

Association of Major Power Consumers in Ontario

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

**DECISION AND ORDER
ON MOTION TO STAY THE OPERATION
OF THE AMENDMENTS TO THE MARKET RULES**

November 25, 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 Application was filed under section 33 of the *Electricity Act, 1998*, S.O. 1998, c. 15, (Schedule B) (Act).

The Amendments, which were published by the IESO on September 5, 2019 and took effect on October 15, 2019, enable the evolution of the IESO's Demand Response Auction (DRA) into a Transitional Capacity Auction (TCA), including allowing participation by generators that have come off power purchase agreements. The IESO is planning to hold the first TCA in early December 2019, with key milestone dates scheduled in the interim period.

AMPCO also filed a Notice of Motion requesting an order of the OEB staying the operation of the Amendments pending the completion of the OEB's review (Motion).

The OEB issued a Notice of Hearing on October 1, 2019.

On October 4, 2019, the OEB issued Procedural Order No.1 indicating that it expects the IESO to participate in this proceeding and directing AMPCO to file all affidavit material on which it intends to rely in support of the Motion and the Application by October 11, 2019. AMPCO filed affidavit material on that day.

On October 18, 2019, the OEB issued Procedural Order No. 2 which set out dates for the proceeding and granted intervenor status to all parties that requested it. In Procedural Order No. 3, issued October 22, 2019, the OEB modified some of the procedural steps and timeline for the hearing of the Motion. In Procedural Order No. 4, issued November 8, 2019, the OEB extended the time for AMPCO's filing of its reply submissions on the Motion to November 11, 2019 and reiterated the hearing schedule for the Application. On November 12, 2019, the OEB issued its Decision on Cost Responsibility & Cost Eligibility.

The Application

The Application was filed by AMPCO, an organization that represents major power consumers in Ontario, some of whom participate in the IESO-administered markets as Demand Response Resources (DR Resources). Participation of DR Resources takes the form of electricity use curtailment. The Application requests that the OEB find that the Amendments are: i) inconsistent with the purposes of the Act; and / or ii) unjustly discriminatory to DR Resources and, having so found, that the OEB must revoke the Amendments and refer them back to the IESO for reconsideration.

The Application concerns the IESO's new capacity market. The IESO has developed a capacity auction to secure capacity commitments to participate in that market. Both DR Resources and dispatchable generating facilities that are neither under contract nor rate regulated are eligible for participation in the auction. This auction builds on the IESO's former DRA, which has been in place since December 2015, in which only DR Resources were procured.

Under the TCA, all resources that clear the capacity auction receive an availability payment for providing capacity. However, DR Resources, if called on to activate that capacity, will curtail their use of electricity, but will not receive a payment for activation under the market rules. In contrast, generators which successfully clear the TCA will receive an availability payment for making capacity available and, if called on to activate capacity by generating electricity, will be paid for that energy at the prevailing market price.

AMPCO's concern is that the inequity in treatment regarding payment terms for DR Resources and generation resources is unjustly discriminatory to the DR Resources, and will result in outcomes that are inconsistent with the Act. AMPCO's allegation is that their capacity bids in the auction will not be able to compete with those of generation resources, since the latter receive an availability payment as well as an energy payment if dispatched.

The IESO has decided to implement the TCA as a means for addressing the capacity gap it has forecast at nearly 4,000 MW in 2023. The Amendments constitute the first phase in the IESO's plan to evolve the DRA into a more competitive capacity acquisition mechanism over time. The IESO's reason to hold the first TCA in December 2019 is to permit multiple rounds of auctions to secure capacity before 2023, with a plan for increasing the diversity of capacity eligible for participating in succeeding auctions. This will allow the IESO and market participants time to learn and adjust before the need for resources becomes critical. The IESO also sees this current iteration of the TCA as an opportunity to secure commitments from generation capacity no longer under contract and which might otherwise close.

