EB-2019-0242

Association of Major Power Consumers in Ontario

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

---

IESO SUBMISSIONS IN RESPONSE TO AMPCO'S REQUEST FOR A STAY

November 5, 2019

STIKEMAN ELLIOTT LLP
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Glenn Zacher LSO#: 43625P
gzacher@stikeman.com
Tel: (416) 869-5688

Patrick Duffy LSO#: 50187S
pduffy@stikeman.com
Tel: (416) 869-5257
Fax: (416) 947-0866

Lawyers for the IESO

TABLE OF CONTENTS

I. INTRODUCTION

1. These are the written submissions of the Independent Electricity System Operator ("**IESO**") on the motion ("**Motion**") filed by the Association of Major Power Consumers in Ontario ("**AMPCO**") seeking to stay the operation of market rule amendment MR-00439-R00 to R05 (the "**Amendment**") enabling the IESO's Transitional Capacity Auction ("**TCA**"), pending the Board's review of the Amendment on the hearing of the application ("**Application**").

2. The IESO opposes AMPCO's request for a stay for the reasons that follow.

II. OVERVIEW

3. The stay of a market rule amendment pending the outcome of an application for review is an extraordinary remedy.[1] As the moving party, AMPCO bears the sole burden of demonstrating that each of the criteria prescribed by section 33(8) of the *Electricity Act, 1998*[2] are met. If it fails to meet any of the criteria, its Motion should be dismissed.

4. AMPCO's evidence on the Motion – which consists entirely of vague, speculative and unattributed hearsay – does not come remotely close to meeting the high evidentiary threshold required to obtain a stay.

5. First, AMPCO fails on the merits since the Board lacks jurisdiction to grant the relief sought. AMPCO is ***not***, in fact, disputing ***the TCA Amendment itself***; it simply seeks to suspend implementation of the TCA Amendment ***until*** the IESO has amended ***other market rules*** to provide for energy payments to DR resources.[3]

6. AMPCO's Application is, in essence, a disguised and indirect challenge to long-standing market rules governing energy payments in the IESO market. AMPCO has no right to seek this relief; and, respectfully, the Board has no jurisdiction to grant it. The market rules governing energy payments in the IESO market are a fundamental element of Ontario's market design and these "Minister-made" rules have been in place since the market opened in 2002. The *Electricity*

---

[1] *Johnson v Ontario (Attorney General)*, 2003 CanLII 20401 (ON SC) at para 17 **(Book of Authorities, Tab "1").**
[2] *Electricity Act*, 1998, SO 1998, c 15, Sch A (the ***"Electricity Act"***).
[3] AMPCO, Submissions on Motions to Stay (**"AMOCO Submissions"**) at paras 4-9, 14, 27.

Act expressly precludes Board review of "a provision of the Market Rules that was made by the Minister before May 1, 2002 unless the application is made before May 1, 2005".[4]

7. AMPCO's Application also has no realistic prospect of succeeding since it is bereft of the necessary economic evidence and analysis that the Board stated in the *Ramp Rate* case is required to demonstrate "unjust economic discrimination".[5] AMPCO's singular reliance on FERC Order 745 does not assist. FERC is not binding in Ontario and there are substantial differences in Ontario's market design which make application of FERC's net benefit test highly questionable. The IESO is nonetheless undertaking a comprehensive stakeholder engagement and third-party study to consider energy payments for demand response resources.

8. Second, proof of irreparable harm – which "must be clear and not speculative"[6] – is wholly absent from AMPCO's evidence. Not a single AMPCO member (or DRA participant) attests to the prospect of any harm. Instead, AMPCO's President Colin Anderson states, inexplicably, in his brief affidavit:

> 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.[7]

9. Mr. Anderson's ensuing bald assertions of potential harm – based on apparent conversations with unnamed AMPCO members – are unattributed, speculative, hearsay statements. AMPCO's failure to provide admissible or reliable evidence of irreparable harm is on its own fatal to its request for a stay.

10. Lastly, litigants who seek pre-hearing remedies to stay the implementation of validly enacted rules or regulations by public authorities have the added burden of rebutting the legal presumption that the rules or regulations are in the public interest. AMPCO (and Board Staff) have ignored this presumption and inverted the applicable test. They have second-guessed the IESO's expert judgment as to why it is prudent to proceed with the TCA, substituted (without any evidentiary foundation) their inexpert judgment for that of the IESO and, suggested that it

---

[4] *Electricity Act*, s. 35(3) **(Book of Authorities, Tab "2")**.
[5] EB-2007-0040 (OEB) ("**Ramp Rate Decision**") (April 12, 2007), at pp 23-26 **(Book of Authorities, Tab "3")**]
[6] *Naji* v *Denys*, 2018 ONSC 6568 (***"Naji"***) at para 87, 92-93; *Abdullah v Maziri*, [2016] OJ No 1600 (***"Abdullah"***) at para 49; *Glooscap Heritage Society v The Ministry of National Revenue*, 2012 FCA 255 (**"Glooscap Heritage Society"**) at paras 31-32; *Thompson v BFI Canada Inc*, 2014 ONSC 3726 (**"Thompson"**) at paras 59-60 **(Book of Authorities, Tabs "4","5","6","7" respectively)**.
[7] Affidavit of Colin Anderson, sworn October 11, 2019 (the **"Anderson Affidavit"**), at para 3.

is for the IESO to justify why its lawful authority to make and implement market rules should not be suspended. This is a mischaracterization of the law governing interlocutory stays and injunctions.

11. AMPCO has not rebutted the legal presumption that the IESO's enactment and implementation of the Amendment is in the public interest. Nor has AMPCO led any evidence to challenge the IESO's evidence and the principal reasons for the IESO Board's decision to approve the Amendment, that: (i) for reliability purposes it is critically important that the IESO introduce and evolve the TCA sufficiently in advance of a significant capacity gap emerging; and (ii) the TCA provides an important opportunity for existing, off contract generators which may otherwise wind down, to the detriment of Ontario reliability and the interests of consumers. The public interest and balance of convenience, accordingly also weigh heavily in favour of refusing AMPCO's request for a stay.

III. FACTS

A. The Transitional Capacity Auction

12. The purpose of the Amendment is to implement a TCA in Ontario.[8]

13. In context of the IESO-administered markets, "capacity" represents the need to have sufficient resources available to ensure that the demand for electricity in Ontario can be met at all times. At a high level, capacity can be provided by supply resources through energy injections or from loads in the form of demand response. The purpose of a TCA is to create a market-based mechanism that secures incremental capacity to help ensure that Ontario's reliability needs are met in a cost-effective manner.[9]

14. The IESO's previous capacity auction - the demand response auction ("**DRA**") - was introduced in 2015. The DRA was limited to demand response ("**DR**") resources, and consisted of an auction in December of each year for a one-year commitment period starting in May of the following year.[10]

---

[8] Affidavit of David Short sworn October 25, 2019 (the "**Short Affidavit**") at para 4.
[9] Short Affidavit, at para 5.
[10] *Ibid*, at para 6.

15. If called upon by the IESO, DRA participants fulfilled their capacity obligation by refraining from consuming energy from the IESO-administered market. DRA participants could participate as either a dispatchable load (which responds to a five-minute schedule) or as an hourly demand response ("**HDR**") participant. DRA participants received availability payments and were subject to non-performance charges.[11]

16. Demand response resources have been activated in very limited circumstances under the DRA. HDR resources have only been economically activated on one occasion since the introduction of the DRA; and dispatchable loads have been dispatched less than 1% of the time over that same period.[12]

17. The TCA is the first step in evolving the DRA into a more competitive capacity auction that includes additional resource types. The Amendment will, as a first step, enable non-contracted and non-regulated Ontario generators to participate in a capacity auction alongside dispatchable loads and HDR resources.[13]

18. The TCA auction will commence on December 4, 2019 for a commitment period of May 1, 2020 to April 30, 2021. Successful participants in the TCA will receive availability payments for providing capacity, subject to non-performance charges.[14]

19. The IESO is planning subsequent phases of its capacity auction design that will enable additional resource types to participate (such as imports and storage) and will introduce new auction features. Each phase is expected to require further changes to the market rules.[15]

20. The IESO plans to increase the forward period for future capacity auctions. The IESO's intention is to run 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).[16]

---

[11] *Ibid.*
[12] *Ibid*, at para 36.
[13] *Ibid*, at para 7.
[14] *Ibid*, at para 8.
[15] *Ibid*, at para 9.
[16] *Ibid*, at para 10.

B. The Need for the Transitional Capacity Auction

21. The TCA is part of the IESO's strategy to address a significant capacity gap that is forecast to start in 2023. On September 13, 2018 the IESO released its electricity planning outlook that forecasted a capacity deficit in summer 2023 of 3844 MW.[17]

22. As part of its Market Renewal initiative, the IESO was planning to implement an Incremental Capacity Auction ("**ICA**") which would address the future capacity gap. However, in September 2018 the IESO determined that it was not feasible for the ICA to be launched in time to address the projected 2023 capacity gap and that alternative measures were required.[18]

23. To address this capacity gap, the IESO, in January 2019, announced its intention to enhance the DRA - calling the enhanced auction the TCA - by allowing more resource types to compete. Between February and August 2019, the IESO conducted a formal stakeholder engagement initiative to gather and incorporate feedback from stakeholders on the design of the TCA. Written submissions were received from generators, DR aggregators, the Market Surveillance Panel, consumers and associations representing local distribution companies, generators and consumers.[19]

24. While work on the ICA was discontinued by the IESO in July 2019, there continues to be a forecasted capacity gap that must be addressed by the IESO to ensure the reliability of Ontario's electricity system. The IESO most recent update forecasts a capacity gap of approximately 4000 MW in summer 2023.[20]

25. The IESO has determined that it cannot rely upon the existing DRA to produce sufficient capacity to satisfy the forecast capacity gap.[21] The last DRA in December 2018 attracted a qualified capacity of over 1000 MW. This is insufficient to meet the forecast capacity gap of approximately 4000 MW in summer 2023. HDR resources also have a history of poor performance during test activations. Between February 2018 and January 2019, HDR resources had a 58% failure rate for test activations which were four hours in duration. These results

---

[17] *Ibid*, at para 11; See *ibid*, Exhibit "A", at p 51.
[18] *Ibid*, at para 12.
[19] *Ibid*, at para 13.
[20] *Ibid*, at para 14; see *ibid* Exhibit "B", at p 4.
[21] As Board staff notes in submissions (see page 14), the IESO has determined that it may only rely upon DR resources to meet capacity needs until the emergence of the forecast capacity gap in 2023.

suggest that the actual capacity available to the IESO under the DRA may be substantially less than the results of prior DRA auctions suggested and not equivalent to capacity provided by supply resources.[22]

26. The IESO is progressing with the phased development of an enduring capacity auction due to the risks associated with attempting to introduce the full suite of changes required closer to the eve of the significant capacity gap arising in summer 2023. Progressing in a phased approach, as the IESO has planned, allows the IESO to:

(a) introduce new resource types into the auction 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 to support their participation in capacity auctions;

(d) provide participants an opportunity for price discoverability;

(e) ensure that committed capacity resources are capable of satisfying their capacity obligations;

(f) provide sufficient time to assess and evolve auction design features, informed by stakeholder input;

(g) allocate the necessary resources to implement new auction design features in manageable steps; and

(h) monitor and identify unforeseen consequences arising from new auction design features.[23]

27. Given the short timeframe in which the IESO must be prepared to meet the 2023 capacity gap, it is critical that the phased implementation of the enduring capacity auction begin with the TCA in December 2019. 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. This provides for limited opportunities for the IESO to execute, learn from and evolve the TCA prior to 2023.[24]

---

[22] *Ibid*, at para 34.
[23] *Ibid*, at para 30.
[24] *Ibid*, at para 32.

C. Stakeholder Engagement on Energy Payments for Demand Response Resources

28. Some DRA participants objected to the commencement of the TCA without first resolving DR participants' claimed entitlement to "energy payments" like those paid to generators.[25]

29. The provision of energy payments to DR participants would represent a substantive change to the IESO-administered energy markets. Loads do not receive energy payments under the market structure that has been in place since market opening in 2002.[26]

30. The IESO previously studied the merit of utilization payments for demand response resources through its Demand Response Working Group ("**DRWG**"). In July 2017, the IESO retained Navigant Consulting ("**Navigant**") to provide research on utilization payments[27] for the purpose of informing a dialogue on their possible merits to drive additional, economically efficient demand response to meet a variety of electricity system needs. Navigant examined practices adopted in other markets, including markets subject to the Federal Energy Regulatory Commission's ("**FERC**") jurisdiction and Navigant assessed arguments for and against providing utilization payments.[28]

31. The IESO released a Discussion Paper prepared by Navigant in December 2017[29], which addressed the complexities involved in the consideration of utilization payments for DR resources, including identifying the various arguments for and against utilization payments in Ontario (Navigant's summary of the arguments for and against utilization payments is attached as Appendix "A").

32. In its conclusion, Navigant cast doubt on whether some of the benefits associated with energy payments to demand resources in other markets would apply in Ontario:

> The arguments for and against utilization payments are nuanced and prudent. Responsible stakeholders can arrive at different conclusions based on preferences for evaluation criteria.

---

[25] *Ibid*, Exhibit "K", at p 2.
[26] *Ibid*, at para 22.
[27] Navigant defined a utilization payment as a payment made to demand response resources when they are called upon to modify their load (Short Affidavit, Exhibit "I", at 2.2). A utilization payment could be an energy payment or some other form of compensation.
[28] Short Affidavit, at para 23.
[29] *Ibid*, at para 24; see Exhibit "I"; see also Exhibit "H".

