

Association of Major Power Consumers in Ontario

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

DECISION ON COST RESPONSIBILITY & COST ELIGIBILITY

November 12, 2019

On September 26, 2019, the Association of Major Power Consumers in Ontario (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 Amendments enable the evolution of the IESO's Demand Response Auction into a Transitional Capacity Auction (TCA), including allowing participation by certain generators. The Application was filed under section 33 of the *Electricity Act*, 1998, S.O. 1998, c. 15, (Schedule B) (Act).

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).

On October 18, 2019, the OEB issued Procedural Order No. 2 (PO 2) which indicated, among other things, that the OEB will make cost awards available in this proceeding to eligible parties and granted intervenor status to all parties that requested it, as follows:

- Advanced Energy Management Alliance (AEMA)
- Association of Power Producers of Ontario (APPrO)
- Capital Power Corporation (Capital Power)
- Kingston CoGen Limited Partnership (KCLP)
- Rodan Energy Solutions Inc. (Rodan)
- School Energy Coalition (SEC)
- TransAlta Corporation (TransAlta)
- IESO (filed on October 17, 2019)

In its Application, AMPCO requested eligibility to seek recovery of its reasonably incurred costs of the Application and the Motion. APPrO and SEC also applied for cost award eligibility in their Notices of Intervention. KCLP, in its Notice of Intervention, submitted that, if AMPCO is granted cost award eligibility, it should also be eligible for an award of costs.

In PO 2, the OEB stated that it intends for the IESO to bear the costs of this proceeding, as this is consistent with the overall legislative scheme, which contemplates a review by the OEB as a potential last step in relation to market rule amendments. The OEB also noted that this was the outcome in the two preceding applications before the OEB to review market rule amendments: EB-2013-0029 / EB-2013-0010 (RES Proceeding) and EB-2007-0040 (Ramp Rate Proceeding).

The OEB did, however, allow the IESO an opportunity to make a submission if it wished to object to bearing the costs of this proceeding, and if it wished to object to any of the requests for cost award eligibility made by AMPCO, APPrO, SEC and KCLP. Provision was also made for a reply submission by any party whose request for cost award eligibility was the subject of an objection by the IESO.

Cost Responsibility

Submissions of the Parties

IESO Submission

On October 23, 2019, the IESO filed its submission (IESO Submission) stating, among other things, that the OEB should defer its determination of who should be responsible for costs until the end of this proceeding, when the OEB will be better positioned to decide whether ‘special circumstances’ have been demonstrated that warrant a departure from the presumptive rule that (i) applicants bear their own costs, and (ii) parties pursuing their own commercial interests are not eligible for cost awards.

The IESO submitted that the two earlier market rule review proceedings are not dispositive with respect to cost responsibility in an application under section 33 of the Act, and further submitted that it disagreed with the OEB’s view, as expressed in PO 2, that making the IESO responsible for costs is consistent with the legislative scheme. The IESO Submission also noted that the decision on cost responsibility in the RES Proceedings was deferred until later in the proceeding after submissions by the parties.

AMPCO Submission

AMPCO filed its reply to the IESO Submission on October 29, 2019 (AMPCO Submission) in which it submitted, among other things, that in the two previous proceedings considering market rule amendments - the RES Proceeding and the Ramp Rate Proceeding - the OEB determined that the IESO should bear the costs of the proceeding. AMPCO noted that, in the Ramp Rate Proceeding, the OEB determined that it would not be appropriate to defer its decision on cost responsibility and made the same determination in the later RES Proceeding. The AMPCO Submission stated that, if the OEB defers determination of who should bear the costs of this proceeding, AMPCO would be forced to abandon the Application as it is not set up or funded to absorb the costs of a regulatory proceeding.

APPrO Submission

On October 29, 2019, APPrO filed its submission (APPrO Submission) in response to the IESO Submission. APPrO stated that deferring a decision on cost responsibility until after the determination of the Application would be unreasonable as APPrO (and other entities that have no ability to recover costs from ratepayers or market participants) would be exposed to uncertain cost risk, which will hamper its participation in this proceeding. APPrO also stated that deferring a decision on cost responsibility could discourage intervenors from seeking intervenor status to bring legitimate concerns and important perspectives to the OEB in other proceedings.

OEB Findings

The OEB has determined that the IESO shall bear the costs of this proceeding. The OEB remains of the view that this is consistent with the overall legislative scheme, which contemplates a review by the OEB as a potential last step in relation to market rule amendments.

The OEB acknowledges that the IESO is responsible for making and amending the market rules, but the fact remains that market rule amendments are subject to oversight by the OEB under section 33 of the Act (among others) and that this oversight is part of the legislative scheme even if as a proceeding separate from the IESO's market rule amendment process.

Based on the above, the OEB also does not see any compelling reasons to defer its decision on cost responsibility, as requested by the IESO.

