

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## RECONSIDERATION ORDER PO-4044-R

Appeal PA19-00298

Order PO-3955

Independent Electricity System Operator

May 20, 2020

**Summary:** The appellant submitted an access request under the *Freedom of Information and Protection of Privacy Act* to the Independent Electricity System Operator (the "IESO") for annual pricing information from 2016 until 2064 for energy services that will be paid to Bruce Power for its Bruce Nuclear Generating Station. The IESO denied access to some records or portions of records, citing certain exemptions under *FIPPA*.

The requester appealed. In Order PO-3955, the adjudicator found that the third party information exemption at section 17(1) of *FIPPA* applied to the information at issue in two records by reason of the deeming provision in section 20(1) of the *Electricity Act* (the "EA") and found that the public interest override in section 23 does not apply to this information. She also found that neither sections 17(1) (third party information) nor 18(1) (economic or other interests) apply to the annual pricing information in Records 4 to 6 and ordered that information disclosed.

Bruce Power then filed a reconsideration request of Order PO-3955 claiming that the information at issue in Records 4 to 6 had been previously designated by the IESO under section 20(1) of the *EA* and was therefore exempt under section 17(1)(a) of *FIPPA*.

In this order, Bruce Power's request for reconsideration is granted on the basis that there was a fundamental defect in the adjudication process. The adjudicator finds that the information at issue in Records 4 to 6 has been designated by the IESO under section 20(1) of the *EA* and is therefore exempt under section 17(1)(a) of *FIPPA*. The adjudicator applies the public interest

override in section 23 to override the section 17(1) exemption for one page of these records and orders disclosure of this page.

**Statutes Considered:** *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A, section 20; *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1)(a), and 23.

**Orders Considered:** Orders MO-2314, PO-3800, PO-3801, and PO-3955.

**Cases Considered:** *Merck Frosst Canada Ltd v Canada*, [2012] 1 SCR 23.

## OVERVIEW:

[1] The appellant submitted an access request to the Independent Electricity System Operator (the "IESO") under the *Freedom of Information and Protection of Privacy Act* ("FIPPA" or the "Act") for:

Any records that contain a forecast of the rates (\$ per kWh or other unit of energy) that will be paid to Bruce Power for the Bruce Nuclear Generating Station [Bruce NGS] in each year from 2016 until 2064. If no records exist with this data on an annual basis, please provide records with the forecast rates on an alternative basis (e.g. quarterly) for which data is available.

[2] The IESO issued a decision, followed by a revised decision, where it identified a number of responsive records. It granted full access to one record (the IESO - Bruce Power Refurbishment Implementation Agreement, Technical Briefing for Media, dated December 3, 2015).

[3] The IESO withheld access to six remaining records in whole or in part. The IESO denied access to one record in full (Record 1) as containing information referenced in a Cabinet submission; and as such, the IESO claimed section 12(1) (Cabinet records) and section 13(1) (advice or recommendations), in addition to section 17(1) (third party information) and section 18(1) (economic and other interests) of the *Act*.

[4] The IESO also denied access to two records in full (Records 2 and 3) as containing information that is in the technical schedule to the Amended and Restated Bruce Power Refurbishment Implementation Agreement, signed between the IESO and Bruce Power (the "ARBPRIA" or the "agreement"). These records are described as follows:

Record 2 - Financial model included in the technical schedule to the ARBPRIA.

Record 3 - ARBPRIA Information for the Financial Accountability Office of Ontario (comprised entirely of price forecasts and analysis derived directly from the financial model in Record 2).

[5] The IESO advised that pursuant to Article 8.7 of the ARBPRIA, the IESO has designated the information in the technical schedule as being highly confidential commercial, financial, scientific, technical, and/or labour relations information for the purposes of section 20(1) of the *Electricity Act, 1998* (the "EA")<sup>1</sup> and, therefore, it is exempt pursuant to section 17(1) of the *Act*.

[6] The IESO granted partial access to three records (Records 4 to 6), but denied access to portions of these records pursuant to the exemptions in sections 17(1) and 18(1).

[7] The appellant appealed the IESO's access decisions and advised that it wished to pursue access to all withheld information in the six records and wished to proceed to the adjudication stage.

[8] The IESO had advised that Bruce Power L.P. ("Bruce Power") should be added as an affected party in the appeal.

[9] Bruce Power is the privately owned operator of the Bruce NGS. Bruce NGS is the largest operating nuclear generating facility in the world and is comprised of two separate nuclear generating stations. The Bruce A nuclear generating station consists of nuclear reactor units 1, 2, 3 and 4. The Bruce B nuclear generating station consists of nuclear reactor units 5, 6, 7 and 8. Bruce NGS currently provides approximately one third of Ontario's electricity supply.

[10] I added Bruce Power<sup>2</sup> as a party to the appeal and sought representations of the IESO, Bruce Power, and the appellant. The parties' representations were exchanged between them in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[11] In its representations, the appellant stated that, based on the submissions of the IESO, it is no longer requesting access to Record 1. Therefore, sections 12(1) and 13(1) of *FIPPA* were no longer at issue. The appellant also clarified that, for the remaining records, it was only seeking access to the annual rates (i.e. annual electricity pricing information) in the records that the Bruce Power Nuclear Generating Station is forecast to charge Ontarians until 2064 based on the ARBPRIA.

[12] On May 16, 2019, I issued Order PO-3955. In that order, I found that section 17(1) of *FIPPA* applied to exempt two of the five records at issue (Records 2 and 3) by reason of the deeming provision in section 20(1) of the *EA*. I found that the public interest override in section 23 did not apply to this information.

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<sup>1</sup> This section is set out later in the order in full.

<sup>2</sup> Bruce Power is also referred to as the affected party in this order.

[13] In Order PO-3955, I also found that neither section 17(1) nor section 18(1) applied to the annual pricing information at issue in Records 4 to 6 and ordered that information disclosed. In particular, I ordered the IESO to disclose to the appellant pages 3 and 11 of Record 4, page 8 of Record 5, and pages 4, 5, and 12 of Record 6. I also upheld the IESO's decision to withhold access to the remaining information at issue in the three records.<sup>3</sup>

[14] Bruce Power then filed a reconsideration request seeking a reconsideration of my decision to order disclosure of pages 3 and 11 of Record 4, page 8 of Record 5, and pages 4, 5, and 12 of Record 6 on the basis that the information in these records had been designated under section 20(1) of the *EA*.

[15] In response to Bruce Power's reconsideration request, I invited and received representations from all parties on whether Bruce Power's reconsideration request met the test for reconsideration. The parties also provided additional representations on the application of section 20(1) of the *EA* and section 23 of *FIPPA* to the pages at issue in Records 4 to 6.<sup>4</sup>

[16] In this order, I grant Bruce Power's request for reconsideration on the basis that there was a fundamental defect in the adjudication process leading to Order PO-3955. I find that the information at issue in pages 3 and 11 of Record 4, page 8 of Record 5, and pages 4, 5, and 12 of Record 6 had been designated by the IESO under section 20(1) of the *EA*. I find that this information is therefore exempt under section 17(1)(a) of *FIPPA*. I further find that the public interest override in section 23 applies, but only to page 8 of Record 5. I order disclosure of this one page of the records.

## **RECORDS:**

[17] The following information is at issue in this reconsideration order:

Record 4 - Review of Bruce Refurbishment Price Estimate and Comparison to Cost of Alternatives (two severances of rates from page 3 and the entirety of page 11).

Record 5 - Bruce Nuclear Refurbishment: Effectiveness of Off-Ramps<sup>5</sup>

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<sup>3</sup> The IESO withheld Records 2 and 3 in full. The IESO granted partial access to Records 4 to 6. Only pages 3 and 11 of Record 4, page 8 of Record 5, and pages 4, 5, and 12 of Record 6 were ordered disclosed in Order PO-3955, as these were the only pages that contained the annual pricing information that the appellant was seeking. The remaining portions of Records 4 to 6 that had been withheld by the IESO did not contain annual pricing information and, therefore, were not ordered disclosed in Order PO-3955.

<sup>4</sup> In this order, I have taken into consideration the parties' representations in both the initial appeal that led to Order PO-3955 and the representations they made in response to Bruce Power's reconsideration request.

<sup>5</sup> Off-ramps are decisions that can be made by the IESO to terminate a plan to refurbish a particular nuclear generator.

(the entirety of page 8).

Record 6 - Impact of Bruce PPA (Power Purchase Agreement) "Step-Up" Price Scenarios<sup>6</sup> on LTEP (Long Term Energy Plan) (2013) Customer Cost (the entirety of pages 4, 5, and 12, other than the titles of pages 4 and 5).

## **ISSUES:**

**Issue A: Does the request for reconsideration meet any of the grounds for reconsideration in section 18.01 of the *Code of Procedure*?**

**Issue B: Was the information at issue previously designated under section 20(1) of the *Electricity Act, 1998*?**

**Issue C: Is there a compelling public interest in disclosure of the information that clearly outweighs the purpose of the section 17(1) exemption?**

## **DISCUSSION:**

[18] In order to place the issues in context, the following is a description of the records originally at issue:

Record 2 - Financial model included in the technical schedule to the ARBPRIA

Record 3 - ARBPRIA Information for the Financial Accountability Office of Ontario that is comprised entirely of price forecasts and analysis derived directly from the financial model in Record 2

Record 4 - Review of Bruce Refurbishment Price Estimate and Comparison to Cost of Alternatives

Record 5 - Bruce Nuclear Refurbishment: Effectiveness of Off-Ramps

Record 6 - Impact of Bruce PPA (Power Purchase Agreement) "Step-Up" Price Scenarios on LTEP (Long Term Energy Plan) (2013) Customer Cost

[19] In Order PO-3955, I upheld the IESO's decision to withhold access to Records 2 and 3, in full, on the basis that the IESO had designated these records under section

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<sup>6</sup> Step-up price scenarios are the anticipated price of power under various scenarios.

20(1) of the *EA*. I found that the public interest override at section 23 did not apply to this information.

[20] As well, in Order PO-3955, I found that neither sections 17(1) nor 18(1) apply to the annual pricing information in the pages at issue in Records 4 to 6 and ordered that information disclosed.<sup>7</sup>

[21] As set out in the June 20, 2019 affidavit of Bruce Power's Chief Risk Officer and Vice President of Business Strategy:

Record 4 contains information regarding the negotiations between Bruce Power and the IESO with respect to the refurbishment of Bruce Power nuclear units 3 through 8. It includes comments on the IESO's long-term planning and the implications thereon of the Bruce Power PPA.

Record 5 contains the IESO's review of the cost/benefit of economic off-ramps if the IESO chooses not to complete various refurbishments related to the Bruce NGS in the future.

Record 6 contains the anticipated price of power under various scenarios.

[22] These characterizations of the records are not contested by the IESO or the appellant.

**Issue A: Does the request for reconsideration meet any of the grounds for reconsideration in section 18.01 of the *Code of Procedure*?**

[23] Bruce Power seeks a reconsideration of my decision, in Order PO-3955, to order disclosure of pages 3 and 11 of Record 4; page 8 of Record 5; and pages 4, 5 and 12 of Record 6.

[24] Section 18 of the IPC's *Code of Procedure* sets out this office's reconsideration process. Sections 18.01 and 18.02 address the grounds for reconsideration of an order or decision of this office:

18.01 The IPC may reconsider an order or other decision where it is established that there is:

- a) A fundamental defect in the adjudication process;
- b) some other jurisdictional defect in the decision; or

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<sup>7</sup> Specifically, I ordered the IESO to disclosure pages 3 and 11 of Record 4, page 8 of Record 5, and pages 4, 5, and 12 of Record 6.

- c) a clerical error, accidental error or omission or other similar error in the decision.

18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

[25] The reconsideration process is not a forum for parties to re-argue their cases in an attempt to obtain a more favourable decision. Mere disagreement with a decision is not a ground for reconsideration under section 18.01 of the *Code of Procedure*.<sup>8</sup>

[26] In its letters seeking a reconsideration of Order PO-3955, Bruce Power raises three grounds in support of its request. For all grounds, Bruce Power claims 18.01(a) and for the latter two, it also claims section 18.01(c) of the *Code of Procedure*. The grounds raised are as follows:

1. In Bruce Power's submission, its inability to see Records 4, 5 and 6 was overlooked in the [adjudication] process and as a result there was a fundamental defect in the adjudication process. As a result, Bruce Power was not heard on whether its own confidential information ought to be disclosed. The Adjudicator did not have an opportunity to make an appropriate decision with the benefit of fully informed submissions from Bruce Power.<sup>9</sup>
2. [T]hrough an oversight, the adjudicator misapprehended the parties' submissions. The adjudicator held that only the IESO can designate a record or information contained in a record for the purposes of section 20(1) of the *Electricity Act* and that the IESO had not done so. The Adjudicator appears to have overlooked the evidence in the record that demonstrated that the IESO had designated the information contained in Records 4, 5 and 6.
3. [T]he IESO has clarified its position. The IESO has exercised its power under section 20(1) of the *Electricity Act*, to confirm that the relevant portions of Records 4, 5 and 6 had already been designated for the purposes of section 20(1) of the *Electricity Act* by section 8.7 of the ARBPRIA. In the event that a re-designation was necessary and for greater certainty, the IESO has also exercised its authority to re-designate the relevant portions of Records 4, 5 and 6.

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<sup>8</sup> Orders PO-2538-R and PO-3062-R.

<sup>9</sup> Bruce Power acknowledges that it did have a copy of page 11 of Record 4 during the inquiry. After Order PO-3955 was issued, the IESO sent Bruce Power a copy of the remaining pages that were ordered disclosed in that order.

[27] As I find that there was a fundamental defect in the adjudication process under section 18.01(a) of the *Code of Procedure* based on the second ground raised by Bruce Power, my reasons below do not need to address the other two grounds, nor whether section 18.01(c) of the *Code of Procedure* applies to the second ground.

***Ground 2 – Did I overlook material evidence and representations in my adjudication of the appeal, amounting to a fundamental defect in the adjudication process?***

[28] Bruce Power states that it had already taken the position, albeit in a more tentative form because it had not seen the records at that time (except for page 11 of Record 4), that section 20(1) of the *EA* likely applied to the relevant portions of Records 4 to 6. It states that it could not make a more definitive submission in its initial representations, made before the release of Order PO-3955, without seeing the records.

[29] With respect to page 11 of Record 4, Bruce Power states that it had argued in its initial representations that section 20(1) of the *EA* applied and that the IESO adopted that submission.

[30] Following the issuance of Order PO-3955, Bruce Power received copies of the pages at issue in this reconsideration order from the IESO (other than page 11 of Record 4, which it already had a copy of).

[31] In its reconsideration request, Bruce Power describes the pages at issue as follows:

- Record 4, Page 3: Bruce Power's pricing information taken from version 18 of the financial model.<sup>10</sup>
- Record 4, Page 11: A price curve derived from version 18 of the financial model. It shows Bruce Power PPA pricing over the term of the ARBPRIA as reflected in that version of the financial model.
- Record 5, Page 8: A series of charts showing the impact on the ARBPRIA PPA price in three scenarios. The information that Bruce Power seeks to withhold is derived from version 18 of the financial model.
- Record 6, Page 4: Five price curves derived from version 16 of the financial model.
- Record 6, Page 5: Three price curves which show the effect of the ARBPRIA pricing on the 2013 LTEP price under various scenarios

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<sup>10</sup> Versions 16 and 18 of the financial model are earlier versions of the final financial model that was included in the technical schedule to the ARBPRIA.



based on a co-mingling of IESO information and Bruce Power information. The Bruce Power information is derived from version 16 of the financial model.

- Record 6, Page 12: Calculations using Bruce Power's confidential information taken from version 16 of the financial model.

[32] There is no dispute with the above characterization of the pages at issue.

[33] The IESO supports Bruce Power's request for reconsideration. It states that the information in at issue Records 4, 5 and 6 was designated as confidential information under s. 20(1) of the *EA* by the previous Chief Executive Officer (CEO) of the IESO, as a result of section 8.7 of the ARBPRIA.

[34] The appellant disputes that there was an accidental error or omission in Order PO-3955 in my not finding that Records 4 to 6 were covered by a designation under section 20 of the *EA*. It refers to my finding in that order that:

Bruce Power would like page 11 of Record 4 deemed under section 20(1) of the *EA*, however, this can only be done by the head and the head of the IESO has not done so.

[35] The appellant states that there was clear evidence that the head of the IESO had not designated the information at issue under section 20(1) of the *EA*, as the IESO's decision letters did not identify these portions of Records 4 to 6 as being designated by the head of the IESO as required by the *EA*. The appellant also argues that the records could not have been designated as the IESO released portions of those records, including the price information appearing at pages 20 to 25 of Record 4.<sup>11</sup>

[36] In reply, Bruce Power states that it is the information that is protected under section 20(1) of the *EA*, not the specific document in which the information is found. It submits that the information is protected whether it is in the original document or transferred to a new document. The information is also protected when it is found in a document that contains both protected and disclosable information within the same document.

[37] Bruce Power submits that it is irrelevant whether other portions of Records 4, 5 and 6 were previously disclosed. It states that the information contained in the relevant portions of Records 4, 5 and 6 was designated by the IESO by virtue of section 8.7 of the ARBPRIA and is therefore protected under section 20(1) of the *EA*. It relies on the Supreme Court of Canada case of *Merck Frosst Canada Ltd v Canada*<sup>12</sup> for the proposition that the protection afforded to third party documents that contain third party information

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<sup>11</sup> In support, the appellant quotes from paragraph 104 of Order PO-3955, referred to above.

<sup>12</sup> *Merck Frosst Canada Ltd v Canada*, [2012] 1 SCR 23.

attaches to the information itself and not the specific form of the document in which the information is found.

*Analysis/Findings*

[38] Section 20 of the *EA* provides that:

(1) A record that contains information provided to or obtained by the IESO or a predecessor relating to a market participant<sup>13</sup> and that is designated by the head of the IESO as confidential or highly confidential is deemed for the purpose of section 17 of the *Freedom of Information and Protection of Privacy Act* to be a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, the disclosure of which could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons or organization.

(2) In this section,

“head” means the person designated as the head of the IESO in the regulations made under the *Freedom of Information and Protection of Privacy Act*.<sup>14</sup>

[39] Concerning the designation under section 20(1) of the *EA*, the following documents sent to or received from the IESO during the IPC appeal and prior to the issuance of Order PO-3955 made no specific mention of the information in Records 4 to 6 being designated by the IESO under section 20(1) of the *EA*:

- The IESO’s decision letters of March 24, 2017 and September 24, 2017;
- The IESO’s letter of February 2, 2018 to the IPC mediator in response to the draft Mediator’s Report of January 23, 2018;
- The Revised Mediator’s Report of February 5, 2018; and,
- The Notice of Inquiry (the NOI) sent to the IESO, dated March 2, 2018, which was based on the Revised Mediator’s Report.

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<sup>13</sup> Bruce Power is a market participant under the *EA*. See Order PO-3197.

<sup>14</sup> The IESO is the institution in this appeal.

[40] All of these documents specifically indicate that the only section 20(1) *EA* designation that was made by the IESO was with respect to two records, Records 2 and 3, which are not the subject of this reconsideration request.<sup>15</sup> Therefore, in Order PO-3955, I did not consider the application of the section 20(1) *EA* designation to the information at issue in Records 4 to 6.

[41] I note, however, as pointed out in its reconsideration representations, Bruce Power did submit in its initial representations to the IPC that the information at issue in Records 4 to 6 was designated by the head of the IESO under section 20(1) of the *EA* by reason of section 8.7 of the ARBPRIA. In arriving at my decision in Order PO-3955, I did not consider these representations or their supporting evidence.

[42] I find that there was a fundamental defect in the adjudication process when I overlooked the material evidence of both the IESO and Bruce Power and did not address their representations made prior to the issuance of Order PO-3955 that the information at issue in Records 4 to 6 was designated by the IESO under section 20(1) of the *EA*.

[43] In particular, I overlooked the following evidence and arguments, provided by Bruce Power prior to the issuance of Order PO-3955, that the information at issue in Records 4 to 6 had been designated under section 20(1) of the *EA*:

[44] At paragraphs 16 to 18 of its representations, Bruce Power stated:

- Record 4 is described in the NOI as *Review of Bruce Refurbishment Price Estimate and Comparison of Cost Alternatives*, and contains information regarding the negotiations between Bruce Power and IESO with respect to the refurbishment and comments on the long-term planning. Bruce Power has reviewed the redacted portion at page 11 of Record 4. Bruce Power relies on section 20(1) of the *Electricity Act* with respect to page 11 of the document. Bruce Power recognizes that IESO originally claimed section 17(1) of *FIPPA*, but Bruce Power is of the view that section 20(1) more properly applies to page 11 and likely applies to the other portions of Bruce Power's confidential information in Record 4. Bruce Power has not seen the information otherwise identified by IESO as being Bruce Power confidential information outside of page 11. [Senior Manager, Energy Contracts and Initiatives of the IESO's (the senior manager)] affidavit at paragraph 15 explains with respect to Records 4 [to] 6 that:

These records contains information that is confidential to Bruce Power, including PPA price

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<sup>15</sup> Record 2 - Financial model included in the technical schedule to the ARBPRIA (fully withheld). Record 3 - ARBPRIA Information for the Financial Accountability Office of Ontario (fully withheld).

information, refurbishment cost information, lease cost information, various PPA risks; and other confidential information provided by Bruce Power during the course of the negotiations.

