



March 2, 2022

Ms. Nancy Marconi  
Registrar  
Ontario Energy Board  
27th Floor - 2300 Yonge Street  
Toronto, Ontario M4P 1E4

*Submitted via RESS and email*

Dear Ms. Marconi,

**Re: EB-2020-0290 - AMPCO/CCC Response to OPG Cost Claim Objection**

On February 24, 2022 OPG filed with the OEB an objection to the cost claims that were filed by certain intervenors, including the Association of Major Power Consumers in Ontario (AMPCO) AMPCO and Consumers Council of Canada (CCC). OPG contends that neither AMPCO nor CCC contributed sufficiently to the Board's adjudication of the D20 Project in the above referenced proceeding to merit recovering their requested amount of costs. AMPCO and CCC disagree.

This response will provide information supporting AMPCO and CCC's participation in the hearing and argument phase of the proceeding in the area of OPG's D20 Project and will set out why OPG's objection should be set aside and the full cost claim amounts should be awarded to AMPCO and CCC.

**A. Total Intervention Costs in EB-2020-0290**

Intervenor costs were much lower in this Application than they were in EB-2016-0152, (almost \$1M<sup>1</sup> compared to \$2.98M<sup>2</sup>) due primarily to Intervenor and OPG reaching a comprehensive settlement agreement. The fact that parties were able to settle so many issues is something to be celebrated. To penalize AMPCO/CCC for its approach on one of the very few areas that were not settled appears highly unusual, particularly when the total claimed intervenor costs of \$1M are so much less than the \$4.4M<sup>3</sup> that was forecast by OPG.

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<sup>1</sup> OPG Cost Objection Letter February 24, 2022 p1

<sup>2</sup> Exhibit L F3-01-SEC-136 (attached)

<sup>3</sup> Ibid

## B. AMPCO/CCC Joint Intervention Activities

AMPCO and CCC purposely joined together their intervention in the areas of SMR and the D2O Project (the two issues that proceeded to oral hearing) specifically to reduce costs. The two parties shared consultant and counsel and divided areas of responsibility (along with other intervenors) with the objective of avoiding duplication. OPG's specific objection to the two parties that took extra steps to be mindful of expenses seems highly unusual and, in AMPCO/CCC's respectful submission, unwarranted.

## C. OPG's Specific Areas of Objection in its Letter

OPG highlights a number of specific areas in its letter setting out the various components of its objections:

### ARGUMENT PHASE

- *“AMPCO/CCC’s Arguments on the D2O Storage Project Lacked Evidentiary Foundation and Did Not Contribute to the Resolution of the D2O Storage Project Issue”* - Reading OPG's letter, one would believe that AMPCO/CCC's sole area of focus regarding the D2O Storage Project was the issue of overbuild and the design alternatives that existed that were not pursued. While AMPCO/CCC did in fact probe in this area, it was only one of many areas of the project that required consideration. This will be further discussed in Sections C, D and E below.

In the area of overbuild, OPG suggests in its letter that AMPCO/CCC were somehow ignoring applicable law and CNSC regulations in the advancement of its argument that the facility was overdesigned. This is untrue. AMPCO/CCC's assertion was that multiple design decisions were taken, the sum of which contributed to the massive overspend. AMPCO/CCC highlighted a number of specific areas of the chosen design where cheaper alternatives existed that were still fully compliant with all laws and regulations - alternatives that AMPCO/CCC believes that OPG inadequately considered before discarding. While AMPCO/CCC accepts that the Board did not find its argument in this area to be sufficient, at page 46 of the Board's Decision and Order (the “Decision”), the Board agreed that OPG's assessment of design alternatives was not robust.

*“The OEB finds that the completed design and build of the final D2O facility was fit for purpose despite the inaccurate cost estimates and OPG's imprudent project management. **While OPG's assessment of alternatives was not robust**, alternatives were considered and included in all business case summaries. There is insufficient evidence that a different configuration or scope would have been a more prudent decision.”[emphasis added]*

Additionally, OPG implies that the entire evidentiary record supports its choice of design for D2O.

