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November 1, 2019

Delivered by Email, RESS & Courier

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
27th Floor, Box 2319
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: Application for Review of an Amendment to the Independent Electricity System Operator Market Rules
Board File No. EB-2019-0242
Kingston CoGen Limited Partnership's Submission on Motion for Stay

Pursuant to the Procedural Order No. 3 dated October 22, 2019, please find enclosed the Submission on Motion for Stay in the above-captioned matter. Paper copies of this letter and the accompanying Submission will be delivered to you by courier.

Should you have any questions or require further information in this regard, please do not hesitate to contact me.

Yours very truly,

BORDEN LADNER GERVAIS LLP

Per:

Original signed by John A. D. Vellone

John A.D. Vellone

cc: John Windsor, Northland Power Inc.
Michael Lyle, IESO
Colin Anderson, AMPCO
Ian A. Mondrow, Gowling WLG

EB-2019-0242

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, 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* for review of amendments to the Independent Electricity System Operator market rules related to the implementation of a Transitional Capacity Auction (MR- 00439-R00-R05).

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.

KINGSTON COGEN LIMITED PARTNERSHIP'S

SUBMISISONS ON MOTION FOR STAY

I. OVERVIEW

1. Kingston CoGen Limited Partnership ("KCLP") opposes the motion brought by the Association of Major Power Consumers in Ontario ("AMPCO") to stay the operation of the Independent Electricity System Operator ("IESO") market rule amendment MR-00439-R00 to R05 that would implement a Transitional Capacity Auction ("TCA") (the "Amendment").

2. The Amendment is in the public interest. The purpose of the TCA is to address the significant capacity gap that is forecast to start in 2023. To date, only demand response ("DR") resources have been able to participate in a DR auction ("DRA").[1] The TCA is the first step to evolve the DRA into a more competitive auction that will include additional resource types, including non-committed dispatchable generators (or off-contract generators), such as KCLP.[2] The IESO's decision to implement the Amendment is prudent and in the public interest. The Amendment enables the IESO to study the TCA and to fine-tune it as necessary to fulfill its mandate.

3. If the Amendment is stayed, there will be irreparable harm to non-committed dispatchable generators and to the public interest. The IESO acknowledges that in the absence of this opportunity to compete, non-committed generators, such as KCLP, may choose to wind down their operations to the detriment of Ontario's electricity system reliability and the interests of Ontario consumers.[3] KCLP has provided clear, specific and factual affidavit evidence that in the absence of being able to participate in the TCA, it will likely be forced to shut down.[4] Moreover, in light of the forecasted capacity shortage in 2023, it is not in the interest of Ontario consumers that non-committed generators such as KCLP shutdown. These generation assets can play a role in addressing the future capacity gap and increasing

[1] Affidavit of David Short, sworn October 25, 2019 ("Short Affidavit") at para 6.

[2] Short Affidavit at paras 7 and 17(a).

[3] Short Affidavit at para 17(c).

[4] Affidavit of John Windsor, sworn October 25, 2019 ("KCLP Affidavit") at para 22.

competition in future capacity auctions.[5] Ratepayers have already paid for the capital cost of KCLP during its power purchase agreement ("PPA"). Ratepayers should not have to lose this source of capacity when it becomes necessary to call upon it.

4. Moreover, the IESO's evidence is that it must move forward with the Amendment now. It would be impractical and imprudent to attempt to introduce the full suite of changes required on the eve of the significant capacity need that the auction is meant to address.[6] The IESO's evidence is that "it is critical that the phased implementation of the enduring capacity auction begin with the TCA in December 2019."[7]

5. In contrast, AMPCO has not met the onus of demonstrating on the basis of clear and compelling evidence that it, or its members, will suffer irreparable harm if the Amendment is implemented. On the face of its evidence, AMPCO's most significant complaint with the TCA appears to be an academic or theoretical concern that DR resources will be competitively displaced by non-committed generators in the TCA if they do not receive a "utilization payment" or "energy payment" to recover the undefined costs they incur with an economic activation. Even if the stay is granted and we revert back to the DRA, DR resources would not receive an energy payment. This demonstrates that AMPCO's application and complaint about an energy payments is a covert attempt to keep off-contract generators out of the auction.

6. Furthermore, the IESO has commissioned a study to examine whether there is a net benefit to Ontario electricity ratepayers if DR resources are compensated with energy payments for economic activations.[8] In addition, the IESO has confirmed that historically, hourly DR resources and dispatchable loads have rarely been economically activated, and that there is a very low likelihood of economic dispatch for the first TCA commitment period.[9]

[5] Short Affidavit at para 35.

[6] Short Affidavit at paras 30 - 32.

[7] Short Affidavit at para 32.

[8] Short Affidavit at paras 18(c) and 25.

[9] Short Affidavit at para 36.

AMPCO has failed to provide clear and compelling evidence that it will suffer irreparable harm between now and the time that the IESO makes this determination. This is fatal to AMPCO's motion for a stay.

