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BY EMAIL

July 29, 2019

Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4

Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

**Re: Alectra Utilities Corporation (Alectra Utilities)
Application for 2020 Electricity Distribution Rates
OEB Staff Submission
Ontario Energy Board (OEB) File Number: EB-2019-0018**

In accordance with Procedural Order No. 1, please find attached OEB staff's submission in relation to preliminary questions regarding the capitalization policy in the above proceeding.

Yours truly,

Original Signed By

Katherine Wang
Advisor
Incentive Rate-setting and Accounting

Encl.

ONTARIO ENERGY BOARD

STAFF SUBMISSION ON PRELIMINARY QUESTIONS RELATED TO CAPITALIZATION POLICY

2020 ELECTRICITY DISTRIBUTION RATES

Alectra Utilities Corporation

EB-2019-0018

July 29, 2019

INTRODUCTION

Alectra Utilities Corporation (Alectra Utilities) filed an application with the Ontario Energy Board (OEB) to change the electricity distribution rates that it charges customers. The application contains a number of requests including a request to reverse the outcome of a prior OEB decision on the capitalization policy for Alectra Utilities.

In Procedural Order No. 1, the OEB invited parties and OEB staff to file submissions on the following two questions:

- 1) Does 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, constitute a motion to vary pursuant to Rule 40.02 of the OEB Rules?
- 2) If Alectra Utilities' request constitutes a motion to vary, has the threshold test been met such that the request should be reviewed on the merits?

In the view of OEB staff, Alectra Utilities' request is an attempt to reargue an issue for which the OEB has already issued a decision. OEB staff submits that Alectra Utilities' request (i) should be considered a motion to vary a previous decision of the OEB and (ii) the threshold test for the OEB to consider the merits of that request has not been met.

BACKGROUND

On May 28, 2019, Alectra Utilities filed an application with the OEB under section 78 of the *Ontario Energy Board Act, 1998* seeking approval for changes to its electricity distribution rates, to be effective January 1, 2020 (2020 rates application). As part of the 2020 rates application, Alectra Utilities asks that (i) "the OEB reverse the outcome of its previous decision to create the capitalization deferral accounts for each of the Brampton, Enersource and Horizon Utilities [rate zones] ..." and (ii) subject to the OEB's determination of the first issue that "the OEB determine the basis for recording balances in the capitalization deferral accounts and the treatment of the ESM for the Horizon Utilities rate zone, in light of the capitalization policy change."¹ The application evidence further describes the request as "...the OEB should reconsider its capitalization decision in EB-2017-0024 and no longer require the use of deferral accounts or the future

¹ EB-2019-0018, Alectra Utilities' application evidence, Ex. 2, Tab 1, Sch. 5, p. 2.

disposition of recorded balances.”²

The capitalization policy requests relate to an earlier application to change Alectra Utilities’ rates effective January 1, 2018 (2018 rates application).³ The 2018 rates application, filed on July 7, 2017, was the first rates application filed by Alectra Utilities following the amalgamation of Enersource Hydro Mississauga Inc. (Enersource), Horizon Utilities Corporation (Horizon), PowerStream Inc. (PowerStream), and Hydro One Brampton Networks Inc. (Brampton). As a result of the amalgamation, as required under International Financial Reporting Standards (IFRS), the capitalization policies of the former Enersource, Horizon, and Brampton changed to conform with the capitalization policy of the identified acquirer, the former PowerStream.

On November 17, 2017, the OEB issued a decision finalizing the issues list for the 2018 rates application. The OEB rejected Alectra Utilities’ submission that the impact of the change in capitalization policy should not be an issue in the 2018 rates application proceeding. The following question was included on the approved 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?⁴

In that same decision, the OEB also advised that it would be setting up “three new accounts to track the change in capitalization for the Horizon RZ [rate zone], Enersource RZ and Brampton RZ to ensure all options remain open and available for consideration, and rate retroactivity for the 2017 period is not an issue.”⁵ However, prior to establishing these accounts, the OEB wanted to hear from parties and OEB staff about the recording details for these accounts. The OEB further indicated that it would hear submissions on options for disposition of these accounts as part of final arguments in the 2018 rates application.⁶

After receiving comments from parties and OEB staff, on December 20, 2017, the OEB ordered Alectra Utilities to establish capitalization related deferral accounts for each of the Brampton, Enersource and Horizon rate zones. These deferral accounts were to record the difference between the revenue requirement calculated using the pre-merger

² EB-2019-0018, Alectra Utilities’ application evidence, Ex. 2, Tab 1, Sch. 5, p. 2.

³ EB-2017-0024.

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

⁵ EB-2017-0024, Decision on Issues List and Interim Rates and Procedural Order No. 3, November 17, 2017, pp. 3-4.

⁶ EB-2017-0024, Decision on Issues List and Interim Rates and Procedural Order No. 3, November 17, 2017, p. 4.

capitalization policies and the revenue requirement calculated with the new capitalization policy for each of the three rate zones.⁷

On December 22, 2017, Alectra Utilities filed its argument-in-chief for the 2018 rates application. Alectra Utilities submitted that the three capitalization related deferral accounts should be closed and the entries already recorded in them reversed.⁸ In its submission, Alectra Utilities took the view that reflecting changes in capitalization in rates prior to rebasing is contrary to OEB policy. Alectra Utilities further argued that intervenors were seeking to improperly convert a non-cash accounting impact to the utility post-merger and within the rebasing deferral period into a cash outcome for customers.

In its reply submission, filed on January 30, 2018, Alectra Utilities continued to maintain that the capitalization related deferral accounts should be closed and any amounts recorded in them reversed.⁹ In support of this position, Alectra Utilities argued that “[t]he capitalization policy change is a function of the integration; the savings or costs arising from integration are to the account of the shareholder.”¹⁰

In April 2018, the OEB issued its final Decision and Order in respect of the 2018 rate application proceeding. In that decision, the OEB rejected Alectra Utilities’ request to close the capitalization related deferral accounts and directed Alectra Utilities to “file a proposal for disposition of the deferral accounts in its application for 2019 rates for Brampton and Enersource [rate zones].”¹¹

On June 6, 2018, Alectra Utilities filed an application to change rates effective January 1, 2019 (2019 rates application).¹² In the 2019 rates application, Alectra Utilities proposed to clear the capitalization related deferral account balances *to its customers* on an annual basis and provided an explanation as to how the balances in these accounts were calculated.¹³ In response to this proposal, a number of intervenors raised concerns about the completeness of the evidence that had been filed on this issue. In addition, the School Energy Coalition raised a couple of different proposals for disposition of these accounts, as well as a different approach to calculating balances in

⁷ EB-2017-0024, Decision and Partial Accounting Order, December 20, 2017. The accounts were effective February 1, 2017.

⁸ EB-2017-0024, Alectra Utilities’ Argument-in-Chief, December 22, 2017, pp. 40-46.

⁹ EB-2017-0024, Alectra Utilities’ Reply Argument, January 30, 2018, pp. 4-5.

¹⁰ EB-2017-0024, Alectra Utilities’ Reply Argument, January 30, 2018, p. 5.

¹¹ EB-2017-0024, Decision and Order (Revised), April 6, 2018, p. 82. As the Horizon rate zone was still in a Custom IR framework through 2019, there are to be no entries in the Horizon capitalization related deferral accounts.

¹² EB-2018-0016.

¹³ EB-2018-0016, Alectra Utilities’ application evidence, Ex. 2, Tab 2, Sch. 7 and Ex. 2, Tab 4, Sch. 7.

them.¹⁴ In light of these circumstances, the OEB determined that “it will not clear the balances in the [capitalization related deferral accounts for] Enersource and Brampton rate zones in this 2019 rates proceeding so that additional options can be considered in the 2020 rates proceeding.”¹⁵

On July 9, 2019, the OEB issued Procedural Order No. 1 in the 2020 rates application proceeding.¹⁶ In that procedural order, the OEB set out a number of procedural steps including the filing of submissions on two preliminary questions related to the capitalization policy issue:

- 1) Does 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, constitute a motion to vary pursuant to Rule 40.02 of the OEB Rules?
- 2) If Alectra Utilities’ request constitutes a motion to vary, has the threshold test been met such that the request should be reviewed on the merits?¹⁷

On July 19, 2019, Alectra Utilities filed its submission on the preliminary questions. Alectra Utilities argues that its request is not a motion to review because there is no “final order or decision” within the meaning of Rule 40.01 of the OEB *Rules of Practice and Procedure*. Alectra Utilities did not address the second (threshold test) question in its submission.

STAFF SUBMISSION

OEB staff submits that the answers to the preliminary questions posed in Procedural Order No. 1 are as follows:

- 1) Yes, Alectra Utilities’ request is a motion to review a previous decision of the OEB.
- 2) No, the threshold test has not been met and the request to close the capitalization related deferral accounts should not be reviewed on the merits.

¹⁴ EB-2018-0016, School Energy Coalition Submission, October 31, 2018, pp. 3-4.

¹⁵ EB-2018-0016, Decision on Confidentiality and Procedural Order No. 3, November 8, 2018, p. 2.

¹⁶ EB-2019-0018, Procedural Order No. 1, July 9, 2019.

¹⁷ EB-2019-0018, Procedural Order No. 1, July 9, 2019, p. 5.

Issue 1: Is Alectra Utilities' capitalization policy request a motion to review?

In its 2020 rates application, Alectra Utilities asked the OEB to “reverse the outcome of its previous **decision** to create capitalization deferral accounts” and “reconsider its **capitalization decision** in EB-2017-0024”.¹⁸ On its face, such words support a finding that Alectra Utilities’ request is a motion to review – which is to be brought when a party seeks to vary, suspend or cancel a “final order or decision” of the OEB.¹⁹

In its submission on the preliminary questions, Alectra Utilities disputes this interpretation. It argues that there is no “final order or decision” and therefore a motion to review has not been triggered. In Alectra Utilities’ view, the order establishing the capitalization related deferral accounts is not a final order but rather an interim order. Moreover, relying in part on the Supreme Court of Canada’s decision in *Bell Canada v. Bell Aliant Regional Communications (Bell Aliant)*²⁰, Alectra Utilities asserts that there is no final order or decision until the OEB decides on how to dispose of the balances in the capitalization related deferral accounts. As a result, Alectra Utilities argues that one option for disposition is that the balances in the capitalization related deferral accounts be disposed to Alectra Utilities.

In response to Alectra Utilities’ submission, OEB staff notes that motions to review apply to both “final orders” and “decisions”. In this case, the OEB has made a decision. Alectra Utilities’ request to close the three capitalization related deferral accounts was already adjudicated as part of the final Decision and Order in the 2018 rates proceeding.²¹ In that Decision and Order, the OEB rejected Alectra Utilities’ request to close these accounts, which would have resulted in Alectra Utilities’ shareholders retaining all amounts arising from the changes in capitalization policy.²² That decision was not interim. It was a final decision made in April 2018. The fact that the OEB did not determine as to how the balances are to be calculated, the distribution amongst customer classes, the billing determinants to be used, or the duration of the rate riders does not change the finality of the OEB’s decision.

OEB staff further submits that the *Bell Aliant* decision is not on point. In that case, the Supreme Court reviewed a Canadian Radio-television and Telecommunications Commission (CRTC) decision on how to distribute funds within a deferral account that had been set up previously. That case centered around the authority of the CRTC to

¹⁸ EB-2019-0018, Alectra Utilities’ application evidence, Ex. 2, Tab 1, Sch. 5, p. 2. [Emphasis added]

¹⁹ See OEB *Rules of Practice and Procedure*, Rules 40-43.

²⁰ *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40.

²¹ EB-2017-0024, Decision and Order (Revised), April 6, 2018, pp. 77-82.

²² EB-2017-0024, Decision and Order (Revised), April 6, 2018, pp. 77-82.

order that funds from deferral accounts be rebated to customers or used to expand broadband service.²³ That case did not involve a request to close already established deferral accounts with the utility retaining all amounts in those accounts for its shareholders – which is what Alectra Utilities has sought in its 2020 rates application.²⁴

OEB staff acknowledges that some of the OEB's previous orders in the 2018 and 2019 rates proceedings discuss parties submitting to the OEB "options" for disposition of these accounts.²⁵ However, such words need to be viewed in light of the April 2018 Decision and Order denying Alectra Utilities' request to close the deferral accounts and reverse any amounts recorded in them. When viewed through that lens, OEB staff submits that the "options" relate to calculation of balances, the distribution of balances amongst customer classes, the billing determinants to be used, and the duration of the rate riders.

Issue 2: Has the threshold test for a motion to review been met?

Assuming that the request to "reverse the outcome of its previous decision to create capitalization deferral accounts" constitutes a motion to review, the next question that the OEB must decide is whether the threshold test has been met.

Rule 43.01 of the OEB *Rules of Practice and Procedure* permits the OEB to determine, as a threshold question, whether the matter should be reviewed before conducting any review on the merits.²⁶

In considering previous motions to review, the OEB articulated the threshold test as follows:

...the grounds must "raise a question as to the correctness of the order or decision". In the panel's view, the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues raised such

²³ *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, para. 35.

²⁴ EB-2019-0018, Alectra Utilities' application evidence, Ex. 2, Tab 1, Sch. 5, p. 2 where Alectra Utilities asks that the OEB "no longer require use of deferral accounts or the future disposition of recorded balances."

²⁵ For example, in EB-2018-0016, Decision on Confidentiality and Procedural Order No. 3, November 8, 2018, the OEB directed Alectra Utilities to file a comparison of "different options" for disposition in its 2020 rate application.

²⁶ Rule 43.01 states "In respect of a motion brought under Rule 40.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits."

that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.

With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case.

In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.

The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.²⁷

In both its 2020 rates application and its submission on the preliminary questions, Alectra Utilities has not raised a question as to the correctness of the OEB's capitalization policy decision in the 2018 rates application. No error in the previous decision has been identified. Alectra Utilities has not shown that the previous findings are contrary to the evidence that was before the previous OEB panel, that the previous OEB panel failed to address a material issue, or that the previous OEB panel made inconsistent findings. Rather, it seeks to reargue an issue based on arguments that were rejected by the OEB in the 2018 rates application.

In its 2020 rates application, Alectra Utilities argues, as it did in the 2018 rates application, that the OEB should order the closure of the capitalization related deferral accounts and the reversal of any amounts recorded in those accounts because it is (i) contrary to OEB policy and (ii) a non-cash event.²⁸ In particular, Alectra Utilities asserts that the establishment of the capitalization related deferral accounts is inappropriate and inconsistent OEB MAAD's policy²⁹ and the OEB's MAADs decision for Alectra Utilities³⁰ as it is effectively rebasing of an isolate aspect of Alectra Utilities' revenue requirement.³¹

²⁷ EB-2006-0322/0338/0340, the Motions to Review the Natural Gas Electricity Interface Review Decision, May 22, 2007, p. 18; adopted more recently in EB-2017-0320, Decision and Order, January 4, 2018, EB-2017-0320, pp. 4-5.

²⁸ EB-2019-0018, Alectra Utilities' application evidence, Ex. 2, Tab 1, Sch. 5, pp. 2-4.

²⁹ EB-2014-0138, Report of the Board: Rate-Making Associated with Distributor Consolidation, March 26, 2015.

³⁰ EB-2016-0025

³¹ EB-2019-0018, Alectra Utilities' application evidence, Ex. 2, Tab 1, Sch. 5, p. 3.

In its April 2018 Decision and Order, the OEB rejected those arguments explaining:

The OEB finds that the change in capitalization policy is not a "benefit" accruing to shareholders as claimed by Alectra Utilities.

Neither the MAADs policy nor the MAADs Handbook addressed a change in capitalization policy resulting from a merger. In contrast, the OEB did require utilities to provide justification when opting to use different accounting standards for financial reporting (i.e. changing from International Financial Reporting Standards (IFRS) to USGAAP) following the closing of the proposed merger transaction. Alectra Utilities did not pursue this option and did not seek any such approval in its MAADs application.

In its MAADs application, Alectra Utilities did not disclose to the OEB that applicable accounting standards mandated a capitalization change for three of the rate zones. The OEB issued its MAADs decision based on the evidence before it. The MAADs decision was silent as the issue was not raised. This Decision is the OEB's first opportunity to consider and opine on the appropriate regulatory treatment for a mandated accounting change resulting from the merger.

Alectra Utilities stated that the change in the capitalization policy was a "non-cash event that had no impact, and will have no impact going forward, on the underlying cost of utility business." The OEB agrees. The change in capitalization policy does, however, change the type of costs (OM&A or capital) and the timing of cost recognition, which is relevant when setting electricity rates.³²

The fact that Alectra Utilities disagrees with the OEB's previous capitalization policy decision does not, on its own, provide a valid basis to review that decision. OEB staff submits that Alectra Utilities has not passed the threshold test. As a result, the OEB should deny the request to reverse the outcome of the OEB's previous decision to keep open the capitalization related deferral accounts for the Brampton, Enersource and Horizon Utilities rate zones.

All of which is respectfully submitted

³² EB-2017-0024, Decision and Order (Revised), April 6, 2018, pp. 79-80.