EB-2024-0004

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 year 2024 and the fees it proposes to charge during the fiscal year 2024.

SUBMISSIONS OF
CANADIAN MANUFACTURERS & EXPORTERS ("CME")

May 21, 2024

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1. INTRODUCTION & BACKGROUND

1. On January 11, 2024, the Independent Electricity System Operator ("**IESO**") submitted incremental expenditures, revenue requirement and a revised usage fee it proposed to charge in 2024 and 2025 to the Ontario Energy Board (the "**OEB**" or the "**Board**") for approval. The IESO's proposed expenditures, revenue requirement and usage fee are incremental to, or have been revised since the Board set them on August 29, 2023, as part of its decision in EB-2022-0318. CME submits that the IESO's requests are contrary to the provisions of the Settlement Agreement between the parties (the "**Settlement Agreement**") and should be rejected.

2. In its application, the IESO provided a letter it received from Ontario's Minister of Energy, Todd Smith dated July 10, 2023 (the "**Powering Ontario Letter**"). The Powering Ontario Letter provided that the IESO was required to assist the Ministry of Energy on several initiatives that were not previously provided for in the IESO's budget, including nuclear power initiatives, clean energy and energy efficiency, and energy transmission (the "**Power Ontario Initiatives**").[1]

3. As a result, the IESO advised that it was seeking approval of $9.9 million in incremental expenditure and revenue requirement over the course of the two years (2024-2025), and a commensurate increase to the usage fees charged to customers. The IESO's forecast deficit was not caused solely by incremental spending as a result of the Powering Ontario Initiative spending. The IESO also projected a deficit as a result of increases to salary and benefits payments to the Society of United Professionals ("**SUP**") employees.[2] The IESO initially forecast an operating deficit of $12.4 million in 2023, $12.6 in 2024 and $19.9 in 2025.[3] The IESO therefore was requesting incremental funding for part, but not all, of the deficit it expected to operate under.

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[1] EB-2024-0004, Exhibit B, Tab 1, Schedule 1, Minister's Letter on Powering Ontario's Growth, p. 1.
[2] EB-2024-0004, Exhibit A, Tab 1, Schedule 4, pp. 2, 3.
[3] EB-2024-0004, Exhibit A, Tab 1, Schedule 4, p. 2.

4. The IESO argued that the Board should grant the IESO's requested relief without a hearing, or alternatively with a written hearing.

5. In Procedural Order #1, dated February 12, 2024, the Board provided that a settlement conference would be held on February 27 and 29, 2024. The parties attended; however, they were unable to reach a settlement on any of the issues.

6. Accordingly, the Board, in Procedural Order #2 dated March 22, 2024, stated that the parties could proceed to interrogatories and provide submissions on the issues. The IESO provided its argument-in-chief on May 6, 2024. Intervenors were required to file submissions by May 21, 2024. What follows are CME's submissions on the issues in this proceeding.

7. CME does not dispute that the Powering Ontario Initiatives are valid endeavors, that the IESO should begin work on them immediately, that the cost of pursuing the initiatives could be incremental to the IESO's previously forecast budgets, or even that the IESO should eventually recover the costs of the Powering Ontario Initiatives. However, in CME's view:

(a) The terms of the Settlement Agreement set out the conditions which the IESO is required to meet in order to request a change in its fees during the period from 2023-2025;

(b) The Powering Ontario Initiatives and their resultant costs do not meet the requirements set out in the Settlement Agreement and therefore the IESO is required to fund the cost of those initiatives without a change in fees until 2026;

(c) The evidence demonstrates that the IESO's current estimates have reduced the forecast deficit. The current forecast deficit with no incremental revenue is now the same size as the previous forecast was with the $9.9 million in incremental revenue. Accordingly, the IESO does not need additional fees to fund the Powering Ontario Initiatives. While the IESO still forecasts an operating deficit, it is attributable to the increase in salary and benefits paid to SUP employees which the IESO was not requesting additional funding for in this application in any event.

