

**ONTARIO ENERGY BOARD**

**IN THE MATTER OF** the Ontario Energy Board Act, 1998, S.O. 1998, c.15, Schedule B, as amended;

**AND IN THE MATTER OF** an Application by Alectra Utilities Corporation to the Ontario Energy Board (“OEB”) for an Order or Orders approving or fixing just and reasonable rates and other service charges for the distribution of electricity as of January 1, 2018.

**SUBMISSIONS OF THE CITY OF HAMILTON ON THE ISSUES LIST**

1. These are the submissions of the City of Hamilton (the “City”) with respect to the issues list in EB-2017-0024.
2. The City’s concern with the issues list relates only to the Horizon Rate Zone (“HRZ”).
3. Issue 1.1 of the draft issues list proposed by Ontario Energy Board (“OEB”) staff is:  
  
Is the Year 4 Custom IR Update proposed by the Horizon Utilities Rate Zone complete and in accordance with the EB-2014-0002 settlement agreement and OEB policies and practices and, if not, are any proposed departures adequately justified?
4. The draft of Issue 1.1 does not specify what “OEB policies and practices” are being referred to, which is a fundamental defect in and of itself. The City is left in the position of having to guess what the relevant criteria are upon which the application is to be assessed. That, the City submits, is unfair in that it prevents the City from meaningful participation in the proceeding.

5. The City submits that the draft of Issue 1.1 is flawed, in two principal respects. First, it does not capture all of the issues relevant to the determination of rates in the HRZ. Second, it is based on incorrect assumptions.

6. The incorrect assumptions are:

That the only issues with respect to the HRZ are

- (i) whether Alectra has appropriately updated the items in the settlement agreement that was reached in EB-2014-0002 (the “settlement agreement”); and
- (ii) whether what Alectra proposes is consistent with OEB policies and practices.

7. The larger assumption underlying proposed issue 1.1 is that what is in the settlement agreement, and the content of the OEB’s policies and practices, are determinative of what Alectra is required to prove and what the OEB may consider in this application. The City’s position is that those matters are not, and, as a matter of law cannot be, determinative of the matters that Alectra must prove and the OEB must consider.

8. The problems created by these incorrect assumptions are compounded by, first, not identifying the “policies and practices” and, second, presumably limiting the range of “policies and practices” which are to be considered relevant.

9. The incorrect assumptions give rise, in turn, to a flawed procedure. The procedure adopted by the application, as set out in Procedural Order No. 1, is flawed in that no provision has been made for the filing of any evidence other than that of Alectra. As a result, even as framed, draft Issue 1.1 cannot be properly addressed.

10. The OEB's statutory obligation is to approve just and reasonable rates. While the OEB may be authorized to approve the use of any method or technique in how the rates are calculated, that does not override the obligation to approve just and reasonable rates.

11. The courts have repeatedly stated that the OEB has a broad discretion to determine what constitutes just and reasonable rates. The exercise of that discretion must be based on the facts in each case. It cannot be based on policies or formulae which, among other things, ignore the facts in individual cases. To put the matter another way, the OEB is required to determine whether the application of policies or formulae result in just and reasonable rates based on the facts in each case. Those facts may require policies or formulae to be adjusted or disregarded.

12. It is not just Issue 1.1 which is based on flawed assumptions. The schedule for disposition of the application, as set out in Procedural Order No. 1, circumscribes the range of considerations that the OEB will consider and the nature and extent of the participation by parties. In particular, and as noted above, the schedule makes no allowance for the presentation of evidence by any party other than Alectra. The effect of the schedule is to prevent parties from leading evidence which, as a matter of law, the OEB must consider in fulfilling its statutory obligations.

13. The City acknowledges that the OEB's exercise of discretion takes place in the context of the following matters, among others:

(1) The Decision and Order in EB-2014-0002<sup>1</sup>.

This decision established the formula by which rates were to be determined, for a period of five years, in what is now called the HRZ, and provided that the rates were subject to annual adjustments in a limited number of specified categories only;

---

<sup>1</sup> Ontario Energy Board Decision and Order in EB-2014-0002, Horizon Utilities Corporation, dated December 8, 2014

- (2) The Settlement Agreement that formed the basis, in part, for the Decision and Order in EB-2014-0002<sup>2</sup>.

