

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

Supplementary WRITTEN SUBMISSIONS

Introduction

1. On October 25th AMPCO filed a Notice of Motion and Written Submissions seeking review by the Board of its *Decision and Order on Cost Awards (Costs Decision)* in EB-2018-0085, (*OPG Motion*), and variance of the *Costs Decision* to award AMPCO additional costs incurred for 0.6 hours of time spent by legal counsel in reviewing the Board's decision and order on the *OPG Motion*, which costs (totalling \$223.74, inclusive of HST) were disallowed in the *Costs Decision*.
2. The grounds for AMPCO's motion are set out in the Notice of Motion and full argument in support of the motion is set out in AMPCO's previously filed Written Submissions in support of its motion.
3. The Canadian Manufacturers and Exporters (CME) and the School Energy Coalition (SEC), both of whom similarly had modest costs incurred for time spent by counsel reviewing the *OPG Motion* decision denied, have filed letters in support of AMPCO's motion.
4. In Procedural Order No. 1 issued herein the Board has indicated that it will proceed to consider the merits of the motion, and that AMPCO could file additional material in support of the motion and relating to its merits.
5. AMPCO repeats and relies on the grounds for its motion as set out in the Notice of Motion, and the arguments in support of the relief sought as articulated in its previously filed

Written Submissions. In addition, AMPCO provides these brief Supplementary Written Submissions.

The Issue

6. No concern was expressed in the *Costs Decision* regarding the appropriateness of the time (0.6 hours) spent by AMPCO's counsel in reviewing the *OPG Motion* decision. The sole basis identified by the Hearing Panel for denial of costs for this modest amount of time was a generic (rather than case specific) finding that "... *cost awards will not be granted for activities after the Decision was issued*".
7. ***The sole issue raised on this motion is whether time spent reviewing a Board decision is eligible for cost recovery.***

EB-2017-0364 Decision

8. AMPCO's previously filed Written Submissions address¹ the *Costs Decision* Hearing Panel's citation of the Board's *Decision and Order on Cost Awards* in EB-2017-0364. In support of its decision not to award AMPCO's reasonably incurred costs for counsel's review of the *OPG Motion* decision, the *Costs Decision* Hearing Panel cited the Board's EB-2017-0364 costs decision as follows:

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

9. As we have previously noted, the Board in that instance did in fact award costs for review of the subject decision. Read in this context, it is not self-evident that the intention reflected in the extracted passage is that time spent in reviewing and reporting on a decision (as distinct from time spent thereafter on activities perhaps arising from a decision) should be ineligible for an award of costs. The extracted statement is equally consistent with the notion that activities beyond the final steps of reviewing and reporting on the outcome of

¹ Paragraphs 10-14.

a particular regulatory proceeding are not eligible for an award of costs in respect of the particular proceeding.

10. This latter conclusion is also much more consistent with the legal principles supporting the importance to an affected party of receipt and review of reasons for a regulatory outcome.

The Important Role of Reasons for Decision

11. We have argued in AMPCO's previously filed Written Submissions that the regulatory process can hardly be accessible to AMPCO's members without an understanding of its outcomes. 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.
12. A seminal judicial statement in support of this position comes from the Supreme Court of Canada in *Baker v Canada*² [emphasis added]:

Courts and commentators have, however, often emphasized the usefulness of reasons in ensuring fair and transparent decision-making. Though Northwestern Utilities dealt with a statutory obligation to give reasons, Estey J. held as follows, at p. 706, referring to the desirability of a common law reasons requirement:

This obligation is a salutary one. It reduces to a considerable degree the chances of arbitrary or capricious decisions, reinforces public confidence in the judgment and fairness of administrative tribunals, and affords parties to administrative proceedings an opportunity to assess the question of appeal....

The importance of reasons was recently reemphasized by this Court in R. v. Campbell, [1997] 3 S.C.R. 3 (S.C.C.) at pp. 109-10.

Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review: R.A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 C.J.A.L.P. 123, at p. 146; Williams v. Canada (Minister of Citizenship & Immigration), [1997] 2 F.C. 646 (Fed. C.A.) at para. 38. Those affected may be more likely to feel they were treated fairly and appropriately if reasons are given: de Smith, Woolf, & Jowell, Judicial Review of Administrative Action (5th ed. 1995), at pp. 459-60. I agree that these are significant benefits of written reasons.

² 1999 SCC 699 at paras 38-44.

...

*In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance of an H&C decision to those affected, as with those at issue in *Orlowski, R. v. Civil Service Appeal Board*, and *R. v. Secretary of State for the Home Department*, militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.*

13. While AMPCO's members' freedoms and livelihoods are not being directly determined by this Board, the affordability and reliability of their electricity services certainly is. The principles enunciated by the Supreme Court of Canada in *Baker v Canada* which underscore the importance to those directly affected by a regulatory decision of being able to see that the applicable issues have been carefully considered and that their interests have been fairly considered should apply in this context. Sound regulatory practice, and the Board's own historical practice, of providing fully articulated reasons for decision recognizes and applies those principles.
14. The Board's cost awards policy, as reflected in hundreds of costs decisions and articulated through the Board's *Practice Direction on Cost Awards*, recognizes that cost eligible parties are eligible for recovery of their reasonable costs "*incurred directly and necessarily for the party's participation in [a Board] process*".
15. Being provided with reasons for decision is of no use if those reasons are not read and understood. Reading and understanding those reasons is part and parcel a party's participation in a Board process.
16. AMPCO's costs for counsel's 0.6 hours of time spent in reviewing the Board's reasons for decision on the *OPG Motion* and thus enabling reporting to AMPCO on that decision were costs "*incurred directly and necessarily for the party's participation in [a Board] process*".
17. The denial of eligibility for recovery of these costs would, if it stands, represent a reversal of the Board's longstanding practice, a practice which is appropriate both as a matter of law and as a matter of sound regulatory practice.

Conclusion

18. AMPCO requests that the Board consider these Supplementary Written Submissions in conjunction with its Notice of Motion and Written Submissions herein, and allow this motion and vary the *Costs Decision* to allow AMPCO recovery of costs incurred for 0.6 hours of time spent by counsel in reviewing the Board's decision and order on the *OPG Motion*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED by:



GOWLING WLG (CANADA) LLP, per:
Ian A. Mondrow
Counsel to AMPCO

February 25, 2019

TOR_LAW\9814880\1