

August 9, 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 (OEB File No. EB-2019-0018) – Reply  
Submission on Preliminary Questions Regarding 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. Alectra Utilities filed its submission on this aspect on July 19, 2019 and OEB Staff and intervenors filed theirs on July 29, 2019. Please find enclosed Alectra Utilities' reply submission. The submission has been filed on RESS and served on all parties in the proceeding.

Yours truly,

*SIGNED ON ORIGINAL*

Jonathan Myers

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.

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

**August 9, 2019**

**OVERVIEW**

1. Alectra Utilities is not seeking to vary a previous order or decision. Both in its present 2020 rate application and under the terms of Procedural Order No. 1, Alectra Utilities is seeking “to reverse the outcome of the OEB’s decision to create the capitalization related deferral accounts for the Enersource, Brampton and Horizon rate zones.”<sup>1</sup> Alectra Utilities is requesting that this be done by disposing of the deferral accounts to Alectra Utilities in 2020. This disposition request does not require the variation of any order or decision in respect of a prior rate year.<sup>2</sup>

2. The Board’s 2018 rates decision in EB-2017-0024 did not decide the issue of disposition, and certainly not in the 2020 rate year. On the contrary, the Board expressly “acknowledge[d] Alectra Utilities’ reply submission that future rate recovery has yet to be determined as subsequent applications and proposals have yet to be filed.” The Board is therefore free to dispose of the

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<sup>1</sup> EB-2019-0018, Procedural Order No. 1, July 9, 2019, p. 6 [emphasis added]; 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.

<sup>2</sup> Alectra Utilities supports the submissions filed by Power Workers’ Union (“PWU”) in this regard.

deferral accounts in the present application as necessary to set 2020 rates, and Alectra Utilities is free to make submissions on the appropriate disposition.

3. Not only did the OEB expressly defer the issue of disposition to the present application for 2020 rates, but the parties filed a Settlement Proposal with the OEB in EB-2018-0016 in which they confirmed that they understood and agreed that the issue of disposition would be deferred to the present application.<sup>3</sup> The Board approved the Settlement Proposal as filed.

4. Even if Alectra Utilities' request "to reverse the outcome of the OEB's decision to create the capitalization-related deferral accounts" could be characterized as a request to close the deferral accounts, a motion to vary is still unnecessary. The Partial Accounting Order is the sole order or decision responsible for the creation of the deferral accounts. It already provides that the accounts may be closed by further order of the Board,<sup>4</sup> so no term of the Partial Accounting Order would need to be varied in order to close the accounts.

5. In any event, neither OEB staff nor any of the interveners have attempted to explain why the Partial Accounting Order does not meet the characteristics of an interim order as defined by the Supreme Court of Canada in *Bell Canada (1989)*.<sup>5</sup> Nor have they identified any other order or decision responsible for the creation of the deferral accounts on a final basis. This is because no such order exists—the Board has never issued a final accounting order for any of these accounts.

## **ARGUMENT**

### **A. Alectra Utilities is not seeking to vary a previous order or decision**

6. There is considerable confusion in the submissions of OEB staff and some of the interveners regarding what Alectra Utilities has requested in this application and what issue is to be decided under Procedural Order No. 1.

7. Alectra Utilities' request is as follows, as reproduced from its evidence for the current 2020 rates application:

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<sup>3</sup> EB-2018-0016, Settlement Proposal, December 6, 2018, p. 3.

<sup>4</sup> EB-2017-0024, Decision and Partial Accounting Order, December 20, 2017, p. 4.

<sup>5</sup> See *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722 at paras. 44, 47 [*"Bell Canada (1989)"*].

First, Alectra Utilities requests that 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].<sup>6</sup>

8. Accordingly, the issue to be decided in these submissions is as follows, as per Procedural Order No. 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 [*sic*] of the OEB Rules?<sup>7</sup>

9. Thus, Alectra Utilities is not seeking to re-open any orders or decisions that were made in respect of prior rate years; instead, it is seeking to reverse the outcome of the OEB's decision to create the deferral accounts insofar as that outcome affects the 2020 rate year that is the subject of the present application. Alectra Utilities is requesting that this be done by disposing of the account balances to Alectra Utilities in 2020. This does not require the Board to vary any previous order or decision.

***The Board's 2018 rates decision did not determine the issue of disposition***

10. OEB staff and several of the interveners argue that Alectra Utilities is seeking to vary the Board's 2018 rates decision that was issued on April 6, 2018 in EB-2017-0024. However, that decision made no determination as to how the deferral accounts would be disposed, and certainly not in respect of the 2020 rate year.

11. With respect to the Brampton and Enersource rate zones, the decision merely stated that "*Alectra Utilities is required to continue to accumulate amounts in its deferral accounts for the change in capitalization policy ... and file a proposal for disposition of balances for 2019 rates.*"<sup>8</sup> In other words, the decision only required Alectra Utilities to continue to accumulate amounts in the deferral accounts, which were established on an interim basis, pending final determination of

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<sup>6</sup> 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 [emphasis added].

<sup>7</sup> EB-2019-0018, Procedural Order No. 1, July 9, 2019, p. 6 [emphasis added].

<sup>8</sup> EB-2017-0024, Decision and Order (Revised), April 6, 2018, p. 2 [emphasis added].

how the accounts would be disposed. The Board expressly deferred determination of this issue to the present application for 2020 rates.<sup>9</sup>

12. With respect to the Horizon Utilities rate zone, the Board’s 2018 rates decision only required Alectra Utilities to “*retain the deferral account*” and provided that recording of balances would not begin until January 1, 2020, once the Custom IR term ends.<sup>10</sup> Indeed, the fact that recording of balances in this account would not begin until 2020 was one of the reasons the Board expressly deferred the issue of disposition, for all three rate zones, to the present application.<sup>11</sup>

13. Although the Board in its 2018 rates decision declined Alectra Utilities’ request to close the deferral accounts in that rate year, it is also declined the requests of OEB staff and the AMPCO that “the balances in the capitalization related deferral accounts should be cleared in favour of ratepayers annually (AMPCO) or every two years (OEB staff).”<sup>12</sup> In other words, the Board declined to make a decision on disposition either way, in order to “enable disposition” in the future.<sup>13</sup>

14. SEC argues that the 2018 rates decision constituted a final decision not to dispose of the deferral accounts to Alectra Utilities because the Board found that the impacts of the change in capitalization policy were not a “benefit” or “efficiency gain” accruing to shareholders under the MAADs policy. This submission is incorrect. The Board was responding specifically to Alectra Utilities’ submission “that the capitalization policy change is a function of the integration, and that the savings or costs arising from integration are to the account of the shareholder as specified in the MAADs Handbook and, more recently, in the MAADs Decision.”<sup>14</sup> The Board’s finding was limited to the interpretation of the MAADs policy. The Board did not determine that there could never be circumstances in a future rate year that would warrant disposing of the deferral accounts

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

<sup>10</sup> EB-2017-0024, Decision and Order (Revised), April 6, 2018, p. 81.

<sup>11</sup> EB-2018-0016, Decision on Confidentiality and Procedural Order No. 3, November 8, 2018, p. 2.

<sup>12</sup> EB-2017-0024, Decision and Order (Revised), April 6, 2018, p. 79.

<sup>13</sup> EB-2017-0024, Decision and Order (Revised), April 6, 2018, p. 81.

<sup>14</sup> EB-2017-0024, Decision and Order (Revised), April 6, 2018, p. 78.

to Alectra Utilities.<sup>15</sup> Nor did the Board preclude Alectra Utilities from filing evidence in this regard in future rate applications.

15. On the contrary, the Board made clear in its 2018 rates decision that it was not determining rate recovery—and therefore disposition of the deferral account balances—for future rate years: *“The OEB acknowledges Alectra Utilities’ reply submission that future rate recovery has yet to be determined as subsequent applications and proposals have yet to be filed. The OEB finds that this future uncertainty creates a regulatory risk, and that this risk is appropriately addressed through deferral accounts to enable ratemaking options.”*<sup>16</sup> Thus, the Board remains free to dispose of the account balances in the present application. Accordingly, Alectra Utilities is entitled to make submissions regarding the appropriate disposition of the account balances for the purpose of setting “just and reasonable” rates in 2020.

16. OEB staff argues that the Supreme Court’s decision in *Bell Aliant* is not on point because it “did not involve a request to close already established deferral accounts with the utility retaining all amounts in those accounts for its shareholders.”<sup>17</sup> To the contrary, *Bell Aliant* is on point because the Supreme Court held that, where the CRTC established deferral accounts through a decision that “did not specifically direct how the deferral account funds were to be used, leaving the issue subject to further submissions,”<sup>18</sup> the CRTC’s “later allocation of deferral account balances for various purposes ... was not a variation of a final rate order.”<sup>19</sup> This is because the deferral account funds could “properly be characterized as encumbered revenues,” in the sense that “the rates always remained subject to the deferral accounts mechanism established in the Price Caps Decision [i.e., the rate-setting decision that created the deferral accounts].”<sup>20</sup> It followed that “nothing in the Deferral Accounts Decision [i.e., the subsequent disposition decision] changed either the Price Caps Decision or any other prior CRTC decision on this point.”<sup>21</sup>

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<sup>15</sup> These circumstances could include events that impact the revenue of Alectra Utilities before rebasing in 2027—for example, the imposition of monthly billing costs on distributors or changes to customer service rules, such as the imposition of a ban on winter disconnections.

<sup>16</sup> EB-2017-0024, Decision and Order (Revised), April 6, 2018, p. 81 [emphasis added].

<sup>17</sup> EB-2019-0018, Submissions of OEB Staff, July 29, 2019, p. 5.

<sup>18</sup> *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40 at paras. 3-4, 8 [“*Bell Aliant*”].

<sup>19</sup> *Bell Aliant*, 2009 SCC 40 at paras. 64.

<sup>20</sup> *Bell Aliant*, 2009 SCC 40 at para. 63.

<sup>21</sup> *Bell Aliant*, 2009 SCC 40 at para. 64 [emphasis added].

17. The same reasoning applies here. When the Board established the deferral accounts through the Partial Accounting Order, the Board stated that “*the Accounting Order is partial as it does not include details on how the accounts will be disposed.*”<sup>22</sup> The funds in the deferral accounts therefore remain encumbered until the Board has made a decision on how to dispose of them. If, as *Bell Aliant* holds, the disposition of encumbered funds from a deferral account does not constitute a variation of a previous rate-setting decision, then neither does Alectra Utilities’ request to dispose of encumbered funds in a particular way.

**B. The Settlement Proposal accepted in EB-2018-0016 confirmed that the issue of disposition would be deferred to the present application**

18. Not only did the Board expressly defer the issue of disposition to the present application, as mentioned above, but Alectra Utilities filed a Settlement Proposal in EB-2018-0016 in which the parties (including SEC, AMPCO, BOMA, CCC, Energy Probe, and VECC) confirmed that they understood and agreed that the issue of disposition would be deferred to the present application.<sup>23</sup> The Settlement Proposal was filed on December 6, 2018, after the Board’s 2018 rates decision in EB-2017-0024. The OEB accepted the Settlement Proposal as filed.<sup>24</sup>

19. The Settlement Proposal read in part as follows:

The Parties agree that the allocation of costs between Alectra Utilities rate zones to determine the [Horizon rate zone] ROE and thus the ESM for 2017; and the interaction between the calculation and the change in capitalization policy, should be deferred to the 2020 EDR Application proceeding. These items would be heard at the same time as the Board considers the balances and disposition of the deferral accounts related to the change in capitalization policy for each of the Brampton and Enersource rate zones. The Parties believe their suggested approach will promote regulatory efficiency. The issues should be discussed and debated once, at the same time, to the benefit of the Board and the Parties. In addition, while the 2017 and 2018 ESM would be dealt with in the same proceeding, they would be dealt with as separate calculations, but the process would still achieve some regulatory efficiency by allowing the

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<sup>22</sup> EB-2017-0024, Decision and Partial Accounting Order, December 20, 2017, p. 2.

<sup>23</sup> EB-2018-0016, Settlement Proposal, December 6, 2018.

<sup>24</sup> EB-2018-0016, Decision and Order, January 31, 2019, p. 3.

Parties and the Board to deal with the cost allocation issues, many of which will be common from year to year, all at once.<sup>25</sup>

20. Thus, the parties expressly understood and agreed that consideration of the disposition of the deferral accounts for each of the Brampton, Enersource, and Horizon Utilities rate zones would be deferred to the present application. The Settlement Proposal further stated that, “as between the Parties, and subject only to the Board’s approval of this Settlement Proposal, this document is intended to be a legal agreement, creating mutual obligations, and binding and enforceable in accordance with its terms.”<sup>26</sup> As noted, the Board approved the Settlement Proposal.

**C. A motion to vary is not required to close the deferral accounts**

21. Even if Alectra Utilities’ request to “reverse the outcome of the OEB’s decision to create the capitalization-related deferral accounts” is characterized as a request to reverse the decision creating the deferral accounts, a motion to vary is still unnecessary.

22. The decision that created the deferral accounts is the Partial Accounting Order, which states that “*Alectra Utilities shall establish the following accounts to record the changes to the revenue requirement, as defined in this Decision, resulting from the change in Alectra Utilities’ capitalization policy...*”<sup>27</sup> These words—which are found in the “Order” portion of the “Decision and Partial Accounting Order”—are the sole basis upon which the deferral accounts exist. This means that any request to close the deferral accounts could only plausibly be a request to vary the Partial Accounting Order.

23. However, it is not necessary to vary the Partial Accounting Order to close the deferral accounts because the Partial Accounting Order already provides that the accounts may be closed by further order of the Board.<sup>28</sup> Thus, no term of the Partial Accounting Order would need to be varied in order to close the accounts.

24. Even assuming that the Partial Accounting Order would need to be varied, the Partial Accounting Order is still interim rather than final and therefore cannot be the subject of a motion

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<sup>25</sup> EB-2018-0016, Settlement Proposal, December 6, 2018, p. 3.

<sup>26</sup> EB-2018-0016, Settlement Proposal, December 6, 2018, p. 3.

<sup>27</sup> EB-2017-0024, Decision and Partial Accounting Order, December 20, 2017, p. 4.

<sup>28</sup> EB-2017-0024, Decision and Partial Accounting Order, December 20, 2017, p. 4.



to vary. Despite drawing a distinction between “orders” and “decisions” for the purpose of Rule 40.01, OEB staff acknowledges that “orders” can only be the subject of a motion to vary where they are final.<sup>29</sup> Yet neither the OEB staff nor any of the interveners have attempted to explain why the Partial Accounting Order does not meet the characteristics of an interim order as defined by the Supreme Court of Canada in *Bell Canada (1989)*.<sup>30</sup> Instead, they largely ignore the Partial Accounting Order and its clear characterization as an interim order, as previously submitted by Alectra Utilities, while failing to identify any order or decision responsible for the creation of the deferral accounts on a final basis. This is understandable because no such order exists—the Board has never issued a final accounting order for any of these accounts.

25. Findings made in a subsequent “decision” in relation to the Partial Accounting Order cannot have the effect of making the Partial Accounting Order final. This is because of s. 19(2) of the *Ontario Energy Board Act*, which provides that “[t]he Board shall make any determination in a proceeding by order.”<sup>31</sup> It is for this reason that when the OEB authorizes a new deferral account, it does so by way of an order rather than a decision—specifically an accounting order. In this case, the OEB has only issued an interim accounting order, and no subsequent decision has included a final accounting order. As such, the existence of the deferral accounts remains precarious and the decision to create the accounts remains encumbered—encumbered by the need for the OEB to make a final determination on how the accounts are to be disposed. As the OEB has not made such a determination, it is open to the panel in the present proceeding to vary the Partial Accounting Order, should this be deemed necessary notwithstanding that the Partial Accounting Order expressly contemplates that the Board may close the accounts by subsequent order.

## CONCLUSION

26. Alectra Utilities is making a disposition request for the 2020 rate year by asking the Board to dispose of the balances in the accounts to Alectra Utilities in 2020; it is not seeking to vary a previous order or decision. Even if Alectra Utilities’ request “to reverse the outcome of the OEB’s decision to create the capitalization-related deferral accounts” could be characterized as a request

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<sup>29</sup> EB-2019-0018, Submissions of OEB Staff, July 29, 2019, p. 5.

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

<sup>31</sup> *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sched. B, s. 19(2) [emphasis added].

to close the deferral accounts, it would still not constitute a motion to vary. The Partial Accounting Order is the sole order or decision responsible for the creation of the accounts. It would not need to be varied in order to close the accounts, as it already includes a term stating that the accounts may be closed by further order of the Board. In any event, the Board has never issued a final accounting order for these accounts that could be the subject of a motion to vary.

All of which is respectfully submitted this 9th day of August, 2019.

**ALECTRA UTILITIES CORPORATION**

By its counsel Torys LLP

for

  
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Charles Keizer