



EB-2009-0013

IN THE MATTER OF sections 25.30 and 25.31 of the *Electricity Act, 1998*;

AND IN THE MATTER OF an Order by the Ontario Energy Board dated November 28, 2008 which approved cost awards for eligible intervenors in an application by the Ontario Power Authority for review and approval of the Integrated Power System Plan and proposed procurement processes;

AND IN THE MATTER OF Rules 42 and 44 of the Board's Rules of Practice and Procedure.

BEFORE: Pamela Nowina
Presiding Member and Vice Chair

Ken Quesnelle
Member

David Balsillie
Member

DECISION ON MOTION

Background and Grounds for the Motion

The Association of Major Power Consumers in Ontario ("AMPCO"), the Ontario Mining Association ("OMA") and the Ontario Federation of Agriculture ("OFA") are intervenors in the Board's Integrated Power System Plan ("IPSP")

proceeding, and each is eligible for a cost award. These intervenors, along with several others, formed the Alliance of Energy Consumers¹ (“Alliance”) in order to intervene co-operatively in the IPSP proceeding, EB-2007-0707. The Alliance participated in the IPSP proceeding and filed evidence in the proceeding.

In accordance with the Board's Procedural Order No. 8, AMPCO, OMA and OFA each filed a cost claim on September 18, 2008 for the Phase 2A portion of the proceeding (from the completion of Phase 1 through September 2, 2008). They were the only members of the Alliance to do so. The total costs claimed for the three parties were approximately \$758,506.

In its cost decision, the Board made two reductions to the costs claimed by members of the Alliance. First, the Board reduced the cost claim of AMPCO by \$47,906.25 finding that the work performed by Mr. White was “clearly within the scope of Mr. White’s role as President of AMPCO and, as such, ineligible for costs”. The Board further reduced the claims of AMPCO, OMA and OFA by 25%, finding that the claims were excessive relative to the breadth of issues addressed in the evidence and with respect to the lack of co-ordination amongst its members.

AMPCO, OMA and OFA jointly filed a motion with the Board on December 22, 2008 requesting an order varying the cost awards decision. The parties jointly submitted that their claims should not have been reduced by 25% and that the cost award for AMPCO, OMA and OFA should be increased by \$104,622.14, \$58,218.91 and \$12,731.25 respectively. AMPCO also claimed that Mr. White’s time should be found eligible and that its cost award should be increased by an additional \$47,906.25.

The Board issued a Procedural Order on January 19, 2009 which provided for interrogatories and submissions. AMPCO, OMA and OFA provided their positions in the motion materials and through interrogatory responses. Board Staff filed a submission. AMPCO filed a reply submission and this dealt only with the eligibility of Mr. White’s time.

¹ The eight parties making up the Alliance of Energy Consumers are: AMPCO; Canadian Chemical Producers Association; Cement Association of Canada (Ontario); Industrial Gas Users Association; OFA; Ontario Forest Industries Association; OMA; and Ontario Stone, Sand and Gravel Association.

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

During the IPSP proceeding, GEC-Pembina-OSEA, and later AMPCO-OMA, filed motions seeking additional time to file intervenor evidence 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. In the current Motion Record, AMPCO, OMA and OFA stated that after being granted the additional time, the Alliance produced what it said it intended to produce and AMPCO further stated that no one suggested that the Alliance's work products were duplicative or beyond the scope of the IPSP proceeding.

AMPCO, OMA and OFA in the current motion asserted that in allowing more time for general preparation and for the filing of intervenor evidence, the Board was also approving the content and coordination of that evidence and all of the costs incurred to assemble the evidence. Board staff submitted that when the Board grants intervenors additional time for the preparation of evidence, this does not amount to a blanket approval for recovery of all costs that are incurred over that period of time. Board staff submitted that cost claims should be considered in accordance with the *Practice Direction on Cost Awards* (the "Practice Direction") and the fact that the Board granted the Alliance an extension of time is irrelevant to the Board's consideration of the reasonableness and recoverability of those costs.

FINDINGS:

The Board believes that it should be self-evident that the opportunity the Board provides to intervenors to participate effectively in a hearing in no way pre-approves the costs of those intervenors. To do so would be to constrain the Board's ability to consider the efficiency and quality of parties' participation.

