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Ottawa

Ms. Christine Long
Registrar & Board Secretary
Ontario Energy Board
27th Floor
2300 Yonge Street
Toronto, ON M4P 1E4

Vancouver

New York

Dear Ms. Long:

AMPCO – Market Rule Amendment Review
Board File No.: EB-2019-0242

We are counsel to the Association of Power Producers of Ontario (“APPrO”). Please find enclosed APPrO’s Summary of Closing Submissions in the above-noted proceeding.

Yours very truly,



Evan J. Barz
EB:sv

Enclosure

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

ONTARIO ENERGY BOARD

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

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

SUMMARY OF CLOSING SUBMISSIONS OF THE ASSOCIATION OF POWER PRODUCERS OF ONTARIO

OVERVIEW

1. The Association of Power Producers of Ontario (“**APPrO**”) submits that the Ontario Energy Board (the “**Board**” or the “**OEB**”) should deny the Application of the Association of Major Power Consumers in Ontario’s (“**AMPCO**”) for an order revoking the Amendments and referring the Amendments back to the Independent Electricity System Operator (“**IESO**”) for further consideration.
2. AMPCO has not put forward any independent evidence in this proceeding that establishes that the Amendments unjustly discriminate against demand response resources (“**DR Resources**”), or unjustly favours any other market participant. As a result, AMPCO has failed to discharge its burden as the Applicant.
3. To the contrary, the independent expert evidence filed by KCLP in this proceeding establishes that the Amendments afford fair and equitable treatment to auction participants, do not

unjustly discriminate against DR Resources, and promote fair and efficient competition to the benefit of Ontario consumers.

The Application and the Amendments

4. On September 26, 2019, AMPCO filed its Application under section 33(4) of the *Electricity Act, 1998* (the “**Act**”) seeking an order from the Board revoking the Amendments, and referring them back to the IESO for further consideration.

5. The Amendments would facilitate expansion of the existing Demand Response Auction (“**DRA**”) into a Transitional Capacity Auction (“**TCA**”) and would allow a narrow sub-set of generators – non-committed dispatchable generators – to participate alongside DR Resources in the TCA.

AMPCO’s Argument

6. AMPCO’s argument in this Application is simple. AMPCO argues that:

- DR Resources will be at a competitive disadvantage vis-à-vis generators in the TCA because DR Resources do not currently receive energy payments when “activated”, whereas off-contract generators do.
- DR Resources must, therefore, increase their capacity auction offers to ensure that they recover their costs of activation in the event that they are activated to provide energy.
- Conversely, off-contract generators can anticipate receipt of energy payments when activated and can set their capacity offers taking into account those energy payments.

- This will allow off-contract generators to submit more competitive bids than DR Resources into the TCA, such that the TCA will unjustly discriminate against DR Resources.

AMPCO Has Failed to Discharge Its Burden of Establishing that the Amendments Unjustly Discriminate Against DR Resources

A. AMPCO, as Applicant, Bears the Burden of Establishing Unjust Discrimination

7. In an application under section 33 of the Act, the OEB's mandate is limited to an examination of the Market Rule amendments against the criteria set out in section 33(9) of the Act – namely whether the amendments are inconsistent with the purposes of the Act or unjustly discriminate against or in favour of a market participant or class of market participants.¹

8. For the purposes of section 33 of the Act, unjust discrimination means unjust economic discrimination.²

9. In these section 33 applications, the burden of proof is on the applicant to satisfy the Board that the requested relief should be granted.³ As a result, AMPCO, as Applicant in this proceeding, bears the burden of proving that the Amendments unjustly discriminate against DR Resources or in favour of another market participant or class of market participant.

B. AMPCO's Evidence Fails to Establish Unjust Discrimination

10. AMPCO's evidence in this proceeding is woefully deficient and falls short of discharging AMPCO's burden of demonstrating that the Amendments unjustly discriminate against DR Resources.

¹ EB-2007-0040, Decision and Order of the Board issued April 10, 2007 at p. 10, APPrO Compendium Tab 1 (“**3x Ramp Rate Decision**”)

² *Ibid* at p. 26.

³ *Ibid* at p. 18.

11. As its only evidence in support of its Application, AMPCO has filed the affidavit of Colin Anderson, President of AMPCO, sworn October 11, 2019 (the “**Anderson Affidavit**”).⁴

12. AMPCO has not advanced an analysis, study, or report that sets out the impact of the Amendments on AMPCO members,⁵ nor is Mr. Anderson aware of any AMPCO members that undertook such an analysis, study or report.⁶ In fact, AMPCO has not put forward any quantifiable evidence regarding the potential economic impacts of the Amendments on AMPCO members,⁷ despite Mr. Anderson having acknowledged that AMPCO had sufficient time to commission such evidence.⁸

13. There is also reason to doubt the reliability of Mr. Anderson’s evidence. DR Resources have historically enjoyed, and currently enjoy, a monopoly in the DRA.⁹ Therefore, Mr. Anderson and AMPCO members have a strong incentive to preserve DR Resources’ monopoly in the DRA to the advantage of AMPCO members and to the detriment of other capacity providers.

