

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.

**CLOSING ARGUMENT OF THE
INDEPENDENT ELECTRICITY SYSTEM OPERATOR**

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I. OVERVIEW

1. The Applicants request that the Board revoke the full package of market rule amendments necessary to enable the IESO's Market Renewal Program (**MRP Amendments**) that is scheduled to go live on May 1, 2025. The Applicants request this relief based on allegations of unjust discrimination and inconsistency with the purposes of the *Electricity Act, 1998*¹ (**Electricity Act** or the **Act**) that were never advanced by the Applicants in the more than five years that the MRP Amendments were being developed, stakeholdered, evaluated, and approved. The Applicants are asking the Board to adjudicate these claims for the very first time in this review proceeding.

2. The Applicants did not earlier advance these claims in the IESO's MRP Amendment Process because they are allegations that concern their contracts. This is made plain in the Applicants' Application for Review (**Application**), wherein the Applicants expressly allege that it is unjustly discriminatory for the IESO to "implement the MRP Amendments... *prior to resolving contractual amendments* to the [Applicants'] Deemed Dispatch Agreements".² This is reiterated in the Applicants' Argument In Chief (**Applicants' Argument** or **Argument**) where, despite the Board's preliminary scoping determination,³ the Applicants continue to press their contract claims.⁴

3. The IESO submits that there are no grounds to support the Applicants' claims that the MRP Amendments are in and of themselves unjustly discriminatory or inconsistent with the purposes of the Electricity Act. The evidence overwhelmingly demonstrates that the MRP Amendments will deliver substantial operational, reliability and efficiency benefits that will reduce costs for all Ontario electricity consumers. These benefits promote the purposes of the Electricity Act and are not contested by the Applicants, whose expert – and sole witness – expressed support for MRP and agreed the MRP Amendments will deliver efficiencies that will benefit electricity consumers.⁵

¹ *Electricity Act, 1998*, SO 1998, c 15, Sch. A (**Electricity Act**), Book of Authorities of the Independent Electricity System Operator (**IESO BOA**), Tab 1.

² Application for Review of Amendments to the Independent Electricity System Operator ("IESO") Market Rules, filed November 7, 2024 (**Application**) at para 31.

³ *Decision and Procedural Order No. 2* dated December 2, 2024 at p 4 to 6.

⁴ *Applicants' Argument* at paras 9, 14, 19, 51, 70-71, 86.

⁵ Technical Conference Transcript dated January 10, 2025 (**Technical Conference Transcript Day 2**), p 77 line 22

4. The Applicants' specific allegations of financial impact are refuted by the IESO's responding evidence and are fundamentally flawed for a number of reasons.

5. First, there is no evidence from the Applicants themselves to support their principal allegation that the MRP Amendments will result in reduced commitments for non-nuclear, non-quick start resources (**NQS resources** or **NQS generators**). The only evidence in support of the Applicants' allegations is from their expert Power Advisory, which has no firsthand knowledge of the facilities' operational parameters or Applicant's offer strategies, and did not request or obtain information from the Applicants for the purposes of preparing its analysis. The result is that Power Advisory's analysis was based solely on a "proxy generator" and "fictional commitment[s]". Further, Ontario has limited peaking resources and NQS resources largely compete with each other, meaning that any reduced commitments for one NQS resource is likely to be made up by other more efficient NQS resources. It is a glaring flaw in Power Advisory's report (**Power Advisory Report**) that it failed to acknowledge this reality and did not account for **even one instance** of intra-group competition over a six-year period in its quantitative impact analysis.

6. Second, the Applicants' allegation of financial impact is premised on a misunderstanding of the purpose of commitments and associated cost guarantee payments, as well as how NQS resources participate in the IESO's wholesale energy market (**IESO market** or **market**). NQS resources receive commitments in exchange for cost guarantees that compensate them where their revenues do not cover their costs. For this reason, the loss of a commitment will reduce a facility's gross revenue but will also reduce the facility's costs and does not necessarily lead to a reduced net margin. Despite admitting that net margin is the correct measure of impact, Power Advisory presented a daily impact analysis based on gross revenues (overstating the impact by eight-fold) and refused to produce the "proprietary" model that it used to calculate the net margin for its proxy generator. When questioned on whether that analysis is reflective of actual impacts, Power Advisory could offer nothing more than "you have to trust [us]". The failure to provide evidence of quantifiable economic discrimination based on a transparent analysis and

actual data is fatal to the Applicants' claim, as the Board made clear in its determination in an earlier market rule amendment review proceeding.⁶

7. Third, the MRP Amendments do not discriminate, let alone unjustly discriminate, against the Applicants, either as a "class" or individually. NQS resources (including the Applicants) currently have the **option** of competing in the market on the same basis as all other generators, i.e. on the basis of energy offers, or offering and being committed on the basis of three-part offers in exchange for which they are guaranteed recovery of associated startup and operational costs. NQS generators will be treated in the same manner and will continue to have this option under the MRP Amendments, albeit this option will extend from the day-ahead to the pre-dispatch timeframe which will improve competition in the commitment, scheduling and dispatch of generation resources. The Applicants' claims focus almost entirely on allegations of economic harm to NQS resources as opposed to discrimination or differential treatment vis-à-vis other classes of market participants. Indeed, the Applicants' sole allegation of discrimination centers on alleged differential treatment between NQS resources and hydroelectric generators with respect to, in particular, the revised market power mitigation (**MPM**) framework. The Applicants, however, misstate and exaggerate the differences in the new MPM framework, and what differences there are reflect the fact that NQS resources and hydroelectric resources have different operational and other characteristics. Different treatment that is justified by different circumstances is not unjust discrimination.

8. Fourth, to the extent the MRP Amendments may reduce market revenues for NQS resource commitments (which is denied) by requiring that **all** market revenues associated with a commitment be offset against associated cost guarantee payments (rather than just a subset of associated market revenues), this represents an improvement to the current market design and generation cost guarantee program, which the OEB's Market Surveillance Panel (**MSP**) and the Auditor General of Ontario (**Auditor General**) have long observed results in overpayments to NQS resources at the expense of Ontario consumers. The Applicants agree that remedying overcompensation of NQS resources will be better for consumers.⁷

9. Fifth, the IESO has concerns with certain aspects of the Applicants' Argument which are important to highlight, specifically:

⁶ EB-2019-0242 Decision and Order dated January 23, 2020 (**TCA Decision**) at pp 10, 24-25, IESO BOA, Tab 2.

⁷ Technical Conference Transcript Day 2, p 100, line 10 to p 101, line 2 and lines 21-23.

- The Applicants materially misstate the law governing the ability of “fact witnesses” to provide opinion evidence and they level unwarranted and spurious allegations against the IESO’s witnesses.⁸
- The Applicants raise new arguments that were not pleaded in their Application or addressed in the evidence.⁹
- The Applicants’ new arguments include inflammatory and unsubstantiated allegations, including that the IESO is waging an “intentional campaign” to push NQS resources out of the market and that the IESO is “flagrantly” violating the law.¹⁰
- The Applicants introduce and mischaracterize evidence from other proceedings that they did not put to the IESO’s witnesses and did not give the IESO an opportunity to respond to.¹¹

10. Each of these issues is more fully addressed below.

11. For the foregoing reasons, the IESO respectfully requests that the Board dismiss the Application.

II. FACTS AND EVIDENCE

A. The Current Design of Ontario’s Wholesale Electricity Market

12. Ontario’s wholesale electricity market was introduced in 2002 and was intended to be a competitive market that would ensure power system reliability at a lower cost than the vertically integrated system that preceded it. The current market design has met many of its objectives and enabled the IESO to manage the electricity grid reliably during an era of structural changes to Ontario’s supply mix. However, the current design of Ontario’s wholesale electricity market has remained largely unchanged since its introduction in 2002 and has well-recognized shortcomings that cause inefficiencies and other operational complexities and reliability challenges. In particular, Ontario’s unique “two schedule system” results in a misalignment

⁸ [Applicants’ Argument](#) at paras 28-40.

⁹ [Applicants’ Argument](#) at paras 59, 80-88, 91-92.

¹⁰ [Applicants’ Argument](#) at paras 58-59, 60.

¹¹ [Applicants’ Argument](#) at paras 19, 37, 80-85.

between price and dispatch that results in the uneconomic dispatch of resources, which necessitates additional costly congestion and generator cost guarantee payment programs.¹²

13. There are three timeframes that are relevant to understanding the current operation of the IESO market and the changes being made by the MRP Amendments:

- (a) *Day-ahead* – In 2006, the IESO introduced a day-ahead calculation engine to optimize energy and operating reserve for the 24 hours of the next day. The day-ahead calculation engine determines the least-cost security-constrained solution for a dispatch day based on the bids and offers submitted by resources. Through the day-ahead commitment process (**DACP**), NQS generators submit offers day-ahead if they wish to participate in the next day's real-time market and, if selected, receive a commitment from the IESO that they will be scheduled the next day.¹³
- (b) *Pre-dispatch* – While the DACP commits resources to meet the following day's expected demand, conditions may change after the DACP is complete. Changes in Ontario supply and demand can occur due to various factors, including but not limited to the weather forecast, supply from variable generators, or system conditions. Bids and offers from all resources are evaluated in the pre-dispatch timeframe between the completion of the DACP and the real-time dispatch. This evaluation is undertaken to reliably meet real-time demand at the lowest possible cost. The pre-dispatch process determines advisory prices and schedules over a number of future hours leading up to real-time. The IESO may issue additional commitments during pre-dispatch if required to meet the anticipated system needs.¹⁴
- (c) *Real-time* – In real-time, the IESO determines the generation output or withdrawal consumption of all dispatchable resources on the IESO-controlled grid for each immediate five-minute interval of the next hour of the day and schedules and dispatches resources accordingly. A generator resource may, for instance,

¹² IESO Market Rule Description Evidence in Response to Procedural Order No. 2 filed December 11, 2024 ([IESO Descriptive Evidence](#)) at p 2.

¹³ [IESO Descriptive Evidence](#) at p 12.

¹⁴ [IESO Descriptive Evidence](#) at p 16.

be scheduled in real-time to provide energy above and beyond a commitment received through DACP or during pre-dispatch to address real-time conditions.¹⁵

14. NQS resources¹⁶ receive particular treatment in the IESO market due to their unique cost and operational characteristics which include:

- (a) unlike quick start resources, NQS resources incur three types of operating costs: (i) the cost of starting up to be available to provide energy (**start-up costs**), (ii) the cost of providing energy (**energy costs**), and (iii) the cost of remaining connected to the IESO-controlled grid while generating net zero active power (**speed no-load costs**); and
- (b) to avoid damaging their equipment, an NQS generator must be scheduled to at least a minimum loading point (**MLP**) and, once started, must continue to generate for at least its minimum generation block run time (**MGBRT**).

15. Without the appropriate market design, NQS resources may not make themselves available unless they are certain they will be able to recover their full costs, not just their energy costs, while meeting their operational parameters.¹⁷ To better integrate NQS resources, the IESO introduced a “unit commitment” process and accompanying cost and operational guarantees in 2003. Until 2003, NQS generators participated in the IESO market on the same basis as all other generators, that is, they submitted and were scheduled and dispatched based solely on energy offers. Under the new unit commitment and guarantee program, NQS generators, as further explained below, were given the option of continuing to participate as all other generators on the basis of energy offers, or being “committed” in exchange for operational and cost guarantees.

16. A unit commitment is an agreement between the IESO and an NQS generator, made in advance of real-time (i.e. in the day-ahead or pre-dispatch timeframe), that the NQS generator will run during specific hours in exchange for operational and financial guarantees.¹⁸ NQS

¹⁵ [IESO Descriptive Evidence](#) at p 18, fn 13.

¹⁶ Non-nuclear NQS generators are the only resources that receive commitments, including the cost recovery guarantee. Quick-start generators, nuclear generators, intertie traders, and dispatchable loads do not receive commitments from the IESO nor does the IESO guarantee that those resources will recover their costs.

¹⁷ [IESO Descriptive Evidence](#) at p 17.

¹⁸ [IESO Descriptive Evidence](#) at p 17.

generators are the only resources in the IESO market that are eligible to receive these cost guarantees.

17. The generator cost guarantee program has evolved over time. Under the current program, NQS resources that receive a commitment in DACP or pre-dispatch are provided with two guarantees by the IESO:

- (a) an operational guarantee that the IESO will schedule the NQS generator to run in a way that respects its operational characteristics, including MLP and MGBRT;¹⁹ and
- (b) a financial guarantee that the IESO will pay the NQS generator a top-up payment where market revenues earned by an NQS generator are insufficient to recover its costs for the commitment.²⁰

18. In return for these two guarantees, the IESO receives operational certainty in advance of real-time that committed NQS generators will be available to satisfy demand on the IESO-controlled grid.²¹

19. In the day-ahead timeframe, the IESO provides NQS generators with an opportunity to submit a “three-part offer” – consisting of offers for energy costs, start-up costs and speed no-load costs – to secure a commitment in the DACP.²² The DACP uses the three-part offers to optimize NQS resources’ total costs when committing NQS resources in the day-ahead timeframe. Subject to commitments made for reliability, this ensures that the DACP commits the most economic NQS resources based on applicable operational parameters and total costs. In 2024, DACP produced approximately two-thirds of all NQS resource commitments.²³

¹⁹ Scheduling is the process by which the IESO determines the generation output or withdrawal consumption of all dispatchable resources on the IESO-controlled grid for every five-minute interval of the day. For NQS resources, the commitment represents a minimum potential schedule – the IESO must schedule a committed NQS resource for at least its MLP and MGBRT. However, the IESO may schedule NQS resources for longer time periods and higher generation outputs, if the resources are economic for more than just their commitments: [IESO Descriptive Evidence](#) at p 18, fn 13.

