

July 19, 2019

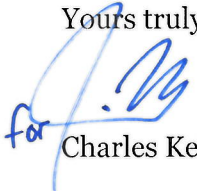
Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
PO Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Dear Ms. Walli:

**Re: Alectra Utilities Corporation (“Alectra Utilities”)
Incentive Regulation Mechanism (“IRM”) Application for 2020 Electricity
Distribution Rates and Charges (EB-2019-0018)
Submissions on Preliminary Issues re Capitalization Policy**

We are legal counsel to Alectra Utilities in connection with the above-referenced application. Alectra Utilities filed its IRM Application on May 28, 2019. On July 9, 2019 the Ontario Energy Board (OEB) issued Procedural Order No. 1, which among other things requires Alectra Utilities to file written submissions in relation to certain preliminary questions regarding its capitalization policy-related requests. Please find enclosed Alectra Utilities’ submissions on this aspect. The submission has been filed on RESS and served on all parties in the proceeding.

Yours truly,


for Charles Keizer

cc: Indy Butany-DeSouza, Alectra Utilities
All Parties

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Act, 1998*, being Schedule B to the *Energy Competition Act, 1998*, S.O. 1998, c.15;

AND IN THE MATTER OF an Application by Alectra Utilities Corporation to the Ontario Energy Board 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, 2020.

**SUBMISSIONS OF ALECTRA UTILITIES
ON PRELIMINARY QUESTIONS REGARDING CAPITALIZATION POLICY**

July 19, 2019

OVERVIEW

1. Alectra Utilities Corporation (“Alectra Utilities”) filed an incentive rate-setting mechanism (“IRM”) application with the Ontario Energy Board (the “OEB” or the “Board”) on May 28, 2019, seeking approval for changes to its electricity distribution rates to be effective January 1, 2020.¹ In its application, Alectra Utilities has requested that the capitalization-related deferral accounts for the Enersource, Brampton, and Horizon rate zones be closed without clearing their balances, or that their balances be disposed to Alectra Utilities.
2. In Procedural Order No. 1, the Board expressed its preliminary view that these requests constitute a motion to vary pursuant to Rule 40.02 of the OEB’s *Rules of Practice and Procedure*.² However, before making a final determination on the nature of the request, the OEB has asked for

¹ EB-2019-0018, Alectra Utilities, IRM Application for 2020 Electricity Distribution Rates and Charges, May 28, 2019.

² It is not clear as to why the OEB has referenced Rule 40.02, which relates to the requirement for a person who was not a party to a proceeding to first obtain leave to bring a motion under Rule 40.01. It is Alectra Utilities’ understanding that the correct reference is to Rule 40.01, which provides that any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend, or cancel the order or decision. Rule 42.01 in turn specifies that the grounds for such a motion must raise a question as to the correctness of the order or decision.

submissions on “[whether] Alectra Utilities’ request to reverse the outcome of the OEB’s decision to create the capitalization related deferral accounts for the Enersource, Brampton and Horizon rate zones, constitutes a motion to vary pursuant to Rule 40.02.”³ As Alectra Utilities’ requests do not seek to vary a “final order or decision” within the meaning of Rule 40.01, it is Alectra Utilities’ submission that they therefore cannot constitute a motion to vary.

3. The deferral accounts were established pursuant to a Partial Accounting Order issued December 20, 2017 in EB-2017-0024. The Accounting Order was considered by the Board to be “partial” because it did not include any details on how the accounts would ultimately be disposed. Moreover, the accounts were established with no end dates and were to remain open until the OEB ordered otherwise.⁴ The Partial Accounting Order was therefore interim in nature. It expressly states that: the Partial Accounting Order would need to be modified by further order of the Board;⁵ it did not decide any of the final issues relating to the deferral accounts;⁶ and it was issued as a temporary measure without sufficient evidence, pending consideration of “all options” for disposition.⁷ These are the hallmarks of an interim rather than final order.