The Denial of Costs Claimed by the Alliance

In its cost award decision the Board reduced the costs of AMPCO, OFA and OMA by 25%, finding that the costs were "excessive relative to [the] breadth of issues addressed in the evidence, and with respect to lack of co-ordination amongst its members."

AMPCO, OFA and OMA, in the Motion materials, argued that the Board's determination regarding overlap and lack of co-ordination was premature and submitted that the Board had erred in determining that the reports submitted by the Alliance overlapped. The motion also argued that the three parties had acted co-operatively. The affidavits of AMPCO, OMA and OFA describe details of this co-operative effort.

AMPCO, OFA, OMA also argued that the Board erred in applying an arbitrary method to assess and compare the efforts of the Alliance and the Green Energy Coalition-Pembina-Ontario Sustainable Energy Association. They submitted that it is not appropriate to assess the value of the Moving Parties' evidence and related cost claim simply by counting reports and issues.

The OMA stated that the Board should not have reduced its cost claim due to concerns about overlapping issues and lack of coordination amongst the Alliance members. The OMA stated that if the Board viewed Alliance evidence as duplicative, the duplication was likely with respect to the evidence put forward by AMPCO and the OFA which dealt strictly with the effect of the IPSP on the price of electricity. The OMA further stated 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.

Board staff submitted, 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. Therefore, Board staff argued, the work was duplicative.

The OFA argued that all of the reports put in evidence by the Alliance were in scope of the IPSP proceeding. Board staff disagreed.

FINDINGS:

In its cost decision the Board did not base its cost disallowance for the Alliance on the issue of scope. Therefore, we need not address this issue in the instant proceeding.

The Board in its cost decision compared the Alliance's costs with those of GEC and concluded that the Alliance's costs were excessive in relation to the breadth of the issues covered and the comparative costs of other intervenors. The Board also found the costs excessive "with respect to lack of co-ordination amongst its members."

The Board recognizes that due to the early adjournment of the hearing, it is difficult to determine if the reports developed by the Alliance overlap and are redundant in their value to the Board. Intervenor evidence has not been tested in the proceeding and the value of this evidence has not been ruled upon by the Board. Therefore the finding that costs were excessive due to lack of co-ordination may have been in error.

However, in reviewing the case, the Board sees no reason to depart from the findings that the Alliances' costs were excessive when compared to the costs of other intervenors. Ideally the Board would have the record of a complete hearing on which to base this assessment. The circumstances in this case were unusual and the Board had to use its best judgment given the information before it. The Board found that given the number of interrogatories filed, the number and size of reports put in evidence and the breadth of the issues covered, the Alliances' costs were excessive compared to the costs of other intervenors. This was a reasonable approach in the circumstances and was not in error.

For these reasons, the Board has determined that 15% of these costs should be denied rather than 25% as determined in the Board's Cost Claim Decision and Order of November 28, 2008.

The Denial of Costs Claimed for the Services of Mr. White

In its cost decision the Board denied all costs submitted by AMPCO for the services of Mr. White based on the Board's understanding of his position as an executive of AMPCO.

AMPCO seeks an increase of \$47,906.25 to its cost award to include the costs claimed for Mr. White's time. The grounds included:

- 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;
- Mr. White resigned as President of AMPCO effective October 31, 2007;
- currently, Mr. White provides consulting services to AMPCO and other clients through AITIA Analytics Inc. ("AITIA"); and
- 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.

Board staff agreed that Mr. White's contractual status with AMPCO is one of "consultant" and not one of "employee" or "officer". However, Board staff submitted that the evidence suggests that Mr. White's duties included 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 that 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 the attached Schedule A.

In addition, Board staff noted the following information provided by AMPCO:

- The contract between AITIA and AMPCO engages Mr. White to "act as President.
- Mr. White is not an officer or a director of AMPCO.

- AMPCO's Board of Directors has authority to approve work and documents issued by AMPCO subject to AMPCO Bylaw No. 1 as amended and 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 further noted that it appears that Mr. White is expected "to act as President" and is responsible for activities listed in "Schedule A" of Mr. White's motion affidavit that appear to be of an ongoing managerial nature, normally carried out by an organization's employees or officers and that he also has signing authority for AMPCO, at least under certain conditions.

Board staff submitted that 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 duties of a president (or other officer or employee). Board staff asserted that 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.