²⁰ [IESO Descriptive Evidence](#) at p 18.

²¹ [IESO Descriptive Evidence](#) at p 18.

²² [IESO Descriptive Evidence](#) at p 19.

²³ IESO Market Renewal Program Rule Amendments Review Responding Evidence dated January 6, 2025 ([IESO Responding Evidence](#)) at p 8, lines 9 to 10.

20. Currently, the IESO is unable to achieve the most economic commitment of NQS resources in pre-dispatch due to two key limitations in its existing process:

- (a) unlike in the DACP, the IESO's existing process commits NQS resources in pre-dispatch based on energy costs alone, without accounting for start-up and speed-no-load costs, which means the IESO may commit an NQS resource with lower energy costs but higher overall costs instead of a resource with lower total costs; and
- (b) the IESO's existing process evaluates costs in the pre-dispatch process separately for each hour, without considering a NQS generator's MLP and MGBRT, which results in inefficient scheduling decisions as the IESO myopically only considers the following hour, one hour at a time, in pre-dispatch.²⁴

21. Further, because the IESO commits NQS resources in the pre-dispatch timeframe based solely on energy offers (without considering three-part offer start-up costs and speed no-load costs), payments under the Real-Time Generator Cost Guarantee program (**RT-GCG**)²⁵ are not based on a competitive evaluation of a generator's costs. Instead, the RT-GCG program guarantees eligible costs based on values that the IESO pre-approves for each NQS resource.²⁶ Under the RT-GCG program, where a NQS resource's market revenue associated with a commitment is insufficient to recover its eligible pre-approved costs, the IESO pays the NQS generator an RT-GCG payment equal to the generator's unrecovered costs.²⁷ Conversely, where a NQS generator earns market revenues that exceed these costs, it is entitled to retain the net profit.

22. Moreover, while the objective of the RT-GCG program is to ensure cost recovery, the manner in which the RT-GCG payment is calculated allows a NQS generator to both earn revenues exceeding its costs **and** still receive a RT-GCG payment for the same commitment.

²⁴ [IESO Descriptive Evidence](#) at p 19.

²⁵ [IESO Descriptive Evidence](#) at p 18.

²⁶ Prior to 2018, RT-GCG payments were based on after-the-fact cost submissions by generators. In 2018, the IESO changed the program so that compensation is based on costs approved by the IESO in advance of the commitment, commonly called "pre-approved costs". The change was triggered by audit findings that revealed that some NQS generators had taken advantage of after-the-fact cost submissions to claim approximately \$200 million worth of inappropriate start-up costs: Oral Hearing Transcript dated January 15, 2025 (Hearing Transcript Day 1), p 103, line 23 to p 104, line 4; Hearing Transcript Day 2, p 37, lines 11-14.

²⁷ [IESO Descriptive Evidence](#) at p 20.

This is because the current RT-GCG calculation does not account for all market revenues earned by a NQS generator that receives a commitment. The current RT-GCG calculation does not offset revenue earned by a NQS generator for providing operating reserve, or running above its MLP or beyond its MGBRT, against the generator's costs.²⁸ As a result, a NQS generator can receive an RT-GCG payment even if that generator has earned sufficient market revenues to cover the costs associated with meeting its commitment.

B. The Market Surveillance Panel Recommendations

23. The MSP has repeatedly expressed concerns with Ontario's current market design, including the limitations of the IESO's process for committing NQS resources during the pre-dispatch timeframe and the RT-GCG program. The MSP has expressed support for "the replacement of the uniform price/two schedule market design with a design that would facilitate future market renewal and rely less on out-of-market payments" including the introduction of "some form of locational pricing".²⁹ The MSP has recommended that the RT-GCG program be eliminated or reformed so that "the revenues used to offset the guaranteed costs be expanded to include all net energy and [operating reserve] revenues" including any revenues earned by the generator from being scheduled above its MLP and running beyond its MGBRT.³⁰

24. In its 2017 IESO Oversight Report, the Auditor General was critical of the inefficiencies in Ontario's current market design and noted that the market's additional payment programs have endured despite concerns expressed by the MSP.³¹ The Auditor General stated that the RT-GCG program "allows gas generators to operate their equipment inefficiently costing ratepayers more than necessary" and that "the IESO continues to pay gas generators about \$30 million more per year than necessary despite the [MSP] recommending that the IESO scale

²⁸ [IESO Responding Evidence](#) at p 23, lines 1 to 14.

²⁹ Ontario Energy Board, Market Surveillance Panel, *Congestion Payments in Ontario's Wholesale Electricity Market: An Argument for Market Reform* dated December 2016 (**MSP December 2016 Report**) at p 1, IESO Brief of Exhibits filed January 6, 2025 ([IESO Brief of Exhibits](#)), Tab 5.

³⁰ Ontario Energy Board, *Monitoring Report on the IESO-Administered Electricity Markets for the period from May 2015 – October 2015* dated November 2016 (**November 2016 Monitoring Report**) at p 125. [IESO Hearing Compendium](#), Tab 4. The Applicants now argue that the MSP reports are not relevant to the assessment of the MRP Amendments: [Applicants' Argument](#) at paras 91 to 92. This is an entirely new and untenable position. The MSP reports are not being relied on with respect to "process" but rather are an important part of the factual context and rationale for MRP and their relevance was not questioned by any party during the hearing. The Applicants' own witness Power Advisory cited the MSP reports and admitted that the MRP Amendments "change some of the inefficiencies that are highlighted in various forms [by the MSP]": Hearing Transcript Day 2, p 145, lines 4 to 11. The Applicants' counsel also put the MSP report to the IESO's witness during his cross-examination.

³¹ Office of the Auditor General of Ontario, *2017 Annual Report: Volume 1 of 2*, 2017, section 3.06: Independent Electricity System Operator – Market Oversight and Cybersecurity (**AGO Report**) at pp 328-330, 332, [IESO Brief of Exhibits](#), Tab 6.

back its [RT-GCG] Program". The Auditor General included a specific recommendation with respect to RT-GCG (referred to as the Standby Cost Recovery program by the Auditor General):

To ensure that ratepayers are not charged for unnecessary costs, we recommend that, if the Independent Electricity System Operator does not cancel the Standby Cost Recovery Program, it fully implement the Ontario Energy Board Market Surveillance Panel's (OEB Panel) recommendations and not reimburse generators for operating and maintenance costs under the Program.³²

25. The IESO is required by section 6.2.5 of its OEB license to file its responses to the MSP's recommendations with the OEB. In those responses, the IESO advised the MSP that it would address the issues identified with the RT-GCG in the design of a revised unit commitment process under MRP.³³

C. The Market Renewal Program

26. The purpose of MRP is to modernize Ontario's electricity markets to improve efficiency and integrate an increasingly diverse and decentralized mix of resources into the Ontario market and electricity system. MRP will deliver significant ratepayer savings, ensure continued reliable operations of the system, and support the transformation underway within the electricity sector in Ontario and globally.³⁴

27. The primary objectives of MRP are to:

- (a) address the current misalignment between price and dispatch in Ontario's electricity market, and eliminate the need for unnecessary congestion payments, by shifting to a Single Schedule Market (**SSM**) and introducing Locational Marginal Pricing (**LMP**);
- (b) introduce a Day-Ahead Market (**DAM**) that will provide greater operational certainty to the IESO and greater financial certainty to market participants, lowering the cost of producing electricity and ensuring the IESO commits the resources required to meet system needs; and

³² AGO Report at p 350, [IESO Brief of Exhibits](#), Tab 6; see also School Energy Coalition's (**SEC**) Submission (**SEC Submissions**), paras 5, 12-18, where it helpfully summarizes other relevant reports by the MSP and AGO.

³³ The reports filed with the OEB for the 2015 to 2024 years were filed by IESO in this proceeding on January 13, 2025 in response to undertaking JT1.10.

³⁴ [IESO Descriptive Evidence](#) at p 2.

- (c) improve efficiency and competitiveness and reduce the cost of scheduling and dispatching resources to meet demand, as it changes from the day-ahead to real-time, through the introduction of the Enhanced Real-Time Unit Commitment Process (**ERUC**).

28. The Applicants' allegations in this proceeding focus primarily on the impact of the changes resulting from the introduction of ERUC, specifically, ERUC's extension of the use of three-part offers and multi-hour optimization into the pre-dispatch timeframe when selecting NQS resources for commitment. Under ERUC, if a NQS resource is scheduled in the DAM, the resulting day-ahead commitments will be transferred to ERUC. ERUC will then make additional scheduling and unit commitment decisions to address any deviations between DAM and real-time, ensuring reliability is maintained cost-effectively.³⁵ The specifics of how commitments are carried forward from DAM through pre-dispatch and into real-time can be found in the IESO's detailed design documentation for MRP.³⁶

29. The introduction of ERUC will result in a more efficient dispatch, as commitments selected during the pre-dispatch timeframe will reflect NQS resources' total costs optimized over the pre-dispatch timeframe, instead of simply relying on the incremental costs found in energy offer prices for the next hour. ERUC will ensure that the most cost-effective set of resources will be available to meet demand in real-time when changes in system needs arise in the pre-dispatch time frame.³⁷ For example, the IESO could, as necessary, advance or extend an operational commitment from DAM during the pre-dispatch time frame.³⁸

30. ERUC's integration of full three-part offer costs into the pre-dispatch timeframe will ensure the IESO compensates NQS resources based on their as-offered costs in a competitive process (as opposed to relying upon pre-approved costs as is the case under the current regime). Consequently, the MRP Amendments eliminate the RT-GCG program and replace it with a new mechanism for guaranteeing NQS generator costs called the Real-Time Generator Offer Guarantee (**RT-GOG**). Under the new RT-GOG program, the IESO guarantees a NQS resource that receives a commitment during pre-dispatch that it will be able to recover its as-

³⁵ [IESO Descriptive Evidence](#) at p 16 and p 21.

³⁶ Exhibit K2.1, Market Renewal Program: Energy Grid and Market Operations Integration Detailed Design, Issue 2.0, filed January 21, 2025 ([Ex K2.1](#)).

³⁷ [IESO Descriptive Evidence](#) at p 21.

³⁸ [Ex K2.1](#), Figures 3-25 and 3-28.

offered costs, including the start-up and speed no-load components of their three-part offers. Cost guarantee payments will typically be made if revenues earned are less than the costs incurred. As is the case under the current regime, a NQS generator is entitled to retain the net profit where market revenues exceed these costs.³⁹

31. Moreover, the cost guarantee calculation for the RT-GOG will more comprehensively account for all revenues earned and costs incurred by a NQS generator over the course of the commitment (including net revenues earned from being scheduled to provide operating reserve and operating above the facility's MLP or beyond its MGBRT). This approach is consistent with the recommendations of the MSP and the Auditor General discussed above.⁴⁰ As in the current market, NQS resources will continue to have the option to participate like other generators by submitting energy-only offers, or to submit three-part offers and be eligible for operational and cost guarantees.

32. In addition to the primary objectives listed above, MRP establishes a revised MPM framework which is necessitated by the introduction of LMP and the opportunities that change creates for the exercise of market power.⁴¹ MRP will replace the current MPM regime with (i) an ex-ante framework to assess economic withholding, and (ii) an ex-post framework to assess physical withholding. Although their implementation differs, the ex-ante and ex-post frameworks share the same general approach to assessment of withholding:

- (a) Determine whether competition is or was restricted in an area and determine the resources in that area.
- (b) If competition was restricted, check whether each identified resource's submitted dispatch data was outside of the applicable materiality threshold (the "conduct test").
- (c) If competition was restricted and a resource's dispatch was outside the applicable threshold (i.e., it failed the conduct test), check whether prices were materially higher than they would have been if there had been competitive conditions (the "impact test").

³⁹ [IESO Descriptive Evidence](#) at p 21.

⁴⁰ [IESO Responding Evidence](#) at p 13, lines 3-9, p 16, lines 3-9, p 20, line 20 to p 22, line 2, p 23, line 15 to p 24, line 14.

⁴¹ [IESO Descriptive Evidence](#) at p 3.

- (d) If the prices were outside the specified threshold (i.e., the tested resource failed the impact test), the resource is mitigated.

33. The initiation of conduct and impact tests is based on the specific grid conditions corresponding to the area on the grid where a resource is located. When an area of the grid is unable to be supplied by additional resources, competition is reduced and this creates the potential for the exercise of market power by suppliers in that constrained area.⁴²

34. In general, the conduct and impact test thresholds are more relaxed in areas with significant competition and tighter in areas where competition is restricted. To determine whether submitted dispatch data was outside applicable thresholds, each resource must have estimates of the dispatch data parameters that the resource would have submitted if it were operating under competitive conditions.⁴³ These estimates are called “reference levels” and “reference quantities” and are determined by the IESO at the request of a market participant, based on input from and consultation with that market participant. Reference levels and quantities are subject to independent expert review and determination in the event the market participant disagrees with the IESO’s determination.⁴⁴

D. The Market Rule Amendment Approval Process

35. The IESO launched MRP design efforts in 2016, together with a comprehensive engagement process (Market Renewal Working Group; individual stakeholder engagements for each of SSM, DAM and ERUC; education sessions, webinars, etc.). The first stage of MRP design was the High-Level Design (**HLD**). This phase culminated in 2019 with issuance of the IESO’s *Market Renewal Project: Energy Stream Business Case (MRP Business Case)*, as well as HLD documents for each SSM, DAM and ERUC.⁴⁵

36. In 2019, the IESO commenced the Detailed Design (**DD**) phase, the purpose of which was to document the intended form of MRP at a level sufficient to support the development of the governing documents, i.e., market rules, market manuals and internal procedures.⁴⁶

⁴² [IESO Descriptive Evidence](#) at p 25.

⁴³ [IESO Descriptive Evidence](#) at p 25.

⁴⁴ [IESO Responding Evidence](#) at p 36, lines 3-7.

⁴⁵ Market Renewal Program Energy Stream Business Case dated October 22, 2019 (**MRP Business Case**), [IESO Brief of Exhibits](#), Tab 9.

⁴⁶ IESO Market Renewal Program: Energy, Grid and Market Operations Integration, Detailed Design Issue 2, January 28, 2021, IESO Undertaking Response filed January 21, 2025 ([Exhibit K2.1](#)).

37. The IESO also commenced in 2019 a separate and parallel process for negotiating contract amendments, including a specific process for negotiating amendments with NQS generators who were parties to Clean Energy Supply (**CES**) and Combined Heat and Power I (**CHP-I**) contracts. The IESO initiated this separate contract amendment process by issuing the *“IESO’s Approach to Amending Market Participant Contracts in Response to the Market Renewal Program”*, wherein the IESO stated:

In an effort to be transparent to all stakeholders, IESO contract management has prepared and published this document and certain other nonconfidential information relating to the contractual implications of the market renewal program (MRP). However any potential contractual implications or required contractual amendments will be determined through a process that is separate and distinct from MRP design. Any contractual implications or required contractual amendments will be addressed with the applicable contract counterparties, as required, by IESO contract management.⁴⁷

38. The DD phase ran from August 2019 to January 2021 which culminated in the publication of detailed design documents for each component of MRP.

39. All proposed market rule amendments are subject to stakeholdering processes and are reviewed and evaluated by the IESO’s Technical Panel, which is comprised of members representing constituencies of generators, transmitters, distributors, retailers or wholesalers, residential consumers, commercial consumers, and others as may be appointed by the Board of Directors of the IESO (**IESO Board**). Due to the scope of the changes, the MRP Amendments were brought to the Technical Panel in batches for preliminary recommendation.⁴⁸ The final consolidated set of Amendments were presented to the Technical Panel for a final vote to recommend at a meeting held on September 10, 2024.⁴⁹

40. At the September 10, 2024 meeting, the members of the Technical Panel voted unanimously to recommend the MRP Amendments to the IESO Board for approval. The Technical Panel members that voted in favour of the recommendation included:

⁴⁷ IESO, *IESO’s Approach to Amending Market Participant Contracts in Response to the Market Renewal Program*, at p 1, IESO Document and Authorities Brief for November 26, 2024 Pre-Hearing Conference dated November 22, 2024, Tab 4.

⁴⁸ Hearing Transcript Day 2, p 89, lines 2 to 25.

⁴⁹ Member Vote and Rationale – Market Renewal Program: Final Alignment Batch, IESO Technical Panel, September 10, 2024, IESO Licence Filings filed November 15, 2024 ([IESO MC 20241017 MRA TP Member Vote and Rationale 20241115](#)) (**TP Member Vote and Rationale**).

- (a) Lukas Deeg, Director, Capital Power, one of the Applicants in this proceeding;⁵⁰
- (b) Jason Chee-Aloy, the Managing Director of Power Advisory, which since 2016 has advised all of the Applicants on the impact of the MRP Amendments⁵¹ and was retained by the Applicants to provide expert evidence in this proceeding;⁵² and
- (c) Vlad Urukov, Director, Market Compliance with Ontario Power Generation, which is the parent company of Atura Power, one of the Applicants in this proceeding.⁵³

41. Each member of the Technical Panel was given an opportunity to provide a written rationale to accompany their vote. Each of Messrs. Deeg, Chee-Aloy and Urukov provided a rationale for their “in favour” votes. In his rationale, Mr. Urukov noted “the extensive stakeholder engagement [on MRP] over the last eight years” and Mr. Deeg stated that the IESO “has been seeking feedback from market participants on MRP market rule batches since 2021”.⁵⁴ In those comments, not one of these three representatives expressed a concern that the MRP Amendments were inconsistent with the purposes of this Act or unjustly discriminated against or in favour of a market participant or class of market participants.⁵⁵

42. Following the Technical Panel vote, the MRP Amendments were forwarded to the IESO Board. The IESO Board unanimously approved the MRP Amendments by way of resolution at its October 18, 2024 meeting.⁵⁶

⁵⁰ Hearing Transcript Day 2, p 89, line 26 to p 91, line 15.

⁵¹ Technical Conference Transcript Day 2, p 17, line 24 to p 18, line 27.

⁵² Hearing Transcript Day 2, p 157, line 10 to 162, line 5; Oral Hearing Transcript dated January 17, 2025 (**Hearing Transcript Day 3**), p 29, lines 10 to 20.

⁵³ Hearing Transcript Day 2, p 89, line 26 to p 91, line 15.

⁵⁴ Member Vote and Rationale – Market Renewal Program: Final Alignment Batch, IESO Technical Panel, September 10, 2024, IESO Licence Filings filed November 15, 2024 ([IESO MC 20241017 MRA TP Member Vote and Rationale 20241115](#)).

⁵⁵ When cross-examined on this point, Mr. Chee-Aloy attempted to rationalize his “for” vote by stating that he was only representing the interests of renewable generators so “stayed in [his] lane” and did not consider the interests of other classes of generators. However, as is apparent from the comments in his rationale, and as Mr. Chee-Aloy admitted, that viewpoint did not constrain him from including comments in his rationale on the need to consider contractual impacts for all classes of generators (“it doesn’t matter if it’s wind and solar, gas, nuclear, hydro, storage”): Hearing Transcript Day 2, p 161, lines 7 to p 162, line 5.

⁵⁶ Resolution of the Board of Directors - Independent Electricity System Operator, October 18, 2024, In Respect of the Market Renewal Program Final Alignment Market Rule Amendments, IESO Licence Filings filed November 15, 2024 ([IESO MC 20241017 MRA TP Member Vote and Rationale 20241115](#)).

43. At no time during the MRP Amendments process did the Applicants (or any other NQS generators) assert that the proposed MRP Amendments were unjustly discriminatory or inconsistent with the purposes of the Act for the reasons stated in the Application, or for any reason. The Applicants now claim that the “concerns raised by the NQS Generation Group for the past five years have been curiously ignored by the IESO culminating in [their] section 33 *Electricity Act*, 1998 application”.⁵⁷ This claim has no basis in fact. The Applicants cite no evidence for this statement and, as evidenced by the large volume of documents that the IESO was required by its OEB licence to file relating to the MRP Amendments, the Applicants never made the allegations they are making in this proceeding as part of the MRP Amendments process.⁵⁸

E. The Application and the Applicants’ Evidence

44. The Applicants filed their Application for Review of Amendments (the **Application**) on November 8, 2024 wherein the Applicants allege that the MRP Amendments are unjustly discriminatory and inconsistent with the purposes of the *Electricity Act*.

45. The Applicants alleged in the Application that it was unjustly discriminatory for the IESO to make the MRP Amendments “prior to resolving contractual commitments to [the Applicants’] Deemed Dispatch Agreements” and that “the harms experienced by the NQS Generators” could be addressed by “contract changes”.⁵⁹

46. Following the Board’s determination in Procedural Order No. 2 that the Applicants’ contract claims were out of scope, the Applicants elected to continue the Application on the grounds that the Amendments themselves were unjustly discriminatory and inconsistent with the purposes of the Act.

⁵⁷ [Applicants’ Argument](#) at para 71.

⁵⁸ As part of its OEB licence obligations, the IESO filed with the Board voluminous documentation relating to the MRP Amendments, which included: all written submissions received by the IESO with respect to the MRP Amendments; minutes, meeting notes, and relevant materials from all stakeholder meetings and all of the meetings of the Technical Panel concerning the MRP Amendments; all materials tabled before the IESO Board of Directors relating to the MRP Amendments; any other materials relating to the development and consideration of options that involved alternatives to the MRP Amendments; and, any materials relating to the consistency of the MRP Amendments with the purposes of the Electricity Act. There is no reference in any of these documents to any complaint by the Applicants, or by any NQS generator, that the proposed MRP Amendments are unjustly discriminatory or inconsistent with the purposes of the Act.

⁵⁹ [Application](#) at paras 10 and 31.

47. The Applicants allege that they will be negatively impacted by the MRP Amendments in four ways:

- (a) the Applicants will receive fewer scheduled commitments following MRP due to the pre-dispatch calculation engines included in the MRP Amendments optimizing across the subsequent hours prior to real-time dispatch and incorporating non-incremental energy costs;
- (b) the Applicants will receive lower RT-GOG payments, whether committed through DAM or ERUC, than the previous RT-GCG payments because RT-GOG incorporates more potential wholesale market revenues in its calculation;
- (c) NQS Generators will receive lower wholesale and operating reserve revenues in periods where MPM is applied because of ex ante mitigation of financial and non-financial parameters;
- (d) NQS Generators may receive lower revenues in the form of “make-whole” payments and the LMP than previous revenues from CMSC payments plus the uniform market clearing price under the IESO-administered market (**IAM**).⁶⁰

48. In accordance with Procedural Order No. 2, the Applicants filed their supporting evidence on December 18, 2024. Despite bearing the onus of proof in this proceeding, the Applicants elected not to submit any evidence from a single one of the applicant companies in support of their allegations, including evidence related to:

- (a) actual pre-dispatch commitments that the Applicants have received in the current market that they anticipate will be reduced by the introduction of three-part offers and multi-hour optimization in pre-dispatch;⁶¹
- (b) the operational characteristics of the Applicants’ facilities or the gas supply procurement strategies they employ that could impact whether a particular facility receives a commitment from the IESO and an associated guarantee payment;⁶²

⁶⁰ Application at para 9

⁶¹ Hearing Transcript Day 2, p 192, line 10 to p 193, line 6; Hearing Transcript Day 3, p 47, line 12 to p 48, line 3.

⁶² Technical Conference Transcript Day 2, p 160, lines 6 to 27; Hearing Transcript Day 2, p 155, line 26 to p 156, line

- (c) information about the Applicants' offer strategies in the current market and how those strategies may be altered under MRP;⁶³
- (d) the amount of wholesale market revenues the Applicants receive in the current market that will be included in the calculation of the RT-GOG (i.e. revenues for providing operating reserve or operating a facility above its MLP or beyond its MGBRT);⁶⁴
- (e) the wholesale energy and operating reserve revenues the Applicants receive in the current market which they claim will be impacted by the introduction of ex-ante mitigation under the new MPM framework;⁶⁵
- (f) the CMSC revenues the Applicants receive in the current market that will not be part of the "make-whole" payments under the MRP Amendments;⁶⁶ or
- (g) the Applicants' internal rates of return, debt-service ratios, return on equity assumptions, credit ratings or other matters that would inform their future investment decisions.⁶⁷

49. Instead, the sole piece of evidence filed by the Applicants is an expert report prepared by Power Advisory that attempts to estimate the alleged financial impact of the MRP Amendments upon the Applicants.⁶⁸ Power Advisory opines that the MRP Amendments will introduce financial risk to the Applicants, and that other supply resources will not face a similar level of financial risk, principally due to:

- (a) reduced commitment and dispatch of NQS resources under the MRP Amendments due to the use of a broader cost envelope (i.e. three-part offers that

14.

⁶³ Hearing Transcript Day 2, p 190, line 13 to p 192, line 14.

⁶⁴ The Applicants are now asserting that they will be harmed "in 6 out of 6 commitments (100% of commitments) following the MPR [sic] Amendments" because RT-GOG incorporates more potential wholesale market revenues in its calculation than RT-GCG: Applicants' Argument at para 11. This argument, which was not made at any time prior to the hearing, necessarily assumes that the Applicants are earning revenues that are not included in the RT-GCG for every commitment in the current market. The Applicants failed to lead any such evidence.

⁶⁵ Technical Conference Transcript Day 2, p 54, lines 7 to 18.

⁶⁶ Hearing Transcript Day 3, p 41, 24 to p 42, line 10.

⁶⁷ Hearing Transcript Day 2, p 171, line 18 to p 172, line 10; Hearing Transcript Day 3, p 63, line 20 to p 64, line 17.

⁶⁸ Expert Evidence in Appeal dated December 18, 2024 prepared by Power Advisory LLC on behalf of the Applicants (Power Advisory Report).

include energy costs, start-up costs and speed no-load costs) that will result in a negative financial impact to the Applicants; and

- (b) the greater number of operational parameters for NQS resources that will be subject to the MPM framework, which will include ex-ante mitigation carried out automatically by the IESO's tools, than other non-NQS supply resources.

50. In the absence of any information from the Applicants, Power Advisory calculated the annual financial impact of the MRP Amendments based on a fictional proxy generator – as if the MRP Amendments had been in effect from 2018 to 2023 – at \$40,909/day (using data from September 12, 2019) and \$3.5 million annually. On the assumption that the proxy generator was a “typical NQS Generator”,⁶⁹ Power Advisory then extrapolated the \$3.5 million annual financial impact to the facilities listed in Appendix A of the Power Advisory report⁷⁰ to arrive at a projected annual impact of “more than \$23 million” to the Applicants.⁷¹

51. Power Advisory was not asked to, and did not, opine on whether the MRP Amendments are inconsistent with the purposes of the Act⁷² or whether they unjustly discriminate against the Applicants as a class or individually.⁷³

F. The IESO's Responding Evidence

52. The IESO filed detailed responding evidence on January 6, 2025 that identified, on a paragraph-by-paragraph basis, where the IESO agreed and disagreed with Power Advisory's analysis and, where it disagreed, the IESO provided detailed explanations for its disagreement.

