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SENT BY COURIER

Toronto, November 21, 2008

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, Suite 2700
Toronto, ON M4P 1E4

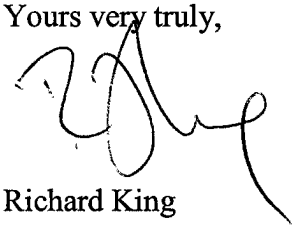
Dear Ms. Walli:

RE: Town of Essex – Purchase of Shares of E.L.K. Energy Inc.
Board Docket No. EB-2008-0310

Please find enclosed a Reply Submission of the Town of Essex with respect to submissions made by the School Energy Coalition and Board Staff in the above-referenced matter. It is being filed on the Board's RESS system, and served on intervenors and observers today.

Please do not hesitate to contact me should you have any questions or concerns.

Yours very truly,



Richard King

/mnm

Encl.

cc. J. Shepherd (SEC)
B. Williams (SEC)
W. Miller (Essex)
R. Dimmel (Essex Power Lines)
A. Sasso (Enwin)

EB-2008-0310

REPLY SUBMISSIONS OF TOWN OF ESSEX

November 21, 2008

This submission replies to the submissions made by the School Energy Coalition ("SEC")(dated October 23, 2008) and Board Staff (dated November 13, 2008) on the threshold question of whether subsection 86(2) of the *Ontario Energy Board Act, 1998* (as amended) ("OEB Act") applies to the purchase by the Town of Essex ("Essex") of the shares in E.L.K. Energy Inc. ("ELK") currently held by the Town of Lakeshore ("Lakeshore") and the Town of Kingsville ("Kingsville").

Before addressing some of the more specific submissions made by the SEC and Board Staff, we would first point out the fundamentally flawed premise from which each of the SEC and Board Staff make their submissions.

On page two of the SEC letter, counsel for SEC states that: "The better approach is to ask the question 'Should the Board review a transaction in which a person acquires control of a regulated utility?'." On page 3 of the Board Staff submission, Board Staff states that: "A transaction of this magnitude which would result in ELK becoming the sole shareholder of ELK is of concern to and should be scrutinized by the Board." With respect, the proper question to be determined is not whether the Board *should* scrutinize the proposed transaction, but rather whether the Board *has the statutory authority* to scrutinize the proposed transaction. This is not an issue of whether the Board or any intervenor thinks it would be desirable or a good idea to scrutinize the application, but rather a question of the interpretation of the Board's enabling legislation. It is an issue that the Board must determine correctly, or it will have acted without jurisdiction.

In making its determination, the Board cannot consider many of the issues raised by Board Staff and SEC in their submissions. Specifically, the information contained in the application that relates to the proposed financing of the transaction cannot be considered unless it is first determined that subsection 86(2) of the OEB Act applies (i.e., the threshold issue). The application was filed for consideration only in the event that the Board determined subsection 86(2) applied. The information in the application cannot be considered in determining the threshold issue. The Board must determine the threshold issue on the basis of the interpretation of subsection 86(2) of the OEB Act, which states:

> "No person, without first obtaining an order from the Board granting leave, shall,
>
> (a) acquire such number of voting securities of a ... distributor that together with voting securities already held by such person ... will in the

> aggregate exceed 20 percent of the voting securities of the ... distributor..."

It would be improper and beyond the Board's jurisdiction to decide that they have jurisdiction to review the proposed transaction on the basis that the Board wants to probe further the financing arrangements. How a transaction is financed does not have any role to play in subsection 86(2) of the OEB Act. Similarly, the Board cannot decide that subsection 86(2) of the OEB Act applies based on the covenants and post-closing commitments in the transaction agreement. These are issues that the Board may inquire into only if they determine that subsection 86(2) applies.

What is before the Board is a two-step process. Step 1 (the threshold "jurisdictional" determination) is to determine whether subsection 86(2) of the OEB Act applies, which is purely a question of statutory interpretation. The only relevant facts that can be considered in this step are those that pertain to the wording of subsection 86(2) of the OEB Act (i.e., what are the shareholdings pre- and post-transaction?). Only if it is determined that subsection 86(2) applies will Step 2 be undertaken. Step 2 involves the Board evaluating the application in the context of the Board's "no harm" test. This would involve examining factual evidence related to financing, contractual covenants, etc. that can be found in the application.

What Board Staff and SEC are asking for is to have the evidentiary basis for Step 2 form the basis for the Board's decision in Step 1. That cannot be done. If the Board were to make its statutory interpretation determination on the basis of the factual evidence to be considered in Step 2, it would commit an error of law.

Proper Interpretation of Subsection 86(2)

There are several reasons why the correct interpretation of subsection 86(2) is that it is to apply only to transactions where a minor shareholder (i.e., a shareholder holding less than 20% of a utility's shares) becomes a major shareholder (i.e., a shareholder holding more than 20% of a utility's shares).

The plain wording of subsection 86(2) of the OEB Act emphasizes that it is the *summation* of the person's existing shares and the shares to be purchased that is key to requiring leave of the Board (note the words "in the aggregate") the interpretation being urged by SEC and Board Staff would make the phrase "in the aggregate" in subsection 86(2) moot, since a major shareholder will always start from a shareholding position of greater than 20%.

The interpretation being urged by SEC and Board Staff seems to be that the Board should apply subsection 86(2) of the OEB Act whenever it feels that the transaction is significant. To that end, both SEC and Board staff specifically argue that the proposed transaction warrants Board review because it involves Essex acquiring a "controlling" interest in ELK (i.e., Essex will own more than 50% of ELK's shares). With respect, this amounts to a re-write of the legislation. If the applicability of subsection 86(2) of the OEB Act depended on acquiring a 50% interest in a utility, the legislation would have said that. It does not. It sets 20% as the shareholding threshold.

Both SEC and Board Staff appear to be treating the threshold issue as not one of statutory interpretation but rather a policy issue. In its very first submission, Board Staff argues that:

"[T]here is no Board policy, guideline or decision indicating that s.86(2) applies only to an initial acquisition over 20% and not to any subsequent acquisitions, regardless of the size of such subsequent acquisitions." This is not a matter of policy. The Board needs to determine whether subsection 86(2) applies based on the legal interpretation of that section. Later, Board Staff argues that: "A transaction of this magnitude which would result in Essex becoming the sole shareholder of ELK is of concern to and should be scrutinized by the Board." Board Staff's submissions make much of the fact that the transaction will make Essex the sole shareholder of ELK. That is a correct fact. However, the applicability of subsection 86(2) is not based on a "sole shareholder" test.

The interpretation being urged by SEC and Board staff would also, in our submission, encompass the potentially absurd result that the Board would be compelled to scrutinize every transaction by a major shareholder. The interpretation we are urging would scrutinize a significant shareholder only once – at the point in time when that person acquired a sufficient quantity of shares to make that entity a significant shareholder. It is our submission that this further argues that the intent of the Legislature was to treat the 20% shareholding as a threshold in subsection 86(2) of the OEB Act.

Finally, Board Staff's argument that this transaction should be scrutinized because the initial formation of ELK was not subject to Board scrutiny is also incorrect. The transaction forming ELK was not scrutinized by the Board because the Board had no statutory authority to review the transaction. That reality does not somehow argue in favour of giving the Board jurisdiction to scrutinize this transaction. These are two separate transactions. The Board needs to determine whether subsection 86(2) of the OEB Act applies to this transaction. That has nothing to do with the transaction that resulted in the formation of ELK in 2000.

For all of the above reasons, we submit that subsection 86(2) of the OEB Act does not apply to the transaction.