

DECISION ON MOTION TO REVIEW

EB-2018-0304

Association of Major Power Consumers of Ontario

**Motion to Review Decision and Order on Cost Awards in EB-2018-
0085**

BEFORE: **Cathy Spoel**
 Presiding Member

April 4, 2019

1 INTRODUCTION

On January 17, 2018, Ontario Power Generation (OPG) filed a motion to review portions of the Ontario Energy Board's (OEB)'s decision in its 2015-2020 payment amounts case. The Association of Major Power Consumers of Ontario (AMPCO) and several other parties intervened in the motion proceeding and were granted eligibility for an award of costs. The OEB ultimately dismissed the OPG motion, and AMPCO and the other cost eligible intervenors filed cost claims in accordance with the OEB's procedural direction.

AMPCO and two other intervenors included in their cost claims time spent reviewing the OEB's decision and reporting to their clients. In its Decision and Order on Cost Awards¹ issued October 9, 2018, the OEB disallowed this portion of the claimed costs. The OEB noted that, consistent with a previous decision², it would not grant cost awards for time spent after the issuance of a Decision. The OEB disallowed 0.6 hours of AMPCO's claimed costs by \$223.74 (inclusive of HST). AMPCO's other costs were approved, and it was awarded \$5,165.07.

¹ EB-2018-0085

² EB-2017-0364

2 PROCESS

On October 25, 2018, AMPCO filed a motion to review the costs decision (the Costs Decision). AMPCO argued that:

- there is no basis in the OEB's *Practice Direction on Cost Awards* (the Practice Direction) for an automatic disallowance of costs incurred after the issuance of a decision
- there are hundreds of precedents for cases before the OEB where the OEB has awarded costs for reviewing and reporting on decisions, and parties therefore have a reasonable expectation of recovery
- AMPCO had no notice or opportunity to comment regarding the OEB's intention to change its longstanding policy and practice with respect to cost awards, and the decision is therefore procedurally unfair.

On February 13, 2019, the OEB issued combined Notice of Hearing and Procedural Order No. 1, which set out dates for AMPCO, OPG, intervenors and OEB staff to file written submissions on the merits of the motion filed by AMPCO. Submissions were received from AMPCO and OEB staff. OEB staff argued that the costs are a discretionary remedy, and that since the Costs Decision was not unreasonable it should not be overturned.

3 FINDINGS

Although costs are discretionary, the OEB has set out its expectations with respect to cost eligible activities through the Practice Direction and through various decisions. The OEB agrees with AMPCO that the OEB has never clearly articulated a policy under which costs incurred after the issuance of the decision are not eligible for recovery. The Practice Direction does not mention any such restrictions. Indeed the OEB has approved recovery for post decision incurred costs on many occasions, usually without comment. The statement in the Costs Decision: “cost awards will not be granted for activities after the decision was issued” does not reflect the policy and practice of the OEB.

There would have been no reason for AMPCO to expect that there was anything unusual or controversial about its request for 0.6 hours of costs to review the decision. OPG did not challenge the cost claim.

The OEB finds that it is reasonable for participants to claim costs for a modest amount of time for reading the decision. In addition to reporting to their clients, reading the decision allows parties to consider whether a motion to review or appeal might be necessary and to receive further procedural instruction (for example with respect to the review of a draft rate order, or the filing of cost claims).

Under the circumstances, this panel finds that the Costs Decision improperly reduced AMPCO’s cost claim by 0.6 hours. Given the small amount of money involved, however, the OEB will not require an actual change to the order or any additional payment to AMPCO.

This decision should not be taken to mean that the OEB is required to grant costs for post decision activities. Awarding costs remains a discretionary remedy, and the OEB will consider each case on its own merits. The OEB is of course also free to amend its Practice Directions. There could be any number of cases where there are good reasons to deny costs for post decision activities, and generally it would be the OEB’s expectation that these costs be very small in any event.

DATED at Toronto April 4, 2019

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary