Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2008-0310

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

AND IN THE MATTER OF an application pursuant to subsection 86(2) of the *Ontario Energy Board Act, 1998* by the Town of Essex for leave to acquire shares of E.L.K. Energy Inc.

BEFORE: Gordon Kaiser
Vice Chair and Presiding Member

Paul Vlahos
Member

Ken Quesnelle
Member

DECISION AND ORDER

This is a decision of Vice-Chair, Gordon Kaiser and Board Member, Ken Quesnelle. The dissenting opinion with reasons of Board Member, Paul Vlahos follows the majority decision.

This is an Application by the Town of Essex to acquire all of the outstanding shares of E.L.K. Energy Inc. ("ELK"), a licenced electricity distributor serving three towns in Southwestern Ontario with approximately 11,000 customers. Essex currently owns 38% of the shares of ELK and will purchase the remaining shares from the Town of Kingsville (38%) and the Town of Lakeshore (24%) pursuant to an agreement filed with this application. The three Towns formed ELK in 2000 in a transaction that was exempt from Section 86 review by virtue of Ontario Regulation 516/99.

Section 86(2) of the *Ontario Energy Board Act, 1998* (the "Act") requires that no person, without first obtaining an Order from the Board granting leave, shall acquire a number of

voting securities of an electricity distributor that together with the voting securities already held by such a person will in the aggregate exceed 20% of the voting securities of that distributor.

Essex takes the position that Section 86(2) of the Act does not apply to the proposed transaction and asks the Board to make a ruling to this effect prior to hearing the application on its merits.

Submissions of the Parties

The Board issued a Notice of Application and Hearing on October 10, 2008. The School Energy Coalition ("SEC") and Essex Power Lines Corporation ("Essex Power") applied for and were granted intervenor status. Enwin Utilities applied for and was granted observer status.

Submissions of the Parties

In its September 17, 2008 letter, Essex states that there are two possible interpretations of subsection 86(2) of the Act, which it called the "Threshold Interpretation" and the "Major Shareholder Interpretation". Essex's description of these interpretations follows:

> (1) "Threshold" Interpretation: This interpretation would see subsection 86(2) apply to share purchase transactions wherein the proposed purchaser of shares starts with less than 20% of the shares of a distributor (pre-transaction) but ends up with the purchaser owning more than 20% of the shares (post-transaction). In other words, the Threshold Interpretation of subsection 86(2) would apply to share purchase transactions that put the purchaser "over the threshold" of a 20% shareholding.
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> (2) "Major Shareholder" Interpretation: This interpretation would see subsection 86(2) apply to any share purchase transaction covered by the Threshold Interpretation *as well as* any transaction involving a shareholder that owns more than 20% of the shares of a distributor (either pre- or post-transaction). In other words, not only would the Major Shareholder Interpretation apply in the case of a person crossing the 20% shareholding threshold, but it would also apply to that person (and any other major shareholder) every time they further increased their shareholding (regardless of how small). This interpretation would apply to any share acquisition by a major shareholder because their initial shareholding is

> greater than 20%, so anything added to that will "in the aggregate" be larger than 20%. [Emphasis in original]

Essex argues that the Threshold Interpretation is the correct interpretation of subsection 86(2) of the Act. In support of its submission, Essex noted that subsection 86(2) emphasizes that it is the summation of the person's existing shares and the shares to be purchased that is key to whether leave of the Board is required – since Essex already owns more than 20% of ELK, it has therefore passed the "threshold".

Essex further submitted that subsection 86(2) is intended to allow the Board to scrutinize the financial viability of an entity that is proposing to become a significant shareholder and that this should only occur once, at the time when the entity first proposes to become a significant shareholder and not on subsequent acquisitions, regardless of the size of those subsequent acquisitions.

Essex Power agreed with Essex's position. SEC and Board staff disagreed.

SEC submitted that in any situation in which a utility owned by multiple municipalities is acquired by one of those municipalities, there is potential for restrictive covenants that either (a) form a barrier to efficient operation of the distribution system, or (b) create advantages for one group of ratepayers over another, or (c) prevent the distributor from engaging in subsequent merger and acquisition activity.

