File #4

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BY EMAIL and RESS

October 23, 2008
Our File No. 2080822

24/10/08

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re. EB-2008-0310 – E.L.K Energy Inc./Town of Essex MAAD Application

We are counsel for the School Energy Coalition. The School Energy Coalition wishes to intervene in the above-named application. The application was provided to us, on behalf of our client, on October 14, 2008. A copy of our formal Notice of Intervention is attached.

Scope of Intervention

Although SEC is proposing to intervene, we do not currently expect that we will be opposing the application. We have reviewed it in detail, and counsel for the Applicant has co-operated in providing us with information and answers to questions we have posed informally. We thank them for that. As a result of that dialogue, we have only two areas of concern:

- To what extent, if any, are the restrictive covenants and post-closing commitments in Article X of the Purchase Agreement appropriate and necessary, and what impact, if any, will they have on ratepayers in the future?

- What is the full extent of the TD Bank financing transaction that finances the purchase, in which the regulated entity borrows to fund the purchase by one of its shareholders of its own shares? We realize that large dividends and other capital flows are likely part of the overall steps in the transaction, leading to a regulated entity with a substantially different capital structure and revenue requirement from today. We believe the Board should understand the full extent of those changes before approving the transaction.

To assist the Board and the Applicant, we have prepared and attached with this letter a list of questions (in the nature, perhaps, of interrogatories) we believe the Applicant should answer before the Board considers whether, and on what conditions, to approve this transaction. Those questions could be answered in writing, or by way of a Technical Conference, as the Board and/or the Applicant prefer. Subsequent to that, and unless the answers produce surprises, we believe that the matter should be dealt with by way of a written hearing.

Threshold Question

The Board has, in the Notice of Application, advised parties that the initial step in this process is to consider and decide the threshold question of whether Board approval of a transaction such as this is required under s. 86(2) of the OEB Act.

We agree with the Applicant that there are two possible interpretations of the section, and we agree that the wording is ambiguous. Under the first interpretation, the acquisition of shares by a person is only scrutinized once, the first time they go over the 20% threshold. Under the second, the Board reviews any acquisition of shares where the resulting total held by the person exceeds 20%.

In its submissions, the Applicant has focused on the financial strength of the person acquiring shares, and we agree that is a key aspect of the Board's review. However, that is not the sole purpose of the review. In fact, financial strength is really, in our view, part of a wider question of whether the acquisition of shares is in the best interests of (or at the very least not harmful to) the ratepayers.

So, for example, the Applicant focuses on the example of a 38% shareholder moving to 39%, then 40%, etc., and suggests that the results of the second interpretation would be absurd. With respect, this is a straw man. Not only is it unlikely that shareholders will increase their shareholdings in that way (we have cast around for a real life example, and have not found one), but even if they do, the Board's processes are sufficiently flexible to ensure that a de minimis application is dealt with quickly and with little cost.

The better approach is to ask the question "Should the Board review a transaction in which a person acquires control of a regulated utility?" The common sense answer to that question is yes, and would still be yes if the proposed acquiror were already a major minority shareholder. This kind of transaction, likely to be reasonably common over the next few years, is exactly the type of situation in which the Board's scrutiny can ensure the ratepayers are not disadvantaged in the process.

The practical proof of this conclusion lies in the two questions we have posed with respect to this application. Those same two questions (and perhaps in particular the first of the two) may arise in any situation in which a utility owned by multiple municipalities (such as Powerstream or Horizon) is acquired by one of the municipalities. The potential for restrictive covenants that either a) form a barrier to efficient operation of the LDC, or b) create advantages for one group of ratepayers over another, or c) prevent the LDC from engaging in subsequent M&A activity, will always be present, and should not proceed without Board review.

It is therefore submitted that, in order to ensure that the goals of the OEB Act, and the overall mandate of the Board, are met, it is necessary to interpret s. 86(2) as requiring Board approval

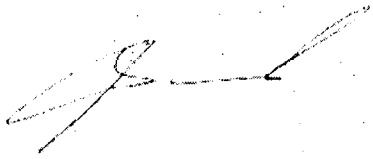
whenever a share acquisition results in a shareholder having more than 20%, whatever percentage they started with.

Conclusion

We request that the Board approve our attached intervention request, and our proposed streamlined process for dealing with the application quickly and efficiently.

All of which is respectfully submitted.

Yours very truly,
SHIBLEY RIGHTON LLP



Jay Shepherd

cc: Bob Williams, SEC (email)
Gail Anderson, SEC (email)
Richard King, Ogilvy Renault (email)
Interested Parties (email)

EB-2008-0310

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c.O.15, Sch. B;

AND IN THE MATTER OF an Application by the Town of Essex under section 86(2) of the Act for leave to acquire shares of E.L.K. Energy Inc.

NOTICE OF INTERVENTION

OF THE

SCHOOL ENERGY COALITION

1. The School Energy Coalition applies for intervenor status in this proceeding.

General Interest of the Intervenor

2. The School Energy Coalition is a coalition established to represent the interests of all Ontario publicly-funded schools in matters relating to energy regulation, policy, and management. It is made up all seven of the major school-related organizations, representing all of the school boards, and all levels of school management, and through them representing the approximately 5000 schools and about 2 million students in Ontario. The primary goal of these organizations is to promote and enhance public education for the benefit of all students and citizens of Ontario.

3. The intervenor's members have a significant interest in the activities of regulated utilities and their affiliates in the province, due to the severe financial implications those activities have on school boards, their students and the people of the province of Ontario. Utility costs are one of the most significant cost pressures facing school boards. The cost of energy services to the intervenor's members is currently in excess of $400 million, and has increased rapidly over the last five years. To produce balanced budgets in the face of ever increasing utility costs, school boards have repeatedly been forced to cut essential programs and services to the detriment of the students and the public of the province of Ontario.

4. All schools in the province are impacted by changes in the rates and ownership of regulated utilities. In the case of the instant application, the schools in the franchise area of E.L.K. Energy Inc. will be directly affected, and schools in the territories of other electricity distributors will be affected by the precedents and principles established by the Board in response to this application.

Issues to be Addressed

5. Please see the attached letter.

The Intervenor's Intended Participation

6. Please see the attached letter.

Counsel/Representative

7. The School Energy Coalition requests that a copy of all documents filed with the Board by each party to this proceeding be served on the Applicant, and on the Applicant's counsel and case manager as follows:

(a) School Energy Coalition:

ONTARIO EDUCATION SERVICES CORPORATION
c/o Ontario Public School Boards Association
439 University Avenue, 18th Floor
Toronto, ON
M5G 1Y8

Attn: Bob Williams, Co-ordinator
Phone: 416 340-2540
Fax: 416 340-7571
Email: bwilliams@opsba.org

(b) School Energy Coalition's counsel:

SHIBLEY RIGHTON LLP
Barristers and Solicitors
250 University Avenue, Suite 700
Toronto, Ontario, M5H 3E5

Attn: Jay Shepherd
Phone: 416 214-5224
Fax: 416 214-5424
Email: jay.shepherd@shibleyrighton.com

Costs

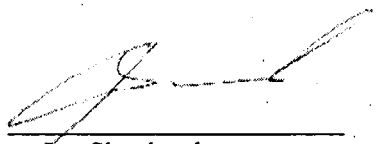
8. The School Energy Coalition intends to apply for recovery of its costs reasonably incurred in the course of its intervention in this matter. The School Energy Coalition has participated in many past natural gas and electricity proceedings in Ontario, consultations, rate cases, and other processes and hearings, and has been found eligible to be paid its reasonably incurred costs in all of those proceedings.

9. The School Energy Coalition is eligible for a cost award because it "primarily represents the interests of consumers (e.g. ratepayers) in relation to regulated services". School boards are one of the largest groups of non-industrial energy consumers in the province, and their energy costs have a direct impact on the education of millions of Ontario children. The formation of the School Energy Coalition ensured that all representatives of the interests of schools participated jointly in OEB proceedings.

10. The School Energy Coalition is not ineligible by reason of any of the criteria contained in section 3.05 of the Practice Direction on Cost Awards.

Respectfully submitted on behalf of the School Energy Coalition this 23rd day of October, 2008

SHIBLEY RIGHTON LLP

Per: 

Jay Shepherd