



EB-2013-0010
EB-2013-0029

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.

**DECISION ON MOTION FOR THE PRODUCTION OF EVIDENCE
AND
PROCEDURAL ORDER NO. 3**

February 12, 2013

On January 24, 2013, a number of entities that have renewable energy supply procurement contracts with the Ontario Power Authority (“OPA”) in respect of wind generation facilities (the “Applicants”) collectively filed with the Ontario Energy Board an application under section 33(4) of the *Electricity Act*, 1998 seeking the review of certain amendments to the market rules made by the Independent Electricity System Operator (“IESO”). The market rule amendments in question (the “Renewable Integration Amendments”) deal with the dispatching of, and the establishment of floor prices for, variable generation facilities, defined as all wind and solar photovoltaic resources with an installed capacity of 5MW or greater,¹ or all wind and solar photovoltaic resources that are directly connected to the IESO-controlled grid.

¹ Wind and solar photovoltaic resources that are embedded (i.e., not directly connected to the IESO-controlled grid) are captured by the Renewable Integration Amendments only if they are registered market participants.

On January 28, 2013, the Board issued its Notice of Application and Oral Hearing in relation to the Application.

The Board issued its Procedural Order No. 1 on January 29, 2013 and its Procedural Order No. 2 on February 4, 2013.

Letter of Direction to the IESO to Produce Evidence

As noted in Procedural Order No. 1, the Applicants previously filed an application with the Board under section 21 of the *Ontario Energy Board Act, 1998* asking the Board to give directions to the IESO to prepare evidence (the “Section 21 Application”).² The Applicants and the IESO both filed submissions in respect of the Section 21 Application. Acting on its own motion, the Board issued a Letter of Direction to the IESO on January 22, 2013 to produce certain evidence by January 29, 2013 (the “Letter of Direction”). The IESO filed voluminous materials on January 29, 2013, and filed a revised set of documents that included a supplementary document on January 31, 2013. These materials were later re-filed on February 6, 2013 in response to Procedural Order No. 2.³

The Applicants’ Motion

As part of the current Application, the Applicants re-filed their request for the production of materials from the IESO, which the Board has treated as a motion. Procedural Order No.1 established the process for the hearing of that motion; namely, the filing of submissions and an oral hearing. Submissions were filed by the Applicants, the IESO and the School Energy Coalition (“SEC”). Those submissions, together with the submissions of the Applicants and the IESO in respect of the Section 21 Application and the transcript of the oral hearing held on February 11, 2013, are available for review at the Board’s offices and on its website.

Submissions of the Parties

In their written and oral submissions, the Applicants reiterated their request for the production by the IESO of all of the materials identified in their Section 21 Application,

² EB-2013-0010. As noted in Procedural Order No. 2, the Board has combined the Section 21 Application proceeding with this one.

³ As required by Procedural Order No. 2, the re-filing was to include un-redacted versions of a number of documents that the IESO had redacted for reasons of relevance.

as reproduced in Schedule A to their February 5, 2013 submissions (the “Requested Evidence”). For convenience of reference, the Requested Evidence is listed in Appendix A to this Decision and Procedural Order.

The Applicants submitted that all of the Requested Evidence may be relevant to the issues in this proceeding, and noted that the Board has taken a broad view of relevance for the purpose of ordering the production of evidence. The Applicants also stated that the Board has previously highlighted the importance of fairness in Board proceedings, and has in other proceedings ordered parties to make best efforts to obtain information from third parties. Further, the Applicants noted that the IESO has long been aware of the potential for their Application, and that the Applicants asked the IESO for the Requested Evidence in November 2012. Hence, in the Applicants’ view, the IESO should be in a position to provide the Requested Evidence in a timely manner. The Applicants, for their part, are prepared to proceed to an oral hearing on March 7, 2013.

In their February 7, 2013 submissions, the IESO expressed reliance on the submissions that it made for the Section 21 Application. The IESO reiterated its position that certain portions of the Requested Evidence go to an issue that is outside the scope of the IESO’s mandate and outside the scope of the review of market rule amendments as set out in section 33 of the Electricity Act. Specifically, the IESO submits that the impact of the Renewable Integration Amendments on the Applicants’ payment rights under their contracts with the OPA, and how those payment rights compare to the payment rights of other dispatchable generators who have contracts with third parties, is clearly out of scope for this proceeding. The IESO invited the Board to first determine the scope of the issues in this proceeding, and to address the issue of evidence thereafter.

During the oral hearing, counsel for the IESO also submitted that the discovery process in relation to the Application should not be used for the collateral purpose of gaining an advantage in negotiations that are ongoing between the OPA and the Applicants. Noting that the Applicants have indicated that they do not intend to file evidence, counsel for the IESO also expressed concern that the production obligations of the parties should be contemporaneous and symmetrical, as is typically seen in applications (i.e. the filing of evidence by the parties followed by interrogatories as required), rather than proceeding by way of ordering the IESO to produce additional

materials. Counsel for the IESO confirmed that the IESO intends to produce evidence, and that the IESO proposes to do so by March 4, 2013.

In their February 7, 2013 submissions, SEC stated that the Board must have sufficient evidence on which to make a decision in this proceeding, and agreed with the Applicants that the test for determining relevance must be broad. In SEC's view, the IESO takes too narrow a view of the issues in this proceeding. Noting that the Board and the parties have little experience or jurisprudence to guide a review under section 33 of the Electricity Act, SEC did not favour the Board staging this proceeding and making determinations on relevance at this time. According to SEC, such determinations should only be made on the basis of a complete evidentiary record. Moreover, SEC submitted that while the Applicants' focus is on how they are affected by the Renewable Integration Amendments, the Board must consider a much broader range of considerations to ensure that other purposes of the Electricity Act are not ignored at the expense of those specifically raised by the Applicants. In SEC's view, the Board should err on the side of broader rather than narrower production, and should order the production of all documents in the possession of the IESO that relate to the Renewable Integration Amendments except where the documents are clearly not relevant to any possible issue in this proceeding.

Board Findings

The Board must accommodate two imperatives in this proceeding; namely, to treat the parties fairly and to issue an order that embodies the Board's final decision no later than March 25, 2013. As counsel for the Applicants pointed out, this places obligations on all of the parties. The Board's *Rules of Practice and Procedure* provide for a thorough process for the filing of evidence and the exchange of interrogatories. While the Board is guided by the principles reflected in those *Rules*, the Board concludes that the process must be adapted in this case to ensure fairness while respecting the statutory timeframe. As well as being time constrained, this proceeding differs from the Board's more customary proceedings. In their Application, the Applicants seek to overturn the action of another party; they are not seeking approval for an action on their part. In this proceeding, the Board must make a determination about the IESO's market rule amendments; the Board therefore expects that initial material necessary for the Board's review will originate with the IESO.

The Board will therefore order the IESO to produce the following materials, being a subset of the Requested Evidence, to the extent that the materials have not already been produced pursuant to the Letter of Direction:

- i. all materials (including reports, presentations and analyses but excluding correspondence) in the possession of the IESO with respect to how the IESO or any other government agency compensates market participants for curtailing or maneuvering their facilities to address: (a) actual or forecast instances of surplus energy; or (b) efficiency of the IESO-administered markets or reliability of the IESO-controlled grid to the extent that the existence and nature of such compensation is not discernible from the market rules or associated market manuals;
- ii. all materials (including reports, presentations and analyses but excluding correspondence) in the possession of the IESO relating to the way in which the Renewable Integration Amendments may impact the extent of curtailment to which variable generators may be subject, including any analysis of historical data, forecasts, projections or estimates of curtailments under ranges of scenarios, and including the underlying methodology, assumptions and calculations;
- iii. all materials (including reports, presentations and analyses but excluding correspondence) in the possession of the IESO respecting the way in which the Renewable Integration Amendments may have an impact on amounts owing by the OPA to variable generators in respect of their procurement contracts; and
- iv. all materials (including reports, presentations and analyses but excluding correspondence) in the possession of the IESO in respect of the matters addressed in any of the purposes set out in section 1 of the Electricity Act in relation to the Renewable Integration Amendments 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.

The Board is satisfied that the above materials may be relevant to the issues before the Board; namely, whether the Renewable Integration Amendments are inconsistent with

the purposes of the Electricity Act or unjustly discriminate against or in favour of a market participant or class of market participants. It remains to be determined to what extent the underlying information was considered by the IESO, or to what extent it should have been considered by the IESO. To be clear, the IESO is required to produce all materials captured by the items above irrespective of whether or not the IESO considers the materials to be relevant.

Item (iv) is very similar to item (viii) in the Board's Letter of Direction. However, there was some uncertainty during the hearing as to whether any distinction had been made between "information" and "material". The Board expects the IESO to confirm whether what it has already filed under the Letter of Direction fully meets item (iv) and to file any additional material if necessary to comply with item (iv).

The Board agrees with SEC that all of the purposes of the Electricity Act should be considered, and this is reflected in item (iv) above.

The Board will not order the IESO to request information of other government bodies. The Board finds that the appropriate information for the IESO to provide is the information that it has in its possession. The Board rarely requires a party to request information from third parties, and given the constraints applicable to this proceeding the Board concludes that such an approach would not assist the Board.

The Board will also not order the IESO to produce any further correspondence beyond correspondence that was captured by the Board's Letter of Direction. The production of correspondence has the potential to be particularly onerous for the IESO but of relatively limited incremental value in assisting the Board. The Board's focus in this proceeding is on the impact or effect of the Renewable Integration Amendments, which the Board believes can be understood from the other materials to be produced under the above items and from the IESO's filings pursuant to the Letter of Direction.

The Applicants also requested that the IESO produce all materials with respect to the expectations that market participants would be compensated with respect to the Renewable Integration Amendments. This request is adequately covered in item (i) above.

As noted above, the IESO argued that the scope of this proceeding should be established by the Board so as to exclude any consideration of the consequential impacts of the Renewable Integration Amendments on the Applicants (or other market participants) arising from their contracts with the OPA. The IESO maintained that it did not, and should not, consider those impacts in the market rule amendment process. The Board is not prepared to make the requested determination at this time in the absence of seeing the materials in the possession of the IESO. If this proceeding were not under a statutory time constraint, the Board might take the approach of conducting a preliminary enquiry into the scope of the issues prior to the filing of evidence and the exchange of interrogatories. However, given the time constraint the approach proposed by the IESO could result in disclosure being completed only a very short time before the Board is required to issue its order in this proceeding. That would be unfair to the Applicants, and would compromise the ability of the Board to appropriately consider the evidence and the issues before issuing its order. In the Board's view, the alternative of requiring early disclosure on a range of issues, even though some may eventually be found to be out of scope, does not unduly harm the IESO. The Board accepts that there is an administrative burden associated with the production of materials on a compressed schedule. However, as noted above the Board is only ordering the production of materials that are already in the possession of the IESO. The Board is not requiring production from third parties via the IESO, nor is it requiring the IESO to produce correspondence or new analyses.

Confidentiality Claims

During the oral hearing on the Applicants' motion, the Board confirmed the schedule for the filing of submissions on the confidentiality claims being made by the OPA and the Ministry of Energy in respect of certain of the materials filed by the IESO in response to the Letter of Direction. The process for addressing those confidentiality claims is proceeding in parallel with the further production of materials by the IESO that is being ordered under the terms of this Decision and Procedural Order.

The Board is concerned that any confidentiality issues associated with the materials to be produced by the IESO under the terms of this Decision and Procedural Order not engender any further delay in this proceeding. The Board expects that, in making this further production, the IESO will comply with the Board's *Rules of Practice and Procedure* and the *Practice Direction on Confidential Filings*. If considered appropriate by the relevant parties, any material in respect of which a confidentiality claim is being

made may be filed by the IESO, the OPA or the Ministry of Energy, provided again that the filing is in accordance with the above-noted Board regulatory requirements. To the extent that a confidentiality claim is being made on the same basis as applies to the current confidentiality claims, it will be sufficient to simply state that.

Remaining Steps in this Proceeding

As noted above, the IESO has stated that it intends to file evidence. The IESO has also indicated that it would like to pose interrogatories to the Applicants. The Applicants have not indicated that they intend to file any evidence, but they have stated that they are prepared to answer interrogatories to the extent that the Board considers them relevant and to the extent that the Applicants have the information in question.

The Board will make provision for the IESO to file evidence if it so chooses, and to pose interrogatories to the Applicants. The Board will allow all other intervenors to do the same. The Board will also make provision for the Applicants to file evidence if they choose. All of this evidence and interrogatories will be due on February 22, 2013. This is sooner than the IESO had proposed. However, the Board has already indicated that it must achieve fairness to the parties within the context of the statutory deadline.

The Board will not make provision for the filing of interrogatories on the IESO's evidence, or on the evidence of any other party (including the Applicants) which is filed on February 22, 2013. The Board is aware that the schedule outlined above will not allow parties to ask interrogatories of the Applicants on any evidence that the Applicants may file. The Board believes that any issues in this regard can be adequately addressed through cross-examination at the oral hearing. In addition, the Board will make provision for a Technical Conference should the parties want the opportunity to ask questions of a technical nature on the evidence.

The hearing of the Application will commence on March 7, 2013 and continue on March 8, 2013 if required. The Board will issue further direction in due course on the conduct of the hearing.

The Board considers it necessary to make provision for the following procedural matters. The Board may issue further procedural orders from time to time.

THE BOARD ORDERS THAT:

1. On or before **Friday, February 22, 2013**, the IESO shall file with the Board and deliver to all parties all materials in its possession that are captured by the list set out in this Decision and Procedural Order under the heading “Board Findings”. Where applicable, that filing shall comply with Rule 10 of the Board’s *Rules of Practice and Procedure* and the *Practice Direction on Confidential Filings* as set out in this Decision and Procedural Order under the heading “Confidentiality Claims”. If the IESO’s filing is voluminous, it may be filed and served on disc only. Nine discs shall be filed with the Board.
2. Any party that wishes to file evidence in this proceeding shall file that evidence with the Board and deliver a copy to all other parties on or before **Friday, February 22, 2013**.
3. Any party or Board staff that wishes to ask interrogatories of the Applicants shall file the interrogatories with the Board and deliver a copy of the interrogatories to all other parties on or before **Friday, February 22, 2013**.
4. Responses to interrogatories shall be filed with the Board and delivered to all other parties on or before **Friday, March 1, 2013**.
5. A Technical Conference will be held to review the evidence filed by the parties. The Technical Conference will commence at 9:30 a.m. on **Monday, March 4, 2013** in the Board’s West Hearing Room on the 25th Floor at 2300 Yonge Street, Toronto.
6. The oral hearing of the Application will commence at 9:30 a.m. on **Thursday, March 7, 2013** in the Board’s West Hearing Room on the 25th Floor at 2300 Yonge Street, Toronto. The hearing is currently scheduled for up to 2 days.

All filings to the Board must quote file number EB-2013-0029, be made through the Board’s web portal at <https://www.pes.ontarioenergyboard.ca/eservice/> and, except as noted above, shall consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender’s name, postal address and telephone number, fax number and e-mail address. Parties shall use the document

naming conventions and document submission standards outlined in the RESS Document Guideline found at <http://www.ontarioenergyboard.ca/OEB/Industry>.

If the web portal is not available, parties may e-mail their documents to the address below. Those who do not have internet access are required to submit all filings on a disc in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Edik Zwarenstein at Edik.Zwarenstein@ontarioenergyboard.ca and the Board's Associate General Counsel, Martine Band at Martine.Band@ontarioenergyboard.ca.

ADDRESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary
E-mail: Boardsec@ontarioenergyboard.ca
Tel: 1-888-632-6273 (toll free)
Fax: 416-440-7656

DATED at Toronto, February 12, 2013

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

Attachments: Appendix A: Requested Evidence (reproduced from the Applicants' February 5, 2013 submissions)

APPENDIX A

TO

**DECISION ON MOTION FOR THE PRODUCTION OF EVIDENCE
AND
PROCEDURAL ORDER NO. 3**

Renewable Energy Supply Generators

Board File No: EB-2013-0010/EB-2013-0029

February 12, 2013

Requested Evidence

(reproduced from the Applicants' February 5, 2013 submissions)

- b) Information relating to discrimination against Affected Generators by exposing them to uncompensated and involuntary curtailment, including:**
- 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")), 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;
 - 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
 - For greater certainty, satisfying this request includes the requirement that the IESO specifically request Government Agencies to provide all of their Materials with respect to:
 - compensation of market participants for curtailing or manoeuvring their facilities to address actual or forecasts instances of surplus energy; and

- 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.

c) Information relating to discrimination in favour of the OPA:

- 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;
- 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
- For greater certainty, satisfying this request includes the requirement that the IESO specifically request Government Agencies to provide all of their Materials with respect to:
 - 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
 - the expectations that market participants, including but not limited to Affected Generators would be compensated with respect to the SE-91 Amendments.

d) Information relating to the consistency of the SE-91 Amendments with the purposes of the EA, including:

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.