

ONTARIO ENERGY BOARD

**Motion by the Association of Major Power Consumers of Ontario (AMPCO)
for Review of Decision and Order on Cost Awards in EB-2018-0085**

AMPCO

WRITTEN SUBMISSIONS

1. On October 9, 2018 the Board issued a Decision and Order on Cost Awards (*Costs Decision*) in EB-2018-0085, being Ontario Power Generation's (OPG) motion (*OPG Motion*) to review and vary the Decision and Order on OPG's 2017-2021 Payment Amounts Application (EB-2016-0152).
2. AMPCO was an intervenor in the Payment Amounts Application, and on the *OPG Motion*, and was determined to be eligible for costs in both processes. At the conclusion of the *OPG Motion* proceeding AMPCO submitted a claim for recovery of its reasonably incurred costs of intervention on the motion. That cost claim, which totalled \$5,388.81, included a claim for recovery of 0.6 hours of legal counsel's time for "*Reviewing Decision and Order*".
3. The *Costs Decision* includes the following determination¹:

The OEB notes that cost awards will not be granted for activities after the Decision was issued. A proceeding is closed with the issuance of the Decision. This is consistent with the OEB's decision in the EB-2017-0364 proceeding. Therefore costs will be reduced by 0.6 hours for AMPCO, 1.5 hours for CME using a blended rate of \$175.60 an hour and 0.4 hours for SEC using a blended rate of \$243.69 per hour.
4. Applying the foregoing finding, the *Costs Decision* Hearing Panel reduced AMPCO's costs awarded by \$223.74.

¹ Page 3, paragraph 2.

5. AMPCO seeks; i) reconsideration by the Board of the determination to disallow AMPCO's modest and eminently reasonable costs for review of the *OPG Motion* decision; and ii) variance of the *Costs Decision* to award AMPCO its costs incurred for such review.
6. The determination by the *Costs Decision* Hearing Panel that “*cost awards will not be granted for activities after the Decision was issued*”, on the basis that “*a proceeding is closed with the issuance of a Decision*” is, in fact, inconsistent with the Board's stated policy on, and with the weight of historical practice of the Board in respect of, cost award eligibility.
7. The instances in which the Board has, and continues to, award reasonable (and usually extremely modest, in the overall context of a proceeding) costs for review by a party of a decision in a matter in which the party intervened are too numerous to list. Such awards have historically been provided without question, and with few, if any, exceptions.²
8. While the particular impacts of the *Costs Decision* on AMPCO are *de minimus*, the larger issue raised by the decision is the Hearing Panel's approach and its potential impact on the Board's cost award policy. While one Hearing Panel's finding cannot, as a matter of law, bind another Hearing Panel, the statements made by the *Costs Decision* Hearing Panel in disallowing costs incurred for review of the *OPG Motion* decision is not constrained to the specific facts of that motion, and could be construed as signaling a broader statement of, and/or shift in, Board policy.
9. AMPCO submits that, for the reasons articulated below, such a broader statement would, with respect, be erroneous, and such a shift would be inappropriate.

EB-2017-0364 Decision

10. In the *Costs Decision* the Hearing Panel cites the Board's Decision and Order on Cost Awards in EB-2017-0364. That was a recent (September 26, 2018) cost decision on a motion by Upper Canada Transmission Inc., operating as NextBridge Infrastructure,

² The decision cited by the *Costs Decision* Hearing Panel in support of the impugned findings is addressed below. We are not aware of any other exceptions to the Board's longstanding policy to award recovery of modest costs for review of a Board decisions, though we have not reviewed the several hundreds of cost claims awarded by the Board over the years to identify whether there are any other isolated exceptions.

asking that Hydro One's Lake Superior Link application be dismissed or not processed because it was incomplete. The motion was dismissed.

11. In the course of considering the cost claims filed, three of which (BLP First Nations (BLP), Batchewana First Nation (BFN) and Métis Nation of Ontario (MNO)) raised particular concerns given that they were significantly in excess of the other cost claims in the matter, the Hearing panel in that matter made the following statement³:

Generally the OEB also does not compensate for time spent conferencing among lawyers or for costs incurred after the OEB's decision is issued.

