
From: Nick Smith
Sent: 10 November 2010 11:17
To: Carol Campbell

Tom

Further to yesterday's IPG I thought it would be useful to update you on a couple of issues.

As you are aware, CEC's position as guarantor has always been arms-length from that of tie as the contracting party. It is appropriate that the Council, in terms of good governance, keeps control of TEL and tie through the terms of the Operating Agreements. However, as tie is the contracting party, the Council simply does not have knowledge that the contracting party itself has. In any analysis to come, the Council has no option but to rely on the information which tie and its advisors provide to the Council. The same applies to tie's advisors. They can only advise on the information presented to them.

Accordingly, as CEC is not in full possession of all the facts and circumstances, there is clearly a risk that any recommendation which Council officers make to Council is based on advice given on the basis of partial or incorrect information. Short of a full root and branch analysis, which would be impossible even if a decision were to be delayed for months, unfortunately I see no way around this except to trust that tie have given their advisors and the Council all correct and relevant information. Unfortunately due to the terms of the Operating Agreement and the fact that tie is a wholly owned and funded subsidiary, there is likely no recourse if tie, TEL or their officers have simply failed to do their job properly.

Further, as an arms-length entity tie have been responsible for setting strategy in relation to resolution of the dispute. The Council has been kept fully informed of the strategy but has rightly not dictated what that strategy should be as the Council does not know all the facts. There is again a risk, however small, that this strategy has not been executed in the best possible manner to achieve optimum resolution. There is little that can now be done about this.

As I have reported to IPG for some time, I have had concerns about the quality of the legal advice received by tie. This has been borne out in relation to both the drafting of the contract and the processing of some of the DRPs. I have always been of the view that it was up to tie to appoint and deal with their own advisors. However, the Council can now take some comfort from the fact that McGrigors have now been brought on board to do a full analysis. I cannot stress enough how import it is that they are given sufficient time to do a thorough analysis of tie's allegations and the underlying data. I will update the IPG next week, but my current view is that tie's workstream is 3-4 weeks behind the planned schedule. This will likely make the December meeting an impossible deadline to meet if CEC and it's advisors are to have any meaningful impute.

Assuming that you are content to accept the risk that CEC will be unable to check all relevant facts underpinning any advice received and will effectively be fully reliant tie and TEL in this regard then I think the most sensible approach is for tie and its advisors to be given sufficient time to carry out a thorough review of the basis for termination. It is in the both tie and the Council's best interests for this to be carried out in a comprehensive manner. Upon completion, and assuming that tie and TEL recommend termination, CEC will have this advice reviewed by and independent QC. This will hopefully ensure that the Council's position is protected as far as possible given the issues raised above.

Kind regards

Nick

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Please note that I am not in the office on a Monday