

KINGSTON COGEN LIMITED PARTNERSHIP'S

WRITTEN ARGUMENT OUTLINE

FILED: DECEMBER 9, 2019

Borden Ladner Gervais LLP
Bay Adelaide Centre, East Tower 22
Adelaide St W.
Toronto ON M5H 4E3

Ewa Krajewska
Tel: (416) 367-6244
Facsimile: (416) 367-6749
Email: ekrajewska@blg.com

John A.D. Vellone
Tel: (416) 367-6730
Facsimile: (416) 367-6749
Email: jvellone@blg.com

Counsels for Kingston CoGen Limited
Partnership

I. OVERVIEW

1. Kingston CoGen Limited Partnership (“KCLP”) opposes the application brought by the Association of Major Power Consumers in Ontario (“AMPCO”) under Section 33(4) of the *Electricity Act, 1998*¹ (the “Act”) to review Independent Electricity System Operator (“IESO”) market rule amendment MR-00439-R00 to R05 (the “Amendment”) that would implement a Transitional Capacity Auction (“TCA”) (the “Application”).

II. THE PROPER LEGAL TEST

2. The Application represents only the third time that the Ontario Energy Board (the “OEB”) has been asked to review specific market rule amendments under Section 33 of the Act.

3. The first was in 2007, in a case that became known as the “3x Ramp Rate Case” (EB-2007-0040). In its April 12, 2007 Decision and Order in the 3x Ramp Rate Case (the “3X Ramp Rate Decision”), the OEB made several findings that are helpful in considering the Application. Specifically:

- (a) the burden of proof in a Section 33 Application rests with the applicant;²
- (b) its mandate under section 33 of the Act is limited to an examination of the market rule amendment against the criteria set out in Section 33(9) of the Act;³ and
- (c) in the context of its mandate under Section 33 of the Act, unjust discrimination means unjust economic discrimination.⁴

4. In this Application, AMPCO holds the burden of proof.

5. Under section 33(9) of the *Electricity Act*, the Board must issue an order either revoking the Amendment or referring it back to the IESO for further consideration if and only if AMPCO discharges its burden of proof to demonstrate that:

- (a) the Amendment is inconsistent with the purposes of the *Electricity Act, 1998*; or
- (b) the Amendment unjustly discriminates against or in favour of a market participant or class of market participants.

6. KCLP submits that AMPCO has failed to discharge its burden of proof, to meet the legal test as set out in section 33(9) of the Act.

¹ S.O. 1998, CHAPTER 15, SCHEDULE A.

² Decision and Order dated April 12, 2007 in EB-2007-0040 at page 18.

³ Ibid. at page 10.

⁴ Ibid. at page 26.

III. THE AMENDMENT IS CONSISTENT WITH THE OBJECTS OF THE ELECTRICITY ACT

A. Relevant Objects of the Electricity Act

7. The Amendment is consistent with the purposes of the Act. The relevant legislative objectives that should be considered in this Application are:

- (a) to ensure the adequacy, safety, sustainability and reliability of electricity supply in Ontario through responsible planning and management of electricity resources, supply and demand;
- (b) to protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service;
- (c) to promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity; and
- (d) to facilitate the maintenance of a financially viable electricity industry.

B. Purpose of the Amendments and the TCA

8. As Dr. Brian Rivard (“Dr. Rivard”) explained in his oral testimony, the IESO has to plan the system in the future so that it is able to meet the electricity demand with a certain probability.

9. The IESO therefore runs the TCA to ensure that it has sufficient capacity available to meet future energy demand for the purpose of reliability.⁵

10. In their efforts for future planning, the IESO anticipates that there will be a 4,000 MW-plus gap for capacity in the year 2023. However, to date the Demand Response Auction (“DRA”) clears around 800 MW and currently there is only about 1,000 MW of qualified capacity amongst Demand Response (“DR”) participants. It is evident that DR participants alone cannot meet this future need of 4,000 MW and therefore it is necessary to look to different resources, including available generation in Ontario.⁶

11. The Amendment is part of the IESO’s strategy to address the forecasted 2023 capacity gap. Through the Amendment, the IESO is proactively ensuring reliable supply of electricity in Ontario and protecting the interests of consumers with respect to prices and the adequacy and reliability of electricity service.

⁵ Oral Hearing Transcript Volume 2 dated November 28, 2019 (“Oral Hearing Day 2”) at page 49 lines 19 to 28 and page 50 lines 1 to 5.