The IESO has committed to study energy payments for DR Resources but will not have that completed until June 2020.

The Motion to Stay

The Motion requests an order of the OEB staying the operation of the Amendments pending completion of the OEB's review of the Application.

Evidence was filed by AMPCO, the IESO and Kingston CoGen Limited Partnership (KCLP). Submissions were filed by AMPCO, the IESO, KCLP, the Association of Power Producers of Ontario (APPrO) and OEB staff.

DECISION

The OEB has considered the factors identified in section 33(8) of the Act, and the evidence and submissions filed by the parties and OEB staff. The OEB is satisfied that the operation of the Amendments should be stayed and, therefore, grants AMPCO's Motion pending completion of the OEB's review of the Amendments.

The following sections address the OEB's mandate in deciding the Motion, followed by a detailed assessment of each of the factors listed in section 33(8) of the Act.

The OEB's Mandate in Deciding the Motion

In their submissions, some parties made arguments that go to the nature of the IESO's role or status as a public agency and to how different factors set out in section 33(8) of the Act should be applied by the OEB as a result. The OEB considers it appropriate to address those arguments at the outset.

The IESO submitted that it is a public authority impressed with public interest, and that it has primary legislative responsibility to make market rules in accordance with its

legislative mandate and objectives. The IESO argued that the OEB should show deference to its decisions as, absent evidence to the contrary, they are entitled to deference and must be presumed to be in the public interest.

The IESO pointed to the general principles governing interlocutory stays and injunctions in the context of public law as being applicable in the context of section 33(8) of the Act. Specifically:

- a stay or injunction is an extraordinary remedy that should be granted sparingly
- 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 because the public interest is engaged, and the impugned legislation or regulations are legally presumed to be in the public interest
- as such, the Amendments are presumed to be in the public interest, the OEB must assume that this is the case, the IESO does not have to justify this and a high evidentiary burden rests on AMPCO to overcome this legal presumption

APPrO and KCLP also argued that, on a motion to stay the implementation of a validly enacted law or regulation, it is presumed that the law will produce a public good, and the Amendments are to be assumed to be in the public interest.

AMPCO disagreed with the proposition that, because the IESO is a public agency, the OEB must assume that the Amendments are in the public interest. AMPCO submitted that the cases cited by the IESO, which are decisions of courts being asked to stay the effect of actions of public agencies, provide no guidance to the exercise by the OEB of its express legislative mandate to oversee the IESO's market rule making function. AMPCO further submitted that the legislation expressly contemplates that the market rule amendments may be stayed pending the OEB's consideration of them in its capacity as a highly specialized public interest economic regulator and that, in this statutory context, the stay does not have the kind of extraordinary character described in the constitutional cases or the cases challenging the authority of law enforcement agencies. AMPCO further submitted that the IESO's promulgation of the Amendments is not a "legislative" function of the kind engaged in the cases cited by the IESO and APPrO.

Findings

The OEB finds that the IESO's role as a public agency must be considered in the context of the statutory scheme in which the Application has been made.

The Application has been made under section 33 of the Act, which provides that a market rule amendment may be revoked by the OEB and sent back to the IESO for further consideration either on the OEB's own motion or on the application of any party if the OEB finds that the amendment is inconsistent with the purposes of the Act or unjustly discriminates against or in favour of a market participant or class of market participants. Moreover, the Act contemplates that the OEB may stay the operation of the amendment pending the completion of its review, and specifically calls on the OEB to consider the public interest, among other factors.

In this context, the OEB does not agree with the IESO that a stay is an extraordinary remedy, nor that the IESO's implementation of the Amendments must be presumed to be in the public interest or its judgment or actions granted deference. The OEB finds that there would be no purpose in having the authority to review market rule amendments if the OEB had to defer to the IESO when undertaking that statutorily mandated review in response to an application, or to stay the operation of market rule amendments pending completion of that review.

