

IESO Response to Stakeholder Feedback

Options to Address Uninsured Liability Risk Engagement Meeting - December 16, 2020

Following the [December 16 2020](#) Options to Address Uninsured Liability Risk stakeholder engagement webinar, the IESO invited stakeholders to provide comments and feedback on the materials presented by January 19, 2021.

The IESO received written feedback submissions from:

1. AMPCO
2. Capital Power
3. Northland Power

The presentation materials and stakeholder feedback submissions have been posted on the IESO stakeholder [engagement webpage](#) for this engagement. Please reference the material for specific feedback as the below information provides excerpts and/or a summary only.

Topic 1 - Preferred Option

Which of the two options do you prefer? Option 1: change IESO indemnity or Option 2: compensation mechanism.

Feedback

AMPCO - supports Option 1; the amendment of the market rules to limit the IESO indemnity to losses caused by gross negligence, subject to the current limitations on recoverable damages.

Capital Power – a third option should be considered; reciprocal limitation: Amend the Market Rules so as to limit liability for both the IESO and Market Participants except in the event of gross negligence or willful misconduct by the party against whom the claim is made. This reciprocal limitation of liability appears consistent with markets identified by the IESO, the tariffs for which are subject to FERC approval.

IESO Response

In response to Capital Power's suggested third option to provide a reciprocal limitation, the IESO is in a different position than market participants as a public entity that provides an essential public service and due to it being a not-for-profit corporation without share capital. The IESO does not agree with the premise that it would be appropriate to implement reciprocal limitations of liability for the IESO and market participants in Ontario. Any finding of liability against the IESO for which the IESO is not insured will impact ratepayers.

The IESO did undertake a review of the liability provisions that apply to market participants in markets where tariffs are subject to FERC approval for reciprocity in the tariffs included in its jurisdictional scan. In general terms, we found that these tariffs do not have reciprocal limitations of liability for market participants. Where such limitations are present, they are generally limited to specific circumstances such as cases where a generator has acted in good faith when implementing or complying with directives from an ISO. Similar to these other jurisdictions, in the IESO market rules, market participant liability is excluded if an act or omission is effected in compliance with the market rules or with the provisions of any policy, guideline etc. A supplemental appendix is posted on the engagement's webpage that provides further details on liability frameworks of North American system operators.

Topic 2 – Compensation Mechanism Option

If the compensation option were pursued, should recovery be from loads or all market participants?

AMPCO - AMPCO suggests that recovery should be from all market participants, not just from load customers. In fact, AMPCO wonders why these two alternatives are being considered in the absence of a third alternative – recovery from supply side participants only. Recovery from all participants (similar to a default levy) is the fair solution.

Capital Power - If the compensation option were to be pursued, the IESO should seek recovery from customers in accordance with the existing cost-recovery framework which permits the IESO to recover its operating costs from customers through OEB-approved fees.

Northland Power - Given the policy is to insure the IESO against claims from all market participants, Northland Power believes the costs of such insurance should be borne by all market participants, inclusive of those that represent distribution level load.

IESO Response

In response to AMPCO's comment, recovery from supply side participants only is correctly identified as a further option. The IESO had not initially identified it as an option since we chose to look at the two existing mechanisms in the market rules, namely uplift and the default levy. We appreciate AMPCO's comments that recovery from all participants is the fair solution, and the IESO would also prefer this recovery model if the compensation mechanism option were pursued. Please see the concluding remarks below.

In response to Capital Power's feedback, under the option where IESO remains liable for its negligence under the market rules, the IESO does not consider the approach of recovering uninsured liability through its administration fee to be optimal because the IESO would incur costs to borrow funds to cover such losses until they could be recovered from ratepayers. This approach increases costs that would be ultimately borne by ratepayers and adds regulatory burden.

In response to Northland Power's comment, the compensation option referred to in this engagement is unrelated to the cost of insurance. Errors and omissions insurance for negligence is no longer available to the IESO.

Topic 3 – Previous Claims Experience

Capital Power - Capital Power is interested in understanding what if any claims have been made under the previous E&O policy? If the details of these claims are confidential, can the IESO provide a summary of the issues and nature of the negligence alleged? This may help participants understand the potential quantum of damages that may arise under a successful claim of negligence

Northland Power - What has been the estimated cost of the insurance previously? Out of the five or so instances where there was a payout related to this type of activity (whether filed as a claim or not), what was the total dollar value of these payouts?

It's prudent for the IESO to periodically assess the appropriateness of insurance obligations; especially in the face of changing circumstances, such as the rapidly rising cost of all types of insurance. Northland Power encourages the IESO to broaden the scope of its review to assess the appropriateness of insurance requirements placed on all market participants, be they through the market rules or contracts with the IESO.

IESO Response

The details of claims under the E&O policy are confidential. We have not engaged in a detailed review of past claims but in general they relate to events which had the risk of leading to claims such as control room errors or errors discovered in IESO systems. As mentioned during the December presentation, the IESO is not aware of past claims that have resulted in a payment of damages to a market participant, nor therefore a need for an insurer to fund a damage claim. The cost of insurance is no longer relevant since no insurer offered to provide insurance to the IESO to cover IESO

negligence. For certainty, the market rules do not place insurance requirements on market participants.

Topic 4 – Miscellaneous

Capital Power - As a matter of process and effective stakeholdering, Capital Power believes it would have been helpful for the IESO to have brought forward examples of how non-FERC markets address liability arising from negligence.

Northland Power - It sounds as if the IESO may be non-compliant with the Market Rules as of September 2020. Has the IESO requested a forbearance from MACD until such time that the issue has been resolved?

IESO Response

The IESO appreciates Capital Power's feedback and did more broadly look at other market/system operators in its review. The IESO decided to focus on the US ISOs (of which the Midcontinent Independent System Operator (MISO) jurisdiction extends into Manitoba) as the most directly analogous jurisdictions due to the interconnectedness of the North American system and the likelihood that many participants in the Ontario market are also participants in the US markets and would therefore be familiar with the liability regime there. Our broader review found the following:

- the Alberta Electric System Operator (AESO) has a regime similar to the IESO in that the AESO is liable for losses caused by its willful misconduct and negligence (for North America our review identified only AESO and Electric Reliability Council of Texas (ERCOT) as being similar to IESO in being liable for negligence, compared to gross negligence for the rest).
- The National Grid ESO generally limits liability to physical damages not to exceed £5 million per incident or series of related incidents.
- The Australian Energy Market Operator (AEMO) is liable for acts or omissions made in bad faith or through negligence, but liability is excluded entirely for the use of computer software to operate the national electricity market.

Responding to Northland Power's question, the IESO is not non-compliant with the market rules as a result of the loss of errors and omissions insurance. The market rules do not require the IESO to carry insurance for its errors and omissions.

Concluding Remarks and IESO Decision

The IESO appreciates the feedback from stakeholders in response to this engagement. Based on limited feedback regarding alternative approaches and general support for Option 1, which is IESO's preferred option, the IESO will propose market rule amendments to implement Option 1, to limit its liability to gross negligence. Due to the current gap in insurance coverage, the IESO will proceed to implement the proposed market rule change.

Please note that the information and responses provided by the IESO herein are for information and discussion purposes only and are not binding on the IESO. This document does not constitute, nor should it be construed to constitute, legal advice or a guarantee, representation or warranty on behalf of the IESO. In the event that there is any conflict or inconsistency between this document and the Market Rules, Market Manuals or any IESO contract, including any amendments thereto, the terms in the Market Rules, Market Manuals or contract, as applicable, govern.