⁶ Oral Hearing Transcript Volume 3 dated November 29, 2019 (“Oral Hearing Day 3”) at page 4, lines 14 to 27.

12. The IESO has unequivocally stated and this remained unchallenged on cross-examination, that DR resources will not be sufficient to meet the capacity gap forecasted for 2023.

13. The IESO acknowledged that amending the market rules to allow off-contract generators to participate in the capacity auction is an economically efficient manner to meet capacity needs and that it is less costly than entering into further fixed contracts with generators.⁷ Furthermore, the IESO acknowledges that it is not in the long-term interest of energy consumers for Ontario to lose the benefit of non-contracted generators.⁸

14. The TCA, as a broader technology-neutral capacity auction, increases competition, reduces capacity prices and is beneficial to consumers.

15. The Market Surveillance Panel's ("MSP") report dated May 2017 commends the IESO for considering the introduction of a technology-neutral capacity market that allows DR resources to compete against other technologies to provide capacity at least cost in the future.⁹ The MSP goes on to express that technology-neutral capacity auction is a more cost-effective way to procure capacity.¹⁰

16. The Amendment promotes economic efficiency and cost effectiveness in generation and DR, allowing both resources to compete to provide capacity into the IAM. Through increased competition the Amendment protects the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.

17. Finally, the Amendment is consistent with the policies of the Government of Ontario as set out in the 2017 LTEP,¹¹ which states that:

"[...] demand response has become a mature and competitive resource.

*Demand Response capacity realized each year will depend on system needs **and the competitiveness of demand response with other resources.**"¹²*

⁷ Oral Hearing Day 3 at page 35, lines 15 to 28 and page 36, lines 1 to 7

⁸ Affidavit of David Short, Sworn October 25, 2019 at para 17(c).

⁹ Compendium for the IESO's Cross-Examination of Colin Anderson dated November 24, 2019 at Tab 6, page 104 of the Market Surveillance Panel Report November 2015-April 2016.

¹⁰ *Ibid* at page 106.

¹¹ Ontario's Long-Term Energy Plan 2017: Delivering Fairness and Choice, Published by the Ministry of Energy, available online at: https://files.ontario.ca/books/ltep2017_0.pdf.

¹² *Ibid* at pp 94-95.

IV. THE AMENDMENTS DO NOT UNJUSTLY DISCRIMINATE AGAINST OR IN FAVOUR OF A MARKET PARTICIPANT OR CLASS OF MARKET PARTICIPANTS

A. The Amendments provide for an open and competitive capacity market where different resources can compete on a level playing field.

18. The Amendments do not unjustly discriminate against DR resources, nor do they favour a market participant or class of market participants.

19. Rather, the Amendments serve to correct and remedy the unjust discrimination against off-contract dispatchable generators that existed in the IESO administered market (the “IAM”) prior to the introduction of the TCA.

20. Prior to the TCA, DR resources had the **exclusive right** to sell capacity into the IAM through the DRA.¹³

21. By contrast, in the absence of the TCA, off-contract dispatchable generators, like KCLP, have no ability to sell capacity into the IAM.¹⁴ KCLP’s parent company, Northland, was forced to suspend operations at, and ultimately sell, its 40MW Cochrane generation facility because it could not recover its fixed operating costs through the IAM.¹⁵

22. In this context, the IESO determined that the TCA would provide opportunities for existing off-contract generators which might otherwise decide to wind down their facilities before the 2023 capacity gap arises, because preserving this existing generation capacity will most likely be significantly cheaper than building net new generation capacity in the future.¹⁶

23. Under the proposed TCA, the IESO will treat DR resources and off-contract dispatchable generation exactly the same: they compete in an economic auction to provide a unit of capacity (a megawatt of generation, or a megawatt of demand reduction), and everyone who clears the auction receives the exact same market clearing price (\$/MW).¹⁷

¹³ Evidence of the IESO, filed November 8, 2019 at paras 24 and 25.

¹⁴ Evidence of John Windsor, filed October 25, 2019 at para 11.

¹⁵ Ibid. at para. 18.

¹⁶ Evidence of David Short dated Nov. 8, 2019 at para. 62.

¹⁷ Oral Hearing Day 2 at page 127, lines 1 to 13.

24. Any market participant that clears the capacity auction will have a capacity commitment, an obligation to bid or offer their energy into the energy market at certain times. However, both DR resources and generators are given a fairly high degree of discretion to establish their energy market bids or offers at a price which allows them to recover their value of lost load or their variable costs of providing energy, as applicable. Dispatchable load bid prices must be greater than \$100/MWh but less than \$2,000/MWh, which is the maximum market clearing price.

