

**IN THE MATTER OF** the *Electricity Act*, 1998, s.33;

**AND IN THE MATTER OF** the *Ontario Energy Board Act* 1998, Schedule B to the *Energy Competition Act*, 1998, S.O. 1998, c.15;

**AND IN THE MATTER OF** an Application made collectively by entities that have renewable energy supply procurement contracts with the Ontario Power Authority in respect of wind generation facilities for an Order revoking certain amendments to the market rules and referring the amendments back to the Independent Electricity System Operator for further consideration.

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**COMPENDIUM OF THE SCHOOL ENERGY COALITION**  
**(Applicant's Motion for Production of Certain Materials from the IESO)**

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**February 11, 2013**

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**Ontario Energy Board Act, 1998, SO 1998, c 15, Sch B**

**Board's powers, miscellaneous**

**21. (1)** The Board may at any time on its own motion and without a hearing give directions or require the preparation of evidence incidental to the exercise of the powers conferred upon the Board by this or any other Act. 1998, c. 15, Sched. B, s. 21 (1).

**Electricity Act, 1998, SO 1998, c 15, Sch A**

**PART I  
GENERAL**

**Purposes**

- 1.** The purposes of this Act are,
- (a) to ensure the adequacy, safety, sustainability and reliability of electricity supply in Ontario through responsible planning and management of electricity resources, supply and demand;
  - (b) to encourage electricity conservation and the efficient use of electricity in a manner consistent with the policies of the Government of Ontario;
  - (c) to facilitate load management in a manner consistent with the policies of the Government of Ontario;
  - (d) to promote the use of cleaner energy sources and technologies, including alternative energy sources and renewable energy sources, in a manner consistent with the policies of the Government of Ontario;
  - (e) to provide generators, retailers and consumers with non-discriminatory access to transmission and distribution systems in Ontario;
  - (f) to protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service;
  - (g) to promote economic efficiency and sustainability in the generation, transmission, distribution and sale of electricity;
  - (h) to ensure that Ontario Hydro's debt is repaid in a prudent manner and that the burden of debt repayment is fairly distributed;
  - (i) to facilitate the maintenance of a financially viable electricity industry; and
  - (j) to protect corridor land so that it remains available for uses that benefit the public, while recognizing the primacy of transmission uses. 2004, c. 23, Sched. A, s. 1.

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**PART II  
INDEPENDENT ELECTRICITY SYSTEM OPERATOR**

**Independent Electricity System Operator**

**4. (1)** The Independent Electricity Market Operator is continued as a corporation without share capital under the name Independent Electricity System Operator in English and Société indépendante d'exploitation du réseau d'électricité in French. 2004, c. 23, Sched. A, s. 4 (1).

### **Composition**

(2) The IESO is composed of those persons who, from time to time, comprise its board of directors. 1998, c. 15, Sched. A, s. 4 (2); 2004, c. 23, Sched. A, s. 4 (2).

### **Objects and character**

5. (1) The objects of the IESO are,

- (a) to exercise the powers and perform the duties assigned to the IESO under this Act, the market rules and its licence;
- (b) to enter into agreements with transmitters giving the IESO authority to direct the operation of their transmission systems;
- (c) to direct the operation and maintain the reliability of the IESO-controlled grid to promote the purposes of this Act;
- (d) to participate in the development by any standards authority of standards and criteria relating to the reliability of transmission systems;
- (e) to work with the responsible authorities outside Ontario to co-ordinate the IESO's activities with their activities;
- (f) to collect and provide to the OPA and the public information relating to the current and short-term electricity needs of Ontario and the adequacy and reliability of the integrated power system to meet those needs; and
- (g) to operate the IESO-administered markets to promote the purposes of this Act. 2004, c. 23, Sched. A, s. 5 (1).

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## **MARKET RULES**

### **Market rules**

32. (1) The IESO may make rules,

- (a) governing the IESO-controlled grid;
- (b) establishing and governing markets related to electricity and ancillary services; and
- (c) establishing and enforcing standards and criteria relating to the reliability of electricity service or the IESO-controlled grid, including standards and criteria relating to electricity supply generated from sources connected to a distribution system that alone or in aggregate could impact the reliability of electricity service or the IESO-controlled grid. 1998, c. 15, Sched. A, s. 32 (1); 2004, c. 23, Sched. A, s. 41 (1, 2); 2009, c. 12, Sched. B, s. 11 (1).

### **Examples**

(2) Without limiting the generality of subsection (1), the market rules may include provisions,

- (a) governing the making and publication of market rules;
- (b) governing the conveying of electricity into, through or out of the IESO-controlled grid and the provision of ancillary services;
- (c) governing standards and procedures to be observed in system emergencies;
- (d) authorizing and governing the giving of directions by the IESO, including,

- (i) for the purpose of maintaining the reliability of electricity service or the IESO-controlled grid, directions requiring persons, including persons providing electricity supply generated from sources connected to a distribution system, within such time as may be specified in the direction, to synchronize, desynchronize, increase, decrease or maintain electrical output, to take such other action as may be specified in the direction or to refrain from such action as may be specified in the direction, and
  - (ii) other directions requiring market participants, within such time as may be specified in the direction, to take such action or refrain from such action as may be specified in the direction, including action related to a system emergency; and
- (e) authorizing and governing the making of orders by the IESO, including orders,
- (i) imposing financial penalties on market participants,
  - (ii) authorizing a person to participate in the IESO-administered markets or to cause or permit electricity to be conveyed into, through or out of the IESO-controlled grid, or
  - (iii) terminating, suspending or restricting a person's rights to participate in the IESO-administered markets or to cause or permit electricity to be conveyed into, through or out of the IESO-controlled grid. 1998, c. 15, Sched. A, s. 32 (2); 2004, c. 23, Sched. A, s. 41 (2-6); 2009, c. 12, Sched. B, s. 11 (2).

