



**Capital Power Corporation, Thorold CoGen L.P.,
Portlands Energy Centre L.P. doing business as Atura
Power, St. Clair Power L.P., TransAlta (SC) L.P.**

**Application to Review Amendments to the Market Rules
made by the Independent Electricity System Operator**

**DECISION ON MOTIONS BY IESO AND
NQS GENERATION GROUP
January 3, 2025**

On November 7, 2024, Capital Power Corporation, Thorold CoGen L.P., Portlands Energy Centre L.P. doing business as Atura Power, St. Clair Power L.P., and TransAlta (SC) L.P., a group of non-quick start gas-fired generators (NQS Generation Group), jointly filed an application under section 33 of the *Electricity Act, 1998*, S.O. 1998, c. 15, (Schedule B) (*Electricity Act*). The application requests that the Ontario Energy Board (OEB) review a set of amendments to the market rules made by the Independent Electricity System Operator (IESO) (MR-00481-R00 to -R013) (Amendments), revoke the Amendments and refer them back to the IESO for further consideration. The Amendments deal with a comprehensive set of changes to the IESO-administered markets required to operationalize the IESO Market Renewal Program (MRP) to evolve Ontario's electricity market.

Background

On November 19, 2024, the OEB issued Procedural Order No. 1, which directed all parties to attend a transcribed virtual pre-hearing conference on November 26, 2024, and provided for matters to be addressed at the pre-hearing conference.¹

Following the pre-hearing conference, the OEB issued Decision and Procedural Order No. 2 (PO2) on December 2, 2024 which, among other things, made decisions on the scope of the proceeding, intervention requests and cost eligibility, cost responsibility, disclosure requests, and proposed evidence.²

¹ [Procedural Order No.1](#)

² [Decision and Procedural Order No. 2](#)

On December 18, 2024, NQS Generation Group filed its evidence in the form of a report prepared by Power Advisory LLC (Power Advisory Report).³

On December 23, 2024, the IESO filed a Notice of Motion (IESO Motion) seeking an order to strike certain portions of the Power Advisory Report.⁴

On December 23, 2024, the OEB issued its Decision and Procedural Order No. 3 (PO3) which provided, among other things, for NQS Generation Group and intervenors to file written submissions on the IESO Motion by December 30, 2024.⁵

On December 23, 2024, NQS Generation Group filed a Notice of Motion seeking a review and variance of portions of PO2 pursuant to Rule 40.01 and 42.01(a) of the OEB's Rules of Practice and Procedure (NQS Motion).⁶

On December 30, 2024, in accordance with PO3, NQS Generation Group filed its Reply to the IESO Motion (NQS Reply).⁷ No other party filed a submission on the IESO Motion.

This decision addresses the IESO Motion and the NQS Motion.

IESO Motion to Strike Portions of the Power Advisory Report

The IESO Motion requests an order of the OEB that:

- (a) strikes out portions of the Power Advisory Report on the basis that they are “irrelevant, out of scope, and contrary to Procedural Order 2”;
- (b) directs NQS Generation Group to file and deliver an amended Power Advisory Report on or before January 3, 2025, that redacts the portions struck;
- (c) requires NQS Generation Group to pay the IESO's costs for the Motion; and
- (d) provides such further and other relief that the OEB deems just.

The IESO Motion makes the following general arguments:

- The NQS Generation Group's allegations that the IESO's proposed Term Sheet (contract) amendments are not sufficient to mitigate the financial impact of the

³ [NQS Generation Group Evidence](#)

⁴ [IESO's Motion](#)

⁵ [Decision and Procedural Order No. 3](#)

⁶ [NQS Generation Group Motion](#)

⁷ [NQS Generation Group Reply to IESO Motion](#)

Amendments, exceed the bounds of a market rule amendment review under section 33(9) of the *Electricity Act* and are out-of-scope.⁸

