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## Food for thought: Judgment of the European Court of Justice on Capacity Market Issues

By: Nigel Bankes

**Case Commented On:** *Tempus Energy Ltd v European Commission*, Judgment of the General Court (Third Chamber, Extended Composition), 15 November 2018, [Case T-793/14](#).

Those engaged in the challenging job of designing a capacity market for Alberta's electricity sector might be interested in this recent judgment of the European Court of Justice in which the Court concluded that the European Commission (EC) had been too hasty in approving the design of the UK's proposed capacity market. The case arises in the particular context of the primary law of the European Union (EU), the Treaty on the Functioning of the European Union and specifically that treaty's provisions on "State aid" – better known to the rest of the world as unlawful state subsidies. The UK's proposed capacity market had to be notified to the EC for its approval because a capacity market, despite the "market" label, represents a departure from a "purer" version of an electricity market (an energy only market). A capacity market involves a degree of central planning (estimating the required capacity) and then "out of market" payments to those who post winning bids to provide that capacity. See my earlier post on Alberta's capacity market legislation [here](#).

Because of the specific treaty and statutory context of the decision and the specifics of the UK's capacity market design, the details of this decision are unlikely to be of interest to Alberta readers. What might be of interest, however, is the general concern raised by *Tempus* which was to the effect that both the UK in its capacity market design and the EC in approving that design had not paid enough attention to the non-generation alternatives for meeting capacity concerns. *Tempus* was in the business of demand side response (DSR). It effectively operated as an aggregator for energy customers with sufficient flexibility to curb consumption during high demand periods or shift consumption to different times. The Court at paragraph 3 summarizes the business model as follows:

... it is customary for demand-side response operators ('DSR operators') to enter into contracts with energy customers, which are often industrial and commercial customers or small- to medium-sized enterprises, under which the customer agrees to be flexible in the consumption of their electricity at a particular time period. The DSR operator calculates the total capacity available from all of the flexible customers at any one time and can then offer that capacity to the electricity network operator - National Grid ('NG') in the present case - in

exchange for a payment, which it passes back to the flexible customer, whilst retaining a small profit margin for itself.

In its complaint, Tempus argued that in designing the capacity market regime, the National Grid (the UK's equivalent of the AESO) had been insufficiently attuned to the benefits of DSR in meeting capacity needs and insufficiently attuned to the particular challenges faced by this sector. As a result, Tempus alleged that the market design as developed and approved would preferentially benefit generation over DSR and thus skew the market and the allocation of State aid. The market design might also overstate the need for new generation, some of which might be fossil based (combined or simple cycle natural gas generation) and might lead to the construction of new generation which would subsequently be stranded.

The Court decided in favour of Tempus. The decision is not a decision on the merits; rather it is a decision to the effect that the Commission was too hasty in issuing its approval. Tempus and others had raised enough red flags with respect to the proposed market design that the Commission should have ordered a more detailed inquiry as to whether the design offered a level playing field to the DSR sector or whether in fact it discriminated in favour of generation.

As I say above there are no direct lessons here for Alberta beyond the general point that system operators are more likely to be familiar with the attributes and benefits of generation than the demand side of the business; extra steps may have to be taken to counter this potential bias in the design of a capacity market, especially if we seek to provide capacity with the least greenhouse gas intensity and at the lowest cost to consumers.

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