



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 COST ELIGIBILITY AND
PROCEDURAL ORDER NO. 6**

March 4, 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.

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. Among other things, Procedural Order No. 2 established a schedule for the filing of submissions and reply submissions by all parties on the issue of cost awards.

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.

On February 28, 2013, the Board issued a Decision on Costs and Confidentiality Requests and Procedural Order No. 4 in which it determined that the IESO would be responsible for the costs of this proceeding and reiterated that cost eligibility requests would be determined at the conclusion of this proceeding.

On March 1, 2013, the Applicants gave notice that they were withdrawing their Application. On the same day, the Board issued its Procedural Order No. 5 to provide intervenors with an opportunity to make submissions if they wished to request that the Board consider continuing this proceeding. The Board written received confirmation from a number of intervenors that they did not intend to make such submissions. No submissions were received from the remaining intervenors by the deadline established for that purpose in Procedural Order No. 5.

Earlier today, the Board issued a Notice advising that this proceeding is being discontinued, subject only to addressing outstanding requests for cost award eligibility and cost claims.

Board Findings on Cost Eligibility Requests

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 Research Foundation ("Energy Probe"); the School Energy Coalition ("SEC"); and Canadian Manufacturers & Exporters ("CME").

The Board finds that CME, BOMA, Energy Probe and SEC are eligible for an award of costs. Each of these parties represents a group of ratepayers, which are potentially

affected by the Renewable Integration Amendments and which ultimately pay the IESO's costs.

The Board finds that the Applicants are not eligible for an award of costs.

In support of their request for cost award eligibility, the Applicants made reference to the record of the only prior proceeding in which the Board has reviewed a market rule amendment (the "Ramp Rate Review"),² in which the Board determined that the applicant (the Association of Major Power Producers in Ontario) and an intervenor representing generators (the Association of Power Producers of Ontario) were eligible for an award of costs.

In their February 13, 2013 submission in response to Procedural Order No. 2, the Applicants reiterated that they should be eligible for the recovery of their costs in this proceeding from the IESO. The Applicants' arguments in support of that position can be summarized as follows:

- 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 IESO's responsibilities to market participants in light of its relationship with the Ontario Power Authority;
- the Applicants' perspective on these issues would be of benefit to the Board; and
- 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.

The Applicants acknowledged that, unlike the applicant in the Ramp Rate Review, they do not ultimately pay the IESO's costs. However, the Applicants noted that "any person" may bring an application under section 33 of the Electricity Act, and submitted that it would be inappropriate for there to be a systematic bias in favour of consumers in challenging market rule amendments. The Applicants also noted that industrial consumers are commercial entities that ultimately pursue their own commercial

² EB-2007-0040.

interests, and that there is therefore no public interest reason to prefer them over generators in terms of cost issues.

In support of its position that the Applicants should bear their own costs in this proceeding, the IESO argued the following in their February 13, 2013 submission in response to Procedural Order No. 2:

- the Applicants are prima facie ineligible for an award of costs under the Board's *Practice Direction on Cost Awards* (the "Practice Direction");
- the Applicants do not contribute to the payment of the IESO's Board-approved costs under the market rules; and
- market participants should be expected to bear their regulatory costs (including the cost of participating in market rule amendment development and review processes) save only in exceptional circumstances.

Under the Board's Practice Direction, the Applicants are prima facie not eligible for an award of costs: first, because they are in the role of applicant; and second, because they are generators. The Practice Direction contemplates that a party that is prima facie ineligible for costs may nonetheless be found eligible for costs in special circumstances. As noted above, the Board has already found that, given the nature of this proceeding, the IESO and not the Applicants will be responsible for the Board's costs and for intervenor costs. What remains to be determined is whether there are special circumstances in this case which would favour a determination that the Applicants are eligible for costs.

The Board finds that the Applicants have represented their private interests as generators in this proceeding. Although the Applicants submitted that the Application raised public interest issues, the Applicants have withdrawn their Application and have not pursued these public interest issues. The Board has therefore received no benefit from the Applicants in that regard. The Board finds that it would be inappropriate for the IESO, and the ratepayers that ultimately pay the IESO's costs, to bear the costs of the Applicants in the circumstances of this case. The Board also agrees with the IESO that market participants should generally be expected to bear their regulatory costs associated with the market rule amendment process. This is consistent with the Board's Decision on Costs and Confidentiality Requests and Procedural Order No. 4, where the Board stated that section 33 of the Electricity Act is part of the overall market rule amendment process. The Board concludes that there are no special circumstances

in this proceeding which would support making the Applicants eligible for an award of costs.

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. BOMA, CME, Energy Probe and SEC (the “eligible parties”) shall submit their cost claims by **Monday, March 18, 2013**. The cost claim must be filed with the Board and one copy is to be served on the IESO. The cost claims must be completed in accordance with the Practice Direction.
2. The IESO will have until **Thursday, March 28, 2013** to object to any aspect of the costs claimed. The objection must be filed with the Board and one copy must be served on the eligible party against whose claim the objection is being made.
3. The eligible party whose cost claim was objected to will have until **Thursday, April 4, 2013** to make a reply submission as to why its cost claim should be allowed. The reply submission must be filed with the Board and one copy is to be served on the IESO.

Service of cost claims, objections and reply submissions on other parties may be effected by courier, registered mail, facsimile or e-mail.

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. 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

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DATED at Toronto, March 4, 2013

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary