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## Market Rule Amendment Proposal

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### PART 1 – MARKET RULE INFORMATION

Identification No.:	MR-00438-R00		
Subject:	Selection of a mediator or arbitrator other than an IESO Dispute Resolution Panel member		
Title:	Dispute Resolution		
Nature of Proposal:	<input checked="" type="checkbox"/> Alteration	<input type="checkbox"/> Deletion	<input type="checkbox"/> Addition
Chapter:	3, 11	Appendix:	
Sections:	Ch. 3 sections 2.6, 2.7		
Sub-sections proposed for amending:			

### PART 2 – PROPOSAL HISTORY

Version	Reason for Issuing	Version Date
1.0	Draft for Technical Panel Review and Comment	May 14, 2019
Approved Amendment Publication Date:		
Approved Amendment Effective Date:		

### PART 3 – EXPLANATION FOR PROPOSED AMENDMENT

Provide a brief description of the following:

- The reason for the proposed amendment and the impact on the *IESO-administered markets* if the amendment is not made.
- Alternative solutions considered.
- The proposed amendment, how the amendment addresses the above reason and impact of the proposed amendment on the *IESO-administered markets*.

#### Summary

The IESO proposes to amend the market rules to allow for parties to a dispute to appoint a mediator or arbitrator who is not a member of the Dispute Resolution Panel.

#### Background

The Market Renewal Working Group first identified market rule governance and decision-making processes as a concern, in light of the scope of market evolution contemplated by the Market Renewal Program and the concern that these reforms would result in more risk-taking by market participants. Consultations with the Market Renewal Working Group, Stakeholder Advisory Committee, Technical Panel and the broader public led to the classification of stakeholder issues into three categories:

- Market rule processes
- Market manual processes
- Dispute resolution processes

An Advisory Group on IESO Governance and Decision-Making was appointed by the IESO Board of Directors to discuss these concerns, and to provide input to the IESO. The input was used to develop 14 recommendations that the IESO Board approved at its December 2018 meeting. The recommendation pertaining to this rule amendment submission asks the IESO to:

"amend the Dispute Resolution provisions of the market rules to provide the market participant/applicant (in a dispute), with selection and veto rights as concerns the appointment of a mediator, arbitrator or panel of arbitrators from the list of Dispute Resolution Panel members (to the extent that this right does not already exist)."

Conversation at the Advisory Group focused on the desire of market participants to change the process of selecting arbitrators and mediations for disputes with the IESO. The IESO raised no objections to this potential change, and this market rule amendment submission will codify the request into the Market Rules.

Further information on the Advisory Group on IESO Governance and Decision-Making, including the complete report and recommendations can be found on the Advisory Group [webpage](#).

The IESO Governance and Structure By-Law requires the IESO Board of Directors to retain a minimum of three members to serve on the Dispute Resolution Panel.

The Dispute Resolution process is used to resolve disputes:

- That arise under the market rules or certain agreements to which the IESO is a party
- Relating to orders by the IESO denying authorization to a prospective market participant or denying registration to a prospective metering service provider

### **PART 3 – EXPLANATION FOR PROPOSED AMENDMENT**

- Between market participants, which do not necessarily involve the IESO

Before disputes require a mediator or an arbitrator, the process begins with good faith negotiations between the disputing parties. The dispute resolution process is used minimally, and disputes are typically resolved at the good faith negotiation stage before moving to the mediation or arbitration stages.

#### **Discussion**

The IESO is proposing the following changes to chapters 3 and 11 of the market rules to enable participants in a dispute to appoint a mediator or arbitrator who is not a member of the IESO Dispute Resolution Panel.

These proposed market rule changes will supplement the existing provisions in chapter 3, section 2.1.3 that provide for parties to dispense with, supplement, or vary the application of all or any part of the certain provisions, including the mediator/arbitrator selection provisions, with the consent of the parties.

#### **Chapter 3**

##### Section 2.6

The main change in section 2.6 is to add section 2.6.2A which is a new provision to add the ability for all parties involved in a dispute to agree to select a mediator that is not a member of the dispute resolution panel.

Most other changes in this section are minor changes to cross references. One reference is added in section 2.6.17 to allow parties to unequally bear the costs of a mediation if that is agreed upon.

