



EB-2014-0216

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O.1998, c.15, Schedule B;

AND IN THE MATTER OF an application by the Independent Electricity System Operator to amend its licence.

BEFORE Christine Long
Presiding Member

Cathy Spoel
Member

DECISION AND ORDER
July 31, 2014

BACKGROUND

1. *The Application*

On June 13, 2014, the Independent Electricity System Operator (“IESO”) filed an application (the “Licence Amendment Application”) with the Ontario Energy Board (the “Board”) under section 74 of the *Ontario Energy Board Act, 1998* (the “Act”) to amend the IESO’s licence. Specifically, the Licence Amendment Application seeks to include a new condition in the IESO’s licence to support recent amendments to the Market Rules relating to the introduction of a “general conduct rule”. The Board assigned file number EB-2014-0216 to the application.

2. *The Related Market Rule Amendments*

In order to place the IESO’s Licence Amendment Application in context, it is important to note the relationship between that Application and recent amendments to the Market Rules. On June 12, 2014, the IESO Board of Directors approved amendments to the

Market Rules that introduce a new “general conduct rule” (the “GCR”) as well as an associated alternative dispute resolution mechanism related to potential breaches of the GCR (the “GCR Process Amendments”).¹

The GCR prohibits conduct that exploits, circumvents, manipulates, undermines or interferes with the IESO-administered markets or the Market Rules. According to the IESO’s application, introduction of the GCR brings Ontario in line with other North American jurisdictions and serves the public interest.

In the normal course, under the Market Rules potential breaches of the Market Rules are investigated by the IESO, and the IESO may issue sanction orders where the IESO concludes that a breach has occurred. In the event of a dispute between the IESO and a market participant relating to a breach of the Market Rules, the Market Rules make provision for a three-stage dispute resolution process that involves negotiation, mediation and arbitration. During the IESO’s consultation process related to the development of the GCR, some market participants questioned the adequacy of this dispute resolution process in the context of the GCR, and maintained that parties should be able to have allegations of breaches of the GCR tested through an independent adjudicative process.² The GCR Process Amendments serve that purpose. Specifically, they allow a market participant to elect that the Board, rather than the IESO, determine whether or not a breach of the GCR has occurred. Where a market participant makes that election, the IESO is required to apply to the Board for that purpose, as well as for the purpose of the Board making factual determinations that relate to the sanction to be imposed. However, under the GCR Process Amendments sanctioning remains with the IESO; in other words, where the Board determines that a market participant has breached the GCR, the matter then returns to the IESO for purposes of determining the sanction to be imposed. In making its determination on sanction, the IESO must adopt and apply findings of fact made by the Board, and may adopt and apply information from the record of the proceeding before the Board, but may not rely on any new evidence.

¹ Market Rule Amendment Proposal MR-00407-R00 (for the GCR Market Rule amendments) and Market Rule Amendment Proposal MR-00407-R01 (for the GCR Process Amendments).

² The consultation process related to the development of the GCR and the GCR Process Amendments is documented on the IESO’s website at <https://ieso-public.sharepoint.com/Pages/Participate/Stakeholder-Engagement/SE-112.aspx> (for the Stakeholder Engagement SE-112 process) and <https://ieso-public.sharepoint.com/Pages/Participate/Stakeholder-Engagement/Technical-Panel/Technical-Panel.aspx> (for the Technical Panel process).

On May 14, 2014, the IESO's Technical Panel voted to recommend both the GCR and the GCR Process Amendments to the IESO Board of Directors. Although some members of the Technical Panel voted against recommending the GCR, subject to one abstention the Technical Panel was unanimous in its support for the GCR Process Amendments. According to the Licence Amendment Application, the secretary of the IESO's dispute resolution panel endorsed the GCR Process Amendments on May 23, 2014. As noted above, the IESO Board of Directors approved the GCR and the GCR Process Amendments on June 12, 2014. No review of those Market Rule amendments was initiated by the Board on its own motion under section 33 of the *Electricity Act, 1998*, and the period for applying to the Board to review those Market Rule amendments under that same section has now expired. However, the coming into force of the GCR and the GCR Process Amendments is contingent on the Board's approval of the Licence Amendment Application.

3. *The Licence Amendment Application*

The Licence Amendment Application requests that the Board include the following new provisions in the IESO's licence to give effect to the GCR Process Amendments:

Section 1 – Definitions

GCR means the general conduct rule set out in Market Rule Chapter 1, section 10A (or any successor provision)

Sanction Order means an order issued under Market Rule Chapter 3, section 6.2.7 (or any successor provision)

Section 7 – Obligation to Comply with Market Rules

- 7.3 Where the Licensee is satisfied that the GCR has been breached, prior to making a Sanction Order and if the market participant under investigation so elects, the Licensee shall apply to the Board to:
- a) make a determination as to whether the GCR has been breached; and
 - b) make findings of fact relevant to the imposition of one or more Sanction Orders by the Licensee.

Where the Board determines that the GCR has been breached, subject to any rights of appeal or review, the Board shall return the matter to the Licensee to determine a Sanction Order.

In the Licence Amendment Application, the IESO notes that the purpose of the proposed licence amendments is to enable the GCR Process Amendments as recommended by the Technical Panel and approved by the IESO Board of Directors. According to the IESO, the option of having an alleged breach of the GCR determined by the Board supports the enforcement of the GCR and allows for a fair, open and independent adjudication of such alleged breaches before the Board. In the IESO's view, the proposed licence amendments promote the purposes of the *Electricity Act, 1998*, the objectives of the Board and the public interest.

4. *The IESO's Request to Dispose of the Licence Amendment Application without a Hearing*

The IESO requested that the Board dispose of the Licence Amendment Application without a hearing under section 21(4)(b) of the Act. According to the IESO, no person will be adversely affected in a material way by the outcome of this proceeding. In support of its request, the IESO has noted the following: that stakeholders were provided with an opportunity to submit comments on the language of the GCR Process Amendments that the IESO's Licence Amendment Application is intended to support; that comments on the GCR Process Amendments were filed and considered; that the GCR Process Amendments were recommended by the Technical Panel; and that stakeholders expressed support for the GCR Process Amendments.

In the alternative, the IESO requested that the matter be disposed of by way of a written hearing.

BOARD FINDINGS

Under section 21(4)(b) of the Act, the Board may dispose of a proceeding without a hearing where the Board determines that no person, other than the applicant, will be adversely affected in a material way by the outcome of the proceeding. The Board agrees with the IESO that the Licence Amendment Application may be disposed of without a hearing. The Board notes that the GCR Process Amendments that are supported by the Licence Amendment Application were developed having regard to

concerns raised by market participants; that the GCR and the GCR Process Amendments were widely stakeholdered by the IESO; that market participant comments on the GCR Process Amendments were generally supportive of those Amendments; that those Amendments had the unanimous support of the IESO's Technical Panel (subject to one abstention); and that the secretary of the IESO's dispute resolution panel endorsed those Amendments. The Board also notes that no person applied to the Board to review the GCR or the GCR Process Amendments.

The GCR Process Amendments and the proposed amendments to the IESO's licence provide market participants with an alternative process for the determination of an alleged breach of the GCR that they otherwise would not have, and that they may – or may not – choose to use in any given case. Market participants that elect to have an alleged breach of the GCR heard by the Board under the GCR Process Amendments have therefore chosen to do so, and as such are not adversely affected in a material way by the proposed licence amendments. The Board has also considered whether persons that are not market participants may be adversely affected in a material way by the proposed licence amendments, given that the GCR by its terms may be breached by a market participant (or the IESO) acting alone or “with another person”, and has similarly concluded that they are not. Under the GCR Process Amendments, the alternative to electing to have an alleged breach of the GCR heard by the Board is to proceed to arbitration under the generally-applicable dispute resolution process set out in the Market Rules. Based on the provisions of the Market Rules that were reproduced in the Licence Amendment Application, it appears that the arbitration process which applies to disputes regarding an alleged violation or breach of the Market Rules contemplates that an arbitration hearing will be open to the public and that all documents filed will form part of the public record of the proceedings, subject to any rulings as to confidentiality made by the arbitrator (section 2.7.21 of Chapter 3 of the Market Rules). Other applicable arbitration procedures set out in sections 2.7 to 2.9 of Chapter 3 of the Market Rules include publication of the notice of an arbitration hearing; the possibility of interventions by directly affected market participants; the ability to apply for the further production of information; and publication of a summary of the award of the arbitrator. Finally, as noted in the Licence Amendment Application, the Board may

hear and determine matters relating to non-compliance with the Market Rules. The Board can do so separate and apart from the GCR Process Amendments.³

Under section 74 of the Act, the Board may amend a licence where the Board considers it in the public interest to do so having regard to the objectives of the Board and the purposes of the *Electricity Act, 1998*. The Board has determined that it is in the public interest to amend the IESO's licence as proposed in the Licence Amendment Application. Preventing and addressing the kinds of conduct captured by the GCR, and by extension the GCR Process Amendments and the proposed licence amendments, furthers the purposes of the *Electricity Act, 1998* and the objectives of the Board relating in particular to: protecting the interests of consumers with respect to prices; promoting economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity; and providing generators, retailers and consumers with non-discriminatory access to transmission and distribution systems in Ontario.

IT IS THEREFORE ORDERED THAT:

The IESO's Licence Amendment Application is granted. The amended licence is attached as Appendix A to this Decision and Order.

DATED at Toronto, July 31, 2014

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

³ It is a deemed condition of every licence issued by the Board that the licensee comply with the provisions of Market Rules applicable to the licensee. Conditions of licence are "enforceable provisions" within the meaning of section 3 of the Act.