53. The IESO summarized its disagreements with Power Advisory's conclusions that the MRP Amendments would result in reduced commitment and dispatch of NQS resources based on five core grounds:

- (a) Power Advisory overstates the extent of new risks or features being introduced by the MRP Amendments that are not present in the current market, as in fact

⁶⁹ Hearing Transcript Day 3, p. 1, line 14 to p 2, line 28, p 62, line 19 to p 63, line 2.

⁷⁰ The actual calculation used for the extrapolation, and which facilities were included in the calculation, is not shown, or even described, in the [Power Advisory Report](#).

⁷¹ Technical Conference Transcript Day 2, p 26, line 26 to p 28, line 2; Hearing Transcript Day 2, p 175, lines 3 to 28.

⁷² Technical Conference Transcript Day 2, p 158, line 15 to p. 159, line 5.

⁷³ Technical Conference Transcript Day 2, p 157, line 20 to p 158, line 14; Hearing Transcript Day 2, p 149, lines 4 to 26. Power Advisory repeatedly conceded that the MRP Amendments will improve the efficiency of the IESO market.

many of the identified risks or features already exist today (such as committing NQS resources based on three-part offers in the day-ahead timeframe).

- (b) Power Advisory asserts that the MRP Amendments would introduce unfair changes to the IESO-administered market without acknowledging the changes rectify long recognized flaws in the current market design and improve competition and market efficiency overall, consistent with longstanding recommendations from the MSP and Auditor General.
- (c) Power Advisory fails to recognize that, to the extent there is a reduced commitment and dispatch of a particular NQS resource, it will primarily be a result of competition amongst NQS generators – i.e. between more competitive/efficient NQS generators and less competitive/efficient NQS generators – and is not expected to uniformly impact NQS generators as a class. Further, as the function of a cost guarantee payment is to ensure that NQS generators are placed in a revenue neutral financial position as it relates to bringing their resource online and operating the resource over a particular period of time, fewer commitments may reduce a particular NQS resource's gross market revenue but will not necessarily reduce its net market revenue.
- (d) Power Advisory incorrectly states that NQS generators will be required to submit three-part offers when an NQS resource is in fact free to forgo three-part offers and compete in the IESO-administered markets based on an energy only offer as other generators do. Under the MRP Amendments, three-part offers are required for NQS resources only if they wish to be eligible for cost guarantee payments. If a NQS resource decides to compete based on an energy only offer, then it must do so on the same basis as other resources and it will not be eligible for cost guarantee payments.
- (e) Power Advisory's financial impact analysis significantly overestimates the financial impact of the MRP Amendments on NQS resources. Amongst other issue, Power Advisory extrapolated the assumed daily financial impacts on a proxy generator to all of the Applicants' NQS resources in Ontario without appreciating that any impact will not be uniform. Nor did Power Advisory's

analysis consider positive impacts where a second NQS resource is committed and dispatched in place of the proxy generator.⁷⁴

54. The IESO summarized its disagreements with Power Advisory's conclusions on the impact of the MPM amendments based on four core grounds:

- (a) Power Advisory misstates and exaggerates the nature and extent of the changes being made by the MRP Amendments to the current MPM framework. The IESO has had a framework to address the exercise of market power since market opening. Under the MRP Amendments, the IESO is moving from an ex-post (after the exercise of market power occurs) to an ex-ante approach that mitigates economic withholding before it occurs – a shift that limits market participants from affecting dispatch schedules, market prices and settlement when competition is restricted.
- (b) Power Advisory misstates and exaggerates the extent to which NQS Generators (or other market participants) will be impacted by MPM under the MRP Amendments. MPM is subject to numerous requirements and materiality thresholds and a NQS Generator's offers may only be mitigated after these requirements and thresholds have been satisfied and it is found to have exercised market power and materially impacted prices.
- (c) Power Advisory incorrectly states that NQS Generators will be differently treated and disproportionately impacted by the new MPM framework relative to other classes or subclasses of market participants, including misstating the nature and extent of parameters applicable to NQS Generators that are subject to mitigation relative to parameters applicable to other market participants and classes of market participants that will be subject to mitigation. The new MPM framework applies to all dispatchable resources and Power Advisory provides no reliable evidence to support its contention that NQS Generators will be disproportionately impacted. Power Advisory's statements in this regard amount to conjecture.

⁷⁴ [IESO Responding Evidence](#) at p 3, line 7 to p 6, line 4.

- (d) Power Advisory exaggerates the extent to which reference levels are “IESO determined”. Reference levels are determined by the IESO at the request of a market participant, based on input from and consultation with that market participant, including NQS Generators, and are subject to independent expert review and determination in the event the market participant disagrees with the IESO’s determination.⁷⁵

55. Notwithstanding that the Applicants bear the burden of proof, the IESO’s responding evidence, and its disagreements with the Power Advisory Report, went virtually unchallenged during the technical conference and the oral hearing. The Applicants asked the IESO witnesses numerous exploratory questions about MRP and about the IESO’s analysis, but barely challenged the IESO’s disagreements with Power Advisory’s analysis.

G. Examination of the Power Advisory Witnesses

56. Two representatives from Power Advisory that authored the relevant portions of the report – Mr. Jason Chee-Aloy and Mr. Brady Yauch – were examined at the technical conference and the oral hearing with respect to the conclusions of the Power Advisory Report.

57. The examinations revealed that Power Advisory’s financial impact analysis, which concluded that the Applicants would suffer a negative financial impact of more than \$23 million annually, is deeply flawed. Many of these flaws were not apparent because Power Advisory did not, as required by Rule 13A.03, disclose in its Report the specific information upon which its opinion is based, including a description of the factual assumptions made and research conducted, and a full list of the documents relied upon in preparing the evidence. The flaws with the Power Advisory analysis that came to light during these examinations include that:

- (a) Power Advisory’s analysis is, by its very nature, “a notional, very academic, high-level exercise”⁷⁶ that is not representative of actual impacts. Power Advisory based its analysis entirely on a “proxy generator” and “fictional commitment[s]”⁷⁷ and did not seek⁷⁸ to ground that analysis using the operational parameters of

⁷⁵ [IESO Responding Evidence](#) at p 35, line 4 to p 36, line 12.

⁷⁶ Technical Conference Transcript Day 2, p 132, line 28 to p 133, line 5; Hearing Transcript Day 2, p 176, line 28 to p 177, line 25.

⁷⁷ Technical Conference Transcript Day 2, p 132, line 28 to p 133, line 5; Hearing Transcript Day 2, p 176, line 28 to p 177, line 25.

⁷⁸ Technical Conference Transcript Day 2, p 159, line 6 to p 160, line 27.

the Applicants' facilities or actual commitments because Power Advisory considered such data to be "commercially sensitive".⁷⁹

- (b) Power Advisory utilizes the incorrect pre-dispatch price as the basis of its analysis. Power Advisory's impact analysis was based on **unconstrained** PD-3 prices even though NQS resources receive commitments based on the **constrained** schedule. Moreover, Power Advisory did not attempt to obtain shadow prices from the IESO that would have been more representative of future constrained LMP prices that will be utilized under MRP.⁸⁰
- (c) Power Advisory fails to clearly and consistently distinguish between impacts on total (i.e. gross) revenue and net margin in its report, a critical aspect of the analysis as any reduction in commitments under MRP would both reduce a generator's revenue and its costs.⁸¹ In Appendix B of the report, Power Advisory presents a calculation of reduced total revenues of \$40,909 as the "Daily Financial Impact of MRP Amendments" despite Power Advisory admitting that financial impact should be measured by a reduction in net margin and not total revenue. As a result, Appendix B overstates the purported daily impact by nearly eight-fold (which in the example would be a maximum of \$5,229 and not \$40,909).⁸²
- (d) Power Advisory failed to "show its work" in calculating the annual financial impact on the proxy generator. In Appendix C of the report, Power Advisory calculates the "Annual Financial Impact" of \$21 million over six years using net margin of the proxy generator but refused to disclose its "proprietary" model such that those calculations could not be tested by other parties.⁸³ When questioned about this, Power Advisory admitted that the panel and other parties have "**got to take**

⁷⁹ Hearing Transcript Day 2, p 192, line 10 to p 193, line 6; Hearing Transcript Day 3, p 47, line 12 to p 48, line 3.

⁸⁰ [IESO Responding Evidence](#) at p 31, lines 9 to 17 and p 32, line 1 to 11; Technical Conference Transcript Day 2, p 32, line 12 to p 36, line 20; Hearing Transcript Day 3, p 59, line 13 to p 62, line 18.

⁸¹ [IESO Responding Evidence](#) at p 4, line 16 to p 5, line 2, p 17, lines 1 to 6.

⁸² Hearing Transcript Day 2, p 167, lines 1 to 21, p 180, line 14 to p 190, line 12.

⁸³ Technical Conference Transcript Day 2, p 144, line 23 to p 148, line 5; Hearing Transcript Day 2, p 197, line 15 to p 198, line 14.

[our] word for it” and assume that Power Advisory’s analysis is appropriate and did not make a mistake in undertaking this complex calculation.⁸⁴

- (e) Power Advisory did not explain in its Report and could not cogently explain why it selected the facilities listed in Appendix A for the purposes of its extrapolation exercise except that they were all owned and operated by the Applicants and that is who retained them.⁸⁵ This confusion was compounded when Power Advisory admitted the Brighton Beach generating facility (owned and operated by one of the Applicants) was “in scope” for the purposes of the analysis but was not included because “we were told not to include it”. Power Advisory declined to explain why that was the case.⁸⁶
- (f) Power Advisory’s extrapolation of the annual financial impact on the proxy generator to the Applicants’ facilities listed in Appendix A is dependent on three significant assumptions that Power Advisory did not disclose in its Report or attempt to substantiate; in particular:
 - (i) Power Advisory assumes the operational parameters of the proxy generator represent an “average” of the operational parameters of the Applicants’ facilities listed in Appendix A.⁸⁷ This assumption is based solely on Power Advisory’s “sense” of the relevant parameters⁸⁸ and an assurance that the panel and other parties “**have to trust our market insight in this case**”⁸⁹ even though Mr. Yauch admitted that “[e]very characteristic or plant [sic parameter] will impact its financial revenues” of the Applicants’ facilities.⁹⁰
 - (ii) Power Advisory assumes that the Dawn spot price for gas, which was utilized in its financial impact analysis, is the appropriate input for all of

⁸⁴ Hearing Transcript Day 3, p 62, line 19 to p 63, line 2.

⁸⁵ Technical Conference Day 2, p 154, line 11 to p 155, line 27; Hearing Transcript Day 2, p 152, line 21 to 153, line 22.

⁸⁶ Hearing Transcript Day 3, p 50, line 26 to p 53, line 24.

⁸⁷ Hearing Transcript Day 3, p 6, line 18 to p 8, line 13.

⁸⁸ Technical Conference Transcript Day 2, p 159, line 6 to p 160, line 27.

⁸⁹ Hearing Transcript Day 3 p 56, line 24 to p 58, line 18.

⁹⁰ Hearing Transcript Day 3, p 56, lines 9 to 23.

the Applicants' facilities even though the generators could have a range of different gas supply procurement strategies.⁹¹

- (iii) Power Advisory assumes that in **every single case** over a six-year period (2018 to 2023) where the proxy generator "lost" a commitment under the MRP Amendments, that commitment would not have been picked up by one the Applicants' facilities, despite Mr. Yauch's admission that the Applicant companies are competitors and that "some [NQS resources] will take commitments from others".⁹² When pressed on this point, Mr. Yauch was forced to admit that the math underlying Power Advisory's analysis did not account for this happening even once over a six-year period.⁹³ As Mr. Yauch admitted in response to question from Commissioner Moran, Power Advisory "didn't consider what the situation would look like if someone else gets dispatched in place of the ... proxy generator".⁹⁴

- (g) Power Advisory presented a definitive impact calculation for the Applicants as a whole⁹⁵ based upon a single scenario rather than providing a range of possible impacts or multiple potential scenarios⁹⁶ in recognition of the inherent uncertainties and implicit assumptions in its analysis.

58. The technical conference and oral hearing likewise revealed that Power Advisory's evidence on the impact of the changes to the MPM framework is purely speculative and unsupported. No effort was made by Power Advisory to collect relevant data from the Applicants or to quantify the alleged financial impact of the changes to the MPM framework.⁹⁷ While NQS generators will have a greater number of operational parameters subject to the MPM framework than other generators, Mr. Yauch admitted that attempting to quantify the impact was not

⁹¹ Hearing Transcript Day 3, p 8, line 14 to p 10, line 19.

⁹² Technical Conference Transcript Day 2, p 67, line 1 to p 73, line 27.

⁹³ Hearing Transcript Day 3, p 10, line 20 to p 16, line 15. See also Figure 7 in the [Power Advisory Report](#) which uses an example of where a commitment lost by one NQS generator is taken by a different NQS generator.

⁹⁴ Hearing Transcript Day 3, p 71, lines 8 to 14.

⁹⁵ Hearing Transcript Day 2, p 173, line 2 to p 174, line 2.

⁹⁶ Hearing Transcript Day 2, p 173, line 2 to p 174, line 22. In this regard, the [Power Advisory Report](#) can be contrasted the approach of the IESO in its MRP Business Case ([IESO Brief of Exhibits](#), Tab 9), which explicitly identified this uncertainty and the IESO's approach to it: "The financial analysis focuses on a subset of benefits where there is a high degree of certainty, uses conservative assumptions, reflects stakeholder feedback, and includes characterizations of uncertainty where appropriate."

⁹⁷ Technical Conference Transcript Day 2, p 53, line 15 to p 54, line 6, p 56, line 25 to p 57, line 10; Hearing Transcript Day 3, p 46, line 24 to p 50, line 18.

something Power Advisory did and it would be “challenging” as reference levels for specific facilities have not yet been set.⁹⁸

III. LAW

A. Market Rule Review Authority

59. The Electricity Act confers primary authority on the IESO to make market rules, subject to limited rights to seek Board review.⁹⁹ Pursuant to subsection 33(9), the Board’s review of market rule amendments is limited to a consideration of whether the amendments are inconsistent with the purposes of the Electricity Act or unjustly discriminatory against or in favour of a market participant or class of market participants.¹⁰⁰ As the Board has previously determined, section 33(9) is “a jurisdiction-limiting provision”, which precludes broader inquiry into the IESO’s rulemaking processes.¹⁰¹

60. In the only two subsection 33(9) review decisions to date, *3x Ramp Rate* and *TCA*, the Board confirmed that “the burden of proof in demonstrating whether the market rule amendments pass or fail the statutory tests is on the Applicants,”¹⁰² which in this case requires the Applicants to prove on a balance of probabilities that the MRP Amendments are inconsistent with the purposes of the Act or unjustly discriminate against the Applicants or NQS resources as a class. The Applicants agree that they have the burden of proof.¹⁰³

B. Criteria for Market Rule Amendment Review

(1) Inconsistency with purposes of the Electricity Act

61. The Electricity Act contains a number of varied objects. The test under section 33 is whether a market rule amendment is inconsistent with the purposes of the Act, not whether it is inconsistent with a single purpose or object. As such, consideration of whether an amendment is inconsistent with the purposes of the Act requires a contextual analysis.¹⁰⁴

⁹⁸ Technical Conference Transcript Day 2, p 56, line 25 to p 57, line 10.

⁹⁹ *Electricity Act*, IESO BOA, Tab 1.

¹⁰⁰ *Electricity Act*, ss. 33(9), IESO BOA, Tab 1.

¹⁰¹ EB-2007-0040, Decision as corrected on April 12, 2007 (“*3x Ramp Rate Decision*”), IESO BOA, Tab 3, Appendix A, Oral Decision (Vice Chair Kaiser), March 29, 2007 at pp 87, 90.

¹⁰² *TCA Decision* at p 8, IESO BOA, Tab 2.

¹⁰³ Applicants Notice of Motion filed December 23, 2024 at para 24.

¹⁰⁴ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21, IESO BOA, Tab 4.

62. In *3x Ramp Rate*, the Board determined that a market rule amendment is not inconsistent with the purposes of the Act because it emphasizes certain statutory objects over others. The Board acknowledged that the impugned amendment might result in a modest increase in consumers bills – which AMPCO argued detracted from the Electricity Act's purpose of protecting the interest of consumers with respect to price – but determined that on balance it furthered other purposes, including promoting economic efficiency, reliability and responsible management of electricity resources.¹⁰⁵

(2) *Unjust discrimination against a market participant or class of market participants*

63. Three elements are required for there to be unjust discrimination.¹⁰⁶

64. First, “discrimination means **economic** discrimination”.¹⁰⁷ In the electricity market setting, whether there is economic discrimination must be considered in the context of the IESO-administered market as a whole.¹⁰⁸

65. Second, the claims of discrimination cannot be purely qualitative and must have some quantitative aspect. That is to say, for impugned conduct to be unjustly discriminatory, it must be discriminatory *in effect*, not just in form or theory. In *TCA*, the Board recognized that since amendments are prospective, quantification may be based on estimates and assumptions about the operation of the market, but nevertheless held that Applicants must provide “adequate information on the nature and extent of the economic impacts.”¹⁰⁹ As the U.S. Supreme Court stated in its seminal decision, *Federal Power Com v. Hope Natural Gas Co.*:

It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end... And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.¹¹⁰

¹⁰⁵ [3x Ramp Rate Decision](#) at p 23, IESO BOA, Tab 3.

¹⁰⁶ [TCA Decision](#) at p 10, IESO BOA, Tab 2.

¹⁰⁷ [TCA Decision](#) at pp. 8, 10, IESO BOA, Tab 2; [3x Ramp Rate Decision](#) at p 26, IESO BOA, Tab 3.

¹⁰⁸ [TCA Decision](#) at p 10, IESO BOA, Tab 2.

¹⁰⁹ [TCA Decision](#) at p 10, IESO BOA, Tab 2.

¹¹⁰ *Federal Power Commission v Hope Natural Gas Co.*, 320 U.S. 591, at p 602, IESO BOA, Tab 5; The United States Supreme Court “reaffirmed] these teachings of Hope Gas” in *Dusquesne Light Co v Barasch*, 488 US 299, at p 310, IESO BOA, Tab 6. See [3x Ramp Rate Decision](#) at pp 23, 25, IESO BOA, Tab 3.

66. Third, any economic discrimination must be **unjust** economic discrimination. As Bonbright observes, some discrimination is inevitable, and the real question is whether the discrimination is efficient or inefficient.¹¹¹

67. The difference in treatment must not be justified by a difference in circumstance.¹¹² As stated by the Board in *TCA*, “treatment can be unequal yet not inequitable or “unjust”.¹¹³ It is only “different treatment in the absence of material and relevant differences in the situation or characteristics among the affected market participants that raises the prospect of unjust discrimination.”¹¹⁴ It is not per se discriminatory to treat different persons differently.¹¹⁵ Many resource types are treated differently in the IESO market based on their unique characteristics and the services they provide.

68. Accordingly, determining whether discrimination is “unjust” requires consideration not only of the interests of the persons complaining of discrimination, but also the legitimate interests of other participants. In this case, it is necessary to weigh the Applicants’ commercial interests against the interests of the IESO, other market participants and consumers and in light of the purposes of the *Electricity Act* to promote reliability and efficiency.

IV. ARGUMENT

A. The Applicants bear the Burden of Proof

69. While the Applicants acknowledge they bear the burden, they indirectly sought to shift that burden to the IESO during the hearing and in their Argument. The Applicants repeatedly questioned the IESO witnesses at the technical conference on what quantitative and other analysis the IESO had done to evaluate and disprove the Applicants’ allegations of adverse economic harm and unjust discrimination.¹¹⁶ The Applicants’ Argument continues this refrain.¹¹⁷

¹¹¹ James C. Bonbright et al, *Principles of Public Utility Rates* (2nd Ed), (Arlington: Public Utility Report, 1988), pp. 517-518, IESO BOA, Tab 7; See [3x Ramp Rate Decision](#) at pp 23-26, IESO BOA, Tab 3.

¹¹² [TCA Decision](#) at pp 8, 10, IESO BOA, Tab 2.

¹¹³ [TCA Decision](#) at p 10, IESO BOA, Tab 2.

¹¹⁴ [TCA Decision](#) at p 10, IESO BOA, Tab 2; See also *Complex Consolidated Edison Co of NY, Inc v FERC*, 165 F3d 992, 1012, 334 US App. D.C. 205 (DC Cir 1999) , IESO BOA, Tab 8; *Western Grid Development, LLC*, 133 FERC K 61,029 (2010), at para 17, IESO BOA, Tab 9.

¹¹⁵ [TCA Decision](#) at p 8, IESO BOA, Tab 2.

¹¹⁶ Technical Conference Transcript Day 1, p 16, line 10 to p 17, line 4, p 31, lines 8-10, p 32, lines 11-13, p 33, lines 24-25, p 35, lines 1-5, 13-15, 18-20, p 39, lines 18-21, p 41, lines 11-14, 21-23, p 42, lines 10-12, p 43 line 28 to p 44 line 1, p 45, lines 3-7, p 52, lines 2-7, p 53, lines 20-21, p 54, lines 8-19, p 56, line 28 to p 57, line 1, p 57, lines 5-8, p 60, lines 8-10, 15-16, p 61, lines 13-18, p 62, lines 20-22, p 63, lines 15-19, p 69, lines 16-21, p 87, lines 10-14, 24-27, p 88, lines 15-19; See also Hearing Transcript Day 1, p 12 line 2 to p 13, line 21; Hearing Transcript Day 2, p 139,

70. The Applicants' position reflects a fundamental misperception of the nature of the legal burden. It presupposes that the IESO has some obligation – at the rule amendment stage or in this review proceeding – to **disprove** the Applicants' claims which is unequivocally not the case. The onus is solely and squarely on the Applicants to prove their case under section 33 of the Electricity Act. The IESO has no positive obligation to disprove harm or discrimination.

71. Nor is the IESO required to perform "quantitative analysis" or any other manner of analysis to respond to the Applicants' complaints. As the IESO explains in detail in its responding evidence and as the IESO's witnesses addressed repeatedly in response to questions from the Applicants at the technical conference and hearing, Power Advisory's analysis contains fundamental flaws and deficiencies. Simply put, a quantitative analysis is not required to reveal and refute these basic deficiencies and flaws.

B. The Applicants' attack on the IESO Witnesses is Spurious

(1) Fact witnesses may provide opinion evidence

72. Throughout this proceeding, the Applicants have questioned the competence of the IESO's two witnesses, Darren Matsugu and Stephen Nusbaum, to provide evidence on matters of wholesale energy markets and market design without being qualified as expert witnesses. The Applicants continue to pursue this line of argument despite the IESO having clarified, as should be self-evident, that Mr. Matsugu and Mr. Nusbaum are "fact witnesses" employed by the IESO who are proffered to give evidence on matters within their specialized knowledge.¹¹⁸

73. It is a trite principle, well established in Canadian law, that a fact witness may provide opinion evidence on relevant matters that fall within the witness's knowledge and expertise. The applicable authorities, which the Applicants chose not to bring to the panel's attention, include a leading Supreme Court of Canada case from 1982:

Except for the sake of convenience there is little, if any, virtue, in any distinction resting on the tenuous, and frequently false, antithesis between fact and opinion. The line between "fact" and "opinion" is not clear... I see no reason in principle or in common sense why a witness should not be permitted to testify in the form

lines 5-7.

¹¹⁷ [Applicants' Argument](#), paras 60 and 76.

¹¹⁸ [Applicants' Argument](#) at para 36; Technical Conference Transcript dated January 9, 2025 (**Technical Conference Transcript Day 1**), p 39, lines 11-12, p 83, lines 2-9, p 157, lines 26-27.

of an opinion if, by doing so, he is able more accurately to express the facts he perceived".¹¹⁹

74. The competence of a fact witness to express opinion evidence includes expressing expert opinion: "A fact witness with expertise can express opinions based on his or her expertise if such opinion stem from the witness's firsthand involvement and not from the litigation".¹²⁰ The governing principles are summarized in Sopinka and Lederman's seminal text, *The Law Of Evidence In Canada*, as follows:

Courts now have greater freedom to receive lay witness's opinions if: (1) the witness has personal knowledge of the observed facts; (2) the witness is in a better position than the trier of fact to draw the inference; (3) the witness has the necessary experiential capacity to draw the inference, that is, form the opinion; and (4) the opinion is a compendious mode of speaking and the witness could not as accurately, adequately and with reasonable facility describe the facts she or he is testifying about.¹²¹

75. Fact witnesses who have special knowledge and experience routinely give opinion evidence on matters that bear on their special experience and knowledge in proceedings before Canadian courts and tribunals. These fact witnesses – often termed "participant experts" – are not required to comply with the requirements that apply to independent experts, i.e., executing expert acknowledgement forms. In *Westerhof v. Gee Estate*, the Court of Appeal for Ontario stated:

Put another way, Dr. Tithecott, a treating physician, was permitted to testify about opinions that arose directly from his treatment of his patient, the plaintiff in the case. He was not required to comply with rule 53.03 [the equivalent of Rule 13A in the Board's *Rules of Practice and Procedure*], and his opinion evidence was admitted for the truth of its contents. This was because he formed his opinions relevant to the matters at issue while participating in the events and as part of the ordinary exercise of his expertise. Accordingly, rather than being a stranger to the underlying events who gave an opinion based on a review of documents or statements from others concerning what had taken place, Dr. Tithecott formed his opinion based on direct knowledge of the underlying facts. He was therefore a "fact witness", or, as I have

¹¹⁹ *Graat v. The Queen*, 1982 CanLII 33 (SCC), [1982] 2 SCR 819 at p 835, IESO BOA, Tab 10.

¹²⁰ *Andersen v. St. Jude Medical, Inc.*, 2010 ONSC 3712 at para 10, IESO BOA, Tab 11.

¹²¹ Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst's, *The Law of Evidence in Canada*, 6th ed. (Toronto: LexisNexis, 2022) , IESO BOA, Tab 12.

referred to such witnesses in these reasons, a "participant expert".¹²²

76. In a recent 2024 decision of the Ontario Superior Court, the Court likewise stated:

Thus, participant experts may give opinion evidence without complying with Rule 53.03 of the *Rules of Civil Procedure* (and thus Rule 20.1 of the *Family Law Rules*).

In essence, the distinction between participant and litigation experts turns on the words "engaged by or on behalf of a party." Participant experts testify to opinions formed during their involvement in a matter. They are not engaged by a party to form their opinions, and they do not form their opinions for the purpose of the litigation. As such, a party does not "engage" an expert "to provide [opinion] evidence in relation to a proceeding" simply by calling the expert to testify about an opinion the expert has already formed".¹²³

77. Fact witnesses for parties to OEB proceedings, including fact witnesses for the IESO, frequently provide opinion evidence that bears on their specialized areas of knowledge and experience. These witnesses are not required to comply with the requirements applicable to an independent expert that is "engaged" by a party to an OEB proceeding, including the execution of Acknowledgement of Expert Duty forms and the requirements that apply to expert evidence under Rule 13A.03 of the *Rules of Practice and Procedure*. That is because they are "party witnesses" with firsthand knowledge, not independent experts **engaged** by a party to the proceeding.¹²⁴

¹²² *Westerhof v. Gee Estate*, 2015 ONCA 206 at [para 70](#), IESO BOA, Tab 13.

