Ontario Energy Board | Commission de l'énergie de l'Ontario

BY EMAIL

November 1, 2019

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

Attention: Ms. Christine E. Long

Dear Ms. Long:

Re: OEB Staff Submission
Association of Major Power Consumers in Ontario (AMPCO)
Application to Review Amendments to the Market Rules Made by the Independent Electricity System Operator (IESO)
Ontario Energy Board: File No.: EB-2019-0242

Pursuant to Procedural Order No. 3, please find attached the submission of OEB staff on AMPCO's Motion to Stay the Operation of the Amendments in the above referenced proceeding.

Yours truly,

Original Signed by

Michael Bell
Project Advisor, Application Policy and Climate Change

cc: All Parties in EB-2019-0242

ONTARIO ENERGY BOARD

OEB Staff Submission on AMPCO's Motion to Stay the Operation of the Amendments

Association of Major Power Consumers in Ontario

Application to Review Amendments to the Market Rules Made by the Independent Electricity System Operator

EB-2019-0242

November 1, 2019

Introduction

On September 26, 2019, the Association of Major Power Consumers (AMPCO) filed a Notice of Appeal (Application) asking the Ontario Energy Board (OEB) to review and issue an order revoking amendments to the market rules made by the Independent Electricity System Operator (IESO) (MR-00439-R00 to -R05) (Amendments), and referring the Amendments back to the IESO for further consideration. The Application was filed under section 33 of the *Electricity Act*, *1998*, S.O. 1998, c. 15, (Schedule B) (Act).

The OEB is required by section 33(6) of the Act to issue an order that embodies its final decision on AMPCO's Application within 120 days of receipt of the Application.

The Amendments enable the evolution of the IESO's Demand Response Auction (DRA) into a Transitional Capacity Auction (TCA)[1] by allowing the participation by non-committed dispatchable generators. The Amendments took effect on October 15, 2019. The IESO is planning to hold the first TCA in early December 2019, with key milestone dates scheduled in the interim period.

AMPCO also filed a Notice of Motion requesting an order of the OEB staying the operation of the Amendments pending the completion of the OEB's review (Motion). In Procedural Order No. 2 issued on October 18, 2019, the OEB indicated that it would proceed to deal with the Motion and the Application in parallel.

Further to the Procedural Orders issued in this proceeding, the following have been filed by parties in respect of the Motion:

- The Affidavit of Colin Anderson, filed by AMPCO on October 11, 2019 (AMPCO Affidavit)
- The Affidavit of David Short, Director of Capacity Market Design for the IESO, filed by the IESO on October 25, 2019 (IESO Affidavit)
- The Affidavit of John Windsor, Vice President of Energy Services and Asset Management at Northland Power Inc., the corporation that indirectly owns Kingston CoGen Limited Partnership (KCLP), an intervenor in this proceeding, filed by KCLP on October 25, 2019 (KCLP Affidavit)
- Written submissions on the Motion, filed by AMPCO on October 29, 2019 (AMPCO Motion Submission) and associated Brief of Authorities

In this submission, OEB staff highlights the factors to be considered by the OEB in determining whether to stay the operation of the Amendments, relevant jurisprudence

[1] The Amendments themselves refer simply to a "capacity auction", and not to a "transitional capacity auction".

on the application of the various factors, and OEB's staff's view as to whether the operation of the Amendments should be stayed pending the OEB's decision on the Application.

The Amendments

Since 2015, the IESO has held annual Demand Response Auctions (DRA) to acquire Demand Response (DR) capacity from market participants that are able to provide that capacity to the market in exchange for an availability or 'capacity' payment; in other words, a payment to ensure that capacity is available as and when called upon during the relevant "commitment period" applicable to the DRA. Four DRAs have been held in Ontario, the most recent in December 2018.

The Amendments enable the evolution of the DRA into a TCA by allowing non-committed dispatchable electricity generators to participate in future capacity auctions alongside DR resources (DR Resources). The Amendments took effect on October 15, 2019. The IESO is planning to hold the first TCA in early December 2019, with key milestone dates scheduled in the interim period. The TCA would aim to secure capacity that could, if needed, be called upon during the commitment period that runs from May 1, 2020 to April 30, 2021. Another TCA is scheduled to take place in June 2020.