In its reply submission AMPCO stated that it is not appropriate for Board staff to attempt to ascertain the specific responsibilities of Mr. White or what duties Mr. White actually performs or whether Mr. White is carrying out duties normally performed by an employee or officer of the company. AMPCO asserted that Board staff should accept that Mr. White is a consultant and should make no further inferences about the structure or the reasons for the structure of the arrangement between AITIA and AMPCO.

FINDINGS

The Board takes note of the following section of the Practice Direction:

6.05 party will not be compensated for time spent by its employees or officers in preparing for or attending at Board processes.

One of the purposes of granting cost awards is to allow parties to retain expert consultants and/or legal counsel to assist them in participating in the Board's

processes. However, section 6.05 makes it clear that an organization will not be reimbursed for time spent by its own employees or officers.

Although Mr. White's relationship with AMPCO is through a consulting contract, it is clear that Mr. White is **acting** as the president of the organization. AMPCO has confirmed that Mr. White has signing authority for the organization for certain matters, and that AMPCO engages Mr. White to "act as president."

In response to concerns raised by Board staff regarding the nature of Mr. White's relationship with AMPCO, AMPCO in its reply submissions stated:

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.

The question before this Board, however, is a simpler one that does not require analysis of other statutes or decisions. The issue before the Board is whether AMPCO can recover its costs for Mr. White's time. A review of CRA practices is not helpful to this analysis. Given the purposes of cost awards by the OEB, we only need consider the OEB Act and the Practice Direction.

The Board's Practice Direction does not allow for parties to recover costs for functions carried out by an officer or employee. The Board believes that this prohibition is appropriate irrespective of the contractual relationship that person holds with the organization. Cost awards are designed to reimburse intervenors for their outside costs for participation in a hearing. They are not intended to fund organizations for the costs of their employees or officers. Mr. White may have billed AMPCO for his time spent working on the IPSP proceeding. Indeed, the Board assumes that it is not unusual for company employees and perhaps officers to spend many hours on regulatory proceedings that affect their organizations. This might include the preparation of evidence and testimony. The issue is not the nature of the work but rather the role of the person performing the work. The Board does not view either employee or officer work as an appropriate expense for recovery.

To be clear, the Board does not infer or suggest any wrongdoing on the part of AMPCO or Mr. White, and the contractual relations between parties are not generally the Board's concern. However, it is the Board's decision that the individual holding the role of "President" is not eligible for cost recovery, irrespective of the specific contractual underpinnings of the relationship. The materials filed by AMPCO, OMA and OFA in both the IPSP and this motion have not convinced the Board that its original decision was in error.

Therefore the Board finds that AMPCO is not eligible for an award of costs for the time spent by Mr. White in the phase 2A of the IPSP proceeding, and this portion of the motion is denied.

THE BOARD THEREFORE ORDERS THAT:

Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, the OPA shall immediately pay the additional costs to AMPCO, OMA and OFA as shown in the bottom row (***Cost Claim Differential***) in Appendix A, Revised IPSP Phase 2A Cost Claims.

DATED at Toronto March 30, 2009

ONARIO ENRGY BOARD

Original signed by

John Pickernell
Assistant Board Secretary

Appendix A
Revised IPSP Phase 2A Cost Claims
{Canadian dollars}

	AMPCO	OMA	OFA
<i>Initial Submission</i>	470,968.44	236,300.67	51,237.38
<i>Less Allowed Disbursements</i>	4,564.44	3,288.48	312.38
<i>Less Errors in Claim</i>	9.21	136.54	0.0
<i>Less A. White Denial of Claim</i>	47,906.25	0.0	0.0
<i>Initial Subtotal</i>	418,488.54	232,875.65	50,925.00
<i>25% Calculation</i>	104,622.14	58,218.91	12,731.25
<i>Second Subtotal</i>	313,866.41	174,656.74	38,193.75
<i>Plus Allowed Disbursements</i>	4,564.44	3,288.48	312.38
<i>November 28/08 Board Approved Cost Award</i>	318,430.85	177,945.22	38,506.13
Modifications as a Result of Decision on Motion			
<i>15% Calculation</i>	62,773.28	34,931.35	7,638.75
<i>Revised Second Subtotal</i>	355,715.26	197,944.30	43,286.25
<i>Plus Allowed Disbursements</i>	4,564.44	3,288.48	312.38
<i>March 30/09 Board Revised Cost Award</i>	360,279.70	201,232.78	43,598.63
<i>Cost Claim Differential</i>	41,848.85	23,287.56	5,092.50

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.