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January 31, 2013

**VIA RESS AND COURIER**

Ontario Energy Board  
2300 Yonge Street  
P.O. Box 2319  
Suite 2700  
Toronto, ON M4P 1E4

**Attention: Ms Kirsten Walli**  
**Board Secretary**

Dear Ms. Walli:

**Re: Application to Review Market Rule Amendments Renewable Energy Supply  
Generators  
Board File No: EB-2013-0029**

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We are counsel for the Applicants, the Renewable Energy Supply Generators, in the above noted matter. This letter is written to request the Board to require the Independent Electricity System Operator (the "IESO") to comply with s. (viii) of the Ontario Energy Board's ("OEB") Letter of Direction dated January 22, 2013 (the "Direction").

In the Direction, the Board ordered the IESO to prepare evidence in accordance with s. 21 of the *Ontario Energy Board Act, 1998* (the "Act"). That Direction was in two parts.

Part I of the Direction (enumerated as ss. (i) to (vi) at p. 7 of the Direction) required the production of evidence that was largely already on the public record as part of the IESO's stakeholding process. The Board noted that this evidence "is similar to the evidence that the Board directed to be provided by the IESO in the early stages of the Ramp Rate Appeal."

Part II of the Direction (enumerated as ss. (vii) and (viii) at pp. 7-8 of the Direction) is described by the Board as "the information that the IESO has, on a without prejudice basis, indicated a willingness to produce."

Within Part II, there are two categories of information, found in ss. (vii) and (viii) of the Direction respectively. The latter category is described as follows:

"information relating to the consistency of the Renewable Integration 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 Renewable Integration Amendments' dispatch and floor price requirements on variable generators, to the extent not already captured by any of the items above."

As indicated in the quotation above, the Board noted that the IESO stated that it was willing to produce this information. In describing this information, the IESO submitted that “The IESO proposes to make production of relevant documentation, including internal analysis, on relevant issues and is working hard to be in a position to do so.” (IESO’s January 22, 2013 submission, paragraph 4).

Despite the IESO’s representations and – more importantly – despite the Board’s Direction, the IESO has failed to provide this information.

The IESO’s productions in this category includes 455 pages, of which, 342 pages are fully or partially redacted. A list of the redacted documents is attached at Schedule A.

The IESO did not indicate that it would be redacting the documents when it volunteered to produce them and it did seek the Board’s approval to withhold this information. Indeed, the IESO provided no grounds for refusing to produce the materials. In doing so, it failed to comply with the Board’s Practice Directions on Confidentiality (“Practice Direction”) which requires filing an unredacted version of a document along with reasons why any information should not be on the public record.<sup>1</sup>

The Board has consistently required the production of materials on an unredacted basis unless a party can demonstrate why the information should not be on the public record:<sup>2</sup>

“The Board’s practice is that the placing of materials on the public record is the rule, and confidentiality is the exception. This is to ensure that the Board, in the exercise of its authority under the Act, conducts its proceedings in an open, transparent, and accessible manner. As is stated in the Practice Direction, ‘The onus is on the person requesting confidentiality to demonstrate to the satisfaction of the Board that the confidential information is warranted in any given case.’”

Further, virtually all of these redacted information are parts of documents that are otherwise disclosed. The Board provided an extensive analysis of the issue of redacting portions of documents in the *Consumers Council of Canada* case where the Attorney General sought to exclude documents that would have included Cabinet discussions. The Board stated the following in that decision:<sup>3</sup>

“As a general rule, once a document is relevant the entire document must be produced.

The only exceptions are if the information is clearly irrelevant **and** it would be prejudicial or damaging in some sense.”

<sup>1</sup> Practice Direction on Confidential Filings, s. 5.1.4.

<sup>2</sup> *Waterloo North Hydro Inc.*, Decision on Confidentiality, EB-2010-0144 (November 29, 2010), .p.7 (quoting from the Board’s Practice Direction on Confidential Filings, p. 2). See also: *Toronto Hydro-Electric System Limited*, Decision and Order on Confidentiality, EB-2012-0064 (November 26, 2012), p. 4.

*Union Gas Limited*, Decision and Order on TransCanada Pipelines Limited Motion for Full Responses to Interrogatories and the Union Gas Limited Request for Confidential Treatment of Certain Filings, EB-2011-0210, (June 15, 2012), p. 5.

<sup>3</sup> *Consumers Council of Canada*, Decision and Order on Motion for Production, EB-2010-0184 (June 8, 2011), p. 8, citing *McGee v. London Life Insurance Co.*, [2010] O.J. No. 898 (Sup. Ct.).

That decision is also helpful because the Board noted that, by redacting a document, the meaning of a document changes:<sup>4</sup>

“Quite apart from any question of relevance, the portions proposed to be redacted change the meaning of the document. While it does appear that the document was prepared in anticipation of a different regulatory scheme than was eventually implemented, it must be read as a whole to have any meaning. The weight to be given to a document which describes a different scheme will of course be a matter of argument.”

The Applicants hereby request that the Board reiterate its direction to the IESO to provide all of the information in s. (viii) of the Direction on an unredacted basis by no later than 5 p.m. on Friday, February 1, 2013. As the Board stated in the Direction, the Board “acknowledges the challenges associated with the conduct of a full hearing within the 60 day time frame set out in section 33(6) of the Electricity Act.”; it did not provide the Direction “lightly” and ordered production “in the interests of efficiency”.

It is unfortunate that the IESO’s failure to comply with the Board’s Direction makes it more challenging to conduct an orderly proceeding. However, given that the IESO did not indicate that it would be seeking to redacting the documents when it volunteered to produce them and it did not later seek the Board’s approval to redact this information in accordance with the Practice Direction on Confidentiality, there is no reason to delay the production of materials for further submissions on the matter. Further, since the IESO already has the documents, it should be able to produce them immediately.

Moreover, if the IESO is directed to provide the information by that time, it is still possible to maintain the current hearing schedule. In this way, the missing material may be reviewed in time for the Applicants to file any additional material respecting their motion for production by Tuesday, February 5, 2013 in accordance with Procedural Order No. 1.

All of which is respectfully submitted.

Sincerely,

George Vegh

c. Counsel for IESO

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**SCHEDULE A**

<b><u>Beginning</u></b>	<b><u>Ending</u></b>	<b><u>Total # Redacted</u></b>
IESO0003494	IESO0003496	3
IESO0003497	IESO0003503	7
IESO0003503.2	IESO0003503.4	3
IESO0003503.6	IESO0003503.9	4
IESO0003503.11	IESO0003503.15	5
IESO0003503.17	IESO0003503.22	6
IESO0003526	IESO0003540	15
IESO0003544	IESO0003545	2
IESO0003549	IESO0003555	7
IESO0003557	IESO0003578	22
IESO0003580	IESO0003581	2
IESO0003583	IESO0003585	3
IESO0003590	IESO0003595	6
IESO0003599	IESO0003600	2
IESO0003603	IESO0003606	4
IESO0003608	IESO0003633	26
IESO0003635	IESO0003644	10
IESO0003646	IESO0003646	1
IESO0003648	IESO0003686	39
IESO0003687	IESO0003700	14
IESO0003702	IESO0003729	28
IESO0003731	IESO0003732	2
IESO0003741	IESO0003742	2
IESO0003787	IESO0003787	1
IESO0003789	IESO0003795	7
IESO0003797	IESO0003801	5
IESO0003804	IESO0003804	1
IESO0003806	IESO0003806	1
IESO0003810	IESO0003843	34
IESO0003845	IESO0003853	9
IESO0003855	IESO0003880	26
IESO0003882	IESO0003888	7
IESO0003890	IESO0003895	6
IESO0003898	IESO0003908	11
IESO0003910	IESO0003930	21
<b>TOTAL REDACTED PAGES</b>		<b>342</b>