SEC submitted that the Board therefore needs to review any share acquisition where it results in a shareholder having more than 20%, regardless of the percentage shareholding that the entity in question started with. SEC also submitted that it was unlikely that shareholders will increase their shareholdings in small increments, thereby requiring multiple applications to the Board for leave, but that even if they did, the Board could manage these potential inefficiencies through its existing processes.

Board staff made the point that there is no Board policy, guideline or decision indicating that subsection 86(2) applies only to an initial acquisition over 20% and not to any subsequent acquisitions, regardless of the size of such subsequent acquisitions.

Board staff added that Essex had acquired its original and current shareholding of 38% through the voluntary amalgamation of the hydro-electric commissions of Essex, Lakeshore and Kingsville and transfer by-laws passed by each of the respective

municipalities. Leave of the Board was, therefore, not sought (nor required) when Essex acquired its shareholding. Because the Board did not have an opportunity to scrutinize that transaction, Board staff submitted that it should do so now.

Board staff also took the position that a transaction of the magnitude proposed by Essex, which would result in Essex becoming the sole shareholder, should be of concern to and be scrutinized by the Board as the proposed transaction may affect ELK's capital structure. In Board staff's view, since the proposed transaction will provide control (more than 50%) to Essex, a Board review is warranted.

DECISION

The issue before us concerns the jurisdiction of the Ontario Energy Board in reviewing the acquisition of shares of electricity distributors pursuant to Section 86 of the Act. The Applicant already owns 38% of ELK and says that any further increases in its shareholding are not reviewable under the Act.

Subsection 86(2) of the Act states:

> *(2) No person, without first obtaining an order from the Board granting leave, shall,*
>
> *(a) acquire such number of voting securities of a transmitter or distributor that together with voting securities already held by such person and one or more affiliates or associates of that person, will in the aggregate exceed 20 per cent of the voting securities of the transmitter or distributor; or*
>
> *(b) acquire control of any corporation that holds, directly or indirectly, more than 20 per cent of the voting securities of a transmitter or distributor if such voting securities constitute a significant asset of that corporation.*

This is solely a question of statutory interpretation. There are no facts in dispute. The basic principles of statutory interpretation were set out 30 years ago by Driedger in *Construction of Statutes*:

> *"Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."*[1]

This principle has been consistently adopted by the Supreme Court of Canada in *Re Rizzo Shoes in 1998, Bell ExpressVu* in 2002 and most recently, in *ATCO Gas* in 2006.[2]

Where the wording of a statute is unclear, courts will give it a meaning that accords with the intention of the Act and the scheme of the Act.[3] In practical terms this means that the Courts will look to the history of the legislation to determine the legislative intent and the meaning of the statutory wording in dispute.

The case which most closely resembles the situation before us is the Supreme Court of Canada Decision in *Bell ExpressVu*. In that case, the Supreme Court overturned a decision of the Ontario Court of Appeal on the meaning of certain terms in the *Employment Standards Act*. Iacobucci J. relied on Driedger's modern principle stating that the statutory interpretation cannot be founded on the wording of the legislation alone. He also relied on Section 10 of the *Ontario Interpretation Act*[4], which directs that every Act receive an interpretation that best ensures the attainment of its objects. He concluded with the following comment on the Court of Appeals' approach:

> *"Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the Court did not pay sufficient attention to the scheme of the ESA, its objects or the intention of the legislature."*[5]

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[1] Elmer Driedger. *The Construction of Statues* (1974) at 67

[2] *Re Rizzo & Rizzo Shoes Ltd.*, [1998], SCR 27, *Bell ExpressVu Limited Partnership v. Rex*, [2002], 2 SCR 559; *ATCO Gas v. Alberta (Energy and Utilities Board)* [2006] 1 SCR 140

[3] Driedger at 105

[4] R.S.O. 1990, c.I.11, repealed July 25, 2007 by S.O. 2006, c.21. Sched. F. ss. 134, 143(1).

[5] *Bell ExpressVu* at paragraph 23

Iacobucci J. also reaffirmed that "the use of legislative history is a tool for determining the intention of legislature is an entirely appropriate exercise and one which has often been employed by this court."[6]

Counsel for the Town of Essex argues that "the plain wording" of Section 86 (2) of the Act emphasizes that it is a summation of the person's existing shares and the shares to be purchased that is the key to requiring leave of the Board. We agree.

