

2005 BCSECCOM 636

August 25, 2005

Headnote

Mutual Reliance Review System for Exemptive Relief Applications - National Instrument 51-102, s. 13.1 - Continuous Disclosure Obligations - An exchangeable share issuer wants an exemption from having to file continuous disclosure documents to permit it to rely on the continuous disclosure documents of its parent issuer - National Instrument 58-101 - Disclosure of Corporate Governance Practices - An exchangeable share issuer wants an exemption from NI 58-101 - The issuer is an exchangeable share issuer that complies with all of the conditions for continuous disclosure relief in section 13.3 of National Instrument 51-102 Continuous Disclosure Obligations except that it has issued certain securities other than exchangeable shares, securities issued to its parent company, or debt securities to certain investors; the additional securities were preference shares issued to one person in connection with services provided under an arrangement

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, ss. 85, 91, 117 and 119

Securities Rules, B.C. Reg. 194/97, ss. 144 and 145

National Instrument 51-102, s. 13.1 and 13.3

National Instrument 58-101, s. 3.1

In the Matter of
the Securities Legislation of
British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, New
Brunswick, Nova Scotia, Newfoundland and Labrador, Northwest Territories and
Nunavut (the Jurisdictions)

and

In the Matter of
the Mutual Reliance Review System for Exemptive Relief Applications

and

In the Matter of
Duke Energy Corporation (Duke Energy) and Duke Energy Canada Exchangeco
Inc. (Exchangeco, and together with Duke Energy, the Filers)

MRRS Decision Document

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Background

The local securities regulatory authority or regulator (the Decision Maker) in each of the Jurisdictions has received an application from the Filers for a decision under the securities legislation of the Jurisdictions (the Legislation) for:

- (a) except in British Columbia, an exemption from the application of Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* (MI 52-109) pursuant to section 4.5 of MI 52-109;
- (b) except in British Columbia, an exemption from the application of Multilateral Instrument 52-110 *Audit Committees* (MI 52-110) pursuant to section 8.1 of MI 52-110;
- (c) except in Nunavut and the Northwest Territories, an exemption from the application of National Instrument 51-102 *Continuous Disclosure Obligations* (NI 51-102) pursuant to section 13.1 of NI 51-102, and an exemption from any comparable continuous disclosure requirements under the Legislation that have not yet been repealed or otherwise rendered ineffective as a consequence of the adoption of NI 51-102 (collectively, the Continuous Disclosure Requirements); and
- (d) except in Nunavut and the Northwest Territories, an exemption from the application of National Instrument 58-101 *Disclosure of Corporate Governance Practices* (NI 58-101) pursuant to section 3.1 of NI 58-101.

Under the Mutual Reliance Review System for Exemptive Relief Applications:

- (A) the Alberta Securities Commission is the principal regulator for this application; and
- (B) this MRRS decision document represents the decision of each Decision Maker.

Interpretation

Defined terms contained in National Instrument 14-101 *Definitions* have the same meaning in this decision unless they are defined in this decision.

Representations

This decision is based on the following facts represented by the Filers:

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1. Exchangeco is incorporated under the *Canada Business Corporations Act*. Exchangeco's registered office address is Suite 2600, Fifth Avenue Place, East Tower, 425 – 1st Street S.W., Calgary, Alberta T2P 3L8.
2. Exchangeco is an indirect subsidiary of Duke Energy. Duke Energy is a public company in the United States whose common shares are listed on the NYSE. Duke Energy is subject to the requirements of the NYSE and the SEC, including with respect to continuous disclosure, certification of annual and interim filings, audit committees and corporate governance.
3. Exchangeco was formed for the purpose of implementing the merger of Duke Energy with Westcoast Energy Inc. (Westcoast) by way of plan of arrangement. Pursuant to the plan of arrangement, shareholders of Westcoast were provided with the opportunity to receive shares of Exchangeco that are exchangeable into common shares of Duke Energy, subject to certain terms and conditions (the Exchangeable Shares). An Exchangeable Share provides the holder with economic terms and voting rights which are, as nearly as practicable, equivalent to those of a Duke Energy common share.
4. The Exchangeable Shares are listed on the TSX and Exchangeco is a reporting issuer in each of the provinces and territories that provides for a reporting issuer regime.
5. Pursuant to an MRRS Decision Document dated February 26, 2002 (the Previous Decision), Exchangeco received an exemption from the continuous disclosure requirements of the Legislation applicable at that time on the basis of the conditions set out in the Previous Decision.
6. Since the date of the Previous Decision, Exchangeco has become subject to certain requirements contained in NI 51-102, as well as the requirements of MI 52-109, MI 52-110 and NI 58-101, from which the Previous Decision does not provide an exemption.
7. 6,000 Series 1 Preference shares (the Exchangeco Preference Shares) were issued by Exchangeco to ML IBK Positions, Inc., Duke Energy's financial advisors in the plan of arrangement, as partial compensation for those advisory services. The Exchangeco Preference Shares are currently held by ML IBK Positions, Inc.
8. Exchangeco cannot rely on the exemption contained in section 13.3 of NI 51-102 due to the issuance of the Exchangeco Preference Shares. As a result, Exchangeco also cannot rely on the exemptions contained in section 4.3 of MI

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52-109, section 1.2(f) of MI 52-110 and section 1.3(c) of NI 58-101. In all other respects, Exchangeco meets the requirements for these exemptions.

Decision

Each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the decision has been met.

Certification and Audit Committee Relief

1. The decision of the Decision Makers (except for the Decision Maker in British Columbia) under the Legislation is that:

(i) the requirements of MI 52-109 shall not apply to Exchangeco, and

(ii) the requirements of MI 52-110 shall not apply to Exchangeco,

provided that (the following being the Order Conditions):

(a) Duke Energy is the direct or indirect beneficial owner of all of the issued and outstanding voting securities of Exchangeco;

(b) Duke Energy is an SEC issuer with a class of securities listed or quoted on a U.S. marketplace;

(c) Exchangeco does not issue any securities other than,

(i) Exchangeable Shares;

(ii) securities issued, directly or indirectly, to Duke Energy;

(iii) the Exchangeco Preference Shares previously issued; or

(iv) debt securities issued to banks, loan corporations, trust corporations, treasury branches, credit unions, insurance companies or other financial institutions;

(d) Exchangeco files copies of all documents that Duke Energy is required to file with the SEC, at the same time as, or as soon as practicable after, the filing by Duke Energy of those documents with the SEC;

(e) Exchangeco concurrently sends to all holders of Exchangeable Shares, in the manner and at the time required by U.S. laws and the requirements of any U.S. marketplace on which securities of Duke Energy are listed or

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quoted, all disclosure materials that are sent to the holders of Duke Energy common shares;

- (f) Duke Energy is in compliance with U.S. laws and the requirements of any U.S. marketplace on which securities of Duke Energy are listed or quoted in respect of making public disclosure of material information on a timely basis, and immediately issues in Canada and files any news release that discloses a material change in its affairs;
- (g) Exchangeco issues in Canada a news release and files a material change report in accordance with Part 7 of NI 51-102 for all material changes in respect of the affairs of Exchangeco that are not also material changes in the affairs of Duke Energy; and
- (h) Duke Energy includes in all mailings of proxy solicitation materials to holders of Exchangeable Shares a clear and concise statement that,
 - (i) explains the reason the mailed material relates solely to Duke Energy;
 - (ii) indicates that the Exchangeable Shares are the economic equivalent to Duke Energy common shares; and
 - (iii) describes the voting rights associated with the Exchangeable Shares.

Continuous Disclosure and Corporate Governance Relief

2. The further decision of the Decision Makers (except for the Decision Makers in Nunavut and the Northwest Territories) under the Legislation is that:

- (i) the Continuous Disclosure Requirements shall not apply to Exchangeco, and
- (ii) the requirements of NI 58-101 shall not apply to Exchangeco,

provided that Exchangeco is in compliance with the Order Conditions.

DATED at Calgary, Alberta on this 25th day of August, 2005

Agnes Lau, CA
Deputy Director, Capital Markets