Cost Award Eligibility

Submissions of the Parties

IESO Submission

The IESO objected to the cost award eligibility requests made by AMPCO, APPrO and KCLP on the basis that these parties are pursuing their own commercial interests and are *prima facie* not eligible for cost awards under the OEB's *Practice Direction on Cost Awards* (Practice Direction). Alternatively, the IESO requested that the OEB defer its decision on cost award eligibility until the end of the proceeding, as it had done in the RES Proceeding.

AMPCO Submission

In its submission, AMPCO referred to the Ramp Rate Proceeding where it was found eligible for recovery of its reasonably incurred costs on the basis that:

- (a) Its application raised legitimate issues for the OEB's consideration.
- (b) As market participants, members of AMPCO are in fact participating in the funding of cost awards in the matter through their payment of the IESO's administrative costs in accordance with the market rules.

The AMPCO Submission argued that the same is true of the Application.

The AMPCO Submission conceded that, in this Application, AMPCO is primarily acting in the interests of its members who offer, or who might offer, Demand Response resources, but noted that AMPCO is also advocating the interests of its members – including those who do not offer Demand Response resources – as electricity consumers. AMPCO submitted that the observations in the Ramp Rate Proceeding regarding AMPCO are instructive and analogous in respect of AMPCO's cost eligibility in this proceeding.

APPrO Submission

APPrO noted that it is a representative of generators who are directly impacted by this proceeding. APPrO submitted that it is uniquely positioned to provide the OEB with useful context as to how its members view the TCA, their ability to participate in it and other issues of asset utilization tied to the TCA. APPrO further stated that there are therefore special circumstances that warrant a finding that it should be afforded cost eligibility in accordance with section 3.07 of the Practice Direction.

SEC and KCLP

Two other intervenors also requested cost award eligibility in their Notices of Intervention – SEC and KCLP – although these two parties did not make submissions in response to PO 2 or the IESO Submission.

The IESO did not object to SEC's request for cost award eligibility.

In its Notice of Intervention, KCLP stated that if AMPCO is granted cost award eligibility, the OEB should do the same for KCLP in light of special circumstances under section 3.07 of the Practice Direction; namely, to ensure that one category of capacity resources (Demand Response resources) do not receive preferential treatment in this process over another competing category of capacity resources (electricity generators), given that both resources are direct competitors in the upcoming TCA.

OEB Findings

The OEB has determined that SEC, as a representative of ratepayers, is eligible for an award of costs under section 3.03 of the Practice Direction.

By contrast, all other parties requesting cost award eligibility are *prima facie* not eligible for an award of costs under section 3.05 of the Practice Direction, AMPCO by reason of being the applicant, and KCLP and APPrO by reason of being or representing, respectively, generators. However, section 3.07 of the Practice Direction contemplates that a party that falls into one of the categories listed in section 3.05 can be eligible in special circumstances.

The OEB has determined that AMPCO is eligible for an award of costs despite being the applicant. This is consistent with the OEB's view that the review process under section 33 of the Act is part of the overall market rule amendment process. The OEB also notes that, as market participants, members of AMPCO are participating in the funding of cost awards in this case through their payment of the IESO's fees in accordance with the market rules.

The OEB believes that, in this case, the views of generators with respect to the Amendments will be important to the OEB's determination of how the Amendments may fare relative to the criteria set out in section 33(9) of the Act. The OEB has therefore determined that APPrO is also eligible for an award of costs.

Although KCLP is also a generator, the OEB has determined that it is not eligible for an award of costs. The OEB is of the view that, given its broad membership, APPrO should be in a position to provide the OEB with generator perspectives on the Amendments, including the perspective of KCLP's owner Northland Power, which according to APPrO's website is a member of APPrO. Even if and to the extent that KCLP's current situation is different from the situation of other generators, it does not appear to the OEB based on KCLP's intervention letter that such difference translates to a unique perspective on the Amendments that speaks directly to the determinations to be made by the OEB on an application under section 33 of the Act.

Being eligible to apply for an award of costs is not a guarantee of recovery of any costs claimed. Cost awards are made by way of OEB order at the end of a hearing. Cost eligible parties should be aware that the OEB will not generally allow the recovery of costs for the attendance of more than one representative of any party, unless a compelling reason is provided when cost claims are filed.

The OEB also takes this opportunity to remind all of the parties that, as in all cases, parties are expected to act responsibly and that the OEB retains discretion to address irresponsible or inappropriate participation through the cost award process.

Parties should not engage in detailed exploration of items that do not appear to be relevant or material. In making its decision on costs, the OEB will consider whether parties made reasonable efforts to ensure that their participation in the hearing was focused on relevant and material issues.

DATED at Toronto, **November 12, 2019**

ONTARIO ENERGY BOARD

Original signed by

Christine E. Long
Registrar and Board Secretary