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**File No. 025001.00106**

November 14, 2024

**BY RESS**  
**registrar@oeb.ca**

Ms. Nancy Marconi, Registrar  
Ontario Energy Board  
PO Box 2319  
26th Floor, 2300 Yonge Street  
Toronto, ON M4P 1E4

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. (the “NQS Generation Group”)  
Application for Review of Amendments to the Independent Electricity System Operator (“IESO”) Market Rules – EB-2024-0331 (“Application”)**

We are in receipt of a letter from counsel to the IESO dated November 11, 2024, wherein several issues require an immediate response from the NQS Generation Group. The issues requiring immediate comment are organized in accordance with the headings that follow, however the NQS Generation Group reserves the right to provide further submissions.

The NQS Generation Group is concerned about two improper strategies employed throughout the IESO’s letter: (a) mischaracterizing the nature of the NQS Generation Group’s Application as an abuse of process; and (b) using procedural mechanisms to deter or avoid substantive examination of the Market Rule amendments.<sup>1</sup> Such a litigation strategy should not be accepted by the OEB and the Market Rule amendments must be examined on their merits. Further, notice of this proceeding was only recently issued and other parties should have an opportunity to weigh in on the matters raised by the IESO.

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<sup>1</sup> For example, the IESO: (a) states the OEB does not have jurisdiction to hear the application; (b) states the OEB does not have jurisdiction to order relevant and material disclosure; (c) recently amended section 6.3 of its Operating Licence in EB-2024-0128 to limit the scope of compelled disclosure; (d) wants to restrict the scope of the OEB’s review via the issues list; (e) wants to restrict the role and number of intervenors; (f) wants to prevent intervenors from filing evidence; (g) sets a truncated schedule without input from any other parties to the proceeding (including intervenors); and (h) without any precedent, wants the threat of a costs award to deter the NQS Generation Group.

## 1. The Application is Squarely Within Ontario Energy Board Jurisdiction

The IESO mischaracterizes the Application as a claim for breach of contract under the guise of a market rule amendment review. The IESO is also critical that the Application is “replete” with references to out of market contracts and contract amendment negotiations.

When properly characterized, the NQS Generation Group’s Application is a review of whether the IESO’s proposed Market Rule amendments to implement the Market Renewal Program (“**MRP**”) are unjustly discriminatory or inconsistent with the purposes of the *Electricity Act, 1998*. The NQS Generation Group asserts the MRP amendments are both inconsistent with the purposes of the *Electricity Act, 1998* and unjustly discriminate against the NQS Generation Group for the reasons provided in the Application. Such a review is within the OEB’s jurisdiction.

The OEB is statutorily required to monitor markets in the electricity sector, including assessing the efficiency, fairness, transparency, and competitiveness of those markets.<sup>2</sup> The Supreme Court of Canada has cautioned administrative tribunals to avoid sterilizing their powers through overly technical interpretations of enabling statutes in *Bell Canada v Canada* (“**Bell**”).<sup>3</sup>

Applicants under section 33(4) of the *Electricity Act, 1998* are required to demonstrate unjust economic discrimination.<sup>4</sup> It would be illogical for the NQS Generator Group to have to demonstrate this legal requirement without also referencing the underpinning IESO contracts that have bearing on the economics of each generation facility. Unjust economic discrimination should not be determined in a hypothetical vacuum, but rather should be grounded in real economic consequences with reference to the applicable contracts.

Excluding rate regulated assets, most (if not all) generator market participants that operate in the IESO-administered markets have contracts with the IESO.<sup>5</sup> If the IESO’s position on the OEB’s jurisdiction is accepted, the OEB would be effectively robbed of any meaningful jurisdiction under section 33 of the *Electricity Act, 1998* to review unjustly discriminatory Market Rule amendments in every circumstance where the IESO has entered into a contract with a market participant. This is an absurd outcome that would grant impunity to the IESO from applications to the OEB by nearly all generation market participants to review of Market Rule amendments, and is surely an outcome the Supreme Court of Canada instructed administrative tribunals to avoid in *Bell*.

To be clear, the NQS Generator Group does not wish to invite the OEB to weigh in on matters better addressed through contractual negotiations. However, the contracts, and the IESO’s proposed contractual amendments, are directly relevant evidence that is probative to the OEB’s consideration and determination of whether or not the Market Rule amendments result in unjust discrimination and inconsistency with the purposes of the *Electricity Act, 1998*.

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<sup>2</sup> *Ontario Energy Board Act, 1998*, SO 1998, c 15, Sch B, s.87(1).

<sup>3</sup> *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, [1989] 1 S.C.R. 1722, at para 1756, online: <<https://www.canlii.org/en/ca/scc/doc/1989/1989canlii67/1989canlii67.pdf>>

<sup>4</sup> Decision and Order EB-2019-0242, January 23, 2020, p.8.

<sup>5</sup> <https://www.ieso.ca/en/Sector-Participants/Resource-Acquisition-and-Contracts/Contract-Data-and-Reports>

Finally, in their letter counsel to the IESO misconstrues the OEB's obiter on section 33 of the *Electricity Act, 1998* as a "jurisdiction limiting" clause. When Decision and Order EB-2007-0040 is properly read in context, the OEB's comments on jurisdiction related to striking evidence from the record on the IESO's stakeholdering process. The OEB did not agree with the applicant's argument that it is incumbent on the OEB to "police" the IESO's rule-making process as a matter of procedural fairness. The cited proposition has no applicability to the present circumstances – this is not what the NQS Generation Group is asking the OEB to review.

## **2. The Ontario Energy Board Has the Jurisdiction to Order the Disclosure**

The IESO is refusing to file any information related to Schedule A of the Application on the basis that the information relates to contract amendment negotiations, are out of scope, and not relevant to the OEB's section 33 review. As already explained above, the NQS Generation Group does not agree.

This refusal by the IESO follows closely on the heels of the OEB's approval in July 2024 of IESO's application to reduce the scope of disclosure required in section 6.3 of its Licence EI-2013-0066 for an *Electricity Act, 1998* section 33 application.<sup>6</sup> In this proceeding the OEB refers to section 6.3 of the IESO's Licence EI-2013-0066 as the "minimum level of relevant information", stating in Decision and Order EB-2024-0128:

As the IESO has highlighted, paragraph 6.3 of its licence does not restrict the entire scope of evidence that can be filed in a section 33 application. Further, information not included in the initial filing can still be introduced if deemed relevant during the OEB's review of an MRA under section 33 of the *Electricity Act*. Moreover, if the OEB or intervenors require additional information regarding a proposed MRA, they are not precluded from requesting this information.

Thus, the test for disclosure under section 21 of the *Ontario Energy Board Act, 1998* is whether the information requested is relevant to the Application.<sup>7</sup> The standard for meeting the test for relevancy is low. All the information requested in Schedule A is directly relevant to the matters at issue in the Application and has been specifically curated to focus on the core matters at issue. The NQS Generation Group provides Appendix A to this letter to provide the OEB with additional context on why the information requested in Schedule A of the Application is relevant.

The NQS Generation Group notes that other intervenors may also be interested in the production of this and other information as well.

## **3. Premature Procedural Matters**

Finally, the IESO raises a number of procedural matters that are premature, especially since a notice of hearing was only recently issued. The OEB should wait until all interested parties have filed interventions before canvassing submissions or making decisions on procedural matters.

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<sup>6</sup> OEB Decision and Order EB-2024-0128, July 23, 2024, online:  
<<https://www.rds.oeb.ca/CMWebDrawer/Record/859958/File/document>>

<sup>7</sup> See also EB-2013-0010, Letter of Direction to Produce Evidence, January 22, 2013, p.6.

Yours truly,

**BORDEN LADNER GERVAIS LLP**

A handwritten signature in black ink, appearing to read "Colm Boyle". The signature is fluid and cursive, with the first name "Colm" and last name "Boyle" clearly distinguishable.

Colm Boyle

JV/CB

## Appendix A

Section of Application, Schedule A	Relevance of Information Request
<i>SECTION 1</i>	
1(a)	<i>This will allow the OEB, the NQS Generation Group and all other parties to better understand whether the IESO's stated intention throughout the MRP process of not extracting financial value from contracted assets was adhered to internally and in public correspondence through the entire stakeholding process, as well as through support from internal analysis.</i>
1(b)	<i>The OEB, the NQS Generation Group and all other parties need to understand whether the IESO undertook a detailed analysis on the financial impact that MRP may have on some or all Market Participants and if undertaken, any such financial impacts identified were properly considered, as were potential remedies such as revisions to the contemplated MRP Amendments and/or contract amendments or other considerations. This evidence goes directly to whether or not the IESO considered if its proposed MRP Amendments were unjustly discriminatory. If the response is the IESO conducted no such analysis – then that response is probative in its own right.</i>
1(c)	<i>The OEB, the NQS Generation Group and all other parties need to understand if the IESO undertook a detailed analysis on the reduction in revenue to the NQS Generation Group as a direct result of the elimination of the RT-GCG program. This evidence goes directly to whether or not the IESO considered if its proposed MRP Amendments were unjustly discriminatory. If the response is the IESO conducted no such analysis – then that response is probative in its own right.</i>
1(d)	<i>The OEB, the NQS Generation Group and all other parties need to understand how the IESO considered, analyzed and modelled the potential financial risk for the NQS Generation Group and any internal analysis on remedies for the financial risk as a result of the deemed dispatch model. This evidence goes directly to whether or not the IESO considered if its proposed MRP Amendments were unjustly discriminatory. If the response is the IESO conducted no such analysis – then that response is probative in its own right.</i>
1(e), (f)	<i>The OEB, the NQS Generation Group and all other parties need to transparently understand how the IESO modelled the commitment and dispatch of the NQS Generation Group under the current Market Rules compared with under the MRP Amendments and whether this was considered throughout the MRP process. This evidence goes directly to whether or not the IESO considered if its proposed MRP Amendments were unjustly discriminatory. If the response is the IESO conducted no such analysis – then that response is probative in its own right.</i>

