



**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 COST RESPONSIBILITY  
AND COST ELIGIBILITY**

**February 5, 2020**

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 (Application). These market rules address the qualifications for participating in the IESO's Demand Response Auctions.

This Decision sets out OEB's determinations on cost responsibility and cost award eligibility in this proceeding. Below is an overview of the procedural steps and filings that relate specifically to these questions.

In its Application, Resolute asked that it be eligible to recover its costs of the Application. An intervenor, the Association of Major Power Consumers in Ontario (AMPCO), also requested cost award eligibility.

In Procedural Order No. 1 issued on October 22, 2019, it was noted that the OEB panel hearing the application will make a determination on cost responsibility and cost award eligibility at a future date, but provision was also 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, and requesting the opportunity to make additional submissions on costs at a later stage of this proceeding.

On December 6, 2019, the OEB issued a Decision on Issues List and Procedural Order No. 2 which, among other things, made provision for the filing of submissions on cost responsibility and cost award eligibility.

Submissions were filed by Resolute, the IESO and OEB staff, and reply submissions were filed by Resolute, the IESO and AMPCO.

## **COST RESPONSIBILITY**

### **Submissions of the Parties**

Resolute, OEB staff and AMPCO submitted that the IESO should be responsible for the costs of this proceeding.

Resolute relied on the cost responsibility decisions made in the three market rule amendment proceedings (MRA Reviews)<sup>1</sup> to date under section 33 of the Act, in which the OEB determined that the IESO was responsible for the costs of the proceeding. Resolute argued that costs should be dealt with in the same way in section 35 cases as in section 33 cases, as both sections are part of the overall legislative scheme with respect to the market rule process. The submissions of OEB staff and AMPCO were to similar effect, and both also noted that responding to challenges to the market rules under either section 33 or section 35 is part of effectively operating the market.

Resolute also argued that the IESO has the ability and the incentive to increase the costs to a customer that is challenging the IESO's market rules, and such incentive will be mitigated if the IESO is made responsible for the cost of the proceeding. Resolute further submitted that, like the Ramp Rate proceeding, this is the first application of its kind and there are legitimate issues to be determined. In reply, the IESO stated that this is not sufficient reason in and of itself to require that the IESO be responsible for the costs of this proceeding.

The IESO argued that applications under section 35 are different from applications under section 33, and that this difference should be recognized in determining cost responsibility. The IESO pointed to differences in the process between market rule reviews and market rule amendment reviews, noting that the section 33 process regarding market rule amendments is a process initiated by the IESO when it provides the OEB with a copy of the amendment for its review. By contrast, an application under section 35 of the Act is neither a step in any other IESO-initiated process nor is it part of a review of a market rule that is already before the OEB, but rather is a "separate,

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<sup>1</sup> EB-2007-0040 (Ramp Rate proceeding), EB-2013-0010/EB-2013-0029 (RES proceeding) and EB-2019-0242 (TCA proceeding)

distinct, and exceptional proceeding initiated by the applicant.”<sup>2</sup> Resolute disagreed with this claim, stating in reply that in both section 33 and section 35 reviews the OEB is exercising its regulatory authority over IESO market rules and the market participant is exercising a statutory right and pursuing the only path to challenge and review an IESO market rule before an independent and impartial tribunal.

The IESO also argued that requiring Resolute, as the applicant, to bear the costs of its Application is consistent with the legislative scheme of section 35 of the Act, and there is nothing in section 35 of the Act that requires or implies that the IESO be responsible for the costs of market rule review applications. The IESO also pointed out that the OEB’s decision to assign cost responsibility to the IESO in the Ramp Rate proceeding expressly stated that its determination in that instance “should not...be understood as tacit recognition that this should necessarily be the case in relation to all future market rule amendment review applications that may come before the Board.”<sup>3</sup>

The IESO further submitted that the OEB should defer its decision with respect to cost responsibility until the end of the proceeding, once it has heard all the evidence and arguments and has observed the conduct of the parties. AMPCO disagreed, stating that cost matters will influence the extent to which it is able to participate. AMPCO also noted that Resolute is a member of AMPCO and that AMPCO cannot ultimately recover costs from its own member.

OEB staff noted that in none of the three MRA Reviews did the OEB consider it appropriate to defer a decision on cost responsibility until the conclusion of the proceeding.

## Findings

The OEB does not see any compelling reason to defer its decision on cost responsibility, and has determined that IESO will be responsible for the costs of this proceeding. The IESO has ongoing responsibility for operating the wholesale markets and it is appropriate that it also be responsible for dealing with issues associated with market operations and the underlying market rules.

For cost responsibility purposes, there is no fundamental difference in the OEB’s view between proceedings to review an existing market rule (section 35 of the Act) and proceedings to review a market rule amendment (section 33 of the Act); both are part of the overall legislative scheme relating to the OEB’s oversight of the market rules.

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<sup>2</sup> IESO submission, filed December 18, 2019 (IESO submission) at page 2 and IESO reply submission, filed January 8, 2020 (IESO reply submission) at paras 4-5

<sup>3</sup> IESO submission, at pages 2-3, referring to the Ramp Rate proceeding, Procedural Order No. 2, page 5

## COST AWARD ELIGIBILITY

### Resolute's Cost Award Eligibility

Resolute argued that, despite the presumption of ineligibility for cost awards for an applicant under section 3.05 of the OEB's *Practice Direction on Cost Awards (Practice Direction)*, it should be eligible for a cost award. Resolute noted that in two of the three MRA Reviews (the Ramp Rate proceeding and the TCA proceeding), the applicant (AMPCO in both cases) was granted cost award eligibility on the basis that the associations represented load-side market participants and as such were "participating in the funding of cost awards through their payments of the IESO's fees in accordance with the market rules."<sup>4</sup> Resolute argued that it is similarly situated in the current proceeding. Resolute noted that in the one case where the OEB did not award costs to the applicants (the RES proceeding), its reason for doing so was that they had withdrawn their application and the OEB found that it had "therefore received no benefit from the Applicants in that regard."<sup>5</sup>

Resolute also pointed out that section 35(4) of the Act requires an applicant to first make use of the provisions of the market rules relating to the review of market rules, which Resolute has done at its own cost. Resolute's reply argued one further point; namely, that failing to approve Resolute's cost award eligibility could have a "chilling effect", discouraging other market participants from submitting legitimate applications under section 35 of the Act. The fact that no other market participant has ever commenced such a review in Resolute's view indicates that there are financial and other barriers to doing so.

In its submission, the IESO referred to and relied on its letter of October 25, 2019, in which it stated that an Applicant, such as Resolute, is presumptively ineligible for a cost award absent "special circumstances" under sections 3.05 and 3.07 of the *Practice Direction*. In the IESO's view, Resolute has not demonstrated any "special circumstances" for departing from this general rule. The IESO further submitted that the OEB should also defer its decision on cost eligibility until the end of the proceeding to

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<sup>4</sup> Resolute submission, filed December 18, 2019 (Resolute submission) at para 6, referring to the TCA proceeding, Decision on Cost Responsibility & Cost Eligibility, at page 5 and the Ramp Rate proceeding, Procedural Order No. 2, at page 5

<sup>5</sup> Resolute submission, at para 7, referring to the RES proceeding. In its Decision and Order on Cost Eligibility and Procedural Order No. 6 in the RES proceeding, the OEB stated (at page 4), "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."

determine whether there are any circumstances warranting departure from the *Practice Direction*.

The IESO and OEB staff both referred to the RES proceeding where the OEB ultimately decided that the applicants were not eligible for an award of costs and where the OEB noted, among other things, that “market participants should generally be expected to bear their regulatory costs associated with the market rule amendment process”.<sup>6</sup>

OEB staff also submitted that the public interest aspect of an application is relevant to a determination of whether the applicant should be eligible for a cost award and, given that the costs borne by the IESO are ultimately paid by ratepayers, it would not be appropriate to impose costs on ratepayers unless there is a public interest engaged by the application.<sup>7</sup> OEB staff concluded that there is merit in deferring a decision on Resolute’s cost award eligibility until the conclusion of the proceeding at which time the OEB will be better positioned to determine whether the public interest has benefitted from the OEB’s review of the market rule provisions at issue in the proceeding.

#### AMPCO’s Cost Award Eligibility

AMPCO stated that its participation in this proceeding was requested and approved on the basis that it is a representative of major electricity loads in the province, i.e. as customers of the regulated market operator. AMPCO relied on section 3.03(a) of the *Practice Direction* which provides that a party in an OEB 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”. In its intervention request, filed with the OEB on October 10, 2019, AMPCO stated:

AMPCO’s interest in this Application is as an Association representing major electricity loads in the province of Ontario. 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.

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<sup>6</sup> IESO submission, at page 3, and OEB staff submission, at page 5, both referring to the RES proceeding, Procedural Order No. 6 at pages 3-4

<sup>7</sup> OEB staff submission at page 5, referring to the RES proceeding, Decision and Order on Cost Eligibility and Procedural Order No.6 at page 4

AMPCO stated that it relies on cost recovery and requires a cost eligibility determination at the outset of a proceeding to determine whether it can participate fully in the proceeding, and that it cannot risk an after-the-fact denial of cost recovery.

In its submission, the IESO referred to and relied on its letter of October 25, 2019, in which it stated that 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 or whether their intervention is deserving of a costs award.

As noted above, the IESO also submitted that the OEB should defer its decision on cost eligibility until the end of the proceeding to determine whether there are any circumstances warranting departure from the *Practice Direction*. AMPCO disagreed, noting that conduct is a matter relevant not to eligibility, but rather to the recovery of approved costs.

## Findings

The OEB finds that there is no compelling reason to depart from the *Practice Direction* by deferring a decision on cost award eligibility until a later stage in the proceeding. The OEB has determined that Resolute and AMPCO are not eligible for cost awards.

As the applicant, Resolute is *prima facie* not eligible for a cost award pursuant to section 3.05 of the *Practice Direction*, absent special circumstances.

The *Practice Direction* also provides, in section 3.04, that in determining cost award eligibility, the OEB may consider, in the case of a commercial entity, whether the entity primarily represents its own commercial interest (other than as a ratepayer), even if the entity may be in the business of providing services that can be said to serve an interest or policy perspective relevant to the OEB's mandate and to the proceeding.

As noted in the RES proceeding, market participants should generally be expected to bear their regulatory costs associated with the market rule amendment process, and the OEB finds that the same should be expected in relation to the costs associated with seeking the review of an existing market rule.

The OEB finds that Resolute is a commercial entity representing its private commercial interest in this proceeding. The OEB does not consider Resolute's participation in this proceeding to be driven by public interest or policy perspective.

With respect to AMPCO's request for cost award eligibility, the OEB finds that the interests that AMPCO proposes to represent in this proceeding are sufficiently represented by Resolute.

**DATED** at Toronto, **February 5, 2020**  
**ONTARIO ENERGY BOARD**

*Original signed by*

Christine E. Long  
Registrar and Board Secretary