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File No. 043650.00001

December 23, 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”)
Notice of Motion**

In accordance with the Ontario Energy Board’s *Rules of Practice and Procedure*, please find enclosed the notice of motion to review and vary the Decision issued on December 2, 2024 in EB-2024-0331.

Please contact the undersigned with any questions.

Yours truly,

BORDEN LADNER GERVAIS LLP

A handwritten signature in black ink, appearing to read 'Colm Boyle', is written over a horizontal line.

Colm Boyle

JV/CB

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sched. B, as amended;

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**”) for a review of the Market Renewal Program Market Rule Amendments passed by the Board of Directors of the Independent Electricity System Operator (“**IESO**”) on October 18, 2024.

AND IN THE MATTER OF the Ontario Energy Board’s (“**OEB**”) Decision and Procedural Order No. 2 dated December 2, 2024;

AND IN THE MATTER OF Rules 8 and 40, 42 and 43 of the Rules of *Practice and Procedure* of the Ontario Energy Board.

NOTICE OF MOTION

The NQS Generation Group will make a Motion to the OEB on a date and at a time to be determined by the OEB.

PROPOSED METHOD OF HEARING: The NQS Generators propose that the Motion be heard by way of an oral hearing.

THE MOTION IS FOR:

1. A review and variance of those portions of the Decision and Procedural Order No. 2 in EB-2024-0331 dated December 2, 2024 (referred to herein as the “**Decision**”) in which the OEB determined the following issues (collectively referred to in this Motion as the “**Review Issues**”):
 - i. The determination that the NQS Generation Group has not established any basis on which contractual matters could be within the scope of this section 33 *Ontario Energy Board Act*, 1998 review (the “**Scoping Issue**”);

- ii. The refusal by the OEB to direct the IESO to file certain information and documents set out in Appendix A of the application filed by the NQS Generation Group on November 7, 2024 (“**Disclosure Issue**”); and
 - iii. The determination by the OEB that the NQS Generation Group should bear any costs awarded to the School Energy Coalition and Consumers Council of Canada (“**Costs Issue**”).
2. An Order that the Motion raises issues material enough to warrant a review of the Decision on the merits thus satisfying the “threshold test” in Rule 43.01 of the OEB’s *Rules of Practice and Procedure* in relation to each of the Review Issues.
3. Variation of the Decision in relation to the Review Issues to determine that:
- i. contractual matters are within scope of a section 33 *Ontario Energy Board Act, 1998* 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 School Energy Coalition and Consumers Council of Canada.
4. Such further and other Orders as the NQS Generation Group may request and the OEB approves.

THE GROUNDS FOR THE MOTION ARE:

The proceeding

5. On October 18, 2024, the Independent Electricity System Operator’s (“**IESO**”) Board of Directors approved a package of amendments (“**MRP Amendments**”), known as “market rule amendments MR-00481-R00-R13”, to the full suite of Ontario Electricity Market Rules (“**Market Rules**”) which were required to operationalize the Market Renewal Program (“**MRP**”).

6. The NQS Generation Group Gas filed an application with the OEB on November 7, 2024 for, *inter alia*, the following relief and was prepared in accordance with all relevant OEB guidance:
- i. review of the IESO's MRP Amendments of the Market Rules under section 33(4) of the *Electricity Act, 1998*;
 - ii. an order revoking the MRP Amendments and referring them back to the IESO for further consideration on the basis the MRP Amendments are inconsistent with the purposes of the *Electricity Act, 1998* and unjustly discriminates against a market participant or class of market participants under section 33(9) of the *Electricity Act, 1998*; and
 - iii. that the OEB exercise its discretion under section 21 of the *Ontario Energy Board Act, 1998* to direct the IESO to provide more fulsome disclosure relating to the MRP Amendments, which disclosures would be specifically relevant to the matters in dispute in the Application (see Schedule A).
7. The Decision and this Motion relate to certain determinations made by the OEB in its Decision that will have material impacts on the NQS Generation Group in respect of the issues remaining to be resolved.
8. The NQS Generation Group has significant concern with how the OEB hearing panel has characterized its Application as a “clear” pursuit of “commercial interests” against a not-for-profit entity that is funded by electricity ratepayers.¹ Rather, when properly characterized the Application is about the IESO implementing MRP Amendments that are unjustly discriminatory against the NQS Generation Group and are inconsistent with the purposes of this *Electricity Act, 1998*.
9. The adverse financial consequences to the NQS Generation Group are a result of unjustly discriminatory MRP Amendments by the IESO. The OEB has determined it is a

¹ EB-2024-0331, Procedural Order No. 2, page 9.

requirement for section 33 applicants to demonstrate unjust economic discrimination.² This legal test should not prejudice the NQS Generation Group's Application before the OEB hearing panel.

The Decision

10. The OEB issued the Decision on December 2, 2024. Consistent with the Decision, on December 18, 2024, the NQS Generation Group filed expert evidence prepared by Power Advisory LLC (the "**Expert Evidence**"). The Expert Evidence includes, *inter alia*, evidence that the impact of the MRP Amendments under the relevant contracts is calculated to be \$250 million over the 2018 – 2023 time frame if applied to all the MWs owned by the NQS Generation Group that are subject to deemed dispatch contract. This is in addition to \$140 million in calculated market impacts over the same 6-year period, which collectively constitutes the NQS Generation Group's evidence of unjust economic discriminatory impacts of the MRP Amendments.
11. On December 23, 2024, the IESO filed a motion to strike as irrelevant and out-of-scope and contrary to Procedural Order No. 2 the portions of the Expert Evidence dealing with the impacts of the MRP Amendments under the contracts. The IESO argues that the effect of the Decision is to rule as out-of-scope expert evidence of a calculated \$250 million in harm to the NQS Generation Group caused by the MRP Amendments.
12. The NQS Generation Group disagree with the IESO that this is the effect of the Decision. In the Decision, the OEB had ruled the NQS Generation Group had "not established any basis upon which contractual matters could be within scope of this section 33 review."
13. In response to this Decision, the NQS Generation Group ensured that its December 18th Expert Evidence filing clearly and unambiguously establishes a linkage, using expert testimony, between both the contractual and market harms and the MRP Amendments that are causing those harms – and are the subject of the section 33 review.

² Decision and Order EB-2019-0242, Association of Major Power Consumers in Ontario, Application to review amendments to the market rules made by the Independent Electricity System Operator, January 23, 2020, page 8.

14. In the alternative, should the Decision be viewed as permanently barring the NQS Generation Group from filing evidence of contractual harms, the NQS Generation Group requests that the OEB review and vary the Decision in relation to the Review Issues.

The Review Motion standard

15. Rule 40.01 of the OEB's Rules of Practice and Procedure allows any person to bring a motion requesting the OEB to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision.
16. Rule 42.01(a) of the OEB's Rules of Practice and Procedure requires that a notice of motion set out the grounds for the motion, which may include:
- i. the OEB made a material and clearly identifiable error of fact, law or jurisdiction;
 - ii. new facts that have arisen since the decision or order was issued that, had they been available at the time of the proceeding to which the motion relates, could if proven reasonably be expected to have resulted in a material change to the decision or order; or
 - iii. facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.
17. The OEB has confirmed that this list of grounds is "not an exhaustive list". What is required is that the motion to review must raise a question as to the correctness of the order or decision.³ The moving party must demonstrate that the findings are contrary to the evidence before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings or something of a similar nature.⁴

³ EB-2016-0005 Decision on Motion to Review and Vary by the City of Hamilton, March 3, 2016, page 4.

⁴ NGEIR (EB-2006-0322, EB-2006-0338, EB-2006-0340) Motions to Review, the Natural Gas Electricity Interface Review Decision, Decision with Reasons, May 22, 2007, pages. 17-18.

18. The moving party must also demonstrate that the alleged error is material and would vary the outcome of the decision.⁵

The Errors in the Decision – Scoping Issue

19. There is a strong basis to determine that the OEB made a material and clearly identifiable errors in the Decision with respect to the Review Issues. The OEB also ignored, or provided insufficient reasons to address, many of the submissions made on behalf of the NQS Generation Group in reaching its Decision.
20. Moreover, as a result of the filing of the NQS Generation Group's evidence, there are new facts that have arisen since the Decision was issued that, had they been available at the relevant time, could be reasonably expected to have resulted in a material change to the Decision.
21. The OEB made the following errors in respect of the Scoping Issue:
- (a) *The hearing panel breached the principles of procedural fairness and natural justice by failing to grant the Applicants their right to be heard and by misinterpreting the Electricity Act, 1998 and the Ontario Energy Board Act, 1998.*
22. The first error committed by the OEB is that the hearing panel erred in law by breaching the principles of procedural fairness and natural justice by failing to give the NQS Generation Group the right to be heard and by misinterpreting the *Ontario Energy Board Act, 1998* and *Electricity Act, 1998*. A breach of procedural fairness is an error of law.⁶
23. Closely related to this issue, the OEB further erred by fettering its discretion by restricting the scope of the hearing and evidence in a way that ties the NQS Generation Group's hands and will impede or prevent it from establishing unjust economic discrimination or inconsistency with the purposes of the *Electricity Act, 1998*.

⁵ Rules 42.01(a) and 43.01(d); see also EB-2006-0322/0338/0340 Decision with Reasons on Motions to Review the Natural Gas Electricity Interface Review Decision, May 22, 2007, pages 17-18.

⁶ *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at para 22.

24. The NQS Generation Group is the applicant and bears the burden of proving its case. The hearing panel acted contrary to the principles of natural justice and breached procedural fairness by limiting the NQS Generation Group's ability to file evidence and make submissions necessary to prove its case. The OEB requires the NQS Generation Group to establish unjust economic discrimination.
25. In failing to properly apply principles respecting legislative interpretation of the power of "review",⁷ the OEB's Decision unjustifiably narrows the scope of a section 33 OEB Act "review". The Decision unfairly prevents the NQS Generation Group from adducing evidence and drawing the connections it requires to demonstrate that the MRP Amendments are inconsistent with the purposes of the *Electricity Act, 1998* or unjustly discriminates against the NQS Generation Group.
26. The Decision is an unfair refusal by the hearing panel to accept contractual evidence and order relevant disclosure from the IESO that would allow the NQS Generation Group to establish unjust economic discrimination and that the MRP Amendments are inconsistent with the purposes of the *Electricity Act, 1998*.
27. The NQS Generation Group and OEB Staff were clear on multiple occasions that the market rules and contracts are inextricably linked and that the OEB considered contracts in the context of prior section 33 proceedings.⁸ The Decision restricts the scope of the hearing and evidence in a way that ties the NQS Generation Group's hands and will impede or prevent it from establishing unjust economic discrimination. This is tantamount to the

⁷ A legislative authorization to "review" operates to permit the OEB to re-open and re-evaluate the propriety of a decision as the power to review includes the power to reconsider: R.W. Macaulay, Practice and Procedure Before Administrative Tribunals § 35:13; *Russell v. Toronto (City)*, 2000 CarswellOnt 4876, [2000] O.J. No. 4762, 101 A.C.W.S. (3d) 1188 (ONCA), at paras 14-15, leave to appeal to SCC refused: S.C.C. File No. 28428. S.C.C. Bulletin, 2001, p. 1413, online: <<https://www.canlii.org/en/on/onca/doc/2000/2000canlii17036/2000canlii17036.pdf>>; EB-2006-0322 / EB-2006-0338 / EB-2006-0340, Decision with Reasons – Motions to Review the Natural Gas Electricity Interface Review Decision, May 22, 2007, pg. 11, online: <<https://www.rds.oeb.ca/CMWebDrawer/Record/180773/File/document>>.

⁸ EB-2024-0331, Pre-Hearing Conference Transcript, November 26, 2024, pages 100-106, 119, 126-130; EB-2024-0331, NQS Cover Letter & Pre-Hearing Submissions, November 25, 2024.

NQS Generation Group not having the right to answer its case before the OEB and is a breach of procedural fairness.