> A unique consideration for Ontario is that today, almost all generation resources are compensated under long-term contract or through regulation that guarantees a certain level of revenue. The economic efficiency arguments under this current market structure are different than they would be if considering the future state of the wholesale power market where generation resources are largely compensated through energy and capacity market revenues. Under the current conditions, more DR activation (as a result of bidding into the market at prices lower than traditional generators) would not actually lead to reduced costs to consumers since generators have their compensation guaranteed.30

33. The IESO followed up on Navigant's conclusions, and observed that the grounds for energy payments in Ontario remained questionable; there was also limited feedback and input by DRWG members:

> Some indication that utilization payment for load **not** exposed to market price identifies a potential area for further discussion
>
> ...
>
> [There was] no clear indication that utilization payments would increase activation for most load types
>
> ...
>
> Based on the 'Negawatt and Megawatt' examples, the current practice is equivalent treatment and a DR utilization payment would introduce nonequivalent treatment
>
> For resources exposed to market pricing, does not appear to have merit to continue discussions for now
>
> Based on the quantity of stakeholder feedback received, the IESO does not see strong interest from DRWG on this topic .... [It is] unclear if this continues to be a priority item to the working group.[31]

34. The issue of utilization payments for demand response resources resurfaced in 2019 as part of the IESO's stakeholder consultation on the implementation of the TCA. Due to the complexity of the issue, the IESO ultimately determined that a broader stakeholder engagement was warranted. The IESO decided to implement the TCA as scheduled and, in parallel,

---

[30] Short Affidavit, Exhibit "I", at 3.2.
[31] *Ibid*, Exhibit "J", at p 16.

committed to a stakeholder engagement to consider changes to the market rules to provide for energy payments to demand resources.[32]

35. On August 22, 2019, the IESO launched a stakeholder engagement initiative entitled *Energy Payments for Economic Activation of Demand Response Resources* ("**Energy Payments Stakeholder Engagement**"), including commissioning Brattle to do a third-party study. The IESO is currently seeking stakeholder feedback on the "[i]nputs and outputs of third-party research and analysis to inform [the] IESO's decision on the energy payment issue".[33]

36. The IESO expects the Brattle study to be concluded in Q2 2020 and to present its draft decision in the Energy Payments Stakeholder Engagement in May 2020, with a final decision in June 2020. Following this, the IESO will initiate any market rule amendments and associated stakeholder engagement necessary to implement its decision.[34]

D. The Adoption of the Amendment by the IESO Board of Directors

37. The Amendment was adopted by the Board of Directors of the IESO (the "**IESO Board**") at its meeting of August 28, 2019. The IESO Board reviewed the market rule amendment materials, including the positions of stakeholders and issues raised during the market rule amendment process, and decided to adopt the Amendment with an effective date of October 15, 2019.[35]

38. The IESO Board unanimously approved the Amendment for the following reasons:

(a) The Amendment is the first phase in evolving the DRA into a more competitive capacity acquisition mechanism that includes new resource types. This allows for increased competition in the acquisition of capacity for the benefit of Ontario customers.

(b) 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 implementation of the first phase of the TCA will enable important experience and learnings with respect to integrating and administering new resource types in the Ontario capacity market sufficiently in advance of more significant capacity needs, currently projected to arise in the 2023 timeframe. A

---

[32] *Ibid*, at paras 25, 29.
[33] *Ibid*, at para 26. See Exhibit "K", at p 7.
[34] *Ibid* at para 27.
[35] *Ibid*, at para 25; see Exhibits "C", "D".

phased approach will reduce risk, while ensuring continued evolution of the market through the phased inclusion of new resources. This is a more prudent approach than attempting to implement a new capacity auction mechanism just prior to the time when there is a more significant capacity need.

(c) The Amendment enables non-committed dispatchable generators to participate in the TCA alongside dispatchable loads and hourly demand response resources. The Amendment provides an important opportunity for existing non-committed generators coming off contract to compete to provide reliability services, in this case capacity. In the absence of this opportunity to compete, these generators may choose to wind down their operations to the potential detriment of Ontario reliability and the interests of Ontario customers.[36]

39. In deciding to approve the Amendment, the IESO Board addressed AMPCO's allegation of unjust discrimination, including its reliance on FERC Order 745 and determined that:

(a) while FERC Order 745 is a relevant consideration, it is not binding in Ontario;

(b) it is unclear whether the net benefit requirement applies in Ontario, given the differences in Ontario's market design;

(c) the IESO has committed to completing an independent study to determine whether there would be a net benefit to Ontario consumers if demand response resources receive energy payments for economic activations; and

(d) the energy payment issue is not material because economic activations in the DRA have historically occurred in very limited circumstances and are not expected to be a material consideration for the December 2019 auction.[37]

40. The IESO Board concluded that implementing the Amendment is a prudent decision and that delaying the Amendment until the Energy Payments Stakeholder Engagement is complete would be detrimental to the market overall, as 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."[38]

41. The IESO Board also noted that the Technical Panel recommended the Amendment in a vote of 11-1 and "exercised its discretion on an informed and reasonable basis." [39]

---

[36] *Ibid*, para 17; See Exhibit "D".
[37] *Ibid*, at para 18; see Exhibit "D" at pp 3-4.
[38] *Ibid*, at para 19; Exhibit "D" at p 4.
[39] *Ibid*, at para 20; see Exhibit "D" at pp 3, 5; see also Exhibit "E". See 134 FERC, 18 CFR Part 35, Docket No. RM10-17-000, Order No.

E. AMPCO's Market Rule Review Application

42. The Amendment was published by the IESO on September 5, 2019.

43. AMPCO filed its Notice of Appeal to commence this Application under section 33 of the *Electricity Act*, 1998 on September 26, 2019.[40] The Notice of Appeal was accompanied by a Notice of Motion to stay the TCA pending the Board's review of the Amendment.[41]

44. In support of its Application and stay Motion, AMPCO has filed a brief affidavit from Colin Anderson, President of AMPCO. In his affidavit, Mr. Anderson claims that, if the TCA proceeds in accordance with the Amendment, it will put DR resources at a disadvantage because they will not receive the energy payments like those that generators receive from participating in the IESO-administered market.[42] In his affidavit, Mr. Anderson states:

> 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.
>
> ...
>
> I am informed ***by AMPCO members*** and verily believe that in the existing DRA process, ***an IESO proposed "work-around" has sometimes been used.*** In that "work-around" DR Resources have increased their capacity offers by an amount sometimes referred to as a "utilization payment". This "utilization payment" is ***thought of as a partial proxy for energy payments upon activation.*** Inclusion of this proxy allows the DR Resources to offer a price that would provide them with some compensation if they are activated for energy. ***If this proxy methodology were to be used by DR Resources in the TCA it would increase their offers and make them uncompetitive relative to the generators.*** [Emphasis added.][43]

45, Demand Response Compensation in Organized Wholesale Energy Markets, March 15, 2011 ("**FERC Order 745**") **(Book of Authorities, Tab "8").**

[40] Affidavit of John Windsor, sworn October 25, 2019, at p 4, note 3.

[41] Affidavit of Colin Anderson, at para 4.

[42] *Ibid*, at paras 14-16, 18-20.

[43] *Ibid*, at para 15.

45. While Mr. Anderson has not been subjected to cross-examination, the deficiencies in his evidence are manifest:

(a) Mr. Anderson's evidence on the work-around payment is unattributed hearsay that comes from unidentified AMPCO members. No explanation or justification whatsoever is provided for the reticence of AMPCO members to provide evidence.[44] If AMPCO members who are DRA participants believe they will be harmed by the TCA and they want to stay and revoke the IESO's lawful authority to make and implement market rules, it is incumbent on them to tender evidence.

(b) Mr. Anderson speaks in vague terms to a work-around payment that has no grounding in the market rules and which he alleges is "IESO proposed" – without offering any attribution or substantiation for his statements (i.e. the who, what, where, when, why and how).[45] Indeed, Mr. Anderson's arguments are so vague, unattributed and speculative as to be incapable of being responded to.

(c) Mr. Anderson states in vague terms that the work-around has "sometimes been used" but does not explain the nature or frequency of the circumstances in which the payment has been used.[46]

(d) Mr. Anderson states in equally vague terms that the work-around payment is "thought of as a partial proxy for energy payment upon activation" but does not explain who holds the alleged belief or whether that belief is correct and/or well founded.[47]

(e) Mr. Anderson speculates that the work-around might be used by DR resources in the TCA without any specificity as to which participants (dispatchable loads, HDR resources, both or some subset) have or might use this methodology, the circumstances under which they would include a work-around payment in their bids, or the quantity of any such payment.[48]

(f) Mr. Anderson apparently made no effort to confirm whether the alleged work-around payment corresponds to an actual material cost for all (or some) DR resources (for which they are not otherwise compensated) or is a simply a practice that some DR resources have adopted in the absence of competition from other resource types.

(g) Mr. Anderson speculates that the inclusion of a work-around payment would make DR resources uncompetitive with generators in the TCA without any substantive analyses of whether the allegation is accurate or if the alleged impact would constitute unjust discrimination.

---

[44] *Ibid,* at para 3.
[45] *Ibid,* at para 15.
[46] *Ibid.*
[47] *Ibid.*
[48] *Ibid.*

46. These same flaws are also evident in Mr. Anderson's evidence on the harm that unspecified DR resources may suffer if the IESO proceeds with the TCA:

> If the TCA proceeds before appropriate resolution by the IESO of the issue of energy payments for DR Resources, ***it is unlikely that DR Resources will clear the new capacity market***. DR Resources' inability to be cost competitive will effectively exclude them from participation in a process that was ***originally exclusive to them*** (the DRA), and the TCA would thereby replace one set of capacity auction participants (DR Resources) with another (generators). [Emphasis added.][49]

47. Mr. Anderson's allegation of harm is vague, speculative and premised on unattributed hearsay. It falls well below the minimum level that the Board should expect from a witness. The evidence is not reliable or credible. No weight should be given to it.

IV. ISSUE

48. The sole issue on this Motion is whether the Board should stay the operation of the Amendment as requested by AMPCO.

49. The operation of market rule amendment is not automatically stayed during the Board's review.[50] To obtain a stay, subsection 33(8) of the *Electricity Act, 1998* requires AMPCO to meet the usual three-part common law test for obtaining an interlocutory stay and, in addition, to satisfy the Board that a stay is in the public interest and will not negatively impact consumers. In particular, the Board is obligated to consider the following factors on this stay motion:

(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

50. As with any interlocutory stay or injunction, AMPCO has the burden of satisfying of the enumerated criteria; failure to satisfy any of the criteria should result in the stay being denied.

---

[49] *Ibid*, at para 20.
[50] *Electricity Act*, 1998, subsection 33(7) (**Book of Authorities, Tab "9"**).

V. LAW AND ARGUMENT

A. A Stay of Validly Enacted Market Rules is an Extraordinary Remedy

51. Before addressing each of the criteria that AMPCO must satisfy to obtain a stay, it is helpful to address the general principles governing interlocutory stays and injunctions in the context of public law. This is particularly important given the submissions by Board staff, which as further explained below, mischaracterize and misapply the applicable principles.

52. As the Supreme Court of Canada and the Ontario courts have repeatedly cautioned, a stay or injunction is "an extraordinary remedy that should be granted sparingly".[51]

53. In this case, the high evidentiary burden on the applicant AMPCO is particularly onerous for two reasons. First, AMPCO must demonstrate that its Application has a high likelihood of success, as opposed to meeting the usual lower standard of a serious issue to be tried. This issue is addressed further in paragraphs 69 to 72 below.

54. Second, applications for stays that seek to enjoin actions by public agencies acting within their jurisdiction – including the implementation and operation of legislation or other regulations – are "on a different footing" than ordinary cases between private litigants. That is because the public interest is engaged and, in these circumstances, the impugned legislation or regulations are legally presumed to be in the public interest.[52]

55. In these cases, the applicant must overcome and rebut the additional legal presumption that the public agency is acting in the public interest and that duly enacted regulations or rules serve the public interest.[53] As the Supreme Court of Canada has stated, once it is shown that a public agency has acted pursuant to its public interest mandate, courts or tribunals must assume that irreparable harm will result from staying the actions by the public agency:

> 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

---

[51] *Johnson*, at para 17; see *RJR-MacDonald Inc. v Attorney General of Canada*, (***"RJR MacDonald"***) [1994] 1 SCR 311 at para 33 **(Book of Authorities, Tab "10")**.

[52] *Ainsley Financial Corp* v *Ontario (Securities Commission)*, [1993] OJ No 1830 at pp 16-17 (***"Ontario Securities Commission"***); citing the Supreme Court of Canada's leading decision in *Manitoba (AG)* v. *Metropolitan Stores (MTS) Ltd.*, [1987] 1 SCR 110, (***"Metropolitan Stores"***) at paras 38-39,84,87,89 **(Book of Authorities, Tabs "11", "12" respectively)**.

[53] *RJR Macdonald*, at paras 68, 69, 71, 80, 88, 92; *Metropolitan Stores*, at para 55, 65, 71-73.

> 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.***[54]

56. At this interlocutory stage, the Amendment *is* presumed to be in the public interest. The IESO does not have to justify this; the Board *must* assume it. The evidentiary burden is entirely on AMPCO to overcome this legal presumption. There is nothing unfair in this. The law rightly and properly places a very high burden on applicants seeking to obtain judgment before trial enjoining an authority of public agency (IESO) to enact and implement rules or regulations (market rules) within its lawful authority (*Electricity Act*, R.S.O. section 32[55]).

B. A Stay is not in the Public Interest

57. As further detailed below, the Amendment is legally presumed to be in the public interest; the IESO has adduced evidence that the Amendment is, in fact, in the public interest; and, neither AMPCO (nor Board staff) has adduced any evidence to rebut the presumption, or to otherwise challenge the evidence adduced by the IESO.

58. The IESO is a public authority impressed with public interest. It has a broad range of statutory objectives related to operating and administering the IESO-controlled grid and IESO-administered market in the public interest, including the forecasting of electricity demand and the procurement of electricity capacity; and, section 32 confers primary legislative responsibility to the IESO to make market rules governing the electricity grid and markets relating to electricity and ancillary services.

59. Before it passes market rule amendment, the IESO is required to undertake significant stakeholder engagement with a range of sector representatives, including consulting with members of the Technical Panel.[56]

---

[54] *RJR Macdonald*, at para 71.
[55] *Electricity Act, 1998*, section 32 **(Book of Authorities, Tab "13").**
[56] *Electricity Act*, 1998, ss 17-18; Market Rules, Ch 3, s 4.