- Record 5 is described in the NOI as *Bruce Nuclear Refurbishment: Effectiveness of Off-Ramps*. Bruce Power has received a redacted copy of this document. The portions of the document provided to Bruce Power do not contain Bruce Power confidential information. The portions which have been identified as containing Bruce Power confidential information were redacted and not provided to Bruce Power. Bruce Power believes, although it cannot be certain without reviewing the document, that section 20(1) of the *Electricity Act* applies. Bruce Power can provide no additional submissions on those portions of the records at this time.
- Record 6 is described in the NOI as *Impact of Bruce PPA Step-Up Price Scenarios on LTEP (2013)* and contains the anticipated price of power under various scenarios. Bruce Power has received a redacted copy of this document. Bruce Power has not been able to see the portions of the document which have been identified by IESO as containing Bruce Power confidential information. Bruce Power believes, although it cannot be certain without reviewing the unredacted document, that section 20(1) of the *Electricity Act* applies.

[45] At paragraphs 21 and 23, Bruce Power stated:

- Bruce Power believes, although it cannot be certain without seeing the documents, that the Bruce Power information in these records was designated under section 20(1) of the *Electricity Act*.

[46] At paragraph 25, Bruce Power stated:

- From Bruce Power's perspective, some or all of the Bruce Power Information at Issue has been designated under section 20(1) of the *Electricity Act*.

[47] At paragraph 41, Bruce Power stated:

- It appears likely to Bruce Power, based on the content of IESO's submissions, that Section 20(1) of the *Electricity Act* applies to the Bruce Power confidential information in Records 1,<sup>16</sup> 4, 5 and 6.

[48] In its representations, made at the same time as Bruce Power's initial representations, the IESO at footnote 11 stated:

- Bruce Power also submits that page 11 of Record 4 is exempted pursuant to section 20(1) of the *Electricity Act*. The IESO adopts those submissions.

[49] Further, at paragraph 32, the IESO adopted Bruce Power's specific designation submissions on Records 4 to 6, where it stated:

- The IESO adopts the submissions of Bruce Power at paragraphs 16, 17 and 18 of its representations as to the application of section 20(1) of the *Electricity Act* to Records 4, 5 and 6.

[50] Accordingly, I find that there was a fundamental defect in the adjudication process under section 18.01(a) of the *Code of Procedure* by reason of my overlooking and failing to address the material evidence and explicit submissions of both Bruce Power and the IESO that the information at issue in Records 4 to 6 had been designated under section 20(1) of the *EA*.

[51] I find, therefore, that there is a basis for me to reconsider Order PO-3955. Given this conclusion, and as noted above, I do not need to consider Bruce Power's other two argued grounds for reconsideration. I will now address the merits of the parties' submissions as to whether that the information at issue was designated under section 20(1) of the *EA*.

**Issue B: Was the information at issue previously designated under section 20(1) of the *Electricity Act*, 1998?**

[52] In now taking into account the parties' submissions on the issue and examining the relevant evidence, I find that the IESO designated the information at issue in pages 3 and 11 of Record 4, page 8 of Record 5, and pages 4, 5, and 12 of Record 6.

[53] In doing so, I have considered the appellant's submission that the IESO's decision letters did not identify these portions of Records 4 to 6 as being designated by the head

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<sup>16</sup> Record 1 was removed from the scope of the appeal by the appellant.

of the IESO. I have also considered his argument that Records 4 to 6 could not have been designated as the IESO released portions of those records.

[54] In finding that the information at issue in Records 4 to 6 had been designated under section 20(1) of the *EA*, I have considered in particular section 8.7 of the ARBPRIA, which reads as follows in its entirety:

The Parties acknowledge that the Counterparty [the IESO] is subject to FIPPA. The Counterparty has reviewed the Confidential Information of the Generator [Bruce Power] contained in the Technical Schedule and has considered such Confidential Information to be disclosed to the Counterparty in connection herewith. The Parties agree that such Confidential Information is highly confidential commercial, financial, scientific, technical, and/or labour relations information, and/or contains trade secrets and is supplied in confidence by the Generator to the Counterparty on that basis and, for greater certainty, for the purposes of subsection 20(1) of the Electricity Act, the Counterparty hereby designates as confidential or highly confidential the Confidential Information of the Generator provided to the Counterparty up to and including the date of this Agreement and acknowledges that the Generator has advised it that all Confidential Information to be provided to the Counterparty after the date of this Agreement is considered by the Generator to be confidential or highly confidential. The Parties agree that the disclosure of the Confidential Information contained in the Technical Schedule, and the Counterparty acknowledges that the Generator has advised it that disclosure of the Confidential Information provided to the Counterparty pursuant to this Agreement, could reasonably be expected to cause irreparable harm and material financial loss to the Generator and significant prejudice to the Generator's competitive position and to interfere with the Generator's contractual arrangements and the negotiations in which the Parties are engaged. Accordingly, the Counterparty acknowledges that the Generator is disclosing its Confidential Information to the Counterparty on the basis that all such Confidential Information is exempt from access by and disclosure to others pursuant to section 17 of FIPPA and the Counterparty agrees it will treat all Confidential Information contained in the Technical Schedule as being so exempt from the disclosure requirements under FIPPA; provided, however, that the Parties acknowledge and agree that the refusal of the Chief Executive Officer of the Counterparty to disclose any Confidential Information in accordance with section 17(1) of FIPPA may be the subject of an appeal to the Information and Privacy Commissioner as set forth under FIPPA. In the event that the Counterparty is requested to disclose, and the Counterparty is planning to disclose, to others pursuant to FIPPA all or any part of the Confidential Information disclosed to the Counterparty by the Generator, the Counterparty will promptly advise the

Generator of such request, so that the Generator will have the opportunity to make detailed representations to the appropriate authority about the nature of the information. The Counterparty agrees to comply with Section 8.6(b) of this Agreement in respect of any request for disclosure of the Generator's Confidential Information pursuant to FIPPA. This Section 8.7 is in addition to, and without limitation of, the obligations of the Counterparty set out in Section 8.2.

[55] I acknowledge that section 8.7 provides that for the purposes of subsection 20(1) of the *EA*, the IESO hereby designates as confidential or highly confidential the Confidential Information of Bruce Power provided to the IESO up to and including the date of the agreement.

[56] The ARBPRIA defines "Confidential Information" as follows:

"Confidential Information" means all information in whatever form (whether written, oral, electronic or documentary) of the Counterparty or the Generator, as applicable, that is of a confidential or proprietary nature or otherwise not generally available to the public, including terms or information redacted from the part of this Agreement that is made public as agreed to by the Parties, the Technical Schedule, all information provided or obtained pursuant to the provisions of this Agreement, and all confidential information in the custody or control of the Counterparty or the Generator, as applicable, whether recorded or not and however fixed, stored, expressed or embodied, which comes into the knowledge, possession or control of the other Party in connection with this Agreement. For greater certainty, Confidential Information shall:

- (a) include: (i) any document, electronic record, correspondence, note, extract or analysis containing, recalling or recording Confidential Information and all new information which is derived at any time from or reflects the review of any such Confidential Information described above, whether created by a Party or any third party at the request or direction of a Party and all copies and extracts thereof whether created by a Party or a third party at the request or direction of a Party; and (ii) all information that a Party is obliged, or has the discretion, not to disclose under applicable Laws and Regulations;
- (b) not include information that: (i) is or becomes generally available to the public without fault or breach on the part of a Party of any duty of confidentiality owed by a

Party to another Party or to any third party; (ii) a Party can demonstrate to have been rightfully obtained by it, without any obligation of confidence, from a third party who, to the knowledge of such Party, had the right to transfer or disclose it to the Party free of any obligation of confidence; (iii) a Party can demonstrate to have been rightfully known to or in the possession of such Party at the time of disclosure, free of any obligation of confidence when disclosed; or (iv) is independently developed by a Party; and

- (c) in the case of the Generator, include information that is of a confidential or proprietary nature or otherwise not generally available to the public of any of its suppliers, contractors or subcontractors of any tier.

[57] In *Merck Frosst Canada Ltd v Canada*,<sup>17</sup> the Supreme Court of Canada determined that the information in a record must be considered in a determination as to whether the section 17(1) exemption applies. The Court stated:

...whether confidential information has been “supplied to a government institution by a third party” is a question of fact. The content rather than the form of the information must be considered: the mere fact that the information appears in a government document does not, on its own, resolve the issue. The exemption must be applied to information that reveals the confidential information supplied by the third party, as well as to that information itself...

[58] I agree with Bruce Power that a section 20(1) designation, which leads to a conclusion that a record is exempt under section 17(1)(a), attaches to specific information and need not attach to the entire record itself. Adjudicator John Higgins in Order PO-3801, which is a decision regarding whether other financial information concerning Bruce Power was designated by the ARBPRIA, stated:

In summary, if section 20(1) of the *EA* applies, the record is deemed to be exempt under the mandatory third party information exemption found at section 17(1) of the *Act*. More specifically, the language of section 20(1) of the *EA* indicates that once information about a market participant supplied to or obtained by the IESO is “designated by the head of the IESO as confidential or highly confidential,” it is deemed to meet the requirements for exemption under section 17(1)(a) of the *Act*, whose language it incorporates.

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<sup>17</sup> Cited above.



For section 20(1) of the *EA* to apply in this appeal, each part of the following two-part test must be satisfied:

1. the record must contain information provided to or obtained by the IESO relating to a market participant, and
2. the information must have been designated by the head of the IESO as confidential or highly confidential.

[59] Therefore, I agree with Bruce Power that it is irrelevant whether other portions of Records 4 to 6 were previously disclosed. I do not agree with the appellant that the IESO cannot have designated Records 4 to 6 under section 20(1) of the *EA* because if it had done so, it would not have been able to release portions of those records. As stated above, a section 20(1) *EA* designation applies to information in records, and does not require that entire records be designated.

[60] The IESO has disclosed some of the same information that it is now at issue in this order from page 25 of Record 4, which contains some of the same information that is at issue in this order in page 12 of Record 6. However, this already disclosed information was not at issue in this appeal.

[61] With respect to the first part of the section 20(1) test, I accept the argument of Bruce Power, supported by the IESO, that information directly provided to it by Bruce Power, or calculated by the IESO, or calculated mutually by these two parties, constitutes information provided to or obtained by the IESO by Bruce Power.

[62] In making this finding, I rely on the findings of Adjudicator John Higgins in Order PO-3801, where he stated:

The information sought by the appellant in this case consists of financial data about the refurbishment of reactors at Bruce Power. Whether that information was directly provided by Bruce Power (as the technical schedule declares that it was), or calculated by the IESO, or calculated mutually by these two parties, I am satisfied that it was "provided to or obtained by" the IESO within the meaning of section 20(1) of the EA. I also find that it relates to Bruce Power, and that, based on Bruce Power's submissions to that effect, it is a market participant. Based on these findings, part 1 of the test is satisfied. [Emphasis added.]

Under part 2, I am satisfied that the information in the Technical Schedule, including the information at issue, has been designated by the head of the IESO as confidential or highly confidential, based on the contents of the

ARBPRIA referred to above, and the fact that it was signed by the CEO, who is the “head” for this purpose. Accordingly, part 2 of the test is also met.

As both parts of the test are met, I find that section 20(1) of the EA applies, and the information at issue is therefore exempt under section 17(1)(a) of the Act.

[63] The information at issue in this reconsideration order is pricing information and was either directly provided by Bruce Power or calculated by the IESO, or calculated mutually by these two parties. As such, relying on the findings in Order PO-3801, I am satisfied that it was “provided to or obtained by” the IESO within the meaning of section 20(1) of the *EA*.

[64] With respect to the second part of the section 20(1) test, Bruce Power must show that the information at issue was designated by the IESO as confidential. The evidence of this designation requires an examination of the ARBPRIA, including its definition of “Confidential Information.”

[65] I note that this information was provided to the IESO prior to the date of the ARBPRIA; however, it comes within the terms of this agreement, as section 8.7 of the agreement states:

...the Counterparty [the IESO] hereby designates as confidential or highly confidential the Confidential Information of the Generator [Bruce Power] provided to the Counterparty up to and including the date of this Agreement...

[66] Furthermore, this information was derived from earlier versions of the final financial model.<sup>18</sup> Versions 16 and 18 are earlier versions of the final version of the financial model of the technical schedule to the ARBPRIA. These earlier versions of the financial model were developed by Bruce Power and provided to the IESO as part of the process of negotiating the ARBPRIA.

[67] The definition of Confidential Information in the ARBPRIA includes the technical schedule. The technical schedule contains the financial model. In addition, the financial model has been previously found by the IPC to be Confidential Information (my original Order PO-3955 and Adjudicator Higgins’ Order PO-3801, quoted above).

[68] In my view, former versions of the financial model likewise come within the definition of Confidential Information. Given that the final version of the financial model was designated as confidential, it stands to reason that the earlier versions were intended

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<sup>18</sup> The final version of the financial model is Record 2 in this appeal.

to be confidential and were not generally available to the public. Therefore, they, too, are confidential information under the terms of the ARBPRIA

[69] The information at issue in Records 4, 5 and 6 is derived from these prior versions of the financial model, specifically versions 16 and 18, as noted above. The definition of "Confidential Information" includes "any document ... containing, recalling or recording Confidential Information and all new information which is derived at any time from...any such Confidential Information."

[70] Therefore, I find that Bruce Power's information contained in the pricing information at issue in pages 3 and 11 of Record 4, page 8 of Record 5, and pages 4, 5, and 12 of Record 6 meets the definition for "Confidential Information" in the ARBPRIA. As noted above, section 8.7 of the ARBPRIA provides that all Confidential Information is designated under section 20(1) of the *EA*.

[71] Taking into consideration the parties' representations, the information at issue and the wording of the ARBPRIA, I find that the information at issue in Records 4 to 6 was designated by the IESO under section 20(1) of the *EA*.