**General or particular**

- (3) A market rule may be general or particular in its application. 1998, c. 15, Sched. A, s. 32 (3).

**Legislation Act, 2006, Part III**

- (4) Part III (Regulations) of the *Legislation Act, 2006* does not apply to the market rules or to any directions or orders made under the market rules. 1998, c. 15, Sched. A, s. 32 (4); 2006, c. 21, Sched. F, s. 136 (1).

**Publication and inspection of market rules**

- (5) The IESO shall publish the market rules in accordance with the market rules and shall make the market rules available for public inspection during normal business hours at the offices of the IESO. 1998, c. 15, Sched. A, s. 32 (5); 2004, c. 23, Sched. A, s. 41 (7).

**Notice to Board**

- (6) The IESO shall not make a rule under this section unless it first gives the Board an assessment of the impact of the rule on the interests of consumers with respect to prices and the reliability and quality of electricity service. 2004, c. 23, Sched. A, s. 41 (8).

**Transition**

- (7) All rules made before subsection 4 (1) of Schedule A to the *Electricity Restructuring Act, 2004* comes into force remain in effect until amended or revoked in accordance with this Act. 2004, c. 23, Sched. A, s. 41 (8).

- (8), (9) Repealed: 2004, c. 23, Sched. A, s. 41 (8).

**Amendment of market rules**

33. (1) The IESO shall, in accordance with the market rules, publish any amendment to the market rules at least 22 days before the amendment comes into force. 2004, c. 23, Sched. A, s. 42.

**Notice to the Board**

- (2) The IESO shall give the Board a copy of the amendment and such other information as is prescribed by the regulations on or before the date the IESO publishes the amendment under subsection (1). 2004, c. 23, Sched. A, s. 42.

**Board's power to revoke**

(3) Despite section 4.1 of the *Statutory Powers Procedure Act* and section 35.1 of this Act, the Board may, not later than 15 days after the amendment is published under subsection (1) and without holding a hearing, revoke the amendment on a date specified by the Board and refer the amendment back to the IESO for further consideration. 2004, c. 23, Sched. A, s. 42.

**Application for review**

(4) Any person may apply to the Board for review of an amendment to the market rules by filing an application with the Board within 21 days after the amendment is published under subsection (1). 2004, c. 23, Sched. A, s. 42.

**Application of *Ontario Energy Board Act, 1998***

(5) Subsection 19 (4) of the *Ontario Energy Board Act, 1998* applies to an application under subsection (4). 2004, c. 23, Sched. A, s. 42.

**Review by Board**

(6) The Board shall issue an order that embodies its final decision within 60 days after receiving an application for review of an amendment. 2004, c. 23, Sched. A, s. 42.

**Stay of amendment**

(7) No application for review of an amendment under this section shall stay the operation of the amendment pending the completion of the Board's review of the amendment unless the Board orders otherwise. 2004, c. 23, Sched. A, s. 42.

**Same**

(8) In determining whether to stay the operation of an amendment, the Board shall consider,

- (a) the public interest;
- (b) the merits of the application;
- (c) the possibility of irreparable harm to any person;
- (d) the impact on consumers; and
- (e) the balance of convenience. 2004, c. 23, Sched. A, s. 42.

**Order**

(9) If, on completion of its review, the Board finds that the amendment is inconsistent with the purposes of this Act or unjustly discriminates against or in favour of a market participant or class of market participants, the Board shall make an order,

- (a) revoking the amendment on a date specified by the Board; and
- (b) referring the amendment back to the IESO for further consideration. 2004, c. 23, Sched. A, s. 42.

**Urgent amendments**

**34. (1)** Section 33 does not apply if the IESO files a statement with the Board indicating that, in its opinion, an amendment to the market rules is urgently required for one or more of the following reasons:

1. To avoid, reduce the risk of or mitigate the effects of conditions that affect the ability of the integrated power system to function normally.
2. To avoid, reduce the risk of or mitigate the effects of the abuse of market power.
3. To implement standards or criteria of a standards authority.

4. To avoid, reduce the risk of or mitigate the effects of an unintended adverse effect of a market rule.
5. A reason prescribed by the regulations. 1998, c. 15, Sched. A, s. 34 (1); 2002, c. 23, s. 3 (14); 2004, c. 23, Sched. A, s. 43 (1).

#### **Publication of urgent amendment**

(2) The IESO shall publish the amendment in accordance with the market rules at the same time or as soon as reasonably possible after the statement referred to in subsection (1) is filed. 1998, c. 15, Sched. A, s. 34 (2); 2004, c. 23, Sched. A, s. 43 (2).

#### **Notice to the Board**

(2.1) The IESO shall give the Board a copy of the amendment and such other information as may be prescribed by the regulations on or before the date the IESO publishes the amendment under subsection (2). 2004, c. 23, Sched. A, s. 43 (3).

#### **Board's power to revoke**

(2.2) Despite section 4.1 of the *Statutory Powers Procedure Act* and section 35.1 of this Act, the Board may, not later than 15 days after the amendment is published under subsection (2) and without holding a hearing, revoke the amendment on a date specified by the Board and refer the amendment back to the IESO for further consideration. 2004, c. 23, Sched. A, s. 43 (3).

#### **Review by Board**

(3) On application by a person who is directly affected by the amendment, the Board shall review the amendment. 1998, c. 15, Sched. A, s. 34 (3); 2002, c. 23, s. 3 (17).

#### **Time for application**

(4) The application must be filed within 21 days after the amendment is published under subsection (2). 1998, c. 15, Sched. A, s. 34 (4).

#### **Effect of revocation by Board**

(4.1) If the Board revokes the amendment under subsection (2.2),

- (a) subsection (3) ceases to apply to the amendment; and
- (b) the Board shall not proceed with any review that arises from an application that was made under subsection (3) before it revoked the amendment. 2009, c. 33, Sched. 14, s. 2 (5).

**Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (4.1) is repealed. See: 2009, c. 33, Sched. 14, s. 2 (6), 4 (2).**

#### **Stay of amendment**

(5) An application under this section does not stay the operation of the amendment pending the completion of the review. 1998, c. 15, Sched. A, s. 34 (5).

#### **Referral back to IMO**

(6) If, on completion of its review, the Board finds that the amendment is inconsistent with the purposes of this Act or unjustly discriminates against or in favour of a market participant or class of market participants, the Board,

- (a) shall make an order referring the amendment back to the IESO for further consideration; and
- (b) may make an order revoking the amendment on a date specified by the Board. 1998, c. 15, Sched. A, s. 34 (6); 2004, c. 23, Sched. A, s. 43 (4).

#### **Other reviews of market rules**

**35. (1)** On application by a person who is directly affected by a provision of the market rules, the Board may review the provision. 2002, c. 23, s. 3 (20).

**Exception**

(2) Subsection (1) does not apply to a provision of the market rules that was reviewed by the Board under section 33 or 34 within the 24 months before the application. 1998, c. 15, Sched. A, s. 35 (2).

**Review of market rule made by the Minister**

(3) Subsection (1) does not apply to a provision of the market rules that was made by the Minister before May 1, 2002 unless the application is made before May 1, 2005. 2004, c. 23, Sched. A, s. 44 (1).

**Restriction**

(4) An application shall not be made under this section by a market participant unless the applicant has made use of the provisions of the market rules relating to the review of market rules. 1998, c. 15, Sched. A, s. 35 (4).

**Stay of provision**

(5) An application under this section does not stay the operation of the provision pending the completion of the review. 1998, c. 15, Sched. A, s. 35 (5).

**Referral back to IMO**

(6) If, on completion of a review under this section, the Board finds that the provision is inconsistent with the purposes of this Act or unjustly discriminates against or in favour of a market participant or class of market participants, the Board shall make an order directing the IESO to amend the market rules in a manner and within the time specified by the Board. 1998, c. 15, Sched. A, s. 35 (6); 2004, c. 23, Sched. A, s. 44 (2).

**Publication**

(7) The IESO shall, in accordance with the market rules, publish any amendment made pursuant to an order under subsection (6). 1998, c. 15, Sched. A, s. 35 (7); 2004, c. 23, Sched. A, s. 44 (2).

**Further reviews**

(8) Sections 33 and 34 do not apply to an amendment made in accordance with an order under subsection (6). 1998, c. 15, Sched. A, s. 35 (8).

**Statutory powers of decision**

**35.1** The powers of the Board to make orders under sections 33, 34 and 35 shall be deemed to be statutory powers of decision for the purpose of the *Statutory Powers Procedure Act*. 2000, c. 26, Sched. D, s. 1 (1).

**Appeals from orders**

**36. (1)** A person who is subject to an order made under the market rules may appeal the order to the Board if the order,

- (a) requires the person to pay a financial penalty or other amount of money that exceeds the amount prescribed by the regulations;
- (b) denies the person authorization to participate in the IESO-administered markets or to cause or permit electricity to be conveyed into, through or out of the IESO-controlled grid; or
- (c) terminates, suspends or restricts the person's rights to participate in the IESO-administered markets or to cause or permit electricity to be conveyed into, through or out of the IESO-controlled grid. 1998, c. 15, Sched. A, s. 36 (1); 2004, c. 23, Sched. A, s. 45 (1).

**Other methods of resolution**

(2) An appeal shall not be commenced under subsection (1) unless the appellant has made use of the provisions of the market rules relating to dispute resolution. 1998, c. 15, Sched. A, s. 36 (2).

**Time for appeal**

(3) The appeal must be filed within the time prescribed by the rules of the Board. 1998, c. 15, Sched. A, s. 36 (3).

**Stay of order**

(4) An appeal does not stay the operation of the order pending the determination of the appeal unless the Board orders otherwise. 1998, c. 15, Sched. A, s. 36 (4).

**Same**

(5) In determining whether to stay the operation of an order, the Board shall consider,

- (a) the public interest;
- (b) the merits of the appeal;
- (c) the possibility of irreparable harm to any person; and
- (d) the balance of convenience. 1998, c. 15, Sched. A, s. 36 (5).

**Powers of Board**

(6) After considering the appeal, the Board may make an order,

- (a) dismissing the appeal;
- (b) revoking or amending the order appealed from; or
- (c) making any other order or decision that the IESO could have made. 1998, c. 15, Sched. A, s. 36 (6); 2004, c. 23, Sched. A, s. 45 (2).

**Same**

(7) In addition to its powers under subsection (6), the Board may also make an order revoking, suspending or adding or amending a condition of the appellant's licence. 1998, c. 15, Sched. A, s. 36 (7).

(8) Repealed: 2000, c. 26, Sched. D, s. 1 (2).

**Exemptions from market rules**

**36.1** (1) A person may apply to the IESO for an exemption from any provision of the market rules. 2001, c. 9, Sched. F, s. 1 (2); 2004, c. 23, Sched. A, s. 46 (1).

**Notice of application**

(2) The IESO shall, in accordance with the market rules, publish notice of the application. 2001, c. 9, Sched. F, s. 1 (2); 2004, c. 23, Sched. A, s. 46 (1).

**Determined by panel of directors**

(3) The application shall be determined by a panel of at least two directors of the IESO assigned to the application by the chair of the IESO's board of directors. 2004, c. 23, Sched. A, s. 46 (2).

**Written submissions**

(4) The panel is not required to hold a hearing but shall consider all written submissions made in accordance with the market rules in respect of the application. 2001, c. 9, Sched. F, s. 1 (2).