1(g)	<i>The OEB, the NQS Generation Group and all other parties need to understand if the IESO undertook detailed modelling on the revenue impact to the NQS Generation Group from changes to the commitment programs and whether these revenue impacts were intended to be addressed by the IESO through other market design changes or contract amendments. This evidence goes directly to whether or not the IESO considered if its proposed MRP Amendments were unjustly discriminatory. If the response is the IESO conducted no such analysis – then that response is probative in its own right.</i>
1(h)	<i>The OEB, the NQS Generation Group and all other parties need to review any analysis by the IESO to determine whether it considered how often/little various members of the NQS Generation Group would be committed under the current Market Rules compared to the MRP Amendments. This evidence goes directly to whether or not the IESO considered if its proposed MRP Amendments were unjustly discriminatory. If the response is the IESO conducted no such analysis – then that response is probative in its own right.</i>
1(i)	<i>The OEB, the NQS Generation Group and all other parties need to understand if the IESO undertook detailed modelling on the financial impact to the NQS Generation Group from the elimination of CMSC and replacement with MWPs. This evidence goes directly to whether or not the IESO considered if its proposed MRP Amendments were unjustly discriminatory. If the response is the IESO conducted no such analysis – then that response is probative in its own right.</i>
1(j)	<i>As the MRP Amendments are modelled after market design elements in other competitive wholesale markets we need to understand whether the IESO considered the unique design of the deemed dispatch contracts in Ontario compared to how other NQS assets are contracted in other competitive wholesale markets. This evidence goes directly to whether or not the IESO considered if its proposed MRP Amendments were unjustly discriminatory. If the response is the IESO conducted no such analysis – then that response is probative in its own right.</i>
1(k)	<i>The OEB, the NQS Generation Group and all other parties need to understand whether the IESO considered and analyzed how NQS assets and other non-NQS assets will be dispatched out of economic merit under the MRP Amendments to better understand the potential for financial harm from NQS assets being displaced by seemingly less economic assets. This evidence goes directly to whether or not the IESO considered if its proposed MRP Amendments were unjustly discriminatory. If the response is the IESO conducted no such analysis – then that response is probative in its own right.</i>
1(l)	<i>There is limited-to-no pricing transparency as a result of the MRP Amendments and this introduces the potential for further financial harm to NQS Generators compared to the current market. This evidence goes directly to whether or not the IESO considered if its proposed MRP Amendments were unjustly discriminatory. If the</i>

	<i>response is the IESO conducted no such analysis – then that response is probative in its own right.</i>
1(m)	<i>No further comments. This evidence goes directly to whether or not the IESO considered if its proposed MRP Amendments were unjustly discriminatory. If the response is the IESO conducted no such analysis – then that response is probative in its own right.</i>
1(n)	<i>No further comments. This evidence goes directly to whether or not the IESO considered if its proposed MRP Amendments were unjustly discriminatory. If the response is the IESO conducted no such analysis – then that response is probative in its own right.</i>
<b>SECTION 2</b>	
2(a)	<i>The OEB, the NQS Generation Group and all other parties need to understand how the IESO analyzed and modelled the commitment and dispatch of resources under MRP Amendments compared to the current Market Rules to determine whether the IESO properly considered the financial harm of the MRP Amendments. This evidence goes directly to whether or not the IESO considered if its proposed MRP Amendments were unjustly discriminatory. If the response is the IESO conducted no such analysis – then that response is probative in its own right.</i>
2(b)	<i>The OEB, the NQS Generation Group and all other parties need to understand if the savings from the original benefits case are largely coming from reduced revenue to the NQS Generation Group compared to other Market Participants (or other means of efficiency) and whether the IESO properly analyzed or considered this outcome. This evidence goes directly to whether or not the IESO considered if its proposed MRP Amendments were unjustly discriminatory. If the response is the IESO conducted no such analysis – then that response is probative in its own right.</i>
2(c)	<i>The OEB, the NQS Generation Group and all other parties need to understand if and how the IESO considered commitment and dispatch concerns from other Market Participants to determine whether there was a different approach that could have been taken in comparison to the approach taken with the NQS Generation Group. This evidence goes directly to whether or not the IESO considered if its proposed MRP Amendments were unjustly discriminatory. If the response is the IESO conducted no such analysis – then that response is probative in its own right.</i>
2(d)	<i>The OEB, the NQS Generation Group and all other parties need to understand why the IESO has moved to a different contract structure (for asset types that were previously contracted under deemed dispatch contracts) as part of its most recent procurements and whether this decision was done as a result of internal analysis. This evidence goes directly to whether or not the IESO considered if its proposed MRP Amendments were unjustly discriminatory. If the response is the IESO conducted no such analysis – then that response is probative in its own right.</i>

2(e)	<i>Same comment as 2(b) above.</i>
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