Overview of the Filings to Date

AMPCO

AMPCO represents major power consumers in Ontario, some of whom participate in the IESO-administered markets (IAM) as DR Resources. AMPCO's position, as set out in its Application and Motion materials, is that the Amendments unjustly discriminate against DR Resources and lead to anti-competitive results contrary to the purposes of the Act. In support of this position, AMPCO argues that generators also have other revenue opportunities in the IAM for the energy services they provide, and their bids into capacity auctions will take into account their anticipated energy payments. DR resources will have to compete against these bids without an equivalent energy payment stream, and therefore be at a competitive disadvantage to generators in the TCA. AMPCO emphasizes that it supports an expanded capacity auction, as long as it remains a fair and non-discriminatory process, which AMPCO states cannot be the case until the issue of energy payments for DR Resources is resolved.[2]

[2] AMPCO Motion Submission, paras 5-7

AMPCO's request to stay the operation of the Amendments is based on the harm that it states DR Resources will suffer if the first TCA is run in December 2019 while energy payments are unavailable to them. Specifically, DR Resources will be forced to compete in an auction process that places them at certain competitive disadvantage, likely excluding them from the new TCA. This harm, according to AMPCO, is entirely avoidable, whereas neither the IESO nor other market participants will suffer any harm if the stay is granted, given that the need for additional capacity does not arise until 2023.[3]

IESO

The IESO has stated that the TCA is part of its strategy to address a "significant capacity gap that is forecast to start in 2023" and the first phase in evolving the DRA into a more competitive capacity acquisition mechanism.[4] The IESO points to the IESO Board of Directors' reasons for adopting the Amendments, including the opportunity to enable non-committed dispatchable generators coming off contract to compete to provide capacity, in the absence of which they may choose to wind down their operations to the potential detriment of Ontario reliability and consumer interests.[5] The IESO indicates it has committed to completing an independent study to determine whether there would be a 'net benefit' to Ontario consumers if DR Resources receive energy payments for economic activations, and that it expects to present its draft decision and rationale for stakeholder review in May 2020.[6] The IESO also notes that the IESO Board of Directors:

- concluded that access for energy payments is not expected to have a material impact on the TCA as DR Resources have been activated in very limited circumstances[7], and further noted that economic activations are not expected to be a material consideration for the December 2019 TCA[8]
- concluded that delaying the Amendments until the independent study is complete would be detrimental to the market overall.[9]

[3] AMPCO Motion Submission, paras 9-12.
[4] IESO Affidavit, paras 11 and 17
[5] IESO Affidavit, paras 17 and 35
[6] IESO Affidavit, para 19
[7] IESO Affidavit, para 36
[8] IESO Affidavit, para 18
[9] IESO Affidavit, para 19

KCLP

KCLP, an intervenor in this proceeding, owns and operates a 110 MW combined-cycle, natural-gas fired facility located in Kingston, Ontario; its Power Purchase Agreement (PPA) with the Ontario Electricity Financial Corporation (OEFC) expired in January 2017. KCLP remains a market participant and offers its energy into the IAM, although this practice does not produce any material energy market revenue due to KCLP's offers reflecting higher costs than the typical energy market clearing price in Ontario. In other words, KCLP cannot recover its fixed and variable operating costs from the energy market.[10]

KCLP states that its parent company, Northland Power Inc., has indicated that it is not willing to continue losing money without some indication that a mechanism will become available to recover sufficient revenues to keep the facility operating. KCLP states that it intends to participate in the TCA auction scheduled for December 2019. It further notes that if it is prevented from participating in the upcoming TCA, it is likely that Northland Power Inc., will decide to discontinue the facility operations, as it did with another Northland Power Inc. generation facility whose OEFC contract had expired.[11]

Factors to be Considered re Stay of Market Rule Amendments

Section 33(7) of the Act allows the OEB to order a stay of the operation of a market rule amendment pending the completion of the OEB's review of the amendment.[12]

The factors to be considered by the OEB in determining whether to stay the operation of a market rule amendment are set out in section 33(8) of the Act as follows:

> (8) In determining whether to stay the operation of an amendment, the Board shall consider,
>
> (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.

[10] KCLP Affidavit, paras 6-7
[11] KCLP Affidavit, paras 18 and 20-21
[12] Section 33(7) of the Act states:
(7) No application for review of an amendment under this section shall stay the operation of the amendment pending the completion of the Board's review of the amendment unless the Board orders otherwise.

