Elizabeth von Engelbrechten
Senior Manager, Regulatory Affairs

FortisAlberta Inc.
320 – 17 Avenue SW
Calgary, Alberta T2S 2V1
Phone: (403) 310-WIRE (9473)
elizabeth.vonengelbrechten@fortisalberta.com
www.fortisalberta.com

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Submitted via email: engage@auc.ab.ca

Alberta Utilities Commission
Eau Claire Tower
1400, 600 Third Avenue SW
Calgary, Alberta T2P 0G5

Re: AUC Consultation – AUC Rule 018: *Rules on Negotiated Settlements* (Rule 018)

On September 13, 2024, the Alberta Utilities Commission (AUC or Commission) issued Bulletin 2024-19 in which it introduced draft amendments to Rule 018 and invited interested parties to provide feedback.[1] FortisAlberta Inc. (FortisAlberta or the Company) makes this submission regarding the Commission's amendments to Rule 018 and appreciates the opportunity to provide comments on the broader issues related to settlements, as introduced by the Commission in Bulletin 2024-19.

FortisAlberta supports the Commission's proposal to rescind Rule 018 and incorporate the amendments to Rule 018 into AUC Rule 001: *Rules of Practice* (Rule 001). The Company also supports the proposed removal of duplicative processes from Rule 018 that are already described in statutory framework, Rule 001, and AUC Rule 022: *Rules on Costs in Utility Rate Proceedings*. FortisAlberta provides additional feedback on the proposed rule amendments below.

The Company also provides feedback on the Commission's proposals on Commission-led mediations and enhanced AUC staff participation in the negotiated settlement process, as it set out in Bulletin 2024-19.

Comments on Proposed Rule Amendments

(i) Subsection 35(4)

The current draft of subsection 35(4) proposes that upon receipt of an outline of issues to be negotiated, the Commission may request more information about any issue and exclude any issues from settlement negotiations.

Subsection 35(4)(a), in combination with the ability of the Commission to request any additional information regarding the settlement agreement, pursuant to subsection 35(8), potentially creates unnecessary duplication and introduces regulatory inefficiency. These provisions would delay and impede the negotiation process by introducing information requests before negotiations are even launched. The Company proposes that the more efficient way to set out subsection (4) would be to: (a) allow the Commission to direct that certain other information pertaining to issues of specific interest be included in the negotiated settlement submissions, and (b) allow the Commission to exclude certain issues. It would also establish greater certainty for parties with respect to the minimum information requirements to be filed with the negotiated settlement. Eliminating information requests at the outset of a negotiation reduces the number of regulatory procedural steps and maintains the efficient progression of negotiations.

[1] Bulletin 2024-19.

The Company understands that the current drafting of the rule provides that parties may simply notify the Commission of their intention to negotiate, rather than asking for permission to commence negotiations. FortisAlberta further understands that the Commission proposes to retain jurisdiction of the issues that can be included in settlement discussions as set out in proposed subsection 35(4)(b).

The Company is concerned that the exclusion of certain issues may lead to the bifurcation of some applications that would be more efficiently dealt with as a whole through negotiated settlement. Namely, FortisAlberta is concerned that the exclusion of issues will ultimately create regulatory inefficiencies by forcing certain matters to a fully litigated process. Further, if parties are limited to negotiating only certain aspects of an application, the incentives to negotiate are distorted. In such an instance, FortisAlberta expects that it, and other parties, would decide to proceed to a full Commission proceeding on the entire application rather than incurring the costs of two bifurcated processes that would require double the regulatory resources.

For these reasons, the Company would encourage that the exercise of the Commission's discretion to exclude any issue from settlement negotiations be exercised thoughtfully and sparingly.

(ii) Subsection 35(5)

As currently drafted, subsection 35(5) of the proposed rule, grants the Commission the authority to direct parties to participate in settlement negotiations. As a general proposition, FortisAlberta submits that settlement negotiations in regulatory proceedings must remain voluntary and not be subject to mandatory direction by the Commission.

However, the Company understands that the current drafting of subsections 2 to 4, taken in conjunction with subsection 5, could be interpreted to direct interveners to negotiate once an applicant has indicated its intention to pursue negotiation. If this is the case, FortisAlberta suggests that further clarification is warranted.

Regardless, and consistent with the view provided above, the inclusion of a mechanism to mandate participation undermines the voluntary nature of negotiation, which is essential for preserving the integrity and effectiveness of negotiations. Forcing negotiations when the parties are not prepared or willing to engage in meaningful discussions is ineffective and risks delaying resolution. If negotiation fails, returning the matter to the adjudicative stream requires additional time and costs, ultimately prolonging the proceeding.

FortisAlberta submits that the decision to engage in negotiations should remain voluntary for both the applicant utility and interveners. To ensure that the regulatory process remains efficient and effective, FortisAlberta recommends that the proposed rule be revised to maintain settlement negotiations as an option that parties may pursue voluntarily, rather than one that is imposed by the Commission.

(iii) Subsection 35(7)

FortisAlberta understands subsection 7 to be drafted to discourage negotiating parties from unreasonably holding out by enabling the filing of a settlement agreement without the unanimous agreement of all parties. The Company believes this section could benefit from further clarification regarding how the Commission will handle situations where one or more parties do not consent to the negotiated outcome. While FortisAlberta agrees that no party should be allowed to hold up the settlement process unreasonably, the proposed rule does not address how the Commission will treat dissenting views or whether and how they

will be considered in its approval process.

A key concern is whether dissenting parties' objections will trigger a full proceeding, which could undermine the efficiencies sought through settlement negotiations. If dissenting views result in the need for a formal hearing or further deliberations, the value of the settlement process could be significantly reduced. With this context, FortisAlberta recommends revisiting the provisions from the current section 7 of Rule 018, which clearly outline how dissenting views are handled, including the Commission's discretion to consider such views without necessarily resorting to a hearing. Specifically, FortisAlberta suggests that the Commission reintegrate elements of the current Rule 018 section 7 into Part 6 of Rule 001, particularly the requirement that the Commission consider dissenting views.

(iv) <u>Subsection 35(8)</u>

a. Subsection 35(8)(a)

FortisAlberta submits that the proposed subsection 35(8)(a), which requires settlement agreements to include "evidence of adequate notice to parties that may be directly and adversely affected by the settlement," requires further clarification. Specifically, the implicit inclusion of a standing test raises concerns about whether it would be the applicant utilities' responsibility to determine which parties may be adversely affected by the settlement and thus require notice. Traditionally, the determination of standing has been a Commission finding, and it remains unclear whether a utility's determination of affected parties will be upheld when the negotiated settlement is filed.

To address these concerns, FortisAlberta would suggest that standing, and to whom notice must be provided, be established by the filing of statements of intent to participate when an outline of issues is submitted to the Commission pursuant to subsection 35(3) of the draft rule. Following this, the Commission can rule on standing to the extent that issues related to standing arise.

Additionally, the adequacy of notice itself is a Commission finding, and shifting this responsibility to applicants may lead to inefficiencies if the adequacy of the notice is later contested. To avoid confusion and ensure consistency, the Company recommends referring to the existing language on notice requirements in Rule 001, particularly sections 7 and 9. This clearly outlines the requirements for providing notice, including the need to identify concerned parties, provide particulars of the matter, and outline any relevant deadlines. Retaining or clarifying the Commission's role in determining both standing and adequacy of notice will ensure that the settlement process is efficient, without the risk of reopening settled matters due to procedural challenges.

b. Subsection 35(8)(b)

Subsection 35(8)(b) of the proposed rule requires that a settlement brief filed with the Commission include "confirmation that no party to the settlement agreement withheld relevant information." FortisAlberta submits that further clarification is required concerning how this confirmation is to be provided, as it is impossible to prove the absence of information withholding as a practical matter.

Typically, such confirmation is included as a clause within the settlement agreement itself, in which parties affirm that all relevant information has been disclosed to the best of their knowledge. If the Commission intends that this confirmation should be satisfied through affidavits or another formalized process, the Company recommends that this be explicitly stated in the rule to avoid any ambiguity.

c. Subsection 35(8)(g)

FortisAlberta submits that proposed subsection 35(8)(g), which requires a settlement brief to demonstrate a "clear link between each settled issue and the evidence," raises concerns about the practical implications for the settlement process. Settlement negotiations, by their nature, are a process of compromise and mutual agreement, often involving give-and-take between parties. Requiring a strict evidentiary link for each settled issue undermines the very purpose of negotiation, which is to allow parties to reach a resolution that balances their interests, rather than rigidly adhering to the evidentiary positions presented by each side.

By imposing an evidentiary standard for each settled issue, the proposed rule may effectively abdicate the evidentiary process to the parties and interveners involved in the negotiation, which could lead to a situation where settlements resemble a form of litigation. This would diminish the purpose of engaging in settlement negotiations as a more efficient alternative to formal hearings. If parties are required to demonstrate that each settlement outcome directly corresponds to specific evidence, it may discourage the willingness to negotiate and compromise, as every issue would need to be justified through evidence rather than through a practical and agreed-upon solution between the parties.

Moreover, this requirement could result in settlements being subjected to a level of scrutiny akin to a litigated proceeding, reducing the efficiency that settlements are intended to provide. If the process of reaching a negotiated settlement becomes as burdensome as litigating issues in a hearing, the incentive to pursue settlements may diminish, ultimately leading to longer and more contentious regulatory processes.

FortisAlberta recommends that the proposed rule recognize the nature of negotiated settlements and exclude the need for strict evidentiary links. While the public interest and the basis for the settlement should be clear, FortisAlberta recommends that the rule not require a direct evidentiary demonstration for each issue, as this could undermine the efficiency and purpose of the negotiation process.

d. Subsection 35(8)(h)

With respect to subsection 35(8)(h) of the proposed rule, which requires that a settlement brief include "any other information that the Commission may direct," FortisAlberta submits that the open-ended nature of this provision raises concerns regarding the scope of additional information that may be required after the settlement agreement and supporting materials have been submitted.

Without clear parameters for what additional information the Commission might request, parties may face uncertainty as to whether their submissions are complete and sufficient. This could lead to inefficiencies if, after negotiations have concluded, further information is required that the parties had not anticipated. In some cases, this uncertainty could make the settlement process less attractive, as parties may be concerned that the negotiations could be reopened. In such cases, it may be more efficient to fully litigate the matter from the outset, rather than engaging in negotiations that may not result in a timely or final resolution.

To ensure that the settlement process remains both efficient and transparent, FortisAlberta suggests that the Commission consider including the scope of additional information that it may require under this provision. This would help parties to better understand their reporting obligations and ensure that settlements can be concluded without unnecessary delay.

(v) <u>Subsection 35(10)</u>

Subsection 35(10) of the draft rule states that the Commission will consider a settlement in accordance with

Part 6. FortisAlberta understands that the reference to Part 6 is to Part 6 of Rule 001. As currently drafted, consideration of a settlement agreement pursuant to Part 6 suggests that a negotiated settlement may be subject to a full Commission proceeding including evidence, information requests and argument. FortisAlberta suggests that Part 6 of Rule 001 be updated to reflect that upon receipt of a settlement agreement the Commission may proceed to making a decision, pursuant to section 49 of Rule 001, on a settlement agreement without further process.

It would be inefficient and counter to the incentives that encourage parties to negotiate (i.e., the avoidance of the effort and expense of participating in a fully litigated hearing) if the consideration of a settlement agreement is subject to a full proceeding before the Commission.

Commission-led Mediated Settlements

FortisAlberta does not currently support the introduction of Commission or Commission senior staff-led mediated settlements for several reasons.

Firstly, and as rightly pointed out by the Commission, a Commission member or senior staff that participated in a mediated settlement process would be required to keep their discussions with the parties to the settlement confidential and play no role in the review of any resultant settlement. Given this requirement, FortisAlberta questions whether a Commission or staff-led mediated settlement framework is logistically feasible with the current number of Commission members, which is legislatively limited to nine members[2] and the current staffing levels at the Commission.

Further, the Company would not be supportive of an approach that mandates the presence of a Commission member in settlement processes. As discussed above, successful settlement discussions require the voluntary participation of all parties, which must also include the ability to voluntarily determine whether settlement discussions would benefit from the assistance of a Commission member. Having said that, and as discussed further below, the participation of Commission staff, including senior staff, may be tenable within prescribed circumstances.

The Company is deeply concerned that it would not be possible to maintain the "without prejudice" environment needed to advance negotiations with the presence of current and/or future decision makers. FortisAlberta is also concerned that the presence of a Commission member would discourage the open and candid conversations that are required to successfully reach settlement.

To fully understand the Commission's proposal for the introduction of Commission-led settlements, FortisAlberta would require further details regarding how such an approach would be implemented to ensure safeguards are in place to maintain Commission independence and fairness to all parties. Parties would be better positioned to provide feedback if the Commission issued further details on its cited example of the California Public Utilities Commission (CPUC). FortisAlberta has reviewed publicly available information about the CPUC process and makes the following observations. In the California process, mediation is provided through the Administrative Law Judge Division, which is comprised of "neutral" administrative law judges that are trained and are experienced in mediation.[3] This process is also fully voluntary and confidential.[4]

[2] *Alberta Utilities Commission Act,* SA 2007, c A-37.2, s. 3(1).
[3] California Public Utilities Commission, Common Questions About ADR
[4] California Public Utilities Commission, Alternative Dispute Resolution (ADR) Program

Specifically, FortisAlberta would need to understand the Commission's proposal for rules and procedures, like those implemented by the CPUC, to ensure the confidentiality of settlement discussions. Additionally, the Company would benefit from a transparent understanding of the file management practices that will effectively screen the Commission or staff member who participated in settlement discussions from the ultimate decision-making process, and potentially from future decision making processes. This information would assist stakeholders in understanding and commenting on whether such an approach is appropriate within Alberta's regulatory framework.

Should the Commission decide to implement Commission-led mediation, FortisAlberta submits that successful implementation of this approach would require a separate arm of the Commission to ensure Commission members that are involved in settlement discussions are not involved in the decision making process regarding the resulting settlement agreement or future proceedings that involve similar issues. Further, this approach would require Commission members without mediation expertise to undertake additional training to provide them with the necessary skills to facilitate fruitful settlement discussions. Given the size of the jurisdiction and the number of regulated utilities in Alberta, more consideration and analysis are needed to determine if the creation of an additional sizable arm of the Commission is an efficient deployment of regulatory resources.

AUC Staff Participation as Observers or Participants in Negotiated Settlement Processes

FortisAlberta is generally supportive of AUC staff participating as a fairness advisor or observer to the negotiation. As currently drafted, the Company takes no issue with subsection 35(6) of the proposed rule.

Subject to the considerations provided below, FortisAlberta sees potential value in staff taking on an expanded role in the future, beyond a "fairness observer", in negotiated settlement discussions. Such participation could include a limited advisory role that provides participants with important insights into the aspects of a settlement discussion that are likely to prove more or less critical when any negotiated outcome is finally laid before the Commission for approval. A clearly defined new role for AUC staff participating in negotiated settlements could also be valuable as a means of helping participants maintain focus on positions and analyses that are grounded in established Commission precedent as a means of ensuring that negotiated outcomes are more likely to respect established AUC policy. Each of these kinds of contributions from properly trained and authorized Commission staff can reasonably be expected to mitigate against unexpected outcomes when final approval for a settlement is sought. Further, a staff arm that makes submissions to the Commission may contribute to reduced future Commission reliance on intervener groups who advance specific interests that do not necessarily reflect the public interest.

With respect to the suggestion that AUC staff could participate in settlement negotiations as a party to the settlement, with a view to filing a staff submission, FortisAlberta submits that such an approach would require the investment of significant resources by the Commission to develop a similar level of expertise across Commission staff. As the Commission is aware, rate making matters are inherently complex and can require years of training to develop the expertise necessary to make clear and helpful submissions to the Commission. Without development of the necessary expertise, FortisAlberta is concerned that the fairness of a process that includes staff submissions to the Commission will be dependent on the staff members involved in a particular proceeding.

Regardless of the expanded role that AUC staff may take in negotiated settlements, FortisAlberta submits that sufficient safeguards must be implemented to ensure that settlement discussions remain confidential, and that AUC staff involved in the settlement process do not communicate directly with the Commission members that will ultimately decide an application. The Company notes that this would require the

development of documents and processes similar to those contained in the AUC Investigations and Enforcement Proceedings Communication Protocol[5] and Bulletin 2016-10.[6]

Conclusion

While FortisAlberta supports initiatives that result in red tape reduction, it submits that some of the proposed amendments to Rule 018 and the introduction of Commission-led mediated settlements potentially result in increased administrative burden, as well as the potential for lengthier proceedings, should negotiations not lead to a complete settlement. To achieve successful negotiated outcomes, the Company recommends that negotiation processes remain voluntary, include consideration of all issues, and be subject to only the additional process steps as may be required to satisfy the Commission that the settlement agreement is in the public interest.

FortisAlberta welcomes the opportunity to make further submissions on this matter and on any documents and processes that may be required to implement changes to the negotiated settlement process in a fair manner.

Please contact me at (403) 514-4941 or Regulatory Affairs via regdept@fortisalberta.com if you have any questions with respect to this submission.

Sincerely,

/Elizabeth von Engelbrechten/
Elizabeth von Engelbrechten
Senior Manager
Regulatory Affairs

[5] Procedural Protocol AUC Investigations and Enforcement Proceedings.pdf.
[6] Bulletin 2016-10.