7. AMPCO's claim of harm also conveniently ignores the fact that large industrial dispatchable loads already receive a sizeable economic incentive to reduce their peak demand during coincident peak periods under the Industrial Conservation Initiative ("ICI"). The Ontario Energy Board's ("OEB" or the "Board") own Market Surveillance Panel reports:

> "The ICI has the effect of shifting the electricity costs recovered through the Global Adjustment from larger volume consumers to households and small businesses. Because the Global Adjustment now accounts for the lion's share of electricity supply costs, baseload as well as peaking, how those costs are allocated between large and small consumers has a significant effect on the effective electricity prices that they pay. Since its introduction in 2011, the ICI has shifted nearly $5 billion in electricity costs from larger consumers to smaller ones. In 2017, the ICI shifted $1.2 billion in electricity costs to households and small businesses—nearly four times greater than the amount in 2011. In 2017, the ICI increased the cost of electricity for households and small businesses by 10%.
>
> […]
>
> In the Panel's view, the ICI as presently structured is a complicated and non-transparent means of recovering costs, with limited efficiency benefits. The magnitude of the incentive to reduce peak demand during a year is inversely related to the Province's need for peak demand reduction the following year. Arguably, the

ICI does not allocate costs fairly in the sense of assigning costs to those who cause them and/or benefit from them being incurred."[10]

8. The existence of the Global Adjustment Mechanism, including the ICI, greatly complicates the analysis in a way that is simply not reflected in AMPCO's overly simplistic submissions. For example, it is possible that because of the Global Adjustment Mechanism in Ontario – which is inversely correlated with energy prices – DR resources will never meet the requirements of a "net benefits test".

9. If the OEB were to grant the stay, this would pre-judge the IESO's stakeholder engagement initiative to consider changes to the market rules to provide energy or utilization payments to DR resources as part of future phases of the capacity auction. The OEB should allow this study to be conducted without interruption and for the IESO to make the requisite decision based on the study's findings and not to have this issue pre-judged through this application.

10. KCLP submits that the previous DRA regime that completely excluded non-committed dispatchable generators from participating gave DR resources an unfair economic advantage in the market. AMPCO is essentially attempting to preserve this economic advantage to its members' benefit and to the detriment of other capacity providers and to the long term detriment of the public and the electricity market in Ontario.

II. AMPCO's Utilization Payment or Energy Payment

III. The Motion for a Stay should be Dismissed

[10] Ontario Energy Board Market Surveillance Panel, "The Industrial Conservation Initiative: Evaluating its Impact and Potential Alternative Approaches" (December 2018) at 2-3.

A. The legal test for a stay of the Amendment

11. Section 33(8) of the *Electricity Act, 1998* sets out the requirements for staying an amendment to the IESO market rules.[11] The OEB must consider five factors in its assessment:

    (a) The public interest;

    (b) The merits of the application;

    (c) The possibility of irreparable harm to any person;

    (d) The impact on consumers; and

    (e) The balance of convenience.

12. The test for granting a stay of the Amendment is similar to that of granting of an injunction, as set out by the Supreme Court of Canada decision in *RJR - MacDonald Inc. v Canada (Attorney General)*[12] as modified by *R v Canadian Broadcasting Corporation*[13], which provides that a stay may be granted if

    (a) the applicant has demonstrated a strong *prima facie* case that it will succeed on the merits;

    (b) the applicant has demonstrated that irreparable harm will result if the relief is not granted; and

    (c) the applicant has shown that the balance of convenience favours granting the stay.[14]

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[11] *Electricity Act, 1998*, SO 1998, c 15, Sched A.

[12] *RJR - MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311, 1994 Carswell Que 120 [*RJR - MacDonald*].

[13] *R v Canadian Broadcasting Corporation*, 2018 SCC 5.

[14] *RJR - MacDonald*, at para 49.

13. Further, section 33(9) of the Act requires that the Board make an order either revoking the amendment or referring it back to the IESO for further consideration if the Board finds that either of the following two conditions are met:

(a) the amendment is inconsistent with the purposes of the *Electricity Act, 1998*; or

(b) the amendment unjustly discriminates against or in favour of a market participant or class of market participants.

B. The Amendment is in the public interest

14. The public interest favours dismissing the motion to stay. On a motion to stay the implementation of a law or regulation, the courts have held that it is presumed that the new law will produce a public good and that it is in the public interest.[15]

15. The Amendment was enacted by the IESO who is a statutory non-profit corporation with a public interest mandate to direct the operation Ontario's electricity transmission grid and to operate the electricity market in Ontario. Under section 32 of the Act, it has legislative authority to make rules governing the electricity grid and markets relating to electricity and ancillary services ("Market Rules"). It also has the power to amend those Market Rules.

16. The objectives of these Market Rules are to govern the grid and to establish and govern "efficient, competitive and reliable markets for the wholesale sale and purchase of electricity and ancillary service in Ontario". The Board oversees the Market Rules and may look at the power given to IESO under the Act to make such amendments. The Board also has the power to revoke a Market Rule amendment, either on its own Motion or upon Application.

[15] *Harper v Canada (Attorney General)*, 2000 SCC 57 at para 9.

