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Our File No.: 19.2201

Via Email, RESS and Courier

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")**

Enclosed please find the IESO's Notice of Motion seeking to review and vary the Ontario Energy Board's Procedural Order No.3 issued on December 17, 2019 in the above-noted Application.

Yours truly,

Goodmans LLP

signed in original

Melanie Ouanouou

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

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ONTARIO ENERGY BOARD

IN THE MATTER OF the *Electricity Act*, 1998, s.35;

AND IN THE MATTER OF an Application by Resolute
FP Canada Inc. for an Order amending Chapter 7, Sections
18.2.1 and 19.2.1 of the Market Rules dated August 7,
2019

AND IN THE MATTER OF Rule 40 of the *Rules of
Practice and Procedure* of the Ontario Energy Board

NOTICE OF MOTION

The Independent Electricity System Operator (the “**IESO**”) will make a motion to the Ontario Energy Board (the “**Board**” or “**OEB**”) at its offices at 2300 Yonge Street, Toronto, on a date and time to be fixed by the Board.

PROPOSED METHOD OF HEARING: The IESO proposes that the motion be heard by way of a written hearing.

THE MOTION IS FOR:

- (a) A review and variance of those portions of the OEB’s Procedural Order No. 3 issued on December 17, 2019 (“**Procedural Order No. 3**”) wherein the OEB required that all parties serve and file all evidence in the Application by December 20, 2019;

- (b) An Order that the IESO satisfies the “threshold test” referred to in Rule 43.01 of the OEB’s *Rules of Practice and Procedure*;
- (c) An Order for a hearing of the motion on its merits, in writing;
- (d) An Order varying Procedural Order No. 3 by granting the IESO an extension to file and serve its evidence until 30 days from the date the Board renders its decision on this motion; and
- (e) Such further and other Orders or relief as the IESO may request and the Board may grant.

THE GROUNDS FOR THE MOTION ARE:

Background and Procedural Order No.3

- (a) Resolute FP Canada Inc. (“**Resolute**”) commenced an Application (EB-2019-0206) under section 35 of the *Electricity Act, 1998* on August 7, 2019 requesting that 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.¹
- (b) By way of a letter dated September 6, 2019, the IESO requested an Order that the Board, among other things, identify and limit the issues to be addressed in the Application, strike certain portions of the Application as being irrelevant to the

¹ Resolute Notice of Application dated August 7, 2019 and supplementary materials delivered August 13, 2019

Board's determination under Section 35 of the *Electricity Act, 1998* and also set a date for the filing of evidence by the Applicant.²

- (c) In Procedural Order No.1, the Board established a process for the development of an Issues List in this Application, but no process for the delivery of evidence by any parties was established.³
- (d) The Issues Day was convened before the Board on November 8, 2019.
- (e) The Board issued its Decision on Issues List and Procedural Order No. 2 on December 6, 2019, which provided for a number of things:
 - (i) identified the approved Issues List for this Application;
 - (ii) directed the IESO to serve and file 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 by December 20, 2019;
 - (iii) a written interrogatory process relating to the Application material filed by Resolute and the materials filed by the IESO as noted in subparagraph (ii) above; and
 - (iv) submissions on costs responsibility and cost award eligibility.⁴

² Letter from Goodmans LLP to the OEB dated September 6, 2019

³ EB-2019-0206, Procedural Order No. 1 dated October 22, 2019

⁴ EB-2019-0206, Decision on Issues List and Procedural Order No.2 dated December 6, 2019

- (f) Procedural Order No. 2 made no provision for the delivery of evidence by any parties (other than the IESO's record from the Technical Panel and Board of Directors) and did not strike any of the contents of Resolute's Application, despite having found that some of the matters raised in the Application were outside the scope of the approved Issues List.
- (g) By way of a letter dated December 13, 2019, Resolute noted that the filing of evidence by Resolute had not yet been addressed by the Board in any of its Procedural Orders and advised that it would file its evidence on December 20, 2019, the same date that the IESO was filing its materials relating to the Technical Panel and Board's review of Resolute's proposed market rule amendment referenced in paragraph (e)(ii) above.⁵
- (h) In response to this letter from Resolute, the Board issued Procedural Order No. 3 on December 17, 2019 indicating that if any party (not limited to Resolute) wished to file evidence in connection with the approved Issues List, then they must do so by December 20, 2019, which deadline was only three days after the issuance of Procedural Order No. 3.⁶
- (i) In a letter dated December 20, 2019, the IESO requested that the Board grant the IESO an extension for a reasonable period of time following the delivery of Resolute's evidence given that the IESO only had three-days' notice of this deadline and that the IESO would be in a position to determine what evidence

⁵ Letter from McCarthy Tetrault LLP to OEB dated December 13, 2019

⁶ EB-2019-0206, Procedural Order No.3 dated December 17, 2019

would be relevant to the Application only once it had seen Resolute's evidence.⁷

On that same date, the IESO filed the materials relating to the Technical Panel and Board's review of Resolute's proposed market rule amendment referenced in paragraph (e)(ii) above as it was required to do pursuant to Procedural Order No.2.⁸

- (j) By way of a letter the same date, the Board rejected the IESO's request for an extension, noting that:
 - (i) Procedural Order No. 3 provided parties with "an opportunity" to file evidence by December 20, 2019;
 - (ii) it did not consider it necessary for the IESO to review Resolute's evidence before submitting its own; and
 - (iii) all parties will have an opportunity through the interrogatory process to request any relevant information with respect to any evidence filed.⁹
- (k) The IESO intends to file evidence relating to the approved issues in this Application, including with respect to, among other things:
 - (i) The purpose of the DR Eligibility Rules, including that the purpose of the demand response auction is to procure capacity from demand-side resources to provide load reduction at the IESO-controlled grid;

⁷ Letter from Goodmans LLP to OEB dated December 20, 2019

⁸ EB-2019-0206, Brief of Materials before IESO Technical Panel and Board of Directors, filed December 20, 2019

⁹ Letter from Board Secretary to Goodmans LLP dated December 20, 2019

- (ii) The elimination of certain features of historical demand response programs in the design of the demand response auction;
 - (iii) The IESO's application and interpretation of the DR Eligibility Rules, including why the use of Resolute's non-IESO revenue meter (which measures its self-generation) was never permitted, or intended to be permitted, in the demand response auction;
 - (iv) How the application of the DR Eligibility Rules depends on the manner in which Resolute has elected to register its capacity resources;
 - (v) In the context of the capacity qualification process for the demand response auction, that the IESO does not do any assessment of what capacity each market participant can provide; and
 - (vi) Responding to Resolute's evidence regarding the IESO's representations to Resolute regarding the registration process and its participation in the demand response auction.
- (1) Given the three-day deadline for evidence imposed by the OEB in Procedural Order No.3, the IESO was not in a position to file any evidence on December 20, 2019 (other than the record of materials before the IESO Technical Panel and Board of Directors which it was required to file pursuant to Procedural Order No.2).

The Errors In Procedural Order No.3

- (m) Rule 40.01 of the Board's *Rules of Practice and Procedure* allows any person to bring a motion requesting the Board to review all or part of a final order or decision and to vary, suspend or cancel the order or decision.
- (n) The standard of review on this motion is correctness, as indicated in Rule 42.01(a) of the Board's *Rules of Practice and Procedure*.
- (o) Rule 42.01(a) of the Board's *Rules of Practice and Procedure* requires that a Notice of Motion shall set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
 - (i) errors in fact;
 - (ii) changes in circumstances;
 - (iii) new facts that have arisen; and
 - (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.
- (p) The Board has confirmed that this list of grounds is not an exhaustive list. In particular, while errors of law and breaches of procedural fairness are not specifically enumerated as grounds for review in Rule 42.01 of the *Rules of*

Practice and Procedure, the Board has previously held that it has the jurisdiction to consider such matters as reviewable errors.¹⁰

- (q) The IESO respectfully submits that in setting this deadline for the delivery of evidence by all parties in Procedural Order No.3, the Board committed at least four reviewable errors:
 - (i) The Board failed to consider a material fact, namely that other parties to the Application (other than Resolute) may also have substantive evidence to file in the Application which could not be compiled upon three days' notice;
 - (ii) New facts have arisen that were not previously known to the Board, namely that the IESO intends to file evidence in response to the evidence tendered by Resolute;
 - (iii) Providing parties with only three days' notice within which to prepare and compile evidence for the Application is contrary to the principles of natural justice and procedural fairness; and
 - (iv) The Board's failure to provide for the sequential delivery of evidence (with Resolute filing its evidence first)¹¹ or, at minimum, its failure to invite submissions from the parties with respect to the process and timeline for the

¹⁰ EB-2006-0322/0338/0340, Decision with Reasons on Motions to Review the Natural Gas Electricity Interface Review Decision, dated May 22, 2007 at pages 14-15; EB-2016-0005, Decision on Motion to Review and Vary by the City of Hamilton, March 3, 2016 at page 4.

¹¹ As was the procedure recently adopted by the OEB in the application commenced by Association of Major Power Consumers in Ontario involving market rule amendments pertaining to the Transitional Capacity Auction (EB-2019-0242), by way of example.

delivery of evidence in the Application, is contrary to the principles of procedural fairness.