The settlement agreement established the terms of the formula by which rates were to be set in what is now the HRZ. In addition, it established the items that were to be updated annually during the five-year term. The settlement agreement was entered into by some, though not all, of the parties to that application.

- (3) The Decision and Order in EB-2015-0075<sup>3</sup>

In this application, the then-Horizon proposed to update the load profile used for the street lighting class in its cost allocation model. It did so in order to reflect, among other things, the fact that the City had converted a number of its street lights to LEDs. In its decision the OEB denied Horizon's application to update the load profile on the basis that there needed to be data available for all rate classes. The effect of the OEB's decision was that it was left to the then-Horizon to provide data in order to update the load profiles for all classes.

- (4) The Decision of the Divisional Court in *Hamilton (City) v. the Ontario Energy Board*<sup>4</sup>

The City appealed the decision of the OEB in EB-2015-0075 on the ground that, among other things, the refusal to update the load profile for the street light class, and therefore to give effect to the City's LED conversion program, was contrary to the provincial government's conservation policies. The Divisional Court denied the appeal, holding that the OEB had the discretion to require that the load profile be updated for all rate classes to ensure that the conservation efforts of other rate classes were fairly recognized.

- (5) The letter from the OEB dated June 12, 2015, entitled: "Review of Cost Allocation Policy for Unmetered Loads – Issuance of New Cost Allocation Policy for Street Lighting Rate Class"<sup>5</sup>

The City does not know why the OEB elected, in this letter, to express a "policy" on the updating of load profiles which was not based on any evidence. Even if there had been evidence to support the policy at the time, which the City does not believe there was, it does not mean that the OEB remains either bound by the policy in perpetuity or entitled to refuse to hear, let alone consider, evidence as to why the policy results in rates which are neither just nor reasonable.

---

<sup>2</sup> *Settlement Proposal in EB-2014-0002, filed September 22, 2014*, found at <http://www.rds.oeb.ca/HPECMWebDrawer/Record?q=CaseNumber=EB-2014-0002&sortBy=recRegisteredOn-&pageSize=400>

<sup>3</sup> Ontario Energy Board Decision and Order in EB-2016-0025 and EB-2016-0360, Enersource Hydro Mississauga Inc., Horizon Utilities Corporation, and PowerStream Inc. dated December 8, 2016

<sup>4</sup> *Hamilton (City) v. The Ontario Energy Board*, 2016 ONSC 6447

<sup>5</sup> Letter from Ontario Energy Board dated June 12, 2015, found at [https://www.oeb.ca/oeb/Documents/EB-2012-0383/LTR\\_CostAllocation\\_Streetlighting\\_20150612.pdf](https://www.oeb.ca/oeb/Documents/EB-2012-0383/LTR_CostAllocation_Streetlighting_20150612.pdf)

14. The City was not a party to the Settlement Agreement in EB-2014-0002, yet the Agreement is now to be given the effect of allowing some parties to impose unfair arrangements on another party, and claiming an OEB sanction for doing so.

15. The City submits that there is nothing in the decisions of the OEB, or of the Divisional Court, or in the policy which would preclude Alectra from updating the load profiles of all rate classes in order to, among other things, ensure that the City's LED conversion program is properly accounted for, and that the resulting rates were just and reasonable. It is the City's submission, beyond that, that Alectra is obligated to do so, and that the OEB should insist on their doing so in order that the OEB be able to conclude, as it is obligated to do, that Alectra's proposed rates are just and reasonable.

16. As noted in paragraph 8 above, the draft issues list does not specify what the "policies and practices" Alectra's application is supposed to be in accordance with. They should have been identified. The failure to do so puts the City in the unfair position of having to speculate as to the identity of the policies and practices in making these submissions.

17. Acknowledging that risk, the City is compelled to speculate that the policies and practices referred to may be the following:

- (1) That Alectra is not required to update its load profiles until data is available for the loads of all rate classes. That was the excuse relied on by the OEB in denying the then-Horizon's request, in EB-2015-0075, to update the load profiles for the streetlight class. The effect of that "policy" or "practice" is that it delegates to now Alectra the power to determine when the load profiles will be updated. It was not a "policy" or "practice" based on a determination that the utility was unable to update information on load profiles for all rate classes. It was nothing more than a recognition that the utility had not done so. That cannot be the basis for a policy or practice, let alone one that is binding in subsequent applications;

- (2) That Alectra is not required to update its load profiles until it rebases. Alectra evidently relies on this policy, as evidenced by its response to the City's interrogatory (HRZ-COH-1). As set below, the OEB commits an error if it fetters its discretion by relying on this policy and refusing to hear evidence as to why it should not apply.

18. If these are indeed the policies and practices referred to in the draft issues list, the question as to why they are the only ones being considered. A fundamental policy informing utility rate making has always been the relationship between costs and rates. Ratepayers should pay rates bearing a close relationship to the costs they require a utility to incur. If the City's LED conversion program reduces costs, why is that not fully reflected in the proposed rates for the streetlight class? Why are some "policies and practices" relevant to the consideration of the Alectra application, but not others?

19. At the very least, parties should be given the opportunity to address the question of what "policies and practices" should be considered.

20. The effects of relying on the earlier decisions and policies, with respect to updating the load profile, are these:

- (1) Alectra is left with what amounts to an unfettered discretion as to when the load profile is updated. If, as the City submits, leaving the load profile unchanged results in the City bearing an unfair burden in street light rates, Alectra is left with the unfettered discretion to maintain the unfair treatment of one rate class;
- (2) No rate class is required to, for example, undertake conservation measures that would affect its load profile. That in itself is contrary to provincial policy. It also allows other rate classes to effectively impose an unfair burden on the City. It also has the effect of allowing other rate classes to limit the exercise of the OEB's discretion.

21. A policy of the OEB that Alectra is not required to update its load profile is, in effect, a decision to delegate a part of the discretion to determine just and reasonable rates from the

OEB to Alectra. The OEB gave no guidance as to how that delegated discretion was to be exercised.

22. The impact on the City of a failure to require that the load profiles be updated is material. Were the City permitted to lead evidence it would be that it will be required to pay approximately \$500,000 in additional rates in 2018 alone.

23. The City submits that, as a matter of law, the City cannot fetter its discretion by relying only on its prior decisions or its policies and practices.

24. The general principle, namely that, while a Minister or a regulatory agency may set out general policies, it cannot fetter its discretion by relying solely on those policies, was expressed by the Supreme Court of Canada in the following terms:

The discretion is given by the Statute and the formulation and adoption of general policy guidelines cannot confine it. There is nothing improper or unlawful for the Minister charged with responsibility for the administration of the general scheme provided for in the Act and Regulations to formulate and to state general requirements for the granting of import permits. It will be helpful to applicants for permits to know in general terms what the policy and practice of the Minister will be. To give the guidelines the effect contended for by the appellant would be to elevate ministerial directions to the level of law and fetter the Minister in the exercise of his discretion. *Le Dain J.* dealt with this question at some length and said, at p. 513:

The Minister may validly and properly indicate the kind of considerations by which he will be guided as a general rule in the exercise of his discretion (see *British Oxygen Co. Ltd. v. Minister of Technology* [1971] A.C. (H.L.) 610; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission* [1978] 2 S.C.R. 141, at pp. 169-171), but he cannot fetter his discretion by treating the guidelines as binding upon him and excluding other valid or relevant reasons for the exercise of his discretion (see *Re Hopedale Developments Ltd. and Town of Oakville* [1965] 1 O.R. 259).<sup>6</sup>

---

<sup>6</sup> *Maple Lodge Farms Ltd. v. Canada* [1982] 2 SCR 2 at pp 6-7.

25. The application of this principle is not altered in circumstances where, as here, a regulatory agency has established a formula by which rates are established. In the case of *TransCanada Pipelines Ltd v Canada (National Energy Board)*,<sup>7</sup> the Federal Court of Appeal considered whether the National Energy Board had fettered its discretion by relying on a formula used to establish the cost of equity. The Court in that case found that the National Energy Board had not fettered its discretion, but only because it had considered, and given the appropriate weight to, evidence as to why its policy should be changed.

26. A body, empowered by a statute to exercise certain authority, cannot limit the exercise of that authority by entering into a contract. This principle was expressed, by the House of Lords, as follows:

The appellants have relied strongly on a well established principle of law, that if a person or public body is entrusted by the Legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge of their duties.<sup>8</sup>

27. The City submits that the OEB cannot fetter its discretion by only considering updates in the categories listed in the settlement agreement, regardless of whether the OEB approved the settlement agreement in its decision in EB-2014-0002. The City further submits that the OEB's ability to approve the establishment of rates by any method or technique does not change that.

---

<sup>7</sup> *TransCanada Pipelines Ltd v Canada (National Energy Board)*, 2004 FCA 149.

<sup>8</sup> *Birkdale District Electric Supply Co v Southport (Corporation)*, [1926] AC 355, at p. 364.

28. The City submits that the OEB is not a party to the settlement agreement reached in EB-2014-0002. Even if the OEB were a party to a contract, that contract cannot be used to fetter its discretion in deciding whether to approve Alectra's application.

29. As the case law cited in paragraphs 24 to 26, inclusive, establishes, the OEB must consider the evidence presented to it to decide, among other things, how its earlier decisions and policies might need to be altered in light of that evidence. It follows from that that the OEB cannot prevent parties from leading evidence which may be contrary to those decisions and policies if relevant to Alectra's application. On the contrary, the OEB must hear and consider such evidence.

30. Even if the OEB believes that Alectra has the discretion to refuse to update its load profiles, the OEB has the right, and indeed in the City's view the obligation, to determine the limits on that discretion. Put simply, the OEB has the obligation to determine when that discretion ends.

31. Alectra has suggested that it does not need to update its load profiles until it re-bases in 2027. Alectra has acknowledged, in its interrogatory responses<sup>9</sup>, that its load profiles need to be updated in order to account for, among other things, the City's LED conversion program. Were Alectra not required to update its load profiles until 2027, any unfairness in the rates the City must pay, resulting from the failure to update its load profile, would thus continue until 2027. The City submits that that was not the intention of the OEB when it reached its decision in EB-2016-0025/EB-2016-0360. The City submits that the question of whether Alectra is allowed to defer updating its load profile until 2017 is an issue which should be considered in this application.

---

<sup>9</sup> See HRZ-COH 2, where Alectra states that "The rates for the streetlighting class which Alectra Utilities proposes in this application do not give full effect to the continuing LED conversion program."

32. Determining now when Alectra must update its load profile is not setting rates for any year beyond 2018. It is determining the nature and extent of the discretion apparently delegated to Alectra in earlier decisions.

33. All of the errors addressed in the preceding section are compounded by the “guidance” offered in Procedural Order No. 2. That “guidance” was provided without giving parties the opportunity to make full submissions with respect to the content of the issues list. The effect of the “guidance” is to compound the problems of procedural fairness that have plagued this proceeding from the outset.

34. The City submits that the following issues should be added to the issues list:

- (i) Are the proposed rates for the HRZ just and reasonable?
- (ii) What changes, if any, are required in the way streetlight rates are determined in the HRZ in order that they give full effect to the City’s LED conversion program?
- (iii) Is Alectra permitted to defer updating its load profile for the HRZ until rebasing in 2027?

All of which is respectfully submitted.

November 3, 2017

**WEIRFOULDS LLP**  
Barristers & Solicitors  
4100 - 66 Wellington Street West  
P.O. Box 35, Toronto-Dominion Centre  
Toronto, ON M5K 1B7

**Robert B. Warren** LSUC #17210M  
Tel: 416-947-5075  
Fax: 416-365-1876  
[rwarren@weirfoulds.com](mailto:rwarren@weirfoulds.com)  
Lawyers for the City of Hamilton