**Exemption requires approval of two-thirds of panel**

(5) An exemption shall not be granted unless the exemption is approved by at least two-thirds of the directors on the panel. 2004, c. 23, Sched. A, s. 46 (3).

**Terms of exemption**

(6) An exemption,

- (a) may be granted in whole or in part; and
- (b) may be granted subject to conditions or restrictions. 2001, c. 9, Sched. F, s. 1 (2).

**Expiry of exemption**

(7) If an exemption is granted, it shall specify that it expires,

- (a) on a date fixed by the panel; or



(b) on the occurrence of an event specified by the panel. 2001, c. 9, Sched. F, s. 1 (2).

#### **Same**

(8) A date fixed for the expiry of an exemption under clause (7) (a) shall not be later than five years after the exemption takes effect, unless the panel is satisfied that the circumstances justify a later date. 2001, c. 9, Sched. F, s. 1 (2).

#### **Reasons**

(9) When the panel decides to grant or refuse to grant an exemption, it shall give written reasons for its decision. 2001, c. 9, Sched. F, s. 1 (2).

#### **Notice of decision**

(10) When the panel decides to grant or refuse to grant an exemption, the IESO shall, in accordance with the market rules, publish notice of the decision. 2001, c. 9, Sched. F, s. 1 (2); 2004, c. 23, Sched. A, s. 46 (4).

#### **Appeal**

(11) A person who is directly affected by the panel's decision to grant or refuse to grant an exemption and who made written submissions to the panel may appeal to the Board within 14 days after publication of the notice of the decision. 2001, c. 9, Sched. F, s. 1 (2).

#### **Short-term exemptions**

(12) Subsection (11) does not apply to a decision to grant an exemption that expires less than 60 days after it is granted. 2001, c. 9, Sched. F, s. 1 (2).

#### **Stay**

(13) An appeal does not stay the decision of the panel pending the determination of the appeal. 2001, c. 9, Sched. F, s. 1 (2).

#### **Powers of Board**

(14) After considering the appeal, the Board may make an order,

- (a) dismissing the appeal; or
- (b) if the Board finds that the decision of the panel is inconsistent with the purposes of this Act,
  - (i) referring the application for the exemption back to the panel for further consideration,
  - (ii) revoking or amending the decision of the panel, or
  - (iii) making any decision that the panel could have made. 2001, c. 9, Sched. F, s. 1 (2).

#### **Removal of exemption**

(15) If the board of directors proposes to remove an exemption, subsections (2), (3), (4), (6), (9), (10), (11), (13) and (14) apply, with necessary modifications, and subsection (16) applies without modification. 2004, c. 23, Sched. A, s. 46 (5).

#### **Appeal of removal of exemption**

(16) If a decision is made to remove an exemption, the only person who may appeal under subsection (11) is the person in whose favour the exemption was granted. 2001, c. 9, Sched. F, s. 1 (2).

#### **Previous exemptions**

(17) An exemption from a provision of the market rules that was granted by the IESO before the day this subsection came into force in respect of a metering installation that was in service before April 17, 2000 or in respect of which the major components were ordered or procured before or within 30 days following April 17, 2000 shall be deemed to have been authorized by law and shall continue until it expires pursuant to its terms or until it is removed under subsection (15). 2001, c. 9, Sched. F, s. 1 (2); 2004, c. 23, Sched. A, s. 46 (6).

**Rules**

(18) The IESO's directors may make rules governing the practice and procedure before panels of directors under this section. 2004, c. 23, Sched. A, s. 46 (7).

**Report**

(19) The IESO shall, not later than May 1, 2007, submit a report to the Minister on the need for and operation of this section. 2004, c. 23, Sched. A, s. 46 (8).

**Extension**

(20) The Lieutenant Governor in Council may, before May 1, 2007, extend by not more than six months the date by which the report referred to in subsection (19) must be submitted. 2004, c. 23, Sched. A, s. 46 (8).

**Tabling of report**

(21) The Minister shall submit the report to the Lieutenant Governor in Council and shall then table the report in the Assembly. 2001, c. 9, Sched. F, s. 1 (2).

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EB-2007-0040

**IN THE MATTER OF** the *Electricity Act*, 1998, S.O.1998, c.15 (Schedule B);

**AND IN THE MATTER OF** an Application by the Association of Major Power Consumers in Ontario under section 33 of the *Electricity Act*, 1998 for an Order revoking an amendment to the market rules and referring the amendment back to the Independent Electricity System Operator for further consideration, and for an Order staying the operation of the amendment to the market rules pending completion of the Board's review.

**DECISION AND ORDER**

(Issued April 10, 2007 and as corrected on April 12, 2007)

**BEFORE:**

Gordon Kaiser  
Presiding Member and Vice Chair

Pamela Nowina  
Member and Vice Chair

Bill Rupert  
Member

**The Application**

On February 9, 2007, the Association of Major Power Consumers in Ontario ("AMPCO") filed with the Ontario Energy Board (the "Board") an Application under section 33(4) of the *Electricity Act*, 1998 (the "Act") seeking the review of an amendment to the market rules approved by the Independent Electricity System Operator (the "IESO") on January 17, 2007. The Board has assigned file number EB-2007-0040 to the Application.

#### 4. *Cost Awards*

Requests for eligibility for an award of costs were made by AMPCO, VECC and APPRO. TransAlta reserved its right to apply for an award of costs should special circumstances arise in the proceeding. In its letter of intervention, the IESO also indicated that it would seek an award of costs.

In response to Procedural Order No. 1, four parties made submissions in relation to the issue of the party from whom cost awards should be recovered. The submissions are summarized in the Board's Procedural Order No. 2 issued on March 9, 2007.