*“This claim was directly contradicted by the evidence on the record, and AMPCO/CCC provided no evidentiary support for their argument.”*

AMPCO/CCC disagrees; as advanced in its evidence, OPG stored heavy water from Unit 2 during its refurbishment outage without using the D2O facility as it was not completed in time to be used. AMPCO/CCC believes that pointing out potential design alternatives regarding storage options was indeed rooted in OPG’s evidence and certainly not an inappropriate use of time as suggested by OPG. AMPCO/CCC should not be penalized for putting forward this point of view, particularly because the Board found that OPG’s assessment of alternatives was not robust, as set out above.

- *“AMPCO/CCC’s Submissions Were Duplicative and Inappropriately Focused”* - the fact that multiple intervenors advanced the same approach in argument regarding the calculation of the quantum of disallowance to be considered<sup>4</sup> should not be grounds for disallowance of one particular intervenor’s cost claim. The disallowance approach that OPG refers to was indeed referenced by multiple intervenors; this should not be surprising, since this is the approach that was employed by the Board in OPG’s previous payment amounts Application (EB-2016-0152) in regards to other OPG projects that were similarly mismanaged (AHS and OSB Projects). Further, exactly how OPG determined which intervenor to attempt to penalize in EB-2020-0290 is unclear. In AMPCO/CCC’s submission, multiple advancements of a treatment previously ordered by the Board by multiple intervenors demonstrates consistency of approach and should not be considered appropriate grounds for penalization of any one particular intervenor.
- OPG states in its letter *“They [AMPCO/CCC] relied on the same citations and quotes from the reports OPG commissioned from Modus Strategic Solutions Canada and Burns & McDonnell Canada and those from the Ontario Auditor General’s Report”*. In its Decision, the OEB indicates it has benefitted from independent third-party reports, filed as evidence, and each OEB finding is supported by quotes from the Modus / Burns Quarter 2, 2014 Report to OPG’s Board of Directors. It would have been unusual for AMPCO/CCC to not reference the same citations as others in seeking a disallowance on the D2O project, given their relevance. Referencing these third-party reports which the OEB relied upon

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<sup>4</sup> “Ultimately, AMPCO/CCC made the same recommendation to use the formulaic disallowance previously applied in EB-2016-0152 that many other intervenors advanced, which the OEB rejected.” – OPG Objection Letter

should not be grounds for disallowance of any one particular intervenor's cost claim.

## DISCOVERY PHASE

- According to OPG, *“AMPCO’s discovery questions lacked proportionality and relevance, and sought minutiae that were not useful in assessing the prudence of a \$500M project spanning 10 years. Among the items AMPCO requested were:*
  - *Specific information on the identity, training and experience of individual project managers. (Ex. L-D2-02-AMPCO-089(c)). When OPG refused to provide this information, AMPCO filed a motion to obtain it, which the OEB denied.*
  - *Meeting Notices (Ex. L-D2-02-AMPCO-097).*
  - *Complete information on two cancelled RFPs that had no relation to the costs that OPG was seeking to recover (Ex. L-D2-02-AMPCO-100 and 101). When OPG declined to produce this information, AMPCO filed a motion to obtain it. This motion also was denied by the OEB.”*

Through the discovery process, AMPCO reviewed the evidence of the D20 project in detail and filed numerous interrogatories, in an effort to contribute to a better understanding by the Board of the D20 project. While project management deficiencies were documented, AMPCO sought more detailed information on project management specifically related to the D20 project to try to quantify the degree of project management deficiencies over time. AMPCO dropped its request for project manager identity at the Motions Day Hearing and AMPCO did not request information on training as indicated by OPG. AMPCO sought more information on meeting minutes and the procurement process in an attempt to address the information asymmetry between OPG and the parties on the details of the D20 project that led to scope changes and contractor selection.

The Board did not deny AMPCO's motion on the basis of relevance. In fact, inadequate project management contributed to the excessive project cost and the schedule extensions, and was one of the five reasons the Board relied on to determine the costs incurred do not support a conclusion of prudence. In the Motion Decision, the Board found the information filed by OPG, including the Auditor General Report which was provided in an AMPCO interrogatory, in addition to any information provided through cross-examination with respect to these documents, to be sufficient for the OEB to assess prudence of expenditures. AMPCO should not be penalized for seeking further project management details, above and beyond these third-party reports, even if its Motion was denied by the OEB. This is particularly true, in AMPCO's respectful submission, when despite the reports of third parties, including the Auditor

General, OPG maintained throughout the application that there should be no disallowance whatsoever.<sup>5</sup>

Finally, in the above excerpt for its letter, OPG uses the fact that the project cost \$500M and took 10 years to complete as a justification for why certain intervenor questions seemed unnecessary and irrelevant. In AMPCO's submission, the escalation of costs from the initial \$110M estimate to the final total cost of \$587M, the ongoing delays in the execution of the project to the point where OPG had to proceed with the Unit 2 Refurbishment with no incremental storage capacity, the departure of the VP of Projects & Modifications in charge of the D20 project in part as a result of mismanagement of the project, are all reasons why the OEB and interested parties were compelled to carefully review OPG's handling of the project over the last 10 years; they are not reasons to treat approval of the D20 Project costs as a mere formality.

- OPG submits that in large measure this joint effort does not meet the requirements for a cost award under the OEB's Practice Direction on Costs Awards, Section 5.01 because their efforts on this issue did not constitute responsible participation in this proceeding and did not contribute to the OEB's resolution of this issue.

Section 5.01 reads as follows:

*In determining the amount of a cost award to a party, the Board may consider, amongst other things, whether the party has demonstrated through its participation and documented in its cost claim that it has:*

- (a) participated responsibly in the process;*
- (b) contributed to a better understanding by the Board of one or more of the issues in the process;*
- (c) complied with the Board's orders, rules, codes, guidelines, filing requirements and section 3.03.1 of this Practice Direction with respect to frequent intervenors, and any directions of the Board;*
- (d) made reasonable efforts to combine its intervention with that of one or more similarly interested parties, and to co-operate with all other parties;*
- (e) made reasonable efforts to ensure that its participation in the process, including its evidence, interrogatories and cross-examination, was not unduly repetitive and was focused on relevant and material issues;*
- (f) engaged in any conduct that tended to lengthen the process unnecessarily;*  
*or*
- (g) engaged in any conduct which the Board considers inappropriate or irresponsible*

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<sup>5</sup> OPG AIC August 17, 2021 p7 lines 20-21

AMPCO/CCC respectfully submits that they participated responsibly in the process meeting all of the requirements of Section 5.01, including taking extra efforts to combine cross examination and argument, thereby reducing costs and duplication.

Three other intervenors referenced AMPCO/CCC's argument in the area of D2O project and supported it; in AMPCO/CCC's respectful submission this is indicative of further cooperation and efficiency, as AMPCO/CCC carried certain aspects of the issue so that others did not have to:

- LPMA - at page 4
- VECC - at page 6
- SEC - at page 37

#### **D. AMPCO/CCC Main Recommendations set out in its Argument**

At page 11 of its Argument, AMPCO/CCC advanced the following three recommendations in regards to OPG's D2O Project:

- a) permanently disallow \$200M of the requested \$509M in spending, with the result that OPG will only be allowed to recover a revenue requirement in payment amounts associated with \$294.7M in capital spending over the test period taking into account amounts previously included in rate base;
- b) reject OPG's request to treat any of the spending as having been in rate base since 2016, instead treating the allowed costs as all having been added to rate base effective 2020;
- c) require that the issue of the recoverability in payment amounts of the revenue requirement associated with the portion of allowed rate base additions properly allocated to "DRP-related" storage be addressed in the first cost of service application filed by OPG subsequent to the completion of the DRP in order to ensure that that portion of rate base is funded by the appropriate source, i.e. if the storage becomes used in conjunction with the decommissioning of Pickering then the costs of that storage should be recovered from the Decommissioning Fund.

In its Decision, the OEB made the following determinations:

- The Board approved a permanent disallowance, consistent with AMPCO/CCC Recommendation a) above.
- The Board approved a penalty on carrying costs, consistent with AMPCO/CCC Recommendation b) above.
- The Board indicated that OPG should be prepared to explain its proposed heavy water management plan and provide the costs of heavy water storage associated

with decommissioned units as embedded in its ONFA estimates at the time of OPG's next payment amounts application, compared to other available options. While this is not identical to AMPCO/CCC's Recommendation c) above, it supports the need for vigilance in this area as requested by AMPCO/CCC.