25. Since implementation of the DRA in 2016, the highest Hourly Ontario Energy Price (“HOEP”) occurred on March 11th, 2017 and was \$1,822.95/MWh. Since 2016, the HOEP exceeded \$1,000/MWh in only 4 hours or roughly 0.01% of the hours, which further illustrates the unlikely risk of activation of DR resources that submit energy bids greater than \$1,000/MWh.

26. AMPCO’s main argument on the merits is that the Amendment unjustly discriminates against DR resources by not providing them with an energy payment upon activation. Its position is that in the existing DRA, the only revenue stream available to DR participants is a capacity payment. If the TCA is implemented, the DR participants will still only qualify for capacity payments, whereas off-contract dispatchable generators will qualify for both capacity payments and energy payments.¹⁸

B. FERC Order 745 does not apply in Ontario and does not help with this Application

27. To support its contention that DR Resources should be paid energy payments, AMPCO relies on Order 745 from the Federal Energy Regulatory Commission (“FERC”) (“Order 745”).¹⁹

28. KCLP submits that the findings from FERC Order 745 are not applicable in Ontario, nor are the findings helpful in answering whether or not the lack of energy payments for DR resources in Ontario is discriminatory, for the following three reasons.

29. First, FERC Order 745 arose in direct response to a unique piece of legislation passed by the United States Congress in 2005 called the *Energy Policy Act of 2005*²⁰ (“**EPA2005**”), which authorized the Federal Energy Regulatory Commission (“**FERC**”) to promote the use of demand response, while also making it national policy to eliminate unnecessary barriers to demand response participation in energy, capacity, and ancillary services markets.

¹⁸ Affidavit of Colin Anderson, sworn October 11, 2019 (“Anderson Affidavit”) at para. 20.

¹⁹ AMPCO Submissions at para 45-46.

²⁰ Pub. L. No. 109-58, 119 Stat. 594, 965 (2005), available online at: <https://uscode.house.gov/statutes/pl/109/58.pdf>.

30. Both the majority and the dissenting opinions in FERC Order 745 make explicit reference to § 1252(f) of the EPA2005 in their decision. § 1252(f) of the EPA2005 provided (as it was then):

FEDERAL ENCOURAGEMENT OF DEMAND RESPONSE DEVICES.—It is the policy of the United States that time-based pricing and other forms of demand response, whereby electricity customers are provided with electricity price signals and the ability to benefit by responding to them, shall be encouraged, the deployment of such technology and devices that enable electricity customers to participate in such pricing and demand response systems shall be facilitated, and unnecessary barriers to demand response participation in energy, capacity and ancillary service markets shall be eliminated. It is further the policy of the United States that the benefits of such demand response that accrue to those not deploying such technology and devices, but who are part of the same regional electricity entity, shall be recognized.

31. Unlike FERC, the OEB is not bound by such a prescriptive legislative mandate to “encourage” or “facilitate” Demand Response, or to “recognize” the net benefits.

32. To the contrary, Ontario has been successful at removing the types of barriers to demand response resources that were the focus of FERC Order 745.²¹ Demand Response resources have been “encouraged” and “facilitated” in Ontario since 2005 by the former Ontario Power Authority, and more recently the IESO, through a progressive series of targeted procurements and programs (DR1, DR2, DR3, CBDR and more recently the DRA).²²

33. This is why the Government of Ontario recognized in its 2017 LTEP, as quoted above.

34. Second, both Mr. Goulding of London Economics International (“LEI”) ²³ and Dr. Rivard²⁴ testified that the Ontario electricity market has unique features (including the Global Adjustment, the Industrial Conservation Incentive, and Ontario’s role as an exporter) that would make it unwise to uncritically adopt concepts about discrimination from FERC Order 745 to Ontario. Dr. Rivard concluded that due to these unique factors the net benefits test would rarely, if ever, be satisfied in Ontario.²⁵

35. These conclusions are further reinforced by Navigant in a report they prepared for the IESO:

“It is important to note that Ontario is different from many U.S. jurisdiction in that many of the DR resources are wholesale market participants or large customers that are exposed to real-time electricity prices as opposed to retail prices. This means that Ontario DR customers avoid the entire real-time electricity price when curtailing and are exposed to high price spikes. When DR

²¹ Affidavit of Dr. Brian Rivard at para. 77.

²² Evidence of David Short dated Nov. 8, 2019 at paras. 44-46.

