

# DRAFT – BACKGROUNDER

## Market Renewal Decision-Making Processes For Review

To inform stakeholder discussion and feedback on  
the: *market rule amendment process, market manual  
amendment process and the dispute resolution process*

---

Wednesday, July 18, 2018

*This draft Backgrounder is provided to the July 18<sup>th</sup> MRWG meeting to review the scope of the presentation. Substantive discussion on the Backgrounder will take place in the facilitated August stakeholder sessions, but the IESO does invite feedback on general scope at this time.*

# DISCLAIMER

This presentation is provided for information and discussion purposes only. This presentation does not constitute, nor should it be construed as, legal advice or a guarantee, representation or warranty on behalf of the IESO. In the event of any conflict or inconsistency between the information contained in this presentation and the market rules, the market manuals, any IESO contract or any applicable legislation or regulation, this presentation will take subordinate priority.

# Purpose and Objective

- This Backgrounder was prepared for information and education purposes, to focus and advance stakeholder discussion and feedback in the facilitated August stakeholder sessions.
- The information in this Backgrounder is intended for information purposes and does not represent any particular position of the IESO.

# Purpose and Objective

- The purpose of this presentation is to outline certain IESO processes to be considered in August 2018 stakeholder sessions with a facilitator, specifically:
  - *Market Rule Amendment (MRA) Process* – stakeholdering and decision-making processes to amend market rules.
  - *Market Manual Amendment Process* – stakeholdering and decision-making processes to amend the market manuals, including distinction between market manual versus market rule content.
  - *Dispute Resolution Process* – processes and remedies for addressing market rule and market manual disputes.

# I. MARKET RULE AMENDMENT PROCESS – OTHER JURISDICTIONS

# MRA Processes – Other Jurisdictions

- Stakeholder participation is more formally incorporated into MRA processes in US ISO/RTOs than it is in the UK, or in Alberta or Ontario:
  - *UK and Canada:* The restructured electricity markets are largely the result of top-down government policy initiatives and authority for market design and market rules has been exercised by government and/or conferred by statute to system operators.
  - *US:* The ISO/RTO framework reflects a more bottom-up evolution. FERC, through its general authority over wholesale electricity markets, encourages the creation of ISOs/RTOs and ISO/RTO governance frameworks reflect agreements amongst utilities and customers – in some cases, the agreements by which investor-owned utilities agreed to turn over the operation of their transmission assets to ISO/RTOs dictate key elements of stakeholder governance models.

# 1. OTHER JURISDICTIONS – US ISOs/RTOs



# US ISOs/RTOs

- Details of processes to introduce new tariffs and to amend existing tariffs vary greatly within and across US ISOs/RTOs. This jurisdictional analysis is intended to be a general summary of key elements of ISO/RTO tariff/MRA amendment processes.

# A. US ISOs/RTOs – Regulatory Oversight

- FERC has authority over the transmission of electricity in interstate commerce, and the sale of electricity at wholesale in interstate commerce.
- FERC oversees six ISOs/RTOs (NEISO, NYISO, PJM, SPP, MISO and CAISO) and generally regulates through its authority to review and approve ISO/RTO tariff amendments to ensure they are *just and reasonable* and *not unduly discriminatory or preferential* (ISO/RTO tariffs contain terms and conditions of service, including market rules).
- FERC exercises authority over ISO/RTO stakeholder governance processes related to markets and system operations on the grounds that governance is integral to ensuring competitiveness and efficiency in the wholesale markets.

# A. US ISOs/RTOs – Regulatory Oversight

- **FERC Order 888:** required all transmission-owning public utilities to file open access, non-discriminatory transmission service tariffs and to unbundle wholesale power services, encouraging the formation of ISOs.
- **FERC Order 2000:** established minimum requirements for ISOs to improve reliability, eliminate discriminatory practices and enhance market efficiency. In particular, Order 2000 mandated ISO independence by requiring that:
  - ISOs have no financial interest in market participants; and
  - ISOs have decision-making processes independent of any single market participant or class of market participants.
- **FERC Order 719:** further promoted ISO independence and balanced stakeholder involvement in governance processes, and specifically, to improve “responsiveness” of ISOs to customers and stakeholders, which FERC assesses with reference to four core principles: *inclusiveness, fairness in balancing diverse interests, representation of minority positions, and ongoing responsiveness.*

## A. US ISOs/RTOs – Regulatory Oversight

- FERC ensures independence by scrutinizing the ISO governance structures and processes, such as composition of stakeholder committees, voting shares, voting rules, etc. as part of ISO compliance filings.

