

January 16, 2013

Ms. Kirsten Walli
Ontario Energy Board
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Dear Ms. Walli:

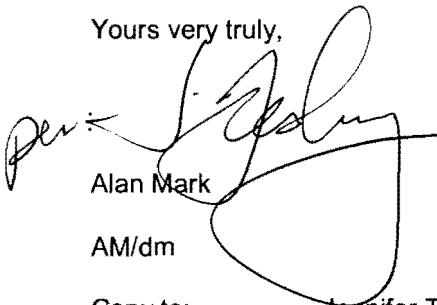
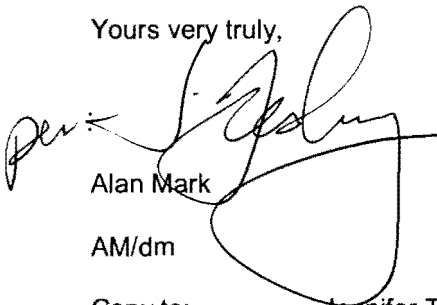
In the Matter of the Electricity Act, 1998, s. 33;

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

And in the Matter of an application by Acconia 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

We are counsel to the Independent Electricity System Operator ("IESO") in the above-noted proceeding. We enclose herewith the IESO's responding Submissions in the above-noted application, together with the Affidavit of Bruce Campbell sworn January 16, 2013. Two (2) hard copies have been sent by courier to your attention.

Yours very truly,


per: 

Alan Mark

AM/dm

Copy to: Jennifer Teskey, Norton Rose Canada LLP
George Vegh, counsel to RES Generators
Service List

DOCSTOR: 2603500\1

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 Acconia 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.

RESPONSE OF THE IESO TO THE RES GENERATORS' DOCUMENT PRODUCTION APPLICATION

1. The IESO Board recently approved a set of Market Rule amendments ("MR-00381") to support the integration of renewable generation into Ontario's electricity market. These amendments will make variable generation (i.e. wind and solar) subject to five-minute, economic dispatch and will establish floor prices for variable generation and flexible nuclear generation. The MR-00381 amendments were published by the IESO on January 3, 2013.
2. To date, no person has applied to the Ontario Energy Board (the "Board") for review of these amendments.
3. Through this Application, the RES Generators have asked the Board to grant an order for production from the IESO and, in effect, a number of other government agencies and ministries, of all manner of documents "prior to formally commencing any appeal".
4. The IESO makes these submissions in response to the RES Generators' Application and requests that the Board dismiss the Application for the following reasons:
 - a. a large portion of the production sought does not exist within the IESO and thus, cannot be produced by the IESO;
 - b. 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; and

- c. with respect to the balance of the requests in the RES Generators' Application, in the absence of an underlying review by the Board of the MR-00381 Market Rule amendments, this Application is premature. However, if the Board is inclined to make an order for production, even in the absence of an underlying review, the IESO submits that the scope of any production should be focussed, as outlined below.

The Production Sought Extends Beyond the Scope of Any Potential Review and Extends to Documents Beyond the Control of the IESO

5. The RES Generators have requested an order for production of, *inter alia*, the following:

- a. "Information relating to discrimination against Affected Generators by exposing them to uncompensated and involuntary curtailment, including:
 - i. All Materials (defined as including internal correspondence and modelling, and all communications with Government Agencies (defined as including the OPA and Ontario Electricity Finance Corporation ("OEFC")), the Ministry of Energy and all Market Participants) with respect to how the IESO or any other government agency compensates market participants for curtailing or manoeuvring their facilities to address actual or forecasts instances of surplus energy or for other purposes;
 - ii. All Materials with respect to the expectations that market participants, including but not limited to Affected Generators, would be compensated with respect to the SE-91 Amendments; and
 - iii. For greater certainty, satisfying this request includes the requirement that the IESO specifically request Government Agencies and the Ministry of Energy to provide all of their Materials with respect to:
 1. compensation of market participants for curtailing or manoeuvring their facilities to address actual or forecasts instances of surplus energy; and
 2. with respect to the expectations that market participants, including but not limited to Affected Generators, would be compensated with respect to the SE-91 Amendments.
- b. Information relating to discrimination in favour of the OPA:
 - i. All Materials relating to the way in which the SE-91 Amendments may impact the extent of curtailments to which the Affected Generators may be subject, and, in particular, all forecasts, projections or estimates of curtailments under ranges of scenarios, identifying who prepared them,

and including the underlying methodology, assumptions and calculations of such forecasts, projections or estimates;

- ii. 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; and
- iii. For greater certainty, satisfying this request includes the requirement that the IESO specifically request Government Agencies and the Ministry of Energy to provide all of their Materials with respect to:
 1. the way in which the SE-91 Amendments may impact the amount that the Affected Generators may be subject to curtailment, and, in particular, a forecast of curtailments; and
 2. the expectations that market participants, including but not limited to Affected Generators would be compensated with respect to SE-91 Amendments..."

RES Generator Application dated January 11, 2013, Schedule E, pp. 5-6.

6. The IESO makes no dispatch decisions based on financial consequences to generators arising from contracts they may have with purchasers or other entities. Nor does the IESO provide compensation to any generator with respect to dispatch other than in accordance with the Market Rules. The IESO administered system operates on the basis of prices offered by market participants. While the offer prices of market participants may be determined internally by them taking into account their contractual arrangements, if any, with third parties or other market participants, those determinations are entirely independent from the IESO and the IESO administered markets.
7. As a result of the growing investment in variable generation in Ontario, the IESO undertook an initiative to better integrate renewable resources into Ontario's electricity system. The need for the MR-00381 rule amendments is based entirely on: (1) managing surplus baseload generation (SBG) at the provincial level; (2) managing SBG at the regional level; and (3) addressing operational needs such as ramping and load following requirements, and the efficient co-ordination with other generation.
8. The IESO based all of its analysis in respect of MR-00381 on the overall system and market effects of the amendments and did not attempt to determine the financial consequences that the amendments may or may not have on any RES generator or any other generators. Rather, the IESO's analysis focussed on the environmental benefits, cost savings, and system operational efficiencies that could be gained through the amendments.
9. In assessing the need for, and impact on the efficient operation of the electricity system of the MR-00381 amendments, the IESO did not itself consider the impact of the amendments on the RES Generators' contractual rights pursuant to their contracts with the OPA. Nor were any such impacts considered in developing and approving the Market Rules, other than to note that any contractual issues raised by the RES Generators were matters to be addressed as between those generators and the OPA.

10. The IESO is not a party to any of the Renewable Energy Supply (“RES”) procurement contracts between the RES Generators and the OPA.
11. The IESO repeatedly advised during the stakeholder process leading up to MR-00381 that contractual matters between the RES Generators and the OPA were out of scope of MR-00381 and thus the IESO would not be analyzing such issues in the stakeholdering process or in the context of formulating the amendments.
12. Further, issues pertaining to the RES Generators’ contractual relationship with the OPA would be irrelevant to any statutory review by the Board. The IESO understands that there are ongoing discussions between the RES Generators and the OPA. However, those discussions and the information pertaining thereto which the RES Generators appear to want to obtain through this application, are outside of the scope of the IESO’s mandate and, it is submitted, outside the scope of any review of the MR-00381 amendments by the Board pursuant to section 33 of the *Electricity Act, 1998* (the “*Electricity Act*”).
13. In this regard, the IESO relies on the decision by this Board on its review of the IESO Market Rules addressing ramp rates (EB-2007-0040, the “Ramp Rate Appeal”). According to the reasoning by the Board in that decision, the RES Generator’s contractual issues cannot be the basis for any review under subsection 33(9) of the *Electricity Act*. As the Board decided in the Ramp Rate Appeal, the scope of the Board’s review is strictly limited to the criteria specified in subsection 33(9) of the *Electricity Act*, namely, whether there has been any unjust discrimination and whether the amendments are inconsistent with the purposes of that Act.
14. Indeed, the Ramp Rate Appeal demonstrates the danger that can result if relevance issues are not addressed early on in a proceeding. In the Ramp Rate Appeal, the Board ordered early broad document production by the IESO. Issues of relevance were deferred to the hearing, wherein the Board ultimately held that large portions of the documents were inadmissible. This resulted in substantial costs to the IESO, both in employee hours required to satisfy the earlier production orders and in financial costs expended to make production, and to pay the substantial applicant and intervenor costs associated with considering the material ultimately ruled inadmissible. As the Board held in the Ramp Rate Appeal:

AMPCO submits that the three times ramp rate market rule amendment should be revoked by this Board and referred back to the IESO for stakeholder consultation, based on the following grounds: First, that the process followed by the IESO in the three times ramp rate stakeholder consultation process violated IESO’s common-law duty of procedural fairness, by breaching AMPCO’s legitimate expectation that the IESO would follow its published stakeholder engagement process and apply its stakeholder engagement principles, and raising a reasonable apprehension of bias that the IESO favoured the interests of generators; secondly, that the integrity of the statutorily-mandated consultation process has been undermined. They say this is inconsistent with the purposes of the *Electricity Act* and unjustly discriminates against Ontario consumers in favour of Ontario generators...

Accordingly, AMPCO argues that the materials produced by IESO relating to procedural matters are relevant both to the issue of procedural fairness and also the substantive issues.

The starting point in this discussion is section 33(9) of the *Electricity Act*...

Accordingly, we find that section 33(9) of the *Electricity Act* is a jurisdiction-limiting provision, not another jurisdiction-granting provision. That is, with respect to a market rule amendment, the Board's jurisdiction is not as broad as suggested by section 20 of the *OEB Act*, but limited by section 33(9) of the *Electricity Act*.

In this regard, the Board has also considered the submissions of various parties, and agrees, that the 60-day time limit for disposing of this review is consistent with the conclusion that the Board's scope of review is limited to the criteria set out in section 33(9).

The legislature can be taken as having known that an exhaustive review of the process would render it impossible to meet these timelines...

AMPCO makes the point that a framework was established to govern the process by which these rules would be amended and implemented. They say that this procedure, despite the expectation they were entitled to, has not been followed.

That may or may not be the case, but this Panel is of the view that that is not a matter for our consideration. Mr. Vegh in his submissions questioned whether the Board should be a parallel Divisional Court. We don't think it should be...

That leads us to the Order requested. Pursuant to this decision, the Board will order that any evidence relating to the stakeholding process be struck...

EB-2007-0040, Decision of the Board dated April 10, 2007, Appendix A, pp. 85, 87, 88, 90 and 91 [Emphasis added.].

15. The RES Generators cannot attempt to use this Application and section 21 of the *Ontario Energy Board Act, 1998* to obtain an order for document production that they would not otherwise be entitled to had a review been brought under section 33 of the *Electricity Act, 1998* (the "*Electricity Act*").
16. Regarding forecasts specifically, in the course of preparing its analysis of the environmental benefits, cost savings, and system operational efficiencies that could be gained through the amendments, the IESO did not prepare any projections or estimates as to the potential reduction, if any, in the contract payments to be received by the RES Generators with the rule amendments in place. Accordingly, no such IESO projections or estimates exist. However, the IESO did use historical data and expected quantities of variable generation to

demonstrate, at a provincial level, the potential for savings in future years with the Market Rule amendments in place.

17. The IESO is a not-for-profit corporate entity created by statute. It has no ability to compel information or documentation from any other such organization, government agency or ministry, as requested in the RES Generators' Application.

The Balance of the Application is Premature

18. There is no underlying review of the MR-00381 rule amendments before the Board. As such, neither the parties nor the issues in dispute have crystallized or been defined and thus the appropriateness of the balance of the production requests cannot yet be ascertained.
19. The IESO has made extensive disclosure to the RES Generators, through the stakeholdering process, of the purpose and basis for the MR-00381 amendments and provided an example of the potential annual savings that could be achieved. The RES Generators have also had the benefit of their own technical and expert advisors throughout the process. They have ample information upon which to commence and proceed with any appeal without the need for prior production by the IESO. The practice followed by Ontario Courts is that production should not, as a rule, be ordered before the close of pleadings, unless the trier of fact is satisfied that the documents sought are essential for a party to plead the case (see, for example, *Canadian National Railway Co. (CNR) v. Metropolitan Toronto Convention Centre Corp.*, [1994] O.J. No. 1149 (S.C.J.)). This test has not and cannot be met in this case.
20. While the RES Generators' Application appears to suggest that a similar production order was granted by the Board in the Ramp Rate Appeal, the production order made in the Ramp Rate Appeal was only made following the commencement of the Appeal.
21. The Ramp Rate Appeal demonstrates the danger of making a broad, early production order without the Board first determining the proper scope of the proceeding. In that case, the Board ordered the broad production sought on fairness and process issues without first making a ruling on the relevance of such issues. The result was a proceeding which was excessively costly and initially unfocused.
22. For the foregoing reasons, the IESO submits that it would be inappropriate for the Board to order document production at this time.
23. The IESO proposes that the Board and the parties arrive at a schedule for the orderly filing of the Notice of Application for review and the evidence to be filed in support thereof, the filing of evidence in response thereto by the IESO and the exchange of interrogatories and the production of further documents if required thereafter.
24. However, if the Board is inclined to make a production order at this juncture, and without waiving any of its rights or accepting the relevance of the materials to this proceeding, the IESO submits that any proposed production should be focussed on 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.

Conclusion

25. The IESO respectfully requests that the Application be dismissed, or in the alternative, that production be ordered in accordance with paragraph 24 above, without prejudice to any of the IESO's rights and without accepting the relevance of the materials to this proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: January 16, 2013

Alan Mark
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AFFIDAVIT OF BRUCE CAMPBELL

(sworn January 16, 2013)

I, BRUCE CAMPBELL, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the Vice President, Resource Integration for the Independent Electricity System Operator (the "IESO"). I am also the IESO representative on the Stakeholder Advisory Committee. I have personal knowledge of the matters to which I hereinafter depose, except where I state that I have obtained the information from others, in which case, I believe such information to be true.
2. I have reviewed the application filed by the RES Generators on January 11, 2013 (the "Application") seeking an order from the Ontario Energy Board that the IESO make production of documents in connection with a possible review of Market Rule amendments recently approved by the IESO Board ("MR-00381") and make this affidavit in response to the Application.

The Market Rule Amendments

3. The IESO is established pursuant to the *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A. The mandate of the IESO, *inter alia*, is to direct the operation and maintain the reliability of the IESO-controlled grid and to operate the IESO-administered markets. The IESO does so with a view to achieving the efficient and reliable operation of the power system.

4. The IESO does not enter into energy supply contracts with market participants. Rather, the IESO operates the energy market pursuant to the Market Rules which govern all market participants.
5. The changing supply mix across the Province, in particular as a result of the growing investment in variable generation, is challenging the IESO's ability to efficiently dispatch power system resources, and at times, to maintain reliability. The IESO is preparing to adapt power system operations and the IESO-administered markets to accommodate all variable generation.
6. The IESO engaged the stakeholder community through the stakeholder engagement entitled Renewable Integration ("SE-91"). It was through this forum that the Renewable Integration Design Principles were presented to stakeholders, revised based on stakeholder feedback and ultimately adopted by the IESO.
7. Two of these principles include: (1) actively dispatching all variable resources connected to the IESO-controlled grid on a five-minute economic basis; and (2) the establishment of floor prices for offers from baseload generators to ensure efficient dispatch of the power system.
8. The MR-00381 amendments address each of the principles outlined above to: (1) incorporate the dispatch of all variable generators that are registered market participants on a five-minute, economic basis; and (2) establish floor prices for variable generators (wind and solar) and flexible nuclear generation.
9. The MR-00381 amendments were published by the IESO on January 3, 2013.

Analysis Conducted In Relation to the Amendments

10. The IESO makes no dispatch decisions based on financial consequences to generators arising from contracts they may have with purchasers or other entities. Nor does the IESO provide compensation to any generator with respect to dispatch other than in accordance with the Market Rules. The IESO administered system operates on the basis of prices offered by market participants. While the offer prices of market participants may be determined internally by them taking into account their contractual arrangements, if any, with third parties or other market participants, those determinations are entirely independent from the IESO and the IESO administered markets.
11. The need for the MR-00381 rule amendments is based entirely on: (1) managing surplus baseload generation (SBG) at the provincial level; (2) managing SBG at the regional level; and (3) addressing operational needs such as ramping and load following requirements, and the efficient co-ordination with other generation.
12. The IESO based all of its analysis in respect of MR-00381 on the overall system and market effects of the amendments and did not attempt to determine the financial consequences that the amendments may or may not have on any RES generator or any other generators. Rather, the IESO's analysis focussed on the environmental benefits, cost savings, and system operational efficiencies that could be gained through the amendments.

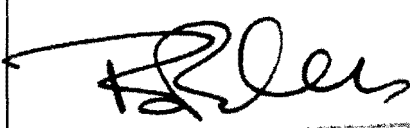
13. In assessing the need for, and impact on the efficient operation of the electricity system of the MR-00381 amendments, the IESO did not itself consider the impact of the amendments on the RES Generators' contractual rights pursuant to their contracts with the OPA. Nor were any such impacts considered in developing and approving the Market Rules, other than to note that any contractual issues raised by the RES Generators were matters to be addressed as between those generators and the OPA.
14. The IESO is not a party to any of the Renewable Energy Supply ("RES") procurement contracts between the RES Generators and the OPA.
15. The IESO repeatedly advised during the stakeholder process leading up to MR-00381 that contractual matters between the RES Generators and the OPA were out of scope of MR-00381 and thus the IESO would not be analyzing such issues in the stakeholdering process or in the context of formulating the amendments.
16. The IESO understands that there are ongoing discussions between the RES Generators and the OPA.
17. Regarding forecasts specifically, in the course of preparing its analysis of the environmental benefits, cost savings, and system operational efficiencies that could be gained through the amendments, the IESO did not prepare any projections or estimates as to the potential reduction, if any, in the contract payments to be received by the RES Generators with the rule amendments in place. Accordingly, no such IESO projections or estimates exist. However, the IESO did use historical data and expected quantities of variable generation to demonstrate, at a provincial level, the potential for savings in future years with the Market Rule amendments in place.
18. The IESO has made extensive disclosure to the RES Generators, through the stakeholdering process (see www.ieso.ca/imoweb/consult/consult_se91.asp), of the purpose and basis for the MR-00381 amendments and provided an example of the potential annual savings that could be achieved. To my knowledge, the RES Generators have had the assistance of expert and technical advisors throughout the stakeholdering process.

SWORN BEFORE ME at
the City of Toronto,
in the Province of Ontario
on January 16, 2013.



A Commissioner for taking affidavits, etc.

REENA GOYAL



BRUCE CAMPBELL