4. Deferral accounts themselves are interim by nature, representing a record of “encumbered revenues” subject always to a final disposition order. The Supreme Court of Canada has ruled on this very issue in *Bell Canada v. Bell Aliant Regional Communications*.⁸

5. Even if it is assumed that the Partial Accounting Order is final rather than interim, the only aspects of the Order that might be considered final are the orders creating the accounts and requiring Alectra Utilities to record certain amounts in the accounts. The question of how the account balances are to be disposed was not and has never been decided by the Board—let alone

³ EB-2019-0018, Procedural Order No. 1, July 9, 2019, p. 6.

⁴ EB-2017-0024, Decision and Partial Accounting Order, December 20, 2017, p. 2.

⁵ EB-2017-0024, Decision and Partial Accounting Order, December 20, 2017, p. 2: “The accounts will remain open until such time as the OEB orders otherwise.”

⁶ EB-2017-0024, Decision and Partial Accounting Order, December 20, 2017, p. 2: “This Accounting Order is partial as it does not include details on how the accounts will be disposed.”

⁷ EB-2017-0024, Decision and Partial Accounting Order, December 20, 2017, p. 2: “Submissions on the options for disposition should be part of final arguments for this proceeding... In order to leave all options open for the disposition of the new accounts, the OEB will not establish an end date for these accounts.” See also EB-2017-0024, Decision on Issues List and Interim Rates and Procedural Order No. 3, November 17, 2017, p. 3: “The magnitude of [the change in capitalization policy] is unknown. Furthermore, the exact date and specific details of the transition to the harmonized capitalization policy are not clear in the evidence.”

⁸ *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40 [“*Bell Aliant*”].

on a “final” basis—so it cannot be the subject of a motion to vary under Rule 40.01. On the contrary, the Board has expressly deferred this issue to the present rate 2020 Electricity Distribution Rate application “to facilitate consideration of a range of options.”⁹ Disposition of the balances recorded in the accounts could include, and Alectra Utilities proposes that it involve, disposing of the amounts to Alectra Utilities.

6. As Alectra Utilities is not seeking to vary a “final order or decision” as required to trigger the application of Rule 40.01, Alectra Utilities submits that it is not necessary to address the issue of whether the threshold test for a motion to vary has been met.

BACKGROUND

A. Alectra Utilities conforms its capitalization policy

7. On December 8, 2016, the Board approved the application of Enersource Hydro Mississauga Inc., Horizon Utilities Corporation, and PowerStream Inc. to amalgamate to form Alectra Utilities, and to purchase and amalgamate with Hydro One Brampton Networks Inc. In the MAADs application, the predecessor applicants selected a 10-year rebasing deferral period.¹⁰

8. After the consolidation, effective February 1, 2017, Alectra Utilities was required under International Financial Reporting Standards (“IFRS”) to implement a new capitalization policy to conform capitalization policies for the Alectra Utilities predecessor rate zones to that of the identified acquirer, the former PowerStream Inc.

B. The Board establishes the deferral accounts

9. On November 17, 2017, in Alectra Utilities’ application for 2018 rates, the Board issued Procedural Order No. 3, in which the Board added the following issue to the final issues list: “What is the appropriate way to account for the change in capitalization policy resulting from the merger for Alectra Utilities and its predecessor companies?”¹¹

⁹ EB-2018-0016, Decision on Confidentiality and Procedural Order No. 3, November 8, 2018, p. 2.

¹⁰ EB-2016-0025/EB-2016-0360, MAADs Decision, December 8, 2016.

¹¹ EB-2017-0024, Decision on Issues List and Interim Rates and Procedural Order No. 3, November 17, 2017, p. 3.