OEB staff notes that the OEB has issued only one previous decision under section 33 of the Act regarding a request to stay the operation of a disputed market rule amendment, in the "Ramp Rate Review" proceeding.[13] In that case, the IESO consented to the request for stay and the OEB so ordered. As such, there is little guidance available from that decision as to the application of the factors in section 33 of the Act.

There is, however, jurisprudence on the factors to be considered on an application for a stay or interlocutory injunctive relief that OEB staff submits is informative to the exercise of the OEB's discretion to stay the operation of the Amendments under section 33 of the Act.

The leading case is the Supreme Court of Canada's decision in *RJR-MacDonald Inc. v. Canada,* where the test is summarized as follows:

> *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.[14]

The test set out in *RJR MacDonald* has been extensively applied by the courts in a variety of decisions, including cases involving administrative agencies and tribunals. [15] The tripartite test from the common law is therefore addressed in this staff submission, in conjunction with the provisions of the Act.

Public Interest

Section 33(8)(a) of the Act requires the OEB to consider whether staying the operation of a market rule amendment is in the public interest. OEB staff submits that the core aspect of the public interest in the consideration of the Amendments is in respect of ensuring that any needed capacity is obtained and available such that consumers have a reliable and cost-effective supply of electricity in the near- and longer-term. This calls

[13] EB-2007-0040, Procedural Order No.1, Appendix A, issued February 7, 2007

[14] *RJR-MacDonald v. Canada (Attorney General),* [1994] 1 S.C.R. 311 , 1994 CarswellQue 120 at para 48 (AMPCO Brief of Authorities, Tab B) and referring to *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110

[15] *Association of Major Power Consumers in Ontario (Appellant) v. Ontario (Energy Board),* 2007 CarswellOnt 4273 (Div. Ct.), (AMPCO Brief of Authorities, Tab A). Also, for example *Dixon v. Ontario (Director, Ministry of the Environment),* 2014 ONSC 5582 (Divisional Court), which involved an application to stay a Renewable Energy Approval of the Ministry of the Environment as well as a Decision and Order of the OEB.

for a viable and effective framework that can attract and retain adequate capacity and energy resources to ensure supplies are reliable and to harness the efficiencies of markets appropriately if that will secure cost-effective outcomes for customers.

Such a framework requires characteristics such as fair rules, appropriately paced change, and the trust of sector participants. In the absence of such a framework, the security of supply is likely to be poorer or costs higher or both. These consequences would clearly be borne by customers.

OEB staff should not be understood as speaking to the merits of the TCA, whether in the abstract or when examined against the criteria set out in the Act, beyond its relevance in assessing the 'merits of the application' element described below. What is at issue on the Motion to stay, from a public interest perspective separate and apart from the other factors is the matter of what sequence of activities is, on balance, more likely to support the orderly development of a procurement mechanism to support needs in the nearer and longer term.

OEB staff is of the view that a stay is more likely to support such an objective. It will reduce uncertainty and mitigate risks regarding obtaining capacity commitments to meet needs. These considerations are closely intertwined with the impact on consumers, as well as with practical matters that feature in the consideration of the balance of convenience. Accordingly, OEB staff references its public interest arguments in these other two sections as well.

Merits of the Application

Section 33(8)(b) of the Act requires that the OEB consider the 'merits of the application', which embodies the serious question to be determined" element of the tripartite test established by the courts when considering an application for a stay or an interlocutory injunction. This requires a preliminary assessment of the merits of the case, but the threshold is a "low one", below the *prima facie* level and not requiring an extensive review of the merits. The Supreme Court stated:

> What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case….
>
> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits

is generally neither necessary nor desirable.[16]

OEB staff notes that there is recent case law from the Supreme Court of Canada indicating a higher threshold than 'serious question to be tried', namely that the applicant must establish a "strong *prima facie* case"; in other words, a strong likelihood that the applicant will ultimately be successful at trial.[17] That case involved a request for a mandatory injunction. The test for a stay or a prohibitive injunction remains the 'serious issue' test, and this distinction has been recognized by courts subsequent to this Supreme Court of Canada decision.[18] The present motion for a stay is not in the nature of a mandatory injunction but rather more akin to a prohibitive injunction.[19] OEB staff therefore submits that the appropriate threshold applicable to this part of the common law test for a stay is the "serious question to be tried". In addition, the lower threshold inherent in the "serious question to be tried" criterion is more in keeping with the "merits of the application" factor as it is articulated in the Act.

