

September 6, 2019

Our File No.: 192201

**Via Email and RESS**

Ontario Energy Board  
2300 Yonge Street  
P.O. Box 2319  
Suite 2700  
Toronto, ON M4P 1E4

**Attention: Michael Bell, Project Advisor**

Dear Mr. Bell:

**Re: PF Resolute Canada Inc. (“Resolute”)  
Application pursuant to Section 35 of the *Electricity Act, 1998* (the “Application”)**

We are counsel to the Independent Electricity System Operator (the “**IESO**”) in connection with the above-noted Application. We are in receipt of Resolute’s Application dated August 7, 2019, as well as its supplementary materials delivered on August 13, 2019.

Resolute has commenced the Application under Section 35 of the *Electricity Act, 1998* (the “**Act**”), requesting that the Ontario Energy Board (the “**Board**”) review, and amend, Chapter 7, Sections 18.2.1 and 19.2.1 of the Market Rules (the “**DR Eligibility Rules**”). In particular, Resolute seeks a ruling on whether the DR Eligibility Rules should be amended to permit Resolute’s metering configuration in place under previous demand response programs.

In considering this issue, the scope of the Board’s mandate under Section 35 of the Act is limited to determining whether the current DR Eligibility Rules, under which the IESO does not permit Resolute’s configuration, are either inconsistent with the purposes of the Act or unjustly discriminate against, or in favour, of a market participant or class of market participants.<sup>1</sup> This is the same as the Board’s jurisdiction in respect of a review of a proposed amendment to the Market Rules under Section 33 of the Act<sup>2</sup> and thus the scope of the Board’s mandate under Section 33 of the Act is instructive to this Application. That scope, as determined by the Board in the 2007 *Ramp Rate* decision, does not permit review of whether the IESO has (or has breached) a duty of procedural fairness, whether the IESO has acted in a manner giving rise to a reasonable

---

<sup>1</sup> Section 35(6) of the Act.

<sup>2</sup> Section 33(9) of the Act.

apprehension of bias and the process by which a Market Rule amendment was made by the IESO.<sup>3</sup> All of these matters are irrelevant to the Board's ultimate determination as to whether the impact or effect of the proposed amendment is one which is either inconsistent with the purposes of the Act or unjustly discriminates against a market participant (in the sense of unjust economic discrimination).<sup>4</sup>

As currently framed, Resolute's Application raises the following issues which are outside the scope of the OEB's jurisdiction on a Market Rule review under Section 35 of the Act:

- a) the consultation and stakeholding process surrounding the IESO's transition from historical demand response programs to its current demand response auction program, including representations made - or not made - by the IESO throughout that process; and
- b) procedural fairness and natural justice concerns relating to the Market Rule amendment process that Resolute had commenced on October 11, 2018, which process culminated in the Technical Panel voting against Resolute's proposed amendment and the IESO Board similarly rejecting the proposed amendment.

Just as Section 33(9) of the Act is a jurisdiction-limiting provision<sup>5</sup>, so too is Section 35(6) of the Act. The scope of the Board's mandate under Section 35 of the Act is limited to determining whether the DR Eligibility Rules are inconsistent with the purposes of the Act or unjustly discriminate against a market participant. Whether or not the IESO followed the rules of natural justice in the context of Resolute's Market Rule amendment process is a matter to be determined by the Divisional Court of Ontario, not the Board.<sup>6</sup> As noted above, "unjust discrimination" means "unjust economic discrimination" and the allegation made by Resolute that the process has been discriminatory to it is outside the scope of this Application. Similarly, the historical consultation process leading to the adoption of the demand response auction program is irrelevant to this determination. As noted by the Board in the *Ramp Rate* decision:

"[The parties] say that the OEB should be reviewing an amendment to the IESO rules and not the IESO stakeholding process; that the scope of the Board's review should be aimed at the rule itself, and the impact of that rule, not the process by which the amendment was made. In other words, it's argued before us that the issue is whether the rule is unjustly discriminatory. The Board agrees with that position."<sup>7</sup>

---

<sup>3</sup> In the Matter of an Application by the Association of Major Power Consumers in Ontario under Section 33 of the Act, EB-2007-0040 (the "**Ramp Rate Decision**"), pg.9-10 and 26.

<sup>4</sup> *Ibid.*

<sup>5</sup> The Ramp Rate Decision, pg.9-10 and Appendix A (Oral Reasons of the Board), pg. 87.

<sup>6</sup> The Ramp Rate Decision, Appendix A (Oral Reasons of the Board), pg. 90.

<sup>7</sup> The Ramp Rate Decision, Appendix A (Oral Reasons of the Board), pg. 87.



All of the grounds of appeal in the Application which make these assertions, and any proposed evidence related thereto, should not be permitted.

It should also be noted that Resolute has already commenced a separate arbitration process under the dispute resolution regime of the Market Rules challenging particular instances of the IESO's application of the DR Eligibility Rules. Any dispute by Resolute as to the IESO's historical interpretation of, or practices under, the Market Rules are to be addressed in that dispute resolution process, not in this Application.<sup>8</sup> Indeed, certain of the paragraphs of Resolute's Application which the IESO seeks to strike (noted below) are the very same allegations that are already raised by Resolute in this separate dispute resolution process.

The Board has the authority under Rule 28 of the *OEB's Rules of Practice and Procedure* to identify the issues that it will consider in a proceeding. It is necessary for the Board to identify and limit the issues in the Application at the outset to ensure that, among other things:

- a) the Board does not exceed its jurisdiction;
- b) the proceeding is conducted in an orderly and efficient manner; and
- c) the IESO is not improperly burdened with the wasted expense and diversion of resources associated with the production of documents and preparation of evidence outside the proper scope of the Application.

While the Applicant has requested directions for documentary productions, the Board, in order to decide the scope of any such productions, will first have to make a preliminary determination of the issues in the Application.

For the reasons set out above, the IESO is requesting an Order as follows:

1. striking paragraphs 13-51 and 57-60 of Resolute's Application (together with the corresponding exhibits);
2. directing that the issues in the Application are as follows:
  - a. whether the DR Eligibility Rules are inconsistent with the purposes of the Act unless amended to permit participants to provide capacity using metering configurations permissible in previous demand response programs; and
  - b. whether the DR Eligibility Rules unjustly discriminate, in economic terms, against, or in favour, of a market participant or class of market participants unless

---

<sup>8</sup> Chapter 3, Section 2.2.1.1 of the Market Rules.

amended to permit participants to provide capacity using metering configurations permissible in previous demand response programs.

3. Setting a date for the filing of evidence by the Applicant, which should be limited to the issues as set out above.

If the Board considers it desirable, the IESO is prepared to make submissions on this narrow issue at a preliminary hearing.

Notwithstanding the IESO's position that many elements of Resolute's Application are beyond the scope of the OEB's jurisdiction on a Market Rule review under Section 35 of the Act, the IESO disputes the allegations raised, and the relief sought, in Resolute's Application as well as Resolute's claim for costs.

Yours truly,

**Goodmans LLP**



Alan Mark

cc: George Vegh, *McCarthy Tétrault LLP*

6975119