12. No authority was cited, nor any reasoning provided, by the Hearing Panel in support of this statement.
13. In fact, none of the cost disallowances in that matter were made on the basis of this statement. The Hearing Panel in that matter proceeded, based on an analysis of the time spent by the various cost claimants, to cap the hours eligible for cost recovery. Parts of the cost claims of each of BPL, BFN and MNO were disallowed on this basis, but without attribution to particular activities. The costs awarded to the School Energy Coalition in that proceeding included costs incurred for legal counsel's review of the Board's decision.⁴
14. We are not aware of any other instance in which the Board has made statements to the effect that costs for review of a decision are ineligible for recovery. Given what was actually determined in respect of costs in the EB-2017-0364 matter, we are not aware of any instance in which costs were in fact disallowed on the basis of incurrence after the Board's decision was issued.⁵

³ EB-2017-0182/0194/0364, September 26, 2018 Decision and Order on Cost Awards, page 4.

⁴ The Statements of Costs filed by the other parties that were awarded full costs did not include time reviewing the decision.

⁵ We have not reviewed the several hundreds of cost claims awarded by the Board over the years to identify whether there are any other isolated exceptions.

Appropriate Cost Award Policy

15. In fact, the Board's longstanding practice is to award cost eligible parties their reasonably incurred costs for review of Board decisions in matters in which they intervene and are eligible for cost recovery.
16. The essential test for costs recovery is set out in section 6.03 of the Board's *Practice Direction on Cost Awards*. Under that test an eligible claimant must establish that "the costs claimed were incurred directly and necessarily for the party's participation in the process" [emphasis added].
17. The implication of the Hearing Panel's finding in the instant case is that time spent on behalf of a party in reviewing and understanding the outcome of a Board process in which that party has been determined to have a legitimate interest and to have reasonably participated is not a proper aspect of that party's responsible participation in that process. As a regular participant in OEB proceedings and as representative of a membership to which it is responsible and is obliged to report, AMPCO strongly disagrees with this proposition.
18. A critical aspect of a public regulatory process is access to that process by those most directly affected. The most obvious class of persons most directly affected by a rate (or in OPG's case "payment") setting process is customers who will pay those rates. In respect of the *OPG Motion*, which challenged the effective date for new payment amounts and which would, if it had been successful, entailed hundreds of millions of dollars in additional ratepayer costs, AMPCO's members fall squarely in the class of persons most directly affected by the outcome. Indeed, that is the basis upon which AMPCO was accepted as an intervenor in, and was found to be eligible for recovery of its reasonably incurred costs for intervention in, the matter, as has also been the case on other OPG payment applications.
19. To conclude that reviewing and understanding the outcome of the process it is not a legitimate part of AMPCO's access to, and responsible participation in, the process is, with great respect, unreasonable. This is so for at least two reasons.
20. First, it is contrary to reason to conclude that having participated responsibly, it is unreasonable for AMPCO to want to understand and be in a position to inform its

constituents on the outcome of the case. The regulatory process can hardly be made accessible to AMPCO's members – OPG's ratepayers – without an understanding of its outcomes. It is pursuit of an outcome which is the entire basis for participation in the process in the first place.

21. Regulatory tribunals are expected as a matter of law and sound regulatory policy to provide reasons for decision so that interested and affected parties will understand what factors the regulator considered, and what conclusions regarding those factors the regulator drew as the basis for its determination. Absent review of the decision in a matter there would be no basis upon which a party could understand what factors were considered and what conclusions regarding those factors were drawn.
22. Further, what if a Hearing Panel mischaracterized, misunderstood, or simply misapplied a principle asserted by a legitimately interested participating party? As a matter of law that party might have a right to seek a review of the decision. Obviously reading and understanding the decision and its implications is a pre-requisite to being aware of, and then evaluating, any such right.
23. It follows inescapably that review of a decision is part and parcel of a party's privileges for, and obligations arising from, participation in a regulatory proceeding. As such, the activity of reviewing and understanding a decision should, within the boundaries of reasonable and proportional expenditure of time and cost, be eligible for cost recovery just like all other activities legitimately connected with a party's reasonable opportunity to meaningfully participate in a regulatory proceeding, which in turn renders the regulatory process accessible to such party.
24. The second reason that concluding that reviewing and understanding the outcome of the process is not a legitimate part of AMPCO's access to, and responsible participation in, the process is, with great respect, unreasonable relates to AMPCO's responsibility as a regular intervenor in the Board's OPG regulatory processes. AMPCO would hardly be acting responsibly if it did not ensure awareness of the Board's previous determinations of OPG's applications, in particular those in which AMPCO actively and recently participated. Effective and reasoned participation in a proceeding, which is the type of participation that an intervenor is obligated to engage in, requires that the intervenor make itself aware of the Board's previous determinations, and in particular those regarding an