17. The Amendment is consistent with the purposes of the *Electricity Act, 1998* and the objects of the Board under the *Ontario Energy Board Act, 1998*.[16] The relevant legislative objectives that should be considered on this motion are:

(a) to ensure the adequacy, safety, sustainability and reliability of electricity supply in Ontario through responsible planning and management of electricity resources, supply and demand;

(b) to protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service;

(c) to promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity; and

(d) to facilitate the maintenance of a financially viable electricity industry.

18. Further, the OEB's legislative objects are an expression of the factors to be taken into account when considering public interest.[17]

19. The IESO has a legislative mandate under section 6 of the *Electricity Act, 1998* to operate the IESO-administered markets to promote the purposes of that Act. The IESO board decision approving the Amendment as being in the public interest considered each of these factors.

20. The Amendment and the TCA are in the public interest for the following reasons:

(a) The Amendment is part of the IESO's strategy to address a significant capacity gap that is forecast to start in 2023.[18] As such, it ensures that the IESO is proactively

[16] *Ontario Energy Board Act, 1998*, SO 1998, c 15, Sched B.

[17] *Ontario (Energy Board) (Re)*, 2006 LNONOEB 23 at para 137.

[18] Short Affidavit at para 11.

ensuring the electricity supply in Ontario and protecting the interests of consumers with respect to prices and the adequacy and reliability of electricity service;

(b) The Amendment enables the IESO to begin implementing the TCA in a phased approach in order to be ready to address the forecasted capacity needs. This reduces risk while ensuring a phased inclusion of new resources. As such, it ensures that the IESO is proactively ensuring the electricity supply in Ontario and protecting the interests of consumers with respect to prices and the adequacy and reliability of electricity service;

(c) The Amendment provides non-discriminatory access by enabling non-committed dispatchable generators to participate in the TCA alongside dispatchable loads and hourly DR resources;[19]

(d) The Amendment promotes economic efficiency and cost effectiveness in generation and DR, allowing both resources to compete to provide capacity into the IAM; and

(e) Through increased competition the Amendment protects the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.

C. The Merits - the Amendment does not unjustly discriminate against DR resources

21. Because the result of the stay will in effect amount to a final determination of the application, this requires an extensive review of the merits.[20] While ordinarily, the applicant must demonstrate that there is a serious issue to be tried, the minimal "serious issue to be tried" component of that test assumes that the stay will operate as a temporary measure and that the rights of the parties will be finally resolved when the appeal proper is heard. However, *RJR-MacDonald* recognizes that in cases where, as a practical matter, the rights of the parties will be determined by the outcome of the stay motion, the court and/

[19] Short Affidavit at para 17(c).

[20] *RJR - MacDonald*, at para 56.

or tribunal may give significantly more weight to the strength of the appeal.[21] As such, AMPCO must meet the higher threshold test on the merits of a strong *prima facie* case and not just the threshold of a serious issue to be tried.[22]

22. AMPCO's main argument on the merits is that the Amendment unjustly discriminates against DR resources. To substantiate this argument, AMPCO relies almost entirely on Order 745 from the Federal Energy Regulatory Commission ("FERC") ("Order 745").[23]

23. The OEB should draw a negative inference from the lack of detailed evidence supporting AMPCO's argument that the Amendment unjustly discriminates against DR resources. AMPCO has not filed any meaningful evidence to substantiate its assertion that preserving the Amendment and denying the stay would stifle competition and drive up prices for consumers.

24. Ontario's market is different. The IESO Board considered Order 745 in coming to its decision to implement the Amendment and found that it is not determinative. Order 745 is not binding on the OEB or Ontario. In its Demand Response Discussion Paper, Navigant noted the following with respect to the application of US policy to Ontario:

> **It is important to note that Ontario is different from many U.S. jurisdiction in that many of the DR resources are wholesale market participants or large customers that are exposed to real-time electricity prices as opposed to retail prices**. This means that Ontario DR customers avoid the entire real-time electricity price when curtailing and are exposed to high price spikes. When DR providers are only exposed to retail rates as they are in many U.S. jurisdictions, they are unlikely to have the same avoided cost benefit when curtailing during spikes in prices.[24] (emphasis added)