(b) The hearing panel erred in law by determining that the contracts themselves are separate from the issues in this proceeding.⁹

28. The second error committed by the OEB is that the hearing panel erred in fact and law by determining the contracts themselves and the provisions for generators to seek amendments to those contracts are separate from the issue of whether the MRP Amendments are inconsistent with the purposes of the *Electricity Act, 1998* or will result in unjust discrimination.
29. The OEB has in effect refused to admit the contracts into evidence. The admissibility of evidence is a question of law.¹⁰ The MRP Amendments should not be considered in an evidentiary vacuum, and, without the contracts, the OEB created this vacuum.
30. If the contracts were truly independent from the issues in the proceeding, then the outcome of the proceeding should have no bearing on the required changes to the contracts. However, this is not reflected in the OEB's reasoning in the Decision when it considered the two possible outcomes of the proceeding:
 - i. Revocation of the MRP Amendments by the OEB, which would result in the NQS Generation Group and the IESO having no need to consider changes to the contracts; and
 - ii. Confirming the MRP Amendments continue in force, which would result in the NQS Generation Group and the IESO determining to what extent, if any, the commercial contract terms would need to be adjusted.
31. These two outcomes relied upon by the OEB demonstrate that the contracts are not separate from the OEB's determination in this proceeding. The OEB states that if the MRP

⁹ Decision at page 13.

¹⁰ *Fanjoy v. The Queen*, [1985] 2 S.C.R. 233 at para. 9; *R. v. Rahmani*, 2021 ONSC 5716 at paras. 5, 27; *Aon Inc. v. Towerhill Developments Inc.*, 2009 CanLII 36999 (ON. S.C.D.C.) at para. 4.

Amendments are revoked, no changes to the contracts would be required. Conversely, the OEB states that if the MRP Amendments are not revoked, the extent of changes to commercial contractual terms would need to be assessed.

(c) New facts could reasonably be expected to result in a material change in the Decision

32. The third error the OEB made was deciding that the NQS Generation Group had “not established any basis” on which contractual matters could be within the scope of this section 33 review. The OEB erred by deciding the Scoping Issue without providing the NQS Generation Group with an opportunity to file any evidence to establish that basis.
33. New facts have arisen since the Decision was issued that, had they been available at the time of the proceeding to which the Motion relates, could reasonably be expected to have resulted in a material change to the Decision. The OEB laid out a procedural schedule where the circumstances surrounding the production of these new facts were not within the control of the NQS Generation Group.
34. On December 18, 2024, pursuant to the OEB’s direction in Procedural Order No. 2, the NQS Generation Group filed its independent expert evidence in support of the application with one of the key findings being:¹¹

While the associated contracts that the NQS Generators hold with the IESO are not the primary focus of this report, the unique nature of Ontario’s “hybrid” market – the interconnection of contracts and rate regulation with a wholesale electricity market – cannot be ignored. [...] The interconnection of the wholesale electricity market and contracts in Ontario – and any financial impacts between the two – cannot be fully separated and have not been done so for all other supply resources, nor have they been viewed in isolation in the past.

¹¹ EB-2024-0331, NQS Generation Group, Evidence Filing, December 18, 2024, para 21.

35. Taken as a whole, the Expert Evidence filed by the NQS Generation Group could reasonably be expected to result in a material change to the Decision. The independent expert evidence clearly articulates that the contracts cannot be separated from the section 33 *Electricity Act, 1998* review.¹² OEB Staff even advocated for the inclusion of contracts in the scope of this proceeding.¹³
36. The NQS Generation Group submits that the independent expert evidence now provides the basis upon which to include contractual matters within the scope of the section 33 review.

The Errors in the Decision – Disclosure Issue

(d) The OEB decided scope of the proceeding and disclosure requests without fully understanding the basis upon which the NQS Generation Group seeks to challenge the amendments.

37. The OEB erred by not considering all the relevant and material evidence when denying the NQS Generation Group's request that the IESO to provide responses to the disclosure requests set out in Schedule A of the Application. The OEB justified its determination on the Disclosure Issue based on the conclusion reached on the Scoping Issue (which was also erroneously decided as set out above).
38. Following the denial of the NQS Generation Group's disclosure requires, the OEB then directed the IESO to file additional evidence that would:¹⁴
- i. "[...] allow the OEB to better understand the basis on which NQS Generation Group seeks to challenge the Amendments"; and
 - ii. "[...] assist the OEB by providing the context to understand the issues raised by NQS Generation Group.

¹² EB-2024-0331, NQS Generation Group, Evidence Filing, December 18, 2024, para 21, section 7.