But Essex then argues that the Threshold Interpretation is consistent with this while the Major Shareholder is not. Essex argues that the Major Shareholder interpretation makes the phrase "in the aggregate" in Subsection 86 (2) moot because the major shareholder will always start from the shareholding position of greater than 20%. With respect, we disagree. The "plain meaning" offered by Essex is not consistent with the legislative intent and legislative history.

Essex also states that continual reviews until a shareholder acquired 100% of the shares would be meaningless or absurd. For reasons that follow, we also disagree with that proposition.

The degree of shareholding is only one aspect of a transaction. There could be restrictive covenants as suggested by SEC. Moreover, each and every transaction may have a different plan as to how the acquisition would be financed and how that financing would affect the capital structure of the utility. The legislative history of this section makes it clear that this is one of the key issues the Legislature wished to address. It is not correct to say that further reviews are meaningless simply because a party has previously acquired over 20% of the shares of the utility.

The test the Board applies in reviewing share acquisitions under Section 86 is whether the transaction will result in harm to the rate payers.[7] How can rate payers be harmed by a share acquisition? The legislative history suggests that harm might result where a transaction would expose the utility to greater financial risk. That greater financial risk can translate into higher rates resulting from increases in the cost of borrowing.

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[6] *Bell Express Vu* at paragraph 31

[7] *In the Matter of Greater Sudbury Hydro Inc., Power Stream Inc. and Veridian Connections Inc.* RP 2005-0018 (August 30, 2005)

The legislative history also makes it clear that the Legislature at a minimum intended that the Board should review acquisitions when the purchaser was acquiring control. That is because it is only with control that real harm can result in terms of increased financial exposure. "Control" is not defined but it is generally accepted that the degree of control increases when share ownership increases.

One of the ways in which a utility can be exposed to greater financial risk is by increasing the debt and reducing the equity of the utility. It is significant to note that under both the *Canadian Business Corporations Act* and the *Ontario Business Corporations Act*[8] increases or decreases in share capital require a special resolution to be passed by a majority of not less than two-thirds of the votes cast by shareholders or resolutions signed by all shareholders entitled to vote on the resolution. This is a long-standing principle. It is evident that concern with adverse capital structures does not disappear once 20% of the shares have been acquired or for that matter, 50% of the shares.

The legislation states that Board approval is required if more than 20% of the shares of the utility are acquired. With respect, that provision cannot be read to suggest that the Legislature would not be concerned if the acquisition involved a shareholding greater than that amount. Or that there was no concern if a minority shareholding had been previously acquired.

The Statute could have said that the transaction was reviewable only if more than 50% of the shares were involved. Instead, the Legislation provides that the review <u>starts</u> when more than 20% of the shares are involved. It is clear from a reading of this section that the Legislature did not mean to limit or reduce the degree of review in providing a 20% threshold. Rather, the Legislature intended to increase the degree of review and review not only transactions where <u>control</u> was acquired but also where a <u>minority</u> interest was acquired.

To suggest that the Legislature did not intend that increases in shareholding above an initial 20% or 30% or 40% should be reviewed makes little sense. Increases in shareholding's only heightens concern. That is because the parties with greater shareholdings are more likely to have the ability to control the financial structure of the utility. And that, the jurisprudence tells us, is where the potential harm lies.

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[8] *Canada Business Corporation Act*, 1985, c. C-44 as am. S. 2(1) and *Business Corporations Act*, R.S.O. 1990, C. B-16 as am. S. 1(1)

Both Section 86 and Section 43 of the Act were introduced in 1998. Section 43 deals with gas distributors, while Section 86 deals with electricity distributors. The provisions are identical. No one can acquire more than 20% of the voting securities of a gas or an electricity distributor without an Order from the Board granting leave.

While Section 86 is new, Section 43 is virtually the same as its predecessor, Section 26 which has existed since 1980. Prior to the enactment of Section 43, changes in control of gas distributors required leave of the Lieutenant Governor in Council pursuant to Section 26 of the Act.[9] In order to understand the legislative intent of Sections 86 and 43, it is useful to examine the jurisprudence under Section 26.