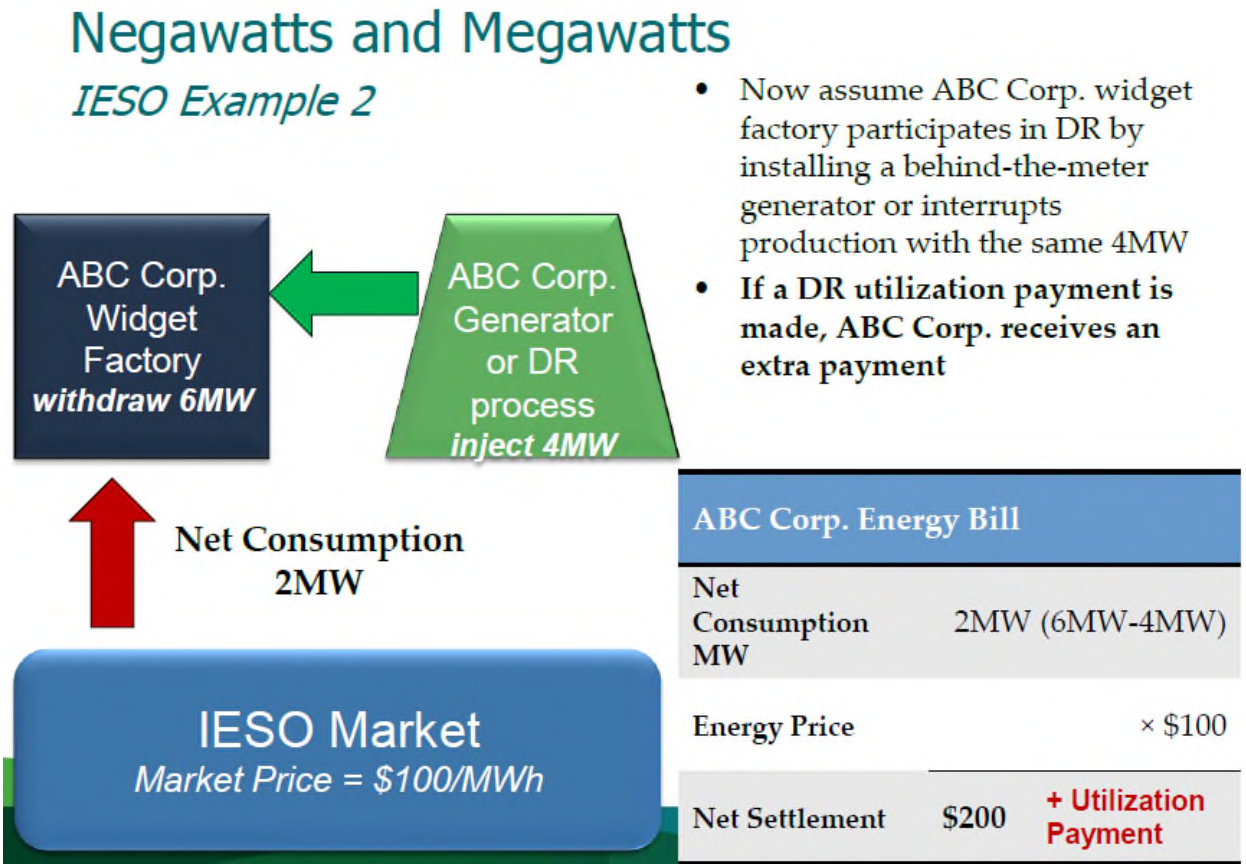
[21] *RJR - MacDonald*, at para 56.

[22] *R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 18.

[23] AMPCO Submissions at para 45-46.

[24] Exhibit "E" to the Short Affidavit, being Navigant's Demand Response Discussion Paper, dated December 17, 2017.

25. Further, based on the record before the OEB, it is premature to determine whether the lack of utilization payments is discriminatory against DR resources. There are examples in the materials that demonstrate that it is not discriminatory. For example, in the presentation by the IESO of March 1, 2018 on Utilization Payments to the Demand Response Working Group, some of the slides suggest that DR resources would get an extra windfall from a utilization payment that would go above being compensated for their energy.



26. The Board should give the IESO the opportunity to continue to study this issue to determine whether there is a net benefit to providing a utilization payment to DR resources. To do so on this motion, would pre-judge the issue.

D. AMPCO has not discharged its onus of demonstrating irreparable harm

1. Irreparable harm requires clear and compelling evidence

27. To demonstrate irreparable harm, AMPCO must establish that a refusal to grant the stay motion would adversely affect its interest and that the harm could not be remedied if the eventual decision on the merits did not accord with the result of the application.[25]

28. The evidence required to prove irreparable harm must be clear and compelling. As the Federal Court held, it is not sufficient to speculate that irreparable harm is "likely" to be suffered.[26] Similarly, general assertions cannot establish irreparable harm.[27]

29. The onus is on AMPCO to prove, on a balance of probabilities, that irreparable harm **will** result.[28]

30. AMPCO has not discharged its onus of demonstrating that its members or DR resources will suffer irreparable harm as a result of the Amendment. The quality of AMPCO's evidence of harm is captured in the following exert:

> "AMPCO has brought this Application on behalf of its members who will be negatively impacted by the amendments at issue. I am providing this evidence, in my role as President of AMPCO, and because of reticence that I perceived among my members to do so themselves. In my view this is an important role for an industry advocacy association, and its President."[29]

31. This is hearsay. AMPCO was unable to identify a single DR market participant that is willing to file and defend on cross-examination clear, specific and factual evidence of irreparable harm arising from the TCA.

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[25] *RJR - MacDonald*, at para 63.

[26] *Canada (Attorney General) v United States Steel Corp*, 2010 FCA 200 at para 7.

[27] *Gateway City Church v Canada (Minister of National Revenue*) 2013 FCA 126.

[28] *International Longshore and Warehouse Union, Canada v Canada (Attorney General)*, 2008 FCA 3.