¹²³ *Starra v. Starra*, 2024 ONSC 6613 at [paras 23, 24](#), IESO BOA, Tab 14.

¹²⁴ The cases relied on by the Applicants do not support their position: (i) In *Lockridge v. Director, Ministry of the Environment*, 2012 ONSC 2316 the applicants attempted to file a number of affidavits from scientists, which were proffered for the scientific value of the opinions expressed therein, without even attempting to meet the requirements of properly qualified expert evidence, and contained limited *irrelevant* factual evidence. Importantly, the scientists did not appear to be participant experts like Mr. Matsugu and Mr. Nusbaum; (ii) *Fairfield v. Director, Ministry of the Environment*, Ontario Environmental Review Tribunal, 93 C.E.L.R. (3d) 135 appears to be cited for the single sentence that "Ms. Valliant was called by the Director as a fact witness, meaning she was not qualified to give opinion evidence to the Tribunal." There is no further substantive discussion about the issue in that case and the case law considered above is not addressed; and (iii) In *Marchand (Litigation Guardian of) v. Public Hospital Society of Chatham* (2000), 51 O.R. (3d) 97 (Ont. C.A.), the Court of Appeal upheld the trial judge's ruling that one of the defendant nurses could not give opinion evidence concerning the conduct of two other defendant witnesses. The Court of Appeal found that the impugned line of questioning went beyond the nurse's personal involvement in the case and rather, she was being asked for her opinion on the conduct of the other defendant witnesses (see para 91-97). There is simply no basis for the Applicants' suggestion that Mr. Matsugu and Mr. Nusbaum cannot comment on the [Power Advisory Report](#). In fact, there are no better witnesses to correct the factual errors set out in the [Power Advisory Report](#), which underpin the Power Advisory analysis. Mr. Matsugu and Mr. Nusbaum are similarly entitled to provide their opinions formed based on their direct knowledge of the underlying facts of the MRP Amendment

78. The cases in which IESO employees have appeared before the OEB as fact witnesses and provided opinion evidence on energy market matters include:

- (a) In *3x Ramp Rate*, a panel of three IESO employees that included Dr. Brian Rivard, then the Manager, Economics, Market Evolution Analysis and Research Group, testified on behalf of the IESO with respect to various technical matters. The parties agreed that Dr. Rivard was qualified to testify as an economist, particularly in relation to electricity markets, and his testimony included analysis on the elasticity of export response and the effect of export arbitrage on the Hourly Ontario Energy Price.¹²⁵
- (b) In *TCA*, a panel of two IESO witnesses – David Short, Senior Director of Capacity Market Design, and Candice Trickey, Director of Demand-Side Strategy and Support – gave evidence on a range of matters related to wholesale electricity market design and operations. Neither Mr. Short nor Ms. Trickey were qualified as independent expert witnesses.¹²⁶
- (c) Employees of the IESO who have expertise in transmission system planning frequently provide evidence to satisfy the need analysis in leave to construct proceedings before the OEB. In that context, the OEB has recognized and relied upon “the key role of the IESO as set out in the provisions of the Electricity Act to ensure adequate, reliable and secure supply of electricity” as well as the IESO’s “expert understanding of the market”.¹²⁷
- (d) A panel of IESO employees, including Tom Chapman, Senior Manager of Wholesale Market Development, provided evidence in the 2022 decision setting of the export transmission service tariff (*ETS*).¹²⁸ The OEB accepted the IESO’s

process.

¹²⁵ EB-2007-0040, [Oral Hearing Transcript dated March 30, 2007](#) at p 78, line 5 to p 79, line 13. Dr. Rivard is currently a member of the OEB’s Market Surveillance Panel.

¹²⁶ EB-2019-0242, [Oral Hearing Transcript dated November 29, 2019](#) at p 1, line 10 to p 2, line 20.

¹²⁷ Hydro One Networks Inc., Application for leave to reconductor electricity transmission lines in the cities of Toronto and Mississauga, EB-2021-0136, [Decision and Order dated December 2, 2021](#) at p 8.

¹²⁸ [EB-2021-0243, Decision and Order dated November 24, 2022](#) at p 7 to 8.

evidence on the impact of an increased tariff on the energy market and called it “helpful in its deliberations.”¹²⁹

79. The Applicants’ legal counsel represented the Association of Power Producers of Ontario (**APPrO**) in *ETS* and retained Power Advisory as an independent expert to provide evidence on behalf of APPrO. APPrO, whose members include the Applicants, did not raise any objection to the IESO providing expert opinion evidence without being qualified as an expert. To the contrary, APPrO **endorsed the IESO’s market expertise** and cited the IESO’s evidence in their closing submissions to buttress the conclusions of Power Advisory:

With the exception of the IESO, there is no other party in this proceeding ***better positioned to opine*** on the impact of exports on the system than Power Advisory.

...

The only other party in this proceeding with ***comprehensive market expertise, the IESO***, directionally agrees with the analysis and conclusions that Power Advisory undertook.¹³⁰

80. As the foregoing authorities make clear, IESO employees such as Mr. Matsugu and Mr. Nusbaum are entitled to appear as fact witnesses and give evidence, including expert opinion evidence, on matters that fall within their knowledge and experience.

(2) *The IESO witnesses have the requisite qualifications to provide opinion evidence*

81. The Applicants make the bald statement that “Mr. Matsugu and Mr. Nusbaum do not have the requisite experience, qualifications, professional recognition or education to be accepted by the OEB as having expertise in the subjects of energy markets and wholesale market design”.¹³¹

82. This allegation is belied by Mr. Matsugu’s and Mr. Nusbaum’s curriculum vitae and the evidence they provided at the technical conference and hearing on their professional qualifications and experience.¹³² The Applicants did not elicit any evidence whatsoever in their

¹²⁹ *ETS* at p 20 to 21.

¹³⁰ EB-2021-0243, Submissions of the Association of Power Producers of Ontario dated September 6, 2022 at paras 23 and 5.

¹³¹ Applicants’ Argument at para 31.

¹³² CV of Darren Matsugu filed January 7, 2025; CV of Stephen Nusbaum filed January 7, 2025; Technical Conference Transcript Day 1, p 82, line 9 to p 91, line 22; Hearing Transcript Day 1, p 1 line 10 to p 32, line 5.

questioning of either of the IESO witnesses at the technical conference or hearing that casts any doubt on their respective qualifications and experience. Notably, the Applicants' own experts relied upon their experience at the IESO as the basis for their qualification and did not take issue with the expertise of Mr. Matsugu or Mr. Nusbaum.¹³³

83. Mr. Matsugu and Mr. Nusbaum are demonstrably qualified to provide evidence on matters of wholesale electricity market design and operations. Their evidence in this respect "stems from [their] firsthand involvement" working full-time in the areas of wholesale market design and operations for much of the last two decades, specifically with regards to MRP.

(3) *The allegation of bias is baseless*

84. The Applicants' argument that Mr. Matsugu and Mr. Nusbaum do not "claim to be neutral, unbiased or non-partisan in their filed evidence" and therefore if the IESO "relies on Mr. Matsugu or Mr. Nusbaum for their purported expertise, they are similarly ***non-independent advocates for the IESO***" is again premised on a fundamental misapprehension and misstatement of the law. It is also an unfair spurious assertion to make.

85. Mr. Matsugu and Mr. Nusbaum are employees of, and presented as fact witnesses on behalf of, the IESO. As witnesses employed by a party to a proceeding, they are, by definition, not independent. Mr. Matsugu and Mr. Nusbaum are therefore not required – and indeed it would be inappropriate for them – to execute Acknowledgement of Expert Duty forms.

86. Mr. Matsugu's and Mr. Nusbaum's employment at the IESO does not, of course, render them mere "advocates for the IESO". Like all witnesses, Mr. Matsugu and Mr. Nusbaum solemnly affirmed to provide truthful testimony and their evidence falls to be assessed and weighed by the panel like any other witnesses, based on the panel's evaluation of their evidence and their credibility in testifying.

87. In their Argument, the Applicants take matters a step further and purport to challenge Mr. Matsugu's and Mr. Nusbaum's truthfulness and integrity, alleging that "clearly Mr. Matsugu and Mr. Nusbaum have many career and financial reasons to align their testimony with the goals of the IESO and their superiors".¹³⁴ An allegation that a witness is biased or has ulterior financial or career motives for shaping his or her testimony strikes at the "heart of a [witness's] integrity"

¹³³ Technical Conference Transcript Day 2, p 12, line 3 to p 17, line 5.

¹³⁴ [Applicants' Argument](#) at para 36.

and should not be made lightly. Such allegations may be “seriously prejudicial to the character or reputation of an individual” and should only be made if the allegations are well substantiated in the evidence.¹³⁵

88. The Applicants offer no authority for the proposition that a witness’s evidence is tainted simply because that witness is employed by the party on behalf of whom they are giving evidence – there is, of course, no such authority. Employees for companies, including utilities, appear routinely as witnesses in Ontario courts and before the OEB. Their evidence is not as a result predetermined to be tainted or biased. This insinuation and leap of logic echoes the same baseless proposition put to Mr. Nusbaum at the technical conference:

MR. BOYLE: So, Mr. Nusbaum, I understand from your earlier exchange with Mr. Vellone that you are not being put forward as an independent expert witness.

MR. ZACHER: No, we're not putting forward Mr. Nusbaum and Mr. Matsugu as independent witnesses. They're employees of the IESO.

MR. BOYLE: Okay. So, to confirm, you didn't sign a declaration that your evidence is fair, objective, and non-partisan?

MR. ZACHER: No, they did not.

MR. BOYLE: ***So, Mr. Nusbaum, you are conceding that your evidence is biased?***

MR. NUSBAUM: ***No, I am not.***¹³⁶

89. The Applicants’ counsel specifically put to Mr. Matsugu and Mr. Nusbaum at the technical conference that their employment remuneration was tied to the success of MRP. This was refuted:

MR. NUSBAUM: Yes. In terms of the execution, there are -- I have performance objectives around completing certain work and completing it to a certain quality and in accordance with our standards. ***But, no, there is no performance compensation associated with achieving those metrics. We do not have bonuses or performance pay, if that is where you are trying to get to.***

MR. BOYLE: And, Mr. Matsugu, I assume it is the same?

¹³⁵ *Sunsource Grids Inc. v. University of Windsor*, 2023 ONSC 5621 at [para 53](#), IESO BOA, Tab 20.

¹³⁶ Technical Conference Transcript Day 1, p 82, lines 12-24.

MR. MATSUGU: ***That is correct.***¹³⁷

90. Remarkably, the Applicants do not disclose and attempt to address this testimony in their Argument. Rather, the Applicants rely upon an exhibit from a different proceeding addressing the IESO’s “Performance Management: Measures and Targets” as support for their argument that “the performance measurement target for Mr. Matsugu and Mr. Nusbaum is full implementation of MRP by 2025.”¹³⁸ The use of this exhibit is improper – it was not entered into evidence and was not put to Mr. Matsugu or Mr. Nusbaum in cross-examination in clear violation of the seminal rule of fairness from *Browne v. Dunn*.¹³⁹ The exhibit is also mischaracterized – it represents company-wide measures and targets, not performance measures applicable to individual employees. It is improper for the Applicants to have introduced and mischaracterized new evidence after the hearing has concluded.

91. The Applicants also make a specific charge that Mr. Matsugu’s evidence is “replete with evasive testimony”.¹⁴⁰ The Applicants provide a single example in support of this allegation that is not supported by the relevant portions of the transcript.¹⁴¹ In that exchange, NQS counsel put a document to Mr. Matsugu from a 2020 proceeding in which Mr. Matsugu was not involved and that Mr. Matsugu had not prepared or reviewed and then asked Mr. Matsugu to agree with a cherry-picked proposition in the document. Mr. Matsugu responded to the question and provided context for his response.

92. Mr. Matsugu and Mr. Nusbaum gave clear and cogent testimony and honestly and truthfully responded to questions put to them by the Applicants, interveners and the panel. There are no grounds whatsoever to question either of Mr. Matsugu or Mr. Nusbaum’s credibility and that their evidence is deserving of substantial weight. The Applicants are advancing serious allegations that were not put the witnesses during cross-examination and are not substantiated by a fair reading of the transcripts.

¹³⁷ Technical Conference Transcript Day 1, p 92, lines 11-26.

¹³⁸ [Applicants’ Argument](#) at para 37.

¹³⁹ See [Goruk v. Greater Barrie Chamber of Commerce](#), 2021 ONSC 4046 at [paras 7 to 11](#), IESO BOA, Tab 21, discussing the rule from *Browne v. Dunn*, 1893 CanLII 65 (FOREP) at p 70 and the importance of confronting a witness with matters of substance where the cross-examiner intends to attack the witness’s credibility.

¹⁴⁰ [Applicants’ Argument](#) at para 40.

¹⁴¹ Hearing Transcript Day 1, p 121, line 25 to p 127, line 23.

C. The MRP Amendments are Not Inconsistent with the Purposes of the Electricity Act

(1) The MRP Amendments will deliver significant benefits

93. The IESO's evidence shows that the MRP Amendments will deliver significant operational, efficiency and reliability benefits. The Applicants have not demonstrated otherwise; nor proven that the MRP Amendments are inconsistent with any other purposes of the Electricity Act.

