



BY EMAIL and RESS

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May 21, 2024
Our File: EB20240004

Attn: Nancy Marconi, Registrar

Dear Ms. Marconi:

Re: EB-2024-0004 – IESO 2024-2025 – SEC Final Argument

We are counsel to the School Energy Coalition ("SEC"). Enclosed, please find SEC's Final Argument in this matter.

Yours very truly,
Shepherd Rubenstein P.C.

Mark Rubenstein

cc: Brian McKay, SEC (by email)
Applicant and intervenors (by email)

ONTARIO ENERGY BOARD

IN THE MATTER OF subsection 25(1) of the *Electricity Act, 1998*;

AND IN THE MATTER OF a submission by the Independent Electricity System Operator to the Ontario Energy Board for the review of its proposed expenditure and revenue requirements for the fiscal years 2024 to 2025 and the fees it proposes to charge during the fiscal years 2024 to 2025.

**FINAL ARGUMENT OF THE
SCHOOL ENERGY COALITION**

Overview

1. In EB-2022-0318 the Ontario Energy Board (“OEB”) issued a Decision and Order approving and implementing a full settlement reached between the Independent Electricity System Operator (“IESO”) and participating intervenors, including the School Energy Coalition (“SEC”).¹ The approved Settlement Proposal (the “Settlement Agreement”) resolved all aspects of the IESO’s application for approval of its 2023, 2024, and 2025 expenditures, revenue requirements, and fees. It also included acceptance of the IESO’s proposed mechanism to adjust its approved usage fees during this period in the event of a material unforeseen change, if certain criteria were met.²
2. Less than four and half months later, the IESO filed an application with the OEB to adjust its previously approved 2024 and 2025 expenditures, revenue requirements, and fees, as a result of increased costs to support the Government of Ontario’s *Powering Ontario’s Growth Plan* (“POG Plan”). Yet, its request is not based on the agreed-upon and approved adjustment mechanism, whose criteria it admits it has not met, but its novel claim that it has a free-standing authority to seek adjustment of its previously approved usage fees.³ The IESO argues that the approved Settlement Agreement does not and cannot restrict its ability to request an increase in fees.

¹ [*Decision and Order \(EB-2022-0318\), August 29, 2023*](#), p.1

² [*Decision and Order \(EB-2022-0318\), August 29, 2023*](#), Schedule B, Settlement Proposal, p.17-18

³ Exhibit A-1-4, p.2-3

3. The OEB should reject the IESO’s request to increase its usage fees for 2024 and 2025 as it is contrary to the approved Settlement Agreement. The IESO’s position makes a mockery of the settlement process, and its acceptance by the OEB could have far-reaching implications. In essence, the IESO argues that it is in the unique position of being entitled to renege on a legally binding agreement and the OEB is not in a position to deny that entitlement. This is neither the law, nor appropriate regulatory policy.

Background

EB-2022-0318 Settlement Agreement

4. On March 29, 2023, the IESO filed an application with the OEB for approval of its expenditures, revenue requirement, and fees for each of 2023, 2024, and 2025. On July 21, 2023, the IESO filed what the OEB later described as a “comprehensive settlement” amongst the participating intervenors.⁴ The Settlement Agreement was a product of negotiations amongst the parties, which led to what the parties called a “package settlement”⁵, and as a result its non-severability was considered “fundamental to the agreement.”⁶

5. As part of the Settlement Agreement, the parties accepted the IESO’s “proposal to seek OEB approval to adjust previously approved expenditures, revenue requirement, and fees in the event of a material unforeseen change.”⁷ Section 3.3 details the mechanism, which provides that if unforeseen expenses or changes in revenue cause the balance in the IESO’s Forecast Variance Deferral Account (“FVDA”) to be reduced below zero at the end of Year 1 of its three-year term (2023), the IESO may choose to re-apply to the OEB to adjust its fee for Year 3 (2025). If it chose to do so, it would file a revised Business Plan with the Minister of Energy and a revised application with the OEB.⁸

