

## Headnote

Multilateral Instrument 11-102 *Passport System* and National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – Exemption from the dealer registration and prospectus requirements for the issue and trade of securities of an issuer to and among employees, executive officers and consultants of a limited partnership and directors of the general partner of the limited partnership – The issuer’s only business is to hold an interest in the limited partnership; purchasers are limited to individuals closely connected to and whose interests are aligned with the business of the limited partnership; information relating to the limited partnership will be provided to purchasers prior to the purchase of the issuer’s securities – Relief granted subject to certain terms and conditions, including the requirement to provide documentation relating to the limited partnership and resale restrictions.

## Applicable Legislative Provisions

*Securities Act*, R.S.N.S. 1989, Chapter 418, as amended, Sections 31, 58 and 79(1)

May 23, 2008

**In the Matter of  
the Securities Legislation  
of Nova Scotia and Ontario (the “Jurisdictions”)**

and

**In the Matter of  
the Process for Exemptive Relief Applications in Multiple Jurisdictions**

and

**In the Matter of BW Founders Holdco Inc. (the “Filer”)**

**DECISION**

## Background

The securities regulatory authority or regulator in each of the Jurisdictions (the “**Decision Maker**”) has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the “**Legislation**”) that the issue and trade of common shares of the Filer (the “**Common Shares**”) to and among employees, executive officers and consultants of Bluewave Energy Limited Partnership (the “**Partnership**”), directors of BW GP Inc., the general partner of the Partnership, and permitted assigns thereof, as defined in section 2.22 of National Instrument 45-106 *Prospectus and Registration Exemptions* (collectively, the “**Qualified**”

**Persons**”), are exempt from the dealer registration requirement and the prospectus requirement (the “**Exemption Sought**”);

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a dual application):

- (a) the Nova Scotia Securities Commission is the principal regulator for this application;
- (b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (“**MI 11-102**”) is intended to be relied upon in Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Prince Edward Island, Saskatchewan, Quebec, the Yukon, Northwest Territories and Nunavut; and
- (c) the decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

### **Interpretation**

Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

### **Representations**

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

1. The Filer is formed under the laws of Ontario and is authorized to issue an unlimited number of Common Shares and an unlimited number of preferred shares.
2. The Filer has its head office located in Nova Scotia.
3. The Filer is not and has no intention of becoming a reporting issuer in any jurisdiction in Canada. The Filer is not in default of securities legislation in any jurisdiction of Canada.
4. The Partnership is formed under the laws of Manitoba and is not a reporting issuer in any jurisdiction of Canada.
5. The Filer is one of six limited partners of the Partnership, which conducts the business of selling and distributing heating fuel and other light oils and related products and services to residential, commercial and industrial customers in locations across Canada (the “**Business**”). The other five limited partners, and the Partnership’s general partner, are controlled by an institutional investor.
6. The securities of the Filer are held by management and employees of the Partnership and a small number of third party investors. The vast majority of the shares of the Filer held by these shareholders were issued prior to the investment by the institutional investor when the Filer was the actual operating business. The remaining small number of shares of the Filer issued since that date are held by shareholders who acquired their shares through private placement exemptions (private issuer and accredited investor).

7. Prior to the organization of the Partnership, the Business was operated by the Filer and the employees of the Business were employed by the Filer. The Business, together with its employees, assets and liabilities, was contributed to the Partnership by the Filer for tax and other structural reasons in connection with a financing of the Business by the institutional investor in which the institutional investor created and acquired control of the Partnership.
8. Following the contribution of the Business to the Partnership, the Filer is now a holding corporation and its only asset is the ownership of an approximately 21% limited partnership interest in the Partnership. The Filer conducts no business activities other than those relating to its ownership of a limited partnership interest in the Partnership.
9. Following the contribution of the Business to the Partnership by the Filer, the employees and executive officers of the Filer became employees and executive officers of the Partnership. The Filer and the Partnership wish to provide the employees, executive officers and consultants of the Partnership with the opportunity to make an indirect investment in the Partnership through their ownership of Common Shares (the employees, executive officers and consultants of the Partnership, collectively with the directors of BW GP Inc., the “**Employees**”). Through the Common Shares, the Employees will indirectly hold an interest in the Business and the Partnership, their employer.
10. It would be a condition of any issuance of Common Shares to Employees or their permitted assigns that the entire gross proceeds received by the Filer in consideration for the Common Shares be invested by the Filer in an equal number of Class A Units of the Partnership, thereby ensuring a direct relationship between the investment by the Employees in Common Shares and the underlying business of the Partnership.
11. The purchase price of the Common Shares will be determined by the board of directors of the Filer and the Partnership in their reasonable judgment. The price will be disclosed to all Employees by way of an internal communication prior to any purchase. All purchases will be at this same price.
12. Purchasers of Common Shares will be provided with copies of the Unanimous Shareholders’ Agreement (“the “**Shareholders’ Agreement**”) and Voting Trust Agreement of the Filer to which they will become party upon acquiring Common Shares, as well as a copy of the limited partnership agreement of the Partnership (collectively, the “**Documents**”). On an on-going basis, holders of Common Shares will receive an update regarding the Partnership’s financial performance on a quarterly basis and copies of the Partnership’s audited annual financial statements (excluding notes) and the Filer’s unaudited annual financial statements on an annual basis. The Filer does not prepare its own audited financial statements as its sole assets and activity is holding the Class A Units of the Partnership. In addition, the Filer and the Partnership will provide holders of Common Shares with a semi-annual determination of the fair market value (as determined in their reasonable judgment) of the Common Shares.
13. The Filer’s tax advisers have advised that the participation of Employees through the Filer was structured to achieve a few tax-related objectives including the following:

- (a) An employer that is a limited partnership is not able to provide employees with stock-based compensation that benefits from the favourable tax treatment afforded employee stock options (only corporations and mutual fund trusts are able to satisfy the conditions imposed under the *Income Tax Act*). Accordingly, employee participation through the Filer was intended to facilitate the design of tax-efficient compensation plans for certain employees;
  - (b) Capital gains realized on the sale of limited partnership interests do not qualify for the lifetime capital gains exemption of \$750,000 provided to Canadian-resident individuals. However, capital gains realized on the sale of Canadian-controlled private corporations that carry on their business activities through a limited partnership may qualify for the exemption, depending on the circumstances. Accordingly, the interposition of the Filer better positions the Employees to benefit from this exemption; and
  - (c) The limited partnership agreement of the Partnership provides that the partners will be paid cash distributions to enable the payment of tax liabilities, calculated using corporate income tax rates. Because the rate of tax applicable to income earned by individuals is frequently higher than the corporate income tax rate, Employees who were directly partners in the Partnership could be liable to pay income tax that is greater than the cash distributions paid to them by the Partnership. The direct participation by Employees in the Partnership could, depending on an Employee's circumstances, create economic hardship;
14. The Employees are currently located only in the provinces where the Partnership operates. These provinces, and the number of Employees currently located in each of these provinces, are set out below:
- Alberta: 39
  - New Brunswick: 6
  - Nova Scotia: 156
  - Ontario: 106
  - PEI: 13
  - Quebec: 1
15. The decision to invest in Common Shares by a permitted assign of an Employee will be made by the Employee who is related to that permitted assign.
16. The directors of BW GP Inc. are, and future directors of BW GP Inc. will be, highly skilled individuals with experience and expertise in the Business who, at the time of their investment in the Common Shares:
- (a) spend a significant amount of time and devote significant attention to the business and affairs of the Partnership;
  - (b) are knowledgeable about the business and affairs of, and the investments made by, the Partnership; and

- (c) are capable of evaluating the merits and risks of an investment in the Partnership through the Filer;
17. Investment in the Common Shares by each Employee is voluntary. No Employee will be induced to invest in the Common Shares by expectation of employment or continued employment of the Employee with the Partnership or BW GP Inc.
  18. Under the terms of the Shareholders' Agreement, the Common Shares may not be transferred, except under certain specified conditions, including a transfer to another Qualified Person at such times and on such terms as are established by the board of directors of the Filer and the Partnership; provided that all Common Shares transferred during the same period shall be transferred at the same price per Common Share (which price shall equal the fair market value of a Common Share then in effect as determined by the board of directors of the Filer and the Partnership in their reasonable judgment).
  19. There is currently no market for the Common Shares and, other than with respect to any sales and purchases between Qualified Persons as contemplated herein, no such market is expected to develop.
  20. The Shareholders' Agreement provides that the business of the Filer shall be restricted to owning the Partnership's units and exercising its rights and complying with its obligations as a limited partner of the Partnership. The Filer is closely related to the Partnership and many of the current shareholders of the Filer would qualify as an Employee under this decision.
  21. The Filer provides a mechanism to incentivize Employees who are critical to the success of the Business and the Partnership and to enable them to benefit from their efforts in building and adding value to the Business.

## **Decision**

Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Maker to make the decision.

The decision of the Decision Makers under the Legislation is that the Exemption Sought is granted provided that:

- (a) the Employee is not induced to purchase the Common Shares by expectation of employment or continued employment of the Employee with the Partnership or BW GP Inc.;
- (b) there is compliance with paragraph 10 of this decision;
- (c) the sole business of the Filer is restricted to owning units of the Partnership and exercising its rights and complying with its obligations as a limited partner of the Partnership;
- (d) prior to the issuance of or trade in any Common Shares to a Qualified Person, the Filer will deliver to the Qualified Person:

- (i) a copy of this decision; and
- (ii) a copy of the Documents;
- (e) the Filer is not a reporting issuer in any jurisdiction of Canada;
- (f) the price of the Common Shares is established by a generally applicable formula contained in the Shareholders' Agreement to which the transferee is or will become a party; and
- (g) the first trade in any Common Shares by a person or company who acquires the Common Shares under this decision in a jurisdiction of Canada shall be deemed to be a distribution or a primary distribution to the public under the securities legislation of the jurisdiction.

"H. Leslie O'Brien"

Chairman  
Nova Scotia Securities Commission