94. The IESO has been working on MRP for almost a decade. Over that period, it commissioned and issued an independent benefits case in 2017 and in 2019 released the MRP Business Case, which it reviewed and updated in 2022. The MRP Business Case assessed the operational, reliability and financial benefits of MRP and the updated business case projects \$700 million in net financial benefits for Ontario electricity consumers over the first 10 years.¹⁴² This is a conservative estimate that does not include other important benefits that are qualitative or are more difficult to quantify, including: enhancing reliability by aligning price and dispatch; addressing instances and causes of gaming; incentivizing needed investments and competition; reducing energy curtailment and spilling; and, establishing the foundation for and enabling the participation of new technologies in the future.¹⁴³

95. The IESO's evidence demonstrates that the projected operational, reliability and efficiency benefits will specifically be delivered through:

- (a) replacing the two-schedule market with SSM, and LMP, which will address the current misalignment between price and dispatch, eliminating the need for unnecessary out of market payments, e.g., CMSC;
- (b) introducing a DAM that will provide greater operational certainty to the IESO and greater financial certainty to market participants, which lowers the cost of producing electricity and ensures that the IESO only commits those resources required to meet system needs; and

¹⁴² MRP Business Case at p 8, [IESO Brief of Exhibits](#), Tab 9; [IESO Business Case Validation Memo dated September 22, 2022 \(IESO Validation Memo\)](#), IESO Answer to Undertakings JT1.12 filed January 13, 2025, Appendix C. The estimated total (as opposed to net) benefits of \$975M from 10 years of operating the new market include \$525M from market efficiency improvements and \$450M from avoiding unnecessary congestion management settlement credit payments.

¹⁴³ MRP Business Case at pp 11-13, [IESO Brief of Exhibits](#), Tab 9; [IESO Validation Memo](#), IESO Answer to Undertakings JT1.12 filed January 13, 2025, Appendix C.

- (c) reducing the cost of scheduling and dispatching resources to meet demand as it changes from the day ahead to real-time through the new ERUC process.

96. The MRP Business Case was informed by stakeholder input and the MRP's projected efficiency benefits have been endorsed by the MSP. The MSP noted that "MRP will bring about key changes to the wholesale market with the objective of improving efficiency, competition and transparency", and that it will address many of the MSP's long-standing concerns regarding costly congestion and cost guarantee payments.¹⁴⁴

97. The MRP's projected efficiency benefits are also endorsed by Power Advisory, which stated at the technical conference and hearing that:

Our report does not actually dispute the overall efficiency benefits of MRP. We think they're there...¹⁴⁵

[...]

We accept all the premises to which the IESO has undertaken market renewal, gone through high-level design and detailed design consultations and then finally rule amendments. We totally accept and understand how the wholesale market has basically been moving towards this point of restructuring. And overall restructuring of the market is going to be [providing] overall benefits....So I agree that there could be overall benefits to the wholesale market. That's not a dispute in our mind.¹⁴⁶

[...]

What that quote is saying is that there are efficiency benefits to MRP that have been discussed at length in this proceeding. Our evidence does not dispute those efficiency benefits. There is a strong case for MRP, and we never take a run at them and say they're not there. The efficiency benefits exist.¹⁴⁷

98. The IESO's projected operational, reliability and efficiency benefits from MRP are consistent with numerous purposes of the Electricity Act, including:

¹⁴⁴ [IESO Descriptive Evidence](#), p 4; Ontario Energy Board, Market Surveillance Panel, *State of the Market Report*, 2023, p 83, [IESO Brief of Exhibits](#), Tab 10.

¹⁴⁵ Technical Conference Transcript Day 2, p 77, line 28 to p 78, line 2.

¹⁴⁶ Technical Conference Transcript Day 2, p 96, line 24 to p 97, line 3.

¹⁴⁷ Hearing Transcript Day 2, p 138, lines 5-10.

(a) to ensure the adequacy, safety, sustainability and reliability of electricity supply in Ontario through responsible planning and management of electricity resources, supply and demand;

[...]

(b) to encourage electricity conservation and the efficient use of electricity in a manner consistent with the policies of the Government of Ontario;

(c) to facilitate load management in a manner consistent with the policies of the Government of Ontario;

(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;

[...]

(f) to protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service;

(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; and

99. The Applicants have not adduced any evidence that questions the substantial benefits of the MRP Amendments or demonstrates that they are inconsistent with the purposes of the Act.

(2) The Applicants led no evidence on the alleged inconsistencies

100. The Applicants, in their Argument, raise new reasons they say the MRP Amendments are inconsistent with the purposes of the Electricity Act. These newly raised arguments – not pleaded in the Application, nor supported by evidence from the Applicants – should be disregarded. They do not, in any event, prove that the MRP Amendments are inconsistent with the purposes of the Act.

101. *Lack of ratepayer benefit of MRP* – The Applicants – whose only witness Power Advisory extolled the purposes and efficiency benefits of MRP – now, for the first time, argue

that the IESO's MRP Business Case, specifically its 2022 Business Case Validation Memo, shows that net present value of MRP implementation costs exceed benefits by \$94 million.¹⁴⁸ It is improper for the Applicants to raise new claims that were not pleaded, are inconsistent with their own witnesses' evidence, and which they never put to the IESO's witnesses. The Applicants' interpretation of the Validation Memo is also wrong. The referenced \$266 million is a net present value calculation, inclusive of implementation costs.¹⁴⁹ The Applicants are deducting costs that have already been factored into the calculation.

102. *Economic sustainability* – Having not asked Power Advisory to opine on whether the MRP Amendments are consistent with the purposes of the Act, the Applicants now seek to rely upon testimony from Mr. Chee-Aloy at the hearing wherein Mr. Chee-Aloy surmises about the Applicants' "contracts" and whether MRP Amendment impacts to the Applicants' "cash flow" could impact the Applicants' ability to cover the debt to service ratios associated with their respective credit facility agreements.¹⁵⁰

103. Again, this is a newly raised argument – not pleaded, nor supported by evidence from the Applicants – and it should be disregarded. Mr. Chee-Aloy's testimony also addresses out of scope contract considerations and constitutes hearsay evidence and conjecture about the Applicants' financing and credit facility arrangements, for which there is absolutely no evidence before the Board.¹⁵¹

104. *Cleaner energy sources and technologies* – The premise for the Applicants' argument that the MRP Amendments are inconsistent with section 1(d) of the Act – i.e., that "the IESO states that the net result of MRP is a reduction in natural gas fired generation"¹⁵² – is unsubstantiated.

105. The evidence cited does not support the Applicants' statement. The IESO did not state that MRP will result in a net reduction in natural gas fired generation. The references relied on by the Applicants is a set of discovery responses filed in a separate proceeding (EB-2020-0230) that was marked as an exhibit in this proceeding for identification only. When one of these discovery responses was put to Mr. Matsugu on cross-examination during the hearing, Mr.

¹⁴⁸ [Applicants' Argument](#) at paras 19, 80-85.

¹⁴⁹ [IESO Validation Memo](#), IESO Answer to Undertakings JT1.12 filed January 13, 2025, Appendix C.

¹⁵⁰ Hearing Transcript Day 2, p 141, line 22 to p 142, line 20.

¹⁵¹ Hearing Transcript Day 2, p 171, line 18 to p 172, line 10; Hearing Transcript Day 3, p 63, line 20 to p 64, line 17.

¹⁵² [Applicants' Argument](#) at para 88.

Matsugu advised that he was not involved in the preparation of the responses, which were in relation to a 2017 report from the Brattle Group. With that caveat, and the caveat that he had only had a brief opportunity to review the responses, Mr. Matsugu stated that he believed that the conclusion reached in the discovery response was in the context of explaining that if IESO was better able to manage surplus base-load conditions (which was a major issue in the Ontario system starting in the early 2010s) and align demand, it would result in being able to use non-emitting resources more during off-peak surplus hours.¹⁵³

D. The MRP Amendments do not Unjustly Discriminate against the Applicants

(1) The MRP Amendments are not discriminatory

106. As stated at paragraph 47 above, the Applicants allege in the Application that they will be negatively impacted by the MRP Amendments in four ways. The Applicants have reiterated these four allegations in their argument.¹⁵⁴ However, the evidence in this proceeding does not support a finding of discrimination on any of these four grounds.

107. First, the evidence in this proceeding does not support the Applicants' allegation that they will receive fewer scheduled commitments following MRP due to the pre-dispatch calculation engines included in the MRP Amendments optimizing across the subsequent hours prior to real-time dispatch and incorporating non-incremental energy costs (i.e. three-part offers); in particular:

- (a) The evidence shows that the MRP Amendments account for the unique characteristics of the NQS generators – through the use of mechanisms such as three-part offers and the cost guarantee programs – to place them on an equal footing as other generation resources on a total cost basis in the IESO commitment and scheduling processes. Contrary to the allegations made by the Applicants, they will not be **required** to compete in pre-dispatch based on three-part offers. The Applicants will continue to have the option under the MRP Amendments to submit energy-only offers, with the only difference being that three-part offers will be extended into the pre-dispatch timeframe. The Applicants are not differentially treated or discriminated against vis-à-vis other generators if they have the option of participating in the market on the same basis as all other

¹⁵³ Hearing Transcript Day 1, p 122, line 4 to p 125, line 6.

¹⁵⁴ [Applicants' Argument](#) at para 49.

generators. The Applicants will be only required to use three-part offers in pre-dispatch if they want to qualify for a payment under the RT-GOG – a program that is only available to NQS resources.

- (b) The Applicants have not proven that the MRP Amendments will cause reduced commitments, either to the Applicants individually or as a class. As the IESO stated in its written evidence, and as Mr. Matsugu and Mr. Nusbaum explained in their testimony, Ontario has limited availability for incremental energy and reserves from other peaking resources. For this reason, it is likely that a NQS resource that is not committed under MRP will be replaced by a more efficient NQS resource.¹⁵⁵ The Applicants' only evidence is Power Advisory's notional exercise based entirely on a "proxy generator" and "fictional commitments".¹⁵⁶ Due to the absence of any fact witnesses from the Applicants, there is no way to link the conclusions of the Power Advisory analysis to any actual facility – some of the Applicants' facilities could receive fewer commitments while others may receive more but the Power Advisory analysis provides no basis upon which to make that evaluation. Further, Power Advisory's failure to account for intra-group competition completely undermines its attempt to extrapolate its proxy generator analysis to the Applicants' facilities as a class.¹⁵⁷ Simply put, there is no evidence upon which one can conclude that the Applicants (or even NQS resources) will individually or as a class receive fewer commitments under MRP.
- (c) The Applicants have not established that fewer commitments will result in a negative financial impact on the Applicants. The purpose of commitments and

¹⁵⁵ IESO Responding Evidence at p 4, lines 19-23, p 13, lines 19-23; Hearing Transcript Day 1, p 55, line 3 to p 56, line 2. It is unlikely, over time, that any reduction in commitments for NQS resources would be replaced by the scheduling of hydroelectric resources because they are energy limited and they offer in a manner that they do not significantly compete with NQS resources: Hearing Transcript Day 1, p 56, line 3 to p 57, line 23. The same largely goes for imports, which, on a historical basis, are mostly imported from Quebec and most, if not all, of that capacity is used when offered into the market. As the IESO explained, typically, imports do not flow into Ontario from other jurisdictions because Ontario market prices are significantly lower than those in other jurisdictions: Hearing Transcript Day 1, p 83, line 15 to p 84, line 28.

¹⁵⁶ Technical Conference Transcript Day 2, p 132, line 28 to p 133, line 5; Hearing Transcript Day 2, p 176, line 28 to p 177, line 25.

¹⁵⁷ The Applicants refer to themselves as a "unique class" for the purposes of subsection 33(9) although the parameters of the class – i.e. the characteristics that they share in common, and which differentiate them from others – have never been coherently defined: Applicants' Argument at para 3. The only apparent characteristic that these parties share in common, and which differentiates them from others, is that they are applicants in this proceeding: Hearing Transcript Day 2, p 154, lines 5-13. It seems doubtful that this alone could be sufficient to qualify them as a class for the purposes of subsection 33(9).

associated operational and cost guarantees is to ensure that if NQS resources make themselves available to be committed, they will be fully compensated for its startup and operational costs incurred in relation to a committed run. Consequently, while fewer commitments would reduce a generator's total revenues, it would also reduce a generator's costs for meeting the commitment such that there would be no reduction of a generator's net margin.

108. Second, the Applicants have not established that they will be discriminated against by the incorporation of more potential wholesale market revenues in the RT-GOG payment calculation. As detailed at paragraphs 31 above, the current RT-GCG calculation does not account for all market revenues associated with a commitment which has been identified by the MSP and the AGO as a deficiency in the design of the program that should be rectified. The change in question remedies a feature of the current market design – the RT-GCG Program – that only applies to NQS resources. It therefore does not change how NQS resources are treated vis-à-vis other generators. Moreover, the proxy analysis undertaken by Power Advisory using a fictional commitment – which showed a reduction of revenue on a single day (September 12, 2019) due to the inclusion of operating reserve revenue in the RT-GOG payment calculation – cannot be linked to any actual facility and is not representative of the impact on the Applicants' facilities as a class.¹⁵⁸ The Applicants' allegation that they will be harmed “in 6 out of 6 commitments (100% commitments)” due to the changes to RT-GOG¹⁵⁹ necessarily assumes that these facilities will earn revenues from providing operating reserve, or running above their MLP or beyond their MGBRT, every single time they receive a commitment. No evidence was led to support that significant assumption.