6. The OEB approved the Settlement Agreement on August 29, 2023, incorporating it into its Decision and Order.⁹ In doing so, it noted that “[u]nder terms of the settlement proposal, the IESO may seek OEB approval to adjust the approved expenditures, revenue requirement, and fees in the

⁴ [*Decision and Order \(EB-2022-0318\), August 29, 2023*](#) p.1

⁵ [*Decision and Order \(EB-2022-0318\), August 29, 2023*](#), Schedule B, Settlement Proposal, p.7

⁶ [*Decision and Order \(EB-2022-0318\), August 29, 2023*](#), Schedule B, Settlement Proposal, p.5

⁷ [*Decision and Order \(EB-2022-0318\), August 29, 2023*](#), Schedule B, Settlement Proposal, p.6

⁸ [*Decision and Order \(EB-2022-0318\), August 29, 2023*](#), Schedule B, Settlement Proposal, p.17-18

⁹ [*Decision and Order \(EB-2022-0318\), August 29, 2023*](#) p.4

event of a material unforeseen change.”¹⁰ Yet, it recognizes, “[h]owever, this would only occur if the balance of the FVDA is less than zero in Year 1 of the three-year cycle, and any adjustment would be for Year 3.”¹¹

POG Plan and the Application

7. Before the Settlement Agreement had been filed with the OEB, on July 10, 2023, the Minister of Energy wrote a letter to the IESO outlining seven specific initiatives to support the Government’s POG Plan.¹² The IESO did not alert parties, who had taken part in the settlement conference negotiations and who were working towards a Settlement Agreement¹³, that it could require additional funding above what had been included in its 2023-2025 application.¹⁴

8. Three days after the OEB issued its decision approving the Settlement Agreement, the IESO submitted an amendment to its 2023-2025 Business Plan to the Minister of Energy for approval, which is a prerequisite for bringing an application to the OEB.¹⁵ It increased its operating expenses by \$9.9M for its work supporting the POG Plan in 2024 and 2025.¹⁶ Even though the IESO must have been working on the amended Business Plan long before it submitted it to the Minister of Energy, it again never brought its intentions to the attention of the parties to the Settlement Agreement or the OEB before the Settlement Agreement was approved.

9. The Minister of Energy approved the amended Business Plan in November 2023, and the IESO filed its application on January 11, 2024. In requesting the adjustment to its approved 2024 and 2025 fees, the IESO does not rely on the mechanism that was agreed upon as part of the EB-2022-0318 Settlement Agreement.¹⁷ This makes sense since the then forecast¹⁸ and subsequent actual 2023 FVDA balance¹⁹ are not below zero as required by Section 3.3.²⁰ It is not clear if the

¹⁰ [*Decision and Order \(EB-2022-0318\), August 29, 2023*](#) p.4

¹¹ [*Decision and Order \(EB-2022-0318\), August 29, 2023*](#) p.4

¹² Exhibit B-1-1, p.2-3

¹³ On June 30, 2023, the IESO wrote the OEB as required by Procedural Order No 1. To inform the OEB that a tentative agreement on all issues had been reached and that parties were working on a settlement proposal. (See [*IESO Letter, Re: Status of Settlement Discussions, dated June 30, 2023.*](#))

¹⁴ OEB Staff Clarification Question 1(c)

¹⁵ [*Electricity Act, 1998, section 25\(1\)*](#)

¹⁶ B-1-2, p.4

¹⁷ A-1-4, p.3

¹⁸ B-1-4, p.11; F-1-1, p.3

¹⁹ OEB Staff Clarification Question 2e; Interrogatory Response 3-SEC-3(2)

²⁰ [*Decision and Order \(EB-2022-0318\), August 29, 2023*](#), Schedule B, Settlement Proposal, p.18

IESO informed the Minister of Energy of the terms of the Settlement Agreement that it had agreed to and was approved by the OEB.

Issues

Issues 1.1 – What is the effect of the approved settlement proposal for the IESO’s 2023-2025 expenditure, revenue requirement, and fees application (and associated OEB decision) and the timing of the Minister of Energy’s July 10, 2023 Letter upon the relief now sought by the IESO?