²³ LEI Responses to Interrogatories dated Nov. 20, 2019 at 1.2 KCLP 2(d) and Oral Hearing Day 1 at page 134, line 23 to page 135, line 18.

²⁴ Affidavit of Dr. Rivard dated Nov. 21, 2019 (“Dr. Rivard Affidavit”) at Section C, paras. 53-85.

²⁵ Ibid.

providers are only exposed to retail rates as they are in many U.S. jurisdictions, they are unlikely to have the same avoided cost benefit when curtailing during spikes in prices.”²⁶

36. AMPCO did not file any compelling evidence, expert or otherwise, to support the assertion that FERC Order 745 is applicable in Ontario or that it supports a conclusion that not making energy or utilization payments to DR resources in Ontario is discriminatory.

C. AMPCO has produced no credible evidence that the absence of energy payments for DR resources is unjust or economically discriminatory

37. The unchallenged expert evidence in this proceeding has been that the absence of an energy payment to DR resources is not unjustly economically discriminatory.

38. Dr. Rivard explained that when DR resources receive an energy payment for an economic activation, it amounts to a double benefit because the DR resource avoids the cost of consuming and receives energy payment from the IESO to avoid this cost. Consequently, DR resources would be at an unjust competitive advantage over off-contract generators in the TCA if energy payments are made to DR resources. This double benefit situation would allow DR resources to cover more of its fixed avoided cost through the energy market, requires less availability payment to cover these costs and they can submit a lower capacity offer price than otherwise cheaper off-contract generators in the TCA.²⁷

39. In LEI’s response to interrogatories, they expressed that whether DR resources are provided energy payments may not be material in the near term.²⁸ This is because actual activation of DR resources has been relatively limited, and DR resource revenues from actual activation have also been limited (as compared DR capacity revenues).²⁹ Based on historical participation, Mr. Goulding of LEI calculated the amount of money that is at stake to be absolutely small.³⁰

40. Throughout the proceeding, AMPCO has provided insufficient evidence to substantiate its allegation of discrimination and to fulfil this prong of the legal test. KCLP relies upon APPRO’s submission on this issue, but makes the following points at a high level:

- (a) There is no direct evidence from any AMPCO member or other DR Resource that they would be unjustly discriminated against.

²⁶ Navigant’s Demand Response Discussion Paper, being Exhibit “I” to the Affidavit of David Short, sworn October 25, 2019.

²⁷ Rivard Evidence at para 43.

²⁸ London Economics International LLC Responses to Interrogatories dated November 20, 2019, 1.4 KCLP-4 at page 7.

²⁹ *Ibid.*

³⁰ Oral Hearing Day 1 at page 155, lines 1 to 9.

- (b) AMPCO's attempt to explain this lack of evidence by alleging that the OEB or the IESO would somehow take retaliatory steps against anyone who filed such evidence,³¹ is spurious and without merit.
- (c) By contrast, in addition to APPrO's involvement on behalf of generators, KCLP filed clear and direct evidence of the impacts of the Application on its operations, and Mr. Windsor was the subject of lengthy cross-examination. This is an important point, because it puts clear and specific facts to the test. It allows all parties, including the OEB, to ask questions and test that evidence.
- (d) While Mr. Anderson presented an interesting story about a steel manufacturer that incurred a certain cost each time it was activated to curtail demand during his examination in-chief,³² there is no direct evidence to support these assertions. In addition, Mr. Anderson fails to ever clearly explain why the hypothetical steel manufacturer could not reflect the cost of burning natural gas (his example) in their energy market bid.
- (e) Mr. Anderson conceded that cost elements associated with curtailment are specific to each individual participant and no two participants are likely to have the same characteristics.³³
- (f) Importantly, AMPCO has not identified a single cost that is incurred by DR resources that cannot be recovered or avoided through appropriate capacity and energy market bids.³⁴

III. OTHER IESO PROGRAMS

41. There are many different programs operated by the IESO as part of the IAM that attempt to remedy issues faced by participants in the market or government programs to incentivize certain economic behaviour or obtain certain benefits for the Province of Ontario.

A. The Industrial Conservation Incentive Program

42. The OEB should, when considering the Application, be cognizant of the benefits that the majority of AMPCO members,³⁵ who are Class A energy consumers, already receive under the Industrial Conservation Initiative. Class A consumers, which are large industrial loads, receive a sizeable economic incentive if they are able to reduce their peak demand during five (5) coincident peak hours under the ICI.