60. The IESO acted within its authority and in the public interest in making the Amendment; in particular:

(a) Between February and August 2019, the IESO conducted a formal stakeholder engagement initiative and received written submissions from generators, demand response aggregators, the Market Surveillance Panel, consumers and associations representing local distribution companies, generators and consumers;[57]

(b) the Technical Panel voted 11-1 in favour of the Amendment after extensive discussions about the issue;[58]

(c) the IESO Board unanimously approved the Amendment and provided reasons for its approval, which included consideration of AMPCO's objections to the Amendment;[59] and

(d) the IESO, in parallel with the Amendment, has initiated the Energy Payments Stakeholder Engagement which will follow-on the IESO's work in its earlier consideration of utilization payments for DR resources.[60]

61. In the circumstances, the Board must assume that the IESO's enactment and implementation of the Amendment is in the public interest, in accordance with the IESO's legislative mandate and objects.

62. The IESO has also tendered evidence in support of the IESO's Board's judgment that it is prudent to initiate the TCA in December 2019 and progress subsequent capacity auction phases in an incremental and measured way to learn and, as necessary, adapt before the projected summer 2023 capacity gap emerges. It is the IESO's opinion that it would be imprudent to risk waiting to implement a capacity auction until closer to the eve of the projected capacity gap. There are, as of December 2019, only three opportunities for to run a capacity auction prior to the projected capacity gap in summer 2023. The IESO is not willing to forego one or more of these opportunities and lose the associated experience and learning.

63. AMPCO has not discharged the burden of rebutting the presumption, or the IESO's evidence, that the Amendment is in the public interest. AMPCO's objections to the Amendment amount to submissions by its counsel second-guessing the IESO Board's reasons, and Mr.

---

[57] Short Affidavit, at para 13.
[58] *Ibid*, at para 20; see Exhibit "E".
[59] *Ibid*, Exhibit "D", at pp 3-6.
[60] *Ibid*, at para 29.

Short's supporting evidence, for proceeding with the TCA in a phased and measured way.[61] AMPCO's counsel's ***legal submissions*** are not ***evidence*** capable of rebutting the applicable public interest presumption, or challenging the IESO's evidence.

64. AMPCO's submissions and critique of the IESO's judgment also invert the legal test by suggesting that the IESO has the onus of justifying the Amendment. That is not the case. There is no onus on the IESO to justify the Amendment; at the interlocutory stage the onus rests entirely on AMPCO.

65. Board staff join AMPCO in mischaracterizing and misapplying the applicable legal test and ***advocating*** for a stay. Board staff, without any evidentiary foundation, question the IESO's statutory authority and expert judgment – e.g., "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" ... [and] ... "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".[62]

66. Board staff second-guess, again in the absence of evidence to the contrary, the IESO's expert judgment and suggest that its (inexpert) judgment should be preferred over that of the IESO – e.g., "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".[63] Board staff, in fact, go so far as to cast doubt on the IESO's forecasts on the grounds that the "basis for these [forecasts] has ***not been tested in this proceeding***" - as if to suggest that an application for a pre-hearing stay imposes an evidentiary burden on the IESO to justify its lawful authority to make and implement market rule amendments, as opposed to imposing the burden on the applicant who seeks to suspend the IESO's authority.

67. Board staff, like AMPCO, ignore the legal requirement that the IESO's actions, including its enactment and implementation of the Amendment – absent compelling ***evidence*** to the contrary – are entitled to deference and must be presumed to be in the public interest. Board staff, like AMPCO, purport to reverse the legal presumption and shift the burden to the IESO to justify the Amendment. This is a mischaracterization and misapplication of the law.

---

[61] See AMPCO's Submissions, at paras 60-61.
[62] OEB Staff Submissions on Motion to Stay (**"OEB Staff Submissions"**), at p 13.
[63] OEB Staff Submission, at p 15.

68. In summary, the presumption that the public interest weighs against a stay of the Amendment has not been displaced.

C. The Merits of AMPCO's Application do not Justify a Stay

a) AMPCO must demonstrate a Strong Likelihood of Success

69. An applicant for a stay must ordinarily demonstrate the relatively low standard of a serious issue to be tried. This bar, however, is raised when the granting of a stay will, as a practical matter, determine the rights of the parties.[64] In such circumstances, the applicant must meet a higher standard and show that its application has a strong likelihood of success.[65]

70. The higher standard applies in this case. If AMPCO is successful on its motion for a stay, the IESO will be unable to implement the TCA in December 2019 and, under the market rules, the IESO will revert to the running of the DRA for the May 1, 2020 to April 30, 2021 commitment period. Success by the IESO in the subsequent Application would be moot; the IESO would not at that point be able to unwind the DRA and implement the TCA. In practical terms, the outcome of this stay motion will determine whether the TCA will be implemented in December 2019 or not.

71. In *Toronto (City) v. Ontario (Attorney General)*[66], the Court of Appeal was confronted with a similar situation where the granting of a stay of a lower court decision would effectively determine the rights of the parties in the 2018 municipal election. In considering the stay request, the Court emphasized the need in such circumstances to subject the appeal to greater scrutiny than the "serious issue to be tried" test:

> 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 may give significantly more weight to the strength of the appeal: p. 338. In our view, this is such a case. An immediate decision is required to permit the Toronto municipal elections to proceed on

---

[64] *RJR-MacDonald*, at para 51; *Toronto (City) v Ontario (Attorney General)*, 2018 ONCA 761, at para 10 **(Book of Authorities, Tab "14").**
[65] This is a separate consideration from the use of a higher standard in cases of mandatory injunction referred to by Board staff in its submissions (OEB Staff Submission, at p 9).
[66] *Toronto (City) v Ontario (Attorney General)*, 2018 ONCA 761.

> October 22. That decision must be rendered now and, subject to further legislative intervention, our decision will determine whether the election proceeds on the basis of 25 or 47 wards. ***In these circumstances, greater attention must be paid to the merits of the constitutional claim and, as contemplated by RJR-MacDonald, we must ask whether there is a strong likelihood that the appeal will succeed.*** [Emphasis added.][67]

72. Moreover, the general rationale for applying the "serious issue to be tried" test at an early stage is the lack of a full evidentiary record.[68] However, in this case, the Board already has the full suite of the evidence from AMPCO before it – what it lacks is the full responding evidence from the IESO and other intervenors. The evidence for AMPCO's Application, however, is as strong as it will get. Therefore, the Board should have no reason to be hesitant in applying the higher standard to AMPCO's stay motion.

2. AMPCO's Evidence does not Demonstrate a Strong Likelihood of Success

73. AMPCO's evidence does not demonstrate there is a strong likelihood that its Application will succeed, nor even a serious issue to be tried if this lower bar were to apply. There are three fundamental flaws in AMPCO's Application that are readily apparent, even in the absence of the IESO's and other intervenors' responding evidence.

74. First, AMPCO's Application does not challenge the substance of the actual Amendment. As is clear from AMPCO's evidence, the Amendment itself cannot be said to discriminate between DR and supply resources. The TCA rules and procedures for bidding, clearing the auction, commitment periods and settlement (availability payments) will equally apply to all participating resources.

75. AMPCO's complaint – that the market rules provide for energy payments to generators, but not to dispatchable loads or other loads participating in the IESO energy market – is in essence a complaint with a fundamental element of Ontario's market design and the market rules that have been in place since market opening.

---

[67] *Ibid*, at para 10.
[68] *RJR-MacDonald*, at para 45.

