

February 7, 2013

Ms. Kirsten Walli
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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 certain amendments to the market rules and referring the amendments back to the Independent Electricity System Operator for further consideration.

Board File Nos.: EB-2013-0029 and EB-2013-0010

We write further to the Board's Procedural Order No. 1 issued on January 29, 2013 in EB-2013-0029 regarding the filing of submissions in response to the Applicants' motion for the production of materials. Please find enclosed the responding submissions of the Independent Electricity System Operator's ("IESO"). The IESO continues to rely upon its previous submissions of January 16 and 22, 2013.

Yours very truly,

A handwritten signature in black ink, appearing to read "Alan Mark", with a stylized flourish at the end.

Alan Mark

Copy to: Jennifer Teskey, Norton Rose Canada LLP
All Parties

DOCSTOR: 2627179\1

ONTARIO ENERGY BOARD

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 certain amendments to the market
rules and referring the amendments back to the Independent
Electricity System Operator for further consideration.

FURTHER SUBMISSIONS BY THE IESO ON THE PRODUCTION OF MATERIALS

1. These further Submissions by the Independent Electricity System Operator ("IESO") respond to the further Submissions of the Applicants filed February 5, 2013. The IESO continues to rely upon its previous Submissions dated January 16 and 22, 2013.

Test for Relevance

2. The Applicants may be correct that a liberal or expansive approach should be taken in determining whether certain documents are sufficiently relevant to an issue in the proceedings to warrant compelling production. However, that misses the point under consideration here. The point presently before the Board is to determine what are the issues in the proceeding.
3. For the reasons discussed in its previous Submissions, it is the position of the IESO that the issue of the impact of the Renewable Integration Market Rule amendments on the Applicants' payment rights under their contracts with the Ontario Power Authority ("OPA"), and the issue of how those payment rights compare to the payment rights of other dispatchable generators who have contracts with third parties, are clearly outside of the mandate of IESO and outside of the scope of review authorized by section 33 of the *Electricity Act* 1998, S.O. 1998, c. 15, Schedule A ("*Electricity Act*").
4. In this regard, the Applicants are clearly wrong when they say, in paragraph 13 of their Submissions, that the question before the Board at this stage of the proceedings is, "whether the materials requested may be relevant to the issues raised by the Applicants." With respect, the issue before the Board is whether the materials requested are relevant to the issues which the Board will be reviewing in the proceeding. The Applicants have no unilateral right to dictate what issues are or are not relevant in this proceeding.
5. With respect to the issue of transparency referred to in paragraph 8 of the Applicants' Submissions, the IESO stands behind the transparency of the SE-91 process, which is apparent from the documents publicly available. Regardless, the issue of whether or not the

SE-91 process was or was not transparent is beyond the scope of this proceeding. This Board ruled in the ramp rate proceeding (EB-2007-0040, "Ramp Rate") that the propriety of the process which lead to the amendments in question was irrelevant. Rather, the only questions before the Board were the consistency of the amendments with the statutory objectives and the question of whether or not the proposed amendments were discriminatory. Whether the process leading to the amendments met some undefined standards of fairness or transparency is irrelevant.

6. The "danger" the IESO referred to in its previous Submissions does not, as suggested in paragraph 10 of the Applicant's Submissions, refer to a concern about what an inquiry into the transparency of the process might reveal. Rather, the danger the IESO was referring to is the possible harm to the process the Board is presently engaged in, if it expands the scope of the proceeding beyond the statutory criteria and permits a wide-ranging inquiry into the nature of the consultation process conducted by the IESO in arriving at the proposed amendments. The expense associated with an overly broad production process such as requested by the Applicant would be very significant, and the examination of process issues would obscure the real issues and impair the ability of the Board and the parties to effectively address the real issues in the limited time available. As observed by this Board in the Ramp Rate proceeding, the limited scope of review specified in the *Electricity Act*, and the requirement that the Board complete this proceeding and deliver its decision within 60 days, are inconsistent with the notion of a broad review of process issues.

Alleged Inconsistency with the Purposes of the *Electricity Act*

7. First, the Applicants omit from the list the relevant statutory objectives. The most germane objectives, and in particular, the objectives set out in subsections 1(a), (f) and (g) of the *Electricity Act* are:

Purposes

1. The purposes of this Act are,
 - (a) to ensure the adequacy, safety, sustainability and reliability of electricity supply in Ontario through responsible planning and management of electricity resources, supply and demand;
 - ...
 - (f) to protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service;
 - (g) to promote economic efficiency and sustainability in the generation, transmission, distribution and sale of electricity...
8. Further, the objective of promoting the use of renewable energy does not permit the Applicants to unilaterally expand the mandate of the IESO beyond its statutory mandate, set out in the *Electricity Act*, to operate the IESO-controlled grid and the IESO-administered markets. The IESO has no power to do anything else. The *Electricity Act* clearly provides, and the Applicants' own assertion in paragraph 34 of their Submissions confirms, that the contracts between market participants and the OPA are exclusively within the purview of the

OPA. It is apparent that the IESO-administered market cannot dispatch on the basis of the financial position of generators pursuant to contracts to which the IESO is not a party and which are fundamentally not concerned with economic system operation.

9. The specific complaints regarding production which are set out in paragraph 18 of the Applicant's Submissions are:
 - (a) that the IESO is of the view that its production obligations do not extend to emails with government agencies; and
 - (b) that the IESO may be of the view that "information relating to the consistency...with the purposes" of the *Electricity Act* may not include materials "considered" by the IESO in respect of the purposes of the *Electricity Act*.
10. With respect to item (a), the production obligation of the IESO extends to, but only to, documents which are relevant to the Board's review of the consistency of the amendments with the purposes set out in the *Electricity Act* and whether or not they are, in fact, unduly discriminatory. Those productions may, in some cases, consist of emails, and emails have been produced by the IESO. However, the IESO has not produced, and does not propose to produce, emails to or from other agencies which don't bear upon the relevant inquiry.
11. With respect to item (b), the IESO has made no distinction based on whether documents were "considered" or not. If they are relevant to the inquiry of the Board, and within the scope of production ordered by the Board, they are subject to production.

Alleged Discrimination against Renewable Energy Supply Generators

12. It is important for the Board to understand the import of the assertion in paragraph 19 of the Applicants' Submission. It is the position of the Applicants that, because of the nature of their contractual arrangements with the OPA, if it is to their financial advantage to generate power 24/7 regardless of their marginal costs of production, then the IESO must operate a market that permits them to do so regardless of whether such operation would be efficient and regardless of the costs of doing so to the electricity system and ratepayers. Not only is this proposition inconsistent, on its face, with any reasonable interpretation of the statutory objectives which are relevant here, it makes it clear that the detriment the Applicants complain about is not that the Market Rules treat like persons differently, but that the rules do not permit them to take maximum advantage of contractual provisions which are unique to them. The relative financial position of generators because of their various and unique contractual arrangements with third parties cannot possibly be the basis for an assertion of unjust discrimination by the IESO in the operation of the market.
13. The Board can and should conclude that an inquiry into the relative financial consequences to dispatchable generators because of their unique contracts with third parties cannot constitute a valid basis for an allegation of unjust discrimination against the IESO.
14. Moreover, the specific production complaints set out in paragraphs 20 through 30 of the Applicants' Submissions are without merit.
15. With respect to paragraph 20 of the Applicants' Submissions:

- (c) much of the material sought is irrelevant, for the reasons indicated above;
 - (d) some of the material alleged to exist, in particular documents of the IESO regarding the expectations of the parties to the contracts at the time the contracts were made, does not exist; and
 - (e) as the Applicants are essentially seeking a production order against the Government Agencies, a motion should be made on notice to those parties.
16. Regarding paragraph 22 of the Applicants' Submissions, the fact that the IESO has participated in meetings with the OPA and the Ministry of Energy wherein the subject of the possible restructuring of the OPA's contractual arrangements with the Applicants was discussed is irrelevant. What documents become relevant to the Board's inquiry in this proceeding simply because the IESO met with the OPA or the Ministry of Energy and even was privy to discussions about ways in which the OPA or the government might wish to prepare a contractual arrangement between the OPA and the Applicants?
17. It is apparent from documents tabled by the IESO in the SE-91 process that the IESO was aware of the ongoing negotiations between the Applicants and the OPA, was encouraging those parties to conclude their negotiations and was advising the parties of the pressing need for the IESO to proceed with the Renewable Integration Market Rule amendments in a timely way. The fact that those discussions took place, does not make them relevant to this proceeding. The discussions and materials either do or do not bear on the issues to be considered by the Board as specified in section 33 of the *Electricity Act*. Materials relating to possible compensation arrangements between the OPA and the Applicants do not become relevant simply because the IESO may be aware of them or even participated in discussions regarding them.
18. Again, in paragraph 27 of their Submissions, the Applicants miss the point. They may be correct that the IESO was aware of the negotiations and perhaps even knew of some of the calculations tabled by the OPA, but it is a non-sequitur to allege, as they do, that the IESO is therefore not to be believed when it asserts that it did not consider the impact of the amendments on the Applicants' contractual rights when determining the need for, and formulating, the Renewable Integration Market Rule amendments. That the IESO did not do so is apparent and confirmed by the uncontradicted and untested evidence on this motion.

Alleged Discrimination in Favour of the OPA

19. Similarly, the allegation that the IESO may have participated in joint presentations with the OPA to the Ministry of Energy does not, by itself, expand the scope of this proceeding. This is aside from the fact that there is absolutely no basis in the record or in any of the productions to support the conclusion that the amendments "were intended to benefit the OPA at the expense of the Applicants".
20. Lastly, paragraph 34 of the Applicants' Submissions reveals the fundamental problem with the Applicants' assertion that this Board should examine the contractual arrangements between generators and the OPA in considering the Renewable Integration Market Rule amendments. The Applicants rightly point out the obligation of the IESO to keep its

activities relating to market operations entirely separate from procurement and contract management activities, which is the purview of the OPA. The IESO agrees with that separation of powers and has put forward uncontradicted evidence that it maintained that separation of functions. Hypocritically, it is the Applicants who both assert the IESO obligation to maintain that separation, yet simultaneously assert that the IESO should not have proceeded with the Renewable Integration Market Rule amendments in light of the impacts to them under their contracts with the OPA and that somehow the IESO should be responsible for re-writing those contracts which it is not even a party to.

Dated: February 7, 2013

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