The factors to consider in respect of a stay are also clearly articulated in section 33(8) of the Act. The OEB finds that it must consider these specific factors and does so in the context of the statutory scheme set out in the Act, rather than the context applicable to the courts in their review of actions of public bodies.

Factors to be Considered in Motions to Stay Market Rule Amendments

Section 33(7) of the Act allows the OEB to order a stay of the operation of a market rule amendment pending the completion of the OEB's review of the amendment.¹

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

- (8) In determining whether to stay the operation of an amendment, the Board shall consider,
- (a) the public interest;
 - (b) the merits of the application;
 - (c) the possibility of irreparable harm to any person;
 - (d) the impact on consumers; and
 - (e) the balance of convenience.

¹ Section 33(7) of the Act states as follows: "No application for review of an amendment under this section shall stay the operation of the amendment pending the completion of the Board's review of the amendment unless the Board orders otherwise."

Most of the parties addressed each of the factors set out in section 33(8) separately, although there is some overlap, as the impact on consumers can be considered an aspect of the public interest, and many of the factors have an impact on the balance of convenience.

a) Public Interest

AMPCO submitted that the public interest is a factor in favour of a stay because:

- there are no system reliability issues that need to be addressed between now and January 24, 2020, when the Application must be decided, and there are no system reliability issues anticipated between now and the summer of 2023
- the evolution of the TCA is a multi-phase process and there is no evidence that deferring expansion of the first auction indicates any material harm to the public interest
- the DRA could still proceed in December 2019, under the pre-existing market rules, and the TCA is just one of several options open to the IESO to meet capacity needs
- proceeding with the December 2019 TCA as planned will inhibit, rather than enhance, competition by displacing one category of market participant (DR Resources) with another (generators)

The IESO argued that it is prudent to initiate the TCA in December 2019 and imprudent to risk waiting to implement a capacity auction until closer to the eve of the projected capacity gap in the summer of 2023.

APPPrO submitted that the public interest will be better served if the stay is denied and the TCA proceeds as scheduled as by expanding the pool of potential auction participants, the TCA will increase competition and decrease auction clearing prices. APPPrO also argued that the December 2019 TCA will afford the IESO important experience with respect to integrating and administering new resource types into the Ontario capacity market, within the short timeframe in which the IESO must be prepared for the forecast 2023 capacity gap. Attempting to integrate several different resources into the TCA in close proximity to that gap will, in APPPrO's view, put the capacity auction process at risk and has the potential to undermine confidence in the TCA.

KCLP's submissions on the public interest were along similar lines, focusing on the benefits that KCLP sees as flowing from the Amendments and the TCA.

OEB staff submitted that the core aspect of the public interest is ensuring that needed capacity is obtained and that a viable and effective framework is developed that ensures reliable supplies and cost-effective outcomes for customers. OEB staff submitted that a stay is more likely to support such an objective and will reduce uncertainty and mitigate risks regarding obtaining capacity commitments.

Findings

The OEB acknowledges that it is helpful for the IESO and market participants to have as much experience as possible to make the transition to a broader capacity auction. However, the OEB is not persuaded that it is essential to run the December 2019 TCA, and finds that the public interest is better served by making a decision on AMPCO's Application before the TCA is implemented.

In its submission on irreparable harm, APPrO expressed the view that if the Amendments are ultimately revoked by the OEB, the results of the December 2019 TCA will be rendered moot. The OEB notes that, by contrast, if the Amendments are stayed it remains open to the IESO to conduct another DRA. The OEB finds that uncertainty about the results of the TCA if it is held but the Amendments are subsequently revoked is not likely to enhance market participant confidence in the market nor ensure that capacity is available for the commitment period associated with the December 2019 TCA if needed.

b) Merits of the Application

OEB's Standard of Review of the Merits

The first issue raised by the parties is what standard the OEB should apply to the consideration of "the merits of the application".

AMPCO submitted that Ontario case law establishes that the threshold for determining whether the Application has merit is a low one, and that the OEB must simply be satisfied that the Application is not frivolous and vexatious.

