EB-2019-0242

Association of Major Power Consumers in Ontario

Application to Review Amendments to the Market Rules made by the Independent Electricity System Operator

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Cost Submissions of the Independent Electricity System Operator (IESO) Pursuant to Procedural Order No. 2

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I. Overview

1. The Board invited the IESO in Procedural Order No. 2 to address the issue of whether it is appropriate for the IESO to bear the costs of this proceeding.

2. The IESO respectfully submits that the Board should not, at this early stage in the proceeding, make an order overriding the presumptive rule that (i) applicants bear their own costs, and (ii) parties pursuing their own commercial interests are not eligible for costs awards.

3. The Board will be better positioned at the conclusion of this proceeding – after it has heard all of the evidence and arguments and made its final determination – to determine whether "special circumstances" have been demonstrated warranting departure from the Board's *Practice Direction on Costs* and the general principles governing costs awards.

II. Responsibility for Costs

4. As the Board noted in Procedural Order No. 2, costs of applications are typically recoverable from the applicant, in this case the Association Major Power Consumers in Ontario (**AMPCO**).

5. AMPCO has not, in its application or motion materials, demonstrated any special circumstances for departing from this general rule. AMPCO may argue at the conclusion of the proceeding that special circumstances exist; but at this stage, it has not discharged this burden.

6. The IESO respectfully disagrees with the Board's statement in Procedural Order No. 2 that departing from the ordinary rules and making the IESO liable for costs is consistent with the overall legislative scheme. There is nothing in section 33 of the *Electricity Act, 1998* that mandates or suggests that the IESO be responsible for the costs of market rule review applications. The two earlier market rule review proceedings before the Board are not dispositive with respect to cost responsibility in an application under section 33. In EB-2007-0040 (**3x Ramp Rate**), the Board cautioned that:

> The fact that costs are to be recovered by the IESO in relation to this proceeding should not, however, be understood as tacit recognition that this should necessarily be the case in relation to all future

> market rule amendment review applications that may come before the Board.[1]

7. In the more recent 2013 challenge to the IESO's market rule amendments integrating renewable resources into dispatch (**Renewable Integration**),[2] the Board deferred its determination on which party - the applicants, the IESO or a combination of the two - would be responsible for costs until later in the proceeding after submission by the parties.[3]

8. The Board ultimately determined:

> The Board finds that it would be inappropriate for the IESO, and the ratepayers that ultimately pay the IESO's costs, to bear the costs of the Applicants in the circumstances of this case. The Board also agrees with the IESO that *market participants should generally be expected to bear their regulatory costs associated with the market rule amendment process.*[4] (emphasis added)

9. The IESO also disagrees that a market rule review application is the "last step" in the market rule amendment process. The *Electricity Act, 1998* confers primary authority on the IESO Board of Directors to approve market rule amendments subject to the OEB's authority to revoke. An application to review a market rule amendment, however, is a separate, distinct, and exceptional proceeding initiated by the applicant and in which the applicant bears the burden of proving that the market rule amendment is contrary to the purposes of the *Electricity Act, 1998* or is unjustly discriminatory.

10. As the initiator of a market rule amendment review proceeding under section 33 of the *Electricity Act*, the applicant should not be presumptively insulated from the cost consequences of that action. Applicants, as the Board stated in the Renewable Integration Proceeding, should "generally be expected to bear their regulatory costs associated with the market rule amendment process".

11. In this respect, there is an important distinction between the *Electricity Act, 1998* and the legislative scheme in US Federal Energy Regulatory Commission (**FERC**) regulated markets (which, notably, AMPCO averts to in its reliance on FERC Order 745). In FERC regulated

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[1] EB-2007-0040, Procedural Order No. 2, dated March 9, 2007, p. 5.
[2] EB-2013-0029/EB-2013-0010.
[3] EB-2013-0029, Procedural Order No. 2, p. 4.
[4] *Supra*, Procedural Order No. 6, p. 4.

markets, Independent System Operators (**ISOs**) must file and obtain FERC approval for tariff amendments – including market rule amendments – and the onus is on the ISO to demonstrate that the proposed amendment is just and reasonable and not unduly discriminatory.[5] This is not the case in Ontario.

12. It would not be in keeping with the legislative scheme or its past practice for the Board to establish a precedent at the outset of the proceeding that relieves an applicant of all cost responsibility for a market rule amendment review, irrespective of the reasonableness of the challenge or the Board's ultimate determination.

13. The IESO requests that the Board defer its determination as to whether AMPCO, the IESO or a combination of the two will be responsible for costs until the conclusion of the application.

III. Cost Eligibility

14. The IESO objects to AMPCO's request for cost eligibility as well as the requests by Association of Power Producers of Ontario (**APPrO**) and Kingston CoGen. An applicant, generator or other party that participates in proceedings for purposes of pursuing its own commercial interests should, absent special circumstances, not be eligible for a costs award.[6]

15. AMPCO is the applicant; Kingston CoGen is a generator and APPrO is a representative of generators. These parties are *prima facie* not eligible for a costs award.

16. AMPCO is also not "primarily represent[ting] the direct interests of consumers (e.g., ratepayers)"; it is acting on behalf of its members' commercial self-interest.[7] Its position (on behalf of dispatchable loads and hourly demand response resources) is that demand resources should receive energy payments in the IESO market, equivalent to payments to generators. Its principal argument is that the Transitional Capacity Auction should be suspended until demand resources' entitlement to energy payments is resolved.

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[5] Federal Power Act, .§ 205(e), which reads, "At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility."

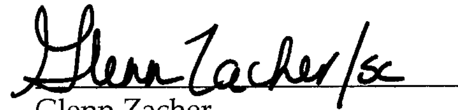
[6] *Practice Direction on Costs*, sections 3.04(b), 3.05(a),(b), 3.07; see also EB-2013-0029, Decision and Order on Cost Award, p. 3 and EB-2019-0207, Decision on Cost Eligibility, p. 3.

[7] Practice Direction on Costs, sections 3.03(a).

17. AMPCO has not provided any reasons, or demonstrated any special circumstances, that entitle it to cost eligibility and its request for cost eligibility should be denied.[8]

18. Alternatively, the Board should defer its determinations on cost eligibility until the conclusion the proceeding, as the Board did in the Renewable Integration proceeding. At the conclusion of the proceeding, the Board will be better informed to consider the factors relevant to determining cost eligibility, including: the principal interests represented by parties, whether parties' submissions assisted the Board, whether parties advanced reasonable positions and participated reasonably, the degree of success achieved by the respective parties and whether there are special circumstances that warrant departure from the ordinary cost eligibility rules.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of October 2019.



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[8] *Practice Direction on Costs*, section 3.02.