8. Accordingly, CME submits that the Board should refer the proposed fees back to the IESO pursuant to Section 25(4) of the *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A (the "**Electricity Act**") and recommend that the IESO propose usage fees exclusive of the $9.9 million in incremental revenue. The IESO can make a proposal about recovery of its incremental costs as part of its next multi-year application to the Board.

2. THE IESO'S REQUEST IS A BREACH OF THE SETTLEMENT AGREEMENT

2.1 The Settlement Agreement Restricts Fee Adjustments During the Plan Term

9. In the Settlement Agreement, the IESO proposed, and the parties accepted a mechanism which outlined the circumstances under which the IESO could return to the Board to ask for adjustments to its previously approved expenditures, revenue requirement and fees. The IESO's application in EB-2022-0318 framed the mechanism in the following terms:[4]

> **"However, if unforeseen expenses or change in revenues cause the IESO's proposed operating reserve, and the balance of the FVDA, to reduce below zero in Year 1 of the three-year cycle (i.e., in 2023), the IESO proposes that the IESO may choose to re-apply to adjust its fees"**

10. The Settlement Agreement defined the mechanism in similar terms:[5]

> **"If unforeseen expenses or changes in revenues cause the IESO's balance of the FVDA to reduce below zero at the end of Year 1 of the three-year cycle (i.e., in 2023), the IESO proposes that the IESO may choose to re-apply to adjust its fees for Year 3 of the three-year cycle (i.e., for 2025)."**

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[4] EB-2022-0318, Application and Evidence, Exhibit F, Tab 1, Schedule 1, p. 4 of 6.
[5] EB-2022-0318, Settlement Proposal filed July 21, 2023, Exhibit I-1-1, p. 18 of 22.

11. As set out in the Settlement Agreement itself, it is intended to be a legal agreement, "creating mutual obligations, and [is] binding and enforceable in accordance with its terms" subject only to the Board's acceptance of the settlement proposal.[6] Given the fact that it is a binding agreement, CME submits that when interpreting its meaning, the Board should have regard to the principles of contractual interpretation. One of the central tenets of contractual interpretation is to reject an interpretation which would make one or more of the terms in the agreement ineffective or meaningless.[7]

12. When viewed using these principles, the only reasonable conclusion is that the Settlement Agreement was intended to restrict the IESO's ability to adjust its fees for 2024 and 2025 to circumstances where unforeseen circumstances caused the FVDA balance to reduce below 0 at the end of 2023.

13. In its Argument-in-Chief, the IESO contended that the Settlement Agreement only provided the specific circumstances under which the IESO was "required" to "assess an adjustment to its fees". However, the IESO's interpretation essentially makes the clause in the Settlement Agreement meaningless and ineffective.

14. The IESO's position in this case is that they have an unfettered right to adjust their fees every year based on Section 25 of the Electricity Act. If that were true, the Settlement Agreement mechanism would be duplicative and unnecessary. Put another way, if the IESO had a right to choose to reapply to the Board adjust its fees every year, regardless of the circumstances, then the ability for the IESO to "choose to reapply to adjust its fees" if the FDVA balance is below zero in 2023 would be an unnecessary statement. The IESO would always have that ability, and whether the FDVA balance is below zero would be irrelevant.

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6 EB-2022-0318, Settlement Proposal filed July 21, 2023, Exhibit I-1-1, p. 4 of 22.
7 *National Trust Co. v. Mead*, [1990] 2 S.C.R 410 at p. 425.

15. Moreover, the language used by the Board when it accepted the Settlement Proposal accords with CME's position. In its decision accepting the Settlement Agreement, the Board described the adjustment mechanism in the following way:[8]

> ***"the IESO may seek OEB approval to adjust the approved expenditures, revenue requirement, and fees in the event of a material unforeseen change. However, 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". [emphasis added]***

16. CME submits that the Board made it clear that it granted the IESO the right to adjust the fees, but provided that this right would "only occur" if the FVDA is less than zero in 2023.