The IESO argued that when the granting of a stay will, as a practical matter, determine the rights of the parties, the applicant must meet a higher standard and show that its application has a strong likelihood of success. The IESO noted that if the stay is granted, the IESO will be unable to implement the TCA in December 2019 and will revert to running the DRA for the May 1, 2020 to April 30, 2021 commitment period. Success by the IESO in respect of the Application would be moot, as the IESO would

not be able to unwind the DRA and implement the TCA. In practical terms, a stay will determine whether the TCA will be implemented in December 2019 or not.

Along similar lines, KCLP submitted that, because the stay will in effect amount to a final determination of the Application, AMPCO must meet a higher threshold test on the merits of a strong *prima facie* case and not just the threshold of a serious issue to be tried.

AMPCO in reply disagreed with the assertion that determination of the Motion will finally determine the rights of the parties, stating that it will simply determine the nature of the December 2019 auction (expanded or not).

OEB staff submitted that the ‘merits of the application’ component of section 33(8) of the Act embodies the ‘serious question to be determined’ test established by the courts, rather than the higher *prima facie* threshold, and does not require an extensive review of the merits.

Findings

The OEB finds that the standard to be applied in relation to the merits of the Application is that the Application is not frivolous or vexatious, and that there is a serious question to be determined.

If granted, the motion to stay will determine whether the December 2019 TCA is run, but it will not determine whether the Amendments should be revoked. The Amendments do not deal only with the December 2019 TCA; unless revoked, the Amendments will continue to be in effect. The IESO’s evidence is that several auctions are expected before 2023. The Amendments will support all of them.

The question to be determined on the Application is whether the Amendments are unjustly discriminatory or inconsistent with the purposes of the Act, not merely whether the December 2019 TCA should run.

Is the Standard Met?

The IESO submitted that AMPCO’s evidence does not demonstrate there is a strong likelihood that its Application will succeed, nor even that there is a serious issue to be tried. According to the IESO, the Application has three fundamental flaws and weaknesses that cannot be overcome:

- first, the Application does not challenge the substance of the actual Amendments, which cannot be said to discriminate between DR and supply

resources, but rather challenges the market rules which provide that DR Resources do not receive energy payments, rules that have been in place since market opening. The IESO argued that the OEB has no jurisdiction to entertain such a challenge given that Minister-made market rules are excluded from OEB review by reason of section 35(3) of the Act.

- second, AMPCO's pre-filed evidence is woefully insufficient to discharge its burden under section 33(9) of the Act, as it consists entirely of vague, speculative and unattributed hearsay about the alleged unjust impact of the Amendments on DR Resources, and does not include any financial information or economic analysis to substantiate or quantify the impact. The evidence filed to-date is insufficient for the OEB to evaluate whether the Amendments result in unjust economic discrimination. Moreover, the IESO's position is that the Amendments do not treat suppliers and DR Resources differently and so are not even *prima facie* discriminatory, but even if they were that is not grounds for review.
- third, the foundation of AMPCO's case is the Federal Energy Regulatory Commission's (FERC) Order No. 745², which is not binding on the IESO and may be of little application in Ontario. AMPCO has not submitted evidence analyzing the appropriateness and impact of importing the FERC framework into Ontario.

With respect to the IESO's jurisdictional argument, AMPCO responded that the Amendments provide for an expanded capacity auction, with the direct result that generators will have an unjust competitive advantage over DR Resources. The fact that this advantage results from energy payments available to generators through another market rule in no way diminishes the discriminatory impact of expansion of the current DRA to include generation resources. According to AMPCO, its focus on the Amendments is both legislatively and factually supported and the relief sought on this motion is wholly within the jurisdiction of the OEB to grant.