76. AMPCO's own evidence demonstrates that the Amendment is not the real target of Application. As Mr. Anderson concedes, AMPCO's complaints predate the TCA Amendment:

> Although the issue of ***appropriate compensation for DR Resources for the services they provide to the IAM (i.e., the issue of energy payments to DR Resources) has long been outstanding*** and has been discussed for some time as part of the IESO's Demand Response Working Group (DRWG), in which I have participated in 2019, the IESO has not yet resolved the issue. It is unlikely that this issue will be resolved before the first TCA happens in December, 2019.[69] [Emphasis added]

77. AMPCO is using this Application and the TCA for leverage to obtain a fundamental change to Ontario's market design and the market rules. As AMPCO states in its submissions:

> AMPCO has applied to the Board for review and revocation of the Market Rule Amendments because, ***until the issue of energy payments for DR Resources is resolved,*** their effect will be to unjustly discriminate against DR Resources in the IAM and thus undermine competitive efficiency contrary to the purposes of the *Electricity Act*.[70] [Emphasis added]

78. AMPCO has no lawful right to challenge market rules that have been in place since market opening, nor does the Board have jurisdiction to entertain such a challenge. Such a challenge does not fall within the purview of section 33 and subsection 35(3), which expressly exclude Minister-made market rules from OEB review. This fact is fatal to AMPCO's Motion, as well as its Application.

79. Second, at its highest, AMPCO's evidence is woefully insufficient to discharge its burden under subsection 33(9) of the *Electricity Act, 1998* and for this reason also its Application is doomed to fail. As detailed at paragraphs 44 to 47 above, AMPCO's evidence consists entirely of vague, speculative and unattributed hearsay about the alleged unjust impact of the Amendment on DR resources. No financial information or economic analysis has been filed to substantiate or quantify this impact, or AMPCO's allegation of unjust discrimination.

80. AMPCO's evidence falls well short of the type of evidence that the Board requires to evaluate, as it stated in the *Ramp Rate* decision, whether the Amendment results in "unjust

---

[69] Anderson Affidavit, at para 8.
[70] AMPCO Submissions, at para. 6.

economic discrimination".[71] The Amendment does not treat suppliers and DR resources differently and so is not even *prima facie* discriminatory; but even if it was, that is not sufficient grounds to grant the relief sought by AMPCO. A market rule that discriminates against a participant or class of participant is not *per se* grounds for review; it is only grounds for review if the discrimination is "unjust". Determination of whether discrimination is unjust, as the Board determined in the *Ramp Rate* case, rests on considerations of overall economic efficiency of the market and whether, in the circumstances, the discrimination is economic.[72] It is readily apparent that AMPCO cannot possibly demonstrate unjust discrimination based on the scant evidentiary record filed in support of its Application.

81. Third, the foundation of AMPCO's case is FERC Order 745, which is not binding upon the IESO and may be of little application in Ontario. To succeed, AMPCO would at a minimum need to adduce evidence analyzing the appropriateness and impact of importing the FERC framework into Ontario. AMPCO has not submitted such evidence.

82. The appropriateness of applying FERC Order 745 in Ontario is not a trivial question. FERC Order 745 resulted from a FERC-initiated Notice of Proposed Rulemaking ("**NOPR**") on which FERC invited comments from ISOs, RTOs and market participants on a wide range of questions. The NOPR spawned a year-long process, thousands of pages of expert evidence, technical conferences and other input. The process drew broad participation, was contested and included strong views for and against energy payments. Even after FERC Order 745 was issued, FERC provided RTOs and ISOs approximately another 18 months to undertake and file studies to determine the circumstances under which paying DR resources resulted in net benefits to customers.[73]

83. As discussed at paragraphs 30 to 36 above, it is unclear whether FERC's net benefit test, if applicable, would demonstrate any net benefit in Ontario, given the differences in Ontario's market design. The only evidence on this issue before the Board comes from Navigant who concluded that "more DR activations (as a result of bidding into the market at prices lower than

---

[71] *Ramp Rate Decision* at pp 23-26.
[72] *Ibid*, at p 26.
[73] *FERC Order 745*, at paras 1, 7, 14-16, 45-48, 84. It should be noted that the OEB, unlike FERC, does not have the authority to initiate proceedings to amend long-standing market rules. This authority is reserved in the Minister and the IESO. That said, it is helpful to note that the IESO is initiating an engagement and study process to consider energy payments, not unlike the process that was initiated by FERC in the US.

traditional generators) would not actually lead to reduced cost to consumers since generators have their compensation guaranteed".[74] In other words, any reductions in the IESO market price may simply be offset by out of market Global Adjustment payments.

84. Due to the complexity of the issue, and the fundamental nature of the change to the Ontario market, the IESO has elected to undertake a stand-alone Energy Payments Stakeholder Engagement to gather input and make a determination on the issue. A broad-based stakeholder engagement is the appropriate forum in which to address and resolve the issue.

85. These three fundamental flaws and weaknesses in AMPCO's Application simply cannot be overcome by AMPCO. The Board should not, in the circumstances, grant a stay which would prevent the IESO holding the TCA in December 2019, and would disrupt the overall evolution of an enduring capacity auction.

D. AMPCO has not Demonstrated Irreparable Harm

86. Paragraph 33(8)(c) of the *Electricity Act, 1998* requires the Board to consider whether irreparable will result from not granting a stay of Amendment. The burden rests on AMPCO to establish that irreparable harm will result from not granting a stay and that burden is a high one.[75] Canadian courts have repeatedly affirmed that "evidence of irreparable harm must be clear and not speculative"[76] and that minimal weight should be accorded to hearsay evidence.[77]

87. The legal test is not satisfied where the evidence is "nothing more than a bald assertion" that relies upon "assumptions, speculations, hypotheticals, and arguable assertions unsupported by evidence".[78] As Justice Stratas of the Federal Court of Appeal has stated:

> To establish irreparable harm, there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a

---

[74] Short Affidavit, at para 24; see Exhibit "1", at 3.2.
[75] *RJR MacDonald*, at paras 68-69; *Dreco Energy Services Ltd v Wenzel*, [2008] A.J. No. 944 (ABCA) (***"Dreco Energy Services"***), at para 33; See *Altalink Management Ltd, (Re)* 2012 LNAUC 92 (Alberta Utilities Commission) (***"Altalink"***), at para 36-37 89 **(Book of Authorities, Tabs "15", "16" respectively).**
[76] *Naji*, at para 87, 92-93; *Abdullah*, at para 49; *Glooscap Heritage Society*, at paras 31-32; Thompson, at paras 59-60.
[77] *Abdullah*, at para 56.
[78] *Glooscap Heritage Society*, at para 31; *Naji*, at para 93;

> stay is granted. Assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight.[79]

88. Notably, in the *Assn' of Major Power Consumers in Ontario v Ontario (Energy Board)*[80] – following AMPCO's appeal of the OEB's decision to the Divisional Court and its request for a stay pending appeal – the Divisional Court refused the stay request on the grounds that AMPCO had failed to demonstrate a "high degree of probability" that irreparable harm will occur if a stay is not granted.[81]

89. AMPCO's evidence comes nowhere close to meeting the high threshold for proving irreparable harm. Not a single AMPCO member that participated in the DRA and intends to participate in the TCA has provided evidence. Instead AMPCO's President has provided ***hearsay*** evidence based on conversations with ***unattributed*** AMPCO members ***speculating*** about ***vague*** possibilities of irreparable harm that ***could*** result if the TCA proceeds in December 2019. No financial or expert analysis has been presented to support these allegations. The applicable law requires that no weight be given to such evidence.