10. ***Effect of a Binding Agreement.*** The IESO argues that the Settlement Agreement does not, and cannot as a matter of law, restrict the IESO’s right to request approval of increased usage fees for 2024 and 2025. SEC disagrees that the approved Settlement Agreement cannot restrict the IESO. More importantly, the Settlement Agreement restricts the ability for the OEB to approve the requested relief, as to do otherwise would be inappropriate.

11. While section 24(1) of the *Electricity Act* provides the IESO with the right to bring forward a fees application, subject to the Minister’s approval of a Business Plan, there is no obligation to do so. The IESO was not required to prepare an amended Business Plan to give to the Minister so that it could then submit this application.

12. In agreeing to the Settlement Agreement, the IESO, in effect, bound itself to not bring forward (or take steps that may require it to bring forward) an application that was inconsistent with its terms. The preamble to the Settlement Agreement expressly states that it creates mutual obligations and is binding and enforceable.²¹ Thus as a matter of law, the Settlement Agreement does restrict the IESO’s right to request the increased usage fees for 2024 and 2025, unless the terms of that agreement are amended by the Parties.

13. In addition, the OEB does not even need to address the question of the effect of the approved Settlement Agreement on the IESO’s right to request an increase in the usage fees. The central question for the OEB is the effect of the approved Settlement Agreement on how the OEB exercises its own authority under section 25(4) of the *Electricity Act* to approve or not approve the IESO’s application.²²

²¹ [*Decision and Order* \(EB-2022-0318\), August 29, 2023](#), Schedule B, Settlement Proposal, p.4

²² [*Electricity Act, 1998, section 25\(4\)*](#)

14. The *Electricity Act* gives the OEB the responsibility to determine if the IESO's proposed expenses, revenue requirements, and fees should be approved.²³ It may approve them, or not, and refer them back to the IESO for further consideration with the Board's recommendations.²⁴ Considering the OEB's approval of a Settlement Agreement that does not permit this fee adjustment, it would not be appropriate or reasonable²⁵ to approve the application. It should be sent back to the IESO with that recommendation.

15. As is the case whenever the OEB determines rates, payment amounts, or fees for any entity it regulates for a given year, the rates, payment amounts, or fees are set for that year. The OEB does permit utilities to adjust their rates or revenue requirements for a given year after they have already been set for that year, subject to existing regulatory mechanisms (e.g., Z-factor), or if it was expressly part of the initial approval.

16. ***Interpretation of the Agreement.*** The IESO's response is the patently untenable position that the specific mechanism included in the approved Settlement Agreement for when it can adjust its fees during the three-year period does not preclude other fee adjustments.

17. The truth is that the mechanism the IESO proposed, which parties agreed to as part of the Settlement Agreement, may have been flawed in practice. It did not consider the situation where there was a positive FVDA balance in Year 1, but the IESO still believed it required additional revenue in Years 2 and 3 because of new government policy direction. However, that is not a legal basis to override the terms of the approved Settlement Agreement.

18. To overcome the reality of the bargain it agreed to, the IESO now seeks to tell a different story, claiming that it never intended to limit its ability to adjust its fees during the three-year term. The mechanism was only "designed as a guardrail that identified specific triggers that would require the IESO to consider and assess an adjustment to its fees."²⁶ This revisionist history is simply not credible. Why would the IESO propose, and parties agree to, a mechanism with very

²³ [*Electricity Act, 1998, section 25\(1\)*](#)

²⁴ [*Electricity Act, 1998, section 25\(1\)*](#)

²⁵ The OEB said in the context of the Ontario Power Authority fees (a predecessor entity to the IESO with almost identical statutory language for the approval process) that "the overall purpose of this hearing is to determine if the revenue requirement and fees proposed by the OPA are reasonable". ([Decision on Issues \(EB-2007-0791\), February 11, 2008](#), p.3)

²⁶ Argument-in-Chief, para.12

specific criteria for when there could be a fee adjustment, if none of it was necessary since the IESO could seek a fee adjustment during the three-year term whenever and on whatever basis it wanted? The answer is that they clearly would not agree to such a mechanism in that context.