[72] Given my finding, this information is deemed to be exempt under the mandatory third party information exemption found at section 17(1) of the *Act*. More specifically, section 20(1) of the *EA* indicates that once information about a market participant supplied to or obtained by the IESO is "designated by the head of the IESO as confidential or highly confidential," it is deemed to meet the requirements for the mandatory exemption under section 17(1)(a) of the *Act*, whose language it incorporates.<sup>19</sup> Section 17(1)(a) reads:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization.

[73] As noted above, I have found that the information at issue in pages 3 and 11 of Record 4, page 8 of Record 5, and pages 4, 5, and 12 of Record 6 had been designated by the IESO under section 20(1) of the *EA*. This information is, therefore, exempt from disclosure under section 17(1)(a) of *FIPPA*.

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<sup>19</sup> See Order PO-3801.

**Issue C: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 17(1) exemption?**

[74] The appellant has raised the application of the public interest override in section 23 to the information at issue in the records, including the information at issue in Records 4 to 6 that is the subject matter of this reconsideration order.

[75] Section 23 states:

An exemption from disclosure of a record under sections ... 17 ... does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[76] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[77] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot rest solely on an appellant who has not had the benefit of reviewing the requested records. To find otherwise would be to impose an onus that could seldom if ever be met by an appellant. Accordingly, the IPC will review the information at issue with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.<sup>20</sup>

***Representations***

[78] The appellant submits that the public deserves to know what the electricity will cost from the multi-billion Bruce NGS project as they are paying for it and will be locked into paying for it for almost 50 years. It relies on the unredacted portions of Records 4 to 5<sup>21</sup> in submitting that there exists a public interest in disclosure of the information at issue in these records, as follows:

- a. Record 4 states that “the ‘step-up’ design of the current Bruce PPA estimate would lead to an overall reduction in annual electricity costs between 2015-2024 and an increase in costs thereafter.” Taxpayers have the right to know now, before all the reactors are completed, what this increase will be.<sup>22</sup>

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<sup>20</sup> Order P-244.

<sup>21</sup> Record 4 is 27 pages long. The IESO withheld portions of pages 2, 3, and 26 and all of pages 11 and 15 to 17. Record 5 is 21 pages long. The IESO withheld access to portions of pages 4 and 19 and all of pages 8, 9, 14 and 15. Record 6 is 15 pages. The IESO withheld all of this record except for the cover page, and portions of page 2 and some page titles.

<sup>22</sup> Record 6 also has step-up information as noted below.

- b. Record 5 states that “[o]pportunities to exercise economic off-ramps<sup>23</sup> arise in 2023 and 2027, 18 months prior to the scheduled refurbishment start. A decision in 2023 to exercise an economic off-ramp would avoid refurbishment of the next four units... A decision in 2027 to exercise an economic off-ramp would avoid refurbishment of the last two units ... (p. 6). The public should be provided with pricing information so they can participate in the debate about whether to exercise one of these “off-ramps” in the future.
- c. Record 5 lists a number of electricity resources that could be pursued instead of Bruce Power’s nuclear plants, including conservation, demand response, hydro power imports from Quebec, renewable generation, energy storage, and so on (p. 18-20). Environmental advocates need the annual price of the nuclear option to assess and potentially advocate for these alternatives.
- d. Record 5 also indicates the “lead time” required to bring alternative electricity resources online ranging from 1 to 10 years (p. 18-20). Environmental advocates need the annual price of the nuclear option as soon as possible to advocate for alternatives. If not, it will be too late to pursue those alternatives.

[79] The appellant received disclosure of very little information from Record 6; therefore, it did not provide specific submissions related to the unredacted portions of this record.

[80] Bruce Power relies on my findings in Order PO-3955 where I did not apply section 23 to Records 2 and 3. It states that that since its initial submissions were made in 2018, it has published on its website that it will receive 7.5 cents per kW/h of electricity. This information is in addition to the following other available public information:

- the ARBPRIA is posted on the IESO’s and Bruce Power’s website;
- the price paid for the electricity generated by the Bruce NGS effective January 1, 2016 is posted on the IESO’s website;
- a Fairness Opinion<sup>24</sup> available to the public was undertaken for the purpose of determining the consistency of the ARBPRIA and the Technical Schedule with the LTEP (Long Term Energy Plan) and its fairness to the taxpayers and electricity ratepayers of Ontario; and,

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<sup>23</sup> A decision to exercise economic off-ramps is a decision to not proceed with refurbishing existing nuclear reactors.

<sup>24</sup> Available on the IESO’s website.

- Bruce Power has currently published on its website that it will receive a payment of 7.5 cents per kW/h of electricity in 2019.

[81] Therefore, it submits that the actual price of power paid to Bruce Power is already public information.

[82] In response, the appellant states that Bruce Power's submission on the public interest relies on the findings in Order PO-3955 without acknowledging that those findings are dependent on the assumption that the additional pricing information in the records at issue in this reconsideration was to be disclosed pursuant to that order. It points out that in Order PO-3955, I did not assess the public interest override test for the pricing information at issue (in Records 4 to 6) as it was not necessary to do so.

[83] The appellant also states that Bruce Power's only new submission is to assert that "it will receive 7.5 cents per kW/h of electricity in 2019" and therefore "the actual price of power paid to Bruce Power is already public information." The appellant submits that the 2019 price is not at all a substitute for the price forecast going forward, including for the duration of the refurbishments. Nor, it submits, is the 2019 price a substitute for any of the important uses of a price forecast.

[84] The IESO disagrees that a compelling public interest exists in disclosure of the pricing information. It states that sufficient public information is already available to determine whether the ABPRIA is fair to the Ontario ratepayer as evidenced by the independent reviews of the underlying rate forecast information conducted by NERA Economic Consulting and Ontario's Financial Accountability Officer.

### ***Analysis/Findings***

#### *Compelling public interest*

[85] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.<sup>25</sup> Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.<sup>26</sup>

[86] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".<sup>27</sup>

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<sup>25</sup> Orders P-984 and PO-2607.

<sup>26</sup> Orders P-984 and PO-2556.

<sup>27</sup> Order P-984.

[87] Any public interest in *non*-disclosure that may exist also must be considered.<sup>28</sup> A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".<sup>29</sup>

[88] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation<sup>30</sup>
- the integrity of the criminal justice system has been called into question<sup>31</sup>
- public safety issues relating to the operation of nuclear facilities have been raised<sup>32</sup>
- disclosure would shed light on the safe operation of petrochemical facilities<sup>33</sup> or the province's ability to prepare for a nuclear emergency<sup>34</sup>
- the records contain information about contributions to municipal election campaigns<sup>35</sup>
- the information about the value for money spent by the Municipal Property Assessment Corporation's integration of a new technological system.<sup>36</sup>

[89] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations<sup>37</sup>
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations<sup>38</sup>

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<sup>28</sup> *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

<sup>29</sup> Orders PO-2072-F, PO-2098-R and PO-3197.

<sup>30</sup> Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).

<sup>31</sup> Order PO-1779.

<sup>32</sup> Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.) and Order PO-1805.

<sup>33</sup> Order P-1175.

<sup>34</sup> Order P-901.

<sup>35</sup> *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.

<sup>36</sup> Order MO-2314.

<sup>37</sup> Orders P-123/124, P-391 and M-539.

<sup>38</sup> Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter<sup>39</sup>
- the records do not respond to the applicable public interest raised by appellant<sup>40</sup>

[90] The appellant is a non-profit organization that produces research and educational materials on how Ontario can move to a 100% renewable electricity system. Its vision "is for a low-carbon, high efficiency energy system that protects our climate, our health and our environment." The appellant states that the annual rates (i.e. annual pricing information) that Bruce Power is forecast to charge Ontarians until 2064 is based on the agreement (the ARBPRIA) between Bruce Power and the IESO. The appellant states that it requires this pricing information in order to prepare research comparing this pricing information with the cost of alternative sources of energy.

[91] In Order PO-3955, because I found that section 17(1) of *FIPPA* did not apply to the pricing information at issue in Records 4 to 6, I did not need to consider whether the public interest override in section 23 applied.

[92] In Order PO-3955, I did, however, consider the application of the public interest override in section 23 to Records 2 and 3. These two records consisted of:

Record 2 - Financial model included in the technical schedule to the ARBPRIA.

Record 3 - ARBPRIA Information for the Financial Accountability Office of Ontario (comprised entirely of price forecasts and analysis derived directly from the financial model in Record 2).

[93] I found these two records exempt under section 17(1)(a) because, by virtue of the ARBPRIA, these records were designated by the IESO under section 20(1) of the *EA*.

[94] In Order PO-3955, I found that section 23 did not apply to override the section 17(1)(a) exemption for either Record 2 or Record 3. Record 3 is comprised entirely of price forecasts and analysis derived directly from the financial model in the ARBPRIA's technical schedule in Record 2.

[95] Neither Record 2 nor Record 3 contain annual electricity rate forecast information. Rather, as I stated in Order PO-3955, Record 3 consists of the results of the IESO's detailed calculations based on the information in the financial model set out in Record 2.

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<sup>39</sup> Order P-613.

<sup>40</sup> Orders MO-1994 and PO-2607.



[96] Records 4 to 6, however, contain annual pricing forecasts. These records are not part of the ARBPRIA, which is dated December 2015. Records 4 to 6 are dated between January and October 2015 and were prepared by the IESO for internal discussions (Records 4 and 5) or for discussion with the Ministry of Energy (Record 6).

[97] Records 4 to 6 were described by the IESO in its initial representations as:

...IESO's internal analysis based in part on Bruce Power information. These records were prepared by Power Systems Planning, a department at IESO comprised of IESO staff. Power Systems Planning works to help the IESO consider and understand Ontario's long-term electricity needs as well as impacts on cost, reliability, and the environment. These records contain information that is confidential to Bruce Power, including PPA price information, refurbishment cost information, lease cost information, various PPA risks, and other confidential information...

[98] The information at issue in this reconsideration order is price forecasting information and in particular, consists of:

- Page 3 of Record 4 - is the "Summary" page for Record 4 and contains two severances of rates.
- Page 11 of Record 4 - shows Bruce Power PPA pricing over the term of the ARBPRIA.
- Page 8 of Record 5 - shows the impact on the ARBPRIA PPA price in three scenarios.
- Pages 4, 5 and 12 of Record 6 - the IESO disclosed the title and most of the overview section of this record. Bruce Power and the appellant had already received the information from page 12 of this record. In particular, for page 12 of this record, I stated in Order PO-3955 that:
  - At page 25 of Record 4, the IESO has disclosed to the appellant a chart entitled, Annual details: total cost of electricity service, residential monthly bill, industrial electricity price. This chart sets out the total cost of electricity services from 2015 until 2032. Record 4 is dated March 24, 2015 and contains a review of Bruce Power's price estimates as against the costs of alternatives. A chart with the same title with the same information plus the "step-up" information has been

withheld on page 12 of Record 6, which is dated January 28, 2015.<sup>41</sup>

- Page 4 of Record 6 is entitled *Comparison of 'Step-Up' price scenario to LTEP Bruce PPA assumption*.
- Page 5 of Record 6 shows the effect of the ARBPRIA pricing on the 2013 LTEP price under various scenarios and is entitled *Total cost of electricity service with 'Step-Up' Bruce PPA price*.<sup>42</sup>

[99] I agree with the appellant's submission that there exists a compelling public interest in disclosure of information in the records at issue that reveals:

- the estimated increase in annual electricity costs after 2023 from the current Bruce PPA before a decision is made to complete all the nuclear reactors at Bruce NGS;
- pricing information that could help determine whether the IESO should exercise economic off-ramps in 2023 and 2027. A decision in 2023 to exercise an economic off-ramp would avoid refurbishment of the next four units. A decision in 2027 to exercise an economic off-ramp would avoid refurbishment of the last two units; and,
- the annual price of the Bruce NGS electricity options that would allow the public to assess and potentially advocate for alternative energy sources, such as conservation, demand response, hydro power imports from Quebec, renewable generation, and energy storage. Environmental advocates need the annual price of the nuclear option as soon as possible to advocate for alternatives that may take up to 10 years to implement.

[100] Therefore, I find that there is a compelling public interest in disclosure of the annual forecasted price of electricity generated by the Bruce NGS over a 49-year period for the years 2015 up to and including 2063, and how this price fluctuates depending on the refurbishment of Bruce NGS's nuclear reactors. I agree with the appellant that:

The public deserves to know what the electricity will cost from this multi-billion project if only because they are paying for it and will be locked into paying for it for almost 50 years.

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<sup>41</sup> Paragraph 104 of Order PO-3955.

<sup>42</sup> The IESO's severed reconsideration representations disclose the titles of pages 4 and 5 of Record 6.

[101] Record 5 contains the IESO's review of the cost/benefit of economic off-ramps if the IESO chooses not to complete various refurbishments related to the Bruce NGS in the future. The pricing information on page 8 of Record 5 is for the years 2015 to 2063 and considers this pricing information on an annual basis with regards to the number of reactors refurbished by Bruce Power. This is confirmed by Bruce Power, where it states:<sup>43</sup>

[T]he information on page 8 of Record 5 is a series of charts showing the impact on the ARBPRIA PPA price in three scenarios:

- (a) if the IESO exercises an off-ramp after 2 units are refurbished;
- (b) if the IESO exercises an off-ramp after 4 units are refurbished; and
- (c) if an off-ramp is not exercised and, accordingly, all 6 units are refurbished.

[102] I have not been provided with evidence by the IESO and Bruce Power that this annual electricity pricing information of the Bruce NGS is contained in the publicly available documents listed above, namely, the ARBPRIA, the 2016 and 2019 figures described above or in the Fairness Opinion<sup>44</sup> about the ARBPRIA provided by the IESO's consultants. Nor can I locate this information in the IESO's planning and forecasting reports referred to by the IESO in its representations.