- In its decision in PO2, the OEB determined that “the contracts themselves and the provisions for generators to seek amendments to those contracts are separate from the issue of whether the Amendments are inconsistent with the purposes of the Electricity Act or will result in unjust discrimination”.⁹
- The OEB’s ruling on scope in PO2 is to intended to govern subsequent steps in the proceeding.¹⁰
- The Power Advisory Report contains inadmissible evidence in breach of PO2 regarding the impact of the Amendment on the NQS Generation Group’s contracts and how such impacts are not adequately mitigated by the IESO’s proposed contract amendments.¹¹
- Parties need clear direction on the scope of this proceeding to ensure that it proceeds efficiently and in accordance with the statutory 120-day timeline.¹²
- NQS Generation Group should be required to pay IESO’s costs of the motion which would have been unnecessary if they complied with PO2.¹³

In its reply argument, NQS submits that the IESO Motion should be dismissed and makes the following general arguments:

- In order to meet the burden of proof to demonstrate unjust economic discrimination, the NQS Generation Group has a right to have the entirety of its application and evidence heard by the OEB.¹⁴
- OEB procedure is subject to principles of natural justice and fairness and a high degree of procedural fairness is owed to the NQS Generation Group in this proceeding.¹⁵
- The striking of evidence is generally not done during the preliminary stages of a proceeding unless it is absolutely clear that the evidence is not relevant.¹⁶

⁸ IESO Motion para 6

⁹ IESO Motion para 10

¹⁰ IESO Motion para 11

¹¹ IESO Motion para 15

¹² IESO Motion para 23

¹³ IESO Motion para 24

¹⁴ NQS Reply, para 10

¹⁵ NQS Reply, para 15-17

¹⁶ NQS Reply para 18

- The OEB should not determine the admissibility of the Power Advisory Report in advance of a hearing on the merits.¹⁷
- The IESO Motion is inconsistent with PO3 which granted an intervenor the opportunity to file evidence regarding the impact of the Amendments on the intervenor and in doing so, the OEB is allowing evidence of contractual harms to be filed by the intervenor.¹⁸
- The consequential impacts of the Amendments on the NQS Generation Group arising from their contracts with the IESO is linked to an issue in this proceeding, namely whether the Amendments result in unjust economic discrimination against NQS Generation Group and are inconsistent with the Electricity Act.¹⁹
- NQS Generation Group disagrees that the IESO should recover its costs of its motion and notes that PO2 requires the IESO to bear its own costs of this proceeding.²⁰

NQS Motion to Review and Vary PO2

The NQS Motion seeks a review of portions of PO2 and variation of PO2 to determine that:

- i. contractual matters are within the scope of a section 33 review;
- ii. directing to the IESO to file the information and documents set out in Appendix A of the application filed by the NQS Generation Group; and
- iii. the IESO should bear any costs awarded to the intervenors School Energy Coalition and Consumers Council of Canada.

The NQS Motion also submits that new facts have arisen since the decisions made in PO2 which, if made available at the relevant time, could reasonably be expected to result in a material change to the decision in PO2.²¹

¹⁷ NQS Reply, para 23-24

¹⁸ NQS Reply para 30-33

¹⁹ NQS Reply para 48

²⁰ NQS Reply, para 56

²¹ Ibid., para. 20

Decision

There are three sets of issues raised by the IESO and NQS Motions:

- (a) The relevance of portions of the evidence filed by NQS Generation Group – this issue is raised in the IESO Motion and in the scoping issue set out in the NQS Motion (the Relevance and Scoping Issue);
- (b) The disclosure issue raised in the NQS Motion (the Disclosure Issue); and
- (c) The costs issues raised in both Motions (the Cost Responsibility Issue).

These are addressed separately below.

The Relevance and Scoping Issue

The IESO Motion and the scoping issue raised in the NQS Motion are both related to the relevance of portions of the Power Advisory Report filed by NQS Generation Group, given the OEB's decision in PO2.

In PO2, the OEB determined that its review under section 33 of the *Electricity Act* would be limited to the Amendments themselves, without regard to contractual matters, to determine if the Amendments are inconsistent with the purposes of the *Electricity Act* or unjustly discriminate against a market participant or class of market participants.

Despite this, the NQS Generation Group filed evidence that includes consideration of contractual matters.

The IESO Motion seeks an order:

- (a) striking out portions of NQS Generation Group's Power Advisory Report on the basis that evidence relating to contractual matters is “irrelevant, out of scope, and contrary to Procedural Order 2”; and
- (b) directing NQS Generation Group to file an amended Power Advisory Report that redacts the portions struck.