19. It is trite law that a legal agreement is interpreted “giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract”.²⁷ The Settlement Agreement is clear: “As part of the Package Settlement, the Parties accept the IESO’s proposal to seek OEB approval to adjust previously approved expenditures, revenue requirement and fees in the event of a material unforeseen change is appropriate.”²⁸ The Settlement Agreement then goes on to describe the IESO proposal that the Parties accepted. Nowhere in the agreement is there any reference to limitations on the scope of the approved adjustment mechanism.

20. When asked specifically to point to any reference in EB-2022-0318 that supports its contention that its proposed fee adjustment mechanism, even if not triggered, did not preclude it from seeking to adjust its fees, the IESO referenced a totally unrelated aspect of the Settlement Agreement.²⁹ As part of the Settlement Agreement, the IESO committed to the disclosure of the annual Interim Year Business Outlook, which is an existing document required as part of the Memorandum of Understanding between the IESO and the Ministry of Energy.³⁰ As part of the document, there would be discussions of responses to government policy and budget variances. The Interim Year Business Outlook commitment makes no reference at all to the ability of the IESO to adjust its fees, and was included under an entirely different part of the Settlement Agreement.

21. It cannot seriously be the intent of the Parties, as the IESO seems to suggest, that an agreement to require reporting on budget variances is somehow an implicit agreement that those variances can be recovered through an additional fee adjustment during the three-year term, one not referenced in the comprehensive Settlement Agreement. The Parties did in fact reference, and describe in detail, a fee adjustment mechanism.

²⁷ *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, para. 47

²⁸ *Decision and Order (EB-2022-0318), August 29, 2023*, Schedule B, Settlement Proposal, p.17-18

²⁹ Interrogatory Response 2.0-VECC-4, Interrogatory Response 1.1-SEC-1

³⁰ Interrogatory Response 2.0-VECC-4

22. ***Non-Disclosure of Material Information.*** The sequence of events is even more problematic considering the IESO did not bring the issue to the attention of intervenors before the filing of the Settlement Agreement, and more importantly, the OEB. Before the decision on the Settlement Agreement was rendered, the IESO was in the final stages of the amendment to the 2023-2025 Business Plan to submit to the Minister of Energy, so it could bring forward the application. The IESO had an affirmative duty to bring forward relevant information to the OEB's and parties' attention.³¹

23. Since the Settlement Agreement does not permit the IESO's requested relief, the only way it can occur is by way of an amendment to the Settlement Agreement. But that requires the agreement of all signatories. The IESO recognized this path when, in response to an OEB Staff clarification question regarding how it proposed to address the OEB's decision approving the Settlement Agreement in this Application, it stated that its "objective in the Settlement Conference [was] to reach an agreement with the intervenors to amend the Settlement Agreement from the previous application in EB-2022-0318 and present the amendment to the OEB panel for approval."³² No agreement was reached, and that means the IESO's fee adjustment cannot be approved.

24. The IESO seems to miss the entire point of the Settlement Agreement when it says that it "intends to fulfill, and is not seeking to modify or revisit, the commitments it made in the approved Settlement Proposal in EB-2022-0318."³³ Those commitments were in exchange for acceptance of its proposed 2023 to 2025 revenue requirements and fees, and the proposed conditions and mechanism by which they could be adjusted during that period. While it is impossible to know exactly what would have happened if intervenors were aware that the IESO was not bound by the agreed revenue requirements and adjustment mechanism, it almost certainly would have led to a different settlement, if one at all.

25. ***Integrity of the Settlement Process.*** The settlement process is an integral part of OEB regulation. Each year, numerous applications are resolved by way of a Settlement Agreement

³¹ See [*Decision and Order \(EB-2008-0304\), November 19, 2008*](#), p.11

³² OEB Staff Clarification Questions 1(a)

³³ Argument-in-Chief, para. 4

between the applicant and intervenors that is then approved by a panel of the OEB.³⁴ The sanctity of an approved Settlement Agreement is paramount. If applicants can simply disregard the central aspect of the agreement, its rates (or fees), then it calls into question the legitimacy of the settlement process.

