

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Electricity Act*, 1998, S.O. 1998, c. 35
(the “**Electricity Act**” or “**Act**”);

AND IN THE MATTER OF an Application by 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**”) for Review of Amendments to the Independent Electricity System Operator Market Rules

**IESO SUBMISSIONS ON DOCUMENTS
FOR EXPERT WITNESS CROSS-EXAMINATION**

January 13, 2025

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OVERVIEW

1. The Independent Electricity System Operator (the “**IESO**”) makes these submissions pursuant to the directions of the Ontario Energy Board (the “**Board**” or “**OEB**”) on January 10, 2025.
2. At issue is the IESO’s request to put two emails authored by the Applicants’ proposed expert witness Power Advisory LLC (“**Power Advisory**”) to Power Advisory on cross-examination. The Applicants propose to qualify three Power Advisory representatives as **independent** expert witnesses and the emails go directly to the independence, or lack thereof, of these witnesses.
3. The Supreme Court of Canada, the Court of Appeal for Ontario, and the OEB have all emphasized the importance of a proposed expert’s independence and the OEB has confirmed that any challenge to a proposed expert’s independence must be addressed before the proposed expert is qualified.
4. The IESO is entitled to test the independence of the proposed Power Advisory expert witnesses on cross-examination, which is crucial to the Board’s ultimate consideration of the admissibility of the Applicants’ expert evidence or, if admitted, the weight ultimately to be afforded to such evidence.
5. For the reasons set out below, the Applicants’ objections to these documents being presented to the proposed Power Advisory expert witnesses are without merit and the IESO should be entitled to put these documents to the Power Advisory witnesses as part of the Applicants’ proposed expert qualification of these witnesses.

BACKGROUND

The Application

6. On November 7, 2024, the Applicants commenced an application under section 33 of the *Electricity Act*, 1998, SO 1998 c. 15 (Schedule B) (the “**Electricity Act**”), requesting that the OEB review amendments to the market rules (the “**MRP Amendments**”) made by

the IESO, revoke the MRP Amendments, and refer them back to the IESO for further consideration.

7. The Applicants allege in the Application that the MRP Amendments result in unjust discrimination to them, which discrimination is made worse by their procurement contracts with the IESO. The Applicants further allege in the Application that the claimed harms sustained by them may be addressed through either amendments to their procurement contracts and/or revocation of the MRP amendments.¹

The Applicants' Expert Evidence

8. On December 18, 2024, the Applicants' filed a report titled "Expert Evidence in Appeal" (the "**Expert Report**") prepared by Brady Yauch, Michael Killeavy, and Jason Chee-Aloy of Power Advisory and advised that Power Advisory "will opine on the following areas of expertise: energy markets, wholesale energy design, energy contract design and operations, and energy policy."²

9. Power Advisory opines in its Expert Report that the MRP Amendments will cause the Applicants to be committed and dispatched less and that this will cause financial harm to them.³ Power Advisory opines that this harm may also be redressed through amendments to the Applicants' contracts.⁴

¹ Application, paragraph 10. In its Decision and Procedural Order No. 2 dated December 2, 2024 ("**Procedural Order 2**") at page 6, the Board determined, among other things, that the Applicants had "not established any basis on which contractual matters could be within scope of this section 33 review."

² Letter from Colm Boyle to Nancy Marconi dated December 18, 2024.

³ Power Advisory Expert Report, para. 16.

⁴ Power Advisory Expert Report, paras. 21, 69-83; On December 23, 2024, the IESO filed a motion to strike those portions of the Expert Report that purport to deal with the alleged impacts of the MRP Amendments on the Applicants' contractual rights and obligations. By way of Decision dated January 3, 2025, the Board granted IESO's motion to the extent of confirming that it agreed that those portions of the Expert Report identified by the IESO were out of scope but refused to strike the impugned portions of the Expert Report, allowing them to remain on the record for context only: Decision on Motions by IESO and NQS Generation Group dated January 3, 2025 at pages 7-8, 10.

The Technical Conference

10. In accordance with Procedural Order 2, the Technical Conference proceeded on January 9-10, 2025, with the IESO presenting its witnesses on January 9, and the Applicants presenting their witnesses on January 10.