³¹ Oral Hearing Day 1 at page 9, line 25 to page 10, line 15.

³² Oral Hearing Transcript Volume 1 dated November 25, 2019 ("Oral Hearing Day 1") at page 16, line 12 to page 17, line 20.

³³ Oral Hearing Day 1 at page 50 lines 10 to 15.

³⁴ Affidavit of Dr. Rivard at paras. 29 and 30.

³⁵ Oral Hearing Day 1 at page 46, lines 26 to 28.

43. If a Class A Consumer successfully reduces their electricity consumption in those hours when the system is at peak, the DR resource can pay as little as nothing for their Global Adjustment charge the following year.³⁶

44. The OEB's own MSP reports:

“The ICI has the effect of shifting the electricity costs recovered through the Global Adjustment from larger volume consumers to households and small businesses. Because the Global Adjustment now accounts for the lion's share of electricity supply costs, baseload as well as peaking, how those costs are allocated between large and small consumers has a significant effect on the effective electricity prices that they pay. Since its introduction in 2011, the ICI has shifted nearly \$5 billion in electricity costs from larger consumers to smaller ones. In 2017, the ICI shifted \$1.2 billion in electricity costs to households and small businesses—nearly four times greater than the amount in 2011. In 2017, the ICI increased the cost of electricity for households and small businesses by 10%.

[...]

In the Panel's view, the ICI as presently structured is a complicated and non-transparent means of recovering costs, with limited efficiency benefits. The magnitude of the incentive to reduce peak demand during a year is inversely related to the Province's need for peak demand reduction the following year. Arguably, the ICI does not allocate costs fairly in the sense of assigning costs to those who cause them and/or benefit from them being incurred.”³⁷

45. While it is true that a Class A consumer that is also a DR resource will not receive its DR availability payment for the five (5) coincident peak hours that it voluntarily curtails to avoid Global Adjustment, that DR resource will continue to receive DR availability payments for all other hours of the year in addition to its reduced GA payment in the following year. As a result, DR Availability Payments and Global Adjustment reduction strategies should be considered complimentary approaches to lower a DR resource's costs rather than exclusionary strategies. The ICI actually provides DR resources that are Class A consumers an artificial competitive advantage over generators in the TCA.³⁸

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

³⁶ Oral Hearing Day 3 at page 40, lines 7 to 15.

³⁷ Ontario Energy Board Market Surveillance Panel, “The Industrial Conservation Initiative: Evaluating its Impact and Potential Alternative Approaches” (December 2018) at 2-3.

³⁸ Dr. Rivard Affidavit, Figure 4 at pages 30 and 31.

B. The Real-Time Generator Cost Guarantee (“RT-GCG”)

47. The RT-GCG Program is a long-standing energy market program that facilitates the participation of certain generators in the Ontario energy market. The program was designed to allow certain generators to make energy offers that were more reflective of their marginal costs in the energy market in circumstances where those generators might otherwise choose not bid into the energy market.³⁹ The RT-GCG Program ensures that certain generators are compensated for certain pre-approved and carefully controlled “out of market” costs which are required to start-up a generating facility in order for the IESO system to be able to utilize energy production from those facilities. If that generator does not recover its costs from the energy payments related to the dispatch (which is quite common in the IESO market), the generator is able to receive cost recovery from the IESO market for some of the start-up costs incurred so long as it is registered for the RT-GCG with the IESO and has met all eligibility requirements in the real time energy market. The costs that are the subject of the RT-GCG Program are not related to the Amendment or the TCA.

C. Hourly Demand Response Compensation (“HDR”)

48. The IESO also has measures to address the ability of HDR resources to participate in the capacity and energy markets. Specifically, the IESO acknowledges that there are certain “out of market” costs incurred by HDR resources in testing or emergency situations which require activation by the IESO. HDR will be activated even if the electricity price is lower than their bid price. As such, there is a need for these HDR resources to be made whole to the difference between their bid price (the value of lost load) and the electricity price. The IESO has plans to offer DR resources payments when they are uneconomically activated in these situations.⁴⁰ Mr. Anderson agrees that this is different from in-market activation of DR resources, which are only activated if the price matches the bid.⁴¹

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

Per:

John A. D. Vellone
Counsel for KCLP

³⁹ Oral Hearing Day 2 at page 112, lines 13 to 16.

⁴⁰ Oral Hearing Day 1 at page 101, lines 10 to 21.

⁴¹ Oral Hearing Day 1 at page 101, lines 26 to 28 and page 102, lines 1 to 2.