

EB-2009-0013

**Notice of Motion for a Review and Variance of Ontario Energy Board
Decision and Order on Cost Awards
February 18, 2009**

AMPCO Reply Submission

The Board's Practice Direction on Cost Awards state, in section 6.05, that "a party will not be compensated for time spent by its employees or officers in preparing for or attending at Board processes."

Board staff acknowledges that Mr. White is neither an employee nor an officer of AMPCO:

"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".

The submission by Board staff, however, frames the issue before the Board as "whether Mr. White's role and responsibilities at AMPCO ... are properly characterized as not those of an employee or officer of AMPCO."

Board staff expresses the view that the schedule of services for which AMPCO has contracted with AITIA Analytics Inc. "appear to be of an ongoing managerial nature, normally carried out by an organization's employees or officers."

Board staff submits that "the panel should consider the spirit and intent of the Practice Direction on Cost Awards." Board staff, setting aside the explicit and plain meaning of the practice direction, suggests that the issue relates to the specific duties Mr. White performs for AMPCO. Board staff suggests the panel should decide whether the actual duties performed by Mr. White make him a *de facto* president.

The submission by Board staff implies that parties, presumably inferring that this is the case with AMPCO in this proceeding, seek to "avoid the prohibition on cost recovery ... by simply structuring their arrangements with employees or officers to classify them as consultants."

The Board staff submission, that a party can simply structure an arrangement with alternative classifications to avoid the Board's prohibition on cost recovery by an employee or officer, represents a gross simplification of the issue and ignores the facts of the arrangement between AITIA Analytics Inc. and AMPCO. The suggestion that these contractual arrangements were in any way intended to avoid the prohibition is unsubstantiated and incorrect.

Board staff would have the Board (the panel in this case) stand in place of the Canada Revenue Agency, relevant legislation, and decisions of the courts in determining the legal distinction between employees and self-employed contracts. A Guide published by the Canada Revenue Agency entitled "Employee or Self-Employed?" (attached to this submission) sets out a series of questions to help determine a worker's employment status:

- The level of control the payer has over the worker;
- whether or not the worker provides the tools and equipment;
- whether the worker can subcontract the works or hire assistants;
- the degree of financial risk taken by the worker;
- the degree of responsibility for investment and management held by the worker;
- the worker's opportunity for profit; and
- any other relevant factors, such as written contracts.

Board staff makes no reference to this body of law and regulation.

The Board staff "note" that the contracted activities "appear to be of an ongoing managerial nature" is irrelevant. The Board's Practice Direction on Cost Awards does not prohibit a consultant from performing duties of such a nature. AMPCO is not seeking to recover its costs related to any such duties.

The same note by Board staff that these contracted activities "are normally carried out by an organization's employees or officers" is without substance. There is no evidence before the Board relating to what activities normally (or in any other circumstances) would be carried out by an employee or officer. Because the Board staff submission makes no reference to AMPCO's bylaws, which set out, among other things, the duties of officers, Board staff is in no position to comment on what the duties would be (normal

or otherwise) of an officer or director of AMPCO, let alone to make sweeping generalizations about corporate governance or employment contracting.

In place of the explicit and plainly worded prohibition contained in the Board Practice Direction on Cost Awards, Board staff suggests that the Board itself should invigilate the details of contractual arrangements and working relationships between consultants and parties appearing before the Board, so as to determine the “functions”, “actual duties” and *de facto* job titles of those consultants in relation to the party by whom they are retained for a case.

The submissions of Board staff would seem to suggest, based on its interpretation of the functions, actual duties and *de facto* job title of Mr. White, that it is the terms of the consulting services agreement between AITIA Analytics Inc. and AMPCO that would violate the “spirit” of the prohibition as that is interpreted by Board staff. There is no evidence before the Board to support a suggestion that these arrangements are peculiar to AMPCO. There is no evidence related to contractual arrangements among other parties and their consultants. While AMPCO is not suggesting that the Board undertake such an investigation, the submissions of Board staff rest on a presumption—entirely unsupported—that the terms of the contractual arrangements between AMPCO and AITIA Analytics Inc. are unique and without precedent.

If accepted by the Board, the submissions of Board staff would have the panel in a given case not only considering applications by parties for intervenor status, but also considering which consultants might be contracted by a party, what the particulars of a consultant’s contractual arrangements might be with that party, and specifically what activities are to be undertaken or services provided pursuant to those and other contractual arrangements for that party whether in relation to the case before the Board or not.

The submissions of Board staff would set aside the evidence before the Board, the plain meaning of the Board’s Practice Direction on Cost Awards, and would extend the Board’s authority into areas where it has neither expertise nor prior experience. AMPCO submits that such a loose and unsupported interpretation of the practice direction would have broad implications, not only introducing a significant and new element of uncertainty into the current practices of the Board but materially elevating risk and administrative burden for parties who appear before it.

The current prohibition in the Practice Direction on Cost Awards is unequivocal. The submissions of Board staff, in substantially reinterpreting that prohibition, would effectively create a new and open-ended prohibition that does not currently exist. The Board may choose to amend its Practice Direction on Cost Awards, but it is entirely inappropriate, in AMPCO's submission, to suggest that the Board should do so *post facto* on the *ad hoc* basis suggested by Board staff in this proceeding.

The Board's Decision on Cost Awards in EB-2007-0707 Phase 2(a) was based on incorrect information. That information has been corrected. The circumstances have been explained. There is no evidence of impropriety. The decision should be overturned.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

The Association of Major Power Consumers in Ontario
February 18, 2009