In decisions subsequent to *RJR – MacDonald* courts have considered the issues set out in the application, the positions of the parties and any evidence filed and, if satisfied that the application is not 'frivolous or vexatious', the courts have found that this part of the test has been met.[20]

The "Overview" section of this submission indicates that the Amendments are a significantly contentious matter. OEB staff submits that, the significant divergence of positions and the competing claims of potential harm that could flow from either implementation or revocation of the Amendments indicate a "serious question to be tried." OEB staff also notes that the IESO has committed to studying the issue of remuneration for DR Resources, so it would appear that the IESO considers the issue at least worth exploring.

OEB staff submits that the Application is neither frivolous nor vexatious and therefore has sufficient merit to meet the threshold.

[16] *RJR MacDonald*, supra at paras 54-55
[17] *R. v. Canadian Broadcasting Corp.,* 2018 SCC 5 (*R. v. CBC*) at paras 15-19
[18] *Loan Away Inc. v. Western Life Assurance Company,* 2018 CarswellOnt 20491, 2018 ONSC 7229 at paras 37-38
[19] *R. v. CBC*, supra, at para 16
[20] See for example, *674834 Ontario Ltd. v. Culligan of Canada Ltd.*, 2007 CarswellOnt 1564 (*674834 Ontario Ltd. v. Culligan),* [2007] O.J. No. 979, (Ont. S.C.J.) at paras 27-30 and *Dixon v. Ontario, supra at paras 47-55*

Possibility of Irreparable Harm

Section 33(8)(c) of the Act requires that, in considering whether to stay the operation of market rule amendments, the OEB consider the "possibility of irreparable harm to any person".

Similarly, according to the case law, the second branch of the test for a stay or injunction also requires consideration of whether 'irreparable harm' would result to the applicant if the stay or injunction is not granted, namely that the harm could not be remedied at a later date. The Supreme Court in *RJR MacDonald* stated:

> Beetz J. determined in *Metropolitan Stores*, at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". *The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.*
>
> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.[21] (emphasis added)

While a court would generally consider harm to the applicant under this portion of the test, leaving harm to the respondents and the public interest to be addressed as part of the balance of convenience factor,[22] OEB staff notes that the Act requires the OEB to consider the "possibility of irreparable harm *to any person*". Accordingly, this submission considers potential harm to others beyond AMPCO in the discussion of the "irreparable harm" factor, having regard to the materials filed to date.

"Irreparable harm" is described in case law as follows:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. *It 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*. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc.Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel LtdMullin*, [1985] 3 W.W.R. 577 (B.C.C.A.))...[23]

[21] *RJR MacDonald*, supra at paras 62-63
[22] *RJR MacDonald*, supra at para 62. See also, for example, *674834 Ontario Ltd. v. Culligan* at para 44
[23] *RJR MacDonald*, supra at para 64

(emphasis added)

The general purpose of an interlocutory injunction is to preserve the *status quo* until the rights asserted by the applicant can be dealt with in a hearing on the merits of the application.[24]

In OEB staff's view, if the auction proceeds but the rules that enable the TCA are later revoked by the OEB, it is possible that DR Resources could sustain 'irreparable harm' that cannot be quantified in monetary terms or remedied with damages. Maintaining the *status quo* of the DRA therefore appears to be preferable in order to prevent harm to DR Resources that cannot later be remedied with damages.

The remainder of this section will address the competing claims of harm based on the stay not being granted (AMPCO) and the stay being granted (KCLP, and the IESO), based on materials filed to date on the matter of the stay.

AMPCO

AMPCO, in its Notice of Motion, states that absent a stay, the competitive disadvantage faced by DR providers in the TCA will result in these providers being driven out of the capacity market. One set of providers will be replaced by another set of providers, and this will amount to a backward step in the evolution of the IAM. In AMPCO's view, this amounts to an irreparable harm to the functioning of, and participant confidence in, the IAM. OEB staff is not persuaded that failure to stay rule the Amendments would pose irreparable harm to the IAM and market participants' overall confidence in the market. OEB staff submits that this characterization of irreparable harm is difficult to recognize given the size and complexity of the market as an institution and the number participants.

