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April 27, 2018

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge St., Suite 2700
Toronto, ON, M4P 1E4

via RESS and Courier

Dear Ms. Walli:

Re: Draft Report of the Board: Corporate Governance Guidance for OEB Rate-Regulated Utilities;
Board File No.: EB- 2014-0255

On March 28, 2018, the Ontario Energy Board ("OEB") released for comment its *Draft Report of the Board on Corporate Governance Guidance for OEB Rate-Regulated Utilities* (the "Governance Report" or the "Report"). The Report provides guidance on best practices in utility governance and outlines new mandatory reporting and record-keeping requirements ("RRRs") for rate-regulated utilities.

Alectra Utilities Corporation ("Alectra Utilities" or "Alectra") is pleased to provide comments on these proposals.

A. SUMMARY OF KEY MESSAGES & RECOMMENDATIONS

1. Alectra supports the OEB's proposal to allow utilities to choose whether to adopt the OEB's guidance regarding their governance architecture and functions. The non-compulsory nature of the guidance properly reflects the diverse landscape of the energy sector in Ontario. However, Alectra is concerned with the OEB's intent to propose amendments to the *Affiliate Relationship Code for Electricity Transmitters and Distributors* ("ARC"), which will require the proportion of independent directors to be greater than 50 percent. Currently, one-third independence is the requirement entrenched in the ARC. Further, Alectra does not support mandating the size of the board of directors ("BOD"). Alectra recommends that the OEB allow utilities the flexibility to

determine the appropriate governance architecture and functions that support effective governance.

Further, Alectra submits that the OEB's guidance on the number and composition of the BOD does not necessarily have to focus on the utility level only. The role of the BOD of the holding company must be considered. Alectra respectfully submits that it could be highly inefficient to have two sizable and primarily independent BODs, where the board at the holding company level already meets or even exceeds the expectations of the guidance. Alectra believes that the primary focus should be on overall corporate governance and performance.

2. Alectra shares the view that the industry should strive to implement best practices with respect to director skills, board and committee structures and functions, and supporting documentation and practices. However, Alectra recommends that utilities must be allowed to tailor their practices in a way that meets their specific needs and circumstances. In addition, given the OEB's intent to "*consider utility governance in the context of its ongoing evaluation of utility performance and rate setting*"[1], Alectra believes that more clarification is required regarding the manner in which this evaluation will be conducted.

3. Regarding the new mandatory RRRs, Alectra identifies two specific issues. First, Alectra is concerned with the lack of clarity as to the way the OEB will be utilizing the information that is required by the proposed RRRs to assess a utilities' performance. Alectra believes that in order for the performance assessment to be fair and effective, clear expectations must be communicated ahead of time. Further, some of the proposed RRRs may compromise confidential information. Confidentiality is a much broader term than privacy. Thus, even if the information is not private, pursuant to the definition under *PIPEDA*[2], it still can be confidential. Alectra suggests that the OEB consider the information that it is gathering through RRRs, and appropriately clarify confidential treatment of RRR information, as necessary.

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[1] *The Report*, p.3.

[2] *Personal Information Protection and Electronic Documents Act* (S.C. 2000, c. 5) ("PIPEDA")

B. BACKGROUND

Consultation Overview

By letter dated June 22, 2016, the OEB initiated a consultation to develop guidance on corporate governance for OEB rate-regulated utilities. At the outset of the process, the OEB retained KMPG to carry out research on the state of corporate governance practices in Ontario's energy sector, as well as other jurisdictions and business sectors. KPMG's report, *Review of Corporate Governance of Electricity Distributors,* was issued April 29, 2015. In 2016, the OEB retained Elenchus to build on the work conducted by KPMG and to provide expert assistance in developing the OEB's approach to utility governance.

On March 28, 2018, the OEB released its Governance Report that set out the OEB's guidance on best practices for utility governance, and a description of new mandatory RRRs for utilities. In a letter issued on the same date, the OEB invited all interested stakeholders to provide comments on the Report.

Report Overview

The Governance Report is focused on promoting the objectives inherent in the Renewed Regulatory Framework ("RRF"). Based on the recommendations provided by KPMG and Elenchus, the OEB identified four areas of specific importance, where it saw fit to guide utility governance practices. Further, new mandatory RRRs have been designed to obtain information about utility governance. The identified areas are as follows:

1. Director Independence

The Report recommends that the majority of the members of a BOD be independent of the shareholder and any affiliate. The OEB is of the view that the quality of governance is likely improved if the proportion of independent directors is greater than the current requirement under the ARC. In addition, the OEB recommends that the BOD be comprised of no less than five directors and that any shareholder agreements or directions that limit the BOD from exercising independent judgment should be avoided. Furthermore, the OEB is considering amending the ARC to reflect governance best practice in this regard.

2. Director Skills

The Report suggests that a BOD, as a whole, must possess the complete range of skills necessary to execute its governance function and discharge its responsibilities effectively. A matrix approach should be used to compile an inventory of director skills.

3. Board and Committee Structures and Functions

The OEB is of the view that BODs should ensure that they are structured to provide oversight of key functions of the utility business. Committees of the BOD are to be an effective means of achieving appropriate oversight of key functions. Committee members should possess the requisite skills to effectively discharge their responsibilities.

4. Supporting Documentation and Practices

The Report recommends that utility BODs have documented written mandates and any committees of the BOD should have a written charter. BODs should have a written code of conduct and should provide orientation for new appointees and continuing education and/or other methods of broadening the skills of all directors.

C. COMMENTS - GUIDANCE ON BEST PRACTICES IN UTILITY GOVERNANCE

i. Director Independence

Alectra shares the OEB's vision "*that good governance is a significant contributor to excellence in utility performance and an important indicator of a utility's ability to achieve expected outcomes valued by customers*."[3] Alectra appreciates the spirit of flexibility and independence

[3] *The Report*, p. 3.

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expressed in the Governance Report, stating that "*it will remain the choice of each utility whether to adopt the OEB's guidance in its governance architecture and functions*."[4]

As had been stated by KMPG in its Final Report – Corporate Governance of Electricity Distributors (the "KMPG Report"), which was adopted by the OEB, *"[a] focus purely on the structure or artifacts of corporate governance may not help the OEB further mature its regulatory oversight of the LDCs.*"[5] Moreover, the OEB's own expectation of its guidance was "*to be based on principles rather than being prescriptive*."[6]

Both KMPG and Elenchus emphasized the primacy of form over substance in assessing the quality of corporate governance. As stated in Elenchus Report, KMPG had noted that:

> "*Board performance cannot be judged by board composition or independence alone. Performance is related to decision-making effectiveness, strategy, risk-taking behaviour, management practices and unforeseen events*."[7]

Elenchus expressed a similar view, recommending that:

> "*Although the OEB guidance should reflect best practice, it should not be overly detailed or prescriptive as to the precise practices to be used. This will allow utilities the flexibility to develop their corporate governance practices over time and in a way that best serves their needs*."[8]

In Alectra's view, the existing regulatory requirements provide adequate safeguards to ensure that regulated utilities are governed in a proper and efficient manner. The ARC requires at least one-third of a utility's BOD to be independent from any affiliate[9]. In addition, the OEB Act imposes on the utility's officers and directors the obligation to "[*e]xercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances*."[10]

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[4] *Ibid*, p.4.
[5] *KMPG Report*, p.6.
[6] *Corporate Governance for Regulated Natural Gas and Electricity Utilities – Final Report Prepared by Elenchus ("Elenchus Report").*
[7] *Ibid*, p. 47.
[8] *Ibid*, p. 50.
[9] *ARC*, s. 2.1.2.
[10] *Ontario Energy Board Act, 1998*, s. 125.2.

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Therefore, Alectra identifies that should the OEB consider amending the current ARC requirements, to increase the proportion of independent directors[11], it would impose an unnecessary regulatory burden on the sector that would not to be consistent with the declared non-prescriptive nature of the guidance. In addition, the increased proportion of independent board members does not guarantee the increased quality of corporate governance. Directors, independent or not, owe the duty of care to the corporation and shall "*act honestly and in good faith with a view to the best interests of the corporation*."[12]

Alectra observes that the increased number of the board members might not fit the diverse landscape of the energy sector in Ontario. Whereas the minimum of five directors may be appropriate for some utilities, others may find that their business needs and corporate structures do not require a BOD of this size. Moreover, incremental costs associated with the increased number of directors is a relevant consideration for all utilities, in light of the expectation for ongoing cost efficiency. Alectra respectfully submits that the increased number of board members should remain as guidance only and should not be imposed as a new regulatory requirement.

In addition, Alectra is of the opinion that the role of a BOD of a holding company cannot be underestimated. The OEB's focus on the governance at the utility level stems from a concern that the board of the holding company may not properly balance the interests of the utility with the interests of other affiliates. Alectra does not share this view or experience. Generally at the holding company level, the concern is for the wellbeing of the overall corporation rather than for a single entity. Moreover, since the utility, is usually the most significant entity within the corporate family, directors at the holding company level would be unlikely to make decisions to the utility's detriment.

[11] *The Report*, p.9.
[12] *Business Corporations Act, R.S.O. 1990, c. B.16*, s. 134 (1)(a).

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A sufficiently independent and knowledgeable BOD would realize that since the utility is the cornerstone of the corporate structure, it is incumbent to ensure the continued success of that entity. In addition, the aforementioned concern is more of an issue where there is a single majority shareholder who is appointing most or all of the directors, but not where there are multiple shareholders with diverse concerns and goals. Alectra respectfully submits that a focus on governance at the utility level only, while overlooking the importance of the holding company's board, is without merit.

ii. Director Skills

Alectra shares the OEB's view that the BOD, as a whole, must possess a wide range of skills in order to effectively discharge their duties.

iii. Board and Committee Structures and Functions

Alectra supports the OEB's opinion that one BOD architecture cannot meet the needs of different utilities. Therefore, in the absence of a common denominator, Alectra does not see the value in providing annual reporting regarding board and committee structures and functions. Such can be filed for information purposes at best but are hardly a comparator for utility performance assessment. Alectra's view is that the effectiveness of the BOD should be assessed based on the utility overall performance and not on details such as names, functions or composition of the board committees.

iv. Supporting Documentation and Practices

Alectra appreciates the importance of maintaining appropriate documentation concerning governance practices. However, Alectra is of the view that the extent of the documentation has to be determined by utilities, based on their internal needs. The requirement to file information related to supporting documentation and practices, as part of the new RRRs, will not adequately reflect diverse practices that utilities may adopt to meet their specific needs.

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D. COMMENTS – NEW MANDATORY GOVERNANCE REPORTING AND RECORD-KEEPING REQUIREMENTS

i. Clarity

Alectra identifies that the required information will affect the evaluation of utility performance. This will defeat the declared non-compulsory nature of the guidance. In other words, if the utilities' existing governance practices will be weighed against the recommended guidance, and any deviation will be to the utility's detriment, the guidance will, essentially, become mandatory. Therefore, Alectra believes that more clarity is required as to the way the OEB will be utilizing the proposed RRRs to assess the utility's performance.

ii. Confidentiality

Alectra is concerned that some of the proposed RRRs may involve the filing of confidential information, or require providing information that is not necessarily relevant.

As an example, in the section related to director independence, the OEB is proposing that utilities report *"[w]hether a utility director is a member of* ***any other*** *board and whether there are any board interlocks"*[13] [emphasis added]. Alectra submits that this requirement seems to be overly broad.

In addition, the requirement to report "[a] brief description of any shareholder agreement or direction and the aspect of the utility business to which it pertains"[14] may entail disclosure of confidential competitive information that is beyond the scope of the OEB.

Alectra believes that the OEB should review these potential requirements prior to imposing them, given the aforementioned confidentiality and competition concerns.

[13] *The Report*, p. 14.
[14] *Ibid.*

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E. CONCLUSION

Alectra Utilities appreciates the opportunity to provide comment on best practices guidance in utility governance and the new mandatory reporting and record-keeping requirements for rate-regulated utilities.

Alectra recognizes the importance of effective corporate governance processes and is supportive of the spirit of flexibility and independence expressed in the Governance Report. Alectra Utilities remains committed to collaborating with the OEB and all stakeholders to further advance the quality of utility corporate governance. Alectra looks forward to future engagement on this important initiative.

If you have any questions with respect to the above, please contact the undersigned.

Sincerely,

[Original signed by]

Indy J. Butany-DeSouza, MBA
Vice President, Regulatory Affairs
Alectra Utilities Corporation