In AMPCO/CCC's submission, its main recommendations made in argument are completely consistent with, and reflective of, the direction ultimately taken by the OEB in its Decision.

#### **E. Main Issues in Determining the D2O Project Disallowance from the Decision**

The following list of five issues can be found at pages 37 and 38 of the Decision. These issues are stated by the Board as being "*suggestive of mismanagement and imprudence on OPG's part...*"

- *Project Funding was Prematurely Approved (N/A)*
- *EPC Contract Terms were not Understood (see AMPCO/CCC page 21)*
- *P&M Group Lacked Adequate Training and Experience (see AMPCO/CCC page 23/24)*
- *Risk Management was Inadequate (N/A)*
- *Inaccurate and Insufficient Reporting (see AMPCO/CCC page 37)*

According to the Board's Decision (pages 28-29 and footnotes 114 - 123) AMPCO/CCC's argument touched on three of these five key areas in determining the disallowance (the second, third and fifth bullets above), thereby demonstrating that AMPCO/CCC pursued areas of the D2O project that the Board relied upon in its Decision.

#### **F. The Bates White Report**

The OEB references five main arguments advanced against the Bates White Report:

- *The Bates White Report does not provide any opinion on prudence, which is what the OEB must assess in the current proceeding. (see AMPCO/CCC pg 46)*
- *The Bates White Report does not provide any assistance to the OEB with respect to whether the design of the D2O Project was the appropriate alternative to pursue. (see AMPCO/CCC pg 46)*
- *Bates White's failure to shield itself from the knowledge of OPG's growing cost estimates was a methodological flaw that calls into question the conclusions of the report. (see AMPCO/CCC pg 46-47)*
- *The Bates White Report is based on questionable assumptions. (AMPCO/CCC supported SEC's submission)*
- *The Bates White Report has other serious problems. (AMPCO/CCC supported SEC's submission)*

According to the Decision at page 40:

**“With respect to the Bates White Report, the OEB finds that this report offers little substantive or probative value in assisting the OEB in determining whether OPG’s actual costs for the D2O Project were prudent. The OEB is of the view that the Bates White Report was an ineffectual statistical and tautological exercise to prove a known fact: that OPG spent \$510 million to build what was the final design and scope of the D2O Project. Stated differently, the Bates White Report is based on a model that is better characterized as a self-fulfilling prophecy.** The model used assumptions and actual known costs incurred by OPG as inputs to derive a range of cost outputs with a most probable project cost estimate of just over \$510 million. Because the authors had access to all the cost information provided by OPG, the OEB cannot regard the report as an independent analysis of the true costs of the D2O Project.” [emphasis added]

Clearly, the Board saw little value in this report. The determination of three of the five main problem areas highlighted in the Board’s Decision were contributed to by AMPCO/CCC, with the other two having been advanced by SEC and supported by AMPCO/CCC, further evidence of cooperation amongst intervenors.

For all the foregoing reasons, AMPCO/CCC respectfully requests that OPG’s objection be set aside and that the full cost claim amounts requested be awarded to both AMPCO and CCC.

All of which is respectfully submitted.

Best Regards,

A handwritten signature in blue ink, appearing to read 'Colin Anderson', with a stylized flourish at the end.

Colin Anderson  
President



**SEC Interrogatory #136**

**Interrogatory**

**Reference:** F3-1-3

Please provide a breakdown of forecast/actual costs related to this application regardless of the year they are incurred. Please provide a similar breakdown of costs for the EB-2016-0152 application.

**Response**

Please refer to Chart 1 below for a breakdown of forecast/actual costs related to EB-2020-0290 and EB-2016-0152.

**Chart 1**

<b>Regulatory Affairs Application Costs (\$K)</b>			
<b>Line No.</b>	<b>Group</b>	<b>EB-2020-0290</b>	<b>EB-2016-0152</b>
1	Expert Witnesses/Consultants	8,850.2	4,124.6
2	Intervenor cost awards	4,430.0	2,980.8
3	External Legal Costs	2,736.2	2,478.5
4	<b>Total Application Costs</b>	<b>16,016.4</b>	<b>9,583.9</b>