11. On the morning of January 9, 2025, counsel for the IESO sent an email to the Applicants and all other parties, attaching two emails which counsel advised they may refer to in their questioning of the Applicants' witnesses on the following day:

- a. An email from Jason Chee-Aloy of Power Advisory to Darryl Yahoda of the IESO dated May 13, 2021 requesting a meeting on behalf of the Applicants, Atura Power, Capital Power, Northland Power and TransAlta, to discuss "analysis of the MRP Detailed Design relating to the working draft contract amendment term sheets received by these generators." Mr. Chee Aloy stated that the Power Advisory representatives at the meeting would include himself, Mr. Killeavy and Mr. Yauch; and
- b. An email from Jason Chee-Aloy to Darryl Yohoda dated May 25, 2021 attaching a PowerPoint presentation for the May 26th meeting titled "Analysis of Impacts of MRP Design and Draft Term Sheet" (collectively, the "**Disputed Documents**"). The PowerPoint presentation argued – as Power Advisory now opines in its Expert Report – that Power Advisory's analysis showed that the IESO's proposed MRP design together with the IESO's proposed term sheet amendments to the NQS generators' contracts:
 - would cause NQS generators negative financial implications;
 - would commit/schedule NQS generators less relative to present market design/rules, resulting in lower market revenues; and

impute NQS generators more relative to present contract settlement, resulting in lower contingency support payments under the contracts.

12. The Applicants' counsel advised that the Applicants objected to the Disputed Documents being presented to its witnesses on the basis that both emails relate to a discussion about the working draft amendment term sheets and not the MRP Amendments and that the May 25, 2021 email and its attachment is marked as "Confidential & Without Prejudice", was prepared in contemplation of settlement negotiations and its disclosure is a breach of confidentiality under the relevant agreements.⁵

13. OEB staff advised the Board of the Applicants' objection and the Board directed that the Disputed Documents would not be allowed to be entered as exhibits nor would questions be allowed at the Technical Conference, but if the IESO wished to introduce these documents it could file written submissions on Monday, January 13, 2025 explaining the purpose of the documents and why they are or are not confidential.⁶

14. The IESO complied with the Board's direction and did not put the Disputed Documents to the Applicants' witnesses at the Technical Conference.

15. On day two of the Technical Conference, Jason Chee-Aloy, Brady Yauch, and Michael Killeavy of Power Advisory were put forward as the Applicants' witnesses and Applicants' counsel confirmed that the Applicants would be looking to have the Board accept Power Advisory as independent experts in energy markets, wholesale market design, energy contract design and operations and energy policy.⁷

16. During questioning from the IESO's counsel, Mr. Chee-Aloy confirmed that Power Advisory has acted for all the Applicants on the matters that are subject of this Application and the Power Advisory Expert Report:

Mr. Zacher: So just coming back to my specific question, have you acted for any of the specific Applicants in this proceeding, on the matters that are the subject of this application and your evidence in

⁵ Email from Colm Boyle to Ljuba Djurdjevic et al dated January 9, 2025.

⁶ OEB Transcript from Technical Conference dated January 10, 2025 ("Jan. 10 Technical Conference Transcript"), page 2 lines 3-14.

⁷ Jan. 10 Technical Conference Transcript, page 3, lines 27-28; page 4, lines 1-2; page 10, lines 15-28; page 11, lines 1-20.

this proceeding, that is the impact of the MRP amendments on market revenues or contract revenues or both?

Mr. Chee-Aloy: Yes, we have.

Mr. Zacher: Okay. Which Applicants?

Mr. Chee-Aloy: All of them.⁸

17. Mr. Chee-Aloy confirmed Power Advisory's continued view that the contract impacts and Market Rule impacts are inseparable.⁹

18. Applicants' counsel refused any further questions concerning Power Advisory's work for the Applicants in the MRP Amendment process, including: (i) whether Power Advisory met with IESO and made presentations to IESO on behalf of the Applicants on matters that are covered by the Power Advisory Expert Report; (ii) whether Power Advisory, on behalf of the Applicants, advocated the same position as set out in the Expert Report in earlier MRP-related contract discussions or other dealings with the IESO; (iii) whether the witnesses continue to be engaged by some or all of the Applicants in respect of the MRP-related contract amendment negotiations with the IESO; and (iv) whether Power Advisory had performed a similar analysis to that found in Appendix B of the Expert Report prior to being retained in November 2024 to provide expert evidence in this proceeding.¹⁰

THE LAW

19. The OEB has confirmed that "[a]ny party who intends to challenge the independence or other aspects of an expert witness's qualifications must do so before he or she is qualified to give expert evidence."¹¹

⁸ Jan 10 Technical Conference Transcript, page 17, lines 24-28; page 18, lines 9-14, 19-27. See also page 14, lines 27-28; page 15, lines 1-2.

⁹ Jan 10 Technical Conference Transcript, page 17, lines 13-23;

¹⁰ Jan 10 Technical Conference Transcript, page 19, lines 17-27; page 20, lines 2-11, 25-28; page 21, lines 1-28; page 22, lines 1-28; page 23, lines 1-28; page 24, lines 1-8; page 35, lines 3-15. On questioning by counsel for the CCC, Mr. Yauch and Applicants' counsel refused to disclose the live excel working copies of figures 19, 20 and 22 found in Appendixes B and C of the Power Advisory Expert Report on the basis that the model was proprietary – Jan 10 Technical Conference Transcript, page 144, lines 22-28; page 145, lines 1-28; page 146, lines 1-28; page 147, lines 1-28; page 148, lines 1-4.

