

November 4, 2019

Our File No.: 19.2201

Via Courier, Email and RESS

Ontario Energy Board
2300 Yonge Street, 27th Floor
P.O. Box 2319
Toronto, Ontario M4P 1E4

Attention: Kristin Walli, Board Secretary

Dear Ms. Walli:

Re: Resolute FP Canada Inc.'s Application Pursuant to Section 35 of the *Electricity Act*, 1998. Ontario Energy Board: File No.: EB-2019-0206 (the "Application")

Further to the Ontario Energy Board's (the "**OEB**") Procedure Order No.1, attached please find the IESO's comments on the draft Issues List proposed by Resolute FP Canada Inc. ("**Resolute**"). In proposing these comments, the IESO relies on the submissions made in its letter of September 6, 2019, a copy of which is re-attached here for your convenience, as well as the points referenced herein which are noted in response to Resolute's letter dated September 20, 2019.

There appear to be two primary issues in dispute between the IESO and Resolute regarding the matters that should properly be considered by the OEB in this Application:

1. The relevance of the IESO's consultation and stakeholder engagement process surrounding its transition from historical demand response programs to its current demand response auction program; and
2. The relevance of the market rule amendment process commenced by Resolute before the IESO (in accordance with Section 35(4) of the *Electricity Act*).

With respect to the first matter, it is the IESO's position that the history of the DR Eligibility Rules (as defined in our letter of September 6, 2019) and what metering configurations were permissible under previous demand response programs is irrelevant to the sole matter to be determined by the OEB in this Application, namely whether the DR Eligibility Rules are

inconsistent with the purposes of the *Electricity Act, 1998* or unjustly discriminate against Resolute to the extent they do not permit Resolute's preferred metering configuration. In addition, even if the fact of Resolute's participation in a prior demand response program was relevant, the consultation and stakeholder engagement process leading up to the adoption of the DR Eligibility Rules, as opposed to the actual impact and effect of the DR Eligibility Rules, is not relevant to the OEB's review.

In addition, as noted in our letter of September 6, 2019, 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.

With respect to the second issue, the IESO does not challenge the relevance to this Application of the documentary record that was before the IESO in conducting its review of Resolute's proposed market rule amendment. Instead, what the IESO disputes is the relevance of the manner in which the IESO conducted the market rule amendment process and, in particular, the allegations at paragraphs 36-46, 59 and 60 of Resolute's Application regarding IESO staff's handling of this process. As noted in our letter of September 6, 2019, 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 OEB.¹ Indeed, Section 35(1) of the *Electricity Act* provides that "on an application by a person who is directly affected by a provision of the market rules, the Board may review the provision". Nothing in Section 35 of the *Electricity Act* suggests that the OEB is tasked with reviewing the IESO's decision itself or the adequacy of the IESO's market rule amendment process, regardless of the fact that applicants must first make use of the IESO's market rule review process before going to the OEB.

The submission by Resolute that the IESO's decision-making process is to be reviewed ignores the mandate the OEB has under Section 35 of the *Electricity Act*. The OEB's mandate is not to review the IESO's decisions with respect to the DR Eligibility Rules or Resolute's request to the IESO for an amendment, but instead, is to review "the provision".

The cases cited by Resolute in its letter of September 20, 2019 do not assist its position, either.

Resolute relies on *R. v. Consolidated Mayburn Mines*, [1998] 1 S.C.R. 706 for the proposition that the OEB is required to review the IESO's decision and conduct the hearing *de novo*. Unlike in *Consolidated Mayburn Mines*, however, this Application does not concern an appeal of an

¹ Although Resolute indicates in its letter of September 20, 2019 that it is not alleging any natural justice concerns regarding the consultation process by which the DR Eligibility Rules were developed – which the IESO never suggested it was – Resolute has not made the same concession as it concerns the IESO's market rule amendment process. These complaints clearly remain in play in this Application.

administrative decision to another administrative body or a judicial review. Instead, this is a separate application to the OEB for a review of the market rules; it is not an appeal or review of the IESO's decision. The concept of hearing *de novo* has no application in this context. Moreover, the legislative provision in *Consolidated Mayburn Mines* which was the basis for the Court's finding that the Environmental Appeal Board would conduct a hearing *de novo* expressly stated as such:

“A hearing by the Board shall be a new hearing and the Board may confirm, alter or revoke the action of the Director that is the subject matter of the hearing and may by order direct the Director to take such action as the Board considers the Director should take in accordance with this Act and the regulations, and, for such purposes, the Board may substitute its opinion for that of the Director.”² (emphasis added)

Any similar explicit right to a hearing *de novo*, and the reference to the opinion of the IESO, are absent from the words of Section 35 of the *Electricity Act*. As clearly indicated by the words of Section 35, it is the provision itself which is to be reviewed rather than the IESO's decisions.

In addition, Resolute's suggestion that the OEB (as opposed to a court) is required to address any concerns regarding the IESO's market rule amendment process is similarly not supported by the cases it cites. Those cases merely stand for the proposition that a court will not prematurely intervene in the administrative process, by way of an application for judicial review, before the relevant tribunals have run their course (including the exhaustion of any internal appeals process within the administrative hierarchy) and addressed, at first instance, the issues raised by the parties.³ There is nothing, however, in those cases which would suggest that the OEB on this Application is required to address concerns regarding the nature or conduct of the IESO's market rule amendment process.

The IESO looks forward to making additional submissions on these matters at the Issues Day hearing.

Goodmans LLP

signed in original

Alan H. Mark

cc: Service List in Schedule “A” to Procedure Order No. 1

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² *R. v. Consolidated Mayburn Mines*, [1998] 1 S.C.R. 706 at paras. 20 and 56.

³ *Ontario College of Art v. Ontario (Human Rights Commission)*, [1993] O.J. No. 61 at paras. 5-7; *Tran v. Saskatchewan (Human Rights Commission)*, [1997] S.J. No. 306 at paras. 26, 27 and 31; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 at paras. 25, 26, 61 and 71

Resolute Proposed Issues list

1. ~~What was the purpose and context of the Rules?~~
2. ~~What was the impact and effect of the Rules on Resolute?~~
3. ~~How should the Board take into account the review of the Amendment under s. 35(4) of the *Electricity Act, 1998*?~~
1. 4. Are the DR Eligibility Rules, as applied, ~~consistent~~inconsistent with the purposes of the *Electricity Act, 1998*?
2. ~~5.~~ Do the DR Eligibility Rules, as applied, unjustly discriminate against Resolute?
3. ~~6. Should~~If the answer to either Question #1 or #2 above is "Yes", then how should the Board direct the IESO to amend the DR Eligibility Rules, ~~and if so, how?~~

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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.¹ 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 Act² 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

¹ Section 35(6) of the Act.

² Section 33(9) of the Act.

apprehension of bias and the process by which a Market Rule amendment was made by the IESO.³ 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).⁴

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 provision⁵, 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.⁶ 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."⁷

³ 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.

⁴ *Ibid.*

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

⁶ The *Ramp Rate Decision*, Appendix A (Oral Reasons of the Board), pg. 90.

⁷ 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.⁸ 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

⁸ 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*

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