

Ontario Energy Board

A GUIDE TO THE PRELIMINARY FILING REQUIREMENTS

FOR

**MERGERS, ACQUISITIONS,
AMALGAMATIONS, AND DIVESTITURES**

in the

**ONTARIO ELECTRICITY TRANSMISSION AND DISTRIBUTION
SECTOR**

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INTRODUCTION

The aim of this Guide is to describe the filing and evidentiary requirements which apply to mergers, acquisitions, amalgamations, and divestitures, in electricity transmission or distribution in Ontario (collectively, “MAADs Transactions”) requiring Ontario Energy Board (the “Board”) approval, to explain some of the provisions of the Ontario Energy Board Act, 1998 (the “Act”) that apply to MAADs Transactions, and to give some guidance as to what considerations and criteria the Board may apply in considering such applications. The filing requirements are more specifically set out in the accompanying Preliminary Filing Requirements for Mergers, Acquisitions, Amalgamations and Divestitures (the “Filing Requirements”),

The Board is of the view that it needs appropriate information to exercise its statutory responsibilities under sections 80, 81, 85 and 86 of the Act, 1998 and the Board has established the Filing Requirements to ensure that this information is available. Please note that filing of the information described in the Filing Requirements does not preclude the applicant from filing additional or supplementary information.

“Applicant” for the purpose of the Filing Requirements includes a person who is required to give notice to the Board under sections 80 or 81 of the Act and “application” has a corresponding meaning.

The Filing Requirements are preliminary in nature and are meant to assist in the preparation and filing of an application. The Board may require the applicant to submit additional, supplemental or updated material. The onus is on the applicant to establish to the Board’s satisfaction that leave should be granted and each individual application for approval of a MAADs Transaction will be determined by the Board on its own merits.

Changes to licences issued by the Director of Licensing (the “Director”) that may be necessary as a result of a MAADs Transaction can generally be dealt with at the same time as the application to approve the MAADs Transaction. However, changes to regulated rates that may be requested as a result of the MAADs Transaction must be dealt with in a separate rate application.

The Board considers all applications to be the joint responsibility of all parties to the proposed transaction. In many instances the party to the proposed transaction other than the applicant will be required to provide detailed information to the Board. The response to each filing requirement should indicate the party who has provided the information. Each party is responsible for the accuracy and completeness of the information provided by such party.

RELEVANT SECTIONS OF THE ONTARIO ENERGY BOARD ACT, 1998

As a convenience to the reader, the following lists and paraphrases some of the relevant sections of the Act. Paraphrases are, of course, no substitute for a careful reading of the actual sections of the legislation. Further discussion of some of the relevant provisions will be provided where appropriate throughout this Guide.

- Section 1: In carrying out its responsibilities in relation to electricity the Board must be guided by the following objectives:
- to facilitate competition in the generation and sale of electricity and to facilitate a smooth transition to competition;
 - to provide generators, retailers and consumers with non-discriminatory access to transmission and distribution systems in Ontario;
 - to promote the interests of consumers with respect to prices and the reliability and quality of electricity service;
 - to promote economic efficiency in the generation, transmission and distribution of electricity;
 - to facilitate the maintenance of a financially viable electricity industry; and,
 - to facilitate energy efficiency and the use of cleaner, more environmentally benign energy sources in a manner consistent with the policies of the Government of Ontario.
- Section 28: The Board must implement directives issued by the Minister concerning market rules or licence conditions addressing the abuse or possible abuse of market power.
- Section 29: The Board must forbear in situations where the Board finds that there is sufficient competition to protect the public interest.
- Section 57: Every electricity market participant must have a licence issued by the Director of Licensing or the Board.
- Section 70: Sets out the broad authority to establish licensing conditions consistent with objectives of the Act. Subsection 70 (5): licences may contain conditions to
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address the abuse or possible abuse of market power. Note that subsection 70(13) provides that a licence cannot require disposal of assets or significant corporate reorganization.

Section 80: No distributor or transmitter or an affiliate shall acquire an interest in or construct a generation facility or purchase shares in a corporation that owns a generation facility, in Ontario, unless it has given notice of its proposal to the Board and the Board has either not issued a notice of review within 60 days, or has approved the proposal.

