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Ms. Barbara Ellard
Director, Resource & System Adequacy
IESO

By Email

May 18, 2023

Dear Barbara,

Re: Feedback and recommendations on the proposed LT1 Contract

I am writing on behalf of the Association of Power Producers of Ontario ("APPrO") to provide feedback and recommendations on the proposed LT1 Contract following the IESO's Procurement Update on May 4, 2023.

APPrO has focused its feedback primarily on the ongoing considerations and design decisions pending LT1 RFP topics.

APPrO is a non-profit organization representing companies involved in the generation of electricity in Ontario, including generators and suppliers of services, equipment and consulting services. APPrO members produce most of Ontario's power from nuclear, hydroelectric, natural gas, wind, solar and other sources.

At the date this letter was written, a draft of the LT1 Contract was not yet available for review. Consequently, we make reference to the relevant provisions of the E-LT1 Contract to make recommendations about changes that in our view ought to be made for the LT1 Contract.

Capitalized terms used in this letter but not defined here have the meaning ascribed to those terms in the E-LT1 Contract.

A. Timelines and COD

APPrO members continue to have serious concerns about the LT1 RFP timelines and the Milestone Date for Commercial Operations that remain unaddressed by the proposed changes to accelerate the start of deliverability testing.

Specifically, the IESO has reduced the amount of time that Suppliers are to be given to design, develop, permit and construct their proposed facilities **by more than 26% (or 270 days)**[1] in the LT1 process due entirely to procurement development delays that are entirely within the IESO's control. Given the experience with delays in the E-LT1 RFP process, further delays are likely.

While APPrO appreciates that the IESO is committed to ensure that system needs emerging in 2027 can be met through the LT1 RFP process, in APPrO's view this will require several structural changes the LT1 Contract to ensure an appropriate allocation of risk given these compressed timelines.

Recommendation 1: Revise Section 2.3(c) of the LT1 Contract so that liquidated damages will not kick in until 365 days after the Milestone Date for Commercial Operation and revise the Longstop Date so that it does not occur until 33 months after the Milestone Date for Commercial Operation. In the alternative, and at a minimum, revise Section 2.3(c) of the LT1 Contract so that liquidated damages will not kick in until 270 days after the Milestone Date for Commercial Operation and revise the Longstop Date so that it does not occur until 30 months after the Milestone Date for Commercial Operation.

This approach has the benefit of maintaining a May 1, 2027 MCOD, while ensuring that Suppliers are not unduly penalized for delays caused by the IESO's stakeholder engagement, planning and procurement processes.

Recommendation 2: Revise the definition of the Milestone Date for Commercial Operation so that it is tied to a fixed period of time after the Contract Date rather than a specific fixed date. Make similar changes to the trigger dates for the Early COD Payment Multiplier.

The E-LT1 Contract tied the definition of the Milestone Date for Commercial Operation to a fixed date of May 31, 2026.

This approach is not appropriate for the LT1 Contract.

It has the effect of shifting onto Suppliers risk arising from the IESO's inability to advance the LT1 consultation, conduct the Deliverability Assessment (which is delayed approximately five months relative to the original January 2023 submission deadline), and complete its evaluation of proposals and issue contracts in a timely manner.

To understand the importance of tying COD to the Contract date, consider the position in which E-LT1 proponents now find themselves. In Section 3.1 of the E-LT1 RFP, the IESO established a target date to notify proponents of selected proposals by May 1, 2023, however, the first batch of notifications of selected proponents only occurred on May 16, 2023, with the remainder of proponents not being notified until sometime in the summer. Some projects continue to be stuck in limbo. Long-lead equipment is not being ordered, even though supply chain constraints

[1] The IESO's June 9, 2022 stakeholder engagement presentation included a slide title "Procurements and Timelines" that included a Gantt chart that showed a LT1 RFP contract award of October 2023. The difference between October 1, 2023 and May 1, 2027 is 1,305 days. The IESO is now estimating an LT1 RFP contract award of as late as Q2 2024. The difference between June 30, 2024 and May 1, 2027 is 1,035 days.

have increased lead times considerably. Many permitting and regulatory approvals processes are on hold pending an announcement. More detailed engineering and design work has been moved to the back burner awaiting an announcement. All of these delays will adversely impact the Supplier's ability to hit May 31, 2026, and ultimately the IESO's goal of bringing resources online to meet known capacity shortfalls.

While APPrO appreciates the acceleration of the start of Deliverability Assessment under LT1, many permitting, regulatory approvals and community engagement processes remain on hold until the Deliverability Assessment results are released on September 11, 2023.

In this context, it would be more appropriate to establish a floating Milestone Date for Commercial Operation (a fixed period of time after the Contract Date).

This is not uncommon. The IESO has used this approach in CHP, RESOP, CHPSOP, ERSOP, HESOP, IEI, LRP and most recently for the Oneida Energy Storage Facility Agreement.

This approach provides Suppliers with a guaranteed minimum period of time over which to develop, finance and construct the facility. In reality, that minimum period of time should be approximately four (4) years. In this context, the IESO originally indicated approximately 3.6 years (1305 days) would be available for LT1 facilities.

The IESO has provided no compelling rational for not doing the same for the LT1 Contract. The IESO is the party charged with managing its procurement process schedule and is accordingly the best positioned to manage the risks arising from shifting dates. Developers, on the other hand, have no ability to impact the IESO's schedule and are restricted by section 3.4 of E-LT1 RFP from proactively communicating impacts and risks arising from unscheduled delays.
It should be noted that some Suppliers may not be made whole through a day-for-day extension to the Milestone Date for Commercial Date. For example, a 10 day delay in issuing the contract is likely to result in at least a 10 day delay in ordering key equipment, which may result in a 6 month delay in receiving key equipment due to current supply chain constraints. In addition, as a result of the delays, facilities that are not 'advanced' will be effectively put in the same situation under LT1 as the 'advanced new build resources' under E-LT1.

Despite this, APPrO is of the view that at a minimum the IESO should ensure that the above two recommendations are accepted.

B. GHG Laws and Regulations

Recommendation: Delete Section 2.10(b) of the LT1 Contract and replace it with similar protections as those provided to OPG in Subsections 2.7(b) and (c) of the December 8, 2021 Lennox Energy Supply Agreement (the "LESA"), but amended to conform with the LT1 Contract settlement mechanism to ensure that Supplier's economics are protected.

Section 2.10(b) of the E-LT1 Contract may undermine the policy objective of any future greenhouse gas pricing requirements that may be imposed by the Government of Ontario or the Government of Canada.

Specifically, to the extent a Supplier cannot recover the impact of any greenhouse gas pricing through HOEP, Section 2.10(b) of the E-LT1 Contract will ensure that any future greenhouse gas price signal will not be seen in full by the ultimate electricity consumer in the Province of Ontario.

As a consequence, it will not properly incent the behavioral change amongst consumers that is necessary to achieve zero emissions in the electricity sector, by instead forcing Supplier to suffer an undue loss.

By contrast, a discrete reopener process that preserves Supplier economics for the purpose of ensuring that any incremental costs arising from changes to greenhouse gas policy not otherwise and reasonably contemplated under the agreement would not economically harm the position of the Supplier under the agreement, would ensure that the proper price signals are followed through to electricity consumers.

C. Planned Outage Capacity Reduction Factor

Recommendation: If a Planned Outage occurs in a Settlement Month other than a Sole Annual Planned Maintenance Month or a Split Annual Planned Maintenance Month because the System Operator refused a Supplier's outage request in accordance with the IESO Market Rules, and Supplier used commercially reasonable efforts to try to reschedule the Planned Outage with the System Operator to occur in the Sole Annual Planned Maintenance Month or a Split Annual Planned Maintenance Month, as applicable, then the Planned Outage Capacity Reduction Factor should be calculated as if the Planned Outage occurred in the Sole Annual Planned Maintenance Month or the Split Annual Planned Maintenance Month, as applicable.

The IESO has created an incentive for all Suppliers to move their Planned Outages into four months of the year.

However, it is reasonably foreseeable that this incentive may actually create problems for the System Operator. For example, if multiple capacity resources attempt to schedule planned outages with the System Operator over the same time period, the System Operator may refuse some of those requests.

The System Operator would know when making this decision which Supplier would incur a penal Planned Outage Capacity Reduction Factor and which would not (the LT1 Contract will be in the public domain).