90. The deficiencies in AMPCO's evidence mirror those in *Abdullah v. Maziri*[82], wherein the Ontario Superior Court refused to enjoin operations by Uber based on speculative hearsay evidence of irreparable harm:

> Two of the plaintiffs [taxi drivers] have provided affidavit evidence making a ***general statement*** that their incomes have gone down by 30-40% since Uber commenced operations in Ottawa. ***These statements have not been supported by any financial statements or any other documentary evidence, or any expert analysis linking a decline in their income to the introduction of the Uber ridesharing services. I find that the taxicab drivers have speculated that they may lose their jobs and also the Union has speculated that it may lose future revenue from reduced membership.***
>
> [...]
>
> ***The fact that the City will shortly receive its own study, which is not in evidence before me, is also a factor when considering***

---

[79] *Glooscap Heritage Society*, at para 31.
[80] *Assn' of Major Power Consumers in Ontario v Ontario (Energy Board)*, 2007 CarswellOnt 4273, **(Book of Authorities, Tab "17")**
[81] *Ibid*, at para 24.
[82] *Abdullah*, supra.

> ***whether irreparable harm will be suffered if an injunction is not granted.*** The City's study from KPMG will analyse the economic impact of the arrival of Uber in the City of Ottawa on existing taxicab fares. The City will then decide what policy it will adopt based on evidence obtained from the study directly related to the City of Ottawa. This evidence, if properly before the Court, would be highly relevant to assist the Court in determining the issue of whether any irreparable harm is being caused.[83] [Emphasis added.]

91. AMPCO's evidence pales even in comparison to the deficient evidence tendered in *Abdullah,* which at least came from the actual taxi drivers who alleged they would be harmed by the operations of Uber. AMPCO's evidence is also entirely speculative as contrasted with the affidavit evidence in *Abdullah* which was rooted in past losses.

92. Also notable was the court's consideration of the forthcoming study from the City. As in *Abdullah,* the IESO's undertaking of a stakeholder engagement and a third party study of energy payments and its commitment to make a final decision by June 2020 mitigates any possible harm alleged by AMPCO.

93. Mr. Anderson's hearsay allegation that AMPCO's members must utilize a "work-around" payment in their bids to cover potential activation cost and that this will make them uncompetitive vis-à-vis generators is also contradicted by the IESO's evidence. In the four years since launch of the DRA, HDR resources have been economically activated on only one occasion and dispatchable loads have been dispatched less than 1% of the time. The IESO does not expect the likelihood of economic dispatch for DR Resources to appreciatively increase in the May 1, 2020 to April 30, 2021 commitment period.[84] KCLP's detailed submissions on this point further emphasize the extreme frailty of AMPCO's claims.[85]

94. Lastly, Board staff advance the remarkable proposition that the reference to "any person" in paragraph 33(8)(c) somehow transforms the long-established standard for proving irreparable harm into one in which evidence of irreparable harm is apparently required from each party so that it can be assessed and balanced by the Board in making its determination. That is not the case. The reference to "any person" simply codifies the common law test which

---

[83] *Abdullah,* at paras 51, 57.
[84] Short Affidavit, at para 36.
[85] KCLP Submissions on motion for stay, at paras 38 - 52.

requires that in the case of a stay to suspend the operation of rules promulgated by a public agency, considerations of irreparable harm engage the public interest and may extend beyond the immediate parties.

95. There is nothing in the language of paragraph 33(8)(c), or the jurisprudence in this area, that transforms the well-known common law standard for irreparable harm into an exercise in balancing competing claims of irreparable harm, as suggested by Board staff.

E. A Stay is Contrary to the Interests of Consumers

96. As recognized by the IESO Board, the Amendment is the first phase in evolving the DRA into a more competitive capacity acquisition mechanism that includes new resource types. This will allow for increased competition in the acquisition of capacity for the benefit of Ontario customers.[86]

97. To fully realize this potential, the IESO needs time to implement an enduring capacity auction in a phased manner that will allow the IESO to learn, adapt as necessary and build confidence of market participants in the auction process.[87] This time will also provide TCA participants with the opportunity to develop and test their business processes and to likewise learn and adapt.[88]

98. It is the IESO's view that allowing supply resources to compete in the December 2019 auction will also reduce the likelihood that the operation of generation facilities coming off contracts will be shut down. These generation assets could play a role in addressing the future capacity gap and increasing competition in future capacity auctions. The IESO is concerned that some of these generation resources may cease operations if the TCA is delayed as they will not have an opportunity to compete in the IESO's capacity auction and may be unavailable as potential lower-cost resources in 2023 and thereafter.

99. The benefits to consumers of a gradual evolution of the TCA to an enduring capacity market was recognized by various consumer representatives in the Technical Panel's

---

[86] Short Affidavit, Exhibit "D", at p. 3.
[87] *Ibid*, at paras 30-33.
[88] *Ibid*

consideration of the Amendment. One consumer representative expressed his rationale for supporting the Amendment on the basis that:

> The amendments as reviewed by the Technical Panel have been offered for stakeholder input and in my view the language reflects the intent of the policy approach for the Transitional Capacity Auction. I believe that implementing the capacity auction will provide greater competitiveness in the market and therefore benefits to consumers. While this approach may not be preferred by all stakeholders, this is transitional by definition and as such will evolve over time. There will be future opportunities to amend the Market Rules to address additional concerns should they arise.[89]

100. Another Technical Panel member who represents the interests of residential consumers, explained in his rationale why the Amendment would benefit the consumers:

> Representing consumers, I want our electricity system to develop into one where we have what economists call pure competition. If we would have had numerous suppliers competing at the time of deregulation we probably would have a competitive, mature electricity market today, like Sweden and Norway. While we might not initially get all details perfectly correct with this proposal, there will be accommodation to make changes in the future, after we have had some experience with TCA. This is one good step towards developing an efficient, competitive electricity market.[90]

101. As recognized by these consumer representatives, a delay in the implementation of the TCA would delay greater competition and deny the IESO an opportunity for learnings to advance the overall objective of a long-term capacity auction. The Board should place significant weight on the views expressed by these representatives as to the impact of any stay on the interests of consumers.

102. In contrast, the Board should give no due to Board staff's unsubstantiated assertions that a stay is justified by the "uncertainty" around the TCA and the risk of lower participation by DR resources[91] which may be scared off by concerns they will be uncompetitive. There are no evidentiary grounds for this assertion. It is at odds with the IESO's uncontested evidence that

---

[89] *Ibid*, Exhibit "E".
[90] *Ibid*, Exhibit "E".
[91] OEB Staff Submission, at pp 8, 14-17.

the prospect of activation of DR resources is extremely unlikely;[92] and, that preparations are currently underway for the TCA and that, in addition to DR resources, market participants representing generators have registered for participation in the December auction. Mr. Anderson's unattributed, speculative, hearsay statements, are for the reasons stated above, also not legitimate grounds for these assertions by staff. In the circumstances, the IESO questions how Board staff could possibly conclude based on the evidence that the interests of consumers are best served by restricting competition in the December 2019 capacity auction.