AMPCO also disagreed with the IESO's assertion that FERC Order 745 is the foundation of AMPCO's case. Rather, the foundation of AMPCO's case is that the Amendments would result in unfair competition. The importance of FERC Order 745 is that it is a finding on this very topic by one of the pre-eminent economic energy regulators in the world made after an exhaustive and hotly contested public review process. AMPCO again pointed to the fact that the IESO is studying this issue, and also noted that the IESO has, in analogous circumstances, recognized that failure to compensate DR Resources could potentially increase the cost of capacity and that, in

² 134 FERC ¶ 61,187, 18 CFR part 35, Docket No. RM10-17-000; Order No. 745, *Demand Response Compensation in Organized Wholesale Energy Markets*, March 15, 2011

the context of the proposed capacity auctions, how these costs are recovered will potentially impact market efficiency.

AMPCO further submitted that its evidence and the Application indicate an issue to be heard that is clearly not frivolous or vexatious, and in fact is a serious one as contemplated by section 33(9) of the Act.

AMPCO argued that the impact of proceeding with the TCA prior to resolving the issue of energy payments for DR Resources is that DR Resources will be at a competitive disadvantage in, and likely excluded from, the TCA, an outcome which in AMPCO's view raises very serious questions of discrimination against market participants and inconsistency with the purposes of the Act.

KCLP stated that AMPCO has not filed evidence to substantiate its assertion that the Amendment would stifle competition and drive up prices for consumers. KCLP submitted that it is premature to determine whether the lack of utilization payments is discriminatory against DR Resources and that the IESO should have the opportunity to continue to study the issue.

OEB staff noted that the Amendments are a significantly contentious matter with diverging positions and competing claims of potential harm, all of which indicates that there is a serious question to be heard.

Findings

The OEB finds that the Application is neither frivolous nor vexatious and raises a serious question to be determined.

The OEB finds that the fact that there are different payment schemes applicable to participants in the TCA raises a legitimate question as to whether the Amendments will result in unjust discrimination.

With respect to the IESO's claim that the OEB lacks jurisdiction to grant the relief sought in the Application, the OEB notes that section 33(4) of the Act provides the OEB with the authority to review an application from any person requesting a review of an amendment to the market rules. AMPCO's Application was filed within the time allowed by the Act. The fact that the lack of energy payments for DR Resources may be a circumstance that results in the Amendments being discriminatory does not mean that, in reviewing the Amendments, the OEB is conducting a review of the market rules relating to energy payments.

c) Possibility of Irreparable Harm to Any Person

The IESO submitted that the burden rests on AMPCO to establish that irreparable harm will result from not granting a stay. The IESO further submitted that evidence of irreparable harm must be clear and not speculative, that minimal weight should be given to hearsay evidence and that AMPCO must demonstrate a high degree of probability that irreparable harm will occur if a stay is not granted.

KCLP submitted that the onus is on AMPCO to prove, on a balance of probabilities, that irreparable harm will result, and that AMPCO has not discharged that onus with clear and compelling evidence that its interests will be harmed and that the harm cannot be remedied.

APPo submitted that AMPCO must establish that failure to grant the stay could so adversely affect DR Resources that the harm could not be remedied.

AMPCO argued in reply that, in stating that the Act means that irreparable harm *will* result from not granting a stay of the Amendments, the IESO is misquoting the Act, as section 33(8)(c) of the Act states that the OEB shall consider the *possibility* of irreparable harm to any person. As such, AMPCO needs only to establish the possibility of irreparable harm to any person in order for the OEB to exercise its authority to order a stay of the Amendments, and not clear, unequivocal proof of it.

AMPCO submitted that irreparable harm is identified by its nature, rather than its magnitude; specifically, it is harm that either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. The submissions of APPo and OEB staff were along the same lines.