109. Third, the Applicants have not substantiated the allegation that NQS Generators will receive lower wholesale energy and operating reserve revenues in periods where MPM is applied because of ex-ante mitigation of financial parameters and validation of non-financial parameters. The Applicants exaggerate the number of parameters applicable to the scheduling and dispatch of NQS resources relative to those applicable to hydroelectric resources. Many of these parameters – including start-up offer, speed no-load offer, single cycle mode, maximum daily energy limit, and maximum number of starts per day – are optional for NQS resources. Furthermore, some of these parameters are not exclusive to NQS resources; other resources,

¹⁵⁸ [Power Advisory Report](#), Appendix A.

¹⁵⁹ [Applicants' Argument](#) at para 11.

including hydroelectric resources, may register these parameters if they are relevant to their operating characteristics.¹⁶⁰ To the extent NQS resources have more parameters that are subject to the new MPM framework, this simply reflects the fact NQS resources have more dispatch parameters through which they can exercise market power and materially impact market payments. It is not discriminatory to treat differently situated persons (resources) differently.

110. Fourth, the Applicants led no evidence to support the allegation that they will be discriminated against because they may receive lower revenues in the form of “make-whole” payments and the LMP than previous revenues from CMSC payments plus the uniform market clearing price under the IAM.¹⁶¹ As Mr. Chee-Aloy stated during this testimony at the technical conference, even if make-whole payments under MRP will be less relative to CMSC in the current market (which was not established by the Applicants), the Applicants “don’t have any issue on that.”¹⁶²

(2) The Applicants have not quantified the alleged discrimination

111. The sole evidence filed by the Applicants – the Power Advisor Report – does not meet the OEB’s requirement for quantitative evidence of the alleged discrimination. As detailed above, Power Advisory’s analysis is, in short, based on a proxy generator, fictional commitments and a black box analysis. It may be summed up by Mr. Yauch’s statement “you have to trust [us]”.¹⁶³

112. This is a fatal deficiency in the Applicants’ ability to discharge their onus of proving that the MRP Amendments cause quantifiable economic harm and unjust economic discrimination. As the Schools Energy Coalition states in its submission, the Board should unequivocally reject, or accord very little weight, to claims which are unsupported by evidence from the Applicants themselves and which is based on modelling which cannot be tested because of confidentiality

¹⁶⁰ IESO Responding Evidence at pp 29-30. To the extent hydroelectric resources have certain parameters through which they can control scheduling and dispatch that simply reflects their unique operating characteristics (e.g., limits on energy and OR they can produce) and the safety and environmental regulations that apply to them. The Applicants do not dispute that hydro resources are subject to unique regulatory requirements that govern their scheduling and dispatch. Technical Conference Transcript Day 2, p 88, lines 5-9, 21-28, p 89, lines 15-18, p 95, lines 4-7, p 120, lines 4-13; Hearing Transcript Day 2, p 134, lines 9-13; Hearing Transcript Day 3, p 44, lines 2-6.

¹⁶¹ Hearing Transcript Day 3, p 41, 24 to p 42, line 10.

¹⁶² Technical Conference Transcript Day 2, p 107, lines 21-24.

¹⁶³ Hearing Transcript Day 3, p 57, lines 24-27.

claims. The “trust us” approach fails to meet the standard required of expert witness testimony under Rule 13A.03¹⁶⁴ and does not satisfy the burden of proof.

113. It is puzzling that the Applicants chose not to submit any factual evidence whatsoever given the OEB’s prior jurisprudence under section 33. In *TCA*, the applicant AMPCO elected not to provide any evidence from its members in support of AMPCO’s allegations that the TCA rule amendments unjustly discriminated against demand response resources (**DR Resources**) relative to other generators and loads. The OEB specifically called out this deficiency in dismissing AMPCO’s application:

On the third element of demonstration of unjust discrimination being the quantification of the economic impact, ***there was no evidence presented by any party on the range of costs incurred by any of these market participants.*** The only example of costs that might be incurred by any of AMPCO’s members was that of an unidentified steel manufacturer. Even then, there was no evidence of what the costs might actually be. ***The absence of quantitative evidence on costs that different parties incur does not permit the OEB to conclude with certainty whether the circumstances between generators and DR Resources are in fact similar or different, and whether, as a consequence, different treatment could constitute unjust discrimination.*** In addition, the experience to date under the DRA indicated that there has been very limited activation of DR Resources, which suggests that there could have been very limited economic impact on the DR Resources. However, ***there was no data on the financial or economic cost to DR Resources or a forecast as to the frequency of activation over the next decade. Absent this information, the extent of the economic impact DR Resources cannot be estimated.***

Given the insufficiency of evidence as described above, the OEB has no basis on which to make the positive finding of unjust discrimination and return the amendments to the IESO for reconsideration.

The OEB is cognizant of AMPCO’s members’ reticence to share their economic data with each other, and other competitors. That said, there are methods by which this

¹⁶⁴ Hearing Transcript Day 2, p 198, line 15 to p 200, line 14. The purpose of Rule 13A, and similar rules before the courts and other tribunals, is discourage the filing of a “barebones expert’s report” with the intent of expanding upon the reasons for the expert’s opinion during his or her testimony. “[E]xperts’ reports should not be a game of hide and seek” and it is “not the job of the Court to search around in the body of an expert report and try and ascertain all the ‘implicit’ opinions contained in it.” See *Sean Omar Henry v. Dr. Marshall Zaitlen*, 2022 ONSC 214 at [paras 18-19](#), IESO BOA, Tab 22.

information could be shared with the OEB without compromising the confidentiality of any individual market participant's information.¹⁶⁵

114. The Power Advisory Report includes other significant flaws as detailed at paragraph 57 above that entirely discredit the conclusions of its financial impact analysis. Despite the numerous deficiencies in the analysis that were identified by the IESO in its responding evidence and during questioning at the technical conference, Power Advisory inexplicably continued to “stand behind” its financial impact analysis and saw no need to change “anything” in the report when provided with an opportunity to do so at the oral hearing.¹⁶⁶ Power Advisory’s entrenched position at the hearing reflected its parallel role as an advocate for the Applicants in discussions with the IESO on the same matters that are the subject of this application.¹⁶⁷

115. The Power Advisory Report also fails to provide any quantitative analysis for several of the risks arising from the MRP amendments that Power Advisory says will cause adverse financial impacts to NQS generators.¹⁶⁸ Upon questioning at the technical conference and hearing, Power Advisory retreated from these assertions and acknowledged that the impact of these risks was uncertain and that it had not attempted assess or quantify their potential impact:

- (a) *27-hour Look Ahead Period (LAP)* - Power Advisory agreed that the “financial risk of [a 27-hour LAP] is not embedded anywhere in numbers. This is one of these risk that we highlight as a potential risk but... we don’t actually know”¹⁶⁹
- (b) *3x to 1x ramp rate* - Power Advisory stated that “There are a lot of unknowns... So we don’t actually know how this is going to work. We just highlight as a potential risk that there is much more volatility in the wholesale market than there is today...”¹⁷⁰ “[T]here could be more upside, that prices, when they are volatile,

¹⁶⁵ [TCA Decision](#) at pp 25-26, IESO BOA, Tab 2.

¹⁶⁶ Hearing Transcript Day 2, p 172, line 11 to p 173, line 1. An expert has an ongoing duty to be non-partisan after the delivery of his or her report. This includes the acknowledgement of obvious errors in the expert’s analysis that could impact its conclusions.

¹⁶⁷ Technical Conference Transcript Day 2, p 17, line 24 to p 18, line 27, p 74, lines 2 to 20.

¹⁶⁸ [Power Advisory Report](#) at paras 48, 51, 52, 58-60.

¹⁶⁹ Technical Conference Transcript Day 2, p 91, lines 22-28. See also, Hearing Transcript Day 3, p 68, line 27 to p 69, line 6.

¹⁷⁰ Technical Conference Transcript Day 2, p 81, lines 9-16.

the NQS generators are online and they're capturing more of the up upside than downside. That is one potential outcome..."¹⁷¹

- (c) *New MPM framework* - Power Advisory agreed ex-ante mitigation is "fairly common across wholesale markets"¹⁷² and admitted it did not know how it would impact NQS generators, including relative to hydroelectric generators: "So we ultimately don't know how this is going to play out"¹⁷³... "in terms of how these parameters are going to be used with respect to market renewal and when the market goes live in May, relative to other resources and what might be the causal effect of how hydroelectric generators may change their operations in the market, based on these parameters, and we think, directionally, it could impact non-quick start generators".¹⁷⁴

(3) *The Applicants have not proven any discrimination is unjust*

116. The Applicants do not purport to provide evidence showing that the alleged discrimination is unjust. Their only witness presented by the Applicants – Power Advisory – was not asked to address the justness of the MRP Amendments. As such, the Applicants' claims are focused solely on allegations that the MRP Amendments will economically harm NQS resources as compared to their position in the current market. Economic harm is not the test for unjust discrimination under subsection 33(9) of the Electricity Act.

117. To the extent the panel finds that the MRP Amendments discriminate against the Applicants, such discrimination is justified because the MRP Amendments will improve overall market efficiency as has been acknowledged by Power Advisory.¹⁷⁵ In *3x Ramp Rate*, the Board concluded that rule amendments which delivered "efficiency benefits" were not unjustly discriminatory even though they economically impacted a class of market participants.¹⁷⁶

118. In lieu of any actual evidence, the Applicants nakedly attempt to flip the burden of proof (which is addressed above at paragraphs 69 to 71) and allege that the IESO is in breach of an

¹⁷¹ Technical Conference Transcript Day 2, p 81 line 27 to p 82, line 2.

¹⁷² Technical Conference Transcript Day 2, p 111, lines 23-25.

¹⁷³ Technical Conference Transcript Day 2, p 120, lines 17-18.

¹⁷⁴ Technical Conference Transcript Day 2, p 121, lines 19-25. See also, Hearing Transcript Day 2, p 125, lines 23-26, p 135, lines 10-14; Hearing Transcript Day 3, p 46, lines 24-28, p 48, lines 4-9.

¹⁷⁵ Technical Conference Transcript Day 2, p 77 line 22 to p 78, line 6, p 96, line 24 to p 97, lines 3, 9-10; Hearing Transcript Day 2, p 138, lines 5-10.

¹⁷⁶ *3x Ramp Rate* at p 26, IESO BOA, Tab 3.

enforceable provision of the *Ontario Energy Board Act, 1998 (OEB Act)*.¹⁷⁷ This allegation was not pleaded in the Application and is utterly lacking in merit. This proceeding is not an inspection, investigation or enforcement proceeding under the OEB Act. The Applicants also make an inflammatory accusation that the IESO “has a targeted, intentional campaign to push emitting resources out of the IESO administered markets under the guise of ‘efficiency’”.¹⁷⁸ This accusation has no foundation in the evidence.

119. The IESO has never, as the Applicants assert, “acknowledge[d] [that] MRP will discriminate against the NQS generation class”.¹⁷⁹ The Applicants rely for this statement on an interrogatory response from a different OEB proceeding. The interrogatory response, plucked out of context, simply does not support this assertion. Furthermore, when the interrogatory response was put to Mr. Matsugu he refuted this proposition – contrary testimony that the Applicants failed to disclose and address in their submissions:

MR. VELLONE: And to the extent there is an increase in non-emitting resources as a proportion of Ontario’s electricity supply, is the corollary true? There is a decrease in emitting resources?

MR. MATSUGU: No....¹⁸⁰

120. These unfounded accusations are particularly remarkable given that the Applicants, who are requesting significant changes to “the core pillars of what MRP is intended to do”, never raised concerns about the unjustness of the MRP Amendments at any time during the stakeholdering and rule-making process.¹⁸¹ This crucial point was captured in an exchange between Mr. Rubenstein and Mr. Nusbaum with respect to the comments of the generator representatives – Mr. Deeg and Mr. Urukov – in the TP Member Vote and Rationale:

MR. RUBENSTEIN: And as I read the document, they do provide comments regarding implementation, contract issues, the market power mitigation working group, but I don't see anywhere in that they take the position or suggest the view that the amendments are unjustly discriminatory or inconsistent with any purpose of the Electricity Act; am I correct?

MR. NUSBAUM: That would be correct.

¹⁷⁷ [Applicants’ Argument](#) at paras 59 and 60.

¹⁷⁸ [Applicants’ Argument](#) at para 58.

¹⁷⁹ [Applicants’ Argument](#) at para 57.

¹⁸⁰ Hearing Transcript Day 1, p 125, lines 7-11.

¹⁸¹ Hearing Transcript Day 2, p 92, line 24 to p 93, line 8.

MR. RUBENSTEIN: Was that ever expressed to the IESO during the technical panel or the broader stakeholder process?

MR. NUSBAUM: That was definitely never raised and definitely never as a material issue, no.¹⁸²

121. At no time in this proceeding have the Applicants explained why allegations that go to the core of MRP were not previously raised with the IESO. Nor have the Applicants attempted to reconcile the allegations made in this proceeding with the favourable votes cast by their own representatives at the Technical Panel. It beggars belief that these representatives would have in good faith voted for rule amendments that unjustly discriminate against the Applicants. The only explanation is that the Applicants did not earlier advance these claims in the IESO's MRP Amendment process because they are allegations that concern their contracts.

V. ORDER REQUESTED

122. The IESO requests that the Application be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of February 2025.



Glenn Zacher / Patrick Duffy / Lesley
Mercer
Stikeman Elliott LLP

¹⁸² Hearing Transcript Day 2, p 91, line 8-20.