10. The Board determined that the magnitude of this change was unknown, and that the exact date and specific details of the transition to the harmonized capitalization policy were not clear in the evidence. As a result, the Board required that “*any impacts in 2017 [be] tracked for all rate zones to leave all options open for how the OEB may treat this capitalization change.*” The Board therefore found it necessary to “*establish three new accounts to track the change in capitalization*” for the Horizon, Enersource, and Brampton rate zones.¹²

11. However, the OEB stated that the “*nature of any disposition of these accounts is not being determined at this time,*” and deferred submissions on this issue to final arguments for the 2018 rate application.¹³

12. The Board established the three deferral accounts at issue on December 20, 2017, by way of a Decision and Partial Accounting Order. The Partial Accounting Order provided that the accounts would “remain open until the OEB orders otherwise.”¹⁴ The purpose of the accounts was to “record the difference between the revenue requirement calculated using the pre-merger capitalization policies and the revenue requirement calculated with the new capitalization policy.”¹⁵

13. The Board stated that the “Accounting Order is partial as it does not include details on how the accounts will be disposed.”¹⁶ The Board again expressed its desire “to leave all options open for the disposition of the new accounts,” and deferred submissions on this issue to final arguments for the 2018 rate application.¹⁷

C. The Board defers consideration of disposition options to the 2019 rate application

14. In its Decision and Order on Alectra Utilities’ rate application for 2018, the Board considered Alectra Utilities’ submission that “the OEB should order the closure of the capitalization related deferral accounts and the reversal of any amounts recorded in those

¹² EB-2017-0024, Decision on Issues List and Interim Rates and Procedural Order No. 3, November 17, 2017, p. 3.

¹³ EB-2017-0024, Decision on Issues List and Interim Rates and Procedural Order No. 3, November 17, 2017, p. 4.

¹⁴ EB-2017-0024, Decision and Partial Accounting Order, December 20, 2017, p. 4.

¹⁵ EB-2017-0024, Decision and Partial Accounting Order, December 20, 2017, p. 1.

¹⁶ EB-2017-0024, Decision and Partial Accounting Order, December 20, 2017, pp. 2, 4.

¹⁷ EB-2017-0024, Decision and Partial Accounting Order, December 20, 2017, p 2.

accounts.”¹⁸ However, the Board found it appropriate to retain the balances recorded in the deferral accounts for the time being “to enable ratemaking options.”¹⁹ In making this finding, the Board referenced its treatment of IFRS-related changes to capitalization policies and found that it was appropriate to apply a consistent approach in respect of Alectra Utilities’ mandatory capitalization policy changes.²⁰

15. The Board further deferred the question of how to ultimately dispose of the balances recorded in the accounts. In doing so, the Board suggested, but made no final determinations on, the possibility of disposing of the accounts during the deferred rebasing period. Specifically, the OEB stated that “while amounts for Alectra Utilities could be held in the accounts approved by the OEB until the next rebasing, and used as an offset to rate base, the deferred rebasing period is 10 years. This is an unreasonably long time to wait for disposition of the accounts.”²¹ The Board then directed Alectra Utilities to “file a proposal for disposition of the deferral accounts in its application for 2019 rates for the Brampton and Enersource [rate zones].”²²

D. The Board defers consideration of disposition options to the current application

16. As directed, Alectra Utilities filed a disposition proposal within its 2019 rate application on June 7, 2018.²³ Alectra Utilities’ proposal involved clearing the deferral account balances on an annual basis. The School Energy Coalition also made proposals for disposition, and put forth a different approach to calculating balances.²⁴

17. On November 8, 2018, the Board considered whether to address the issue of how to dispose of the account balances, but it decided “*to defer consideration of this issue and direct Alectra Utilities to file a comparison of different options and its preferred option in its 2020 rate application.*” The Board adopted this approach to “allow Alectra Utilities sufficient time to consider different options and provide supporting evidence.” The only conditions placed on Alectra Utilities’ submissions were that they must “*take into consideration options proposed in*

¹⁸ EB-2017-0024, Decision and Order (Revised), April 6, 2018, p. 77.

¹⁹ EB-2017-0024, Decision and Order (Revised), April 6, 2018, p. 81.

²⁰ EB-2017-0024, Decision and Order (Revised), April 6, 2018, p. 81.

²¹ EB-2017-0024, Decision and Order (Revised), April 6, 2018, p. 82.

²² EB-2017-0024, Decision and Order (Revised), April 6, 2018, p. 82.

²³ EB-2018-0016, Alectra Utilities, Annual Filing under Board-Approved CIR Plan and IRM, June 7, 2018.

²⁴ EB-2018-0016, Decision on Confidentiality and Procedural Order No. 3, November 8, 2018, p. 2.

*this proceeding, including options involving adjustments to rate base,” and include “a forecast to the end of the deferred rebasing period for all options provided in the 2020 rate application for the Enersource, Brampton and Horizon rate zones.”*²⁵

18. Alectra provided the requested forecast and comparison of options on May 28, 2019, in its filing for the current application.²⁶ Alectra Utilities’ preferred option is that the Board “*no longer require the use of deferral accounts or the future disposition of recorded balances.*”²⁷

ARGUMENT

19. In substance, Alectra Utilities is requesting that the deferral accounts be closed without clearing the balances, or that the balances recorded in the accounts be disposed to Alectra Utilities. This request does not constitute a motion to vary because it does not aim to vary a “final order or decision” as required by Rule 40.01 of the *Rules of Practice and Procedure*.

A. The Partial Accounting Order is not final

20. Only a “final order or decision” may be the subject of a motion to vary under the OEB Rules.²⁸ By definition, orders or decisions that are not final—*i.e.*, those that are interim—remain subject to further review and modification in the ordinary course, so need not be “re-opened” by way of a motion to vary.

21. In order to determine whether Alectra Utilities’ request constitutes a motion to vary, it is first necessary to define the order or decision that Alectra Utilities is supposedly seeking to vary. The Partial Accounting Order establishes the deferral accounts (including the obligation to record amounts in the accounts) and specifies the length of time for which they are to remain open. Thus, to the extent that Alectra Utilities’ request involves closing the deferral accounts or altering their duration, the only order or decision it could be seeking to vary is the Partial Accounting Order.

²⁵ EB-2018-0016, Decision on Confidentiality and Procedural Order No. 3, November 8, 2018, pp. 2-3.

²⁶ EB-2019-0018, Alectra Utilities, IRM Application for 2020 Electricity Distribution Rates and Charges, May 28, 2019, Exhibit 2, Tab 1, Schedule 5, pp. 2-9.

²⁷ EB-2019-0018, Alectra Utilities, IRM Application for 2020 Electricity Distribution Rates and Charges, May 28, 2019, Exhibit 2, Tab 1, Schedule 5, p. 2.

²⁸ *OEB Rules of Practice and Procedure*, r. 40.02 [emphasis added].

22. For the reasons that follow, the Partial Accounting Order is not “final” but interim in nature. Therefore, it does not require, and cannot be the subject of, a motion to vary under Rule 40.01. Instead, the Board is entitled to modify or supplement the Order in the ordinary course of proceedings.

The Partial Accounting Order has all the characteristics of an interim order

23. The Supreme Court of Canada has stressed the “importance of distinguishing final orders from interim orders” in the ratemaking context. This is because the characterization of an order as final or interim determines the ease with which any prejudicial effects of the order may be remedied.²⁹

24. In order to distinguish between final and interim orders, the Supreme Court has laid out the following “essential characteristics” of an interim order:

- (a) it “may be reviewed and modified in a retrospective manner by a final decision,” often indicating this by expressly stating that it is subject to further order or direction;
- (b) it “does not make any decision on the merits of an issue to be settled in a final decision”; and
- (c) its “purpose is to provide temporary relief against the deleterious effects of the duration of the proceedings ... on the basis of evidence which would often be insufficient for the purposes of the final decision.”³⁰

25. The Partial Accounting Order meets all the characteristics of an interim order. Thus, any request relating to the subject matter of the Order—namely, whether the accounts should remain open, for how long, or how the account balances should be disposed—does not relate to a “final” order or decision.

²⁹ *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722 at para. 45 [“*Bell Canada (1989)*”].

³⁰ *Bell Canada (1989)*, [1989] 1 S.C.R. 1722 at paras. 44, 47.

26. First, it is clear that the Partial Accounting Order may be reviewed and modified by a final decision. The Order expressly states that its effect lasts only “until the OEB orders otherwise.”³¹ When such words are present, they “show plainly that [the order] is not a final disposition of the rights of any of the parties in controversy.”³² The Order is open-ended in this way to “leave all options open for the disposition of the new accounts,” in contemplation of a future order or decision “at the time [the Board] is considering the approach to disposition of the new accounts.”³³ The Board is still considering this issue, and indeed expressly deferred it to the current rate application.³⁴

27. Second, the Partial Accounting Order does not make any decision on the merits of the deferral accounts issue—*e.g.*, how long they will remain open, to whom they will be disposed, in what amounts, etc. The Order is simply an “accounting order,” the sole purpose of which is “to record the changes to the revenue requirement” for each rate zone pending determination of the substantive issue of disposition.³⁵ This substantive issue was deferred to the present proceeding. Further, the Board “direct[ed] Alectra Utilities to file a comparison of different options and its preferred option in its 2020 rate application.”³⁶ Alectra Utilities has followed the OEB’s direction,³⁷ indicating that its preferred option is not to require the use of the deferral accounts or future dispositions to other entities.³⁸ It cannot be that complying with a direction from the Board to make submissions on an unresolved issue—the disposition of the accounts—constitutes an attempt to vary a “final” order or decision.

28. Third, the purpose of the Partial Accounting Order was to provide temporary relief against the potentially deleterious effects of the duration of the proceedings. The Board established the deferral accounts because, “[b]ased on the dates within this procedural order, a decision for this proceeding will not be issued in 2017.” It was therefore necessary to “track the change in

³¹ EB-2017-0024, Decision and Partial Accounting Order, December 20, 2017, p. 4.

³² *Wood v. Wood*, [1946] 2 D.L.R. 54 at para. 1 (Ont. C.A.).

³³ EB-2017-0024, Decision and Partial Accounting Order, December 20, 2017, pp. 2-3.

³⁴ EB-2018-0016, Decision on Confidentiality and Procedural Order No. 3, November 8, 2018, p. 2.

³⁵ EB-2017-0024, Decision and Partial Accounting Order, December 20, 2017, p. 4.

³⁶ EB-2018-0016, Decision on Confidentiality and Procedural Order No. 3, November 8, 2018, p. 2.

³⁷ EB-2019-0018, Alectra Utilities, IRM Application for 2020 Electricity Distribution Rates and Charges, May 28, 2019, Exhibit 2, Tab 1, Schedule 5, pp. 2-9.

³⁸ EB-2019-0018, Alectra Utilities, IRM Application for 2020 Electricity Distribution Rates and Charges, May 28, 2019, Exhibit 2, Tab 1, Schedule 5, p. 2.

capitalization” in the meantime, “to ensure that all options remain open and available for consideration.”³⁹ Effectively, the Partial Accounting Order was made so as to preserve the Board’s ability to deal with the recorded amounts from the effective dates for the accounts, subject to determining the substantive issue of disposition. As with most interim orders, this relief was provided expeditiously without all the necessary evidence,⁴⁰ on the express understanding that further submissions and evidence would be provided, including in the present proceeding, to assist the OEB in reaching its final decision.⁴¹

29. For the foregoing reasons, the Board never issued a “final order or decision” within the meaning of Rule 40.01 as to whether and for how long the deferral accounts are to remain open, or how the amounts recorded in the accounts would be disposed of. Thus, these issues cannot be the subject of a motion to vary. To the extent Alectra Utilities’ request involves these issues, it is in the context of the direction from the OEB.

Deferral accounts are interim by nature

30. When deferral accounts are established, they do not determine the issue of rate recovery or guarantee recovery to a particular group.⁴² That is not their purpose. Instead, deferral accounts merely represent records of “encumbered revenues,”⁴³ in the sense of being “encumbered by the possibility of the [regulator’s] future directions” on how to dispose of the balances.⁴⁴ In other words, deferral accounts are an interim measure pending the regulator’s subsequent, final decision on how to dispose of the account balances.⁴⁵

³⁹ EB-2017-0024, Decision on Issues List and Interim Rates and Procedural Order No. 3, November 17, 2017, pp. 3-4.

⁴⁰ In deciding to establish the deferral accounts, the Board noted that “[t]here was limited information in the application on the change to a common capitalization policy for Alectra Utilities... The magnitude of these changes is unknown. Furthermore, the exact date and specific details of the transition to the harmonized capitalization policy are not clear in the evidence”: EB-2017-0024, Decision on Issues List and Interim Rates and Procedural Order No. 3, November 17, 2017, p. 3.

⁴¹ EB-2017-0024, Decision on Issues List and Interim Rates and Procedural Order No. 3, November 17, 2017, p. 4; EB-2017-0024, Decision and Partial Accounting Order, December 20, 2017, p. 2; EB-2017-0024, Decision and Order (Revised), April 6, 2018, p. 79; EB-2018-0016, Decision on Confidentiality and Procedural Order No. 3, November 8, 2018, p. 2.

⁴² Consistent with this, it is noted that when the Board grants a request for a deferral or variance account it typically reminds applicants that establishing the account provides no guarantee of recovery of the recorded amounts.

⁴³ *Bell Aliant*, 2009 SCC 40, paras. 61, 63.

⁴⁴ *Bell Aliant*, 2009 SCC 40, headnote.

⁴⁵ *Bell Aliant*, 2009 SCC 40 at paras. 22, 37, 64.

31. The Supreme Court of Canada addressed the interim nature of deferral accounts in *Bell Aliant*, which dealt with circumstances directly applicable to this proceeding. The case concerned a landmark rate-setting decision by the Canadian Radio-television and Telecommunications Commission (the “CRTC”). As part of its decision, the CRTC ordered deferral accounts to be held by each affected telecommunications carrier, but it “did not specifically direct how the deferral account funds were to be used, leaving the issue subject to further submissions.”⁴⁶ The CRTC subsequently issued a Deferral Accounts Decision that “directed how the funds in the deferral accounts were to be used,” including ordering the disposition of one-time customer credits from the accounts.⁴⁷

32. The key issue in the case was whether the decision establishing the deferral accounts was “final,” such that the Deferral Accounts Decision could be considered an impermissible retroactive or retrospective variation of a final rate order.⁴⁸

33. The Court ruled that the decision establishing the deferral accounts was not final; therefore, the CRTC’s later decision on how to dispose of the deferral account balances “was not a variation of a final rate order.” Rather, it “was the culmination of a process undertaken in the Price Caps Decision.”⁴⁹ Put differently, it is the “disposition which represents the final step in a process set in motion by the [decision establishing the deferral accounts].”⁵⁰ Thus, until the Board has decided how the balances in the deferral accounts will be disposed, it cannot be said that Alectra Utilities is seeking to vary a “final” order or decision, as required to trigger the application of Rule 40.01.

B. No order or decision has been made on how to dispose of the account balances

34. Alectra Utilities’ request that the account balances be disposed to Alectra Utilities can only constitute a motion to vary if a “final order or decision” has been made on how to dispose of the account balances. No such order or decision has been made, let alone a “final” one. Rather, the Board expressly decided “to defer consideration of this issue and direct Alectra Utilities to file a

⁴⁶ *Bell Aliant*, 2009 SCC 40 at paras. 4, 8.

⁴⁷ *Bell Aliant*, 2009 SCC 40 at paras. 12, 60.

⁴⁸ *Bell Aliant*, 2009 SCC 40 at paras. 24-25, 58, 60, 63.

⁴⁹ *Bell Aliant*, 2009 SCC 40 at para. 64.

⁵⁰ *Bell Aliant*, 2009 SCC 40 at para. 37 [emphasis added].

comparison of different options and its preferred option in [the current] 2020 rate application.” This was done in order “to facilitate consideration of a range of options.”⁵¹

35. The Board’s express decision to defer the issue of disposition to the current proceeding demonstrates that it has not yet made a “final” order or decision on how to dispose of the account balances. In fact, the Board has not previously made any order or decision on how to dispose the account balances.

Procedural Order No. 3 did not decide how to dispose of the account balances

36. In Procedural Order No. 3 in Alectra Utilities’ application for 2019 rates, the Board declined Alectra Utilities’ request to clear the deferral accounts on an annual basis. However, it did so only “in this 2019 rate proceeding so that additional options can be considered in the 2020 rate proceeding.”⁵²

37. Declining a request to dispose of the accounts in a particular manner, for the purposes of a particular proceeding, does not decide the question at issue, which is “how the accounts will be disposed.”⁵³ In order to decide this question, it would be necessary to decide to whom the account balances will be disposed, in what amounts, and on what date. All of these issues remain unresolved. In fact, the OEB expressly directed Alectra Utilities to make submissions on these issues in the present proceeding.⁵⁴

The Board’s 2018 rates decision did not decide how to dispose of the account balances

38. In its decision on Alectra Utilities’ application for 2018 rates, the Board contemplated an outcome that involved “determining amounts that should be credited to customers.” But it did not actually decide whether to credit any amounts to customers, or to anyone. Instead, the Board ordered Alectra Utilities to “file a proposal for disposition of the deferral accounts in its application for 2019 rates for the Brampton and Enersource RZs.”⁵⁵

⁵¹ EB-2018-0016, Decision on Confidentiality and Procedural Order No. 3, November 8, 2018, p. 2.

⁵² EB-2018-0016, Decision on Confidentiality and Procedural Order No. 3, November 8, 2018, p. 2.

⁵³ EB-2017-0024, Decision and Partial Accounting Order, December 20, 2017, p. 2.

⁵⁴ EB-2018-0016, Decision on Confidentiality and Procedural Order No. 3, November 8, 2018, p. 2.

⁵⁵ EB-2017-0024, Decision and Order (Revised), April 6, 2018, p. 82.

39. This is in keeping with the Supreme Court’s direction in *Bell Aliant*. The Court explained that in certain cases, it may be “understood that the disposition of the deferral account funds might include an eventual credit to subscribers once the [regulator has] determined the appropriate allocation.”⁵⁶ But until that determination has been made, the funds in the deferral accounts are merely “encumbered,” in that they are “subject to the possibility of disbursement to customers.”⁵⁷

40. One option for disposition—which Alectra Utilities proposes in this proceeding—is that the balances be disposed to Alectra Utilities. There is nothing preventing the Board from doing this. Provided the Board acts reasonably and is guided by its statutory objectives,⁵⁸ it has “considerable scope in establishing and approving the use to be made of deferral accounts.”⁵⁹ Further, the legal definition of a “disposition” encompasses any payment “required by law,”⁶⁰ including a payment required by a valid OEB order.⁶¹

CONCLUSION

41. Only a “final order or decision” can be the subject of a motion to vary under Rule 40.01. The order establishing the deferral accounts and requiring them to remain open is interim rather than “final,” as are the deferral accounts themselves. Further, no “order or decision” has been made as to how the accounts will be disposed. Thus, Alectra Utilities’ request to close the accounts or dispose of their balances to Alectra Utilities does not fall within the scope of Rule 40.01, and cannot constitute a motion to vary.

RELIEF REQUESTED

42. Alectra Utilities respectfully asks the Board to find that Alectra Utilities’ request in respect of the capitalization-related deferral accounts for the Enersource, Brampton, and Horizon rate zones does not constitute a motion to vary under Rule 40.01 of the *Rules of Practice and Procedure*.

⁵⁶ *Bell Aliant*, 2009 SCC 40 at para. 65 [emphasis added].

⁵⁷ *Bell Aliant*, 2009 SCC 40 at para. 25 [emphasis added].

⁵⁸ *Bell Aliant*, 2009 SCC 40 at para. 56, 74, 76.

⁵⁹ *Bell Aliant*, 2009 SCC 40 at para. 55.

⁶⁰ *Moore v. Sweet*, 2018 SCC 52 at para. 63.

⁶¹ *Garland v. Consumers’ Gas Co.*, 2004 SCC 25 at paras. 48, 50-51.

All of which is respectfully submitted this 19th day of July, 2019.

ALECTRA UTILITIES CORPORATION

By its counsel Torys LLP

for



Charles Keizer