AMPCO further submitted that the harm to DR Resources if the December 2019 TCA auction proceeds would be harm that could not be cured in the specific, statutory context in which it arises. According to AMPCO, if the December 2019 TCA proceeds, it would result in driving DR Resources out of the fledgling Ontario capacity market. DR Resources would be deprived of the opportunity to provide capacity to the market during the delivery period of the December 2019 TCA and to obtain capacity payments, a loss for which DR Resources would have no obvious or effective legal recourse. In that sense, according to AMPCO, the harm is incurable (and thus irreparable).

AMPCO also argued that in the absence of a stay, the December 2019 TCA will have already occurred and DR Resources will already have suffered unfair competition and undue discrimination.

According to the IESO, AMPCO's evidence only provides hearsay evidence speculating about vague possibilities that harm could result if the TCA proceeds in December 2019, and AMPCO's claims regarding their inability to compete with generators are belied by the fact that there has been very limited economic activation of DR Resources in the past and no expectation that the likelihood of economic dispatch of DR Resources will increase in the commitment period associated with the December 2019 TCA.

The IESO also submitted that its commitment to undertake a stakeholder engagement and a third party study of energy payments and to make a final decision by June 2020 mitigates any possible harm alleged by AMPCO.

APPRO submitted that DR Resources will not suffer irreparable harm if the TCA proceeds as scheduled in December 2019 because of the timing of the hearing of the Application and the OEB's obligation to render a decision by January 24, 2020. If the December 2019 TCA proceeds, availability payments to successful participants will not be paid until May 2020. If the Amendments are revoked by the OEB, the December 2019 auction process will be rendered moot and there will be no harm to AMPCO members.

KCLP argued that AMPCO has not demonstrated that there would be harm to DR Resources if the TCA proceeds as scheduled, pointing among other things to the following:

- AMPCO has provided no evidence of the type of costs or materiality of loss or harm that DR Resources would actually incur if activated ('avoidable costs')
- based on evidence provided by the IESO, the potential harm to Hourly DR Resources is insignificant
- the most likely conclusion to draw from the behavior of dispatchable loads in the market is that they do not incur an avoidable cost on economic activation; as such, they cannot suffer harm if they do not receive an energy payment
- it is not sufficient for AMPCO to merely assert loss of market share, and in any event there is nothing in AMPCO's evidence that demonstrates that this will cause irreparable harm that it could not recover from in the future
- a negative inference should be drawn from the fact that no member of AMPCO or any DR Resource has provided specific evidence of harm

KCLP also argued that its evidence demonstrates that it would be harmed if the stay is granted and it is unable to participate in the TCA. KCLP stated that, if the stay is granted, an off-contract generator will be denied the opportunity to compete to earn an availability payment of approximately \$85,643.60 per MW per year. An off-contract

generator that decides to incur that amount as a loss will have difficulty recovering it over time. KCLP submitted that, given its current circumstances, it is likely that its parent company will decide to discontinue facility operations if KCLP is prevented from competing in the upcoming TCA.

Findings

The OEB finds that the clear wording of section 33(8)(c) is “the possibility of irreparable harm to any person”, not that there *will be* irreparable harm, or even that it is likely that there will be irreparable harm.

The OEB accepts AMPCO’s evidence that under the TCA, the fact that some participants would receive energy payments on activation and others would not raises the *possibility* of irreparable harm to those who would not, and it is not readily apparent that there is a mechanism available to compensate DR Resources for such harm in the event that the December 2019 TCA is run. As the results of the proposed TCA and the frequency of activation are unknown, the extent of the harm is necessarily uncertain.

The OEB acknowledges the possibility of harm to potential participants such as KCLP if the TCA is not run in December 2019; this is addressed under the balance of convenience factor below.

d) Impact on Consumers

AMPCO argued that if the Amendments are not stayed and the TCA is permitted to proceed prior to determination of the Application, the resulting exclusion of DR Resources from the competition to provide capacity is likely to result in higher costs for consumers and a less reliable electricity system.

APPrO submitted that the interests of consumers will be better served if the stay is denied and the TCA proceeds as scheduled. By expanding the pool of potential auction participants, the TCA will result in a greater number of resources participating and thereby increase competition with the likely result that auction clearing prices will decrease, resulting in reduced costs for the IESO and therefore lower electricity rates. APPrO pointed out that higher participation rates in the DRA have resulted in auction clearing prices decreasing by 42%.

The IESO submitted that a stay is contrary to the interests of consumers for the following reasons:

- the evolution of the DRA into a more competitive capacity acquisition mechanism will allow for increased competition, which will benefit Ontario customers
- allowing supply resources to compete in the December 2019 TCA will also reduce the likelihood that generation facilities coming off contracts will be shut down. These assets can play a role in addressing the future capacity gap and increasing competition in future auctions
- the IESO needs time to implement an enduring capacity auction in a phased manner that will allow it to learn, adapt as necessary and build confidence of market participants in the auction process, and allow TCA participants to test their processes and also learn and adapt

OEB staff submitted that an issue to be considered is the effect a stay of the operation of the Amendments might have on the procurement of forecasted resource needs. This could have a direct impact on customers, who ultimately bear the consequences of ineffective or inefficient procurement activities through lower reliability, higher costs, or both. OEB staff was of the view that, if resources are required in the upcoming commitment period, they are more likely to be achievable through a repeat of the DRA process than the first execution of the TCA in current circumstances. OEB staff was also of the view that a stay of the operation of the Amendments is more likely to protect the interests of consumers relative to the alternative.

The IESO argued that the OEB should give no weight to OEB staff's assertion that a stay is justified by the uncertainty around the TCA and the risk of lower participation by DR Resources, as there are no evidentiary grounds for this assertion and it is at odds with the IESO's uncontested evidence that the prospect of activation of DR Resources is extremely unlikely, that preparations are underway for the TCA and that, in addition to DR Resources, market participants representing generators have registered for participation in the December 2019 TCA.

Findings

The OEB recognizes that it is in the interests of consumers for capacity to be available as needed. Based on the evidence, the projected capacity gap will not arise until 2023, and the OEB is not persuaded that the failure to run the TCA in December 2019 will render the IESO incapable of ensuring that capacity will be available to meet that projected gap.

The OEB also finds that, as a matter of principle, consumers are likely to benefit in the longer term from a market that promotes open competition. If the auction attracts more participants, it is reasonable to expect that auction prices will be lower which would benefit consumers.

On the other hand, the OEB finds that consumer interests may not be served by the uncertainty surrounding the TCA pending completion of the OEB's review of the Amendments, similar to the OEB's finding on this point in relation to the public interest.

e) Balance of Convenience

AMPCO submitted that, in assessing the balance of convenience, the OEB must determine which of the parties will suffer the greater harm from either the granting of, or refusal to grant a stay, and consider the impact on third parties. AMPCO argued that the case law holds that the status quo should be preserved when possible.

AMPCO submitted that the evidence filed by the IESO and KCLP fails to demonstrate any harm to the market, to system reliability or to generators that would result from staying the Amendments on an interim basis, let alone harm that would outweigh that which will be suffered by DR Resources and the functioning of the market should the December 2019 TCA proceed. Specifically:

- there is no evidence that granting the stay would preclude the gradual evolution of the capacity auction process that the IESO is seeking to have, given that there are additional auctions planned before the forecasted capacity gap arises in the summer of 2023
- the IESO has a variety of tools to enable it to ensure that sufficient capacity exists, including the DRA
- KCLP concedes that there is no guarantee that it would secure a capacity obligation through the December 2019 TCA
- the potential harm cited by KCLP of having to shut down operations does not flow from granting the stay, but rather results from the fact that KCLP has been unable to recover its fixed operating costs in the market since its contract expired in 2017

AMPCO argued that, in contrast, its evidence establishes that implementing the TCA now would be harmful to the functioning of the market, harmful to DR Resources and harmful to the public interest. AMPCO submitted that, as such, the balance of convenience favours granting the stay.

The IESO argued that it is imprudent to wait to implement a capacity auction until closer to the eve of the projected capacity gap, and that the arguments put forward by AMPCO and OEB staff amount to second-guessing the IESO's judgment in the absence of evidence to the contrary. The IESO argued that the OEB should accept its evidence on this point as the IESO has the responsibility to advance the evolution of the market and

ensure sufficient capacity is available to serve Ontario's needs, which are highly complex matters.

The IESO submitted that the competition benefits and the risk of shuttering off-contract generators outweigh the potential harm to AMPCO's members' narrow commercial interests.

The IESO also submitted that OEB staff's references to preserving the status quo and this tilting the balance of convenience in favour of a stay are misguided, as Canadian courts have largely dispensed with consideration of the status quo. 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. KCLP made a similar submission.

AMPCO submitted that the IESO has misapplied the case law on preserving the status quo as the decision cited refers specifically to constitutional law cases. AMPCO submitted that recent cases, including cases to stay exercises of power by public agencies, have held that the status quo is a relevant factor to consider where all else is equal from a balance of convenience perspective, and that the status quo should be preserved when possible.

APPrO submitted that DR Resources will suffer no harm if the December 2019 TCA proceeds as scheduled while, on the other hand, granting the stay will cause harm including:

- depriving the IESO of important information and jeopardizing the IESO's ability to implement an enduring capacity auction
- potential for off-contract generators ceasing operations

KCLP also submitted that the balance of convenience favours dismissing the Motion, referring as well to the IESO's evidence of need to move forward in order to properly prepare for 2023 and also reiterating the lack of evidence of harm to AMPCO.

OEB staff addressed the competing claims of harm based on the stay being granted or not. OEB staff submitted that maintaining the status quo of the DRA appears to be preferable in order to prevent harm to DR Resources that cannot later be remedied with damages. OEB staff also stated that:

- it is not convinced that running three versions of the TCA by 2020 is essential to avoiding harm to the goal of meeting the 2023 capacity deficit
- there is little evidence to judge the magnitude of the risk of generator exit from the market if there is a delay to the TCA

OEB staff submitted that, on a balance of convenience, maintaining the status quo is the preferable option and that a stay will allow an orderly determination of the Amendments preceding any procurement activity under a TCA.

Findings

The OEB acknowledges that staying the implementation of the Amendments would result in a corresponding delay in the participation of non-committed dispatchable generators coming off contract. However, this needs to be balanced against the potential harm that can be caused to DR Resources as a result of unequal treatment in relation to payments.

As noted above, it is also unclear what would happen if the December 2019 auction is allowed to proceed and the Amendments are later revoked by the OEB. The OEB finds that this potential uncertainty is avoidable by staying the operation of the Amendments pending completion of the OEB's review. According to section 33(6) of the Act, the OEB is required to issue an order that embodies its final decision in this matter within 120 days of the date of receipt of the application (i.e. January 24, 2020). Beyond that date, the IESO plans to run two capacity auctions, in June 2020 and December 2020, before the IESO undertakes the auction for the summer of 2023, when the capacity gap is projected to occur. The OEB finds that the benefits of avoiding this potential market uncertainty outweigh the potential short delay in the TCA first auction.

THE ONTARIO ENERGY BOARD ORDERS THAT:

The operation of the Amendments to the market rules identified as MR-00439-R00, MR-00439-R01, MR-00439-R02, MR-00439-R03, MR-00439-R04 and MR-00439-R05 on the subject of the Transitional Capacity Auction, adopted by the Board of Directors of the IESO on August 28, 2019, is hereby stayed pending completion of the OEB's review of those Amendments and issuance by the OEB of its order embodying its final decision on AMPCO's application for review of those Amendments.

DATED at Toronto, **November 25, 2019**

ONTARIO ENERGY BOARD

Original signed by

Christine E. Long
Registrar and Board Secretary