## B. US ISOs/RTOs – Decision-Making Authority

- Ultimate authority to propose market rule changes to FERC is vested in the board of directors in most ISOs/ RTOs, though stakeholders typically have extensive involvement in the development of proposals.

## B. US ISOs/RTOs – Decision-Making Authority

- NEISO, MISO, SPP, CAISO – Stakeholder input is formally incorporated into the tariff amendment process through committee and working group processes, but stakeholder authority is ultimately limited to providing advice to the ISO board of directors, executives and staff. In most instances, the board of directors has final authority to decide on proposed tariff amendments with FERC, under Section 205 of the *Federal Power Act* (FPA). However, in one case (MISO), the executives exercise that authority in most circumstances, and make filing decisions under the oversight of the board of directors.

## B. US ISOs/RTOs – Decision-Making Authority

- NYISO and PJM – senior stakeholder committees have some shared governance:
  - NYISO: Board of directors may only file proposed tariff amendments under Section 205 with the concurrence of the Management Committee, which requires 58% approval to refer tariffs to the Board (Board may, in exigent circumstances, unilaterally file a Section 205 tariff proposal with FERC).
  - PJM: Board of directors is not bound by stakeholder recommendations and has sole authority to decide on and file proposed amendments to PJM's *Open Access Transmission Tariff (OATT)* and *Reliability Assurance Agreements*. However, the Members Committee has Section 205 filing authority over amendments to PJM's *Operating Agreement* (tariffs are contained in both the OATT and *Operating Agreement*).

## C. US ISOs/RTOs – Stakeholder Committee & Working Group Structures

- Stakeholder committee / working group structures are both a product of ISO/RTO and stakeholder negotiations and FERC's requirement that ISOs be independent of market participants and have decision-making processes that are independent of market participants or any class of market participants.



## C. US ISOs/RTOs – Stakeholder Committee & Working Group Structures

- US ISO/RTO stakeholder committees, working groups or technical groups typically have the following features:
  - Stakeholders are grouped by sector, such as transmission owners, generators, alternative resource/ suppliers, end-use consumers, marketers, public power entities, consumer advocates, environmental groups, etc.
  - Stakeholder constituencies are represented in committees and working groups that participate in market rule development and amendment processes.

## C. US ISOs/RTOs – Stakeholder Committee & Working Group Structures

- Stakeholder constituencies are granted weighted voting rights to ensure balanced representation across all sectors. Stakeholder representation and voting rights are the product of negotiations between ISOs/ RTOs and stakeholders, and most agreements reflect the principle of ensuring that a plurality of sector support is required to advance tariff amendments and that one or two sectors are not able to force or block tariff amendments.
- Stakeholder committees and working groups often include voting and non-voting members. Non-voting representatives may attend and participate in market rule development and amendment processes, but may not vote (non-voting members may include ISO staff, PUC staff, other state representatives, and independent market monitor representatives).

## C. US ISOs/RTOs – Stakeholder Committee & Working Group Structures

- Independent market monitors play an integral role in market rule development and amendment processes by proposing and/or assessing market rule amendments to promote competitiveness and ensure there is no exercise of market power.
- Independent market monitors often have rights to make presentations to senior stakeholder committees or ISO boards and have the right to intervene and file comments at FERC.

## D. US ISOs/RTOs – Voting/Other Processes

- Stakeholder committees and working groups include voting and other processes for advancing MRA proposals:
  - As in Ontario, most tariff amendment proposals originate with ISO staff, or are proposed by other participants and further developed by ISO staff as sponsor; ISO staff as sponsor lead working groups and committees and shepherd proposed tariff amendments through working groups and committees; and, ISO staff draft and redraft tariff amendment proposals as they progress through various working groups and committees up to the ISO board of directors.

## D. US ISOs/RTOs – Voting/Other Processes

- Lower level working groups and committee process is more informal. Meetings are often not public and formal minutes of working group or committee meetings are not kept. Also, voting may not be employed to advance proposals to the next level.
- Tariff amendment proposals progress through working group and committee levels that culminate in consideration by a senior stakeholder committee, which generally have a more formal process.
- Stakeholder consideration of proposed tariff amendments is consensus driven, particularly at the senior stakeholder committee level.

## D. US ISOs/RTOs – Voting/Other Processes

- Consensus driven decision-making is facilitated through sector weighted voting, which is intended engender accommodation and cooperation amongst different stakeholder constituencies, and is also designed to prevent one or two stakeholder groups from blocking tariff amendment proposals.
- Stakeholder sector groups are usually not given more than 15 – 20% of the vote and senior stakeholder committees generally require between 50 – 68% approval to recommend advancing tariff proposals to ISO boards of directors.