14. Additionally, under cross-examination Mr. Anderson acknowledged that:

(a) He does not have any direct responsibility for any DR Resource;¹⁰

(b) He does not have any insight into the bids that AMPCO members make into the auction;¹¹ and

⁴ EB-2019-0242, Transcript of Proceedings, Day 1 (Nov 25, 2019), p. 24, lines 16-21, APPrO Compendium Tab 2.

⁵ *Ibid*, p. 23, lines 23-28 and p. 24, line 1.

⁶ *Ibid*, p. 25, lines 20-28.

⁷ *Ibid*, p. 24, lines 15-16

⁸ *Ibid*, p. 26, lines 1-5.

⁹ Affidavit of Colin Anderson, p. 4, para 20, APPrO Compendium Tab 3 (“**Anderson Affidavit**”).

¹⁰ EB-2019-0242, Transcript of Proceedings, Day 1 (Nov 25, 2019), p. 32, lines 3-8, APPrO Compendium Tab 1.

¹¹ *Ibid*, p. 32, lines 3-8.

- (c) He does not know the absolute cost numbers of AMPCO's members because AMPCO members do not disclose that information to him.¹²

As a result, the Board should afford Mr. Anderson's evidence the commensurate evidentiary value for what it is: a theoretical concern from a non-market participant that is unsupported by experience, facts or data.

15. The Anderson Affidavit¹³ and Mr. Anderson's oral testimony also contain statements that are not attributed to specific AMPCO members, which Mr. Anderson is seeking to have admitted for their truth in this proceeding. In particular, during his direct examination (and at various other points during oral evidence), Mr. Anderson described alleged costs incurred by a steel manufacturer DR Resource in shutting down its operations upon activation by the IESO.¹⁴ These statements should be afforded zero evidentiary value by the Board, since: (a) they are not attributed to any specific AMPCO member(s); (b) Mr. Anderson never worked for a steel manufacturer (or any DR Resource);¹⁵ (c) Mr. Anderson acknowledged that he does not have any insight into the bids that AMPCO members make into the auction *or* the absolute cost numbers of AMPCO members; and (d) most critically, the other parties to this proceeding did not have an opportunity to test this evidence since the parties were not able to cross-examine the purported AMPCO member regarding those alleged costs.

¹² *Ibid*, p. 30, lines 19-24.

¹³ Anderson Affidavit at p. 4, paras 15-19, APPrO Compendium Tab 3. The impugned paragraphs address, among other things: (a) an alleged "work-around" that AMPCO members use to increase their capacity offers by an amount as a proxy for energy payments (para 15); and (b) the alleged impact on AMPCO members if they do not include this proxy for energy payments in their capacity offers (paras 16-19).

¹⁴ EB-2019-0242, Transcript of Proceedings, Day 1 (Nov 25, 2019), p. 16 lines 12-28 and p. 17, lines 1-20, APPrO Compendium Tab 1.

¹⁵ *Curriculum vitae* of Colin Anderson, APPrO Compendium Tab 4.

16. If AMPCO or its members wanted to introduce credible economic evidence into the record, they had every opportunity to file an affidavit from a DR Resource or from an economic expert. AMPCO and its members chose not to file such evidence.

17. In light of the foregoing, AMPCO has failed to discharge its burden of establishing that the Amendments unjustly discriminate against DR Resources or unjustly favour a market participant or class of market participants.

C. Policy Considerations Regarding AMPCO's Insufficient Evidence

18. The IESO has indicated that it is planning subsequent phases of its capacity auction design that will enable additional resource types to participate and will introduce new auction features. Each phase is expected to require further amendments to the Market Rules.¹⁶

19. The IESO is also embarking on a major Market Renewal Program, which will introduce fundamental reforms to the province's electricity markets, and will no doubt result in numerous (and likely material) Market Rule changes.

20. With each future amendment to the Market Rules, the opportunity arises for any person to apply to the Board for a review of the amendment pursuant to section 33(4) of the Act.

21. Against this backdrop, this Application presents an opportunity for the Board to make clear that an applicant seeking relief under section 33 of the Act is required to "put their best foot forward" by introducing economic evidence regarding the impact of the amendment on the applicant (or the market participant who the amendment is said to unjustly discriminate against or

¹⁶ Affidavit of David Short, sworn October 25, 2019 at p. 2, para 9 ("**Short Affidavit**"), APPrO Compendium Tab 5.

in favour of). This will help to ensure that the Board has sufficient evidence before it to evaluate any Market Rule amendment that is the subject of future application and will help prevent a litany of applications on specious grounds.

22. On the other hand, if the Board grants AMPCO's requested relief on the basis of the paltry evidence that AMPCO has proffered in this proceeding, it has the potential to create negative repercussions for the Board and the IESO Administered Markets ("IAM"). Most notably, granting the requested relief on the basis of the evidence put forward by AMPCO may open the flood gates to applications that are neither supported by expert evidence or affidavit evidence from a market participant (consumer, generator, regulator, or otherwise). Such an outcome would waste Board resources by requiring it to hold hearings to address potentially unmeritorious applications, as well as preventing the IESO from making timely changes to the Market Rules that the IESO deems necessary.