26. The IESO also references its uniqueness among entities regulated by the OEB, presumably as context for why it should be able to seek a fee increase whenever it believes it is required.³⁵ This uniqueness includes that it can be directed by the government, and that it is a not-for-profit corporation without share capital, so it has no shareholder to absorb unplanned material budget increases. This is all undoubtedly true and is the reason the OEB has previously approved, and the approved Settlement Agreement maintains, the FVDA, which is entirely unique to it. The FVDA allows for the opportunity for a full true-up of all costs and revenues to reflect that it has no shareholders.

Issue 1.3 - What is the implications of any approval of the IESO's request upon continuation of a three-year term for setting the IESO's fees, expenditure, and revenue requirements?

27. SEC's concern is not so much the impact of an approval of the IESO's application on the current three-year term, but its impact going forward. If the IESO succeeds in its application, based on its view, that by law it cannot be limited by the terms of an approved settlement, or any other OEB order regarding when it can bring forward an application to adjust its fees, then SEC sees little merit in future IESO applications including settlement processes. If there is never any guarantee that the IESO will not seek incremental increases beyond what has been agreed to, then there is limited utility in the process.

Issue 2.1 and 2.2 – Is the IESO's Fiscal Year 2024 and 2025 Incremental Requirement Requirements Appropriate?

28. IESO's incremental revenue requirement of \$4.5M in 2024 and \$5.4M for work to support the POG Plan may be appropriate. The OEB and the parties in this proceeding really have no way of knowing.

³⁴ In the 12 months preceding the filing of this argument, [Settlement Proposals had been filed in 16 different proceedings](#).

³⁵ Argument-in-Chief, para. 10

29. SEC recognizes that the Minister of Energy has tasked the IESO with undertaking several new and important initiatives, and they require both internal and external resources that necessitate the expenditure of funds.

30. SEC's concern is that there is little evidentiary support for the specific incremental resources, both additional FTEs and other costs, that it is seeking for the purposes of supporting the POG Plan. The Minister of Energy's letter sets out seven specific initiatives for the IESO to undertake, yet the IESO could not provide a breakdown of the incremental budget for each of them separately.³⁶ The IESO's evidence is that since it does not budget based on activity, it cannot provide such information; it budgets on a business unit basis.³⁷

31. While that may generally be the case, here, where it needed to determine what additional resources would be required to deal with seven discrete initiatives, it is hard to understand how the IESO undertook such a task without internally looking at each initiative to determine what resources would be required to complete it.³⁸ The IESO's evidence is that it consulted the various business units to understand their "interdependencies and constraints", and after determining that new resources were required, "a total of 30 incremental headcount were deemed necessary to carry out the work between 2023-2025, along with needs for additional consulting, research, and legal services."³⁹

32. This is not a reasonable way to budget, and certainly not sufficient information for the OEB to assess the reasonableness of the specific amount it is seeking.⁴⁰

Issue 2.3 – What are the alternatives to the IESO's proposal to meet the additional revenue requirement? What alternatives did the IESO consider?

33. The IESO identifies alternatives to meet the additional revenue requirement: either stop work outlined in the 2023 to 2025 Business Plan or secure additional financing.

³⁶ All Intervenor Clarification Question 1

³⁷ The inability to present information on a program, project or activity basis has been an on-going struggle for intervenors' ability to properly scrutinize the IESO's budget. Some small steps were taken as part of the most recent Settlement Proposal. (See [*Decision and Order \(EB-2022-0318\), August 29, 2023*](#), Schedule B, Settlement Proposal, p.7)

³⁸ Exhibit B-1-1, p.3

³⁹ All Intervenor Clarification Question 14

⁴⁰ In response to 2.1-SEC-6, the IESO provided a breakdown of costs by category using simplified assumption. But as the IESO points out in the response, this is not how it budgeted costs.

