

Toronto Dominion Bank Tower
Toronto ON M5K 1E6
Canada
Tel: 416-362-1812
Fax: 416-868-0673



George Vegh
Direct Line: 416 601-7709
Direct Fax: 416 868-0673
Email: gvagh@mccarthy.ca

September 20, 2019

VIA EMAIL, RESS AND COURIER

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

Attention: Ms Kirsten Walli
Board Secretary

Dear Ms. Walli:

Re: PF Resolute Canada Inc.
Application pursuant to Section 35 of the *Electricity Act*, 1998
EB-2019-0206

Introduction and Summary

We are counsel for Resolute in this review of Chapter 7, ss. 18.2.1 and 19.2.1 of the Market Rules (the "DR Eligibility Rules"). The grounds for the review is that the impact of the Market Rule on Resolute is discriminatory and inconsistent with several objectives of the *Electricity Act* ("EA"). The appeal is brought under s. 35 of the EA.

This is the first application that the Board has considered under s. 35. A statutory precondition to bringing an application under s. 35 is that the applicant must first seek a review of the Market Rule by the IESO (the "IESO Review"). The Notice of Appeal contains materials and information respecting the IESO Review that was brought by Resolute. It also contains materials and information respecting the IESO's original consultation for the DR Eligibility Rules when they were passed in 2006 (the "Consultation").

We are in receipt of a letter from the IESO to Michael Bell, an OEB Project Manager requesting that the Board strike paragraphs 13-51 and 57-60 of the within application.¹ The IESO argues

¹ The IESO's request that to a Project Manager that a portion of Resolute's application be struck is inconsistent with the Board's *Rules of Practice and Procedure* with respect to requesting orders by the Board through way of a motion. See: OEB *Rules of Practice and Procedure*, Rule 8. These submissions assume that, notwithstanding

that because these paragraphs and related materials related to the IESO Review and the Consultation, they are not relevant.

The paragraphs opposed by the IESO address two matters which are clearly within the scope of this hearing.

The first relates to the IESO Review, which is largely made up of the record before the IESO in its mandatory review under ss. 35(4) of the EA.

The second relates to the IESO record of the Consultation. To be clear at the outset, Resolute does not have any complaints with that Consultation process, and in particular, contrary to the IESO's suggestion, Resolute is not making any allegations that the rules of natural justice either apply to or were violated by the market rule amendment process that led to the DR Eligibility Rules.

The IESO Consultation information and materials form part of the legislative history of the DR Eligibility Rules. This is necessary for the Board to understand both the original intent of the DR eligibility Rules and the impact and effect of the IESO's application of the DR Eligibility Rules on Resolute. As indicated in the Notice of Application, and contrary to the assertions of the IESO, Resolute is not challenging the process by which these rules were developed. Rather, Resolute's position is that the IESO's application of these rules involved a unilateral departure from the text and purpose of the DR Eligibility Rules. It is the IESO's application of the DR Eligibility Rules that makes the impact and effect of the DR Eligibility Rules unjustly discriminatory and inconsistent with the following purposes of the EA:

"to ensure the adequacy, safety and reliability of electricity supply in Ontario through responsible planning and management of electricity resources, supply and demand"²;

"to facilitate load management in a manner consistent with the policies of the Government of Ontario"³; and

"to facilitate the maintenance of a financially viable electricity industry"⁴.

The remedy requested from the Board in this application is to restore the DR Eligibility Rules to their original purpose and intention.

Further, the Review and Consultation information and materials are similar to the minimum requirements respecting materials that the Board requires the IESO to produce and that the Board has relied upon in exercising its more narrow mandate respecting market rule amendments under s. 33 of the EA (see the discussion respecting s. 6.3 of the IESO's OEB license discussed in s. 1 below).

Finally, this is a case of first instance and the issues relating to how the Board should exercise its review authority under s. 35 of the EA in the public interest should not be preemptorily

the IESO's irregularity, the Board will deal with this matter in accordance with those Rules and that this matter will be put before a panel.

² EA, ss.1(a).

³ EA, ss. 1(c).

⁴ EA, ss. 1(i).

decided. Rather, Resolute submits that the mandate of the Board under s. 35 should be an issue in this review and addressed in evidence and argument. This is the only way to ensure that there is a complete record before the Board so that it can make an appropriate determinations under the EA and that can be available for a court in the event of an appeal of the Board's decision.

Resolute therefore proposes the development of an issues list that includes the issue of whether the IESO's application of the DR Eligibility Rules is unjustly discriminatory and inconsistent with the purposes of the EA. The issues list should also include the mandate of the Board's consideration of the IESO Review under ss. 35(4) and 35(6) of the EA, the meaning of "unjust discrimination" in ss. 35(6), as well as other issues that the Board considers relevant after receiving submissions from all parties. The IESO and every other party would then be free to take whatever position they choose on these issues and the Board can make its decision on the basis of a complete record.

As will be set out in greater detail below, Resolute's submissions are as follows:

1. The IESO's request is made under Rule 28 of the *Board's Rules of Practice and Procedure*. That Rule authorizes the Board to prepare an Issues List in a proceeding. The Board has traditionally set an issues list after hearing submissions from all parties in accordance with a procedural order. The IESO has not given any reasons why the Board should depart from its practice in this area. With respect to the IESO Review and Consultation information and materials in particular, these are the types of information that the Board has required in reviews under s. 33 of the EA.
2. The IESO's submissions do not address the structure of a review of IESO Market Rules under s. 35 of the *Electricity Act* ("EA"), which forms the basis of this application. In particular, the IESO does not address either the role of the IESO Review under ss. 35(4) of the EA or Board's mandate under ss. 35(6) of the EA. Neither of these issues have yet been considered by the Board and a proper consideration of these issues should be an issue in this case and be informed by facts.
3. Instead of addressing these fundamental issues of first instance, the IESO submissions largely address the mandate of the OEB on a review of a *market rule amendment under s. 33 of the EA*. This mandate is much more narrow than the Board's mandate under s. 35 and, in any event, Resolute does not agree with the IESO's submissions respecting s. 33. Specifically, Resolute submits that the meaning of "unjust discrimination" should be an issue in this proceeding must be informed by the facts.

Each of these points will be addressed in turn.

1. Setting an Issues List

Needless to say, Resolute does not object to the Board setting an issues list in this proceeding. This is a standard OEB practice and is expressly provided for under Rule 28 of the Board's *Rules of Practice and Procedure*. However, the IESO has not provided any reason why the Board should depart from its normal practice of setting an issues list after hearing submissions by parties. The IESO has made its submissions, but the Board has not yet registered any intervenors who may also seek to make representations on the issues list.

Nor does Resolute object to the mandate of the Board's consideration of the IESO Review under ss. 35(4) and 35(6) of the EA or the meaning of "unjust discrimination" in ss. 35(6) being

issues in this proceeding. The IESO and every other party would then be free to take whatever position they choose on these issues. The Board can then make its determinations on the basis of a complete record.

Indeed, information respecting the IESO's consideration of a Market Rule amendment (analogous to but more narrow than the review mandate under s. 35) and consultations relating to Market Rule amendment (again, analogous to but more narrow than the review mandate under s. 35) are standard components of the record for OEB Market Rule reviews. Section 6.3 of the IESO's OEB licence requires the IESO to file the following information seven days after the filing of an application under s. 33 of the EA:

