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December 6, 2019

Re: Chapleau Public Utilities Corporation (CPUC)
Application for approvals to amalgamate Chapleau Public Utilities Corporation and Chapleau Energy Services Corporation and continue operations as Chapleau Public Utilities Corporation
Responses to OEB Staff Interrogatories

File OEB File Number: EB-2019-0135

Dear Ms. Long,

In accordance with Procedural Order No. 1, please find attached CPUC's Reply Argument.

Should you have any questions concerning this matter, do not hesitate to contact me at the information below.

Thank you for your consideration,

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EB-2019-0135

**Chapleau Public Utilities Corporation (CPUC)
Application for approvals to amalgamate Chapleau Public Utilities Corporation and Chapleau Energy Services Corporation (CESC) and continue operations as Chapleau Public Utilities Corporation**

REPLY ARGUMENT ON BEHALF OF CPUC

These are the reply submissions of CPUC in support of its application to the Ontario Energy Board (the "OEB" or the "Board") for leave to amalgamate with CESC.

Summary of Outstanding Issues In Relation to Board Staff Submissions

CPUC believes the positions of Board Staff relative to the relief requested in this application are as set out below; where it appears to CPUC that Board Staff opposes or questions the relief requested CPUC has provided reply submissions to assist the Board in its determination:

a) CPUC asks that, further to s. 86(1)(c) of the OEB Act, the Board approve the amalgamation of CPUC and CESC into a single entity operating as CPUC;

Board Staff agrees that the proposed amalgamation meets the Board's "no harm" test; accordingly, CPUC believes that Board Staff agrees that leave to amalgamate should be granted.[1]

b) CPUC asks that, if approval to amalgamate is granted, the Board grant its approval of the amalgamation with an effective date of January 1, 2018, so that the certificate of amalgamation issued to the amalgamated entity CPUC with an effective date of January 1, 2018 will not become void pursuant to s. 86(6.2) of the OEB Act;

Board Staff submits that the Board does not have the jurisdiction to grant an order with an effective date of January 1, 2018 as requested;[2] accordingly, CPUC has prepared reply submissions with respect to the issue of the Board's jurisdiction to grant retroactive relief under s. 86 of the OEB Act.

[1] Board Staff Submission, p. 7.
[2] Board Staff Submission, p. 15.

c) CPUC asks that the Board transfer its licence and rate orders to the amalgamated entity pursuant to s. 18 of the OEB Act; in the event the Board grants CPUC an effective date of January 1, 2018 for the approval of its amalgamation CPUC asks that the transfer of the licence and rate orders, if also approved, be granted an effective date of January 1, 2018;

Board Staff supports the requested relief including the request for an effective date that matches the effective date of the order approving amalgamation.[3]

d) CPUC asks that the Board grant the amalgamated entity permission to continue to track costs to existing deferral and variance accounts; in the event the Board grants CPUC an effective date of January 1, 2018 for the approval of its amalgamation CPUC asks that the Board also grant an effective date of January 1, 2018 for the permission for the amalgamated entity to continue to track costs to existing deferral and variance accounts; and

Board Staff supports the requested relief including the request for an effective date that matches the effective date of the order approving amalgamation.

e) CPUC asks that the Board grant CPUC an exemption under s. 71(4) of the OEB Act permitting it to undertake certain business activities beyond the distribution of electricity as a result of exceptional circumstances; in the event the Board grants CPUC an effective date of January 1, 2018 for the approval of its amalgamation CPUC asks that the Board also grant an effective date of January 1, 2018 for the approval sought under s. 71(4).

Board Staff makes no submissions in support of or opposing the requested relief, instead seeking to delay the proceeding on this issue so that it may be heard separately.[4] Accordingly, CPUC has provided reply submissions as to why the proceeding should not be delayed, and suggests an alternative to delay wherein the Board could grant a time limited approval of the relief sought, with a requirement that CPUC report annually on the business activity permitted under that approval in the previous year while CPUC remains on IRM. CPUC would be required to re-apply for a permanent exemption at the time of its next rebasing application.

Effective Date of Leave to Amalgamate Order

These are CPUC's reply submissions as to why the Board has the jurisdiction to grant leave to amalgamate with an effective date of January 1, 2018 and why the

[3] Board Staff Submission, p. 18.
[4] Board Staff Submission, p. 17.

Board should make such an order. CPUC believes, based on Board Staff's submissions, that it is not necessary to make reply submissions specific to the effective date of the various other relief requested, on the assumption that the effective date for all other requested relief will be determined by the effective date of the leave to amalgamate order if granted.

Circumstances Surround CPUC's Request for a January 1, 2018 Effective Date

CPUC respectfully submits that it is important to stress the circumstances within which it is requesting an effective date of the leave to amalgamate order of January 1, 2018, circumstances that Board Staff did not dispute or otherwise address in its submissions.

By the time the Board issues a decision in this proceeding CPUC will have been operating as an amalgamated entity for approximately two full years. The predecessor corporate entities will have been treated as dissolved since January 1, 2018. CPUC will have interacted with its employees, its customers, its suppliers, and the world at large as an amalgamated entity throughout.

Board Staff concedes that the nature of the amalgamation is such that it should be granted leave, since it is at is essence simply the combination of two wholly owned affiliates into a single corporate entity, without any material changes to the operating or other important characteristics of the resulting distribution entity that could threaten to fail the no-harm test employed by the Board when determining whether or not to grant leave to amalgamate.[5] In other words, this is not, in CPUC's respectful submission, the type of amalgamation that s. 86(1)(c) of the OEB Act was intended to vet.

The circumstances that lead Board Staff to conclude that amalgamation should be granted now are identical to the circumstances that existed on and prior to January 1, 2018; had CPUC filed for leave to amalgamate prior to January 1, 2018 it would have been clear, CPUC respectfully submits, that leave should have been granted based on these same facts.

The Board has already approved distribution rates for CPUC based on evidence filed in EB-2018-0087 of CPUC's operating costs for 2018 as the Bridge Year and 2019 as the Test Year based on the elimination of the virtual utility structure through an amalgamation effective January 1, 2018. Accordingly approving the amalgamation with an effective date of January 1, 2018 will have no negative effect on CPUC's distribution customers, as rates have already been set for 2019 and the ensuing IRM period based on the presumption that CPUC, the amalgamated entity, was operational from January 1, 2018.

[5] Board Staff Submission, p. 7.

The negative consequences of a decision that does not grant an effective date of January 1, 2018 to CPUC are material. As described in 1-Staff-12 a) the failure of the amalgamation effective January 1, 2018 will necessitate the restatement of the accounting and corporate lives of the previously dissolved pre-amalgamation corporations at a cost approaching CPUC's annual approved regulated return on investment, and threatens the operation of the various contracts and commitments that CPUC will have entered into as an amalgamated entity with various third parties since January 1, 2018.

That CPUC was specifically asking the Board for an effective date of January 1, 2018 for the amalgamation was included in the Notice of Application circulated to the public; no party came forward to intervene in the application, let alone oppose the requested relief.

Analysis of Board Staff Submissions on Effective Date

It is within these circumstances that CPUC requests an effective date of January 1, 2018 for an order granting leave to amalgamate; Board Staff's only objection, it seems, to such an order is that the jurisdiction of the Board under the OEB to grant leave to amalgamate is to be so narrowly defined as to preclude any order, ever, granting leave to amalgamate that is backdated to precede an already obtained certificate of amalgamation or precede an already executed amalgamation, such that, in essence, the Board is powerless to ever grant the type of relief that CPUC is seeking in this application in order to "save" an already executed amalgamation no matter the factual circumstances.[6]

Board Staff's review of the jurisdiction of the Board under the relevant sections of the OEB focuses solely on the interpretation of s. 86(1)(c) and s. 86(6.2) of the OEB Act in isolation, without regard for the overall scheme of the OEB Act and various sections of the Act granting (or limiting) the jurisdiction of the Board in various ways.[7]

Board Staff asserts in its argument that:

> *One of the fundamental principles of statutory interpretation is that a retrospective power can only be granted through clear legislative language. Where there is no specific authorization in the statute and an administrative agency or tribunal purports to make its order effective retrospectively, it <u>may</u> be found to have exceeded its jurisdiction.[8] (emphasis added)*

[6] Board Staff Submission, p. 15.
[7] Board Staff Submission, pp. 12-15.
[8] Board Staff Submission, pp. 14-15.

CPUC notes that even in asserting that "retrospective power can only be granted through clear legislative language" Board Staff concedes that in the absence of such clear language an administrative agency or tribunal that purports to make an order effective retrospectively only "may" be found to have exceeded its jurisdiction; it is not the case, Board Staff concedes, that the absence of clear legislative language granting retrospective power necessarily precludes such power in the hands of the administrative agency or tribunal.

Board Staff goes on to cite s. 78(3) of the OEB as an example where retrospective or retroactive orders can be made, in limited circumstances, even though there is no clear legislative language granting such retrospective power in that section.[9] Since the wording of s. 78(3) of the OEB Act remains unchanged from case to case it is necessarily true that it is the details of each specific request that determine whether retrospective ratemaking is permitted; in the present case, however, Board Staff pointedly ignores the specifics of the case before it.[10]

CPUC notes further that the issue of retroactive ratemaking in particular, as would be the case under s. 78(3) of the OEB Act, has been found to be of special concern as a result of the necessarily competing interests between a utility and its customers when it comes to rates:

> *I do not accept Atco's submission that the Commission erred in law by engaging in prohibited retroactive ratemaking. Whether a decision is impermissible retroactive ratemaking is an issue of fact. (See ATCO Gas, Re, 2010 ABCA 132, 477 A.R. 1 (Alta. C.A.), discussed below.) There are two fundamental policy concerns behind retroactive ratemaking. With regard to the utility, retroactive ratemaking is unfair because a utility relies on certain rates to make business decisions. To change them after the fact could cause unexpected results for the utility: Yvonne Penning, "Can Economic Policy and Legal Formalism Be Reconciled: The 1986 Bell Rate Case" (1989) 47 U Toronto Fac L Rev 607 at 610. With regard to consumers, retroactive ratemaking redistributes the cost of utility service by asking today's customers to pay for expenses incurred by yesterday's customers: "Can Economic Policy and Legal Formalism Be Reconciled" at 610. Clearly, that should be avoided.*[11]

While it is true that in many cases the operation of s. 86 of the OEB Act can also raise issues of competing interests, which has arguably led to the Board's "No Harm Test", there are clearly no competing interests in this particular case, as there is no

[9] Board Staff Submission, p. 15.
[10] Board Staff Submission p. 15.
[11] *Re ATCO Pipelines*, 2014 ABCA 28 (Alberta Court of Appeal) (*ATCO v. Alberta*) paragraph 51.

negative effect on any party as a result of granting the requested relief, and only negative consequences on CPUC and, indirectly, its customers, if the requested relief is not granted. To the contrary, the requested relief in this instance is intended to rectify what was essentially a procedural mistake on the part of CPUC in order to preserve the shared expectations of CPUC, its customers and the third parties that CPUC has dealt with since purporting to amalgamate effective January 1, 2018.

In CPUC's respectful submission the fact that retroactive ratemaking always involves a tension between a utility's and its customers interest in rates, whereas it is not necessarily the case that retroactive application of s. 86 related approval of an amalgamation (and certainly not the case in the context of CPUC's request), leads to the conclusion that there should be greater latitude when considering whether an order under s. 86 of the OEB Act can and should be made with retroactive effect than when considering s. 78(3) of the OEB Act, not less as suggested by Board Staff.

CPUC notes that while Board Staff focusses on s. 86(1)(c) and s. 86(6.2) of the OEB Act in its analysis, Board Staff does not address those sections in conjunction with the broader sections of the OEB Act cited by CPUC in its argument in chief, or s. 86(6) of the OEB Act which is the section that governs that actual power to grant leave to amalgamate and contains no " temporal" language whatsoever:

> *s. 86(6) An application for leave under this section shall be made to the Board, which shall grant or refuse leave.*

Board Staff limits its analysis in this way even as it relies upon the decision in *Beau Canada Exploration Ltd. v. Alberta (Energy & Utilities Board),* 2000 ABCA 132 (Alberta Court of Appeal) (the "Beau Decision"), which undertook a much broader form of analysis. In coming to its interpretive conclusion in the Beau Decision the Court did not simply rely on the notion that the absence of specific authorization to make retrospective orders meant no such jurisdiction existed. Rather, the Court analyzed the entire statutory scheme as it related to the operative sections of the subject legislation, including the applicable regulations, noted that there were other sections of the subject statute that specifically permitted retroactive orders, and evaluated the effect of the requested retroactive orders on the basis of the unfairness that the exercise of such power would create in the context of the specific relief requested.[12]

Notable in not only the Beau Decision but in all of the decisions relied up by Board Staff is that there were parties in opposition to the requested relief, based on their

[12] *Beau Canada Exploration Ltd. v. Alberta (Energy & Utilities Board),* 2000 ABCA 132 (Alberta Court of Appeal), paragraphs 30-39.

opposing interests.[13] In the present application that is simply not the case, as no party responded to the notice of application to seek intervenor status despite the request for an effective date of January 1, 2018 for the leave to amalgamate having been noted specifically in the Notice of Application. That no party intervened is understandable as the requested relief has no negative impact on any party legitimately interested in the regulation of CPUC; to the contrary, the requested relief serves to indirectly benefit the customers of CPUC by supporting the financial viability of the regulated distributor.

In CPUC's view the interpretative analysis must also recognize the Board's objectives under the OEB Act, as those objectives are specifically imported into the exercise of the Board's jurisdiction, over both factual determinations and statutory interpretations, in every decision it makes. In the present case CPUC respectfully submits that the objective most directly relevant to the analysis of the Board's jurisdiction is objective 2, in that while an order exercising jurisdiction to make a retroactive order will maintain the status quo with respect to the Board's objectives, the failure to make an order exercising jurisdiction to make a retroactive order will have consequences relevant specifically to objective 2, which requires that:

> *The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:*
>
> *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.*[14]

As set out in its interrogatory responses, in the absence of an order "saving" the amalgamation effective January 1, 2018 will result in material costs to CPUC in relation to the need to revive the corporate lives of the predecessor companies and restate the accounting for both those companies and their parent, in addition to the consequential impact on any of the contractual or other obligations entered into by the (non-existent) amalgamated company since January 1, 2018. All of these consequences may materially impact the cost effectiveness and financial viability of CPUC, a specific concern for the Board under the OEB Act when carrying out its responsibilities, which include exercising its exclusive jurisdiction over determinations of fact and law under the OEB Act.

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[13] *Northwestern Utilities Ltd. v. Edmonton (City)* 1978 CarswellAlta 141 (Supreme Court of Canada) and *Re West Energy Ltd*., 2007 CarswellAlta 1057 (Alberta Energy and Utilities Board)

In reviewing the overall statutory scheme of the OEB Act, CPUC notes that there are no instances where retroactive powers are specifically granted or denied by the Act, unlike the situation in the Beau Decision, wherein the Court was able to cite several sections where the effective date in connection with the statutory jurisdiction under the subject Act in that proceeding was specified.[15] Further, as noted by Board Staff, there is at least one other instance where it has been determined that the Board can make retroactive orders according to Board Staff's submissions, s. 78(3) of the OEB Act, even though the section contains no explicit language permitting such orders.

Board Staff does not actually address the factors that weigh in favour of the Board actually exercising its discretion to provide for a retrospective order as requested; CPUC can only surmise that Board Staff is indifferent to the exercise of such discretion in favour of CPUC, if the Board determines such discretion exists. According CPUC can only reiterate the factors that it believe weigh in favour of granting such an order; to that end CPUC would like to note that the factors it has outlined in its Argument in Chief closely mirror the factors that the Supreme Court of Canada has set out when a court is faced with a request that it make a *nunc pro tunc* or "back-dated" order:

> *. . . the courts have identified the following non-exhaustive factors in determining whether to exercise their inherent jurisdiction to grant such an order: (1) the opposing party will not be prejudiced by the order; (2) the order would have been granted had it been sought at the appropriate time, such that the timing of the order is merely an irregularity; (3) the irregularity is not intentional; (4) the order will effectively achieve the relief sought or cure the irregularity; (5) the delay has been caused by an act of the court; and (6) the order would facilitate access to justice. . . None of these factors is determinative.*[16]

To be clear, CPUC is not suggesting that the Board has the same inherent jurisdiction as the courts; CPUC is simply suggesting that in the process of determining the circumstances under which the Board should entertain granting retrospective orders, the OEB should be guided by a similar analysis in order to determine whether the statutory scheme it is operating under, in conjunction with the specifics

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[15] *Beau Canada Exploration Ltd. v. Alberta (Energy & Utilities Board), supra.* paragraph 30. *CPUC* recognizes that there are several sections under the OEB Act where the effective date of regulations, Board issued Rules and Board issued By-Laws are specified; however there are no instances to CPUC's knowledge where the actual exercise of the Board's jurisdiction to make certain decisions under the OEB Act are specifically time limited.

[16] *Canadian Imperial Bank of Commerce v. Green*, [2015] 3 S.C.R., paragraph 90.

of the case before it, lead to the conclusion that a retrospective or "back dated" order is appropriate.

Following the non-exhaustive list of factors outlined by the SCC, CPUC notes that:

a) There are no "opposing parties" that would be prejudiced by the requested relief; aside from the fact that no party sought to intervene in the application, the requested relief, if granted, has no negative effect on CPUC's customers or other parties; quite the opposite, the requested relief, if granted, supports the financial viability of CPUC to the benefit of CPUC's customers;

b) CPUC has asserted (and Board Staff has not impugned the assertion) that the requested relief, leave to amalgamate, would have been granted had the relief been sought prior to January 1, 2018. Indeed, Board Staff supports the request for leave to amalgamate based on the information that CPUC has submitted in support of the amalgamation, information that is premised on an amalgamation that occurs on January 1, 2018;

c) CPUC has noted in its evidence that its failure to seek leave to amalgamate prior to January 1, 2018 was through inadvertence, and that it has gained no advantage for having failed to seek leave at that time; and

d) An order made effective January 1, 2018 will "save" the certificate of amalgamation under s. 86(6.2) of the OEB Act.[17]

In the present case, CPUC respectfully submits, the overall statutory scheme of the OEB Act, in conjunction with the specific circumstances of the relief requested, lead to the conclusion that the OEB has the jurisdiction (and should exercise that jurisdiction) to make an order with an effective date that "saves" the amalgamation that CPUC entered into with an effective date of January 1, 2018.

Exemption under s. 71(4) of the OEB Act

Board Staff claims that CPUC provided new evidence about the nature of the business activities it is asking for permission to continue under s. 71(4) of the OEB Act for the first time in its Argument in Chief, noting by way of example the description of "lift customers onto roof" as appearing, according to Board Staff, for the first time in the Argument in Chief, and contrasting that specific example with the description of "lift man onto roof" as found in the interrogatory responses.[18]

[17] On reflection it may be that an order backdated to December 31, 2017 that provides for an order allowing amalgamation effective January 1, 2018 may be the appropriate form of any order should the Board provide the requested relief.
[18] Board Staff Submission, p. 17.

Largely on that basis Board Staff seeks to delay the hearing of this aspect of the application.[19]

With respect, it is clear that the activity being described by CPUC in the Argument in Chief and the interrogatory are the same; for the purposes of the interrogatory the description was framed in relation to a specific act wherein a man was lifted onto a roof, whereas the Argument in Chief described the same activity more generically as lifting customers onto roof in order to capture a non-gender specific activity going forward. They do not refer to two different activities.

More importantly CPUC cannot understand Board Staff's apparent confusion and concern about the nature of the activities being undertaken. To that end CPUC reiterates that the activities relate to a single overall activity of which the list found at 1-Staff-3 d) are examples: providing to the local community access to CPUC's resources in the form of the labour of CPUC's (2) linemen and equipment in the form of, for the most part, CPUC's boom truck.

Board Staff has suggested delaying the determination of this aspect of the application so that it can seek further information. CPUC notes again that the revenue from these activities have already been included as offsets to CPUC's 2019 revenue requirement in EB-2018-0087; as noted in 1-Staff-3-c) the gross revenue forecast for this activity for the test year was $39,474, which revenue, after incremental expenses, was fully applied against CPUC's proposed revenue requirement either in the form of reduced distribution related OM&A costs as a result of the allocation of those costs to the activity or through the application of the net revenue from the activity against the 2019 revenue requirement. Given this fact CPUC is at a loss as to what other specific concern would warrant a delay and further hearing time, along with the associated expense. CPUC respectfully submits that such a delay is not necessary given the relatively small scope of the activity, the fact that the revenue from that activity has already been credited fully to ratepayers, and the information on the record in this proceeding and in EB-2018-0097 with respect to the proposed activity insofar as it describes a resource that CPUC is providing to a small, remote community.

If it is of interest to the Board, CPUC would respectfully suggest that the permission under s. 71(4) of the OEB Act to continue with these kinds of activities could be granted on a time limited basis, with the requirement that CPUC come forward with a renewed exemption request at the time of its next rebasing, and that in the meantime the Board could require CPUC to provide a report at the time it files for annual IRM related adjustments describing the nature of the activities that CPUC has provided in the previous year so that the Board can follow up with any activities that it may want more information on. In this way CPUC could continue to make its

[19] Board Staff Submission, p. 17.

resources available to the community, while the Board would be in a position to monitor CPUC's activity in this regard and make a final determination in the context of a full cost of service proceeding.

Conclusion

For all the reasons outlined in CPUC's Argument in Chief and Reply Submissions, CPUC asks that the Board grant the relief requested. While CPUC recognizes that the circumstances under which the Board should grant retroactive relief such as what is requested in this application are limited, CPUC respectfully submits that the circumstances in this instance fit within those limited parameters such that the Board should exercise its discretion to granted retroactive relief.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 6th DAY OF DECEMBER 2019