



**ENMAX Corporation and  
Calgary District Heating Inc.**

**Applications for Disposition of the Downtown District  
Energy Centre and Transfer of the Combined Heat and  
Power Generating Unit**

**April 19, 2021**

**Alberta Utilities Commission**

Decision 26163-D01-2021

ENMAX Corporation and Calgary District Heating Inc.

Applications for Disposition of the Downtown District Energy Centre and Transfer of the Combined Heat and Power Generating Unit

Proceeding 26163

Applications 26163-A001 and 26163-A002

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1400, 600 Third Avenue S.W.

Calgary, Alberta T2P 0G5

Telephone: 310-4AUC (310-4282 in Alberta)

1-833-511-4AUC (1-833-511-4282 outside Alberta)

Email: [info@auc.ab.ca](mailto:info@auc.ab.ca)

Website: [www.auc.ab.ca](http://www.auc.ab.ca)

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**Energy Centre and Transfer of the Combined Heat**  
**and Power Generating Unit**

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## **1 Decision summary**

1. This decision approves the disposition by ENMAX Corporation of the Downtown District Energy Centre (DDEC) and the transfer of related approvals from ENMAX Independent Energy Solutions Inc. (EIES) to Calgary District Heating Inc. (CDHI) For the reasons that follow, the Alberta Utilities Commission finds that the disposition will not result in harm to customers and that the transfer of approvals is in the public interest.

## **2 Introduction and process**

2. ENMAX Corporation (ENMAX) is the owner and operator of the DDEC, which provides district energy (in the form of central heating and hot water services) to municipal, commercial and residential buildings in downtown Calgary. The DDEC contains a 3.3 megawatt (MW) natural gas fueled combined heat and power generating unit (CHP unit) owned by EIES, a subsidiary of ENMAX. The CHP unit operates in accordance with a power plant approval and connection order issued by the Commission to EIES.<sup>1</sup> On December 18, 2020, ENMAX filed the following applications with the Commission:<sup>2</sup>

- (i) Application requesting a declaration pursuant to Section 101(4) of the *Public Utilities Act* that the disposition by ENMAX of the DDEC, including the facilities and equipment associated with the DDEC and CHP unit, to CDHI is exempt from the application of Section 101(2)(d)(i) of the *Public Utilities Act*, or in the alternative, an order approving the disposition under Section 101(2)(d)(i) of the *Public Utilities Act*.
- (ii) Application on behalf of EIES requesting approval of the transfer of the power plant approval and connection order for the CHP unit from EIES to CDHI.

3. The Commission issued notice of the applications on December 22, 2020, and received a statement of intent to participate (SIP) from ATCO Gas and Pipelines Ltd. The Commission established a process to consider the applications that involved one round of information requests followed by written argument and reply argument. The record of the proceeding closed on February 23, 2021.

4. In reaching the determinations in this decision, the Commission has considered all relevant materials comprising the record of this proceeding. Accordingly, references in this

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<sup>1</sup> Power Plant Approval 23243-D04-2018 and Connection Order 26110-D02-2020.

<sup>2</sup> Exhibit 26163-X0001, 2020-12-18-ENMAX – DE Calgary Disposition Application, December 18, 2020 and Exhibit 26163-X0003, 2020-12-18-ENMAX-DE Calgary Transfer Application, December 18, 2020.

decision to specific parts of the record are intended to assist the reader in understanding the Commission's reasoning relating to a particular matter and should not be taken as an indication that the Commission did not consider all relevant portions of the record with respect to a particular matter.

### **3 Application to dispose of the Downtown District Energy Centre**

#### **3.1 Background**

5. ENMAX is a designated owner of a public utility for the purposes of sections 101 and 102 of the *Public Utilities Act* pursuant to Section 1(1) of the *Public Utilities Designation Regulation*. ENMAX owns and operates the DDEC, which is itself a public utility within the meaning of Section 1(i) of the *Public Utilities Act*. The DDEC has been operational since 2010 and provides district energy service in accordance with thermal energy service agreements (TESAs) executed between ENMAX and various building owners or operators in downtown Calgary. There are currently 21 TESAs in place, originally executed between 2011 and 2020.

6. ENMAX, which is wholly owned by The City of Calgary, operates the DDEC on an unregulated basis pursuant to Section 78(2) of the *Public Utilities Act*, which exempts a public utility owned or operated by a municipality from the application of Part 2 of the *Public Utilities Act* unless the public utility is brought under the act by a bylaw of the municipality.

7. On November 5, 2020, ENMAX and EIES executed a purchase and sale agreement under which CDHI agreed to purchase, and ENMAX and EIES agreed to sell, the DDEC and all associated facilities and equipment, subject to, among other conditions, approval from the Commission of the disposition (the transaction).

8. CDHI is a wholly owned subsidiary of Atlantica Sustainable Infrastructure plc., which owns and operates a portfolio of assets that includes electricity generation, storage and transmission facilities in various jurisdictions. ENMAX filed a letter provided by CDHI confirming that CDHI supports ENMAX's applications before the Commission. In response to an information request from the Commission, CDHI confirmed that it understood that it had agreed to purchase a public utility and would accept full regulatory responsibility for the DDEC under Part 2 of the *Public Utilities Act*. CDHI acknowledged that under its ownership, the DDEC would no longer be eligible for the exemption in Section 78(2) of the *Public Utilities Act*, but stated that it intended to bring an application before the Commission in the future seeking exemptions from certain provisions of the *Public Utilities Act*, so as to obtain regulatory treatment consistent with complaint-based regulation.

9. ATCO Gas filed a SIP in the proceeding on the basis that ENMAX's applications did not consider the potential impact of the disposition on ATCO Gas's regulated customers. ATCO Gas expressed concern that the Commission could not fully evaluate the consequences of the disposition without a clearer understanding of the proposed regulatory treatment of the DDEC following the transaction.

#### **3.2 Approval of dispositions outside of the ordinary course of business**

10. Section 101(2)(d)(i) of the *Public Utilities Act* states that the Commission must approve the sale or disposition of property by the owner of a designated public utility when made outside

the ordinary course of its business. The Commission's predecessor, the Alberta Energy and Utilities Board (board), developed a frequency and materiality test as a means to determine whether a proposed disposition was outside the ordinary course of a utility's business and, as such, required consent.

11. In its application, ENMAX stated that the transaction is outside of ENMAX's ordinary course of business from the perspective of frequency and type of sale. ENMAX did not disclose the particulars of the purchase and sale agreement executed between it and CDHI, but did refer to a news release prepared by ENMAX, and issued concurrently with the execution of the purchase and sale agreement, in which ENMAX indicated that the value of the transaction is approximately \$27 million.

12. The Commission observes that the DDEC is the only district energy facility operated by ENMAX. The Commission also notes that the sale of an asset which itself constitutes a public utility is a relatively unusual occurrence. The Commission therefore agrees with ENMAX's view that the sale of the DDEC is outside of the ordinary course of ENMAX's business and requires approval under Section 101(2)(d)(i) of the *Public Utilities Act*.

### **3.3 Commission's jurisdiction to grant exemptions from the approval provision**

13. Section 101(4) of the *Public Utilities Act* provides the Commission with jurisdiction to grant an exemption from the requirement to obtain approval under Section 101(2) in respect of a particular transaction or class of transactions.

14. The Commission has previously used this discretionary authority to exempt a designated owner of a public utility from the requirement to obtain approval prior to proceeding with a transaction when it has considered the exemption to be in the public interest.<sup>3</sup> When considering whether to grant an exemption, the Commission "must be satisfied that the [exemption] would not undermine the ability of [the public utility] to provide safe and reliable service at just and reasonable rates."<sup>4</sup> However, this is not the only consideration that has been taken into account by the Commission and its predecessor in determining whether a requested exemption should be granted. Other factors include, but are not limited to:

- The operational and regulatory history of the utility.
- The potential effect of the requested exemption on regulatory oversight.
- The duration and scope of the requested exemption.
- Any objections to the application registered by interveners.
- Other general public interest concerns.

15. In this case, ATCO Gas argued that the operation of the DDEC within its service area has policy implications for the utility system that have not been addressed, and intervened in the proceeding, in part, to assert that the unique characteristics of the transaction warrant a broader review than the Commission would ordinarily apply to the sale of an asset. The Commission

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<sup>3</sup> See for example, Order U99115: CU Inc. Application Regarding Exemption From Certain Sections of the *Public Utilities Board Act* and the *Gas Utilities Act*, Application 990182, File 6640-179, November 23, 1999.

<sup>4</sup> Decision 2004-024: AltaLink Investment Management Ltd., Request for Relief Under Section 101(2) of the *PUB Act*, Application 1282388-1, March 16, 2004, page 7.

accepts that the circumstances of the transaction are somewhat unique, particularly in the sense that it constitutes the sale of a public utility to an owner that is a new entrant to the Alberta utility sector. In these circumstances, and given the concerns cited by ATCO Gas, the Commission considers it prudent to review the transaction to ensure that any potential harm arising from the disposition of the DDEC is understood and considered. The Commission has therefore not exercised its discretion to exempt the transaction from the application of Section 101(2) of the *Public Utilities Act*.

### 3.4 Evaluation under the no-harm test

16. In deciding whether to approve a disposition application that is outside the ordinary course of business under Section 101(2) of the *Public Utilities Act*, the Commission and its predecessor have traditionally applied a “no-harm” test that considers the disposition in the context of both potential financial impacts and service level impacts, in terms of both quantity and quality, to customers.

17. The no-harm test traditionally applied by the Commission and its predecessor has been reviewed in several board, Commission and court decisions, and was summarized in Decision 2000-41 where the board stated the following:<sup>5</sup>

... rather than simply asking whether customers will be adversely impacted by some aspect of the transactions, the Board concludes that it should weight the potential positive and negative impacts of the transaction to determine whether the balance favours customers or at least leaves them no worse off, having regard to all the circumstances of the case. If so, then the Board considers that the transactions should be approved.

18. In *ATCO Gas & Pipelines Ltd v Alberta (Energy and Utilities Board)*,<sup>6</sup> the Supreme Court of Canada discussed the nature of public utilities and the rationale for the kind of prohibition found in Section 101(2)(d) of the *Public Utilities Act*. Bastarache J., writing for the majority, stated that the board “should only exercise its discretion to act in the public interest when customers would be harmed or would face some risk of harm.”<sup>7</sup>

19. Subsequently, in *ATCO Gas and Pipelines v Alberta (Energy and Utilities Board)*,<sup>8</sup> the Court of Appeal of Alberta considered the scope of the no-harm test, with reference to the Supreme Court of Canada’s *Stores Block* decision. The Court of Appeal found that the harm contemplated by the Supreme Court must be harm related to the transaction in question.<sup>9</sup> The Commission has interpreted this to mean that it must apply the no-harm test to the transaction as a whole, including its surrounding circumstances.<sup>10</sup> The Commission has generally applied the no-harm test to consider potential harm to customers served by the property that is the subject of a proposed transaction, as well as customers of any regulated affiliate of a public utility that is a party to the transaction.

<sup>5</sup> Decision 2000-41: TransAlta Utilities Corporation, Sale of Distribution Business, July 5, 2000, PDF page 11.

<sup>6</sup> *ATCO Gas & Pipelines Ltd v Alberta (Energy and Utilities Board)*, 2006 SCC 4 [*Stores Block*].

<sup>7</sup> *Stores Block*, paragraph 84.

<sup>8</sup> *ATCO Gas and Pipelines Ltd v Alberta (Energy and Utilities Board)*, 2009 ABCA 171 [*Harvest Hills*].

<sup>9</sup> *Harvest Hills*, paragraph 32.

<sup>10</sup> See for example: Decision 2013-255: ATCO Gas, Disposition of North Yard Service Centre, Application 1609115-1, June 17, 2013, paragraphs 21-24.

20. In this proceeding, the Commission requested parties to address in argument the question of which customers should be considered if the Commission were to apply the no-harm test to the transaction.

21. ENMAX and CDHI argued that, consistent with its previous decisions, the Commission should apply the no-harm test with respect to customers of the DDEC (i.e., those building operators or owners who are parties to a TESA) as well as customers that receive regulated utility service from ENMAX Power Corporation, which is a subsidiary of ENMAX.

22. With respect to both of these customer groups, ENMAX maintained that no harm would arise as a result of the transaction. ENMAX submitted that the transaction would not change the scope or quality of district energy service provided to DDEC customers, or the prices charged for such service, as the existing TESAs would be assigned to CDHI, whose parent company has significant experience owning and operating thermal-based generation assets similar to the DDEC. ENMAX confirmed that all parties to a TESA had been notified of the transaction, and that none had raised concerns.

23. Both ENMAX and CDHI also maintained that there would be no impacts to customers of ENMAX Power Corporation as a result of the transaction, as the DDEC has been operated on a standalone basis, separate and apart from the regulated utility function of ENMAX Power Corporation.

24. ATCO Gas submitted that the Commission should also consider harm to ATCO Gas's past, present and future customers, arguing that the existence and potential expansion of DDEC service may contribute to upward pressure on the rates paid by ATCO Gas customers.

25. Further, ATCO Gas submitted that beyond the traditional no-harm test, the Commission's review of the transaction should also address the DDEC's history and future operations. ATCO Gas submitted that the Commission should take a broad view of the transaction given the unique circumstances of a municipally-owned entity disposing of a public utility to a non-municipal owner, and the fact that there is uncertainty around the future regulatory treatment of the DDEC given CDHI's intent to seek exemptions to certain provisions of the *Public Utilities Act*.

26. ATCO Gas requested that, should the disposition be approved, the Commission impose conditions on CDHI regarding disclosure of the rates paid by DDEC customers and any plans to expand DDEC service. ATCO Gas also requested that the Commission's approval of the disposition be subject to a condition that any change or expansion to DDEC service would require the approval of the Commission.

27. ENMAX argued that the relief requested by ATCO Gas is inconsistent with the longstanding no-harm test, and that it is based on speculative impacts to customers that bear no relation to the transaction. With respect to ATCO Gas's concerns regarding the future regulatory treatment of the DDEC, CDHI submitted that following the transaction, the DDEC would move from a position of no regulatory oversight by the Commission (due to Section 78(2) of the *Public Utilities Act*) to a position wherein the DDEC would be subject to the entirety of Part 2 of the *Public Utilities Act* and CDHI would assume full regulatory responsibility for its operation. CDHI therefore argued that any risk of uncertainty regarding the future regulatory treatment of the DDEC is borne by CDHI and not DDEC customers.



28. The Commission is not satisfied that the circumstances of this proceeding are sufficiently unique to warrant a departure from the well-established no-harm test, which has evolved over time to reflect the Commission's statutory mandate and which has been acknowledged by both the Court of Appeal and Supreme Court of Canada.

29. As confirmed by the Court of Appeal, in applying the no-harm test, the Commission must confine its assessment to impacts arising as a result of the transaction and circumstances surrounding the transaction. In this respect, the no-harm test is applied on a prospective basis. It considers the future benefits and harms that will arise from a proposed disposition relative to the status quo.

30. In the current circumstances, ATCO Gas has raised a number of concerns relating to potential harm to its customers arising from the past and current operation of the DDEC, as well as harm that may arise in the event that DDEC service is expanded in the future. The Commission acknowledges the concerns raised by ATCO Gas, but finds that ATCO Gas's concerns are speculative and that it has failed to establish any connection between these concerns and the transaction that is the subject of this proceeding.

31. It appears to the Commission that ATCO Gas's concerns are based on its belief that the DDEC represents a competitive threat to regulated natural gas service within its service area and therefore poses a risk of harm in the form of financial impacts to its customers. The Commission is not satisfied that impacts to ATCO Gas customers are directly relevant to its application of the no-harm test. However, in any event, as pointed out by ENMAX, there is no evidence before the Commission in this proceeding to suggest that ATCO Gas or its customers would suffer any incremental harm were the DDEC to be owned by CDHI. Rather, the impacts asserted by ATCO Gas are entirely speculative in nature and relate to the existence, rather than the disposition, of the DDEC.

32. The construction of the DDEC was approved by the Commission, and the DDEC is operated in accordance with the regime set out in the *Public Utilities Act* which includes the exemption provided for under Section 78(2). As confirmed by CDHI, one effect of the transaction is that, under CDHI's ownership, the DDEC would no longer benefit from the application of Section 78(2), and would be brought under the full purview of the *Public Utilities Act* unless and until CDHI brings an application seeking relief pursuant to Section 79. At that point, subject to a determination on standing, ATCO Gas may have an opportunity to examine the future regulatory treatment of the DDEC in the context of a proceeding established for that purpose. However, in the Commission's view, the focus of an application brought under Section 101(2)(d) is to assess any impacts associated with a proposed disposition. The fact that the DDEC has historically benefited from municipal ownership does not serve to expand the scope or purpose of the no-harm test.

33. The evidence before the Commission demonstrates that there will be no impacts to the safety or quality of utility service as a consequence of the transaction. Specifically, the existing TESAs governing DDEC service will be assigned to CDHI, and CDHI will assume the obligations currently held by ENMAX. The Commission is satisfied that CDHI, through its parent company, has sufficient expertise to provide the same level and quality of service to DDEC customers as they currently enjoy. Similarly, the Commission accepts that there will be no impacts to regulated customers of ENMAX Power Corporation, as the DDEC business has been operated by ENMAX on a standalone basis, separate and apart from the core regulated

utility function carried out by ENMAX Power Corporation. The Commission also finds that approval of the disposition will not result in any financial harm to customers of the DDEC or ENMAX Power Corporation. ENMAX stated that the transaction will not affect ENMAX's credit rating or have any adverse impact on the financing costs of ENMAX Power Corporation. Based on the information provided by ENMAX, the Commission notes that the transaction costs will be borne by ENMAX and will not be recovered from ratepayers.

34. In summary, the transaction will not harm utility services or the rates charged for those services. Nor will the transaction negatively affect regulatory oversight of the DDEC, ENMAX or its subsidiaries. The Commission finds that the no-harm test has been satisfied and approves the transaction.

#### **4 Application to transfer power plant approval and connection order**

35. The DDEC contains a 3.3 MW natural gas fueled CHP unit, which operates pursuant to Power Plant Approval 23243-D04-2018 and is connected to the Alberta Interconnected Electric System via ENMAX Power Corporation's 25-kilovolt distribution system pursuant to Connection Order 26110-D02-2020. The power plant approval and connection order are held by EIES.

36. ENMAX, on behalf of EIES, requested that the Commission authorize the transfer of Power Plant Approval 23243-D01-2018 and Connection Order 26110-D02-2020 from EIES to CDHI to reflect the change of ownership that would be effected by the transaction. ENMAX explained that, in accordance with Appendix A of Rule 007: *Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations and Hydro Developments*, a participant involvement program was not required for the ownership transfer because it does not involve the construction or modification of any electric facilities.

37. In accordance with the requirements of Section 23 of the *Hydro and Electric Energy Act*, ENMAX provided a certificate of registration demonstrating that CDHI is extra-provincially registered in the province of Alberta under the *Business Corporations Act*.

38. The Commission has reviewed the application and finds that there are no technical or environmental concerns associated with the ownership transfer. The Commission considers that the concerns raised by ATCO Gas, as discussed in greater detail above, relate primarily to the application to dispose of the DDEC and not the corresponding transfer of approvals. Accordingly, the Commission is satisfied that there are no outstanding public or industry objections or concerns associated with the approval transfers. Based on the information provided, ENMAX has demonstrated that CDHI is eligible to hold a power plant approval and connection order.

39. Based on the foregoing, the Commission considers the application to transfer the power plant approval and connection order to be in the public interest in accordance with Section 17 of the *Alberta Utilities Commission Act*.

40. Pursuant to sections 11, 18 and 19 of the *Hydro and Electric Energy Act*, the Commission approves the transfer of the power plant approval and connection order to CDHI. The Commission will issue a new power plant approval and connection order upon receipt of written

confirmation from ENMAX or CDHI that the ownership transfer has been completed. Accordingly, the Commission directs ENMAX or CDHI to provide such confirmation no more than seven days after the transaction is closed.

41. CDHI has confirmed that upon the transaction closing, it will become the owner of a public utility and will accept full regulatory responsibility for the DDEC under Part 2 of the *Public Utilities Act*. The Commission considers this commitment by CHDI to include sections 101, 102 and 109 of the *Public Utilities Act*. Therefore, effective from the closing of the transaction until such time as the Commission declares otherwise, the Commission directs CDHI to conduct itself as though it were a designated owner of a public utility under the *Public Utilities Designation Regulation*.

## 5 Order

42. It is hereby ordered that:

- (1) ENMAX Corporation's application to dispose of the Downtown District Energy Centre located at 435 Ninth Avenue S.E., Calgary, Alberta, is approved.
- (2) ENMAX Corporation's application, on behalf of ENMAX Generation Portfolio Inc., to transfer the combined heat and power generating unit's power plant approval and connection order to Calgary District Heating Inc. is approved.
- (3) ENMAX Corporation or Calgary District Heating Inc. shall provide written confirmation to the Commission that the ownership transfer has been completed, no later than seven days after the transaction is closed.
- (4) Effective from the time the transaction is closed, Calgary District Heating Inc. is directed to conduct itself as an owner of a public utility to which sections 101, 102 and 109 of the *Public Utilities Act* apply.

Dated on April 19, 2021.

**Alberta Utilities Commission**

*(original signed by)*

Douglas A. Larder, QC  
Acting Commission Member

## Appendix 1 – Proceeding participants

<b>Name of organization (abbreviation) Company name of counsel or representative</b>
ENMAX Corporation (ENMAX) on behalf of ENMAX Independent Energy Solutions Inc.
Calgary District Heating Inc. (CDHI) Stikeman Elliott LLP
ATCO Gas and Pipeline Ltd. (ATCO Gas)

Alberta Utilities Commission
Commission panel D.A. Larder, QC, Acting Commission Member
Commission staff M. Anderson (Commission counsel) B. Edwards S. Karim A. Anderson

## Appendix 2 – Summary of Commission directions

This section is provided for the convenience of readers. In the event of any difference between the directions in this section and those in the main body of the decision, the wording in the main body of the decision shall prevail.

1. Pursuant to sections 11, 18 and 19 of the *Hydro and Electric Energy Act*, the Commission approves the transfer of the power plant approval and connection order to CDHI. The Commission will issue a new power plant approval and connection order upon receipt of written confirmation from ENMAX or CDHI that the ownership transfer has been completed. Accordingly, the Commission directs ENMAX or CDHI to provide such confirmation no more than seven days after the transaction is closed..... paragraph 40
2. CDHI has confirmed that upon the transaction closing, it will become the owner of a public utility and will accept full regulatory responsibility for the DDEC under Part 2 of the *Public Utilities Act*. The Commission considers this commitment by CHDI to include sections 101, 102 and 109 of the *Public Utilities Act*. Therefore, effective from the closing of the transaction until such time as the Commission declares otherwise, the Commission directs CDHI to conduct itself as though it were a designated owner of a public utility under the *Public Utilities Designation Regulation*..... paragraph 41