The Board determined that cost awards in this proceeding should be recovered from the IESO, for the reasons stated in Procedural Order No. 2. The Board also determined that VECC, APPRO and AMPCO are eligible for an award of costs in this proceeding, subject to any objections that the IESO might wish to make for consideration by the Board. By letter dated March 16, 2007, the IESO indicated that while it accepts and respects the Board's decision regarding cost eligibility, it reserved the right to ask the Board to limit the amount of costs recoverable by parties objecting to the Amendment in the event that it appears, at the end of the proceeding, that some or all of the grounds for the objection ought not to have been advanced.

#### 5. *Production of Materials by the IESO*

As noted above, among other things Procedural Order No. 1 directed the IESO to file materials associated with the development and adoption of the Amendment. By letter dated March 2, 2007, AMPCO alleged that the IESO's filing in response to Procedural Order No. 1 was deficient in a number of respects. By letter also dated March 2, 2007, the IESO replied to the allegations contained in AMPCO's letter, stating that there is no merit to AMPCO's allegations and that the IESO had produced all of the materials required by Procedural Order No. 1.

In its Procedural Order No. 2, the Board among other things ordered the IESO to produce certain materials, including material prepared by the IESO in the context of the Day Ahead Commitment Process and/or the Day Ahead Market initiative that directly relates to ramp rate (the "DAM/DACP Materials"). In ordering the IESO to produce the DAM/DACP Materials, the Board expressly recognized that the relevance of those Materials to the criteria set out in section 33(9) of the Act, which form the basis of the issues list set out in Procedural Order No. 1, is not clear. Procedural Order No. 2 thus also invited parties to make submissions on the issue of the relevance to this

proceeding of the DAM/DACP Materials, and more specifically to the criteria set out in section 33(9) of the Act and the issues list set out in Procedural Order No. 1.

On March 12, 2007, the IESO filed a letter with the Board in response to Procedural Order No. 2. In that letter, the IESO stated that the nature and extent of the task involved in satisfying the document production requirements of Procedural Order No. 2 makes completion of the task within anything remotely close to the specified timeframe completely impractical. Without waiving any of its rights or accepting the relevance to this proceeding of the materials identified in Procedural Order No. 2, the IESO put forward a proposed plan to meet the Board's information requirements within the requisite timeframes. On March 14, 2007, AMPCO filed a letter with the Board expressing its concerns regarding the IESO's proposed plan. The concerns related principally to the scope of the IESO's production in respect of the subject matter and time period to be covered.

On March 14, 2007, the Board issued its Procedural Order No. 3. The effect of Procedural Order No. 3 was to revise the nature of the production required of the IESO under Procedural Order No. 2, generally in line with the proposed plan submitted by the IESO in its letter of March 12, 2007 but with the exception that the production should cover a longer period than that proposed by the IESO.

#### 6. *Technical Conference*

Procedural Order No. 1 made provision for a technical conference to be held in this proceeding. On March 20, 2007, and in response to inquiries received by certain parties, Board staff communicated with the parties to confirm whether they wished to proceed with the technical conference. Based on the responses received to that communication, the Board decided to cancel the technical conference and the parties were so advised by Board staff on March 21, 2007.

#### 7. *Submissions on the "Relevance Issue"*

On March 21, 2007, AMPCO filed with the Board a letter setting out a proposal for submissions on the issue of the relevance of certain materials to this proceeding. As noted above, in its Procedural Order No. 2 the Board invited parties to make submissions on the relevance of the DAM/DACP Materials. AMPCO's proposal, made with the consent of the IESO, was to the effect that AMPCO would provide the Board and all parties with a "comprehensive submission on the relevance of materials

produced by the IESO in relation to a central theme contained in AMPCO's application: "that the Amendment violates fundamental principles of procedural fairness". The proposal also suggested that, rather than filing submissions in accordance with Procedural Order No. 2, parties should await production of AMPCO's comprehensive submission and respond to that document.

On March 22, 2007, the Board issued its Procedural Order No. 4 setting out the timeframe for the filing of AMPCO's submissions on relevance. The Board encouraged intervenors to make written submissions in response to those of AMPCO but, given the imminence of the commencement of the oral hearing, indicated that it would allow all intervenors to make oral submissions on the relevance issue at the beginning of the oral hearing.

Written submissions on relevance were filed by AMPCO, the IESO, APPrO and Coral Energy. The positions of the parties are summarized below under the heading "The Board's Mandate".

#### 8. *The Oral Hearing and Final Written Argument*

The Board held an oral hearing in this proceeding, commencing on March 29, 2007 and concluding on March 30, 2007. The first day of the hearing was devoted almost exclusively to submissions by the parties on the "relevance issue", as described in greater detail below under the heading "The Board's Mandate". On the second day of the hearing, witnesses gave evidence on behalf of AMPCO, the IESO, APPrO and TransCanada, principally in relation to the nature and impact or effect of the Amendment. The position of the parties in this regard is discussed in greater detail below under the heading "The Impact of the Amendment".

During the hearing, proposals were also made by certain of the parties in relation to the filing of final written argument, and these were accepted by the Board. AMPCO filed its final written argument on April 2, 2007. VECC filed its final written argument on April 3, 2007. The following parties filed their final written argument on April 4, 2007: the IESO; APPrO; and TransCanada. OPG filed a letter with the Board indicating its support for the final argument filed by APPrO. Coral Energy did not file final written argument, but did indicate during the oral hearing that it would address the substantive issues associated with the Amendment through APPrO. AMPCO filed its written reply argument on April 5, 2007.

## The Board's Mandate

The “relevance issue”, as it has been referred to in this proceeding, arose initially in relation to the DAM/DACP Materials. As stated in Procedural Order No. 4, the issue is relevance of materials – and hence of the position or argument that the materials support – relative to the criteria set out in section 33(9) of the Act. This issue, of necessity, requires consideration of the scope of the Board's mandate on applications to review amendments to the market rules under section 33 of the Act.

