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February 6, 2013

DELIVERED VIA EMAIL

Kirsten Walli, Board Secretary
Ontario Energy Board
P.O. Box 2319, 26th Floor
2300 Yonge Street
Toronto, Ontario
M4P 1E4

Dear Ms Walli:

IN THE MATTER OF the *Electricity Act*, 1998, S.O. 1998, c. 15, Schedule A;

AND IN THE MATTER OF an Application made collectively by entities that have renewable energy supply procurement contracts with the Ontario Power Authority in respect of wind generation facilities for an Order revoking amendments to the market rules and referring the amendments back to the Independent Electricity System Operator for further consideration.

Board File No: EB-2013-0029

Ministry of Energy Submissions on Confidentiality regarding the document entitled *Managing Surplus Generation* dated May 14, 2012 (the Document)

We write on behalf of the Ministry of Energy in connection with the above-noted matter. Pursuant to Procedural Order No. 2, at page 8, the Board has granted permission to the Ministry to make written submissions by way of a letter setting out argument in respect of any claims for confidentiality which the Ministry wishes to assert over the above-noted document ordered to be produced by the Ontario Power Authority (OPA).

The Ministry hereby claims confidentiality over the entire Document which is listed in Schedule C, to the February 1st, 2013 letter filed by the Independent Electricity System Operator (IESO) in response to the Applicants' letter dated January 31, 2013. The Document was originally authored by the Electricity Supply, Transmission and Distribution branch of the Ministry of Energy and came into the possession of the IESO.

The Ministry is providing this letter to all parties and intervenors. Attached herewith as Appendix "A" to this document, is a non-confidential summary of the un-redacted version of the Document. The Ministry will rely upon the OPA for the submission to the Board of the Document itself.

Ministry's Position and Argument

In accordance with the Board's *Practice Direction on Confidential Filings* (Revised October 13, 2011) ("Confidentiality Practice Direction"), the Ministry is asserting confidentiality over the entire document. The Confidentiality Practice Direction lists treatment as an access request under the *Freedom of Information and Protection of Privacy Act* (Ontario) (FIPPA), as a consideration for determining confidentiality per Appendix A, paragraphs F and G., Had the Document been requested through FIPPA, the Ministry would take the position that the Document would not be disclosed for the following reasons:

1. Confidential Advice to Government

The Document comprises advice to government, and in particular executive decision-makers. Disclosure would reveal the advice or recommendations made to government and in particular to key policy decision-makers.

Government depends on the unbiased advice of civil servants when crafting policy recommendation-based documents. Were a senior adjudicative tribunal such as the Board to disclose this type of document in a public proceeding, the effect going forward could impair the ability of key decision-makers to make policy decisions on what are often important and sensitive policy matters based on unbiased information and recommendations.

Electricity policy represents one of the most crucial and sensitive areas of government policy-making, particularly where concerns of rate-payers and investors (including generators) must be very delicately balanced. At present, electricity policy in the area of total resource integration is evolving and key decision-makers must be permitted to receive advice from civil servants about matters which involve ongoing policy development and policy decision-making free from public scrutiny. It is the Ministry's position that the matters represented in the deck involve evolving policy issues which are not yet settled and for which fundamental decisions are still ongoing.

Further, while the issue of government transparency and openness is a key consideration for both the Board and for government, in this instance it is the Ministry's submission that greater harm would result to the deliberative nature of policy development if the document were to be disclosed. Such harm would, in our respectful view, serve to undermine the quality of decision-making and therefore outweigh the potential good which would be achieved through the public disclosure of this document.

Finally, while the positions of other parties may support the disclosure or partial disclosure of the Document or of certain information contained therein, it is the Ministry's position that government's interests, while co-ordinate in many instances with its electricity agencies such as the IESO and OPA, are broader. Government must be provided with sufficient latitude in creating documents designed to assist key decision-makers. This exercise should be free from the threat of disclosure of such documents where they contain important matters of policy development.

That the Document was disclosed to the IESO and the OPA does not undermine its fundamental purpose of providing advice to senior decision makers. Decisions of this sort require the input not just of Ministry staff but also of key sector participants such as the IESO and the OPA. The IESO often provides important input and information on system reliability, demand forecasts and physical system constraints. The OPA often provides information in relation to resources under contract, procurement updates and related matters.

2. Third-Party Confidential and Commercially-Sensitive Information

Beyond the key argument for confidentiality provided for in paragraph 1 above, the document does contain information received from third-party gas and wind generators who are counter parties to OPA contracts, and such information is commercially-sensitive in nature. The

disclosure of such information has the potential to interfere with the ongoing settlement negotiations of the OPA with its counter-parties, could be prejudicial to the OPA's interests and may have broader implications for other entities involved in current and sensitive negotiations with government or any of its agencies. The impacts of such a disclosure are either negative or not fully appreciated, and may adversely affect the interests of ratepayers and other stakeholders.

3. **Disclosure Could Undermine the Economic and Other Interests of Ontario**

The fundamental decisions relating to how government will effectively manage the issues relating to surplus baseload generation involve key policy decision-making processes which are still ongoing. Key to such decisions are electricity pricing, the electricity forecasts involving different sources of generation to be employed and the timing for such deployment, as well as decisions relating to the balancing of interests of generators of both renewable and non-renewable energy sources. These issues have implications for rate payers and other stakeholders.

Use of Confidentiality Undertaking

The Ministry recognizes that the Confidentiality Practice Direction provides for the disclosure of un-redacted documents to counsel representing involved parties where a Declaration and Undertaking has been signed. The Ministry is strongly opposed to this approach being used in this instance. The primary argument which the Ministry is making is based on preserving the sanctity of decision-makers to make decisions on sensitive policy issues in areas of developing policy, free from public scrutiny. Therefore, the maintaining of confidentiality is crucial to that preservation.

The Ministry makes this assertion based upon the inherent confidentiality associated with the policy development documents of which this document is representative: that is, documents which are briefing materials and which contain a mix of sensitive commercial and sensitive policy information and which was prepared for the singular purpose of briefing key decision-makers. Disclosure even to counsel for involved parties could reveal elements of the ongoing policy deliberations of key decision-makers.

For any further information regarding the above submissions, please do not hesitate to contact us.

Sincerely,



Halyna N. Perun
Director- Legal Services Branch, Ministry of Energy & Ministry of Infrastructure

c.c. All EB-2013-0029 Parties and Intervenors

Enclosure

Appendix "A"

Non-Confidential Summary of the redacted document entitled Managing Surplus Generation (dated May 14, 2012)

- The redacted document provides a description of surplus baseload generation (SBG) and a variety of tools that can be used to manage the issue. The deck contains:
 - A forecast of the level of SBG;
 - A description and analysis of tools that can be used to manage SBG;
 - An overview of government communication considerations with respect to SBG and the tools that can be used to manage such considerations;
 - A selection of options which combine different tools for managing SBG including a Ministry staff recommended option;
 - Analysis of the impact of the options on ratepayers and the level of SBG; and
 - A list of key government decisions that must be made in regards to managing SBG including a timeline.