



Independent Electricity System Operator

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October 22, 2024

VIA Email and RESS

Ms. Nancy Marconi
Registrar
Ontario Energy Board
27th Floor 2300 Yonge Street
Toronto, ON M4P 1E4

Dear Ms. Marconi,

**Re: Independent Electricity System Operator's (IESO) Written Submission on the
Disposition of the Commodity Variance Accounts 1588 and 1589 and Issue
6.2
Ontario Energy Board File No.: EB-2024-0007**

Please find below the IESO's written submission in the above referenced proceeding pursuant to Procedural Order No.2.

BACKGROUND

On June 3, 2024, Algoma Power Inc. (API) filed its cost-of-service application (Application) to the Ontario Energy Board (OEB) under section 78 of the *Ontario Energy Board Act, 1998*, to change electricity distribution rates and other charges beginning January 1, 2025. In their application, API also requested an Order from the OEB to the Independent Electricity System Operator (IESO) to disapply or extend the limitation period set out in Section 36.1.1(1) of the *Electricity Act, 1998* (the "*Act*"), for Accounts 1588 (RSVA – Power) and 1589 (RSVA – GA) related to the Global Adjustment (GA) based on revised information for May 2021 and January 2022. This request references Section 36.1.1(7)(b) of the *Act*, which allows the OEB to disapply or extend the limitation period, particularly in the context of a decision, order or direction regarding a variance account. This marks the first application where the OEB is being asked to consider Section 36.1.1(7) in accordance with relevant statutory and common-law principles.

In Procedural Order No. 1, issued on July 22, 2024, the OEB staff consulted with Intervenor for issues that warranted additions to the standard Issues List for API's application. In the Decision on Issues List dated August 2, 2024, the OEB reviewed and made minor adjustments to the proposed Issues List, specifically excluding Accounts 1588 and 1589 from Issue 6.1 and moving the previously proposed Issue 7.3 under the Deferral and Variance Account heading, renumbering it as Issue 6.2.

As a result, Issue 6.2 now states:

"Is the proposal for the disposition of balances in Accounts 1588 and 1589, including the request for an order as per Section 36.1.1 of the Electricity Act, 1998 requiring the IESO to settle past Class A submissions, appropriate?"

The OEB also decided in Procedural Order No. 1 that it would exclude Issue 6.2 from the set of issues eligible for settlement at the settlement conference, which commenced on September 18, 2024, and continued through the 20th, concluding on the 25th.

Accordingly, the OEB determined to address Issue 6.2 by way of written hearing after the settlement conference.

The OEB issued Procedural Order No. 2 on September 27, 2024, which provided dates for submissions and reply to submissions to Issue 6.2. Please refer to the "IESO Position" section below which addresses Issue 6.2.

For the reasons set forth in this written submission, in considering API's or any request to extend or disapply the limitation period provided by section 36.1.1(1) of the *Act*, through application of section 36.1.1(7), it is important the OEB consider common-law principles of discoverability and the necessity for fair and equitable treatment of all market participants.

Furthermore, should the OEB grant such an Order, the IESO wishes to advise how the payment would be processed as a financial matter (specifically, as a liquidated payment to be made in the next current period, rather than a 're-settlement' of the applicable prior period) so as to assist the OEB in issuing an Order that most fairly, effectively, and compliantly disposes of the matter.

For additional clarity, as set forth in this written submission, the IESO takes no position on any issues in the Application except for Issue 6.2. Nor does IESO take any position on the underlying accounting substance of Issue 6.2 and relies on OEB in this respect as in the ordinary course.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The *Electricity Act*, 1998, Section 36.1.1(1):

"Despite anything in this or any other Act or regulation, the market rules or any licence or code issued by the Board, but subject to the regulations made under this section and to subsections (7) and (8), no market participant, consumer, entity or person shall, more than two years or other prescribed period of time after the applicable date, be entitled to seek or receive any payment, adjustment or amount, or be required to make any payment or adjustment or to pay an amount, from or to the IESO, where the payment, adjustment or amount is based on an entitlement or a specified charge that arises under an Act or a regulation, or one or more provisions of an Act or a regulation, that is prescribed for the purposes of this subsection".

