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November 1, 2019
File No.: 101926.1124

BY RESS and EMAIL

Ontario Energy Board
P.O. Box 2319, 27th Floor
2300 Yonge Street
Toronto, ON M4P 1E4

Attention: Ms. Christine E. Long, Registrar and Board Secretary

Dear Ms. Long:

**Re: Association of Major Power Consumers in Ontario (“AMPCO”) Application for
Review of an Amendment to the Independent Electricity System Operator
 (“IESO”) Market Rule Amendment
OEB Case No. EB-2019-0242**

We write in response to AMPCO’s letter of October 31, 2019 seeking permission to file additional evidence. The IESO strongly opposes the request.

AMPCO is the applicant in this proceeding and bears the burden of proving that the test in subsection 33(9) of the *Electricity Act, 1998* has been satisfied. The 120 day time period within which the Board is required to render a decision also, by necessity, imposes particularly tight timelines. AMPCO, in our submission, should have filed all of its evidence with the filing of its Application on September 26, 2019. It did not and it proposed to file additional “affidavit material as and when permitted by the Board”. The Board granted AMPCO this indulgence and directed AMPCO to file any additional affidavit evidence by October 11, 2019, which it did. AMPCO had the opportunity, as part of its initial Application filing and supplemental evidence filing, to file economic or other expert analysis. It chose not to do this.

In its Procedural Orders to date, the Board recognized that the appropriate procedure was for AMPCO as applicant to file the entirety of its evidence and that the IESO and other intervenors be afforded a fair opportunity to understand that evidence (through the submission of interrogatory requests) and prepare responding evidence. This is consistent with well understood and accepted practices and procedures in proceedings of this nature.

The proposed filing of new expert evidence by AMPCO after two opportunities to file evidence in chief – and contemporaneous with the intervenor evidence on November 8, 2019 – is not contemplated by the Board’s Procedural Orders. It would also, if permitted, violate fundamental principles of civil/administrative procedure and procedural fairness, and constitute case-splitting. Courts and tribunals have long applied the rule against case-splitting in recognition that, in circumstances such as this, fairness dictates that responding parties be provided with an opportunity to understand the full case being advanced by the applicant prior to filing their own evidence. This fundamental aspect of fairness will be seriously undermined if the Board permits AMPCO to file new expert evidence. AMPCO has not provided an adequate explanation as to why it could not have provided this evidence at an earlier date. The market rule amendment at issue in this proceeding was published on September 5, 2019 and the content of the amendment was known to AMPCO well in advance of that date. Indeed, as the record indicates, AMPCO

opposed the proposed amendment. AMPCO had ample time prior to the deadline for the filing of its evidence on October 11, 2019 to decide what evidence to prepare and file, including the proposed expert evidence. There can be no justification for AMPCO's failure to proactively prepare its case for this proceeding, particularly given the 120-day timeline for a Board determination under subsection 33(6) of the *Electricity Act, 1998*. The Board should not grant the requested indulgence.

AMPCO's claim that this is not the "affidavit material" referred to in Board's Procedural Order No. 1 should be disregarded. Procedural Order No. 1 reflected the language of AMPCO's own Notice of Appeal in which it proposed (in paragraph 53) to file "affidavit material as and when permitted by the Board" in support of its application. Notably, the Notice of Appeal made no mention whatsoever of the proposed expert evidence that AMPCO now seeks permission to file. If AMPCO intended to file subsequent expert evidence, it should have provided clear notice of that intention at the outset.

Nor should the Board give credence to AMPCO's assertion that this evidence is necessary to address the Board's statement in Procedural Order No. 2 about the experience of payments for demand response resources in other jurisdictions. Again, AMPCO is the applicant in this proceeding and had an obligation to advance all of its evidence (including addressing the experience in other jurisdictions) at the outset of this proceeding. AMPCO should not have been relying upon Board staff to put forth evidence needed to support its own case. The relevance of experience in other jurisdiction was surely not a surprise to AMPCO given its own reliance upon FERC Order 745 and the jurisdictional scan undertaken by Navigant as a part of the Demand Response Working Group (which was listed in the IESO's Licence Filings at section 6.3 (iv) and is appended to the IESO's affidavit evidence responding to the stay motion at Exhibit "I"). The Board has the benefit of the Navigant report, which contains a jurisdictional scan of the treatment of payments to demand response resources in US markets and other jurisdictions, and will have the opportunity to consider any further evidence that may be filed on this issue by intervenors on November 8, 2019.

For these reasons, we ask that the Board deny AMPCO's request and direct that the proceeding continue in accordance with the Board's prior directions on the exchange of evidence.

Yours truly,



for: Glenn Zacher

cc. IESO Regulatory Affairs
James Hunter, *IESO*
Patrick Duffy, *Stikeman Elliott LLP*
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