In January, 1985 the Board reviewed the proposed acquisition of Northern and Central Gas Corporation Limited by Inter-City Gas Corporation.[10] In August of that year, the Board reviewed the acquisition by Unicorp Canada Corporation of more than 20% of the shares of Union Enterprises Ltd., which held all the common shares of Union Gas.[11] In 1986, the Board reviewed the Gulf Canada Corporation acquisition of Hiram Walker Resources, Ltd., which in turn owned 83% per cent of the outstanding shares of Consumers Gas.[12] In January of 1990, the Board reviewed the sale by Inter-City Gas of its interest in ICG Canada (formerly Northern and Central) to West Coast Gas Inc. [13] And in October of 1990 the Board reviewed the proposed acquisition of the common shares of Consumers Gas Ltd., by British Gas.[14]

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[9] Section 26 was introduced in 1980. Ontario Energy Board Act, in 1980 C. 332, S. 26(2)
"(2) No person, without first obtaining the leave of the Lieutenant Governor in Council, shall acquire such number of any class of shares of a gas transmitter, gas distributor or storage company that together with shares already held by such person or by such person and an associate or associates of such person will in the aggregate exceed 20 per cent of the shares outstanding of that class of the gas transmitter, gas distributor or storage company."

[10] EBO 119/118, *In the Matter of an Application by Inter-City Gas Corporation and Norcen Energy Resources Limited* (January, 1985)

[11] EBRLG 28 *In the Matter of Reference Respecting Unicorp Canada Corporation and Union Enterprises Ltd.* (August 2, 1985)

[12] EBRLG 30, *Gulf Canada Corporation, Transfer of Shares Consumer Gas Company Ltd.* (November 17, 1996)

[13] EBRLG 4, *Inter-City Gas Corporation, Change in Ownership and Control of ICG Utilities (Canada) Ltd. and ICG Utilities (Ontario) Ltd.* (January 31, 1990)

[14] EBRLG 35, *Proposed Acquisition of Common Shares of Consumers Gas Company Ltd.*

In virtually all of these cases the Board was concerned with the financial status of the new parent. The Board was also concerned that the utility not be harmed by new capital structures and loan agreements that would subject the utility to greater risk.

In most of the cases, the Board required undertakings and an agreement that these undertakings could be enforced as if they were a Board order. These undertakings often related to maintaining certain debt/equity ratios and restrictions on dividend payouts. In the recent Union re-organization case,[15] past undertakings were transferred to the new corporate entities resulting from the re-organization. One of the undertakings required Union Gas Limited and Westcoast Energy to limit debt to a specific debt/equity ratio.

At the same time Section 43 was introduced, the Government introduced Section 86 in exactly the same terms to apply to electricity distributors. It is reasonable to assume that the intent of Section 86 was the same as Section 43 and Section 26 before it. This runs counter to the position advanced by the Town of Essex in this case. The Essex position is that the Legislature had no concern once an acquisition of 20% of the shares had been approved. Given the proceedings leading up to the 1998 legislation, it is difficult to understand why the Legislature would weaken the legislation in the fashion the Applicant suggests.

It should also be noted that the major remedy the Board used to protect the public interest was to obtain undertakings. In virtually all of these cases those undertakings could not have been given by a party that did not have control.

The harm to the public most often is a change in capital structure where the acquiring party uses utility assets to finance the transaction. The Board decisions referred to demonstrate this concern, as do many US public utility cases.[16] The harm only arises

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by British Gas PLC (October 15, 1990)

[15] *In the Matter of Union Gas Limited and Westcoast Gas Inc.*, EB-2008-0304, November 9, 2008; These undertakings date back to undertakings of May 13, 1988 which followed the acquisition of Union by Unicorp Canada Corporation in 1985. *In the Matter of a Reference Respecting Unicorp Canada Corporation*, [See EBRLG 28, August 2, 1985].

[16] Charles F. Phillip, Jr., *The Regulation of Public Utilities, Theory and Practice* (Arlington, VA: Public Utilities Reports, Inc. 1988) at pp. 265 to 256); *New England Telephone & Telegraph Company v. State*, 104 N.H. 229 at p. 238 (N.H. 1962); *Public Service Commission of the State of New York v. Jamaica Water Supply Company*, 386 N.Y.S. 2d 230 (1976), aff'd 397 N.Y.S. 2d 784 (1977)

when the acquiring party obtains control. Without that there is no ability to change the capital structure to the detriment of the public.

We note that in this case there is a concern that the debt portion of the capital structure will escalate significantly. The Applicant submits that in matters of statutory interpretation, the Board is not entitled to consider the facts in the application. We doubt that. But in any event, the Board's concern with this aspect of share acquisitions is well documented. The Board routinely considers this issue.

The Applicant also argues that by continually reviewing transactions, when a party increases its shareholding, leads to an "absurd" result. The implication is that the reviews would be meaningless. We see no basis for that conclusion. The potential harm in these transactions is not restricted solely to the degree of shareholding. These transactions often involve shareholder agreements and covenants that may impact future operations of the utility. And as previously indicated real harm may only result once shareholding exceeds 66%.

It is also argued that the Board may have other remedies to deal with actions by shareholders that are not in the public interest. That may be, but there is a good reason why legislation often contains structural remedies such as these. In many cases, the only time the appropriate remedies (undertakings or otherwise) can be put in place is before closing. It is more difficult to deal with these problems after a transaction is closed than before closing. That in our view is why these particular sections exist both with respect to gas and electricity. Any potential harm to the public interest must be considered before closing and before control is acquired and real harm results.

In summary, the legislative history regarding Sections 86 and 43 (and Section 26) clearly shows that potential harm becomes more likely as shareholding increases. That conclusion runs counter to a statutory interpretation that suggests that the Legislature only intended a single review of an acquisition at the minority shareholder level.

That conclusion also runs counter to the Statutory scheme established by the Act. We have concentrated on Section 86(2). But Section 86(1) provides that no distributor without first obtaining an Order of the Board granting leave can sell a distribution system

or any part of this distribution system necessary to serve the public. Nor can a distributor amalgamate with any other corporation without obtaining leave of the Board.

There is no carve out or exemption relating to the shareholding of the amalgamating corporations. It is clear the Legislature intended that no sales or amalgamations would take place without Board review. To suggest, as Essex does, that the most significant transactions in the case of share acquisitions would be exempt makes little sense.

Having decided that the Board has jurisdiction and authority to review this application pursuant to Section 86, the Board will hold a public hearing at Toronto on January 19, 2009 at 9:30 a.m. to hear submissions from all interested parties. The Applicant will have a witness available to answer questions from the Board or other parties. If any parties wish to put written questions by way of interrogatories to the Applicant before the hearing, they may do so provided that they file them at least 7 days before the hearing. The Applicant will answer the questions at least 4 days before the hearing. A Procedural Order giving effect to these terms follows this Decision.

DATED at Toronto, December 31, 2008

ONTARIO ENERGY BOARD

Original Signed By

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Gordon Kaiser
Vice Chair

Original Signed By

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Ken Quesnelle
Member

MINORITY DECISION

I have reached a different conclusion than the majority.

The issue at hand is interpreting subsection 86(2)(a) of the *Ontario Energy Board Act, 1998* (the "OEB Act") dealing with the transfer of shares of an electricity utility. This subsection reads the same as subsection 43(2)(a) of the OEB Act which applies to gas utilities. Subsection 86(2)(a) was introduced in 1998 when the predecessor legislation, the 1980 Ontario Energy Board Act, was updated to include, among other things, economic regulation of electricity utilities. The provision for the transfer of shares as it currently reads existed prior to 1998 for gas utilities under the former legislation and did not change in 1998 or since then. In my view, the 20% provision for electricity utilities in subsection 86(2)(a) in the OEB Act, which repeats the provision for gas utilities that existed for a long time, did not need to change as it was always intended in my view by the legislator to be read harmoniously with and in deference to the *Ontario Securities Act, R.S.O. 1990, c. S.5 (*the "Securities Act"), the governing legislation for the purchase and sale of securities in publicly traded corporations expand on the relevance of the Securities Act to the issue at hand at the end of this Decision.

The majority places considerable emphasis on seizing the opportunity to identify and review restrictive covenants. A desire or inclination to exercise some form of regulatory oversight is not a proper guide in my view to the Board's consideration of its own jurisdiction. While we may want to regulate in a certain way, our ability to do so is strictly, and appropriately limited by the provisions of the statute as they are, not as we would have them be.

The notion that a review pursuant to 86(2)(a) really provides an opportunity to "head off" restrictive covenants is, with respect, a misapprehension. Given effective control of the corporation, a party can impose such conditions at any time, with or without share transfers. A desire to control this aspect of utility governance is not served by a subsection 86(2)(a) review. A provision that may be considered unacceptable from the Board's perspective can be put in place outside an 86(2)(a) review. Restrictive covenants could have been put in place at the time the corporation was first formed, or adopted in a context where a party has secured them without holding a controlling position, (i.e. 20% or more) in the corporation, where subsection 86(2)(a) would not have been or will be triggered. Alternatively restrictive covenants could be "purchased"

at a post review date, an action that would not require Board review as no sections of the OEB Act would be triggered.

The foregoing demonstrates that subsection 86(2)(a) oversight is not to be seen or read as bestowing on the Board some form of curative review.

On the other hand, the Board's regulatory authority in respect of rate setting and the protection of ratepayers is not fettered by restrictive covenants, shareholder directives or any other shareholder agreements that may be included as part of a share purchase transaction or fashioned after a review.

Specifically, I consider the ratemaking powers given to the Board by the legislation to be the powers by which the Board is to prevent ratepayer harm from occurring. The majority's concerns center around the prospect of higher borrowing costs due to a riskier capitalization. The regulatory treatment of a utility's capital structure for purposes of setting rates has been, from the beginning of rate regulation in this province, a deeming exercise. The Board sets rates on the basis of what it considers to be a reasonable capitalization of utilities and the reasonable costs that flow from the Board-deemed capital structure. It would be contrary to the principle of fiduciary responsibility for a utility's board of directors if they permitted a purposeful deviation from the Board's deemed parameters if there is a real risk that this will result in higher borrowing costs with no reasonable prospect for recovery of these costs, as is the Board's practice. As the additional costs would not be reflected in rates, capital structure therefore gravitates towards the deemed parameters. The point is, this is squarely a just and reasonable rates matter. As such, the ratepayers are protected in the context of the OEB Act's section 1 objectives.

The majority speaks of the appropriate remedies being in the nature of Undertakings or conditions when the review is done up-front. The Undertakings that exist today are Undertakings to the Government, when the Government referred matters to the Board. The nature of these references was to supplement provincial legislation. The Undertakings that existed prior to the new 1998 legislation were substantially reduced in 1998. There is no provision in the OEB Act that authorizes the Board to institute Undertakings. In the recent Union re-organization case (EB-2008-0304) noted by the majority, the maintenance of a certain level of common equity was a continuation of a prior 1998 Undertaking given to the Government. In any event, common equity and

capital structure matters for electricity distributors are dealt with by the Board through other regulatory instruments, such as the Rate Handbook.

As for conditions, the Board's authority to impose them is not unrestricted as there are other considerations at play. Interference with the free market place for example is one such important consideration. Conditions cannot be that elastic so as to encroach on the economic freedom of the utility and their imposition can be risky from a jurisdictional point of view when the Board has other remedial powers, which it does. Even if conditions of the type contemplated by the majority were possible, their enforcement or effectiveness is questionable, as there is no jurisdiction for the Board to reverse its prior approval of a share purchase transaction.

The Majority Shareholder interpretation would result in subsection 86(2)(a) applying every time a shareholder that already held 20% or more of a utility's shares purchased more shares. An application to this Board would be required every time an existing shareholder with 20% or more shares proposed to acquire any additional shares, no matter how insignificant the amount is or its consequences. I agree with the Applicant that this would lead to "absurd" results. Consider a 1% change in share ownership from any existing level of ownership over 20%, even from 99% to 100% or from any other level that already constitutes control within the meaning of the *Business Corporation Act*. The significant inefficiencies and regulatory burden associated with having to review these types of transactions under the Majority Shareholder interpretation would not have escaped the legislature. It stands to reason that the legislators would have addressed them. They did not. The fact they did not supports in my view the Threshold interpretation.

