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BY EMAIL

December 18, 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 the Decision on the Issues List and Procedural Order No. 2, please find attached the submission of OEB staff in the above referenced proceeding.

Yours truly,

Original Signed by

Michael Bell
Project Advisor, Application Policy and Conservation

cc: All Parties in EB-2019-0206

ONTARIO ENERGY BOARD

OEB Staff Submission

Resolute FP Canada Inc.

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

EB-2019-0206

December 18, 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 (Demand Response Qualification Rules) (Application). These market rules address the qualifications for participating in the IESO's Demand Response Auctions. Resolute also requested eligibility to recover its costs in respect of the Application.

In its letter dated September 6, 2019 regarding the scope of the OEB's review on an application under section 35 of the Act, the IESO objected to Resolute's request for costs.

On October 22, 2019, the OEB issued Procedural Order No.1 which, among other things, accepted the intervention requests of the following parties:

- Advanced Energy Management Alliance
- Association of Major Power Consumers in Ontario (AMPCO)
- Capital Power Corporation
- the IESO
- Rodan Energy Solutions Inc.
- TransAlta Corporation

AMPCO also applied for cost award eligibility in its intervention request.

Procedural Order No.1 also provided that any party objecting to the requests for cost award eligibility by AMPCO or Resolute should file their objections with the OEB. On October 25, 2019, the IESO filed a letter objecting to both Resolute's and AMPCO's eligibility for an award of costs in respect of the Application. 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), and that Resolute has failed to demonstrate any special circumstances that would justify a departure from that general rule. 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.

On December 6, 2019, the OEB issued its Decision on Issues List and Procedural Order No. 2 which, among other things, made provision for submissions on which party

should bear the costs of this proceeding and any submissions objecting to the request of any party for cost award eligibility.

OEB staff's submission on cost responsibility and on Resolute's cost award eligibility request is set out below. OEB staff makes no submission in respect of AMPCO's request for cost award eligibility.

Cost Responsibility

This is the first application to the OEB under section 35 of the Act. However, OEB staff submits that decisions of the OEB on the issue of cost responsibility in the context of applications under section 33 of the Act are informative even for applications made under a different section.

The issue of cost responsibility was considered in some detail in the proceeding involving market rule amendments pertaining to the 3x ramp rate assumption (EB-2007-0040, the Ramp Rate Proceeding), in the later proceeding involving market rule amendments pertaining to the integration of wind generation facilities (EB-2013-0029, the Renewable Integration Proceeding), and in the proceeding that is currently before the OEB involving market rule amendments pertaining to the Transitional Capacity Auction (EB-2019-0242, the TCA Proceeding).

In all three cases, the OEB determined that it was more appropriate for the IESO to pay any cost awards, principally by reason of this approach being consistent with the OEB's perspective on the overall legislative scheme. In none of these cases did the OEB consider it appropriate to defer a decision on cost responsibility to the conclusion of the proceeding. Relevant excerpts from the OEB's decisions in this regard are set out below:

Ramp Rate Proceeding¹

The Board has considered the submissions of the parties and has determined that it is not appropriate in this case to defer its decision on cost awards as requested by the IESO. The Board has also determined that cost awards in this proceeding should be recovered from the IESO. This is the first application of its nature that will be heard by the Board, and appears to raise legitimate issues for the Board's consideration in relation to the criteria set out in section 33(9) of the Act. The Board also notes that, as market participants, members of AMPCO are in fact participating in the funding of cost awards in this matter through their

¹ EB-2007-0040, Procedural Order No. 2, March 9, 2007, page 5

payment of the IESO's administrative costs in accordance with the market rules.

Renewable Integration Proceeding²

The IESO shall be responsible for the costs of this proceeding. The Board does not agree with the IESO that it would be "unjust" for the IESO to bear the cost of defending its market rule amendments. Rather, the Board finds that having the IESO bear the costs of this proceeding is consistent with the overall legislative scheme. The review process under section 33 of the Electricity Act is part of the overall market rule amendment process. On that basis, it is appropriate for the IESO, rather than the Applicants, to bear the costs of this review. The Board understands the IESO's concern about unmeritorious applications; however, no such allegation has been made in this proceeding and the Board has a variety of tools to address such a situation should it arise.

TCA Proceeding³

The OEB has determined that the IESO shall bear the costs of this proceeding. The OEB remains of the view that this 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.

The OEB acknowledges that the IESO is responsible for making and amending the market rules, but the fact remains that market rule amendments are subject to oversight by the OEB under section 33 of the Act (among others) and that this oversight is part of the legislative scheme even if as a proceeding separate from the IESO's market rule amendment process.

Based on the above, the OEB also does not see any compelling reasons to defer its decision on cost responsibility, as requested by the IESO.

As is the case with section 33, section 35 of the Act is part of the overall legislative scheme relating to OEB oversight of the market rules. The IESO is responsible for operating the IESO-administered markets to promote the purposes of the Act,⁴ a

² EB-2013-0029, Decision on Costs and Confidentiality Requests and Procedural Order No. 4, February 28, 2013, page 6

³ EB-2019-0242, Decision on Cost Responsibility & Cost Eligibility, November 12, 2019, page 3

⁴ Section 6(1) of the Act sets out the objects of the IESO, including "to operate the IESO-administered markets to promote the purposes of the Act" (s.6(1)(g))

responsibility which is exercised through the market rules. Part of that responsibility involves responding to challenges to the market rules - whether to a market rule amendment or to an existing rule. In OEB staff's view, it is therefore appropriate for the IESO to bear the costs of proceedings involving the OEB's oversight of the market rules irrespective of the section under which the rule is being contested.