As the proceeding progressed, it became clearer that AMPCO's views as to the scope of the Board's mandate differs markedly from the views of other parties. A number of the concerns raised by AMPCO regarding the Amendment relate not to the impact or effect of the Amendment, but rather to the process by which the Amendment was made by the IESO. Many of the materials filed by the IESO in response to the Board's Procedural Orders are relevant to those concerns, but have little or no relevance to the issue of the impact or effect of the Amendment.

The position of the parties in relation to the scope of the Board's mandate, as expressed in the written submissions filed in response to Procedural Order No. 4 and/or in oral submissions made at the commencement of the oral hearing, may be summarized as follows.

AMPCO's position is that the Board's mandate is not limited to the grounds set out in section 33(9) of the Act. Rather, the Board has a “plenary review jurisdiction” that would allow the Board to address what AMPCO alleges as significant failures of procedural fairness by the IESO. In support of its position, AMPCO referred to and relied on sections 33(4), 33(5) and 33(6) of the Act, on section 19(4) of the *Ontario Energy Board Act, 1998*, on the Board's authority to determine all questions of law and fact in all matters within the Board's jurisdiction, and on the Board's public interest role. On that basis, in AMPCO's view the criteria expressed in section 33(9) of the Act are better understood as the two instances in which the legislature has directed the Board on how it must exercise its review discretion, leaving the Board otherwise able to exercise its review discretion as the Board sees fit.

By contrast, the position of the IESO, APPRO, Coral, OPG and TransCanada is that the Board's mandate is limited by section 33(9) of the Act to a determination of whether (a) the amendment is inconsistent with the purposes of the Act; or (b) the amendment unjustly discriminates against or in favour of a market participant or a class of market

participants. On that basis, whether the IESO has, and breached, a common law duty of procedural fairness or acted in a manner giving rise to a reasonable apprehension of bias (both of which allegations were denied by the IESO), are not matters for consideration by the Board on a market rule amendment review application under section 33 of the Act. Materials produced by the IESO that are relevant only to the IESO's processes in making the Amendment should therefore be disregarded. The IESO also specifically requested that the Board strike AMPCO's March 26, 2007 submission from the record.

On March 29, 2007, the Board rendered an oral decision on this issue. Specifically, the Board determined that its mandate under section 33 of the Act is limited to an examination of the market rule amendment against the criteria set out in section 33(9) of the Act. The Board also ordered that any evidence relating to the IESO's stakeholdering process, including AMPCO's March 26, 2007 submission, be struck from the record. An excerpt from the transcript of the oral hearing that contains the Board's decision and order in this regard is set out in Appendix A to this Decision and Order.

The parties agreed to, and filed with the Board, a list of the materials affected by the Board's decision (i.e., those to be struck from the record and those to remain on the record).

### **The Impact of the Amendment**

It remains for the Board to determine whether the Amendment is inconsistent with the purposes of the Act or unjustly discriminates against or in favour of a market participant or a class of market participants.

A brief summary of the position of the parties is set out below, followed by the Board's findings.

In order to better understand the position of the parties, however, it is necessary to provide some further context around the setting of prices in the IESO-administered energy market and the role that the ramp rate multiplier plays, if only at a high and simplified level.



**APPENDIX A**

**to**

**Decision and Order  
April 10, 2007**

**Association of Major Power Consumers in Ontario  
Review of Market Rule Amendment  
EB-2007-0040**

**Excerpt from Transcript of Oral Hearing Held March 29, 2007**

**(see attached document)**

1 our binder. I apologize, it might just be me, but the  
2 record, the decision does not bear out the quote that that  
3 included.

4 MR. RUPERT: Mr. Rodger, I was going to mention, I  
5 think the page 5 reference, at least as I read it here,  
6 didn't refer to the page that was doing what you thought it  
7 did. Maybe there is a cross-reference issue in your  
8 submissions.

9 MR. RODGER: I'll certainly check that. Sorry, Mr.  
10 Rupert.

11 MR. KAISER: Why don't you have a look now, and see if  
12 you can help us.

13 MR. RODGER: Mr. Chair, we'll endeavour to get copies  
14 during the lunch break.

15 MR. KAISER: All right. We'll take the lunch break  
16 now. We'll come back at 2 o'clock.

17 --- Recess taken at 12:34 p.m.

18 --- On resuming at 2:11 p.m.

19 **DECISION:**

20 MR. KAISER: Please be seated.

21 The Board has decided to issue a decision now on the  
22 matter of the relevance of the evidence with respect to the  
23 process, rather than deferring it, as Mr. Rodger suggested,  
24 in order that we can proceed with the case in a more  
25 orderly manner.

26 We are dealing with an application by AMPCO under  
27 section 33(4) of the *Electricity Act* for review of the  
28 three times ramp rate market rule amendment. In that

1 context there has been a discussion and a concern about the  
2 scope of the case, and particularly whether evidence  
3 regarding the process by which the IESO reached this rule  
4 is relevant.

5       AMPCO submits that the three times ramp rate market  
6 rule amendment should be revoked by this Board and referred  
7 back to the IESO for stakeholder consultation, based on the  
8 following grounds: First, that the process followed by the  
9 IESO in the three times ramp rate stakeholder consultation  
10 process violated IESO's common-law duty of procedural  
11 fairness, by breaching AMPCO's legitimate expectation that  
12 the IESO would follow its published stakeholder engagement  
13 process and apply its stakeholder engagement principles,  
14 and raising a reasonable apprehension of bias that the IESO  
15 favoured the interests of generators; secondly, that the  
16 integrity of the statutorily-mandated consultation process  
17 has been undermined. They say this is inconsistent with  
18 the purposes of the *Electricity Act* and unjustly  
19 discriminates against Ontario consumers in favour of  
20 Ontario generators.

21       They also allege certain substantive failures, as  
22 well, which are not at issue in the proceeding this  
23 morning.