applicant whose processes the intervenor regularly participates in. No doubt a failure on AMPCO's part to be reasonably informed of the outcome of previous OPG matters, in particular those in which it actively participated, would be grounds for criticism for inefficient and less than optimally informative and helpful intervention in subsequent proceedings addressing the same or similar subject matter. In the current instance, for example, AMPCO certainly has a right to know, and arguably an obligation to know, what principles the OEB will apply in connection with establishing an "effective date" for approved OPG payment amounts. Otherwise AMPCO will be unable to responsibly participate on the issue in future proceedings. The same applies to the myriad other issues raised in regulatory proceedings before this Board.

25. It must be noted that there is no suggestion in the impugned finding in the *Cost Decision* that it was unreasonable for AMPCO's counsel to spend, and charge AMPCO for, 0.6 hours (36 minutes) for reviewing of the outcome of the process in which AMPCO actively participated. Rather that time was simply excluded, *ab initio*, as not eligible for recovery.
26. AMPCO respectfully submits that such exclusion, *ab initio*, was contrary to both Board policy and sound regulatory policy.
27. We have also considered the principle enunciated in the Board's *Practice Direction on Cost Awards*⁶ and in past Board decisions on costs to the effect that the value provided to the Board in its deliberations is a factor to be considered in determining an award of reasonably incurred costs.
28. Clearly time spent by AMPCO's counsel reviewing the Board's decision on the *OPG Motion*, where further submissions were not offered by AMPCO, will not have provided value to the Board's deliberations on the *OPG Motion per se*. However, while we agree that the value provided to the Board's deliberations should generally be a primary consideration in assessing costs eligible for recovery, it should not be the only consideration, nor a necessary one in all circumstances.
29. The reasonable ability of cost supported intervenors to inform themselves of the ultimate decisions of the Board is a critical aspect of an accessible regulatory process, and responsible ongoing participation in that process, and independently merits cost award

⁶ Section 5.01(b).

support. Costs awarded for a reasonable amount of time reviewing the outcomes of the proceedings in which the intervenor has, and has been determined to have, a direct interest, supports accessibility to, and responsible ongoing participation in, OEB processes, even if no further submissions to the Board are proffered in the particular process following such decision review.

30. In contrast, denying reasonable and relatively modest costs for decision review would compromise the accessibility, public acceptability, and future efficiency and effectiveness of the Board's processes and their outcomes.
31. It should also be considered that the Board's cost award tariff for external legal fees has been consciously set by the Board below "market". AMPCO does not recover all of its intervention costs, even if the Board awards AMPCO recovery of 100% of its costs eligible for recovery. In the result, like many other cost eligible intervenors, AMPCO makes a significant investment of its members' own money in responsible pursuit of its OEB interventions. It is therefore not necessary for the Board to arbitrarily or unduly limit the type of activities for which AMPCO is eligible to recover costs in order to ensure that AMPCO's self-funded contribution towards its participation in OEB proceedings continues.
32. If review and understanding of the outcome of the process is a reasonable endeavor for AMPCO, in support of accessibility of AMPCO and its constituents to the Board's regulatory process, then it must be concluded that the reasonable (indeed modest) costs incurred by AMPCO in review of the Board's decision were "*incurred directly and necessarily for [AMPCO's] participation in the process*", and therefore are eligible for recovery in accord with the Board's stated policy on costs.
33. It is respectfully submitted that none of the interests of Ontario's electricity ratepayers, OPG, or the broader public would in any way be compromised by recovery by AMPCO of costs incurred for the extremely modest, and completely responsible, expenditure of time by counsel reviewing the Board's decision on the *OPG Motion*.
34. In contrast, the narrow approach to cost award considerations reflected in the cost determination in question has the potential to significantly, and inappropriately, constrain future responsible intervenor conduct and accessibility to the regulatory process, to the prejudice of both cost eligible intervenors and the Board's own processes and mandate

35. We do not believe that such a result is intended by the Hearing Panel in this instance, which is another reason that we respectfully suggest that reconsideration of the determination in question, based on the positions which AMPCO has now had an opportunity to put forward on this motion, is appropriate.

