ONTARIO ENERGY BOARD

Enbridge Gas Distribution Inc. (EGD) and Union Gas Limited (Union)
Application for Leave to Amalgamate

Industrial Gas Users Association (IGUA)
Submissions on Issues List

APPLICABILITY OF THE BOARD'S "MAADs POLICY"

1. The crux of the debate in respect of the appropriate scope of inquiry for this proceeding is whether the Board's "MAADs policy" should be applied to the application *"holus bolus"*.

2. The applicants take the position, through advocacy of a narrow issues list framed to fit well within the parameters of the MAADs policy, that this issue is resolved, and need not be of any consideration in this proceeding.

3. The applicants also assert that the legitimate scope of inquiry in respect of their application is bounded by the manner in which they have themselves framed that application.[1] They assert, for example, in reference to the applicability of the "no harm" test for consolidation approval[2], that:

> *It is neither reasonable nor fair, however, that, when an applicant has focused its evidence on meeting a widely-applied test, other parties should be free to put into issue some other test that the applicant could have had no expectation that it would need to address in its pre-filed evidence.*

4. It is accepted in regulatory jurisprudence that it is in the discretion of an applicant how its case is framed. To suggest, however, that in making that choice the applicant gets to dictate the boundaries of the tribunal's inquiry is a novel proposition, and a wrong one. Perhaps in an argument regarding procedural fairness a case could be made that applicants who have not addressed an issue in their evidence that needs to be considered

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[1] Argument-In-Chief on Draft Issues List (Issues AIC), paragraphs 1, 2 and 32.
[2] Issues AIC, paragraph 32.

should be able to file additional evidence to address that issue. The remedy in such event is not that the tribunal's mandate and jurisdiction, or the public interest, is somehow constrained by the manner in which an applicant has, of its own volition, chosen to present its application.

5. In respect of the real issue at hand, there is no basis on which to conclude, *ab initio*, that the MAADS policy necessarily applies, "*holus bolus*", to determination of whether to grant leave for the merger of EGD and Union pursuant to section 43 of the *Ontario Energy Board Act, 1998* (*OEB* Act). This has not been determined in any manner by the Board, either expressly or implicitly, though it will be determined at the end of this case. It cannot be reasonably concluded that this is not an issue in this proceeding.

The Relevant OEB Policies

6. The applicants assert in their Argument-In-Chief on the Draft Issues List (Issues AIC)[3] that:

> *It is evident from the Rate Handbook itself, and from linkages among the Consolidation Handbook, the Rate Handbook and the Gas Filing Requirements, that the Board's MAADs policies provide guidance for consolidations by both gas and electricity distributors. This can also be seen from the linkages between the MAADs policies and the Board's Renewed Regulatory Framework ("RRF"), formerly the Renewed Regulatory Framework for Electricity.*

7. The asserted linkages are, at best, rather loose, and the argument that they necessarily lead to application of the MAADs policy to determination of the scope (as distinct from the eventual outcome) of this application does not bear up under more careful analysis.

8. In March, 2015 the Board issued its *Report of the Board: Rate-Making Associated with Distributor Consolidation* [EB-2014-0138] [*2015 Consolidation Rate Making Report*]. The introduction to the report states [emphasis added]:

> *The Ontario Energy Board's renewed regulatory framework is a comprehensive performance based approach to regulation. The framework sets expectations that electricity distributors will seek out efficiencies to increase productivity and manage costs. The OEB issued a letter on February 11, 2013, announcing an initiative to*

[3] Issues AIC, paragraph 10.

assess how the OEB's regulatory requirements for electricity distributors may affect the ability of distributors to realize operational or organizational efficiencies.

...

The report of the Ontario Distribution Sector Review Panel, issued in December 2012, set out a vision for consolidation resulting in less costly and more efficient delivery of electricity, with a predicted cost savings of $1.2 billion over the next ten years. When the Minister of Energy responded to the Panel's report, he indicated that he expected that the sector would find ways to achieve those savings through more efficient service delivery, including negotiated consolidations. This view was carried forward in the government's December 2013 Long Term Energy Plan ("LTEP"), where it is stated that the government expects electricity distributors to pursue innovative partnerships and transformative initiatives that will result in savings for electricity ratepayers.

...

After considering the government's policy expectations, the results of the consultations, and the OEB's own expectations that the distribution sector should continue to seek out efficiencies especially through consolidation, the OEB has concluded that it will proceed at this time with amendments to its rate-making policy associated with electricity distributor consolidation.

This report sets out the OEB's amendments to its rate-making policy for electricity distributors following a MAADs transaction.

9. The first Board policy in the area of utility consolidations – the *2015 Consolidation Rate Making Report* – was expressly driven by, and expressly addressed, consolidation in the electricity distribution sector.

10. The word "gas" does not appear anywhere in this 2015 report.

11. In January, 2016, the Board issued its *Handbook to Electricity Distributor and Transmitter Consolidations* [*2016 Electricity Consolidations Handbook*]. The introduction to this handbook states:

> *The Commission on the Reform of Ontario's Public Services, the Distribution Sector Review Panel and the Premiers [sic] Advisory Council on Government Assets have all recommended a reduction in the number of local distribution companies in Ontario and have endorsed consolidation.*
>
> ...
>
> *The OEB recognizes that there is a growing interest in and support for consolidation. The OEB has a statutory obligation to review and approve consolidation transactions where they are in the public interest. In discharging its mandate, the OEB is committed to reducing regulatory barriers to consolidation.*

...

> *While the Handbook is applicable to both electricity distributors and transmitters, most of the OEB's policies and prior OEB decisions have related to distributors. Transmitters should consider the intent of the Handbook and make appropriate modifications as needed to reflect differences in transmitter consolidations.*

12. This *2016 Electricity Consolidations Handbook* is the centrepiece of the Board's "MAADs policy". It was expressly developed in response to government policy and reports focussed on the public interest benefits expected from consolidation of Ontario's (then) 75 plus electricity distributors. It expressly applies to electricity distributors and transmitters.

13. The applicants in their Issues AIC rely almost exclusively[4] on the *2016 Electricity Consolidations Handbook* in asserting their position that it is not legitimate for the Board in this application to consider the applicability of a deferred rebasing period to the merger proposal, asserting that:

> *In light of the guidance provided by the Board for consolidation applications, there is no legitimate issue in this case about the deferred rebasing period.*

14. This is a remarkable proposition in light of the fact that the *2016 Electricity Consolidations Handbook* does not even purport to apply, expressly or by implication, to gas distributor merger applications under *OEB Act,* section 43.

15. The word "gas" does not appear anywhere in this 2016 handbook.

16. In October, 2016 the Board issued its *Handbook for Utility Rate Applications* [*2016 Rate Applications Handbook*]. The introduction to this handbook states:

> *The Handbook is applicable to all rate regulated utilities, including electricity distributors, electricity transmitters, natural gas utilities, and Ontario Power Generation. It has been developed based on the OEB's policies and the experience gained through the processing of rate applications since the release of the Renewed Regulatory Framework for Electricity (RRFE). The OEB expects utilities to file rate applications consistent with this Handbook unless a utility can demonstrate a strong rationale for departing from it.*

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[4] Issues AIC, paragraphs 34-38.

17. Following a discussion of the development of the RRFE, the introduction to this handbook continues (at page 4) as follows:

> *Although the RRFE was developed specifically for electricity distributors, the OEB has for some time indicated that the principles underpinning the RRFE are applicable to all regulated utilities (natural gas utilities, electricity distributors, electricity transmitters and Ontario Power Generation).*
>
> *Since the release of the RRFE Report, over half of Ontario electricity distributors have applied for rates under the RRFE. Enbridge Gas Distribution Inc. also applied using the principles of the RRFE. Based on its review of those rate applications, the OEB has now completed an assessment of the RRFE and the principles underpinning it. This Handbook outlines how the RRFE will be applied to all regulated utilities going forward. The framework will be referred to as the Renewed Regulatory Framework (RRF) in this document and by the OEB going forward to reflect this transition.*

18. The *2016 Rate Applications Handbook* does apply to gas utilities. However, ***it is about setting rates, not about encouraging or approving consolidations***. As noted above, there is a separate policy document which addresses consolidations - *2016 Electricity Consolidations Handbook* – and it applies expressly, and specifically, to electricity distributors.