## E. US ISO/RTOs – Input & Influence over MRA Decision-Making

- Stakeholders provide input and advice to ISO boards, which are generally authorized to decide upon rule amendments and file Section 205 tariff amendment proposals with FERC. The typical process is described below:
  - ISO staff prepares briefing note/recommendation to ISO board, which may or may not align with senior stakeholder committee vote/recommendation.
  - Senior stakeholder committee voting results, including any registered objections/dissents are available to the ISO board; minutes of senior stakeholder committee meetings are publicly posted and may also be included in the ISO board package.

## E. US ISO/RTOs – Input & Influence over MRA Decision-Making

- ISO staff briefing note / board package is generally not vetted by or made available to senior stakeholder committees, and are generally not otherwise public.
- Stakeholders whose proposals fail to advance to senior stakeholder committees or the ISO board, or who disagree with the senior stakeholder vote/recommendation, may in some cases appeal and/or make submissions to the ISO board.
- ISO board may approve/reject tariff amendment proposal; ISO boards typically do not provide reasons for decision.
- If tariff amendment proposal is approved, it is filed with FERC under Section 205. Section 205 ISO tariff filings typically include detailed rationale for proposed tariff amendment and record of stakeholder process, including results of stakeholder voting, any alternatives considered, reasons for rejecting alternatives, etc.



## F. US ISOs/RTOs – MRA Review & Appeal

- US ISOs/RTOs must file all proposed tariff amendments with FERC under Section 205 of the FPA (or Section 206 when unable to obtain required stakeholder authorization, where applicable):
  - FERC is authorized to review proposed tariff amendments to ensure that it is just and reasonable and not unduly discriminatory or preferential.
  - Tariff does not become effective until accepted or approved by FERC.

## F. US ISOs/RTOs – MRA Review & Appeal

- Section 205 process provides that:
  - ISO generally must file and provide notice of proposed tariff 60 days before the effective date (however, FERC has authority to waive this prior notice requirement in certain circumstances to allow a tariff change to become effective at an earlier date.
  - Stakeholders have 21 days to respond and oppose the proposed tariff.
  - FERC may conduct public trial-type hearing process.
  - Onus is on the ISO to demonstrate that the proposed tariff is just and reasonable and not unduly discriminatory or preferential.
  - FERC authorized to reject or approve the proposed tariff.
  - FERC processes most tariff filings by “paper hearings” within a prescribed 60 day period.

## F. US ISOs/RTOs – MRA Review & Appeal

- Market participants may also initiate Section 206 complaint to set aside and amend an existing tariff on the basis that it is not just and reasonable or is unduly discriminatory or preferential (onus is on the complainant).
- FERC has authority under Section 206 to initiate, on its own initiative, an investigation into whether an existing tariff provision is just, reasonable and not unduly discriminatory, and may revise the tariff provision if it finds that the existing provision is unjust, unreasonable, or unduly discriminatory.

## 2. OTHER JURISDICTIONS – ALBERTA

## A. Alberta – Regulatory Oversight

- Alberta Utilities Commission (AUC) regulates electric and gas sectors, and is authorized to protect economic, social and environmental interests where competitive markets are ineffective.
- AUC has authority to prescribe procedures governing AESO rulemaking.
- AUC also serves as a review/appeal authority for AESO rulemaking and disputes arising under AESO market rules.

## B. Alberta – MRA Decision-Making Authority

- AESO authorized by *Electricity Utilities Act* (EUA) to make rules falling within its jurisdiction, including rules relating to the design and operation of the competitive wholesale electricity market.
- AESO has established stakeholder engagement principles and procedures, but stakeholder input in rulemaking is limited to providing advice to the AESO.

## B. Alberta – MRA Decision-Making Authority

- AESO current stakeholder principles for consultation on rule changes, include the following:
  - Consultation process will be inclusive, transparent, fair and efficient, and will be understood and accepted by all parties.
  - Consultation process, particularly with respect to the degree of detail of information provided, the time required for review of information and the extent of consultation, will be commensurate with the importance, complexity, potential impacts and urgency of rule amendments.
  - The consultation process will be comprehensive in order to enable the AESO board to make the best decision possible in the context of AESO's statutory mandate.

## B. Alberta – MRA Decision-Making Authority

- AESO may develop written terms of reference for each rules consultation process.
- Stakeholders will be given the opportunity to provide written comments in response to AESO documentation made available during the consultation process.
- When finalizing draft rule changes, AESO will have regard for all written stakeholder input and will provide written explanation where draft rule changes do not address a stakeholder concern or accommodate a stakeholder suggestion.
- While written input from stakeholders will inform the AESO's decision-making authority, the responsibility for the decision rests with the AESO, pursuant to its statutory mandate.