##### Section 2.7

The main change in section 2.7 is to add section 2.7.1.A which is a new provision to add the ability for all parties involved in a dispute to agree to select an arbitrator that is not a member of the dispute resolution panel.

All other changes in this section are minor changes to cross references.

#### **Chapter 11**

The IESO proposes to amend the definitions for “arbitrator” and “mediator” to allow for persons to arbitrate or mediate a dispute who are not existing members of the IESO Dispute Resolution Panel, upon agreement of the disputing parties.

Specific changes to the market rules are listed below.

## PART 4 – PROPOSED AMENDMENT

## Chapter 3

## 2.6 Mediation

2.6.2 Subject to section 2.6.2~~AB~~, within five *business days* of the filing of a *notice of dispute* in respect of an application to which section 2.6.1A.1 applies or of the earlier of the filing of a *response* or of the expiry of the time for filing a *response* pursuant to section 2.5.4 in all other cases, the *secretary* shall, provided that the *secretary* is satisfied that the dispute is one to which section 2.2.1 or 2.2.2 applies and that the dispute has not been resolved:

2.6.2.2 in any other case, subject to section 2.6.2A, assign one member of the *dispute resolution panel* who is independent of the parties to inquire into and act as *mediator* in respect of the dispute and shall advise the parties to the dispute as to the identity and address for service of the *mediator*.

2.6.2A Where all of the parties to a dispute so agree, they may appoint a person that is not a member of the *dispute resolution panel* to mediate the dispute. In such a case, the parties shall advise the *secretary* as to the identity and address for service of the *mediator*.

2.6.2~~AB~~ Where a *response* or a response to a counterclaim or crossclaim contains a counterclaim or crossclaim against another *respondent*, the *secretary* shall not take the action referred to in section 2.6.2.1 or 2.6.2.2 until five *business days* following:

2.6.2~~AB~~.1 the filing of the response to a counterclaim or crossclaim in respect of the last counterclaim or crossclaim filed in the same dispute; or

2.6.2~~AB~~.2 the expiry of the time for filing a response to a counterclaim or crossclaim pursuant to section 2.5.6A in respect of the last counterclaim or crossclaim filed in the same dispute,

2.6.17 The parties are responsible for their own costs and legal expenses incurred in respect of the mediation. The parties must bear equally the *costs of the mediation*, unless otherwise agreed to by the parties.

2.6.20 Where a *mediator* dies, resigns or otherwise becomes incapable of acting as *mediator* in respect of a dispute prior to termination of the mediation, subject to section 2.6.2A, the *secretary* shall assign another member of the *dispute resolution panel* to inquire into and act as *mediator* in respect of the dispute. With the consent of the parties to the mediation, the new *mediator* may continue the mediation. In the absence of such consent, the *mediator* shall commence the

mediation anew and the time period prescribed in section 2.6.14.3 shall be extended accordingly.

## 2.7 Arbitration

2.7.1 Subject to section 2.7.1-~~AB~~, within five *business days* of:

the *secretary* shall, subject to section 2.7.1A, in accordance with the *Governance and Structure By-law* provide the parties with a list of at least three names of members of the *dispute resolution panel* available to arbitrate the dispute. No person who acted as a *mediator* in respect of a dispute may be included on the list of members available to arbitrate the same dispute.

2.7.1A Where all the parties to a dispute so agree, they may appoint a person that is not a member of the *dispute resolution panel* to arbitrate the dispute. In such a case, the parties shall advise the *secretary* as to the identity and address for service of the *arbitrator*.

2.7.1-~~AB~~ Where a *response* or a response to a counterclaim or crossclaim filed in respect of a dispute to which section 2.6.1A applies contains a counterclaim or crossclaim against another *respondent*, the *secretary* shall not take the action referred to in section 2.7.1.1 until five *business days* following:

2.7.1-~~AB~~.1 the filing of the response to a counterclaim or crossclaim in respect of the last counterclaim or crossclaim filed in the dispute; or

2.7.1-~~AB~~.2 the expiry of the time for filing a response to a counterclaim or crossclaim pursuant to section 2.5.6A in respect of the last counterclaim or crossclaim filed in the dispute,

2.7.1-~~BC~~ Within five *business days* of the filing of a *notice of dispute* in respect of an application to which section 2.6.1A.1 applies, subject to section 2.7.1A, the *secretary* shall in accordance with the *Governance and Structure By-law* provide the *applicant* with a list of at least three names of members of the *dispute resolution panel* available to determine the amount of any compensation payable to the *applicant*. Where the *applicant* fails to select an *arbitrator* within ten *business days* of receipt of such list, subject to section 2.7.1A, the *secretary* shall, in accordance with the *Governance and Structure By-law*, appoint one member of the *dispute resolution panel* to be the *arbitrator* in respect of the application and shall by written notice so advise the *applicant*. The *arbitrator* shall be deemed to have been appointed as of the date of such notice.

2.7.1-~~CD~~ In the case of an application referred to in section 2.7.1-~~BC~~:

2.7.1-~~CD~~.1 sections 2.7.2, 2.7.8, 2.7.9, 2.7.10 and 2.7.32 shall not apply; and

2.7.1-~~CD~~.2 all other sections of this section 2.7 shall be read:

- 2.7.5 Where the parties to a dispute have failed to select an *arbitrator* within ten *business days* of receipt of the list referred to in section 2.7.1, or advise the secretary in accordance with section 2.7.1A, the *secretary* shall, in accordance with the *Governance and Structure By-law*, appoint one member of the *dispute resolution panel* to be the *arbitrator* in respect of the dispute and shall by written notice so advise the parties. The *arbitrator* shall be deemed to have been appointed as of the date of such notice.
- 2.7.11.1 in the case of an application referred to in section 2.7.1-~~BC~~, the filing of the *applicant's* materials referred to in section 2.7.7; and
- 2.7.12 A *market participant* who might be directly affected by the award of the *arbitrator* in a dispute referred to in section 2.2.1 or 2.2.2.1 and, in the case of an application referred to in section 2.7.1-~~BC~~ or of a dispute referred to in section 2.2.2.1, the *IESO*, may apply to the *arbitrator*, on notice to the parties, no less than five *business days* prior to the date of the hearing, for leave to intervene at the hearing. Parties may make submissions on the application for leave to intervene. The *arbitrator* may, in his or her sole discretion, grant leave to intervene to any *market participant* who demonstrates that it has an interest in the subject matter of the arbitration and may be directly affected by the decision in the arbitration, on such terms and subject to such rights of participation as the *arbitrator* considers reasonable.
- 2.7.32A Where an award relates to an application referred to in section 2.7.1-~~BC~~ and:
- 2.7.32B Where an award relates to an application referred to in section 2.7.1-~~BC~~ and the award consists of a determination by the *arbitrator* that the *applicant* is entitled to compensation pursuant to section 6.7.5 of Chapter 5, the *arbitrator* may determine that some or all of:
- 2.7.40 Where an *arbitrator* dies, resigns, is removed or otherwise becomes incapable of acting as an *arbitrator* in respect of a dispute prior to completion of the arbitration, a replacement shall, with the consent of all of the parties to the arbitration, be selected by the *secretary* from among the remaining members of the *dispute resolution panel* in accordance with the *Governance and Structure By-law*. In the absence of such consent, and subject to section 2.7.1A, the *secretary* shall forthwith provide the parties with a revised list of at least three names of members of the *dispute resolution panel* available to fill the vacancy and the parties shall make good faith efforts to agree on the appointment of one of the members named in the list as the replacement *arbitrator*. Where the parties so agree, they shall so advise the *secretary*.
- 2.7.42 Where the parties have failed to select a replacement *arbitrator* within ten *business days* of receipt of the list referred to in section 2.7.40, subject to section 2.7.1A, the *secretary* shall, in accordance with the *Governance and Structure By-law*, appoint one member of the *dispute resolution panel* to be the replacement *arbitrator* and shall by written notice so advise the parties.

## Chapter 11

*arbitrator* means a person ~~member of the dispute resolution panel~~ appointed pursuant to section 2.7 of Chapter 3 to arbitrate a dispute;

*mediator* means a person ~~member of the dispute resolution panel~~ appointed pursuant to section 2.6 of Chapter 3 to mediate a dispute;

### PART 5 – IESO BOARD DECISION RATIONALE

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