Section 81: No generator or affiliate of a generator shall acquire an interest in or construct a transmission or distribution system or purchase shares in a corporation that owns a transmission or distribution system, in Ontario, unless it has given notice of its proposal to the Board and the Board has either not issued a notice of review within 60 days, or has approved the proposal.

Section 82: The Board must approve proposals under s. 80 or s. 81 if it determines that the proposal will not adversely affect the development and maintenance of a competitive market, and/or in the case of s. 80, the proposal is required to maintain reliability of the transmission or distribution system.

Section 85: Amalgamation: If a distributor proposes to amalgamate with another corporation, a new licence is required for the proposed amalgamated corporation.

In determining whether to issue a licence the Board or the director will consider the cost/benefit to consumers, financial viability, compliance with performance standards, and any other matters which the Board would normally consider in issuing a licence.

Section 86(1) Divestiture: A transmitter or distributor may not grant, sell, lease, or otherwise dispose of its transmission or distribution system or that part of the system necessary in serving the public, without leave of the Board.

Section 86(2) Acquisition: A person may not without leave of the Board, directly or indirectly, acquire and/or hold more than 20 percent of the voting shares of a transmitter or distributor or acquire control of a corporation that holds 20% of the voting shares of a transmitter or distributor if the voting shares are a significant asset of the corporation.

Section 87: Monitoring Markets: The Board must monitor markets in electricity and may report to the Minister on their efficiency, fairness, transparency, and competitiveness. If the Minister requests, the Board will advise the Minister on

any abuse or potential abuse of market power in the electricity sector and circumstances giving rise to unintended outcomes or effects that operate contrary to the interests of competition.

Note that O. Reg. 516/99 provides that an application under section 86(2) of the Act is not required where a corporation acquires all the voting shares of a distributor if the shares of the corporation are all owned by one or more municipalities and the shares of the distributor are all owned by the same municipality or municipalities.

RULES OF PRACTICE AND PROCEDURE

The Board requires the filing of an application in order to commence a review of a proposed MAADs Transaction. An application for a MAADs Transaction is commenced by filing the Filing Requirements form. The Board has established written Rules of Practice and Procedure (the "Rules") which it follows in making its decisions. Parties should consult the Rules prior to preparing and filing an application.

Hearing:

The Board may dispose of an application by a written or an oral hearing. The applicant may also request, under certain circumstances, that the matter be dealt with without a hearing pursuant to subsection 21(4) of the Act.

Confidentiality:

It should be noted that applications, and the evidence filed with the Board to support them, are generally placed on the Board's public record. If an applicant seeks to have some information kept confidential, the applicant must request confidentiality and clearly explain what harm will result from public disclosure of the information. Rules 13 and 47 of the OEB Rules of Practice and Procedure provide more guidance to parties on the question of confidentiality of filings and hearings.

Rule 13 provides that a party to a Board proceeding may request that all or any part of a document be held in confidence by the Board. With the request, the party must include a summary of the nature of the information in the document and must set out the reasons for the request for confidentiality. The request for confidentiality must be served on other parties to the proceeding.

Any person may object to the request for confidentiality and the Board may then determine, with or without a hearing, whether the document for which confidentiality was requested should be placed on the public record. In determining whether a document should be placed on the public record, the Board will generally consider whether intimate financial, commercial or personal matters or other matters would be disclosed of such a nature that the desirability of avoiding disclosure of those matters in the interest of the person affected or in the public

interest outweighs the desirability of adhering to the principle that hearings and their supporting evidence should be open to the public.

Rule 47 provides that any party may request that a hearing or a part of a hearing be held in the absence of the public. Where the Board determines that the hearing or part of the hearing should be held in the absence of the public, Rule 47 specifies the persons who may attend the hearing and requires them to sign an undertaking not to disclose evidence or information received during the course of the hearing or part of the hearing which is held in the absence of the public.

INSTRUCTIONS FOR THE PRELIMINARY FILING REQUIREMENTS

PART I GENERAL MINIMUM FILING REQUIREMENTS

All applicants must complete Part I of the Preliminary Filing Requirements.

1.1 Identification of the Parties

1.1.1 Name of Applicant: The complete corporate name of the applicant should be included in this part.

- (a) In the case of a notice given under section 80 of the Act, the applicant is the transmitter or distributor or the affiliate of the transmitter or distributor that is proposing to acquire an interest in a generation facility in Ontario, to construct a generation facility in Ontario or purchase shares of a corporation that owns a generation facility in Ontario.
- (b) In the case of a notice given under section 81 of the Act, the applicant is the generator or affiliate of the generator that is proposing to acquire an interest in a transmission or distribution system in Ontario, to construct a transmission or distribution system in Ontario or purchase shares of a corporation that owns a transmission or distribution system in Ontario.
- (c) In the case of an application under section 85 of the Act, a joint application must be filed and either party may be the applicant. In such case the other amalgamating corporations should be listed in Part 1.1.2 as Other Parties to the Transaction.
- (d) In the case of an application under subsection 86 (1) of the Act, the applicant is the transmitter or distributor that is proposing to sell, lease or otherwise dispose of a transmission or distribution system, or part of a transmission or distribution system that is necessary in serving the public.

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- (e) In the case of an application under subsection 86(2) of the Act, the applicant is the person proposing to acquire directly or indirectly voting securities of a transmitter or distributor such that the aggregate of all voting securities held by such person exceeds 20% of the voting securities of the transmitter or distributor.

Address of Head Office: The complete address of the head office should be inserted, including the applicable postal code. The address should include a street address and not merely a post box number.

Telephone Number, Facsimile Number and E-Mail Address: These numbers should include the area code and any applicable extensions.

Name of Individual to Contact: The contact person should be knowledgeable concerning the details of the application and be able to assist Board staff in answering any questions or providing additional information. If the address of the contact person is different from the head office of the applicant, then the contact person's address should be attached to the application.

- 1.1.2 Other Parties to the transaction: The comments for Part 1.1.1 apply to all other parties to the transaction.
- 1.1.3 A list of the officers, directors and shareholders of each of the parties to the transaction should be attached. The list of officers should also indicate the respective offices held. If the shares of the corporation are widely held then this should be stated. In such case, each shareholder and its affiliates holding an aggregate of more than 20% of the issued and outstanding voting securities of the party should be listed.
- 1.1.4 Attach a corporate chart showing the relationship between each party to the proposed transaction and each of their respective affiliates. The chart should include all affiliates and should not be limited to affiliates engaged in, or providing goods and services to any person engaged in, the generation, transmission, distribution or retailing of electricity ("Electricity Sector Affiliates").

1.2 Description of the Businesses of Each of the Parties

- 1.2.1 Attach a description of the business of each of the parties to the proposed transaction, including each of their Electricity Sector Affiliates, or any affiliates engaged in provided goods or services to an electricity generator, transmitter, distributor, or retailer. A detailed description of the nature of electricity sector activity engaged in, by each of the affiliates should also be included. Please indicate if any of the Electricity Sector Affiliates are licensed or otherwise regulated in any jurisdiction.

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- 1.2.2 Attach a description of the geographic territory served by each of the parties to the proposed transaction, including each of their Electricity Sector Affiliates, if applicable. If possible, please provide a map outlining the geographic territory served.
 - 1.2.3 Attach a description of the customers, including the number of customers in each class, served by each of the parties to the proposed transaction. If available, please provide a breakdown of the share of revenue on a class by class basis.
 - 1.2.4 Provide a description of the proposed geographic service area of the parties after completion of the proposed transaction. Include the details of requested changes in the description of the territory contained in the licence of each of the parties, if applicable.

1.3 Description of the Proposed Transaction

- 1.3.1 State the nature of the application. The applicant should specifically check whether the application falls under any of the following categories:
 - Amalgamation of a distributor with another corporation pursuant to section 85 of the Act;
 - Sale, lease or other disposition of transmission or distribution system or part of a transmission or distribution system necessary in serving the public pursuant to subsection 86(1) of the Act;
 - Acquisition directly or indirectly of voting securities of a transmitter or distributor such that after completion of the proposed transaction the acquirer would hold an aggregate of more than 20% of the voting securities of such transmitter or distributor pursuant to subsection 86(2) of the Act;
 - Notification of acquisition or construction of a generation facility by a transmitter or distributor pursuant to section 80 of the Act. If yes, the applicant must also complete Part III;
 - Notification of acquisition or construction of a transmission or distribution system by a generator pursuant to section 81 of the Act. If yes, the applicant must also complete Part III;
 - Amendment to conditions of licence as a result of the proposed transaction. If yes, the applicant must also complete Part IV;

The applicant may include more than one application or notification provided that such

application and/or notification relates to one transaction or series of transactions between the same parties. Please note that an application to amend rates is subject to a separate rate hearing process and will not generally be dealt with in a MAADs Transaction. In addition, an application to amend a licence to provide for any exemption from any requirement of a code or rule of the Board is subject to a separate application process.

- 1.3.2 The applicant is required to submit a detailed description of the proposed transaction. If the proposed transaction is an amalgamation of two or more corporations the applicant should include a description of the authorized and issued capital of each of the amalgamating corporations and the proposed issued and outstanding shares of the amalgamated corporation after the transaction.

If the proposed transaction is a transfer of shares the applicant should submit a detailed description of the issued and outstanding shares of the parties prior to the proposed transaction, and the number and class of shares being transferred.

If the proposed transaction is a sale, lease, or other disposition of assets, the applicant should submit a detailed list of the assets being transferred. If not all of the assets of the transferor are being transferred, the applicant should indicate what assets are not being transferred, whether such assets will continue being used to serve the public and if not what the applicant's plans are for disposing of such assets.

- 1.3.3 Attach the details of the consideration (e.g. cash, assets, shares) to be given and received by each of the parties to the proposed transaction. The applicant should also provide the total gross and net book value for both tax and accounting purposes of the shares or assets being transferred, as applicable.
- 1.3.4 Attach the financial statements (including balance sheet, income statement, and sources and uses of funds) of the parties to the proposed transaction for 2 complete years prior to the proposed transaction. The financial statements should be audited, if available. If the financial statements are unaudited, accountant's comments should also be included. The financial statements should be signed by 2 directors of the corporation.
- 1.3.5 Attach the pro forma financial statements of the parties reflecting completion of the proposed transaction. This information will assist the Board in assessing the financial viability of the parties after completion of the proposed transaction.

1.4 Other Information

- 1.4.1 Provide copies of all annual reports, proxy circulars, prospectuses or other information filed with securities commissions or similar authorities or sent to shareholders for each

of the parties to the proposed transaction and their affiliates within the past 2 years. This information is required by the Board as part of its due diligence to ensure that the information provided to the Board is consistent with information sent to shareholders and other regulatory authorities. It will also assist the Board in understanding the nature of the businesses of the parties to the proposed transaction.

- 1.4.2 Attach copies of all legal documents (or the most recent drafts, if not yet executed) to be used to implement the proposed transaction. Documents should include, where appropriate, transfer by-laws, resolutions approving the transaction, articles of incorporation, articles of amalgamation, asset or share transfer agreements, and shareholder agreements. This information is needed to further assist the Board in understanding the nature of the proposed transaction and as part of the Board's due diligence in reviewing the transaction.
- 1.4.3 Attach confirmation that the parties to the proposed transaction are in compliance with all licence and code requirements, and will be in compliance with licence and code requirements after completion of the proposed transaction. If the parties are not, or after the transaction will not be in compliance, the details and reasons for such non-compliance should be specified. If the parties will not be in compliance and wish the Board to consider granting an exemption from compliance with any licence or code requirements this should be specifically stated; however, the actual granting of the exemption is subject to a separate application process.
- 1.4.4 Explain whether the proposed transaction will result in a change of control of any of the parties. If the proposed transaction will not result in a change of control, such as a corporate reorganization, then the applicant only needs to complete and file the information requested in Part I of the Filing Requirements. If the proposed transaction will result in a change of control, then Part II, Part III, and Part IV, if applicable, must be completed.

PART II ADDITIONAL FILING REQUIREMENTS

Where the proposed transaction results in a change of control, in addition to the information set out in Part I the applicant must provide the following additional information to the Board:

2.1 Facilitate Competition

- 2.1.1 One of the objectives in Section 1 of the Act that the Board is required to consider in carrying out its responsibilities under the Act is to facilitate competition in the generation and sale of electricity and to facilitate a smooth transition to competition. This part requires the applicant to attach a short description of the impact, if any, of the proposed

transaction on competition. It is possible that the proposed transaction will not affect competition, for example if the transaction only involves electricity distributors with no Electricity Sector Affiliates.

Competitive forces are expected to operate in electricity generation and retailing markets. If either of the parties has Electricity Sector Affiliates in these sectors, then the proposed transaction can potentially impact both the evolution of competitive markets in these sectors, and the quality of competition once markets have reached a relatively mature state. Such effects may emerge from increasing concentration of ownership of generation assets, or increasing ownership of retailing market share, resulting in market power.

Many MAADs Transactions may not have an impact on competition. If this is the case, the applicant should confirm that there will be no competitive impact and state the reasons why competition will not be affected by the transaction.

2.2 Non-Discriminatory Access to Transmission and Distribution Systems

2.2.1 The provision of non-discriminatory access to transmission and distribution systems is a requirement of the Act and all transmission and distribution licences. The Filing Requirements require the applicant to confirm that the proposed transaction will have no impact on access to the transmission or distribution system of the parties. If the proposed transaction will have an impact, the applicant is required to provide the details of and the reasons for such impact, including steps proposed to be taken to minimize such impact.

2.3 Protect Interests of Consumers

2.3.1 Section 1 of the Act requires the Board to consider the protection of the interests of consumers with respect to prices and the reliability and quality of electricity service. To assist the Board in considering this objective, the applicant must provide detailed information on the costs and benefits of the proposed transaction to consumers. For example, the proposed transaction may facilitate capital expenditures that improve the safety and reliability of the system, as well as help assure continued high quality service. Some transactions may have implications for rates that consumers may pay in the future - either as a result of harmonization issues, or due to economies achievable in the transaction. If not all of the customers of a party to the transaction are being transferred, please also explain the impact on prices, reliability and quality of electricity service, if any, on the remaining customers of the selling utility.

2.3.2 The applicant must describe the steps, including any capital expenditures plans, that

will be taken to ensure that safety and system integrity are maintained after completion of the proposed transaction.

- 2.3.3 The applicant must provide details, including any capital expenditures plans, on how quality and reliability of service will be maintained after completion of the proposed transaction.
- 2.3.4 The parties are asked to indicate whether either party intends to undertake a rate harmonization process after the proposed transaction is completed.
- 2.3.5 The rate harmonization process is described in the Distribution Rate Handbook. The parties are asked to confirm if rate harmonization is planned, that it will conform with the process contained in the Distribution Rate Handbook.
- 2.3.6 To ensure that the interests of consumers are protected with respect to prices, the applicant must provide details of the rates that the parties proposed to implement after completion of the proposed transaction. The purpose of this filing requirement is to provide the Board with general information concerning the intention of the parties concerning proposed rate changes. Note that any proposed change in rates is subject to a separate rate hearing process. The approval of a MAADs Transaction does not necessarily mean that the rates set out in the material filed with the Board will be approved.
- 2.3.7 It is important that potential changes in rates should be effectively communicated to ratepayers. This requirement provides that the applicant must describe how the proposed change, if any, in rate structure has been communicated to affected ratepayers.

2.4 Promote Economic Efficiency

- 2.4.1 The applicant is asked to identify and quantify any costs, efficiencies and/or economies of scale that may result from the proposed transaction. For example, the proposed transaction may result in the creation of a larger transmitter or distributor who is able to take advantages of economies of scale. The parties are asked to specifically bring any economic efficiencies to the Board's attention.

2.5 Financial Viability

One of the objectives listed in section 1 of the OEB Act, 1998 is to facilitate a financially viable electricity industry. Financial viability can clearly be affected by merger and acquisition activity, so the filing requirements in this part aim to ensure the Board has adequate information on the

financial characteristics of the transaction.

- 2.5.1 The applicant must provide a valuation of any assets or shares that will be transferred in the proposed transaction, including the details of how this value was determined. The parties must also indicate any assumptions about future rate levels that were made in determining such valuation.
- 2.5.2 The details of the financing of the proposed transaction must be submitted to the Board.
- 2.5.3 An outline of the interest coverage ratios and cashflow to debt ratios of the parties to the proposed transaction prior to and after completion of the proposed transaction should be provided.
- 2.5.4 The parties to the proposed transaction must file the most recent individual or joint public health and safety audits, and environmental audits of the facilities of the parties to the proposed transaction that have been prepared. If public health and safety audits or environmental audits have not been conducted, the parties should provide the details of how the potential liability associated with the continued operation of assets has been determined. How the parties propose to deal with any potential liabilities should also be included.

2.6 Facilitate Energy Efficiency and Use of Environmentally Benign Energy Sources

- 2.6.1 The parties should provide details of the environmental policies and programs established by each of the parties to the proposed transaction and changes to these policies, if any, that would arise from the proposed transaction.
- 2.6.2 The parties should provide details of any energy efficiency policies and programs of each of the parties to the proposed transaction and indicate changes to these programs, if any, that would arise as a result of the proposed transaction.

2.7 Other

- 2.7.1 Details of any public consultation process engaged in by the parties and the details of any communication plans for public disclosure of the proposed transaction should be provided to the Board.
- 2.7.2 The parties to the proposed transaction are requested to list all suits, actions, investigations, inquiries or proceedings by any government body, or other legal or administrative proceeding, except proceedings before the Board, that have been

instituted or threatened against each of the parties to the proposed transaction or any of their respective affiliates.

2.7.3 Please provide the Board with any other information that is relevant to the application.

PART III ACQUISITIONS BETWEEN ELECTRICITY TRANSMITTERS AND DISTRIBUTORS AND ELECTRICITY GENERATORS

If the application involves the acquisition of an interest in a generation facility in Ontario, the construction of a generation facility in Ontario or the purchase of shares of a corporation that owns a generation facility in Ontario by a transmitter or distributor or affiliate of a transmitter or distributor, then the applicant must notify the Board pursuant to section 80 of the Act.

If the application involves the acquisition of an interest in a transmission or distribution system in Ontario, the construction of a transmission system in Ontario or the purchase of shares of a corporation that owns a transmission system in Ontario by a generator or affiliate of a generator, then the applicant must notify the Board pursuant to section 81 of the Act.

In either case, the transaction cannot be completed unless the Board has not issued a notice of review of the proposal within 60 days of the filing of the notice, or the Board has approved the proposal under section 82 of the Act.

To assist the Board in determining whether to issue a notice of review, in addition to the information set out in Parts I and II, the applicant should submit the following information :

- 3.1.1 Describe the generation capacity, within the Province of Ontario, of the parties to the proposed transaction, including each of their respective Energy Sector Affiliates prior to and after completion of the proposed transaction.
- 3.1.2 Describe the generation market share, within the Province of Ontario, of the parties to the proposed transaction, including each of their respective Energy Sector Affiliates, prior to and after completion of the proposed transaction.
- 3.1.3 Describe what gains in efficiency would result from the proposed transaction.

PART IV AMENDMENTS TO LICENCE

Part IV must be completed if either party to the proposed transaction is requesting an amendment to its licence as a result of the proposed transaction. Requests for amendments to the licences that do not arise directly from the proposed transaction should be dealt with in a

separate application process.

- 4.1.1 Schedule I to the licence contains the description of the licensed territory. If either party requires a change in the licensed territory as a result of the proposed transaction, the specific details of the change of description, including a map of the revised territory, should be filed.
- 4.1.2 One of the conditions of the licence is that the licensee must comply with all of the Board's codes and rules. If either of the parties will not be in compliance with all applicable codes and rules the reason for such non-compliance should be explained. For example, after completion of the proposed transaction the parties may not be in compliance with the requirement in the Affiliate Relationships Code concerning the independence of the board of directors of the utility. Please note that any application for an exemption from the provision of a rule or code is subject to a separate application process.