34. It is revealing that one of the potential alternatives the IESO is not considering is finding ways to deliver the work outlined in the 2023 to 2025 Business Plan more efficiently, to free up additional resources to complete the POG Plan work at a lower incremental cost. The IESO has been able to complete its work under budget in the past. The IESO's actual 2023 expenses were \$12.9M below the approved amount, which itself is an increase of \$4.1M from what it had forecast for the end of 2023 when it filed its application in January.⁴¹ This one-year variance alone is more than the entire cost of the IESO's POG Plan work.

35. Even if the additional funding, in whole or in part, cannot be found within its previously approved budget, it should use the FVDA, which was intended to allow it to true-up its approved revenue requirement and fees against actuals.⁴²

36. The IESO argues that to do so, which would require "additional financing, if available - has risks and is ultimately a more costly alternative than updating the IESO's usage fee for 2024 and 2025."⁴³ Financing is clearly available, and there are no risks.

FDVA Balance (\$M)	IESO Proposal - Application (1)			IESO Proposal - IRR (2)			No Fee Adjustment - IRR (3)		
	2023	2024	2025	2023	2024	2025	2023	2024	2025
Opening Balance	15.0	2.6	-5.5	15.0	10.2	2.1	15.0	10.2	-0.3
Demand Volume Variance	1.0	0.0	0.0	5.0	2.3	-1.9	5.0	2.3	-1.9
Expenses in BP	8.8	-1.7	-7.6	12.9	-1.7	-7.6	12.9	-1.7	-7.6
Bill 124	-21.2	-6.4	-6.9	-22.0	-6.4	-6.9	-22.0	-6.4	-6.9
POG	-1.0	-4.5	-5.4	-0.7	-4.5	-5.4	-0.7	-4.5	-5.4
Closing Balance	2.6	-10	-25.4	10.2	-0.1	-19.8	10.2	-0.1	-22.1
Proposed Fee Adjustment for POG		4.5	5.4		2.3	5.4		0	0
POG Borrowing Costs					-0.1	-0.1		-0.2	-0.3
Revised Closing Balance		-5.5	-20.0		2.1	-14.5		-0.3	-22.4
(1) F-1-1, p.3.									
(2) All Intervenors Clarification Question 13; IR OEB Staff 2-2a									
(2) All Intervenors Clarification Question 13; IR OEB Staff 2-2b									

37. As summarized by the table above, the IESO is forecasting that, because of 2023 actuals and revised expenses and volume forecasts, when incremental financing costs for the POG Plan work are included, there will be an FVDA deficit of \$0.3M at the end of 2024 and \$22.4M at the end of 2025, if there is no usage fee adjustment.⁴⁴ This is in contrast to when it had filed its

⁴¹ Interrogatory Response 2.3-SEC-8; Interrogatory Response 2- OEB Staff 2-2a

⁴² Interrogatory Response 2.3-SEC-8

⁴³ Argument-in-Chief, para. 26

⁴⁴ Interrogatory Response 2.3-SEC-8; Interrogatory Response 2-OEB Staff 2-2b

Application, where it had forecast a deficit of \$5.5M by the end of 2024 and \$20M by the end of 2025, after adjusting its usage fee.⁴⁵ A lower deficit by the end of 2024 and a slightly larger deficit by the end of 2025 are good indicators of the lack of risk and the IESO's ability to finance the POG Plan costs if they are included in the FVDA.

Issue 3.1 - Is the IESO's proposed 2024 and 2025 Usage Fees appropriate?

38. As discussed above, the proposed 2024 and 2025 usage fees, which include an adjustment that is inconsistent with the approved Settlement Agreement, are not appropriate.

Summary

39. SEC submits that the OEB should reject the requested relief and refer the matter back to the IESO.

Respectfully, submitted on behalf of the School Energy Coalition, this May 21, 2024.

Mark Rubenstein
Counsel for the School Energy Coalition

⁴⁵ Interrogatory Response 2.3-SEC-8; Interrogatory Response 2-OEB Staff 2-2a,b