- (r) At the time of issuing Procedural Order No.3, the Board was unaware of the IESO's intention to file evidence in this Application in response to the evidence to be filed by Resolute (beyond the Technical Panel and IESO Board materials that it was already filing on December 20, 2019) as there had, thus far, been no process established by the Board for the delivery of evidence.
- (s) The evidence which the IESO intends to file in this Application is highly relevant to the Application and the approved Issues List.
- (t) Had the Board intended that December 20, 2019 be the deadline for the IESO to file all of its evidence, and not just the record that was before the Technical Panel and Board of Directors, then it should have provided for this in Procedural Order No. 2. There was no reason for the IESO to have assumed that this would be the case.
- (u) Indeed, given that Resolute's original Application contained submissions which fell outside the scope of the Issues List that was ultimately approved by the Board, and given that still outstanding was the IESO's request that certain portions of the Application be struck, it was reasonable to provide for the sequential delivery of evidence in this Application, with Resolute delivering its evidence first based on the approved issues in the Application. Having reviewed Resolute's pre-filed evidence, it is clear that the IESO will be required to file evidence in direct response to some of the evidence Resolute has tendered. It is

inconsistent with notions of procedural fairness that the IESO ought to have been required to guess at what type of evidence referred to in the original Notice of Application Resolute might have been relying on in light of the now-approved Issues List.

- (v) Even if the Board considered it appropriate in the circumstances to order the simultaneous delivery of evidence by all parties, the IESO and other parties should have been provided with more than three days' notice of the deadline.
- (w) The interrogatory process provided for in Procedural Order No. 2 and 3 is not sufficient to ensure that all relevant evidence is before the Board on this Application. The IESO can only respond to those interrogatories which are posed to it by other parties. In the event other parties fail to ask questions or request information with respect to matters which are relevant to the Board's consideration of this Application, the IESO will not have the opportunity to independently introduce this evidence. In addition, the interrogatory process would not permit any other parties to request additional information about any of the IESO's evidence submitted in response to the interrogatories.
- (x) Consistent with the principles of procedural fairness and the *Statutory Powers and Procedure Act*, R.S.O. 1990, c. S.22, parties have the right to present evidence at a hearing. While the Board is entirely within its power to issue a Procedural Order setting a deadline for the delivery of evidence and requiring that all parties simultaneously file evidence, the parties must be afforded a reasonable opportunity to present this evidence.

- (y) The deadline set out in Procedural Order No.3 significantly prejudices the IESO's ability to effectively assert its position on the Application and fairly participate in the proceedings.

The Threshold Test to Review the Decision is Satisfied

- (z) Rule 43.01 of the Board's *Rules of Practice and Procedure* provides that, in respect of a motion brought under Rule 40.01 to review and vary a decision, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.
- (aa) In making this threshold determination, the Board has regard to the following considerations:
 - (i) The grounds set out in the Notice of Motion must raise a question as to the correctness of the order or decision;
 - (ii) The issues raised which challenge the correctness of the order or decision must be such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended;
 - (iii) The moving party must show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings or something of a similar nature; and

- (iv) The error must be material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.¹²
- (bb) For all the reasons noted above, there is a basis to question the correctness of Procedural Order No. 3 to the extent it requires evidence from all parties to be filed on December 20, 2019 and should therefore be corrected by granting the requested relief.
- (cc) In issuing Procedural Order No.3, the Board failed to consider various material issues:
 - (i) that parties other than Resolute would have relevant evidence to file in response to Resolute's evidence;
 - (ii) that providing only three days within which to prepare and file this material would not be reasonably sufficient time; and
 - (iii) that the other parties should have been provided with sufficient opportunity to review Resolute's evidence so as to understand the nature of its position in light the approved Issues List, before having to file their own responding evidence.
- (dd) Had the Board considered these material facts, this should have changed the Board's determination as to the timing of the deadline imposed for the delivery of

¹² EB-2006-0322/0338/0340, Decision with Reasons on Motions to Review the Natural Gas Electricity Interface Review Decision, dated May 22, 2007 at page 18.

evidence by all parties. In this way, this error is material and relevant to the Board's decision to issue Procedural Order No.3.

- (ee) The evidence deadline imposed in Procedural Order No.3 materially prejudices the IESO's ability to present evidence in this Application and amounts to a denial of natural justice and procedural fairness.
- (ff) Once the deadline in Procedural Order No.3 is corrected, the IESO will be able to file its evidence in the Application (in contrast to the current situation, where the IESO was not afforded a reasonable opportunity to file any such evidence).
- (gg) The IESO has satisfied the threshold test and the Board should proceed to hear the motion on its merits.
- (hh) Rules 1.03, 7, 8 and 40, 41, 42 and 43 of the Ontario Energy Board *Rules of Practice and Procedure*.
- (ii) Such further and other grounds as counsel may advise.

THE FOLLOWING DOCUMENTARY MATERIALS will be used at the hearing of the motion:

- (a) Materials from the record in EB-2019-0206, including Procedural Order No.3;
- (b) IESO's submissions and affidavit evidence on this motion to be delivered in accordance with the Board's directions; and
- (c) such further and other materials as the lawyers may advise and the Board may permit.

January 6, 2020

Goodmans LLP

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Lawyers for the Respondent,

Independent Electricity System Operator

TO: Service List in Schedule "A" to Procedural Order No. 1