- i. all Market Rule Amendment Submissions relating to the amendment, including any covering memoranda;
- ii. all written submissions received by the Licensee in relation to the amendment;
- iii. minutes or meeting notes of all stakeholder meetings (including meetings of the Licensee's Stakeholder Advisory Committee) and of all meetings of the Licensee's Technical Panel at which the amendment or the subject matter of the amendment was discussed;
- iv. a list of all materials related to the amendment or the subject matter of the amendment tabled before any stakeholders (including the Licensee's Stakeholder Advisory Committee) or before the Licensee's Technical Panel;
- v. a list of all materials tabled before the Board of Directors of the Licensee in relation to the amendment or the subject matter of the amendment, and a copy of all such materials other than those already captured by item (i) above;
- vi. a copy of the decision of the Board of Directors of the Licensee adopting the amendment;
- vii. any final report conducted or commissioned solely by the Licensee, and not subsequently circulated outside of the IESO, comprising an analysis relating to the costs and benefits of the amendment to the extent not already captured by any of the items above;
- viii. all materials (excluding correspondence and draft materials) relating to the development and consideration of options that involved alternatives to the amendment, to the extent not already captured by any of the items above, which are authored or commissioned solely by the Licensee and not subsequently circulated outside of the IESO; and
- ix. any materials (excluding correspondence and draft materials) relating to the consistency of the amendment with the purposes of the Electricity Act, to the extent not already captured by any of the items above, which are authored or commissioned solely by the Licensee and not subsequently circulated outside of the IESO.

This information constitutes the bare minimum of the IESO Review and the IESO Consultation information that should be considered in this application... The IESO has not provided any of this information. The OEB's mandate for a s. 35 review is much broader; and, *mutatis mutandis*, the Review and Consultation Information is relevant in this application.

2. The Structure of Section 35

Section 35 of the EA provides:

35 (1) On application by a person who is directly affected by a provision of the market rules, the Board may review the provision.

(2) Subsection (1) does not apply to a provision of the market rules that was reviewed by the Board under section 33 or 34 within the 24 months before the application.

(3) Subsection (1) does not apply to a provision of the market rules that was made by the Minister before May 1, 2002 unless the application is made before May 1, 2005.

(4) An application shall not be made under this section by a market participant unless the applicant has made use of the provisions of the market rules relating to the review of market rules.

(5) An application under this section does not stay the operation of the provision pending the completion of the review.

(6) If, on completion of a review under this section, the Board finds that the provision is inconsistent with the purposes of this Act or unjustly discriminates against or in favour of a market participant or class of market participants, **the Board shall make an order directing the IESO to amend the market rules in a manner and within the time specified by the Board.**

(7) The IESO shall, in accordance with the market rules, publish any amendment made pursuant to an order under subsection (6).

(8) Sections 33 and 34 do not apply to an amendment made in accordance with an order under subsection (6).

Section 35 of the EA thus permits a person directly affected by a provision of the market rules to have the Board to review the provision.⁵

The structure of a review under s. 35 has two integrated components. The first component (ss. 35(4)) is a mandatory review of the Market Rule by the IESO. The second (ss. 35(6)) describes the OEB's review, under which it has the authority to make an order "directing the IESO to amend the market rules in a manner and time specified by the Board." Neither of these components are found in s. 33 of the OEB Act, which is the section that the IESO emphasizes in its submission.

With respect to the first component, because this is a case of first instance, the Board has not yet considered its mandate in evaluating an IESO review. However, even in the more limited case of reviewing an amendment under s. 33, the Board has looked at and adjudicated upon

⁵ Section 35 also incorporates various restrictions on when the Board may exercise that power, none of which are relevant here. The IESO seeks to add to these statutory conditions by claiming that the IESO claims the appeal should not proceed because there is an ongoing dispute resolution process between the IESO and Resolute. There is no basis for the Board not proceeding on that ground.

the adequacy of the IESO's consideration of a proposed rule. Thus, in the *Ramp Rate Appeal*, the OEB reviewed the materials listed in 6.3 of the IESO's OEB licence (listed in s. 1 above) as well as other information submitted by the IESO and other parties. This material was reviewed to address the adequacy of the IESO's determinations in passing the market rule. In upholding the amendment, the Board made findings on the adequacy of the IESO's consideration of the rule amendment, for example, the Board noted that "the IESO reviewed several alternatives in the course of developing the Amendment."⁶ After reviewing the IESO's decision with respect to the amendment in that case, the OEB upheld the amendment and concluded that "the IESO has carefully considered the impact of Amendment on consumers' average bills."⁷ The issue of the adequacy of the IESO's considerations of the amendment was thus an issue in the *Ramp Rate Appeal* and the adequacy of the IESO's Review under ss. 35(4) is obviously relevant here as well.

By way of statutory context, the IESO Review under ss. 35(4) is what the courts have characterized as the first "intermediate or interlocutory"⁸ step in the decision-making process that ultimately leads to the OEB's review. The second component - Board's decision and remedy in ss. 35(6) - contains the power to substitute its decision for that of the IESO on review and direct the IESO to amend the Market Rules. The Board thus has the broad remedial power of directing an amendment of the Market Rules in a manner specified by the Board. This power does not exist under s. 33.

The Supreme Court of Canada addressed the nature of a two-step review with broad remedial powers as follows:⁹

"Sitting as a panel of three, the Board has full power to review the Director's decision and take any action it deems necessary and **may substitute its own opinion for that of the Director (s. 123). It is, therefore, a de novo process whose purpose is to permit the Director's decision to be reviewed in light of submissions by the affected party.** Furthermore, should this party not be satisfied with the outcome, he or she has a right of appeal to the Divisional Court on a question law, and a right of appeal to the Minister on any other matter."

As a result, the Board not only has the authority to review the IESO's decision in its review of the Market Rules, it is required to conduct a "de novo process whose purpose is to permit the ... decision to be reviewed in light of submissions by the affected party." Indeed if the Board cannot adjudicate upon the IESO's Review, it is hard to see why that review is made a mandatory part of the OEB review process.

The courts have been very clear that they expect the regulator in a second step in a two-staged process to address any concerns respecting the first stage of that process. This permits the courts to review the entire record of the proceeding on appeal. Specifically, the courts have held that an appeal of the "intermediate or interlocutory" step in a two-staged decision is only

⁶ *Ramp Rate Appeal*, Decision and Order, Appendix A, p.24.

⁷ *Ramp Rate Appeal*, Decision and Order, Appendix A, p.24..

⁸ See, for example, *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 at paragraph 45.

⁹ *R. v. Consolidated Mayburn Mines Ltd.*, [1998] 1 S.C.R. 706 at paragraph 56.

available after the second step is completed so that the courts can address whether any concerns with the first step were adequately addressed in the second step.¹⁰

The IESO's claim that the Board's review be conducted without considering the Review information and materials is not only inconsistent with the Board's mandate, it defeats the entire purpose of the statutory requirement of the IESO review under ss. 35(4) and the OEB's review in ss. 35(6).

3. Contrasts between ss. 33 and 35 Reviews

The IESO does not address the structure of s. 35 of the EA. Rather, it makes submissions on the Board's power *under s. 33 of the EA*, which applies to *market rule amendments*.

Resolute submits the following.

First, Section 33 of the EA is a very constrained power. It contains neither of the steps in the two-step process in s.35, and, in particular:

- i. Unlike a s. 35 review, there is no requirement for an IESO review of a rule amendment under as. 33 review. Instead, the OEB's review is of a market rule amendment that was pursued on its own terms and, not as a first stage of the OEB review process. As a result, unlike the IESO Review in ss. 35(4), the IESO's Market Rule amendment process in a s. 33 review is not an "intermediate or interlocutory" step in the OEB review process; and
- ii. Also unlike a s. 35 review, under a s. 33 review the Board only has the power to revoke a market rule amendment, not to direct the IESO to amend the rule. The Board therefore does not have the power under a s. 33 review to substitute its opinion for that of the IESO's.

As a result, the Supreme Court's observations on the requirement to conduct a "de novo process whose purpose is to permit the ... decision to be reviewed in light of submissions by the affected party" does not apply under a s. 33 review, but it does apply under a s. 35 review.

Second, at the time of the Ramp Rate appeal, s. 33 of the EA provided for a 60 day time limit on completing a review of a market rule amendment.¹¹ In the Ramp Rate Appeal, the Board noted that this time limit also restricted the scope of the Board's proceeding.¹² That time constraint is not present here and the Board has the time it requires to carry out its statutory obligations.