In the NQS Motion and its submissions filed in response to the IESO Motion, the NQS Generation Group argues that the evidence relating to contractual matters is relevant and that the OEB's decision in PO2 that determined that the scope of the proceeding would be limited to a review of the Amendments themselves, without regard to contractual matters, is incorrect and should be reversed.

The NQS Motion alleges that the OEB breached the principles of procedural fairness and natural justice by failing to give NQS Generation Group its right to be heard, and by misinterpreting the *OEB Act*, and the *Electricity Act*.²²

The NQS Generation Group also alleges that the OEB fettered its discretion and unjustifiably narrowed the scope of the section 33 review under the *Electricity Act* and in so doing, prevented NQS from answering its case before the OEB.²³

The OEB finds that the NQS Generation Group makes the same arguments already rejected by the OEB. Their position at the pre-hearing conference was clear: the Amendments are unjustly discriminatory on their face, and the effect is made worse under their contractual arrangements with the IESO:

COMMISSIONER MORAN: ... So, again just to understand where you want to go with this review, I take it why you're pointing to that is that you want us to understand or you want to argue and convince us that these market rule amendments, based on the existing contractual arrangements that you're operating under, amount to unjust economic discrimination; is that fair?

MR. VELLONE: I would say that is a portion of our argument but not the totality of it.

COMMISSIONER MORAN: Okay. What would the rest --

MR. VELLONE: The market rule amendments are discriminatory in their own right, and that is just made worse by the contracts that operate, that the generators have.

COMMISSIONER MORAN: All right, so what you want to argue is that, on a standalone basis, without regard to any contractual relationships that you may have, your client may have, with the IESO, that the amendments themselves in their entirety give rise to unjust economic discrimination?

MR. VELLONE: Correct, and then that is made significantly worse by the procurement contracts in question.²⁴ [emphasis added]

²² Ibid., para 21-22.

²³ Ibid., para. 23, 25, 27

²⁴ [Pre-hearing Conference Transcript](#), p.74, line 8 to p.75, line 1

Consistent with the approach taken by NQS Generation Group, in its own submissions asserting that the Amendments, on their face, unjustly discriminate against the NQS generators, the OEB determined that it was not necessary to inquire into the contractual arrangements with the IESO, describing the position taken by the NQS Generation Group as follows:

NQS Generation Group takes the position that the Amendments result in unjust discrimination in the IESO-administered electricity market against a class of market participants, namely the non-quick start gas-fired generators. NQS Generation Group goes on to assert that the procurement contracts between the IESO and those generators makes the discrimination worse.²⁵ NQS Generation Group argues that the nature of the process followed by the IESO to develop the Market Rule Amendments and the interaction of the contracts with the Market Rules also fall within the scope of the issues to be determined.²⁶

The OEB concluded as follows:

The issue of unjust discrimination is clearly within the purview of the OEB in this section 33 review, regardless of any contract, and the OEB fully intends to carry out that review. NQS Generation Group has not established any basis on which contractual matters could be within the scope of this section 33 review.²⁷

NQS Generation Group has not provided any new basis on which to revisit the scoping decision. They point to their Power Advisory Report as providing a new basis for reconsideration. Having reviewed the Power Advisory Report for this purpose, the OEB finds that there is no new basis presented. Instead, the filed evidence is entirely consistent with the submissions made by the NQS Generation Group at the pre-hearing conference. In effect, the NQS Generation Group is simply seeking a second kick at the can.

In paragraph 16 of the IESO motion, the IESO has enumerated the references in the Power Advisory Report that the IESO asserts is outside the scope of what the OEB decided in PO2. Having reviewed those references, the OEB agrees that they fall outside the scope of what the OEB needs to consider in answering the question of whether the Amendments are inconsistent with the purposes of the Electricity Act or unjust discriminate against or in favour of a market participant or class of market

²⁵ [Decision and Procedural Order No. 2](#), at p. 4

²⁶ Ibid.