F. The Balance of Convenience does not Favour a Stay

103. The final requirement that must be met for AMPCO to obtain a stay under subsection 33(8) is satisfying the Board that, on the balance of convenience, the stay should be granted.

104. The burden on an applicant seeking to enjoin the actions of a public agency acting within its jurisdiction is, as noted above, more onerous than that in litigation between two private parties. The court or tribunal hearing the motion for a stay must assume that the acts of the public agency are in the public interest, and that enjoining or suspending such acts would cause harm.

105. AMPCO has not rebutted the presumption that the Amendment is in the public interest.

106. The IESO has also tendered evidence in support of the IESO's Board's judgment that it is prudent to initiate the TCA in December 2019 and progress subsequent capacity auction phases in incremental and measured way to learn and, as necessary, adapt before the projected summer 2023 capacity gap emerges. It is the IESO's opinion that it would be imprudent to risk waiting to implement a capacity auction until closer to the eve of the projected capacity gap. There are, as of December 2019, only three opportunities for to run a capacity auction prior to the projected capacity gap in summer 2023. The IESO is not willing to forego once of these opportunities and lose the associated experience and learning.

107. The arguments put forth by AMPCO and Board staff counsel amount to second-guessing the IESO's judgment in the absence of any evidence to the contrary. It is the IESO's responsibility to advance the evolution of the market and ensure sufficient capacity is available

[92] Short Affidavit, at para 36.

to serve the needs of Ontario. These are complex matters in which the IESO is highly experienced. Its judgment is entitled to deference.

108. The IESO's Board also referenced the benefits of increased competition by opening up the TCA to other resources. AMPCO does not acknowledge this benefit. Its Application focuses on the narrow commercial interest of its members:

> If the TCA proceeds before appropriate resolution by the IESO of the issue of energy payments for DR Resources, it is unlikely that DR Resources will clear the new capacity market. DR Resources' inability to be cost competitive will effectively exclude them from participation in a process that was ***originally exclusive to them (the DRA)*** ...[93] [Emphasis added]

109. Nor does AMPCO challenge the IESO Board's reasonable concern – augmented by KCLP's affidavit – that the failure to proceed with the TCA risks the shuttering of off-contract generators to the potential detriment of Ontario consumers.

110. Board staff's repeated references to preserving the status quo and this tilting the balance of convenience in favour of a stay are misguided. Justice Sharpe of the Ontario Court of Appeal, who authors the leading Ontario text on injunctions, has noted that Canadian courts have largely dispensed with consideration of the status quo. The Supreme Court of Canada has described it as being of limited value in private law cases and having no merit in public law cases, and Justice Sharpe observes:

> This phrase [preservation of the status quo] is frequently used to describe the purpose of an interlocutory injunction although it adds little or nothing to the analysis and, in fact, may produce a possible source of confusion.[94]

111. To the extent that the status quo has any application, it favours preserving the IESO's status quo authority to make and implement market rules – not suspending this authority while AMPCO compels the IESO to pursue its agenda.

---

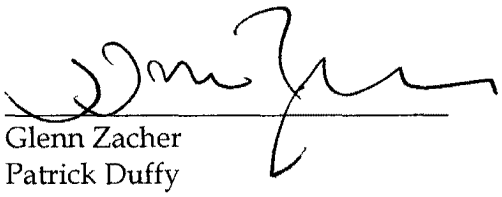
[93] Anderson Affidavit, at para 20.
[94] Robert J Sharpe, *Injunctions and Specific Performance*, paras. 2540 - 2550.

112. In summary, the IESO has offered compelling public interest reasons for proceeding with the TCA; by contrast, AMPCO has tendered no reliable or credible evidence of harm. The balance of convenience therefore also weighs heavily in favour of the IESO.

VI. ORDER REQUESTED

113. For the foregoing reasons, the IESO requests that AMPCO's Motion to stay the Amendment be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of November 2019.



Glenn Zacher
Patrick Duffy
Stikeman Elliott LLP

Appendix A

Arguments against utilization payments	
Wholesale Price Efficiency[95]	Real-time wholesale prices are an efficient price signal because they match supply and demand based on bids and offers on a minute-by-minute, and hour-by-hour basis, and introducing an additional payment could create an inefficacy in the market because dispatchable loads would receive an out-of-market payment that could alter their bid/offer strategy. In Ontario, this argument applies to loads that receive the wholesale energy price.
Disproportional Benefits[96]	Providing a utilization payment compensates a DR resource disproportionately relative to a supply resource because the DR resource does not incur a cost associated with the production of electricity. Therefore, a DR resource should be treated as if it had first purchased the power it wishes to resell to the market. This argument is based on the premise that the value of a megawatt of electricity curtailed (a "negawatt") is not equivalent to a megawatt of electricity, and assumes that the cost of curtailment for a DR resource is immaterial.
Harm to Other Suppliers[97]	Utilization payments will result in downward pressure on wholesale prices because DR resources are able to bid into the energy market at prices lower than traditional supply and will be dispatched more frequently. However, in Ontario, to have a material impact on capacity or energy prices, utilization payments would have to result in a considerable increase in levels of participation and activation. Under the current market structure in Ontario, most generators are under contract or receive regulated rates and hence consumer costs are largely fixed.
Harm to Economy[98]	Utilization/energy payments will incentivize loads to reduce production to provide demand reductions into the electricity market, reducing the supply of other goods in the economy and increasing prices.

[95] Short Affidavit, Exhibit "I", at 3.1.1.
[96] *Ibid*, Exhibit "I", at 3.1.2.
[97] *Ibid*, Exhibit "I", at 3.1.3.
[98] *Ibid*, Exhibit "I", at 3.1.4.

Arguments for utilization payments	
Reducing Consumer Costs[99]	Utilization payments will increase the level of DR participation and activation, which is a less expensive form of capacity and energy than traditional supply resources, and hence will result in lower consumer costs
Disconnect Between Wholesale and Retail Prices[100]	Retail prices do not reflect the real-time fluctuations in the cost of electricity and are inefficient and utilization payments are a way of improving the economic efficiency of the retail price by providing an additional financial incentive during high-price events. However, this argument is only valid for customers on retail rates and not exposed to real-time energy prices.
Fairness[101]	Generation resources receive a utilization payment in the form of an energy payment when they produce electricity and DR resources should be treated fairly and receive a utilization payment when they curtail electricity. The argument is based on the FERC Order 745 which requires that the energy payments result in a *net benefit* to consumers. However, this argument is based on the assumption that, in Ontario, a megawatt of electricity curtailed (negawatt) is equivalent to a megawatt of electricity.
Other Costs Associated with Curtailment[102]	There is a cost associated with curtailing demand (or producing a negawatt of electricity), which is equal to the value of lost load, which can be higher than the avoided cost of electricity, utilization payments compensate DR resources for these costs. However, for large commercial and industrial customers, the value of lost load can be very high, which could result in limited activation of DR resources regardless of whether utilization payments are offered.

[99] *Ibid*, Exhibit "I", at 3.1.5.
[100] *Ibid*, Exhibit "I", at 3.1.6.
[101] *Ibid*, Exhibit "I", at 3.1.7.
[102] *Ibid*, Exhibit "I", at 3.1.7.