[29] Anderson Affidavit at para 3.

32. The OEB should draw a negative inference based on the fact that no member of AMPCO, or any other DR resource, has provided specific evidence of harm arising from the Amendment.

33. By contrast, KCLP has filed clear, specific, concrete and factual evidence that it is likely to suffer irreparable harm should the Amendments be stayed and the TCA not proceed as planned. This is because without the TCA, there is simply no market for capacity where generators can compete in the IAM.

34. Put another way, the previous DRA process unjustly discriminated against off-contract generators, and in favour of DR market participants, by giving DR market participants an exclusive ability to compete in a market for capacity in the IAM. With the stay motion, AMPCO seeks to return to this unjust and discriminatory situation.

2. AMPCO's irreparable harm is based on conjecture unsupported by evidence

35. AMPCO's alleged loss is based on conjecture and is entirely hypothetical. AMPCO's position is that if the stay is not granted and the TCA proceeds as per the Amendment, DR resources will not receive an energy payment (or a utilization payment, as referred to in Mr. Anderson's affidavit), which will cause AMPCO members an economic disadvantage.

36. At a high level, KCLP provides the following responses to AMPCO's alleged harm.

(a) AMPCO has not defined what it means by "utilization payment" in its evidence. AMPCO defines a "utilization payment" as a "proxy for energy payments upon activation".[30] In its submissions, AMPCO states that the problem lies with not receiving an energy payment. This Board can draw an adverse inference over the lack of this specificity and ambiguity in AMPCO's position.

[30] Anderson Affidavit at para 15.

(b) The IESO has stated that under the TCA participants will receive availability payments for providing capacity, subject to non-performance targets.[31] As such, AMPCO will receive a payment for being available.

(c) In its reasons for the Amendment, the IESO stated that access to energy payments is not expected to be a material consideration for the December 2019 auction.[32]

(d) The IESO is engaged in a study to determine whether it is appropriate to provide utilization payments for DR resources. As such, if in the future the IESO finds that there is merit to such payments, the IESO would commence a market rule amendment process to implement those changes.[33] The OEB should not pre-determine the outcome of these consultations.

37. Even if the Amendment is stayed and the Market Rules revert back to the DR capacity auction, DR resources are not paid an energy payment under the DRA. As such, AMPCO's real source of complaint is not the lack of energy payments since that will not change whether the TCA proceeds or not. This demonstrates that what AMPCO is truly concerned about is controlling the size of the auction pool in an effort to maintain a higher auction price.

3. AMPCO's two options do not constitute irreparable harm

38. AMPCO says that under the Amendment, DR resources will be forced to reconsider its strategy for how it will compete in the TCA. AMPCO lists two options:[34]

(a) Option 1 – submit a capacity offer that does not incorporate potential losses if economically activated; or

[31] Short Affidavit at para 8.

[32] Exhibit "D" to the Short Affidavit, being Reasons of the IESO Board in Respect of an Amendment to the Market Rules, dated August 28, 2019 at 4.

[33] Short Affidavit at para 26.

[34] Anderson Affidavit at para 19.

(b) Option 2 – submit a capacity offer that does incorporate the expected losses.

39. KCLP walks through these two options to demonstrate that in neither case do DR resources suffer irreparable harm.

Option 1 – DR resources would submit a capacity offer that does not incorporate potential losses if economically activated

40. In this scenario, the DR resource offers the amount it would have offered if the DRA were allowed to persist and then risks being activated and not recovering costs that it incurs when activated.

41. AMPCO has not submitted any evidence of the type of costs DR resources would actually incur if activated or the expected materiality of loss or harm upon activation. For harm to occur, the cost incurred if activated must been an avoidable cost (i.e. a cost that is incurred if and only if activation occurs). By contrast, if the cost incurred does not depend on activation (i.e. an unavoidable cost) such as a fixed cost, activation would not increase the costs incurred and hence the risk of harm. This fixed cost is covered by the availability payment. So, the cost that the DR resource would be looking to be compensated must be an avoidable cost from economic activation.

42. AMPCO has not submitted any specific evidence or data that would help the Board understand what is the avoidable cost from economic activation or its magnitude. AMPCO had the onus to provide evidence in the form of data. This data ought to show the value of expected loss that would be incurred based upon the hours that the DR resource expects to be economically activated and the avoidable cost incurred upon activation. This Board should draw a negative inference from the absence of this evidence.

43. In reviewing and extrapolating from the IESO's evidence, this Board can come to the conclusion that the potential harm to an Hourly DR resource is insignificant:

(a) the IESO's evidence is that this type of DR resource has only been economically activated on 1 occasion since the implementation of the DRA (roughly three and a

half years) and the IESO does not expect the number of activations to increase in the commitment period for the TCA. Based on this data, the probability of a DR resource being activated is roughly one hour in 3.5 years or 0.003%.

(b) While we do not have the information on avoidable variable costs incurred upon activation, this Board can make an assumption that since AMPCO believes it needs to receive an energy payment at market price to cover these costs, it would definitely cover these costs when activated at the highest market-clearing price realized since the implementation of the DRA. Since implementation in 2016, the highest Hourly Ontario Energy Price ("HOEP") occurred on March 11th, 2017 and was $1,822.95/MWh. Since 2016, the HOEP exceeded $1,000/MWh in only 4 hours or roughly 0.01% of the hours, which further illustrates the unlikely risk of activation of DR resources that submit energy bids greater than $1,000/MWh.

(c) If activated, the Hourly DR resource must reduce its consumption for 4 hours. Using the assumption of 1 expected activation event (or a 0.003% chance of activation) and an avoidable cost of $1,822/MWh, the ***maximum*** expected loss absent an energy payment would be $0.24 (0.003% x $1,822/MWh x 4 hours).

(d) This expected loss is *de minimis* when compared to the annual availability payments. The DRA clearing price in the last auction was $234.64 – MW – day which implied an annual availability payment of $85,643.60 per MW year.

(e) Furthermore, this is not an unmanageable risk of loss. The Hourly DR resource can manage the risk of incurring this loss through its energy bid. The Hourly DR resource may bid a price of up to $1,999.99/MWh for energy. If it were to bid at this amount, it would only be dispatched for economic reasons if the relevant activation price was $1,999.99 or greater. As noted above, the HOEP has not exceeded this amount since the implementation of the DRA. This means that the expected loss to an Hourly DR resource under this strategy is largely controllable by the resource.

<u>Option 2 – DR resource submits a capacity offer that does not incorporate the expected losses if economically activated</u>

44. Under this strategy, the DR resource incorporates any expected losses from activation into their capacity auction offer. To be optimal, this strategy has to result in even less loss than the first option discussed above for the Hourly DR resource to adopt it. Under this scenario, because the Hourly DR resource submits a higher auction bid, it increases the risk of being unsuccessful in the TCA and missing out on the entire availability payment, which is a greater amount than the expected loss from option 2. That said, given the expected losses described above, it is hard to imagine that not receiving an availability payment should materially affect the amount a DR resource would offer in the TCA.

45. Harm to **dispatchable loads** is considered separately. The IESO's evidence is that dispatchable loads have been dispatched less than 1 percent of the time since the implementation of the DRA. This amounts to approximately 87 hours per year on average. This means that in approximately 87 hours a year, the dispatchable load freely chose to submit an energy bid and to respond to the instruction by the IESO to reduce consumption. The dispatchable load did this without the expectation of an energy payment.

46. If on activation, the dispatchable load incurred an avoidable cost, as alleged in the AMPCO evidence, it would have been willing to incur this cost simply to avoid paying the market price for consumption. This means, it would be willing to consume electricity even if the value it gets from consuming the electricity is negative, because doing so means it avoids a cost. To see this, consider the following example. Assume that the avoidable cost of activation is equal to C. As a dispatchable load, it consumes electricity as an input in the production of a product it can sell for a profit (i.e. a widget it sells to consumers wanting widgets). In principle, it should be willing to consume electricity as long as the value it gets from using the electricity as in input is less than the price it pays for the electricity. Assume the value it gets from consuming is V and the price it pays is P. If the dispatchable load consumes, it realizes a value of V-P. If the dispatchable load does not consume, it incurs a cost of C. This means that it is willing not to consume only if V-P<-C (i.e. it is willing to consume at a loss of productive value). Given that the dispatchable loads have been economically dispatched an average of 87 hours per year, it would have been dispatched not to consume at relatively low prices. Since 2016, the highest HOEP has never

exceeded $100/MWh. This implies that either dispatchable loads place a very low value on consuming electricity or the alleged avoided cost of activation, C, is very low.

47. Dispatchable loads participated in the IAM since market opening and well before receiving an availability payment from the DRA. Their participation was premised on the ability to avoid high electricity price (prices that exceed V). It was in their economic interest to do this without an availability payment or an energy payment. Given that most companies will place a relatively high value on consumption and most certainly something higher than $100/MWh, the most likely conclusion to draw from the dispatchable loads behaviour is that they ***do not*** incur an avoidable cost such as C on economic activation. Without an avoidable cost of economic activation, they ***cannot*** suffer harm if they do not receive an energy payment. They can avoid the harm of consuming at prices that exceed their willingness to pay through their energy bid.

4. Allegations of competitive disadvantage is not irreparable harm

48. AMPCO speculates, without concrete evidence and specific evidence, that DR resources will be at a competitive disadvantage to generators in the TCA because they will not have additional anticipated IAM payment streams to factor in when setting their auction price.[35]

49. In its submissions, AMPCO defines the irreparable harm as a competitive disadvantage. At law, unfair competition may amount to an "irreparable harm" if:

(a) it results in concrete and adverse consequences—such as a permanent market loss;[36] or

(b) going out of business.[37]

[35] AMPCO Submissions for Motion for Stay, dated October 29, 2019 at para. 25 ("AMPCO Submissions"); Anderson Affidavit at paras 13 and 14.

[36] *RJR - MacDonald* at 405.

[37] *Weston Gardens Retirement Inc. v 2540250 Ontario Ltd.*, 2019 ONSC 2663 at para 23

50. Flowing from this principle, the law is settled that "any interference with a business [will not] constitute irreparable harm"[38]; and the parties cannot use interlocutory injunctions as conduits to "prevent competition".[39]

51. In the event that a party has suffered a concrete and difficult-to-compensate loss that may amount to an "irreparable harm", they must adduce clear and non-speculative evidence of such harm. It is not sufficient to merely assert loss of market share. Here, AMPCO's competitive disadvantage allegations focus on utilization payments. There is no clear evidence that such payments will lead to unfair competition that may have concrete and adverse consequences for AMPCO. On the contrary, this remains under study by the IESO. AMPCO also has not adduced any evidence—beyond bald assertions—regarding the alleged perils associated with utilization payments and that the purported losses it may suffer will be difficult to quantify and/or compensate. Furthermore, our evidence above indicates that any alleged harm is *de minimus*.

52. Even if we consider AMPCO's arguments at its highest (though KCLP disagrees) – that it will not be able to participate in the TCA while its members do not receive a "utilization payment" – there is nothing in AMPCO's evidence that demonstrates that this will cause irreparable harm to its members that it could not recover from in the future. The IESO will be engaged in consultations about the merits of a utilization payment for DR resources. It is possible that in the next stages of the evolution of the TCA such a utilization payment will be made available. AMPCO does not state or provide any evidence that by not being able to participate in the TCA in the interim period this will cause its members irreparable harm. This is fatal to AMPCO's motion for a stay of the Amendment.

5. KCLP's evidence of harm

53. In contrast, KCLP has provided evidence that it will be harmed if the stay is granted and it is unable to participate in the TCA. In particular, with respect to the harm to KCLP:

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[38] *Zeo-Tech Enviro Corp. v Maynard*, 2005 BCCA 392 at para 43.

[39] *Mark Anthony Group Inc. v Vincor International Inc*., 1998 CanLII 6424 (BCCA) at para 32.

(a) KCLP no longer has a PPA with the IESO. Normally, under a PPA, the generator's fixed costs are covered by the PPA. KCLP's fixed costs are not.

(b) While KCLP has continued to be a market participant in Ontario and to offer its energy into the IAM, the energy market in Ontario at this time does not provide KCLP sufficient opportunities to generate revenues above its marginal operating costs.

(c) Without the TCA, KCLP is unable to recover its fixed and variable costs from the energy market alone.

(d) The first TCA is scheduled for December 4, 2019.[40]

(e) If KCLP is prevented from competing in the upcoming TCA, it is likely that its parent company will decide to discontinue facility operations.

54. AMPCO's attempts to discredit KCLP's evidence is not convincing. KCLP provides evidence that if the stay is granted and it is not able to participate in the TCA, then it is likely to wind-down operations. There is precedent for this happening to a similar generator – Cochrane – when it was no longer under a PPA.

55. Furthermore, we can estimate the harm to the off-contract generator from the stay by assuming that the entire capacity market clearing price is needed to cover the fixed costs of its operation. Based on the prices from the last auction, that expected harm is $85,643.60 per MW per year. That is, if the stay is granted, KCLP will be denied the opportunity to compete to earn an availability payment of roughly $85,643.60 per MW per year. This availability payment does not represent profit. It simply represents the recovery of legitimate costs incurred to make sure the generator asset is maintained and available for the reliability benefit of Ontario consumers.

56. Furthermore, if the stay is granted, the off-contract generator will have to make the decision to incur the loss of $85,643.60 per MW for one more year and then hope to recover this

[40] Anderson Affidavit at para 8.

loss in the future through the energy market and the TCA or to decide that it is not worth staying in business. If both the energy market and TCA are as competitive as the IESO projects, it will be difficult to recover these losses over time, as competition will drive down prices to the point where all resource will only earn enough to recover their annual fixed and variable cost.

6. Harm to the public if the stay is granted

57. Were KCLP discontinued, this could cause harm to Ontario consumers when there is a capacity gap. The IESO's evidence is that if non-committed dispatchable generators are not able to compete in the TCA, these generators may choose to wind down their operations to the "potential detriment of Ontario reliability and the interests of Ontario consumers".[41] Similarly, in the IESO's Reasons in respect of the Amendment to the Marker Rules, the IESO determined that delaying the auction to complete the analysis would be detrimental to the market overall:

> Specifically, delaying the auction 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**. A delay would therefore result in decreased competition in Ontario and give rise to potential negative impacts on reliability. [42] (emphasis added)

58. AMPCO suggests, without evidence, that deferral of the first auction is not fatal to the program.[43] This is incorrect and ignores the IESO's evidence. Granting the stay will cause harm to the IESO's plans to prepare for and address the capacity gap that is forecasted for 2023. The IESO board concluded that delaying the auction in order to complete the analysis

[41] Short Affidavit at para 17(c)

[42] Exhibit "D" to the Short Affidavit, being Reasons of the IESO Board in Respect of an Amendment to the Market Rules, dated August 28, 2019 at 4.