¹³ EB-2024-0331, Pre-Hearing Conference Transcript, November 26, 2024, pages 100-106, 119, 126-130

¹⁴ EB-2024-0331, Procedural Order No. 2, page 11.

39. The OEB hearing panel self-admittedly decided the Scoping Issue and the Disclosure Issue without fully understanding the basis of or the issues raised by the NQS Generation Group's Application. In doing so, the OEB incorrectly exercised its discretion.
40. The OEB hearing panel was obligated to exercise discretion on the merits of an individual case and cannot ignore relevant and material evidence to the Decision. Moreover, the Disclosure Issue was based on an incorrect determination on the Scoping Issue. To the extent the Scoping Issue was incorrectly decided, the Disclosure Issue was similarly incorrectly decided.

The Errors in the Decision – Costs Issue

(e) The Decision on the Costs Issue lacks justification, transparency, and intelligibility.

41. The OEB hearing panel erred by failing to provide justifiable, transparent, or intelligible reasons for departing from decisions of prior OEB panels in respect of the Costs Issue. The OEB failed to provide any reasoning showing how prior decisions on cost responsibility were distinguishable or wrongly decided.
42. While the NQS Generation Group recognizes the OEB is not bound by the doctrine of *stare decisis* respecting their own decisions, justice demands equality of treatment and impartiality prevail when the merits of a case are considered.
43. 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.¹⁵ Moreover, the NQS Generation Group stated at the pre-hearing conference that the Application raises legitimate and

¹⁵ EB-2024-0331, Application, at para 29.

important public policy and public interest issues in relation to the criteria set out in section 33 of the *Electricity Act, 1998*.¹⁶

44. In any event, the OEB hearing panel did not provide any reasons how the current circumstances are different from those costs decisions in EB-2007-0040, EB-2013-0010/EB-2013-0029, EB-2019-0242, or EB-2019-0206 which similarly involved private commercial parties appealing market rule amendments.¹⁷
45. Nor did the OEB hearing panel address the NQS Generation Group's concern raised regarding the OEB hearing panel's apparent misinterpretation of precedent in Procedural Order No. 1.¹⁸ This appears to have contributed to the OEB hearing panel's error on the Costs Issue.

The Errors in the Decision – Review Issues

(f) The hearing panel erred in law by providing insufficient reasons.

46. The OEB hearing panel erred in respect of the Review Issues broadly by failing to provide sufficient reasons and therefore committed an error in law.¹⁹
47. It is an error of law where a tribunal's reasons do not permit meaningful appellate review. Specifically, reasons are insufficient if they are not responsive to the case's live issues and the parties' key arguments.²⁰ The reasons provided by the hearing panel were not responsive to many of the arguments raised by the NQS Generation Group and failed to address the cited precedents.

¹⁶ EB-2024-0331, Pre-Hearing Conference Transcript, November 26, 2024, pages 57-58.

¹⁷ EB-2024-0331, NQS Cover Letter, November 25, 2024, pages 2-3.

¹⁸ EB-2024-0331, NQS Cover Letter, November 25, 2024, page 3.

¹⁹ For the leading case on sufficiency of reasons, see *R. v. Sheppard*, [2002 SCC 26](#), [2002] 1 S.C.R. 869 at paras. [24-28](#); for the similarities between judicial and administrative decisions, see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#), [2019] 4 S.C.R. 653 at para. [79](#) [*"Vavilov"*]; for the civil context, see *F.H. v. McDougall*, [2008 SCC 53](#), [2008] 3 S.C.R. 41 at para. [98](#); for cases that dealt with the adequacy of reasons of an interlocutory order see *Ontario College of Teachers v. Bouragba*, [2019 ONCA 1028](#), 51 C.P.C. (8th) 280 at paras. [35-36](#), and *Muir v. Chisty*, [2014 ONSC 6046](#) at paras. 30-31.

²⁰ *Heliotrope Investment Corporation v. 1073650 Ontario Inc.*, [2024 ONCA 767](#), at para. [15](#) citing *R. v. Walker*, [2008 SCC 34](#), [2008] 2 S.C.R. 245 at para. [20](#) [*"Walker"*].

