

ONTARIO ENERGY BOARD

In the Matter of the *Electricity Act, 1998*, s. 33;

And in the Matter of the *Ontario Energy Board Act, 1998*, s. 21;

And in the Matter of an application by Acciona Wind Energy Canada Inc., Brookfield Power Wind Prince LP, CP Renewable Energy (Kingsbridge) Limited Partnership, Erie Shores Wind Farm Limited Partnership, Greenwich Windfarm, LP, Talbot Windfarm, LP, Enbridge Renewable Energy Infrastructure Limited Partnership, Kruger Energy Port Alma LP, Suncor Energy Products Inc., Canadian Renewable Energy Corp., and Canadian Hydro Developers, Inc. (collectively the “RES Generators”) for an order that the Independent Electricity System Operator (“IESO”) prepare evidence that is relevant to a pending appeal of a Market Rule Amendment dated November 29, 2012.

Reply Submissions on Request for Production

PART I - INTRODUCTION

1. By Application dated January 11, 2013, the RES Generators requested the Ontario Energy Board (the “OEB” or the “Board”) to exercise its discretion under s. 21 of the *Ontario Energy Board Act, 1998* (the “*OEB Act*”) to give directions requiring the IESO to prepare evidence that is relevant to a pending appeal (the “Pending Appeal”) by the RES Generators of the Renewable Access Amendments pursuant to s. 33 of the *Electricity Act, 1998* (the “*EA*”).
2. That request was necessary because of the very tight timelines for an appeal under s. 33 and because IESO has refused to provide this information on a voluntary basis. Specifically, on November 28, the RES Generators requested the IESO to provide information that is relevant to the Pending Appeal, but the IESO refused to do so. Instead, it mischaracterized that request as seeking information “contractual issues between your clients and the Ontario Power Authority.” In fact, no such information was requested.
3. The IESO filed submissions on this motion on January 16, 2013. Its main substantive submissions are addressed in PART II below.

4. The IESO's overall approach is that the request is premature because the Pending Appeal has not yet been filed. The underlying challenge here is that the tight timelines make it extremely difficult to use the usual mechanisms for production of materials. One would therefore hope that, as a public agency, the IESO would seek to assist the Board in providing full information so that it may conduct the proceeding in an orderly fashion. Unfortunately, this is not the case and the IESO remains insistent that it will not provide the requested information unless ordered to do so – this is true even for information that it is otherwise prepared to file.
5. Given the IESO's intransigence, and given the timelines for an appeal, the RES Generators propose an approach to have these matters resolved in an orderly fashion and seek direction from the Board in that regard. This proposal is set out in Part III Below.
6. The RES Generators' response to the two specific substantive submissions of the IESO is set out below.

PART II – THE IESO'S POSITIONS ON THE MOTION

7. The IESO's refusal to provide the requested information is as follows:

IESO Position 1 – The Availability of Information:

“a large portion of the production sought does not exist within the IESO and thus, cannot be produced by the IESO.” (paragraph 4(a)).

“It [the IESO] has no ability to compel information from any other such organization, government agency or ministry, as requested in the RES Generators' Application.” (paragraph 17)

RES Generators' Response:

8. The request production seeks “Materials” from the IESO. It defines “Materials” as “internal correspondence and modelling, and all communications with Government Agencies (defined as including the OPA and Ontario Electricity Finance Corporation (“OEFCE”)), and all Market Participants.” All of these “Materials” are of the kind that should exist within the IESO.
9. The requested production also requests the IESO to “specifically request Government Agencies to provide all of their Materials”. The request for production does not request the IESO to “compel” anyone to do anything. It is common practice for the Board to have parties request information from other persons to contribute to the record.

IESO Position 2 – The Relevance of Information:

“the fundamental premise of the request is that the impact of the amendments on the RES Generators' right to certain payments pursuant to their contractual arrangements with the Ontario Power Authority (the "OPA") is both relevant to the Board's consideration of any review and is an analysis which the IESO conducted. To the contrary, those contractual arrangements are outside the mandate of the IESO, were not the subject of analyses conducted by the IESO, and would in any event be irrelevant to any review of the amendments by the Board”

10. The position is repeated throughout the submissions and it appears to be made in respect of all information requested in sections (a) and (b) of Schedule B to the Application for materials.
11. However, it is not relevant to the request. The only reference to OPA procurement contracts in the requested information is the request for “All Materials respecting the way in which the SE-91 Amendments may have an impact on amounts owing by the OPA to Affected Generators in respect of their procurement contracts.” If the IESO does not have any of these “Materials”, it can advise.
12. With respect to the relevance of financial impact of the Renewable Access Amendments more generally, as the IESO is aware, one of the issues in the Pending Appeal is whether the IESO discriminated against RES Generators and in favour of the OPA by changing the Market Rules with the result that the impact and effect of the Market Rule is to benefit the OPA at the expense of the RES Generators. The information requested in section (a) of Schedule B to the Motion relate to the impact of the Renewable Access Amendments on the OPA and RES Generators is therefore relevant to the appeal.
13. As the IESO is also aware, another issue in the Pending Appeal addresses how other market participants are compensated for being required to change their market behaviour to achieve a public good and whether the RES Generators are being discriminated against because they do not receive compensation under the same circumstances. The IESO’s response that it “does not provide compensation to any other generator with respect to dispatch other than in accordance with the Market Rules” begs the question. The question is whether the IESO’s practice is discriminatory, not whether it complies with Market Rules. The information requested in section (b) of Schedule B to the Motion relate to the way in which other market participants are compensated are therefore relevant to the appeal.

PART III – PROPOSED APPROACH

14. The IESO has proposed providing a small amount of the information requested. It is a small subset of the Materials requested in section (c) of Schedule B to the Motion. Specifically, section (c) requested the IESO to provide information on how it considered the purposes of the *Electricity Act, 1998* (“EA”) when developing the Renewable Access Amendments. This is relevant because one ground of appeal is that the Renewable

Access Amendments are consistent with the purposes of the *EA*. The specific documents requested are as follows:

“All Materials considered by the IESO in respect of the matters addressed in ss. 1(d), (e) and (i) of the *EA* in the SE-91 Amendment process, including all Materials relating to the development and consideration of options that involved alternatives to imposing dispatch and floor price requirements on wind generators.”

15. The IESO has agreed to provide the following:

“a. analysis conducted by the IESO relating to the environmental benefits, cost savings, and system operational efficiencies that could be gained through the amendments; and

b. information relating to the consistency of the MR-00381 amendments with the purposes of the Electricity Act, including all materials relating to the development and consideration of options that involved alternatives to imposing the MR-00381 dispatch and floor price requirements on variable generators.”

16. The RES Generators have two points in this respect.

17. First, it is not clear why the IESO has refused to provide this without a Board order. The RES Generators therefore hereby request that the IESO provide that information immediately and without the need for a Board order.

18. Second, this information is quite restricted. Indeed, it appears to consist of IESO communications materials (the typical power point decks, etc.), and not useful information respecting the underlying facts. The RES Generators therefore request that the IESO provide this information is without prejudice to its original request for production set out above.

19. As for the remainder of the requested materials, the RES Generators proposal is as follows: given that the time for filing an Appeal is January 24, 2013 and in order to avoid continual motions before the Board, the RES Generators respectfully request that the Board conduct an oral hearing of this motion for production and other preliminary matters as soon as possible after the filing of the appeal so that it can provide an order for disclosure of information and other directions as soon after that date possible.

20. The IESO has been aware of the RES Generators' request for information since at least November 28, 2013. There should therefore no excuse for not being able to collect the requested material and have it available for production forthwith upon the Board's order following the motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: January 21, 2013

George Vegh
McCarthy Tétrault LLP
Telephone 416-601-7709
Email: gvegh@mccarthy.ca
Counsel for RES Generators