[103] I find that only Record 5 directly responds to the applicable public interest raised by the appellant. As noted above, the public interest concerns how refurbishment of the reactors would affect the future pricing of electricity from Bruce NGS. This page shows the anticipated annual price of electricity for the Bruce NGS for each of the years 2015 to 2063 and dependent on the numbers of available nuclear reactors. The reason for this finding is that only this page of the pages at issue show the annual forecasted rates from 2015 until 2063 based on the number of reactors refurbished at Bruce NGS. The other pages at issue do not directly respond to this public interest as raised by the appellant. These pages do not contain pricing information broken down by number of generators refurbished. At issue in each of these pages is:

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<sup>43</sup> Affidavit of the Chief Risk Officer and Vice President of Business Strategy for Bruce Power dated June 20, 2019.

<sup>44</sup> Bruce Power provided a copy of the Fairness Opinion, which was undertaken for the purpose of determining the consistency of the ARBPRIA and the technical schedule with the LTEP and its fairness to the taxpayers and electricity ratepayers of Ontario. The Fairness Opinion concludes that this agreement enables the IESO to efficiently achieve the nuclear mandate set forth in the 2013 LTEP, secures the operation of Bruce Power for the long term without exposing the IESO to operating risk and open-ended cost risk, and meets the criteria for fairness articulated in the Opinion.

- Page 3 of Record 4 - one rate estimate figure,
- Page 11 of Record 4 - a comparison of PPA rate to LTEP assumptions,
- Page 4 of Record 6 - a price comparison based on a LTEP assumption,
- Page 5 of Record 6 - the total cost of electricity service with step-up Bruce PPA price
- Pages 4, 5 and 12 of Record 6 - only contains figures from 2015 until 2032.

[104] As I mentioned above, Records 2 and 3 also do not respond to this particular public interest.

[105] I find that disclosure of page 8 of Record 5 would inform a public discussion about the exercise of economic off-ramps (decisions as to whether refurbish a reactor) prior to the date that new reactors are expected to be refurbished in 2023 and 2027. As well, disclosure of this page could provide insight into how the annual electricity costs from 2015 up until and including 2063 at Bruce NGS compares to other energy alternatives for the term of the ABPRIA.

[106] Disclosure of page 8 of Record 5 would shed light on the operations of the IESO. I find that the amount of information already disclosed is not adequate to address the public interest considerations. Based on my review of the information at issue in page 8 of Record 5 and the parties' representations, I find that there is a compelling public interest in the disclosure of the pricing information in page 8 of Record 5.

[107] I have considered whether there is a compelling public interest in non-disclosure of page 8 of Record 5. Bruce Power relies on the findings in Order PO-3801, where Adjudicator John Higgins found that section 23 did not apply to override the section 17(1)(a) exemption to the following information contained in the technical schedule to the ABPRIA:

- Counterparty Cost Thresholds for each reactor refurbishment; and
- the targeted rate of return for Bruce Power and the underlying constituent figures, namely, the targeted rate of return on equity, the targeted rate of return on debt, and the assumed capital structure.

[108] In that order, Adjudicator Higgins stated:

...I conclude that a very substantial amount of detailed information is available to the public about the ARBPRIA, and two independent review mechanisms have already been employed. These reviews assess the fairness of the ARBPRIA and its consistency with the principles in Ontario's Long-Term Energy Plan, as well as risks to ratepayers and others. For this reason, I find that a compelling public interest in the disclosure of the particular information the appellant seeks has not been established.

[109] In this appeal, the information at issue relates to different information from that in Order PO-3801, namely, the annual price for electricity generated by the Bruce NGS depending on the refurbishment of a varying number of reactors. The information in Order PO-3801 does not respond to this compelling public interest. Based on my review of the parties' representations, I find that there is not a public interest in non-disclosure of the information on page 8 of Record 5.

[110] In making this finding about page 8 of Record 5, I have considered that this specific information has been designated under section 20(1) of the *EA*. I have also considered that the IESO publishes aggregates amounts for all generators across the province. However, these aggregate amounts do not address the electricity costs at Bruce NGS from 2015 to 2063 and how these costs will vary depending on the number of generators refurbished. As noted by the appellant, I agree that the public has a right to know what the electricity cost will be from the multi-billion Bruce NGS project as they are paying for it and will be locked into paying for it for almost 50 years.

[111] Further, I have considered the IESO's argument that there is a public interest in non-disclosure. Specifically, the IESO raised the concern that disclosure could harm the IESO in current and future negotiations with other industry players.

[112] I find that any harm in disclosure raised by the IESO and by Bruce Power is speculative. The IESO and Bruce Power provided general submissions that did not address the specific pricing information in the pages at issue in Records 4 to 6. In any event, I find that any harm in disclosure of page 8 of Record 5 is outweighed by the public interest in disclosure.

[113] In conclusion, I find that there is a compelling public interest in disclosure of page 8 of Record 5.

*Purpose of the exemption*

[114] The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[115] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.<sup>45</sup>

[116] I have considered the purpose of the section 17(1) exemption, which is to protect the informational assets of third parties and, in particular, to limit disclosure of information that could be exploited by a third parties' competitor in the marketplace. In doing so, I have also considered the purpose of section 20(1) of the *EA* in relation to the records at issue. In Order PO-3801, the IPC accepted that the purpose of section 20(1) was to broaden the protection available to third parties, like Bruce Power.

[117] Bruce Power's submission raises a concern about third parties, like Bruce Power, having certainty that their confidential information will be protected once it is designated under section 20(1) of the *EA*.

[118] However, the IESO cannot guarantee that third party information is protected. As set out above in the ABPRIA, a refusal of the IESO to disclose information in accordance with section 17(1) of *FIPPA* may be the subject of an appeal to the Information and Privacy Commissioner as set forth under *FIPPA*. As well, even if the IESO's decision is upheld under section 17(1), a finding may be made by the IPC that the public interest override applies in section 23 to override the application of this exemption.

[119] Bruce Power is also concerned that disclosure would likely result in increased costs to Ontario ratepayers.

[120] Considering the contents of page 8 of Record 5, I cannot ascertain how disclosure of this page of the records, which contains annual pricing information dependent on the number of nuclear reactors utilized, could increase the cost of electricity to Ontario ratepayers neither the IESO nor Bruce Power provided particulars that support their concerns about this.

[121] I find that the compelling public interest in disclosure of the information on page 8 of Record 5 clearly outweighs the purpose of the established section 17(1) exemption in protecting the information assets of third parties and the designation of this page under section 20(1) of the *EA*. Here, Bruce Power's legitimate interest in maintaining the confidentiality of its information must give way to the competing public interest in disclosure of this particular information.

[122] Accordingly, I find that section 23 applies to override the section 17(1) exemption with respect to page 8 of Record 5 and I will order this page disclosed.

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<sup>45</sup> Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, cited above.

**ORDER:**

1. Bruce Power's request for reconsideration is granted. I uphold the IESO's decision that the information at issue in pages 3 and 11 of Record 4, page 8 of Record 5, and pages 4, 5, and 12 of Record 6 is exempt under section 17(1) by reason of it being designated under section 20(1) of the *Electricity Act*.
2. I apply the public interest override in section 23 to override the section 17(1) exemption to page 8 of Record 5 and order the IESO to disclose this page to the appellant by **June 24, 2020** but not before **June 19, 2020**.
3. The timeline noted in provision number 2 may be extended if the IESO is unable to comply in light of the current COVID-19 situation. I remain seized of the appeal to address any such requests.



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Diane Smith  
Adjudicator

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May 20, 2020