ONTARIO ENERGY BOARD

IN THE MATTER OF the *Electricity Act*, 1998 S.O. 1998, c. 35 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 "**NQS**" or "**Applicants**") for Review of Amendments to the Independent Electricity System ("**IESO**") Operator Market Rules

---

SUBMISSIONS ON OBJECTION TO

IESO RELIANCE ON CERTAIN DOCUMENTS

13 JANUARY 2025

Mr John Vellone
Mr Colm Boyle

BORDEN LADNER GERVAIS LLP
Barristers & Solicitors
Bay Adelaide Centre, East Tower
22 Adelaide St. W
Toronto, ON M5H 4E3

Lawyers for the Applicants

I. BACKGROUND

1. On January 9, 2025, the IESO purported to file two emails from May 13, 2021 and May 25, 2021 in these proceedings and indicated that it "may refer" to these emails as part of its questioning of the NQS group witnesses (***PA***):

    a) **May 13**: This email chain relates to scheduling of a privileged and confidential meeting regarding negotiations of working draft contract amendment term sheets received from the generators.

    b) **May 25**: This email chain includes a PowerPoint presentation that is expressly marked "Confidential & Without Prejudice". This relates to discussions about draft term sheet scope and implications, not the Market Rule Amendments that are subject of this proceeding.

2. The NQS immediately objected to the IESO's reliance on these Documents and the information provided therein (***Documents***). To resolve the disagreement, the panel provided clear instructions: "if the IESO wishes to introduce the document[s], it shall file a written submission explaining the purpose of the documents and why they should not be treated as confidential."[1]

3. The IESO has largely ignored the panel's instruction. Instead, it has proceeded directly to argue its case on the alleged independence of PA, bypassing the matter currently at issue; namely, NQS' objection to the IESO's reliance on the Documents. In fact, the IESO's submissions filed on January 13, 2025, dedicate no more than three paragraphs to the

[1] Email from M Bell to C Boyle and others, dated January 9, 2025, re "EB-2024-0331 NQS Generation Group".

admissibility issue (paragraphs 34 to 36), focusing almost entirely on whether the NQS' named experts are sufficiently independent.

4. The IESO's submissions are premature and unresponsive to the panel's instruction. Suffice to say, NQS disagrees with the IESO on the issue of the independence of its identified experts, PA, and will respond to that issue at the appropriate time. However, the matter currently under consideration is whether the Documents may be relied upon by the IESO as part of the record to cross-examine PA witnesses. The IESO has put forward virtually no argument on this matter.

5. The Documents should be excluded from the IESO's cross-examination in these proceedings for five reasons: (a) the objection is untimely; (b) the Documents are unnecessary and irrelevant; (c) the Documents were provided on the understanding that they were "without prejudice"; (d) the Documents are settlement privileged; and (e) the Documents are confidential. Each ground of NQS' objection is discussed in sequence below.

II. LAW AND ARGUMENT

A. THE OBJECTION IS UNTIMELY

6. Section 14.03 of the OEB Rules of Practice and Procedure require the IESO to raise issues related to the good character, propriety of conduct or competence of a party **at least 15 calendar days prior to the hearing**:

> 14.03 Where the good character, propriety of conduct or competence of a party is an issue in the proceeding, the party is entitled to be furnished with reasonable information of any allegations at least 15 calendar days prior to the hearing.

7. The nature of IESO questioning at the Technical Conference made indirect allegations that PA's conduct in this proceeding by signing the independent expert witness declaration was

improper. The IESO became fully aware that PA was retained by BLG when the expert evidence was filed on December 18, 2024. Instead of complying with section 14.03 and raising the issue of propriety of conduct of PA 15 days in advance of the technical conference or oral hearing, the IESO raised this issue **during** the technical conference and only 6 days before the oral hearing. Further, the IESO has not furnished any reasonable information of allegations with sufficient precision of the alleged failing and did not note the grounds or bases on which this assertion is founded.

8. Rather, the IESO elected to spring these spurious allegations at the technical conference to discredit PA without sufficient notice in advance. This is unfair. The IESO is out of time and this line of questioning based on the Documents must not be allowed by the panel.

B. THE DOCUMENTS ARE UNNECESSARY

9. The IESO has strenuously argued that contractual matters are irrelevant and out of scope of OEB review:

> The Application also proposes to convert the Board's review of market rule amendments into a forum for litigating contract claims. It sweeps into a market rule amendment review, a review by the Board of out-of-market commercial negotiations together with the Applicants' proposed assessment of IESO analysis and decision-making processes relating to these contract amendment negotiations and the MRP Amendments' impact on the Applicants' contractual rights and obligations. **These matters are irrelevant and out of scope for a review under section 33(9) of the Electricity Act**. [emphasis added]

10. Now, the IESO seeks to introduce records relating to privileged and confidential negotiations on contractual amendments. The IESO cannot have it both ways. Matters related to contractual amendments cannot be relevant on the one hand, but irrelevant on the other. The OEB already determined that evidence relating to contractual matters is out of scope.[2]

---

[2] OEB Decision on Motion, January 3, 2025, at p. 8.

