

ONTARIO ENERGY BOARD

**ASSOCIATION OF MAJOR POWER
CONSUMERS IN ONTARIO (AMPCO)**

**Application for Review of an Amendment
to the Independent Electricity System Operator Market Rules**

SUBMISSIONS FOR MOTION FOR STAY

PART I: OVERVIEW

1. The applicant, Association of Major Power Consumers in Ontario (AMPCO), moves, pursuant to section 33(8) of the Ontario *Electricity Act*, S.O. 1998, c. 15, Sch. A (*Electricity Act*) to stay the operation of the Market Rule Amendments (hereinafter defined) pending their review by the Board.
2. By statute, the Board must complete its review of the Market Rule Amendments by January 24, 2020.¹
3. The Market Rule Amendments implement a transitional capacity auction (TCA), the first of which is scheduled for December 4, 2019. Implementation is essentially achieved by opening the existing Demand Response auction platform (DRA) to allow uncontracted electricity generation facilities to participate alongside DR Resources to offer capacity. The DRA has operated successfully since 2015 as a market platform for DR Resources to offer capacity to the Independent Electricity System Operator (IESO) Administered Market (IAM).

¹ *Electricity Act*, S.O. 1998, c. 15, Sch. A, subsection 33(6).

4. Materials filed by the IESO² and Kingston CoGen Limited Partnership (KCLP)³ in response to AMPCO's motion suggest that AMPCO is opposed to the TCA proceeding. This is not the case.
5. AMPCO is not proposing that the TCA should never proceed, and is not proposing that generators and other qualified resources should not participate in future auctions. AMPCO supports the expansion of the DRA to include generation and other resources.⁴
6. Rather AMPCO has applied to the Board for review and revocation of the Market Rule Amendments because, until the issue of energy payments for DR Resources is resolved, their effect will be to unjustly discriminate against DR Resources in the IAM and thus undermine competitive efficiency contrary to the purposes of the *Electricity Act*.
7. AMPCO supports an expanded capacity auction, as long as it remains a fair and non-discriminatory process. What AMPCO opposes is the co-opting of the successful DRA platform to a TCA the effect of which would be to inhibit competition by replacing one set of resources (DR Resources) with another (generators).
8. The narrow issue before the Board on this motion is whether the first of four anticipated TCAs between now and 2021, which is currently scheduled for December 4, 2019⁵, should be stayed until the Board has considered and determined the concerns raised in AMPCO's application (which it must do by January 24, 2020).⁶ The second TCA is currently planned to be held in June, 2020 (with subsequent TCAs planned for December, 2020 and then 2021).⁷
9. AMPCO's stay request is based on the harm DR Resources will suffer if the first TCA is run in December 2019, while energy payments are unavailable to them. In these circumstances, DR Resources will be forced to compete in an auction process that puts them at certain competitive disadvantage, likely excluding them from the new market

² Affidavit of David Short sworn October 25, 2019, paragraph 34.

³ Affidavit of John Windsor sworn October 25, 2019, paragraph 23.

⁴ Affidavit of Colin Anderson sworn October 11, 2019, Exhibit B, p. 33 of 40 (paragraph 13).

⁵ Affidavit of David Short sworn October 25, 2019, paragraph 8.

⁶ *Electricity Act*, subsection 33(6).

⁷ Affidavit of David Short sworn October 25, 2019, paragraph 10.

mechanism (the TCA) which has commandeered the former market mechanism (the DRA) in which they have participated since 2015.

10. This harm is entirely avoidable.
11. If the OEB grants this request for a stay, the IESO would have time to resolve the issue of energy payments for DR Resources (the issue that puts them at a competitive disadvantage). The stay would therefore avoid implementation of a market mechanism that would not only fail to enhance competition, which is the IESO's stated objective⁸, but would in fact be discriminatory and harmful to the current DRA participants.
12. While DR Resources face certain harm if the first TCA is run in December, 2019, the IESO and other market participants will suffer no harm if the stay sought by AMPCO is granted. AMPCO and the IESO agree that the need for additional capacity does not arise until 2023. There is no evidence to suggest that the TCA must be conducted in December 2019 to ensure that 2023 capacity needs can be met.
13. The IESO has been considering the merit of energy payments for DR Resources since at least 2017⁹, and launched the most recent round of stakeholdering on this issue in late August of this year.¹⁰ AMPCO is not proposing, and indeed there should be no need, to delay the TCA past mid-2020, when the IESO plans to have made a final decision on the issue.¹¹ If the first TCA was held after mid-2020, the IESO still has ample time to run several auctions before acquisition of capacity for 2023 becomes an issue.
14. All parties acknowledge a strong public interest in a fair, competitive capacity market. That objective can only be realized if the issue of energy payments for DR Resources is resolved prior to implementation of the first TCA.
15. That is the basis of AMPCO's motion for a stay.

⁸ Affidavit of David Short sworn October 25, 2019, paragraphs 2, 5 and 17.a).

⁹ Affidavit of David Short sworn October 25, 2019, paragraph 23.

¹⁰ Affidavit of David Short sworn October 25, 2019, paragraph 26.

¹¹ Affidavit of David Short sworn October 25, 2019, paragraph 27.

PART II: FACTS

Nature of the Underlying Market Rule Amendments

16. In 2015, the IESO introduced an annual DRA in which only DR Resources could participate. DR Resources submit offers in December of each year for a one-year commitment period beginning in May the year following. DR Resources called upon by the IESO meet their commitments by refraining from consuming energy from the IAM.¹²
17. The IESO has indicated that annual DRAs have been very successful. In the most recent DRA, 38 organizations were registered as auction participants, the highest number since the auction began in 2015, and auction clearing prices have decreased 42% since the first DRA in 2015, with the latest auction resulting in a 30% price decrease over the previous one. According to the IESO, the DRA has been established as a valuable and reliable tool to secure capacity on the system, while benefiting DR participants and lowering prices for all Ontario electricity consumers.¹³
18. As part of its market renewal efforts, the IESO plans to transition the DRA into a broader capacity market involving additional resources types.¹⁴ In January, 2019, the IESO announced its intention to “*enhance*” the DRA – calling the “*enhanced*” auction the TCA.¹⁵
19. Between February and August, 2019, the IESO engaged stakeholders to provide feedback on the design of the TCA. AMPCO delivered six written submissions to the IESO as part of this process, taking issue with the implementation of the TCA prior to resolution of the energy payment issue for DR Resources.¹⁶ Other DRA participants delivered submissions taking similar issue.
20. Despite the repeated objections of these engaged stakeholders, on September 5, 2019 the IESO issued the Market Rule Amendments which evolve the existing DRA platform into the TCA.¹⁷

¹² Affidavit of David Short, sworn October 25, 2019, paragraph 6.

¹³ AMPCO’s Notice of Appeal, attachment for footnote 6.

¹⁴ Affidavit of David Short sworn October 25, 2019, paragraph 7.

¹⁵ Affidavit of David Short sworn October 25, 2019, paragraph 13.

¹⁶ Affidavit of Colin Anderson, sworn October 11, 2019, paragraph 9.

¹⁷ Affidavit of Colin Anderson, sworn October 11, 2019, paragraphs 5 and 6. See also attachment for footnote 1 to AMPCO’s Notice of Appeal.

AMPCO's Application for Review and Revocation of the Market Rule Amendments

21. AMPCO filed a Notice of Appeal (Application) seeking review and revocation of the Market Rule Amendments, pursuant to Section 33(9) of the *Electricity Act* on September 26, 2019.
22. The basis of AMPCO's Application is:
 - (a) Generation resources, unlike DR Resources, have other revenue opportunities in the IAM, including payments for energy services provided. DR Resources do not currently have commensurate revenue opportunities for the energy services they provide to the market.
 - (b) Requiring DR Resources to compete against generators without resolving the comparative value of DR Resources and generation resources in the energy market, and how to justly and reasonably compensate the former in a manner comparable to the latter, would undermine the current success of the DRA and handicap DR Resources from successfully competing within their own existing market platform.
 - (c) Because the operation of the Market Rule Amendments will unfairly discriminate against DR Resources in favour of generators and lead to anti-competitive results contrary to the *Electricity Act*, the OEB should review and revoke the Market Rule Amendments.

This Motion for a Stay of the Implementation of the Market Rule Amendments

23. The first TCA is scheduled for December 4, 2019, with preliminary steps required to be taken over the next few weeks.¹⁸
24. The issue of energy payments for DR Resources will not be resolved before that time. On August 22, 2019, the IESO launched a stakeholdering process which contemplates a final decision on this issue by June of 2020.¹⁹
25. Accordingly, if the first TCA proceeds in December 2019, the TCA will allow for two classes of participant – one whose members receive an energy payment (generators) and one whose members do not (DR Resources). DR Resources will thus be at a competitive disadvantage to generators in the auction because they will not have additional anticipated IAM payment streams to factor in when setting their auction “offer price”.²⁰ In particular,

¹⁸ Affidavit of Colin Anderson sworn October 11, 2019, Exhibit A.

¹⁹ Affidavit of David Short, sworn October 25, 2019, paragraphs 26 and 27.

²⁰ Affidavit of Colin Anderson, sworn October 11, 2019, paragraphs 13 and 14.

because DR Resources do not currently receive energy payments when “activated” in the IAM, they must increase their capacity auction offers to ensure that they recover their costs of activation should they be activated to provide energy. Generators, on the other hand, in setting their capacity auction offers can anticipate receipt of energy payments when activated to provide energy, and set their capacity offers accordingly.

26. In the result, it is likely that DR Resources will effectively be excluded from the auction process that was originally exclusive to them (the DRA).²¹ The evidence indicates that 4 generators have already qualified for participation in the TCA scheduled for December, 2019²² indicating that this will likely be the result, absent a stay of the Market Rule Amendments pending determination of AMPCO’s Application. KCLP anticipates “*millions of dollars*” in revenues from the upcoming TCA²³, which would come at the expense of its TCA competitors, further underscoring the harm to DR Resources should the stay not be granted.
27. Accordingly, AMPCO brings this motion to stay the operation of the Market Rule Amendments, pending the outcome of its Application so as to avoid the certain harm that will be faced by many of its members if the TCA proceeds prior to resolution of the energy payments issue.

PART III: LAW AND ARGUMENT

28. The test to be applied by the OEB on this motion is set out in section 33(8) of the *Electricity Act*. It requires the Board to consider the following factors in deciding whether to grant a stay:
- (a) the public interest;
 - (b) the impact on consumers;
 - (c) the merits of the application;
 - (d) the possibility of irreparable harm to Ontario DRA participants; and

²¹ Affidavit of Colin Anderson, sworn October 11, 2019, paragraph 20.

²² Affidavit of David Short, sworn October 25, 2019, paragraph 28.

²³ Affidavit of John Windsor, sworn October 25, 2019, paragraph 21.

(e) the balance of convenience.²⁴

The public interest and the impact of the Market Rule Amendments on consumers are factors that militate in favour of granting the stay.

29. All parties agree on one point: there are no system reliability issues that need to be addressed between now and January 24, 2020, when AMPCO's Application must be decided. Indeed, there are no system reliability issues anticipated between now and the summer of 2023.²⁵
30. The IESO explains that the capacity auction evolution is a multi-phase process, with at least three subsequent phases currently planned, including auctions in: (i) June, 2020; (ii) December, 2020; and (iii) 2021. Each phase will build upon the last.²⁶
31. Deferral of the first auction (by staying the Market Rule Amendments pending the outcome of the Application) is therefore not fatal to the program. It merely means, perhaps, one less round in multi-round evolutionary process (or that the IESO could re-schedule its planned process).
32. Contrary to the apparent suggestions in Mr. Short's affidavit, granting of the stay would not lead to "imprudent" implementation of the TCA "*just prior*" to more significant capacity needs in 2023²⁷, nor would granting of the stay preclude gradual evolution of the market mechanism²⁸. There are 3 more auctions currently planned between now and 2021, the last of which appears to be planned at least a year prior to the reliability concern period commencing spring, 2023.²⁹
33. Moreover, the TCA is just one of several options open to the IESO to meet capacity needs. At the August 14th Stakeholder Advisory Committee, Mr. Butters asked for clarification as to whether the TCA will become the preferred method for capacity procurement. Ms. Anderson, on behalf of the IESO, said *the capacity team is stratifying the resources and*

²⁴ *Electricity Act*, S.O. 1998, c. 15, Sch. A, subsection 33(8).

²⁵ Affidavit of Colin Anderson, sworn October 11, 2019, paragraph 22; Affidavit of David Short, sworn October 25, 2019, paragraph 11.

²⁶ Affidavit of David Short, sworn October 25, 2019, paragraphs 9 and 10.

²⁷ Affidavit of David Short, sworn October 25, 2019, paragraph 17 b).

²⁸ Affidavit of David Short, sworn October 25, 2019, paragraph 31.

²⁹ Affidavit of David Short, sworn October 25, 2019, paragraph 10.

*looking at the risk profile to determine the correct mechanism. The capacity auction is one option of many that will be investigated over the course of 2020.*³⁰ [emphasis added]

34. In summary, holding the first TCA in December, 2019 is not necessary to address reliability requirements, and none of the evidence indicates any material harm to the public interest in deferring expansion of the DRA by just over a month and a half until determination of AMPCO's application by January 24, 2020. (AMPCO notes that the DRA could still proceed in December, 2019, in accord with the pre-existing Market Rules.³¹)
35. On the other hand, among the IESO's objectives in evolving the existing DRA is to acquire power system supply capacity *"in a manner that increases participation, competition ... and economic efficiency"*.³² This objective is part of the express rationale for the IESO Board of Directors in adopting the Market Rule Amendments.³³ Mr. Short in his affidavit underscores that³⁴;

It is critical that the IESO evolve its capacity auction in a manner that promotes confidence in the auction process amongst existing and potential auction participants.

36. The evidence is that proceeding with the December, 2019 TCA as planned will have the opposite effect³⁵; contrary to the public interest.
37. The IESO Board of Directors' conclusion that delaying the Market Rule Amendments *"would be detrimental to the market as it would delay introduction of increased competition"*³⁶ is flawed, since it fails to recognize that generator participation in the capacity auction prior to resolution of energy payments for DR Resources would inhibit, not enhance, competition.
38. In other words, the introduction of an expanded capacity auction in December 2019 will

³⁰ Affidavit of Colin Anderson, sworn October 11, 2019, Exhibit F, p. 12 of 13, second last paragraph.

³¹ IESO presentation to IESO Board, Enhancing Ontario's Electricity Markets – MRP and TCA, June 12, 2019, page 22.

³² Affidavit of David Short, sworn October 25, 2019, paragraphs 2, 5 and 17 a).

³³ Affidavit of David Short, sworn October 25, 2019, paragraph 18 a).

³⁴ Affidavit of David Short, sworn October 25, 2019, paragraph 31.

³⁵ Affidavit of Colin Anderson, sworn October 11, 2019, paragraphs 13, 14 and 20 and Exhibit B, pages 22, 29, 35 and 40.

³⁶ Affidavit of David Short, sworn October 25, 2019, paragraph 19.

not increase competition, but will likely have the opposite effect.³⁷ Four generators have already registered to participate in the December, 2019 TCA, at least one of whom (KCLP) anticipates “*millions of dollars*” of incremental revenues as a result, which would be at the expense of its competition, including DR Resources which have successfully participated in this auction platform for the past 4 years.

39. Displacing one category of market participant (DR Resources) with another (generators) will not enhance competition, though it may well harm it, both in the near term as a result of displacing DR Resources in the December, 2019 auction, and in the longer term as an unjustly discriminatory initiative undermining general market confidence. In a recent decision, the U.S. Federal Energy Regulatory Commission (FERC) recognized that:

A market functions effectively only when both supply and demand can meaningfully participate, and barriers to demand response limit the meaningful participation of demand in electricity markets.

...

Removing barriers to demand response will lead to increased levels of investment in and thereby participation of demand response resources (and help limit potential generator market power), moving prices closer to the levels that would result if all demand could respond to the marginal cost of energy.

...

In Order No. 719, the Commission found that allowing demand response to bid into organized wholesale energy markets “expands the amount of resources available to the market, increases competition, helps reduce prices to consumers and enhances reliability.”

40. Driving DR Resources out of the auction would be contrary to the public interest in electricity market economic efficiency as sought by the IESO³⁸, and as reflected in the public interest objects of the IESO prescribed in the *Electricity Act*, including, “*promoting economic efficiency and sustainability in the generation, transmission, distribution and sale of electricity*”³⁹ [emphasis added] and thus protecting the interest of customers with respect to prices of electricity services⁴⁰. Displacing DR Resources with generation resources would also be contrary to the legislative public interest objectives of the IESO

³⁷ Affidavit of Colin Anderson, sworn October 11, 2019, paragraph 20.

³⁸ Affidavit of David Short, sworn October 25, 2019, paragraphs 2, 5, 17.a).

³⁹ *Electricity Act*, subsection 6(g).

⁴⁰ *Electricity Act*, subsection 6(f).

encouraging electricity conservation and the efficient use of electricity⁴¹, facilitating load management⁴², and promoting the use of cleaner energy sources and technologies, including alternative energy sources and renewable energy sources⁴³, all in a manner consistent with the policies of the government of Ontario.

41. If the Amendments are not stayed and the TCA is permitted to proceed prior to determination of the Application, the resulting exclusion of DR resources from the competition⁴⁴ to provide capacity to the IAM is likely to result in higher costs for consumers and a less reliable electricity system, as noted by FERC.
42. In these circumstances, the public interest is better served by waiting to adopt the Market Rule Amendments implementing the TCA until such time as they have undergone a review by the Board, and it has been determined whether these Amendments will hamper the fair, efficient and competitive operation of the IAM or discriminate against DR Resources.

The application is meritorious.

43. Ontario case law establishes that “*the threshold of determining whether there is a serious issue to be tried is a low one.*”⁴⁵ On this criterion the Board must simply be satisfied that the Application is not frivolous or vexatious.⁴⁶
44. Subsection 33(9) of the *Electricity Act* requires the Board to consider whether a market rule amendment “*unjustly discriminates against or in favour of a market participant or class of market participants*”, or “*is inconsistent with the purposes of this Act*”. If the Board finds that either of these circumstances exist, then it must make an order revoking the amendment(s), and referring the amendment(s) back to the IESO for further consideration.
45. As set out in AMPCO’s Application material, the pre-eminent North American energy regulator – FERC - has carefully and thoroughly considered the role of DR Resources in

⁴¹ *Electricity Act*, subsection 6(b).

⁴² *Electricity Act*, subsection 6(c).

⁴³ *Electricity Act*, subsection 6(d).

⁴⁴ Affidavit of Colin Anderson, sworn October 11, 2019, paragraph 20.

⁴⁵ *Association of Major Power Consumers in Ontario (Appellant) v. Ontario (Energy Board)*, 2007 CarswellOnt 4273 (Div. Ct.), at paragraph 19 (Brief of Authorities, Tab A).

⁴⁶ *RJR-MacDonald v. Canada (Attorney General)*, 111 D.L.R. (4th) 385, at paragraph 49, 55 (Brief of Authorities, Tab B).

wholesale energy markets, and the issue of just and reasonable compensation of those resources for their participation. FERC has concluded that:

- (a) Failure to compensate DR Resources for the value they provide to energy markets in the same manner as compensation is afforded to generation resources for the value which they supply to energy markets results in wholesale prices that are unjust and unreasonable.
- (b) Fairness of compensation of wholesale energy market participants for energy services provided influences the fairness and efficiency of capacity markets.⁴⁷

46. It follows that expanding the current DRA platform to allow generation resources eligible for energy market compensation to participate in the broadened capacity auction without addressing just and reasonable compensation for DR resources providing energy market services would result in capacity markets that are unfair and inefficient, and effectively anti-competitive and discriminatory. Such a result is contrary to several purposes of the IESO set out in the *Electricity Act*, including:

- (a) encouraging electricity conservation and the efficient use of electricity in a manner consistent with the policies of the Government of Ontario;
- (b) facilitating load management in a manner consistent with the policies of the Government of Ontario;
- (c) promoting 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;
- (d) protecting the interests of consumers with respect to prices and reliability of electricity service; and
- (e) promoting economic efficiency and sustainability in the generation, transmission, distribution and sale of electricity.⁴⁸

47. It is notable that the IESO itself recognizes the imperative to resolve the issue of energy payments for DR Resources. The IESO has established a stakeholdering process and

⁴⁷ 134 FERC, 18 CFR part 35, Docket No. RM10-17-000, Order No. 75, *Demand Response Compensation in Organized Wholesale Energy Markets*, March 15, 2011, page 67, footnote 167 (Brief of Authorities, Tab C).

⁴⁸ *Electricity Act*, section 6.

engaged a consultant to assess the issue, with the objective of reaching a final decision on the point by June 2020.⁴⁹

48. The impact of proceeding with the TCA prior to resolving the issue of energy payments for DR Resources is that they will be at a competitive disadvantage in, and likely excluded from, the auction.⁵⁰ This outcome raises very serious questions of discrimination against market participants and consistency with the purposes of the *Electricity Act*.
49. AMPCO submits that its evidence and Application indicate an issue to be tried that is clearly not “*frivolous or vexatious*”, and in fact is a serious one as contemplated by section 33(9) of the *Electricity Act*.

Implementation of the Market Amendments Rule would result in irreparable harm to persons seeking to provide DR Resources to the IAM and to the IAM itself.

50. As a matter of law, “irreparable harm” for the purposes of the test for a stay is identified by its nature, rather than its magnitude. Irreparable harm is “*harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other*”.⁵¹
51. The harm to DR Resources, if the December 2019 TCA proceeds, would be harm that could not be cured in the specific, statutory context in which it arises.
52. Generation resources, unlike DR Resources, receive payments for energy services provided. DR Resources do not currently have commensurate revenue opportunities for the energy services which they provide to the market.⁵²
53. If the TCA is implemented now (through the Market Rule Amendments), generators will offer into the auction taking into account the energy payments anticipated when they are activated. DR Resources will have to compete against these offers without any anticipated energy payments for activation, putting DR Resources at a competitive disadvantage to generators in the fledgling Ontario capacity market.⁵³

⁴⁹ Affidavit of David Short, sworn October 25, 2019, paragraphs 25 to 27.

⁵⁰ Affidavit of Colin Anderson, sworn October 11, 2019, paragraphs 12, 13 and 20.

⁵¹ *RJR-MacDonald, supra*, at paragraph 59 (Brief of Authorities, Tab B).

⁵² Affidavit of Colin Anderson, sworn October 11, 2019, paragraphs 12-14.

⁵³ Affidavit of Colin Anderson, sworn October 11, 2019, paragraph 14.

54. Without ensuring just and reasonable compensation to DR Resources, on a comparable basis with other resources which bring similar value to the IAM, the TCA will only result in driving the DR Resources that have successfully participated in the DRA out of the fledgling Ontario capacity market, and replacing one set of capacity auction participants (DR Resources) with another (generators).⁵⁴
55. This would actually be a step backward in evolution of the IESO administered markets, not a step forward, and as such would result in irreparable harm to DR Resources, and irreparable harm to the functioning of, and participant confidence in, the IAM.
56. It would also deprive the current set of capacity auction participants (DR resources) of the opportunity to provide capacity to the IAM during the delivery period of the subject auction(s) and to obtain capacity payments therefore, a loss for which such resources would have no obvious or effective legal recourse. In that sense, it is incurable (and thus irreparable) harm within the meaning of the case law.⁵⁵

The balance of convenience favours maintaining the status quo.

57. In assessing the “balance of convenience” the OEB must determine which of the parties before it will suffer the greater harm from either the granting of, or refusal to grant, a stay.⁵⁶ As part of the analysis of this criterion, the impact on third parties can also be considered⁵⁷, and case law holds that the “*status quo should be preserved when possible*”.⁵⁸
58. In this case, the balance of convenience favours staying the operation of the Market Rule Amendments pending determination of whether they are inconsistent with the objectives of the *Electricity Act*, and/or unduly discriminatory to DR Resources.
59. The evidence filed by respondents on this motion – the IESO and KCLP – fails to demonstrate any harm that would result from staying the Market Rule Amendments on an

⁵⁴ Affidavit of Colin, sworn October 11, 2019, paragraph 20.

⁵⁵ *RJR-MacDonald, supra*, paragraph 64 (Brief of Authorities, Tab B).

⁵⁶ *RJR-MacDonald, supra*, paragraphs 67-68 (Brief of Authorities, Tab B).

⁵⁷ *Quizno's Canada Restaurant Corp v. 1450987 Ontario Corp.*, 2009 CarswellOnt 2280 (Ont Sup Ct J), paragraphs 103-104 (Brief of Authorities, Tab D).

⁵⁸ *Atlas-Gest Inc. v. Brownstones Building Corp.*, 1992 CarswellOnt 2570 (Ont. Gen. Div.), paragraph 3 (Brief of Authorities, Tab E).

interim basis, let alone harm that would outweigh that which will be suffered by DR Resources should the December 2019 TCA proceed.

60. The IESO's affiant, David Short, explains what the impact will be on the IESO's market renewal program if the December 2019 TCA does not proceed: it will not have the benefit of "*learnings with respect to integrating and administering new resource types in the Ontario capacity market*"⁵⁹ that would otherwise be gained through the December auction. However, Mr. Short does not state that, or explain why, learnings from the two remaining phases of the capacity auction expansion process which precede the planned auction in 2021 (auctions planned for June, 2020 and December, 2020) would provide an insufficient basis for IESO to harvest these learnings. Nor does the evidence indicate whether the 4th round of TCA currently planned for 2021 is the round which is required to address the currently anticipated 2023 reliability issues, or whether an additional round might be inserted. In other words, Mr. Short's evidence does not demonstrate harm that would flow from staying the implementation of the Market Rule Amendments for a month and a half, as distinct from harm that might flow from the TCA never being implemented (which is not what AMPCO is proposing and not an outcome that will result from granting this motion). There is no evidence that granting the stay would preclude gradual evolution of the capacity auction process, and it is obvious that it would not.
61. Nor does the evidence demonstrate harm to system reliability. The forecasted capacity gap does not arise until the summer of 2023.⁶⁰ In the meantime, the IESO has a variety of tools available to it to ensure sufficient capacity exists. The DRA mechanism, which has been functioning successfully and securing cost effective capacity resources for the benefit of the IAM and Ontario's electricity consumers since 2015 can continue, and the IESO has recognized the DRA is a "*valuable and reliable tool for the IESO to secure capacity on the system...*".⁶¹ It also recognizes that the capacity auction is one option of many for capacity procurement that will be investigated over the course of 2020.⁶²

⁵⁹ Affidavit of David Short, sworn October 25, 2019, paragraph 17b. See also comments to the same effect in paragraphs 32 and 33.

⁶⁰ Affidavit of David Short, sworn October 25, 2019, paragraphs 12 and 14.

⁶¹ Affidavit of Colin Anderson, sworn October 11, 2019, paragraph 10 and Exhibit C.

⁶² Affidavit of Colin Anderson, sworn October 11, 2019, Exhibit F, p. 12 of 13.

62. Finally, the evidence also fails to demonstrate any harm to generators, such as KCLP, that would flow from granting the motion to stay. KCLP's evidence is that if the stay is granted, KCLP would lose the opportunity to compete for capacity for the summer and winter periods of next year, though KCLP also concedes that there is no guarantee that it would secure a capacity obligation through the auction.⁶³
63. While Mr. Windsor also observes that KCLP may have to shut down operations, this potential concern is both highly speculative – it is a decision that will apparently be made by KCLP's parent based on undisclosed criteria in respect of which there is no evidence from KCLP's parent or anyone else - and unconnected to the TCA specifically or to the request for a stay. The cited potential harm does not flow from granting the stay that has been requested; rather, it results from the fact that KCLP has been unable to recover its fixed operating costs via market mechanisms since its PPA expired in 2017, and the assertion that “[t]he parent company of KCLP has indicated that it is not willing to continue losing money without some indication that a mechanism will become available to recover sufficient revenues to keep the facility operating”.⁶⁴ The nexus between this general concern and the December TCA and its specific revenue potential in particular is not established. The affiant goes on to state his belief *[i]f KCLP is prevented from competing in the upcoming TCA... it is likely that the parent company will decide to discontinue facility operations*.⁶⁵ No basis for this belief has been provided. While it is not clear whether Mr. Windsor's assertion refers to the TCA program as a whole (i.e. all 4 of the currently planned evolutionary phases), or simply the first, December, 2019, stage, it seems non-credible that this result would obtain, after 3 years of operating in the IAM without a power purchase agreement (PPA), and given the IESO's stated objective of resolving the issues raised in AMPCO's Application by June, 2020.
64. On the other hand, AMPCO's evidence establishes that implementing the TCA now would be harmful to the functioning of the market, harmful to DR Resources and harmful to the public interest.
65. Running the December 2019 TCA would lead to an unfair capacity auction. If the TCA proceeds (as a result of the impugned Market Rule Amendments), generators will offer

⁶³ Affidavit of John Windsor, sworn October 25, 2019, paragraph 10.

⁶⁴ Affidavit of John Windsor, sworn October 25, 2019, paragraphs 15,17 and 20.

⁶⁵ Affidavit of John Windsor, sworn October 25, 2019, paragraph 20.

into the auction taking into account the energy payments anticipated when they are activated. DR resources will have to compete against these offers without any anticipated energy payments for activation, putting DR resources at a competitive disadvantage to generators.⁶⁶

66. Given the registration, to date, of 4 generators for the December TCA, the likely impact of proceeding with the December TCA is that DR Resources will not be able to clear the auction, losing a market revenue source that they have had for 4 years. Their inability to be cost competitive will effectively exclude them from participating in a process that was originally exclusive to them (the DRA), and thus replace one set of capacity auction participants (DR Resources) with another (generators).⁶⁷
67. In contrast, granting the interim stay requested by AMPCO would have the effect of preserving the status quo during the relatively short period of time between now and when the OEB issues a decision on the Application. Only 1 of the 4 currently planned “evolutionary” TCA’s would be affected. This factor is relevant to the balance of convenience analysis⁶⁸, and in this case, it is a factor that militates in favour of granting the stay.
68. The balance of convenience favours granting of the interim stay requested.

PART IV – CONCLUSION AND ORDER REQUESTED

69. For the foregoing reasons, AMPCO submits that the Board should grant an order staying the Market Rule Amendments. It has demonstrated that such an order:
 - (a) is in the public interest: it will ensure that an unfair auction does not proceed and that the fairness and competitiveness of the IAM market is not undermined, either in the short term through an unjustly discriminatory auction or in the longer term through a resulting loss of confidence in the fairness of the IAM;
 - (b) is warranted given that the Application is meritorious;
 - (c) is necessary to prevent the risk of irreparable harm to DR Resources, who will be excluded from a market mechanism originally designed for them without any recourse for recovery resulting losses;

⁶⁶ Affidavit of Colin Anderson, sworn October 11, 2019, paragraph 14

⁶⁷ Affidavit of Colin Anderson, sworn October 11, paragraph 20.

⁶⁸ *Donovan v. Sherman Estate*, 2019 ONCA 465, paragraph 23 (Brief of Authorities, Tab F).

- (d) is in the interests of Ontario consumers; and
- (e) is appropriate given that the balance of convenience favours preventing harm to DR Resources over addressing the vague, unsubstantiated and speculative concerns raised in the evidence of the IESO and KCLP, concerns which are not credibly connected with the deferral of only the first of at least 4 iterations of the TCA currently planned.

ALL OF WHICH IS RESPECTFULLY SUBMITTED by:



GOWLING WLG (CANADA) LLP, per:

Laura Van Soelen
Counsel to AMPCO

October 29, 2019