AMPCO further states that the competitive disadvantage suffered by DR Resources would also deprive them of the opportunity to provide capacity to the IAM during the delivery period of the subject auction and to obtain capacity payments therefor, a loss for which they would have no obvious or effective legal recourse. OEB staff acknowledges that the magnitude of such a claim to harm cannot be readily estimated, nor is there obvious recourse to damages from a particular party. As a consequence, OEB staff agrees that the absence of a stay could create conditions for irreparable harm to some of DR resources.

[24] *674834 Ontario Ltd. v. Culligan of Canada Ltd.*, 2007 CarswellOnt 1564 at para 22, [2007] O.J. No. 979, (Ont. S.C.J.), at para. 22,

KCLP

The KCLP Affidavit states that, since KCLP's PPA with the Ontario Electricity Financial Corporation (OEFC) expired on January 31, 2017, KCLP has not been able to earn revenues that cover its fixed and variable operating costs from the IESO energy and ancillary services markets.[25] KCLP states that if the Amendments are stayed, KCLP would lose out on the opportunity to compete for capacity for both the summer and winter commitment periods, covering May 2020 to April 2021, potentially costing millions of dollars and the shutdown of the KCLP facility.[26]

While OEB staff understands KCLP's concerns, the impact of staying the Amendments does not, in OEB staff's view, rise to the level of an irreparable harm to the generator. The root cause of KCLP's business challenges regarding its facility predates, and is unrelated to, the TCA process. Furthermore, in OEB staff's view, a market participant enjoys no right to expect a given set of market rule changes to occur on a schedule and in a manner that would resolve its underlying concerns regarding the economic viability of a given generating asset. These risks fall to KCLP alone to manage.

IESO

The IESO Affidavit refers to the phased approach by which the IESO has planned to introduce the full suite of changes required to develop an enduring capacity auction which allows the IESO, among other things, to:

a) introduce new resource types gradually;
b) assess and respond to how new resource types behave in the capacity auction;
c) provide participants with an opportunity to develop and test business processes and business models in support to support their participation in capacity auctions.[27]

The IESO points out that there are only three planned auctions (December 2019, June 2020, and December 2020) before the IESO undertakes the auction for the critical summer 2023 period. The IESO states that it cannot rely upon the existing DRA to produce sufficient capacity to satisfy the coming 2023 capacity gap of approximately 4,000 MW, especially in light of the history of poor performance of HDR resources in test activations. The IESO also mentions that it is concerned that some generation resources not under contract may cease operations if the TCA is delayed as they will have no opportunity to compete in the IESO's capacity auction.[28]

[25] KCLP Affidavit at para 6-7
[26] KCLP Affidavit at para 20-21 #
[27] IESO Affidavit, p. 3
[28] IESO Affidavit, p9

OEB staff is not convinced that running three versions of the TCA by December 2020 is essential to avoiding harm to the goal of meeting the 2023 capacity deficit. In the event that the stay is granted and the OEB does not revoke the Amendments, there will still be two auctions that can run under the Amendments before the IESO runs an auction that covers commitment periods in 2023. Given the amount of time remaining before 2023, there may be further schedule flexibility than the IESO's plan currently indicates. As for the risk of generator exit from the market in the face of a delay to the TCA, OEB staff submits that there is currently little evidence to judge the magnitude of this risk and that it therefore cannot be assigned much weight at present.

Furthermore, OEB staff is not convinced that a running of the TCA in current circumstances is in fact likely to generate learnings that will have lasting value, since the existence of a hearing in parallel to the initiation of the process has the genuine potential to alter the behavior of potential participants. Finally, while OEB staff understands IESO's position that the DRA may be insufficient to meet needs in 2023, the IESO's preference to use the TCA to satisfy any resource requirements in 2020 is not well justified.

These latter two points are discussed in the next section, Impact on Consumers, in more detail.

Impact on Consumers

Section 33(8)(d) of the Act requires that, in considering whether to stay the operation of market rule amendments, the OEB consider the impact on consumers. The current case relates most immediately to the interests of consumers in the reliability, adequacy and cost-effectiveness of supply.

According to the IESO's 2018 forecast, 811 additional megawatts of resource capacity are required in order to satisfy resource requirements in the summer of 2020[29]. The IESO's Pre-Auction Report for the December 2019 TCA identifies a target capacity of 675 MW for the summer commitment period (May 1, 2020- Oct 31, 2020) and 675 MW for the winter commitment period (Nov 1, 2020 – April 30, 2021). The basis for these figures has not been tested in this proceeding. The IESO has furthermore indicated that its updated 2019 annual forecast of requirements will be released over the next few months[30]. Nevertheless, an issue to be considered is the effect a stay might have on the procurement of these capacity needs, if any. These needs, if unmet, have a direct impact on customers, who ultimately bear the consequences of ineffective or inefficient procurement activities through lower reliability, higher costs, or both.

[29] IESO Affidavit, Appendix A, page 51
[30] IESO Market Renewal Update on the ICA, July 16, 2019

The IESO Affidavit indicates that the IESO does not believe the DRA, the procurement process that has been used for the past four years to secure capacity to meet total resource requirements, is sufficient to attract the quantity of resources foreseen to be required in 2023[31]. But it makes no such comment regarding the potential effectiveness of the DRA in meeting 2020 requirements. It merely notes that in the event that a TCA is not available, "less competitive mechanisms may be required to address the capacity gap in 2023"[32]. Other options therefore exist to meet capacity needs from 2020 through 2023. Its own planning document from 2018, in fact, states that "[c]ontinuing to acquire capacity from demand response through the auction can meet needs to 2023"[33].

The IESO advocates for using the TCA to meet needs, in part, because its broader eligibility requirements are likely to enhance competition. Even assuming this to be true over the longer term, in OEB staff's view, current uncertainty about the TCA has a genuine potential to dampen interest in the upcoming auction process. This, coupled with opposition to its design from DR Resources, has the potential to diminish overall participation levels. Some participants may simply view the risks and costs of preparing for and participating in the TCA as not worthwhile given the uncertainty about the outcome of the market rule amendment review process; others may abstain given the perception of uneven treatment among competing resource types. If participation is lower, fewer resources may be secured through the auction. All other things being equal, fewer offers may also portend higher offer prices, which will ultimately be recovered from consumers. OEB staff grants that there is little evidence as yet to quantify or estimate how broadly or how strongly uncertainty may alter eligible participants' plans or behavior. Nevertheless OEB staff views the relationship between uncertainty and lower participation to be directionally accurate.

The DRA, by contrast, is subject to less uncertainty. In OEB staff's understanding it would be re-enabled through a straightforward stay of the Amendments. The familiarity of the DRA design and rules would, all things being equal, generally suggest less uncertainty would attach to the process and outcomes that result from the auction. Bidding behaviour and participation levels could generally be expected to resemble levels in prior years.

While the IESO has indicated that high failure rates among some types of DR resources may mean that actual DR capacity available may be far less than the results of prior auctions suggest[34], it seems plausible that at least some resources which failed test activations in early 2019 will have improved processes and commitments such that they

[31] IESO Affidavit, page 9
[32] IESO Affidavit, page 8
[33] IESO Affidavit, Appendix A, page 51
[34] IESO Affidavit, page 9

can pass future ones. The IESO's concerns regarding DR performance suggest that some additional resources may nevertheless be required were a DRA to be administered. However, this may also be the case if the TCA were to be run but was undersubscribed due to uncertainty). As the IESO has indicated in its analysis of non-committed resources[35], there exist generation resources in Ontario that could be used to meet needs. Absent a successful TCA, another process would be needed to secure them. (The use of another process may also address the risk of generator market exit that the TCA is intended to address).

On balance, in the event that resources are required to maintain resource requirements in the upcoming commitment period, OEB staff is of the view that relatively higher levels of resource commitment are likely to be achievable through a repeat of the DRA process than the first execution of the TCA in current circumstances. The overall reliability risks of the DRA approach therefore appear lower as well, especially given the option to supplement DRA outcomes with another commitment process if required. As a consequence, OEB staff is of the view that a stay of the operation of the Amendments is more likely to protect the interests of consumers relative to the alternative. For this reason, OEB staff supports a stay of the operation of the Amendments.