17. In this case, it is not contentious that the IESO does not meet the requirements set out in the adjustment mechanism. The IESO's evidence indicated that the balance of the FVDA was not less than zero in Year 1 (2023).[9] According to the IESO's updated evidence based on 2023 actuals, the balance in the FVDA was $10.2 million at the end of 2023.[10] The IESO has candidly acknowledged that it is not "relying" on the adjustment mechanism set out in the Settlement Agreement.[11]

2.2 There is No Conflict Between the Settlement Agreement and the Requirements of the Electricity Act

18. The IESO has taken the position that even if the Settlement Agreement purports to restrain its ability to adjust its fees, that it could not do so "as a matter of law".[12] The IESO argues, in essence, that it has an unfetterable statutory entitlement to change its usage fees every year.

19. CME submits that the Settlement Agreement does not "restrain" the requirements of the Electricity Act. Section 25 of the Electricity Act, provides as follows:

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8 EB-2022-0318, Decision and Order, dated August 29, 2023, p. 4.
9 EB-2024-0004, Exhibit A, Tab 1, Schedule 4, p. 3.
10 EB-2024-0004, Clarification Questions Filed March 14, 2024, All Intervenors Clarification Question 13.
11 EB-2024-0004, Exhibit A, Tab 1, Schedule 4, p. 3.
12 EB-2024-0004, Exhibit G, Tab 1, Schedule 1 – VECC- 4, p. 3.

(a) The IESO is required to submit its proposed expenditure, revenue requirements and the “fees it proposes to charge during the fiscal year” to the Board at least 60 days before each fiscal year, but after it has been approved by the Minister;

(b) Where the IESO is not able to meet that deadline, it is allowed to submit its proposed expenditure, revenue requirements, and the fees it proposes to charge to the Board as soon as possible after it is approved by the Minister;

(c) The Board is entitled to review and approve the proposed expenditures, revenue requirements and fees, or refer them back to the IESO for further consideration. If it does not approve the fees, the existing fees are continued.

20. The Electricity Act does not require the IESO to propose a usage fee that will exactly match the proposed expenditure for the same fiscal year. As will be discussed further below, this is tacitly acknowledged by the IESO given the fact that their proposed fee, even having been increased to cover forecast costs related to the Powering Ontario Letter still leads to an operating deficit as a result, *inter alia*, of the increased salary and benefits paid to its SUP employees.[13] If the Board accepts CME’s interpretation of the Settlement Agreement, the IESO could still discharge all the requirements of the Electricity Act. It could still submit its proposed expenditure, revenue requirements and its proposed fees each year, have them approved by the Minister, and submit them to the Board.

Moreover, even if the Board found that the IESO could not fetter its ability to apply for an updated usage fee under section 25 of the Electricity Act as a result of the Settlement Agreement, the Electricity Act still provides that the Board has the power to accept the proposed usage fee or remit the issue back to the IESO for further consideration with the Board’s recommendations. Since the additional costs faced by the IESO did not cause

[13] EB-2024-0004, Exhibit G, Tab 2.0, Schedule 4 – VECC – 2.

the FVDA to drop below zero in 2023, and therefore the IESO does not meet the conditions for a fee adjustment pursuant to the Settlement Agreement, CME submits that it is still within the Board's power pursuant to the Electricity Act to deny the IESO's adjusted fees and remit the issue back to the IESO with a recommendation that the IESO adhere to the requirements of the Settlement Agreement.

2.3 The IESO was Aware of the Powering Ontario Initiatives Prior to Completing the Settlement Agreement

CME is concerned about the IESO's actions in entering into the Settlement Agreement when it knew about the Powering Ontario Initiatives. The Powering Ontario Letter is dated July 10, 2023.[14] The IESO submitted the Settlement Agreement to the Board for approval on July 21, 2023.[15] Accordingly, the IESO was aware that the Minister had required the IESO to complete additional work, for which it had not previously budgeted, prior to the conclusion of the Settlement Agreement. Despite this, the IESO did not inform the parties of this development.