48. Despite the parties filed several pages of submissions, hundreds of pages of authorities and supporting documents, and several hours at a pre-hearing conference, the OEB only provided one paragraph of scant reasoning for restricting the scope of this proceeding.
49. The OEB either ignored or did not provide sufficient reasoning to address the arguments raised by the NQS Generation Group that the OEB must consider the following in an application under section 33 of the *Electricity Act, 1998*:
- i. its obligation under section 87 of the *Ontario Energy Board Act, 1998* to monitor “markets in the electricity sector”;
 - ii. the purposes of the *Ontario Energy Board Act, 1998*, including “to promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry”;
 - iii. the purposes of *the Electricity Act, 1998*, including “(d) to promote the use of cleaner energy sources and technologies, including alternative energy sources and renewable energy sources, in a manner consistent with the policies of the Government of Ontario”, “(g) to promote economic efficiency and sustainability in the generation, transmission, distribution and sale of electricity”, “(i) to facilitate the maintenance of a financially viable electricity industry”;;
 - iv. the NQS Generation Group’s allegation that the IESO violated the prohibition of unjust IESO conduct under subsection 5(5) of the *Electricity Act, 1998*;
 - v. how the OEB’s power of “review” under section 33 has been interpreted by appellate courts.
50. By excluding consideration of contractual matters the OEB erred by modifying its obligation to monitor “markets in the electricity sector” by improperly reading-in an obligation to only monitor “IESO-administered markets” established by the market rules.

51. The Supreme Court of Canada cautioned administrative tribunals from sterilizing their powers through overly technical interpretations of enabling statutes.²¹ Here, the Hearing Panel did just that and took an overly technical approach to interpreting the *Electricity Act, 1998*.
52. By ignoring the harms caused by the MRP Amendments under the applicable contracts, the OEB panel has failed in their obligations to maintain a financially viable electricity sector, and failed to directly address the implications of Section 5(5) of the *Electricity Act, 1998* which imposes binding obligations on the IESO which it breached.
53. Investors in Ontario's independent generation fleet do not distinguish between economic harms caused by the MRP Amendments directly under the IESO-administered markets versus the harms caused under contract. At the end of the day, the financial viability of the each generator investment is a bottom line number.

(g) Rules and Additional Grounds

54. The NQS Generation Group relies upon Rules 7, 8, 12, 40, 41, 42 and 43 of the OEB's Rules of Practice and Procedure.
55. In addition to the specific grounds set out above, the grounds for this Motion also include such further grounds as counsel may advise and the OEB may permit.

The errors are material

56. Each of the errors described above have a material impact on the NQS Generation Group. As explained in the Expert Evidence, at issue is whether or not the adjudicative panel considers a calculated financial impact of the MRP Amendments of \$250 million to the NQS Generation Group in assessing whether or not the MRP Amendments are unjustly economically discriminatory.

²¹ *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722 at 1756, 60 D.L.R. (4th) 682 [“*Bell Canada*”].

57. While we do not agree with such a determination and would strongly oppose, it is entirely foreseeable that the OEB could determine that the calculated financial impacts of \$140 million over a 6 year period are not sufficiently discriminatory to be “unjust”, but that a calculated cumulative financial impact of \$390 million over that same 6 year period is sufficiently discriminatory to be “unjust”.
58. As a consequence, the NQS Generation Group submits that the errors may have a material impact on the outcome of this proceeding.

NQS Generation Group satisfies the threshold test

59. Rule 43.01 of the OEB’s Rules of Practice and Procedures states that “prior to proceeding to hear a motion under Rule 40.01 on its merits, the OEB may, with or without a hearing, consider a threshold question of whether the motion raises relevant issues material enough to warrant a review of the decision or order on the merits.”
60. Each of the errors highlighted in this Motion raises material questions about the correctness of the Decision. Some of the errors are related to new evidence not considered in the Decision. Correcting the errors will materially impact the Decision. As such, the NQS Generation Group satisfies the OEB’s threshold test and the OEB should proceed to hear the Motion on its merits.
61. Should the OEB find it necessary to consider the threshold question, the NQS Generation Group requests the opportunity to make written submissions.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

62. The record of documents filed on EB-2024-0331; and
63. Such further and other materials as the NQS Generation Group may provide and the OEB may permit.

December 23, 2024

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AND TO: ALL INTERVENORS IN EB-2024-0331