



Resolute FP Canada Inc.

**Application by Resolute FP Canada Inc. for an order
directing the Independent Electricity System Operator
to amend the Market Rules relating to
the qualifications for participating in Demand Response Auctions**

**DECISION ON ISSUES LIST AND PROCEDURAL ORDER NO. 2
December 6, 2019**

On August 7, 2019, Resolute FP Canada Inc. (Resolute) applied to the Ontario Energy Board (OEB), pursuant to section 35 of the Electricity Act, 1998 (Act), for an order directing the Independent Electricity System Operator (IESO) to amend sections 18.2.1 and 19.2.1 of Chapter 7 of the IESO's Market Rules (DR Qualification Rules) (Application). These market rules address the qualifications for participating in the IESO's Demand Response Auctions. Resolute has also asked the OEB for direction on the production of documents and eligibility to recover its costs in respect of the Application. On August 13, 2019, Resolute filed additional materials in support of its Application.

Issues List

In Procedural Order No. 1 issued on October 22, 2019, the OEB noted that the parties had raised issues related to the scope of this proceeding and the OEB's jurisdiction in hearing the Application, and established a process for the development of an Issues List. Specifically, Resolute was directed to file a Draft Issues List, and provision was made for submissions on Resolute's Draft Issues List and subsequently for an Issues Day to be held on November 8, 2019.

Resolute filed a Draft Issues List on October 28, 2019. Submissions on that Draft Issues List were filed by the IESO and OEB staff, including their respective proposed issues lists. The issues lists proposed by each of Resolute, the IESO and OEB staff are reproduced in Schedule A.

Summary of the Positions of the Parties on the Issues List

Some of the positions evolved to some degree between the filing of written submissions and the Issues Day, and the summary below takes such evolution into account where applicable.

Resolute, the IESO and OEB staff each proposed: (i) two issues relating to the determinations to be made on an application under section 35 of the Act, as articulated in section 35(6); and (ii) one issue relating to how the OEB should exercise the remedial authority set out in section 35(6) of the Act in the event that the OEB determines that the DR Qualification Rules fail the tests that are also set out in that section.

There were variations in the wording proposed for these three issues, although during the Issues Day the IESO indicated that it was content to accept the wording proposed by OEB staff.

Resolute's Draft Issues List included an issue regarding the impact and effect of the DR Qualification Rules on Resolute and another regarding the purpose and context of the DR Qualification Rules. OEB staff's view was that the impact of the DR Qualification Rules on Resolute is already captured by the two issues referred to above relating to the determinations to be made on an application under section 35 of the Act. OEB staff was also of the view that the purpose and context of the DR Qualification Rules can be informative to the OEB, but to the extent that they are relevant they are also already captured and properly constrained within these same two issues. OEB staff therefore submitted that stand-alone issues were not needed as proposed by Resolute. At Issues Day, the IESO supported OEB staff's position.

Resolute's Draft Issues List and the issues list proposed by OEB staff both included a further issue going to the question of the relevance to this proceeding of the market rule review referred to in section 35(4) of the Act. Resolute noted that the IESO's review is a compulsory part of the review process as set out in legislation, and submitted that it must therefore have some meaning. Resolute further submitted that the requirement in section 35(4) is presumably for the purpose of providing the IESO with an opportunity to consider the matter, and is designed to assist the OEB in its review. Resolute also noted that parties can take different positions on the relevance of the review, and that debate should not be closed off now. At Issues Day, Resolute and the IESO agreed that consideration of the IESO review should not and does not imply that the OEB is obliged to defer to the IESO's decision; rather, they each acknowledged that the review may be informative to the OEB in this proceeding.

OEB staff submitted that the OEB's role in an application under section 35 is not to review the market rule review process engaged in for the purposes of section 35(4) of the Act 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" decision. However, OEB staff submitted that there was value in the OEB having before it the documentary record of the IESO's review as it could be helpful to the OEB in making a determination as to whether the DR Qualification Rules fail the tests set out in section 35(6) of the Act. Similarly, the IESO submitted that an application under section 35 of the Act is not an appeal, review or oversight of the IESO's process or decision, but agreed that it would be of assistance to the OEB and the parties for the record of the market rule review process to be placed before the OEB.

Findings on the Issues List

The OEB notes that there are three issues on which there appears to be no substantive disagreement. These are issues 4, 5 and 6 on Resolute's Draft Issues List, issues 1, 2 and 3 on the IESO's proposed issues list and issues 1, 2 and 3 on OEB staff's proposed issues list. As noted above, at Issues Day the IESO indicated that it was content to accept OEB staff's articulation of these three issues.

The OEB approves these three issues and adopts the following wording:

- Are the DR Qualification Rules inconsistent with the purposes of the *Electricity Act, 1998*?
- Do the DR Qualification Rules unjustly discriminate against Resolute?
- If the answer to either question 1 or 2 is yes, then how should the OEB direct the IESO to amend the DR Qualification Rules?

The OEB finds that adding the words "as applied" to the first two issues, as set out in the issues lists proposed by both Resolute and the IESO, is not necessary since the section 36(6) test inherently includes both "as written" and "as applied".

Resolute's proposed issues 1 and 2 concern the purpose and context of the DR Qualification Rules and their impact and effect on Resolute.

The OEB finds that issues 1 and 2 on Resolute's Draft Issues List can be addressed under the first two approved issues listed above, and they therefore do not need to be separate items on the Issues List. The OEB finds that, while the history, context and application of the DR Qualification Rules is important to the OEB's consideration of how

they fare against the tests set out in section 35(6) of the Act, procedural details relating to the development of the DR Qualification Rules are not relevant to the determinations to be made by the OEB in this proceeding.

Issue 3 on Resolute's Draft Issues List and issue 4 on OEB staff's proposed list relate to section 35(4) of the Act, which makes it a condition precedent to the filing of an application under section 35 that the market participant have "made use of the provisions of the market rules relating to the review of the market rules". Essentially, the question is whether and how the IESO's review of the market rule amendment proposal made by Resolute for the purposes of section 35(4) of the Act is relevant to this proceeding.

The OEB finds that procedural details of the IESO's review of Resolute's market rule amendment proposal are not relevant to this proceeding, as this will not assist the OEB in reaching a decision on the Application. In this proceeding, the OEB cannot provide any relief relating to the IESO's review regardless of what those details might have been.

The OEB finds that the issue proposed by each of Resolute and OEB staff regarding section 35(4) of the Act does not need to be on the Issues List. However, the OEB is of the view that all materials that were before the IESO Technical Panel and Board of Directors relating to that review will assist the OEB in rendering its decision in this case. This Procedural Order provides for the filing of such materials by the IESO. At Issues Day, the IESO confirmed its agreement to file a record of the section 35(4) review similar in nature to the record that the IESO would be required to file in a proceeding under section 33 of the Act.

The approved Issues List for this proceeding is attached as Schedule B.

Cost Responsibility and Cost Award Eligibility

The issue of who bears the costs of this proceeding and who is eligible for cost awards is currently outstanding.

In its Application, Resolute asked that it be eligible to recover its costs of the Application, relying on cost decisions made in two earlier OEB proceedings under section 33 of the Act. An intervenor, the Association of Major Power Consumers in Ontario (AMPCO), has also requested cost award eligibility on the basis that it

represents the direct interests of consumers in relation to services provided by the IESO.

In Procedural Order No. 1, it was noted that the OEB panel hearing the Application would make a determination on cost responsibility and cost award eligibility. Provision was, however, made for the filing of objections to the cost award eligibility requests of Resolute and AMPCO.

The IESO filed a letter on October 25, 2019 objecting to both requests for cost award eligibility. The IESO reiterated its earlier objection to Resolute's request on the grounds that, as an applicant, Resolute is presumptively ineligible for a cost award absent special circumstances under sections 3.05 and 3.07 of the OEB's *Practice Direction on Cost Awards* (Practice Direction). The IESO further submitted that Resolute has failed to demonstrate any special circumstances that would justify a departure from the general rule, and has failed to discharge the burden imposed under section 3.02 of the Practice Direction.

With respect to AMPCO, the IESO submitted that it is premature to determine whether AMPCO is participating in this proceeding primarily as a representative of ratepayers or is participating on behalf of its members' commercial self-interest. The IESO further submitted that, if the latter, this would weigh strongly against any entitlement with respect to costs.

The IESO requested the opportunity to make additional submissions on costs at a later stage in the proceeding.

The OEB considers it opportune at this time to make provision for submissions on cost responsibility and cost award eligibility.

Interrogatories and Type of Hearing

This Procedural Order makes provision for an interrogatory process.

By letter dated October 15, 2019, Resolute submitted that a written hearing may be sufficient, but reserved the right to request an oral hearing later in the process. The OEB will make its determination on the type of hearing once the interrogatory process is complete.

It is necessary to make provision for the following matters related to this proceeding. The OEB may issue further procedural orders from time to time.

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. The IESO is directed to file with the OEB, and deliver a copy to all parties, all of the materials that were before the IESO Technical Panel and Board of Directors related to the IESO's review of the amendment to the DR Qualification Rules proposed by Resolute for the purposes of section 35(4) of the Act, by **December 20, 2019**.
2. Any party or OEB staff that wishes to request any information and documentation with respect to the Application material filed by Resolute or the material filed by the IESO that is relevant to issues on the approved Issues List shall file written interrogatories with the OEB and serve them on all parties by **January 17, 2020**.
3. Resolute and the IESO shall file interrogatory responses with the OEB and serve them on all parties by **January 31, 2020**.

Submissions on Cost Responsibility and Cost Award Eligibility

4. If any party or OEB staff wishes to make a submission on which party should bear the costs of this proceeding or a submission objecting to the request of any party for cost award eligibility, it shall file a written submission with the OEB and serve it on all parties by **December 18, 2019**.
5. If any party or Board staff wishes to reply to a submission on cost responsibility filed by another party under paragraph 4, it shall file a written reply submission with the OEB and serve it on all parties by **January 8, 2020**.
6. If a party whose request for cost award eligibility is the subject of an objection by another party under paragraph 4, wishes to reply to the objection, it shall file a written reply submission with the OEB and serve it on all parties by **January 8, 2020**.

All materials filed with the OEB must quote the file number, **EB-2019-0206**, be made in a searchable/unrestricted PDF format and sent electronically through the OEB's web portal at <https://pes.ontarioenergyboard.ca/eservice>. Two paper copies must also be filed at the OEB's address provided below. Filings must clearly state the sender's name,

postal address and telephone number, fax number and email address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at <https://www.oeb.ca/industry>. If the web portal is not available parties may email their documents to the address below. Those who do not have computer access are required to file seven paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Michael Bell at Michael.Bell@oeb.ca and OEB Counsel, Ljuba Djurdjevic at Ljuba.Djurdjevic@oeb.ca.

ADDRESS

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

Email: boardsec@oeb.ca
Tel: 1-888-632-6273 (Toll free)
Fax: 416-440-7656

DATED at Toronto, **December 6, 2019**

ONTARIO ENERGY BOARD

Original signed by

Christine E. Long
Registrar and Board Secretary

Schedule A

Decision on Issues List and Procedural Order No. 2

Resolute FP Canada Inc.

EB-2019-0206

Draft Issues Lists Submitted By Parties and OEB Staff

December 6, 2019

DRAFT ISSUES LISTS SUBMITTED BY PARTIES AND OEB STAFF

Resolute's 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*?
4. Are the Rules, as applied, consistent with the purposes of the *Electricity Act, 1998*?
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?

The IESO's Proposed Issues List

1. Are the DR Eligibility Rules, as applied, inconsistent with the purposes of the *Electricity Act, 1998*?
2. Do the DR Eligibility Rules, as applied, unjustly discriminate against Resolute?
3. 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?

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?

Schedule B

Decision on Issues List and Procedural Order No. 2

Resolute FP Canada Inc.

EB-2019-0206

Approved Issues List

December 6, 2019

Approved 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. If the answer to either question 1 or 2 is yes, then how should the OEB direct the IESO to amend the DR Qualification Rules?