11. At paragraph 31, the IESO purports to circumvent is own submissions and the ruling of the OEB by casting the questioning as relating only to prior engagement of PA by the Applicants.[3] However, in its submissions, the IESO also highlights the fact that during questioning Mr Chee-Aloy confirmed that PA has advised NQS on matters related to the contractual amendments. Its purported justification for relying on the Documents in cross-examination, by reference to the very same point from Mr Chee-Aloy's testimony, is no justification at all.[4] The factual point the IESO seeks to establish is already confirmed by the testimony of Mr Chee-Aloy. The IESO does not require the Documents to make this point.

12. Rather, it is clear from IESO's subsequent questioning that, contrary to the suggestion in its submissions, its attempted reliance on the Documents is not related to probing the question of independence, but rather constitutes an attempt to access privileged and confidential information regarding the nature and content of the prior discussion between the parties. These matters are unrelated to any question of expert independence, or whether PA was previously retained by the Applicant, and are addressed in the following sections.

C. THE DOCUMENTS WERE COMMUNICATED ON A "WITHOUT PREJUDICE" BASIS

13. The Documents relate to scheduling plans for a meeting to discuss the MRP design and draft terms and a PowerPoint presentation provided by PA at the subsequent meeting. The PowerPoint slide states on the cover slide: "Prepared for IESO – Confidential & Without Prejudice". Thus, the substance of the presentation was only communicated to the IESO on

[3] IESO Submissions, dated January 13, 2024, at para. 31.
[4] IESO Submissions, dated January 13, 2024, at para. 31.

the express understanding and agreement that the parties would treat the statements contained in the Documents as being without prejudice.

14. The IESO participated in these settlement discussions about these working draft contract amendment term sheets and never raised issue with the without prejudice nature of discussions with NQS at that time. Having received the information in the Documents on this basis, the IESO cannot now unilaterally rescind and breach that agreement by seeking to rely on the same information in these proceedings.

15. The Documents are clear on their face: PA and the Applicants were willing to engage in the meeting and share the enclosed information and positions in the presentaiton on a "without prejudice" basis. If the IESO was not prepared to abide by this condition of the presentation, it should have registered its disagreement at the time to allow the Applicants and PA the opportunity to decide whether to proceed with the presentation at all.

16. The Supreme Court of Canada has confirmed that parties have the ability to modify the scope of "without prejudice" and privileged materials by contract. As stated in *Bombardier Inc v. Union Carbide Canada Inc*:[5] "I have concluded that it is generally open to parties, in the mediation context, to contract for confidentiality that exceeds that of the common law settlement privilege; in particular, parties may contract out of the exception to that privilege that enables a party to disclose confidential information in order to prove the terms of a settlement." In this case, the parties established for themselves that this Document, and the information contained therein, would be without prejudice. If the IESO disagreed, it should

5 *Bombardier inc. c. Union Carbide Canada inc.*, 2014 SCC 35, at para. 58.

have voiced that disagreement at the time, rather than receive the information on a certain basis in 2021 and then unilaterally rewrite these conditions in these proceedings.

D. THE DOCUMENTS ARE SUBJECT TO SETTLEMENT PRIVILEGE

17. Irrespective of the IESO's tacit agreement not to rely on the Documents in subsequent legal proceedings, it is not permitted to do so based on the common law doctrine of settlement privilege. As explained by the Supreme Court of Canada:[6]

> Settlement negotiations have long been protected by the common law rule that "without prejudice" communications made in the course of such negotiations are inadmissible (see David Vaver, "'Without Prejudice' Communications — Their Admissibility and Effect" (1974), *9 U.B.C. L. Rev. 85*, at p. 88). The settlement privilege created by the "without prejudice" rule was based on the understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed. […]
>
> As McEachern C.J.B.C. pointed out, the protection is for settlement negotiations, whether or not a settlement is reached. That means that successful negotiations are entitled to no less protection than ones that yield no settlement.

18. In paragraph 34 of its submissions, the IESO sets out the criteria for establishing settlement privilege: (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; (iii) the purpose of the communication must be to attempt to effect a settlement. The IESO dedicates two sentences to argue this issue; it has advanced virtually no case to contest the privileged nature of the Documents.[7] The Documents are privileged, for the following reasons:

---

[6] *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 (CanLII), [2013] 2 SCR 623, at paras. 13 and 17.

