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BY EMAIL

November 22, 2019

Ms. Christine E. Long
Registrar and Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
BoardSec@oeb.ca

Dear Ms. Long:

**Re: Chapleau Public Utilities Corporation
Application for approval to amalgamate Chapleau Public Utilities
Corporation and Chapleau Energy Services Corporation
OEB Staff Submission**

Ontario Energy Board File Number: EB-2019-0135

In accordance with Procedural Order No. 1, please find attached the OEB staff submission for the above proceeding. This document has been sent to Chapleau Public Utilities Corporation.

Chapleau Public Utilities Corporation is reminded that its reply submission is due by December 6, 2019, should it choose to file one.

Yours truly,

Original Signed By

David Martinello
Advisor, Generation & Transmission

Encl.



OEB Staff Submission

**Application for approval to amalgamate
Chapleau Public Utilities Corporation and
Chapleau Energy Services Corporation**

Chapleau Public Utilities Corporation

EB-2019-0135

November 22, 2019

1 INTRODUCTION

1.1 Overview of the Application

Chapleau Public Utilities Corporation (CPUC), filed an application to the Ontario Energy Board (OEB) on April 5, 2019 (Application). The Application requested approval of an amalgamation with CPUC's affiliate, Chapleau Energy Services Corporation (CESC), effective January 1, 2018. Both CPUC and CESC are wholly owned by the Township of Chapleau (Township). Specifically, CPUC requested the following orders of the OEB:

- Approval to amalgamate CPUC and CESC into a single entity, pursuant to section 86(1)(c) of the *Ontario Energy Board Act, 1998* (OEB Act)
- Approval for CPUC to transfer its licence and rate orders to the amalgamated entity pursuant to section 18 of the OEB Act
- Approval for the amalgamated entity to be granted permission to continue to track costs to existing deferral and variance accounts
- Authorization of an exemption under section 71(4) of the OEB Act permitting CPUC to undertake certain business activities beyond the distribution of electricity as a result of exceptional circumstances

CPUC requested that, if approval to amalgamate is granted, that the approval be granted with an effective date of January 1, 2018 for the amalgamation as well as the other requests made by CPUC.

1.2 Application Context and Considerations

During the course of CPUC's 2019 cost of service application (Rate Application)¹, it was discovered that CPUC and CESC amalgamated on January 1, 2018, prior to obtaining the approval of the OEB.

Prior to the January 1, 2018 amalgamation, CPUC operated as a "virtual utility" between 2012 and 2017. During this time, CPUC operated as the regulated distributor and owned the distribution system, but retained its affiliate, CESC, to provide the necessary services to operate and maintain the distribution system.

According to the Application, the reasoning for the amalgamation stemmed from CESC's cessation of operations and CPUC's need to find an alternative to obtaining the

¹ EB-2018-0087

services it required to maintain and operate its distribution system which were provided by CESC prior to amalgamation.² CPUC stated that, as CESC was an affiliate of CPUC, the options for obtaining the necessary resources were to:

- Directly transfer the assets of CESC to CPUC
- Amalgamate CPUC with CESC, with the effect that the assets of CESC and CPUC would be held together within the amalgamated entity

The Township determined that amalgamating CPUC and CESC would be the means to transfer the assets.

CPUC filed Articles of Amalgamation, pursuant to the *Ontario Business Corporations Act* (OBCA), with the Ministry of Government and Consumer Services (MGCS) in December 2017. The Articles of Amalgamation were endorsed by the MGCS Director on January 1, 2018; such endorsement constitutes a 'Certificate of Amalgamation'.³

Although CPUC and CESC amalgamated effective January 1, 2018, for the purposes of the OBCA, no application was filed with the OEB requesting approval of the amalgamation pursuant to section 86(1)(c) of the OEB Act. Since January 1, 2018, CPUC and CESC have ostensibly operated as the amalgamated entity of CPUC. However, section 86(6.2) of the OEB Act states that a certificate of amalgamation is void if it is endorsed before leave of the OEB for the amalgamation is granted.

As a result, while the Application is to be assessed in the context of the OEB's "no harm" test, given that the Application is filed after CPUC and CESC ostensibly amalgamated, the effective date of the amalgamation is a unique, additional consideration in this proceeding.

1.3 Process to Date

CPUC filed the Application on April 5, 2019. The OEB issued a Notice of Hearing on September 16, 2019. No parties applied for intervenor status and no letters of comment were filed with the OEB.

In accordance with Procedural Order No. 1, OEB staff filed interrogatories on October 10, 2019 while CPUC's responses to interrogatories were received by the OEB on October 29, 2019. CPUC filed its Argument-in-Chief (AIC) on November 7, 2019.

² Application, p. 3

³ *The Ontario Business Corporations Act, R.S.O. 1990, c.B.16 (OBCA), section 178*

2 RELEVANT REGULATORY PRINCIPLES

2.1 The “No Harm” Test

The OEB applies the “no harm” test when assessing applications for approval of utility consolidations. The “no harm” test was first established by the OEB in 2005 through its decision in an adjudicative proceeding,⁴ and has been used to guide OEB decision making on mergers, acquisitions, amalgamations and divestitures (MAADs) applications since then.

The *Handbook to Electricity Distributor and Transmitter Consolidations* (MAADs Handbook), issued by the OEB on January 19, 2016, confirmed that the OEB will continue its practice of applying the “no harm” test when adjudicating utility consolidation requests. The OEB considers whether the “no harm” test is satisfied based on an assessment of the cumulative effect of the transaction on the attainment of its statutory objectives. The OEB Act states:⁵

Board objectives, electricity

1(1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:⁶

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
 - 1.1. To promote the education of consumers.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.
3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer’s economic circumstances.
4. To facilitate the implementation of a smart grid in Ontario.

⁴ RP-2005-0018/EB-2005-0234/EB-2005-0254/EB-2005-0257

⁵ OEB Act, Section 1

⁶ Note that on a date to be named by proclamation of the Lieutenant Governor, paragraph 1 of subsection 1 (1) will be repealed and replaced with “To inform consumers and protect their interests with respect to prices and the adequacy, reliability and quality of electricity service”, and paragraph 1.1 will be repealed.

5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connections of renewable energy generation facilities. 2004, c. 23, Sched. B, s. 1; 2009, c. 12, Sched. D, s. 1; 2015, c. 29, s. 7

If the proposed transaction has a positive or neutral effect on the attainment of these objectives, the OEB will approve the consolidation.⁷

⁷ MAADs Handbook, pp. 3-4

3 OEB STAFF SUBMISSIONS REGARDING THE “NO HARM” TEST

In its review of the Application, OEB staff considered the requirements described in the MAADs Handbook and other applicable OEB policies as described herein.

3.1 Assessment of Application Against the “No Harm” Test

The MAADs Handbook provides guidance to applicants and stakeholders on how the OEB reviews consolidation transactions proposed under section 86 of the OEB Act. As noted above in Section 2.1, the MAADs Handbook confirms that the OEB applies the “no harm” test in its assessment of consolidation applications. In determining whether the proposed transaction has a positive or neutral effect on the attainment of the OEB’s statutory objectives, the OEB has primarily focused its review on the impacts of the proposed transaction on price and quality of service to customers, and the cost effectiveness, economic efficiency and financial viability of the consolidating utilities.

Submission

The amalgamation that is proposed in the Application is not a “traditional” consolidation of two, or more, utilities with separate distribution systems. Instead, it is the combination of two affiliates, CPUC and CESC – the distribution system and the staff/resources used to maintain and operate the distribution system. Acknowledging this context, OEB staff submits that CPUC has demonstrated that the proposed transaction will not adversely affect customers with respect to price or quality of service. Further, OEB staff submits that the proposed transaction will not negatively affect the cost effectiveness, economic efficiency, or financial viability of CPUC. OEB staff therefore submits that the proposed transaction meets the “no harm” test.

The basis for OEB staff’s submission is discussed in further detail below.

3.2 Impact on Price, Economic Efficiency and Cost Effectiveness

CPUC noted that the transition and transaction costs it incurred when it initially amalgamated for an effective date of January 1, 2018 were not directly recovered by ratepayers and were not included in its Rate Application.⁸ Further, CPUC outlined that any costs associated with this Application will not be collected from ratepayers.⁹

⁸ EB-2018-0087

⁹ Response to Interrogatories OEB 1-Staff-5 (a) and (b)

CPUC submitted, through its AIC, that the approval of rates in the Rate Application¹⁰, which was based on a post-amalgamation cost structure, supports the conclusion that the proposed amalgamation has no adverse impact on price.¹¹ In addition, CPUC further submitted that the proposed amalgamation has no adverse impact on its economic efficiency and cost effectiveness as the operation and maintenance of the distribution system, and the associated costs, are unaffected by the amalgamation in any material way. This is highlighted by CPUC's response to interrogatories in which it noted that the amalgamation did not, and was not, intended to change, in any material way, the manner in which CPUC operated and maintained its distribution system. However, the only material effect highlighted by CPUC pertained to the reduction in administrative and regulatory burden associated with running a virtual utility.¹²

Submission

OEB staff is satisfied by CPUC's evidence that the transaction and transition costs will not be recovered through ratepayers and that the transaction is not intended to materially change the manner in which the CPUC distribution system is operated post-amalgamation. Therefore, from a price, economic efficiency and cost effectiveness standpoint, OEB staff submits that the proposed amalgamation will have a neutral effect on the ratepayers of CPUC as there will be no synergies or savings experienced, nor will there be any costs to ratepayers as transaction and transition costs have not, and will not, be recovered through rates.

With regards to CPUC's submission that there is no adverse impact on price as a result of the approval of rates in the Rate Application¹³, which are based on a post-amalgamation structure, OEB staff notes that in the Decision and Order in the Rate Application¹⁴, the amalgamation of CPUC and CESC was addressed as follows:

The parties agreed that the settlement of the revenue requirement is based on ensuring that [CPUC] has adequate resources to continue operating the utility, and not on an assumption that the amalgamation application (filed on April 6, 2019) will be approved by the OEB. The parties also acknowledged that the application for leave to amalgamate will be considered in a separate proceeding.¹⁵

¹⁰ EB-2018-0087

¹¹ CPUC AIC, p. 6

¹² *Ibid.*

¹³ EB-2018-0087

¹⁴ *Ibid.*

¹⁵ EB-2019-0135

The parties agreed that the outcome of the amalgamation application will have no impact on the reasonableness of the settled revenue requirement.¹⁶

3.3 Impact on Service Quality and Reliability

The MAADs Handbook requires utilities to indicate the impact that the proposed transaction will have on customers with respect to reliability and quality of electricity service. The MAADs Handbook also provides that in considering the impact of a proposed transaction on the quality and reliability of electricity service, and whether the “no harm” test has been met, the OEB will be informed by the metrics provided by the distributor in its annual reporting to the OEB and published in its annual scorecard.¹⁷

OEB staff reviewed CPUC’s 2018 Electricity Utility Scorecard to examine reliability measures with respect to System Average Interruption Duration Index (SAIDI) and System Average Interruption Frequency Index (SAIFI) metrics. The results of this review indicate that CPUC has been able to maintain fairly consistent reliability performance over the past five-year period, with the exception of the increased SAIDI and SAIFI metrics reported in 2018. The historical reliability metrics of CPUC are shown in Table 1.

Table 1: Historical SAIDI and SAIFI Performance for CPUC

Description	2014	2015	2016	2017	2018
SAIDI	0.28	4.75	1.82	0.94	12.51
SAIFI	0.38	1.07	0.63	0.69	4.49

In 2018, CPUC noted that it experienced significant increases in customer interruptions due to loss of supply, an element that is beyond CPUC’s control. However, the nature in which CPUC owns and operates its distribution system, or the resources available, is not in any way changed by the proposed amalgamation.¹⁸ CPUC outlined that system reliability is a primary goal and that it strives to achieve this through various efforts including, but not limited to, replacing aging assets as proposed in its distribution system plan and the future planned construction and conversion of the existing 4.16 kV circuits to 25 kV.¹⁹

¹⁶ EB-2018-0087, Decision and Order, June 6, 2019, p. 5

¹⁷ MAADs Handbook, p. 7

¹⁸ CPUC AIC, p. 7

¹⁹ Response to Interrogatory 1-Staff-8 (b)

Submission

OEB staff accepts CPUC's evidence that the proposed amalgamation does not in any way change the nature of the distribution system owned and operated by CPUC as well as the resources available to CPUC. OEB staff notes that the CPUC distribution system will continue to be maintained by former CESC staff – individuals who possess knowledge and understanding of the service area in which they operate. There are no proposed reductions to line crew or operations staff, which will ensure that staffing levels will be adequate to address outages and maintain electricity service for customers.

Based on the evidence provided, OEB staff submits that service quality and reliability levels in the CPUC service area are likely to be maintained. As a result, OEB staff submits that the proposed amalgamation meets the “no harm” test with regards to service quality and reliability.

3.4 Impact on Financial Viability

The OEB sets out in the MAADs Handbook that the impact of a proposed transaction on the acquiring utility's financial viability for an acquisition, or on the financial viability of the consolidated entity in the case of a merger will be assessed. The OEB's primary considerations in this regard are:

- The effect of the purchase price, including any premium paid above the historic (book) value of the assets involved
- The financing of incremental costs (transaction and transition costs) to implement the consolidation transaction

As both CPUC and CESC are related by virtue of a common shareholder (the Township), the assets were transferred over at the net book value as of the date of the amalgamation. As the assets were transferred at book value, no financing was required.²⁰ As a result, CPUC stated that there would be no adverse effect on the amalgamated company's financial viability. In addition, CPUC submitted that the financial viability of CPUC, as an amalgamated entity, was confirmed through the approval of rates in its Rate Application²¹ where the OEB approved a cost and rate structure for CPUC based on the proposed amalgamated entity.²²

²⁰ Application, p. 9

²¹ EB-2018-0087

²² CPUC AIC, p. 7

Submission

OEB staff agrees that as the assets were transferred over at the net book value, there will not be any negative impacts on the financial viability of CPUC. As a result, from a financial viability perspective, the proposed amalgamation meets the “no harm” test.

4 OEB STAFF SUBMISSIONS ON OTHER MATTERS

In its review of the other requests made by CPUC, OEB staff has considered the requirements described in the MAADs Handbook, the OEB's jurisdiction as outlined per the OEB Act, and other applicable OEB policies as described herein.

4.1 Amalgamation Effective Date

In the Application, CPUC requested that the OEB approve the amalgamation with an effective date of January 1, 2018 so that its certificate of amalgamation would not become void pursuant to section 86(6.2) of the OEB Act.²³ CPUC stated that it is unaware of any examples where a distributor has had a certificate of amalgamation issued prior to seeking leave to amalgamate, nor did CPUC provide any decisions in which the interpretation and application of section 86(6.2) of the OEB Act has been considered.²⁴

CPUC submitted that the OEB has the jurisdiction under the OEB Act to make an order approving an amalgamation with a retrospective effective date and made the following arguments:

- Granting leave to amalgamate under section 86(1)(c) of the OEB Act is under the OEB's exclusive jurisdiction, as is the interpretation and application of section 86(6.2) of the OEB Act
- The OEB has very broad authority as section 23(1) of the OEB Act states that it can "impose such conditions as it considers proper, and an order may be general or particular in its application"
- When the OEB exercises its jurisdiction, it is to be guided by the objectives outlined in section 1(1) of the OEB Act²⁵

Based on this reasoning, CPUC submitted that granting approval for leave to amalgamate with an effective date of January 1, 2018 would be permissible.

CPUC provided several reasons for why it would be appropriate for the OEB to order an effective date of January 1, 2018, including:

²³ Section 86(6.2) of the OEB Act states that a certificate of amalgamation endorsed by the director appointed under section 278 of the *Business Corporations Act* is void if it is endorsed before leave of the Board for the amalgamation is granted.

²⁴ CPUC AIC, p. 7

²⁵ The OEB's objectives for electricity are detailed in Section 2.1 of this submission.

- There will be no adverse impact on any customer or any other potentially interested party
- CPUC already had rates approved effective 2019 onwards based on a cost structure that assumes an amalgamation effective January 1, 2018
- No parties have come forward to intervene and/or provide any objection to the requested relief
- Had CPUC applied for approval prior to January 1, 2018, as per the normal course, it would have been approved without qualification
- Failure to seek leave to amalgamate prior to January 1, 2018 was through inadvertence and granted no benefit to the amalgamating corporations

Based on the aforementioned reasoning, CPUC submitted that granting leave to amalgamate with an effective date of January 1, 2018 better supports the OEB's objectives with respect to electricity under the OEB Act than refusing to provide an effective date that saves the existing certificate of amalgamation.²⁶

Submission

Does the OEB have the authority to grant leave to amalgamate with a retrospective effective date?

As indicated in the introductory section of this submission, CPUC did not apply for OEB approval, in accordance with section 86 of the OEB Act, prior to filing Articles of Amalgamation with the MGCS in December 2017.²⁷ The Articles of Amalgamation were endorsed by the MGCS Director on January 1, 2018; such endorsement constitutes a 'Certificate of Amalgamation'.²⁸

OEB staff submits that, as a starting point, it is necessary to consider the wording of the subject provision of the OEB Act in order to determine the legislative intent and whether it allows for OEB discretion to order a retrospective effective date. The applicable provisions of section 86 of the OEB Act state:

²⁶ CPUC AIC, p. 10

²⁷ The OBCA, R.S.O. 1990, c.B.16, section 178(1) requires that, after an amalgamation has been adopted or approved by the corporation(s) board(s) of directors, articles of amalgamation must be submitted to the MGCS Director.

²⁸ Section 178(4) of the OBCA provides that, upon receipt of Articles of Amalgamation, the Director shall endorse thereon in accordance with section 273 a certificate which shall constitute the certificate of amalgamation. When Articles of Amalgamation become effective, the amalgamating corporations continue as one corporation and the amalgamating corporations cease to exist as entities separate from the amalgamated corporation (OBCA, s. 179(a)-(c)).

86 (1) No transmitter or distributor, ***without first obtaining*** from the Board an order granting leave, shall,

...

(c) amalgamate with any other corporation.

...

(6.2) A certificate of amalgamation endorsed by the director appointed under section 278 of the *Business Corporations Act* is ***void if it is endorsed before leave of the Board*** for the amalgamation is granted. [***Emphasis added***]

OEB staff notes that section 86(1) is temporally specific in that it does not allow for an amalgamation without **first** obtaining an order granting leave of the OEB. The provision could have been less specific by omitting the word ‘first’ and, arguably, it may have been open to interpretation that leave of the OEB was required at *some point*, for example contemporaneously with the amalgamation process or even after the fact. However, the language of the legislation indicates that OEB leave is a condition precedent to an amalgamation and is not open to interpretation otherwise.

Similarly, subsection 86(6.2) also contains very specific language that a certificate of amalgamation is void if it is endorsed “**before leave...is granted**”. Again, the temporal specificity of the provision indicates that there is no room for interpretation and the exercise of discretion to deem otherwise. The statute could have said the certificate of amalgamation is void “unless” or “without” leave of the OEB and that, arguably, could be interpreted that leave must be obtained *at some point* and the validity of the certificate of amalgamation could be upheld even if leave was granted after the issuance of the certificate. However, the statutory language is very specific in that it requires leave of the OEB as a condition precedent to a valid certificate of amalgamation; failure to fulfill the condition precedent results in a void certificate, at least for the purposes of the OEB Act.

One of the fundamental principles of statutory interpretation is that a retrospective power can only be granted through clear legislative language.²⁹ Where there is no specific authorization in the statute and an administrative agency or tribunal purports to

²⁹ *Beau Canada Exploration Ltd. v. Alberta (Energy & Utilities Board)*, 2000 ABCA 132 (Alberta Court of Appeal) at para 28. See also *Northwestern Utilities Ltd. v. Edmonton (City)* 1978 CarswellAlta 141 (Supreme Court of Canada) at paras 7 and 9 and *Re West Energy Ltd.*, 2007 CarswellAlta 1057 (Alberta Energy and Utilities Board) at para 18, although in the latter case the AEUB found that the applicable legislation did not limit the Board’s ability, on an application to *review and vary* a decision of the Board, to give retroactive effect to its decision. *Re West Energy* at paras 25-29

make its order effective retrospectively, it may be found to have exceeded its jurisdiction.³⁰

While there are limited exceptions to the general rule against retroactive or retrospective application of a regulator's order, the circumstances in which it is permitted are in a context where a regulator is exercising a broad discretionary power granted to it by legislation. For example, the OEB has broad discretion when setting rates pursuant to section 78(3) of the OEB Act, which states:

The Board may make orders approving or fixing **just and reasonable rates** for the transmitting or distributing of electricity, unit smart metering or such other activity as may be prescribed and for the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act*, 1998. [**Emphasis added**]

In fulfilling its rate setting mandate, a regulator has relatively broad, discretionary powers to set "just and reasonable rates" which, in limited circumstances, allows for retrospective or retroactive application of the regulator's order.³¹

In the present case, the OEB is asked to grant leave to CPUC and CESC to amalgamate pursuant to a provision of the OEB Act and the OEB does have the jurisdiction to so. However, in contrast to the statutory provisions applicable to setting 'just and reasonable' rates, the provisions with respect to an amalgamation are more narrowly drafted. Established case law indicates that a statutory decision maker, that is, an agency or tribunal such as the OEB, must act within its statutory authority.³² In the context of section 86, a retrospective application of an order approving the amalgamation would be contrary to the statutory provision, which specifies temporally specific conditions precedent.

OEB staff therefore submits that the OEB cannot grant leave to amalgamate with a retrospective effective date. OEB staff's submission is focused on the operation of section 86 of the OEB Act, and OEB staff makes no submission on the implications of this result for CPUC for any other purpose.

³⁰ *Beau Canada v. Alberta*, *supra*, at para 29

³¹ See for example *Bell Canada v. Canada* (*Canadian Radio-Television and Telecommunications Commission*) 1989 CarswellNat 586 (Supreme Court of Canada) ("*Bell Canada v. CRTC*") and *Re ATCO Pipelines*, 2014 ABCA 28 (Alberta Court of Appeal) (*ATCO v. Alberta*)

³² *New Brunswick (Board of Management) v. Dunsmuir*, 2008 CarswellNB 124 (S.C.C.). See also *Slaight Communications Inc. v. Davidson*, 1989 CarswellNat 193 (S.C.C.) ("an administrative tribunal may not exceed the jurisdiction it has by statute"); *ATCO v. Alberta*, *supra*, ("Administrative tribunals ... are statutory creations; they cannot exceed the powers that were granted to them by their enabling statute")

4.2 Section 71(4) Request

During the interrogatory phase of the proceeding, OEB staff sought clarification from CPUC with regards to its compliance with section 71(1) of the OEB Act.³³ Certain statements in the Application suggested that non-distribution services provided by CESC to CPUC and non-CPUC customers were still being undertaken by CPUC since January 1, 2018, which would be contrary to section 71(1) of the OEB Act. OEB staff inquired if CPUC would seek an exemption pursuant to section 71(4) of the OEB Act which states:

Despite subsection (1) the Board may, if in its opinion special circumstances of a particular case so require, authorize a transmitter or distributor to carry on a business activity other than transmitting or distributing electricity other than through one or more affiliates, in accordance with an order of the Board. 2015, c. 29, s. 13.

In its response to interrogatories, CPUC asked the OEB to grant CPUC an exemption under section 71(4) of the OEB Act so that it could continue to provide non-distribution services to CPUC and non-CPUC customers. CPUC stated that it would be appropriate to grant CPUC an exemption under section 71(4) of the OEB Act based on CPUC's operational circumstances.³⁴ In its AIC, CPUC noted that Chapleau was a small and remote community and certain resources are not easily accessible in the open market in the area.³⁵ CPUC described the nature of the non-distribution activities³⁶ performed by CPUC as a "smattering of very customer specific needs that are met by allowing customers occasional access to CPUC/CESC resources, i.e. the linemen (and their vehicles) that are on staff with CPUC/CESC".³⁷

CPUC stated that, when such services were previously provided by CESC, the revenue generated "by offering such services lowered the costs allocated to CPUC; when performed by CPUC as an amalgamated entity, the model that was presumed in

³³ Subject to subsection 70 (9) and subsection (2) of this section, a transmitter or distributor shall not, except through one or more affiliates, carry on any business activity other than transmitting or distributing electricity. 2004, c. 23, Sched. B, s. 12.

³⁴ Response to Interrogatories 1-Staff-2 (b) and (c)

³⁵ CPUC AIC, p. 11

³⁶ Through its AIC, CPUC identified the activities as: streetlight maintenance; chimney cleaning; tree cutting; repairing broken poles; repairing ice surface lights; changing out street banners; repairing yard lights; lifting communication lines; lifting hot tub; lifting pump; repair shingles and fascia; install clothesline pole; install beacon and windsock at airport; drill holes; install yard lighting; install poles; repair flags; open switches (at the mill); re-secure conductor; takedown Selkirk chimney; repair guy wire; dig well; removal of Vianet poles; lift customers onto roof; repair burnt hot line clamp; and lift pellet furnace into basement.

³⁷ CPUC AIC, p. 12

CPUC's [Rate Application] (EB-2018-0087), the forecast revenue from this activity was used to offset the revenue requirement that rates are based on."³⁸

CPUC requested that, if the OEB grants leave to amalgamate effective January 1, 2018, the exemption under section 71(4) of the OEB Act should also have an effective date of January 1, 2018.

Submission

In its AIC, CPUC provided new information that raises concerns for OEB staff. For example, there are differences between non-distribution activities that were outlined in CPUC's AIC and those outlined previously in responses to interrogatories. In the AIC, "lift customers onto roof" was identified as a non-distribution activity while in interrogatories it was identified as "lift man onto roof". Without further information, OEB staff cannot understand the scope of this activity or the potential implications of the utility engaging in that activity. This is further complicated by the fact that it is unclear as to how frequently such activity is undertaken by CPUC. Also, CPUC's AIC notes that it provides a variety of "one-off services as the need arises" which raises additional questions as to what other services can or will be undertaken. Again, it would be difficult for OEB staff to support the granting of an exemption under section 71(4) of the OEB Act if it does not understand all of the non-distribution activities that CPUC would be undertaking.

OEB staff therefore submits that the OEB should defer addressing the section 71(4) request in the Application and instead, hear this request separately. This will allow sufficient details and implications to be explored appropriately before the OEB were to render its decision.

4.3 Transfer of Licence and Rate Orders

Through responses to interrogatories, CPUC confirmed that it was also seeking permission to transfer its licence and rate orders to the amalgamated entity as well as approval to continue to track costs to existing deferral and variance accounts. CPUC further recognized that whether such relief is granted is dependent upon whether the OEB approves the request for leave to amalgamate. If the OEB grants leave to amalgamate effective January 1, 2018, CPUC submitted that permission to transfer CPUC's licence and rate orders and permission to track and continue existing deferral

³⁸ *Ibid.*

and variance accounts should also be granted with an effective date of January 1, 2018.³⁹

Submission

OEB staff notes that, although the corporate name of CPUC will not change following amalgamation with CESC, the amalgamated entity is a distinct new entity from the amalgamating companies, which cease to exist when amalgamation becomes effective.⁴⁰ Accordingly, OEB staff submits that, if the OEB grants leave to amalgamate, it should also approve the request to transfer the licence, rate orders and existing deferral and variance accounts to the amalgamated entity with an effective date of the Decision and Order, pending approval of the Application.

³⁹ CPUC AIC, p. 10

⁴⁰ Section 179 of the OBCA states:

179 Upon the articles of amalgamation becoming effective,

(a) the amalgamating corporations are amalgamated and continue as one corporation under the terms and conditions prescribed in the amalgamation agreement;

(a.1) the amalgamating corporations cease to exist as entities separate from the amalgamated corporation;

5 CONCLUSION

CPUC has requested the OEB's approval for the following, effective January 1, 2018:

- Approval to amalgamate CPUC and CESC into a single entity, pursuant to section 86(1)(c) of the OEB Act
- Approval for CPUC to transfer its licence and rate orders to the amalgamated entity pursuant to section 18 of the OEB Act
- Approval for the amalgamated entity to be granted permission to continue to track costs to existing deferral and variance accounts
- Authorization of an exemption under section 71(4) of the OEB Act permitting CPUC to undertake certain business activities beyond the distribution of electricity as a result of exceptional circumstances

OEB staff submits that the proposed amalgamation meets the “no harm” test as described in the MAADs Handbook. However, the language of section 86 of the OEB Act is temporally specific and unambiguous, and an order approving the retrospective effective date of January 1, 2018 would be contrary to the specific conditions precedent set out in the OEB Act. OEB staff suggests the amalgamation effective date be that of the OEB's Decision and Order, pending approval of the Application.

All of which is respectfully submitted.