

Enwave Energy Corporation – Consent and Acknowledgement

Date:	July 9, 2013
To:	City Council
From:	Deputy City Manager and Chief Financial Officer
Wards:	All
Reference Number:	P:\2013\Internal Services\Cf\Cc13015cf (AFS #17986)

SUMMARY

The purpose of this report is to obtain Council authority to provide a Consent and Acknowledgement to Sun Life Assurance Company of Canada and to a collateral agent for the benefit of the secured creditors of Enwave Energy Corporation ("Enwave") under various Financing Agreements, regarding Enwave's proposed assignment of its interest in the Energy Transfer Agreement dated January 18, 2002 between the City and Enwave, as amended. This report is being submitted directly to Council to permit Enwave to meet certain contractual deadlines.

RECOMMENDATIONS

The Deputy City Manager and Chief Financial Officer recommends that:

1. Council authorize the Deputy City Manager and Chief Financial Officer to enter into, execute and deliver a consent and acknowledgement (the "Consent and Acknowledgement") to Sun Life Assurance Company of Canada ("Sun Life") and to a Collateral Agent to be appointed pursuant to a General Security Agreement to be granted by Enwave, whereby the City consents to the assignment by Enwave of its interest in the Energy Transfer Agreement dated January 18, 2002 between the City and Enwave, as amended, (the "Energy Transfer Agreement") to Sun Life and to BNY Trust Company of Canada as security for credit facilities negotiated by Enwave and its lenders; provided, however, that the terms and conditions of the Consent and Acknowledgement, and any related documents in which the City has an interest, are satisfactory to the Deputy City Manager and Chief Financial Officer and the City Solicitor and in a form satisfactory to the City Solicitor.

2. Council authorize the Deputy City Manager and Chief Financial Officer to deliver and execute, if necessary, on behalf of the City, any additional documents that the Deputy City Manager and Chief Financial Officer and the City Solicitor determine are necessary to give effect to Recommendation 1 above.

Financial Impact

Enwave is seeking refinancing in order to implement its business plan. All of the lenders that are part of the new financing arrangements require as collateral an assignment of Enwave's interest in the Energy Transfer Agreement between the City and Enwave. In order to effect such assignment, the City's consent is required.

The provision of the City's consent is expected to have no financial impact on the City's position.

DECISION HISTORY

At its meeting of December 5, 6 and 7, 2005, City Council adopted, as amended, the staff recommendations contained in the Recommendations Section of the confidential report (November 15, 2005) from the City Manager, the Deputy City Manager and Chief Financial Officer and the City Solicitor, respecting Enwave Reorganization and Income Trust, which was forwarded to Members of Council under confidential cover; authorizing, among other things, the City to consent to Enwave's assignment of the Energy Transfer Agreement to its lenders as collateral security for credit facilities negotiated by Enwave and its lenders. Pursuant to this authority, the City executed Consents and Acknowledgments consenting to the assignment of the Energy Transfer Agreement in favour of Enwave's lenders including Integrated Private Debt Fund LP.

The Council decision document can be found at:

<http://www.toronto.ca/legdocs/2005/agendas/council/cc051205/pof10rpt/cl004.pdf>

At its meeting of August 25, 26 and 27, 2010 City Council adopted recommendation no. 2 of item EX46.9 authorizing the Deputy City Manager and Chief Financial Officer to enter into, execute and deliver a consent and acknowledgement to Integrated Private Debt Corp., ("IPDC"), consenting to Enwave assigning its interest in the Energy Transfer Agreement (the "Energy Transfer Agreement") to IPDC as collateral security for a new credit facility being negotiated between Enwave and IPDC.

The Council decision document can be found at:

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2010.EX46.9>

ISSUE BACKGROUND

The City is a party to the 50-year Energy Transfer Agreement dated as of 18 January 2002 with Enwave as amended by amending agreements dated August 20, 2007 and September 1, 2010 (collectively, the "Energy Transfer Agreement"). Pursuant to the

Energy Transfer Agreement the City provides Enwave with cold treated drinking water for their district cooling system which provides air conditioning to a number of downtown buildings. The Energy Transfer Agreement defines the responsibilities, operational relationships, required infrastructure upgrades and cost obligations as agreed upon between the parties.

