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November 11, 2024

By Email and RESS

File No.: 101926.1173

Ontario Energy Board
2300 Yonge Street, 26th Floor
Toronto ON M4P 1E4

Attention: Nancy Marconi, Registrar

Dear Ms. Marconi:

**Re: Capital Power Corporation, Thorold CoGen L.P., Portlands Energy Centre L.P. dba Atura Power, St. Clair Power L.P., TransAlta (SC) L.P. (collectively, the “NQS Generation Group” or “Applicants”) Application for Review of Amendments to the Independent Electricity System Operator Market Rules
Ontario Energy Board File Number: EB-2024-0331**

We are counsel to the Independent Electricity System Operator (the “**IESO**”) with respect to the application under section 33 of the *Electricity Act, 1998* (the “**Act**”) to review a package of amendments to the IESO Market Rules (“**MRP Amendments**”), known as “market rule amendments MR-00481-R00-R13”, commenced by the NQS Generation Group on November 8, 2024 (the “**Application**”). The MRP Amendments constitute the full set of market rule amendments necessary to enable and operationalize the IESO’s Market Renewal Program (“**MRP**”), which is scheduled to “go live” on May 1, 2025.

We ask the Board to confirm that the IESO, as the body responsible for making the Market Rules, is automatically a respondent to the Application without the need to file a request for intervenor status. The IESO is a necessary party to the Application under the scheme of the Act and has a role which is distinct from that of other potential intervenors.

In that regard, the IESO requests that any future correspondence with respect to this matter be sent to the following representatives:

Andrew Bishop (Andrew.Bishop@ieso.ca)
James Hunter (James.Hunter@ieso.ca)

and the IESO's counsel:

Glenn Zacher (gzacher@stikeman.com)

Patrick Duffy (pduffy@stikeman.com)

Lesley Mercer (lmercer@stikeman.com)

The IESO is in the process of collecting the documentation with respect to the MRP Amendments that it is required by section 6.3 of its licence to file with the Board within seven days of the date of the filing of the Application. The IESO intends to file that documentation with the Board as soon as possible, and no later than November 15, 2024.

The Application and Requested Document Disclosure Exceeds the Board's Jurisdiction

The NQS Generation Group's Application substantially exceeds the Board's jurisdiction under section 33 of the Act. Section 33, as the Board has previously ruled, is a "jurisdiction limiting" clause which restricts the Board's market rule amendment review to solely assessing and determining whether the impugned market rule amendments are inconsistent with the purposes of the Act and/or are unjustly discriminatory to a market participant or class of market participants.¹ The NQS Generation Group's Application is replete with references to out of market contracts and contract amendment negotiations between the IESO and the NQS Generation Group. The Application is in essence a claim for breach of contract under the guise of a market rule amendment review. The Applicants' Clean Electricity Supply ("**CES**") and Combined Heat and Power ("**CHP**") contracts (collectively the "**Contracts**") all expressly contemplate the MRP Amendments and provide for amendments to be made to the Contracts in the event the MRP Amendments are implemented. The Contracts also include arbitration clauses that may be exercised if the parties cannot agree upon appropriate amendments. All of the Applicants have, since approximately 2019, been engaged in contract amendment negotiations with the IESO relating to the MRP Amendments. The Application is a transparent attempt by the NQS Generation Group to utilize the Board's processes to gain leverage in the Applicants' ongoing contractual amendment discussions with the IESO and it is the IESO's position that such conduct should not be countenanced by the Board.

The Applicants seek disclosure of a broad range of documents referenced in Schedule A to the Application that relate to the Contracts and the parties' contract amendment negotiations, as well as other documents that are clearly out of scope and irrelevant to the Board's section 33 review. The IESO has no obligation to file, and will not be, filing these documents as part of the initial filing under its licence and the IESO objects to their production; in particular:

- Schedule A broadly, including more specifically paragraphs 1 (a), (b), (j) and 2(d), seeks documents related to the Contracts and contract amendment negotiations between the IESO and the Applicants.² This reflects that fact that the Applicants conflate the alleged "harms" of the MRP Amendments with out of market contracts. These documents are out

¹ EB-2007-0040, Decision and Order dated at pp. 9-10 and Appendix A (Oral Reasons of the Board), p. 87; EB-2019-0242, Decision and Order dated January 23, 2020 at pp. 8-10.

² See, for example, paragraphs 10, 11, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23 and 25.

of scope and are irrelevant to the Board's evaluation of the statutory tests in subsection 33(9) of the Act.

- The documents identified, *inter alia*, in paragraphs 1(c) to (f) and 2(a) to (c) of Schedule A pertain to the IESO's analysis and decision-making as part of the process of making the MRP Amendments. As the Board previously determined, the Board's mandate in a section 33 review does not include a review of the processes by which a market rule amendment was made by the IESO.³ As such, these document requests are clearly outside the scope of the Application.
- The request to produce the documents identified, *inter alia*, in paragraphs 1(g) to (i), (k) to (n) and 2(e) of Schedule A is premised upon a fundamental misunderstanding of the nature of an application under section 33 of the Act. The NQS Generation Group bears the burden to lead evidence to satisfy the statutory tests under the subsection 33(9).⁴ The Board should not permit the NQS Generation Group to engage in a "fishing expedition" in the hopes that these requests might turn up IESO documents that it can construe as supporting its case. It is particularly important for the Board to reject such requests given that this is a review proceeding, given the extensive underlying market rule amendment and stakeholder processes that they were undertaken by the IESO as part of MRP, and because of the incredibly broad scope of the MRP Amendments that the Applicants seek to have reviewed.

IESO Requests a Prehearing Conference to Establish Hearing Procedure and Timetable

On behalf of the IESO, we request that the Board convene a pre-hearing conference under Rule 31 of the Board's *Rules of Practice and Procedure* to be held during the week of November 18, 2024. As the Board will be aware, subsection 33(6) requires the Board to make its final decision within 120 days of the date of the receipt of the Application (March 7, 2025). To meet this deadline, and to ensure an efficient and focused hearing of the Application, it is our view that an early pre-hearing conference is imperative to address the following matters:

- *Issues List* – The IESO requests that the Board promptly establish an Issues List confirming that the issues are limited to those statutorily prescribed by subsection 33(9) – whether the amendments are question is (i) inconsistent with the purposes of this Act or, (ii) unjustly discriminates against or in favour of a market participant or class of market participants. If the NQS Generation Group disagrees with the IESO's view and proposes additional issues, it should set out its position in writing and the issues list should be determined at the pre-hearing conference.
- *Identification of proposed intervenors* – The form and nature of this Application is important and informs the Board's procedure. It is an expedited review of the IESO's decision to make the MRP Amendments and not a proceeding of first instance. In the circumstances, it is the IESO's position that the Board should rigorously apply Rule 22.02 and require any party applying for intervenor status to demonstrate, in a written

³ EB-2007-0040, Decision and Order dated at p. 10.

⁴ EB-2007-0040, Decision and Order dated at p. 18; EB-2019-0242, Decision and Order dated January 23, 2020 at p. 8.

submission, together with any necessary supporting evidence, to be filed before the pre-hearing conference, that it satisfies the test for intervention, including establishing that it has a “substantial interest” in the particular market rule amendments that are under review. The Application should not be treated as an opportunity for any party, including intervenors, to attempt a re-do and “re-stakeholder” the MRP Amendments, particularly given the extensive stakeholder, Technical Panel and IESO Board processes undertaken as a part of MRP.

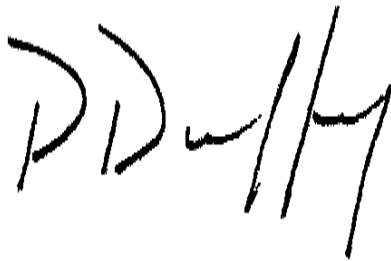
- *Role of the intervenors* – In the event the Board grants intervenor status to any party, it should utilize Rule 22.06 to define the appropriate role of that party by imposing appropriate conditions on their participation, such as by restricting their ability to file evidence. This will streamline the review process by appropriately confining interventions to parties that have a substantial interest in the market rule amendments that are under review.
- *Defining the scope of evidence in the proceeding* – Any new evidence that may be filed in this Application should be appropriately limited and accord with the nature of the review procedure and be limited to and probative with respect to the two statutory tests in subsection 33(9). It is critical that the Board implement measures to ensure that this Application remains aligned with the expedited review process and strictly focused on the application of the statutory tests, and not on the implications that the amendment might have on out of market contracts between the IESO and individual members of the NQS Generation Group. The Contracts are not, as noted above, within the scope of the market rules and contract disputes between the IESO and NQS Generation Group members are subject to their own distinct and exclusive dispute resolution processes that may be exercised by the Applicants.
- *Establishing a schedule for all steps in the proceeding* – The IESO has attached for the Board’s consideration a proposed timeline for the necessary steps in the Application. The procedure utilized for the Application should reflect the nature of a review application in which the applicant bears the burden of proof. Prehearing/discovery procedures, such as interrogatories and technical conferences, as well as settlement conferences, are not *per se* applicable to review processes and should not be scheduled unless a party requesting one or more of these steps can justify its necessity. Any prehearing motions that either of the parties intend to bring may be addressed at the procedural conference and, as appropriate, incorporated in the hearing schedule.
- *Setting rules for the hearing format* – The Board should establish rules for the hearing format and timing to appropriately streamline and limit the length of the hearing format and ensure the time is used effectively and efficiently.
- *Costs Eligibility* – The Board should define which parties, if any, are eligible for costs. The IESO’s position is that, consistent with the Board’s prior rulings parties representing the private interests of generators are not eligible for costs⁵ and it would be inappropriate for the IESO, and the ratepayers that ultimately pay the IESO’s costs, to bear the costs of

⁵ EB-2013-0010/EB-2013-0029, Decision On Cost Eligibility and Procedural Order No. 6 dated March 4, 2013 and as corrected on March 5, 2013, at p. 4.

the NQS Generation Group in this Application. It is important to note that the NQS Generation Group is seeking to revoke the full set of MRP Amendments and to altogether block enablement of MRP, which has been in development for many years and is intended to benefit all Ontario ratepayers. In the circumstances, it is the IESO's position that it is important for the Board to confirm upfront that the usual "loser pays" costs rules applicable to commercial litigation and arbitration proceedings will apply in this case and, therefore, if the NQS Generation Group is not successful, it will be responsible for it and the IESO's costs.

We look forward to the Board's response in respect of the matters addressed herein.

Yours truly,

A handwritten signature in black ink, appearing to read 'PDuffy', written in a cursive, stylized script.

Patrick G. Duffy

PGD/sb

cc. Glenn Zacher
Lesley Mercer
John Vellone, Counsel for Applicants
Colm Boyle, Counsel for Applicants

Proposed Hearing Schedule – EB-2024-0331

Action	Date
IESO filing of docs required by OEB licence	November 15, 2024
Initial prehearing conference	Week of November 18, 2024
Preliminary motions, if any	Week of November 25, 2024
Filing of Applicants' supporting evidence	November 29, 2024
Filing of the IESO's responding evidence	December 20, 2024
Second prehearing conference, if necessary	Week of January 6, 2024
Hearing	Week of January 13, 2025
Filing of Applicants' closing argument	January 31, 2025
Filing of IESO's closing argument	February 6, 2025
Oral argument	Week February 10, 2025
Statutory deadline for Board's final decision	March 7, 2025