24       Accordingly, AMPCO argues that the materials produced  
25 by IESO relating to procedural matters are relevant both to  
26 the issue of procedural fairness and also the substantive  
27 issues.

28       The starting point in this discussion is section 33(9)

1 of the *Electricity Act*. It has been referred to by  
2 virtually everyone this morning. It provides that:

3 "If, on completion of its review, the Board finds  
4 that the amendment is inconsistent with the  
5 purposes of this Act, or unjustly discriminates  
6 against or in favour of a market participant or a  
7 class of market participants, then the Board  
8 shall make an order revoking the amendment on the  
9 date specified by the Board and referring the  
10 amendment back to the IESO for further  
11 consideration."

12 AMPCO argues that all of the IESO materials are  
13 relevant because they demonstrate that the IESO failed to  
14 follow procedural fairness in developing the amendment.  
15 According to AMPCO, the lack of procedural fairness  
16 demonstrates that the amendment unjustly discriminates  
17 against its members in favour of generators.

18 In other words, AMPCO argues that it has rights of  
19 natural justice in IESO rule-making and that those rights  
20 should be enforced by the Board in the market review  
21 amendment process.

22 All of the other parties appearing before us this  
23 morning state that this is an incorrect interpretation of  
24 section 33(9), because it equates the term "unjustly  
25 discriminates" with a violation of the rules of natural  
26 justice and it equates the Board's review process with a  
27 judicial review application.

28 They argue that the purpose of the Board's review in a

1 market review amendment should be aimed at economic  
2 efficiency and not natural justice.

3 They say that the OEB should be reviewing an amendment  
4 to the IESO rules and not the IESO stakeholdering process;  
5 that the scope of the Board's review should be aimed at the  
6 rule itself, and the impact of that rule, not the process  
7 by which the amendment was made.

8 In other words, it's argued before us that the issue  
9 is whether the rule is unjustly discriminatory. The Board  
10 agrees with that position.

11 Sections 19(1) and 20 of the *OEB Act*, read together,  
12 provide that the Board has general authority to determine  
13 any question of law or fact arising in any matter before it  
14 except where that authority is limited by statutory  
15 provision to the contrary.

16 In the case of a market rule amendment, another  
17 statutory provision does limit the Board's jurisdiction.  
18 Section 33(9) of the *Electricity Act* specifically sets out  
19 certain grounds on which the Board may make an order.

20 Accordingly, we find that section 33(9) of the  
21 *Electricity Act* is a jurisdiction-limiting provision, not  
22 another jurisdiction-granting provision. That is, with  
23 respect to a market rule amendment, the Board's  
24 jurisdiction is not as broad as suggested by section 20 of  
25 the *OEB Act*, but limited by section 33(9) of the  
26 *Electricity Act*.

27 In this regard, the Board has also considered the  
28 submissions of various parties, and agrees, that the 60-day

1 time limit for disposing of this review is consistent with  
2 the conclusion that the Board's scope of review is limited  
3 to the criteria set out in section 33(9).

4 The legislature can be taken as having known that an  
5 exhaustive review of the process would render it impossible  
6 to meet these timelines.

7 We then come to what can be seen as a second and  
8 distinct issue. That is whether there is a common-law  
9 principle of administrative law that the IESO has violated  
10 in the course of this market rule amendment process which  
11 yields a separate and distinct remedy.

12 The IESO says the common-law principles of  
13 administrative law do not assist AMPCO in extending the  
14 jurisdiction of the Board to review the details of the  
15 stakeholdering process. They say that the IESO is a  
16 statutory corporation whose affairs are managed and  
17 supervised by an independent board of directors, and the  
18 functions carried out by the IESO under the review at issue  
19 in this proceeding is a rule-making function and is  
20 essentially a legislative function.

21 They rely upon the Supreme Court of Canada's 1980  
22 decision in the Inuit Tapirisat as support for the  
23 proposition that in legislative functions these rules do  
24 not apply.

25 AMPCO takes a different view and it relies upon the  
26 Supreme Court of Canada 1990 decision in Baker, as well as  
27 the Divisional Court decision in Bezaire.

28 The aspects of the decision that AMPCO relies upon can

1 be found at pages 15 and 14, where the Court stated that  
2 one of the criteria that must be looked at in determining  
3 whether the rules of natural justice apply to a process is  
4 whether the parties had a legitimate expectation that those  
5 rules would be followed. The Court states, in part:

6 "Fourth, the legitimate expectations of the  
7 person challenging the decision may also  
8 determine what procedures the duty of fairness  
9 requires in given circumstance."

10 They go on to say:

11 "This doctrine as applied in Canada is based on  
12 the principle that the circumstances affecting  
13 procedural fairness take into account the  
14 promises or regular practices of administrative  
15 decision-makers and it would generally be unfair  
16 for them to act in contravention of  
17 representations as to procedure or to backtrack  
18 on substantive promises without according  
19 significant procedural rights."

20 The Court also noted that another factor to be  
21 considered in determining the nature and extent of the duty  
22 of fairness that's owed to the parties is the importance of  
23 the decision to individuals involved.

24 As has been pointed out, there's no question that  
25 there's a significant amount of money involved in this  
26 decision; it's an important decision. With respect to the  
27 expectations of the parties, there is a provision in  
28 section 13.2 of the *Electricity Act* requiring the IESO to

1 establish processes by which consumers, distributors and  
2 generators may provide advice. AMPCO makes the point that a  
3 framework was established to govern the process by which  
4 these rules would be amended and implemented. They say  
5 that this procedure, despite the expectation they were  
6 entitled to, has not been followed.

7 That may or may not be the case, but this Panel is of  
8 the view that that is not a matter for our consideration.  
9 Mr. Vegh in his submissions questioned whether the Board  
10 should be a parallel Divisional Court. We don't think it  
11 should be.

12 IESO may or may not have followed the rules of natural  
13 justice. And they may or may not have been required to do  
14 so based upon the different authorities that have been  
15 cited by the different parties. But that, we believe, is a  
16 matter to be determined by the Divisional Court, not the  
17 Ontario Energy Board.

18 Mr. Rodger did refer us to a decision of this Board on  
19 September 20th, 2005. That appears at tab 11 of Ms.  
20 DeMarco's brief. I'm reading in part:

21 "The Board concludes that stakeholder concerns  
22 have been substantially met. The true test will,  
23 however, be the experience of stakeholders in the  
24 new process. Stakeholders and the Board will  
25 have opportunities to review how well the process  
26 works over time as they are implemented. The  
27 Board therefore approves the IESO proposals on  
28 its stakeholdering process. It should be noted,



1           however, that this approval relates to the  
2           processes that the IESO has proposed. It does not  
3           change the Board's obligation to review IESO  
4           programs that have implications for IESO fees,  
5           expenses and revenue requirements, even when  
6           these programs have been subjected to the IESO  
7           stakeholdering process."

8           Mr. Rodger's submission was that having approved the  
9           stakeholdering process it was incumbent upon the Board to  
10          follow through and police, if you will, the rule-making  
11          process.

12          We differ on that. The two are distinct functions.  
13          The review at question is a judicial review and best  
14          reserved for the courts.

15          That leads us to the Order requested. Pursuant to  
16          this decision, the Board will order that any evidence  
17          relating to the stakeholdering process be struck. That  
18          would include Mr. Rodger's submission of March 26th. If  
19          the parties are unable to agree on what evidence is to be  
20          excluded or not excluded, the Board may be spoken to.

21          That completes the Board's ruling in this matter.

22          **PROCEDURAL MATTERS:**

23          Mr. Rodger and Mr. Mark, we were going to suggest,  
24          subject to your convenience, that you may want to adjourn  
25          for the rest of the day and regroup in light of that.

26          MR. MARK: It probably makes sense.

27          MR. KAISER: Unless there be some debate and  
28          discussion as to what evidence is to be struck and what



# ONTARIO ENERGY BOARD

FILE NO.: EB-2011-0242  
EB-2011-0283

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VOLUME: 1

DATE: January 12, 2012

BEFORE:	Paul Sommerville	Presiding Member
	Cynthia Chaplin	Member and Vice-Chair
	Marika Hare	Member

THE ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act*,  
1998, S.O. 1998, c.15, Schedule B; and in  
particular section 36 (2) thereof;

AND IN THE MATTER OF an application by Enbridge  
Gas Distribution Inc. for an Order or Orders  
approving and setting prices for Enbridge Gas  
Distribution Inc.'s purchase of biomethane;

AND IN THE MATTER OF an application by Union Gas  
Limited for an Order or Orders approving and  
setting prices for Union Gas Limited's purchase  
of biomethane.

Hearing held at 2300 Yonge Street,  
25<sup>th</sup> Floor, Toronto, Ontario,  
on Thursday, January 12, 2012,  
commencing at 9:04 a.m.

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VOLUME 1  
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BEFORE:

PAUL SOMMERVILLE	Presiding Member
CYNTHIA CHAPLIN	Member and Vice-Chair
MARIKA HARE	Member

1 Thursday, January 12, 2012

2 --- On commencing at 9:04 a.m.

3 MR. SOMMERVILLE: Good morning, everyone. Please be  
4 seated.

5 The Board has convened this morning in two matters,  
6 EB-2011-0242, an application made by Enbridge Gas  
7 Distribution Inc., and EB-2011-0283, an application of  
8 Union Gas Limited.

9 The Board has previously decided to hear these  
10 applications through a combined proceeding. Pursuant to  
11 Procedural Order No. 2, which was issued on December 19th,  
12 2011, the Board set today's hearing, the sole purpose of  
13 which is to hear submissions on whether the Board should  
14 stage the hearing of these applications by making provision  
15 for a first phase, which would consider threshold-type  
16 issues, to be followed, if necessary, by a second phase  
17 which would address the details of the Applicants'  
18 proposals on their respective merits.

19 The Board has received and read several brief written  
20 submissions. Sitting with me are Cynthia Chaplin, Vice  
21 Chair, and Marika Hare, Board member.

22 May I have appearance, please?

23 **APPEARANCES**

24 MR. CASS: Good morning, Mr. Chair. Fred Cass for  
25 Enbridge Gas Distribution.

26 MR. BRETT: Tom Brett for BOMA.

27 MR. WARREN: Robert Warren for the Consumers Counsel  
28 of Canada.

1           **DECISION**

2           MR. SOMMERVILLE: The Board has come to a  
3 determination on the staging question. The Board is not  
4 convinced that the circumstances of these cases support or  
5 favour staging. Without making any determination with  
6 respect to any of the jurisdictional issues or the other  
7 threshold issues that have been raised or discussed here  
8 today, the Board considers that its consideration of all  
9 the relevant aspects of these applications is best  
10 accomplished if the applications are heard as a whole  
11 without any staging.

12           This ruling is not intended to inhibit or prejudge in  
13 any matter whatsoever any issues, jurisdictional or  
14 otherwise, that any party may want to raise in the course  
15 of this combined proceeding.

16           Accordingly, the Board will issue a procedural order  
17 in due course which will establish the issues list for the  
18 combined proceeding and set out the schedule of events for  
19 the proceeding. This schedule will not contemplate any  
20 staging.

21           Are there any questions with respect to the Board's  
22 ruling?

23           Thank you very much. The Board stand adjourned, and  
24 stay tuned for the procedural order, which we will issue in  
25 due course. And thank you very much for your very able  
26 submissions today. Thank you.

27 --- Whereupon the hearing concluded at 11:37 a.m.

28