



EB-2009-0010

IN THE MATTER OF the *Ontario Energy Board Act 1998*,
S.O.1998, c.15, (Schedule B);

AND IN THE MATTER OF an application by Ontario
Power Generation Inc. pursuant to section 78.1 of the
Ontario Energy Board Act, 1998 for an Order or Orders
determining payment amounts for the output of certain of
its generating facilities;

AND IN THE MATTER OF Rule 42 of the of the Ontario
Energy Board's *Rules of Practice and Procedure*.

BEFORE: Gordon Kaiser
Presiding Member and Vice Chair

Cynthia Chaplin
Member

DECISION ON MOTION

Introduction

On December 2, 2008 the Association of Major Power Consumers of Ontario ("AMPCO") filed a Notice of Motion for a review and variance of the Ontario Energy Board's ("Board") Decision and Order on Cost Awards dated November 10, 2008 ("Cost

Decision”). The Cost Decision had been made in relation to the Ontario Power Generation Inc. (“OPG”) Payments proceeding, file number EB-2007-0905. The Motion seeks an Order from the Board to vary the Cost Decision with respect to the eligibility of AMPCO's costs for time spent by Mr. Adam White in the OPG proceeding.

The Board heard the motion in writing and invited submissions from AMPCO, OPG and Board staff. The Board received a submission from Board staff and a reply submission from AMPCO.

AMPCO provided the following grounds for its Motion:

1. The Board’s finding in the Cost Decision was based on an outdated curriculum vitae for Mr. White that identified him as President of AMPCO
2. Mr. White resigned as President of AMPCO, effective October 31, 2007
3. Mr. White provides consulting services to AMPCO and other clients through AITIA Analytics Inc.
4. Mr. White is neither an employee nor an officer of AMPCO, and consequently any disallowance of Mr. White's time cannot be based on Rule 6.05 of the Board’s *Practice Direction on Cost Awards*

AMPCO also provided a corrected curriculum vitae for Mr. White and a copy of the executed letter of resignation dated October 16, 2007.

Board staff acknowledged that Mr. White was no longer an employee or officer of AMPCO but questioned whether the nature of his role was that of a *de facto* president. Board staff submitted that the Board should consider the spirit and intent of the *Practice Direction on Cost Awards* and concluded that if the Board found that Mr. White was acting as a *de facto* president, then the original decision finding his time to be ineligible for cost recovery should not be overturned.

AMPCO, in its reply submission, reiterated that Mr. White was not an employee or officer of AMPCO and therefore was not ineligible under a plain reading of the Board’s *Practice Direction on Cost Awards*. AMPCO noted that it is not seeking to recover any costs related to the administrative or managerial duties which are included in the contract between Mr. White and AMPCO. AMPCO concluded that the prohibition in the *Practice Direction on Cost Awards* is unequivocal and that the submissions of Board staff represent a substantial reinterpretation of that prohibition which would effectively

create a new and open-ended prohibition. AMPCO suggested that while the Board may choose to amend its *Practice Direction on Cost Awards* it should not do so after the fact in this proceeding. AMPCO concluded as follows:

The Board's Decision on Cost Awards in EB-2007-0905 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.

Board Findings

The Board made the following findings in the OPG Cost Decision¹:

Secondly, the Board is concerned that the costs claimed by AMPCO are substantially greater than the costs claimed by other parties. The Board has considered the AMPCO submissions of August 29, 2008, but the Board finds that the contribution by AMPCO was not significantly greater than that of other intervenors. It is true that this proceeding was unique and complex. But all intervenors faced that situation. This hearing lasted 15 days. All of the major intervenors including AMPCO participated each day. However the average cost for CME, SEC and CCC is 25% below the AMPCO cost claim. These costs are ultimately borne by the electricity consumer. The Board has a responsibility to impose some cost discipline on the process.

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 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 a Board processes". As a result, the claim for Mr. White's time is not eligible for recovery.

In the circumstances, the Board will reduce the AMPCO cost claim in total by 10%, a reduction which includes the amount billed for Mr. White's time. This will still leave the AMPCO costs well above the other intervenors.

¹ The quote begins with "Secondly,..." It should be noted that in the Cost Decision, the Board expressed concerns with two cost claims: the "first" was Energy Probe's and the "second" was AMPCO's.

It is clear the Board's primary concern was with the overall magnitude of AMPCO's cost claim. The Board finds that whether or not Mr. White's time is eligible for recovery, no change should be made to the overall finding regarding the level of the cost award. The reduction to AMPCO's cost claim of 10% was based on the fact that AMPCO's claim exceeded by 25% the average of the claims by Canadian Manufacturers and Exporters, the School Energy Coalition and the Consumers Council of Canada. The Cost Decision further stated that even with a 10% reduction AMPCO's costs were "well above the other intervenors".

The Board concludes that it is not necessary to make a finding regarding the eligibility of Mr. White's time.

The Motion is denied. No costs will be awarded in this matter.

ISSUED at Toronto, March 5, 2009

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary