

**ONTARIO ENERGY BOARD**

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

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

**AMPCO**

**REPLY TO IESO SUBMISSIONS ON COSTS**

1. In Procedural Order No. 2 herein the Board determined that it will make cost awards in this proceeding available to eligible parties, and that it is appropriate for the IESO to be responsible for the costs of this proceeding. The Board found that this is consistent with;
  - (a) the overall legislative scheme in which this Application by AMPCO for review of an IESO market rule amendment arises, as a potential last step in relation to market rule amendments; and
  - (b) the outcome in (the only) two determined market rule review applications to date.
2. The Board also invited the IESO to make a submission if it wishes to object to bearing these costs, and to also make a submission if it wishes to object to any of the requests for cost eligibility, including that of AMPCO.

**The IESO Should Bear the Costs of this Proceeding**

3. The IESO has made a submission in which it asks the Board to reconsider its P.O. No. 2 findings on costs and, instead, defer determination of who should pay costs and who should be eligible for costs until the conclusion of this proceeding.

4. The IESO argued the same thing in each of the previous market rule amendment review applications brought before this Board;
  - (a) the EB-2007-0040 (Ramp Rate) Proceeding; and
  - (b) EB-2013-0029/0010 (RES) Proceeding.

In both instances, the Board rejected that argument. It should do so again.

5. In the Ramp Rate Proceeding the Board determined that it would not be appropriate to defer its decision, as had been requested by the IESO, regarding whether the IESO would be responsible for costs of the proceeding, and found that the IESO would be responsible for such costs.<sup>1</sup>
6. In the RES Proceeding the Board again determined that it would not be appropriate to defer its decision, as had again been requested by the IESO, regarding whether the IESO would be responsible for costs of the proceeding, and it again found that the IESO would be responsible for the such costs.<sup>2</sup>
7. In the RES proceeding the Board articulated its rationale as follows<sup>3</sup>:

*The IESO shall be responsible for the costs of this proceeding. The Board does not agree with the IESO that it would be “unjust” for the IESO to bear the costs of defending its market rule amendments. Rather, the Board finds that having the IESO bear the costs of this proceeding is consistent with the overall legislative scheme. The review process under section 33 of the Electricity Act is part of the overall market rule amendment process. On that basis, it is appropriate for the IESO, rather than the Applicants, to bear the costs of this review. The Board understands the IESO’s concern about unmeritorious applications; however, no such allegation has been made in this proceeding and the Board has a variety of tools to address such a situation should it arise.*

8. The IESO has now, for a third time, argued that the Board should defer its decision regarding whether the IESO will be responsible for the costs of this proceeding. In doing so, the IESO has argued that the Board should adopt a “costs follow the cause” model.

---

<sup>1</sup> P.O. 2, page 5, first full paragraph.

<sup>2</sup> P.O. 4, page 6, 2<sup>nd</sup> full paragraph.

<sup>3</sup> P.O. 4, page 6, 2<sup>nd</sup> full paragraph.

9. The IESO has also argued that the finding in P.O. No. 2 that the IESO should bear the costs of this proceeding is not consistent with the overall legislative scheme, because;
- (a) there is no express wording to this effect in section 33 of the *Ontario Electricity Act, 1998 (EL Act)*;
  - (b) an application to the Board to review a market rule amendment is a “*separate, distinct and exceptional proceeding*” in which the applicant bears the burden of challenging the market rule;
  - (c) this is unlike in FERC jurisdictions where ISOs must file and obtain FERC approval for market rule amendments and the onus is on the ISO to demonstrate the appropriateness of such amendments.
10. The Board should, for a third time, dismiss the IESO’s arguments.
11. A “*costs follow the cause*” model is not the model that this Board operates under. It is a model adopted for private litigation between parties, not public interest regulation.
12. As the Board has previously found (in the RES Proceeding);
- “the review process under section 33 of the Electricity Act is part of the overall market rule amendment process. On that basis, it is appropriate for the IESO, rather than the Applicants, to bear the costs of this review.”*
13. This is obvious from the legislative structure governing market rules. The lack of an express direction in section 33 of the *EL Act* that the IESO must bear the costs of any such proceeding does not in any way undermine this conclusion. The authority for the Board to award costs for participation in a proceeding before the Board arises from section 30 of the *Ontario Energy Board Act, 1998*, and applies, and has been habitually applied, to various types of proceedings before the Board under legislative provisions that do not expressly provide direction on costs.
14. The IESO’s focus on who is the applicant under the legislative governance process ignores the more salient factor, which is; ***who is the regulated entity.***
15. The fact that an application such as this one under *EL Act* section 33 is separate, distinct, and (as history has proven despite the IESO’s concerns brought forward in the 2007 Ramp Rate Proceeding and again in the 2013 RES Proceeding) exceptional, and is one in which the applicant bears a burden of proof, does not in any way render it not part of the overall

legislative scheme and governance process applicable to IESO rule making. To the contrary, as a potential last step in relation to market rule amendments, and the only step that entails consideration of the appropriateness of a market rule amendment outside of the IESO itself, an application such as this one plays a critical role in the overall legislative IESO governance scheme.

16. That fact that in FERC jurisdictions the ISO's bear the burden of proving to their independent regulator that their proposed market rules are appropriate merely underscores the importance of an application such as this in governance of IESO rule making, and the attendant appropriateness of Ontario's electricity ratepayers, through the IESO, bearing responsibility for the costs of such proceedings. In a legislative framework where, but for an application such as this, the IESO would not have to make public account to a third party regulator for its market rule actions, the facilitation of such recourse is particularly important to ensure proper governance and oversight in the public interest.
17. Were the Board to defer determination of who should bear the costs of this proceeding, including the costs of one or more parties other than themselves and the costs of the Board, AMPCO would be forced to abandon this application.
18. AMPCO is a not-for-profit consumer interest advocacy organization. AMPCO is funded by its members, who as Ontario electricity consumers also fund the IESO's operations (including its activities in response to this application). AMPCO is simply not set up or funded to absorb costs for an entire regulatory proceeding.
19. AMPCO does already absorb significant portions of its own costs of participating in regulatory proceedings, including;
  - (a) its own, unrecoverable organizational costs, including its costs of participating in IESO stakeholdering, in government relations activities, and in unfunded or unfunded portions of OEB initiatives; and
  - (b) its costs in OEB proceedings for legal and expert support beyond the below market tariff for cost recovery.

These costs to AMPCO are significant.

20. AMPCO does not have the capability to absorb the costs of this proceeding, beyond its own unrecoverable costs. Were the Board to leave that possibility open, AMPCO would

be forced to abandon this application, and the IESO would, finally on this third time around, be successful in significantly neutering the governance function of section 33 of the *EL Act*.

21. The Board should not allow this result.
22. AMPCO believes that its application herein, on its face, reflects a fully and fairly articulated and reasonable and responsible challenge to the IESO's market rule amendments, and the IESO has not asserted otherwise. There is no basis upon which the Board could conclude that the bringing of this application is not a *bona fide* and responsible exercise by AMPCO of a legislative entitlement for "*any person*" to apply to the Board under section 33 of the *EL Act* for review of an amendment to the market rules.
23. The IESO is a regulated entity. It is regulated by this Board. Part of this Board's regulatory mandate is to oversee, on application by "*any person*", market rule amendments, at least to the extent of ensuring that they are non-discriminatory and not contrary to the purposes of the *EL Act*. It is completely appropriate and consistent with this regulatory structure that the IESO, and though the IESO Ontario's electricity consumers on whose behalf the IESO operates and is regulated, be responsible for the reasonable costs of this proceeding.

#### **AMPCO's Eligibility for Recovery of its Reasonably Incurred Costs**

24. The IESO has also argued that AMPCO should not be eligible for recovery of its reasonably incurred costs in this proceeding because;
  - (a) it is the applicant herein; and/or
  - (b) it is acting on behalf of its members' commercial self-interests (as contemplated in paragraph 3.03(a) of the Board's *Practice Direction on Costs*) and there are no special circumstances justifying AMPCO's request for cost eligibility.
25. In the Ramp Rate Proceeding in which AMPCO was the applicant, AMPCO was found eligible for recovery of its reasonably incurred costs, on the basis that;
  - (a) its application raised legitimate issues for the Board's consideration; and

- (b) as market participants, members of AMPCO are in fact participating in the funding of cost awards in the matter through their payment of the IESO's administrative costs in accordance with the market rules.

The same is true in the current application.

26. The IESO has submitted that in the current application AMPCO is not primarily representing the direct interests of consumers (e.g. ratepayers), as contemplated by the Board's *Practice Direction on Cost Awards*.
27. It is true that, on this application, AMPCO is primarily acting in the interests of its members who offer, or who might offer, Demand Response resources (DR Resources), and as offerors, or potential offerors.
28. In advocating a "net benefits" test regarding the availability of energy payments to DR Resources, AMPCO is also advocating the interests of its members, including those who do not offer DR Resources, as electricity consumers.
29. In the circumstances of this application, AMPCO's members who offer DR Resources are also, as DR Resource offerors, "customers" of the IESO. In this respect, the observations of the Board in the Ramp Rate Proceeding cost determination decision regarding APPrO are instructive, and fully analogous in respect of AMPCO's cost eligibility in this proceeding. In that case the Board determined<sup>4</sup>;

*Generators constitute a class of participants in the IESO-administered markets that will be directly affected by the outcome of this proceeding. The Board believes that the views of generators with respect to the Amendment will be important to the Board's determination...*

30. AMPCO does acknowledge the Board's findings in the RES Proceeding regarding the cost eligibility of the applicants in that case. As noted in the IESO's submissions herein on cost responsibility<sup>5</sup>, the Board in that case ultimately determined<sup>6</sup>:

*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*

---

<sup>4</sup> P.O. No. 2, page 6, last paragraph.

<sup>5</sup> Paragraph 8.

<sup>6</sup> P.O. No. 6, page 4.

*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 amendments process. [Emphasis added]*

31. The IESO neglected to include the passage leading into the one which it excerpted. The preceding passage reads as follows:

*The Board finds that the Applicants have represented their private interests as generators in this proceeding. Although the Applicants submitted that the Application raised public interest issues, the Applicants have withdrawn their Application and have not pursued these public interest issues. The Board has therefore received no benefit from the Applicants in that regard. [Emphasis added.]*

32. In that case, the Board issued a Decision on Costs on February 28<sup>th</sup>, in which it determined that the IESO would be responsible for the costs of the proceeding and that cost eligibility requests would be determined at the conclusion of the proceeding. On March 1<sup>st</sup>, the Applicants withdrew their application. The matter had been settled. In the result, the Board was never called upon to undertake a public interest consideration.
33. The circumstances of that case are not analogous to those currently before the Board in respect of cost eligibility, and the finding in that case that the applicants, who had withdrawn their application, should in those circumstances not be eligible to recover their costs, does not provide any guidance on the issue of AMPCO's eligibility for recovery of its reasonably incurred costs in the instant proceeding.
34. AMPCO further submits that it has borne a significant amount of unrecoverable cost prior to bringing the instant application. AMPCO has participated in the IESO's stakeholding of the market rule amendments which are at issue in this application for more than a year, and has throughout borne its own costs (funded by its members) in doing so. The IESO argues that should continue through this application process. AMPCO disagrees.
35. The reason that the Board's practice is to determine cost eligibility and ultimate cost recovery in two stages - eligibility at the outset of a proceeding and recovery at the end of a proceeding - is to strike a balance between facilitating participation of cost eligible parties while maintaining the discretion to disallow recovery where costs have not been reasonably incurred or in support of the public interest in a robust, informed and ultimately publicly acceptable regulatory process and determination. Parties like AMPCO who rely

on cost awards to enable them to actively participate in regulatory proceedings on a properly informed and advised basis, across from regulated utilities whose ratepayers fund their regulatory activities, can thus come to the table, though they must assume the risks of their behavior at the table. AMPCO is prepared to assume that risk, as it always has. It cannot, however, fully and properly participate in this proceeding if it is forced to assume the risk that it will not recover any of its costs, regardless of how responsibly and prudently those costs were incurred and whether or not its participation assists the Board in its determinations.

36. The IESO has argued<sup>7</sup> that AMPCO's cost eligibility should be determined at the conclusion of the proceeding, when;

*"... the Board will be better informed to consider the factors relevant to determining cost eligibility, including: the principal interests represented by the parties, whether the 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".*

37. The IESO has confused cost eligibility and cost recovery principles, and conflated "costs follow the cause" principles which do not apply in a regulatory context with those principles that do apply. In particular;

- (a) The Board can make a determination on the "principal interests represented by the parties" now. In respect of AMPCO, as noted above, AMPCO is primarily representing the interests of its members who are IESO "customers" in offering DR Resources (and secondarily the interests of all of its members as electricity consumers for whom the "net benefits" that would result from energy payments to DR Resources is an important consideration). AMPCO's eligibility for recovery of its reasonably incurred costs for participation in OEB proceedings has regularly and consistently been recognized by the Board (as has its responsible conduct, after the fact).
- (b) Whether AMPCO's participation in this process is ultimately of assistance to this Board, and whether it has advanced reasonable positions and "participated reasonably" (the IESO's term, though we expect this should actually read "responsibly") will determine the extent to which AMPCO's costs are found, at the end of the day, to have been reasonably incurred and recoverable. AMPCO is prepared to take this risk, as it always has. That has nothing to do, under the

---

<sup>7</sup> IESO Costs Submission, paragraph 18.



Board's costs regime, with its eligibility to apply for such recovery. It is that eligibility which it is seeking to have determined now, as is the Board's normal practice.

- (c) The degree of success achieved by the respective parties is a concept applicable in litigation, not in regulatory proceedings. In regulatory proceedings the accessibility of the process to those directly affected and the contribution of those parties to a better understanding of issues and concerns by the Board and thus to a robust and acceptable outcome are the important, public interest, considerations.
- (d) AMPCO submits that, for the reasons detailed above, it should be determined to be eligible for recovery of its reasonably incurred costs, and there are no "*special circumstances*" considerations required for, or relevant to, this determination (other, perhaps, that while AMPCO is the applicant herein, the IESO is the regulated entity subject to the legislation).

38. The IESO is wrong in its positions.

- (a) The Board can, and with respect should, determine AMPCO to be eligible for recovery of its reasonably incurred costs now. Absent such a determination, the risk of no cost recovery despite responsible and informative participation will constrain AMPCO's ability to fully and fairly participate in this proceeding.
- (b) On the other hand, whether AMPCO's costs will have been reasonably and responsibly incurred as the proceeding unfolds cannot be determined now, will only be determinable at the end of the proceeding, and is a risk that AMPCO is fully prepared to assume, as it always does.

39. AMPCO thus reiterates the request included in its application that it be determined eligible for recovery of its reasonably incurred costs.

40. With such a determination, AMPCO intends to proceed to retain independent expertise in response to the Board's suggestion in P.O. No. 2 that the Board would be particularly interested in receiving evidence that describes the experience with compensation for demand response in markets in other relevant jurisdictions and the extent to which that experience is informative in the context of the market rule amendments in issue herein.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED by:**



**GOWLING WLG (CANADA) LLP, per:**  
Ian A. Mondrow  
Counsel to AMPCO

October 29, 2019