

## ONTARIO ENERGY BOARD

**IN THE MATTER OF** the *Electricity Act*, 1998, S.O. 1998, c. 15, Schedule A, s.33;

**AND IN THE MATTER OF** the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Schedule B, s.21;

**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.

### REPLY SUBMISSIONS OF THE MINISTRY OF ENERGY – CONFIDENTIALITY CLAIM

1. Pursuant to Procedural Order No. 2, on February 6, 2013, the Ministry of Energy (“Ministry”) provided initial submissions (“Original Submissions”) of the claim for confidentiality associated with the document listed in Schedule C to the February 1<sup>st</sup>, 2013 letter (the “Document”) filed by the Independent Electricity System Operator (IESO) in response to the Applicants’ letter dated January 31, 2013.
2. On February 13, 2013, the Ministry provided further submissions on the issue of confidentiality in relation to the Document (“Supplementary Submissions”).
3. The within submissions are in response to the reply submissions of the Applicants and Intervenor, dated February 15<sup>th</sup>, 2013.

#### *Ministry’s Position and Supplementary Argument*

4. The Ministry makes the following submissions in reply to the Applicants on the issue of confidentiality:
  - i) the Board’s determination on confidentiality should be based on a balancing of the public interests in non-disclosure and disclosure, as well as the probative value of disclosure to the other parties, and in light of this balance, the document should not be disclosed;
  - ii) the exemption set out in s. 13 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) is demonstrative of the public interest in protecting the deliberative policy development function of government;
  - iii) given the Ministry’s limited role in these proceedings, and lack of involvement in the Market Rule Amendment process, the document’s potential value if disclosed (if any) is limited and disclosure is unwarranted given the confidentiality concerns.

*i. Balancing confidentiality concerns and interests in disclosure*

5. The Board's Practice Direction on Confidential Filings ("Practice Direction") provides that the Board will allow confidential treatment of information where such treatment is warranted. Such treatment is warranted where a confidentiality concern is significant enough to outweigh the potential public interests in openness and transparency of Board decisions, and the probative value of the information over which confidentiality is claimed. The Ministry need not assert a claim of Cabinet privilege in order to establish the confidential nature of the Document and request that the Board prevent the disclosure of the Document to the other Parties or the public, as suggested by the Applicants.<sup>1</sup>
6. Rather, in this case, the Ministry need only show that the balance of interests and detrimental impacts does not favour disclosure. Given that the Document did not originate with the IESO, and was shared by the Ministry on a confidential basis for a limited purpose, and not to inform or influence the development or adoption of the market rules in question, the Ministry submits that it should not be disclosed. The email attached as "Exhibit A" to the Supplementary Submissions demonstrates that the Document at issue was not shared with the IESO for the purpose of influencing any decisions to be made with regard to the Renewable Integration Market Rule Amendments at issue in these proceedings.
7. The Ministry discussed the potential chilling effect on the policy development process in its Supplementary Submissions. There is also the potential that ordering disclosure of confidential government policy documents, particularly in a proceeding where the government is not a party, would impede the dissemination of information between government and its agencies. Open communication between government and its agencies is vital to the development of public policy, particularly in the highly technical and evolving area of energy policy. Such communication should not be impeded in circumstances such as the present case, where government may lack the data and technical information required for effective policy development, and agencies are consulted for the purpose of addressing these gaps.

*ii. The scope and purpose of confidentiality under s. 13 of FIPPA*

8. The importance of maintaining the integrity of the policy development process is reflected in the exemption from disclosure under section 13 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The protection from disclosure granted to documents that would reveal advice to government is demonstrative of the public interest in a policy development and decision making process of government that is unimpeded by undue public scrutiny.

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<sup>1</sup> EB-2013-0029, Reply Submissions of Renewable Energy Supply Generators on Confidentiality and Cost Awards, dated February 15, 2013 at para 21.

9. The Ministry does not assert that the Board is bound by the disclosure exemptions in FIPPA. However, the Practice Direction indicates that the Board will consider as a factor in its determination of a claim for confidentiality, “any FIPPA or FIPPA related exemptions”.<sup>2</sup> The Board’s discretion to determine whether confidential treatment of a record is validly requested is not limited to common law claims of privilege. As such, the Ministry submits that the confidential nature of the Document is supported by the exemption from disclosure under s. 13 of FIPPA, and by the public interest the exemption seeks to protect. The Board should consider whether the Applicants’ interest in disclosure outweighs the public interest in maintaining confidentiality over government policy development. The Ministry submits that it does not.
10. The Ontario Court of Appeal recently commented on the scope and purpose of the exemption from disclosure set out in s. 13 of FIPPA. In *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*<sup>3</sup>, the Court concurred with the description of the purpose of the exemption set out in *Canadian Council of Christian Charities v. Canada (Minister of Finance)*<sup>4</sup>:
- It would be an intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted. Disclosure of such material would often reveal that the policy-making process included false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighting of the relative importance of the relevant factors as a problem is studied more closely. In the hands of journalists or political opponents this is combustible material liable to fuel a fire that could quickly destroy governmental credibility and effectiveness.
11. The Court of Appeal’s decision clarifies that the exemption from disclosure under the FIPPA regime includes advice and recommendations in drafts and other records relating to the deliberative process, whether or not the particular records were provided to the ultimate decision maker. The exemption includes all options and related analyses, and is not restricted to recommended options.<sup>5</sup> The decision further reinforces the public importance of the policy development and decision making process being protected, and the public interest in fostering development of government policy in an unbiased and frank manner. The ability of public servants to freely and frankly advise decision makers on matters of policy development is of fundamental importance in a parliamentary democracy, and warrants the protection from disclosure of the Document at issue.

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<sup>2</sup> Ontario Energy Board Practice Direction on Confidential Filings at Appendix A, para (g).

<sup>3</sup> *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, (2012) ONCA 125.

<sup>4</sup> [1999] 4 F.C. 245 (T.D.), 53 D.T.C. 5337, at para. 31.

<sup>5</sup> *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, (2012) ONCA 125 at para 29.

*iii. The nature of the proceeding and the limited role of the Ministry in the issues before the Board*

12. The importance of maintaining confidentiality over the deliberative process of government policy making is particularly important in this case, given that the Ministry is not a party to the proceedings, and government policies are not the subject of the Board's review. Contrary to the submissions of the Intervenor, Energy Probe Research Foundation<sup>6</sup>, the Ministry has not provided policy direction to the IESO or the OPA in relation to the Market Rule Amendments at issue. The Ministry does not have any statutory authority to issue directions to the IESO, nor does it have a role to play in the development of Market Rules. All ministerial directions issued to the OPA are publicly available, and none relate to the matters at issue in these proceedings.
13. The nature of the current proceedings also supports non-disclosure. The Board's review of the IESO's Market Rules amendment is limited in scope and duration. The interests or rights at issue in these proceedings, if any, are economic. Thus, the need for disclosure of the Document is less compelling than if, for example, the proceedings were dealing with a disciplinary matter wherein reputational risks or other interests would be at stake.<sup>7</sup>
14. The Applicants argue that the Board has previously rejected submissions made by the government related to FIPPA exemptions in the CCC case<sup>8</sup>, and ordered the production of non-privileged documents.<sup>9</sup> However, the circumstances in the CCC case were vastly different. The disclosure of government materials in that case was related to evidence filed by the Attorney General. In that case, the issue to be determined related to a constitutional challenge of charges permitted by statute. The government was an intervenor in the proceedings on the issue of the constitutionality of those charges and Ministry of Energy policies were directly at issue. In contrast, here the Ministry of Energy's involvement is very limited, and government was not involved in the development or adoption of the amendments at issue.

*Conclusion*

15. As suggested by the Board's staff, the Ministry agrees that the Board should consider in its determination on the issue of confidentiality "whether the public interest in non-disclosure is outweighed by other factors, including notably the extent to which the information in question is considered necessary to enable the parties to present their cases or to permit the Board to determine the issues in a proceeding or provide meaningful and well-documented reasons for its decision".<sup>10</sup> The Ministry submits that the production of documents by the IESO is extensive and sufficient to enable the

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<sup>6</sup> EB-2012-0029 Energy Probe Research Foundation Submissions on Confidentiality, dated February 15, 2013 at p. 7.

<sup>7</sup> *Carey v. Ontario* [1986] 2 SCR 637 at para 23.

<sup>8</sup> EB-2010-0184.

<sup>9</sup> EB-2013-0029, Reply Submissions of Renewable Energy Supply Generators on Confidentiality and Cost Awards, dated February 15, 2013 at paras 17-20.

<sup>10</sup> EB-2013-0029, Board Staff Submission on Confidentiality, dated February 15, 2013 at p. 15

parties to present their cases, and allow the Board to decide on the issues. As such, any perceived benefit in the disclosure of the Document would not outweigh the detrimental impact to the public interest in denying confidential treatment to the advice of public servants to executive decision makers. The evolving nature of the policies at issue, which is of public importance and involves the balancing of competing interests, also favours non-disclosure.

16. Ordering disclosure of the Document would not only affect the iterative policy making process of government, but would have a chilling effect on the sharing by government of sensitive policy development materials and other information with its agencies and affiliates for fear that confidential materials will be ordered to be publicly disclosed in hearings where the government's policies are not at issue.

All of which is respectfully submitted.

Dated: February 20, 2013