Subsection 86(2)(a) could not have been intended to be the regulatory mechanism to permit the Board continuing oversight of a distributor's major shareholders because the trigger for that oversight (a share acquisition) is sporadic at best and in many cases non-existent. For example, consider a distributor with a single shareholder, and that the shareholder suddenly experiences a significant financial crisis that has the potential to adversely impact the distributor's capitalization. Subsection 86(2) would not apply. Rather, the Board would utilize its licensing and rate review powers under the OEB Act to intervene and to protect the utility and its ratepayers. It is well accepted that the Board's powers in this regard are broad.

The 20% shareholding level establishes the degree of ownership at which the influence on corporate decision making that the legislation prescribes as warranting a review by the Board. A review that is triggered by an acquisition resulting in the ownership at that level need not be less rigorous than if the ownership were to be at a 50% level or greater. The legislation in fact sets a higher standard by requiring the review to occur at a lower entry level than a 50% share ownership. It is not a situation of "weakening" the legislation as the majority suggests; one could argue that in fact it is strengthening it.

An economic regulator's principle function in utility regulation is the determination of rates. The power to supervise the finances of utilities is incidental to fixing rates. It stands to reason that these other powers are conferred or are to be exercised within the context of other applicable legislation.

Specifically, the issue here involves the transfer of shares. Share transfers in public corporations are governed by the Securities Act, administered by the Ontario Securities Commission. While it may be that presently no utilities are publicly traded, there are a number of utilities that are "reporting issuers" within the meaning of the Securities Act by virtue of their debt instruments and they are subjected to the provisions in that Act. A utility that is not a reporting issuer today could become a reporting issuer in the future.

The Securities Act uses 20% to define a "control person". A "control person" under Section 1 ("Definitions") under that Act is a person that holds more than 20% of the voting shares. In the words of that Act, a control person can "affect materially the control of the issuer".

Since the legislator is the same for both Acts, it stands to reason that the 20% threshold in subsection 86(2)(a) in the OEB Act was intended by the legislator to be harmonious with and in deference to the 20% "control person" definition in the Securities Act. It serves as an "early warning", a notion that is discussed in the Securities Act (see Early Warning System, sections 102 to 102.2). If the legislators had intended "control" as in the meaning under the *Business Corporation* Act (which is noted in subsection 86(3) of the OEB Act where "control" is defined for purposes of reading subsection 86(2)), they could have also used "control" in subsection 86(2)(a), as they did in subsection 86(2)(b). They did not. This could not be an oversight. I view the 20% threshold provision in subsection 86(2)(a) of the OEB Act as constituting early warning. It is arguably more meaningful to have that early warning through a review for a new shareholder exceeding the 20% "control person" threshold than to have a review for an existing

shareholder increasing its shareholding from the “control person” threshold at increments.

For all of the above, I find that Essex should not be required to seek leave of this Board under subsection 86(2) (a) of the OEB Act in order to proceed with its planned shares purchase transaction.

DATED at Toronto, December 31, 2008
ONTARIO ENERGY BOARD

Original Signed By

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Paul Vlahos
Member

THE BOARD ORDERS THAT:

1. Intervenors and Board staff who wish information and material from the Applicant that is in addition to the Applicant's pre-filed evidence with the Board, and that is relevant to the hearing, shall request it by written interrogatories filed with the Board and delivered to the Applicant on or before **January 12, 2009**. Where possible, the questions should specifically reference the pre-filed evidence.

2. The Applicant shall file with the Board complete responses to the interrogatories and deliver them to the intervenors no later than **January 15, 2009.**

3. An oral hearing will be held at 2300 Yonge Street, 25th floor, Toronto, Ontario in the Board's West Hearing Room. The oral hearing will be held on **January 19, 2009** commencing at 9:30 a.m. and be expected to conclude by 5:00 p.m.

All filings to the Board must quote the three file number, EB-2008-0310, be made through the Board's web portal at www.errr.oeb.gov.on.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.oeb.gov.on.ca. If the web portal is not available you may email your document to the address below. Those who do not have internet access are required to submit all filings on a CD or diskette in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

ADDRESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Attention: Kirsten Walli
Board Secretary
E-mail: Boardsec@oeb.gov.on.ca

Tel: 1-888-632-6273 (toll free)
Fax: 416-440-7656

DATED at Toronto, December 31, 2008
ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary