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November 1, 2019

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**SENT BY ELECTRONIC MAIL, FILED ON RESS & COURIER**

Ms Kirsten Walli  
Board Secretary  
Ontario Energy Board  
27<sup>th</sup> Floor  
2300 Yonge Street  
Toronto, ON M4P 1E4

Dear Ms Walli:

**AMPCO – Market Rule Amendment Review**  
**Board File No.: EB-2019-0242**  
**APPrO Submission on Stay Motion**

We are counsel to the Association of Power Producers of Ontario (“APPrO”). Please find enclosed APPrO’s submission on the AMPCO motion to stay.

Yours very truly,



Evan Barz  
EB:hi

Enclosure

c: Ian Mondrow/Laura Van Soelen (Counsel to AMPCO)  
Glenn Zacher/Patrick Duffy (Counsel to IESO)  
James Hunter (IESO)  
Michael Bell (OEB Staff)  
Ljuba Djurdjevic (OEB Staff)  
David Butters (APPrO)  
Richard King (Osler)  
Intervenors of Record

**ONTARIO ENERGY BOARD**

**IN THE MATTER OF** the *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A, as amended;

**AND IN THE MATTER OF** an application by the Association of Major Power Consumers in Ontario, pursuant to section 33 of the *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A and Rule 17 of the Ontario Energy Board Rules of Practice and Procedure requesting that the Ontario Energy Board review a set of Market Rule amendments made by the Independent Electricity System Operator (MR-00439-R00 to R05: Transitional Capacity Auction).

**AND IN THE MATTER OF** a notice of motion by the Association of Major Power Consumers in Ontario, pursuant to section 33 of the *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A and Rule 17 of the Ontario Energy Board Rules of Practice and Procedure to stay the operation of amendments to the Independent Electricity System Operator market rules pending determination of the Application.

**EB-2019-0242**

**SUBMISSIONS ON MOTION FOR STAY**

**ASSOCIATION OF POWER PRODUCERS OF ONTARIO**

**NOVEMBER 1, 2019**

**PART I – OVERVIEW**

1. On September 26, 2019, the Association of Major Power Consumers in Ontario (“**AMPCO**”) brought an application pursuant to section 33 of the *Electricity Act, 1998* (the “**EAct**”) requesting the Ontario Energy Board (“**OEB**” or “**Board**”) review a set of Market Rule amendments (the “**Amendments**”) made by the Independent Electricity System Operator (the “**IESO**”) (MR-00439-R00 to R05: Transitional Capacity Auction) (the “**AMPCO Review**”).
  
2. On the same day, AMPCO also brought the within motion for, *inter alia*, an order staying the operation of the Amendments, pending determination of the Board’s review of the Amendments.
  
3. The Amendments implement a transitional capacity auction (“**TCA**”), the first of which is scheduled for December 4, 2019. The TCA is the initial step in the planned evolution of the existing demand response auction platform (“**DRA**”) into a more competitive capacity auction that includes additional resource types. More specifically, the Amendments will evolve the existing DRA by adding non-committed, dispatchable generators to participate in a capacity auction, together with dispatchable loads and hourly demand response resources (together, “**DR Resources**”).
  
4. The narrow issue before the Board on this motion is whether the December 4, 2019 TCA should be stayed until the Board has reached a decision on the AMPCO Review, which it is required to do by January 24, 2020 by virtue of section 33(6) of the EAct.

5. The Association of Power Producers of Ontario (“**APPrO**”) submits that, in considering the test established by section 33(8) of the EAct, AMPCO’s requested stay should be denied. As described in greater detail below, in support of this position APPrO submits that:

- (a) The public interest and the impact of the Amendments on consumers militates against granting the stay;
- (b) AMPCO has failed to establish that DR Resources will suffer irreparable harm if the requested stay is not granted; and
- (c) The balance of convenience favours allowing the December 4, 2019 TCA to proceed as scheduled.

## **PART II – THE FACTS**

### **Background to the Amendments**

6. The DRA was introduced in 2015 and consisted of an auction in December of each year for a one-year commitment period commencing in May of the following year. If called upon, DR Resources participating in the DRA fulfilled their capacity obligation by refraining from consuming energy from the IESO-administered markets (“**IAM**”). DR Resources participating in the DRA received availability payments (also known as capacity payments).<sup>1</sup>

7. This phase of the TCA is the first step in expanding the DRA into a more competitive capacity auction by enabling non-committed, dispatchable Ontario generators to participate in a

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<sup>1</sup> Affidavit of David Short sworn October 25, 2019, paragraph 6.

capacity auction alongside DR Resources.<sup>2</sup> As was the case with the DRA, TCA participants will receive availability payments for providing capacity. The first TCA is scheduled to take place on December 4, 2019 for a commitment period that is to run from May 1, 2020 to April 30, 2021.<sup>3</sup>

8. The IESO anticipates proceeding with further amendments to its capacity design auction that will enable additional resources to participate (including imports and storage) in future phases of the auction.<sup>4</sup> To this end, the IESO intends to hold future capacity auctions in June 2020 (for a May 1, 2021 to April 30, 2022 commitment period), December 2020 (for a May 1, 2022 to April 30, 2023 commitment period) and in 2021 (for a May 1, 2023 to April 30, 2024 commitment period).<sup>5</sup>

#### **The Need for the December 4, 2019 TCA**

9. The IESO is presently forecasting a significant capacity gap of 3,844 MW beginning in summer of 2023.<sup>6</sup>

10. To address this forecasted capacity gap, in January 2019, the IESO announced its intention to implement the TCA. Following stakeholder engagement between February and August 2019, on August 28, 2019 the IESO Board of Directors (“**IESO Board**”) formally adopted the Amendments by way of an IESO Board resolution.<sup>7</sup>

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<sup>2</sup> Affidavit of David Short sworn October 25, 2019, paragraph 7.

<sup>3</sup> Affidavit of David Short sworn October 25, 2019, paragraph 8.

<sup>4</sup> Affidavit of David Short sworn October 25, 2019, paragraph 9.

<sup>5</sup> Affidavit of David Short sworn October 25, 2019, paragraph 10.

<sup>6</sup> Affidavit of David Short sworn October 25, 2019, paragraph 11.

<sup>7</sup> Affidavit of David Short sworn October 25, 2019, paragraph 13 & 15.

11. The IESO has indicated that it is important that the December 4, 2019 TCA be permitted to proceed as scheduled for, *inter alia*, the following reasons:

- (a) In light of the short timeframe for the IESO to prepare for the forecasted 2023 capacity gap, proceeding with the December 4, 2019 will provide the IESO with important information and experience with respect to integrating and administering new resource types in the Ontario capacity market.<sup>8</sup> As there are only three planned capacity auctions before the IESO holds the auction for the critical summer 2023 period, the December 4, 2019 auction provides a significant opportunity to learn from and evolve the TCA prior to 2023.<sup>9</sup>
- (b) Delays to planned implementation of the TCA (including the December 4, 2019 TCA) will reduce the margin for error and could force the IESO to address the forecasted 2023 capacity gap by relying upon less competitive mechanisms.<sup>10</sup>
- (c) The amendments ushering in the December 4, 2019 TCA will enable existing energy generators coming off contract to compete to provide capacity into the TCA. In the absence of such an opportunity, these generators may choose to (or may have already chosen to) cease operations to the potential detriment of the IAM and the interests of Ontario customers.<sup>11</sup>

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<sup>8</sup> Affidavit of David Short sworn October 25, 2019, paragraph 17.

<sup>9</sup> Affidavit of David Short sworn October 25, 2019, paragraph 32.

<sup>10</sup> Affidavit of David Short sworn October 25, 2019, paragraph 33.

<sup>11</sup> Affidavit of David Short sworn October 25, 2019, paragraph 35.

12. In support of its resolution adopting the Amendments, the IESO Board released reasons supporting the Amendments which ultimately concluded that delaying the introduction of the TCA would be detrimental to the market overall, since it would “*delay the introduction of increased competition, create an unnecessary delay in the phased approach to developing the auction in advance of substantial future capacity needs, and risk failing to retain access to existing generation assets coming off contract.*”<sup>12</sup>

**The AMPCO Review and AMPCO’s Motion for a Stay of the December 4, 2019 Auction**

13. At the core of AMPCO’s submissions in support of the requested stay is the argument that DR Resources will face irreparable harm if the December 4, 2019 TCA is allowed to proceed, since “*the TCA will allow for two classes of participants – one whose members receive an energy payment (generators) and one whose members do not (DR Resources).*”<sup>13</sup> More specifically, AMPCO alleges that DR Resources will be at a competitive disadvantage vis-à-vis generators in the TCA because DR Resources do not currently receive energy payments when “activated” and, as a result, they must increase their capacity auction offers to ensure that they recover their costs of activation in the event that they are activated to provide energy. Conversely, AMPCO submits that generators can anticipate receipt of energy payments when activated and can set their capacity offers taking into account those energy payments. This, AMPCO argues, will allow generators to

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<sup>12</sup> Affidavit of David Short sworn October 25, 2019, Exhibit “D”, *Reasons of the IESO Board in respect of an Amendment to the Market Rules* (August 28, 2019), p. 4.

<sup>13</sup> AMPCO Submissions for Motion for Stay dated October 29, 2019, paragraph 25.

submit more competitive bids into the TCA, with the likely result that DR Resources will be excluded from the TCA.

**PART III – THE LAW AND ARGUMENT**

14. The test to be applied by the OEB on this motion is set out in section 33(8) of the EAct. The test requires the Board to have regard to the following considerations in deciding whether to grant or deny the requested stay of the Amendments:

- (a) the public interest;
- (b) the merits of the application;
- (c) the possibility of irreparable harm to DR Resources;
- (d) the impact on consumers; and
- (e) the balance of convenience.<sup>14</sup>

15. For the reasons elaborated upon below, APPrO submits that:

- (a) the public interest and the impact of the Amendments on Ontario consumers militates against granting the stay;
- (b) AMPCO has failed to establish that DR Resources will suffer irreparable harm if the requested stay is not granted; and

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<sup>14</sup> *Electricity Act*, S.O. 1998, c. 15, Sch. A, subsection 33(8).



- (c) the balance of convenience favours allowing the December 4, 2019 TCA to proceed as scheduled.

**The public interest and the impact of the Amendments on consumers militates against granting the stay**

16. Contrary to AMPCO's submissions on the motion, the public interest and the impact of the Amendments on consumers does not militate in favour of granting the stay. Rather, the public interest and consumers will be better served if AMPCO's requested stay is denied and the December 4, 2019 auction can proceed as scheduled.

17. The TCA is the first step in transforming the DRA into a more competitive capacity auction, by enabling non-committed, dispatchable Ontario generators to participate alongside DR Resources.<sup>15</sup> Expanding the pool of potential participants in the auction process will result in a greater number of resources participating in the auction process, thereby increasing competition in the TCA (as compared to the DRA), with the likely result that auction clearing prices will decrease in the TCA. This outcome is in the public interest, as it will result in reduced costs for the IESO (since the IESO will pay less in availability payments to successful participants in the TCA), which will in turn result in lower electricity rates for Ontario consumers.

18. Indeed, AMPCO's own submissions acknowledge that participation in the most recent December 2018 DRA was the highest since the DRA's inception (with 38 participants), and these higher participation rates resulted in auction clearing prices decreasing by 42% since the first DRA

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<sup>15</sup> Affidavit of David Short, sworn October 25, 2019, paragraph 7.

in 2015, with the latest auction resulting in a 30% decrease over the previous one.<sup>16</sup> By logical extension, it follows that introducing off-market and non-regulated Ontario generators into the capacity auction (alongside DR Resources) should result in more participants in the TCA – the result of which should be greater competition and decreased auction clearing prices.

19. Reducing auction clearing prices and the electricity rates paid by Ontarians is in keeping with the purposes of the EAct, including:

- (a) “to protect the interests of consumers with respect to prices ... of electricity service”;
- (b) “to promote economic efficiency ... in the generation ... and sale of electricity”;  
and,
- (c) “to facilitate the maintenance of a financially viable electricity industry”.<sup>17</sup>

20. It is also in the public interest for the December 4, 2019 TCA to proceed as planned as it will afford the IESO important experience with respect to integrating and administering new resource types into the Ontario capacity market, within the short timeframe in which the IESO must be prepared for the forecasted 2023 capacity gap.<sup>18</sup> Taking this phased approach to the TCA, is prudent as it will reduce risk and will allow the IESO to, *inter alia*: (a) ensure that committed capacity resources are capable of satisfying their capacity obligations; (b) provide sufficient time

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<sup>16</sup> AMPCO Submissions for Motion for Stay dated October 29, 2019, paragraph 17.

<sup>17</sup> *Electricity Act*, S.O. 1998, c. 15, Sch. A, subsections 1(f), (g), and (i).

<sup>18</sup> Affidavit of David Short sworn October 25, 2019, paragraph 17.

to assess and evolve auction design features; (c) allocate the necessary resources to implement new auction design features in manageable steps; and (d) monitor and identify unforeseen consequences arising from new auction design features.<sup>19</sup>

21. On the other hand, attempting to integrate several different resources into the TCA in close proximity to the summer of 2023 will put the capacity auction process at risk and has the potential to undermine confidence in the TCA,<sup>20</sup> contrary to the public interest and the best interests of Ontario consumers.

22. Finally, the case law establishes that the public interest favours dismissing a motion for a stay. On a motion to stay the implementation of a validly enacted law or regulation “it is wrong to insist on proof that the law will produce a public good. Rather, at this stage of a proceeding, this is presumed.”<sup>21</sup> For the reasons articulated above, the Amendments are consistent with the purposes of the EAct and the objects of the IESO under the EAct. Given the Amendments’ consistency with the purposes and objects of the IESO’s enabling statute and the presumption that the Amendments are in the public good, this strongly militates against granting the requested stay.

**AMPCO has failed to establish that DR Resources will suffer irreparable harm if the requested stay is not granted**

23. APPrO agrees with AMPCO that the leading case on “irreparable harm” for the purposes of the test for a stay is the Supreme Court of Canada’s decision in *RJR-MacDonald v Canada (Attorney General)*. Based on *RJR-MacDonald*, AMPCO must establish that failure to grant the

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<sup>19</sup> Affidavit of David Short sworn October 25, 2019, paragraph 30.

<sup>20</sup> Affidavit of David Short sworn October 25, 2019, paragraphs 32-33.

<sup>21</sup> *Harper v Canada (Attorney General)*, 2000 SCC 57, paragraph 9.

stay could so adversely affect DR Resources that the harm could not be remedied if the eventual decision on the merits did not accord with the result of the stay motion. 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.*”<sup>22</sup>

24. Where APPrO disagrees with AMPCO is with respect to whether DR Resources will suffer irreparable harm if the December 4, 2019 TCA proceeds as scheduled. It is clear that DR Resources will not suffer irreparable harm.

25. The reason why DR Resources will not suffer irreparable harm relates to the timing of the hearing of the AMPCO Review and the Board’s statutory obligation to render a decision on that application by January 24, 2020 in accordance with section 33(6) of the EAct.<sup>23</sup>

26. The Board will be required to render its decision on the merits of the AMPCO Review by January 24, 2020. There are two possible outcomes – either:

- (a) the Board will determine that the Amendments are unjustly discriminatory to DR Resources; or
- (b) the Board will determine that the Amendments are not unjustly discriminatory to DR Resources.

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<sup>22</sup> *RJR-MacDonald v Canada (Attorney General)*, 111 DLR (4<sup>th</sup>) 385, at paragraph 63-64 [“*RJR-MacDonald*”].

<sup>23</sup> *Electricity Act*, S.O. 1998, c. 15, Sch. A, subsection 33(6).

27. In the former case (i.e., AMPCO is successful), the Amendments will be revoked prior to the start of the May 1, 2020 commitment period (in accordance with section 33(9) of the EAct). Under this scenario, DR Resources cannot be harmed because generators cannot compete against DR Resources.

28. In the latter case (i.e., AMPCO is unsuccessful), then the Board has determined that proceeding with the TCA does not discriminate against DR Resources – so there can be no irreparable harm to DR Resources. not.

29. Therefore, if the TCA is held on December 4, 2019 as planned, in no circumstances will DR Resources suffer any harm, since availability payments to successful participants in the TCA will not yet have been paid and will not be paid until May 2020. Simply put, if the Amendments are deemed to be discriminatory to DR Resources by the Board, the Amendments will be revoked and the results of the December 4, 2019 auction process will be rendered moot and there will be no harm to AMPCO members, financial or otherwise.

30. Accordingly, the evidence filed by AMPCO on this motion fails to meet the high threshold required to establish irreparable harm. AMPCO has not proven that DR Resources will suffer harm which cannot be quantified in monetary terms, nor has it established that it will suffer harm that cannot be cured.

31. As a result, AMPCO's requested stay must be denied by the Board.

**The balance of convenience favours allowing the December 4, 2019 TCA to proceed as scheduled.**

32. Whether the balance of convenience favors granting the stay depends upon a determination of which of the party will suffer the greater harm from the granting or refusal of the stay, pending a decision on the merits.<sup>24</sup>

33. As explained above, regardless of the outcome of this motion, DR Resources will suffer absolutely no harm if the December TCA is held as scheduled, let alone irreparable harm.

34. In contrast, granting the stay will deprive the IESO of important information about the Ontario capacity market . There is clear evidence before the Board that the IESO's ability to effectively implement an enduring capacity auction may be jeopardized if it is not permitted to proceed with the TCA in December 2019. That is the only certain outcome of a successful stay.

35. As indicated by the IESO, there are only three planned auctions before the IESO undertakes the auction for the critical summer 2023 period, which provides limited opportunities for the IESO to learn from and evolve the TCA in a prudent fashion.<sup>25</sup> Therefore, delaying the planned December 4, 2019 auction will increase the likelihood of errors, with resulting harm to the IAM and Ontario consumers.

36. Staying the operation of the December 4, 2019 also has the potential to result in some off-contract generators ceasing operations, as they will have no opportunity to compete in the IESO's capacity auction. As indicated in the affidavit filed by Kingston CoGen Limited Partnership

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<sup>24</sup> *RJR-MacDonald*, supra, paragraph 67.

<sup>25</sup> Affidavit of David Short sworn October 25, 2019, paragraph 33.

(“KCLP”), there is real likelihood that the parent company of KCLP may decide to discontinue the operation of its natural gas-fired facility if it is prevented from competing in the December 2019 TCA.<sup>26</sup> If other off-contract generators similarly decide to shutter operations, this has not only severe consequences for KCLP and other generators, but also adversely impacts the IESO and Ontario consumers, by inhibiting the IESO’s ability to address the potential looming capacity gap forecasted for the summer of 2023. Therefore, staying the operation of the December TCA could create long-lasting negative repercussions for KCLP, generators, the IESO, and Ontario consumers.

37. Furthermore, when considering the balance of convenience analysis, a distinction must also be made between public interest arguments made by private applicants (AMPCO), and public interest arguments made by public authorities (the IESO). Where a private applicant alleges risk of public harm, that harm must be demonstrated. As noted above, AMPCO simply has not demonstrated any harm to DR Resources.

38. On the other hand, the jurisprudence establishes that it is assumed that the Amendments are already in the public interest. As was held by the Supreme Court of Canada in *RJR-MacDonald*:

In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the

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<sup>26</sup> Affidavit of John Windsor sworn October 25, 2019, paragraph 20.

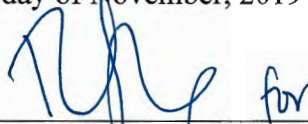
court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.<sup>27</sup>

Given this presumption, and AMPCO's inability to proffer any evidence of any harm, the balance of convenience favours denying the requested stay.

39. Finally, AMPCO's argument that the balance of convenience favours maintaining the status quo is a misapplication of the jurisprudence.<sup>28</sup> Preservation of the status quo is simply not the preeminent consideration. Rather, the jurisprudence establishes that preserving the status quo is effectively irrelevant where, as is the case here, the applicant had failed to prove irreparable harm or show they were favoured by the balance of convenience.<sup>29</sup>

40. In light of the foregoing, the balance of convenience favours dismissing the motion and denying AMPCO's requested stay.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED,**  
this 1<sup>st</sup> day of November, 2019



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**OSLER, HOSKIN & HARCOURT LLP,**  
Counsel for the Association of Power Producers of Ontario  
Per: Evan Barz

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<sup>27</sup> *RJR-MacDonald*, supra, paragraph 76.

<sup>28</sup> AMPCO Submissions for Motion for Stay dated October 29, 2019, paragraph 57.

<sup>29</sup> *Reliable Life Insurance Co v Ingle*, [2000] O.J. No. 4075, 100 A.C.W.S. (3d) 879, paragraph 33-34; and *Winking Judge Pub Ltd v Donnelly Hospitality*, 2019 BCSC 336, paragraph 67.