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BY EMAIL

November 4, 2019

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

Attention: Ms. Christine E. Long

Dear Ms. Long:

**Re: OEB Staff Submission
Resolute FP Canada Inc.
Application Pursuant to Section 35 of the *Electricity Act*, 1998.
Ontario Energy Board: File No.: EB-2019-0206**

Pursuant to Procedural Order No. 1, please find attached the submission of OEB staff on the Draft Issues List in the above referenced proceeding.

Yours truly,

Original Signed by

Michael Bell
Project Advisor, Application Policy and Climate Change

cc: All Parties in EB-2019-0206

ONTARIO ENERGY BOARD

OEB Staff Submission on the Draft Issues List

Resolute FP Canada Inc.

Application Pursuant to Section 35 of the *Electricity Act*, 1998.

EB-2019-0206

November 4, 2019

RESOLUTE FP Canada Inc.

EB-2019-0206

OEB Staff Submission on Draft Issues List

Introduction

On August 7, 2019, Resolute FP Canada Inc. (Resolute) applied to the Ontario Energy Board (OEB) under section 35 of the *Electricity Act, 1998* (Act) for a review of certain existing provisions of the Independent Electricity System Operator's (IESO) market rules (Application). Resolute is seeking to have the OEB direct the IESO to amend sections 18.2.1 and 19.2.1 of Chapter 7 of the market rules, which relate to the qualifications for participation in the IESO's Demand Response Auction (DRA) (DR Qualification Rules).

On August 13, 2019, Resolute filed additional materials in support of the Application. On September 6, 2019, the IESO filed a letter stating that the Application raises issues that are outside the OEB's jurisdiction when considering an application for review under section 35 of the Act, and asked the OEB to strike certain sections of the Application.

By letter dated September 20, 2019, Resolute objected to the request to strike sections of the Application as the issues raised in the Application in its view are within the scope of the OEB's review under section 35 of the Act, and further proposed the establishment of an issues list.

Procedural Order No.1, issued October 22, 2019, approved a number of parties as intervenors in this proceeding. It also established filing dates for a Draft Issues List to be filed by Resolute and for submissions from other parties on the Draft Issues List. It also made provision for an Issues Day hearing on November 8, 2019.

Background

Resolute is a market participant that operates a pulp and paper mill (Mill) and a 62.4 MW generation facility (Generator) in Thunder Bay. Resolute's load is supplied by the IESO-controlled grid and the Generator.

There are revenue grade meters measuring the consumption of the Mill from the Generator, and the consumption of the Mill from the IESO-controlled grid. According to Resolute:

- the Mill qualified as a demand response provider under the former Ontario Power Authority's (OPA) DR2 and DR3 programs, the IESO's Capacity Based Demand Response (CBDR) Program, and the IESO's Demand Response Auction (DRA)
- its metering configuration was designed by the OPA and approved by the IESO in establishing its participation in the above-noted programs
- its metering configuration has not changed since 2013.¹

In its Application, Resolute states that the IESO changed its position on configurations permitted under the DR Qualification Rules. There was no market rule amendment to reflect a change in qualification requirements. Resolute states that it first became aware of the IESO's new position on June 14, 2017 when the IESO issued a preliminary settlement statement alleging that Resolute failed a Demand Response activation. The statement contained a "claw back" of capacity payments based on the alleged activation failure. Resolute states that the IESO advised that the reason for the failure is that the configuration that Resolute had used since 2013 and that the IESO approved as recently as November, 2016 was not acceptable because some of the load that was reduced had been previously served by self-generation and not the IESO-controlled grid.²

In the Application, Resolute requests an order of the OEB directing the IESO to amend the DR Qualification Rules so that these are applied by the IESO to "reflect the original intention of the DR Qualification Rules, namely, that they do not disqualify configurations that were reviewed and approved under demand response programs existing at the time the DR Qualification Rules came into effect".³

Resolute's Proposed Issues List

Pursuant to Procedural Order No.1, Resolute filed the following Draft 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*?
4. Are the Rules, as applied, consistent with the purposes of the *Electricity Act, 1998*?

¹ Application, paragraph 5

² Application, paragraph 31.

³ Application, paragraph 1

5. Do the Rules, as applied, unjustly discriminate against Resolute?
6. Should the Board direct the IESO to amend the Rules, and if so, how?

OEB Staff Submissions on the Draft Issues List

For the purposes of its submission, OEB staff has relied upon the structure of section 35 of the Act to guide its approach to the issues.

Section 35(6) identifies the core OEB determinations on an application under section 35 of the Act. OEB staff therefore will focus first on issues 4, 5 and 6, each of which is readily referable to this section of the Act. OEB staff will then address Resolute's proposed issues in the following order: issues 2 and 1, which, OEB staff will submit are subsumed in Resolute's proposed issues 4 and 5 and need not be articulated separately; and Resolute's issue 3.

Resolute's Proposed Issues 4, 5 and 6

As noted above, section 35(6) of the Act identifies the core OEB determinations on an application under section 35 of the Act. OEB staff therefore supports the inclusion of issues 4, 5 and 6 given their direct relationship to this section, albeit not necessarily in the words proposed in the Resolute Draft Issues List.

Proposed Issues 4 and 5

Issues 4 and 5 refer to the criteria against which the OEB is to evaluate market rules that are at issue under section 35 of the Act. OEB staff notes that these criteria or tests parallel those in section 33, which pertains to the review of market rule amendments. In the only case under section 33 determined by the OEB to date, the OEB identified these two tests as the sole issues in the proceeding.⁴ The OEB has recently done the same in a proceeding under section 33 that is currently before the OEB.⁵ Accordingly, explicit references to the applicable tests in the issues list for this case are appropriate, in OEB staff's view.

OEB staff notes that Resolute's proposed articulation of the two tests from section 35(6) of the Act refers specifically to the rules "as applied". OEB staff is of the view that the OEB's consideration of the rules under this section of the Act, which applies to existing market rules, must include not merely consideration of the rule(s) as written, but also consideration of how the IESO is applying the rule(s) that are the subject of the Application. OEB staff is of the view that the tests as articulated in section 35(6) are

⁴ EB-2007-0040, Decision and Order, issued April 10, 2007 (Ramp Rate Review), p.5

⁵ EB-2019-0242, Procedural Order 2, issued October 18, 2019, p.4

sufficient to encompass “as applied”, and therefore does not believe that it is necessary to include these words in the articulation of the issue.

OEB staff also notes that Resolute’s proposed articulation of the test related to the purposes of the Act refers to whether the rules are “consistent” with them; however, the test as written requires consideration of whether the rules are inconsistent with purposes of the Act. In OEB staff’s view, it is appropriate to track the language of the Act in this regard.

OEB staff submits that the two issues under discussion in this section should therefore read as follows:

Are the DR Qualification Rules inconsistent with the purposes of the *Electricity Act, 1998*?

Do the DR Qualification Rules unjustly discriminate against Resolute?

Proposed Issue 6

Issue 6 reflects the remedial authority granted to the OEB under section 35 of the Act. Section 35(6) requires that the OEB’s order specify the manner and time within which the IESO is to amend the market rules if the OEB finds that the rules at issue fail either of the prescribed tests. OEB staff therefore submits that it is appropriate for this to be identified as an issue in this case. However, OEB staff also submits that the wording of the issue should more closely track the language of section 35(6), including a reference to timing:

In the event that the OEB finds that the DR Qualification Rules (i) unjustly discriminate against Resolute or (ii) are inconsistent with the purposes of the Act, in what manner and within what time should the OEB direct the IESO to amend the market rules?

Resolute’s Proposed Issue 2:

In a proceeding decided under section 33 of the Act, the OEB’s focus was on the effect or impact of the market rule amendments in question.⁶ OEB staff do not dispute that the “effect and impact” of the DR Disqualification Rules on Resolute is relevant to this proceeding. However, in OEB’s staff’s view, the “effect and impact” of the DR Qualification Rules is already captured by the issues discussed above (Resolute’s proposed issues 4 and 5), and need not be the subject of a separate and stand-alone issue.

⁶ Ramp Rate Review, *supra*, p.10

Resolute's Proposed Issue 1:

OEB staff acknowledges that the purpose and context of the provision(s) of the market rules that are disputed in an application under section 35 of the Act can be informative to the OEB in making a determination as to whether the provision(s) fail the tests set out in section 35(6). However, OEB staff submits that, to the extent that the purpose and context of the DR Qualification Rules are relevant, they are already captured and are properly constrained within - the issues discussed above (Resolute's proposed issues 4 and 5).

Resolute's Proposed Issue 3:

One of the features that distinguishes section 35 of the Act from section 33 of the Act is section 35(4). That section makes it a condition precedent of filing an application for review with the OEB that the market participant have "made use of the provisions of the market rules relating to the review of market rules."

As that condition precedent is unique to section 35, and as this is the first proceeding before the OEB under that section, OEB staff agrees that how section 35(4) fits into the OEB's mandate should be an issue in this proceeding. However, OEB staff submits that the issue should be articulated in more neutral terms than proposed by Resolute, namely:

Is the review of the DR Qualification Rules under section 35(4) of the Act relevant to the exercise of the OEB's mandate under section 35 of the Act beyond confirming that the review has in fact taken place? If so, how?

OEB staff does not believe that the OEB's role in an application under section 35 is or includes a 'review' of the market rule review process engaged by Resolute in the sense of calling for an inquiry into the sufficiency or fairness of that process or an evaluation of whether the IESO reached the "correct" conclusion.

That said, OEB staff is also of the view that the factual context and documentary record of the market rule review process that was engaged by Resolute can be informative to the OEB in making a determination as to whether the provision(s) fail the tests set out in section 35(6), irrespective of how broadly or narrowly the OEB determines the relevance of that review process to be. Furthermore, if the OEB has the benefit of some existing documentary evidence, it would reduce the regulatory burden on the parties of having to reconstruct some of the relevant evidence for purposes of this proceeding.

Although not a matter for the articulation of the issues list, OEB staff uses this opportunity to note that, in its view, Resolute has met the requirement under section 35(4) to avail itself of the market rule review process.

Conclusion

As noted above, this is the first application of its kind to come before the OEB. OEB staff wishes to add that, in its view, the OEB's mandate under section 35 of the Act is different from – and broader than – its mandate under section 33 of the Act. While staff has proposed a smaller number of issues than proposed by Resolute, the OEB's broader remedial powers to direct the IESO to amend the market rules (if the impugned rules fail the tests) suggests a need for a potentially broader inquiry than would be the case in an application under section 33 of the Act. The OEB should have before it an evidentiary record that enables it to make the determinations required of it under section 35 in as well-informed a way as possible.

OEB staff's proposed issues list is attached as Appendix A.

All of which is respectfully submitted

Appendix A

OEB Staff's Proposed Issues List

1. Are the DR Qualification Rules inconsistent with the purposes of the *Electricity Act, 1998*?
2. Do the DR Qualification Rules unjustly discriminate against Resolute?
3. In the event that the OEB finds that the DR Qualification Rules (i) unjustly discriminate against Resolute or (ii) are inconsistent with the purposes of the Act, in what manner and within what time should the OEB direct the IESO to amend the market rules?
4. Is the review of the DR Qualification Rules under section 35(4) of the Act relevant to the exercise of the OEB's mandate under section 35 of the Act beyond confirming that the review has in fact taken place? If so, how?