One final consideration on the question of resource need is that the forecast of requirements is subject to change. The IESO has indicated that it has updated its resource requirement forecasts and expects to release it publicly, but it had not done so as of the time of this submission. Preliminary information, provided in August 2019, appears to indicate that there is no capacity shortfall in either summer 2020 or winter 2020/21[36]. This may well change. However, if the preliminary forecast is indicative of the final forecast of 2020 needs, OEB staff submits that not only is the TCA not required to secure resources in order to ensure reliable supplies next year, but also that any activity to retain resources that entail financial commitments for consumers would appear to run counter to consumers' immediate interests. The only value of resource commitments for 2020, in such a case, would be to foster an investment climate for later years. As discussed above, it is not clear that conducting the TCA in current circumstances is likely to be informative of the evolutionary path the TCA will require in order to be fit for use to meet needs in 2023. Consequently, consideration of the impact on consumers favours granting a stay of the Amendments.

Balance of Convenience

Section 33(8)(e) of the Act requires that, in considering whether to stay the operation of

[35] IESO Affidavit, Appendix A, page 51.
[36] IESO Affidavit, Exhibit B, Capacity Update, Stakeholder Advisory Committee, August 14, 2019

market rule amendments, the OEB consider the balance of convenience.[37]

Court decisions indicate that this part of the test involves the determination of which of the parties will suffer the greater harm from the granting or refusal of the stay order pending a decision on the merits, and that the factors to be considered are numerous and will vary in each individual case.[38] However, as indicated earlier in this submission, the Act requires considering the possibility of irreparable harm to *any person.* OEB staff's submission therefore addressed the competing claims of harm made by AMPCO, IESO and KCLP under the 'irreparable harm' factor and will not be repeated here under the 'balance of convenience' factor.

Also, as discussed earlier in this submission with respect to 'irreparable harm', the general purpose of an interlocutory injunction is to preserve the *status quo* until the rights asserted by the applicant can be dealt with in a hearing on the merits of the application.[39]

OEB staff submits that, on a balance of convenience, maintaining the status quo is the preferable option.

A stay is primarily more practical, in OEB staff's view, and it would have benefits for the broader sector. A stay will allow an orderly determination of the Amendments to precede any procurement activity under a TCA, should it proceed. As noted above, this sequence has potential to support greater certainty for participants and may stand to attract more participation, and thereby better harness competition to deliver value for customers. In staff's view, a stay of its initial operation is more likely to support regulatory and investment certainty in the process relative to allowing the TCA to be conducted prior to the OEB's determination on the rules which enable it.

The IESO has maintained that its phased approach to development of the TCA will support its orderly evolution in time to procure the quantity of capacity required to supplement committed resources in 2023. As noted above, OEB staff questions how valid the learnings from the December 2019 auction will be under the TCA rules given the uncertainty the current process may inject into the TCA.

For these largely practical reasons, OEB staff is of the view that the balance of convenience rests with staying the Amendments pending completion of the OEB's review of the Application.

[37] *RJR – MacDonald v. Canada*, supra at paras 67-68
[38] *RJR – MacDonald v. Canada*, supra at paras 67-68
[39] *674834 Ontario Ltd. v. Culligan of Canada Ltd.*, 2007 CarswellOnt 1564 at para 22, [2007] O.J. No. 979, (Ont. S.C.J.), at para. 22,

Conclusion

In conclusion, OEB staff submits that based on the factors set out in section 33(8) of the Act, the circumstances of this case favour the granting of a stay of the Amendments. OEB staff is of the view that the Application demonstrates sufficient merit.

Having considered the remaining elements of the test, OEB staff submits that a stay would best support the public interest and reflect the balance of convenience, for the following reasons:

a) the denial of a stay raises the prospect of irreparable harm to DR Resources

b) the uncertainty over the TCA is likely to diminish participation in the auction process as planned

c) It is therefore an open question whether the TCA would be effective in meeting needs for 2020 capacity, the need for which still appears unclear

d) there exist viable alternatives to the TCA to procure capacity, such as the DRA, should any more capacity be required in the near term

e) it is not clear whether the impact of holding the TCA in the current circumstances will support the gathering of learnings as IESO intends to do

f) allow for a more orderly development of a mechanism to procure any needed capacity resources

Throughout this submission, OEB staff has attempted to focus on the considerations that apply to the granting of a stay alone. OEB staff sees value in better understanding the admittedly more complex question of the impact on the form and timing of commitments to resources which clear the auction in the event that the TCA is conducted in December 2019 but the Amendments are revoked by an Order of the OEB at some point thereafter. These impacts may be of relevance to the decisions before the OEB. OEB staff suggests that the IESO could usefully speak to this issue in its submissions.

All of which is respectfully submitted