

January 8, 2020

**VIA RESS AND COURIER**

Ms. Christine E. Long  
Registrar & Board Secretary  
**ONTARIO ENERGY BOARD**  
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Dear Ms. Long:

**Re: EB-2019-0206: Resolute FP Canada Inc. (Resolute FP) Application for Amendment of IESO Market Rules.**

**Association of Major Power Consumers in Ontario (AMPCO) Reply on Cost Eligibility and Responsibility.**

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We write as legal counsel to AMPCO and in reply to the IESO's submissions regarding AMPCO's request to be determined eligible for recovery of its reasonably incurred costs of participation in this matter. We also provide comments on the issue of determination of the party to be responsible for costs herein.

**AMPCO's Request for Cost Eligibility**

AMPCO's intervention request letter (October 10<sup>th</sup>) explained that AMPCO's interest in this matter is "as an association representing major electricity loads in the province", and went on to state:

*AMPCO takes the position that all entities that participate in the Ontario electricity market incur significant costs to modify their equipment, operations and processes in such a way as to facilitate their participation. They do so with the belief that the market rules will govern their participation fairly and that those rules (and any interpretation thereof) will not be changed unilaterally, retroactively and without appropriate justification in a way that harms a market participant's ability to participate. AMPCO wishes to ensure that such a situation did not take place.*

That is to say, AMPCO's interest in this proceeding is as a party relying on the regulated services provided by the IESO to market participants. This interest is analogous to that of a "consumer" in respect of regulated transmission or distribution services, as contemplated by section 3.03(a) of the

Board's *Practice Direction on Cost Awards*. Section 3.03(a) of the *Practice Direction* provides that a party in a Board process is eligible to apply for a cost award where the party;

*"primarily represents the direct interest of consumers (e.g. ratepayers) in relation to services that are regulated by the Board". (Our emphasis.)*

Through its legal counsel's letter dated October 25<sup>th</sup> the IESO has objected to a finding at this time that AMPCO is eligible to recover costs in this matter, stating:

*... it is AMPCO's position that it is eligible for costs because it represents the direct interests of consumers in relation to services provided by the IESO. Given the early stages of this Application, it is premature to determine whether AMPCO's participation in this proceeding is primarily as a representative of ratepayers' interests or on behalf of its members' commercial self-interest (the latter of which would weigh strongly against any entitlement with respect to costs), or to whether their intervention is deserving of a cost award.*

The IESO was given a further opportunity to file cost eligibility objections, and did so on December 18<sup>th</sup>, wherein it stated (insofar as related, potentially, to AMPCO's request for cost eligibility);

*... 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. (Our emphasis.)*

(Nothing further was said in the IESO's counsel's December 18<sup>th</sup> letter about AMPCO's request for cost eligibility in particular.)

In respect of AMPCO's eligibility for cost recovery, the IESO's submissions miss the mark. AMPCO's participation was requested and approved on the basis that it is representative of major electricity loads in the province, which rely on access to the IESO administered market on a set of rules clearly stated and consistently and fairly interpreted and applied; i.e. as customers of the regulated market operator.

IESO's submissions reference "the conduct of the parties" in respect of determinations of eligibility. Conduct is a matter relevant not to eligibility, which is determined under the OEB's process based on the nature of the proceeding and on the nature of the interests represented, but rather to recovery at the end of the day. Determining AMPCO's eligibility for recovery of its reasonably incurred costs on the basis that it represents the interests of major electricity loads in access to the IESO administered market ultimately regulated by the OEB would allow for recovery by AMPCO of its costs reasonably incurred as a result of conduct appropriate to pursuit of that interest.



For parties like AMPCO which rely on cost recovery, given responsible and reasonable conduct, to sustain, and guide, their ongoing active, informed and thus responsible participation in the OEB's public interest proceedings, cost eligibility determinations at the outset of a proceeding determine whether such parties, including AMPCO, can participate fully in the proceeding. While AMPCO can take and manage the risk of recovery (i.e. based on its responsible and reasonable participation), it cannot risk an after the fact denial of recovery despite its responsible and reasonable participation.

We also note that;

1. as the Board has noted in the past, AMPCO's members ultimately share the cost, with other Ontario ratepayers, of the IESO's activities, including the IESO's costs incurred in this matter; and
2. given the below market tariff at which costs are awarded by the Board, even with cost recovery under the Board's processes AMPCO will bear a significant portion of its costs of participation in this matter and will thus have an intrinsic interest in ensuring that such participation is efficient as well as effective.

AMPCO thus reiterates its request that, at this time, it be determined eligible for recovery of its reasonably incurred costs of intervention in this matter, on the basis that it represents major electricity loads in the province in relation to wholesale electricity market services ultimately regulated by the Board.

### **Cost Responsibility**

For the same reasons as articulated above, and in particular given that Resolute FP is a member of AMPCO, AMPCO also encourages the Board to determine now where cost responsibility will lie for this matter. AMPCO cannot ultimately seek to recover costs from its own member. The Board's ruling on determination now of which party will be responsible for costs awarded will influence the extent to which AMPCO is able to participate in this matter.

In respect of cost responsibility, the IESO argues that this proceeding under section 35 of the *Electricity Act, 1998 (EL Act)* is substantively different from the other market rule review applications to date brought under section 33 of the *EL Act*, in that while the section 33 applications have been determined by the Board to be potential last steps in the market rule amendment processes in issue, no such conclusion applies in respect of section 35 applications as no market rule amendment process is in issue.

We note, however, that while arising from different circumstances, section 35 applications employ the same legislative tests for relief as do section 33 applications (i.e. inconsistency with the *EL Act's* legislative purposes or unjust discrimination), and thus similarly provide a mechanism for ultimate governance by this Board in the broader public interest of the IESO Market Rules and their application. In this respect both section 33 and section 35 applications are essentially part and parcel of effectively running, and appropriately regulating, the market.

AMPCO submits that absent circumstances indicating that a section 35 application is frivolous, vexatious or otherwise irresponsible, the costs of such an application, including the costs reasonably incurred by participants determined to be eligible for cost recovery, are appropriately borne by the market, through the IESO, in order to facilitate access by parties, including “consumers” of the IESO’s regulated services, to the regulator overseeing the delivery of those services.

Review of Resolute FP’s materials filed to date provide no indication that its application is frivolous, vexatious or otherwise irresponsible. It is thus appropriate that the Board determine, now, that the IESO will be responsible for costs in this matter.

Yours truly,

  
Ian A. Mondrow

- c. Resolute FP Canada Inc.  
Independent Electricity System Operator  
C. Anderson (AMPCO)  
Intervenors of Record

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