OEB Dismisses Application Seeking Revocation of Market Rule Amendments

By Fred D. Cass

In September 2019, the Association of Major Power Consumers in Ontario (AMPCO) filed an application to the Ontario Energy Board (OEB) in which it asked the OEB to revoke, and send back for further consideration, a set of amendments to Ontario’s wholesale electricity market rules made by the Independent Electricity System Operator (IESO). This application was dismissed by the OEB in a decision and order issued on January 23, 2020.

By way of background, the IESO had launched a Demand Response Auction (DRA) in 2015 to procure Demand Response resources (DR resources), which commit to being available to reduce consumption based on market prices during a predefined commitment period. The amendments to the market rules that were the subject of the AMPCO application are intended to enable the evolution of the DRA into a Transitional Capacity Auction (TCA). The TCA allows participation by generators that are neither under contract nor rate-regulated.

AMPCO’s application was made under section 33 of the Electricity Act, 1998, which says that if the OEB finds an amendment to the market rules is inconsistent with the purposes of the statute, or unjustly discriminates against or in favour of a market participant or class of market participants, the OEB shall revoke the amendment and refer it back to the IESO for further consideration. The OEB’s decision on AMPCO’s application noted that, absent unjust discrimination, there was no issue regarding consistency with the purposes of the statute, so the central issue was whether, by providing for generators and loads to compete in an expanded capacity auction, the amendments have the effect of being unjustly discriminatory to DR resources.

The OEB found that three elements are required to support a conclusion that the amendments are unjustly discriminatory, namely: (1) there must be economic discrimination; (2) it must be shown that the difference in treatment is not justified by a difference in circumstances; and (3) the claim of discrimination cannot be purely qualitative, rather, there must be some quantitative aspect to it.

In its consideration of whether the AMPCO application had established these three elements of unjust discrimination, the OEB found that generators and DR resources will be treated differently if they successfully bid in the TCA. Such differences in treatment result from the different payments that different resources are eligible to receive if activated. In this way, the OEB said, there at least appears to be discrimination and, in theory, the differences in treatment could result in unjust economic discrimination.

However, on the third required element of unjust discrimination (quantification of economic impact), the OEB said there was no evidence presented by any party on the range of costs incurred by any of these market participants. In the absence of evidence on costs that different parties incur, the OEB could not conclude with certainty whether the circumstances between generators and DR resources are similar or different and, whether, as a consequence, different treatment could constitute unjust discrimination.

Given the insufficiency of evidence, the OEB said it had no basis on which to make a positive finding of unjust discrimination. The OEB recognized that members of AMPCO were reticent to share their economic data with each other, and with other competitors. However, the OEB said that there are methods by which this information could be shared with the OEB without compromising the confidentiality of any individual market participant’s information.

The OEB concluded its decision with some general observations that might be helpful to the IESO. Among other things, the OEB said that, when considering market changes, the IESO should examine the total
costs and compensation available to capacity market participants and that the priority is to ensure there is no unjust discrimination for or against any class of market participants.

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