[7] IESO Submissions, dated 13 January 2025, at para. 35.

a) On criteria (i), contrary to the IESO's submissions,[8] a litigious dispute *was* within contemplation. The fact that the parties discussed these issues in 2021 does not change the fact that they were engaged in a process that would conclude in either agreement or arbitration. Having engaged the contractual amendment process under s. 1.6 of the agreements,[9] amicable resolution or litigious proceedings would ensue. Therefore, the discussions were exchanged in the context of this contractual mechanisms, not in the ordinary course of the commercial relationship with no litigation in contemplation. The parties were engaged in these discussions as part of an effort to avoid the litigation that would result from a failure to agree.

b) On criteria (ii), the Documents (and specifically the first slide of the PowerPoint presentation) are expressly marked "without prejudice". The IESO's only argument is that "labelling documents 'without prejudice' or 'settlement privilege' does not make them so".[10] This comment is trite and does not advance the IESO's position. By expressly stating "without prejudice", the Documents satisfy the second criteria identified in *R. v. Delchev*. The privilege is established by the express statement in combination with the satisfaction of the other two criteria.

c) In criteria (iii), the purpose of the communication is clearly to attempt to effect a settlement. The IESO advances no contrary argument. The PowerPoint presentation sets out, in detail, the analysis of impacts on MRP design and a draft term sheet. As part of the presentation, PA identifies the following "Next Steps", which clearly

---

8 IESO Submissions, dated 13 January 2025, at para. 35.

9 There are multiple contracts at issue in these proceedings. For simplicity, NQS refers to the Combined Heat and Power (CHP IV) form of Contract as a representative agreement.

10 IESO Submissions, dated 13 January 2025, at para. 35.

indicate the fact that the parties are working towards a consensus on the MRP amendments and that further discussion and analysis will take place "if required":

i. "Additional discussions between IESO and gas-fired generators regarding analysis of MRP Design and Draft Term Sheet";

ii. "**If required**, additional analysis, refinement of analysis, etc." [emphasis added]; and,

iii. "[u]ltimately, IESO and gas-fired generators should work towards consensus on analysis and applicability to Draft Term Sheet implications".

19. The Documents satisfy the criteria for attracting settlement privilege, in addition to the agreement of the parties that the Documents and related discussions would be "without prejudice". To allow the IESO to use this type of information in the manner proposed would place a chill on settlement negotiations and undermine the public interest in promoting settlement discussions. The IESO has not identified an overriding public interest in justice that outweighs the public interest in encouraging settlement.

20. Further, in multi-party litigation cases, the issue of settlement privilege arises when the plaintiff settles with one defendant but not with the others. Often the non-settling defendant or the third-party requests production of the settlement agreement or negotiations leading up to the settlement. Generally, courts have held that they are not entitled to that production. For example, in the case of *Rush & Tompkins*, Lord Griffiths expressed his conclusion as follows [Law of Privilege in Canada § 12:72]:

> I have come to the conclusion that the wiser course is to protect without prejudice communications between parties to litigation from production to other parties in the same

> litigation. In multi-party litigation it is not an infrequent experience that one party takes up an unreasonably intransigent attitude that makes it extremely difficult to settle with him. In such circumstances it would, I think, place a serious fetter on negotiations between other parties if they knew that everything that passed between them would ultimately have to be revealed to the one obdurate litigant. What would in fact happen would be that nothing would be put on paper, but this is in itself a recipe for disaster in difficult negotiations which are far better spelt out with precision in writing.

E. BREACH OF CONFIDENTIALITY UNDER THE CONTRACT

21. Under [the contract], the IESO agreed not to disclose "Confidential Information" and to keep it confidential and secure.[11] Confidential Information is defined in the [contract] as:

> All information that has been identified as confidential and which is furnished or disclosed by the Disclosing Party and its Representatives to the Receiving Party and its Representatives in connection with this Agreement, whether before or after its execution, including all new information derived at any time from any such confidential information, but excluding: (i) publicly-available information, unless made public by the Receiving Party or its Representatives in a manner not permitted by this Agreement; (ii) information already known to the Receiving Party prior to being furnished by the Disclosing Party; and (iii) information disclosed to the Receiving Party from a source other than the Disclosing Party or its Representative, if such source is not subject to any agreement with the Disclosing Party prohibiting such disclosure to the Receiving Party; and (iv) information that is independently developed by the Receiving Party; and Mutually Confidential Information.

22. The information exchanged as part of the Documents constitute Confidential Information, as it is identified as "confidential" and has been disclosed by the Applicants in connection with the Agreement. Having labelled the information as Confidential, and absent any objection from IESO at the time, the Documents clearly fall within the agreed scope of Confidential Information. On this basis, the Documents should be excluded from the record and any cross-examination of the PA witnesses on the basis that this agreed confidentiality will be lost. The fact that the parties agreed to a mechanism for protecting "Confidential Information" in the agreements, and the IESO received certain information in the Documents on the basis of its confidentiality, adds further weight to the validity of NQS' objection.

---

[11] CHP IV Form of Contract, at s. 8.1. See also, definition of "Confidential Information" at s. 1.1, "Definitions".

III. REQUESTED ORDER

23. For the reasons set out above, the Applicants request that the panel:

a) ORDER that the Documents and enclosed information be excluded from the record and any cross-examination of the PA witnesses by the IESO; and

b) ORDER such other relief as the panel may consider just.

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

Mr John Vellone

BORDEN LADNER GERVAIS LLP
Barristers & Solicitors
Bay Adelaide Centre, East Tower
22 Adelaide St. W
Toronto, ON M5H 4E3

Lawyers for the Applicants