19. There is a section in the *2016 Rate Applications Handbook* that discusses consolidations (which are referred to as "MAADs").[5] This brief (two paragraph) section of the handbook refers back to the *2016 Electricity Consolidations Handbook*, the centrepiece of the Board's "MAADs policy" as discussed above, and proceeds to address how the rates policy set out in the *2016 Rate Applications Handbook* interacts with the MAADs policy set out in the *2016 Electricity Consolidations Handbook*. To that end, this MAADs section of the *2016 Rate Applications Handbook* states:

> *The OEB has issued [ ] [the 2016 Electricity Consolidations Handbook] that makes clear that rate setting is generally not a consideration in reviewing a consolidation through a merger, acquisition, amalgamation or divestiture. In the first cost of service or Custom IR application following the consolidation, the OEB will scrutinize specific rate-setting aspects of the MAADs transaction, including a rate harmonization plan and/or customer rate classifications post consolidation.*

[5] 2016 Rate Applications Handbook, page 21.

20. This brief section of the *2016 Rate Applications Handbook* then lists the considerations related to the MAADs transaction that the Board will include in the cost of service proceeding following the MAADs transaction.

21. Nothing in this section suggests, or implies, that the Board intended its MAADs policy to apply to gas distributors. This section merely provides guidance on how rate applications following a transaction to which the MAADs policy does apply need to reflect and address the preceding MAADs transaction.

22. While it is certainly the case that the *2016 Rate Applications Handbook* indicates that the Board's RFE rate making policies now apply to EGD and Union, there is no indication anywhere in this policy document that the MAADs policy is also to be applied to EGD and Union.

23. Finally in respect of policy documents, the applicants rely on their Issues AIC on the Board's February, 2017 *Filing Requirements for Natural Gas Rate Applications* [*2017 Gas Rate Filing Requirements*]. The introduction to the *2017 Gas Rate Filing Requirements* states:

> *This document provides information about the filing requirements for a natural gas utility's cost of service rate application.*

24. There is a sub-section in the *2017 Gas Rate Filing Requirements* that addresses utility consolidations.[6] The entirety of that sub-section is as follows:

> *In the first cost of service application following a consolidation, the applicant is expected to address any rate-making aspects of the MAADs transaction, including rate harmonization and/or customer rate classifications post consolidation.*

25. That's it. One sentence. The only sentence in all of the relevant Board policies that can at all be said to "link" the term "MAADs" (not the MAADs policy) to gas utilities.

26. This extremely weak "linkage" is most certainly and obviously insufficient to necessarily conclude that the Board's fully and carefully developed policy to facilitate the Ontario government's policy, and the Board's own policy, to encourage consolidation among Ontario's 75 plus electricity distributors should be applied, "*holus bolus*", to the instant

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[6] 2017 Gas Rate Filing Requirements, subsection 2.1.9 at page 17.

application proposing merger of the province's two primary gas distributors. This extremely weak "linkage" is certainly insufficient as a basis to preclude, from the outset, consideration of the very issue of whether the Board's MAADs policy should, or should not, apply, in whole or in part, to the application now before the Board.

27. The applicants themselves repeatedly note that their application is *"based on guidance"* and was *"guided by"* the Board's policies and decisions on MAADs.[7] Notably, the applicants don't assert that the application, or their proposed issues list, is "in accordance with", or "in compliance with" the Board's MAADs policies. They can't, as illustrated above.

28. This is an issues process. It is certainly a legitimate issue in this application whether the Board's MAADs policy, which applies to electricity distributors and transmitters, should be applied, in whole or in part, to the proposed merger of EGD and Union.

29. It is certainly not legitimate to claim that this determination has already been made, expressly or implicitly, and is thus beyond the reasonable scope of inquiry and debate in this application.

30. Even if the MAADs policy does contemplate application to the current application (which, in IGUA's submission, it does not), Board policy may be guidance only, and this Hearing Panel cannot as a matter of law be fettered by that policy in the exercise of its discretion. In reviewing the application before it this Hearing Panel must consider, at some level, whether to apply the Board's electricity MAADs policy, or not.

31. That is why several of the intervenors have filed the "Intervenor Proposal" issues list (as that term is defined by the applicants at Issues AIC paragraph 22). The Intervenor Proposal issues list is designed to pose the question of whether the Board's MAADs policy, which applies to electricity distributors and transmitters, should be applied, in whole or in part, to the proposed merger of EGD and Union.

[7] Issues AIC, pargaraphs 1, 2 and 3.

Specific Circumstances of this Application

32. Apart from the lack of any necessary link in existing Board policies between MAADs policy applicable to the electricity sector and the EGD/Union merger that is before the Board in this application, and apart from the legal imperative for this Hearing Panel to at least turn its mind to whether the MAADs policy should apply in the circumstances before it or not, there are number of reasons why the question of whether the MAADs policy should be applied to this application, in whole or in part, is an important question in the particular circumstances before us:

(a) The Board's MAADs policy was developed to incent electricity distributor consolidation, in accord with the strong policy position of the provincial government. In current instance, Enbridge Inc.'s acquisition of Spectra, and thus of Union Gas Limited, has already occurred. The issue before the Board at the moment is whether EGD and Union should now be further integrated, as a matter of corporate structure, through merger. It is arguable that the incentive function of the Board's electricity MAADs policy is not required in this instance.

(b) Government and Board policy is to encourage electricity distributor consolidation in order to extract efficiencies from the sector that would not otherwise be pursued and obtained, to the ultimate benefit of electricity ratepayers. In the current instance, given the already established joint ownership of the two primary Ontario gas distributors, it is legitimate to argue that the Board can expect, and indeed must require in determining just and reasonable rates, efficiencies from co-ordinated operation of EGD and Union, whether or not they merge as a matter of corporate structure. That is, not only could it be argued that no "incentive" is required to encourage such efficiencies, it could also be argued that such efficiencies are to be expected and should be required from regulated entities who must exercise prudence in operating their monopoly, franchised services in the public interest.

(c) It could also be reasonably argued that an *"ab initio"* evaluation of whether the Board's electricity MAADs policy should apply, and if so with what modifications, if any, is a required consideration in this case simply given the scale and scope of the two regulated entities who have applied for leave to merge to form an even bigger regulated entity. The combined 2018 revenue requirement of these two regulated utilities is $4.3 billion (extrapolated for 10 years would be in the order of $50 billion), and they have a combined 3.6 million customers. Clearly these are not like the typical Ontario electricity distributors for whom the Board's MAADs policy was developed.

33. The issue for the moment is not whether any of these arguments are ultimately persuasive. Rather the issue is whether these lines of inquiry are reasonable, and reasonably necessary for the Board to properly consider the application placed before it by EGD and Union.

34. IGUA believes that they are.

Implications of Applying the Board's MAADs Policy

35. It must also be considered that the implications of applying the Board's MAADs policy, unmodified, are significant. They include:

(a) No benefit of any synergies to ratepayers for 10 years, subject only to sharing in years 6 through 10 but only, on the applicants' formulation, if the utilities over earn by 300 basis points (bp). In today's terms, that would be a 12% return to the shareholders before ratepayers see any benefit from the merger.

(b) We note that this 300 bp dead band proposed by the utilities is actually a Board stipulated rate plan off ramp. That is, the Board will inquire, in this eventuality, whether the rate plan has gone off the rails and requires adjustment, even without the utilities "proposing" it. The fact that this is a general Board mandated off ramp indicates the significance of the utilities' proposal for adopting it as part of their proposed merger program.

(c) The 10 year rebasing deferral is proposed by the applicants in the face of both utilities coming off 5 year rate plans designed, assumed by the Board, and represented by the utilities when approval was sought, to incent sustained efficiencies that would accrue to the benefit of ratepayers following the conclusion of the rate plan. We are not aware of any instance to date when a utility consolidation has been approved and rebasing deferral granted in the circumstance where the constituent entities are both coming off extended rate plans prior to the effective date for the proposed consolidation, and proposing to skip (not really defer) rebasing for another decade.

36. Again, the issue for the moment is not whether these particular circumstances themselves indicate that the Board's electricity MAADs policy should not be applied, or should not be applied without modification, to the merger proposal before us. Rather the issue is whether inquiry in these particular circumstances is reasonable, and reasonably necessary, for the Board to properly consider the application placed before it by EGD and Union.

37. IGUA believes that it is.

The Companion Rate Plan Application

38. We believe that the applicants know this as well.

39. In a conventional MAADs application before this Board no "rate plan" application would be required, because there is a MAADs rate framework. The fact that the applicants have contemporaneously filed a rate plan application [EB-2017-0307] underscores the uncertainties inherent in the regulatory approach which the applicants have proposed; i.e. should the MAADs policy, including the rate framework associated therewith, developed for Ontario's electricity distributors apply to the merger proposed herein.

40. IGUA does not fault the applicants for bringing that application. In fact, IGUA believes that it is necessary in order to determine how the proposed merger, if approved, should be managed from a rate making perspective. It is necessary precisely because, as the applicants themselves observe in their companion application, the post-merger rate framework developed by the Board for electricity distributors cannot simply be transferred, without modification, for application to a post-merger EGD and Union. (That is why, for example, the applicants have filed in that case their own gas utility productivity study.)

"INTERVENOR PROPOSAL" ISSUES LIST

41. The Intervenor Proposal issues list captures the narrowly scoped issues put forward by the applicants (as indicated by the bold and italicized numbers included in the Intervenor Proposal which cross-references the utilities' draft issues list issue numbers) within a more appropriately scoped framework for consideration of the application. That more appropriate scoped framework includes the issue of whether the Board's "MAADs policy" should be applied to the application, in whole or in part.

42. Subject to the specific submissions which follow in respect of the "no harm" test, IGUA believes that all of the issues included in the Intervenor Proposal are appropriate for inclusion, at the outset of this proceeding, in defining the legitimate scope of inquiry herein.

Applicability of the "No Harm" Test

43. The utilities have taken particular exception through their Issues AIC submissions to the questioning of the applicability to the proposed merger of the "no harm" test.

44. IGUA does not agree with the assertion by the applicants that the Board's recent decision approving EPCOR's acquisition of NRG [EB-2016-0351] disposes of the question of whether the "no harm" test should apply in the instant matter. Apart from the legal fact that this Hearing Panel is not bound by previous Board decisions, in the EPCOR case:

    (a) No significant argument was advanced on the point.

    (b) The Hearing Panel in that case provided no reasoning on the point.

    (c) The Board's finding in that case was that the "no harm" test applies *"in this case"*, and was stated exactly twice, in a half a sentence each time and in that fashion. Further, *"this case"* involved the acquisition of a very small, and often problematic, utility by the well known, well resourced and experienced EPCOR utility group, and presented a very different context for the Board's approval than the context applicable in the instant application.

45. Nonetheless, given the weight of the balance of the authority that the applicants review in their Issues AIC, IGUA does agree with the applicants that Board should reject departure from the "no harm" test as an issue in the current section 43 merger approval proceeding unless some reasonable (perhaps not "very compelling" as asserted by the applicants) rationale is put forward.

46. IGUA is not at present aware of such a rationale. As a matter of principle, IGUA believes that utility shareholders should be, and are as a matter of regulatory law, free to organize their businesses and business affairs in the manner in which they choose. That is a principle that the "no harm" test essentially codifies. (That is also an issue wholly distinct from issues regarding assumptions for rate making purposes, including whether a rebasing deferral period is appropriate, and if so for how long and how conditioned.)

47. However, if another party does raise a reasonable rationale for the legitimacy of pursuing the issue of whether the "no harm" test should be applied in this instance, then that party, and other interested parties, should be allowed to pursue the issue.

48. In any event, even if the Board does conclude that the applicability of the "no harm" test need not be the subject of inquiry in application, IGUA does view the issue of how the test

should be applied in this case (Intervenor Proposal issue 2) and whether the applicants have met the test (Intervenor Proposal issue 3) as necessary for inclusion in the final issues list.

Intervenor Proposal Issue 7: Impacts of the Merger

49. The Intervenor Proposal includes, as issue 7:

> *Would the proposed merger impact any other OEB policies, rules or orders (e.g. regulation of new storage, Storage and Transmission Access Rule (STAR))? If so, what are those impacts and how should the Board address them?*

50. It is interesting, and instructive, that this is the only particular issue singled out by the applicants for challenge in their Issues AIC (apart from the issue of whether the "no harm" test should apply).

51. In challenging the inclusion of this issue on the list, the applicants invoke the "no harm" test as setting the entire scope of the Board's legitimate inquiry in this matter.