Finally, contrary to the IESO's suggestion, Resolute's is not seeking a review based on the rules of natural justice. In the *Ramp Rate Appeal*, the OEB characterized the natural justice issue as follows: "AMPCO [i.e., the Applicant] argues that it has rights of natural justice in IESO rule-making and that those rights should be enforced by the Board in the market review amendment process."¹³ The OEB concluded that it does not enforce the rules of natural justice:

¹⁰ See, for example, *Harekin v. University of Regina*, [1979] 2 S.C.R. 561; *Tran v. Saskatchewan (Human Rights Commission)*, [1997] S.J. No. 306; and *Ontario College of Art v. Ontario (Human Rights Commission)* (1993), 11 O.R. (3d) 798 (Ont. Div. Ct.).

¹¹ Electricity Act, ss. 33(6).

¹² Ramp Rate Appeal, Appendix A to Decision and Order, pp. 87-88.

¹³ Ramp Rate Appeal, Decision and Order, Appendix A, p. 86.

“IESO may or may not have followed the rules of natural justice. And they may or may not have been required to do so...But that, we believe, is a matter to be determined by the Divisional Court, not the Ontario Energy Board.”¹⁴

Resolute acknowledges that the Board does not have the authority of the Divisional Court to remedy a breach of natural justice and is not asking the OEB to do so here. Again, Resolute is not claiming that the process used in developing the DR Qualifications Rule is inconsistent with the rules of natural justice. Indeed, Resolute has no complaint with the process by which the DR Qualifications Rule was developed. This application is focused on the impact of the IESO’s application of the DR Qualifications rule and its impact on Resolute.

The DR Qualification Rule, as applied, is purported to permit the IESO to unilaterally and retroactively disallow approved configurations. That has a discriminatory impact and is inconsistent with the purposes of the EA related to the “responsible planning and management of electricity resources, supply and demand,”¹⁵ “to facilitate load management in a manner consistent with the policies of the Government of Ontario”¹⁶ and to “facilitate the maintenance of a financially viable electricity industry”.¹⁷

That impact was specifically addressed in the IESO Review process and materials. The IESO’s proposal that the Board strike the paragraphs of Resolute’s application would effectively prevent these issues from coming forward.

Finally, the IESO quotes the Board’s decision in the *Ramp Rate Appeal* to the effect that “unjust discrimination” under s. 35 of the EA refers to “economic discrimination” as opposed to discriminatory actions in the context of natural justice. Resolute agrees that, as an economic regulator, the Board’s mandate with respect to discrimination is different than the courts’ mandate with respect to natural justice. However, the meaning of permissible and impermissible types of IESO unjust discrimination is fact specific and its meaning in this case must be informed by the facts. It is therefore a proper issue in this application.

Conclusion

In conclusion, Resolute submits that there is no basis for striking the paragraphs addressing the IESO Review under ss. 35(4) and the IESO’s original Consultation of the DR Eligibility Rules as requested by the IESO. To the contrary, doing so would be inconsistent with the Board’s obligation under s. 35 of the EA.

Resolute therefore proposes the development of an issues list that includes the issue of whether the IESO’s application of the DR Eligibility Rules is unjustly discriminatory and inconsistent with the purposes of the EA. The issues list should also include the mandate of the Board’s consideration of the IESO Review under ss. 35(4) and 35(6) of the EA, the meaning of “unjust discrimination” in ss. 35(6), as well as other issues that the Board considers relevant after receiving submissions from all parties. The IESO and every other party would then be free to

¹⁴ Ramp Rate Appeal, Decision and Order, Appendix A, p. 90.

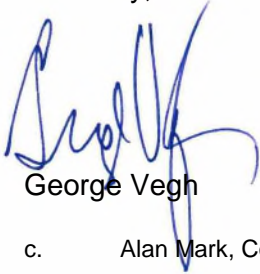
¹⁵ EA, ss.1(a).

¹⁶ EA, ss. 1(c).

¹⁷ EA, ss. 1(i).

take whatever position they choose on these issues and the Board can make its decision on the basis of a complete record.

Sincerely,



George Vegh

c. Alan Mark, Counsel for the IESO