¹¹ EB-2016-0152 at page 100.

20. The law surrounding the admissibility of expert evidence is well-established and emphasizes the trier of fact's necessary and important gatekeeper role in screening inadmissible expert evidence.¹²

21. The Supreme Court of Canada in *R. v. Mohan* and its more recent decision *White Burgess Langille Inman v. Abbott and Haliburton* prescribes a two-step process. First, the party tendering expert evidence has the onus of proving that the evidence satisfies the four threshold admissibility requirements: relevance, necessity, absence of an exclusionary rule, and a properly qualified **independent** expert. If the evidence does not satisfy all of these requirements, it is excluded.¹³

22. Second, if the proposed expert evidence survives the admissibility threshold, the trier of fact will assess the value of the evidence against the potential harm of admitting it. If the value of the evidence is marginal or outweighed by prejudice or other risks, the trier of fact may exclude it.¹⁴

23. In *White Burgess*, the Supreme Court of Canada clarified that an expert's lack of impartiality and independence goes to the admissibility of the expert evidence, not just its weight and, as such, an expert's impartiality and independence should be considered by the trier of fact at **both** the admissibility stage and the gatekeeping stage of the inquiry.¹⁵

24. An expert witness cannot and does not meet the threshold requirement of independence if the expert is or has acted as an advocate on behalf of the party in respect of which the proposed expert witness's evidence is tendered.¹⁶ In *Fellowes, McNeil v. Kansa General International Insurance Co.*, the Ontario Superior Court of Justice rejected proposed independent expert evidence from a lawyer tendered on behalf of a defendant because the lawyer had earlier acted as an advocate for the defendant in related matters.

¹² *R. v. Mohan*, 1994 CanLII 80 (SCC) at para 23; See also *White Burgess Langille Inman v. Abbott and Haliburton*, 2015 SCC 23 ("*White Burgess*") at paras. 16-17.

¹³ *White Burgess* at para. 19.

¹⁴ *White Burgess* at paras. 20-21.

¹⁵ *White Burgess* at paras. 40, 53-54, *Bruff-Murphy v. Gunawardena*, 2017 ONCA 502 at paras. 38-39; *R. v. Abbey*, 2017 ONCA 640 at para. 55.

¹⁶ See *White Burgess* at paras. 35-37.

The Court found that the lawyer did not have the minimum level of independence required due to his role as an advocate on behalf of the defendant.¹⁷

25. Similarly, in *M.M. v. R.M.*, the Ontario Superior Court of Justice rejected proposed independent expert evidence from an accountant tendered on behalf of the respondent because the accountant had been the accountant for the respondent long before he was approached to give independent expert evidence. The Court found that it was impossible to untangle his longstanding work for the respondent and suggest his opinion was somehow impartial.¹⁸ In so holding, the Court reiterated an oft-cited passage from *Ebrahim v. Continental Precious Minerals*, wherein Justice Brown (as he then was) similarly rejected the defendant's expert evidence from the founder and CEO of Kingsdale Shareholder Services Inc., on the basis that Kingsdale had previously executed a multi-year contract with the defendant to provide shareholder services, stating that **"a person under retainer to a party to litigation, however qualified he might be in the subject area, lacks the independence necessary to provide opinion evidence that is 'fair, objective and non-partisan'"**.¹⁹

26. The OEB has made clear that it, like the courts, requires that expert witnesses be independent and impartial.²⁰

27. In EB 2010-0008, a decision which pre-dates *White Burgess*, the OPG filed an expert report which gave evidence that using CWIP to finance nuclear power plants was becoming the accepted approach in US jurisdictions. Several intervenors objected to this evidence based on independence concerns given that the proposed independent expert had been an advocate for the recovery of CWIP by utilities.²¹

28. While the OEB allowed the expert to give evidence, it ultimately found the report to be a "completely one-sided account of the issue"²² and emphasized that the Board expects

¹⁷ *Fellowes, McNeil v. Kansa General International Insurance Co.*, 1998 CanLII 14856 (ON SC).

¹⁸ *M.M. v. R.M.*, 2016 ONSC 7003 ("*M.M.*") at para. 16.

¹⁹ *M.M.*, 2016 ONSC 7003 at para. 16, citing *Ebrahim v. Continental Precious Minerals*, 2012 ONSC 9818 at paras. 46.

²⁰ EB-2010-0008 at page 79.