Basis for Review of the *Cost Decision*

36. The Board has authority under Rule 41.01 of its Rules of Practice and Procedure (*Rules*) to, at any time, “review all or part of any order or decision and confirm, vary, suspend or cancel the order or decision”. Such review, conducted on the Board’s own motion, does not require any party to satisfy a “threshold question” of whether the matter should be reviewed. In such an instance, the Board will have itself determined that circumstances indicate that the subject decision merits review.
37. The basis of the Board’s disallowance of a portion of AMPCO’s cost claim was not mechanical (like a calculation error) or procedural (like the lack of appropriate expenditure receipts or documentation), but rather was substantive. The Board’s disallowance was not in response to submissions by OPG (or any other party), and thus the nature of the Board’s concern could only have been discovered by AMPCO through review of the *Costs Decision* itself. In these circumstances, it is respectfully submitted that procedural fairness requires that AMPCO be provided with an opportunity to respond to the Board’s concerns regarding those aspects of AMPCO’s cost claim disallowed prior to the Board making the disallowance determination.
38. On this basis, AMPCO requests that the Board act on its own initiative under *Rule* 41.01, accord AMPCO procedural fairness in respect of disallowance of a portion of its cost claim, and review the *Costs Decision* on the merits, with the benefit of these submissions and without requiring that AMPCO satisfy a “threshold question” as a precondition to such review.
39. In the alternative, the Board may proceed to review the *Costs Decision* pursuant to *Rule* 40. *Rule* 41 requires that a motion brought under *Rule* 40 set out the grounds for the motion that raise a question as to the correctness of the order or decision in question. While *Rule* 41 proceeds to enumerate what such grounds may include, as has been previously determined by the Board (on a motion by the Industrial Gas Users Association

for review of a cost disallowance on analogous, though not identical, grounds to the review requested by AMPCO herein)⁷:

- (a) The Board has broad discretion under the *Ontario Energy Board Act, 1998* in awarding costs, including broad discretion to determine when it will review a costs decision.
- (b) The four delineated grounds for review under *Rule 42.01* are not exhaustive, and the OEB may, where it chooses to do so, review a decision even if it is not persuaded that the grounds claimed fall squarely within the four enumerated grounds set out in *Rule 42.01*.

40. We submit that sufficient grounds have been raised by AMPCO in these submissions to warrant review by the Board of the *Cost Decision*. In summary:

- (a) Contrary to the stated basis for the Hearing Panel's disallowance of the costs in question, the impugned findings by the Hearing Panel in the *Cost Decision* would in fact constitute a departure from longstanding Board policy on cost eligibility.
- (b) In concluding otherwise, the Hearing Panel erred.
- (c) AMPCO had no notice of the Board's concerns, which in fact depart from long-standing Board policy, and unless it is able to proceed with the instant motion will have had no opportunity to respond to those concerns.
- (d) Such a policy change would constrain the ability of legitimately interested parties to effectively participate in OEB proceedings on an ongoing basis, contrary to principles of effective and accessible regulation and thus contrary to the public interest.
- (e) OEB intervenors not party to the *OPG Motion* and who rely on cost eligibility for full and effective participation in Board proceedings have not been given notice of the departure from long-standing Board policy taken in the *Cost Decision*. We have submitted that modest amounts of time spent on behalf of intervenors reviewing Board decisions is time reasonably spent by intervenors in responsible participation in Board proceedings, and should continue (as has been the case in the past) to be eligible for cost recovery. This principle affects every cost eligible intervenor, and should not be abandoned by the Board through a decision made in the absence of the ability of those other directly affected, and potentially prejudiced, parties to be heard.

⁷ EB-2016-0248, Decision and Order, October 20, 2016.

Conclusion and Relief Requested

41. For the foregoing reasons, we respectfully request that the Board amend its *Cost Decision* and allow recovery by AMPCO of a further 0.6 hours of counsel's time for review of the *OPG Motion* decision, plus HST applicable thereon.
42. As evidenced by the extent of AMPCO's efforts in responding to the Board's disallowance of a very small portion of AMPCO's *OPG Motion* cost claim, the principle in issue on this motion is an important one to AMPCO. AMPCO also believes that the principle in issue is important for other cost reliant intervenors and for the continued integrity of the OEB's processes and the acceptability of the outcomes of those processes.
43. AMPCO is not seeking recovery of its reasonably incurred costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED by:



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