In 2005, Enwave entered into a credit agreement with Integrated Private Debt Fund LP. At that time, Council authorized the City to provide a Consent and Acknowledgement (which the City did) to each of The Bank of Nova Scotia and Integrated Private Debt Fund LP consenting to Enwave assigning its interest in the Energy Transfer Agreement to Integrated Private Debt Fund LP and The Bank of Nova Scotia as collateral security for an operating line of credit with the Bank of Nova Scotia and the credit agreement with Integrated Private Debt Fund LP (collectively the “2005 Credit Agreements”). The Bank of Nova Scotia has first priority with respect to Enwave’s assignments of the Energy Transfer Agreement.

The City has executed a Consent and Acknowledgement Agreement dated as of September 8, 2010 with Integrated Private Debt Corp. (“IPD”), as secured party, and Enwave (the “2010 Consent”), whereby the City consented to, among other things, the granting of security to IPD over the Energy Transfer Agreement.

COMMENTS

Enwave has been working for some time now on putting new arrangements in place to replace its current financing arrangements which mature in October of 2013. The proposed Consent and Acknowledgement for which delegated authority is being requested will provide the necessary consents for these new financing arrangements. The new arrangements include an assignment and amendment of certain of the existing loans to Sun Life as well as a new issuance of bonds and revolving credit facility (secured through BNY as joint collateral agent).

IPD intends to assign to Sun Life its interest in, among other things, an existing assignment of the Energy Transfer Agreement, pursuant to an agreement to be entered into between, among others, Sun Life and IPD (the “Assignment”). Following the Assignment, Enwave intends to enter into the following Financing Agreements:

- a. an Amended and Restated Credit Agreement between Sun Life and Enwave;
- b. a Revolving Credit Agreement between The Bank of Nova Scotia and Enwave; and
- c. an Indenture between a trustee and Enwave for the private placement of certain secured bonds.

The Financing Agreements will be secured by, among other things, a general security agreement made between Enwave and the Collateral Agent, as collateral agent for the benefit of the creditors under the Financing Agreements (the “General Security Agreement”), which shall serve to charge, among other things, the Energy Transfer Agreement.

All of the lenders that are part of the new Financing Agreements have required the City of Toronto’s consent as a condition to closing, given the importance of the energy transfer agreement with the City to Enwave’s business. If Enwave waits until the next City Council meeting, Enwave does not believe it will have enough time to close its new financing arrangements before the October 2013 maturities of its existing financial arrangements, and therefore will miss a key contractual deadline, which will put Enwave in default and subject to demands by lenders for repayment. Further, part of the proceeds from these new financing arrangements will be used to execute Enwave’s business plan, which is unlikely to proceed until these financing arrangements are in place. This includes Enwave’s proposed Deep Lake Water Cooling System expansion. At its meeting in June 2013, Council authorized City staff to begin negotiations with Enwave regarding its expansion proposal and to report back on the status of negotiations by the end of year.

Under the Energy Transfer Agreement, Enwave requires the City’s consent to transfer or assign its rights under the Energy Transfer Agreement for any purpose other than to a lender for the sole purpose of financing of the Deep Lake Water Cooling Project (the “DLWC Project”). In this instance, while the Financing Agreements have not yet been provided to City staff, it is understood that they do not limit the use of funds to the DLWC Project, and, therefore, the City’s consent is required. Under the Energy Transfer Agreement, the City’s consent may only be withheld if the City, acting reasonably, is not satisfied that (a) the assignee will be capable of satisfying the obligations of Enwave, (b) the assignee is creditworthy and reputable or (c) the assignment would not prejudice the security, quality or purity of the City’s water supply.

Given the stage of Enwave’s negotiations with its lenders and the timing in relation to the delivery of this staff report, all the necessary documents have either not been finalized or provided to City staff for its review. Therefore, in the circumstances, it is recommended that Council delegate the necessary authority as proposed in this report so to permit staff to deal with this request from Enwave and its lenders for the City’s consent to the assignment of the Energy Transfer Agreement. Specifically, it is recommended that any Consent and Acknowledgement, or related documents, from the City would have to be on terms and conditions satisfactory to the Deputy City Manager and Chief Financial Officer and the City Solicitor.

n order to protect the City's interests, it is possible that City staff will want to negotiate the terms of the Consent and Acknowledgement, as well as related documents in which the City has an interest. Accordingly, the recommendation that the City consent to the assignment is, as noted above, subject to the terms and conditions being acceptable to the Deputy City Manager and Chief Financial Officer and the City Solicitor.

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SIGNATURE

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