²¹ EB-2010-0008 at page 79; Transcript from EB-2010-008 at page 13, lines 11-21; pages 15-16, lines 24-28 and 1-25; page 27, lines 8-19.

²² EB-2010-0008 at page 78.

objectivity from independent expert witnesses.” The Board gave little weight to the evidence and held that it could not be relied upon by OPG as underpinning its request for CWIP.²³

ARGUMENT

29. As the authorities make clear, the independence of expert witnesses is a crucial consideration in both determining the admissibility of and weighing expert evidence and the IESO submits that it should be allowed to ask questions of the Applicants’ purported independent expert witnesses on this critical issue.

30. There is no basis for the Applicants’ assertions that the Disputed Documents should not be allowed to be presented to the Applicants’ witnesses because they speak to contractual matters and/or are ostensibly confidential and subject to settlement privilege.

31. First, the fact that Power Advisory has acted and may still be acting for the Applicants in an advocacy role is relevant to the independence issue irrespective of the matters on which they are retained - Power Advisory does not satisfy the threshold requirement to be **independent** expert witnesses if it has or is advocating for the Applicants on matters that relate to the matters that are the subject of Power Advisory’s Expert Report.

32. Second, while contractual matters are out of scope for this section 33 review as confirmed in Procedural Order 2, the IESO is not seeking to rely upon the Disputed Documents for the purposes of addressing the impact of the MRP Amendments on contract matters. It is seeking to rely upon the Disputed Documents for the purposes of addressing whether the Power Advisory witnesses satisfy the criteria for being independent expert witnesses. Further, the Board refused to strike those portions of the Expert Report that purport to deal with the alleged impacts of the MRP Amendments on the Applicants’ contractual rights and obligations, allowing them to remain on the record for context. Moreover, at the Technical Conference, Applicants’ counsel confirmed that the Applicants would be seeking to have Power Advisory qualified as experts in energy contract design and operations.

²³ EB-2010-0008 at page. 79.

33. Third, as confirmed in Procedural Order 2, contractual negotiations between the IESO and the Applicants are proceeding in parallel to this proceeding. If the Applicants are unsuccessful in this Application, they may pursue these contractual negotiations, and failing agreement, have recourse to arbitration. It strains credulity to suggest that Power Advisory's advocacy work on behalf of the Applicants in the contractual negotiations is irrelevant to whether they can act as **independent** expert witnesses in these related proceedings. The Applicants plead in the Application and Power Advisory opines in its Expert Report that the alleged unjust treatment and harms resulting from the MRP Amendments may be redressed through both revocation of the MRP Amendments and/or amendments to the Applicants' contracts.

34. Fourth, there is no basis to suggest that the Disputed Documents should not be allowed on the basis of settlement privilege and/or confidentiality. Settlement privilege only applies when the following criteria are established: (i) a litigious dispute must be in existence or within contemplation; (ii) the communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and (iii) the purpose of the communication must be to attempt to effect a settlement.²⁴ Unconditional assertions of privilege (i.e. without prejudice labels) are not dispositive.²⁵

35. The Disputed Documents relate to contract negotiations in 2021, over three and a half years ago. Not only was litigation not in existence in 2021 but there can be no serious suggestion that litigation was contemplated at that time. Absent ongoing or contemplated litigation, contractual negotiations are not protected by settlement privilege.²⁶ Labelling documents "without prejudice" or "settlement privileged" does not make them so.

36. Finally, the IESO does not agree that the Disputed Documents contain confidential information. The information contained in the disputed documents is repeated in the Application and the Power Advisory Expert Report; any information that may have been confidential is no longer confidential, or any confidentiality has been waived. Alternatively,

²⁴ *R. v. Delchev*, 2015 ONCA 381 at para. 24.

²⁵ *Algoma Steel Inc. v. Capitol Steel Corporation et al*, 2021 ONSC 2531 at para. 37.

²⁶ *L'Abbé v. Allen-Vanguard*, 2011 ONSC 7575 at para. 32; *Lucas et al v. 1858793 Ontario Inc. o/a Howard Park et al*, 2020 ONSC 964 at para. 46, affirmed 2021 ONCA 52 at paras. 55-56.

the IESO has not to date filed the Disputed Documents and is prepared to file them confidentially in accordance with the OEB's Practice Direction on Confidential Filings if that is necessary.

37. For the reasons set out above, the IESO respectfully requests that it be allowed to ask the Power Advisory witnesses about the Disputed Documents at the time that the Applicants seek to qualify them as independent expert witnesses at the hearing scheduled for January 15-17, 2025. This will assist the Board in determining whether Power Advisory's evidence is admissible and, if so, what weight should be accorded to the evidence.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of January, 2025.



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