As a consequence, we are recommending a discrete change to ensure that if a Supplier requests an outage during a Sole Annual Planned Maintenance Month or a Split Annual Planned Maintenance Month, and that outage request is refused by the System Operator and as a consequence of that refusal the planned outage must move to a different month – the Supplier should not be financially penalized by the refusal of the System Operator.

D. Discriminatory Action

Recommendation: Revise Section 13.1(c)(ii)(B) of the E-LT1 Contract to provide additional clarity to the carve out of what is not considered a Discriminatory Action.

The carve out of events that will not be considered Discriminatory Action in Section 13.1(c)(ii)(B) of the E-LT1 Contract could be interpreted as being inadvertently broad and overbearing. Section 13.1(c)(ii)(B) states: "has been made public in a discussion or consultation paper". A simple solution would be to clarify the carve-out to read: "has been made public in a discussion paper or consultation paper…" which better aligns with APPrO's understanding of the true intention of the carve-out.

E. Market Rule Changes

The IESO has indicated it does not intend to reopen the design of this provision, but may consider further refinement based on specific feedback.

As drafted, Section 1.6 of the E-LT1 Contract misallocates the vast majority of the risks arising from an IESO Market Rule change by not adequately protecting Supplier's economics.

This fundamental misallocation of risk which has in-turn resulted in increased costs for capacity as Suppliers attempt to price-in this IESO caused error. As a consequence, ratepayers will be paying for the IESO's error for the duration of the E-LT1 Contract. APPrO does not believe that this is in the public interest.

Recommendation: Revise Section 1.6 of the LT1 Contract so that it protects Supplier's economics in the same way the IESO did so in Section 1.6 of the CHP Contract [2] or Section 1.7 of various iterations of FIT Contracts.[3]

The IESO has exclusive jurisdiction over changes to the IESO Market Rules,[4] and is therefore in the best position to manage the risks associated with IESO Market Rule changes. Despite this, with Section 1.6 of the E-LT1 Contract transfers most of the risks associated with changes in IESO Market Rules onto the Supplier.

This is not appropriate and is likely to result in higher pricing due to the IESO's error in risk allocation.

The risk of changes to the IESO Market Rules are not hypothetical. The IESO's market renewal initiative has reached the point where, for the energy market stream, a high-level design as well as various iterations of the detailed design documents have been published. The changes will involve the introduction of a single schedule market and a day-ahead market, along with other changes. It is unknown at this time what specific amendments to the IESO Market Rules will be ultimately approved and implemented by the IESO – and consequently the implication of these changes on the specific facts associated with Supplier economics is very difficult to forecast or accurately predict.

[2] https://www.ieso.ca/en/Sector-Participants/Energy-Procurement-Programs-and-Contracts/Procurement-Archive
[3] https://www.ieso.ca/en/Sector-Participants/Feed-in-Tariff-Program/FIT-Archive
[4] Sections 32-33 of the Electricity Act, 1998.

Prior changes to the IESO Market Rules triggered the Section 1.6 equivalent within other IESO Contracts. For example, when the IESO introduced dispatch and curtailment requirements into the IESO Market Rules applicable to variable generation unities with its SE-91 initiative, numerous generators had no choice but to rely on their rights under the Section 1.6 equivalent to protect those projects from the financial risks associated with curtailment beyond defined annual and contract life thresholds.

As drafted Section 1.6 of the E-LT1 Contract does not provide meaningful protections to the Supplier against the majority of these risks. As a consequence, it is likely to result in higher pricing for ratepayers.

In conclusion, APPrO appreciates the opportunity to provide this feedback on the ongoing considerations and design decisions regarding LT1. Given the recent announcement of May 16, which indicates that the IESO did not achieve its non-storage target for the E-LT1 process, we believe that our comments with respect to the LT1 Contract can improve the success of future procurement, and we hope that the IESO finds this input both thoughtful and productive in that respect. We have worked hard to canvass our interested members and consolidate their input into a series of discrete revisions that, in our view, would serve to improve the LT1 procurement and result in better outcomes for all Ontarians.

Sincerely,

David Butters
President & CEO

CC: John Vellone, Borden Ladner Gervais LLP