O. Reg. 153/23, Section 2(1)(a) and (b)(i):

"For the purposes of subsection 36.1.1 (1) of the Act, no market participant, consumer, entity or person shall be entitled to seek or receive any payment, adjustment or amount, or be required to make any payment or adjustment or to pay an amount, from or to the IESO if,

(a) the invoice for the payment, adjustment or amount was issued by the IESO more than 24 months ago; and

(b) the payment, adjustment or amount is based on an entitlement or a specified charge that arises under or was invoiced under any of the following provisions:

(i) section 25.33 of the Act".

O. Reg 153/23, Section 36.1.1(7)(b):

"Despite subsection (1), the IESO shall not be restricted from making or receiving any payment or adjustment of any amount to or from a market participant, a consumer, an entity or a person

in respect of an entitlement or a specified charge to which that subsection applies where such payment or adjustment results from"

(b) a decision, an order or a direction of the Board in respect of a variance account".

SUMMARY OF API'S PROPOSAL

The Application primarily relates to rate adjustments covering the period from 2025 to 2029. In addition, the Application includes items relating to certain historical retail settlement variance accounts (RSVAs), being Accounts 1588 and 1589, which are the subject of Issue 6.2.

API initially sought the disposition of these Accounts 1588 and 1589 in its Incentive Rate-setting Mechanism (IRM) Application for 2023 in EB-2022-0014. In that application, API noted that the variances in Accounts 1588 and 1589 for certain periods (May 2021 and January 2022) exceeded the OEB's 1% threshold and acknowledged the need to investigate the causes. API stated that they could not provide an explanation at that time and withdrew their request to settle those balances until their investigation was complete.¹

API again sought the disposition of Accounts 1588 and 1589 for the applicable periods (May 2021 and January 2022) in its IRM Application for 2024 in EB-2023-0005. In that application, API advised that it had been unable to identify the drivers of the variances and that it had engaged a third-party consulting firm to assist in the investigation, and again withdrew its request to dispose of the account balances until it concluded said investigation.²

In its IR responses in this Application, API advised that the investigative work was completed in March 2024 which discovered the need for changes of 3,445,387 kWh for Class A-May 2021 period and 437,136 kWh for Class A-January 2022 period, relative to the previously submitted values, resulting in a resubmission of \$339,087 for May 2021 and \$19,117 for January 2022, respectively.³

API first notified the IESO of any issues with these variance accounts in March 2024, after the conclusion of its investigation. By the time the IESO was notified, the two-year limitation period defined in Ontario Regulation 153/23 (O. Reg. 153/23) had passed. This regulation establishes

¹ OEB *Decision and Rate Order* Issued December 8th, 2022, for Algoma Power Inc.'s application for rates and other charges to be effective January 1, [2023](#) (EB-2022-0014), Section 7: Group 1 Deferral and Variance Accounts, page 8

² OEB *Decision and Rate Order* Issued December 7th, 2023, for Algoma Power Inc.'s application for rates and other charges to be effective January 1, 2024 (EB-2023-0005), Section 7: Group 1 Deferral and Variance Accounts, pages 8-9

³ Algoma Responses to Interrogatories filed September 4, 2024, 9-Staff-71 ("API IR Responses"), responses (a) and (c).

a two-year limit for determinations under section 25.33 of the *Electricity Act, 1998*, including Ontario Regulation 429/04 (the "GA Regulation").

Accordingly, API states that "*to facilitate the final disposition of Accounts 1588 and 1589, API is seeking an OEB order directing the IESO to disapply or extend the limitation period set out in Sub-Section (7)(b), of Section 36.1.1(1) of the Electricity Act, 1998, and to:*

- A) accept the proposed adjustments to API's Class A values for both May 2021 and January 2022 as set out in this application in furtherance of the final disposition of API's 1588 and 1589 variance accounts, and;*
- B) make payments to API in accordance with those adjustments so that API may dispose of those variance accounts on a final basis.⁴"*

IESO POSITION

The IESO's position on Issue 6.2 is as follows:

Firstly, regarding the potential disapplication or extension of the limitation period in this case (or any case), the IESO respectfully suggests that OEB consider and apply, as applicable in the circumstances, common-law principles of discoverability.⁵

Secondly, if IESO is directed to disapply or extend the limitation period in this case, the IESO wishes to advise how the payment would be processed as a financial matter to assist the OEB in issuing an Order that most fairly, effectively, and compliantly disposes of the matter.

1) Any disapplication of the limitation period should be consistent with common-law principles

A) Legislative history and API evidence on efforts made to comply with limitation period

The *Electricity Act, 1998*, was amended on January 1, 2022, with a new section 36.1.1 providing that (underlining added for emphasis):

36.1.1(1) Despite anything in this or any other Act or regulation, the market rules or any licence or code issued by the Board, but subject to the regulations made under this section and to subsections (7) and (8), no market participant, consumer, entity or person shall, more than two years or other prescribed period of time after the applicable

⁴ Algoma Cost of Service Application filed July 19, 2024, (Updated "EXHIBIT 9 – DEFERRAL AND VARIANCE ACCOUNTS"), page 21

⁵ For clarity, this position relates to the potential exercise of subsection 36.1.1(7) of the *Electricity Act, 1998*. Principles of discoverability do not apply to subsection 36.1.1(1) of the *Electricity Act, 1998*: 36.1.1(5)

date, be entitled to seek or receive any payment, adjustment or amount, or be required to make any payment or adjustment or to pay an amount, from or to the IESO, where the payment, adjustment or amount is based on an entitlement or a specified charge that arises under an Act or a regulation, or one or more provisions of an Act or a regulation, that is prescribed for the purposes of this subsection.

The new section 36.1.1 also provided that (underlining added for emphasis):

(7) Despite subsection (1), the IESO shall not be restricted from making or receiving any payment or adjustment of any amount to or from a market participant, a consumer, an entity or a person in respect of an entitlement or a specified charge to which that subsection applies where such payment or adjustment results from,

(b) a decision, an order or a direction of the Board in respect of a variance account;

Beginning with the publishing of a draft of those amendments on December 2, 2021,⁶ and following stakeholder engagement on April 19, 2023 of O. Reg. 153/23,⁷ market participants (including API) were made aware of the forthcoming two-year limitation period that was formally established by O. Reg. 153/23 on July 1, 2023.

At that time (July 2023 and earlier), API was “actively working” on the variances that are the subject-matter of Issue 6.2, the disposition of which had been deferred in EB-2022-0014 and EB-2023-0005.⁸ Such deferral did not require that API provide any notice to the IESO or the market of the pending passing of the limitation period. Accordingly, API first indicated to the IESO its intention to seek a disapplication or extension of the limitation period on March 7, 2024; and first provided notice of same to the market in its within Notice of a Rate Hearing dated June 27, 2024.⁹

B) Common-law principles and application

⁶ *Electricity Act, 1998*, [SO 1998, c 15, Sch A, in force between Dec 2, 2021 and Dec 31, 2021, Canlii.org](#). See also IESO slide-deck for IESO Education Session held on February 15, 2022, [Education on Upcoming Market Rule Amendment: Recalculated Settlement Statements & 2 Year Limitation on Resettlement](#)

⁷ See Regulatory Posting: [2-year Limitation Period for Certain Statutory and Regulatory Entitlements \(aligns with Independent Electricity System Operator \(IESO\) Replacement of Settlement System \(RSS\) project\)](#). ([ontariocanada.com](#)).

⁸ API IR Responses, response (b). See also discussion above regarding EB-2022-0014 and EB-2023-0005.

⁹ API IR Responses, response (a).

It is commonly understood that the OEB, like any Ontario board or tribunal, must exercise the powers granted to it in accordance with the common law and relevant provincial statutes, having regard to principles of fairness and justice.¹⁰

Generally speaking, the purpose of a limitation period is to balance the rights of applicants and the rights of those impacted by potential applications to a level of certainty and finality in managing their affairs.¹¹ The principle of discoverability protects the right to apply, while also requiring that applicants exercise reasonable diligence in investigating the material facts underlying the application and (if applicable) provide notice once “*prima facie* grounds for inferring” a claim are discovered or discoverable.¹² This is particularly important in the case of claims that have a material impact on other interested parties.

The purpose of the limitation period applicable to adjustments under the GA Regulation is to provide that same level of certainty and finality to ratepayers in the IESO-administered markets – who collectively balance the physical markets with the aggregate of their payments, such that an adjustment in favour of one applicant or group of ratepayers will have a cost impact on the remainder. It also provides important certainty and finality to IESO, in its capacity as administrator of the GA Regulation, including the design, maintenance and operations of systems to settle the markets in an increasingly complex landscape.

As a practical matter, any disapplication of the limitation period will increase costs to market participants and ratepayers well after the fact, complicating compliance and potentially leading to disputes over adjustments that could have been resolved within the earlier timeframe.

In light of the foregoing and recognizing that each submission for an adjustment is unique, IESO respectfully suggests that OEB, in considering API’s (or any) application to disapply the prescribed two-year limitation period, should apply, as applicable in the circumstances, the principles of discoverability described above.

2) Processing Financial Payments

If the OEB were to order the disapplication or extension of the limitation period for Accounts 1588 and 1589 concerning the GA, the IESO would like the OEB to consider the following:

- A) The application of applicable procedures, aimed at assisting the OEB in issuing an Order that most fairly, effectively, and compliantly resolves the matter;

¹⁰ Robert B. Warren, *The Governance of Regulatory Agencies – A Further Case Study of the Ontario Energy Board*, Energy Regulation Quarterly: Vol 10, Issue 1, 2022 ([online](#)).

¹¹ *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469 at para. 8.

¹² *Lawless v. Anderson*, [2011 ONCA 102](#) at paras. 22-23 and 28, citing *Gaudet et al v. Levy et al.* (1984), 1984 CanLII 2047 (ON SC), 47 O.R. (2d) 577 (H.C.J.).

- B) The financial implications for the IESO-administered markets, highlighting the necessity for a fair and equitable process; and
- C) The reliance of the IESO on the OEB to verify the accuracy of the adjustments to be processed by the IESO in such case.

A) Application of Relevant Procedures

It is the responsibility of the IESO to settle the market in accordance with the *Act*, the GA Regulation and direction from OEB. Should the OEB grant the Order sought in this case, the IESO wishes to advise the OEB on how the payment to API would be processed as a financial matter (specifically, as a liquidated payment to be made in the next current period, rather than a 're-settlement' of the applicable prior period) so as to assist the OEB in issuing an Order that most fairly, effectively, and compliantly disposes of the matter.

Any settlements transactions relating to GA outside of the two-year limitation period will be processed by the IESO (if directed by the OEB), as a financial payment in the current period.¹³ Therefore, the transactions would be processed as a financial (i.e. liquidated) payment(s) in the next current period (and not as a 're-settlement' of the applicable prior period) and be used to process the payments sought by API under Issue 6.2 for Accounts 1588 and 1589 for May 2021 and January 2022 periods.

To process the financial payment in such case (including the within application), the IESO would require an Order from OEB (issued directly to IESO) that expressly: (a) details the liquidated dollar amount required to be processed in respect of the given period(s); and (b) directs IESO to apply that payment in the next period.

In this case, if the OEB were to grant API the relief sought regarding Issue 6.2, the financial payment to API would be processed on the next available preliminary settlement statement.

B) Balancing the IESO-administered markets; implications on other market participants and ratepayers

To ensure that the IESO-administered markets remain balanced, any transaction relating to GA (be it an adjustment or a financial payment) processed in favour of one market participant, or a group of ratepayers, will be recovered from the remaining market participants and ratepayers in the next current period, at the same time the payment is made to the API via a balancing mechanism per the procedure described in part (A) of this section above. In this case, if the Order sought by API were to be granted in respect of Issue 6.2, every market participant and ratepayer in Ontario would be subject to a proportionate allocation of the payment amount.

¹³ As the terms "adjustment" and "payment" are used in subsections 36.1.1(1) and 36.1.1(7) of the *Electricity Act, 1998*.

API is one of many LDCs operating within the province. A ruling in this Application may be cited by other LDCs to argue that they are similarly situated and thus entitled to the same relief. Given the potential implications for other market participants and ratepayers, the IESO emphasizes that this Application will offer guidance for future similar cases.

C) The IESO relies upon OEB to verify any financial payments as an accounting matter

As in the ordinary course, if the OEB were to issue the Order sought by API in respect of Issue 6.2, IESO Staff would expect that OEB had verified API's resubmission as an accounting matter. The IESO is only able to reconfirm the accuracy of the initial settlements, based on API's submission to the IESO, as recorded in accordance with the applicable rules at the time. IESO takes no position, and relies upon the OEB, to ensure all necessary accounting validations are in place.

All of which is respectfully submitted.

Yours truly,

Carrie Aloussis

Carrie Aloussis
Senior Manager, Regulatory Affairs

cc: All EB-2024-0007 Intervenors (email)