23. In light of the above, APPrO submits that this is an appropriate proceeding for the Board to make clear that an applicant bringing an application for review of a Market Rule amendment must proffer independent and credible evidence regarding the economic discrimination purported to result from the amendment.

KCLP's Evidence in this Proceeding Establishes that the Amendments do not Unjustly Discriminate

24. While AMPCO has failed to put forward evidence in this proceeding that the Amendments unjustly discriminate against DR Resources, Kingston CoGen Limited Partnership ("KCLP") has filed expert affidavit evidence from Dr. Brian Rivard¹⁷ that the Amendments "*afford fair and*

¹⁷ Revised Affidavit of Brian Rivard, sworn November 21, 2019 ("Rivard Affidavit"), APPrO Compendium Tab 6.

equitable treatment to TCA participants, do not place DR Resources at a competitive disadvantage to non-committed dispatchable generators, and promote fair and efficient competition to the benefit of Ontario consumers.”¹⁸

25. Moreover, Dr. Rivard’s evidence directly addresses AMPCO’s assertion that the Amendments unjustly discriminate against DR Resources because non-committed dispatchable generators receive an energy payment upon economic activation whereas DR Resources do not. Contrary to AMPCO’s assertion, Dr. Rivard demonstrates that paying an energy payment to DR Resources for economic activations would, in fact, afford a competitive advantage to DR Resources over non-committed dispatchable generators in the TCA.¹⁹

26. More specifically, Dr. Rivard shows that if DR Resources receive an energy payment for an economic activation this amounts to a double benefit for the DR Resource, since it receives a payment from the IESO (first benefit) and it avoids the cost of consuming by reducing its net-metered load (second benefit). In contrast, the non-committed dispatchable generator only acquires a single benefit, which allows it to recover its avoidable cost of activation (the cost of fuel).²⁰ Unlike DR Resources, there is no second benefit to a non-committed dispatchable generator since it is not avoiding any cost, but it is, instead, only incurring the costs of generation, which the energy payment is specifically paid to the non-committed dispatchable generator to cover-off.²¹

27. The above-noted analysis of Dr. Rivard was not seriously contested.

¹⁸ Rivard Affidavit at p. 8, para 19.

¹⁹ Rivard Affidavit at p. 14, para 31.

²⁰ Rivard Affidavit at p. 21, para 51.

²¹ Rivard Affidavit at pp. 10-11, para 24.

28. In addition to the expert evidence of Dr. Rivard, KCLP also filed evidence from John Windsor, Vice President of Energy Services and Asset Management at Northland Power, which is the parent owner of KCLP.²² Mr. Windsor's evidence indicates that the current DRA discriminates against off-contract generators by not permitting those generators to compete alongside DR Resources for capacity. As a result, KCLP currently does not have any mechanism to sell its capacity into the IAM²³ and does not have a mechanism to recover its fixed operating costs.²⁴ This may result in the parent company of KCLP deciding to discontinue the operation of its generating facility in order to mitigate its losses.²⁵

29. As was articulated by the IESO during its oral evidence in this proceeding, DR Resources through the DRA have had a "sandbox" where they are "protected from the rest of the playground."²⁶ The Amendments are intended to open-up that exclusive sandbox by providing an opportunity to off-contract generators to compete alongside DR Resources in the TCA to supply capacity to Ontario. In designing the Amendments, the IESO was not "picking winners and losers" but was merely providing a competitive process for both types of resources.²⁷

Conclusion

30. APPrO submits that AMPCO has not met its burden of establishing that the Amendments unjustly discriminate against DR Resources, or unjustly favour any other market participant. The

²² Affidavit of John Windsor, sworn October 25, 2019 ("**Windsor Affidavit**"), APPrO Compendium Tab 7.

²³ Windsor Affidavit at p. 6, para 11.

²⁴ Windsor Affidavit at p. 6, para 17.

²⁵ Windsor Affidavit at p. 8, para 23.

²⁶ EB-2019-0242, Transcript of Proceedings, Day 3 (Nov 29, 2019), p. 21, lines 17-19, APPrO Compendium Tab 8.

²⁷ *Ibid*, p. 22, lines 19-20.

only expert evidence before the Board that addresses the impact of the Amendments²⁸ establishes that the Amendments afford fair and equitable treatment to auction participants and that the Amendments do not unjustly discriminate against DR Resources. As a result, AMPCO's Application must be denied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,
this 9th day of December, 2019



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

²⁸ While London Economics International LLC ("LEI") was retained to assist OEB Staff as an independent expert, LEI's work was limited to providing context around DR Resource participation in a selection of US markets at the Independent System Operator and Regional Transmission Organization level, as well as the applicability of Federal Energy Regulatory Commission Order 745 to programs offered by these markets. As such, LEI's expert evidence does not address the sole issue that is before the Board, namely whether the Amendments unjustly discriminate against DR Resources, or unjustly favour any market participant.