grants approval to an intervenor for additional time for the preparation of evidence and approval to carry out other associated activities, this does not amount to a blanket approval for recovery of all costs that are incurred over that period of time. Irrespective of any extensions granted, the Board considers cost claims in accordance with the Practice Direction on Cost Awards (the “Practice Direction”), in particular section 5 of that document. The fact that the Board granted AMPCO et al an extension of time is irrelevant to its consideration of the reasonableness and recoverability of those costs.

The implication of Vice-Chair Nowina’s November, 2007 speech

In a speech to AMPCO directors and members at AMPCO’s fall meeting in November, 2007, Board Vice-Chair Pamela Nowina generally encouraged involvement by AMPCO in OEB proceedings and stated (page 4 of her speech) that she hoped that AMPCO would “be fully represented” at the upcoming IPSP hearings.

AMPCO et al in its motion appears to suggest that if a Board Member encourages the involvement of an intervenor in a proceeding, the Board is in some way pre-approving the costs that the intervenor would then incur to participate in the hearing. Board staff submits that this would not be an appropriate conclusion. Although the Board encourages stakeholders to participate in its processes, this does not amount to a pre-approval of all (or, in fact, any) of the costs that an intervenor may incur in the course of its participation. As noted above, the Board considers cost awards within the context of the Practice Direction.

The Reduction Applied to the OMA

The Ontario Mining Association (OMA) in paragraph 5 of its affidavit states that the Board should not have reduced its cost claim due to concerns about overlapping issues and lack of coordination amongst its members. This affidavit states that if the Board viewed Alliance evidence as duplicative, the duplication was likely with respect to the evidence put forward by Mr. White and Mr. Cowan and this evidence dealt strictly with the effect of the IPSP on the price of electricity. The OMA further states in paragraph 5 and 6 of its affidavit that the OMA did not prepare or submit evidence related to electricity prices and it only supplied evidence that related to the supply, demand and availability of natural gas.

The OMA asserts that its evidence does not relate in any way to electricity costs or electricity prices (the likely areas where overlaps in evidence could have occurred). Board staff submits, however, that the effect of the supply, demand and availability of natural gas on the IPSP is directly related to the cost and the price of electricity due to the fact that gas-fired generation is frequently the price setting supply resource.

The Reduction Applied to the OFA

The Ontario Federation of Agriculture (OFA) in paragraph 7 of its affidavit states that the two key tests of the IPSP, namely: prudence and efficiency had not yet been defined when the OFA spoke to these matters at the January, 2008 IPSP Issues Conference. This affidavit further states that the OFA read a widely accepted definition of efficiency into the record and also put forward a view on prudence.

Board staff submits that the statutory IPSP financial/economic tests, economic prudence and cost-effectiveness (not prudence and efficiency as stated by the OFA), were defined by the Board in the "Report of the Board on the Review of and Filing Guidelines Applicable to the Ontario Power Authority's Integrated Power System Plan and Procurement Processes" ("Board's IPSP Filing Guideline") and this document was included at A-3-1 in the OPA's pre-filed evidence and thus is on the record. In addition the statutory IPSP financial/economic tests, economic prudence and cost-effectiveness were also mentioned and discussed in some detail at the Issues Conference (before the OFA made its submission) by the OPA at pages 50-60 of the January 14, 2008 Issues Hearing transcript and by GEC at pages 46-50 of the January 15, 2008 Issues Hearing

transcript. Board staff therefore submits that the evidence put forward by the OFA on these matters was redundant to information already in the Board's possession.

The OFA in its affidavit at paragraph 11 states that its second report put forward views on regional capacity and demand forecasts, regional power cost differences, possible subsidies between different areas of the province and suggested rate design remedies. Board staff submits that in the IPSP issues hearing the Board stated that it would not be able to deal with electricity prices in detail and it would not deal with matters such as electricity rates (Issues Decision With Reasons March 26, 2008, pages 8 and 9). Therefore Board staff submits that potential regional power cost differences, possible area subsidies and rate design remedies would not have been within the scope of the proceeding.

The Denial of Costs Claimed by Mr. White

AMPCO et al seeks an increase of \$47,906.25 as a result of the denial of costs claimed by Mr. White in the IPSP proceeding.

The grounds presented by AMPCO et al through Mr. White's filed affidavit 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;

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.

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-2007-0707 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 Motion Affidavit stated the following:

- Mr. White is the President and Chief Executive Officer of AITA Analytics ("AITA") Inc;
- On October 31, 2007 Mr. White resigned as President of AMPCO;
- On November 1, 2007 AITA 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 A¹ [to the Services Contract];

AMPCO also provided information on this issue through its interrogatory responses in this proceeding:

- In the response to IR #4, AMPCO reiterates that the contract between AITA 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?

¹ Schedule A is attached to this submission.

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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 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 s. 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.

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.