[43] AMPCO Submissions at para 31.

will be detrimental to the market overall.[44] AMPCO has not filed any evidence to rebut this assertion by the IESO.

59. AMPCO is attempting to second-guess, without any evidence, the IESO's regulatory choices by suggesting that as there are three auctions scheduled between now and 2021, that there should be no concern in delaying the current auction.[45] The OEB should defer to the IESO's experience and prudence in determining whether a delay of this auction is in the public interest. In particular, the IESO's evidence is that:

(a) A capacity deficit will exist in the summer of 2023 of approximately 4000 MW;[46]

(b) The Amendment is the first phase evolving the DRA into a more competitive capacity acquisition mechanism that includes new resource types;[47] and

(c) The Amendment enables the IESO to begin implementing the TCA in a phased approach in order to be ready to address forecasted capacity needs in Ontario. The IESO's evidence is that this will reduce risk and is a more prudent approach than attempting to implement a new capacity auction on the eve of the time when capacity will be required.[48]

E. The balance of convenience favours dismissing the motion for a stay

60. At its core, the balance of convenience is a determination of which of the parties will suffer the grater harm from the granting or refusal of a stay pending a decision on the merits.[49]

[44] Exhibit "D" to the Short Affidavit, being Reasons of the IESO Board in Respect of an Amendment to the Market Rules, dated August 28, 2019 at 4.

[45] AMPCO Submissions at para 32.

[46] Short Affidavit at para 14.

[47] Short Affidavit at para 17(a).

[48] Short Affidavit at para 17(c).

[49] *RJR - MacDonald* at para 342.

61. The onus is on AMPCO to demonstrate that it would be in the public interest to stay the Amendment. The jurisprudence holds that it is assumed that the Amendment is already in the public interest. In *RJR - MacDonald*, the Supreme Court of Canada held that:

> When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. **In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit**.

62. The guidance from the Supreme Court of Canada in *RJR - MacDonald* is again of assistance in interpreting this criterion:

> 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 party 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 court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.[50]

63. In *Assn of Major Power Consumers of Ontario v Ontario (Energy Board)*, the Divisional Court considered a request made by AMPCO to grant a stay pending an appeal to the Divisional Court of a decision of the OEB dismissing a challenge to certain amendments to the Market Rules. The Divisional Court phrased the question at the balance of convenience stage as "whether there are '…public interest benefits which flow from the granting of the relief sought'. That is, is there a public benefit if the stay is granted?"[51]

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[50] *RJR - MacDonald* at para 71.

[51] *Assn of Major Power Consumers of Ontario v Ontario (Energy Board)*, 2007 OAC 11 (Div Ct) at para 32.

64. The British Columbia Court Supreme Court's decision in *Sobeys West Inc. v College of Pharmacists of British Columbia* is instructive. In that case the respondent regulatory body, who is responsible for registering and licensing pharmacist and pharmacy technicians throughout the province, became concerned about incentives, such as customer loyalty or reward programs, offered by some pharmacies. The regulator banned the practice. Two companies filed a petition to quash the bylaws and brought an injunction enjoining the regulator from applying or enforcing the bylaws. The Court dismissed the injunction, writing: "I consider that the respondent must be offered the opportunity to develop its position as to public safety on the hearing of the petition, and that I cannot assume that the statutorily created body charged with the protection of the public relating to pharmacists and pharmacies has proceeded contrary to its statutory obligations in passing the impugned by-laws."[52]

65. AMPCO's submission that the balance of convenience favours maintaining the status quo is not supported by the jurisprudence.[53] Preservation of the status quo is not the default rule nor a pressing consideration in analyzing the balance of convenience. This is especially the case when the courts are to assume that the regulator and/or the legislature is acting in the public interest. The British Columbia Court of Appeal found that on applications for a stay, the notion of preserving the status quo is of "limited utility".[54]

66. In this case, the balance of convenience favours dismissing the stay motion:

    (a) The IESO's evidence is that it must move forward with the December 2019 auction in order to properly prepare for 2023. It is not up to AMPCO to second guess this evidence without any supporting documentation or expert reports.

[52] *Sobeys West Inc. v College of Pharmacists of British Columbia*, 2014 BCSC 12 at para 46.

[53] AMPCO Submissions at para 57.

[54] *Telus Communications v Rogers Communications Inc*., 2009 BCCA 581 at para 70.

(b) As part of this process to create a capacity auction, the IESO is engaged in stakeholder consultations to determine whether DR resources should receive an energy payment or not. This consultation process should not be pre-determined.

(c) There is no evidence that AMPCO will be irreparably harmed if it does not receive energy payments during the first TCA auction. The harm that AMPCO has propounded is theoretical and speculative – a loss of competitive advantage. But AMPCO has not provided any concrete data on how the loss of the energy payment is going to harm AMPCO's members' interests. Nor have any members provided such data. On the other hand, the IESO's evidence shows that an energy payment may actually constitute a windfall to AMPCO.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

Per:

Original signed by John A. D. Vellone

John Vellone
Counsel for KCLP