## B. Alberta – MRA Decision-Making Authority

- AESO staff undertakes stakeholder consultation through committees and working groups (including working groups established for each of the five design streams for the proposed new capacity market).
- Working groups are designed to have a balanced representation across the sector.
- The working group consultation process strives to achieve consensus.

## B. Alberta – MRA Decision-Making Authority

- If consensus cannot be achieved, working group members may vote on leading alternatives. Voting results, along with rationale supporting all alternative and dissenting views, are documented and posted on the AESO's website.
- The AESO is not bound by working group recommendations that have attracted majority or consensus support.

## C. Alberta – Changes to Decision-Making & Stakeholder Process Under Consideration

- As part of Alberta's transition to a capacity market, the government and the AESO have been considering changes to governance structures, including MRA stakeholder and decision-making processes.
- Alberta previously had an ISO rule filing and review process with the AUC, like Ontario, but as part of its current market transition, new legislative changes have been introduced and further changes are being considered.
- As a result of Alberta's governance review, these new or prospective changes to AESO decision-making and stakeholder processes include:
  - the AUC's authority to review/approve ISO rules and to prescribe rule making procedures to be followed by the AUC in making rule amendments, and
  - the AESO's MRA stakeholdering processes.

## D. Alberta – New AUC Authority

- Alberta recently passed Bill 13, which amends the *Alberta Utilities Commission Act* (AUCA).
- AESO must now file all proposed rule amendments for approval by the AUC.

## D. Alberta – New AUC Authority

- AESO has the burden of satisfying the AUC that the statutory criteria are met, including additional criteria relating to the proposed new capacity market.
  - The AESO rule: (i) is not technically deficient, (ii) supports the fair, efficient and open competitive operation of the market, and (iii) is in the public interest.
  - If the AESO rule relates to the capacity market, the rule: (i) supports ensuring a reliable supply of electricity is available at reasonable cost to customers, (ii) does not conflict with and is not inconsistent with any regulations.
  - The AESO, in developing the rule, complied with the AUC's rulemaking procedures.

## D. Alberta – New AUC Authority

- The AESO will make rules establishing the capacity market and the operation of the capacity market (Bill 13 further prescribes what may be included in the AESO capacity market rules, such as the definition of capacity, capacity auction requirements, etc.).
- The AUC will: (i) make rules requiring the AESO to consult with market participants and other interested parties in developing rules, and (ii) may make rules governing the making of rules, including the procedures and processes to be followed by the AESO, the form and content of rule filings with the AUC, and the requirements the AESO must meet to satisfy the AUC that the rules satisfy the statutory criteria.

## D. Alberta – New AUC Authority

- Bill 13 also provides a two-part process for the AUC's approval of the new capacity market rules:
  - Provisional approval within six months of filing with the AUC of the first set of rules for the new capacity market.
  - Final approval of provisionally-approved rules within 24 months after the initial provisional ruling.

## E. Alberta – MRA Stakeholdering

- The AUC is currently revising Rule 017, which prescribes the procedures to be followed by the AESO in making and amending the rules.
- The current draft of Rule 017 provides that, for both ordinary rules and new rules related to the capacity market, the AESO must:
  - Provide written notice of the proposed amendments to the MSA, market participants and other interested parties and post notice on the AESO's website.
  - Solicit and receive comment from the MSA, market participants and other interested parties and post comment on the AESO's website within five business days.



## E. Alberta – MRA Stakeholdering

- Draft Rule 017 continued:
  - Design and participate in a consultation process.
  - Following development of a proposed rule, provide written notice to the MSA, market participants and other interested parties, solicit further comment, and post all comments to AESO website.
  - Include with ASEO rule amendment filing with the AUC a description of the consultation process along with a list of all parties who participated and a list of any comments / submissions made by parties, a description of the objective or purpose of the proposed rule, a copy of any analysis done by the AESO with the description of assumptions and methodology, an explanation of how the rule satisfies the statutory criteria, and a description of any alternatives considered and why they were rejected.

# 3. OTHER JURISDICTIONS – UNITED KINGDOM

## A. UK – Regulatory Oversight

- UK regulatory/market design and MRA process is different than the US, Alberta or Ontario ISO model and stakeholder input is much more limited.
  - Market rules, including those for the UK's capacity market, are developed by the Department for Business, Energy and Industrial Strategy (BEIS), a ministerial department of the government.
  - Stakeholders may provide some input on market rule amendments through BEIS consultation processes.

## A. UK – Regulatory Oversight

- UK regulator, Ofgem, administers the market rules and annually provides opportunity for stakeholders to revise/propose market rule amendments, this does not involve structured stakeholder committee/working group processes as in the US/Canada and there is no stakeholder voting.
- Authority for making market rule amendments remains with BEIS.
- There is no appeal process, other than to the courts on an error of law standard.

# Preliminary Issues for Consideration

- The IESO board will retain authority for making market rules and filing proposed MRAs with the OEB. This is consistent with:
  - The legislative framework in Ontario, which authorizes the IESO to make market rules.
  - Practice in Alberta, the UK and most US ISOs/RTOs.
- The IESO does wish to have further dialogue with stakeholders about how the MRA process may be enhanced.
- The IESO would like to hear from stakeholders regarding what specific MRA process matters they think should be further considered and the IESO will take this into consideration for the purpose of preparing content for the facilitated August stakeholder sessions.

# II. MARKET MANUAL AMENDMENT PROCESS

## A. Market Manual Amendment Process

- The IESO is authorized by the *Electricity Act* to make market rules. This authority is exercised by the IESO board, subject to a market participant's right to seek OEB review.
- The IESO also issues market manuals, guidelines, interpretation bulletins and other documents. Authority to approve market manuals is delegated by the IESO board to management.
- Stakeholder issues for consideration include the content of a market rule versus a market manual, and the process governing market manual amendments.

## B. Rulemaking Principles

- Rulemaking by administrative bodies takes two general forms: subordinate legislation and informal rulemaking.
  - *Subordinate legislation* typically includes rules, codes, bylaws, etc. made by a legislative delegate that have the force of law.
  - *Informal rulemaking* typically includes the power to issue directives or policy statements, to create procedural manuals or to impose informal rules of procedure that generally do not confer rights or create legal liabilities or restrictions.



## B. Rulemaking Principles

- There is no bright line between what constitutes subordinate legislation versus informal rulemaking, or what processes apply to subordinate legislation versus informal rulemaking.
- Rules comprising subordinate legislation should ordinarily attract more stringent procedural requirements.
- Procedural requirements for rule-making are not dictated by how a rule or instrument is labelled, but instead derive from the practical effect of the rule or instrument.

## C. Distinction between Market Rule and Market Manual Content

- Market rules should generally be reserved for requirements that:
  - Confer or impose substantive rights, obligations or liabilities.
  - Impose material financial impacts.
  - Pose material impacts to reliability.
  - May be enforced through penalties or other enforcement action.
- Market manuals must be authorized by market rules and should generally be used to prescribe:
  - Procedures and processes for satisfying requirements set out in the market rules.
  - Providing other necessary supplementary market rule details.

# Preliminary Issues for Consideration

- IESO management will retain authority to make market manual amendments.
- The IESO does wish to have further dialogue with stakeholders about how the market manual amendment process may be enhanced.
- The IESO would like to hear from stakeholders regarding what specific market manual process matters they think should be further considered and the IESO will take this into consideration for the purpose of preparing content for the facilitated August stakeholder sessions.

# II. DISPUTE RESOLUTION PROCESS

# Dispute Resolution Process

- The dispute resolution process (DRP) set out in the market rules applies to *any dispute between the IESO and any market participant, which arises under the market rules, market manuals or any standard, policy or procedure established by the IESO pursuant to the market rules.*

# Dispute Resolution Process

- The DRP includes the following features:
  - Good faith negotiations and mediation, which if unsuccessful or waived, is followed by binding arbitration.
  - Mediators and arbitrators available from a five-person panel appointed by the IESO, pursuant to the *Governance and Structure By-Law*.
  - Market participants may appeal an arbitration decision to the OEB if the decision requires payment in excess of \$10,000 or denies, terminates or suspends authorization to participate in the market.

# Dispute Resolution Process

- In addition to the DRP, market participants who disagree with a market rule or market manual may:
  - Request an exemption from the applicable market rule or market manual (Chapter 1, Section 14).
  - Propose an amendment to the market rules (Chapter 3, Section 4).

# Preliminary Issues for Consideration

- The IESO does wish to have further dialogue with stakeholders about how the dispute resolution process may be enhanced.
- The IESO suggests that stakeholders identify any inadequacies with the current DRP or present other dispute mechanisms for consideration.
- The IESO would like to hear from stakeholders regarding what specific DRP matters they think should be further considered and the IESO will take this into consideration for the purpose of preparing content for the facilitated August stakeholder sessions.