52. Even assuming that the "no harm" test does apply to approval of the proposed merger itself, that does not necessarily indicate that the merger, if approved, might not then raise other issues to be addressed. Even if it were ultimately determined that such other issues should not defeat the merger, it might well be determined that such other issues should be addressed through conditions to the merger or some other mechanisms to ensure appropriate ratepayer and/or market safe guards.

53. The Intervenor Proposal attempts to provide some concrete examples that were raised in the intervenors' early discussions regarding the implications of the proposed merger. For example, would the merging of ownership of the vast bulk of Ontario's gas storage facilities dictate any particular considerations, conditions or safeguards? As the Board will be aware, where this Board is exercising its specialized jurisdiction the competition authorities defer to this Board in respect of considerations of competitive impact.

54. As another example, would approval of the proposed merger impact ex-franchise transportation rates once EGD's contracts with Union for transmission service are effectively unwound through the legal merger of the two entities, and if so is some remedial measure, in the interim or otherwise, appropriate?

55. It is disingenuous of the applicants to assert that the consequences of the merger, if approved under the "no harm" test (if that is the test ultimately determined by the Board to apply), should not be considered in the event that the evidence (yet to be elicited) provides a reasonable basis upon which to do so.

56. Indeed, in rejecting the Intervenor Proposal in aggregate, the applicants have rejected the notion that there could be conditions attached to approval of the proposed merger (issue 8 of the Intervenor Proposal). That can't be right.

57. In rejecting the Intervenor Proposal in aggregate, the applicants have also rejected the proposal that commitments to future action that were made by the utilities during their respective rate plan terms should be at least identified so that parties and the Board can consider whether these commitments are impacted by the proposed merger, and if so what, if anything, is appropriately done in recognition of, or to address, such impact.

58. In their companion rate plan approval application [EB-2017-0307] the applicants propose to address some of these commitments and prior Board directives during the proposed rebasing deferral period, and respond to the balance as part of a rebasing proceeding in 2029 (i.e. a decade from now).[8] The applicants state in that filing:

> *Both EGD and Union have received prior Board directives and/or made commitments that were to be addressed in their 2019 rebasing proceedings. Many of the directives and commitments are dependent on a comprehensive review that would occur as part of rebasing.*

59. In light of *their own evidence* in the rate plan application, it is counterintuitive to assert, as the applicants effectively do, that the Board should not include within the scope of its deliberations in this case identification and consideration of the implications of the merger and/or a 10 year rebasing deferral (resulting in more than 15 years between cost of service applications) on prior Board directives to, and commitments made to this Board by, the applicants.

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[8] EB-2017-0307, Exhibit B, Tab 1, page 30, section 10.3 and Exhibit B, Tab 1, Attachment 5.

CONCLUSION

60. The 15 parties identified in IGUA's counsel's letter to the Board herein dated January 23, 2017 with which the Intervenor Proposal issues list was submitted, and other parties not expressly identified in that letter, have followed the Board's procedural directions and statement of expectations and spent a considerable amount of time and effort discussing their respective concerns with the application and co-operatively developing the Intervenor Proposal issues list.

61. While each of the named (and unnamed) parties will make their own submissions on the details included in the Intervenor Proposal issues list, in IGUA's view the list represents a strong consensus on the appropriate scope under which the Board should commence its inquiry in respect of this singular and significant application.

62. The applicants are proposing, in this application and their companion rate plan application [EB-2017-0307], that the Board determine the basis upon which gas distribution rates for recovery of $50 billion dollars will determined in the decade to come. In this application, the applicants are proposing to defer rebasing, already more than 5 years past, for another decade, for a total of 15 years without a cost of service review.

63. In IGUA's respectful submission the Board should not accept the proposal by the applicants to apply to their proposed merger a regulatory framework developed in an entirely different context for an entirely different purpose without at least considering whether such a course is appropriate.

64. The applicants urge the Board to proceed narrowly, without engaging in such a consideration, even before the evidentiary record is properly developed.

65. Other parties, including IGUA, urge the Board not to so constrain its review, at least not at this early stage.

66. The Intervenor Proposal issues list is both well-defined and appropriately and responsibly cast, and should form the basis for the Board's deliberations in this matter as it proceeds.

ALL OF WHICH IS RESPECTFULLY SUBMITTED by:

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January 26, 2018