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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: Christine E. Long, Board Secretary

Dear Ms. Long:

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")

Pursuant to its Procedural Order No.2, the Ontario Energy Board (the "**Board**" or "**OEB**") has ordered the delivery of submissions regarding:

- 1) which party should bear the costs of this proceeding; and
- 2) objections to the request of any party for cost award eligibility.

By way of letter dated October 25, 2019, the Independent Electricity System Operator (the "**IESO**") provided its submissions to the Board objecting to both Resolute FP Canada Inc. ("**Resolute**") and AMPCO's requests that they be eligible to recover costs in respect of this Application. The IESO relies on the submissions contained in that letter and does not intend to repeat them here, although the IESO reserves the right to reply to any costs submissions in accordance with the schedule set out in Procedural Order No.2.

With respect to the issue of cost responsibility, it is the IESO's position that, to the extent the Board determines that any party is eligible for costs of this Application (including Resolute or AMPCO), then the IESO should not be the party responsible for the payment of these costs.

In the case of applications, cost awards are typically recovered from the Applicant.¹ Neither AMPCO nor Resolute has, or can, demonstrate any special circumstances for departing from this general rule.

While the OEB has found in market rule amendment applications under Section 33 of the *Electricity Act, 1998* that the IESO may be the appropriate party to be responsible for costs, those determinations are distinguishable from this Application, which is a market rule review application that has been commenced by Resolute pursuant to Section 35 of the *Electricity Act, 1998*. In those market rule amendment cases, the OEB determined that the IESO ought to be responsible for the costs of those proceedings because that is consistent with the overall legislative scheme which contemplates a review by the OEB as a potential last step in relation to market rule amendments.² The context of a market rule review process under Section 35 of the *Electricity Act, 1998*, however, is entirely different. While an applicant must resort to the IESO market rule amendment process before commencing an application to the OEB under Section 35 of the *Electricity Act, 1998*, this Application is not part of the market rule amendment process. Instead, an application to review a market rule under Section 35 of the *Electricity Act, 1998* is a separate, distinct, and exceptional proceeding initiated by the applicant. This is consistent with the Board's refusal to include in this Application an issue on the Issues List relating to whether and how the IESO's review of Resolute's proposed market rule amendment is relevant to this proceeding. As noted in its Decision on Issues List:

“the 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.”³

Requiring Resolute, as the Applicant, to bear the costs of this Application is entirely consistent with the legislative scheme of Section 35 of the *Electricity Act, 1998*. Furthermore, there is nothing in section 35 of the *Electricity Act, 1998* that mandates or suggests that the IESO be responsible for the costs of market rule review applications.

Even if the OEB were to consider its prior decisions in the Section 33 applications as being persuasive to its decision in this Application, those decisions are not determinative. As noted by the OEB in EB-2007-0040 (the “**Ramp Rate Appeal**”), despite determining that costs of that particular application were to be borne by the IESO, the Board stated that this determination should not “be understood as tacit recognition that this should necessarily be the case in relation

¹ EB-2019-0242, AMPCO Market Rule Amendment Application, Procedural Order No. 2 at pg. 2.

² EB-2019-0242, AMPCO Market Rule Amendment Application, Procedural Order No. 2 at pg. 2-3 and Decision on Cost Responsibility & Cost Eligibility at pg.3; EB-2013-0029/EB-2013-0010 (the “**Renewable Energy Suppliers' Appeal**”), Procedural Order No. 4.

³ EB-2019-0206, Resolute FP Canada Inc. Application, Decision on Issues List and Procedural Order No. 2 at pg. 4.

to all future market rule amendment review applications that may come before the Board.”⁴ Similarly, in the Renewable Energy Suppliers’ Appeal, although the Board initially determined that the IESO ought to be responsible for costs which may be awarded, the Board ultimately decided that the applicants were not eligible for a costs award and noted that “market participants should generally be expected to bear their regulatory costs associated with the market rule amendment process”.⁵

As the initiator of a market rule review proceeding under section 35 of the *Electricity Act, 1998*, Resolute should not be presumptively insulated from the cost consequences of this Application.

As noted in our letter dated October 25, 2019, the IESO respectfully submits that the Board should defer its decisions with respect to cost eligibility and/or cost responsibility until the end of the proceeding. The Board will be better positioned at the end of the proceeding, once it has heard all the evidence and arguments and has observed the conduct of the parties, to determine whether there are any circumstances warranting departure from the Board’s *Practice Direction on Costs Awards* (which provides that applicants are presumptively ineligible for a costs award absent “special circumstances”) and the general principle that cost awards are typically recovered from the Applicant.

Yours truly,

Goodmans LLP

signed in original

Alan H. Mark

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

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⁴ Ramp Rate Appeal, Procedural Order No. 2 at pg. 5.

⁵ Renewable Energy Suppliers’ Appeal, Procedural Order No. 6 at pg. 3-4.