Ontario Energy Board

Commission de l'énergie de l'Ontario

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 COSTS AND CONFIDENTIALITY REQUESTS AND PROCEDURAL ORDER NO. 4

February 28, 2013

On January 24, 2013, a number of entities that have renewable energy supply procurement contracts with the Ontario Power Authority (the "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* (the "Electricity Act") seeking the review of certain amendments to the market rules made by the Independent Electricity System Operator (the "IESO") (the "Application"). 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.

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.

On February 11, 2013, the Board heard a motion by the Applicants for the production of further materials from the IESO. On February 12, 2013, the Board issued its Decision on Motion for the Production of Evidence and Procedural Order No. 3.

This Decision and Procedural Order addresses two matters: first, the issue of the entity from whom cost awards and the Board's costs should be recovered in this proceeding; and, second, the requests made by the OPA, the Ministry of Energy, the IESO and the Ontario Electricity Financial Corporation ("OEFC") for the confidential treatment of documents.

On February 26, 2013, the Board received a request for late intervenor status from the Canadian Manufacturers & Exporters ("CME"). The Board will accept CME's request for late intervenor status subject to CME accepting the record as it stands. CME also requested cost eligibility. Cost eligibility is addressed below.

A. Recovery of the Costs of this Proceeding

The Board received requests for cost award eligibility from five parties: the Applicants; the Building Owners and Managers Association of Greater Toronto ("BOMA"); Energy Probe; the School Energy Coalition ("SEC"); and CME.

In Procedural Order No. 2, the Board:

i. determined that any costs awarded in this proceeding, as well as any Board costs, will be recovered from the Applicants, the IESO or a combination of the two;

[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.

ii. indicated that it would benefit from submissions by the parties as to which of the two entities should most appropriately bear the costs of this proceeding and, if both, in what proportion;
iii. established a schedule for the filing of submissions and reply submissions by all parties on the issue of cost awards;[2]
iv. indicated that the Applicants and the IESO should include in their submissions any objections they might have to any of the cost eligibility requests made in this proceeding; and
v. stated that all requests for cost eligibility will be determined at the end of this proceeding.[3]

Positions of the Parties

The Board received submissions on the issue of cost recovery from the Applicants, the IESO, BOMA, Energy Probe and SEC, as well as reply submissions from the Applicants and the IESO. A number of those submissions made reference to the Board's decision on responsibility for costs in the only prior proceeding in which the Board has reviewed a market rule amendment (the "Ramp Rate Review").[4]

In their submission, the Applicants reiterated that they should be eligible for the recovery of their costs in this proceeding from the IESO, and that the IESO should be required to pay its own costs and the costs of intervenors. The Applicants' arguments in support of that position can be summarized as follows:

i. the Application raises legitimate and important public interest issues in relation to the criteria set out in section 33(9) of the Electricity Act that go beyond the commercial impact of the Renewable Integration Amendments on variable generators; namely, how the IESO should, in making amendments to the market rules, take into account the purposes of the Electricity Act, the interaction between the market rules and procurement contracts and the

[2] During the hearing of the Applicants' motion on February 11, 2013, the Board extended the deadline for the filing of the initial submissions by one day, to February 13, 2013.
[3] SEC's request for intervenor status and cost award eligibility was filed late. By letter dated February 5, 2013, the Board confirmed that the approach set out in Procedural Order No. 2 applies equally to SEC's cost eligibility request.
[4] EB-2007-0040. This was an application filed by the Association of Major Power Consumers in Ontario to review a market rule amendment pertaining to the operation of the "three times" ramp rate.

IESO's responsibilities to market participants in light of its relationship with the OPA;

ii. the Applicants' perspective on these issues would be of benefit to the Board;

iii. the Board has granted cost award eligibility to generators where they are directly affected by the outcome of a proceeding and provide a useful perspective on the issues, as was the case in the Ramp Rate Review among others;

iv. the Applicants have acted responsibly and with a view to minimizing costs; and

v. the IESO has known for several years that a review of the Renewable Integration Amendments was likely, and it would therefore have been prudent to budget for its own costs and those of other parties in relation to such a review.

SEC, Energy Probe and BOMA also submitted that the costs of this proceeding should be borne by the IESO.

SEC submitted that a proceeding to review a market rule amendment is a broad inquiry that involves a consideration of the effects of the amendment against the criteria set out in the Electricity Act. According to SEC, responsibility for cost awards should lie with the IESO in relation to a proceeding that is essentially a continuation of the IESO-initiated process to make the Renewable Integration Amendments. SEC also noted that ratepayers already contribute to the IESO's Board-approved fees, which presumably include the costs of market rule amendment reviews, including intervenor cost awards.

Energy Probe's submission was along similar lines.

BOMA's arguments were to the effect that the IESO is a not-for-profit public institution whose decision to make the Renewable Integration Amendments is the driver of this proceeding; that the issues raised in market rule amendment review proceedings affect the broad public interest; that the IESO was required to bear the costs of the Ramp Rate Review and that this should be the case in the normal course in order to avoid time-consuming disputes in future cases over responsibility for costs; and that requiring the Applicants to pay all or part of the costs of this proceeding could have a chilling effect on the willingness of market participants to challenge market rule amendments, which in turn would be harmful to the Ontario market.

The IESO stated that it would be "manifestly unjust" if the IESO, as the effective "respondent" in this proceeding, were forced to defend its market rules, pay all cost awards and receive no contribution to its costs regardless of the outcome of the proceeding. The IESO also submitted that a decision by the Board that costs should be borne by the IESO in a case such as this, where special circumstances do not exist, would effectively establish a practice to that effect. In the IESO's view, such a practice would be inappropriate and would establish incentives that could encourage unmeritorious applications for market rule amendment reviews. For these reasons, the IESO's position is that the Board should adopt a "costs follow the cause" approach and defer its determination until the merits of the application are decided and all matters regarding the conduct of the hearing that could be relevant to costs are known.

In their reply submissions, the Applicants took issue with the IESO's statement that it would be "manifestly unjust" for the IESO to bear the costs of this proceeding. The Applicants noted that the Board required the IESO to pay costs in the Ramp Rate Review, consistent with the Board's practice in most of proceedings. Although the IESO is not the applicant in this proceeding by reason of the formal structure of section 33 of the Electricity Act, it is the proponent of the Renewable Integration Amendments and, in the Applicants' view, it is therefore appropriate for the IESO to be responsible for the costs of reviewing those Amendments. The Applicants also disagreed with the IESO's assertions regarding the precedential impact of deciding that the IESO should bear the costs of this proceeding. In the Applicants' view, the Board has tools that can be used to discourage unmeritorious reviews, and the "slippery slope" referred to by the IESO is only a hypothetical risk given that this is only the second time that the Board has conducted a review under section 33 of the Electricity Act.

In its reply submission, the IESO submitted that the Board should not address the issue of cost awards based on the view, expressed by the Applicants and intervenors, that market rule amendment reviews are always conducted under a public interest mandate. While acknowledging that market rule amendments may involve some questions of interest beyond the parties, the IESO noted that the Electricity Act regime is one where market rule amendment reviews are the exception and not the rule. The IESO also argued that the Board should not make its decision based on the premise that the IESO is required to submit to a public review process as part of its mandate and hence should anticipate and account for the costs of such reviews in its application for Board approval

of its fees. The question is whether ratepayers who pay the IESO's fees should have to bear the burden of funding the costs of the Applicants, who have a commercial interest in the outcome, or the costs of intervenors.

As noted above, in Procedural Order No. 2 the Board stated that that all requests for cost eligibility will be determined at the end of this proceeding. BOMA and SEC included in their submissions a request that the Board reconsider that approach and determine their cost award eligibility at this time, as is the Board's usual practice. In its reply submission, the IESO encouraged the Board not to accede to those requests.

Board Findings on Cost Responsibility for the Proceeding

The IESO shall be responsible for the costs of this proceeding. The Board does not agree with the IESO that it would be "unjust" for the IESO to bear the cost of defending its market rule amendments. Rather, the Board finds that having the IESO bear the costs of this proceeding is consistent with the overall legislative scheme. The review process under section 33 of the Electricity Act is part of the overall market rule amendment process. On that basis, it is appropriate for the IESO, rather than the Applicants, to bear the costs of this review. The Board understands the IESO's concern about unmeritorious applications; however, no such allegation has been made in this proceeding and the Board has a variety of tools to address such a situation should it arise. The Board notes that it has not yet determined whether the Applicants will be eligible for an award of costs.

As indicated earlier, the Board will determine cost eligibility for the Applicants, BOMA, SEC, Energy Probe and CME at the conclusion of the proceeding.

B. Requests for Confidential Treatment

Eleven of the documents filed by the IESO on January 31, 2013 are the subject of requests for confidential treatment in this proceeding. For ten of those documents (the "OPA Documents"), the request is made by the OPA, while both the OPA and the Ministry of Energy are seeking confidential treatment in respect of the eleventh document (the "Ministry/OPA Document").[5] The OPA Documents have all been

[5] The confidentiality request made by the OPA initially covered only 9 documents, of which one was the Ministry/OPA Document. However, in its February 20, 2013 reply submission, the OPA confirmed that its

redacted to a greater or lesser degree, whereas the Ministry/OPA Document has been redacted in its entirety.

The history regarding these confidentiality requests, and the Board's process for dealing with them, is set out in Procedural Order No. 2[6] and is described in some detail in Board staff's February 15, 2013 submission. For convenience of reference, the eleven documents are listed in Appendix A to this Decision and Procedural Order.

In its February 12, 2013 Decision on Motion for the Production of Evidence and Procedural Order No. 3, the Board ordered the IESO to produce further materials and, where applicable, to do so in accordance with Rule 10 of the Board's *Rules of Practice and Procedure* and the *Practice Direction on Confidential Filings* (the "Practice Direction"). The Board also stated that any material in respect of which a confidentiality claim is being made could be filed by the IESO, the OPA or the Ministry of Energy, if considered appropriate by the relevant parties.

In the February 22, 2013 letter accompanying its further production, the IESO gave notice of confidentiality claims in respect of fifteen documents. Confidentiality is being requested by the IESO in relation to eight documents (the "IESO Documents"), by the OPA in relation to six documents (the "Additional OPA Documents") and by OEFC in relation to one document (the "OEFC Document"). For convenience of reference, the fifteen documents are listed in Appendix B to this Decision and Procedural Order.

Positions of the Parties on the OPA Documents and Additional OPA Documents

The OPA Documents are presentations to the Ministry of Energy, made either by the OPA alone or jointly with the IESO. According to the OPA, it is in settlement negotiations with the Applicants regarding their procurement contracts. The OPA's submissions on the confidential treatment of the OPA Documents are two-fold: first, that the OPA Documents are protected under the doctrine of settlement privilege; and, second, that the disclosure of the OPA Documents would prejudice settlement negotiations between the OPA and the Applicants. In its February 13, 2013

confidentiality request, and the grounds for it, also extends to two further documents. The OPA has filed un-redacted copies of these two documents with the Board.

[6] At the hearing on the Applicants' motion for the production of further materials from the IESO, the Board confirmed that submissions on the confidentiality claims would be in writing and also confirmed the schedule for the filing of those submissions.

submission, the OPA stated that its confidentiality claim, as well as the grounds for that claim, should be understood as also extending to the Ministry/OPA Document.

The OPA objected to disclosure of the un-redacted OPA Documents even to counsel that have provided a Declaration and Undertaking, since such disclosure would result in a breach of settlement privilege and would prejudice settlement negotiations with the Applicants. The OPA stated that it is particularly concerned with disclosure to counsel for the Applicants, since that counsel also represents one of the Applicants in the settlement negotiations.

By letter dated February 22, 2013, the OPA confirmed that the grounds for its confidentiality request in respect of the Additional OPA Documents are the same as apply to the OPA Documents, and further confirmed that it also objects to the disclosure of the un-redacted Additional OPA Documents even to counsel for a party that has filed a Declaration and Undertaking, noting again that counsel for the Applicants represents one of the Applicants in the settlement negotiations. Two of the Additional OPA Documents are spreadsheets in respect of which the OPA is claiming confidentiality over the whole of the Documents. The OPA has provided all parties with a non-confidential description or summary of those two Documents. The OPA has also provided all parties with redacted versions of the other four Additional OPA Documents.

Settlement Privilege

The OPA identified the rationale for settlement privilege as expressed by the courts, and submitted that the three conditions that must be met in order for settlement privilege to apply are met in this case:

i. A litigious dispute must be in existence or within contemplation: the OPA Documents make it clear that litigation was within contemplation. As an example, one of the Documents refers to “litigation potential”.
ii. The communication must be made with the express or implied intention that it would not be disclosed in a legal proceeding in the event negotiations failed: this is evident both from the nature of the contents of the OPA Documents, and from the explicit wording on the Documents, such as “Confidential”, “Confidential Advice to Government” and “Commercially Confidential – Not for Distribution”.

iii. The purpose of the communication must be to attempt to effect a settlement: insofar as the OPA Documents and communications are concerned, it is apparent that the OPA's motivating purpose was to attempt to effect a settlement.

The OPA further submitted that, because settlement privilege is a "class" privilege, the onus is on the party seeking disclosure of the material to establish that the case falls within an exception to the privilege. In the OPA's view, there is nothing before the Board that would satisfy the onus on the Applicants to establish an exception to settlement privilege.

In their respective submissions, the Applicants, SEC and Board staff generally agreed with the OPA's statement of the rationale for, and of the three conditions applicable to, a claim of settlement privilege, although SEC raised a question as to whether the privilege is treated as a class privilege or a case-by-case privilege in Ontario. However, those submissions then either asserted that the conditions have not been met in this case, or raised some question in that regard.

The Applicants stated that settlement privilege clearly does not apply here because none of the OPA Documents consist of settlement communications between the parties. The Applicants submitted that, in order for settlement privilege to apply, the communication in question must be made between the parties to the settlement negotiations. That is not the case here, as the OPA Documents were produced prior to the date on which the OPA advised the Applicants that it was prepared to enter into settlement negotiations, and none of those Documents were communicated to the Applicants by the OPA. Instead, the OPA Documents were shared with the IESO and the Ministry of Energy, neither of whom is involved in any settlement negotiations with the OPA. In the Applicants' view, the OPA's position is based on a mischaracterization of the law of settlement privilege, and the Board should order the production of the un-redacted OPA Documents.

SEC similarly submitted that settlement privilege does not apply in this case. SEC did note that there is an outstanding question as to whether settlement privilege is a "class" or case-by-case privilege in Ontario. SEC also added that, even if settlement privilege does apply in this case, disclosure is nonetheless permissible where the documents in question have relevance apart from establishing the liability of a party or a weakness in

a party's claim. SEC stated that, in this proceeding, the Board is not determining, nor is it interested in, any potential liability that the OPA may or may not believe that it has towards the Applicants. In SEC's view, the redacted information should be disclosed because it may be useful in the Board's inquiry insofar as it quantifies the financial impact of the Renewable Integration Amendments on the Applicants. That, in turn, will be important in assessing whether the Renewable Integration Amendments further the purpose of the Electricity Act that speaks to the protection of consumer interests with respect to price.

BOMA submitted that settlement privilege has no application to the intervenors in this case, even if it has application to counsel for the Applicants. In BOMA's view, to characterize the OPA's discussions with the Applicants as private commercial discussions related to settling a dispute "mischaracterizes the nature of their relationship, and the activities". BOMA offered a number of observations in that regard, including: financial negotiations between individual generators and the OPA will be conducted by them directly with their own counsel rather than through a group effort, and presumably the OPA's offer to each of them will be similar; the information sought is aggregated information that is the best information available with which to judge the economic and financial impacts of the Renewable Integration Amendments; and it is clear that the IESO and the OPA have been working in tandem with the Ministry of Energy on the Renewable Integration Amendments, and the combined effect of their actions have financial and economic effects that need to be disclosed in order for the Board to determine the issues in this proceeding. BOMA also submitted that there is no information on the record to date about the impact of the Renewable Integration Amendments on ratepayers. In BOMA's submission, information that has been redacted from the OPA Documents and that goes to the issue of ratepayer impacts needs to be disclosed to intervenors.

Energy Probe took no position on whether settlement privilege is applicable in this case.

Referring to two earlier decisions of the Board regarding privilege, Board staff submitted that the Board has authority to hear and determine privilege claims and further suggested that the Board is required to apply common law evidentiary principles in adjudicating such claims. Board staff also submitted the following: that in considering whether settlement privilege applies, the courts distinguish between true "settlement" negotiations in a litigious context and the more general and common "commercial"

negotiations occurring in the normal course, where litigation may always be said to be a possibility; that it is at least questionable whether Board proceedings constitute litigation for the purposes of the application of settlement privilege; and that the courts normally require the party claiming privilege to file evidence – rather than submissions or argument – establishing that all relevant requirements pertaining to the privilege are met. Board staff noted that the OPA's submissions do not identify the nature of the contemplated litigation in question, nor do they identify the relationship between the contemplated litigation, the negotiations in question and the information contained in the OPA Documents.

Board staff also addressed two further issues. First, noting that an un-redacted copy of one of the OPA Documents had been inadvertently disclosed, Board staff submitted that the inadvertent disclosure of a document that is privileged as a matter of evidence law does not operate as a waiver of the privilege. Board staff did note, however, that the same considerations would not necessarily apply in respect of the inadvertent disclosure of a document where a claim is based on confidentiality as opposed to privilege. Second, noting that the OPA Documents have been shared with third parties, Board staff submitted that such sharing, if done subject to suitable restrictions, does not operate to waive or eliminate a privilege if the test for common interest is met. In Board staff's view, the concept of common interest could also be applied to a claim based on confidentiality.

In its reply submission, the OPA submitted as an "over-arching response" to the submissions of the other parties and of Board staff that, if documents or other communications substantiating or "lying behind" explicit settlement communications were to be required to be disclosed, settlement privilege would prove to be meaningless since the disclosing party would be placed at a negotiating disadvantage. In the OPA's view, legal precedent and the common law policy of promoting the settlement of disputes overwhelmingly support a much broader interpretation of settlement privilege that focuses on the substance of the communication in order to protect a party's right to keep confidential documents that have been prepared in furtherance of settlement.

In response to the submissions of the Applicants and SEC, the OPA submitted that communications or documents created or produced for the purpose of settlement negotiations do not need to have been disclosed to the parties subject to the negotiations in order to attract the protection of settlement privilege; in other words, the

fact that the OPA Documents were shared with third parties and not the Applicants cannot at law preclude the Board from making a finding that those Documents are privileged. The OPA noted that the Applicants and SEC have agreed that the modern legal test for settlement privilege is as enunciated in *The Law of Evidence in Canada*,[7] referring specifically to the three conditions identified in the OPA's earlier submission. The OPA then submitted that the jurisprudence confirms that settlement privilege protects both communications and documents created for the purposes of settlement negotiations from production to the party(ies) and to strangers, citing *Middlekamp* v. *Fraser Valley Real Estate Board*[8] as well as court and tribunal cases that have followed or referred to that decision. The OPA also cited *Middlekamp* and another decision[9] as confirming that the courts make no distinction about the form of the document or communication that a party claims as privileged, and in particular that the communication does not have to contain an actual settlement offer in order to attract the privilege.

In response to Board staff's submission, the OPA noted that there is precedent for Ontario tribunals considering and applying the common law doctrine of settlement privilege to applications properly within their statutory jurisdiction.[10]

Confidentiality

The OPA's second argument in support of its confidentiality request is that disclosure of the OPA Documents would prejudice settlement negotiations between the OPA and the Applicants. The OPA referred to the fact that Appendix A of the Practice Direction includes, as a factor to be considered by the Board in determining confidentiality claims, the potential harm that could result from the disclosure of the information, including whether the information could interfere significantly with negotiations being carried out by a party.

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[7] Bryant et. Al, *The Law of Evidence in Canada*, 3rd Ed. (Lexis Nexis Canada, 2009) at page 103, endorsed by the Ontario Court of Appeal as the test for settlement privilege in *Losenno* v. *Ontario Human Rights Commission*, 2005 CANLII 36441, at paragraph 19.

[8] (1992) 71 B.C.L.R. (2d) 276 (B.C.C.A.), at paragraphs 17-18.

[9] *Linear S.R.L.* v. *CCC-Canadian Communication Consortium Inc.*, [2000] B.C.J. No. 2491 (B.C.S.C.), at paragraph 9.

[10] *Starnino Holdings Ltd.* v. *Ontario (Ministry of the Environment)*, [2007] O.E.R.T.D. No. 68, Case No. 05-153 (Ontario Environmental Review Tribunal), at paragraph 132 (decision dated November 29, 2007), and *Mattamy Realty Ltd.* v. *Oakville (Town),* [2012] O.M.B.D. Case No. PL100041 (Ontario Municipal Board), at paragraph 3 (decision dated April 12, 2012).

The Applicants stated that it is difficult to respond to the OPA's position because the OPA has not offered any evidence in support of how it may be prejudiced, nor has it offered a summary of the OPA Documents. In the Applicants' view, the bare allegation made by the OPA is not sufficient, and the OPA should be required to provide at least some evidence to substantiate its position. The Applicants also submitted that the OPA had not provided any precedent or authority for its request that counsel be denied access to the un-redacted OPA Documents, and the Board should therefore deny that request.

SEC submitted that the OPA's claim of prejudice is an overstatement since financial impacts to the Applicants outlined in the OPA Documents would seem to be made on an aggregate basis, whereas any contract negotiations would have to be completed on an individual basis. By contrast, in SEC's view it is clear that non-disclosure will prejudice all parties, as they will not have relevant information about the financial impact of the Renewable Integration Amendments. SEC therefore submitted that the balance between the potential prejudice to the OPA of disclosure, on the one hand, and the definite prejudice to all parties of non-disclosure on the other, is best met by providing the un-redacted OPA Documents to external counsel and consultants for the parties. SEC also suggested that all parties be reminded that the Board's form of Declaration and Undertaking requires that confidential information be used exclusively for duties performed in respect of this proceeding.

Energy Probe submitted that the Board should not be constrained by any claims of confidentiality beyond those contemplated by the Practice Direction, especially where such claims result in restrictions on access to, and use of, critical and important information. Energy Probe noted that acceptance of the OPA's position will severely limit the utility of the highly redacted OPA Documents in the discovery and hearing phase of this proceeding. Energy Probe also submitted that the Board cannot proceed to carry out its mandate without information on the impact of the Renewable Integration Amendments on generators and consumers. Energy Probe suggested that, if the Board were to accept the OPA's position, the redactions to the OPA Documents should be held to a minimum to accord with the criteria in the Practice Direction. Energy Probe did not accept that this has been done by the OPA, and requested that the Board direct the OPA to review the OPA Documents and significantly reduce the extent of redactions.

Board staff submitted that the factors listed in Appendix A of the Practice Direction are simply factors to be considered by the Board, and that even if disclosure of a document could result in one of the listed harms it remains for the Board to determine whether the public interest in transparency and openness outweighs the harm that is being alleged (or vice versa). Board staff further submitted that, to the extent that there is genuine potential harm in the disclosure of some or all of the information that has been redacted from the OPA Documents, there is merit in according confidential treatment to that information. Board staff noted, however, that the OPA's submissions do not articulate with specificity how harm would ensue from the disclosure of the redacted information in the OPA Documents, whether in whole or in part.

Board staff suggested two approaches that might be used in the event that the Board was to determine that confidential treatment is warranted in respect of some or all of the redactions in the OPA Documents. First, the OPA could be ordered to provide, for the public record, a non-confidential summary of the redacted information. Second, if and to the extent that the potential harm exists solely in relation to disclosure to counsel for the Applicants, it would be open to the Board to direct that un-redacted copies of the OPA Documents be provided to counsel for all parties, other than counsel for the Applicants. Board staff did note that this latter approach would be unusual, and would create information asymmetry as between the parties.

In its reply submission, the OPA reiterated that disclosure of the redacted information contained in the OPA Documents will result in actual harm by placing the OPA at a negotiating disadvantage. The OPA submitted that it is impossible to quantify the magnitude of, or otherwise specify, the harm that will ensue if production of the OPA Documents is ordered by the Board as it is impossible to predict the outcome of the settlement negotiations. The OPA further submitted that what is known at this time is that it would not be in the interests of fairness to force any party into a negotiating disadvantage by requiring the disclosure of confidential information relating to settlement strategy and confidential settlement negotiations. In the OPA's view, it has provided the Board with requisite proof that harm will ensue if the un-redacted OPA Documents are ordered to be disclosed.

Board Findings on the OPA Documents and Additional OPA Documents

There was no dispute as to the three conditions which should be met for a claim of settlement privilege:

1. A litigious dispute must be in existence or within contemplation.
2. The communication must be made with the express or implied intention that it would not be disclosed in a legal proceeding in the event negotiations failed.
3. The purpose of the communication must be to attempt to effect a settlement.

The Board finds that, at a minimum, the OPA has not met the third condition.

The OPA's submission in support of the third condition is that "it is apparent that the motivating purpose of the OPA, insofar as the documents and communications are concerned, was to attempt to effect a settlement". The OPA has provided no evidence to substantiate this assertion. The Board accepts that the OPA is involved in negotiations with certain generators. However, that does not mean that all documents created by the OPA on this topic have as their purpose to effect a settlement. That this is the purpose must be demonstrated clearly.

The most obvious example of a communication that has settlement as its purpose would be a communication by the OPA to one or more wind generators. This is clearly the context contemplated in the passage from *Middlekamp* v. *Fraser Valley Real Estate Board* quoted by the OPA in its argument:

> …I find myself in agreement with the House of Lords that the public interest in the settlement of disputes general requires "without prejudice" documents or communications created for, or communicated in the course of, settlement negotiations to be privileged. I would classify this as a "'blanket', prima facie, common law or 'class'" privilege because it arises from settlement negotiations and protects the class of communications exchanged in the course of that worthwhile endeavour.
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> In my judgment this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, and whether or not a settlement is reached. This is because, as I have said, a party communicating a proposal relating to settlement, or responding to one, usually has no control over what the

> other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served.

To the extent that the OPA relies on the above quotation as authority for the proposition that communications do not need to be between the negotiating parties in order to attract settlement privilege, the Board disagrees. The issue in the *Middlekamp* case was whether communications between two parties to a settlement negotiation should be produced to and at the instance of a third party. The latter part of the above quotation clearly refers to communications between negotiating parties: "…a party communicating a proposal relating to settlement, or responding to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlement will not be served". The Board also notes the reference to settlement privilege protecting "the class of communications exchanged in the course of" settlement negotiations.

In the current proceeding, settlement privilege would potentially apply to communications between the OPA and the Applicants (either individually or as a group). The documents at issue are not communications from the OPA to one or more of the Applicants. They are presentations to the Ministry of Energy prepared by the OPA either individually or jointly with the IESO.

Even if the Board accepts that there may be documents that can be the subject of settlement privilege notwithstanding that they were not exchanged between negotiating parties, it would nonetheless need to be established that the documents were created for the purpose of effecting settlement. As noted above, the documents are presentations to the Ministry of Energy, made either by the OPA alone or jointly with the IESO, and the OPA has provided no evidence to substantiate its assertion that the documents were prepared for the purposes of settlement. The Board has inspected the un-redacted documents in question and cannot discern how they could be said to have been produced for the purpose of settlement negotiations. In the Board's view, the purpose of the documents is to inform the Ministry of Energy in a number of areas:

- surplus baseload generation
- IESO work in amending the market rules
- potential implications for various types of generators
- OPA negotiations

So while the documents may be related to the negotiations, the Board does not believe that they have as their purpose to effect a settlement. The Board therefore concludes that the OPA Documents and the Additional OPA Documents are not protected by settlement privilege.

The OPA also claims that disclosure of the documents would prejudice settlement negotiations by placing it at a disadvantage in its negotiations with certain generators. The Board understands that the OPA is in negotiations with certain generators in parallel with the current Board proceeding, and that the OPA Documents and Additional OPA Documents contain information which could provide an advantage to parties to those negotiations. However, the Board is conducting a public hearing process, and the information is potentially relevant to the review of the Renewable Integration Amendments. The material is potentially relevant to the issues before the Board and must therefore be available to the parties. Negotiations are ongoing and therefore confidentiality is warranted. These conflicting goals must be resolved in a fair and pragmatic way. The Board will therefore grant confidential status to the documents and they will only be made available to the external counsel and consultants from whom the Board accepts an executed Declaration and Undertaking.

The OPA objects to counsel for the Applicants receiving the material because he also represents one of the generators in negotiations with the OPA. The Board accepts that, to the extent that confidentiality is warranted by reason of potential prejudice to the OPA's negotiating position, it follows that the material must not be disclosed to any individual that is participating in the current negotiations. Therefore, the Board will only accept a Declaration and Undertaking from external counsel (or consultants) who also confirm that they will not hereafter be involved in the ongoing negotiations with the OPA.

Positions of the Parties on the Ministry/OPA Document

According to the Ministry of Energy, the Ministry/OPA Document was originally authored by Ministry staff and came into the possession of the IESO through an e-mail. That e-mail referenced the specific use that the Ministry intended to make of that Document, specifically as a policy development tool to inform a technical discussion. The Ministry of Energy also noted that the fact that the word "confidential" appears on each page of the Ministry/OPA Document makes it clear that the Document was intended to be treated as confidential.

As noted above, the OPA's submissions on the confidential treatment of the Ministry/OPA Document are the same as those made in respect of the OPA Documents.

The Ministry of Energy, for its part, identified three bases for its confidentiality request in respect of the Ministry/OPA Document as follows:

i. The Document comprises advice to government and, in particular, advice to executive decision-makers on sensitive and ongoing policy matters. The government should be permitted to undertake policy analysis free from public scrutiny at early junctures in the policy development process. The Board should consider the potential detrimental effect on the deliberative process of public policy making should disclosure be ordered. The instances where the Board has required the disclosure of government briefing materials are rare, and in the only recent Board decision on this point (in proceeding EB-2010-0184)[11] the policy development process had run its course, which is not the case here. The importance of confidentiality in the policy development process is supported by section 13 of the *Freedom of Information and Protection of Privacy Act* (Ontario) ("FIPPA"), under which records may be withheld if they would reveal "advice or recommendations of a public servant, or any other person employed in the service of an institution or a consultant retained by an institution", and by the Information and Privacy Commissioner's expression of the purpose of that section in Order P-1398.[12] In this regard, the Board should not feel bound to strict definitions of the terms "advice" and "recommendation", but rather should take a broad approach and include background information, options and analysis leading to the development of recommendations.

ii. The disclosure of the information contained in the Document has the potential to interfere with the on-going negotiations of the OPA with its counterparties, could be prejudicial to the OPA's interests and may have broader implications for other entities involved in current and sensitive

[11] The Decision and Order in question was issued on June 8, 2011 in the context of a proceeding to determine a motion by the Consumers Council of Canada in relation to section 26.1 of the *Ontario Energy Board Act, 1998.*

[12] May 22, 1997, upheld on judicial review.

negotiations with the government or its agencies. These implications are either negative or not fully understood at this time.

iii. The disclosure of the Document could undermine the economic or other interests of Ontario, in part because negotiations between the OPA and various counterparties with vested interests in the outcome of this proceeding are ongoing and in part because other strategic positions of the government are at play. The disclosure of the information in the Document could provide counterparties and competing jurisdictions with unintended insight and economic and strategic advantages, to the detriment of the Province's negotiating position or to that of the government's agencies.

The Ministry further argued that the balance of interests favours non-disclosure of the Ministry/OPA Document. In the Ministry's view, the benefits of disclosure are purely speculative, whereas disclosure has the potential to undermine the free and frank development of energy policy going forward. The Board should therefore only disclose the Ministry/OPA Document to the parties in response to a focused inquiry in relation to specific information, and not in response to a general inquiry for information. In the alternative, if the Board does order the disclosure of the Ministry/OPA Document, it would be more appropriate to disclose a version of the Document that has been redacted in a manner consistent with the redactions sought by the OPA.

The Applicants submitted that the Ministry of Energy has not substantiated its request for confidential treatment and that the Board should order that the Ministry/OPA Document be disclosed. The Applicants noted that the Board has unambiguously determined that briefing notes, of which the Ministry/OPA Document is one, are not confidential for the purposes of disclosure. The Applicants referred in this regard to the same Board decision as that cited by the Ministry of Energy (from proceeding EB-2010-0184), wherein the Board stated that a briefing note does not meet the test set out in *Carey* v. *Ontario*[13] of being part of the decision-making level of government.

The Applicants also noted that the Ministry of Energy is not seeking the formal protection of claiming public interest immunity, and that it has not offered any certificate or evidence in support of its assertion that disclosure could undermine the economic

[13] [1986] 2 S.C.R. 637.

and other interests of Ontario. Rather, the Ministry of Energy has offered vague and unsubstantiated assertions that the information in the Ministry/OPA Document must be confidential because it addresses issues around surplus baseload generation ("SBG"). In effect, the Ministry of Energy is arguing that a proceeding aimed at determining whether a market rule allegedly aimed at SBG should be sheltered from information on alternative means to address SBG that were considered by the Ministry, the OPA and the IESO. In the Applicants' view, if the Board accepts the Ministry of Energy's submission, it will effectively make it impossible to ever order disclosure from the Ministry and will be prejudicial to a critical evaluation of the IESO's own positions on alternatives to addressing SBG. The Applicants also cautioned the Board that it is very easy to exaggerate the importance of ensuring that advice to government is free and frank, as noted by the Supreme Court in *Carey* v. *Ontario.*

SEC submitted that certain portions of the Ministry/OPA Document should be treated as confidential, but that the un-redacted Document should be provided to counsel for the parties. In SEC's view, the Board's form of Declaration and Undertaking is sufficient protection in respect of confidential information, and only in the most exceptional circumstances is the nature of the document such that it should be completely secret, so that no parties see it. According to SEC, this proceeding is not an example of such exceptional circumstances.

SEC noted that the Board is not bound by FIPPA, and that the FIPPA exemptions relied upon by the Ministry are only a guide to the Board in determining confidentiality requests under the Practice Direction. Further, SEC stated that the Board should, if anything, construe the reference to "advice or recommendations" narrowly rather than broadly as suggested by the Ministry of Energy. In SEC's view, based on the non-confidential summary of the Ministry/OPA Document provided by the Ministry, a number of pieces of information appear to be neither advice nor recommendations, and should therefore be placed on the public record. SEC noted, in this regard, that section 13 of FIPPA does not permit the withholding of factual material. With respect to the pieces of information that could be considered advice or recommendations, SEC's view was that the harm that the Ministry of Energy claims will occur from disclosure is overstated. Again, the form of Declaration and Undertaking is more than adequate to protect the information from the harms asserted by the Ministry in any event.

BOMA stated that it was unable to find the Ministry/OPA Document, and hence was unable to make submissions in relation to that Document.

Energy Probe did not express a position in relation to the Ministry of Energy's argument regarding the non-disclosure of advice to government, but disagreed with the Ministry's other arguments. In Energy Probe's view, the arguments relating to the economic and other interests of Ontario and to the balance of interests are nothing more or less than a statement of the public interest, which *inter alia* is what the Board is to determine as it relates to the Renewable Integration Amendments. Further, the Ministry of Energy has not disputed the relevance of the Ministry/OPA Document to this proceeding. According to Energy Probe, an examination of the Ministry's role in the events leading up to this proceeding is important. Energy Probe also stressed that any information on the impact of the Renewable Integration Amendments on the Applicants and on electricity consumers that the Board feels is relevant and that is requested by the parties should be produced under the terms of the Practice Direction. The utility of the Ministry's non-confidential summary of the Ministry/OPA Document is, in Energy Probe's view, *de minimis*.

Board staff noted that the Ministry of Energy's arguments could be read as advancing a claim for public interest immunity, as described in *Carey* v. *Ontario*, and submitted that the analytical approach to making a determination on public interest immunity lends itself well to the determination of the Ministry's claim under the Practice Direction. Board staff acknowledged that Appendix A of the Practice Direction includes "any other matters relating to FIPPA or FIPPA exemptions" as a factor that may be considered by the Board in determining a request for confidentiality. Board staff also acknowledged that sections 13 and 18 of FIPPA allow (but do not require) records to be withheld in respect of, respectively, advice or recommendations to government and information the disclosure of which could reasonably be expected to be injurious to the economic and other interests of Ontario. However, Board staff noted that both of these exemptions are subject to the "compelling public interest" override set out in section 23 of FIPPA.

Board staff submitted that, to the extent that the Ministry/OPA Document comprises information in the nature of advice or recommendations to the government (including the identification and assessment of different available options), there is a public interest in according confidential treatment to that information. Further, the same holds true of information the disclosure of which could reasonably be expected to be injurious to the

economic and other interests of Ontario. If the Board were to accept this view, the Board would then need to consider whether the public interest in non-disclosure is outweighed by other factors. However, Board staff also submitted that the public interest argument in relation to advice to government should not extend to information of a factual nature that is provided to support the policy decision-making process. This latter point, in Board staff's view, finds support in the fact that section 13 of FIPPA specifically excludes a record that contains factual material (among others) from the exemption that otherwise applies in respect of advice or recommendations to government.

In its reply submission, the Ministry of Energy agreed that the Board's determination should be based on a balancing of the public interests in non-disclosure and disclosure, as well as the probative value of disclosure to other parties, and urged the Board to find that the balance favours non-disclosure of the Ministry/OPA Document. The Ministry of Energy touched on a number of the arguments made in its earlier submissions, and also made the following additional submissions:

i. The Ministry need not, as suggested by the Applicants, assert a claim of Cabinet privilege in order to establish the confidential nature of the Ministry/OPA Document.
ii. 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 and be particularly problematic where the government relies on its agencies for support in respect of the data and technical information required for effective policy development.
iii. The potential value of the Ministry/OPA Document in this proceeding is limited and disclosure is unwarranted given: (a) the Ministry's limited role in this proceeding; (b) the Ministry's lack of involvement in the market rule amendment process, and notably that the Ministry has not provided policy direction to the IESO or the OPA in relation to the Renewable Integration Amendments; (c) the scope of this proceeding, which is limited to economic issues as opposed to reputational risks or other interests; and (d) the fact that the production of documents by the IESO is extensive and sufficient to allow parties to present their cases and to allow the Board to determine the issues.

iv. The decision of the Court of Appeal in *Ontario (Minister of Finance)* v. *Ontario (Information and Privacy Commissioner)*[14] clarifies that the exemption from disclosure under section 13 of FIPPA includes advice and recommendations in drafts and other records relating to the deliberative process whether or not provided to the ultimate decision maker, as well as all options and related analysis (as opposed to simply the recommended options).

v. The circumstances of this case are vastly different than the earlier case in which the Board ordered the production of government documents. Specifically, the government was an intervenor in that case, which was a proceeding involving a constitutional challenge in respect of which Ministry of Energy policies were directly at issue. Such is not the case here.

Board Findings on Ministry/OPA Document

The Board finds that the Ministry/OPA Document will be disclosed, but that it will be held confidential and will only be provided to external counsel and consultants from whom the Board accepts an executed Declaration and Undertaking and who further confirm that they will not hereafter be involved in the ongoing negotiations with the OPA.

The Board has reviewed the Ministry/OPA Document. The document contains much of the same information contained in the OPA Documents, including:

- factual information about surplus baseload generation
- the IESO market rule amendment process
- contractual provisions in various agreements between the OPA and generators
- options to address various issues

The Board reaches the same conclusion it did in proceeding EB-2010-0184, namely that the Ministry/OPA Document does not meet the test set out in *Carey* v. *Ontario* of being part of the decision-making level of government. It is a briefing to unnamed senior officials; not to Cabinet and not to the Minister.

The Ministry draws a distinction between the two proceedings on the basis that it is not active in this proceeding. The Board finds that this distinction is not relevant. What is relevant is that the material was in the possession of the IESO, the proponent of the

[14] (2012) ONCA 125.

Renewable Integration Amendments, and the material contains information which is potentially relevant to the issues before the Board.

The Ministry also distinguishes between the two cases on the basis that the policy in question in the current proceeding is still under development. The Board finds that this distinction supports a finding that the material should be treated as confidential, not that it should be completely undisclosed.

The Ministry also claims that competitive harm will come from disclosure. Again, the Board finds that this concern is adequately addressed by treating the information as confidential and limiting its disclosure to representatives of parties that have signed a Declaration and Undertaking and confirm that they will not be involved in the ongoing negotiations with the OPA.

IESO Confidentiality Claim

The documents over which the IESO is asserting confidentiality are ancillary services contracts with different market participants. According to the IESO, these contracts all specifically provide that certain information is to be kept confidential. The IESO submitted that it would be prohibited from disclosing the information that has been redacted from the IESO Documents under section 17 of FIPPA, which prohibits an institution from disclosing a record that reveals commercially sensitive third party information. Although disclosure on consent is permitted under section 17 of FIPPA, the IESO stated that it has contacted each of the counterparties to the contracts and they have all advised that they do not consent to disclosure. The IESO noted that third party information as described in section 17 of FIPPA is the type of information that the Board has previously determined should be kept confidential as contemplated in Appendix B to the Practice Direction. The IESO also submitted that the Board should have regard to various items listed in Appendix A to the Practice Direction, including those pertaining to certain harms that could result from disclosure and to the existence of a legislative requirement to maintain confidentiality. Given that the information redacted from the IESO Documents is subject to a FIPPA prohibition against disclosure, in the IESO's view it would not be appropriate for any person to be afforded the opportunity to review the un-redacted versions of those Documents even if a Declaration and Undertaking has been provided by their counsel or representative.

Board Findings on IESO Documents

The Board finds that the IESO Documents will be treated as confidential, and will only be provided to external counsel and consultants from whom the Board has accepted an executed Declaration and Undertaking and who further confirm that they will not hereafter be not involved in the ongoing negotiations with the OPA.

The Board has reviewed the IESO Documents and agrees that they contain commercially sensitive information. However, the information goes directly to one of the areas of enquiry, namely what compensation the IESO pays to other market participants for certain services. The information is therefore potentially relevant to the issues before the Board and therefore the Board concludes that the IESO Documents should be made available to the parties with suitable protections so as to maintain confidentiality.

OEFC Confidentiality Claim

On February 22, 2013, OEFC filed a letter with the Board indicating that redacted and un-redacted versions of the OEFC Document were being filed by the IESO, and outlining the grounds for OEFC's confidentiality request in respect of that Document. According to OEFC, disclosure of some of the information that has been redacted from the OEFC Document would prejudice OEFC's competitive position in negotiating and minimizing the cost of curtailments with the non-utility generators ("NUGs") with whom OEFC has contracts. In addition, some of the information has been redacted due to concerns about disclosing the "OEFC timing and notice parameters for reasons of commercial confidentiality" and to avoid affecting ongoing curtailment negotiations with the NUGs. OEFC also stated that minimizing the NUG curtailment costs is to the benefit of ratepayers, as costs under the NUG contracts are recovered through the Global Adjustment. OEFC did not specifically identify whether it objected to disclosure of the un-redacted OEFC Document to counsel or consultants that have signed a Declaration and Undertaking.

Board Findings on OEFC Document

The Board accepts OEFC's claim of confidentiality. The OEFC Document will only be provided to external counsel and consultants from whom the Board accepts an executed Declaration and Undertaking and who further confirm that they will not hereafter be involved in the ongoing negotiations with the OPA or in any ongoing negotiations between OEFC and NUG generators.

The Board has reviewed the OEFC Document and agrees that it contains information which is commercially sensitive and which could potentially adversely impact OEFC's negotiating position. The Board therefore agrees that the information should not be publicly disclosed. However, the Board also finds that the information is potentially relevant to the current proceeding and should therefore be provided under confidentiality protections.

C. Access to Un-redacted Documents

The Board has received a Declaration and Undertaking from representatives of all of the parties other than Ontario Power Generation, the IESO and CME. For the reasons set out above, the Board will not accept any Declaration and Undertaking without confirmation in writing that the person signing same will not represent a party in the ongoing negotiations with the OPA or OEFC. To be clear, such confirmation is a condition of the Board's acceptance of a Declaration and Undertaking. The process for requesting and obtaining access to the un-redacted documents is set out below. The Board will notify all parties of the persons from whom the Board has accepted a Declaration and Undertaking, and will require the IESO to provide copies of the un-redacted documents to those persons.

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. A representative of a party that wishes to have access to un-redacted copies of any of the OPA Documents, the Additional OPA Documents, the Ministry/OPA Document, the IESO Documents and the OEFC Document shall, to the extent that it has not already done so, file with the Board and deliver to all other parties a Declaration and Undertaking in the form set out in the Practice Direction no later than **12:00 p.m. (noon)** on **Friday, March 1, 2013.**

2. A representative of a party that has filed a Declaration and Undertaking and that wishes to have access to any of the un-redacted documents referred to in paragraph 1 shall, no later than **12:00 p.m. (noon)** on **Friday, March 1, 2013,** file with the Board and deliver to all other parties confirmation in writing that the

representative will not represent a party in the current negotiations between the OPA and wind generators or between OEFC and the NUGs on or after the date of filing of such confirmation.

3. The IESO shall, no later than at the commencement of the Technical Conference on **Monday, March 4, 2013**, deliver a copy of the un-redacted documents referred to in paragraph 1 to each person from whom the Board has confirmed that it has accepted a Declaration and Undertaking.

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 CD 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. Except as noted above, filings must 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
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2300 Yonge Street, 27th Floor
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Attention: Board Secretary
E-mail: Boardsec@ontarioenergyboard.ca
Tel: 1-888-632-6273 (toll free)
Fax: 416-440-7656

DATED at Toronto, February 28, 2013

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

Attachment: Appendix A: Confidentiality Requests Related to IESO's January 31, 2013 Filing
Appendix B: Confidentiality Requests Related to IESO's February 22, 2013 Filing

APPENDIX A

TO

DECISION ON COSTS AND CONFIDENTIALITY REQUESTS AND PROCEDURAL ORDER NO. 4

Renewable Energy Supply Generators

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

February 28, 2013

Confidentiality Requests Related to IESO's January 31, 2013 Filing

The documents are identified using the document identification numbers from the IESO's February 1, 2013 and February 6, 2013 letters. Documents shaded in grey are documents that appear to have been prepared jointly by the IESO and the OPA, whereas the others bear only the OPA's name.

OPA Documents		Ministry/OPA Document	
Document No.	Title	Document No.	Title
IESO0003497	Renewable Dispatch – Ministry of Energy (October 11, 2011)	IESO0003910	Managing Surplus Generation (May 14, 2012)
IESO0003503.1	Renewable Dispatch – Ministry of Energy (October 11, 2011)		
IESO0003548	Integration of Renewables and Recommendations for		

OPA Documents		Ministry/OPA Document	
Document No.	Title	Document No.	Title
	Dispatch Management – Update to Ministry of Energy – Confidential Advice to Government (August 13, 2012)		
IESO0003602	Integration of Renewables: RES and FIT – Ministry of Energy Update (October 29, 2010)		
IESO0003687	Integration of Renewables: RES and FIT Contracts – Ministry of Energy Update (November 25, 2010)		
IESO0003786	Potential Surplus Energy: A Summary – Briefing jointly prepared by IESO and OPA – Confidential (March 1, 2012)		
IESO0003854	Integration of Renewables and Recommendations for Dispatch Management – Update to Ministry of Energy – Confidential Advice to Government (August 15, 2012)		
IESO0003701	Integration of Renewables: RES and FIT Contracts – Ministry of Energy Update (November 29, 2010)		

OPA Documents		**Ministry/OPA Document**	
Document No.	Title	Document No.	Title
IESO0003589	Addressing Dispatch and Curtailment of Renewable Facilities – Joint OPA and IESO Presentation (July 13, 2010)		
IESO0003634	Integration of Renewables: RES and Fit (October, 2010)		

APPENDIX B

TO

DECISION ON COSTS AND CONFIDENTIALITY REQUESTS AND PROCEDURAL ORDER NO. 4

Renewable Energy Supply Generators

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

February 28, 2013

Confidentiality Requests Related to IESO's February 22, 2013 Filing

The documents are identified based on the description set out in the IESO's February 22, 2013 letter.

IESO Documents

Reactive Support and Voltage Control: Brookfield
Reactive Support and Voltage Control: Brookfield Great Lakes Power
Reactive Support and Voltage Control: Bruce Power
Reactive Support and Voltage Control: Lower Matagami Limited Partnership
Reactive Support and Voltage Control: OPG
Reactive Support and Voltage Control: Shell Energy North America
Reactive Support and Voltage Control: TransAlta Sarnia
Operating Reserve: OPG

Additional OPA Documents

Update to Ministry on Contract Implications of Renewable Integration (December 2010)
Overview of Curtailment and OPA Contracts (March 29, 2011)
Hourly Potential Surplus Energy with Pickering Continued Operations (October 6, 2011)
Hourly Potential Surplus Energy without Pickering Continued Operations (October 7, 2011)
Integration of Renewables: OPA Recommendations for Dispatch Management (June 26, 2012)
Renewable Contract Amendments for Dispatch Management (September 7, 2012)

OEFC Document

NUG Protocol with OEFC (November 19, 2010)