²⁷ [Decision and Procedural Order No. 2](#), at pp. 5-6

participants. However, the OEB will not strike the impugned evidence from the record or require NQS Generation Group to file a revised Power Advisory Report. Having determined that evidence relating to contractual matters is out of scope, the OEB will allow it to remain on the record for context only. However, to the extent that a party seeks to rely on it to argue that the market rule amendments are unjustly discriminatory or inconsistent with the purposes of the Electricity Act, the OEB will disregard that evidence. The question before the OEB is focused on the Amendments themselves. That is why the OEB directed the IESO to provide a detailed overview of the Amendments and their impact on market participants.

In its submissions responding to the IESO Motion, NQS Generation Group asserts that in PO3, the OEB has allowed FirstLight to file “evidence of contractual harms”, and that it is unfair to prevent NQS Generation Group from also doing so. This argument must fail, given the clear direction the OEB gave to FirstLight in PO3:

Given that the OEB is not requiring the IESO to file further information, the OEB will allow FirstLight to submit its own evidence describing the nature of the impact that FirstLight says the Amendments will have from their perspective. **Any such evidence from FirstLight shall be restricted to the scope of this proceeding as described in PO2** and be filed by December 31, 2024. [emphasis added]

To the extent that the FirstLight evidence goes beyond the scope of the proceeding established in PO2, the OEB will treat it in the same manner as the NQS Generation Group evidence.

The OEB directs NQS Generation Group and FirstLight to ensure that when it comes time for them to present evidence in the oral hearing, that the evidence remains within the scope of the proceeding, as provided in PO2.

Disclosure Issue

The NQS Motion alleges that the OEB did not consider all the relevant and material evidence when denying its request that the IESO provide responses to the disclosure requests set out in Schedule A of the NQS application. NQS Generation Group noted that the OEB justified its decision on the Disclosure Issue by referring to its conclusion drawn in the Scoping Issue (which NQS also challenges).

Because the OEB finds that the NQS Generation Group is unsuccessful on the Relevance and Scoping Issue, it follows that it is also unsuccessful on the Disclosure Issue as raised in the NQS Motion.

Cost Responsibility Issue

The NQS Motion alleges that the OEB erred in departing from prior OEB panels with respect to its decision on the issue of cost responsibility.²⁸ In PO2, the OEB determined that the NQS Generation Group shall be responsible for its own costs and any costs awarded to the School Energy Coalition and Consumers Council of Canada (each intervenors in the proceeding). The NQS Motion objects to the OEB's characterization that the Application is about commercial interests and maintains that its Application is about the financial harms that it will suffer as a result of the Amendments and also raises legitimate and important public policy and public interest issues.²⁹

The NQS Motion states:

For the reasons set out at paragraphs 8 and 9 above, the NQS Generation Group objects to the OEB's characterization of the Application in the Costs Issue that "It is clear that NQS Generation Group is pursuing its commercial interests in bringing this application..." Rather, the Application clearly states that the financial harms suffered by the NQS Generation Group are caused by the MRP Amendments.³⁰

In relation to the issue of cost responsibility, the OEB finds that this is a distinction without a material difference.

The NQS Motion also states:

Moreover, the NQS Generation Group stated at the pre-hearing conference that the Application raises legitimate and important public policy and public interest issues in relation to the criteria set out in section 33 of the *Electricity Act*.³¹

The OEB recognizes that the application raises important questions that will be addressed in this proceeding, undiminished by the OEB's decision on cost responsibility. The NQS Generation Group has not established a basis on which to change the decision on cost responsibility set out in PO2.

²⁸ [NQS Generation Group Motion](#), at para 41

²⁹ *Ibid.*, para 43

³⁰ *Ibid.*, para.43

³¹ *Ibid.*

In the IESO Motion, the IESO seeks its costs for the motion. The OEB has already determined that the IESO will bear its own costs in this proceeding and sees no reason to change this approach.

Conclusion and Order

The OEB grants the IESO Motion to the extent of confirming its decision on scope of the proceeding set out in PO2. The OEB denies the IESO request to strike the impugned portions of the Power Advisory Report. They may remain on the record for context only. The OEB dismisses the NQS Motion in its entirety for the reasons outlined.

DATED at Toronto, **January 3, 2025**

ONTARIO ENERGY BOARD

Nancy Marconi
Registrar