The IESO has argued that its knowledge of the Powering Ontario Initiatives is irrelevant.[16] It stated that Subsection 25(1) of the Electricity Act prohibits the IESO from submitting its revenue requirement and proposed usage fees until after they have been approved by the Minister. In CME's respectful submission, this argument misses the point.

The parties entered into the Settlement Agreement based on the evidence regarding the IESO's forecast expenditures, revenue requirements, and proposed usage fee. Implicit in entering the Settlement Agreement is the understanding that the evidence provided by the IESO was the best estimate of those amounts. While CME agrees with the IESO that it would not necessarily know the exact incremental costs of the Powering Ontario Initiatives as soon as it received the Powering Ontario Letter, CME submits that the IESO would likely have known that it could not complete work on the:

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[14] EB-2024-0004, Exhibit B, Tab 1, Schedule 1, Minister's Letter on Powering Ontario's Growth, p. 1.
[15] EB-2022-0318, Letter from the IESO to the Ontario Energy Board, dated July 21, 2023, Re: Settlement Proposal.
[16] EB-2024-0004, Independent Electricity System Operator, Argument-in-Chief, dated May 6, 2024, p. 6.

1) Bruce Nuclear New-Build Impact Assessment Cost Recovery Framework;

2) Feasibility Study and Business Case for Future Nuclear Generation in Ontario;

3) Second Long-Term Request for Proposals (LT2 RFP);

4) Future Clean Electricity Fund;

5) Energy Efficiency and Conservation Framework;

6) Supporting Innovation Through Distributed Energy Resources (DER); and

7) Transmission related work,

without incurring incremental costs above and beyond those forecast in its application for EB-2022-0318. Accordingly, CME's concern is not whether or not the IESO could submit accurate updated forecasts to the Board for approval in July 2023 that is the problem. It is the fact that the IESO entered into the Settlement Agreement on the basis of forecasts that it was likely aware were no longer the best estimates of its costs, and denied the other parties the opportunity to evaluate their position regarding the Settlement Agreement in light of this new information.

3. THE IESO HAS NOT DEMONSTRATED WHY THE INCREMENTAL REVENUE IS NEEDED

3.1 The IESO Does Not Explain Why It Can Not Fund the Powering Ontario Initiatives Through Debt

21. The IESO requested approval for incremental revenue requirement of $9.9 million to fund the initiatives set out in the Powering Ontario Letter. However, the IESO's evidence indicates that its forecast operating deficit is driven both by the incremental FTEs necessary to complete the Ministry of Energy's new initiatives as well as, *inter alia*,

increased compensation to SUP members as a result of collective bargaining arbitration decisions.[17]

22. Specifically, the IESO did not request incremental revenue to fund the $34.5 million increase awarded to SUP members.[18] Despite initially forecasting operating deficits totalling $44.9 million over the course of 2023-2025, the IESO chose to only request incremental funding of $9.9 million.[19]

23. When asked by intervenors why the IESO didn't elect to fund the entire operating deficit through the use of the operating reserve and debt, including the $9.9 million for the Powering Ontario initiatives, the IESO answer was two-fold. First, it stated that it needed to ensure that the initiatives assigned by the minister are properly defined, staffed and prioritized amongst the other initiatives for 2023-2025.[20] Second it stated that increasing revenue ensures that the expenses associated with the work are reflected in the usage fees for the year they are incurred, thus mitigating intergenerational impacts.[21]

24. CME submits that neither answer is persuasive. It is not clear from the IESO's answer why increasing the usage fees to generate $9.9 million in incremental revenue is the only way that the IESO can ensure that initiatives assigned by the minister are properly defined, staffed and prioritized. If the IESO paid for the costs of these initiatives through the operating reserve and debt financing, it would have the ability to plan, staff and execute these initiatives in the same fashion that it would if it funded those activities through any other means. Additionally, the IESO's explanation begs additional questions that it has not addressed, for instance: if other costs are required to be funded through the operating reserve or debt financing, will the IESO be unable to define, staff and prioritize those activities? If so, why?

17 EB-2024-0004, Exhibit A, Tab 1, Schedule 4, p. 3.
18 EB-2024-0004, Exhibit F, Tab 1, Schedule 1, p. 1.
19 EB-2024-0004, Exhibit F, Tab 1, Schedule 1, p. 1.
20 EB-2024-0004, Exhibit G, Tab 1, Schedule 1 – OEB Staff 2-1, p. 3 of 4.
21 EB-2024-0004, Exhibit F, Tab 1, Schedule 1, p. 2.

25. In its Argument-in-Chief, the IESO states that it does not believe it is good practice, nor management, to operate with a fully exhausted operating reserve in the FVDA as a means of funding known/planned work that has been directed and approved by the Minister in support of the POG Plan.[22] However, it does not explain why it then believes that it is appropriate to operate with a fully exhausted operating reserve in the FVDA as a result of increased salary and benefits paid to SUP members.

26. The IESO has failed to explain why one set of costs should be treated differently than the other. It is a distinction without a difference. The fact that the IESO is comfortable operating with significantly higher costs as a result of the increased salary and benefits indicates that it would be equally at ease operating with significantly higher costs because of the Powering Ontario Initiatives.

27. Moreover, while it can be important to reflect the costs of the IESO's contemporaneously with when the services are provided, the Board has accepted that multi-year plan terms will invariably involve some disconnect between the actual costs incurred by the regulated entity and the services provided. The regulatory efficiency that is gained by moving to multi-year plans rather than an annual plan necessarily has a cost in this respect. However, given the amount at issue, and the fact that the plan term is only three years, CME submits that requiring the IESO to fund these costs through debt and recovering the costs starting in 2026 is appropriate.

3.2 The IESO's Updated Evidence Indicates there is No Need for Funding of the Powering Ontario Initiatives

28. In its initial application, the IESO forecast that it would have a combined deficit of $44.9 million over the 2023-2025 period. As it had an operating reserve of $15 million, the IESO forecast that it would incur a total debt of $29.9 million in the FVDA at the end of 2025.[23] If the Board approved the IESO's request to increase the usage fee and

22 EB-2024-0004, Independent Electricity System Operator, Argument-in-Chief, dated May 6, 2024, pp. 2-3.
23 EB-2024-0004, Exhibit A, Tab 1, Schedule 4, p. 3.

generate $9.9 million in additional revenue, the total debt at the end of 2025 was forecast to be $20 million.[24]

29. However, the IESO reduced the anticipated deficit in its updated evidence. For instance, while the IESO initially forecast an operating deficit of $12.4 million in 2023, the IESO calculated that its actual deficit in 2023 was only $4.8 million.[25] Similarly, once the updated energy forecast was taken into account, the IESO only forecast a deficit of $10.3 million in 2024, rather than $12.6 million.[26]

30. Accordingly, with a lower expected deficit, it is not clear why the IESO requires additional financing since it accepted that it would have to finance a significant portion of the original deficit using financing even with the higher proposed usage fees.

4. CONCLUSION

31. For all the foregoing reasons, CME submits that the Board should refer the proposed fees back to the IESO for further consideration and recommend to the IESO that it propose fees exclusive of the $9.9 million in incremental funding.

5. COSTS

32. We request that CME be awarded 100% of its reasonably incurred costs in connection with this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of May 2024.

Scott Pollock

Scott Pollock
Counsel for CME

[24] EB-2024-0004, Exhibit A, Tab 1, Schedule 4, p. 3.
[25] EB-2024-0004, Exhibit G, Tab 1.1, Schedule 3 – SEC -3, p. 2.
[26] EB-2024-0004, Exhibit G, Tab 1.1, Schedule 3 – SEC -3, p. 2.