Cost Eligibility

OEB staff notes that, in both the Ramp Rate Proceeding and the TCA Proceeding, the OEB found that the applicant (AMPCO in both cases) was eligible for an award of costs at the same time as it determined that the IESO should bear cost responsibility. In both cases, the OEB referred to the provision in the Practice Direction that speaks to special circumstances, as well as to the fact that, as market participants, members of AMPCO are participating in the funding of cost awards through their payment of the IESO's fees. Relevant excerpts from the OEB's decisions in this regard are set out below:

Ramp Rate Proceeding⁵

AMPCO represents the interests of consumers and, on that basis and as an intervenor, would also normally be eligible for an award of costs under the Board's *Practice Direction on Cost Awards*. In this proceeding, however, AMPCO's status as the applicant would make it *prima facie* ineligible absent special circumstances. The Board has determined that, for the same reasons as expressed above in relation to the issue of cost recovery from the IESO, AMPCO is eligible for an award of costs in this proceeding.

TCA Proceeding⁶

...[A]ll other parties requesting cost award eligibility are *prima facie* not eligible for an award of costs under section 3.05 of the Practice Direction, AMPCO by reason of being the applicant, and [Kingston CoGen Limited Partnership] and [the Association of Power Producers of Ontario] by reason of being or representing, respectively, generators. However, section 3.07 of the Practice Direction contemplates that a party that falls into one of the categories listed in section 3.05 can be eligible in special circumstances.

⁵ EB-2007-0040, Procedural Order No. 2, March 9, 2007, page 6

⁶ EB-2019-0242, Decision on Cost Responsibility & Cost Eligibility, November 12, 2019, page 5

The OEB has determined that AMPCO is eligible for an award of costs despite being the applicant. This is consistent with the OEB's view that the review process under section 33 of the Act is part of the overall market rule amendment process. The OEB also notes that, as market participants, members of AMPCO are participating in the funding of cost awards in this case through their payment of the IESO's fees in accordance with the market rules.

However, in the Renewable Integration Proceeding, the OEB deferred its decision on the cost award eligibility of the applicants, and ultimately found that they were not eligible. The decision stated:

The Board finds that the Applicants have represented their private interests as generators in this proceeding. Although the Applicants submitted that the Application raised public interest issues, the Applicants have withdrawn their Application and have not pursued these public interest issues. The Board has therefore received no benefit from the Applicants in that regard. The Board finds that it would be inappropriate for the IESO, and the ratepayers that ultimately pay the IESO's costs, to bear the costs of the Applicants in the circumstances of this case. The Board also agrees with the IESO that market participants should generally be expected to bear their regulatory costs associated with the market rule amendment process.⁷

The OEB concluded that there were no special circumstances in that proceeding to support making the applicants eligible for cost awards.

OEB staff submits that the public interest aspect of an application under section 35 of the Act is relevant to a determination of whether the applicant should be eligible for a cost award in an application made under that section. In OEB staff's view, the statement above that market participants should generally be expected to bear their regulatory costs associated with the market rule amendment process applies equally in the context of an application under section 35 of the Act. As the OEB also noted in the Renewable Integration Proceeding, costs borne by the IESO are ultimately paid by ratepayers. In OEB staff's view, it would not be appropriate for costs to be imposed on ratepayers unless there is a public interest – that is, an interest beyond the private commercial interest of an applicant or set of applicants – engaged by the application.

⁷ EB-2013-0029, Decision on Cost Eligibility and Procedural Order No. 6, March 4, 2013, page 4

Such a determination may not be able to be made at the outset of every proceeding. It is not as yet clear to OEB staff, based on the record of this proceeding to date, whether there is a public interest issue at play.

However, OEB staff notes that this proceeding involves the market rules and their application. It also involves consideration of the purposes of the Act, including three specifically identified by Resolute in its Application: ensuring the adequacy, safety, sustainability and reliability of electricity supply through responsible planning and management of electricity resources, supply and demand; facilitating load management in a manner consistent with the policies of the Government of Ontario; and facilitating the maintenance of a financially viable electricity industry.⁸ Given these topics, it is OEB staff's view that public interest aspects of the case may well become clearer as the case proceeds.

OEB staff therefore submits that there is merit in deferring a decision on Resolute's cost award eligibility until the conclusion of this proceeding. At that time, the OEB will be better positioned to determine whether the public interest has benefitted from the OEB's review of the Demand Response Qualification Rules.

For clarity, OEB staff is not expressing the view that that Resolute is outright ineligible for an award of costs, but rather that there is merit in deferring a determination on whether Resolute should be eligible to recover any of its costs through a cost award and, if so, to what extent, until the conclusion of this proceeding.

All of which is respectfully submitted

⁸ Application, page 3. These purposes are found in sections 1(a), 1(c) and 1(i) of the Act, respectively.